THE RIGHT OF INDIGENOUS CHILDREN TO CULTURAL SAFETY IN THE FAMILY LAWS OF AUSTRALIA AND NEW ZEALAND

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Australia and New Zealand are both signatories to the United Nations Convention on the Rights of the Child and therefore are expected to promote Indigenous cultural safety in their respective family laws under article 30. Australia has a particular obligation due to the intergenerational trauma that Indigenous Australians continue to suffer as a result of colonialism. The Australian Law Reform Commission has recently reported that the Family Law Act 1975 (Cth) continues to fail to protect the right to cultural safety for Indigenous children under article 30 due to a lack of legal safeguards. Conversely, New Zealand has arguably better implemented article 30 under the Care of Children Act 2004 (NZ), which provides legal mechanisms for the ordering of cultural reports and cultural speakers. This article argues that New Zealand law better recognises Indigenous kinship in determining the child's best interests and offers an example of law reform to Australia.

I INTRODUCTION

Culture is intrinsic to the Indigenous identity – it is not an optional lifestyle choice. Indigenous Australians and Māori New Zealanders share a sacred bond with the intertwined elements of land, family, law, and ceremony.[1] This bond is governed by the intricate kinship system which dictates the roles, obligations, and relationships between Indigenous people.[2] The British colonisation of Australia and

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1 Patrick McConvell, 'Introduction: Revisiting Aboriginal Social Organisation' in Patrick McConvell, Piers Kelly and Sébastien Lacrampe (eds), *Skin, Kin and Clan: The Dynamics of Social Categories in Indigenous Australia* (Australian National University Press, 2018) 1, 9 <http://doi.org/10.22459/SKC.04.2018.01>; Jacinta Ruru, 'Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand' (2005) 19(3) *International Journal of Law, Policy and the Family* 327, 327–8 <https://doi.org/10.1093/lawfam/ebi026> ('Indigenous Peoples and Family Law').

2 Tony Jefferies, 'Close-Distant: An Essential Dichotomy in Australian Kinship' in Patrick McConvell, Piers Kelly and Sébastien Lacrampe (eds), *Skin, Kin and Clan: The Dynamics of Social Categories in Indigenous Australia* (Australian National University Press, 2018) 363, 364 <https://doi.org/10.22459/SKC.04.2018.11>.

New Zealand has eroded these Indigenous customary laws through state-sanctioned assimilation mechanisms.[3] Hence, in responding to the intergenerational trauma caused by colonisation, it is vital that Australia's contemporary legal framework suitably protects Indigenous youth and their due rights to culture.

New Zealand is comparable to Australia as they are similarly colonised nations, both substantively and temporally as territories colonised by the British in the late eighteenth and nineteenth centuries.[4] Furthermore, both countries have ratified the *United Nations Convention on the Rights of the Child* ('*UNCRC*').[5] In particular, article 30 of the *UNCRC* stipulates Indigenous children shall not be denied the right to enjoy their culture.[6] This right is supposed to be promoted under the *Family Law Act 1975* (Cth) ('*FLA*') in Australia, and the *Care of Children Act 2004* (NZ) ('*COCA*') in New Zealand. Both nations have significant Indigenous populations whose values of kinship diverge from the Western nuclear family ideal that is fundamentally ingrained within their legal systems.[7] This Anglo-European norm centralises two biological parents as the pillars of a 'functional' family '– a construction which lies at the heart of private family law'.[8] The normativity of the Western model of kinship has posed a challenge to the incorporation of the right to Indigenous culture in the promotion of the child's best interests under article 3 of the *UNCRC*.[9]

The primary question addressed in this article is whether Australian or New Zealand family law provisions uphold international standards for protecting the right of Indigenous children to enjoy their culture. The assessment of Australian and New Zealand family laws shall be based upon the extent to which the nation's respective law accommodates Indigenous kinship values. This article argues that New Zealand family law policies aimed at ensuring the cultural safety of Indigenous children have proven to be relatively successful and can be beneficially transplanted into the Australian context. Part II examines the sociocultural need for the Indigenous children of Australia and New Zealand to have their cultural safety rights protected in accordance with the *UNCRC*. Part III critiques the extent to which the *FLA* successfully upholds the right of Indigenous children to their culture in Australia. Part IV analyses the effectiveness of equivalent family law legislation

3 Sarah Keenan, 'Moments of Decolonization: Indigenous Australia in the Here and Now' (2014) 29(2) *Canadian Journal of Law and Society* 163, 164 <https://doi.org/10.1017/cls.2014.11> ('Moments of Decolonization'); Ruru, 'Indigenous Peoples and Family Law' (n 1) 327.

4 Ruru, 'Indigenous Peoples and Family Law' (n 1) 328.

5 *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*UNCRC*').

6 Adelaide Titterton, 'Indigenous Access to Family Law in Australia and Caring for Indigenous Children' (2017) 40(1) *University of New South Wales Law Journal* 146, 161 <https://doi.org/10.53637/MRDJ2734> ('Indigenous Access to Family Law').

7 Ruru, 'Indigenous Peoples and Family Law' (n 1) 328.

8 Keryn Ruska and Zoe Rathus, 'The Place of Culture in Family Law Proceedings: Moving Beyond the Dominant Paradigm of the Nuclear Family' (2010) 7(20) *Indigenous Law Bulletin* 8, 8 ('The Place of Culture in Family Law Proceedings').

9 Henry Kha and Kailee Cross, 'Equal Shared Parental Responsibility and Children's Rights in Australia' [2020] 14 *University of New South Wales Law Society Court of Conscience* 27, 27 ('Equal Shared Parental Responsibility').

that aims to promote the right of Indigenous children to culture in New Zealand. Part V argues that the family law of New Zealand pertaining to Indigenous cultural safety could serve as a model for reform of the *FLA* in Australia.

II ARTICLE 30 OF THE *UNCRC*: THE RIGHT TO INDIGENOUS CULTURE

States Parties of the *UNCRC* are legally bound to incorporate the universal rights into 'all laws, judicial and administrative decisions, policies and programmes relating to children'.[10] The core *UNCRC* principal of 'devotion to the best interests of the child' fundamentally guides parties in designing national Indigenous cultural safety laws that comply with article 30.[11] The *UNCRC* stipulates that states should undertake 'special measures through legislation and policies for the protection of indigenous children'.[12] However, the *UNCRC* does not provide an adoptable legislative framework for protecting Indigenous children, creating great disparity between the *UNCRC*'*s* universal nature of rights and how the rights are interpreted at a national level.[13]

Although the *UNCRC* grants children individual rights, the fulfilment of these rights relies heavily upon positive familial relationships.[14] The *UNCRC* states that the article 30 right is 'conceived as being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures'.[15] Hence in conforming to article 30,[16] national family law provisions should contain mechanisms that protect the cultural safety of Indigenous children. Parenting orders refer to the court orders detailing the care arrangements for a child, with focused consideration of the child's welfare.[17] Consequently, parenting orders hold vital powers in ensuring that Indigenous children are able to spend sufficient time with their Indigenous parent(s) and are raised with strong ties to their culture per article 30.

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10 United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, 40th sess, UN Doc CRC/C/RUS/CO/3 (23 November 2005) 7 [31].

11 Bethaina Dababneh, 'Is Family Dispute Resolution Facilitating the Child's Rights to Culture?' (PhD Thesis, University of Western Sydney, 2014) 54 ('Facilitating the Child's Rights to Culture'); *UNCRC* (n 5) art 3.

12 United Nations Committee on the Rights of the Child, *General Comment No 11: Indigenous Children and Their Rights under the Convention*, 50th sess, UN Doc CRC/C/GC/11 (12 February 2009) 5 [20] ('*General Comment No 11: Indigenous Children and Their Rights under the Convention*').

13 Mai Heide Ottosen, 'In the Name of the Father, the Child and the Holy Genes: Constructions of "The Child's Best Interest" in Legal Disputes over Contact' (2006) 49(1) *Acta Sociologica* 29, 32 <https://doi.org/10.1177/0001699306061898>.

14 Dababneh, 'Facilitating the Child's Rights to Culture' (n 11) 55.

15 *General Comment No 11: Indigenous Children and Their Rights under the Convention* (n 12) 4 [16].

16 *UNCRC* (n 5).

17 *Family Law Act 1975* (Cth) s 64B; *Care of Children Act 2004* (NZ) s 48.

Indigenous Australian family structures follow a kinship system that encompasses extended family members in childrearing roles.[18] Kin networks are grounded in collectivism and dictate care obligations in the absence of a biological parent.[19] Māori, the Indigenous people of Aotearoa, or New Zealand, follow similar kin structures, '*whānau*'.[20] *Whānau* provide 'the ground in which kinship and social relationship obligations and duties are learned'.[21] Indigenous kinship systems view their children as 'not the child of the birth parents, but of the family' which is 'not a nuclear unit' but 'part of a tribal whole, bound by reciprocal obligations to all whose future was prescribed by the past fact of common descent'.[22]

The British justified their occupation of Australia under the Proclamation of Governor Bourke 1835 (United Kingdom) based on a legal fiction known as terra nullius or 'nobody's land' to justify their forceful acquisition of Indigenous lands.[23] The Human Rights and Equal Opportunity Commission's *Bringing Them Home* report examined the colonial practice of forcibly removing thousands of Indigenous children from their families pursuant to government-sanctioned assimilation policies between 1910 and 1970.[24] The forcible removal of an Indigenous child meant 'that child's entire community lost, often permanently, its chance to perpetuate itself in that child'.[25] Hence, the *Bringing Them Home* report concludes that this was the 'primary objective of forcible removals' and it is the incontrovertible reason why this practice amounts to cultural genocide.[26] Assimilation operated on the flawed assumption that Indigenous Australians were inferior peoples that required integration into the white community.[27] Through assimilation, British colonisers sought to eradicate Indigenous civilisations by denying their civil rights to self-governance, to speak their languages, and to use their land.[28] Colonisation destroyed Indigenous customary legal systems by facilitating the complete subordination of Indigenous peoples to the British common law.[29] Accordingly, these monocultural practices inflicted grave damage

18 Stephen Ralph, 'Addressing the Needs of Indigenous Women in the Family Court' (2004) 6(1) *Indigenous Law Bulletin* 20, 21.

19 Ibid.

20 Natanahira Herewini, 'Māori Communities Raising Children: The Roles of Extended Whānau in Child Rearing in Māori Society' (Thesis, University of Auckland, 2018) 8.

21 Ruru, 'Indigenous Peoples and Family Law' (n 1) 329.

22 Ibid, quoting Department of Social Welfare, *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Report, September 1988) 74–5.

23 David Mercer, 'Terra Nullius, Aboriginal Sovereignty and Land Rights in Australia: The Debate Continues' (1993) 12(4) *Political Geography* 299, 300 <https://doi.org/10.1016/0962-6298(93)90043-7>.

24 Human Rights and Equal Opportunities Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, April 1997) ('*Bringing Them Home*').

25 Ibid 218.

26 Ibid.

27 Anthony Moran, 'White Australia, Settler Nationalism and Aboriginal Assimilation' (2005) 51(2) *Australian Journal of Politics and History* 168, 169 <https://doi.org/10.1111/j.1467-8497.2005.00369.x>.

28 Ibid 170.

29 Tom Calma, 'The Integration of Customary Law into the Australian Legal System: Calma' (Speech, National Indigenous Legal Conference, 27 October 2006) <https://humanrights.gov.au/about/news/speeches/integration-customary-law-australian-legal-system-tom-calma-2006>.

upon the Indigenous identity by creating a legal system that inherently privileges Western values above all others.[30]

British settlement in New Zealand was marked by the signing of the Treaty of Waitangi ('Treaty') in 1840,[31] which was a partnership that intended to allow both Māori and British colonisers to coexist peacefully.[32] As a Treaty partner, Māori can reasonably expect all legislation to be mutually beneficial, equally reflecting Māori values.[33] Whilst the jurisprudence of the Treaty presents biculturalism, it simultaneously granted the Crown sovereign powers to govern New Zealand.[34] As Western conventions were introduced into New Zealand, state-sanctioned mechanisms implemented British common law and the English education system onto Māori people.[35] Legislation prioritising English language education and Western medicine over Māori equivalents served as thinly veiled guises for Māori assimilation into British culture.[36] The signing of the Treaty led to Māori laws being subsumed into the worldview of the settlers.[37] Norman Albert Anaru claims that colonial practices facilitated the purposeful demotion of Indigenous culture in New Zealand.[38] As Alan Ward explains, the signing of the Treaty meant that '[t]he saving of the Maori race involved the extinction of Maori culture.'[39]

The erasure of Indigenous kin culture through settler law and policy continues to oppress Indigenous peoples on their native lands.[40] Jacinta Ruru finds that today, Indigenous people possess 'little legal ability to pursue the application of their own law unless legislation specifically provides for it'.[41] Thus, article 30 of the *UNCRC* holds countries, particularly colonised nations like Australia and New Zealand, accountable for maintaining legal systems that actively protect the cultural identity of the Indigenous child. Therefore, in order to provide a secure place for Indigenous values, Australia and New Zealand's family law systems should ensure their parenting order provisions accommodate customary kinship.

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30 Keenan, 'Moments of Decolonization' (n 3) 164.

31 Now codified under the *Treaty of Waitangi Act 1975* (NZ).

32 Ian Pool, *Colonization and Development in New Zealand Between 1769 and 1900: The Seeds of Rangiatea* (Springer, 2015) vol 3, 86 <https://doi.org/10.1007/978-3-319-16904-0>.

33 Carwyn Jones, 'Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity' [2012] (February) *Māori Law Review* 1, 20.

34 David V Williams, 'The Continuing Impact of Amalgamation, Assimilation and Integration Policies' (2019) 49(1) *Journal of the Royal Society of New Zealand* 34, 35 <https://doi.org/10.1080/03036758.2019.1677252> ('The Continuing Impact of Amalgamation').

35 Norman Albert Anaru, 'A Critical Analysis of the Impact of Colonisation on the Māori Language through an Examination of Political Theory' (MA Thesis, Auckland University of Technology, November 2011) 65–6 ('A Critical Analysis of the Impact of Colonisation'); *Education Act 1847* (NZ); *Tohunga Suppression Act 1907* (NZ).

36 Anaru, 'A Critical Analysis of the Impact of Colonisation' (n 35) 66.

37 Williams, 'The Continuing Impact of Amalgamation' (n 34) 35.

38 Anaru, 'A Critical Analysis of the Impact of Colonisation' (n 35) 40.

39 Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Australian National University Press, 1974) 38.

40 Ruru, 'Indigenous Peoples and Family Law' (n 1) 327.

41 Ibid 327–8.

III IS THE INDIGENOUS CHILD'S RIGHT TO CULTURE ADEQUATELY PROTECTED UNDER AUSTRALIAN FAMILY LAW PROVISIONS?

A The *Family Law Act 1975* (Cth)

The current *FLA* provisions governing the cultural safety of Indigenous children were introduced as amendments to Part VII in 2006.[42] Part VII guides judicial decision making in relation to children and parenting.[43] These amendments directly addressed concerns that the previous framework failed to 'explicitly recognise child-rearing obligations or parenting responsibilities … other than parents'.[44] Arguably, the most significant amendment in remedying the 'perceived gaps in the former *FLA* is section 61F'.[45] This section stipulates that the Court must 'have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture', thereby giving effect to article 30.[46] Indigenous culture encompasses the 'traditions' and 'lifestyle' of Indigenous peoples.[47] The *FLA* recognises the foundational differences between Indigenous kinship customs and Western family practices, acknowledging both equally at law.[48] Furthermore, the amendments situate the Indigenous child's 'right to enjoy their culture' as a central principle underlying the objects of the parenting provisions.[49]

The amendments also inserted significant rights for Indigenous children to fully explore and appreciate their culture, and access support requisite to maintaining a connection to their Indigenous culture.[50] The article 30 right to enjoy that culture with other people who share that culture is reaffirmed as one of thirteen additional considerations under the *FLA*,[51] which the Court must consider in determining the 'best interests' of an Indigenous child.[52] Furthermore, the Court must also have regard to 'the likely impact' that any proposed parenting order will have on that right to enjoy culture.[53] Australian case law indicates that these *FLA* amendments have both successfully,[54] and unsuccessfully protected the right of Indigenous children to culture.[55] In the 2019 Australian Law Reform Commission ('ALRC') report *Family Law for the Future: An Inquiry into the Family Law System*, the ALRC asserts that the *FLA* inadequately guarantees Indigenous children their

42 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 10.
43 *Family Law Act 1975* (Cth) s 60A.
44 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 10. See also *Re CP* (1997) 137 FLR 367.
45 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 10.
46 *Family Law Act 1975* (Cth) s 61F.
47 Ibid s 4(1) (definition of 'Aboriginal or Torres Strait Islander culture').
48 Ibid s 61F.
49 Ibid s 60B(2)(e).
50 Ibid s 60B(3).
51 Ibid s 60CC(3)(h).
52 Ibid s 60CA.
53 Ibid s 60CC(3)(h)(ii).
54 *Verran v Hort* [2009] FMCAfam 1 ('*Verran*'); *Ricketts v Crowe* [2015] FCCA 3629 ('*Ricketts*').
55 *Oscar v Acres* [2007] FamCA 1104 ('*Oscar*'); *Donnell v Dovey* (2010) 237 FLR 53 ('*Donnell*').

unequivocal right to cultural safety.[56] This inadequacy stems from the *FLA*'s lack of protective mechanisms that place appropriate significance on Indigenous culture and there is also a need to increase judicial understandings of the complex kinship system.[57] Thus, the ALRC confirms that novel legislative reform is necessary to adequately protect the Indigenous child's article 30 right.

Whilst the aforementioned *FLA* amendments sought to better recognise Indigenous cultural and kin structures within the legislation, these amendments were introduced in tandem with the rebuttable presumption of shared parental responsibility.[58] Section 60CC(2)(a) stipulates that a primary consideration in determining the child's best interests is the 'benefit … of having a meaningful relationship with both of the child's parents'.[59] The other primary 'best interests' consideration is the need for protection from physical or psychological harm and abuse, neglect or family violence.[60] This presumption of shared parental responsibility ingrains the flawed message to judges that parenting situations aligning more closely with the nuclear, two-parent family construct are always best for children.[61] Since this presumption appears as the paramount consideration in all matters affecting the child, the legitimacy of collective Indigenous child-rearing practices is further diminished at law.

B Recognising the Unique Cultural Needs of Indigenous Children

The Federal Magistrates Court of Australia decision in *Verran v Hort* proves that the inclusion of sections 61F and 60CC(3)(h) in the *FLA* has at times led to proper judicial consideration of Indigenous culture in determining care arrangements.[62] This case concerned the care arrangements of two children with the applicant being the non-Indigenous paternal grandmother and the respondents being the Aboriginal Tiwi mother and non-Indigenous father.[63] Whilst the paternal grandmother had no ties to Tiwi culture, the parents had a history of violence and substance abuse.[64] Drawing on the 2006 *FLA* amendments, the Court acknowledged the continued dispossession faced by Indigenous peoples due to European occupation.[65] For this reason, Brown FM through the application of section 61F, recognised that 'the greatest protection' for an Indigenous child from the 'corrosive affects of racism or prejudice is to be part of a community which has to deal with such discrimination

56 Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report, March 2019) 171–2 [5.67]–[5.70] ('*Family Law for the Future*').
57 Ibid 172 [5.71].
58 *Family Law Act 1975* (Cth) s 61DA; Richard Chisholm, 'Making It Work: *Family Law Amendment (Shared Parental Responsibility) Act 2006*' (2007) 21(2) *Australian Journal of Family Law* 143, 147.
59 *Family Law Act 1975* (Cth) s 60CC(2)(a).
60 Ibid s 60CC(2)(b).
61 Ibid s 60CC(2)(a); Felicity Kaganas and Shelley Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' (2004) 12(1) *Feminist Legal Studies* 1, 22–3 <https://doi.org/10.1023/B:FEST.0000026077.03989.70> ('Contact Disputes'); Kha and Cross, 'Equal Shared Parental Responsibility' (n 9) 29–30.
62 *Verran* (n 54) 1.
63 Ibid [1]–[25].
64 Ibid.
65 Ibid [256] (Brown FM).

regularly'.[66] However, it is noteworthy that no expert anthropological evidence on Tiwi culture or childrearing practices was presented to the Court and it was merely accepted that 'Tiwi culture is a live and vibrant one.'[67] On appeal, the Full Family Court of Australia found that the absence of anthropological evidence did not prevent Brown FM from making a determination in the best interests of the children.[68]

Ultimately, the explicit recognition of the unique cultural needs of Indigenous children within the *FLA* allowed the Court to delegate sole parental responsibility to the paternal grandmother whilst ordering that the children spend time with the Tiwi mother.[69] This decision ensured the children were protected from violence whilst accounting for their cultural needs by providing 'access to strong role models, who share his or her racial makeup'.[70] Evidently, the 2006 *FLA* amendments positively guided the Court thorough consideration of Indigenous culture along with other vital considerations in assessing the children's best interests in this matter. Hence, Brown FM sought to act in the children's best interests by meticulously balancing the children's right to enjoy their Tiwi culture with their right to live in a secure and non-violent household.[71] In this case, the judicial commentary demonstrates a nuanced understanding of the importance of cultural safety for Indigenous children.

The decision in *Ricketts v Crowe* further attests to the effectiveness of the *FLA* amendments in shifting judicial perspectives to being more receptive towards Indigenous cultural issues.[72] In this case, the Court was required to determine parenting arrangements for an Aboriginal child whose parents were unable to care for him.[73] Both parties in this case were Indigenous: the applicant was the child's long-term, non-biologically related Aboriginal carer and the respondent was the child's Aboriginal maternal grandmother.[74] Kelly J cited Brown FM in *Verran v Hort* to emphasise that in dealing with an Aboriginal child, the imperative aim was to protect his right to cultural safety.[75] In dealing with two Indigenous parties, Kelly J relied heavily on an expert family report in her understanding of the 'fluid nature of Aboriginal child caring arrangements and parenting practices'.[76] The Court considered the child's attachment to his carer against the detrimental impact that dislocation from culture can have on an Indigenous child's long-term emotional and psychological welfare.[77]

The Court relied on sections 60B(3) and 60CC(3)(h) of the *FLA* to favour the Indigenous maternal grandmother as she could provide the best 'opportunity

66 Ibid [258].
67 Ibid [384].
68 *Hort v Verran* [2009] FamCAFC 214.
69 *Verran* (n 54) [1]–[5] (Brown FM).
70 Ibid [258].
71 Ibid [434].
72 *Ricketts* (n 54).
73 Ibid [5] (Kelly J).
74 Ibid [7].
75 Ibid [32]; *Family Law Act 1975* (Cth) s 60CC(3)(h).
76 *Ricketts* (n 54) [90] (Kelly J).
77 Ibid [102].

for [the child] to grow up with a greater immersion in his culture'.[78] The *FLA*'s Indigenous culture provisions allowed the Court to discern that the child's lack of kin relationship with his Aboriginal carer rendered her culturally inappropriate to have sole parental responsibility.[79] The Court explained that in remaining with his carer and away from his Indigenous kin, the child would merely 'be visiting his culture and his traditions, not living them'.[80] The decisions in *Verran v Hort* and *Ricketts v Crowe* demonstrate positive cases that have attempted to reconcile the English common law with the Indigenous customary law.

C The Lack of Judicial Comprehension of Indigenous Cultural Complexities

As the *FLA* provides the 'right to culture' as one of thirteen additional judicial considerations in making parenting orders, its significance can simply be diminished in favour of greater emphasis being placed on another consideration. In *Oscar v Acres*, when determining the best interests of an Aboriginal child, Barry J prioritised the meaningful relationship between the child and his non-Aboriginal father, over his Aboriginal grandmother and his right to cultural safety.[81] The Court ordered that the child live in the primary care of the father on the basis that a meaningful parental relationship is a paramount consideration in determining the child's best interests.[82] Since the Court deemed the child safe from violence in both households,[83] the salient point of law involved balancing the child's right to a meaningful parental relationship directly with his right to Indigenous cultural safety.[84] Barry J sought to satisfy the perceived 'letter and the spirit of the law' expressed in section 60CC(2)(a) by 'placing the child in the primary care of a parent rather than a non-parent'.[85] In doing so, Barry J failed to give appropriate weight to the child's Indigenous culture under section 60CC(3)(h).[86]

Although the Court arguably catered for the child's Indigenous culture by allowing him to spend school holidays with his Indigenous kin, the Court's decision was made despite the admission of expert anthropological evidence showing that 'granting sole custody to a non-aborigin[al] parent or family may have a similar effect as did the seizure of children a century ago'.[87] This decision reveals the *FLA*'s underlying preference for natural parents rather than collective family structures.[88] Ultimately, this decision elucidates a cultural bias within the *FLA*. So long as the right to Indigenous cultural safety is not given sufficient legislative significance,

78 Ibid [98]–[102].
79 Ibid [88].
80 Ibid [89].
81 *Oscar* (n 55) [182] (Barry J).
82 Ibid [143]–[145]; *Family Law Act 1975* (Cth) s 60CC(2)(a).
83 *Oscar* (n 55) [168] (Barry J); *Family Law Act 1975* (Cth) s 60CC(2)(b).
84 *Oscar* (n 55) [168] (Barry J).
85 Ibid [147].
86 Ibid [143].
87 Ibid [82].
88 Kaganas and Day Sclater, 'Contact Disputes' (n 61) 1.

the Court will fail to properly acknowledge the importance of promoting the child's right to Indigenous culture.[89]

In *Donnell v Dovey*,[90] the child's Aboriginal Wakka Wakka maternal elder half-sister and Torres Strait Islander father both sought parenting orders after the child's mother passed away. The child had lived with the mother till her death, and then with his sister.[91] In granting primary care to the father, the trial judge relied on family reports which emphasised the importance of Torres Strait Islander culture, despite the father's limited prior involvement in the child's upbringing.[92] On appeal, the Full Family Court of Australia found that the trial judge had failed to obtain anthropological evidence relating to Wakka Wakka child-rearing practices.[93] In their reasoning, the Full Family Court determined that the sister's claim came under section 61F, namely that the Court must have regard to 'a person …. who have exercised, or who may exercise, parental responsibility' of an Indigenous child.[94] This had been neglected by the trial judge.[95] Furthermore, the Full Family Court found the trial judge had dismissed the sister's evidence proving that Wakka Wakka kin laws dictate the responsibility of the eldest child to raise a younger sibling in circumstances where parents have died.[96] Therefore, the trial judge had erred by placing undue weight upon family reports 'to the detriment of a proper examination' of the child's Aboriginal culture.[97]

Moreover, the Full Family Court found that the trial judge filled cultural evidentiary gaps by relying on 'the norms of the dominant European/white Australian culture – which is taken for granted and about which expert evidence is never required'.[98] The trial judge should have been aware that the function of section 61F is to reduce the emphasis on 'modern Anglo-European notions of social and family organisation' in matters involving Indigenous children.[99] However, this was overlooked at trial.[100] According to Keryn Ruska and Zoe Rathus, the trial judge's commentary evidences a general privileging of the dominant nuclear family ideal over Indigenous kin culture.[101] This case highlights the 'difficulties in the applicability of the court to apply the law to cultural systems of family care within a kin-network'.[102] The ambit of section 61F is supposed to give appropriate weight to relevant Indigenous childrearing practices, but it is not a 'bulletproof'

89 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 10; Aleardo Zanghellini, 'Is There Such a Thing as a Right to Be a Parent?' (2008) 33 *Australian Journal of Legal Philosophy* 26, 59.
90 *Donnell* (n 55).
91 Ibid 55 [4]–[5].
92 Ibid 55 [13], 67 [74].
93 Ibid.
94 Ibid 70 [88]–[89]; *Family Law Act 1975* (Cth) s 61F(b).
95 *Donnell* (n 55) 70 [90].
96 Ibid 60 [49].
97 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 10.
98 *Donnell* (n 55) 85 [171].
99 Ibid 121–2 [327], quoting Stephen Ralph, 'The Best Interest of the Aboriginal Child in Family Law Proceedings' (1998) 12(2) *Australian Journal of Family Law* 140, 143.
100 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 11.
101 Ibid.
102 Dababneh, 'Facilitating the Child's Rights to Culture' (n 11) 68.

legal safeguard.[103] Without an amendment to the *FLA*, the Court will continue to favour parents over non-parent claimants, even if it may not promote the best interests of the child.[104] *Donnell v Dovey* illustrates that the colonial undertones of section 60CC(2)(a) in prioritising natural parents inhibit an appropriate judicial understanding of the cultural complexities in matters involving multiple Indigenous parties.[105]

IV IS THE INDIGENOUS CHILD'S RIGHT TO CULTURE ADEQUATELY PROTECTED UNDER NEW ZEALAND FAMILY LAW PROVISIONS?

A *Care of Children Act 2004* (NZ)

The family laws of New Zealand are fundamentally underpinned by 'the Crown's obligation to protect actively Māori interests' and 'to recognize rangatiratanga (Māori sovereignty)' under the Treaty of Waitangi.[106] The High Court has stated that 'all Acts dealing with the status, future and control of children are to be interpreted as coloured by the principles of the Treaty'.[107] According to Ruru, this 'important dictum … represents the now critical place of the Treaty in today's environment'.[108] With this in mind, the Treaty binds the Family Court of New Zealand to carefully 'traverse the Treaty principles' jurisprudence and extend it to a family context'.[109]

The New Zealand legislative equivalent of the *FLA* governing parenting orders for Indigenous children is the *COCA*.[110] Similar to the *FLA,* the *COCA* upholds article 3 of the *UNCRC*, which makes a child's best interests as the primary consideration.[111] The overarching purpose of the *COCA* is twofold: to promote children's best interests by helping to ensure appropriate guardianship arrangements, and to 'recognise certain rights of children'.[112] Under the *COCA*, parenting orders determine the roles of 'providing day-to-day care for the child'.[113] As with section 61F of the *FLA*, any person who is not a biological parent and is

103 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 11; Bruce Scott, 'The Importance of Section 61F of the *Family Law Act* in Cases Involving an Indigenous Child', *The Education Network* (Web Page, August 2010) <https://www.tved.net.au/PublicPapers/August_2010,_Sound_Education_in_Family_Law,_The_Importance_of_Section_61F_of_the_Family_Law_Act_in_Cases_Involving_an_Indigenous_Child.html>.

104 Ruska and Rathus, 'The Place of Culture in Family Law Proceedings' (n 8) 11.

105 Titterton, 'Indigenous Access to Family Law' (n 6) 179.

106 Ruru, 'Indigenous Peoples and Family Law' (n 1) 332.

107 *BP v Director-General of Social Welfare* [1997] NZFLR 642, 646 (Gallen and Goddard JJ).

108 Ruru, 'Indigenous Peoples and Family Law' (n 1) 331.

109 Ibid 332.

110 New Zealand Law Commission, *Dispute Resolution in the Family Court* (Report No 82, March 2003) 777.

111 Mark Henaghan and Ruth Ballantyne, 'Bill Atkin: A Fierce Defender of Children's Rights and Proponent of Child-Focused Legislation' (2015) 46(3) *Victoria University of Wellington Law Review* 591, 595 <https://doi.org/10.26686/vuwlr.v46i3.4912>; *UNCRC* (n 5) art 3.

112 *Care of Children Act 2004* (NZ) s 3(1).

113 Ibid s 48(2).

a member of the child's family, 'whānau, or other culturally recognised family group' must apply for leave to make a parenting order application.[114]

The *COCA* provides that upholding the best interests of the child is the paramount consideration in determining guardianship.[115] Unlike the thirteen 'best interests' additional considerations of the *FLA,* the *COCA* provides six streamlined principles for judicial consideration in determining the child's best interests. In this process of consideration, the Supreme Court of New Zealand identified the relevant principles to the matter and provided reasonable explanation as to why principles deemed irrelevant have not been considered.[116] The best interest considerations under section 5 of the *COCA* are summarised below:

1. Courts must consider the protection of the child against violence. This principle is the only prescriptive, mandatory consideration;[117]
2. The responsibility of a child's upbringing falls to parents and guardians;[118]
3. The need for ongoing cooperation between persons involved in the child's upbringing;[119]
4. The need for continuity in the child's upbringing;[120]
5. The need to preserve and strengthen the child's relationship with both their parents, family group, *whānau*, *hapū*, or *iwi*;[121]
6. The need for the child's identity including culture, language and religion to be preserved and strengthened.[122]

The incorporation of Māori family terms like *whānau* (family), *hapū* (clans) and *iwi* (tribes) within the best interest considerations provides cultural legitimacy of Māori family groups under the *COCA*. This aligns with the spirit of the Treaty. In contrast, the *FLA* does not integrate Indigenous terms into its provisions due in part to the diversity of Indigenous Australian languages. While the *FLA* privileges the notion that an individualistic relationship with both parents is optimal for a child's welfare,[123] the ambit of the *COCA* is more inclusive of collective family structures.[124] This is evident through the balanced consideration of the two-parent relationship within the *whānau* relationship.

In the determination of parenting orders, the weight given to each principle (with the only exception of violence) remains completely up to judicial discretion. This unspecified weighting of culture in the *COCA* is similar to section 60CC of the *FLA*, where Australian courts are required to consider culture as one of several best interest considerations. However, the equal weighting of culture under section 5 of the *COCA* is arguably more protectionary than the inclusion of cultural safety as a

114 Ibid s 47(1)(d).
115 Ibid s 4(1).
116 *Kacem v Bashir* [2011] 2 NZLR 1, [17] (Tipping J for Blanchard, Tipping and McGrath JJ).
117 *Care of Children Act 2004* (NZ) s 5(a).
118 Ibid s 5(b).
119 Ibid s 5(c).
120 Ibid s 5(d).
121 Ibid s 5(e).
122 Ibid s 5(f).
123 *Family Law Act 1975* (Cth) s 60CC(2)(a).
124 *Care of Children Act 2004* (NZ) ss 5(e)–(f).

mere additional consideration within the *FLA*.[125] The right to culture is effectively elevated as a primary consideration in New Zealand family law, whereas this is relegated as one of a long list of secondary considerations in Australian family law.

B Māori Culture, Cultural Reports and Cultural Experts

Since judicial officers must consider the child's cultural identity in New Zealand,[126] the Court can obtain a cultural report about a child as part of a parenting order application under section 133 of the *COCA*.[127] The appointment of the expert report writer falls under the Court's discretion.[128] The content of the cultural report covers important aspects of the 'child's cultural background'.[129] Report writers often consult each party to gain a thorough understanding of the prominent issues so they may be relayed accurately to the Court.[130] In relation to Māori children, court ordered cultural reports can clarify issues judges have pertaining to the intricacies of Māori child-rearing practices.[131] Thus, the specialist report writer plays a crucial role in influencing judicial perspectives towards a Māori child's cultural needs under article 30. While the *FLA* empowers Australian courts to give directions to obtain expert evidence,[132] this general provision fails to provide a similarly precise mechanism for obtaining specific cultural expert evidence as is contained in New Zealand's *COCA*.[133]

Section 136(1)(a) empowers any party to *COCA* proceedings to request the Court to hear a person speak on the 'child's cultural background'. In lieu of a cultural speaker request, the Court may suggest to a party that it may be useful to hear about the child's culture.[134] However, if the Court, the child or the lawyer for the child decline to make a section 136 request, it does diminish the protectionary capabilities of this provision.[135] The overarching protective function of these cultural reports and speakers is to fully equip judicial officers in making quality decisions regarding the care of Māori children in adherence with section 5(f) of the *COCA* and article 30 of the *UNCRC*.

Despite the explicit provision of cultural reports in the *COCA* and speakers to the Court in matters involving Indigenous children, the New Zealand Ministry of Justice in *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* ('*Te Korowai Ture ā-Whānau*') found that these provisions are currently being underutilised.[136] It was reported that

125 Titterton, 'Indigenous Access to Family Law' (n 6) 161.
126 *Care of Children Act 2004* (NZ) ss 5(e)–(f).
127 Ibid s 133.
128 Ibid.
129 Ibid s 133(1)(b) (definition of 'cultural report').
130 New Zealand Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (Report, May 2019) 43 ('*Te Korowai Ture ā-Whānau*').
131 Ibid.
132 *Family Law Act 1975* (Cth) s 69ZX.
133 *Care of Children Act 2004* (NZ) ss 133, 136(1).
134 Ibid s 136(3).
135 New Zealand Ministry of Justice, *Te Korowai Ture ā-Whānau* (n 130) 42.
136 Ibid 43.

very few cultural reports have been obtained by the Court in relevant family law proceedings.[137] The reluctance of judges to request a cultural report stems directly from a lack of available qualified report writers.[138] The findings of *Te Korowai Ture ā-Whānau* further revealed that most New Zealand family lawyers were 'unaware of section 136' and the cultural speaker provision or 'did not recall it ever being used'.[139] Moreover, *Te Korowai Ture ā-Whānau* highlights the lack of specific recognition of Māori culture and perspective within sections 133 and 136 of the *COCA*.[140] The wording of these sections deals with the 'cultural background' of a child only in a general sense, thus failing to specifically validate the intricacies of *whānau* and the collective Māori worldview.[141] Overall, the *Te Korowai Ture ā-Whānau* report proves that the mere availability of cultural provisions within the *COCA* alone is not sufficient in completely protecting the Māori child's right under article 30.

The *Oranga Tamariki Act 1989* (NZ) ('*OTA*') arguably better incorporates *tikanga Māori* (Māori customary law) with explicit support of promoting the wellbeing of Māori children and young persons based on the principles of the Treaty of Waitangi.[142] The *OTA* is principally concerned with regulating state responses to child abuse and youth justice in New Zealand. In particular, the 2019 amendments to the *OTA* have strengthened *tikanga Māori* concepts through the introduction of the concepts and statutory definitions of the following:

1. *Mana tamaiti* (plural *tamariki*):

   > [T]he intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.[143]

2. *Whakapapa*:

   > [T]he multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend.[144]

3. *Whanaungatanga*:

   > [T]he 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.[145]

137 Ibid.
138 Ibid.
139 Ibid 43.
140 Ibid 37.
141 Ibid.
142 *Oranga Tamariki Act 1989* (NZ) ss 4(1)(f), 7AA.
143 Ibid s 2(1) (definition of 'mana tamaiti (tamariki)').
144 Ibid s 2(1) (definition of 'whakapapa').
145 Ibid s 2(1) (definition of 'whanaungatanga'); Judge Sharyn Otene, 'Te Hurihanga Tuarua?: Examining Amendments to the *Oranga Tamariki Act 1989* That Took Effect on 1 July 2019' (2019) 9 *New Zealand Family Law Journal* 139, 140–2.

Furthermore, a new section was introduced in the *OTA* that places duties on the Chief Executive of Oranga Tamariki-Ministry for Children to 'have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi'.[146] The inclusion of *tikanga Māori* concepts in the *OTA* is significant because it represents a paradigm shift in embracing the importance of Indigenous culture in decision making on the wellbeing of children and young persons. The inclusion of *te reo Māori* (the Māori language) in the law helps recognise the importance of the right of Indigenous children to cultural safety. This is something that may serve as a potential model on better recognising *tikanga Māori* in the *COCA*.

C *Nikau* Case

Nikau v Tatchell concerned a Māori child who was raised by her paternal aunt and uncle as her *whāngai* (adoptive) parents, which refers to the informal process of customary open adoption.[147] The practice of *whāngai* 'has limited legislative recognition' and requires full adoption to be recognised as a legitimate parenting relationship.[148] Through the *whāngai* process, the child's Māori birth father and Pākehā (New Zealander of European descent) birth mother along with the *whāngai* parents agreed to cooperate in the child's upbringing.[149] However, a breakdown in the relationship between the child's four parents resulted in the birth parents seeking a parenting order for the child's day-to-day care.[150] Coyle J acknowledged the obligation of the Family Court of New Zealand to recognise its Treaty obligations to Māori children, particularly when considering the best interests of children under subsections 5(e) and (f) of the *COCA*, by placing a 'careful focus on ensuring that the relationships as set out in the [*COCA*] and a child's sense of identity as Maori can be particularly and specially both preserved and strengthened'.[151]

Furthermore, Coyle J expressed a sophisticated judicial understanding of Māori kinship stating that in preserving the child's cultural identity, 'there are aspects of Māori culture which cannot be taught objectively from afar, but which need to be lived and breathed and experienced, to be learnt through osmosis so as to become an integral part of a person's life'.[152] Balancing all the section 5 principles of the *COCA*, the Court held that the child's daily care should remain with her *whāngai* parents as they lived closer to the child's *whānau*, thereby providing an upbringing immersed in her Māori identity.[153] Comparatively, the birth parents lived further from *whānau* support, and hence were granted contact mostly during

146 *Oranga Tamariki Act 1989* (NZ) s 7AA(2)(b).
147 *Nikau v Tatchell* [2018] NZFC 1239 ('*Nikau v Tatchell*').
148 Ruru, 'Indigenous Peoples and Family Law' (n 1) 337.
149 *Nikau v Tatchell* (n 147) [1] (Coyle J).
150 Ibid [7].
151 Ibid [102].
152 Ibid [97]; Mark Henaghan, 'New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 *United Nations Convention on the Rights of the Child*' (2020) 28(3) *International Journal of Children's Rights* 588, 599 <https://doi.org/10.1163/15718182-02803003>.
153 *Nikau v Tatchell* (n 147) [97] (Coyle J).

school holidays.[154] This decision represents the embracing of diverse, collective family structures by the Court in granting parenting rights to the *whāngai* parents over the birth parents on a cultural basis.[155] Hence, this decision highlights the strong protectionary capabilities of section 5 of the *COCA* in its consideration of the vitality of cultural safety for Māori children in relation to their welfare.

On appeal, the aforementioned decision in *Nikau v Tatchell* was overruled by the High Court of New Zealand on the basis that Coyle J erred in granting the *whāngai* parents day-to-day care of the child. In the High Court appeal case of *Nikau v Nikau*,[156] Woolford J held that the earlier decision placed too much weight on the child's *whānau* relationship and Māori identity as determinative principles for evaluating her best interests under subsections 5(e) and (f) of the *COCA* as opposed to more significant principles.[157] Rather, the High Court privileged the relationship between the child and her biological family over the accessibility of her Māori culture through her *whāngai* parents.[158] This decision relied heavily upon the wording of section 5(b) of the *COCA*, which emphasises that the child's upbringing is 'primarily' the responsibility of their parents.[159] The decision was made notwithstanding the fact that Woolford J openly acknowledged that granting day-to-day parenting orders to the birth parents would be detrimental to the child's full access to her Māori *whānau*.[160] However, he argued that the principles of continuity and biological family relationships are 'more significant' to a child's welfare.[161] The High Court's judicial reasoning leaned into Western values in favour of the nuclear family being the optimal family environment for all children to thrive in.[162] Moreover, this decision demonstrates that the cultural safety provisions can occasionally appear to be more symbolic with less emphasis on Māori *whānau* values.

The *whāngai* parents applied for leave to appeal to the Court of Appeal of New Zealand.[163] Cooper and Winkelmann JJ unanimously dismissed the leave application as they saw no error in the conclusion reached by the High Court.[164] The Court of Appeal found that the parenting orders promoted continuity in the care arrangements for the child with her biological parents, and the child's cultural connections to *Te Ao Māori* (Māori worldview) could still be fostered through

154 Ibid [140].
155 Henaghan, 'New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 *United Nations Convention on the Rights of the Child*' (n 152) 599.
156 *Nikau v Nikau* [2018] NZHC 1862 ('*Nikau v Nikau* (HC)').
157 Ibid [32] (Woolford J).
158 Henaghan, 'New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 *United Nations Convention on the Rights of the Child*' (n 152) 600.
159 *Nikau v Nikau* (HC) (n 156) [48] (Woolford J).
160 Ibid [65]–[66].
161 Ibid.
162 Robyn Davis and Judith Dikstein, 'It Just Doesn't Fit: The Tiwi Family and the *Family Law Act* – Can the Two be Reconciled?' (1997) 22(2) *Alternative Law Journal* 64, 65; Titterton, 'Indigenous Access to Family Law' (n 6) 149.
163 *Nikau v Nikau* [2018] NZCA 566 ('*Nikau v Nikau* (CA)').
164 Ibid [32].

regular contact with the *whāngai* parents.[165] Clearly, a value judgment was made to prioritise the care of the child by biological parents according to Western family norms, even though it meant that this would be achieved at the expense of more actively promoting the child's culture and her closer family ties with the *whānau*. Article 5 of the *UNCRC* states:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.[166]

It is important to note that the responsibility of parents for the care of children can extend beyond biological parents and include extended relatives based on local customs so long as it would promote the best interests of the child. However, in the *Nikau v Nikau* case, the biological and *whāngai* parents had such a toxic relationship that a shared parenting arrangement ordered by the Family Court was found not to be realistically achievable.[167] Moreover, the fact that the child and the biological parents were away from their *whānau* did not necessarily mean that the best interests of the child were adversely compromised overall, because the parenting order struck an appropriate balance based on the practical circumstances. The wide judicial interpretation of the child's right to Indigenous culture provides room for judicial officers to rely upon their own cultural norms in determining the Māori child's best interests.[168] Overall, the decision in *Nikau v Nikau* leaves open the possibility that *whāngai* parents could be viewed as parents within section 5(b) of the *COCA*, which is a positive development in the law of New Zealand and helps promote article 5 of the *UNCRC*.

Although the availability of cultural reports and cultural experts is a success of New Zealand family law, these provisions have not always been perfectly implemented. Firstly, the fact that only the Court retains power to order a cultural report pertaining to a child under section 133 of the *COCA* is less than satisfactory. Here, the Court can simply choose not to order an expert cultural report and remain uninformed on a complex cultural matter, and instead rely upon their own assumptions on what is culturally appropriate for the child. Such uninformed decision-making could result in Indigenous children being placed in culturally inappropriate parenting arrangements that fail to protect their right under article 30.[169] Secondly, the overall inability of the Court, the child, and the child's lawyer to obtain cultural speakers to speak on the child's Māori background represents a substantial disservice to the Māori child. Were cultural reports and speakers available to all key stakeholders in *Nikau v Nikau,* the Court could have better understood the nuances of *whāngai* adoption and the detrimental impact of a Māori

165 Ibid [31].
166 *UNCRC* (n 5) art 5.
167 *Nikau v Nikau* (CA) (n 163) [30] (Winkelmann J for Cooper and Winkelmann JJ).
168 *Nikau v Nikau* (HC) (n 156) [67]–[68] (Woolford J).
169 See John Dewar, 'Indigenous Children and Family Law' (1997) 19(2) *Adelaide Law Review* 217, 217; *UNCRC* (n 5) art 30.

child growing up away from their *whānau*. Thus, increasing access to cultural speakers in parenting matters would help improve judicial understandings of Māori culture and better enable the Court to make a culturally informed decision that could protect the Māori child's right to Indigenous culture under article 30. Looking at the *COCA*, it is apparent that it retains its monocultural and colonial roots by favouring the individualist role of biological parents in child-rearing.[170] However, the founding principles of Māori sovereignty enshrined in the Treaty should continue to bind lawmakers to create family law provisions that can also appropriately protect Māori *whānau* values.[171]

V A COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF ARTICLE 30 OF THE *UNCRC* IN AUSTRALIA AND NEW ZEALAND

The salient issue of the Australian and New Zealand family law systems is the deeply ingrained Anglo-European judicial perspectives. Ruru states 'that there exists an inconsistent legislative history aimed at, on the one hand, restricting, and on the other, embracing Maori customary family law'.[172] In relation to Indigenous people, it is important to recognise the harmful impact that restrictive government policies regarding Indigenous children have had in the past,[173] and 'ensure that these experiences are not repeated'.[174] Whilst it is difficult to completely move away from these perspectives, lawmakers can cultivate positive family law legislation that actively promotes multiculturalism and considers diverse family structures on par with the nuclear family. Thus, the *FLA* and the *COCA* should actively protect Indigenous children and their cultural safety right under article 30 of the *UNCRC* by ensuring that courts are completely informed on the intricacies of their cultural background before making a parenting order.

It is apparent that both the *FLA* and the *COCA* incompletely protect the right of Indigenous children to enjoy their culture under article 30 of the *UNCRC*. However, on a comparative analysis, New Zealand's *COCA* better upholds these international standards. This argument is based on the notion that the *COCA* contains all the same protectionary mechanisms as the *FLA* with the additional inclusion of cultural safety provisions. The availability of these protective provisions lends itself to the existence of the Treaty. The Treaty is of vital constitutional importance and any legislation should be consistent with the 'spirit and principles of the Treaty'.[175] Accordingly, the founding Treaty principles of Māori sovereignty bind lawmakers to create legislation that encompasses Māori customary family laws and reflects

170 Jacinta Ruru, 'Kua Tutū Te Puehu, Kia Mau: Māori Aspirations and Family Law Policy' in Mark Henaghan and Bill Atkin (eds), *Family Law Policy in New Zealand* (LexisNexis, 5th ed, 2020) ch 2, 78–9.

171 Graeme Austin, 'The Treaty of Waitangi and Child Custody: Some Legal and Rhetorical Issues' (1994) 10 *Australian Journal of Law and Society* 85, 86.

172 Ruru, 'Indigenous Peoples and Family Law' (n 1) 328.

173 *Bringing Them Home* (n 24) 5.

174 *Family Law for the Future* (n 56) 171 [5.69].

175 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (Chilwell J).

the centrality of *whānau* within the letter of the *COCA*.[176] On the other hand, John Gardiner-Garden argues that the Australian legal system is 'underpinned by the notion that there was nothing of value in [I]ndigenous culture'.[177] Hence, this distinct lack of a similar founding document in Australia has consequently allowed lawmakers to develop the *FLA* without owing Indigenous Australians obligations of partnership, participation and protection.

The inclusion of culturally focused provisions that empower courts to obtain cultural reports,[178] and parties to request cultural speakers,[179] prove that New Zealand is actively endeavouring to protect the article 30 right, albeit with some limitations on empowering all key stakeholders to access cultural reports and speakers.[180] Whilst the *FLA* allows expert cultural evidence to be brought forth in parenting matters,[181] there is a distinct lack of specific cultural provisions available. This means it is inherently more difficult for Indigenous Australians and their legal representatives to present the intricacies of their culture to the Court.[182] Hence, the *COCA* is more conducive than the *FLA* to judicial officers coming to culturally informed decisions regarding Indigenous children.

The equal weighting afforded to cultural safety as a best interest consideration in the *COCA* amongst only five other considerations demonstrates to judicial officers the importance of culture to the Māori child's welfare. In contrast, the *FLA* diminishes the significance of Indigenous cultural safety by forcing courts to weigh culture against twelve 'additional considerations'.[183] As Warnick, Thackray and O'Ryan JJ note, 'any matter not captured by s 60CC(2) cannot be a "primary consideration", regardless of how important it may be in determining the outcome'.[184] This has limited protection to cultural safety in the *FLA*, which has been accentuated by its prioritisation of the two-parent family as a 'primary consideration' in determining the child's best interests.[185] This has undermined judicial priority being placed on collective family structures innate to Indigenous kin networks. Although the 2006 *FLA* amendments represented a positive step forward in recognising the fundamental importance and sensitivity of Indigenous culture, the aforementioned deficiencies have diminished the ability of Australian courts to protect an Indigenous child's right to culture under article 30 of the *UNCRC*.[186]

The New Zealand *COCA* arguably better protects an Indigenous child's right under article 30 of the *UNCRC* compared to Australia. The ALRC has made two

176 Ibid.
177 John Gardiner-Garden, 'From Dispossession to Reconciliation' (Research Paper No 27/1998–9, Parliament of Australia, 29 June 1999) 3.
178 *Care of Children Act 2004* (NZ) s 133.
179 Ibid s 136.
180 Ibid ss 133, 136.
181 *Family Law Act 1975* (Cth) s 69ZX.
182 Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (Thomson Reuters, 7th ed, 2019) 807 [23.320].
183 *Family Law Act 1975* (Cth) s 60CC(3).
184 *Donnell* (n 55) 74 [104].
185 Titterton, 'Indigenous Access to Family Law' (n 6) 176–7; *Family Law Act 1975* (Cth) s 60CC(2)(a).
186 *UNCRC* (n 5) art 30.

recommendations that already function as provisions within the *COCA*.[187] Firstly, the ALRC advocates for the inclusion of an *FLA* provision that empowers key stakeholders to request a cultural report.[188] The intended function of these cultural reports is to assist the Court to make informed decisions on Indigenous cultural issues. Since the *COCA* already contains a similar cultural report provision alongside a cultural speaker provision, it is already more successful at protecting the Indigenous child's article 30 right in this manner. Accordingly, the *FLA* could draw upon the *COCA* provisions for legislative inspiration. Secondly, the ALRC recommends that the *FLA* be amended so that the Courts must consider the child's opportunities to connect with their 'family, community, culture and country' as a primary consideration of the child's best interests.[189] As the *COCA* equally prioritises culture amongst other 'best interests' principles (with the exception of violence which is given greater weight), the Australian *FLA* could look to New Zealand as an example.

The adoption of New Zealand style law in Australia would promote Indigenous cultural safety and align with the protectionary ambit of article 30 of the *UNCRC*. By making Indigenous culture a more prominent consideration in determining a child's best interests, it would acknowledge the importance of culture to Indigenous people and increase legislative protection of this right.[190] This sort of legal change would help promote the fact that a sustained 'connection to culture is a foundational right' for Indigenous children.[191] The inclusion of provisions empowering key stakeholders to request expert cultural reports and speakers would allow judges to make better informed decisions on a child's Indigenous cultural background and help avoid culturally problematic outcomes such as in the case of *Donnell v Dovey*.[192] The proposed introduction of cultural reports should be inspired by sections 133 and 136 of the *COCA*. These sort of cultural reports and speakers 'provide the court with a better understanding of the unique circumstances … of the Aboriginal family' whilst championing the 'greater voice for the Aboriginal family in court'.[193] Making these provisions accessible to all key stakeholders in a parenting matter would only increase judicial awareness of the importance of Indigenous culture.[194] If these proposed provisions had existed in *Donnell v Dovey*, a cultural report could have provided expert evidence on Wakka Wakka childrearing practices, which would have better promoted the best interests of the child by factoring in the sister as a viable option to care for the child.[195] Such changes would help the *FLA* better accommodate the complexities of Indigenous kinship.

187 *Care of Children Act 2004* (NZ) ss 133, 136.
188 *Family Law for the Future* (n 56) 172 [5.71].
189 Ibid 172 [5.71].
190 Ibid [5.70].
191 Ibid 171 [5.67].
192 *Donnell* (n 55).
193 *Family Law for the Future* (n 56) 172 [5.71].
194 Ibid.
195 *Donnell* (n 55).

VI CONCLUSION

Redressing the colonial mistreatment of Indigenous peoples in Australia and New Zealand through legislation is vital. Ensuring future generations of Indigenous children have unobstructed access to their kin and culture is key. Accordingly, article 30 of the *UNCRC* binds these nations to protect the Indigenous child's cultural safety right within their family law provisions. New Zealand's *COCA* better upholds international standards for protecting the right of Indigenous children to enjoy their culture. This is due to the existence of cultural reports and cultural speakers in the *COCA*, and the comparatively greater weight placed on Indigenous kinship in determining the child's best interests. Similar protective provisions are lacking within the Australian *FLA*. Moreover, the *COCA* provisions foster greater judicial understandings of the complexities inherent to Indigenous kin culture. Although the *COCA* is not without its own limitations and shortfalls, it is clearly a step in the right direction and can serve as a viable example to Australian family law.

By adopting the *COCA* provisions on a child's right to Indigenous culture, the *FLA* will better promote the spirit of article 30 of the *UNCRC*. Thereby promoting a child's right to have his or her culture respected and practiced in the laws of Australia and New Zealand.[196] These proposed amendments would positively influence judicial attitudes towards Indigenous kin culture and ensure more consistent, culturally appropriate outcomes for Indigenous children. Furthermore, these reforms will assist in ending the cycle of Indigenous intergenerational trauma stemming from colonisation. The promotion of a child's right to Indigenous culture will help promote equality, empower Indigenous communities, and will provide supportive environments for Indigenous children to thrive.

196 Carissa Wong, 'Inclusion of Indigenous Children's Rights: Informing Water Management in Canada' in Claire Fenton-Glynn (ed), *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations* (Cambridge University Press, 2019) 236, 242 <https://doi.org/10.1017/9781108140348.011>.