# Interim Regulatory Impact Statement: Consultation options for adoption law reform

| Quality Assurance (completed by QA panel) | |
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| Reviewing Agency/Agencies: | Ministry of Justice |
| Panel Assessment & Comment: | The Ministry of Justice's RIA QA panel has reviewed the Interim Regulatory Impact Statement: A New Adoption System for New Zealand (Interim RIS) prepared by the Ministry of Justice and considers that the information and analysis summarised in the Impact Summary meets the Quality Assurance criteria.<br><br>Because the purpose of the Interim RIS is to address any gaps in the second discussion document and support further public consultation on reform, the panel has focused its final assessment on whether there is an adequate description in the document of the feasible options and analysis of the options to support the rationale for the preferred option (where applicable). The panel notes that while there are preferred options in this second discussion document, they are not final, and submitters are invited to suggest other options to address the issues raised.<br><br>The panel considers that the Interim RIS is complete, as it appropriately supplements the information available to the public and Ministers in the discussion document. The Interim RIS provides analysis of the options set out in the discussion document, as well as those that are not preferred, briefly drawing out the advantages and disadvantages of each option against the criteria. As interim analysis, the panel considers it is balanced and uses appropriate supporting evidence, with the limitations of information clearly signalled. As indicated on the previous Interim RIS, the panel would expect to see a future complete RIS to include the feedback from the upcoming second consultation process, describe the costs and feasibility of the final policy proposals (together with the outstanding sections of the RIS, such as implementation). |

# Section 1: General information

## 1.1 Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Interim Regulatory Impact Statement (IRIS).

This Interim Regulatory Impact Statement (IRIS) provides an assessment of the options for change to adoption laws that the Ministry of Justice is seeking feedback on in its second round of public and targeted engagement on adoption law reform through the discussion document *A new adoption system for Aotearoa New Zealand*, as well as setting out analysis of a broader range of non-preferred options, which have not been included in the discussion document for engagement.

Public and targeted engagement is being undertaken to seek feedback on options for reform the Government is considering. This IRIS reflects the Ministry of Justice's preferred options. These options generally align with those included in the discussion document, except as expressly indicated.

Following the second round of engagement further analysis of preferred options will be undertaken. We will provide Cabinet with a RIS to support its final policy decisions, that assesses options for change and implementation, identifies a preferred approach to reform, and includes our monitoring and review processes for the preferred approach.

## 1.2 Executive Summary

Adoption is the legal process that transfers legal responsibility for and parentage of a child from the child's birth parents to an adoptive parent. Once an adoption order is made, the law treats the child as if born to the adoptive parents and heavily restricts access to the adopted person's birth information. Our adoption laws cover domestic, intercountry and overseas adoptions and access to adoption information.

**Government intervention is required to modernise New Zealand's adoption laws**

The three Acts setting out New Zealand's adoption laws range between 25 and 67 years old and have not been significantly changed in that time. In particular, the Adoption Act 1955 reflects the common social norms of the time, for example, that children were raised by heterosexual married parents, that adopted children did not have contact with their birth parents, and that most adoptions took place in New Zealand. These norms have changed. We also know that many people adopted in the 'closed adoption' era suffered harm through losing connections to their birth family, whānau, identity and culture.

The Act is now out of step with contemporary norms and best practice regarding the care of children. Open adoption (where contact is encouraged between birth and adoptive families and whānau) is now the norm but the law does not reflect or provide a framework for this. Many aspects of the Adoption Act have been criticised as being out of step with tikanga Māori. Intercountry and overseas adoptions, outside of protections of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption ("The Hague Convention"), now make up majority of adoptions made and recognised under New Zealand law. Some of these adoptions raise serious child protection risks where other countries' laws don't align with New Zealand's approach to child safety and welfare.

Adoption law reform offers an opportunity to:

- take a child-centric approach to adoption law and processes, in keeping with other domestic child-focused legislation
- ensure our adoption laws are consistent with New Zealand's domestic and international human rights obligations
- better consider the values of Māori and other cultures, and better meet te Tiriti o Waitangi obligations
- consider what support and information is necessary and appropriate for children, birth parents, adoptive parents, and wider family and whānau.

**This IRIS canvasses options for a new adoption system**

This IRIS accompanies the discussion document *A new adoption system for Aotearoa New Zealand* (the discussion document).

The topics covered by this IRIS are set out in section 3.1 and canvass all aspects of the adoption process:

- the purpose of adoption and guiding principles
- who can be adopted and who may adopt
- what happens when a child is placed for adoption
- who has a say during the adoption process

- who makes adoption decisions and how they decide
- the legal effect of adoption, including who the adopted person's legal parents are and rights and responsibilities that flow from it
- post-adoption contact between adopted children and the birth parents and whānau
- support that could be offered as part of the adoption process
- who can access adoption information and when
- processes for varying or discharging an adoption order
- processes for overseas and intercountry adoptions.

For the most part, the discussion document seeks feedback on the preferred options identified in this IRIS for each of these topics, which cumulatively would create a new adoption system. For analysis of the section "Who can adopt?", the discussion document seeks feedback on an alternative option than the IRIS preferred option.

For some issues further engagement is required and the IRIS does not identify a preferred option. In these cases, the discussion document seeks feedback on a range of options. In addition to the options in the discussion document, this IRIS analyses the alternative options considered but not put forward in the discussion document.

The preferred options would create a new adoption system that:

- provides that the purpose of adoption is child-centred and contains guiding principles that ensure children's rights are upheld
- provides that birth parents and adoptive parents are **all** legal parents, though only adoptive parents have guardianship rights, responsibilities and duties
- supports children to meaningfully participate, share their views and have them taken into account by decision-makers
- gives birth family and whānau rights to be involved in the adoption process, and facilitates post-adoption contact between the child and birth family and whānau
- enables adopted people to automatically access information on their original birth record, with no age restrictions on access
- recognises and supports adopted peoples' rights to be connected to their birth culture.

**The accompanying discussion document and this IRIS will support engagement to support identification of the impacts of preferred options and stakeholder views**

In 2021 we carried out public consultation and targeted engagement on a discussion document *Adoption in New Zealand.* That engagement sought views on problems with the current law and a range of potential options for addressing issues.

Most people we heard from felt current adoption laws have caused harm, and supported fundamental change. Most people thought adoption should focus on protecting children's rights, including rights to identity and maintaining connections with birth family/whānau, access to information, maintaining culture and participating in decision-making about themselves in the adoption process. There were also calls for more support through the adoption process.

Almost half of the people we engaged with spoke about te Tiriti o Waitangi. Almost all of those people considered that the Government has an obligation to acknowledge past harms caused by breaches of te Tiriti in relation to adoption and that partnership on reform is required. We heard that significant changes are needed to ensure te Tiriti-consistent adoption processes.

The preferred options identified in this IRIS reflect that feedback, and the discussion document seeks stakeholder views on them. This IRIS sets out our impact analysis for the full range of options.

Following consultation, we will review stakeholder feedback and advise the Minister of Justice on a complete package of reform. Complete impact analysis setting out the costs and benefits of the preferred approach, risks and mitigations, will be provided when the Minister seeks Cabinet agreement to a package of proposals for reform.

## 1.3 Key Limitations or Constraints on Analysis

This analysis has been constrained by:

- **Constrained timeframes:** The Government intends to introduce a Bill to the House within the current Parliamentary term. Conducting two rounds of public engagement within this timeframe has constrained the level and depth of evidence gathering and analysis which can be carried out prior to engagement.

- **Defined scope:** The following matters are out of scope of the reform:
    - Past adoption practice, as past adoption placements are being considered as part of the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions ('the Royal Commission')
    - Whether adoption should continue to be the legal mechanism to transfer legal parentage where a child is born by surrogacy, which is being considered as part of Te Aka Matua o te Ture | Law Commission's review of surrogacy.

  These matters are discussed further in the IRIS section on project interdependencies.
- **Evidence limitations:** While there is evidence about the overall impacts of adoption in New Zealand (particularly the impacts on adopted persons and birth mothers), and about the impact of closed adoptions in New Zealand and internationally,[1] the IRIS is constrained by a lack of information related to the impact of specific procedural aspects of New Zealand's adoption law on adopted persons, birth parents and adoptive parents. It is also not clear to what extent research is relevant to contemporary adoption practice, e.g. where closed adoptions are no longer the norm.
    - Adoption-related information and data is held across various agencies, and with the Courts, with varying levels of ease of access and comprehensiveness. Given this, we cannot be confident that data on current trends and practice is complete and accurate.
    - A primary purpose of engagement is to gather further information to help assess the impact of the options for adoption law reform we are considering. The first round of public engagement provided further information but was limited by who we heard from. The second round of engagement is an opportunity to hear a wider range of views on options for reform, particularly where we do not yet have a clearly identified option.
- **Limitations on analysis of legal recognition of whāngai.** Although we undertook targeted engagement conversations with a number of Māori groups and individuals, including Māori academics, and received written submissions from Māori organisations, such as Te Hunga Roia Māori o Aotearoa, as well as from more than 30 individuals who identified as Māori, we did not achieve sufficient engagement to inform a decision on whether there should be changes to the way the law treats whāngai and atawhai.
- **Limitations on analysis of the first round of consultation**: Thematic analysis of the first round of engagement was conducted to gather public views on issues and options for reform. A summary of engagement can be found in Appendix A. Further, engagement was limited by the following factors:
    - the 2021 COVID-19 outbreak and extended lockdown in Auckland impacted on the quality and number of engagements we were able to hold. Some planned engagements were cancelled as it was not appropriate to engage without a face to face presence. A number of planned in-person engagements were held online (for example, talanoa with Samoan communities), which may have limited the range of participants and, potentially, the depth of the information and ideas shared. Other engagements (in particular, talanoa/fono with other Pacific communities), were postponed until the second round of engagement due to the project's timing constraints.
    - difficulties identifying people with adoption experiences meant we could not proactively access some groups we wanted to hear from, in particular birth fathers and children and young people who have been adopted recently under modern adoption practice. We received some written submissions from adults on behalf of adopted children. However, we did not receive any submissions that could be identified as being from birth fathers.

## Responsible Manager(s) (completed by relevant manager)

Naomi Stephen-Smith
Policy Manager, Family Law
Ministry of Justice

1 The impacts on the individual of some aspects of adoption law, for example, closed adoption, are well established. See, for example, Anita Gibbs "Beyond colour-blindness: Enhancing cultural and racial identity for adopted and fostered children in cross-cultural and transracial families" (2017) 27(4) Journal of Aotearoa New Zealand Social Work, 74-83; Maria Haenga-Collins & Anita Gibbs "Walking between worlds": The experiences of New Zealand Māori cross-cultural adoptees" (2015) 39(1) Adoption and Fostering, 62–75; E. Newman "A Right To Be Māori?' Identity formation of Māori Adoptees (Thesis, Master of Arts, University of Otago, 2012); E. Newman "Challenges of Identity for Māori Adoptees" (2011) 3(2) Australian Journal of Adoption; A. Ahuriri-Driscoll *Ka Tū te Whare, Ka Ora: the constructed and constructive identities of the Māori adoptee. Identity construction in the context of Māori adoptees' lived experiences* (PhD Thesis, University of Canterbury, 2020).

# Section 2: Problem definition and objectives

## 2.1 What is the current state within which action is proposed?

**Adoption changes a child's legal parents and family and whānau**

Adoption is the legal process through which legal responsibility for, and parentage of, a child is transferred from a child's birth parents to an adoptive parent(s). Adoption orders are usually made by the New Zealand Family Court. Once an adoption order is made, the law treats the child as if they were born to the adoptive parents.

An adoption order allows the adoptive parents to make decisions for the child and provide their day-to-day care. It also creates new legal relationships between the child and adoptive family and whānau. At the same time, the adoption order removes the child's legal relationship to their birth parents and birth family, whānau, hapū and iwi.

There is no legal mechanism for a person who has been adopted to retain connection to their birth family and whānau (or vice versa). Ongoing contact agreements are made in some adoptions between an adopted person's birth and adoptive families and whānau, but these operate entirely on a good faith basis. We have no information on the proportion of adoptions that include an ongoing contact agreement. A person who has been adopted may not access their adoption information until they are 20 years old. If they do not have ongoing contact with their birth family and whānau or information about their birth family and whānau from their adoptive parents, they are likely to have little knowledge about their birth family background. Once adopted people are 20 years old, they may apply to access information that the government holds about their birth record and adoption. For adoptions before 1986, access can be vetoed by either the birth parent or the adopted person.

**Adoption is regulated by three pieces of legislation**

The Adoption Act 1955, the Adult Adoption Information Act 1985 and the Adoption (Intercountry) Act 1997 regulate adoption practice in New Zealand. Associated regulations also apply.

Legislation prescribes matters such as:

- who may adopt and be adopted
- when an adoption order may be granted
- the effect of an adoption order
- recognition of intercountry and overseas-made adoption orders; and
- how adopted persons may access their adoption information as adults.

Other aspects of adoption practice have developed through the interaction of the law and the operational practice of Oranga Tamariki and other agencies, such as:

- support and information for participants in the adoption process
- processes for assessing the suitability of adoptive applicants; and,
- any arrangements for post-adoption contact between a person who is adopted and their birth family and whānau.

**Current forms of adoption**

New Zealand's legislation currently allows for domestic adoptions, intercountry adoptions and the recognition of overseas adoptions.

**Domestic adoptions:** Domestic adoptions are where the adoptive parent(s) and child both live in New Zealand. An example of a domestic adoption is where a New Zealand based couple adopts a child who is also living in New Zealand.

**Overseas adoptions:** Overseas adoptions are where both the adoptive parent(s) and child live in an overseas country. New Zealand law recognises some adoptions made in overseas countries. This means that if the child and parents move to New Zealand, they will have the same rights and responsibilities as other children and parents under New Zealand law.

An example of an overseas adoption is where people living in the United Kingdom adopt a child there. The adoptive parents and child may subsequently decide to move to New Zealand, where the adoption could be recognised as valid.

**Intercountry adoptions:** An intercountry adoption is where the adoptive parent(s) live in one country and the child lives in another country. In New Zealand, an intercountry adoption might follow the Hague Convention process or the process set out in New Zealand's domestic law, which takes a Hague Convention-consistent approach where possible.

Examples of intercountry adoptions include:

- A New Zealand based couple adopt a child living in China using the Hague Convention process. If the child is under 18 years old, this is a Hague Convention intercountry adoption as both China and New Zealand are signatories to the Hague Convention.
- A New Zealand based couple adopt a child living in Ethiopia. This is an 'other' intercountry adoption as Ethiopia isn't signatory to the Hague Convention (even though New Zealand is) and the couple can adopt the child in the New Zealand Family Court following the domestic adoption process.

Some New Zealanders may use the overseas adoptions process for an intercountry adoption. This may be the case where New Zealanders travel to another country and adopt a child under the other country's domestic law, but then return to New Zealand and have the adoption recognised here.

**Tamaiti whāngai or tamaiti atawhai** is the Māori customary practice where tamariki are placed in the care of others (generally whānau members), instead of the birth parents. Whāngai is often referred to as 'Māori customary adoption', but there are significant differences between whāngai and adoption as set out in the Adoption Act, and the Adoption Act specifically excludes whāngai from being considered as a legal form of adoption.[2] Despite this, some Māori use the adoption process to formalise whāngai arrangements, as formal adoption can make it easier for whāngai parents to access Government support or to arrange healthcare and education for the tamariki in their care.**Government, the courts and accredited agencies have a role in the adoption process**

*Oranga Tamariki*

Oranga Tamariki provides a service for birth parents wanting to place their child for adoption. Oranga Tamariki works with birth parents and gives them information and support so that they can make informed decisions about their child's care.

Oranga Tamariki also provides services for potential adoptive parents. It provides education and training for people considering adoption, including an overview of the process and other ways of caring for children. Its social workers assess potential adoptive parents. Oranga Tamariki also pre-approves and maintains a pool of potential adoptive parents whose profiles are shown to birth parents considering adoption. When requested by the Family Court, Oranga Tamariki will assess adoptive applicants and provide the Court with a social worker's report.

Oranga Tamariki's involvement varies between cases, depending on the way an adoption application is made. If the birth parents contact Oranga Tamariki, it will generally be involved throughout the entire process until a final adoption order is made. However, birth parents are not required to use Oranga Tamariki services. If an adoption is arranged independently and an application is made directly to the court, Oranga Tamariki may only be involved when preparing a social worker report for the court.

Oranga Tamariki is also the New Zealand Central Authority for intercountry adoptions under the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Hague Convention'). This means it undertakes assessments for, arranges and finalises adoptions where a child is to be adopted from another Hague Convention country.

*The Courts*

The Family Court is responsible for considering adoption applications and granting interim and final orders. When making decisions, the Court primarily relies on adoption laws and jurisprudence but may also look at other New Zealand laws and international agreements.

The Family Court considers information provided in the adoption application and any additional evidence supporting the application. This can include, for example, evidence about the identity of the adoptive applicants and the child to be adopted, or evidence about the birth parents' consent to the adoption.

The social worker's report helps the Court decide whether the applicants are fit and proper, and if the adoption is in the child's interests. The Family Court may also receive other evidence through a lawyer to assist the court, by the judge speaking directly to the child or adoptive parents, or by adding a government department as a party to the application.

*Department of Internal Affairs ('DIA')*

DIA is responsible for recording, holding, and releasing information about birth records, including adoption information.

When an adoption order is made, DIA issues a new birth certificate for the child. A person who has been adopted can apply to receive a birth certificate which shows information from their original birth records (what is described as their "original birth certificate") from DIA. DIA is also maintains the current adoption information veto system for adoptions that took place before March 1986.

DIA is also responsible for granting people citizenship. Children adopted by a New Zealand citizen, will often be entitled to New Zealand citizenship. Once an adoption is finalised, the child (or their adoptive parents) can apply for their citizenship to be recognised through DIA.

2 Adoption Act 1955, s 19.

*Immigration New Zealand*

Immigration New Zealand sometimes also plays a role in intercountry adoptions. Children being adopted via intercountry adoption, or who have been adopted overseas by a New Zealand citizen or resident, may require a visa to enter New Zealand.

*Ministry of Justice*

The Ministry of Justice is responsible for adoption legislation.

*Accredited agencies*

Accredited agencies may also play a role in facilitating intercountry adoptions under the Hague Convention. Accredited agencies are non-government organisations who have been delegated power by the government to undertake education and assessment functions, or functions associated with the facilitation and finalisation of adoption. An accredited agency may not perform both functions.

Currently, there are three accredited agencies; Intercountry Adoption New Zealand (ICANZ), Compassion for Orphans and Adoption First Steps.

Accredited agencies do not have a role in domestic adoption.

**Adoption numbers**

The number of domestic adoptions has reduced over time. In the 1970s, numbers of adoptions peaked at nearly 4000 adoptions per year. In contrast, in 2021 the Family Court approved 111 adoptions under the Adoption Act. Intercountry adoption numbers under the Hague Convention are also relatively low, with 18 adoptions granted in 2019.

Intercountry adoptions outside of the Hague Convention process (including overseas adoptions) make up the majority of adoptions made and recognised under New Zealand's law. In 2021, approximately 413 children[3] adopted overseas were granted citizenship by descent, the majority of whom were from Pacific Island countries.[4] Other children adopted overseas by New Zealanders (including both citizens and residents) are granted resident visas, but data on the number of these adoptions is not available.[5]

**Longstanding calls for reform**

Many previous reviews have recommended substantial reform of adoption laws. Examples include Patricia Webb's *A Review of the Law of Adoption* in 1979, the 1987 Interdepartmental Working Group's *Review of the Adoption Act 1955*, and the New Zealand Law Commission's 2001 report, *Adoption and its Alternatives*.

Legal action has emphasised the urgency of reform. In *Adoption Action v Attorney General,* the Human Rights Review Tribunal found seven provisions of the Adoption and Adult Adoption Information Acts constitute unjustifiable discrimination for the purposes of the New Zealand Bill of Rights Act 1990 ('NZBORA'). The law was found to be discriminatory on the basis of age, sex, disability and marital status.[6] Māori individuals and groups have also brought two cases to the Waitangi Tribunal alleging that the Adoption Act constitutes unjustifiable discrimination against Māori.[7] These cases have not been heard, as they have been delegated to the Tribunal's kaupapa inquiries for consideration. Advocates also regularly engage with the media to keep the subject of adoption law reform in the public view.[8]

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3 Note that this number is substantially lower than previous years, largely due to the effects of the COVID-19 pandemic on international migration

4 Children are entitled to citizenship by descent if they are adopted overseas by a New Zealand citizen and are under 14 years old at the time of their adoption.

5 If a child is 14 years or older at the time they are adopted by a New Zealand citizen, they can obtain a resident visa. If a child is adopted overseas by a permanent New Zealand resident, regardless of their age, they can obtain a resident visa.

6 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.

7 WAI 160, WAI 286; as cited in New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000), 87.

8 See, for example, "*Outdated adoption law set for change*" Newsroom (18 February 2021).

## 2.2 What is the policy problem or opportunity?

This reform provides an opportunity to ensure New Zealand's adoption laws reflect modern society and are fit for purpose. Safeguarding children's rights, best interests and welfare will be at the heart of this work. The reform also provides the opportunity to ensure that we meet our domestic and international human rights obligations.

When the Adoption Act was enacted in the 1950s, adoption most commonly featured an infant's care moving from an unmarried birth mother to a married couple, who were usually strangers to the birth family and whānau. Social norms of the time included:

- that children are best raised in heterosexual married homes
- that an adopted child would be better off without contact with their birth parents; and,
- that the majority of adoptions would take place domestically.

While practice has changed in some areas (e.g. in the case of infant adoptions, birth parents are presented with a choice of adoptive parents and often maintain contact), there are a number of opportunities to improve regulation of adoption to ensure it is in step with the wider array of contemporary norms, as well as best practice related to care of children. Examples include:

- ensuring a person's suitability to adopt and care for a child (the Act currently only includes limitations related to age, sex and marital status)
- reflecting contemporary understanding about the importance of identity, by improving access to adoption information and making provision for contact between the adopted person and their birth family and whanau; and
- allowing for the participation and agency of the adopted person.

The majority of adoptions no longer occur domestically, and there are insufficient safeguards for overseas or intercountry adoptions. As an example, the recognition of some overseas adoptions has raised serious child protection risks where the other countries' laws don't align with New Zealand's approach to child safety and welfare.

The judiciary and Oranga Tamariki have put concerted ongoing effort into using statutory interpretation and practice-based solutions to enable the Adoption Act to function as best as possible in support of modern understandings of best practice in adoption. Law reform is needed to further support this process. Without legislative change many of the status quo issues will remain or escalate.

Many aspects of the Adoption Act have been criticised as not appropriately considering tikanga Māori. The Act was described as "alien" and as "an affront to Māori culture" by Māori submitters to the 2000 Law Commission review of the Act.[9] Specific focuses of Māori critique of the Adoption Act in previous reviews have been:

- The "clean break" principle that underlies the Act, which results in the legal effect of adoption being that a child is treated as if they were born to their adoptive family and whānau, and completely severs their legal relationships with their birth whānau and whakapapa; and,
- The lack of opportunity for the involvement of wider whānau, hapū and iwi in adoption decisions.

The two cases before the Waitangi Tribunal allege that the Act has breached the Crown's responsibility to active protection under Te Tiriti o Waitangi by allowing Māori to be separated from their whānau and whakapapa through adoption without considering the effect that this has on their identity as Māori.[10]

**Adoption law reform will enable New Zealand's law to take a child-centric approach to adoption processes, in keeping with the approach taken in all other domestic child-focused legislation**

Reform offers an opportunity to consider how New Zealand's adoption laws can best safeguard and promote the rights, best interests and welfare of children. The United Nations Committee on the Rights of the Child has criticised the lack of scope for children's participation and consent in the Adoption Act in its three previous country reports on New Zealand's adherence to its obligations under the United Nations Convention on the Rights of the Child ("the Children's Convention").[11] The United Nations International Children's Emergency Fund (UNICEF) has

9 New Zealand Law Commission, *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000), 85.

10 WAI 160, WAI 286; as cited in New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000), 87.

11 Committee on the Rights of the Child, *General Comment 12* (20 July 2009) CRC/C/GC/12.

echoed the view that increased scope for children's participation would improve New Zealand's adoption laws.[12] Many similar jurisdictions, such as the United Kingdom, most Australian and most Canadian states, territories and provinces require a child to consent to their adoption once they have reached a specified age and provide opportunities for children to participate in decisions affecting them. Domestically, New Zealand's other legislation that governs processes ruling on the care of children, the Care of Children Act 2004 (CoCA) and the Oranga Tamariki Act 1989, has mechanisms to support children's participation in decisions concerning their care.

Similar international jurisdictions state in their legislation that the purpose of adoption is to provide a service for the child, to promote the child's welfare and best interests throughout its life. New Zealand's adoption law does not set out the purpose of adoption. This allows adoptions to take place for a range of reasons, with no guidance for judges on what should and should not be considered legitimate purposes of adoption.

**Adoption law reform gives an opportunity to ensure that our adoption laws are consistent with New Zealand's domestic and international human rights obligations**

Reform also provides an important opportunity to align New Zealand's adoption laws with domestic and international human rights obligations. In particular, there is an opportunity to strengthen New Zealand's law in relation to our international obligations set out in the Children's Convention and the Hague Convention, particularly relating to safeguarding children's rights, best interests and welfare. There is also an opportunity to ensure the law is consistent with our own domestic human rights obligations as set out in the NZBORA and Human Rights Act 1993.[13]

**Adoption law reform provides an opportunity to better consider the values of Māori and other cultures, and better meet te Tiriti o Waitangi obligations**

Reform of adoption laws will enable government to better address the concerns and values of Māori and people of other cultures. It also provides the opportunity to ensure the law better meets te Tiriti o Waitangi obligations. The Adoption Act currently reflects 1950s Pākehā understandings of family and childcare, and does not acknowledge the importance of a child's culture or wider family, whānau, hapū and iwi. Given the effect of an adoption, which removes a child's legal ties to their birth family and whānau, a child's legal connections to their culture, heritage and language may also be lost.

The Adoption Act does not recognise the significance of other cultures' concepts and practices relating to the care of children, including Māori practices. For example, the Act states that the Māori customary practice of tamaiti whāngai or tamaiti atawhai has no effect in adoption laws. Other New Zealand laws only recognises whāngai placements for very limited purposes.

**Adoption law reform will enable the Government to consider what support and information is necessary and appropriate for children, birth parents, adoptive parents and wider family and whānau**

Reform also provides an opportunity to explore what support and access to adoption information the government should provide before, during and after the adoption process. Where Oranga Tamariki is involved early in the adoption process it offers information, training, and support services to birth parents and adoptive parents. However, these services are voluntary and there is no dedicated government funding for adoption support services. The law doesn't require any pre, during or post-adoption support in domestic adoption cases.

It is now well known that adoption, particularly 'closed' adoptions, have caused harm for the child and the birth parents, through loss of connection to family and whānau, identity and culture. Submitters to the Royal Commission have provided evidence of the impact that lack of sufficient support in the adoption process has had on the mental and emotional health of adopted persons and birth parents.[14] This harm was particularly damaging due to historical practices surrounding taking of consent without appropriate support, the exclusion of family and whānau from adoption decision making, and the secrecy of adoptions. These historical practices are not reflective of current practice, but have ongoing impact on adopted persons, their birth parents, wider family and whānau and descendants. Government support could help past and present adoptees with dealing with the changes that an adoption brings.

Restrictions on accessing adoption information can prevent the person who is adopted from exploring their birth background. Restrictions also affect the descendants of a person who has been adopted. DIA provides approximately 400-500 original birth certificates to requestors each year.[15] Research shows that lack of

12 UNICEF New Zealand *Kids Missing Out* (2013) https://tewhareporahou.files.wordpress.com/2015/08/kids-missing-out-a4-document.pdf

13 For example, see *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.

14 Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions *Tāwharautia – Pūrongo o te Wā: Interim Report*, 54 (2020).

15 Data received from Department of Internal Affairs on 1 April 2021.

connection to whakapapa information is particularly harmful for Māori.[16] For adoptions that took place before 1 March 1986, people who have been adopted and birth parents are able to place a 'veto' on their information held by DIA. DIA is not able to share a full original birth certificate if a veto is in place. As at December 2020, there were 201 active vetoes, with the large majority placed by birth mothers. Between 2016 and 2020, six people who were adopted were refused access to their original birth certificate due to an active veto.[17] Reform provides the opportunity to reconsider how access to adoption information should be managed given the right to identity of the person who is adopted, as provided for in Article 8 of the Children's Convention.

## 2.3 What do stakeholders think about the problem?

The Ministry of Justice carried out a first round of public consultation and targeted engagement on the discussion document *Adoption in Aotearoa New Zealand* during 2021. The engagement aimed to understand the views of the public and key stakeholder groups regarding problems with the current adoption law, some suggested options for addressing issues and other ideas people might have for change. We received 271 written submissions and met with 27 individuals and groups with an interest in adoption law reform. An external consultancy ran targeted engagement with three groups (Māori individuals, the Samoan community and young people impacted by adoption). A detailed summary of the views heard in the first round of engagement is attached as Appendix A.

Most people felt current adoption laws and processes have caused harm and need fundamental change. Some said adoption should be discontinued altogether and some thought that past harms, mainly stemming from the impact of past, closed adoptions, need to be addressed. Most people we heard from thought that the adoption regime should focus on protecting children's rights, including rights to identity and maintaining connections with birth family/whānau, access to information, maintaining culture and participating in decision-making about themselves in the adoption process. There were also calls for increasing the amount of information and support given to people before, during and after adoption.

Almost half of the people we engaged with spoke about te Tiriti o Waitangi. Almost all of those people considered that the Government had obligations under te Tiriti to acknowledge past harms caused by breaches of te Tiriti in relation to adoption, and that partnership in adoption policymaking and allowing processes for rangatiratanga in the adoption process is required. We heard that significant changes were needed to ensure Tiriti-consistent adoption processes respect the inalienability of whakapapa, the centrality of whānau, hapū and iwi, the rights of adopted people to their whakapapa, and the importance of culture.

Groups with particular interest in reform of New Zealand's adoption laws are:

**Children who will be and who have been adopted**

Children are the subject of adoption law. Adoption changes the care arrangements for children and fundamentally alters their family relationships, with lifelong (and intergenerational) effect. Children who will be adopted are the group who will most centrally be affected by the features of a new adoption system. A number of possible changes to the system could also have retroactive effect, and also change the rights of adopted persons ( both children and adults) who were adopted under the Adoption Act 1955.

We expect a new adoption system to meet children's rights, and protect their interests and welfare. Rights that are considered in reform proposals within the discussion document include the child's right to have their best interests as a primary consideration in decisions affecting them, their right to participate, right to identity, right to culture and right to family and whānau.

Given that children's rights are to be at the heart of the new law, it is important for there to be opportunities for children, particularly those with adoption experiences, to engage with the reform process.

However, we acknowledge that there are particular difficulties in engaging with children, including:

- it is difficult to identify children and young people with adoption experiences to engage with, and relies on self-identification, and
- engaging with children and young people is highly sensitive and requires significant planning to ensure the process upholds their mana.

Our engagement processes are being designed to allow for engagement to be deep rather than broad, and as comprehensive as possible, given these constraints.

**Adults who were adopted**

Children and young people have the most recent experiences of the current adoption system. As people age, their perception of life and life events changes. Things that are important to children and young people during the

16 See for example Maria Haenga-Collins *Closed Stranger Adoption, Māori and Race Relations in Aotearoa New Zealand, 1955-1985* (PhD thesis, Australian National University, 2017).

17 Data received from Department of Internal Affairs on 1 April 2021.

adoption process may no longer seem important to adopted people once they are adults. Adopted people may reflect differently on their adoption experiences depending on their stage of life. It is also important we hear adult adoptee perspectives, so that the new adoption system will meet children and young people's needs in the future.

Some of the possible changes to the system could also apply to existing adoptions and change the rights of adopted persons (both children and adults) who were adopted under the Adoption Act 1955. In particular, changes to aspects of the legal effect of adoption, and changes to the adopted person's rights to information are likely to be of high interest to many adult adoptees.

**Other people with adoption experience**

Many people are affected by an adoption process beyond the person being adopted. Birth parents, adoptive parents, the wider family, whānau and hapū of the adopted person and the adopted person's descendants all have interests on how a new adoption system might treat their rights and interests.

The new adoption system will set out areas that affect each of these groups, including:

- the rights of participation in the adoption decision making process of the adopted person, birth parents, adoptive parents and wider family, whānau and hapū, including their rights to consent.
- the support available to birth parents, adoptive parents and wider family and whānau.
- the legal effects of an adoption on the rights of adopted persons and the rights and responsibilities of birth and adoptive families.
- processes for ongoing contact between the child and their birth family and whānau following adoption.

**Māori**

Many Māori have consistently opposed aspects of current adoption law. The "clean break" principle that treats a child as if they were born to their adoptive family and whānau conflicts with the strong value placed by te ao Māori on whānau, hapū and iwi connections and whakapapa. Equally foreign to te ao Māori is the lack of opportunity for wider whānau, hapū and iwi to be involved in adoption decisions. Māori have a strong interest the future purpose of adoption is, how adoption could best be responsive to different cultural understandings of family and whānau and responsibility for childcare, and how adoption laws should provide for the cultural distinctiveness of Māori tamariki.

In addition, reform provides the opportunity to explore whether Māori consider that changes should be made to the way the law treats whāngai. Currently, the lack of legal recognition of whāngai placements can disadvantage whāngai tamariki and whāngai parents by affecting their access to government services (such as enrolling whāngai tamariki in school or healthcare services).

**Pacific communities**

The majority of New Zealand's adoptions in recent years involve recognition of overseas adoptions from Pacific Island nations.

**Rainbow community**

The rainbow community has in the past experienced both direct and indirect discrimination as a result of adoption laws. For example, the Adoption Act sets out eligibility criteria on who may apply to adopt a child, including that two people applying to adopt together must be 'spouses'. That eligibility criterion has, until relatively recently, restricted same-sex couples from adopting. The rainbow community have a particular interest in ensuring that adoption law is consistent with New Zealand's domestic and international human rights obligations.

**Disabled communities**

Disabled people have in the past experienced both direct and indirect discrimination in the adoption process. The communities have been concerned regarding the consent provision of the Adoption Act, which allows for a birth parent's consent to an adoption to be dispensed with on the basis of mental or physical incapacity. We heard in first round engagement that disabled persons have an interest in ensuring that reform of adoption laws takes a strengths-based approach to supporting disabled persons in the context of adoption laws and processes.

## 2.5 What interdependencies exist in relation to the identified problem?

**Surrogacy**

Adoption is the only way intending parents can become the legal parents of a child born by surrogacy. Any changes to adoption law will impact on the adoption process for children born by surrogacy.

Te Aka Matua o te Ture | The Law Commission ('the Law Commission') is due to publish the final report on its review of surrogacy, Te Kōpū Whāngai: He Arotake | Review of Surrogacy, in 2022. The review is considering

changes to surrogacy laws, including to how the law attributes legal parenthood in surrogacy arrangements. If implemented, those changes would mean that adoption would no longer be used to attribute legal parenthood in these situations. The adoption law reform work does not propose changes to how adoption applies to surrogacy arrangements at this stage.

**Care and protection**

Oranga Tamariki's care and protection functions are currently under review. While Oranga Tamariki's adoption services functions are separate from their care and protection functions, large-scale changes to the structure or mandate of Oranga Tamariki could have substantial implications for the way that adoption services are delivered. Adoption law reform will not consider changes to care and protection settings.

**The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions**

The Royal Commission was set up in 2018 to respond to calls for investigation into a broad range of historic abuse that vulnerable individuals suffered in the care of the state and in faith-based institutions between 1950 and 1999. The Royal Commission's Terms of Reference specifically list adoption placements as a setting in which abuse may be considered. The Royal Commission has heard submissions regarding past adoption practices. The Royal Commission will deliver its final recommendations on responses to past abuse in 2023. The Government will consider its response to the Royal Commission at that stage. For this reason, historical abuse and responses to past practice are out of scope for these reforms.

**The Law Commission review of succession law**

In November 2021, the Law Commission completed its report on the Review of Succession Law. The report made recommendations about New Zealand's succession law (inheritance, or what happens to property after a person dies). However, the report did not make recommendations about how the law should apply to adopted people.

The Government is due to respond to the Law Commission's report shortly, which will outline any next steps for this area of law reform. How succession law applies to adopted people will be considered as part of any agreed wider succession work. The adoption law reform work does not propose changes to succession law at this stage.

## 2.5 What are the objectives sought in relation to the identified problem?

The Government's overall programme of adoption law reform is guided by the following objectives:

1. To modernise and consolidate New Zealand's adoption laws to reflect contemporary adoption processes, meet societal needs and expectations, and promote consistency with principles in child-centred legislation;

2. To ensure that children's rights are at the heart of New Zealand's adoption laws and practice, and that children's rights, best interests and welfare are safeguarded and promoted throughout the adoption process, including the right to identity and access to information;

3. To ensure that adoption laws and practice meet our obligations under Te Tiriti o Waitangi and reflect culturally appropriate concepts and principles, in particular, tikanga Māori, where applicable;

4. To ensure appropriate support and information is available to those who require it throughout the adoption process and following an adoption being finalised, including information about past adoptions;

5. To improve the timeliness, cost and efficiency of adoption processes where a child is born by surrogacy, whilst ensuring the rights and interests of those children are upheld[18]; and,

6. To ensure New Zealand meets all of its relevant international obligations, particularly those in the UN Convention on the Rights of the Child and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.

This IRIS and the discussion document form the basis of public engagement and set out options for reform the Government is considering, and areas where further views are required. The purpose of these documents is to test our understanding of issues with current adoption laws and seek the public's views on options for a new adoption system. Feedback received as part of public engagement will help to guide final policy development. Targeted engagement with specific communities impacted by adoption is also planned.

18 However, given that Cabinet asked adoption reform timelines to align with the Government response to the review of surrogacy by Te Aka Matua o te Ture | The Law Commission, the adoption law reform work does not propose changes to how adoption applies to surrogacy arrangements at this stage.

# Section 3: Option identification

## 3.1 What options are available to address the problem?

The attached discussion document *A new adoption system for Aotearoa New Zealand* will provide the basis for public engagement in relation to issues with current laws and options for change that are being considered.

The discussion document supports public and targeted engagement on potential options for a new adoption system, following the first round of public and targeted engagement, which sought engagement on the issues with current adoption laws.

The discussion document covers:

- **Purpose and principles of adoption**:
  This section covers options for the purpose of the new system of adoption and the principles that should underpin it.
- **Who can be adopted?**
  This section covers options relating to the age of children who can be adopted.
- **Who can adopt?**
  This section considers options relating to eligibility to adopt and adoptions involving children and adoptive applicants from different cultures.
- **What happens if a child is placed for adoption?**
  This section sets out options for what processes should be in place pre-adoption, including appointing a dedicated social worker for the child, the placement of the child before an adoption order is made, and the consideration of alternatives to adoption for the birth parents.
- **Who can have a say?**
  This section sets out options for who can be involved in the adoption process, including the child, their birth parents, wider family and whānau, and, in the case of tamariki Māori, their hapū and iwi.
- **Who makes the decisions?**
  This section considers options relating to the role of the Government, including a requirement to engage with Oranga Tamariki, and the Court in adoption decisions.
- **How do they decide?**
  This section considers options related to the inputs into adoption decisions including the suitability assessment of adoptive applicants, information and reports available to the Court, and how the Court must consider other available care arrangements for the child
- **What is the legal effect of adoption?**
  This section considers options for the legal effect that an adoption will have, and its impact on the legal status of the adopted person with regard to parental decision-making rights, financial responsibility for the child, the adopted person's rights to citizenship and succession. It also sets out options relating to changing the adopted person's name and information recorded on their birth certificate.
- **What contact can birth parents and adopted children have after an adoption?**
  This section considers options for post-adoption contact between the child and their birth family and the maintenance of the adopted person's culture following an adoption.
- **What support can people access?**
  This section seeks people's views on the types of support services that could be offered as part of the adoption process.
- **Who can access adoption information and when?**
  This section considers options for how people should be able to access adoption information following an adoption, including the ongoing use of vetoes.
- **What if things go wrong?**
  This section considers options for processes for varying or discharging an adoption order.
- **What happens in overseas and intercountry adoptions?**
  This section considers the processes for making intercountry and recognising overseas adoptions, including those facilitated under the Hague Convention.

The IRIS will consider each of these sections in turn (except where specified below), analysing the issues and preferred options for change raised in the discussion document. The second discussion document outlines the new adoption system we are considering and contains three journey maps to illustrate how it could operate for children, birth parents and family and whānau, and adoptive parents. This first discussion document released last year, focused on issues with the existing system.

The IRIS does not cover the following aspects of the discussion document because they do not propose detailed options. These are:

- what support can people access;
- inheriting property; and
- varying an adoption order.

In some areas the range of options analysed in this IRIS differ, or are grouped differently, from those presented in the first IRIS. This is because some unviable options were dismissed, new options were identified as the policy work developed, and in some places our options have become more detailed and specific.

The options have been considered against the criteria below. The criteria have different elements noted, which may be of more or less significant for specific issues.

| | |
|---|---|
| Children's rights | Does the option uphold and prioritise children's rights, including those set out in the United Nations Convention on the Rights of the Child? |
| Fit for purpose | Does the option address the identified problem or opportunity? |
| Equity | Does the option treat population groups equally, or is any differential treatment justified? How does the option impact on parties such as the birth parents or adoptive parents and other affected groups like the family and whānau of the adopted child?<br><br>Does the option accommodate and support differing cultures including cultural practices and religion? If not, is there justification? |
| Feasibility and durability | Is the option consistent and workable with our existing domestic and international laws and obligations?<br><br>Can it be implemented clearly and efficiently?<br><br>How usable is it, by all New Zealanders (not just those with specialist skills or knowledge)?<br><br>What about cost, and could it be scaled? |
| Tiriti o Waitangi | Is the option consistent with te Tiriti o Waitangi?<br><br>To what extent does it promote the particular rights and interests of tangata whenua, and honour the Government's commitments to Māori under te Tiriti? |

The intent of assessing options against these criteria has been to inform the Ministry's advice on options we think the Government should consider. In line with the children's rights focus in the objectives for reform, we have more heavily weighted the children's rights criterion. This is consistent with international obligations, such as the Children's Convention, which says that the best interests of the child shall be the paramount consideration in adoption practice. In some cases, this may mean that options that uphold children's rights are preferred over options that rate more strongly against other criteria.

**Example key for qualitative judgements:**

| | |
|---|---|
| ++ | much better than doing nothing/the status quo/counterfactual |
| + | better than doing nothing/the status quo/counterfactual |
| 0 | about the same as doing nothing/the status quo/counterfactual |
| - | worse than doing nothing/the status quo/counterfactual |
| - - | much worse than doing nothing/the status quo/counterfactual |

# Options analysis tables

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## Purpose and principles of adoption

### Problem definition

The Adoption Act is unclear about when an adoption should happen or when it might be an appropriate care option for a child. The lack of clarity means that adoptions can be made for a range of different purposes. In some cases, this may lead to adoptions being made for reasons that New Zealanders do not generally agree with, for example for immigration or family reunification purposes, or in situations that may not be in the child's best interests. Judges make decisions about whether an adoption should happen on a case-by-case basis. There is also limited guidance about the most appropriate way to conduct an adoption process and the nature of the adoption arrangements that should be put in place.

### What we heard in engagement

Around half the people we engaged with talked about the purpose of adoption, with most saying that adoption should be in the best interests of the child. There were mixed views about the extent to which a purpose should be expressed in legislation. Most who talked about whether purpose should be in legislation argued that an explicit purpose(s) would provide guidance for the courts to meet the best interests of the child. However, others opposed including a prescriptive purpose statement, as they felt there should be flexibility to allow for a range of reasons for adoption. Most people considered adoption should provide stability, security, wellbeing, long-term care, a family when birth family cannot care for child, connection to whānau and legal recognition. Bringing children to New Zealand or out of poverty resonated less, as some people felt this is not in the child's best interest, but more about family building.

## Purpose of adoption

### Options we have considered

We have considered the following option for reform:

- **Status Quo:** No purpose for adoption specified in legislation.
- **Option 1 (Preferred): Legislation defines the purpose of adoption.**
  The purpose of adoption could be outlined within core principles of the Act, or as part of the test for when an adoption order should be made.

If a purpose for adoption is included in legislation, we have considered the following options as a potential purpose:

- Option 1: Provides a service for the child
- Option 2: Must be in the child's best interests
- Option 3: To provide a stable, enduring and loving family relationship for a child
- Option 4: For a child whose parents cannot or will not provide care for them parents
- Option 5: To create continuity of care for a child
- Option 6: To deepen a child's connection with family, whānau, hapū and iwi by living with other relatives.
- Option 7: To provide care for a child who cannot or will not be cared for by birth parents or their wider family/whānau

- Option 8: To provide legal recognition of social connections and/or close relationships - For example, to recognise relationships between step-parents and step-children, or foster parents and foster parents
- Option 9: To provide for immigration for opportunities in NZ or family reunification. For example, to recognise relationships between step-parents and step-children, or foster parents and foster parents
- Option 10: Is a last resort if no other alternatives are available.

| **Purpose of adoptions:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo: No purpose for adoption specified in legislation, allow judicial practice to guide understandings of purpose.**<br><br>**ME** | 0<br><br>Lack of clarity about the purpose of adoption can allow adoptions for purposes which may not be in the best interests of children. | 0<br><br>It is unclear when adoption should happen or when it is likely to be an appropriate care arrangement for a child. | 0<br><br>Lack of an explicit purpose in legislation allows purpose of adoption to be malleable to individual circumstances. However, it does not expressly require consideration of matters that reflect different cultural views. | 0<br><br>Generally inconsistent with existing family law which sets out purposes for different types of care orders e.g. under the Care of Children Act (CoCA) and the Oranga Tamariki Act. Also inconsistent with international interpretations of when adoption should be used.<br><br>However, does allow for flexibility in its application and has allowed practice to be developed over time. | 0<br><br>No purpose in legislation means adoption can be used flexibly.<br><br>However, creates potential for adoption to be used in ways that fail to actively protect Māori rights under te Tiriti. This may be likely to occur where implicit cultural understandings of the purpose of adoption become the default purpose of adoption. |
| **Option 2 (Preferred): Purpose in objectives or principles of legislation.**<br><br>**ME** | +<br><br>Depending on purpose, can help to place children's rights at the heart of the new laws.<br><br>Outlining explicit purposes is potentially in tension | +<br><br>Provides clarity about when adoptions are appropriate.<br><br>Supports consistency in decision-making around when adoption is | -<br><br>Stating a purpose of adoption means adoption is less flexible to apply to individual circumstances.<br><br>The purpose could entrench views on | +<br><br>Consistent with other domestic laws.<br><br>All comparable jurisdictions include a purpose of adoption in their adoption legislation to help shape judicial decision- | +<br><br>Depending on the purpose, clarity can help provide a safeguard that adoption is used in appropriate circumstances that are consistent with obligations to actively protect Māori rights under te Tiriti and extend the same rights and |

| **Purpose of adoptions:** Analysis of options<br><br>KEY: ☐ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | with flexibility and individual context in judicial decision-making. The level of risk created would depend on the level of restrictiveness that is used in defining the purpose and the way in which the purpose applies to the judge | appropriate, and that the decision-making reflects parliament's intention. | adoption that are not shared by all cultures. or it could allow for different cultural views to be considered. | making about when adoption is and is not appropriate.<br><br>Clarity in the purpose means adoption can be used consistently over time. But it may limit how practice can evolve in response to societal changes. | privileges of non-Māori to Māori.<br><br>Recognising and protecting Māori rangatiratanga would require Māori determining the purpose of adoption for tamariki Māori. |

| **Defining a purpose of adoptions:** Analysis of option<br><br>KEY: ☐ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 1 (Preferred):**<br>**To provide a service for the child.**<br><br>**CW (All)** | ++<br><br>Recognising adoption as a service for the child supports children's rights by focusing on the individual needs of the child. | ++<br><br>Provides clarity when adoption is appropriate, as it focuses on the child rather than the other people involved in the process. | -<br><br>Does not focus on the needs of adults e.g. birth parents or adoptive parents. | +<br><br>May be unclear what is meant by 'service for the child', particularly when we often use other language to explain this concept in other family law.<br><br>Language not used elsewhere in NZ law but is consistent with ideas of making decisions that are in a child's best interests and promote their welfare. Consistent with the law in several Australian states. | +<br><br>Purpose focused on active protection of welfare of tamariki Māori.<br><br>However, care needed in interpretation, so that understandings of welfare and child's interests make space for Māori views of flourishing, in keeping with Māori right to rangatiratanga. |

| **Defining a purpose of adoptions:** Analysis of option<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 2 (Preferred): Must be in the child's best interests.**<br><br>**CW (All)** | ++<br><br>Consistent with children's right to have their wellbeing and development provided for. Also consistent with best practice that decisions about children's care are in the child's best interests, taking into account the individual circumstances of the child. | ++<br><br>Provides clarity about when adoption is appropriate, that focuses on what is appropriate for a particular child. | 0<br><br>Child's best interests will be culturally specific, and process will need to be informed to acknowledge this | ++<br><br>Clear language which reflects common practice and is well-understood by professionals and some parts of the public. However, may need to provide clarity on what this means in the adoption context as is open to interpretation which could lead to inconsistencies in what is considered best for a child.<br><br>Is consistent with other child-centred legislation (CoCA and Oranga Tamariki Act) and international obligations.<br><br>Aligns with international obligations, including the Hague Convention. | +<br><br>Purpose focused on active protection of welfare of tamariki Māori.<br><br>However, care needed in interpretation, so that understandings of welfare and child's interests make space for Māori views of flourishing, to support Māori equal rights promised under article 3 of te Tiriti. |
| **Option 3 (Preferred): To provide a stable, enduring and loving family relationship for a child.**<br><br>**CW (All)** | ++<br><br>Promotes children's rights by supporting a child's right to a family life and recognising the importance stability and love have on a child's wellbeing and development (particularly attachment and bonding). | ++<br><br>Provides guidance about when adoption is appropriate. Focuses on the importance of stable, enduring and loving relationships to children. | ++<br><br>Treats population groups equally. Provides flexibility to recognise different types of family relationships. | +<br><br>Relatively clear and accessible, particularly given its use in other family law contexts.<br><br>Consistent with existing family law that recognises children's needs for stability but does not acknowledge that this can be | +<br><br>Purpose focused on active protection of welfare of tamariki Māori.<br><br>However, care needed in interpretation, so that understandings of welfare and child's interests make space for Māori views of flourishing, to support Māori equal rights |

| **Defining a purpose of adoptions:** Analysis of option<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | provided through other care arrangements. | promised under article 3 of te Tiriti. |
| **Option 4 (Preferred): For a child whose parents cannot or will not provide care for them.**<br><br>**CW (All)** | ++<br><br>Child rights-consistent approach as it is based on the child's needs.<br><br>Provides clear ground for when adoption is considered appropriate, taking a child-focused approach which reflects best practice. | +<br><br>Provides guidance about when adoption should be used that focuses on the child. But does not delineate purpose of adoption from other care arrangements, which may also be used where parents cannot or will not care for the child, including permanently. | -<br><br>Does not reflect cultural norms that allow for adoption within family as a normal part of sharing family responsibilities. | ++<br><br>Clear ground for when adoption should be used.<br><br>Consistent with approach in CoCA and the Oranga Tamariki Act that children should be cared for by their parents, where this is possible. | -<br><br>Purpose focused on active protection of welfare of tamariki Māori.<br><br>However, tension with Māori understanding of the child as belonging to whānau, hapū and iwi to allow birth parents' ability or will to care for child alone to shape decision. Protecting whānau rangatiratanga would lead to a wider focus on whānau and hapū ability to care for tamariki. |
| **Option 5: To create continuity of care for a child.**<br><br>**CW (All)** | +<br><br>Continuity (and the stability it provides) is consistent with children's rights, particularly Article 20 of the Children's Convention which recognises the desirability for continuity in a child's upbringing. | +<br><br>However, continuity of care can be achieved by a range of orders available within care of children legislation in the New Zealand context, it does not require adoption to be achieved. | -<br><br>In some cultures, continuity of care is valued less, and flexibility of a child's care is common. | +<br><br>Clear term that is used currently in the care of children processes.<br><br>Consistent with existing family law and links to the importance of stability for a child's wellbeing needs. | -<br><br>Purpose focused on active protection of welfare of tamariki Māori.<br><br>However, recognition of importance of continuity should be balanced against importance of other rights, for example right to whānau care where this is available.<br><br>Focus on specific caregiver may not reflect Māori understandings |

| **Defining a purpose of adoptions:** Analysis of option<br><br>KEY: ▭ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | | of continuity of care as a collective e.g., within whānau and hapū. |
| **Option 6:**<br>**To deepen a child's connection with family, whānau, hapū and iwi by living with other relatives.**<br><br>**CW (All)** | -<br><br>Recognises child's right to continuity to the child's ethnic and cultural background, and the importance of the child's family, whānau, hapū and iwi in their life and upbringing.<br><br>However, is not a needs-based approach and this outcome could be achieved through other care arrangements. | - -<br><br>Does not provide a clear definition or set of circumstances in which adoption should be used. Interpretation would need to develop as to when adoption would deepen whānau connections, and whether this justified adoption. | +<br><br>More reflective of the approach to customary adoptions or arrangements in some cultures, where care of a child is less focused on birth parents. | -<br><br>This option may not provide enough clarity on when an adoption is considered appropriate, which may lead to inconsistencies in its application.<br><br>Is likely to be inconsistent with international obligations and does not align with practice across other family law (e.g. CoCA and Oranga Tamariki Act) which provide other ways for a child to maintain connections with their relatives. | -<br><br>Supports flexible arrangements for care of tamariki, in line with whāngai. However, this is in tension with permanence of adoption decision.<br><br>Sets legal decision maker as arbiter of whether an adoption will promote whānau connection, which does not reflect rangatiratanga right for whānau Māori to define this. |
| **Option 7:**<br>**To provide care for a child who cannot or will not be cared for by birth parents or their wider family and whānau.**<br><br>**CW (All)** | -<br><br>Recognises children have a right to be cared for by their family and whānau and, if they can't be, that the State has a responsibility to find a family and whānau for the child. However, living with family and whānau may not always be in the best interests of the child, | -<br><br>Provides clarity about when adoption should be used. Could give undue weight to alternatives within family and whānau that are not in the child's best interests.<br><br>Listing a preference for family and whānau care as | ++<br><br>Recognition of right to family and whānau care in keeping with cultural diversity of views of role of family in caring for children. | +<br><br>Clear ground for when adoption should be used.<br><br>Consistent with approach in CoCA and OT Act that alternatives outside the birth family and whānau should be explored as a last resort. | +<br><br>Supports active protection of tamariki rights to whānau and whakapapa by ensuring whānau care alternatives are considered and explored. |

| **Defining a purpose of adoptions:** Analysis of option<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | sometimes adoption may be preferable. | a principle of adoption gives it a guiding force on decisions, where placing this within the purpose of adoption could limit judicial discretion and lead to preventing adoptions which should be further considered. | | Also consistent with principle of subsidiarity in the Hague Convention. | |
| **Option 8:**<br>**To provide legal recognition of social connections and/or close relationships.**<br><br>**CW (All)** | -<br><br>This option may promote a child's best interests as it can provide legal certainty of connection for the child to a person with whom they already have a close relationship with.<br><br>However, it may also result in adoptions that benefit or promote adult interests rather than those of the child. This option does not necessarily consider the individual child's needs or acknowledge that social connections could be better fostered through other mechanisms. | -<br><br>Provides limited clarity about when these relationships should be recognised through adoption. It is not focussed on when adoption is appropriate for the child. | +<br><br>Allows for step-parent adoptions as a normal function of the purpose of adoption. | -<br><br>Would provide some clarity on why adoption may be used, but also open to interpretation based on someone's person views, culture, or understandings of adoption.<br><br>Inconsistent with international obligations, particularly the Hague Convention, as could be seen as lower standard for when adoption should be used. However, likely to be consistent with UNDRIP as it could provide recognition of adoptions that take place alongside the customary practices of different cultures. | -<br><br>Does not necessarily recognise value of whakapapa, where adoption may be used to recognise symbolic whānau relationships over whakapapa relationships.<br><br>However, it is unclear what social connections or close relationships would be recognised. Could support whāngai relationships, but does not reflect the fluidity in whāngai practices. Equally, requiring Crown recognition of Māori relationships does not fit with Māori rangatiratanga. |
| **Option 9:**<br>**To provide for immigration for opportunities in NZ** | -- | - | - | - | - |

| **Defining a purpose of adoptions:** Analysis of option<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **or family reunification.**<br><br>**CW (All)** | Potential to promote a child's rights by giving them access to education and healthcare in New Zealand and a right to see family in New Zealand. However, an 'adoption' is unlikely to be the best way to achieve these outcomes, and the consequences of adoption for family relationships may not be in the child's best interests.<br><br>Incentive to adopt for immigration purposes creates risks of exploitative adoptive relationships, which are not in the best interests of children. | Provides clarity about when adoption can be used. But focuses on immigration and family reunification**,** rather than focusing on what is appropriate for a child.<br><br>Children migrating to New Zealand may be more appropriately considered as part of immigration policy. | Some children would be adopted in order to immigrate, this creates risk to children, which differ based on their nationality rights. | Would create confusion and inconsistency with immigration settings, which has different objectives than rules around care of children.<br><br>Immigration pathways are better suited to assessing when a child's migration to New Zealand is appropriate. | Immigration is a complex area of interrelation between the kāwanatanga responsibilities of the Crown and the Māori right to partnership.<br><br>These questions may be more appropriately considered as part of immigration policy. |
| **Option 10:**<br>**Is a last resort if no other alternatives are available.**<br><br>**ME** | -<br><br>Consistent with the objective for children to be cared for within family and whānau if possible before an adoption placement is considered. However, there may be cases where adoption is in a child's best interests, despite the existence of other options. | -<br><br>Provides clarity about when adoption can be used. But starts with a presumption that adoption is undesirable**,** rather than focusing on what is appropriate for a child. | -<br><br>Likely to increase barriers for adoptive applicants to receive an adoption order. | +<br><br>Relatively straightforward purpose that is clear and accessible.<br><br>Less flexible to different individual and cultural circumstances. This may result in perverse practice where alternative care options are preferred, even when adoption would be in the child's best interests. | +<br><br>Places high value on active protection of tamariki right to whakapapa and whānau. |

**Preferred option**

Our preferred option is that legislation define the purpose of adoption, and that purpose be that adoption:

- is a service for a child, and is in their best interests;
- will create a stable, enduring and loving family relationship; and
- is for a child whose parents cannot or will not provide care for them.

Ensuring that the purpose of adoption includes a reference to a child's best interests are upheld in adoption centres adoption decision-making (including decisions on post-adoption support) on children's rights. This approach is consistent with other jurisdictions in the United Kingdom, Canada and Australia.

Clarifying the purpose this way would help support consistency with, and clear differentiation from, the purposes of other child-centred legislation in New Zealand. Specifically, the Oranga Tamariki Act 1989 (Oranga Tamariki Act) purpose includes ensuring that children who require care have 'a safe, stable and loving home from the earliest opportunity'. Safety is important in that context, where care and protection concerns are prevalent, whereas the nature of creating 'enduring' relationships is more prominent for adoptions where children require a family to care for them over their life. Guiding principles can help to support the overarching purpose of the legislative regime.

## Principles of adoption

**Options we have considered**

- **Status Quo:** No principles in legislation.
- **Option 1 (Preferred):** A set of core principles is outlined in the Act:
    - Option 1A: That the long-term well-being and best interests of the child or young person are the first and paramount consideration.
    - Option 1B: That a child is encouraged and supported to participate and give their views in adoption processes, and that their views are considered.
    - Option 1C: Preservation of, and connection to, culture, and identity.
    - Option 1D: Protection of whakapapa.
    - Option 1E: Recognise the whanaungatanga responsibilities of family, whānau, hapū, iwi and family group.
    - Option 1F: Recognise that primary responsibility for caring for a child lies with family, whānau, hapū, iwi and family group.
    - Option 1G: Family and whānau should have an opportunity to participate and have their views taken into consideration.
    - Option 1H: Openness and transparency.
- **Option 2:** Adoption as a last resort. When other care arrangements will provide sufficiently for the needs of the child.
- **Option 3:** Promote child safety.
- **Option 4:** Provision of support.

- **Option 5:** Ongoing contact with birth family and whānau.

We have not yet concluded analysis on whether a Te Tiriti o Waitangi principle is needed. A core objective of reform is to ensure that adoption laws and practice meet the Crown's obligations under te Tiriti. We have looked to reflect te Tiriti in the set of guiding principles. Following the second round of engagement, we will consider whether the package of proposals adequately meet our te Tiriti obligations, or whether there is the need for a descriptive or operative te Tiriti clause in legislation. We note the courts have found that in any proceedings dealing with the status, future and control of children the law must be interpreted as coloured by the principles of the Treaty of Waitangi.

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**No principles set out in legislation, allow judicial precedent to guide principles**<br><br>**ME** | 0<br><br>Lack of clarity about when adoption is appropriate or what considerations should be taken into account in making adoption decisions may allow adoptions that are not in children's best interests. | 0<br><br>No statutory guidance about when adoption should happen and is likely to be an appropriate care arrangement for a child, or what other considerations should be taken into account in making adoption decisions. | 0<br><br>Lack of principles to inform when adoption should happen means that unconscious assumed understandings guide practice; these will likely privilege dominant Pākehā understandings of adoption | 0<br><br>Does not provide strong guidance for application of the Act.<br><br>However, does allow for flexibility in its application and allowed practice to developed over time. | 0<br><br>Fails to actively protect tamariki Māori by ensuring that the principles of connection to whānau, whakapapa and culture are valued in adoption decisions.<br><br>Lack of principles is not consistent with tikanga Māori approach to decision making. |
| **Option 1A (Preferred):**<br>**That the long-term well-being and best interests of the child or young person are the first and paramount consideration.**<br><br>**CW (All)** | ++<br><br>Supports children's best interests being upheld in adoption as it centres adoption decision-making on child rights. Helps to protect against exploitation and commodification of children. | ++<br><br>Clear principle to guide practice in balancing different rights in the adoption process. Looks at a wide range of factors relevant to the child's interests, e.g. including safety. | 0<br><br>Child's best interests will be culturally specific, and process will need to be informed to acknowledge this. | ++<br><br>Common concept applies across child legislation in New Zealand makes it easy to understand and apply.<br><br>Consistent with international obligations (i.e. the Children's Convention and the Hague Convention). | +<br><br>Principle focused on active protection of welfare of tamariki Māori.<br><br>However, care needed in interpretation, so that understandings of welfare and child's interests make space for Māori views of flourishing, to support Māori equal rights promised under article 3 of te Tiriti. |

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 1B (Preferred): That a child is encouraged and supported, wherever practical, to participate and express their views in adoption processes, and that their views are taken into consideration.**<br><br>**CW (All)** | ++<br><br>Upholds fundamental right for children to participate in decisions made for them. Participation important to inform decisions about child's best interests. Flexibility to recognise children also have right to choose not to participate. | ++<br><br>Gives clear guidance about how the child has a role in determining whether adoption is appropriate. | ++<br><br>Ensures children have rights to participate in decisions made about them, as adults do. | ++<br><br>Provides a strong expectation that the opportunity for child participation is required. But further provisions needed to establish how this will be practically implemented.<br><br>Consistent with obligations under Children's Convention. | +<br><br>Respects and actively protects the mana of tamariki. |
| **Option 1C (Preferred): Preservation of and connection to culture, and identity.**<br><br>**CW (All)** | ++<br><br>A child's culture (ethnicity, name, spirituality, religion, language etc) is an integral part of their identity, and that consideration of whether adoption will be in the best interests of a child must consider the impact on their culture. | ++<br><br>Provides clear guidance about the importance of culture when determining whether adoption is appropriate. Focuses broadly on culture, e.g. can support use of contact arrangements. | ++<br><br>Helps to support adopted children to preserve their culture, like other children, and do not lose their culture through an adoption.<br><br>Supports all cultural groups in the transmission of their culture to the next generation, where adoption has historically resulted in cultural loss. | +<br><br>Clear requirement, but further provisions and/or guidance will be needed to clarify how culture and identity are to be preserved<br><br>In keeping with rights to culture affirmed in the Children's Convention, and rights to pass on culture affirmed in the United Nations Declaration on the Rights of Indigenous Persons ('UNDRIP'). | ++<br><br>Recognises that culture and identity are taonga and must be protected under Article 2 of te Tiriti. |

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 1D (Preferred): Protection of whakapapa.**<br><br>**CW (All)** | ++<br><br>Upholds children's rights to family by supporting and protecting connection to whakapapa, whānau, hapū, and iwi. | ++<br><br>Provides clear guidance about the importance of adoption supporting adopted persons to maintain connection to their identity and family ties. | ++<br><br>Of particular value to Māori and other cultures who have suffered cultural harm as a result of past adoption practice. | +<br><br>Clear directive for those operating under the new adoption regime that whakapapa is to be protected. Clear provisions needed for how this should occur.<br><br>Upholds Children's Convention right to protect and preserve child's, including their name, nationality and family ties. | ++<br><br>Recognises that whakapapa is a taonga and a right that must be protected under Article 2 of te Tiriti. |
| **Option 1E (Preferred): Recognise the whanaungatanga responsibilities of family, whānau, hapū, iwi and family group.**<br><br>**CW (All)** | ++<br><br>Supports upholding children's rights to family, whānau, hapū and iwi ties.<br><br>Children have a fundamental right to belong to their family/whānau, hapū and iwi. | ++<br><br>Strong direction for decision-makers to consider placements within the family, whānau, hapū and iwi if available. | ++<br><br>Including 'family group' reflects our responsibilities to other cultures family structures e.g. tribe or villages. | ++<br><br>Aligns with approach taken in other child centred legislation, e.g. Oranga Tamariki Act.<br><br>Will be feasible so long as accompanying provisions support this principle. | +<br><br>Gives effect to Article 2 of te Tiriti by supporting Māori tino rangatiratanga over the care of their tamariki.<br><br>Whanaungatanga responsibilities are broader than primary responsibility for day-to-day care and there is benefit in these two principles being separate. Whanaungatanga could be defined, in relation to a |

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | | person, as per the Oranga Tamariki Act.[19] |
| **Option 1F (Preferred): Recognise that primary responsibility for caring for a child lies with family, whānau, hapū, iwi and family group.**<br><br>**CW (All)** | ++<br><br>Upholds child rights to family, whānau, hapū and iwi ties.<br><br>Children have a fundamental right to be cared for and belong to their family/whānau, hapū and iwi. | ++<br><br>Strong direction for decision-makers to consider placements within the family, whānau, hapū and iwi if available.<br><br>Uphold responsibilities of family/whānau, hapū and iwi to care for their tamariki. | ++<br><br>Including 'whānau, hapū, iwi and family group' reflects our responsibilities to other cultures family structures e.g. tribe or villages. | ++<br><br>Aligns with approach taken in other child centred legislation, e.g. Oranga Tamariki Act 1989.<br><br>Will be feasible so long as accompanying provisions support this principle. | ++<br><br>Gives effect to Article 2 of te Tiriti by recognising Māori tino rangatiratanga over the care of their tamariki. |
| **Option 1G (Preferred): Family and whānau should have an opportunity to participate and have their views taken into consideration.**<br><br>**CW (All)** | ++<br><br>Supports children's rights to family ties. In particular, Māori whānau have the opportunity to consider their response to the situation. This supports decision makers to consider a range of perspectives to consider | ++<br><br>Provides guidance that a family should have an opportunity to participate in the process. | +<br><br>Provides family and whānau members with equal opportunity to have a say about the care of their children.<br><br>Reflects a collective decision-making approach | +<br><br>Clear requirement that is easy to understand, though accompanying provisions/guidance needed as to how this should happen in practice. | +<br><br>Gives effect to Article 2 of te Tiriti by supporting Māori tino rangatiratanga over the care of their tamariki.<br><br>However, participation is mediated through Crown-controlled processes, and |

19 Whanaungatanga can be defined, in relation to a person, as per the Oranga Tamariki Act 1989—

- the purposeful carrying out of responsibilities based on obligations to whakapapa:
- the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:
- the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection.

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | what is in the child's best interest. | | that applies across all adoption decisions. | | Crown holds all decision-making powers. |
| **Option 1H (Preferred): Openness/Transparency.**<br><br>**CW (All)** | ++<br><br>Upholds children's rights to identity, family ties and culture by ensuring aspects of adoption are open and transparent as far as possible. | +<br><br>Sets a strong standard that there should be openness and transparency in the adoption process, but does not provide clarity about when adoption should be used. | ++<br><br>Alongside other provisions this supports children to have access to information about themselves, including basic identifying information that in the past adoptive children have not had access to. This also supports intergenerational equity for the descendants of adopted persons. | +<br><br>Sets an expectation, but will need to be supported by provisions relating to the sharing and accessibility of information relating to adoption. | ++<br><br>Supports active protection of the right to whakapapa, and recognises that this is an essential right for tamariki Māori. |
| **Option 2: Adoption as a last resort. When other care arrangements will not provide sufficiently for the needs of the adopted child.**<br><br>**CW (All)** | -<br><br>Consistent with the objective for children to be cared for within family and whānau if possible before an adoption placement is considered.<br><br>However, would not allow adoptions to occur where other options exist, even if this were in the child's best interests. | -<br><br>Provides clarity about when adoption can be used. But starts with a presumption that adoption is undesirable**,** rather than focusing on what is appropriate for a child.<br><br>May result in perverse practice where alternative care options are preferred, even when adoption in child's best interests. | -<br><br>Strong presumption against adoption results in significant difficulties for adoptive applicants, even in cases where adoption is in a child's best interests. | -<br><br>Relatively straightforward and clear principle.<br><br>However, judicial application and interpretation may be difficult – it could be very hard to prove that all options for a child's care had been explored, and that adoption as a last resort was justified. | +<br><br>Supports active protection of tamariki right to be cared for within whānau, hapū wherever possible. |

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 3: Promote child safety.**<br><br>**CW (All)** | +<br><br>Helps protect children against commodification and exploitation. Prioritises the safety of children.<br><br>However, other care arrangements are also likely to be appropriate to promote a child's safety. | +<br><br>Provides limited guidance about when adoption is appropriate. Instead focuses on the circumstances of the adoption.<br><br>However, safety should be incorporated into any greater assessments of child's welfare, so a specific principle may not be necessary | +<br><br>No differential treatment. | +<br><br>Clear and easy to understand. But further provisions needed to assess what this means in practice. | +<br><br>Child safety is important to protect children as taonga. |
| **Option 4: Provision of support through the adoption process.**<br><br>**CW (All)** | +<br><br>Emphasises the need for children to have support. | - -<br><br>Doesn't provide guidance about when adoption is appropriate. Provisions within the Act are better suited to determine appropriate provision of support. | + +<br><br>Ensuring adequate provision of support would have a particularly beneficial impact on groups with vulnerabilities e.g. intercountry adoptees, disabled people. | --<br><br>Practical effect unclear.<br><br>Requiring people involved in an adoption to engage with support is unlikely to be feasible or to respect their rights. | +<br><br>Support can be important to support the welfare of tamariki, in keeping with Government responsibilities to active protection. |
| **Option 5: Ongoing contact with birth family and whānau.**<br><br>**CW (All)** | +<br><br>Supports children's rights to family and whānau.<br><br>May be occasions where there is risk of harm from ongoing contact with family | - -<br><br>Provides guidance about the importance of contact to an adoption arrangement. Narrow focus on contact rather than more broadly looking at culture, | ++<br><br>Supports the mana and role of family and whānau in the life of the child. | -<br><br>Could be ambiguous at this level. Would need to be carefully worded to only promote contact is in the child's best interests and if birth | +<br><br>Supports active protection of tamariki rights to whānau and whakapapa. |

| **Principles**: Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | and whānau, and this must be acknowledged. | whakapapa, and whanaungatanga. | | parents are willing to engage. Policy settings for determining contact are better dealt with in specific provisions in the legislation | |

**Preferred option**

Our preferred option is Option 1. Providing principles in legislation will help to guide decision-making and is consistent with good regulatory practice. The preferred principles reflect the most important aspects that we heard in engagement, is consistent with the preferred purpose of adoption, and keeps the focus on children. Many of these align with existing principles in the Oranga Tamariki Act 1989.

## Who may be adopted

**Problem definition**

Current law says that any person under the age of 20 years is a child who may be adopted. This does not align with who is considered to be a child in other pieces of New Zealand's family law, although it is consistent with the Age of Majority Act 1970. International agreements about children define a child as being under the age of 18 years old. However, domestically, parenting orders (regarding the day-to-day care of children) may not be made in respect of a child aged 16 years or over, unless there are special circumstances. This recognises the evolving capacity and independence of children as they get older. There are also some circumstances, such as entering into marriage, a civil union or de facto relationship, where 16-year-olds are treated as being adult and not requiring parental care. Other international jurisdictions also have a younger age as their maximum age for adoption.

The age of adoption is intrinsically connected to questions about the purpose of adoption. Some purposes of adoption are more consistent with a younger maximum age of adoption, while allowing an older age of adoption could encourage the use of adoption for some purposes that most people might not consider legitimate reasons for adoption.

**What we heard in engagement**

In the first round of engagement, less than half of the people that expressed a view on who they thought should be adopted specified an age they considered appropriate. Some of the people we engaged with argued there is a place for adult adoption to recognise the importance of an enduring legal relationship between an adult and the person that raised them. A range of ages were supported in engagement, although there was no strong consensus, 16 and 18 were the most common ages supported.

**Options we have considered**

- **Status Quo:** Retain current law and practices around who may be adopted.
  Any person under the age of 20 may be adopted, or a 20-year-old may be adopted when application began before their 20th birthday
- **Option 1:** Change the definition of child to mean a person under 16 years old.
- **Option 2:** Change the definition of child to mean a person under 18 years old.
- **Option 3:** Remove age limit on who is able to be adopted.
  This option would allow people of any age to be adopted, including adults.
- **Option 4:** Do not define a child by age, but adopt a 'dependency test'.
  A Court may approve an adoption based on the need for parental care of an individual, without reference to the person's age.

**Who may be adopted:** Analysis of options

KEY: ▭ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status quo** | 0 | 0 | 0 | 0 | 0 |

| **Who may be adopted:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **ME** | Enables children to be adopted, and to have a family and care where their birth family cannot provide that. | Sets a clear age for who can be adopted. Allows people over 18 who may not be considered children to be adopted, which may make it more difficult to maintain a clear purpose of adoption. | Could be seen as inequitable as it allows people under the age of 20 to have their legal status and legal parents changed, which is not available to older people.<br><br>Differential treatment on the basis of age may be justified, based on a child-centric purpose of adoption. | Consistent with NZ Age of Majority Act 1970.<br><br>Clearly defined age makes it easy to apply.<br><br>Inconsistent with international agreements, such as the Children's Convention, and age of child in other domestic child-centred legislation, such as the Oranga Tamariki Act and Care of Children Act. | The specific age of adoption is not centrally relevant to te ao Māori conceptions of care of tamariki, more relevant is the need for care of tamariki as taonga, and it is this that the Tiriti gives commitment to actively protect. |
| **Option 1: Define a child in legislation as a person under 16 years old**<br><br>**ME** | +<br><br>Focuses purpose of adoption on being for children in need of new permanent parental care. But, some adoptions would not progress based on the age of the child where it would otherwise be in their best interests. | 0<br><br>Recognises the need for parental care for children under 16 years old (given they are not able to live independently).<br><br>Does not recognise that 16- and 17--year-olds may still need some parental support. | -16- and 17-year-olds adversely affected, cannot be adopted<br><br>Age bar is inequitable, though may be justifiable, as those over the age of 16 do not have the same need for care as people under 16 years.<br><br>Likely to disproportionately affect Pacific peoples, who have more commonly adopted older children. This could be justified if it is considered adoption is a service for children who require parental care and a | -<br><br>Clear and straight forward to understand.<br><br>Inconsistent with other areas, however, doesn't align with definition of family law, e.g. CoCA defines a child as a person under 18 years.in CoCA or Oranga Tamariki Act<br><br>Does not align with international agreements, especially Hague Convention on intercountry Adoption, which allows intercountry adoption up | 0<br><br>The specific age of adoption is not centrally relevant to te ao Māori conceptions of care of tamariki, more relevant is the need for care of tamariki as taonga, and it is this that the Tiriti gives commitment to actively protect. |

| **Who may be adopted:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | family, but 16-year-olds may be considered too young as older children would miss out. | until the age of 18, and the children's Convention, which sets 18 as the age of childhood. | |
| **Option 2: Define a child in legislation as a person under 18 years old**<br><br>**ME** | +<br><br>Focuses purpose of adoption on being for children in need of a new family. | +<br><br>Focuses purpose of adoption on being for children in need of a new family and could be more consistent with societal views on when a person reaches adulthood (18 years old).<br><br>May be argued that those near upper end of age range are not usually in need of parental care. | +<br><br>Age bar to be adopted is discriminatory, but is be able to be justified as those over the age of 18 do not have the same need for care as people under 18 years.<br><br>Likely to disproportionately affect Pacific peoples, who have more commonly adopted older children. However, this is justified as it is a service for children who require parental care and a family. This is less likely be needed for young people over the age of 18. | ++<br><br>Easy to understand and implement.<br><br>Consistent with other areas of family law, e.g. CoCA defines a child as a person under 18 years.<br><br>Consistent with age of a child in CoCA and Oranga Tamariki Act.<br><br>Consistent with international agreements (e.g. the Children's Convention and, including obligations under the Hague Convention). | 0<br><br>The specific age of adoption is not centrally relevant to te ao Māori conceptions of care of tamariki, more relevant is the need for care of tamariki as taonga, and it is this that the Tiriti gives commitment to actively protect. |
| **Option 3: Place no age limit on who is able to be adopted.**<br><br>**ME** | - -<br><br>Does not place children's rights at the centre of adoption laws, as would enable an adult focus for adult adoptions. | - -<br><br>May make it harder to maintain a clear purpose of adoption, given that the reasons for adoption of an adult are likely to be very | ++<br><br>No age discrimination. | -<br><br>Easy to understand and implement.<br><br>Does not align with other family law areas, e.g. parenting orders under CoCA cannot be made in | 0<br><br>The specific age of adoption is not centrally relevant to te ao Māori conceptions of care of tamariki, more relevant is the need for care of tamariki as taonga, and it is |

| **Who may be adopted:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | different than the reasons for the adoption of a child.<br><br>Arguably does not meet societal needs and expectations, given it is generally recognised adults are not in need of a new family or parents to care for them. | | respect of anyone regardless of their age.<br><br>Does not align with international obligations, including the Children's Convention and the Hague Convention. | this that the Tiriti gives commitment to actively protect<br><br>However, having a policy that allows for adult adoptions on the basis of a felt connection to caregivers, rather than a need for care, would not support purposes of adoption relating to the need for care of tamariki. |
| **Option 4: Do not define a child by age, but adopt a 'dependency test'**<br><br>**ME** | --<br><br>Upholds children's rights by removing an age limit and focuses instead on dependency, but allows for adults to be adopted.<br><br>However, could mean that some older children are not able to be adopted where it is considered they are independent enough to not require adoption. | --<br><br>Sets guidance about who is able to be adopted. But, it may allow adult adoptions which is inconsistent with the child-focus of reforms and the proposed purpose of adoption.<br><br>Relying on 'dependency' could mean some adults in need of care are adopted, but there are other instruments which allow for the care of adults in need of it – adoption is not required to establish care arrangements in these cases. | +<br><br>No discrimination by age.<br><br>Allows for the adoption of adults who meet a test for dependency, most likely to be disabled persons. | -<br><br>Creates uncertainty. Tailored approach is less clear than status quo and could be difficult to develop a dependency test<br><br>Moderate work to implement and resourcing could be required depending on the test used.<br><br>Inconsistent with some domestic legislation (e.g. CoCA) which places age limits on who is considered a child. | +<br><br>The specific age of adoption is not centrally relevant to te ao Māori conceptions of care of tamariki, more relevant is the need for care of tamariki as taonga, and it is this that the Tiriti gives commitment to actively protect.<br><br>A system based on dependency of tamariki, rather than a specific age, is more in keeping with te ao Māori understandings. |

**Preferred option**

We have not determined a preferred option. The discussion document seeks views on an age of 16 or 18. Our preliminary view is that 18 may be more appropriate.

## Who can adopt

**Problem definition**

Under the Adoption Act, to be able to apply to adopt a child, an applicant must meet the eligibility criteria within the Act. If an applicant is eligible, their suitability to be an adoptive parent for the child is then considered by an Oranga Tamariki social worker.

Eligibility criteria protect children by ensuring that they are adopted by fit and proper guardians. The current approach assesses the eligibility of people to adopt by reference to broad identity markers, such as sex, relationship status and age. These identity markers were proxies for determining fit and proper guardians, based on conservative 1950s social attitudes and conceptions of family that revolved around the nuclear family structure.

Social attitudes have changed significantly since then, particularly regarding same-sex couples and the many legitimate forms that families can take. Society also acknowledges fathers' rights. The Human Rights Review Tribunal has held that the Act's eligibility criteria are discriminatory, and that discrimination is unjustifiable under the New Zealand Bill of Rights Act 1990.

A separate issue is whether eligibility criteria should make any distinctions about who may adopt based on their relationship to the child. Adoptions by stepparents and relatives are allowed under the current law but have been criticised due to the changes that they make to the adopted person's relationships (legal and social) with their birth family.

**What we heard in engagement**

In engagement, we heard that the law should say the Court can decide if a person can adopt a child on a case-by-case basis. People thought the current approach that stops people from applying to adopt based on their characteristics is discriminatory and should be removed. In particular, we heard that people shouldn't be stopped from applying to adopt a child because of their sex or relationship status. People said that the current approach might stop adoptions that are in the best interests of the child from happening.
People had different views on whether a person should be a certain age before they can apply to adopt a child. Some people thought there shouldn't be a minimum age. They thought that a judge could decide if someone should adopt a child on a case-by-case basis. Other people thought that setting an age would be a good guide for people being mature enough to adopt a child. Some people also suggested there should be a maximum age for people to be able to adopt.

**Other information we have considered**

Eligibility bars on the sex or marital status of adoptive applicants do not exist in any Australian or Canadian jurisdictions or in the UK. Age is a condition of eligibility in the majority of overseas jurisdictions. A number of Australian and Canadian jurisdictions and the UK have a minimum age of between 18 and 21 to be eligible to adopt. [20]

20 See for example United Kingdom Adoption and Children Act 2002, Victoria Adoption Act 1984, Ontario Child, Youth and Family Services Act SO 2017 c 14.

**Options we have considered**

- **Status Quo:**
  Eligibility criteria restrict persons from adopting where:
  - They are under 25, or under 20 years older than the child to be adopted;
  - They are a single male wanting to adopt a female child;
  - They are two persons wanting to adopt jointly who do not qualify as spouses (i.e. civil union couples).
- **Option 1: Age as the only bar to adoptive applicants' eligibility**
  Set an age criterion of 18 years, before a person is eligible to adopt a child
- **Option 2 (Preferred): No eligibility criteria. Rely on judicial assessment of suitability to decide whether a person should be able to adopt.**
- **Option 3: A presumption against step-parent adoptions**
  Step-parents of a child would not be eligible to adopt the child unless there are special circumstances

**Who can adopt:** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
|---|---|---|---|---|---|
| **Status Quo**<br>**CW (4)** | 0<br>Inflexible to individual situations, may bar from adoption persons who would be the best possible carers for a child. | 0<br>Not fit for purpose. Innate characteristics used to exclude persons from being able to adopt, which may not reflect a person's suitability to adopt. | 0<br>Discriminates on the grounds of age, sex and relationship status, and this discrimination has been found to be unjustifiable in terms of the New Zealand Bill of Rights Act. | 0<br>Current situation of judicial precedent with regard to the definition of "couple" is complex and fraught. More clarity in the law would aid judicial decision making. | 0<br>Does not support acknowledgement of individual mana.<br><br>Characteristics that limit eligibility have been determined by Pākehā assumptions of what makes a person a fit and proper parent, not reflecting Māori understandings or Māori rangatiratanga to determine these settings for tamariki Māori. |
| **Option 1: Age criteria for eligibility, but no criteria based on** | ++<br>Supports child being adopted by person with enough | ++<br>Age bar acts as a proxy | + | ++ | -<br>Te Ao Māori view of childcare situates responsibility for the |

| | | | | | |
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| **sex or marital status**<br><br>**CW (4)** | maturity and ability to raise them. | for maturity, which is commonly accepted as being required to support a child. | Gets rid of discriminatory bars based on sex and marital status.<br><br>Engages discrimination on the basis of age. However, setting the age at 18 years is likely to be justifiable, as a proxy for maturity. | Easily implementable. Age criteria an understood feature of current system. | tamariki within whānau, so the individual maturity of any one "parent" is less crucial.<br><br>Court barring a person from care of a child based on age as a proxy for maturity does not recognise rangatiratanga right for hapū and iwi to determine who is the most suitable carer for the child. |
| **Option 2 (Preferred): No eligibility criteria. Rely on judicial assessment of suitability to decide who should be able to adopt.**<br><br>**ME** | ++<br><br>Centres the child in the process and focuses on who is best suited to care for the child. No potentially suitable person barred from adopting. | ++<br><br>Allows judge to assess any applicant to consider if the child's adoption by that person would be in the child's best interests. | ++<br><br>Culturally responsive and flexible.<br>Does not discriminate on any grounds. | +<br><br>Feasible as it centres the decision-making on who is suitable to adopt a child, rather than identity markers.<br><br>Also, durable as it would provide the flexibility to adapt over time. | ++<br><br>Flexibility to ensure that all adoptive parent options can be explored fits with viewing tamariki as taonga, and allowing the most suitable carer for tamariki Māori to be chosen. |
| **Option 3: Add a presumption against step-parent and relative adoptions.**<br><br>**CW (1,2)** | 0<br><br>Protects a child's ongoing connection with their other birth parent and that parent's family and whānau. But this needs to be assessed in light of other proposed changes that support that connection, e.g. regarding legal effect.<br><br>May impact on felt security of the relationship between the adopted person and their step-parent.<br><br>May be opposed by children and families who have a | +<br><br>Clear statement around who may adopt.<br><br>Working to support principle that adoption should not be used where other care arrangements e.g. guardianship would suffice.<br><br>Supports the purpose of adoption being that adoption is only for children whose parents | -<br><br>Impact focused on step-parents and families. May discriminate on grounds of family status. | -<br><br>Likely to result in increased process in step-parent applications to adopt, as step-parents must prove circumstances to overcome the presumption. | +<br><br>Discontinuing step-parent adoptions was widely supported by Māori, given the effect of step-parent adoptions on whakapapa and whānau connection. Reducing the number of step-parent adoptions supports active protection of tamariki right to whānau care.<br><br>This assessment changes to '0' when we consider the impact of our preferred approach to legal effect, as under that proposal legal |

| | | | | | |
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| | strong desire to recognise a stepparent's role. But such adoptions may still be possible if it is in the child's best interest. | cannot or will not care for them. | | | connections with whakapapa and whānau are retained. |

**Preferred option**

Our preliminary preferred option is that there are no eligibility criteria (Option 2). This addresses the finding of the Human Rights Review Tribunal that the existing criteria are discriminatory.

The discussion document is consulting on whether adoptive applicants should be a minimum age of 18 years (Option 1). We will further consider these options after the second round of engagement.

## Adoption involving different cultures

**Problem definition**

Currently, adoption laws do not require that the culture of an adoptive applicant be considered as part of determining their eligibility to adopt a child. Culture is an aspect that Oranga Tamariki social workers consider in determining the suitability of an adoptive applicant. It is possible that this element could also be considered in determining whether a person may apply to adopt a child.

The harm of dislocation from culture many adoptees have experienced, particularly those adopted cross-culturally, has been extensively documented. In the New Zealand context, research is increasingly documenting the harm caused to Māori adoptees through losing whakapapa knowledge and connection to whānau, hapū and iwi.[21]

**What we heard in engagement**

Nearly all submitters agreed that changes should be made to better include culture in the adoption process. Most submitters expressed support for consideration of culture being a central component of determining whether an adoption should go ahead. The most common themes raised by submitters were:

- culture is central to identity, and it should be considered as part of a child's best interests;
- separating an adopted person from their culture is highly likely to cause trauma;
- consideration of culture as part of adoption processes is part of the Crown's obligations to Māori under Te Tiriti o Waitangi.

In engagement, there was strong support for:

21 See, above n1.

- better information on a child's culture being gathered and available to the Court in making decisions;
- the Court having to take a child's culture into account in determining whether an adoption should occur;
- support to help a child maintain their culture post-adoption.

Some people strongly supported a presumption against cross-cultural adoptions. This would mean that, in most cases, a child from one culture wouldn't be able to be adopted by people from another culture, unless there were special circumstances. We heard that culture was important to people who had been adopted. People who lost connection to their culture told us that they suffered harm as a result. Those who didn't support a presumption said that it could stop adoptions from happening that would be in the child's best interests.

**Other Information we have considered**

In Australia and Canada, the large majority of states and territories include additional principles that must be met in the case of the adoption of an indigenous child.[22] In the USA, the Indian Child Welfare Act 1978 (IWCA) is a Federal law enacted to protect the best interests of Indian children and promote the stability and security of Indian tribes and families. IWCA is applied in all child custody proceedings and provides that in any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[23]

**Options we have considered**

- **Status Quo: No barrier to cross-cultural adoptions**
  No separate procedure or consideration required in the case of cross-cultural adoption.
- **Option 1: Presumption against cross-cultural adoptions**
  Legislation sets out a test or extra assessment steps that must be met before a cross-cultural adoption can be approved.

| **Cross-cultural adoptions:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo:**<br>**No barrier to cross-cultural adoptions, allow judicial practice to guide**<br>**ME** | 0<br><br>Does not preserve child's right to culture.<br><br>May result in adoptions which are not in the best | 0<br><br>Does not reflect full range of factors that may impact on who should be able to adopt a child. | 0<br><br>Does not acknowledge the importance of cultural groups being able to maintain the upbringing of their | 0<br><br>No additional process for cross-cultural adoptions to be approved. | 0<br><br>Does not actively protect the right of tamariki Māori to be raised as tamariki Māori, |

22 See, for example, Adoption Act 2000 (NSW), s 33 and Adoption Act 1984 (Vic), s 50; British Columbia's Adoption Act RSBC 1996 c5, s 7.

23 Indian Children Welfare Act 1978, 25 U.S. Code 1915. Placement of Indian Children

| **Cross-cultural adoptions:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | interests of the child, when considering the child's need to maintain a connection to their culture. | Cross-cultural adoptions have caused significant past harm | children within their culture. | | and has resulted in active, generational harm and loss.<br><br>Fails to recognise Māori rangatiratanga over the upbringing of their tamariki. |
| **Option 1: Presumption against cross-cultural adoptions, except in special circumstances**<br><br>**ME** | +<br><br>Strong assertion of child's right to be raised within their birth culture. Flexibility allows for cross-cultural adoptions which are clearly in the best interests of the child to be approved. Circumstances for exception will be determined by precedent.<br><br>However, setting a high bar against cross-cultural adoptions may mean that adoptions that would be in the child's best interests cannot progress (e.g. where adoptive parents would support a child to maintain connection to their culture). | -<br><br>Likely to significantly reduce numbers of cross-cultural adoptions, which we know carry significant cultural impact.<br><br>However, a presumption against application may be a higher bar than necessary to support a child's culture to be appropriately considered in determining whether adoption should occur. Acknowledging the importance of culture in suitability criteria for an adoption and a general principle of the importance of culture may enable judges to determine when a cross-cultural adoption is inappropriate, without impeding applications from being made | +<br><br>Supports minority cultural groups to maintain culture.<br><br>Disproportionate impact on prospective adopters who do not share the culture of the child. | - -<br><br>Could be difficult to determine how the presumption operates and what circumstances this doesn't apply due to the complexity in determining a child's best interests.<br><br>Particularly difficult to apply in case of child with mixed cultural background. | +<br><br>Supports a whānau, hapū and iwi-led approach to care for tamariki Māori. Acknowledges the importance of tamariki Māori being raised as Māori.<br><br>However, application of the presumption would depend on judicial decision making about when it should be overridden, limiting Māori rangatiratanga. |

**Preferred Option**

We do not have a preferred option at the moment. The discussion document seeks views on whether a presumption against cross-cultural adoptions is appropriate.

## What happens if I am placed for adoption?

### Social worker for the child

**Problem definition**

Children are central to the adoption process, however, there is limited support for them (including support for their participation) throughout the process. Social workers are appointed to support the adoption process. They engage with birth parents in considering adoption as a care option and they are involved with adoptive parents as part of assessing the applicants' suitability and (often) through preparation and support programmes. There is currently no legal mandate for the social worker to engage with the child, meaning the child has no dedicated professionals to support them (including their participation) through the adoption process.

**What we heard in engagement**

We heard very strongly from engagement that children's voices should be encouraged and supported in adoption, and where they are too young or where it would be inappropriate for the child to speak directly, they should have someone available to represent their views. We heard that people being adopted also need more information and support through the court process.

When considering who could represent the person being adopted where they are unable to do so themselves, we also heard that the social workers already involved in adoption cases cannot fairly represent the child's interests, as they also represent the interests of the birth or adoptive parents. People often mentioned the idea of someone being an impartial advocate for the child, representing their views where the child can't.

**Options we have considered:**

- **Status Quo: Social worker works with potential adoptive parents, birth parents and the child simultaneously**
- **Option 1 (Preferred): Dedicated social worker is assigned to support and represent the child**
- **Option 2 (Preferred): Require social worker to be appropriate to represent the child, by reason of their personality, cultural background, training, and experience**
- **Option 3 (Preferred): Social worker required to provide child with age-appropriate information on adoption, its impact and their rights**

| **Social worker for the child:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo**<br>**Social worker works with potential adoptive parents, birth parents and the** | 0<br>Social worker does not represent the interests of the child specifically and | 0<br>Social workers support the adoption process, rather than any particular person | 0<br>Social worker has no legislative requirement to engage with birth parents and child, only with | 0<br>Current practice is feasible. | 0<br>Does not provide active protection to tamariki and parents in |

| **Social worker for the child:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **child simultaneously**<br><br>**CW (2,3)** | does not engage with child before an adoption case comes to Court. Constrains the insights they can provide the Court about the child's best interests. | in the process. Has most contact with adoptive applicants, especially where cases apply directly to the Court. | adoptive parents. However, in practice social workers support birth parents and child to some degree in nearly all cases. | In other domestic care of children settings, social workers are involved with entire whānau, including children. | considering the pros and cons of adoption. |
| **Option 1 (Preferred): Dedicated social worker is assigned to support and represent the child.**<br>**CW (2,3)** | ++<br><br>Dedicated social worker will promote child's best interests and right to participate as they will be solely focussed on the child and help them to meaningfully participate. Social workers have the training and expertise to support children appropriately. | ++<br><br>Given training and expertise, social worker appears to be the most effective professional to talk to child, form relationship and elicit views which will lead to strong participation. | 0<br><br>Child given greater access to funded support/representation than adults. May be justified given the significant impact adoption has on the child and their need for support to effectively participate. | - -<br><br>Resourcing requirements, and need to assess capacity of social worker workforce. | +<br><br>Consistent with te ao Māori understanding that child is taonga and should be protected. Social worker may be more likely than lawyer for child to have cultural capability to support tamariki Māori, however, this will not always be the case. |
| **Option 2 (Preferred): Require social worker to be appropriate to represent the child, by reason of their personality, cultural background, training, and experience.**<br><br>**CW (All)** | ++<br><br>Social worker who matched to the child based on their characteristics will be better placed to have the ability to support child and family and whānau in culturally appropriate ways. The child may be better able to relate to the social worker, which would support children's | ++<br><br>Culturally competent social work practice can have an important influence on adoption decisions. Provides the child with dedicated support to enhance participation in the process. | -<br><br>Likely to have positive impact on many cases, but likely to be inequitable in its impact due to resourcing and capacity issues- a suitably matched social worker may not always exist or be available. Likely to have significantly less capacity for some cultures. | -<br><br>Likelihood that this will struggle to be implemented with consistency as will be limited by the social worker workforce, proposal is worded as 'where possible' to acknowledge the practical realities of achieving this option.<br><br>Consistent with recent changes to the Care of Children Act, related to | +<br><br>A Māori social worker is already required for Māori cases. This has meant that in some cases non-adoption social workers work the case, whilst they bring cultural knowledge, they may lack adoption specific knowledge. Broadening this |

| **Social worker for the child:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | identity and engagement in the process. | | | appointing a lawyer for child. [24] Also consistent with existing provisions in the Oranga Tamariki Act relating to appointing a lawyer for child, lay advocate, etc. | requirement will help tamariki Māori to be supported by the best matched social worker to support them in culturally (and other) appropriate ways. |
| **Option 3: Age-appropriate information about adoption to be provided to child by social worker.**<br><br>**CW (All)** | ++<br><br>Upholds child's right to participate in decisions affecting them.<br><br>It is in the child's best interests to have them understand the impact and effects of adoption, which in turn can support them to participate in the adoption process. | ++<br><br>Follows best practice to help social worker to support child with providing views on adoption. | +<br><br>Age-appropriate information will assist children to participate at different ages. | +<br><br>Feasible to implement, with small to medium resourcing implications.<br><br>Need to develop age-appropriate information and then provide it to the child in their particular circumstances. | +<br><br>Supports information on adoption being given to tamariki Māori. This option will need to be appropriate for tamariki Māori, in keeping with Article 3 obligation to equal rights to knowledge about the adoption process. |

**Preferred Option**

Our preferred options are that a dedicated social worker for the child:

- is appointed, separate to the social worker working with the birth parents and adoptive parents.
- is matched to an adoption case by being suitably qualified to represent the child, by reason of their personality, cultural background, training, and experience; and
- provides the child with age-appropriate information about adoption, its impacts, and their rights.

[24] Family Court (Supporting Children in Court) Legislation Act 2021, s 8.

These options will allow the social worker to build a strong relationship with the child to help support them through the process and will support the child's understanding of the process and their informed participation. The dedicated social worker will be required to provide the child with age-appropriate information about adoption, its impacts, and their rights. This will support the child's understanding of the process and their informed participation. Specific duties and responsibilities of the dedicated social worker in adoption cases will be considered as part of our ongoing policy work.

## Who cares for the child during the process?

**Problem definition**

Currently, a social worker can approve a child's placement with adoptive applicants while an adoption proceeding is underway. This provides care for the child while an adoption order is pending and supports the forming of bonding relationships between the child and adoptive applicants where it is likely that an adoption will take place. A placement will only be approved where the birth parents have provided their consent to the adoption. Reform provides an opportunity to consider whether these placements should be permitted.

**What we heard in engagement**

We did not specifically seek feedback on this issue in the first round of engagement. However, social workers and professional commentators told us that these placements are an important step in the adoption process, which support the provision of care for the child while adoption proceedings are underway.

**Options we have considered**

- **Status Quo (Preferred): Oranga Tamariki may place a child in the care of adoptive applicants before an adoption order is made**
- **Option 1: Child may be placed with temporary carers before an adoptive placement is made, but not with adoptive applicants**

| **Child placement during process:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo (Preferred): Oranga Tamariki may place a child in the care of adoptive applicants before an adoption order is made.**<br>**ME** | 0<br><br>Provides care for child, with benefits of prioritising security and a move towards permanency.<br><br>Allows bonding with adoptive applicants and testing of potential adoptive relationship. | 0<br><br>Provides fit for purpose care for child, and allows the adoptive applicants to develop a relationship with the child, where Oranga Tamariki considers it is appropriate. | 0<br><br>Could be seen as supporting pathway towards adoption over care by whānau, if this placement is chosen over whānau placement because of attachment and bonding that takes place between | 0<br><br>Feasible to implement as is currently in place and appears to work well. Extending the time for birth parents consent to 30 days may impact on feasibility. | 0<br><br>Does not support active protection of right to whānau placement of tamariki. However, placement with prospective adoptive applicants would likely only be preferred over within whānau care by |

| **Child placement during process:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | Allows time to consider adoptive placement against alternative care options.<br><br>Child's right to be cared for by family is upheld by only allowing such placements once birth parents have given their consent. | Only allows placements where birth parents have already consented to the adoption so less risk an attachment will form where an adoption won't proceed. | child and adoptive applicants. | | Oranga Tamariki in cases with a very strong reason for this preference. |
| **Option 1:**<br>**Child may be placed with temporary carers before an adoptive placement is made, but not with adoptive applicant**<br>**ME** | -<br><br>May present a missed opportunity for bonding between child and adoptive applicants pre-adoption, and testing of the adoptive relationship. The child may bond or attach to another carer who will not care for them long-term.<br><br>Does not support child's feelings of security and permanency in their care. | +<br><br>Provides care for the child, but does not support forward process, or support security and permanency of care for child. | -<br><br>Could be argued to disadvantage adoptive applicants, as other carers preferred for interim placement | -<br><br>Requires Oranga Tamariki to find alternative care arrangements in these cases.<br><br>Unlikely to be feasible as finding alternative carers for the child would require additional resource. | +<br><br>Minimises chances of prior care being a factor in a decision between whānau and non-whānau carers for tamariki, which may protect tamariki right to whānau care options being explored. |

**Preferred Option**

Our preferred option is the status quo, that a social worker may approve the placement of a child with the prospective adoptive parents before an adoption order is made. Approval would be contingent on:

- Birth parents providing informed consent
- A suitability assessment suitability of the adoptive applicants.

Given the proposal to extend the period before a birth parent can provide their consent to an adoption to 30 days (during which time they can re-evaluate their decision),it should remain that an adoptive placement should not be made until the consent is provided. Subject to the above, the social worker approval for an adoption placement should allow adoptive applicants to have day-to-day care of the child while adoption proceedings are underway, pending consideration and determination by the Court.

## Consideration of alternative care arrangements

**Problem definition**

Adoption sits at the extreme end on a spectrum of care of children arrangements, as it has permanent and lifelong legal impacts on the child, their birth parents and the adoptive parents. Currently, the law does not require other types of care arrangements to be considered when deciding whether a child should be adopted. This can result in adoption orders being made where another order, such as a guardianship order (where birth parents can have more involvement in decisions for the child) may be more appropriate. It may also mean that adoption orders are made where different arrangements, such as placement with the birth family and whānau are available, have not been considered.

**What we heard in engagement**

Most people and organisations we heard from, including the Family Court Judges, supported using adoption as a last resort, or at least considering alternatives before granting an adoption order. We heard that alternative care orders are often better for the child, when compared with the impacts of adoption. One of the main reasons given was that an alternative order can provide more connection with the child's birth family.

**Options we have considered**

- **Status Quo: No legal requirement for social workers to discuss alternatives to adoption with birth parents before an adoption process begins**
- **Option 1 (Preferred): Require Oranga Tamariki social workers to advise birth parents about alternative care options to adoption**

| **Consideration of alternative care arrangements:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**No requirement for Oranga tamariki to discuss alternative care options with birth parents before an adoption case comes to Court.**<br>**ME** | 0<br><br>Child's right to be cared for by their family is not upheld as options for alternative care arrangements to an adoption, which may be in the child's best interests, are not required to be discussed pre-adoption. However, this often occurs in practice. | 0<br><br>Does not support discussion of all options for a child's care before a case comes to Court.<br><br>However, in practice social workers have these discussions with birth parents in nearly all cases, except where birth and adoptive parents go directly to Court without | 0<br><br>Disadvantages birth family and whānau, who may miss out on chances of early involvement in adoption discussions, and opportunities to offer alternative care options. | 0<br><br>No feasibility constraints.<br><br>Not consistent with approach to considering what care is best for a child in other domestic care of children proceedings. | 0<br><br>Lack of consideration of alternatives means that due consideration may not be given to other arrangements that may be better suited to tamariki Māori.<br><br>Providing support to allow for Māori parents to make decisions following consideration of options for care within whānau and hapū acknowledges |

| **Consideration of alternative care arrangements:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | engaging with Oranga Tamariki. | | | rangatiratanga and the right for Māori to make their own decisions about care of tamariki. |
| **Option 1 (Preferred): Require Oranga Tamariki social workers to advise birth parents about the alternatives to adoption (alternative orders, alternative care options) before a case may come to Court.**<br>**ME** | +<br><br>Helps protect children's rights by informing parents of alternative options – especially if they are unaware. This may result in arrangements that are better suited to the child.<br><br>May also help to uphold child's right to be cared for by their family, as alternative care options may be able to be found within their family or whānau. | +<br><br>Supports birth parents to be properly informed when considering the care arrangements they think will be best for their child, and the level of ongoing involvement they wish to have.<br><br>This option will work alongside other options for birth parent involvement with Oranga Tamariki. Where birth parents are already engaging with Oranga Tamariki pre-adoption, current practice promotes discussion of alternative options. | +<br><br>Supports birth parents having full understanding of their options within the adoption process, which will have the most impact for particularly vulnerable groups, e.g. disabled parents, those with English as a second language. | +<br><br>Feasible – this happens in practice already, but ensuring it is required will create expectation of continued consistent practice | +<br><br>Informing birth parents of options may lead to alternative care within the whānau which is consistent with the desirability of maintaining whakapapa ties and recognising the child is taonga of the whānau, hapū and iwi.<br><br>Supporting whānau Māori to make decisions about care of tamariki without the use of a Court, where possible, recognises Māori rangatiratanga and the ability of Māori to determine what care will best support their tamariki. |

**Preferred options**

Our preferred options are that that the social worker should inform parents of alternative care options and the Court must consider alternative care arrangements. This would support birth parents to consider alternatives to adoption early in the adoption process, before the Court process is underway. This would work alongside social work practice and mechanisms intended to support greater family and whānau involvement in early decision-making processes.

## Who can have a say: child participation

**Problem definition**

Evidence shows that children benefit from participating in proceedings affecting them, as it can promote feelings of being respected and valued, instead of causing anxiety, frustration and isolation.[25] Current law provides minimal ability for the child to participate in their adoption, with section 11 of the Adoption Act only requiring due consideration be given to a child's wishes before an adoption order is made.

The Family Court will sometimes use its inherent powers to appoint a counsel to assist in adoption cases,[26] however their role is not focused on enabling child-participation. A judge may also use their inherent powers to speak to the child in their chambers.

The lack of specific mechanisms to enable a child's participation in the adoption process has been criticised internationally and is not in keeping with practice in other jurisdictions, or in other New Zealand proceedings involving the care of children, such as those under the Care of Children Act or the Oranga Tamariki Act. In 2009, the UN Committee on the Rights of the Child stated that it is vitally important that a child placed for adoption be heard, and that the "best interests" of the child cannot be defined without considering the child's views. [27]

**What we heard in engagement**

In targeted engagement with young people on adoption reform, adopted young people said they especially want to have their views heard and their rights monitored if an adoption was made when they were old enough to participate.[28]

In general engagement, around half of the submitters who responded to the question of how to better incorporate rights of children into the adoption process talked of giving the child the right or a reasonable opportunity to participate in their own adoption process. Almost all submitters in favour of participation noted that the feelings and perspective of the child should be a primary consideration for decisions about an adoption and the best interests of the child. This view was supported by a large majority of adopted people and most of the adoptive parents.

Some submitters felt that legally enshrining the right for a child to participate would ensure that it is applied consistently throughout the adoption process. Submitters also noted that prescribing the right for a child to participate in law would align with international standards, such as the Children's Convention.

A small proportion of submitters noted concerns for children who may be too young to participate in the adoption process. A common suggestion was that the age or maturity of the child should be taken into consideration when ascertaining as to whether a child should be given the opportunity to participate. Most submitters did not specify a specific age which they considered to be appropriate for the child to participate.

Many submitters in favour of child participation suggested better child participation support systems could help the Court make decisions in the child's best interests, enhance the child's understanding of the adoption process and court processes, enable them to express their views, and support their informed participation. Some submitters considered that having an independent third-party support the child in the adoption process would help uphold their rights to participate and be heard.

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25 C Fenton-Glynn, "The child's voice in adoption proceedings" (2014) 22(1) International Journal of Children's Rights, 135-163.

26 Counsel to assist were appointed in 35 adoption cases in 2019 and 41 adoption cases in 2020.

27 CRC/C/GC/12.

28 Martin Jenkins (2021) *Targeted Engagement: Adoption law reform report.*

A small number of submitters supported requiring a child's consent to an adoption. They considered that requiring a child's consent would promote the child's right to participate in the decision. However, some submitters considered that child consent should not be required, as it can place a heavy emotional burden on the child.

**Other information we have considered**

As noted above, evidence shows that children benefit from participating in proceedings that affect them. Children are more likely to respect a decision where they have participated in some form. This is important because an adoption's success can depend on the child's attitude and their willingness to integrate into a new environment. Participation can also protect vulnerable children by increasing their confidence, self-efficacy, and self-worth.[29]

Some overseas jurisdictions require a child to consent to their adoption. All Canadian jurisdictions require a child's consent, as well as some Australian states and territories.[30] However, evidence shows that while children often want a role in the decision-making process, they do not want the responsibility for the decision.[31] Our international obligations, such as Article 12 of the Children's Convention, provide that children have the right to freely express their views (which includes the right to decide not to express their views) in matters affecting them. In Aotearoa New Zealand, child consent is rarely required in other family law contexts, such as those under the Care of Children Act and Oranga Tamariki Act 1989.

In its 2000 report, the Law Commission recommended that a child's view relating to their adoption must be ascertained, where that child is capable of forming their own views. Those views must be given due weight in accordance with the child's age and maturity.[32]

**What this section covers**

The following options sections are broken down into:

- Extent of child participation
- professional support
- child consent.

## Extent of child participation

**Options we have considered**

We have considered the following options for the extent to which children can participate and how their views are heard.

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29 Baroness Hale of Richmond "Can You Hear Me, Your Honour?" (2012) 1 Family Law 30, 35.

30 New South Wales, Northern Territory, Western Australia and South Australia require children over 12 years of age to give consent to their adoption and specify that the views of the child should be sought in relation to the adoption application.

31 C Fenton-Glynn "The child's voice in adoption proceedings" (2014) 22(1) International Journal of Children's Rights, 135-163.

32 New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000).

- **Status Quo: Child's wishes to be given due consideration**
- **Option 1 (Preferred): Child's views to be sought and considered**
- **Option 2 (Preferred): Social worker to encourage and report on child's participation**
- **Option 3 (Preferred): Child has right to attend and speak at Court**

| **Extend of child's participation:** Analysis of options<br><br>KEY: ☐ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo: Child's wishes to be given due consideration.**<br><br>**CW (2,3)** | 0<br><br>Provides the Court must take the child's wishes into account for specific purpose of the court determining whether an adoption promotes child's welfare or interests.<br><br>Does not provide for wider participation at court or throughout the adoption process.<br><br>'Wishes' has been interpreted narrowly, so does not allow for more meaningful participation. | 0<br><br>Only requires limited participation<br><br>Ineffective at achieving meaningful participation as lacking mechanisms to enable the child to participate. Does not ensure child has information to enable participation. | 0<br><br>Child given lesser rights to participate in hearing than adults do in hearings that concern them. To an extent likely to be justified to have reasonable differences to support children's participation to be facilitated in age-appropriate ways. | 0<br><br>Feasible as no requirement to do anything to provide child with active opportunities to participate throughout the process. Considering wishes is narrower than seeking child's views.<br><br>Inconsistent with role of children in other family law and international obligations. | 0<br><br>Does not actively protect the mana of tamariki Māori as obtaining the child's wishes occurs for a narrow purpose. |
| **Option 1 (Preferred): Child's views to be sought and considered.**<br><br>**CW (2,3)** | ++<br><br>Consistent with child's right to participate in matters affecting them, as it requires decision-makers to seek and hear children's views (where they wish to share those views). | +<br><br>Specifies one way in which children should participate in the adoption process. However, requires supporting mechanisms to help this to happen consistently in practice. | 0<br><br>Child given lesser rights to participate in hearing than adults do in hearings that concern them. To an extent likely to justified to have reasonable differences to support children's | +<br><br>Is able to be implemented, but requires supporting mechanisms to support implementation in practice. Consistent with requirements in other family law (e.g. CoCA) and international | +<br><br>Upholds mana of tamariki by ensuring their views are sought and considered for a broader purpose. |

| **Extend of child's participation:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | Supports decision-makers to take the child's views into account when determining whether adoption is in the child's best interests. | | participation to be facilitated in age-appropriate ways. | obligations (e.g. the Children's Convention). | |
| **Option 2 (Preferred): Social worker to encourage and report on child's participation.**<br><br>**CW (All)** | +<br><br>Active requirement on social worker will help support children to have opportunities to participate.<br><br>Reporting on participation will help to inform decision-making, which should support decisions to be made in the child's best interests. | ++<br><br>Helps to achieve reform objectives by ensuring appropriate support is available to the child to assist them in participating.<br><br>Acts as an accountability mechanism to support participation happening in practice. | +<br><br>Supports greater role for child, to age-appropriate extent, which brings their participation closer to the levels given to adults in the process.<br><br>Involvement of social worker of particular importance for some groups to participate, e.g. disabled children. | 0<br><br>Reflects current practice. May need guidance to support implementation. | +<br><br>Provides a mechanism for supporting tamariki participation, which can uphold the mana of the child. Consideration needs to be given to how this is implemented, to support the child's views to be represented in a way that upholds of the child's mana and recognises them as taonga.<br><br>Need for implementation to ensure that child social worker has cultural competence to respect and express tamariki views. |
| **Option 3 (Preferred): Child's right to be heard at court.**<br><br>**CW (All)** | ++<br><br>Consistent with right to participate and will support the Court to make decisions in the child's best interests. | ++<br><br>Will support objectives of reform and purposes of adoption by assisting courts to make decisions in their best interests. | +<br><br>Supports greater role for child, to age-appropriate extent, which brings their participation closer to the levels given to adults in the process. | +<br><br>Feasible. Child would need to be supported through other mechanisms to be able to make use of this right. | ++<br><br>Upholds the mana of tamariki to the greatest extent of options assessed – by giving them the right to speak directly to Court if they choose to do so. |

**Preferred options**

Our preferred options are that the legislation requires that:

- the child's views to be sought and considered.
- a social worker must encourage the child to participate and reports on how the child participated, including any views expressed by the child, in the social worker report.
- the child has right to attend and speak at Court.

This package of options will support children's views to be consistently considered, as opposed to the current case-by-case approach. It will also help provide the child with appropriate support to participate before and during proceedings. Provision for the child to attend and speak at the adoption proceeding aligns with treating children in a way that reflects their level of maturity and capacity, and upholds their right to choose to participate. Providing the right for the child to speak in their adoption proceedings enables the Court to hear directly from the child to help inform their decision-making.

## Representation to support child participation at court

**Options we have considered**

We have considered the following options for whether and which professionals could support the child during the proceedings:

- **Status Quo: No dedicated professionals specified in law:** The Court sometimes uses inherent powers to appoint counsel to assist to present the child's wishes to the Court. Counsel to assist serves an investigative function as opposed to a strict advocate role.
- **Option 1 (Preferred): Lawyer for child may be appointed:** The Court may appoint a lawyer for the child who acts as the child's legal representative, supports the child to participate and reports on the child's views to the Court.
- **Option 2 Lawyer for child must be appointed:** The Court must appoint a lawyer for the child who acts as the child's legal representative, supports the child to participate and reports on the child's views to the Court.
- **Option 3 Advocate may be appointed:** The Court can appoint a non-legal advocate for the child, instead of lawyer for child. The advocate can be chosen by the child and is approved by the Court. If the child does not have capacity to choose then the Court can appoint someone.

**Representation to support child participation at court:** Analysis of options

KEY: ▭ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status quo: No dedicated professionals specified in law**<br><br>**ME** | 0<br><br>Children's rights are not upheld, as they receive no support to participate in proceedings affecting them. | 0<br><br>Children are not supported to participate and to receive information relevant to the | 0<br><br>Inequitable as adults in the adoption process are able to access professionals to assist and support them in the | 0<br><br>No implementation issues. However, inconsistent with approach to supporting child | 0<br><br>Fails to uphold the mana of tamariki. |

| **Representation to support child participation at court:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | adoption process from appropriate professionals. | adoption process. Children do not have a right to access to such support. | participation in other domestic child-focused legislation. | |
| **Option 1 (Preferred): Lawyer for child may be appointed.**<br><br>**ME** | ++<br><br>Where needed, child may be supported with lawyer for child who is better equipped than counsel to assist.<br><br>Supports a child's rights to be upheld through the legal process of adoption by giving them their own legal representation.<br><br>Flexible for cases where this may not be necessary. | +<br><br>Supports the child's participation and provides legal representation.<br><br>Consideration of specialist training so that it is fit-for-purpose in adoption proceedings may be needed, due to evidence around shortcomings of the role.[33] | 0<br><br>Child given greater access to funded legal representation than adults. Likely to be justified given the significant impact adoption has on the child and their need for support to effectively participate.<br><br>Lawyer for Child will need specific guidance in understanding the particular needs of the child, especially cultural needs. | +<br><br>Lawyer for child is an established role in family law (e.g. under CoCA or the Oranga Tamariki Act).<br><br>Allowing flexibility for situations where lawyer for child may not be necessary makes option more feasible given existing workforce pressure.<br><br>Will require cost, workforce resourcing to implement, though number of cases is comparatively low. | +<br><br>Promotes active protection of tamariki rights and interests. Lawyer for child may not have cultural capability to support tamariki Māori and understand their interests.<br><br>Given lawyer is appointed by Crown, need to ensure they understand te Tiriti obligations toward tamariki Māori. |
| **Option 2: Lawyer for child must be appointed**<br><br>**ME** | +<br><br>Child always able to be supported with lawyer for child who is better equipped than counsel to assist. However, requires child to interact with another professional in cases where this may not be necessary or appropriate. | +<br><br>Supports the child's participation and provides legal representation. Consideration of specialist training so that it is fit-for-purpose in adoption proceedings may be needed due to evidence around shortcomings of the role.[34] | 0<br><br>Child given greater access to funded legal representation than adults. May be justified given the significant impact adoption has on the child and child's need for support to effectively participate. Lawyer for Child may need specific guidance on | +<br><br>Lawyer for child is an established role across other family law areas. Existing workforce pressure means requiring a lawyer for child in every adoption may not be feasible. However, note low number of adoption cases annually. | +<br><br>Lawyer for child promotes children's rights which is consistent with active protection of tamariki rights and interests. Lawyer for child may not have the cultural capability to support tamariki Māori and understand their interests. |

33 Ministry of Justice *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (2019).

34 Ministry of Justice *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (2019).

| **Representation to support child participation at court:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | Requiring lawyer for child is inflexible and does not anticipate cases where a lawyer for child would add little value, for example for very young children. | understanding the particular needs of children in adoption context. | | Given the lawyer is appointed by the Crown, need to ensure they understand te Tiriti obligations toward tamariki Māori. |
| **Option 3: Advocate may be appointed ME** | +<br><br>Advocate is appointed to promote child's right to participate and their best interests. However, an advocate would need specific training to support a child and understand their rights. | 0<br><br>May be more effective in supporting child's participation (particularly if they have an existing relationship). However, advocate may not have understanding of adoption or legal system to provide appropriate support. | 0<br><br>Child given greater access to funded legal representation than adults. Likely to be justified given the significant impact adoption has on the child and their need for support to effectively participate.<br><br>Advocate will need specific guidance in understanding the particular needs of the child, especially cultural. | -<br><br>Unclear whether appropriate advocates would be available to fill role. Would need to consider skills and experience needed to be an advocate, and how these could be provided. | 0<br><br>Promoting children's rights is consistent with te ao Māori understanding that child is taonga and should be protected.<br><br>Advocate may need training to have the cultural capability to support tamariki Māori. |

**Preferred option**

Our preferred option is that the Court may appoint a lawyer for child. This option enables sufficient flexibility so that a lawyer for child can be appointed, if the court considers it would be in the child's best interests, but does not make it mandatory. The lawyer for child would support children's participation by being responsible for representing the child in the adoption proceedings, reporting the child's views to the Court, and advocating for the child's best interests and welfare.

## Child consent

**Options we have considered**

We have considered the following options for the child's consent:

- **Status Quo (Preferred): Child's consent not required: The child does not consent to their adoption, but their views are taken into account.**
- **Option 1: Child may give their consent: Children may consent to their adoption if they have capacity, but consent is not required.**
- **Option 2: Child must give their consent: Children must give their consent to their adoption if they have capacity.**
- **Option 3: Child can oppose adoption: Children have the right to oppose an adoption order.**

| **Child's consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo (Preferred): Child's consent not required.**<br><br>**ME** | 0<br><br>Does not promote child's right participate. Other reform options may provide more appropriate ways to participate.<br><br>Giving the child responsibility for the decision may have a heavy emotional toll on the child.<br><br>May not be in a child's best interests where the child strongly opposes the adoption.<br><br>Does not force child to participate where they do not wish to. | 0<br><br>Could be inconsistent with supporting child participation in the adoption process as it may lead to instances where adoption goes ahead despite the child opposing it.<br><br>However, other mechanisms can provide a way for the court to assess the child's views.<br><br>An adoption that is strongly opposed by the child is highly unlikely to be approved. | 0<br>Does not promote children's agency where they are capable of making decisions.<br><br>Potentially unjustified differential treatment as child does not get the opportunity to consent, even when they have capacity or are deemed sufficiently mature to make other significant life decisions, such as marriage. | 0<br><br>Easy to understand. Consistent with approach taken in other child legislation where participation provisions do not provide for consent (CoCA and Oranga Tamariki Act). | 0<br><br>Does not recognise the mana of tamariki. |
| **Option 1: Child may give their consent, if they** | ++ | ++<br><br>Supports child's right to have a say in matters affecting | ++<br><br>Ensures children have consent rights at a similar | + | 0<br><br>Recognises the mana of tamariki by enabling them to |

| **Child's consent:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **have capacity to do so.**<br><br>**ME** | Promotes child's right to participate, and right not to participate if they wish.<br><br>May promote child's best interests, as gives child a determinative role (if desired) which can support 'buy-in' to the decision.<br><br>Does not require a child to give their consent which may not be sufficiently flexible to apply to all circumstances.<br><br>May make the child assume responsibility for the decision which may place an emotional burden on them. | them. However, other proposals also enable the child to have a say, without imposing a determinative role on them. | level to those of the adults in adoption cases. | Clear to apply, but may require guidance for determining a child's capacity.<br><br>Would require additional information and support services to help child to make informed decision when giving their consent.<br><br>Inconsistent with approaches in other family law, e.g. for orders made under CoCA and Oranga Tamariki Act. | consent to a significant decision about their life.<br><br>However, individual decision making for tamariki not reflective of te ao Māori approach to decision making about tamariki. |
| **Option 2: Child must give their consent, where they have capacity to do so.**<br><br>**ME** | -<br><br>Promotes children's right to participate. However, inconsistent with the right for the child to choose not to participate should they wish.<br><br>May promote child's best interests, as gives child a determinative role, which can support 'buy-in' to the decision.<br><br>Does not provide flexibility for situations where a child does not want to play a | +<br><br>Consistent with reform objectives, as upholds child's right to have a say in matters affecting them.<br>However, may have unintended consequences causing harm when child does not want to make a consent decision.<br><br>Other proposals also enable the child to have a say, without imposing a determinative role on them. | ++<br><br>Ensures that children have consent rights equal to those of the adults in adoption cases. | +<br><br>Clear to apply, but may require guidance for determining a child's capacity. Would require additional information and support services to help child to make informed decision when giving their consent.<br><br>Inconsistent with approaches in other family law, e.g. for orders made under CoCA and Oranga Tamariki Act. | 0<br><br>Recognises the mana of tamariki by requiring them to consent to a significant decision about their life. However, individual decision making for tamariki not reflective of te ao Māori approach to decision making about tamariki. |

| **Child's consent:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | determinative role. May cause harm to the child. | | | | |
| **Option 3: Child can oppose adoption, when they have the capacity to do so.**<br><br>**ME** | +<br><br>Promotes child's right to participate, and right not to participate if they wish.<br><br>Child does not have active determinative role in adoption placement, but able to oppose if they feel strongly.<br><br>May promote child's best interests, as the ability to oppose the adoption may give them a sense of 'buy-in' to the decision. | +<br><br>Supports child's right to have a say in matters affecting them.<br><br>However, other proposals also enable the child to have a say, without imposing a determinative role on them. | +<br><br>Provides children with a consent right similar to those of the adults in adoption cases. | +<br><br>Clear to apply, but may require guidance for determining a child's capacity.<br><br>Would need to consider what the consequences would be if adoption is opposed and who cares for the child. | 0<br><br>Recognises the mana of tamariki by enabling them to oppose an adoption which would have a significant impact on their life. However, individual decision making for tamariki not reflective of te ao Māori approach to decision making about tamariki. |

**Preferred option**

Our preferred option is that a child's consent not be required. As noted above, research indicates that children want to have a say in decisions that affect them, but do not want to be the ultimate decision-maker. Providing for a child to consent, either in a voluntary or mandatory way, would also be inconsistent with the approach taken in other child-centred legislation in New Zealand and not align with the objective to promote consistency with principles in child-centred legislation.

However, as there was some support for requiring a child's consent during the first round of engagement, and in view of the proposals for enhancing child participation, we consider it appropriate to seek further feedback on the issue.

## Who can have a say: Parents' role

**Problem definition**

At present, the law requires birth parents to consent to an adoption (unless consent is dispensed with by the court). Once birth parents have given consent to an adoption, they have no further legally mandated role in the adoption process. Any involvement of birth parents in court processes is dependent on judicial discretion. If birth parents are not invited to be part of court processes, the Court may miss out on information that could be material to determining what is in the best interests of the child, such as the reasons for placing the child for adoption, family and whānau background, or other information unique to the child.

**What we heard in engagement**

Almost all those we heard from in engagement supported birth parents having a right to participate in the adoption process. This view was usually supported by those that were adopted, birth parents and adoptive parents alike. People considered the birth parents have a right to be involved in the process, and that their participation would help inform what is in the child's best interests and help birth parents to deal with the effects of placing a child for adoption. Almost half of the people who commented on the issue highlighted that there will be instances when birth father's involvement would be inappropriate, such as when there are safety concerns.

**What this section covers**

The following options sections are broken down into:

- birth parent participation
- consent
- timing of consent.

## Birth parent participation

**Options we have considered:**

- **Status Quo: No mandated birth parent involvement in adoption hearings:** An adoption hearing may go ahead without any direct involvement of the birth parents. Judges can decide how and when to include them.
- **Option 1 (Preferred): Give birth parents a right to participate in adoption cases:** Include in legislation that a birth parent has a right to participate in adoption cases once they get to court.
- **Option 2: Require the Court to hear from a birth parent before making an adoption order:** The Court could be required to hear from a birth parent before making an order.

**Table of options: birth parent participation:** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for Purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status Quo: No mandated birth parent involvement in adoption hearings.**<br><br>**ME** | 0<br><br>Birth parents may not have opportunity to provide information that could support decision making around their interests. | 0<br><br>Does not guarantee that birth parents may have their say in adoption proceeding.<br><br>No assurance that birth parent views have not | 0<br><br>Birth parents' rights are significantly impacted by an adoption and it is inequitable that they do not have the same rights as others (such as the adoptive parents) in | 0<br><br>No implementation difficulties.<br><br>Inconsistent with other care of children legislation that gives parents right to share their views and participate in | 0<br><br>Māori parents do not have opportunity to share their views in Court on what is best for their tamariki. This is in conflict with respecting their mana as well as failing to |

| **Table of options: birth parent participation:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | changed since giving consent. | regard to attending proceedings. | decisions about the care of their child (e.g. CoCA, Oranga Tamariki Act). | actively protect the tamariki right to whānau connection. |
| **Option 1 (Preferred): Give birth parents a right to participate in adoption cases.**<br><br>**ME** | ++<br><br>Increases information available to court, which is likely to improve decision-making as to whether an adoption is in a child's best interests. | ++<br><br>Supports Court to have the information needed to make decisions. | ++<br><br>Increases rights of birth parents on par with those of adoptive parents. | +<br><br>Relatively easy to understand, although care is needed to ensure birth parents do not feel compelled to participate.<br><br>Consistent with domestic and international obligations. | ++<br><br>Allows Māori parents to participate in proceedings about their tamariki and help to inform what is in their best interests, which would support Māori parents' mana. |
| **Option 2: Require the Court to hear from a birth parent before making an adoption order.**<br><br>**ME** | ++<br><br>Increases information available to the court, which is likely to improve decision-making as to whether an adoption is in a child's best interests. | --<br><br>Requiring the court to hear from a birth parent where they do not want to speak in an adoption hearing is unlikely to deliver useful information and may cause harm. | --<br><br>In tension with rights of birth parents if they do not want to speak in the hearing. | - -<br><br>Easy to understand, but difficult to implement in some cases. Would be difficult to enforce if birth parents do not wish to participate.<br><br>In Aotearoa, a person is only required to speak to a court in a very limited range of serious circumstances. No international precedent for this option. | -<br><br>Strong active protection of tamariki right to whānau. However, forcing parents to speak where they refuse to would be an affront to their mana and not in keeping with providing equal rights to Māori. |

**Preferred option**

Our preferred option is for birth parents to be given a right to participate in proceedings, but not be required to. This option supports birth parents to participate in proceedings, where they wish to do so, and can provide relevant information for the court to consider. However, it does not go so far as to compel birth parents to participate, as some may not wish to be part of the proceedings, beyond giving their consent.

## Consent

**Problem definition**

Currently, the only people who must consent to an adoption are:

- the child's birth mother;
- the child's birth father, depending on his status with regard to the child; and,
- the spouse of an adoptive applicant who applies to adopt as a single person.

A birth mother's consent to their child's adoption is always required, unless the requirement for their consent is dispensed with. Currently, a birth father's consent is required if he is a guardian of the child or was married to the mother at the time of the child's conception or birth. For non-guardian birth fathers, the law says that the Court may require their consent if the Court considers it 'expedient to do so'. Where the Court does not consider it expedient to obtain a birth father's consent, the birth father does not get a say in whether the adoption should proceed and his views on the adoption are not heard.

The Human Rights Review Tribunal held that allowing a birth father's consent to be ruled not expedient is an unjustified discrimination on the basis of sex, as there is no equivalent circumstance in which it can be ruled "not expedient" for a birth mother to give consent to her child's adoption.[35] Additionally, not allowing a birth father to consent does not support the child's right to connection with their father and his family and whānau.

**What we heard in engagement**

Almost all the people we engaged with thought that both parents should have to consent to an adoption, unless it is inappropriate or impractical for them to do so. We heard that a child's right to identity and family is supported by requiring both parents to consent. During engagement many people criticised the Court's ability to rule a birth father's consent not expedient.

**Options we have considered**

- **Status Quo: Retain existing consent requirements**
  Birth mother must consent, and birth father if he is listed as a guardian. Spouse of adoptive applicant must consent. No requirement for consent of child, wider family and whānau. All consents may be dispensed with where Court considers the person is inappropriate to consent for a listed ground in the Act.
- **Option 1 (Preferred): Require consent of both birth parents unless dispensed with**
  Grounds for dispensation are discussed below.
- **Option 2: Require Oranga Tamariki to attempt to locate and contact a non-guardian father and gather his views on adoption, but do not require his consent**

35 *Adoption Action Incorporated v Attorney-General* [2016] NZHRRT 9.

| **Who should consent:** Analysis of options<br><br>KEY: = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo.**<br><br>**ME** | 0<br><br>Does not uphold child's right to family, as fathers' may be excluded from decision making.<br><br>Decisions made about the child may be uninformed by views of birth father as to the best interests of the child, which may exclude options for the child's care, e.g. within the birth father's family and whānau. | 0<br><br>Does not support birth fathers to have a role in proceedings, based on a legal status that may not relate to their interest in the child's care. This has historically been a cause of significant harm.<br><br>However, in current practice, it is very unusual for birth fathers to be excluded. | 0<br><br>Discrimination against birth fathers, which has been determined to be unjustifiable by HRRT. | 0<br><br>Can be operationally simpler to gain consent from mother and exclude a father who is difficult to engage with or locate.<br><br>Inconsistent with strong focus on birth father and wider whānau rights in other domestic care of children processes. | 0<br><br>Māori fathers' rights to care for their tamariki are overlooked, which is a breach of their rights to rangatiratanga over decisions regarding their tamariki.<br><br>Fails to actively protect rights of tamariki Māori to whānau and culture, especially where only birth father is Māori has historically led to significant harm and loss of culture[36].<br><br>Focus on individual consent rights has been criticised as not providing space for hapū and iwi decision making about care of tamariki. |
| **Option 1 (Preferred): Require consent of both birth parents unless dispensed with.**<br><br>**ME** | ++<br><br>Supports child's right to family. | ++<br><br>Upholds both birth parents' parental rights. When consent is not required it is due to issues that have a | ++<br><br>Equitable treatment of all birth parents. | ++<br><br>No feasibility constraints as it largely reflects current practice. | ++<br><br>Allows for birth parents to exercise rangatiratanga over care of their child. |

36 Westlaw. Principles of Adoption. PA1.3.06

| **Who should consent:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | Supports decisions being made in the best interests of the child and upholds child rights. | rational connection to the welfare of the child (see 'when should consent be dispensed with' table below). | | Consistent with approach to the role of parents in other legislation relating to care of children.<br><br>Will require increased social worker time/cost to contact non-guardian birth fathers and seek consent, where this is not already occurring. | Supports active protection of tamariki right to whānau. |
| **Option 2:**<br>**Require Oranga Tamariki to attempt to locate/ contact birth father and gather his views on adoption, but do not require his consent.**<br><br>**ME** | ++<br><br>Better supports child's interest to have ongoing contact with birth family and whānau where possible.<br><br>Birth father involvement may support decisions on best interests of child. | +<br><br>Greater likelihood for birth father role in adoption proceedings, but dependent on the procedures put in place to support their involvement. | -<br><br>Birth fathers' rights less than birth mothers. | -<br><br>Requires increased social worker time/cost to locate non-guardian birth father and seek consent.<br>May lead to some cases being drawn out where there are disagreements about consent. | +<br><br>Acknowledges role of birth father and whānau in life of child, which is consistent with affirming mana.<br><br>The extent to which this option supports active protection of tamariki right to whānau will be dependent on implementation. |

**Preferred option**

Our preferred option is that both the birth mother and birth father's consent on the adoption be required, unless the Court dispenses with the requirement for their consent (see section "when should consent be dispensed with"). Requiring birth parents' consent is in line with the proposed new guiding principles for adoption, including the protection of whakapapa and recognising that primary responsibility for caring for a child lies with their birth family and whānau. It also supports the proposal for the Court to consider alternative care arrangements for the child, and therefore whether adoption is in the child's best interests.

## Timing of consent

**Problem definition**

Currently, a birth mother cannot consent to her child's adoption until the baby is more than 10 days old. A mother's consent cannot be withdrawn while an adoption proceeding is on-going and is final once an adoption order has been made.

There is evidence that suggests allowing a birth mother to consent soon after birth can be damaging, given the physical and psychological effects that birth may have on a mother. There is a risk of the of birth parents being unduly pressured to give consent during a vulnerable time**.**

Once given consent is permanent and cannot be withdrawn. While this reflects the permanence of the legal consequences of an adoption and allows the benefit of security of placement and care for the child, it also does not allow birth parents to retract their consent if they change their mind and wish to raise their child themselves.

**What we have heard in engagement**

We heard in engagement that most people disagreed with the current timeframe for giving consent. They considered that 10 days offers too little time for a parent to deliberate over whether adoption will be in the best interests of their child, particularly for birth mothers who may be isolated and vulnerable directly after the child's birth.

**Other information we have considered**

Internationally, timeframes for consenting to an adoption vary. Some jurisdictions have no minimum time period, while the United Kingdom requires a period of 42 days. Thirty days after the child's birth is the timeframe chosen by most Australian states. This timeframe has been supported by commentators as a reasonable period for providing a birth mother with information, and was favoured by the Law Commission's review of adoption laws in 2000.[37] Many other comparable jurisdictions allow for certain periods for withdrawal of consent including all Australian jurisdictions, most Canadian provinces and the UK.[38]

**Options we have considered**

- **Status Quo: Retain existing timing before which a birth mother may not consent to adoption.**
  Consent may not be obtained until at least 10 days after the birth of a child.
- **Option 1 (Preferred): Require a period of 30 days before birth parent(s) may consent to an adoption.**
- **Option 2 (Preferred): Allow consent to be withdrawn after it has been given until a final adoption order has been made.**
- **Option 3: Allow consent only once the individual has received counselling.**
- **Option 4: Provide access to free legal advice before a person gives consent to adoption.**
- **Option 5: Do not require a minimum time period before consent can be given.**
- **Option 6: Allow consent to be given before a child is born.**

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37 New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000).

38 See, for example Victoria's Adoption Act 1984 and Ontario's Child Youth and Family Services Act SO 2017 c 14.

| **Timing of consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| **Option** | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo:**<br>**Consent may be given after 10 days following child's birth. No withdrawal of consent once given**<br>**CW (4)** | 0<br><br>Short time period before consent can be given may result in birth parents giving consent without fully considering the decision, understanding of their rights, or under coercion. This does not uphold a child's rights to family.<br><br>Does not protect the child's right to family if birth parents change their mind but cannot withdraw consent. Children may miss out on being raised by their birth parents if birth parents are unsuccessful in having their consent withdrawn. | 0<br><br>Does not allow enough minimum time for consent to be well informed and freely given. | 0<br><br>Birth parents are negatively affected by allowing consent to be given early in a child's life, without the birth parent receiving support or advice.<br><br>Birth parent vulnerable to pressure from others, likely to be physically and mentally vulnerable.<br><br>This lack of protection has potential to disproportionately impact on disabled parents, who may have particular vulnerability or stigma attached to their parenting. | 0<br><br>Simple to run and clear to understand.<br><br>Inconsistent with international obligations, particularly under the Convention on the Elimination of Discrimination against Women and UNDRIP. | 0<br><br>Not in keeping with Crown obligations to active protection of birth parents.<br><br>Threatens tamariki right to whānau and culture, by allowing adoptions to take place before sufficient consideration of interests of the child. This has caused significant past harm.[39]<br><br>An approach which requires support and advice to be given to birth parent and their whānau would be more in keeping with te ao Māori processes for decision making about care of tamariki. |

39 Westlaw. Principles of Adoption. PA1.3.06

| **Timing of consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| **Option** | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 1 (Preferred): Extend time period before which consent cannot be given to 30 days.**<br>**CW (2,3, 4)** | +<br><br>Birth parents have longer to consider their decision, so they can be more certain about whether adoption is in the best interests of their child. This upholds a child's right to family and for decisions to be made considering their best interests. However, has impacts on the placement of the child, who cannot be placed with adoptive parents until consent is received (see above for analysis of who cares for a child during the process). | +<br><br>Allows more time for birth parents to make a well-considered decision, unimpacted by the immediate impacts of the birth.<br><br>However, no guarantee that extra time alone will support decision-making, without provision of support and advice. | +<br><br>Reduces potential for pressure and coercion around consent decision in some cases, which is likely to disproportionately harm birth mothers and/or disabled parents. But does not ensure that extra support will be made available within that time. | +<br><br>Easy process change. Some adoption proceedings will start later than they previously would have. | +<br><br>More time to consider if adoption is the right option supports active protection of parent and tamariki welfare. |
| **Option 2 (Preferred): Allow consent to be withdrawn until a final adoption order has been made.** | +<br><br>May support birth parents to make better decisions about whether adoption is in best interests of the child, as they can change their mind. Enhances child's right to family if birth parent's change their mind after consent is given.<br><br>However, may reduce certainty for the child and | +<br><br>Allows birth parent time and opportunity to reconsider, so that their decision to place child for adoption is settled. | +<br><br>Reduces potential for pressure and coercion around consent decision in some cases, which is likely to disproportionately harm birth mothers and/or disabled parents.<br><br>Adoptive parents are negatively affected by a lack of certainty. | -<br><br>Potential to result in some adoption processes being begun and then discontinued.<br><br>Provides clarity for those involved in an adoption about the rules relating to withdrawing consent. | ++<br><br>More time to consider if adoption is the right option supports active protection of parent and tamariki welfare.<br><br>Allowing birth parents to reconsider consent supports their rangatiratanga over decisions about care of their tamariki, acknowledging that |

| **Timing of consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| **Option** | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | harm the security of the adoptive relationship. | | | | decision needs time to be considered fully. |
| **Option 3:**<br>**Allow consent only once the individual has received counselling.**<br>**(CW 1,3, 4)** | + +<br><br>Counselling assists birth parents to make settled, informed decisions about whether adoption is in the best interests of their child. | + +<br><br>Counselling supports consent decisions that are informed and free from pressure.<br><br>However, mandated counselling may not be well suited or the right approach to support some birth parents to make this decision. Requiring counselling could be inappropriate where birth parents have strong objection to this and strong, consistent desire to place their child for adoption. | +<br><br>Reduces potential for pressure and coercion around consent decision particularly for birth mothers and/or disabled parents.<br><br>For counselling services to be effective they would need to be culturally sensitive and adaptable to birth parents with different needs. Inequity of targeting of services could cause harm.<br><br>Mandating counselling may limit the rights of the parents. | -<br><br>Implementation of counselling services will need to be carefully developed to be effectively delivered.<br><br>This will be highly dependent on availability and resourcing of counselling services. Shortage of counselling providers is likely to be an issue and could delay giving of consent.<br><br>Consistent with international commitments, e.g. to CEDAW and UNDRIP. | +<br><br>Provision of support to vulnerable birth parents is in keeping with manaakitanga and actively protecting the best interests of tamariki as taonga and of parents.<br><br>Counsellors would need have cultural understanding to help Māori interact with Pākehā adoption system in keeping with their rights to equal rights and privileges under Article 3 of te Tiriti.<br><br>There is a risk that counselling services do not meet Māori needs and cause further trauma. Implementation will need to provide support for cultural awareness and competency. |
| **Option 4:**<br>**Provide access to free legal advice before a person gives consent to adoption.** | + +<br><br>Supports birth parents to make decisions about whether adoption will be in | + +<br><br>Supports birth parents to give informed consent. If birth parents are well- | + +<br><br>Protects birth parents from making decisions without full understanding of the | +<br><br>Cost implications. Likely to slow consent processes. | + +<br><br>Supports birth parents, including parents of tamariki Māori, to make |

| **Timing of consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| **Option** | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **CW (All)** | their child's best interests, in knowledge of legal consequences. | supported to give their informed consent, they may be less likely to rely on withdrawal provisions. | consequences of adoption. This may have particular importance for some groups, e.g. disabled parents. | Consistent with international commitments, e.g. to CEDAW and UNDRIP. | decisions in full understanding of effect for tamariki. This is in keeping with active protection of the rights of Māori parents. |
| **Option 5:**<br>**Do not require a minimum time period before consent can be given**<br>**ME** | - -<br>Does not protect child's right to connection with family and whānau. Allows decisions about a child's future care to be made in haste, with less time to consider whether adoption is really in the best interests of the child. | - -<br>Increased risk of uninformed or coerced consent. | - -<br>Increases vulnerability of birth parents to pressure and coercion to consent to adoption. Birth parents less likely to engage with support and advice prior to giving consent. | -<br>Would speed up the adoption process.<br>Not consistent with international commitments, e.g. to CEDAW and UNDRIP. | - -<br>Fails to actively protect birth parents and tamariki.<br>Birth parents less likely to have full understanding of the impacts of adoption, how this will affect tamariki, and their options for care of tamariki. Extension of status quo practice which has caused harm of cultural loss to Māori. |
| **Option 6:**<br>**Allow consent to be given before a child is born**<br>**ME** | - -<br>Does not protect child's right to connection with family and whānau.<br>Does not allow for birth parent to reconsider their attitude to adoption following the birth of the child, which has the potential to impact on the child's right to be based within family and whānau, if | - -<br>Does not protect birth parents from risks of uninformed or coerced consent.<br>Does not allow birth parents to consider their thoughts on adoption following the child's birth. May result in situations where birth parents strongly wish to | - -<br>Increases vulnerability of birth parents to pressure and coercion to consent to adoption. Birth parents less likely to engage with support and advice prior to giving consent. Particular risk for particularly vulnerable groups e.g. disabled parents. | +<br>Would speed adoption process.<br>Not consistent with international commitments, e.g. to CEDAW and UNDRIP. | - -<br>Fails to actively protect birth parents and tamariki from the harm of adoption that is not in best interests of the child.<br>Birth parents less likely to have full understanding of the impacts of adoption, how this will affect tamariki, and their other options for care of tamariki. Extension |

| **Timing of consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| **Option** | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | this is an appropriate option. | withdraw consent following a child's birth. | | | of status quo practice which has caused harm of cultural loss to Māori. |

**Preferred options**

Our preferred options are that:

- the minimum time for consent to be given be 30 days from the birth of the child; and
- withdrawal of consent be allowed up to the point that a final adoption order is made.

Lengthening the consent timeframe would help provide appropriate space and time for a birth parent to consider their decision to place their child for adoption. A longer minimum time for consent would also better protect against the risk of birth parents being unduly pressured to give consent during a vulnerable time. Providing a period within which birth parents may withdraw consent to their child's adoption would also allow birth parents to stop the adoption from proceeding if they change their mind. A withdrawal period recognises the permanence of the legal consequences of an adoption and that some birth parents may change their mind.

## When should consent be dispensed with?

**Problem definition**

Under the current law, a birth parent's consent may be dispensed with:

- where that parent has abandoned, neglected, persistently ill-treated or failed to exercise the normal duty or care of parenthood towards their child; or
- on the basis of a parent's physical or mental incapacity.

The process of dispensing with consent requires balancing the rights of parents to make decisions related to their child's future and the best interests of the child. The current approach places clear boundaries around when it is appropriate to dispense with consent.
The current provision enabling the Court to dispense with consent on the grounds of a birth parent's mental or physical disability is discriminatory and has faced longstanding criticism, including during our engagement last year, and particularly from the disability community. In 2016, the Human Rights Review Tribunal found it to be inconsistent with the New Zealand Bill of Rights Act 1990,[40] and it is also inconsistent with our international human rights obligations under the United Nations Convention on the Rights of Persons with Disabilities.

In recent years, dispensing with consent in adoption cases has become more unusual. However, reform provides an opportunity to consider whether, and in what circumstances, dispensation of consent is appropriate.

40 *Adoption Action Incorporated v Attorney-General* [2016] NZHRRT 9.

**What we heard in engagement**

We heard from most people we engaged with that consent should only be dispended with in rare circumstances, and not on the basis of mental or physical incapacity alone. We also heard that dispensing with consent should be reserved for cases where requiring consent poses a risk to the birth mother or child, or other rare circumstances, such as where a birth father cannot be found. In cases where a parent has an ongoing desire to maintain their parental responsibilities to the child, we heard that it is unlikely that adoption will be in the best interests of the child.

**Options we have considered**

- **Status Quo:** Court may dispense with consent where:
    - it is satisfied that the parent has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child
    - the parent's mental or physical disability makes them unfit to consent to adoption.
- **Option 1 (Preferred): Allow the Court to dispense with consent where the parent meets the grounds of having abandoned, neglected, persistently ill-treated or failed to exercise the normal duty and care of parenthood to the child**
- **Option 2 (Preferred): Allow the Court to dispense with consent where informing the birth parent about a child's potential adoption would pose a clear risk to either the child or other birth parent**
- **Option 3: Allow the Court to dispense with consent on the grounds of mental or physical disability**
- **Option 4: Do not allow for dispensation of consent**

| **Dispensing with consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo**<br>**ME** | 0<br><br>Denies child's right to connection with family, and the ability of parents to be able to make decisions for child in their best interests.<br><br>Can be used to approve adoption that is in the best interests of the child, where the parent has proven | 0<br><br>Some grounds for dispensing consent are not connected to the birth parent's treatment of the child. | 0<br><br>Discriminatory ground against disabled persons.<br><br>Impacts birth parents right to justice/ right to involvement in the life of their child. | 0<br><br>Feasible approach to dispensation of consent, judges have case law to guide when consent should be dispensed with.<br><br>Inconsistent with commitments to UN Convention on the Rights of | 0<br><br>Dispensation of consent does not recognise the mana of birth parents and whānau.<br><br>Court holding power to place tamariki for adoption in direct opposition to the views of birth parents runs counter to |

| **Dispensing with consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | incapable of acting in child's best interests. | | | People with Disabilities ('UNCRPD'). | recognising mana and rangatiratanga of parents. |
| **Option 1 (Preferred): Allow dispensation of consent where the parent meets the grounds of having abandoned, neglected, persistently ill-treated or failed to exercise the normal duty and care of parenthood to the child.**<br>**CW (2,3)** | ++<br>Allows dispensing of consent where birth parent has proven their unsuitability to care for the child. Prioritises upholding child's rights over birth parent's rights. | ++<br>Dispensation of consent focused only on factors related to birth parent's treatment of the child. | +<br>Birth parents' rights to care for their child overridden on the basis of conduct, rather than any innate characteristic, e.g. disability. | + +<br>Straightforward to apply. Court precedent exists for determining when a birth parent's consent should be dispensed with on these grounds.<br><br>Consistent with commitments to UNCRPD.<br><br>Reflects one of the existing grounds for dispensing with consent. | -<br>Enables court to remove responsibility for care of child from whānau Māori without their consent, which undermines rangatiratanga. |
| **Option 2 (Preferred): Allow dispensation of consent where informing the birth parent about a child's potential adoption would pose a clear risk to either the child or other birth parent.**<br>**CW (1,3)** | ++<br>Protects child from risk of harm from birth parent. | ++<br>Allows court to determine whether adoption will be in the best interests of the child, and is not restricted by a parent who poses a risk to the child refusing to consent. | +<br>Birth parents' rights to care for their child overridden on the basis of conduct, rather than any innate characteristic. | - -<br>Likely that a test for risk posed by requiring a birth parent's consent would require further adjudication and evidence. Status quo criteria of "abandoned, neglected, persistently ill-treated" may be simpler to determine.<br><br>However, this test could align with proposed test for when family and whānau | -<br>Allows for protection of the child as taonga.<br><br>Court given the power to make decisions about whether a parent's consent should be required, including for Māori. This does not recognise parents' rangatiratanga. |

| **Dispensing with consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | involvement in adoption proceeding would cause unwarranted distress. | |
| **Option 3: Allow dispensation of consent on the grounds of physical or mental incapacity.**<br>**CW (1,2)** | --<br>Does not support children to remain connected to disabled parents and breaches their rights to family.<br>May result in the undesirability of separating a child from family where this is not necessary. | --<br>Consent dispensed with when no link to parent's treatment of child, and other options that do not require overriding birth parents' consent are likely available. | --<br>Discrimination against disabled parents, which has been found unjustifiable. | -<br>No feasibility issues.<br>Fundamentally inconsistent with New Zealand's commitments to the rights of disabled persons under UNCRPD. | - -<br>Injury to the mana of the person whose consent is dispensed with.<br>In tikanga Māori support would be given to a parent who is struggling, rather than physical or mental incapacity being given as a reason for decisions to be made about them without their consent. |
| **Option 4: Do not allow court to dispense with consent.**<br>**ME** | - -<br>May prevent adoption placements which may be in the best interests of the child. | - -<br>Not flexible enough to allow for dispensation of consent in rare cases where it is not appropriate for a birth parent to consent. Could have unintended consequences – e.g. birth mothers refusing to identify birth fathers because of fear that they will refuse to consent to adoption. May create risk | +<br>Strong emphasis on the rights of birth parents. | -<br>Could prevent adoption in cases where it would otherwise be appropriate. But other care arrangements will still be possible. | + +<br>In keeping with respecting the mana of parents and whānau, no decision about care of tamariki may happen without their consent. |

| **Dispensing with consent:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | of harm for a birth parent or the child. | | | |

**Preferred Options**

Our preferred option is that the Court should only be allowed to dispense with consent of a birth parent where:

- informing the birth parent about a child's potential adoption would pose a clear risk to either the child or other birth parent; or
- the parent meets the grounds of having abandoned, neglected, persistently ill-treated or failed to exercise the normal duty and care of parenthood to the child.

Dispensing with consent should be rare, however there should be some circumstances where the Court has discretion to dispense with consent. Requiring the consent of parents in cases where there is a risk to the child or other birth parent, or where they have neglected or ill-treated the child, could have unintended consequences. For example, birth mothers may refuse to name the birth father of children they wish to place for adoption if there is a risk to their safety. Additionally, there may be cases where a parent refuses to engage with an adoption proceeding or to consent to the adoption out of desire to disadvantage the other birth parent, rather than out of a desire for ongoing contact with the child.

## Who can have a say: Wider family and whānau

**Problem definition**

Currently, opportunities for family and whānau involvement are quite limited. Pre-adoption, wider family and whānau will only be involved in discussions about the potential for adoption if the birth parent invites them to be involved or consents to Oranga Tamariki contacting them. Once an adoption case reaches the Court, wider family and whānau rarely have any involvement. This is in tension with the values of Māori, Pacific peoples and people of other cultures in New Zealand, who place high value on the role of wider family and whānau in decision-making, and often have a much stronger communal culture regarding decision-making.

Two claims have been made to the Waitangi Tribunal, asserting the inconsistency of the Adoption Act with tikanga Māori, due to the lack of recognition of the place of whānau, hapū and iwi in adoption practices.[41] These claims have yet to be heard.

**What we heard in engagement**

Most of those we engaged with supported increased whānau involvement in the adoption process. Reasons included the potential to help explore alternative care arrangements within the whānau, to assist the Court to make decisions in the child's best interests, and to help maintain connection to a child's whānau, culture and identity. The child's rights to connection

41 WAI 160, WAI 286; as cited in New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000), 87.

to their family and whānau, and the family and whānau rights to be involved in the child's life were seen as of high value, and the current law seen as not giving nearly enough value to these rights.

Many of those we engaged with commented that in some circumstances family and whānau involvement may be inappropriate. Some ethnic community members shared that cultural stigmas related to unplanned pregnancy and adoption meant that involving family could risk the safety of the mother and child. Many of those we engaged with also highlighted the high potential for trauma and unintended consequences if family involvement was forced where the birth mother had experienced significant harm from family.

On this basis most people we engaged with considered that family and whānau involvement should be strongly encouraged, but not mandated given the potential for harm.

**What this section covers**

The following options tables consider:

- What mechanisms should be used for birth family and whānau involvement?
- What do we do where birth parents do not wish to involve family and whānau?
- Who decides if family and whānau involvement would cause unwarranted distress?

## What mechanisms should be used for birth family and whānau involvement?

**Options we have considered**

- **Status Quo:** Wider family involvement pre-adoption occurs only at discretion of birth parents. No mechanisms for in-Court or post-adoption involvement.
- **Option 1 (Preferred): Wider family and whānau views must be set out in social worker report.**
- **Option 2 (Preferred): Giving family and whānau ability to attend adoption hearing and speak.**
- **Option 3: Birth family and whānau must consent to an adoption.**

| **What mechanisms should be used for birth family and whānau involvement:** Analysis of options<br>KEY: ▭ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**No required birth family and whānau involvement.**<br>**Involvement occurs at the discretion of birth** | 0<br><br>Children's right to family and whānau not recognised. | 0<br><br>No legislative mechanisms for | 0<br><br>Family and whānau disadvantaged and the value of their role in the child's life | 0<br><br>Clear rule, easy to apply. Limiting participation of family and whānau likely simplifies and | 0<br><br>Does not gives effect to Article 2 of te Tiriti and provide for Māori tino |

| **What mechanisms should be used for birth family and whānau involvement:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **parents.**<br><br>**ME** | Family and whānau input into decisions about the best interests of the child not available. | involvement of family and whānau. | not acknowledged. Negative impact on cultural groups who place value on the importance of wider family and whānau in decision-making. | streamlines the process in many cases.<br><br>Inconsistent with the high value placed on family and whānau involvement in other domestic care of children legislation (e.g. Oranga Tamariki Act). | rangatiratanga over decisions about care of tamariki. It also does not allow for Māori to practice tikanga decision making practices. |
| **Option 1 (Preferred): Birth family and whānau views set out in social worker report.**<br><br>**CW (2)** | ++<br><br>Will provide information to the Court about family and whānau views on whether an adoption is in the best interests of the child, and potentially present in-family options for care. This supports the child's right to family and whānau connection. Also enables other care options to be considered. | +<br><br>Provides a level of involvement for family and whānau, although this is mediated through social worker. | + +<br><br>Provides for increased consideration of family and whānau views. | +<br><br>Clear and easy to implement.<br><br>Resource required to enable social worker to gather whānau views, although this already occurs in the majority of cases. | +<br><br>Gathering whānau views on adoption supports active protection of tamariki right to whānau.<br><br>Whānau role and mana acknowledged. However, this input is mediated through the Social Worker, and judge makes decisions about weight whānau views hold, so this option is not fully recognising rangatiratanga. |
| **Option 2 (Preferred):**<br><br>**Giving family and whānau ability to attend adoption hearing and speak.** | ++<br><br>Recognises the child's right to family. Supports judge to receive relevant | 0<br><br>Allows for more direct contact between family and whānau and Court | 0<br><br>Provides family and whānau with equal rights to attend and participate in proceedings. | -<br><br>May need further guidance on who is considered to be family and whānau for this purpose in order to be useable – otherwise | +<br><br>A mana-enhancing option, as whānau views are not |

| **What mechanisms should be used for birth family and whānau involvement:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **CW (1)** | information so they can make an informed assessment of whether an adoption is in the best interests of the child. | proceedings.[42] More direct involvement is a greater recognition of the importance of the role of family and whanau.<br><br>However, requiring family involvement in some cases may expose child and birth parents to harm. | However, requiring family involvement against the birth parents' wishes may cause harm, particularly in cultural contexts where there is cultural stigma related to unplanned pregnancy and adoption could lead to risk of abuse for mother and child.<br><br>May deter birth parents from engaging in adoption proceedings where they fear involvement of family and whānau. | could require the Court to hear from a large number of people. | mediated to Court via social worker.<br><br>Aligns with the importance te ao Māori places on whakapapa and wider family and whānau. |

42 This approach has been supported in a number of Australian states. In all states except NSW and SA any person may apply to speak at an adoption hearing, at the discretion of the judge. This is also allowed in Alberta and Ontario.

| **What mechanisms should be used for birth family and whānau involvement:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 3:**<br>**Birth family and whānau must consent to an adoption**<br>**ME** | -<br>Family and whānau consent supports child's right to connection with family.<br>However, requiring family and whānau consent may be harmful in some cases, and may prevent adoptions which would be in the best interests of the child. | -<br>Provides the highest level of involvement for family and whānau, in recognition of their role in the life of the child.<br>Does not allow flexibility to acknowledge where family involvement will not be in child's best interests. Forced family involvement may expose child and birth parents to harm in some cases. | -<br>Does not allow for birth parents to make decisions about the best care for their child.<br>Forcing family involvement against the birth parents' wishes may cause harm, particularly in cultural contexts where there is cultural stigma related to unplanned pregnancy and adoption could lead to risk of abuse for mother and child. | - -<br>Potential to greatly increase complexity in the system, leading to delay, need for mediation, greater role for state arbitration role in the most difficult and contentious cases.<br>May not be sufficiently flexible for a wide variety of family situations. | ++<br>Provides for whānau Māori tino rangatiratanga over decisions about care of tamariki. Whānau Māori make decisions about the care of tamariki, which the Court may be used to gain Crown endorsement/ support services.<br>Active protection of tamariki Māori connection to whānau and culture. |

**Preferred Options**

Our preferred options are:

- a requirement that birth family and whānau views on adoption be included in a social worker's report to the Court on an adoption, unless this would cause unwarranted distress to birth parents or the child; and
- provision for the birth family and whānau to attend adoption proceedings with the right to be heard (see below for a discussion of options when birth parents do not want to involve family and whānau).

Requiring family and whānau views to be presented in the social worker report provides the social worker with a clear mandate to engage with the family and whānau early in the process to seek and consider their views. This would enhance the social worker's understanding of the child's circumstances and family and whānau views on the adoption context, and whether whānau-based care options are available, from an early stage in the process. Information on these matters supports the Court when the case is being considered.

Allowing the birth family and whānau to attend proceedings and speak in Court would provide a strong mana-enhancing mechanism for family and whānau to share their views in their own words. The Court could also ask questions and seek further information if required. It would also provide an opportunity for family and whānau to share any information with the

Court that they deem relevant about their wishes related to the child if an adoption was to go ahead, for example regarding aspects such as ongoing contact and name changes. We consider an approach that has a strong focus on supporting birth family and whānau participation, without requiring their consent, is preferable.

Requiring consent from wider birth family and whānau would be a fundamental shift away from New Zealand law's current approach which charges parents and guardians with responsibility for decision-making about a child's care. Requiring birth family and whānau consent to an adoption has the potential to prevent an adoption which is in the best interests of the child.

## What do we do where birth parents do not wish to involve family and whānau?

**Options we have considered**

- **Status Quo:** Wider family involvement pre-adoption occurs only at discretion of birth parents. No mechanisms for in-Court or post-adoption involvement.
- **Option 1 (Preferred): Limit and whānau involvement if it would cause unwarranted distress.**
- **Option 2: Limit family and whānau involvement in certain circumstances with set criteria for what this includes.**
- **Option 3: Birth family and whānau must be involved.**

**Where birth parents do not wish to involve family and whānau:** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status quo** | 0<br><br>Children's right to family and whānau not recognised.<br>Family and whānau input into decisions about the best interests of the child not available. | 0<br><br>No legislative mechanisms for involvement of family and whānau. | 0<br><br>Family and whānau disadvantaged and value of their role in child's life not acknowledged. Negative impact on cultural groups who place value wider family and whānau in decision-making. | 0<br><br>Clear rule, easy to apply. Limiting participation of family and whānau likely simplifies and streamlines the process in many cases.<br><br>Inconsistent with high value placed on family and whānau involvement in other domestic care of children legislation. | 0<br><br>Does not provide for Māori tino rangatiratanga over decisions about care of tamariki. Does not allow for Māori to practice tikanga decision making practices. |

| **Where birth parents do not wish to involve family and whānau:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 1 (Preferred):**<br><br>**Limit involvement if it would cause unwarranted distress.**<br><br>**ME** | +<br><br>Tension between child's right to family and whānau, and the need to protect child from situations where family and whānau involvement could be harmful.<br><br>Focus of unwarranted distress likely to often be on distress of birth parents, rather than child. | ++<br><br>Meets purpose of emphasising importance of family and whānau involvement, while still providing recourse for exclusion of family and whānau, where their involvement would cause harm. | +<br><br>Family and whānau will only be excluded where this involvement would cause unwarranted distress. | 0<br><br>Dependent on decision about decision-maker (see below) e.g. the Judge or Social Worker. (See table below assessing these options). | -<br><br>Crown is the decision maker about whether whānau involvement would be harmful, which is inconsistent with recognising whānau rangatiratanga. Social worker or judge making decision will need strong guidance/ cultural support to ensure that these decisions do not exclude Māori whānau inappropriately. |
| **Option 2:**<br><br>**Limit family and whānau involvement only in certain circumstances, with set criteria for what this includes.**<br><br>**ME** | +<br><br>Strong recognition of child's right to family and whānau.<br><br>May protect the child from being harmed where family and whānau involvement could put their safety at risk.<br><br>Prescribed criteria may be more objective basis for determining harm to | - -<br><br>Meets purpose of emphasising importance of family and whānau involvement, while enabling family and whānau to be excluded where their involvement would cause harm.<br><br>However, may be too inflexible and not allow family and whānau to be excluded in cases | +<br><br>Aims to balance importance of family involvement with the need to prevent harm to the child or birth parents. | - -<br><br>May be difficult to set clear criteria that are sufficiently flexible to cater to all situations. Overly prescriptive criteria may mean people are excluded or included when they should not be.<br><br>Could have implementation issues in what evidence is required to 'prove' circumstances which could be traumatising. | - -<br><br>Objective circumstances may protect Māori whānau from exclusion, but may also exclude Māori whānau where case-by-case decision-making would allow them to be involved.<br><br>May fail to actively protect tamariki right to whānau. |

| **Where birth parents do not wish to involve family and whānau:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | child, than a measure using "unwarranted distress" of birth parent as the test. | where there are legitimate fears of harm. | | | |
| **Option 3:**<br><br>**Wider family and whānau must be involved**<br><br>**ME** | - -<br><br>Family and whānau involvement supports child's right to connection with family.<br><br>However, requiring family and whānau involvement may be harmful in some cases, and may prevent adoptions which would be in the best interests of the child. | -<br><br>Clear guidance about when family and whānau are involved. Does not allow flexibility to acknowledge where family involvement will not be in child's best interests. | --<br><br>Recognises value and importance of wider family and whānau in decision-making.<br><br>However, forcing family involvement against birth parents' wishes may cause harm, especially if there is cultural stigma related to unplanned pregnancy and adoption that could lead to risk of abuse for mother and child. | - -<br><br>Potential to greatly increase complexity in the system, leading to delay, need for mediation, greater role for state arbitration role in the most difficult and contentious cases.<br><br>Difficulty in delineating which family and whānau members have consent rights.<br><br>May not be sufficiently flexible for a wide variety of family situations. | ++<br><br>Provides for whānau Māori tino rangatiratanga over tamariki.<br><br>Active protection of tamariki Māori connection to whānau and culture. |

**Preferred option**

Our preferred option is an ability to limit birth family and whānau involvement where it would cause the birth parents or child unwarranted distress. This could provide for situations where their involvement may cause harm to the birth parents or child. Allowing direct birth family and whānau involvement in adoption decisions, such as speaking in court, comes with risks. We heard in engagement that situations where birth parents have a strong desire not to involve their family and whānau in decision-making about a child's adoption can be exceptionally complex. In many cases, involving wider family and whānau may risk serious harm for the birth parents and the child.

## Who decides if family and whānau involvement would cause unwarranted distress?

**Options we have considered**

We have considered the following options:

- **Status Quo: Birth parent has full discretion over whether family and whānau are involved.**
  There is no requirement to assess whether involvement will cause "unwarranted" distress.
- **Option 1: Social worker makes the decision as to whether family and whānau involvement should occur, or if "unwarranted distress" exception applies.**
- **Option 2: Judge makes the decision as to whether family and whānau involvement should occur, or if "unwarranted distress" exception applies.**

| **Who decides if family and whānau involvement would cause unwarranted distress:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**Birth parent has full discretion over whether family and whānau are involved**<br>**ME** | 0<br>Children's right to family and whānau not recognised. Family and whānau input into decisions about the best interests of the child not available. | 0<br>No legislative mechanisms for involvement of family and whānau. | 0<br>Family and whānau disadvantaged and the value of their role in the child's life not acknowledged. Negative impact on cultural groups who place value on the importance of wider family and whānau in decision-making. | 0<br>Clear rule, easy to apply. Limiting participation of family and whānau likely simplifies and streamlines the process in many cases.<br>Inconsistent with the high value placed on family and whānau involvement in other domestic care of children legislation. | 0<br>Does not provide for Māori tino rangatiratanga over decisions about care of tamariki. Does not allow for Māori to practice tikanga decision making practices. |
| **Option 1: Social worker makes the decision as to whether family and whānau involvement should occur, or if "unwarranted distress" exception applies** | ++<br>Social worker makes their decisions about family and whānau involvement in line with principles of the Act, | +<br>Provides process for determining when family and whānau involvement should be excluded on the | --<br>Will require consideration of principles of natural justice because of the impact on people's rights to participate in the adoption process. Social Worker | --<br>Decision will have an impact on a person's ability to participate in a court proceeding. A judge may | -<br>Crown making decision about involvement of whānau in adoption decision-making, which |

| | | | | | |
|---|---|---|---|---|---|
| **ME** | can balance child's right to family and safety.<br><br>Social worker often has more detailed 'day-to-day' understanding of the circumstances of the case and so can make a well-informed decision. | grounds of unwarranted distress.<br><br>Social workers can usually spend time building rapport with birth parents to understand their circumstances. They can discuss with birth parents whether family and whānau involvement would be harmful, or whether there are opportunities to involve family and whānau, even in limited ways. Because social workers are involved from the beginning of the process, empowering them to make these decisions facilitates early family and whānau involvement where possible. | may not be best placed to evaluate these concerns. | be in a better position to make such a decision.<br><br>Need to consider how the decision could be reviewed. Would judicial review be used, or could this be decision be set aside by the judge? Reviews of the decision may add to the length of the process. | does not support rangatiratanga of whānau. |
| **Option 2:**<br>**Judge makes the decision as to whether family and whānau involvement should occur, or if "unwarranted distress" exception applies**<br><br>**ME** | ++<br><br>Judge makes their decisions about family and whānau involvement in line with guiding principles, can balance child's right to family.<br><br>Judges are well versed in making difficult decisions and well-practised in considering what will be in a child's best interests. | +<br><br>Provides process for determining when family and whānau involvement should be excluded on the grounds of unwarranted distress.<br><br>A judicial process would provide formal legitimacy and an experienced decision-maker. However, a Judge would likely rely in part on a social worker's evidence to make a decision. | +<br><br>Judge will be used to evaluating competing considerations and upholding the right to justice. | +<br><br>Consistent with normal practice for judges to make decisions about who can participate in court proceeding.<br><br>May result in delay. Could result in significant resourcing and timing costs. | -<br><br>Crown making decision about involvement of whānau in adoption decision making, which does not support rangatiratanga of whānau.<br><br>Judge will not be involved with whānau in making determination whether or not they should be involved in case, likely to receive their views mediated through social worker, if at all. |

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| | | If this decision occurs as part of the adoption case, there is a risk that that a judicial decision could be too late in the process to involve birth family and whānau in a genuine way. | | | |

**Preferred option**

We do not have a preferred option as this stage and are seeking further engagement on whether a judge, social worker or other party should be able to decide that family and whānau involvement would cause unwarranted distress. The process will need to consider the needs of different decision-makers in a case at different points. As social workers are required to engage with family and whānau in making a social worker report, they need to be able to make a call on the safety of that involvement early in the process. Once the case gets to Court, the judge will need to apply the guiding principles in determining whether an adoption is in the best interests of the child, and so would need to be confident that not involving family and whānau was appropriate.

## Who can have a say: Hapū and iwi in adoption of tamariki Māori

**Problem definition**

In practice, Oranga Tamariki social workers consider the cultural needs of the child as part of their assessment of an adoption. Increasingly, judges in adoption cases have an understanding of the importance of a child's culture as a factor underpinning their practice and decisions. Their ability to do so is limited by their cultural knowledge of social workers and the judge. There are very limited mechanisms to support culturally aware practice, or to monitor that it is employed consistently in all cases.

The harm of dislocation from culture many adoptees have experienced, particularly those adopted cross-culturally, has been extensively documented. New Zealand research is increasingly documenting the harm experienced by Māori adoptees through loss of whakapapa knowledge and connection to whānau, hapū and iwi.[43]

**What we heard in engagement**

In other reviews of decision making related to tamariki Māori, the Government has heard a strong voice from Māori about the need for Māori rangatiratanga to be provided for. Waitangi Tribunal findings in the urgent inquiry into Oranga Tamariki (WAI 2915) emphasised the need to allow for much greater avenues for Māori to hold influence and agency over decisions that will affect them. The inquiry held that the Tiriti commitment to Māori rangatiratanga over kāinga guarantees the right of Māori to care for and raise the next generation.[44]

**Other information we have considered**

43 See, for example, above n 1.

44 Waitangi Tribunal *WAI2915: He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (2021) 12.

Other jurisdictions have increasingly recognised that indigenous communities have specific needs and rights related to the adoption of their children, and have allowed separate mechanisms for indigenous consultation before an adoption of an indigenous child may take place.[45]

**Options we have considered**

- **Status Quo:** No involvement of hapū and iwi in consideration of the adoption of tamariki Māori.
- **Option 1: Require consultation with hapū or iwi group before adoption of tamariki Māori.**
  Consultation with hapū or iwi-based organisation, which is then reported to the Court and considered as an input into decision-making.

| **Hapū and iwi involvement:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**No involvement of hapū and iwi in consideration of the adoption of tamariki Māori**<br><br>**ME** | 0<br><br>Hapū and iwi may have particular understanding of the needs and interests of tamariki Māori. Excluding them from the process means this knowledge cannot be considered. | 0<br><br>Does not align with reform objective of allowing adoption processes to be informed by other cultures, particularly tikanga Māori, where appropriate. | 0<br><br>Does not acknowledge the cultural understandings and decision-making processes of Māori. | 0<br><br>Hapū and iwi involvement would add time and resourcing requirements to adoption processes. | 0<br><br>Does not acknowledge hapū and iwi rangatiratanga in involvement in decisions in the care of tamariki Māori. |
| **Option 1: Require consultation with hapū or iwi before adoption of tamariki Māori**<br><br>**ME** | ++<br><br>Allows Court to hear hapū and iwi views on whether adoption will be in Māori child's best interests.<br><br>May result in tabling alternative care options within hapū and iwi. | +<br><br>Will ensure hapū and iwi views are taken into consideration when deciding what is best for a child.<br><br>Allows for alternative placements within hapū and iwi to be considered. This | +<br><br>Gives hapū and iwi Māori a say in what happens to their tamariki. However, may mean processes for Māori children take longer than for other children. | --<br><br>Significant initial implementation burden, as processes require development. Could be difficult to develop process to allow this to happen in a timely way particularly given the low number of | ++<br><br>Aligns with te Tiriti as it acknowledges hapū and iwi rangatiratanga in decisions about care of tamariki Māori, although implementation will need to consider the ways that hapū and iwi consultation is |

45 See, for example, Adoption Act 2000 (NSW), s 33 and Adoption Act 1984 (Vic), s 50; British Columbia's Adoption Act RSBC 1996 c5, s 7.

| **Hapū and iwi involvement:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | aligns well with objectives for reform. | | domestic adoptions each year.<br><br>Will require resourcing for Māori hapū and iwi, as well as the Crown.<br><br>Privacy considerations and information sharing issues need to be worked through. | arranged and the weight it holds in decision making.<br><br>Supports active protection of tamariki connection to hapū and iwi and acknowledges hapū and iwi knowledge of the best interests of tamariki. |

**Preferred option**

We do not have a preferred option. We seek further views from engagement, particularly from Māori, about the appropriateness of this option.

## Who makes the decisions?

### Decision-making on adoption

**Problem definition**

Authority for decision-making and advisory and support services is held by government in the domestic adoption process. The Family Court is responsible for considering adoption applications and granting interim and final orders. When making decisions, the Court primarily relies on adoption laws and jurisprudence but may also look at other New Zealand laws and international agreements.

**What we heard in engagement**

From engagement, we heard support for the government and the judiciary continuing to have a role in domestic adoptions. The large majority of the people we engaged with consider that government should continue to hold responsibility for assessment and placement decision-making in the domestic adoption process. We heard that government oversight is an important safeguard to ensure the best interests of the child are upheld and to protect children from exploitation and commodification. People tended to support the higher level of oversight in assessments and the safeguards the Court process provides.

**Options we have considered**

- **Status Quo: Family court holds authority for decision making in adoption.**
- **Option 1: Delegate authority for decision making in adoption.**

| **Decision-making on an adoption:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo (Preferred): Family Court holds authority for decision making in adoption.**<br><br>**ME** | 0<br><br>Family Court has experience in making decisions about children's best interests, and support for court from professionals can support decisions to be made in ways that will protect the rights and welfare of the child. | 0<br><br>Family Court are experienced decision-makers, with experience in applying legislation and precedent. This supports robust decision making, with high public legitimacy. | 0<br><br>Court holds impartial role in determining adoption cases, which promotes equity.<br><br>Court needs strong cultural capability to support equitable outcomes in adoption cases for all cultures. Te Ao Marana and other ongoing | 0<br><br>No additional feasibility/ resourcing impacts.<br><br>Retaining decision-making and assessment functions is consistent with the public policy approach to decisions on the care of | 0<br><br>Crown holds all decision-making powers over care of tamariki Māori. This does not recognise Māori rangatiratanga over decisions about care of tamariki. |

| **Decision-making on an adoption:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | initiatives will continue to grow Court cultural capability. | children that are made in the Family Court.<br><br>Our other child-centred legislation (CoCA and Oranga Tamariki Act) do not allow for non-government providers to make decisions about orders for children. The state (Family Court, Oranga Tamariki) can still consider different perspectives to inform their decision-making and assessment, but 'final' decision sits with the Court. | |
| **Option 1: Delegate authority for decision making in adoption**<br><br>**ME** | 0<br><br>A delegated process may provide more specific support for a particular child's best interests.<br><br>However strong monitoring and safeguards would be required to support all delegated decision making to appropriately consider all child's rights, particularly to family, identity and culture. | - -<br><br>Provides a mechanism for adoption decisions to be made.<br><br>However, lacks the resourcing and experience of the Court system.<br><br>Presents risks of inconsistent decision making, lack of support and lack of public legitimacy. Would need strong monitoring and | - -<br><br>Could result in inconsistent decisions, with inequitable outcomes for children and adoptive applicants.<br><br>Risk of inequitable outcomes for some groups e.g. disabled communities if insufficient independent monitoring/oversight. | - -<br><br>Processes would need to be established and regulation, monitoring and oversight established to protect children.<br><br>Inconsistent with other child-centred legislation, which has the Court as the decision maker in all cases. | ++<br><br>Could allow for Māori to have tino rangatiratanga over decision making relating to tamariki Māori if decision making was delegated to Māori. |

| **Decision-making on an adoption:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | accountability systems to be an effective option. | | | |

**Preferred Option**

Our preferred option is for the Family Court alone to make adoption orders, and government to hold responsibility for assessment of prospective adopters, rather than transferring some responsibility to third parties.

The court system is an established method of adjudication with public legitimacy and established information gathering and advisory processes. The roles of lawyers and social workers in the adoption process are defined and these sectors have considerable experience. Any devolution of services would require regulation and oversight so that the best interests of children are protected.

Retaining decision-making and assessment functions within government is consistent with the public policy approach to decisions on the care of children that are made in the Family Court. This does not exclude the state (Family Court, Oranga Tamariki) from considering different perspectives to inform their decision-making and assessment, but reinforces that the 'final' decision sits with the Court. Options to consider how Māori could be more involved to support Court decision-making and state assessment processes is discussed including increasing role of family and whānau, and engaging on whether hapū and iwi should need to be consulted when tamariki Māori are placed for adoption.

## Engagement with Oranga Tamariki (Direct applications)

**Problem definition**

Adoption applications can currently come to the Court in two different ways. The most common pathway is for an adoptive applicant to go through an Oranga Tamariki preparation and suitability assessment, before being selected as an adoptive parent from the pool by a birth parent. Alternatively, birth and adoptive parents may independently come to a decision about a proposed adoption, and apply directly to the Court for an adoption. This is referred to as a "direct application."

Where an application comes directly to the Court, adoptive applicants do not engage with Oranga Tamariki prior to application. They do not receive the information and preparation sessions that applicants in the Oranga Tamariki adoptive applicant pool receive. Birth parents also do not engage with Oranga Tamariki, meaning that social workers may have a less comprehensive understanding of the context of why an adoption is occurring, and this information cannot be provided to the Court. Where Oranga Tamariki do not engage with a birth parent pre-adoption, they are also unable to assess if there is any risk of coercion in the adoptive arrangement.

**What we heard in engagement**

We heard in engagement that prospective adoptive parents not engaging with Oranga Tamariki could mean that they had less understanding of some of the child's needs, such as those regarding identity and culture. We also heard that in these cases, Oranga Tamariki have a shorter timeframe in which to assess the suitability of an adoptive applicant while a case is before the courts, and their reports maybe unable to source some useful information for the Court.

**Options we have considered**

- **Status Quo: Allow applicants to apply directly to the Family Court without having to engage with Oranga Tamariki**.
- **Option 1 (Preferred): Adoptive applicants are required to engage with Oranga Tamariki before making an adoption application to the Court.**
  All applicants to adopt must first go through Oranga Tamariki preparation and assessment. Direct applications to the Court would not be allowed.

| **Engagement with Oranga tamariki:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo:**<br>**Allow applicants to apply directly to the Family Court without having to engage with Oranga Tamariki**<br>**ME** | 0<br>Checks on adoptive applicants in direct applications may be less comprehensive, meaning that there is less assurance that the applicant is a suitable adoptive parent who will meet the child's needs, interests and welfare. | 0<br>Provides process for an adoption application to come to Court.<br>Less support for adoptive applicant and less information around the context of the adoption for the Court, which can affect Court's decision making. | 0<br>Direct applications receive less preparation and assessment services, than applicants through the Oranga Tamariki process. | 0<br>Allows direct applicants agency to choose whether or not to engage with Oranga Tamariki.<br>Small cost saving in preparation. | 0<br>Less opportunity for social workers to engage with birth parents on matters such as potential alternatives to adoption. Many adoptions between different cultures currently are direct applications. This is not in keeping with active protection of tamariki right to whānau and culture. |
| **Option 1 (Preferred):**<br>**Adoptive applicants are required to engage with to engage with Oranga Tamariki before making an application to Court.**<br>**ME** | +<br>Ensures that all adoption applications face equivalent scrutiny as to the suitability of the adoptive applicants, ensuring all applications | +<br>Increases consistency in the levels of preparation of adoptive applicants and the levels of information about the context of the adoption | +<br>Increases equity of process for all adoptive applicants. | -<br>This option will require a small amount of additional resource for preparation services for adoptive applicants. | +<br>Suitability assessments include an assessment of the cultural support that an adoptive applicant can provide the child. It is consistent with te Tiriti principle of active protection to require that this consideration is |

| **Engagement with Oranga tamariki:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | focus on child's best interests<br><br>It could be argued that added delay in the process is not in the best interests of the child where direct applications were from clearly suitable applicants | for the Court | | | applied to all adoptions equally. |

**Preferred Option**

Our preferred option is that the new adoption system require all applications to engage with Oranga Tamariki before they are brought before the Family Court.

This option will ensure that adoptive parents go through information and preparation sessions to grow their understanding of the particular needs of adoptive children. It also supports Oranga Tamariki to engage with birth parents, to have a full understanding of the context of the application to inform social worker reports on the adoption.

## How do they decide?

### Suitability to adopt

**Problem definition**

Currently the law says that an adoption must promote the "welfare and interests" of the child and that the applicant must be a "fit and proper person" to adopt. The Adoption Act Regulations 1959 require the social worker's report to include any details of the applicants' criminal history. The regulations also require applicants to disclose any relevant details of their medical and financial circumstances to the Court. However, the law does not set out the factors that make a person suitable, or give judges guidance as to how an applicant's criminal, medical or financial history should be weighted. Oranga Tamariki practice determines what other factors are assessed in considering whether an adoptive applicant is suitable, and these factors inform the content of a social worker's report on an adoption. A judge uses this report to determine whether the adoption will be in the best interests of a child.

**What we heard in engagement**

We heard that case by case assessments of suitability were better than a set legislative test for suitability, given that what would make an adoptive parent suitable to adopt will differ from case to case. Most of those we heard from supported safety, health and financial criteria being used in suitability assessments of adoptive parents, but with some degree of flexibility, and also considered that an applicant's attitudes towards adoption (for example to maintaining the child's culture and links to their birth family) should make up part of the suitability assessment. We heard from some communities that there was a need for flexibility in assessing the impact of a person's medical or financial circumstances on their ability to parent, so as not to entrench disadvantage, e.g. to the disabled community.

**Options we have considered**

- **Status Quo (Preferred)**: **Judge must be satisfied that the adoptive applicants are suitable to adopt**.
  A judge's decision on suitability will be informed by the social worker report and any other relevant information presented to the Court. Suitability assessment that informs the social worker report left to professional discretion, rather than set in law. Regulations require police, health and financial assessments to be provided to judge as part of suitability assessments.
- **Option 1: Include suitability criteria or a test in legislation. The Courts would use these criteria to assess whether an adoptive parent it suitable to adopt**.
- **Option 2: Include restrictions on who can be considered suitable to adopt.**
  For example, bars based on safety, health and financial characteristics such as specific criminal convictions could be a bar to being considered suitable to adopt.

| **Suitability:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo (Preferred): Judge must be satisfied that the adoptive** | 0 | 0 | 0 | 0 | 0 |

| **Suitability:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **applicants are suitable to adopt.**<br>A judge's decision on suitability will be informed by the social worker report and any other relevant information presented to the Court. Suitability assessment that informs the social worker report left to professional discretion, rather than set in law<br><br>**ME** | Social worker reports support judges to make decisions about whether adoptive parents are suitable to protect the welfare of the child, and whether the adoption will be in the best interests of the child. | Criteria for determining suitability determined by best practice understandings of social work profession. Social workers are able to assess suitability with individual discretion, and flexibility. Criteria may evolve with best practice over time.<br><br>Lack of objective legislative standard may lead to perceptions of inconsistency, and individual practice may require monitoring. | Consistent criteria applied to all applicants from a population group/cultural perspective. | No feasibility constraints.<br><br>Practice-based approach is consistent with other child-centred legislation. | Flexibility that enables all adoptive parent options to be explored fits with active protection of tamariki welfare.<br><br>Current practice-based criteria include that the adoptive applicant understand the importance of accepting and understanding the child's cultural heritage.<br><br>However, Crown maintain decision making role, as to who and what constitutes a suitable carer, including for tamariki Māori. Risk that suitability assessment may be driven by Pākehā assumptions of what makes someone a suitable parent. |
| **Option 1: Include suitability criteria or a test in legislation**<br><br>**CW (2)** | 0<br><br>Criteria may support judges to make more consistent decisions about whether adoptive parents are suitable, and in the best interests of children.<br><br>Conversely, inflexible criteria might prevent an | -<br><br>Inflexible criteria are less able to adapt to changing needs of different children and changes in best practice understandings over time.<br><br>Setting out suitability criteria in law may help | -<br><br>No differential treatment.<br><br>However, this may fail to recognise the ways in which differential treatment would promote equity for some carers in consideration of their | 0<br><br>Feasible and unlikely to have resource implications. Social workers would still be required to assess parents against these factors. | -<br><br>Need to make clear that suitability is not driven by Pākehā assumptions of what makes someone a suitable parent. Potential that suitability criteria that are inflexible may uphold unconscious bias. |

| **Suitability:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | adoption which would be in the child's best interests. | public understanding and transparency of judicial decisions. | suitability, e.g. disabled parents.<br><br>Suitability criteria would need to be interrogated to make sure that it does not impose cultural biases in its assumptions about what makes a "suitable" parent. | | Criteria would need to be carefully designed to promote active protection of tamariki Māori rights and welfare. |
| **Option 2: Include restrictions on who can be considered suitable to adopt. For example, bars based on safety, health and financial characteristics**<br><br>**CW (1)** | +<br><br>Has the potential to provide extra protection to children against being adopted by unsuitable adoptive parents, which would protect the child's rights.<br><br>There is also a risk that such restrictions prevent potential suitable adoptive placements, as it will not take into account changes in circumstance, e.g. time elapsed since criminal convictions. | - -<br><br>May guide judicial decision-making on suitability.<br><br>However, in practice judges, are highly likely to give appropriate weight to criminal convictions and health or financial considerations which might make a person unsuitable to adopt. If a judge considers a person suitable despite a relevant conviction, there is likely to be strong justification. | - -<br><br>May frame bars to criteria around factors that do not actually determine suitability and are likely to disproportionately negatively affect some groups, e.g. disabled, Māori and Pacific peoples. | +<br><br>This option is likely to be clear and easy to understand and operate, depending on criteria chosen.<br><br>However, criteria may conflict with international and domestic human rights obligations if framed in ways that create discrimination. | -<br><br>Māori disproportionately likely to be affected by proposed bars .Need to make sure that any bars to suitability do not disproportionately impact on Māori, in order to provide active protection of equal Māori rights to be adoptive parents under article 3 of te Tiriti. |

**Preferred options**

Our preferred options are that:

- before an adoption order can be made, the Judge must be satisfied that the adoptive applicants are suitable to adopt. A judge's decision on suitability will be informed by the social worker report and any other relevant information presented to the Court.
- that the suitability criteria used to inform the social worker report be left to professional discretion, rather than prescribed in law.

These options support suitability assessment that is robust enough to assess that adoptive parents meet baseline expectations of suitable parenting, but also flexible enough to allow for the differing needs and circumstances of individual cases, and changes to what is considered suitable over time. Oranga Tamariki would continue to develop practice guidance for the suitability assessment, which supports suitability assessments to reflect best practice understandings.

## Social worker reports

**Problem definition**

Currently a social worker must provide a report to the Court on the suitability of adoptive applicants. Oranga Tamariki determines the content of the report. While this has the benefit of flexibility to changing standards of practice, the lack of specificity provides no safeguards that the report that is child-centric and the judge will receive the information they need to decide whether an adoption will be in the child's best interests.

**What we heard in engagement**

We heard that the social worker's report should be comprehensive and have a variety of relevant information. People said it should include post-birth contact intentions and plans. People also said it should set out how the applicants will communicate with the child about the adoption and inform them of the right to obtain their full birth details. We also heard that the report should set out the cultural needs of the child and how they will be addressed, and the views of the wider family and whānau.

A few submitters suggested requiring separate reports from social workers; one about the child's best interests and their family situation, and another reporting on the adoptive parents.

**Options we have considered**

- **Status Quo (Preferred): Social worker report must include assessment of suitability of adoptive applicants.** No further requirements for content of social worker report.
- **Option 1 (Preferred): Social worker to encourage and report on child participation in adoption process.**
- **Option 2 (Preferred): Birth family and whānau views set out in social worker report.**
- **Option 3 (Preferred): Social worker report includes relevant information on child's culture.**

| **Social worker reports:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo (Preferred):**<br><br>**No legislative guidance on requirements for social worker report beyond assessment of adoptive applicant suitability.**<br><br>**CW (All)** | 0<br><br>Social worker's report provides a basis for assessing whether an adoptive applicant will meet a child's best interests.<br><br>However, the law does not require reports to consider a number of key aspects of the child's best interests, such as culture. | 0<br><br>Little legislative specificity to shape social worker report. | 0<br><br>Lack of emphasis on culture in report puts forward assumption that culture of child to be adopted is not relevant. This disadvantages minority cultures. | 0<br><br>Report processes are embedded and resourced within current system. | 0<br><br>Lack of emphasis on importance of culture devalues culture of tamariki Māori, which does not support their equal rights under Article 3 of te Tiriti. |
| **Option 1 (Preferred): Social worker to encourage and report on child participation in the adoption process.**<br><br>**CW (2,3) (Addition to Status Quo)** | ++<br><br>Active requirement on social worker will support children to have opportunities to participate.<br><br>Reporting on participation will help to inform decision-making, which supports decisions being made in the child's best interests. | +<br><br>Will support child participation and consistency of practice. | +<br><br>Reporting child participation may bring particular benefits for some groups in allowing Court to understand their level of participation and make decisions accordingly, e.g. disabled persons. | 0<br><br>Reflects current practice. Flexibility may be lost by if this requirement is included in primary legislation and practice may not be able to evolve.<br><br>May need guidance to support implementation. | +<br><br>Provides a mechanism for supporting tamariki participation, which can uphold the mana of the child.<br><br>Consideration needs to be given to how this is implemented, to support the social worker to safeguard the child's views, and represent those views in a way that upholds of the child's mana and recognises them as taonga.<br><br>Need for implementation to require that child social worker has cultural |

| **Social worker reports:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | | competence to respect and express tamariki views. |
| **Option 2 (Preferred):**<br><br>**Birth family and whānau views set out in social worker report.**<br><br>**CW (1,3) (Addition to status quo)** | ++<br><br>Will provide information to the court about family and whānau views on whether an adoption is in the best interests of the child, and potentially present in-family options for care. This supports the child's right to family connection. | +<br><br>Supports consideration of whether child is in need of adoptive care. | + +<br><br>Provides for increased consideration of family and whānau views in adoption decision. | +<br><br>Clear and easy to implement. Resource required to enable social worker to gather whānau views, although this already occurs in the majority of cases. | +-<br><br>Gathering whānau views on adoption supports active protection of tamariki right to whānau.<br><br>Whānau role and mana acknowledged. However, this input is mediated through the Social Worker, and judge makes decisions about weight whānau views hold, so this option is not fully recognising rangatiratanga. |
| **Option 3 (Preferred):**<br><br>**Social worker report includes relevant information on child's culture.**<br><br>**CW (1,2) (Addition to status quo)** | ++<br><br>Upholds children's right to identity and culture by ensuring that social worker discusses child's culture and documents what is known. Informs better decision making on child's best interests. | +<br><br>Supports court to have better information to support decision making.<br><br>Limited by the level of knowledge that family and whānau hold on their own culture and their willingness to share this information. | ++<br><br>Supports enhanced consistency of cultural knowledge about children to be adopted. | +<br><br>Provides clear mandate for social workers in gathering cultural information, but likely to still be implementation challenges to info gathering in some cases. | +<br><br>Will help to encourage whakapapa information to be collected and available to Māori children, which is crucial for active protection of tamariki right to whakapapa. Information will also support tamariki right to whānau and culture. |

**Preferred options**

Our preferred options are that the social worker report:

- continue to report on an adoptive applicant's suitability
- encourage and report on child participation in adoption process;
- Include birth family and whānau views set out in social worker report; and,
- include relevant information on child's culture.

Requiring in law that the social worker report take a certain form or include certain aspects would create baseline expectations of what information the Court should have in making this decision. This guidance would be in line with existing best practice.

## Court power to request expert advice

**Problem definition**

Currently the Court does not have the power to order any additional reports, such as cultural, medical, psychiatric or psychological reports about the child. While some information will be provided to the Court through the social worker report, sometimes the Court may need additional information to make an informed decision that is appropriate for a child's specific vulnerabilities or needs.

**What we heard in engagement**

In engagement, there was strong support for:

- better information on a child's culture being gathered and available to the Court in making decisions;
- allowing the Court to order a cultural report.

Introducing the ability for the Court to order additional reports was also strongly supported by most of those we heard from in engagement, including the Family Court Judges. Improved information was viewed as being central to helping judges make decisions that appropriately considered child needs.

**Options we have considered**

- **Status Quo: Court does not have the power to order specialist reports.**
- **Option 1 (Preferred): Court can order a specialist medical, psychiatric or psychological report on the child.**

- **Option 2 (Preferred): Court can order cultural reports.**

| **Court power to request expert advice:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**Court may not order additional reports as part of adoption process.**<br>**ME** | 0<br>Court unable to access all information it may need to make an order in the best interests of the child. | 0<br>Court does not have information to support decision making where a child has medical and/or psychological needs or to support consideration of culture in decision making. | 0<br>Fails to provide Court with potentially relevant information about<br>- children with specific medical and psychological needs, e.g. disabled children; and<br>- children with specific cultural needs<br>Could lead to inequitable outcomes for children with those needs. | 0<br>Different reports available in proceedings under the Care of Children Act than in proceedings under the Adoption Act. | 0<br>Inability to receive appropriate advice restricts the Court's active protection of tamariki welfare. Inability to order a cultural report fails to value the importance of culture, which is a taonga for tamariki, and devalues the influence of Māoritanga in the Courts. |
| **Option 1 (Preferred):**<br>**Court can order a specialist medical, psychiatric or psychological report on the child.**<br>**CW (2)** | +<br>Enables the Court to get all the information it needs to make orders in the best interests of the child. | +<br>Supports thorough decision making by Courts, with Court able to access all information they consider will be relevant. | ++<br>Supports the equitable care of children with particular needs, for example children with disabilities. | -<br>Ensures court can access relevant information.<br>Costs, and substantial delays (due to shortage of providers) associated with these reports.<br>Would be consistent with powers for court to order reports in Care of Children Act proceedings. | 0<br>Will help to provide specialist information to support decisions about what is in the best interests of tamariki Māori. Risk of imposing Pākehā models of wellbeing on Māori. This could be a disadvantage to Māori unless culturally appropriate approaches are taken. |

| **Court power to request expert advice:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Option 2 (Preferred):**<br><br>**Allow Court to order cultural report.**<br><br>**CW (2)** | ++<br><br>Cultural reports provide information that will assist judicial decision-making about the best way that care of a child can maintain their cultural identity. | +<br><br>Reports provide Court with the information it needs to make decisions. | +<br><br>Support Court to understand relevant cultures involved in an adoption.<br><br>Risk of disadvantaging some adoptees where cultural report writers are not available for some cultures. | -<br><br>Risk of insufficient supply of quality report writers for all cultures. May increase delays and costs.<br><br>Cost will be moderate, but small numbers required. Guidance needed to aid decisions about when cultural report needed, social worker report may sufficiently canvas cultural issues in some cases. | +<br><br>Reports will inform Court about te ao Māori considerations in discussing adoption of tamariki Māori to help inform decisions.<br><br>However, judges will need to give cultural issues appropriate consideration. Implementation may require guidance on use of reports and how they are weighted in decision making. |

**Preferred options**

Our preferred options are that:

- the Court have the power to order cultural reports; and,
- the Court have the power to order medical, psychiatric or psychological reports on the child.

Allowing the Court to order these reports will support it to have all relevant information about as child when considering whether an adoption will be in the best interests of that child. It is also consistent with existing powers in the Care of Children and Oranga Tamariki Acts. This supports the Court to have the ability to access the same information for adoption proceedings, as they can for other proceedings about children's care arrangements.

## Consideration of alternative care arrangements

**Problem definition**

Adoption is the most permanent of care of children arrangements. In some cases, adoption orders may not be the most appropriate care arrangement for a child, such as where there may be extended family able to care for the child. In those cases, another order, such as a guardianship order (where birth parents and family or whānau can have more involvement in decisions for the child) may be more appropriate. Different arrangements, such as placement with the birth family and whānau or recognising the role of the step-parent may also sometimes be more appropriate for a child. However, when the Court is considering an adoption order, they are not currently required to consider whether other types of care arrangements should be used.

**What we heard in engagement**

Many people and organisations we heard from supported using adoption as a last resort, or at least considering alternatives before granting an adoption order. We heard that alternative care orders are often better for the child, when compared with the impacts of adoption. One of the main reasons given was that an alternative order can provide more connection with the child's birth family. We heard that decisions should not just consider the pros and cons of adoption as a way to care for the child, but what other orders and care arrangements could be made.

During consultation, some people suggested that step-parent adoptions should be prohibited as they are unnecessary. These people considered that guardianship orders available under the Care of Children Act can meet the needs to recognise and provide rights to a step-parent.

**Options we have considered**

- **Status Quo: The law is silent on how and when alternatives to adoption should be considered.**
- **Option 1 (Preferred): Court has to be satisfied that alternative care options have been considered before making an adoption order.**
- **Option 2: Court must be satisfied alternatives to adoption have been considered only where the proposed adoptive parent is a step-parent.**

| **Consideration of alternative care arrangements:** Analysis of options<br>KEY: ☐ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo:**<br><br>**The law is silent on how and when alternatives to** | 0<br><br>Other alternatives are not considered which may be | 0<br><br>Does not support effective decision-making, as less permanent options for a child's care, such as | 0<br><br>Family and whānau disadvantaged when adoption chosen without sufficient consideration | 0<br><br>Court only needs to consider whether an adoption is in the child's best interests, not | 0<br><br>Lack of consideration of alternatives means that due consideration may not be given to other arrangements |

| **Consideration of alternative care arrangements:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **adoption should be considered.**<br><br>**ME** | in the child's best interests. | guardianship may not be consistently considered. | being given to options for in-whānau care. | whether other options are viable or better suited. | that may be better suited to tamariki Māori. This fails the obligation of active protection of tamariki rights, especially rights to whānau and culture. |
| **Option 1 (Preferred):**<br>**Court has to be satisfied that alternative care options have been considered before making an adoption order.**<br><br>**ME** | ++<br><br>Consideration of whether alternative care options are available that meet child's needs. Will help Court to determine that arrangement chosen is in the best interests of the child. Also upholds children's right to be cared for by their family as family care likely to be considered as an option, rather than just whether prospective adoptive parents are suitable. | ++<br><br>Would ensure other care options are considered without making adoption a last resort.<br><br>Still allows judicial discretion to make decisions about when adoption will be in best interests of child. | +<br><br>No equity concerns. | -<br><br>Straight forward requirement, but could prolong proceedings as the Court needs to make broader considerations and may need further information to support decision-making.<br><br>More closely aligns with care and protection system, meaning all children who are not able to be cared for by their parents receive the same opportunity for consideration of care options. | ++<br><br>Requiring consideration of alternatives to adoption will help ensure alternative arrangements within the whānau are considered. Particularly alongside proposed principles that recognise the role of family, whānau, hapū and iwi, considering alternatives to adoption supports active protection of the rights of tamariki to whānau and culture. |
| **Option 2:**<br>**Court must be satisfied alternatives to adoption have been considered only where the proposed adoptive parent is a step-parent.**<br><br>**ME** | +<br><br>Encourages consideration of whether alternative care options are available that meet the child's needs in some circumstances, but not all. | +<br><br>Would ensure other care options are considered in some circumstances.<br><br>More targeted approach that identifies that alternative care orders are currently less likely to be considered in the case of | -<br><br>Treats step-parents differently from other prospective adoptive parents. May amount to discrimination on grounds of family status, whether this would be justifiable | -<br><br>Feasible, but proceedings could take longer due to the court needing to make further considerations. Would need to provide clarity over what level of consideration of alternative options is considered appropriate, or the wider factors | +<br><br>Will help ensure that alternative arrangements within the whānau are considered.in place of a step-parent adoption . Risk remains that within whānau care arrangements not considered for non-step-parent adoptions, which is not in keeping with |

| **Consideration of alternative care arrangements:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | step-parent adoptions. However, this targeting may obscure the need for alternative care options in other adoption cases. | discrimination would need to be interrogated. | that would justify a step-parent adoption. | active protection of tamariki right to whānau care. |

**Preferred options**

Our preferred option is that the Court must be satisfied that alternative care arrangements have been considered before granting an adoption order.

This will require the Court to consider the full range of options available for a child's care and chooses the option that meets the child's best interests. This consideration can be applied consistently across all cases, will ensure that guardianship and permanent care of children options are appropriately canvassed, and support the judge to be satisfied that adoption is the best care option for the child. We do not consider it would be justified to prohibit or make it more difficult for a step-parent to adopt where they otherwise meet the requirements for adoption.

## What is the legal effect of an adoption?

### When an adoption becomes final: interim and final adoption orders

**Problem definition**

The law requires the Family Court to make an interim adoption order in the first instance, unless the Court finds there are special circumstances that make it desirable to make a final adoption order. The adoptive parents do not become the child's legal parents until the order is made final, but the interim order gives them responsibility for day-to-day care of the child. Interim orders have been described as a 'trial period' for the child and the adoptive parents, however, in practice, we have found no record of any interim orders that have not been followed by a final adoption order.

Currently, final orders are often approved in the first instance, which suggests that their use is generally accepted. There is no support or monitoring provided to adoptive parents, so no apparent way for the court to ascertain whether a final order should be approved or not approved. Additionally, the interim period has the potential to create uncertainty in the relationship between the child and their adoptive parents.

**What we heard in engagement**

We heard in engagement that adoptive parents considered interim orders unnecessary and that they did not receive additional support that might provide a rationale for this 'trial period' being imposed. This view was supported by the Family Court Judges. We also heard in engagement that the small risk of the order not being made final creates uncertainty for the child and the adoptive parents and a fear that the child may be removed.

**Options we have considered**

- **Status Quo: Family Court required to make interim order before a final adoption order unless there are special circumstances.**
- **Option 1: Family Court must make final adoption orders in the first instance.**
- **Option 2 (Preferred): Family Court can make final adoption orders in the first instance, unless the judge considers that the circumstances of the case make an interim order desirable.**

**Interim and final adoption orders:** analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status Quo:**<br>**Orders interim, unless made as final because of special circumstances** | 0<br>Adoptive parents may feel less secure regarding the permanence of adoption. This may impact on the | 0<br>Frequent use of special circumstances to grant a final adoption order in the first instance suggests that | 0<br>Adoptive parents impacted by lack of security about | 0<br>Interim orders appear to be unnecessary. No evidence found of any interim order not being approved as a | 0<br>No recognised Tiriti implications. |

| **Interim and final adoption orders:** analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **ME** | child's connection with their adoptive parents.<br><br>Can provide time to support decisionmakers to ascertain whether the adoption is appropriate for the child. | final orders are more desired, and are often viewed as appropriate by judges.<br><br>Lack of monitoring of interim orders means that function of interim orders as "trial period" has little utility. | whether adoption will proceed. | final order, and many orders are made final through special circumstances.<br><br>May impose unnecessary costs by having an additional order and hearing to approve final order.<br><br>Court may not always have all the information needed to make the final order. | |
| **Option 1:**<br>**Family Court must make final adoption orders in the first instance**<br><br>**ME** | +<br><br>Supports the connection between the adoptive parents and child being formed, by ensuring security and permanency of adoption from earliest stage.<br><br>Takes away security of interim order, which may be overturned swiftly, which may place child wellbeing at risk. | -<br><br>Does not provide opportunity for further consideration of adoptive placement, which the lack of permanency of an interim order allows.<br><br>No flexibility in situations where it is not appropriate to make the final order in the first instance. | 0<br><br>No specific equity concerns. | +<br><br>Would simplify the recognition process and reduce the need for unnecessary court appearances in approving an adoption. | 0<br><br>No recognised Tiriti implications. |
| **Option 2 (Preferred):**<br>**Family Court can make final adoption orders in the first instance, unless the judge considers that** | ++ | ++ | + | ++ | 0<br><br>No recognised Tiriti implications. |

| **Interim and final adoption orders:** analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **the circumstances of the case make an interim order desirable.**<br><br>**ME** | Would provide more certainty for the child in most cases.<br><br>Gives the court ability to make an interim order, if, in the circumstances a final order is not in the best interests of the child. | Provides flexibility where it is not appropriate to make the order in the first instance.<br><br>Allows for further scrutiny of orders where this is desirable. | Supports adoptive parents' and child's need for security. | Would simplify the process and reduce the need for unnecessary court orders.<br><br>Provide flexibility where it is not appropriate to make the order in the first instance. | |

**Preferred options**

Our preferred option is that the Court must make a final adoption order, unless the judge considers that the circumstances of the case make an interim order desirable. The discussion Document also includes questions about whether it is necessary to specify in legislation the types of circumstances that would make an interim order desirable or whether this should be left to the discretion of the Court.

Final adoption orders will be appropriate in most cases, providing certainty for the child and adoptive parents, which will assist with development of the adoptive relationship. However, providing flexibility provides the Court with the discretion to consider what is in the best interests of the child.

## Legal effect of adoption

**Problem definition**

The legal effect of adoption sets out the status of an adopted person and their legal connection to birth and adoptive families. This underpins the rights of the adopted person and sets out the responsibilities of birth and adoptive parents towards the child following adoption.
The legal effect of adoption has flow on consequences for parents and the child in a range of areas. Under current law:

- a child may inherit from adoptive parents, and is not entitled to inherit from birth parents as of right;
- adoptive parents must pay child support and maintenance, and birth parents have no ongoing responsibilities for these matters;
- adoptive parents have day to day care for and decision-making about a child; and
- the child's citizenship rights in New Zealand law flow from both birth parents and adoptive parents.

Under current law, an adoption order legally severs the links between an adopted person and their birth family and wider whānau. It replaces the birth family with the adoptive family in law, with the effect that the adopted person is treated "as if born to" their adoptive parents by law. This has been referred to in commentary as the "legal guillotine."

**What we heard in engagement**

Most people we heard from in engagement supported removing the 'legal guillotine' effect of a final adoption order, where a child's legal connection to their birth parents is severed following an adoption order. We heard that adoption should not sever the adopted person's connection to their birth parents, but it should clearly define adoptive parents' rights to care for the child in order to provide them with security and stability.

Some people considered that that succession and inheritance for an adopted child should continue to be the same as if the child was a biological child of their adopted parents. Most people we engaged with also considered that the adopted person should be able to inherit from their birth parents.

Almost all people who engaged with us on child maintenance considered that maintenance should continue to be the responsibility of the adoptive parents, as the birth parents intend to give these responsibilities up when they place the child for adoption, and the adoptive parents agree to take them on as a condition of the adoption.

We did not engage specifically regarding the rights of adopted persons to citizenship, and so did not receive much specific feedback on this matter. However, engagement strongly supported the theme that an adopted person should not be disadvantaged because of the legal effect of their adoption.

**What this section covers**

The following options sections are broken down into the sub-areas of legal effect, with options considered concerning:

- legal effect;
- responsibilities for child maintenance
- citizenship rights of the adopted person.

We do not discuss the effect on inheritance (or succession law) because, it is proposed that how succession law applies to adopted people will be considered as part of any agreed wider succession reform work. The discussion document does not propose any options on this.

## Legal effect

**Options we have considered**

- S**tatus Quo: Adoption means that a child has no legal connection to their birth family and whanau.**
- **Option 1: Birth and adoptive parents share legal guardianship rights and responsibilities for the child**
  The legal effect of adoption will recognise both the birth parents and the adoptive parents as the child's legal parents, but the adoptive parents have additional responsibilities. This could mean the adoptive parents have day-to-day care of the child and are the child's primary guardians. The birth parents could still maintain some parental responsibilities to the child – these could be decided on a case-by-case basis depending on the role they will continue to play in the child's life.
- **Option 2 (Preferred): Birth parents and adoptive parents are both legal parents of the child following adoption, however only adoptive parents hold guardianship rights and responsibilities**
  The legal effect of adoption will recognise both the birth parents and adoptive parents as the child's legal parents, but only the adoptive parents are permanent guardians and have full parental rights and responsibilities toward the child. Birth parents do not remain guardians.
  This could be similar to situations under the Care of Children Act in which the Court removes a legal parent's guardianship and parental responsibilities, and create new guardians, but the parent is still recognised as having a legal relationship to their child.

| **Legal effect:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**Adoption means that a child has no legal connection to their birth family and whānau**<br><br>**Adoptive parents hold all guardianship rights to decision making over child**<br><br>**Adoptive parents hold all rights and responsibilities for child's day to day care**<br><br>**ME** | 0<br><br>Children's connection to their birth family is severed causing lasting harm and breaching children's rights to family and identity.<br><br>Child has certainty and consistency regarding adoptive parents' ability to make decisions about them.<br><br>Placing responsibility for day to day care with adoptive parents supports the child's continuity and security of care, and will support child welfare given that purpose of adoption should allow adoption to only occur where birth parents are unable or unwilling to provide care. | 0<br><br>Provides clarity on the effect of an adoption, with no question regarding roles of birth and adoptive parents.<br><br>Adoptive parents are able to make decisions efficiently without needing to gain agreement of birth parents.<br><br>Placing responsibilities for day to day care with adoptive parents is in keeping with the intent of adoption as a care option; if parents desire ongoing day to day care opportunities, then a different care arrangement for their child which provides this should be chosen . | 0<br><br>Birth family and whānau lose their connection to the adopted child entirely.<br><br>Adoptive parents and family gain all rights and responsibilities of parenthood and family connection to the adopted child and their descendants.<br><br>Decision making rights all sit with adoptive parents, instead of birth parents and family and whānau.<br><br>Rights to day to day care sit with adoptive parents, which is likely to affect the ability of birth family and whānau to connect with child. | 0<br><br>No feasibility constraints.<br><br>Legal effect of adoption is consistent with international obligations' understanding of the legal effect of adoption, including the Hague Convention.<br><br>Consistent with most common overseas jurisdictions legal effect of adoption, which allows for New Zealand adoptions to be easily recognised overseas when New Zealanders migrate with adopted children.<br><br>Clarity and concentration of decision-making rights supports adoptive parents to navigate processes that require parental approval of a decision for child, e.g. in health, education.<br><br>Ensuring clarity of day to day care for adoptive child provides. | 0<br><br>Severs tamariki Māori legally from their whakapapa. No requirement for protection of identity, whānau connection, cultural identity. Māori rights to succession through whakapapa sometimes lost. Significant past harm, as Māori adoptees are not connected to, or even aware, of their identity as Māori.<br><br>Significant failure of active protection obligation to Māori rights to whakapapa, whānau and culture.<br><br>Concentration of decision-making rights with adoptive parents does not allow Māori birth parents to have any say over their child after they are adopted. This may affect active protection of tamariki right to whānau and culture.<br><br>Tamariki right to whānau (and potentially culture) not |

| **Legal effect:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | | actively protected by loss of day to day care from parents. |
| **Option 1:**<br><br>**Birth and adoptive parents as legal parents and guardians**<br><br>**Birth parents and adoptive parents share some rights for decision making over child**<br><br>**Birth parents and adoptive parents share some rights and responsibilities over the child's day to day care**<br><br>**ME** | -<br><br>Upholds child's rights to family and identity by maintaining a connection to their birth family.<br><br>Potential to undercut security of adopted child in their adoptive family relationships.<br><br>Shared decision-making rights has the potential to lead to adverse outcomes for child where parents cannot reach agreement. Could result in delays in meeting child needs. Child may be harmed if decision making disputes lead to conflict between birth and adoptive parents.<br><br>Shared day to day care may support child to maintain connection with birth whānau, and build | - -<br><br>May result in tension and conflict about differing rights and roles of birth and adoptive parents.<br><br>May result in reduced clarity of obligations and entitlements as birth and adoptive parents. These would need to be clearly set out in adoption.<br><br>Does not align with purpose that adoption should be for child "whose birth parents cannot or will not provide care." | -<br><br>Adoptive children are connected to their family like other children.<br><br>Limits adoptive parents' ability to make decisions for the child, in favour of birth parents.<br><br>Birth family and whānau retain some ability to be involved in child's care. | - -<br><br>Ambiguous to implement. Could be unintentional or inequitable impacts on birth parents and adoptive parents depending on the split of responsibilities.<br><br>Inconsistent with international agreements and overseas jurisdictions, which may cause difficulties for New Zealanders wishing to go through intercountry adoption, or to migrate with their adoptive children from New Zealand.<br><br>Likely to require some dispute resolution processes to help birth and adoptive parents balance their shared decision-making and care rights and responsibilities. | +<br><br>Adopted tamariki maintain the links to whakapapa and whānau, but may be limited in the extent they are able to live into them. Ongoing whānau connection and cultural knowledge mediated through relationship between birth and adoptive parents.<br><br>Shared decision-making rights allow Māori birth parents to have significant say over their child after they are adopted, supporting their rangatiratanga over the care of their tamariki.<br><br>Shared day to day care rights and responsibilities allow birth parents to maintain some care of their tamariki, and can support their knowledge of whānau and culture. |

| **Legal effect:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | multiple loving parental relationships.<br><br>However, risk of conflict over care and lack of clarity in responsibilities resulting in child's needs not being met. In some circumstances, ongoing day to day care with birth parents may be harmful, or otherwise not in child's best interests. | | | | |
| **Option 2 (Preferred):**<br><br>**Birth parents and adoptive parents legal parents, with adoptive parents only as guardians.**<br><br>**Adoptive parents have all rights to decision making.**<br><br>**Adoptive parents have all rights and responsibilities for adopted child's day to day care.**<br><br>**ME** | ++<br><br>Children maintain legal connection to their birth family which upholds their rights to identity and whanau.<br><br>Child has certainty and consistency regarding adoptive parents' ability to make decisions about them.<br><br>Placing responsibility for day to day care with adoptive parents supports the child's continuity and security of care, and will support child welfare given | ++<br><br>Provides for change of guardianship rights and responsibilities of child to adoptive parents, while avoiding negative consequences of legal severance.<br><br>Adoptive parents are able to make decisions efficiently without needing to gain agreement of birth parents.<br><br>Placing responsibilities for day to day care with adoptive parents is in keeping with the intent of | ++<br><br>Enables birth parents and family and whānau to maintain a legal connection to child. | +<br><br>Clear option, no feasibility constraints.<br><br>Legal effect of adoption is consistent with international obligations' understanding of the legal effect of adoption, including the Hague Convention.<br><br>Giving adoptive parents legal parenthood is consistent with most common overseas jurisdictions legal effect of adoption, which allows for New Zealand adoptions to be easily recognised | 0<br><br>Adopted tamariki maintain their links to whakapapa and whānau, but ongoing whānau connection and cultural knowledge mediated through relationship between birth and adoptive parents.<br><br>Concentration of decision-making rights and day to day care with adoptive parents does not allow Māori birth parents to have any say over their child after they are adopted. This may affect active protection of tamariki right to whānau |

| **Legal effect:** Analysis of options<br><br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | that purpose of adoption should allow adoption to only occur where birth parents are unable or unwilling to provide care. | adoption as a care option; if parents desire ongoing day to day care opportunities, then a different care arrangement for their child.<br><br>Obligations and entitlements related to childcare, such as Working for Families, are tied to guardianship responsibilities. Clarity of these responsibilities will prevent any uncertainty about these obligations or entitlements. | | overseas when New Zealanders migrate with adopted children. | and culture, if other mechanisms are not used to protect these rights. |

**Preferred Option**

Our preferred option is for the legal effect of adoption to enable birth parents and adoptive parents to have status as legal parents, with adoptive parents only as guardians. This would give adoptive parents all rights to decision making about the child and all rights and responsibilities for the child's day to day care.

This changed legal effect would acknowledge that the birth parents of a child are their birth parents, and that adoption does not change that reality. The legal effect would allow for openness and provide a foundation for ongoing contact between the child and their birth family post-adoption, as agreed by both birth and adoptive families (see below). However, it would provide for adoptive parents to take on guardianship responsibilities where birth parents are unable or unwilling to do so, and would provide sufficient clarity to support adoptive parents to effectively parent the child.

Our preferred option adoption aligns with the proposed purpose of adoption, particularly that adoption provides care for a child where birth parents cannot or will not provide care for them. Providing clarity that the adoptive parents become the permanent guardians of the child and that the birth parents are removed as guardians supports the child's wellbeing by providing certainty and security for the new family relationship. Changing the legal effect of adoption in this way would align with the reform objectives of promoting consistency with te Tiriti and reflecting culturally appropriate concepts and principles. It would enhance the adopted person's rights to identity, family and culture by ensuring that the child has security in their connection to both their adoptive family and birth family.

## Financial responsibility for the child

**Options we have considered**

- **Status Quo (Preferred): Retain existing law on child maintenance.**
  Adoptive parents are financially responsible for the child following an adoption and birth parents do not have financial responsibility for the child.
- **Option 1: Financial responsibility sits with both adoptive and birth parents after an adoption.**
  Provide that both birth and adoptive parents are finically responsible for the child. This could correlate with the level of contact the parent has with the child.

| **Financial responsibility for child maintenance:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo (Preferred): Adoptive parents are financially responsible for the child following an adoption and birth parents do not have financial responsibility for the child.**<br>**ME** | 0<br>Adopted child provided for in clear, secure, permanent arrangement.<br>Supports the creation of a permanent, enduring family relationship between the adoptive parents and the child. | 0<br>Supports clear responsibility to provide for adoptive child. | 0<br>Removes financial obligations from birth parents. | 0<br>Simple rule regarding liability and consistent with the objectives of the Child Support Act. | 0<br>No issues identified. |
| **Option 1:**<br>**Financial responsibility sits with both adoptive and birth parents after an adoption.**<br>**ME** | -<br>Requiring birth parents to provide maintenance may undermine connection between the child and birth parents.<br>Could make adoption less desirable option for birth parents, resulting in parents keeping care of children | -<br>Provides maintenance for child following adoption. However, lacks clarity as to responsibilities of birth and adoptive parents. Could be additional complexity to determine child support arrangements if relationship between adoptive parents ends. | -<br>Both adoptive and birth parents have responsibility for the child.<br>May have a negative impact on birth parents who have chosen to give up a child they cannot care for, which may include financial reasons. Adoptive parents have chosen to assume | -<br>Additional parents liable for child support creates complexity in determining liability. Having liability tied to the level of contact is inconsistent with the Child Support Act. | 0<br>No issues identified. |

| **Financial responsibility for child maintenance:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | that they have no desire to raise. | Additionally, placing financial responsibility for child with birth parent does not fit the intent of birth parents in choosing adoption as a care option. | care for the child and may be more likely to be in a better financial position. | | |

**Preferred options**

Our preferred option is that adoptive parents be financially responsible for the upkeep of an adopted child following adoption. This is consistent with the status quo. In general, our child support laws place the obligation to financially support children on biological parents, except in situations where others have accepted responsibility to maintain a child. The current legal effect of adoption treats adoptive parents as if they are the biological parents and they are financially responsible for the child. The adoptive parent has taken on the responsibility of adoption in full awareness that this will require them to maintain the child financially. Requiring the birth parent to have all or some financial responsibility for the child could have negative effects, such as undermining the connection between the birth parent and child.

## Citizenship

**Options we have considered**

- **Status Quo (Preferred): Children may gain NZ citizenship from adoptive parents, but also retain citizenship of birth.**
- **Option 1: Lose entitlement to citizenship from birth parents through an adoption.**
- **Option 2: Keep birth parent citizenship and not be entitled to any citizenship from adoptive parents.**

| **Citizenship entitlement:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo (Preferred):**<br><br>**Children may gain NZ citizenship from adoptive** | 0<br><br>Consistent with human rights obligations that | 0 | 0<br><br>Adopted child may have more rights to citizenship | 0 | 0<br><br>Ensures any Māori children who are adopted to non-NZ |

| **Citizenship entitlement:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **parents, but also retain citizenship of birth parents.**<br>**ME** | children should not be stateless. Is in the best interests of the child who gains citizenship rights rather than loses them. | Provides child with citizenship rights. | than other children who can only gain from their birth parents. | No feasibility constraints. | citizens in NZ (if this occurs in child's best interest) do not lose their New Zealand citizenship, which is important for their right to live in NZ and access NZ benefits and entitlements. This is fundamental to active protection of equal rights and privileges to adopted tamariki, consistent with Article 3 of te Tiriti. |
| **Option 1:**<br>**Lose entitlement to citizenship from birth parents through an adoption.**<br>**ME** | - -<br><br>Adoption may disadvantage child by taking from them a citizenship and all the benefits of that citizenship. | - -<br><br>Provides child with citizenship rights, but dependent on adoptive parents' citizenship, child may lose New Zealand citizenship. This would affect their eligibility for some services.<br><br>Inconsistent with preferred legal effect, which would mean that an adoption does not sever the child's legal connection to their birth parents. | - -<br><br>Children could lose their birth rights to New Zealand citizenship because their parents chose not to care for them, which would be inequitable compared to other children born to New Zealanders for no justifiable reason. | -<br><br>Feasible, but inconsistent to other child legislation where citizenship rights are not impacted by care arrangements. | - -<br><br>Māori children may lose New Zealand Citizenship which would negatively impact on their rights and entitlements in New Zealand. This would be inconsistent with active protection of adopted tamariki equal rights under Article 3 of te Tiriti. |
| **Option 2:**<br>**Keep birth parent citizenship and not be** | - - | - | - - | + | - |

| **Citizenship entitlement:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **entitled to any citizenship from adoptive parents.**<br>**ME** | Child does not gain the same citizenship as adoptive parents which may cause them issues particularly with regard to entitlements, benefits and rights while in adoptive parents' country of origin. | Would provide security of citizenship for child, however unequal citizenship status of adoptive parents and their child could negatively impact adoptive family's ability to function as a family unit. | Adoptive family has lesser citizenship rights than natural family. | Feasible. Consistent with other child legislation where citizenship rights do not flow from the care arrangement. | Māori children would maintain New Zealand citizenship birth rights, but may be disadvantaged in ability to travel and live internationally. |

**Preferred Option**

Our preferred option is to continue to allow children to inherit citizenship rights from the birth and adoptive parents. This is consistent with the status quo whereby when a child is adopted they:

- may gain NZ citizenship from their adoptive parents (if they meet the requirements in the Citizenship Act 1977); and
- retain their citizenship of birth.

This is consistent with the preferred new legal effect of adoption which recognises the child's right to identity and does not sever ties with the birth parents. Overseas countries may have their own rules about citizenship, such as whether dual citizenship is permitted, but New Zealand law does not impact on those rules.

## Post-adoption birth certificates

**Problem definition**

When a person is adopted, their original birth record (held by the Department of Internal Affairs) is closed and a new record is created. Any birth certificates requested after that date reflect the information on the new birth record, showing the child's adopted name and the names of the adoptive parents in place of the child's birth parents. There is generally no indication on a post-adoptive birth certificate that an adoption has taken place.[46] This reflects the legal effect of adoption, in that the adopted person is treated "as if born to" their adoptive parents.

46 Adoptive parents can request that their adoptive status be recorded on the birth certificate, but we hear that this rarely happens in practice.

Birth certificates can be a strong identity marker, and the post-adoption birth certificate can cause adopted persons pain where they feel that it doesn't connect with their identity. For Māori adopted persons and their descendants in particular, the status quo current approach to birth certificates conceals important information about their whakapapa and whānau. The adopted person has no ability to choose to list their birth parents on their birth certificate.

The current approach to birth certificates is tied to the historical secrecy and stigma of adoptions. It can also present a barrier to an adopted person's knowledge of their identity. Historically, it was not uncommon for an adopted person to be unaware of their adoption until later in life, and their birth certificate would support this lack of knowledge of their identity and history. We know that situations where an adopted person is not told of their adoption are very rare in recent years.

**Engagement**

We heard that birth certificates are fundamental to a person's identity. Many people told us that the current approach to birth certificates is inappropriate. Replacing the adopted person's birth parents with the names of the adoptive parents reflects a 'legal fiction' and is harmful. People told us that birth certificates are central to a person's identity and that changing the birth certificate impacts on their identity.

We also heard that some adopted people prefer not to have their adoptive status on their birth certificate as it's private. Birth certificates are used day-to-day (such as to support applications) and some people might not want to share their adoptive status in those situations.

**Options we have considered**

- **Status Quo: No recognition of adopted status or birth parents on birth certificate.**
- **Option 1: Include the names of both the birth parents and the adoptive parents on a new birth certificate.**
- **Option 2 (Preferred): Create two new birth certificates, one with just the names of adoptive parents, and one birth certificate with the names of both birth parents and adoptive parents on it.**
- **Option 3: Introduce a new, different type of legal parenthood document that shows the adoptive parents as the child's legal parents but does not make changes to the child's original birth certificate.**

**Post-adoption Birth Certificates:** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status quo:**<br>**No recognition of adopted status or birth parents on birth certificate**<br>**ME** | 0<br>The status quo is not in the child's best interests as it serves to obscure biological parentage, and may contribute to some adopted | 0<br>Allows for recording and recognition of adoptive relationships, but does not reflect adopted person's birth family on birth | 0<br>Adopted and non-adopted people do not have equal access to information about their birth parents, and their right to privacy is assumed | 0<br>No implementation constraints. | 0<br>Denies Māori adopted persons connection to their whakapapa and whānau. This has been a cause of |

| **Post-adoption Birth Certificates:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | persons being unaware of their adopted status. Does not uphold the right to identity under the Children's Convention. | certificate. May contribute to adopted person being unaware of their adopted status. | over their right to information and identity. This is inconsistent with te ao Māori understandings of the importance of whakapapa connections. | | significant intergenerational harm.<br><br>Does not respect Māori right to identify as Māori or whānau, hapū and iwi rangatiratanga over how tamariki identity is recognised and registered. Crown has full control over what is registered on birth certificates. |
| **Option 1:**<br>**Include the names of both the birth parents and the adoptive parents on a new birth certificate.**<br><br>**ME** | +<br><br>Recognises that children should have the right to information about their identity, history, family and whānau. Supports a child's right to identity. For tamariki Māori, supports their connection to their whakapapa and tūrangawaewae. Recognises the different aspects of a child's identity and how that identity can change (e.g. the child wants their identity tied to both birth and adoptive parents to be recognised).<br><br>Does not provide for child to have autonomy over | ++<br><br>Recognise reality of pre- and post-adoption relationships. Recognises enduring nature of adoptive relationship while honouring the birth parent relationship equally. | ++<br><br>Ensures adoptees know who their birth parents are, the same as non-adopted persons. In keeping with te ao Māori understanding of the importance of whakapapa connections. Signifies adopted person's ongoing connection to their birth family, which is particularly important in Pacific communities. | +<br><br>A usable document that doesn't replace the parents listed on the certificate, and recognises the new legal relationship as equal but different to the birth relationship. Feasible and easy to implement. Straightforward option that is easy to understand in theory and practice.<br><br>However, privacy concerns with this approach if adopted person doesn't want to have their adoptive status noted (would essentially "out" a person's adoptive status). | +<br><br>Retains connections to birth parents and whakapapa. Using an additive model rather than replacement model supports active protection of tamariki right to whakapapa connections. |

| **Post-adoption Birth Certificates:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | whether to disclose their adoptive status when using a birth certificate. | | | | |
| **Option 2 (Preferred):**<br>**Create two new birth certificates, one with just the names of adoptive parents, and an amalgamated one with the names of both birth parents and adoptive parents on it.**<br><br>**ME** | ++<br><br>Supports adopted person's right to identity and to know about their birth parents, and if choice is given about what certificate can be used it supports their right to participate in constructing that identity. For tamariki Māori, supports their connection to their whakapapa and tūrangawaewae.<br><br>Very flexible, giving the adopted person has a choice about what information they want on their birth certificate. | ++<br><br>Supports recognition of adopted person's ties to both birth and adoptive families. Clarity will be required about the legal status of amalgamated certificates. | ++<br><br>Adoptees know who their birth parents are in the same way as non-adopted persons. Signifies adopted person's ongoing connection to their birth family, which is particularly important in Māori and Pacific communities. | +<br><br>On their own, each certificate is a usable document, recognises the new legal relationship as equal but different to the birth relationship.<br><br>Clarity will be required about the legal status of amalgamated certificates.<br><br>Further consideration would be needed around who may access each certificate, and how certificates might be used as official documents. | +<br><br>Retains connections to birth parents and whakapapa. Using an additive model rather than replacement model supports active protection of tamariki right to whakapapa connections<br><br>Allows tamariki to choose which certificate to use, but tamariki always have access to whakapapa knowledge and can choose whether this is disclosed on the birth certificate they use. |
| **Option 3:**<br>**Introduce a new, different type of legal parenthood document that shows the adoptive parents as the child's legal guardians but does not make changes to the child's original birth certificate.** | ++<br><br>Recognises that children should have the right to information about their identity, history, family and whānau. Supports a child's | +<br><br>Allows for recognition of adoption, without obscuring the birth family of the adopted person. | +<br><br>Signifies adopted person's ongoing connection to their birth family, which is particularly important in Māori and Pacific communities.<br><br>However, discounts agency | - -<br><br>Would require development of new legal parenthood certificate, with potential ramifications for wider birth registration regime and use of birth certificates as legal documents. This would | ++<br><br>Whakapapa-centric model, where birth parents are acknowledged as intrinsically linked to tamariki identity through presence of the birth certificate. This supports active protection of tamariki |

| **Post-adoption Birth Certificates:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **ME** | right to identity and to know parents.<br><br>Rejects concept of children as transferrable between families, and recognising that adoption changes care of child, rather than changing the parents of the child. For tamariki Māori, supports their connection to their whakapapa and tūrangawaewae. | | of adopted person, who may wish to list adoptive parents on their birth certificate. | require significant further consideration. | right to whakapapa and whānau. |

**Preferred Options**

Our preferred option is that adopted people be able to access two types of post-adoption birth certificates: one that includes the names of both sets of parents; and another that includes only the adoptive parents.

This option addresses the current system's 'legal fiction' of an adopted person's identity, ensuring that an adopted person is made aware of their adoptive status. It provides choices for adopted people in using their birth certificates. It acknowledges that some adopted people might want to keep their adoption status private, and some may not. This flexible approach also recognises that what an adopted person wants on their birth certificate may change as they get older.

## Name Changes

### Problem definition

Under current laws, adoptive parents have the same ability as non-adoptive parents to change a child's name. This can occur at the time an adoption order is made, or later. A child's first name and surname can both be changed.

Allowing an adoptive parent to change a child's name aligns with a view that the child's identity fundamentally changes at adoption, and aligns with adoptive parents being viewed as the legitimate "parents" of the adoptive child, with rights to make any decisions related to the child. It may also support a child's sense of belonging to an adoptive family, in acknowledgement of the permanence and security of the arrangement.

However, names have strong connection to a person's identity and, often, culture. Retaining a child's name may support the adopted child to integrate their identity as part of both birth and adoptive families. Birth parents, family and whānau may have strong connection to a child's name and opposition to it being changed. This is particularly true in many non-European cultures, including te ao Māori and in many Pacific cultures, where names carry mana and status, may reflect history and whakapapa, and in some cultures are gifted to the child by family, or decided by wider family members. Depending on the child's age, a name change (especially first name) may also have day to day significance for their life.

We also understand that some adopted people appreciate having their surname changed in particular, as it gives them a connection to their adoptive family and makes them feel like "a part of the family". We also understand that some families may have legitimate reasons for needing to change a person's name in adoption cases.

Decisions about whether and in what circumstances an adopted child's name may be changed must reflect the tension of the rights of the adoptive parents to decision making and the interests of the child and their birth parents, family and whānau in continuation of the child's identity and connection to whānau and culture.

### What we heard in engagement

We didn't specifically ask about changing children's names during the adoption process in our first discussion document. However, we did hear from people about the issue.

Some people said that a person's name is an important part of their identity and shouldn't be changed. For many people, they noted a name carries strength and status, and is a connection to family and place.

Other people said that changing the child's name can help them feel part of their adoptive family. This was noted to especially important to change on a birth certificate where the child was born overseas.

### Options we have considered

- **Status Quo: Allow any name changes in adoption cases, with judicial approval**
- **Option 1: Do not allow first or last name changes.**
- **Option 2 (Preferred): Last name changes allowed, when the judge deems it appropriate.**
- **Option 3: First name changes allowed, when judge considers it will be in child's best interests.**
- **Option 4: Allow any name changes with permission of birth parents and person to be adopted (if age-appropriate).**
- **Option 5: Limit adoptive parents' ability to change child's name after an adoption until adopted person is able to change their name themselves.**

| **Name changes:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**Allow any name changes in adoption cases with judicial approval.**<br>**ME** | 0<br><br>Allowing name changes may impact on child's right to identity, and potentially culture. | 0<br><br>Name changes may be allowed.<br><br>Judge decides whether name changes are appropriate or not. | 0<br><br>Adoptive parents have equal rights to change the name of their child as birth parents. | 0<br><br>No feasibility constraints.<br><br>In domestic care of children situations, a guardian may not change a child's name, but difference between guardianship and adoption contexts may be justifiable. | 0<br><br>Associated with culture of secrecy and loss of whakapapa and whānau knowledge, which has caused significant historical harm to whānau Māori.<br><br>Does not support Crown's obligation to active protection of tamariki rights to whakapapa, culture and whānau. |
| **Option 1:**<br>**Do not allow first or last name changes.**<br>**CW (5)** | +<br><br>Supports right to identity under the Children's Convention.<br><br>Gives space for adopted person to change their own name when they are old enough to apply/consent.<br><br>Adopted child will not have the ability to share a last name with their legal guardians the way non-adopted people can, despite likelihood that some adopted children may | -<br><br>An outright ban is not flexible to individual circumstances. | +<br><br>More supportive of cultural significance of names, particularly in cross-cultural or intercountry adoptions.<br><br>Denies adoptive parents the ability to change names the way biological parents can, but this may be balanced by the need to protect children's identity. | +<br><br>Clear and easy to implement. | +<br><br>Supports active protection of tamariki right to whakapapa and culture, acknowledging the significance of names.<br><br>Does not support rangatiratanga, especially where there may be whānau support for a name change. |

| **Name changes:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | desire this. This may harm child's emotional sense of connection to their adoptive identity and family. | | | | |
| **Option 2 (Preferred):**<br>**Last name changes allowed, when the judge deems it appropriate.**<br>**CW (3)** | ++<br><br>Supports right to identity under the Children's Convention, to a degree. However, allowing last name changes allows children to lose that part of their identity.<br><br>May support adopted child's sense of connection to their adoptive family and foster security in their placement. | +<br><br>Places barrier on ability to change a child's name to balance adoptive parent rights with child's identity<br><br>Judge must be satisfied that last name change is appropriate. | +<br><br>Supports cultural connection by placing barrier on name change. Last names may hold cultural, whakapapa and family significance. | 0<br><br>No feasibility issues. | +<br><br>Supports active protection of tamariki right to whakapapa and culture, acknowledging the significance of names.<br><br>Does not support rangatiratanga, especially where there may be whānau support for a name change, as judge controls child's name. |
| **Option 3:**<br>**First name changes allowed, when judge considers it will be in child's best interests.**<br>**CW (2,5)** | +<br><br>Supports right to identity under the Children's Convention, to a degree. However, allowing first name changes allows children to lose that part of their identity.<br><br>Less likely that a child will desire a first name change | +<br><br>Places barrier on ability to change a child's name to balance adoptive parent rights with child identity. | 0<br><br>Supports some cultural practices regarding names. First names may have cultural, whakapapa ad family significance. | 0<br><br>No feasibility issues. | +<br><br>Supports active protection of tamariki right to whakapapa and culture, acknowledging the significance of names.<br><br>Does not support rangatiratanga, especially where there may be whānau support for a name |

| **Name changes:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | to signify their connection to adoptive family. | | | | change, as judge controls child's name. |
| **Option 4:**<br>**Allow any name changes with permission of birth parents and person to be adopted (when age-appropriate).**<br>**ME** | ++<br>Depending on the age of the child, this option may allow for their participation.<br>Having collaboration can better protect the child's best interests.<br>Name changes, where child and family and whānau agency respected, are far less likely to be harmful for the child's sense of connection to identity, family and culture. | +<br>Allows adoptive parents to change name of child, while still respecting child's connection to birth family and whānau, by requiring consent. | ++<br>Supports cultural practices regarding names- any changes to the child's name would need to be approved by the people who were most likely to have given that name. | ++<br>Feasible and usable, although does require some good faith between parties. | +<br>Supports active protection of child's right to whakapapa and culture. Most rangatiratanga consistent approach, whānau Māori hold the right to permit or oppose name change of tamariki.<br>However, centres decision making with birth parents and tamariki, without requiring consideration of wider whānau views on a name change. |
| **Option 5:**<br>**Limit adoptive parents' ability to change child's first name after an adoption until adopted person is able to change their name themselves.**<br>**CW (1, 3)** | ++<br>Extends protection of child's identity and cultural links to a name throughout childhood until the adopted person is old enough to make own decisions. Flexibility to recognise legitimate reasons for changing name. | -<br>Balances adoptive parent rights with child's identity. | --<br>May be discrimination on grounds of family status as this would only apply to adoptive parents (biological parents can change their child's name at any time).<br>May prevent name changes for reasons unrelated to the | - -<br>May be difficult to implement, especially if exceptions are allowed. Would require a process to determine whether name change allowed, Resource implications. | +<br>Supports active protection of tamariki right to whakapapa and culture.<br>Does not support rangatiratanga, especially where whānau may support name change. |

| **Name changes:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | adoption. May limit the right to freedom of expression. | | |

**Preferred options**

Our preferred option is that a judge can consider changing an adopted person's surname at the time of adoption, where they deem it appropriate.

We also seek further feedback on engagement on whether first name changes should be allowed. We have listed two options:

- first name changes shouldn't be allowed as part of the adoption process; or
- a child's first name should not be restricted from being changed until the adopted person is able to change their name themselves.

Making limits on when a name change may be approved by the court balances the rights of the adoptive parents to make decisions about a child's name and the potential interests of the child in a name change, for example to share a last name with their adoptive family, with the interests of the child in continued connection with their birth identity, especially where their name holds particular whakapapa, cultural or family connection significance.

## What contact can birth parents and adopted children have after an adoption?

### Post-adoption contact

**Problem definition**

It is common in current practice for adoptions to be “open”, which means that the adopted person is aware of their adoption and has some knowledge about their birth family and whānau, and often a level of contact with their birth family and whānau. However, the current law does not require adoptive and birth families to keep in contact after an adoption is finalised, and any agreements birth and adoptive parents make about post-adoption contact operate on the good faith of birth and adoptive parents. Because of this, there is a risk that adopted children have little or no post-adoption contact with their birth parents, family and whānau, even in circumstances where this contact would be in the best interests of the child.

Oranga Tamariki encourages families to make a note of their intentions related to post-adoption contact before an adoption is finalised. However, the law does not provide any recourse if these agreements are not carried through. This leaves both families vulnerable to a breakdown in intentions or commitments.

**What we heard in engagement**

Most people who engaged with the question of post-adoption contact agreements supported it. Submitters noted that agreements and ongoing contact are in the best interests of the adopted person in most cases. They considered that agreements should be flexible and able to be reviewed in light of changing circumstances. Submitters also noted the importance of wider family and whānau being able to participate and be captured in the agreements. Submitters were split on how disagreements over a contact agreement should be dealt with. Some supporters wanted enforceable agreements, while others were less supportive of the courts being involved in agreements.

**Options we have considered**

- **Status Quo: No contract agreement required to be considered in adoption cases**, contact post-adoption is in good faith with no legal backing.
- **Option 1 (Preferred): A post-adoption contact agreement must be considered in all cases before an order is made.**

  The agreements:
  - Must be agreed before the adoption is finalised
  - Support the child to participate in the formation of agreements, to an age-appropriate level
  - Are flexible and able to be amended via mediation
  - Involve wider birth family and whānau (not just birth parents) unless this would cause unwarranted distress
- **Option 2: A post-adoption contact agreement is required in all cases before an order is made.**
- **Option 3: Post-adoption contact orders are non-binding; disputes may be taken to mediation.**
- **Option 4: Post adoption contact orders are enforceable.**
- **Option 5: If the adoptive parents intend to move, they must consult with birth parents to determine how to maintain post-adoption contact (if it occurs).**

| **Post adoption contact:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br><br>**No contract agreement required to be considered in adoption cases, contact post-adoption is in good faith with no legal backing.**<br><br>**(Not compatible with 1A, 2, 4)** | 0<br><br>No guarantee of ongoing contact with birth family. Contact and manner of contact at discretion, of, adoptive parents, which is not in the child's best interests.<br><br>This fails to support upholding children's rights to family. | 0<br><br>Birth parents, and family and whānau, cannot to require that adoption arrangement considers ongoing contact.<br><br>No ability to enforce or follow up commitment to ongoing contact. | 0<br><br>Adoptive parents hold power over birth parents and family and whānau ability to maintain contact with child.<br><br>Does not recognise the importance of family connections. Disadvantages groups that place great importance on family connections and whakapapa. | 0<br><br>Straightforward to apply.<br><br>Does not reflect current best practice regarding adoptions. | 0<br><br>Does not support active protection of tamariki rights to whānau, whakapapa (and potentially culture). No protection for ongoing tamariki connection to whanau. |
| **Option 1A (Preferred):**<br><br>**A post-adoption contact agreement must be considered in all cases, by judges and/or by families involved.**<br><br>**CW (1,3,4,5)** | ++<br><br>Enables consideration of ways a child can maintain connections to their identity, birth family, culture and language, following adoption. | +<br><br>Strong direction that ongoing contact between child and their birth family is desirable.<br><br>Discretionary approach allows flexibility if order is not wanted by birth parents and family and whānau or not appropriate. | +<br><br>Signals that ongoing contact with birth parents and family and whānau is desirable.<br><br>Essential to consider how to balance rights between birth and adoptive families when questions about maintaining contact arise. | +<br><br>Clarity for decision-makers but might require further guidance and information for birth and adoptive parents on ongoing contact arrangements.<br><br>Forming agreements may require substantial social worker involvement, especially where there are differing expectations between birth parents.<br><br>Consistent with approach to managing ongoing contact | ++<br><br>Supports greater active protection of tamariki right to whānau and whakapapa.<br><br>Acknowledges rangatiratanga by allowing whānau agency in the formation of contact agreements and the necessity for specifics of agreements, however agreements ultimately approved by the Court. |

| **Post adoption contact:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | for separated families in general family law. | |
| **Option 1B (Preferred):**<br>**Post-adoption contact agreements are made before the adoption order is finalised.**<br>**CW (All)** | +<br>Children's right to family supported by agreements being made as part of discussions about whether adoption is in child's best interests. | +<br>Allows intentions regarding ongoing contact with the child to be set out early and any disagreements can be worked out before adoption is final. | +<br>Balances rights of both families in discussions, as the order has not been finalised. | ++<br>Feasible, as discussions can be incorporated into other pre-adoption processes.<br>Will require resourcing and implementation support, and consideration of the role social workers might play in helping negotiate agreements. | ++<br>Supports active protection of tamariki right to whānau and whakapapa. |
| **Option 1C (Preferred):**<br>**The child is supported to participate in forming the post-adoption contact agreement, to an age-appropriate level.**<br>**CW (All)** | ++<br>Supports child's right to participate and be involved in decisions on their care. In child's best interests for them to can indicate preferred level of contact, where they can contribute meaningfully. | +<br>Involving child, to the extent appropriate, will support agreements being best suited to the needs and desires of the child. | +<br>Balances rights of child with rights of adoptive parents. | -<br>Will need to consider ways to enable child participation and what is done in cases where it is not viable or appropriate.<br>Participation support will have quite high costs per case, though number of cases are low. | ++<br>Supports active protection of tamariki right to whānau and whakapapa. |
| **Option 1D (Preferred):**<br>**Post-adoption contact agreements are flexible** | ++ | +<br>Allows for ongoing contact between child and birth | -<br>Provides mechanism for birth and adoptive families | + | ++ |

| **Post adoption contact:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **and able to be amended via mediation.**<br>**CW (All)** | Supports child's right to identity, birth family, culture and language.<br><br>Recognises child's needs may evolve and allows arrangement to change to support this.<br><br>Informally resolving issues with contact by amending orders less likely damage to birth/ adoptive parent relationship than formal. court process. This is likely to be beneficial to the child. | family to be arranged in ways that suit all those involved.<br><br>Provides legal way to support birth and adoptive parents cooperate to achieve best outcomes for child.<br><br>Simple ways to amend agreement preferable to requiring ongoing Court engagement to make changes. | to negotiate ongoing contact, but ultimately continues status quo position that adoptive parents can withhold contact without legal consequence. | Supports post-adoption contact agreements to be durable and able to evolve.<br><br>Mediation is relatively easily understandable and navigable process, but involves some additional cost. | Supports active protection of tamariki right to whānau and whakapapa.<br><br>Mediated approach to resolution allows whānau Māori to have a strong role in determining the outcomes of dispute about ongoing contact. This supports whānau Māori rangatiratanga. |
| **Option 1E (Preferred):**<br>**Post adoption contact agreements involve family and whānau, unless this would cause unwarranted distress.**<br>**(CW All)** | ++<br><br>Supports child's right to identity and family (and potentially culture), acknowledging role wider family and whānau role in child's life.<br><br>Provides flexibility to protect child from harm in cases where family and whānau involvement would not be appropriate. | +<br><br>Helps post-adoption contact to support connection between child and their birth family.<br><br>Involvement of family and whānau will have particular value where birth parents do not have much involvement. | ++<br><br>Recognises importance of family and whanau role in child's life, and allows for family and whānau to be involved in decision making about post-adoption contact.<br><br>The unwarranted distress carve-out protects cases where it would be inappropriate for wider family to participate. Otherwise, the openness of this option is flexible to the needs and wishes of each | -<br><br>Adds time, cost and complexity to the decision-making process.<br><br>Forming agreements may require substantial social worker involvement, especially where there are differing expectations between birth parents and family and whānau.<br><br>May need conditions around which family and whānau will be involved. | ++<br><br>Supports active protection of tamariki right to whānau and whakapapa. This is enhanced by allowing post-adoption contact with whānau, rather than just birth parents. Recognises mana and role of whānau in the life of tamariki.<br><br>Supports rangatiratanga in context of post-adoption contact. Whānau Māori have active role in determining what contact |

| **Post adoption contact:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | family (some wider family members may want to participate and others not, and this option affords that flexibility). | | will be in best interests of tamariki. |
| **Option 2:**<br>**A post-adoption contact agreement (negotiated between parties in the child's best interests) is required in all cases.**<br>**CW (1B-E, 3, 4, 5)** | +<br>Protects child's right to identity, connection to culture and language. Support children's right to family.<br>May risk harm to child in some cases, where ongoing contact with birth family would be inappropriate. | -<br>Strong direction for ongoing contact between families.<br>Risk that parents will not follow it if they did not 'buy in' to the contact plan and it was imposed on them. | +<br>Creates expectation of greater balance between birth and adoptive families following adoption. Risk that balance is not maintained in practice if orders are breached (see options 3 and 4 regarding dispute resolution options for maintaining ongoing contact). | -<br>Relatively straightforward for social workers to support parties to develop.<br>May be unfeasible where birth family or whānau want no ongoing contact or contact is not appropriate.<br>May not be sufficiently flexible to cater to all situations.<br>Contact with family is not mandated in any other domestic care of children legislation. | ++<br>Supports active protection of tamariki right to whānau and whakapapa. Would support whānau rights if birth parents not interested in ongoing contact agreement. |
| **Option 3:**<br>**Post-adoption contact agreements are non-binding, disputes may be taken to mediation.** | -<br>Does not guarantee that contact will occur Potentially weak option for supporting child's right to whanau. | +<br>Creates expectation of post-adoption contact between child and their birth family, but allows for | 0<br>Continues status quo with regards to the power of birth family to challenge an adoptive right who does not follow a contact agreement. | -<br>Mediation will likely be required to support families in dispute resolution, with associated costs. | -<br>Lesser protection for tamariki right to whānau and whakapapa. |

| **Post adoption contact:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **(Not compatible with 4)** | | negotiation as to how this should best be managed.<br><br>Does not provide a way to formally enforce order if one party chooses not to follow it. | | | |
| **Option 4: Post-adoption contact agreements are enforceable.**<br><br>**(Not compatible with Status Quo, 3)** | -<br><br>Supports child right to contact with their birth family and whānau.<br><br>However, formal dispute resolution process likely to cause more serious damage to birth/ adoptive parent relationship than mediation. Could be harmful to child, if it strains relationship between birth and adoptive parents. | -<br><br>Clarity regarding post-adoption contact between child and their birth family.<br><br>Potential to increase obligations of adoptive responsibility on adoptive parents, and potentially cause friction in their relationship with the birth family. | +<br><br>Addresses imbalance between adoptive parents and birth families in pursuing ongoing contact.<br><br>May negatively impact on adoptive parents' sense of security in the adoptive relationship. | - -<br><br>May lead to a more complicated, expensive process for dispute resolution. More difficult for birth and adoptive parents to navigate. Resourcing impacts in terms of time and costs for Court. | 0<br><br>Supports active protection of tamariki right to whānau and whakapapa.<br><br>Court role in resolving disputes on contact agreements does not support whānau rangatiratanga or Māori forms of dispute resolution. |
| **Option 5:**<br><br>**If the adoptive parents intend to move, they must consult with birth parents to determine how to maintain post-adoption contact (if it occurs).** | ++<br><br>Upholds children's rights to family by encouraging post-adoption contact can continue. | ++<br><br>Supports ongoing contact following adoptive family relocation. May mitigate risk that relocation causes contact agreements to break down. | +<br><br>Adoptive parents need to go through an additional step before they can relocate. However, this differential treatment is justified as it upholds | -<br><br>Simple to legislate, however, may need a mechanism in place to support families to have these conversations. This may have resourcing implications. | +<br><br>Ensures contact arrangements for Māori whānau are not overlooked following relocation, which supports active protection of tamariki right to whānau and whakapapa. |

| **Post adoption contact:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for Purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **(Preferred)**<br><br>**CW (All)** | | | adoptive children's rights to family.<br><br>Improves birth parents and family and whānau ability to maintain contact post-adoption. | | |

**Preferred Options**

Our preferred options are that post-adoption contact agreements:

- are required to be considered in all domestic adoption cases, which reinforce the importance of contact without the inflexibility of being compulsory;
- are agreed to before an adoption is finalised, so all parties can have a say and a judge can consider it before making a decision;
- allow the child to participate, where appropriate, consistent with the reform objective of encouraging child participation;
- are flexible and can be amended via mediation if there is disagreement later on, to recognise that the needs and circumstances for families can change;
- involve the wider birth family and whānau, unless this would cause unwarranted distress to the birth parents or the child, recognising the important role that wider family can have in a person's life.

We also have a preferred option that If the adoptive parents intend to move, they must consult with birth parents to determine how to maintain post-adoption contact (if it occurs).

Connection to birth family is an important part of open adoption, and supporting this is in line with protecting the best interests of adopted persons. Not having ongoing contact with their birth family following adoption has been harmful for many adopted people and has affected their ability to make connections with their birth family later in life, while post-adoption contact has been noted as supporting ongoing relationships between the child and both birth and adoptive families.[47] Where contact does occur, it helps adopted people maintain their identity. This is likely to be particularly important in cases of cross-cultural adoption, where the adoptive family may not have sufficient cultural capability to demonstrate or explain cultural practices and beliefs. Contact agreements can also promote wider family and whakapapa connections for adopted tamariki Māori, and other cultural groups.

47 See, for example, M Iwanek. *A Study of Open Adoption Placements*. (Department of Social Welfare, Wellington, 1987), 33.

For birth parents and/or wider birth family and whānau who wish to maintain contact with the adopted child, not being able to do so is painful. We also understand that adopted people are hurt in a different way if the post-adoption contact stops or drops away. Flexibility to support changes in contact arrangements may mitigate these problems, so families can mutually agree on a new agreement, with the adopted person being involved to an age-appropriate level.

We do not have a preferred option regarding whether contact agreements should be enforceable, or whether mediation should be the only course for resolution of disputes about contact. We seek further views from engagement to inform our consideration of this matter.

## Post-adoption culture plans

**Problem definition**

There is currently no requirement for adoptive parents to consider how they will support their adopted child to maintain their culture following adoption. This may contribute to a child becoming disconnected from their culture, particularly where an adoptive parent does not share their culture and is unable or unwilling to help them maintain it.

**What we heard in engagement**

We heard in engagement that there is a high chance of a child becoming disconnected from their culture if they are adopted by parent(s) who do not share their culture. We heard that this has historically caused a lot of harm to adopted persons, especially Māori adopted persons, who were adopted by Pākehā. We heard that it is difficult for an adoptive parent to help a child maintain a culture that they do not share.

**Options we have considered**

- **Status Quo: No information on how adoptive parents would support child's culture required to be tabled as part of adoption application.**
- **Option 1: Require adoptive parents to report/make plan on how they will support adopted child's culture, as part of post-adoption contact plan.**

**Post-adoption culture plans** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status quo:**<br>**No information on how adoptive parents would support child's culture required to be tabled as part of adoption application.**<br>**ME** | 0<br>Does not uphold children's rights to culture, particularly in the case of a cross-cultural adoption. | 0<br>Provides no clarity on whether or how culture should be considered following an adoption. | 0<br>Disadvantages minority cultures. | 0<br>Straightforward to apply.<br>Does not reflect the high importance given to cultural development in other | 0<br>Does not support tamariki right to culture, or recognise importance and mana of cultural connection to wellbeing of tamariki. |

| **Post-adoption culture plans** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | domestic care of children legislation. | |
| **Option 1:**<br>**Require adoptive parents to report/make plan on how they will support adopted child's culture when making an adoption application, as part of making post-adoption contact plan**<br><br>**ME** | +<br><br>Strong support for child's right to culture - signals importance of this right.<br><br>Requires adoptive parents to give intentional thought to how to maintain their child's culture, potential to improve their parenting.<br><br>However, inflexible plans could put children in situations that are not in their best interests. Plans will need to be flexible to changing needs of the child. | +<br><br>Recognises importance of culture.<br><br>However, flexibility will be essential. Plans that do not acknowledge the individual needs of the child, and how these are likely to change over time, may result in tokenistic and performative or coercive and harmful approaches to engagement with culture.<br><br>Will require strong support and buy in from adoptive parents and child's cultural community to have much effect. | ++<br><br>Recognises the importance of culture, and will provide support for adopted children of minority cultures to continue to engage with their culture. | -<br><br>Making plans for engaging with child's culture will likely require specialist support from social workers. Training and resourcing this workforce will incur costs. | +<br><br>Helps Māori children's culture to be upheld and maintained following an adoption which supports active protection of tamariki rights to culture and identity. |

**Preferred Options**

We do not yet have a preferred option regarding the use of post-adoption culture plans if the adoptive applicants are from a different culture to the child.

Post-adoption culture plans could support the Court to help it make a decision on whether the adoption is in the child's best interests. This reinforces that it's in a child's best interests to have their right to culture upheld. It would also make sure that adoptive parents are aware of the cultural needs of their adoptive child and have their intentions for maintaining the child's connection to their culture recorded. However, the ability for post-adoption culture plans to be monitored or assessed would be minimal. It is also unclear the extent to which adoptive parents could be supported and informed to make realistic and helpful culture plans, without significant community buy-in and support.

## Who can access adoption information and when?

### Access to information

**Problem definition**

Current laws relating to access to adoption information are based on the underlying principles that a "clean break" between the child and birth family was best. A person who has been adopted must be at least 20 years old before they can apply for their "original birth certificate", and birth parents cannot apply to access information about the child they placed for adoption until the child is 20 years old. Restrictions to adoption information can also have intergenerational effects on the family and whānau of a person who has been adopted. For adoptions that took place before 1 March 1986, people who have been adopted and birth parents are able to place a 'veto' on their information held by the Department of Internal Affairs. This prevents other people from accessing their birth record information.

Adoption information can also be held by Oranga Tamariki, the Family Court and, in some cases, non-government organisations. Accessing adoption information held by Oranga Tamariki and the Family Court can also be difficult. Accessing information held by Oranga Tamariki requires the applicant to have a copy of their "original birth certificate", meaning the restrictions above also apply to those applications and creating a two-step process to access information. Access to adoption court records held by the Family Court may only be granted if there is a 'special ground', which is a high threshold to meet. Some adopted people have had to start court cases to access their information.

**What we heard in engagement**

We heard in engagement that access to information is a human right, and that the restriction on access also has intergenerational effects as children and grandchildren of adopted people are subsequently unable to access the information. We heard from an adoption group that the Government is the kaitiaki of information, but not gatekeepers of information. Closely tied to this was the sentiment that restricting access to information denies adopted people (and their descendants) information fundamental to their identity. We heard that adopted people want the ability to have full and complete access to their birth records so that they can understand who they are, where they come from, and why they were adopted. For some submitters, simply not knowing their medical background or being unable to inform a doctor of their family medical history or being asked about their medical background has been distressing, even if it hasn't culminated in an adverse health outcome. We heard that opening access to adoption information would be empowering for adopted people.

**Options we have considered**

- **Status Quo**: **Retain existing restrictions on accessing adoption information**.
    - Adopted persons must reach the age of 20 before they can apply to access their adoption information**.**
    - Adopted persons must receive counselling when accessing their information.
    - No person other than an adopted person or a birth parent may apply to access adoption information.
- **Option 1 (Preferred): Adopted people have automatic access, by right, to their original birth record.**
- **Option 2 (Preferred): Remove the age restriction for people who were adopted wanting to access birth information, but information could be made age-appropriate where necessary.**
- **Option 3 (Preferred): Remove the requirement to provide an original birth certificate to receive adoption information from Oranga Tamariki.**
- **Option 4 (Preferred): Adopted persons are not required to receive counselling to receive their adoption information, but counselling is available if requested.**
- **Option 5: Allow adopted persons pre-adoption birth certificate to be open to the public.**

- **Option 6: Allow wider family and whānau or descendants of a birth parent or adopted person to apply to access adoption information with the consent of the adopted person.**
  This option would create a process for wider family and whānau to try to reconnect with adopted family members.
- **Option 7: Enable the Court to grant access to court adoption records if it is satisfied the person has a genuine interest in the record.**
  This would broaden who is able to access adoption records and likely make it easier for people to find out information about themselves or family and whānau members.
- **Option 8: Create a separate system for storing and sharing information about the identity of a person who has been adopted.**
  This database could sit alongside the birth certificate process and include information relating to a person's whakapapa, culture and heritage. It could also include relevant genetic and medical information. Implementation issues, including privacy and data sovereignty issues, will need to be considered.

**Access to information:** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
|---|---|---|---|---|---|
| **Status quo:**<br>**Retain existing restrictions on accessing adoption information**<br>**ME** | 0<br><br>Does not recognise child's right to identity.<br><br>Knowledge of identity central to child wellbeing.<br><br>Child may be unable to access critical life information, e.g., medical information, which creates risk. | 0<br><br>Significant barriers for adopted persons to access their identity information, and in some cases prevents access to their identity information. | 0<br><br>Adopted persons cannot access information that is easily accessible for all non-adopted persons.<br><br>Barriers to access have intergenerational for descendants of adopted persons. | 0<br><br>No feasibility constraints.<br><br>Inconsistent with international human rights obligations.<br><br>Inconsistent with domestic privacy settings, which guarantee rights to personal information. However, privacy implications in adoption settings are complicated by competing privacy interests of birth parents and adopted persons. | 0<br><br>Restricting Māori adopted persons from accessing whakapapa does not support the Crown's responsibility to actively protect the Māori right to whakapapa and whānau. |
| **Option 1 (Preferred):**<br><br>**Adopted person has automatic access, by** | ++<br><br>Upholds a child's right to information and identity. | ++<br><br>Allows access to adoption information without barriers. | ++<br><br>Affords adopted people equal right to their birth | +<br><br>Feasible and durable in theory. | ++<br><br>Supports Māori adoptee access to information about |

| **Access to information:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **right, to their original birth record.**<br>**CW (2-4, 6)** | | | record as people who have not been adopted. | However, need to consider situations where there may be risk to a birth parent from information about an adoption being released. | their whānau and whakapapa connections.<br><br>However, whakapapa information may still be unavailable to Māori adoptees, despite lowered or removed restrictions, based on information not being recorded at the time of adoption. |
| **Option 2 (Preferred):**<br>**Remove the age restriction for people who were adopted wanting to access birth information, but information could be made age-appropriate where necessary.**<br>**CW (1,3,4, 6)** | ++<br><br>Supports right to identity and to know family under the Children's Convention. | ++<br><br>Improves access to information by removing or lowering age restriction. | ++<br><br>Reduces or removes age discrimination for accessing personal information. | ++<br><br>Clear and simple to enforce. May result in influx of applications (although numbers may be low given open adoptions are common practice for adoptees under the age of 20).<br><br>The Human Rights Review Tribunal found that the age restriction on information is discriminatory on the basis of age in NZBORA.[48] | +<br><br>Removing age restriction lessens Crown powers to gatekeep identity information of Māori adoptees, and indirectly supports Māori adoptees' ability to connect to whānau, hapū and iwi. |
| **Option 3 (Preferred):** | + | + | + | - - | + |

48 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.

| **Access to information:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Remove the requirement to provide an original birth certificate to receive adoption information from Oranga Tamariki.**<br>**CW (1,2, 4)** | Supports adoptee's right to identity under the Children's Convention. | Reduces one barrier to adopted person being able to access their identity information, but does not guarantee full (unredacted) access to OT information. | Improves equity for adopted persons who have restricted access to their birth documentation. | Implementation difficulties for pre-1986 files if vetoes retained. Original birth certificates allow records to be matched with any existing veto. Oranga Tamariki would need to redesign processes to overcome this barrier. | Removing requirements to access information restricts the Crown powers to gatekeep identity information of Māori adoptees, and indirectly supports Māori adoptees' ability to connect to whānau, hapū and iwi. |
| **Option 4 (Preferred):**<br>**Adopted person not required to undergo counselling to access birth information.**<br>**CW (1-3, 6)** | 0<br>Likely to largely apply to adult adoptees. | +<br>Opens access to information and balances supporting adopted people to access information and giving choices about accessing support. | ++<br>Adopted person given equal rights to access their identity information as non-adopted person, with no barriers. | ++<br>Potential small cost-saving.<br>Increases consistency with domestic and international human rights obligations. | ++<br>Requiring counselling to access whakapapa information is a barrier to active protection of right to whakapapa and whānau. |
| **Option 5:**<br>**Allow any person to access an adopted person's original birth record.**<br>**ME** | - -<br>Does not acknowledge adopted person's privacy rights or support their control of their identity information. Some adopted persons may not want their adopted status to be public knowledge | +<br>Supports widened access to adoption information.<br>However, this access no longer relates to adopted person's knowledge of their identity.<br>Untargeted measure, may give access to knowledge about adopted person's adoptive history to people | -<br>Equal treatment of original birth record of adopted and non-adopted people. Does not recognise adopted person's right to privacy. | 0<br>Easy to bring procedures for releasing adopted person's birth records in line with procedures for non-adopted.<br>Not consistent with privacy principles in domestic legislation. | -<br>Access to information about tamariki Māori should be controlled by Māori, allowing this information to be free to any person does not respect the need for active protection of Māori data sovereignty. |

| **Access to information:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | with no need for this knowledge. | | | |
| **Option 6:**<br><br>**Allow wider family and whānau of a birth parent or adopted person to apply to the Court access their original birth record with the consent of the adopted person.**<br><br>**CW (1-4)** | +<br><br>Indirectly supports children's right to identity and know family (both for adoptees and for wider family and whānau of adoptees).<br><br>Offers adoptees potential avenue for family reunification where they have been through a historical closed adoption, supporting the right to identity (and the right to community under UNDRIP). | +<br><br>Addresses concerns about restricted access to information for wider family and whānau, does not affect the rights of the adopted person.<br><br>Given this is a consent-based model, questionable that Court process to request access is necessary. | ++<br><br>Supports rights of family and whānau.<br><br>Enhances equity for families of adopted persons compared to families without adoption, in terms of right to knowledge and connection with family members. | +<br><br>Reasonably clear and straightforward but would need to be clear who can request the information or what threshold someone must meet.<br><br>May result in increases of applications to the Family Court for information. | ++<br><br>Allowing wider family to apply to access this information supports tamariki rights to whānau and whakapapa.<br><br>This acts as recognition of the role and mana of whānau in the life of tamariki Māori.<br><br>However, a Court-controlled process to allow whānau to access information on their tamariki is not in keeping with allowing whānau rangatiratanga over processes and decisions related to tamariki. |
| **Option 6:**<br><br>**Expand rights for the Court to grant access court adoption records if it is satisfied the person has a genuine interest in the record.** | +<br><br>May support child's rights to identity in some cases. May supports an adoptee's ability to receive medical treatment as medical professionals would meet | +<br><br>This option does improve access to information, but only indirectly for the adopted person themselves. Will be of more benefit for those who get | +<br><br>Courts will make rulings on who may access information, this will determine whether access is equitable or not. | 0<br><br>"Genuine interest" test will need to be clearly defined to support public understanding. | +<br><br>Supports active protection of tamariki right to whakapapa and whānau.<br><br>However, a Court-controlled process to allow |

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| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **ME** | the threshold to receive this information. | better medical care as a result.<br><br>Will need careful balancing to determine that genuine interest does not override privacy considerations. | Assists in equitable medical treatment for adopted and non-adopted people. | May not be feasible to open information this far (court capacity etc.), but theoretically feasible to implement and will be usable. | access to personal information on the basis of unusual circumstances does not provide for Māori data sovereignty, nor rangatiratanga in making decisions over when information should be released. |
| **Option 7: Create a separate system for storing and sharing information about the identity of a person who has been adopted.**<br><br>**ME** | +<br><br>Allows adopted people to access crucial identifying information such as their whakapapa and iwi connections, as well as significant information that may affect their life, such as hereditary medical conditions, without having to access this information via their birth parents. This is particularly important for adopted persons who do not have ongoing connection with their birth family. For those under 18, this system would likely be a much more accessible way to get their information, rather than the status quo. | ++<br><br>Has potential to give adopted persons access to information that they currently cannot receive. Effectiveness will be determined by whether birth parents can and will give out this information at the time of adoption. | +<br><br>Supportive of equity. Brings adopted persons' rights to information about identity in line with non-adopted persons. | -<br><br>The policy intent is reasonably clear and easy to understand.<br><br>May not be necessary if other options are implemented as it may create a new system for people to navigate that withholds information.<br><br>This would likely take a long time to implement, leaving adopted people without information for even longer. Time and resource intensive option. | +<br><br>An information system could have a role in supporting retention of personal and whakapapa information, which could support tamariki right to whakapapa and whānau. However, Crown ownership and control over the storage of such data is not consistent with Māori autonomy over their data and information. Māori agency and control over such a system could support rangatiratanga, but only if this was an option that was desired by Māori. |

**Preferred Options**

Our preferred options are that:

- That adopted people should have automatic access to the information on their original birth record.
- There are no age restrictions for adopted people accessing adoption information.
- Counselling for adopted people accessing information is available on request, but not be compulsory.
- There is no requirement for an original birth certificate to be presented to access adoption information held by Oranga Tamariki.

These options support adopted people to access information about their identity. They remove restrictions which constitute unjustifiable barriers on adopted persons receiving information about themselves, information which is freely available to all non-adopted persons. The options would support equitable treatment of adopted persons. They would work against historical attitudes that adoption was something that should be secret and shameful, attitudes which are not in keeping with modern New Zealand. The proposed principles for adoption support a default approach of openness and transparency in the adoption system, and these options would support that principle.

We seek further views on who should be able to access an adopted person's pre-adoption information. This information could be open to all people, like it is for non-adopted people, or it could be available to specific persons, at the consent of the adopted person. The preferred option will need to balance principles of open access, with the right to privacy, and adopted persons views on this matter.

## Veto system

**Problem definition**

If a person was adopted prior to 1 March 1986, a birth parent(s) may have placed an endorsement (commonly referred to as a "veto") on the birth certificate to withhold their details. A veto can last for 10 years and be renewed. Vetoes cannot be placed for children adopted after 1 March 1986. An adopted person aged 19 years or older may also place a veto on their information. There are currently 202 vetoes in place, with 27 being held by adopted people, and the vast majority of the remaining belonging to birth mothers.

Vetoes prevent adopted persons (and in some cases birth parents) from being able to access information about the adoption. For adopted persons this leads to a lack of identity knowledge and can be harmful for adopted persons, their family and whānau and their descendants.

**What we heard in engagement**

The vast majority of people who engaged with us on vetoes felt that they should end, however there was a divide over whether they should end immediately or somehow be phased out (e.g., by not allowing renewals). People felt that vetoes are remnants of the closed era of adoption and are inconsistent with current attitudes regarding adoption. However, to our knowledge we did not hear from any veto holders, or anyone who has experience with vetoes. These are key viewpoints currently missing from our research.

In our own research and what we have heard anecdotally, we understand that the reason behind placing a veto is commonly tied to strong feelings of shame, hurt, and fear of stigma. While a number of the vetoes placed when the Adult Adoption Information Act passed were not renewed (indicating an initial fear of the consequences of open information were not realised for many people), there remains a small group of people (birth mothers, primarily) who are adamant about keeping their vetoes in place. We have heard anecdotally that some of the people with vetoes still in place often take quite extreme measures to not only keep their veto, but keep their identity hidden altogether, including from the agency that administers the vetoes. These steps including temporarily setting up a Private Box, or purchasing a burner phone. However, we have also read a lot of material about the pain that comes from

having restricted or blocked adoption information. People with vetoes placed against them often feel this hurt two-fold; the difficulty of getting any information from a system that continues to prioritise privacy, plus the knowledge that their birth parent takes active steps on a regular basis to prevent any form of contact or relationship.

**Options we have considered**

- **Status Quo: Maintain vetoes with renewal.**
- **Option 1: Remove vetoes (all expire on a certain date), or phase out (one final renewal of 1-2 years and then expire).**
- **Option 2: Phase out or remove vetoes, but allow veto holders to apply to keep their veto if they can prove losing it would cause unwarranted distress.**
- **Option 3: Different treatment of adopted people with vetoes and birth parents with vetoes e.g. keep vetoes placed by adopted people, phase out vetoes placed by birth parents.**
- **Option 4: Remove vetoes but allow for no contact orders to be placed, either permanently or for a certain time.**

| **Veto system:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status quo:**<br>**Maintain vetoes with renewal.**<br><br>**ME** | 0<br><br>Vetoes only apply to adult adopted persons. | 0<br><br>Prevents people from accessing information about themselves and their identity.<br><br>Allows people, including people who have been adopted, to protect their private information when they do not want others to have access, | 0<br><br>Can prevent adopted people from finding out about their family. This created inequitable outcomes for these adopted people.<br><br>Protects veto holders' rights to privacy. It also protects their right to freedom of expression. | 0<br><br>Simple to apply. | 0<br><br>Vetoes on information deny Māori adoptees the ability to know and connect to their whakapapa, their whānau, hapū, and iwi, and tūrangawaewae. This is clearly in tension with active protection of Māori right to these taonga. Vetoes have been a source of significant harm in denying Māori adoptees the right to their whakapapa. |
| **Option 1:**<br>**Remove vetoes (all expire on a certain date) or phase out (one final** | 0 | +<br><br>Improves access to adoption information | 0 | +<br><br>No explicit feasibility constraints, however, support services, e.g. | ++<br><br>Supports active protection of adoptees' rights to whakapapa and whānau, |

| **Veto system:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
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| **renewal of 1-2 years, then expire).**<br><br>**CW (2-4)** | Vetoes only affect adult adopted persons. | supporting the right to identity.<br><br>However, this option is also likely to cause harm to people who do not wish for their personal information to be released. This will include some birth mothers in particular, who have been harmed by past practice. It will also | Supports adoptee's right to identity, and right to know family.<br><br>Limits right to privacy and freedom of expression of people who have placed vetoes. Does not allow for information to be withheld in any situation.<br><br>Time given for phase out gives veto-holders time for them to come to terms with prospect of information being released, and access support. | counselling, to help veto holders come to terms with release of adoption information would be highly beneficial, and would require resourcing. | and quickly ends the practice that prevents this information being made known. |
| **Option 2:**<br>**Phase out or remove, but can apply to keep it if losing it would cause unwarranted distress.**<br><br>**CW (1, 3,4)** | 0<br><br>Vetoes only affect adult adopted persons. | + +<br><br>Improves access to adoption information, supporting the right to identity.<br><br>Achieves aim of reform to open up information about adoption, while being mindful of the painful history of past adoptions that may require sensitivity and flexibility. | +<br><br>In most cases, supports adopted person's rights to identity and family.<br><br>Strikes a balance between adopted people's rights and birth parents' rights because while it may not result in the opening of information for everybody it does recognise the individual circumstances that may make releasing | +<br><br>Cost and time needed for setting up review process, which may also require delay in phase out of vetoes.<br><br>Clarity needed in how review decisions would be managed sensitively. | +<br><br>Supports active protection of adoptees' rights to whakapapa and whānau, where vetoes are removed.<br><br>Court process for determining when vetoes may stay may not respect Māori adoptees rangatiratanga. Court processes would need to be given strong understanding of the importance of adoptees' rights to whakapapa and whānau |

| **Veto system:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
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| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | such information inappropriate. | | and the importance of this for Māori. |
| **Option 3:**<br>**Different treatment of adopted people with vetoes and birth parents with vetoes e.g. keep vetoes placed by adopted people, phase out vetoes placed by birth parents.**<br><br>**CW (1,2,4)** | 0<br><br>Vetoes only affect adult adopted persons. | +<br><br>Addresses most urgent need (adopted people having access).<br><br>Recognises that there are situations where releasing information may cause harm to the adopted person. But does not recognise possible harm to birth parents. | 0<br><br>Supports adopted persons' rights to identity and family, as well as their agency in retaining their private identity information if they so desire.<br><br>Treating adopted people and birth parents differently may be discriminatory on grounds of family status.<br><br>Recognises the lack of power adopted people have faced when they are adopted, and that the barrier to information continues that power imbalance between adopted person and parent. | +<br><br>No feasibility constraints. | +<br><br>Supports active protection of adoptees' rights to whakapapa and whānau, eventually ends practice that prevents this information being made known for some people it affects. |
| **Option 4:**<br>**Remove vetoes but allow for no contact orders to be placed, either permanently or for a certain time.** | 0<br><br>Vetoes only affect adult adopted persons. | -<br><br>Effective at improving access to information, but would bar adopted person from seeking to learn more about their birth family. This is a stronger direction than | -<br><br>Supports adopted people to gain access to their unredacted birth certificates like non-adopted people, which upholds their right to identity. However, right to | -<br><br>May not be feasible. May be difficult to enforce no contact orders. | +<br><br>Māori adoptees given opportunity for knowledge of their whakapapa and whānau, but may be denied opportunity to connect with them, which does not |

| **Veto system:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **CW (1-3)** | | under the status quo and is not effective at protecting the adopted person's right to identity. | family limited by not being able to contact birth parents (or adoptee).<br><br>Supports birth parents in maintaining their privacy, even if information is released. | | actively protect right to whānau. |

**Preferred Options**

We have not decided on a preferred option at this point. The discussion document lists two potential options for the new system. These are:

- Status quo (no new vetoes can be created, but existing vetoes can continue to be renewed infinitely), or
- Changing the current veto system so that all vetoes have one final renewal available that lasts for 1-2 years. After that time, the veto would end, and the information can be accessed by the other party. People who would experience unwarranted distress by having their veto expire could apply to have the veto extended further.

Decisions about the future of vetoes require careful balancing of the rights of birth parents to privacy, and the expectation that they have been given for the past 35 years that their adoption information will not be released, with the right of adopted persons to identity, with flow on effects for descendants of adopted persons and wider family and whānau of adopted persons.

## What happens if things go wrong?

### Discharge of adoption

**Problem definition**

Currently, the Adoption Act contains a power for the court to discharge adoption orders, but this is rarely used. Discharge has the effect of reversing the effect of the adoption order, meaning that birth parents resume full legal parenthood. The impact of this differs depending on whether the person is a child or adult. This is because adults have more capacity to make significant decisions about themselves, but the discharge of the adoption will have less practical impact on their day-today life. In comparison, children will likely still require parental care, and may not have capacity to make decisions about a discharge of their adoption. The Act is silent about who can apply for a discharge of an adoption, which creates ambiguity and uncertainty about whether an application may be made.

The Act only allows discharge on the ground of misrepresentation or a material mistake in the original adoption proceeding. This focuses on the situation when the adoption order was made and does not expressly consider situations where events after the adoption order that may suggest the order is no longer appropriate, although these events may be considered in assessing whether there was misrepresentation or a mistake.[49] The Court has discretion not to discharge an adoption even if this ground is met, but it does not expressly state what the Court should consider or be satisfied of to grant a discharge if the ground is otherwise met.

The Act does not indicate what role the birth and adoptive parents should have in the proceedings. It does not require them to consent to the order, or have a specified role in the proceedings. Discharge of adoption, particularly for children, has an impact on the adopted parents who will no longer have any parental rights and responsibilities, and birth parents, who will resume full parental rights and responsibilities (unless additional orders around the care of the child are made).

The Act requires the Attorney-General to consent to the application. This may act as a barrier to people bringing applications to court, however, this can allow for assessment of applications, so that only suitable applications with a chance of success come before the Court.

**What we heard in engagement**

The high bar to discharging an adoption order was criticised in the first round of engagement as not centring on the rights and best interests of the adopted person. Instead, people thought the focus was on preserving the integrity of the adoption as a legal "contract" and the interests of the adoptive parents in finality of the adoption. People considered this prioritisation of finality is reflected in the fact that the circumstances following an adoption order being made are not grounds for discharge.

Adult adopted people told us that discharging an adoption order could support an adopted child to go back to their birth family where an adoptive placement was abusive. They also said that discharging an adoption order could support an adult adopted person's sense of identity, where they strongly wanted to reject the legal connection to their adoptive family on the basis of past harm.

However, people noted that discharge has significant legal impacts, including restoring birth parents as the adopted person's legal parents, and that there should be a robust process to make sure that it cannot be done lightly.

We also heard that the requirement for the Attorney-General to consent is unusual. The Attorney-General plays a special role in consenting to some more sensitive prosecutions, reporting to the Court in charitable trust matters, and in recognition of certain intercountry adoptions. However, requiring Attorney-General consent for an application provides a filter so

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49 Applicants in a number of cases have received a discharge by arguing that subsequent behaviour of adoptive parents, e.g. abuse, meant that the parent's claim to be a suitable adoptive parent amounted to misrepresentation at the time the adoption order was made. See, for example, *SFD v JEL* (2005) 24 FRNZ 909.

that only applications with a chance of success come before the Courts. It also means the Crown Law Office gets involved, which can help applicants get information they need to support the application. For example, information from the original court record.

**What this section covers**

- Who can apply to discharge an adoption?
- When can an adoption be discharged?
- Should birth or adoptive parents be required to consent to a discharge of adoption?
- What should be the process for an application for discharge coming to Court?

## Who can apply to discharge an adoption?

**Options we have considered**

- **Status Quo: The legislation is silent on who can make an application.**
- **Option 1 (Preferred): A birth parent can apply to discharge the adoption of a child.**
- **Option 2: A birth parent can apply to discharge the adoption of an adult.**
- **Option 3 (Preferred): An adoptive parent can apply to discharge the adoption of a child.**
- **Option 4: An adoptive parent can apply to discharge the adoption of an adult.**
- **Option 5: (Preferred): An adult can apply to discharge their own adoption.**
- **Option 6: If the child is 16 or 17, they can apply to discharge their own adoption.**
- **Option 7: Wider family and whānau can apply to discharge the adoption.**

| **Who can apply to discharge an adoption:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo**<br>**ME** | 0<br>Lack of clarity about who can apply may stop applications for discharge which would be in best | 0<br>Lack of clarity means law less effective if people who could apply are not applying. | 0<br>Does not recognise impact of adoption on groups who are potentially ineligible to apply for a discharge, e.g. wider family | 0<br>Unclear who can apply. | 0<br>Inability for whānau to apply for a discharge is not in keeping with supporting whānau Māori |

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| | interests of the child. For example, previous applications from grandparents have been denied on the grounds that the grandparent was not an eligible person to apply for discharge. Where judges are uncertain of who may apply, they may apply the law cautiously. | | and whānau of the adopted person.<br><br>Courts have held wider family and whanau not allowed to apply for discharge. | | rangatiratanga over care of tamariki, or recognise the mana and role of whānau in care of tamariki. |
| **Option 1 (Preferred):**<br><br>**A birth parent can apply to discharge the adoption of a child**.<br><br>**CW (1-7)** | 0<br><br>Focused on the birth parent's rights, not child's role. However, a birth parent's support is important to help decisionmakers in considering the effects of the discharge and whether the discharge is in the interests of the child. Focus is on who can apply not whether there are grounds to discharge (see table below).<br><br>May create disruption in the adoption relationship and undermine security.<br><br>Recognises that the child may lack capacity to make an application. Does not recognise that some children may have capacity to apply. | +<br><br>Provides clarity about who can apply to discharge the adoption. A birth parent is affected by the proceedings. | +<br><br>Recognises impact on the birth parents if adoption is discharged and they resume full legal parenthood (unless additional orders are made about the care of the child).<br><br>Does not address the situation where one birth parent seeks to resume care and other does not (see role of birth parents below). | +<br><br>Simple to apply.<br><br>Allowing birth parents to apply is consistent with guardianship or parenting orders, which allows parents to apply. But, if it is the only group that can apply, it is more limited than who can apply guardianship or parenting orders. | +<br><br>Supports active protection of tamariki right to whānau, as birth parent may restore whānau connections. |

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| **Option 2:**<br>**A birth parent can apply to discharge the adoption of an adult.**<br>**CW (1-7)** | 0<br><br>Relates to an adult adoptee. | +<br><br>Provides clarity about who can apply. A birth parent is affected by the proceedings. | --<br><br>Does not recognise the significance of the discharge on the adult adoptee. Undermines their autonomy.<br><br>Practical impact on birth parent is less where the person is an adult. | -<br><br>May lead to applications that are inappropriate because they are not sought by the adult adoptee. | -<br><br>Does not support mana of adopted person – decisions being made about them, without them. |
| **Option 3 (Preferred):**<br>**An adoptive parent can apply to discharge the adoption of a child.**<br>**CW (1-7)** | 0<br><br>Potential for applications which are not in the child's best interests, where the adoptive parent wishes to relinquish care, not based on any consideration of how this will affect the child.<br><br>Focus is on who can apply not whether there are grounds to discharge.<br><br>Recognises that the child may lack capacity to make an application. Does not recognise that some children may have capacity. | +<br><br>Provides clarity about who can apply to discharge the adoption. An adoptive parent is affected by the proceedings. | +<br><br>Recognises impact on the adoptive parents because discharge ends their parenting rights and responsibility.<br><br>If this is the only group, it does not recognise the impact on birth parents. | +<br><br>Simple to apply.<br><br>Allowing adoptive parents to apply is consistent with guardianship or parenting orders, which allows parents to apply. But, if it is the only group that can apply, it is more limited than who can apply guardianship or parenting orders. | -<br><br>Does not support mana of adopted person – decisions being made about them, without them. |
| **Option 4:**<br>**An adoptive parent can apply to discharge the adoption of an adult.**<br>**CW (1-7)** | 0<br><br>Relates to an adult adoptee. | -<br><br>Provides clarity about who can apply.<br><br>Adoptive parent being able to apply for discharge without the | --<br><br>Does not recognise the significance of the discharge on the adult adoptee. Undermines their autonomy. | - -<br><br>May lead to applications that are inappropriate because they are not sought by the adult adoptee. | -<br><br>Does not support mana of adopted person – decisions being made |

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| | | involvement of the adopted person, does not support reform objective of supporting rights of adoptive person to participation in decisions about their family. | Practical impact on adoptive parent is less where the person is an adult. | | about them, without them. |
| **Option 5 (Preferred):**<br>**The adult can apply to discharge their own adoption.**<br>**CW (1-7)** | 0<br>Relates to an adult adoptee. | ++<br>Provides clarity about who can apply. Adopted person is affected by discharge so should be able to make application. | +<br>Recognises the significance of the discharge on the adult adoptee and their autonomy.<br>Does not recognise the impact on birth and adoptive parents. Practical impact is less when for adults. | +<br>Easily implementable. | ++<br>Recognises adult adoptee's mana and right to acknowledge or not acknowledge adoptive whānau on their own terms. |
| **Option 6:**<br>**If the child is 16 or 17, they can apply to discharge their own adoption.**<br>**CW (1-7)** | ++<br>Supports child's autonomy and right to participate in decisions about their care. | +<br>Provides clarity about who can apply. Adopted person is affected by discharge so should be able to make application.<br>Potential risk of some inappropriate applications. | ++<br>Enhances right to freedom from discrimination under the Bill of Rights Act by removing potential discrimination on grounds of age.<br>Does not recognise the impact on birth and adoptive parents. Practical impact is less for older children. | +<br>Consistent with other family law that recognises evolving capacity of older children. May need processes to allow courts to assess capacity of 16- and 17-year-olds. | +<br>Supports tamariki rights to whānau and whakapapa, as tamariki are permitted to act to discharge their connection to an adoptive whānau in favour of their birth whanau. |
| **Option 7:**<br>**Wider family and whānau can apply to discharge the adoption.**<br>**CW (1-6)** | 0<br>Family and whānau may support child's best interests, and apply for discharge where | +<br>Provides some clarity about who can apply. But may mean a wide group of people can | - -<br>Does not recognise the impact on birth and adoptive parents. | +<br>Consistent with guardianship orders that allow specified members of family and whānau to | +<br>Acknowledges mana and role of whānau, and recognises their standing |

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| | adoptive placement is causing harm.<br><br>Potential for applications which are not in the best interests of the child, where whānau had strong opposition to an adoption, but the adoption was approved. | apply to discharge the adoption.<br><br>Family and whānau may support the Court to realise when an adoption needs to be discharged where a birth parent is absent. | For an adult, does not recognise the significant impact on the adult and their autonomy. | apply to discharge the order.<br><br>May need further clarity about who within the family and whānau can apply.<br><br>May lead to applications that are not supported by the birth/adoptive parents or the adoptive person. | in decisions about the care of tamariki. |

**Preferred options**

Our preferred options are that, for a child, the birth parent or adoptive parent can apply to discharge the adoption. This reflects the fact that children may not be well-placed to make decisions about bringing an application to discharge an adoption and this is consistent with other applications relating to care of children Birth parents and adoptive parents are particularly affected by the discharge, and therefore, we think they are appropriate people to make an application.

The discussion document is consulting on whether 16- and 17-year-olds should be able to apply to discharge their adoption with the consent of the Court. While 16- and 17-year-olds are legally children, they are more likely to have capacity to make clear and informed decisions about discharging an adoption than younger children. Including a specific provision for 16- and 17-year-olds recognises the child's right to participation in decision-making concerning them and enhances consistency with the right to freedom from discrimination on grounds of age under the Bill of Rights Act.

For an adult, our preferred option is that only the adult should be able to apply to discharge their adoption. This recognises the particular significance of the decision on the adult and their sense of identity. Discharging an adoption order for an adult will have an impact on the birth parents who will become the sole legal parents of the adult child. This may impact succession or other matters that depend on legal parentage. We think it is preferable for this impact to be dealt with in relation to the question of consent of the birth parents, rather than as part of the application process.

## When can an adoption be discharged?

**Options we have considered:**

- **Status Quo (Preferred): In cases of mistake or material misrepresentation.**
- **Option 1 (Preferred): If there is mutual consent between birth and adoptive parents.**
- **Option 2 (Preferred): If there is an irretrievable breakdown in the relationship between adoptive parents and the adopted person.**
- **Option 3 (Preferred): If the court is satisfied it is in the interests of the adoptive person, in addition to one or more of the grounds being met.**

- **Option 4: For a child, the court must consider orders under CoCA and Oranga Tamariki Act instead of or in addition to the discharge.**
- **Option 5: No grounds. Judge may discharge based on their discretion**

| **When can an adoption be discharged:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo (Preferred):**<br>**In cases of mistake or material misrepresentation.**<br>**CW (1-5)** | 0<br>Allows discharge only where adoption should not have been made. Does not require consideration of child's best interests and may not allow discharge in situations where it would be in the child's best interests. | 0<br>Only allows discharge in limited cases, not reflecting the enduring nature of adoption. Not sufficient to allow discharge based on changes to the adoptive relationship following adoption. | 0<br>Prioritises adoptive parents' interests in security of care over considering whether discharge of adoption would be in best interests of child or birth parents. | 0<br>Current process is feasible. | 0<br>Restrictive grounds for discharge do not support Māori right to whānau connection where an adoption has broken down and is no longer in best interests of tamariki. |
| **Option 1 (Preferred):**<br>**If there is mutual consent between birth and adoptive parents.**<br>**CW (SQ, 2-5)** | -<br>Supports child's right to family.<br>Consideration needed for views of child to support discharge to appropriately involve child participation. | +<br>Allows discharge when supported by birth and adoptive parents. In keeping with purpose that adoption is for a child whose parents cannot or will not care for them. | 0<br>Does not include the consent of the adopted person including if they are an adult (But see preferred option that only the adopted person can make the application if they are an adult). | +<br>Simple criteria for Court to consider.<br>Consistent with desire for consensus and negotiation in other domestic care-of-children related matters. | +<br>Acknowledges rangatiratanga of whānau Māori, However, consensus decision-making still requires Court sign off, and Court assessment that discharge is "in the best interests of the child". |
| **Option 2 (Preferred):**<br>**If there is an irretrievable breakdown in the relationship between** | ++<br>Acknowledges that changes to the adoptive | +<br>Allows discharge in situations that occur after | ++<br>Allows for balancing of adoptive parents' rights | +<br>"irretrievable breakdown" used internationally, some | +<br>Supports Article 1 kāwanatanga |

| **When can an adoption be discharged:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **adoptive parents and the adopted person.**<br>**CW (SQ, 1, 3-4)** | relationship post-adoption can mean that discharge would be in the child's best interests. | the adoption. Supports that adoption is a service for a child, so can be undone once it is no longer "of service" to the child. | to permanency in the adoptive relationship with best interests of child. | precedent to support decision-making.<br><br>May be influx of discharge cases, and need for resourcing. | responsibilities of the Crown, for decision that has caused harm to tamariki Māori within Crown-governed system to be reversible. |
| **Option 3 (Preferred):**<br>**If the court is satisfied it is in the interests of the adoptive person, in addition to one or more of the grounds being met.**<br><br>**CW (All)** | + +<br><br>Makes best interests of the child paramount consideration. | + +<br><br>Supports all factors to be considered, not simply whether a ground is met – for example an adoptive person may have had an irretrievable breakdown in their relationship with their adoptive parents, but it may be in their best interests for the adoption to stand based on, for example, their connection to wider adoptive family. | +<br><br>Recognises significant impact on adults who have been adopted.<br><br>Interests of the adoptive and birth parents may carry less weight. | +<br><br>Consistent with the approach to other proceedings relating to the care of children. | -<br><br>Court has decision-making power, even if for example, there was whānau agreement to discharge an adoption. This is opposed to rangatiratanga. Court is the arbiter of best interests of child, will need to consider these specifically for tamariki Māori. |
| **Option 4 (Preferred):**<br>**For a child, the court must consider whether orders under CoCA and Oranga Tamariki should also be made.**<br>**CW (All)** | +<br><br>Provides for discharge of adoption order to be considered in the context of other options, in determining whether discharge is in child's best interests. | +<br><br>Supports all factors to be considered in deciding whether to discharge the adoption, not simply whether a ground is met. | +<br><br>Requires the court to consider the appropriateness of the birth parents resuming full care of the child. This recognises that the birth | +<br><br>Supports consistency with other care of children processes and with the original adoption proceeding. | -<br><br>Court deciding on best care options for the child, in place of whānau attempt to take care of tamariki does not protect whānau rangatiratanga. |

| **When can an adoption be discharged:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | parents may not wish to resume care. | | |
| **Option 5:**<br>**No grounds. Judge may discharge based on their discretion**<br>**CW (3 and 4)** | +<br>Limited guidance about when discharge may be appropriate. Court could consider whether a wider range of circumstances mean discharge is in best interests of child. . Undercuts stability of adoption if discharge can be received too easily, which may not be in the interests of the child. | - -<br>Lack of clarity about when discharge is appropriate. Raises risk of inconsistency. May increase the number of discharges and undermine the enduring nature of adoption. | -<br>Adoptive parents disadvantaged, adoption can be discharged much more easily<br>Birth parents have much easier recourse to argue discharge of adoption is in child's best interests, rather than having to meet grounds. | -<br>May lead to an increase in applications.<br>Flexible to apply to a wide variety of circumstances. | +<br>Allows for active protection of whakapapa connections, best interests can be argued from te ao Māori lens, without having to fit restrictive legislative criteria to prove need for discharge. |

**Preferred options**

Our preferred options are to retain the status quo (discharge on grounds mistake as to fact or material misrepresentation), but also allow discharge where:

- there is mutual consent between the birth and adoptive parents; or
- an irretrievable breakdown in the relationship between adoptive parents and the adopted person.

This recognises a wider range of circumstances where discharge may be appropriate, while still ensuring that discharge is relatively rare. They would allow discharge where the birth and adoptive parents support the discharge or when there is a complete breakdown in the adoptive relationship making it no longer appropriate to continue the adoption.

Our preferred options also include that the discharge must be in the interests of the adopted person. This recognises the significant impacts of the discharge on the adopted person. The Court should also consider additional orders under the Care of Children Act or the Oranga Tamariki Act if one or both of the birth parents are not able or willing to care for the child.

## What role should birth or adoptive parents have?

**Options we have considered**

- **Status Quo: Consent not required.**
- **Option 1: Birth parent consent required.**
- **Option 2: Adoptive parent consent required.**
- **Option 3 (Preferred): Birth parents participate in discharge proceedings.**
- **Option 4 (Preferred): Adoptive parents participate in discharge proceedings.**

**What role should birth or adoptive parents have:** Analysis of options

KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1)

| | Upholds children's rights | Fit for purpose | Equity | Feasibility and durability | Te Tiriti o Waitangi |
|---|---|---|---|---|---|
| **Status Quo:**<br>**Consent not required.**<br>**CW (3 and 4)** | 0<br>Allows discharge that may be in the child's interest even without the birth or adoptive parents' consent. | 0<br>Does not specify the role birth and adoptive parents should play in a discharge application. | 0<br>Doesn't take into account impact on birth/adoptive parents. | 0<br>Straightforward and easy to implement. | 0<br>Allows for straightforward discharge that supports active protection of tamariki ability to return to whānau connections<br><br>However, the Court making decisions about discharge of adoption without considering birth parents and whānau views does not support rights to rangatiratanga. |
| **Option 1:**<br>**Birth parents required to consent.**<br>**CW (2)** | --<br>A discharge that is in the interests of the child may be prevented if one or | -<br>Sets out a clear role for birth parents. Prevents a discharge that otherwise | +<br>Takes into account the impact on discharge on birth parents who will | -<br>May add complexity to proceedings, particularly | -<br>Does not actively protect mana of adopted person |

| **What role should birth or adoptive parents have:** Analysis of options<br>KEY: ▭ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | both birth parent's does not consent. | meets the grounds if there is no consent. | regain day-to-day care of the child (unless other orders are made).<br><br>May prevent one birth parent resuming full legal parenthood if the other does not consent. Means other orders may be needed to allow birth parent to care for child. | where birth parents do not agree with each other.<br><br>Consistent with other aspects of adoption reform where we propose consent.<br><br>Not consistent with other orders regarding the care of children which do not require consent. | – decisions being made about them, without them. |
| **Option 2:**<br><br>**Adoptive parent consent required.**<br><br>**CW (1)** | --<br><br>A discharge that is in the interests of the child may be prevented if one or both adoptive parents does not consent. | --<br><br>Prevents a discharge that otherwise meets the grounds if there is no consent.<br><br>May make it difficult to obtain a discharge in some situations where the relationship has broken down. | +<br><br>Takes into account there is some impact of discharge on adoptive parents who will no longer have legal parenthood or day-to-day care of the child.<br><br>Does not recognise the impact on the birth parent. | -<br><br>Feasible to implement.<br><br>Not consistent with other orders regarding the care of children which do not require consent.<br><br>Consistent with other aspects of adoption reform where we propose consent. | -<br><br>Does not support mana of adopted person – decisions being made about them, without them.<br><br>Does not supports active protection of tamariki right to whānau, as may make it difficult to restore whānau connections. |
| **Option 3 (Preferred):**<br><br>**Birth parents participate in discharge proceedings.**<br><br>**CW (SQ, 4)** | ++<br><br>Birth parents' participation will help Court determine what the circumstances of the child/adopted person | ++<br><br>Clarity about the role of birth parents. Supports | ++<br><br>Ensures that discharge cannot occur without the input of the birth parent(s) and recognises | +<br><br>Supports judges to have the relevant information to make a decision. Will | +<br><br>Recognises the mana of birth parents, active protection of the child's |

| **What role should birth or adoptive parents have:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | would be following a discharge. | decision on whether discharge is justified. | the impact discharge will have on them. | require time and resourcing to hear views.<br><br>Consistent with proposed approach to adoption proceedings. | right to care within the whānau |
| **Option 4 (Preferred):**<br>**Adoptive parents participate in discharge proceedings.**<br>**CW (SQ, 3)** | ++<br><br>Adoptive parents' participation will help Court to determine the reasons for a discharge and whether they are justified. | ++<br><br>Clarity about the role of adoptive parents Supports decision on whether discharge is justified. | +<br><br>Ensures that discharge cannot occur without the input of the adoptive parent(s) and recognises the impact discharge will have on them. | -<br><br>Supports judges to have the relevant information to make a decision.<br><br>Will require time and resourcing to hear views.<br><br>Consistent with proposed approach to adoption proceedings. | 0<br><br>Have not identified any issues. |

**Preferred options**

Our preferred option is that birth parents and adoptive parents have the opportunity to participate in discharge proceedings to allow their views to be heard. We do not consider they should be required to consent to the discharge, as this may prevent discharge when it is otherwise in the interests of the adoptive person.

## What should be the process for an application for discharge coming to Court?

**Options we have considered**

- **Status Quo: The Attorney-General must approve the application to the Court.**
- **Option 1: A person can apply directly to the Court.**
- **Option 2: A person can apply to the Court for leave to apply for discharge.**
- **Option 3: For a child, require applicants to engage with Oranga Tamariki before submitting an application to discharge the adoption.**

| **Process for discharging an order:** Analysis of options<br>KEY: ▭ = Legislative option ☐ = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo: Attorney-General consent required to apply for the discharge of an adoption order.** | 0<br><br>Makes it more difficult to apply for discharges which may be in child's best interests. | 0<br><br>Slows process for discharge and makes it more costly and difficult. Applicants may find it intimidating to apply to Attorney-General.<br><br>Protects stability of adoption by preventing inappropriate applications for discharge. | 0<br><br>May make it more difficult for adults who have been adopted, birth/adoptive parents to pursue a discharge. | 0<br><br>Reduces costs to Court by preventing inappropriate applications.<br><br>Crown Law Office can help people to get information they need for application. | - -<br><br>Crown gatekeeper for applications, does not recognise Māori rangatiratanga. |
| **Option 1:**<br><br>**A person can apply directly to the court.** | +<br><br>This supports expediting of discharge where it is in child's best interests. | -<br><br>No barrier to application – may result in more applications without a chance of success. | ++<br><br>Removes barriers for applications for adults who have been adopted, | +<br><br>Much simpler process. | +<br><br>Recognises mana of applicant, takes away a barrier to Māori agency , |

| **Process for discharging an order:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | This lack of gatekeeper may result in more applications which are not in child's best interests. | May result in insufficiently prepared applicants who do not have the information or case ready to prove justification for discharge.<br><br>Making it easier to discharge an adoption may undermine its enduring nature. | birth/adoptive parents to pursue a discharge. | Could result in more applications, and more Court resource needed.<br><br>No Crown Law resource required. No help provided to applicants to support them to have access to the relevant information for the proceeding. | despite being within Crown process. |
| **Option 2:**<br>**A person can apply to the court for leave to apply for discharge.** | +<br><br>May expedite discharge process. This is positive where a discharge will support children's rights.<br><br>Slight risk that this could lead to rise unsuitable applications. | +<br><br>Allows Court to make decision over whether application has merit.<br><br>Protects stability of adoption by preventing inappropriate applications for discharge. | +<br><br>Removes barriers for applications for adults who have been adopted, birth/adoptive parents to pursue a discharge. | 0<br><br>Slight increase in Court workload to rule out cases without merit.<br><br>Reduces duplication, as cases do not have to meet AG bar before being considered by Court.<br><br>No Crown Law resource required. No help provided to applicants to support them to have access to the relevant information for the proceeding. | - -<br><br>Crown gatekeeper for applications, does not recognise Māori rangatiratanga. |
| **Option 3:** | + | + | - | - | - - |

| **Process for discharging an order:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **For a child, require applicants to engage with Oranga Tamariki before submitting an application to discharge the adoption.** | Provides filter to prevent inappropriate discharge application. | Adds a barrier to applications.<br><br>Oranga Tamariki could provide information to support discharge applications which are in the best interests of the child. | For adults who have been adopted there is no barrier to application. But, they are also not able to access support from Oranga Tamariki that is available for children. | Requires implementation and resourcing of Oranga tamariki to provide support and assessment of applications. | Crown gatekeeper for applications, does not recognise Māori rangatiratanga. |

**Preferred option**

We do not currently have a preferred option and are engaging further on whether to retain the requirement for applications to discharge an adoption order to be approved by the Attorney-General. We think it is necessary to consider whether an additional process is needed before an application can be made, and if so, whether Attorney-General consent is needed, or whether other mechanisms could ensure that discharge applications are suitable.

## What happens in overseas and intercountry adoptions?

**Problem definition**

Currently, the law provides four pathways for recognising overseas adoptions and facilitating intercountry adoptions in New Zealand:

- Pathway 1: Hague Convention intercountry adoptions

  The Hague Convention sets out an internationally agreed process for intercountry adoptions between countries that belong to the Convention. The Convention has safeguards to ensure that those adoptions are in the best interests of the child. The Hague Convention is implemented by the Adoption (Intercountry) Adoption Act 1997. New Zealand is a receiving state, meaning that New Zealand-based adoptive applicants can adopt children from other countries that are signatory to the Hague Convention, but that New Zealand children are not made available for adoption under the Convention.

- Pathway 2: Intercountry adoptions in the New Zealand Family Court

  Section 3 of the Adoption Act allows anyone to make an adoption application in the New Zealand Family Court from anywhere, regarding any child, anywhere. Applications under the Adoption Act involving people living overseas (either the child or adoptive applicants) will follow New Zealand's domestic adoption process.

- Pathway 3: Overseas adoptions and Pathway 4: Intercountry adoptions in overseas court

  Section 17 of the Adoption Act automatically recognises adoptions made by overseas courts as valid in New Zealand, so long as the adoptions meet the criteria relating to validity and the legal effect of the adoption. Some intercountry adoptions also use the pathway created by section 17, whereby New Zealand residents adopt a child living overseas under the domestic adoption processes of that country and then seek to have the adoption recognised upon returning to New Zealand.

Current settings allow some intercountry adoptions to take place via pathways that were not intended for that purpose and therefore do not have adequate safeguards in place, taking into account the specific risks those pathways might pose. For example:

- Pathway 2 is unusual as it allows the New Zealand Family Court to make decisions about people or matters not connected to New Zealand. It can be challenging for the Court to get information needed to consider an application, verify the accuracy of information provided and confirm the child's identity, which can make it difficult for the Court to determine whether the adoption is in the child's best interests.
- Pathway 2 enables people living overseas to make an application in the New Zealand Family Court to bypass their own country's laws.
- Pathways 2, 3 and 4 may present risks to New Zealand's national security, given the difficulties in verifying the accuracy of information provided and confirming the child's identity.
- Pathway 4 (enabled by section 17) allows New Zealanders to bypass the law relating to intercountry adoption in New Zealand, by enabling those people to leave New Zealand to adopt a child overseas where they may not have been able to under New Zealand law and subsequently return to New Zealand with the adoption being automatically recognised.
- Pathway 4 can place children's best interests and welfare at risk, particularly where the country making the intercountry adoption does not take some of the steps New Zealand considers necessary to safeguard children's rights.

Reform offers the opportunity to consider how we can ensure the overseas and intercountry adoption processes:

- are child-centric, and supports the welfare and best interests of children; and,
- ensure New Zealand meets its domestic and international human rights obligations.

**What we heard in engagement**

We heard that intercountry adoptions happen for a wide range of reasons. For example, intercountry adoptions from the Pacific are often driven by cultural values, access to education and employment in New Zealand, and family circumstances (such as the death of a biological parent).

Most people supported establishing effective safeguards to protect the safety of children in intercountry adoptions. Although there were mixed views about how these safeguards should be established, there was support for the processes used under the Hague Convention, or equivalent safeguards being established for all intercountry adoptions. There were strong views among a few who thought that all intercountry adoptions should be prohibited.

We heard during engagement that some technical changes could be made to the way the Hague Convention process operates in practice, including the countries we have agreements with, and ensuring consistency for the citizenship rights of children adopted under the Convention.

**Options we have considered**

- **Status Quo: Intercountry and overseas adoptions continue under current Pathways 1 – 4.**
  Intercountry and overseas adoptions are facilitated and recognised using Pathways 1 – 4.
- **Option 1: Prohibit all intercountry adoptions.**
  Provide that intercountry adoptions involving New Zealand residents cannot take place, either under the Hague Convention or not.
- **Option 2: Do not recognise any overseas adoptions.**
  Provide that no adoptions made overseas will be recognised in New Zealand.
- **Option 3: Prohibit all intercountry adoptions and do not recognise overseas adoptions.**
  Combination of options 1 and 2.
- **Option 4 (Preferred): Continue to allow Hague Convention intercountry adoptions.**
  Intercountry adoptions can take place under the established Hague Convention process, with technical changes made where necessary.
- **Option 5 (Preferred): Define intercountry and overseas adoptions.**
  Define in law that intercountry adoptions are those where the adoptive applicant(s) live in NZ, and the child lives overseas, and overseas adoptions as those where both the child and adoptive applicant(s) live overseas. Adoptive applicant(s) would be required to follow the appropriate pathway.
- **Option 6 (Preferred): Create new safeguards for intercountry and overseas adoptions.**
  Set out in law safeguards, such as criteria that need to be met or processes that need to be followed, for intercountry and overseas adoptions.

| **Intercountry and overseas adoptions:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| **Status Quo**<br><br>**Intercountry and overseas adoptions continue under current Pathways 1 – 4.** | --<br><br>Aside from Pathway 1, does not meet child-focused international obligations, with adoptions taking place without adequate safeguards.<br><br>Children's best interests not paramount, and children coming to harm. | -<br><br>Enables intercountry and overseas adoptions to be facilitated/recognised, but not in a safe way that protects children. | -<br><br>Children adopted via Pathways 2 – 4 receive less protection than children adopted under Pathway 1 or domestically. | --<br><br>Current processes are usable, but not feasible to continue in the long-term given the risks to children's wellbeing.<br><br>Not sustainable in the long-term given the risks to children's wellbeing.<br><br>National security risks associated with a lack of safeguards in current pathways.<br><br>Reputational risks from lack of safeguards. | --<br><br>Lack of Māori involvement in design of intercountry adoption pathways does not support Māori rangatiratanga. |
| **Option 1:**<br><br>**Prohibit all intercountry adoptions.** | -<br><br>Intercountry adoption would not be available in cases where it may be in a child's best interests. | --<br><br>Does not provide a safe pathway for intercountry adoptions. May encourage people to adopt children in the overseas jurisdiction. | -<br><br>Disadvantages overseas based children for whom adoption to New Zealand may be in their best interests.<br><br>Pacific populations within New Zealand are disproportionately disadvantaged by no longer being able to use intercountry adoption methods. | --<br><br>Fails to recognise there may be some situations where intercountry adoption is appropriate.<br><br>NZ being signatory to the Hague Convention would become redundant – causing inconsistency with New Zealand's obligations under that Convention. | -<br><br>Could prohibit tamariki Māori being adopted from overseas to whānau or another Māori whānau in New Zealand which may not be in their best interests. Does not acknowledge whānau Māori rangatiratanga to decide when this |

| **Intercountry and overseas adoptions:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | | | | Does not provide flexibility for situations where intercountry adoption is appropriate. | would be in the best interests of tamariki. |
| **Option 2:**<br><br>**Do not recognise any overseas adoptions.** | --<br><br>Does not protect children's right to family. May prevent adoptive children from being able to migrate to New Zealand with their adoptive family, or place additional barriers around their being able to do so. | --<br><br>Recognition of overseas adoptions likely to still occur, but would require those migrating to NZ to adopt in the New Zealand Family Court before bringing the child to New Zealand. Does not acknowledge there still remains a need to recognise overseas adoptions where family move to New Zealand. | --<br><br>Results in differential treatment for adopted children compared to biological children. | --<br><br>There will still be a need for adoptions to be recognised where people migrate to NZ with adopted children.<br><br>Requiring re-adoption of those children in NZ Family Court is not feasible – may be years since the adoption occurred and/or information may not be available.<br><br>Would result in overseas adoptions coming to NZFC, with time and resourcing requirements likely to be high for these cases. | --<br><br>Māori who reside overseas who may adopt then later chose to move back to New Zealand would not be able to have their new whānau recognised, along with the benefits of recognition of New Zealand citizenship and associated rights. This is not in keeping with providing adopted tamariki with equal rights and privileges guaranteed under Article 3 of te Tiriti. |
| **Option 3:**<br><br>**Prohibit all intercountry adoptions and do not recognise overseas adoptions.** | --<br><br>Does not protect children's right to family. May prevent adoptive children from being able to migrate to New Zealand with their adoptive family, or place additional | --<br><br>Recognition of overseas adoptions likely to still occur, but would require those migrating to NZ to adopt in the New Zealand Family Court before bringing the | --<br><br>Results in differential treatment for adopted children compared to biological children. | --<br><br>There will still be a need for adoptions to be recognised where people migrate to NZ with adopted children.<br><br>Requiring re-adoption of those children in NZ Family Court is not feasible – may be years since the | -<br><br>Māori who reside overseas who may adopt then later chose to move back to New Zealand would not be able to have their new whānau recognised, along with the benefits |

| **Intercountry and overseas adoptions:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | barriers around their being able to do so. | child to New Zealand. Does not acknowledge there still remains a need to recognise overseas adoptions where family move to New Zealand. | Only domestic adoption viable option for NZ adoptive applicants. | adoption occurred and/or information may not be available.<br><br>Would result in overseas adoptions coming to NZFC, with time and resourcing requirements likely to be high for these cases. | of recognition of New Zealand citizenship and associated rights. This is not in keeping with providing adopted tamariki with equal rights and privileges guaranteed under Article 3 of te Tiriti. |
| **Option 4 (Preferred):**<br>**Allow Hague Convention intercountry adoptions.** | ++<br><br>Children's rights are protected as intercountry adoption process follows the safeguards set out in Hague Convention.<br><br>Technical changes can be made to ensure equal treatment of children re citizenship. | ++<br><br>Ensures intercountry adoptions can continue to take place with Hague Convention safeguards.<br><br>Not all adoptions that take place overseas will be recognised. | -<br><br>Only allows for recognition of intercountry adoptions from our Hague Convention partner states. | ++<br><br>Hague Convention process is well established with new countries continuing to accede to the Convention. It is feasible to continue using, with technical changes made where needed.<br><br>NZ currently has agreements with seven countries. | 0<br><br>New Zealand is not a sending country, meaning tamariki Māori are not adopted under the Hague Convention. |
| **Option 5 (Preferred):**<br>**Define intercountry and overseas adoptions.** | ++<br><br>Ensures adoptions follow the appropriately established processes which (depending on | ++<br><br>Prevents the use of inappropriate pathways for adoption, including enabling people to | +<br><br>Adopted children can be treated the same as biological children when migrating to NZ. | ++<br><br>Clarity for adoptive applicant(s) on which adoption pathway should be followed. | +<br><br>Creating clear and narrow processes lessens the current risk posed by intercountry and overseas adoptions, |

| **Intercountry and overseas adoptions:** Analysis of options<br>KEY: = Legislative option = Practice-based option ME = Mutually exclusive option CW (1) = Complementary with (Option 1) | | | | | |
|---|---|---|---|---|---|
| | **Upholds children's rights** | **Fit for purpose** | **Equity** | **Feasibility and durability** | **Te Tiriti o Waitangi** |
| | the detail) can protect children's rights. | bypass their domestic laws. | | | protecting the privilege of future Maori intercountry adoptive parents to adopt, in keeping with their rights under Article 3. |
| **Option 6 (Preferred):**<br>**Create new safeguards for intercountry and overseas adoptions.** | ++<br><br>Depending on the safeguards, can focus on protecting children's rights, including those relating to safety, family, identity.<br><br>Can ensure consistency with child-focused international obligations. | +<br><br>Depending on the safeguards, can enable intercountry and overseas adoption processes to be created that protect the safety and wellbeing of children. | +<br><br>Depending on the safeguards, should be able to provide a similar level of protection to children adopted overseas/via intercountry adoption to those adopted domestically in NZ. | 0<br><br>Depends on the safeguards. | +<br><br>Safeguards may lessen the current risk posed by intercountry and overseas adoptions, protecting the privilege of future Maori intercountry adoptive parents to adopt, in keeping with their rights under Article 3. |

**Preferred options**

Our preferred option is creating three intercountry and overseas pathways, with clear definitions of what constitutes an intercountry adoption and an overseas adoption:

- Pathway A: Hague Convention intercountry adoptions
  We propose that intercountry adoptions should be able to take place via the established Hague Convention intercountry adoption process, which has safeguards to protect children and uphold their rights. Technical changes (not provided in the discussion document) may need to be made to the process to ensure its proper functioning and these will be considered alongside implementation issues.
- Pathway B: Overseas adoptions
  We propose defining an overseas adoption as one where both the child and adoptive applicant(s) do not live in New Zealand. Enabling overseas adoptions to be legally recognised is important so that families with adoptive children who travel or move to New Zealand can have their relationships recognised. We propose that recognition under

this pathway continue to be automatic via an administrative process. The administrative process means that families are not required to go through an additional step to have their legal parent-child relationship recognised when migrating to New Zealand. The detail of the new overseas adoption pathway, including relevant criteria for recognising the adoption, is yet to be determined.

- Pathway C: Other intercountry adoptions
  We propose defining an intercountry adoption as one where the adoptive applicant(s) live in New Zealand and the child lives overseas. We consider there is still a need to enable some intercountry adoptions outside of the Hague Convention process to take place, particularly in recognition of the fact that the majority of our Pacific neighbours are not signatory to the Convention. The detail of the new other intercountry adoption pathway is yet to be determined.

The discussion document also seeks feedback on:

- what criteria should be required to be met to automatically recognise overseas adoptions; and
- what the new process for other intercountry adoptions (Pathway 3) should look like.