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Digging up the Heteronormative Roots of the Adoption Act 1955: Reforming the Law of Adoption in Aotearoa

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This paper sets out to examine the existing law of adoption in both the Adoption Act 1955 and the line of cases that have discussed the Act's interpretation. Section 3 of the Adoption Act requires applicants to an adoption to be "spouses" which has been traditionally understood to mean married heterosexual couples. In the face of a society with an ever-growing diversity of families, the courts have sought to extend the definition to include de facto, same-sex and even separated couples. However, while the Act's desperate need for reform has been accepted by academics, judges, and even Parliament, the law-making scope required to unroot the heteronormative assumptions of section 3, is beyond the jurisdiction of the courts. This paper examines the reform proposals of the Law Commission and Gabrielle Thompson and demonstrates how existing reforms, such as these, fail to go far enough. There is consensus that the Adoption Act should move away from a form-based approach which places the relationship status of the parents as paramount, and towards a function-based assessment of the relationships between parents and children. The reforms also explicitly allow applications by those who are not and have not been in a romantic relationship. However, despite these bold reforms, these suggestions still fall short in failing to commit fully to function over form. This paper argues that commitment to function requires Parliament to do away with criteria for applicants to be eligible entirely, including the form of their relationship to fellow applicants, and instead focus solely on the applicant's ability to function as a parent to the child.

Key Words

Adoption Act 1955; Re Application by AMM and KJO to adopt a child; Re Pierney; Re May; Re Gordon; Law Commission; law reform.

I Introduction

The Adoption Act 1955 is over 65 years old and has become plagued by the inaction of Parliament to enact any meaningful reform. Despite reform attempts, the law it contains captures the attitudes and policy approaches of a society that is also over 65 years ago. Though reform is desperately needed, it is important that the law is reshaped in a way that can stand the test of time.

To understand how to do this, reforms must first turn to the core of the legislation's purpose. In 1955 traditional family units of a very particular form were considered paramount for the health of society. These structures were seen as so critical to the functioning of society that they had to be woven into everything, including the adoption law. Thus, this heternormative traditional family standard is inextricably woven into the Adoption Act.

The wording of the Adoption Act 1955 has pushed heteronormative assumptions which have led to nontraditional families, such as queer or separated families, to face difficulty. As this paper will show, nontraditional families are increasingly accepted in society, and can provide stable and loving homes for children. Prioritising the form of parental relationships over the function of familial relationships may deprive certain families of legal recognition.

While the Adoption Act may have reflected the values of society at the time, families in the modern era are becoming increasingly diverse, and it is time for a core piece of family legislation, the Adoption Act, to reflect this diversity of family structures. Effective reforms need to start from the ground up in order to properly address and dismantle these heteronormative assumptions. As even a cursory look into New Zealand's adoption case law will show, broken law can only produce broken results. Despite the efforts by the courts, interpretative approaches have proven not to work.

Part II looks at the starting point and the historical context of the law. This section describes how the historical purposes of the Act no longer adequately meet contemporary needs.

Part III tracks the development of adoption case law and why the courts have fallen short every time. I will use these cases to show that a strict interpretative approach cannot work to correct the heteronormative assumption of the Adoption Act since the wording of a key section allows little room for purposeful reform. Even where the courts have taken an ambitious approach, as in *Re Gordon*, neither the Act itself nor the role of the courts can bend to accommodate. Further, regardless of jurisdiction, discretionary assessments without more stringent principled guidance, may lead to more unjust results.

Part V lays out reforms that have been put forward that adjust the Act from a form-based approach, to a function-based approach. This section canvasses existing reform proposals, and explains why, despite useful elements, they fail to entirely correct the heteronormativity at the core of the Act. Despite suggesting bold and effective reforms, the proposals are let down by a failure to fully commit to function over form in two main areas. Firstly, that the proposal limits reforms to two people and secondly, that all romantic parents will live together.

II The Current Law of Adoption

Adoption law has had a long history in Aotearoa, first introduced with the Adoption of Children Act 1881, which has evolved into the legislation we have today.[1] The Adoption Act 1955 was a product of its time, reflecting the traditional values of the era. These values have become increasingly inconsistent with the attitudes of the modern day. Despite this inconsistency, little has been done to alter the legislation itself. To appreciate the significance of potential reforms, it is necessary to consider both the historical roots of adoption legislation, as well as recent discourse.

[1] Adoption of Children Act 1881; Adoption Act 1955.

A Adoption Act 1955

Aotearoa's key adoption law is the Adoption Act 1955, a piece of legislation that has been left substantially unchanged for over 65 years.[2] Although academics at the time claimed that the legislation was intended to "safeguard the welfare and rights of children", this vision of welfare and rights was in a historical context quite different to contemporary society.[3] At the time of the law's passing, there was a concern about the number of births to unmarried mothers.[4] Legislators were eager to 'safeguard' children from the perceived instability an unmarried mother created by providing a surrogate form of the preferred family structure, the nuclear family.[5] This traditional form of 'one mother and one father' allowed for children to be slotted into a family that could obscure the fact that anything had happened.

The Adoption Act was intended as a "statutory guillotine", one that meant that both biological parents and child could move on as if they had never been connected.[6] But in order to do this, the adopting family had to be capable of resembling the biological parents, of stepping into their shoes. Creating this illusion was so society should be none the wiser that they were anything other than a conventional family. But conceptions of family have now changed, at least in part. Nuclear families are still a common family structure, though other forms of family, such as single parents and extended whānau, are increasingly common. Children born to unmarried women no longer carry the same moral "burden and reminder… of sin" that they once did, so the motivation and prejudice

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[2] Ministry of Justice *Adoption in Aotearoa NZ* (June 2021) at 4.

[3] "The Adoption Act 1955" (1956) 32 NZLJ 17 at 17.

[4] A Gibbs and R Scherman "Pathways to parenting in New Zealand: issues in law, policy and practice" (2013) 8 Kotuitui: New Zealand Journal of Social Sciences Online 13 at 13.

[5] Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [22].

[6] Megan Louise Hutchison "Giving, Withdrawing and Dispensing with Consents Before and After the Adoption Act 1955: History, Criticisms and Options for Reform" (LLB(Hons) Dissertation, Victoria University of Wellington, 1999) at 4.

behind the original legislation has passed.[7] Adoption has evolved beyond that narrow scope of condemning single parenthood and labels of illegitimacy.[8]

Importantly though, the historical functions of the legislation continue to set the parameters of the law today. As is discussed below, the modern day has brought new needs and family structures, but heteronormativity remains the undercurrent to the Adoption Act 1955, and thus the foundation of our adoption law.

B The purposes of adoption in the modern age

Conceptions of family have evolved since the Act was passed in 1955, and so too have the needs and social purposes of adoption. Adoption still finds its uses in the legal transfer of parental responsibility and rights, but in different contexts. Biological parents who are unable or unwilling to be legal guardians can shift these responsibilities to an adoptive parent; or adoptive parents who are unable to conceive may seek out biological surrogates. Adoption is only one way that children can be cared for in Aotearoa, but it does provide a symbolic and legal status that some families prefer.

It is important to note that adoption is a tool that is not appropriate in every instance. Guardianship is another of the tools for care and protection of young people in Aotearoa. Guardians function as parents in many of the same ways, having particular legal duties and rights in relation to the child.[9] However there are some legal differences between guardianship and legal parenthood. For example, legal parents remain so for the child's life, whereas guardianship ends at 18 or when the child enters into a legally recognised

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[7] J Rowe *Yours By Choice, A Guide for Adoptive Parents* (Routledge & Kegan Paul, London, 1959), at 45.

[8] Helen Colebrook and Megan Noyce "Adoption Reform" (2000) NZLJ 363 at 363.

[9] Care of Children Act 2004, s 15.

relationship.[10] Further, succession laws apply automatically to parents, though not to guardians.[11]

The symbolic nature of adoption can still remain important to some families too. Particularly in surrogate situations, the transfer of legal parenthood can help adoptive parents feel fully connected to a child in its permanence.[12] It is important to note however, that this may echo the principles of the 1955 Act. The Act supposed that to make a family 'legitimate', parents must adopt. I do not aim to interrogate that view here. The primary point to note is that some families do have a particular attachment to the idea of adoption, and so the Act should at the very least be driven by inclusivity and the priority of child wellbeing.

C So what is the issue?

While adoption legislation itself is due for a change, it has fallen to the judiciary to patch things up as much as possible. Parliament's inaction on the adoption issue has meant that courts are left as the only mechanism to curb the heteronortative sting of the 1955 legislation. This is because adoption applications are made to the Family Court and thus the interpretation of the Act falls to judges.[13]

The adoption process begins with an application to the Family Court, which is accompanied by a social worker's report containing details of the applicants. Judges then have discretionary scope to grant adoption orders and turn applicants into legal parents.[14]

The discretionary power of judges should theoretically aid the flexibility of the law, making the law able to better withstand the test of time. Unfortunately the elasticity of

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[10] Care of Children Act, ss 8, 15, 29.

[11] Care of Children Act, ss 8, 15, 29.

[12] Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [39].

[13] Adoption Act 1955.

[14] Adoption Act, s 13.

the law can only be stretched so far. Much of the Adoption Act does not explicitly state the underlying presumptions of a nuclear family, however, certain sections do. The section of interest in this paper is section 3. Section 3 outlines the circumstances in which the court is authorised to make adoption orders.[15] For instance, "an adoption order may be made on the application of 2 spouses jointly in respect of a child", and "an adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse."[16]

Sections 3(2) and 3(3) have caused particular problems because of the understanding of the word "spouse". As discussed above, "spouse" in this section was about creating the ideal surrogate family for a child to be 'transplanted' into. The Act strived to create the illusion of normality. The conventional view of "spouse" referred to legally married couples, since typical 1955 families were made up of a wife and a husband who had children after marriage.[17] Therefore, only married, heterosexual spouses were able to fulfil these roles as the adoptive parents. Clearly, in the modern day a strict heteronormative standard creates issues for many applicants who do not fit these criteria.

While legislative reform would be preferred, filling the gaps in the meantime has fallen to the courts. The following section details how courts have interpreted section 3 of the Act, arguably its greatest difficulty, to apply to various cases.

III How The Courts Have Adapted

Courts have been stuck in a legislative bind. Although society has come to largely accept forms of family that differ from the wife-husband-kids arrangement, courts have struggled to grapple with the lack of latitude the statutory language in the Act allows. In

[15] Adoption Act, s 3.

[16] Adoption Act, s 3 subss 2, 3.

[17] Homosexual Law Reform Act 1986; New Zealand Bill of Rights Act 1990; Civil Union Act 2004.

order to keep up with modern expectations of adoptive parents, courts have been required to perform some 'interpretative gymnastics' in order to reach a more equitable outcome.[18]

A The Development of NZ Adoption Cases

The Adoption Act is a good example of where the judges have extended the liberties of these sections. This section tracks the evolution of judges wrestling with the definition of "spouses" in the Adoption Act and balancing legislative fidelity with the modern scope sought from the Act.

1 Re AMM and KJO

Re AMM and KJO dealt with an adoptive couple who had been living together in a stable relationship for 10 years, though they were not married.[19] AM had a son to whom KO had been a parent for all 18 months of the child's life.[20] Despite AM already being the legal and biological parent of the child, the applicants sought to share legal parenthood. This roundabout application process was required by the Act since adoption severed existing legal relationships, thus AM's legal parent status would be extinguished by any adoption order. In order to retain legal status, while also attaching this status to KO, AM was required by the Act to apply alongside KO. The applicants therefore had to apply together under subsection 3 of section 3 of the Adoption act, the same one which requires the applicants to be "spouses".

"Spouses" is ordinarily defined to mean couples who are married, whereas these applicants were in a de facto relationship. The couple's lack of marriage obviously created a dilemma for the courts. Although the term "spouses" was still typically understood to mean one thing, de facto couples and families were very normalised by 2010. Further, this case involved a birth parent applicant. It would be an absurd result if

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[18] Bill Atkin "Adoption law: The courts outflanking Parliament" (2012) 7 NZFLJ 119 at 119.
[19] Re Application by AMM and KJO [2010] NZFLR 629.
[20] John Caldwell "Re application by AMM and KJO to adopt a child" (2010) NZLJ 300 at 300.

either the birth parent could remain the legal parent, or that parenthood could be extinguished by the partner in applying as a single applicant, but that applying together would frustrate the sharing of legal rights.

So, in 2010 the High Court in *Re AMM and KJO* for the first time, expanded the term "spouses" in the Adoption Act 1955 to include a de facto couple.[21] Whereas in the Family Court it was found that "spouses" could refer only to a married couple, the High Court relied on a *Hansen* style section 6 analysis to reach a broader definition.[22] Importantly, the court explicitly limited the expansion to "de facto couples of the opposite sex". The court was careful to limit the impact of their decision to different sex couples. Of course, their reasoning for the limitation was not explicit, though it was likely a reluctance to push the boundaries any further than strictly necessary. While same sex relationships had growing social acceptance, same sex marriage was yet to be legally recognised. While the court did acknowledge that there had been a minor shift in the barriers of adoption, they warned of future applications that challenged the legislation much further.[23] Applications that departed further from the traditional family unit would "have to wait for another day".[24]

I accept that extension to include de facto couples *was* within the rights of the court. Despite the ordinary meaning of "spouse", an exclusive heterosexual de facto relationship which resembled marriage was sufficient as a modern equivalent to warrant expansion of the term.[25] Although the court did seem to hesitate in coming to the conclusion to grant legal parenthood to both applicants, through contemporary lenses it was not a radical step. In many ways, the couple in *AMM and KJO* aligned with many of the characteristics of a family in 1955. Given the relationship seems to be marriage in many senses except legal, the court was not shifting the heteronormative definition far.

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[21] At [73].

[22] At [50].

[23] John Caldwell, above n 20, at 300; Re Application by AMM and KJO, above n 19, at [73].

[24] John Caldwell, above n 20, at 300.

[25] At [35].

2 Re Pierney

The case which extended the meaning of "spouse" to include both couples of the same and opposite sex, was *Re Pierney* in 2015. This case dealt with applicants that had been in a same sex de facto relationship for nearly 10 years.[26] The child in question, similarly to AMM and KJO, was the biological child of one of the applicants and had been raised by both applicants since birth.[27] It is likely that the biological connection impacted the court's willingness to find eligibility for adoption.

Judge McHardy claimed that there was no justification to exclude same-sex couples eligibility status. It is worth noting that this case was decided after the passing of the Marriage Definition Act, and so the Court found that they were no longer confined to extending "spouses" to just opposite sex couples.[28] Further, the year prior to the *Pierney*, another same-sex couple had been approved to adopt by the Family Court, albeit they were married.[29]

The form of family in *Re Pierney*, though no doubt outside of the contemplation of the 1955 Parliament, does fit the modern interpretation that was open to the courts. But, again, it was no feat of judicial activism. The family involved in *Re Pierney* was a couple that were a long-term and exclusive partnership. While they were not legally married, the form of their relationship likely imported heternormative ideas of stability.

The 'traditional family unit' may be interpreted as the relationships, rather than the actors within them. Even within same-sex couple relationships, if they are able to present a certain way, particularly resembling heteronormative relationship, they may be able to pass as a 'traditional family unit'. This concept has been coined 'homonormativity', an

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[26] Re Pierney [2015] NZFC 9404, [2016] NZFLR 53 at [2].

[27] At [4].

[28] At [13].

[29] Re Application by Reynard (Adopt a Child) [2014] NZFC 7652, [2015] NZFLR 87.

idea that there are "particular types of intimate homosexual relationships that reflect social hierarchies, including race, gender, class, and other configurations of privilege"[30].

While it could be argued that the function of the relationship was the basis of the decision, it was the *form* that meant the legislation could allow the order. The form of the relationship was in part homonormative and cannot be considered to have altered the form of the 'spouse'/'family' definition.

3 Re May

Re May was next in the relevant developments of cases. The case regarded the joint adoption application made by a legally married but separated couple.[31] The court held that they were able to qualify as "spouses" under the ordinary interpretation of the section.[32]

This case created difficulty for the courts, since although the couple technically fell within the ambit of section 3, the opposite problem from that in *Pierney* arose. Unlike *Pierney*, the couple met the legal requirement at face value, but the function of their family was not one that was intended by the statute. *Re May* demonstrated the somewhat arbitrary conflation of marriage. While the court had struggled to stretch the law to fit unmarried couples who were in a stable committed relationship, they were able to endorse one that was married, though separated.

Re May highlighted the underlying heteronormativity that the courts have failed to unseat, despite their creative efforts. While other cases saw courts chipping away, albeit slowly, at what modern family structures can be, this case seems to take a step backwards.

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[30] Nan Seuffert "Same-sex immigration: domestication and homonormativity" in A. Bottomley & S. Wong (ed) Changing Contours of Domestic Life, Family and Law: Caring and Sharing (2009) Chapter 8 at 2.

[31] Re May [2016] NZFLC 3573.

[32] Re May, above n 31.

Despite the applicants being separated, marital status imported stability. *Re May* showed how relying too heavily on the legislation can lead to a tick-box exercise which prioritises form over function.

In *Re Pierney*, the court stressed the importance of looking at the function of the family, drawing on the family that it was "legally regulating a family situation which is already existent."[33] Whereas *Re May* overlooked the absence of this very kind of relationship on the basis of their form of relationship – i.e. still being legally married despite de facto separation.

4 Re Gordon

Re Gordon is one of the latest cases in the development of adoption law, and no doubt the one that pushes the boat out the furthest. This case involved not only a separated couple, but one whose marriage had been legally dissolved at the time that they applied.

The applicants had been foster parents to a young girl since the age of two, though subsequently separated. Nonetheless, they remained loving and stable parents to the child. The child then requested that they legally adopt her when she turned 18. She considered them both to be her parents and wanted these relationships to be legally recognised.

So what did this mean for the courts? The family neither technically fell within section 3 by virtue of their legal relationship, nor did they function as the 'traditional family unit' that allowed the finding in *AMM and KJO* and *Pierney*. However, in an effort to give effect to the common wishes of the parties, the courts were led to interpret the section even more creatively. Instead of the typical relationship between parents, it was the commitment to the parenting role that was important to consider.[34] The commitment to these relationships was something that the applicants were able to satisfy. The courts felt

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[33] Re Pierney, above n 26, at [4].

[34] Re Gordon [2019] NZHC 184, [2020] 2 NZLR 436, at [35].

that including former spouses within the meaning of "spouses" more accurately reflected modern attitudes.

The court was right to say that a loving, separated form of family is increasingly socially accepted, and *should* be reflected in our law. This is the only case that has come close to unseating the heteronormative form test of the law. The courts were looking not at the heternormative resemblance of the couple's relationship, but instead to the relationship they had with the child. While, as discussed below, prioritising form over function is the key change which should guide reform, this approach is neither the current purpose of the existing law, nor is it possible under the words of the existing statute.

The need for reform does not translate to a power of the courts to rewrite the existing legislation. In coming to the decision that a separated and non-married couple could be "spouses", the court went beyond its interpretative role. Unfortunately, the restrictive language and nature of the Act meant that the court cannot just read in whatever criteria it sees fit. Under the existing legislation, the relationship status and form of the applicants must be considered.

B Beyond The Role of the Courts

The courts are given an interpretative role, not a law-altering one. Although judges are intended to have some scope to allow older legislation to continue to be applied to contemporary facts, this cannot be unfettered power. While the Adoption Act is clearly a product of its time, courts "cannot blithely re-write a piece of legislation just because it is out of date or because it is discriminatory".[35]

[35] Nathan Crombie "New meaning for historic term: de factors as "spouses" in new High Court ruling" (2010) 6 NZFLJ 313.

The Bill of Rights Act 1990 provided judges with powers to maximise human rights, without undermining parliamentary sovereignty.[36] Although section 6 of BORA does allow judges to to prefer an alternative interpretation of a provision which better protects the rights in BORA, this is not an unqualified power. Both section 4 and language within section 6 itself, prevents judges redefining legislation. Section 4 requires judges to uphold legislation where the meaning is clear even if it infringes rights. Again, section 6 requires that before a rights-consistent meaning can be preferred, the enactment must be capable of bearing that meaning. Therefore, judges can neither substitute language whenever they see fit, nor can they refuse to enforce legislation on the basis of its rights violations.

Despite the restrictions on the use of BORA there have been two different, though both unsatisfactory, ways that the courts have approached the use of the Adoption Act 1955. Firstly, the courts have relied heavily on the required form of "spouses". This faithful interpretation means that the recognition of modern family structures will either be exceptionally slow, or impossible altogether. Section 3 makes it exceedingly hard to break away from heteronormative assumptions, as demonstrated by the persistent default position of the courts. Building on the language on the existing act to will not be able to address the foundations on which the current law rests, nor the policy decisions behind the Act.

The second approach has been the one taken in *Re Gordon*, placing function over form. Although an admirable one, this aggressive application of section 6 of the NZ Bill of Rights Act 1990 likely went beyond that which would be intended by Parliament.[37] The interpretation taken in *Re Gordon* was never actually open to the court on the plain words of the statute. While it shows a step in the right direction, ultimately that step must be one made by Parliament.

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[36] Rosie Wall "Re Gordon: An Illustration of Judicial Activism Arising from Uncertainty in the New Zealand Bill of Rights Act 1990" (LLB(Hons) Dissertation, Victoria University of Wellington, 2020) at 4.

[37] *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113.

C The Danger of Discretionary Assessments

Further, even if the function over form approach had been open to the court, the court having too much discretion brings its own dangers. The primary danger in these processes are decision makers inserting their own personal prejudices, which can expose both applicants and children to harmful outcomes. When wide discretion is allowed for a decision-maker, like a judge, they may consciously, or unconsciously, turn decisions on inappropriate factors, even when they genuinely believe that they are acting in the child's best interests.

The discretion allowed to judges in their assessments, may open up the danger of them substituting their presumptions instead of a proper and competent examination of the particular child in the particular child's circumstances. Justice Brennan, of the Australian High Court, once warned "in the absence of legal rules or a hierarchy of rules the best interests approach depends upon the value system of the decision maker".[38] Each child must be considered as an individual and his or her needs and welfare assessed within the context of the particular family unit.[39]

So even if judges were accepted to have the jurisdiction purported in *Gordon*, leaving these decisions to the courts, without more stringent guidance, may lead to unjust results regardless.

D The Pressing Need For Reform

The legislation was and remains out of date, and in place of reform by Parliament, the courts have had to revise the law themselves.[40] However, to alter the law to the extent

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[38] Department of Health and Community Services v JWB (1992) 175 CLR 218 (High Court of Australia) at 271.

[39] Mark Henaghan (ed) *Principles under the Care of Children Act 2004* (online ed, Family Law Service).

[40] Bill Atkin, above n 18, at 123.

that they have done, was not within the courts jurisdiction. And even where it was, the changes have been both slow to develop and limited in their extent.

The aggressive use of section 6 of BORA has arguably moved the courts beyond their interpretative role, particularly in the case of *Gordon*. Despite it being a more rights-friendly interpretation, and a better reflection of society's attitudes, it is not within the scope of the courts' role. Rather, reform should be referred to Parliament to bring the legislation into the present.

Further, and more importantly, even if the current trend was within the courts' jurisdiction, they have struggled to move their definition of who may adopt beyond one based on the idea of the nuclear family. For the most part all applications of the law have still centred on a nuclear family, one that merely substitutes the 'husband' and 'wife' figures. It is impossible for the courts to truly find an interpretation of the Act that is flexible and inclusive in contemporary society when the Act was written in 1955 with 1955 intentions and attitudes. There is only so far words can be stretched before it reaches absurdity. A primary focus of the courts has still been to find a relationship 'resembles marriage'.[41] And in fairness to the courts, to find anything other than two people who are in a romantic relationship within the definition of 'spouse' is not linguistically possible.

Obviously the courts' approach has been satisfactory for some de facto and married couples, but there are still family structures that are excluded. Other forms of family, including those that are not in a romantic relationship, or are beyond 2 people, do not fit into this interpretation. So instead of the courts struggling to apply this outdated law, it is time to tackle it properly. But this reform should not be about copy and pasting the existing law into modern language, it needs to be about shifting the focus from form to function.

IV Reform Proposals

[41] Ross Carter "'Spouses' in the Adoption Act" [2010] NZLJ 271.

The Adoption Act being unfit for purpose is not a contentious issue.[42] Despite this, Parliament has been steady in its inaction. While incremental changes have been made in the form of the Care of Children Act 2004, the Civil Union Act 2004, the Relationships (Statutory References) Act 2005, and the Marriage (Definition of Marriage) Amendment Act 2013, Parliament has consistently neglected to enact any change to the definition of an 'adoptive parent'.

There have been two Law Commission attempts at initiating reform, one in 2000, and one currently taking place in 2021.[43] Evidently, the former failed to lead to direct change to the Adoption Act 1955, though it undoubtedly fed into some of the related legislation listed above. Both reports have suggested guiding principles that should be used in shaping our law. These principles have begun to give a sense of the way our law may change, and reform suggestions from both the Law Commission in 2021 and Thompson in their article 'The eligible adoptive parent' have had the benefit of building on the indirect changes triggered by the Law Commission.

A What should our guiding principles be?

In 2000, the Law Commission suggested that clear guiding principles may be written into the act to refocus the child as the paramount consideration in the adoption process.[44] The priority of children is useful to keep in mind in shaping what direction adoption law should be moving in. These principles guide not only legislation reform, but the part played by the judiciary as well.

In order to bring New Zealand more in line with international conventions such as the United Nations Declaration on Child Placement and the United Nations Convention on the Rights of the Child, the latter of which NZ has ratified, the Commission considered

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[42] Bill Atkin, above n 18, at 119.

[43] Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework*, above n 5; Ministry of Justice, above n 2.

[44] Helen Colebrook and Megan Noyce, above n 8, at 363.

several guiding principles.[45] These often used the wording of international provisions, such as the ‘paramountcy principles’ which says that the “welfare and interests of the child are the first and paramount consideration”.[46] Factors that may come into consideration in the assessment of a child’s welfare and interests included physical and emotional needs, security in the family, quality of the relationships with the birth and adoptive parents, the preservation of a child's heritage (whakapapa), and the character of the adoptive parents.[47]

In 2021, the Ministry of Justice released a provisional discussion document in reviewing adoption legislation. The paper also suggests a revision of the stated purposes of the Act, with a particular view of changing the legislation to be ‘child-centred’.[48] Building on many of the same points as the 2000 report, the 2021 paper also notes that the purpose of adoption should be to “deepen a child’s connections with family whānau, hapū and iwi”, and should be a “service for a child’, rather than the parents.[49] This is a notable shift from the 1955 purposes. Moving towards a child-centred adoption framework is important as general society has come to understand the importance of wider networks in supporting children. Child care legislation should be for the benefit of the child, rather than serving the capitalistic and conservative values preserved by the Adoption Act 1955.

These guiding principles not only further evidence how the modern needs have outgrown the existing law, but also provide the backdrop for the suggestions put forward in the sections below.

B Law Commission

[45] Law Commission *Adoption: Options for Reform*, above n 12, at [33]-[34].

[46] Law Commission *Adoption: Options for Reform*, above n 12, at [124].

[47] Law Commission *Adoption: Options for Reform*, above n 12, at [130].

[48] Ministry of Justice, above n 2, at 12.

[49] Ministry of Justice, above n 2, at 12.

The Law Commission released its report titled "Adoption and its Alternatives: a Different Approach and a New Framework" in September 2000. The Commission aimed to place the best interests of the child at the core of new reform, a concept that the Commission considered consistent with more recent legislation.[50] The general aim of the Commission was to bring the legislation into the present with a focus on "the fundamentals of love and security". This report was the result of consultation by academics, as well as a public discussion following their preliminary paper released in 1999.[51] The resulting document is comprehensive in both its contextual background and its recommendations. The Law Commission's proposals were broad, and to go through them in detail is beyond the scope of this paper. However, I will touch on those that are most relevant to this thesis.

The Commission noted that the 1955 Act was outdated and restrictive in the recognised form of families. This applied particularly to the section of reforms titled "Who may adopt". The general proposal for reform was that there should be no classes of people disqualified from eligibility on the basis of relationship status or gender. Rather it is whether particular applicants are able to promote "the interests of the particular child".[52]

The Commission touches on both the gender and relationship status discrimination in the eligibility process for adoption. Firstly, the Commission recommends that section 4(2) which says that a single man cannot adopt a female child,[53] should be removed. This would bring the Act, the report argues, more in line with a general test of suitability, rather than eligibility.[54] Although different terminology was used by the Commission, this suitability over eligibility test is very similar to the form versus function tests considered in this paper.

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[50] At *xv*.

[51] At *xv*.

[52] At [335]

[53] Except where he is her biological father, or in special circumstances.

[54] At [336].

More relevantly, the Commission then goes on to recommend that there should be no eligibility restrictions regarding marital or relationship status.[55] On both issues of single parents, and unmarried couples, the Commission sees "deeming a class of persons ineligible might remove a beneficial option for an individual child."[56] This was an issue that had a number of submissions, many who supported treating married and de facto couples alike.[57] However some submissions raised "commitment" as an issue with de facto relationships. The Commission did not comment on this directly, but rather noted again that it was a matter of suitability over eligibility.[58]

The recommendation ultimately made by the Commission was that de facto couples should be permitted to adopt. However, the Commission did note that the "stability of the couple's relationship" would be something that would come into the assessment of suitability.[59] It is important to note, as discussed above, that too wide of discretion can pose its own risks. It may allow assumptions that may be brought in by what "stability" means. Clearly, some still believe, as demonstrated by the submissions received by the Commission, that marriage reflects a greater level of relationship stability and commitment. Further, this assessment was suggested by the Commission to be left to a social worker. This has the potential to leave room for biases and if delegated as such, there would need to be stringent guidelines to avoid prejudicial assessments.

The Commission then moved on to discuss the issue of eligibility for same-sex couples. Their recommendations were ultimately the same, that there should be no general prohibition against application by same-sex couples. The Commission considered that there was insufficient evidence to justify a disqualification of all same-sex applicants. Rather it would be based on the same 'eligibility' test.[60]

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[55] At [339].

[56] At [341].

[57] At [341].

[58] At [348].

[59] At [349].

[60] At [361].

While on the face, reducing the barriers to same-sex applicants seems to be consistent with the other recommendations on eligible applicants, but the recommendations around same-sex applicants seemed to be qualified in ways that other couples were not. For instance, in assessing the "merits" of the couple, it gives the example of asking same-sex couples what 'role models' they plan to provide. While it should be noted that this report was well before Parliament passed the Act which changed the definition of marriage, it makes for an interesting inconsistency in the report. Despite the Commission spending a significant portion of the report explaining the archaic roots of the Adoption Act, and how the families it allowed are no longer representative of New Zealand society, the report's implicit definition of family still seems reminiscent of those same nuclear families. The criteria suggested for suitability remains seated in heteronormativity. For example, why should same-sex couples need to worry about providing opposite gender role models, if they themselves were enough?[61] The Commission seems to imply that opposite gender roles need to be fulfilled for a family to be 'suitable'.

Finally, the Commission suggested updating the language in section 3 of the Act, as a general recommendation. The Commission recommended changing the wording to use 'partner' either instead of, or in conjunction with, spouse.[62] This was to make clear that there should be no exclusion of non-heterosexual-married couples in adoption applications. The wording suggested made clear that it would still just be a couple applying, and that this couple would be in a relationship that resembled marriage.[63] This is also ringing the nuclear family bells. It is a struggle to see how the Commission can champion how much families have changed since 1955, just to use the 2-parent, marriage-resembling cookie cutter to write the reforms.

The Commission's recommendations show their age. Although they were generally along the right track, they were often left a bit wanting. The move from eligibility to

[61] At [359].

[62] At [363].

[63] At [362].

suitability was a positive one, though the Commission remained vague of what this might look like in practice. Further, the recommendations left room for very subjective assessments which have the potential to discriminate against the very families that reform would seek to destigmatize. Although these reforms were a good place to start, Thompson's proposals build significantly.

C The Eligible Adoptive Parent

Gabrielle Thompson's article, "The eligible adoptive parent", builds on the recommendations of the Law Commission, though modernises many of the reform suggestions. Thompson argues that the primary purpose of adoption is to benefit the child, yet the legislation itself does not make this purpose so clear.[64] The article suggests a better defined set of principles to guide applications; a set of principles that would shape the pool of eligible applicants. If the principles are set out to be "the needs of a child to love, commitment to care, security, stability and connection", then the court's consideration of applicants should be on the basis of this, and this alone.[65]

Thompson states that the current law requires the court to be satisfied that the joint applicants, in that type of application, are in "a stable and committed relationship".[66] The article points out that adoption cases up to this point have generally followed this guiding principle, with the exception of cases such as *Re Gordon*. In those cases, it is the desire for a "parent-child relationship" which the court has assessed.[67] This is a reform that echoes the recommendations by the Commission. Where Thompson goes further is in the suggestion to open applications for joint applicants who "are not, and never have been, in a romantic or intimate relationship".[68]

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[64] Gabrielle Thompson "The eligible adoptive parent" (2021) NZLJ 89 at 89.

[65] At 91.

[66] At 89.

[67] At 91.

[68] At 91.

The test put forward by Thompson is wider since it is about promoting the "welfare and best interests of the child" as the primary consideration.[69] Although the Law Commission ultimately sought the same thing, Thompson had the advantage of contemporary cases like *Re Gordon* to build from. Thompson did not necessarily have to break down the barriers for individual classes of applicants in order to progress the relationship form test.

However, substantively, Thompson's recommendations differ in two respects. Firstly, this test is less implicitly qualified with heteronormative assumptions. This starts at the breaking down of the romantic relationship of the parents. Thompson explicitly addresses this, saying that it does not matter whether the relationship between the applicants is romantic, since it is what they can provide to the children which is the primary focus.[70]

Unlike the Law Commission which declined to directly endorse same-sex parents, Thompson points to evidence that "parents of either gender have the same capability to create positive child outcomes".[71] Thompson's 2021 perspective progresses the Law Commission's plainly outdated 2000 outlook. Thompson's article makes clear that it is not that same-sex applicants do not necessarily make for 'bad parents', but that they can actively make for good ones. It is also pointed out that role models may be important, but that it is not a requirement solely considered for same-sex applicants. Rather it is a consideration for all extended family networks.[72]

Further, Thompson is less vague about the criteria for assessing the suitability of prospective parents. The test lists the child's needs of love, care, security, stability, and connection as those that applicants must be committed to. Further, the applicants must be committed to creating a parent-child relationship with the particular child.[73] This test is more specific and gives a better picture of how it may be applied in practice. This

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[69] At 91.

[70] At 91.

[71] At 91.

[72] At 91.

[73] At 91.

leaves less room for subjective biases of either judges or social workers. Although there may be certain factors that may look different for different applicants (e.g. stability), for the most part, the factors could be universal.

D Where the Reforms Fall Short

Thompson's proposal addresses a large number of the issues with the existing legislation. However, one area that Thompson fails to address, is the ways that even romantic relationships are discriminated against even if all forms of romantic couples are allowed to apply. The reforms proposed assumed that romantic relationships are restricted to just two people, and that these couples will be living together.

1 Requirement to live together

In their reform proposal, Thompson suggests removing the requirement for non-romantically connected applicants to have been living together for a set period of time. It is pointed out that this would privilege particular relationships and make it difficult for other family structures e.g. extended family applicants, to succeed.[74] In order to allow for say, whānau members, to adopt, the living arrangements question should be restricted to parties in romantic relationships. However, a flaw in this is that Thompson assumes that all romantic partners live together. This may be the conventional way for long-term intimate partners to live, though it seems a dispensable barrier to put in front of potential applicants when it has already been found to be irrelevant in other scenarios.

The solution is simply to remove the requirement of living together from the assessment of stability altogether. Living together, though often commonplace in many committed relationships, is a heteronormative import nonetheless. Living together is not the function that determines whether applicants would be suitable, it is a question of stability and commitment. Living together is just used as a heteronormative standard by which to measure it. As pointed out by Thompson in their article, having the requirement of living

[74] At 91.

together for all applicants may mean whānau members are unable to adopt, and therefore it should be dropped.[75] If it is accepted that whānau can provide stability without lying together, then there is no reason that the same can not be said for applicants who are in a romantic relationship.

2 Restriction to one or two parents

Heteronormative assumptions creep in a little as Thompson also presumes that all applicants, whether in romantic relationships or not, would be couples (or single applicants). As pointed out by Thompson, care within the family, rather than severing ties with adoption, is preferable. When families take on the role of caring for children themselves, it is often that different family members, including aunts, uncles, grandparents and siblings will step up to help. Many different people, and combinations of people will often be caring for the child. So the idea of a couple is not based on an ideal of how children should be raised, but is another remnant of the nuclear family.

Polyamory is often met with prejudice and contempt, and polyamorous families are no exception.[76] These have been studied socially, though there is very little legal analysis on polyamorous families. In fact, there is no case law at all in New Zealand on polyamorous parents. This paper does not claim that there are a high number of polyamorous families which regularly use adoption channels were it not for the law's current form. However, while reform is being made, it seems foolish to make these kinds of exceptions to the inclusivity principle. Particularly because, as discussed below, polyamorous families are not something Parliament should shy away from.

As noted, there is limited work in the realm of polyamory. However, studies have been done in the US which look at child outcomes with polyamrous parents.[77] How children

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[75] At 91.

[76] Jennifer Bavacqua "Adding to the Rainbow of Diversity: Caring for Children of Polyamorous Families" (2018) 5 JPEDHC 490 at 491.

[77] Jennifer Bavacqua, above n 76.

respond with not only different romantic attachments between different parents in their life, as well as different living arrangements, can help speak to what is really important in considering stability for children.[78] These can then be imported to what criteria are actually important when assessing adoption applicants.

One study found greater levels of self-awareness, self-confidence and social awareness in children with polyamorous parents.[79] Children are resilient and adaptable. Perhaps we should be less concerned with our own moral judgments of adult relationships, and more on facilitating positive and nurturing relationships. Because that is what actually serves as the foundation for child wellbeing.[80]

In a Canadian case, the judge found that a child had "three loving, caring, and extremely capable individuals" who happened to be in a polyamorous relationship.[81] Just because the concept of polyamorous families had not been in the minds of the legislature did not mean that the three parents were unable to be the best form of family for their child. In fact, it would have been *contrary* to the best interests of this particular child to be "deprived" of the parentage of their mother.[82] In order to allow stability and consistency for that child, the court found that an order could be made to recognise all three parents. The court was empowered to make this order by virtue of their *parens patriae* jurisdiction. This enables the court to make orders in the best interests of a child where there is a gap in the legislative scheme.[83] The judge noted that the power allowed them to bridge the gap in the Family Law Act which did not provide for recognising the parentage of a child conceived through sexual intercourse, who had more than two

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[78] Ada Cigala and others "Family Exploration: The Contribution of Stability and Change Processes" (2018) 27 J Child Fam Stud 154 at 162.

[79] Jennifer Bavacqua, above n 76..

[80] Jennifer Bavacqua, above n 76..

[81] British Columbia Birth Registration No 2018-XX-XX5815 (Re), [2021] BCJ No 867, 2021 BCSC 767 at [17].

[82] At [37].

[83] Halsbury's Laws of Canada (reissue, 2018, online ed) vol (1) Principle of the child's best interests at 4.

parents.[84] The court found that since the legislative had not contemplated polyamorous families in the passing of the Act, the court had jurisdiction to declare the third legal parent. New Zealand courts do not have this same jurisdiction and therefore if these same facts were to arise, the courts would be unable to 'bridge the gap' in the same way.

As both the case and studies show, children are able to flourish in broader and bigger families. But we already know this. Not only does Thompson's reforms allow for non-romantic applicants to adopt, but whāngai structures and Māori structures are already upheld by the law. One of the broadest definitions of family that can be found in legislation is in the Oranga Tamariki Act 1989. Family group is defined by the act as being a group with "whom the child or young person has a biological or legal relationship… or a significant psychological attachment."[85] The Act encourages family groups to support children as much as possible in the first instance. The Act appreciates that children can be adequately supported by more than just two people, and by people that do not even live together.

If the legislature can appreciate that having more than one or two guardians or caregivers can be beneficial for children, it is heteronormativity, not the function, that is confining romantic relationships.

Thompson's article as a whole put forward positive reform suggestions that target many of the deep rooted biases that hold firm in the current legislation. In reforming the law, it is important not to limit the impact of the reform by allowing heteronormativity to cloud the fundamental principles which the reforms should uphold. It is also important that these reforms are not limited by their very application. The adoption cases have shown that interpretation of the courts can vary widely. It is important that as reforms move to a more subjective test, this does not leave room for heteronormative assumptions to sneak back in.

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[84] Family Law Act 2011, s 26 (SBC, Canada).

[85] Oranga Tamariki Act 1989, s 2.

VI Conclusion

Reform in adoption is finally making headway, and this opportunity should not be missed. We are fortunate to live in an age where family, amongst other things, are becoming increasingly fluid. Unlike the previous legislation, reform should be prospective. Parliament should not be waiting for particular applicants to become frustrated in a broken system before acknowledging that legislation is discriminatory or out-of-date. Judges have bridged the gap for a short time, but they lack the jurisdiction needed to take the legislation as far as it must go to overcome its heteronormativity. Further, lack of jurisdiction aside, discretionary decisions bring danger in itself, thus greater guiding principles and guidelines must be set out to circumvent the possibility for discrimination. Reform proposals including those from the Law Commission and Thompson move us forward, though not quite enough.

This paper argues that the pool of eligible adoption applicants should be as inclusive as possible. A greater understanding of child and family well being gives our Parliament the privilege of constructing legislation which reflects modern science. We know that children all have generally similar needs in regards to stability and love, and it is time for us to acknowledge that in our law. The fixation on adult relationships and thinly veined judgments of morality needs to come to an end. Children deserve adoption legislation that actually puts them at the centre.

While the exact wording of an Act is not developed in this paper, setting out guiding principles of inclusivity and a *real* focus on children, not the configuration of their parents, with an awareness of potential dangers of broader legislation, is a good place to start.

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