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# THE CHILD'S RIGHT TO PARTICIPATION

## Strengthening New Zealand's Commitment to Article 12 of the United Nations Convention of the Rights of the Child within an Adoption Framework

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## *Abstract*

Article 12 of the United Nations Convention on the Rights of the Child provides children with the right to express their views in any judicial and administrative proceedings that concern them. Despite the ratification of the Convention in 1993, New Zealand's legislature has consistently refrained from amending the Adoption Act 1955 to fulfil this international obligation. In its current state, the statutory regime provides minimal legislative mechanisms to empower children to participate in their adoption proceedings. This essay addresses the importance of placing the child's voice and agency at the forefront of New Zealand's adoption framework. With reference to overseas jurisdictions and other fields of medicine and research, the essay assesses the viability of implementing consent-based models of participation founded upon statutory age limits and general competency tests. It also examines the plausibility of creating statutory provisions akin to those under s 11(b) of the Oranga Tamariki Act 1989, thereby shifting the onus onto adult facilitators themselves. Overall it is argued that a two-tiered-duties-of-care model ought to be imposed onto decision-makers and officers of the Family Court. This strikes a finer balance between respecting the child's participatory integrity, and acknowledging the articulation of Article 12 as a right of the child as opposed to a duty.


***Key terms:* "***Adoption", "Adoption Act 1955", "Law Reform", "Child Participation", "Family Law"*

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## *I. Introduction*

The United Nations Convention on the Rights of the Child (UNCRC) was adopted by the United Nations General Assembly in 1989 and entered into force in September 1990.[1] New Zealand's fourth National Party Government ratified the UNCRC in April 1993, creating an ongoing responsibility of the State to respect and uphold the rights enshrined within it.[2] Article 12, which provides children with the right to make decisions about their lives, is regarded as one of the four 'General Principles' within the UNCRC.[3] It is not only an independent right to facilitate dialogue and foster mutual respect, but is also used to interpret other provisions within the UNCRC. Article 12 challenges the paternalistic adult-centric framework of making decisions about a child, as it highlights the importance of the child's own participation in legal processes concerning them.

The practice of adoption is commonly expressed as the permanent transfer of the legal rights and responsibilities towards a child from the biological parents to the adoptive parents.[4] Yet such legalistic definitions solely focus on the adult parties to the process and fail to acknowledge that adoption is also a social, emotional and legal process for the child. Nevertheless, this discourse has dominated legislation guiding the adoption process within New Zealand. The Adoption Act 1955 (the Act) was crafted as a legislative response to the social dismay of illegitimacy.[5] The Act did not contemplate the multitude of other purposes of adoption, and that adoptees may be older than the age of infancy. Consequently, the Act provides minimal legislative mechanisms to promote the child's engagement and participation within the adoption process. This demonstrates the lack of cognisance of the adoptee's participatory rights and illustrates that children are provided with no consistent mechanisms for agency and empowerment throughout the adoption process. Evidently, this aspect of New Zealand's family law is failing to meet its obligations under the UNCRC.

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[1] Ministry of Justice "International human rights: UN Convention on the Rights of the Child" (19 August 2020) Justice.Govt.NZ <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/crc/>.
[2] Ministry of Justice, above n 1.
[3] *United Nations Convention on the Rights of the Child General Comment No. 12: The Right of the Child to Be Heard* LI, CRC/C/GC/12 (20 July 2009) at [2].
[4] Oranga Tamariki Ministry for Children "Adopting in NZ" (21 March 2022) OrangaTamariki.Govt.NZ <https://www.orangatamariki.govt.nz/adoption/adopting-in-nz>.
[5] Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [4].

After decades of persistent advocacy for reform being met with inaction, the current Labour Government has pushed adoption reform onto its legislative agenda. Having started its initial review in 2021, the Government is currently undergoing its second round of public engagement to seek views on the current state of New Zealand's adoption law and proposals for change.[6] One focus for the Ministry of Justice is how to "support meaningful participation of children" throughout the adoption process.[7]

This essay examines possible participatory models that could be implemented within a reformed framework and allow New Zealand to meet its obligations under Article 12 of the UNCRC with respect to their adoption laws. Part II will break down Article 12 itself. Part III will briefly discuss Articles 13 and 17 of the UNCRC which are necessary preconditions to strengthen the child's participation in legal proceedings. Part IV will review New Zealand's current adoption framework under the Adoption Act 1955, and Part V will examine the policy justifications for legislative reform to this participatory aspect of the law. Part VI will discuss various models of participation that may be viable. It will first examine consent-based models of participation driven by statutory ages and competence tests, before discussing an alternative participatory model that imposes a series of positive duties on the Court akin to the Oranga Tamariki Act 1989 (OTA). Against this background, Part VII will conclude that New Zealand should refrain from implementing a consent-based model of participation, for it will not respect the nuances found within Article 12 itself. Instead, a better balance will be struck by imposing mandatory legislative duties on the Court to provide opportunities for the child to feel supported and assisted to engage with the adoption process if they desire.

## *II. UNCRC Article 12: Nature and Scope*

This section will break down Article 12 into its components to analyse the scope of the participatory right that it affords. It will discuss the intentions of the UN Committee of the Rights

[6] Oranga Tamariki Ministry for Children "Adoption law reform engagement opens" (21 June 2022) Oranga Tamariki <https://www.orangatamariki.govt.nz/about-us/news/adoption-law-reform/>

[7] Ministry of Justice "Adoption law reform: options for creating a new system" Justice.Govt.NZ <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/adoption-law-reform-options-for-creating-a-new-system/>

of the Child (the Committee), with reference to the General Comment 12 as well as other interpretations by child rights experts since the UNCRC was first approved.

Article 12 reads:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

As a precondition to exercising Article 12, the child must be 'capable of forming his or her own views'. There is no reference to a minimum age at which the child is deemed capable. Thus, implicit in Article 12 is the recognition that a child's development is a continually evolving process that must not be demarcated by age limits. The Article does not require the child's views to encompass a certain threshold of sophistication before their right to participation is realised. Lundy argues that the emphasis must be on the child's *ability* to form a view, regardless of whether it is mature or not.[8] Children who engage in non-verbal forms of communication such as movement or artwork may express views that are perceived as 'less mature' than traditional oral dialogue.[9] Nevertheless, Lundy's argument is pragmatic as it recognises that these children still demonstrate an ability to form a view and ought to access Article 12.

Under the Article, the child has the 'right to express [themselves] freely'. Importantly, this confers on the child an entitlement as opposed to a mandatory duty. General Comment 12 highlights that the child has the right *not* to exercise Article 12,[10] which may be relevant when a child does not

[8] Laura Lundy "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 British Educational Research Journal 927 at 935.
[9] Gerison Lansdown "Working Paper 36: Can you hear me? The right of young children to participate in decisions affecting them" (May 2005) Bernard Van Leer Foundation at 1.
[10] United Nations Convention on the Rights of the Child General Comment No. 12, above n 3, at [16].

feel comfortable or safe participating in the decision-making process. The child's views must be expressed freely, without pressure or coercion from other interested parties.

Once the child has expressed their views, the decision-maker must give them 'due weight in accordance with [the child's] age and maturity'. Article 12 does not give the child the full right to self-determination and does not require the decision-maker to give effect to their wishes. Although the subjunctive 'and' suggests that age and maturity bear different definitions, these concepts are often conflated by decision-makers. Gerison argues that decision-makers undergo a "filtering process" and misjudge the child's level of maturity given their young age.[11]

Article 12(2) imposes a positive duty on the state to implement procedural mechanisms that provide children with the 'opportunity to be heard in any judicial and administrative proceedings' that affect them. The Committee emphasises that Article 12(2) includes proceedings that are brought by others but inevitably concern the child, such as parental separation and adoption.[12]

The child has the option to be 'heard directly or through a representative or an appropriate body'. Representatives may include family members, guardians or legal representatives, the latter of whom are particularly beneficial for family law proceedings. The representative or body must strictly convey the views of the child and refrain from imposing their own view of what is best for the child.[13]

## *III. Further Articles Supporting the Right to Participation: the Indivisibility of Articles 13 and 17*

The Committee states that all of the Articles within the UNCRC operate together and must not be viewed in isolation.[14]

[11] Lansdown "Can you hear me", above n 9, at 5.
[12] United Nations Convention on the Rights of the Child General Comment No. 12, above n 3, at [33].
[13] At [37].
[14] At [68].

Under Article 13, the child's right to freedom of expression includes the right to seek, receive and impart information. Therefore, not only is the child is entitled to proactively seek information, but they also have a legitimate expectation to receive information from the state. The Article acknowledges that children can impart information through alternative mediums such as art, which is particularly empowering for children who face cognitive disabilities or are yet to develop their literacy skills.

Article 17 details the child's right to access information from a diversity of national and international sources. Similar to Article 13, it imposes a duty on the state to disseminate information that may socially and culturally benefit the child.

Thus, Articles 13 and 17 are vital to ensuring that the child's participatory rights under Article 12 can be realised. The child must be provided with sufficient information of a depth and breadth appropriate for their level of comprehension, to facilitate their *informed* participation. They must also be encouraged to share their views through broader channels of communication to foster participatory inclusivity for children of all competences.

## *IV. Adoption: New Zealand's Current Legal Framework*

New Zealand legally recognises three forms of adoption. Domestic adoptions take place when both the child and adoptive parent(s) are citizens or permanent residents of New Zealand. Domestic adoption applications fall within the jurisdiction of the Family Court and are governed by the Adoption Act 1955.[15] Overseas adoptions concern orders that have been granted in overseas jurisdictions. They are recognised when the child and/or adoptive parent(s) are seeking to enforce certain rights in New Zealand.[16] Intercountry adoptions enable a New Zealand citizen or permanent resident to adopt a child from overseas. If the child is from one of the seven countries that New Zealand has an agreement with under the Hague Convention, the adoption process is governed by the Adoption (Intercountry) Act 1997.[17]

[15] Ministry of Justice Summary Paper "Adoption in Aotearoa New Zealand" (June 2021) at 4.
[16] At 4.
[17] At 4.

The process of whāngai also operates as a form of Māori customary adoption. It is described as an informal and open process, where the child is raised by a wider member(s) of the whānau.[18] It endeavours to preserve the child's whakapapa and reinforces the concept of whanaungatanga (kinship) which founds the Māori worldview. Whāngai is rarely recognised under domestic law except for the purpose of succession under the Te Ture Whenua Maori Act 1993.[19]

The scope of this essay focuses on domestic adoption proceedings subject to the Adoption Act 1955. With current statutory review underway, the time is ripe to examine the Act's anachronistic provisions and address how the child's voice can be enhanced within a new legal framework.

### *A. Adoption Act 1955*

Prior to the 20th century, the pathway of adoption was only afforded to married women who had given birth to an extramarital child.[20] Unmarried women were encouraged to place their child under institutional care instead.[21] At the turn of the century adoption became more socially and institutionally encouraged for single mothers. There was greater recognition that "children were best raised in a two-parent adoptive family rather than by a single mother".[22]. Hon. Marshall[23] expressed how a "complete revision of our [Adoption of Children Act 1881] was necessary in order to bring our legislation into line with modern thought on the subject".[24]

The Long Title of the Adoption Act 1955 states that it is intended "to consolidate and amend certain enactments of the Parliament of New Zealand relating to the adoption of children". The brevity of its purpose is indicative of the Act's lack of rigour as a whole, to the extent that its drafters omitted to define 'adoption' at all. Importantly, although the Act predates the UNCRC itself, its lack of reform has resulted in the Act continuing to omit any reference to the UNCRC.

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[18] At 9.
[19] Community Law "Whāngai Adoption" Community Law New Zealand < https://communitylaw.org.nz/community-law-manual/chapter-14-parents-guardians-and-caregivers/adoption/whangai-adoption/>.
[20] Law Commission *Adoption and Its Alternatives,* above n 5, at [19].
[21] At [19].
[22] At [20].
[23] Hon. J R Marshall was the Member of Parliament responsible for the Adoption Act 1955 in its Member's Bill form.
[24] (26 October 1955) 307 NZPD 3374.

### *B. The Child's Participation Rights*

Regrettably, s 11(b) of the Act is the only provision to expressly acknowledge the child's voice throughout the adoption process. The paragraph requires the Court to be satisfied that:

> the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child.

Its reference to 'the wishes of the child' draws various parallels with the right to participation in Article 12 of the UNCRC, despite being drafted 44 years prior. The 1955 Act requires "due consideration" to be given to the child's wishes in light of their age and understanding, while Article 12 requires the child's views to be given "due weight" in accordance with their age and maturity.

S 11(b) has been applied inconsistently since its enactment, due to the absence of any other statutory provisions prescribing when the child's views are to be ascertained and in what manner. As discussed below, some decision-makers have predetermined the outcome of the order without according it 'due weight' in light of the child's wishes. In other proceedings, the child adoptee has not been asked to participate at all. S 11(b) of the Act therefore reinforces a paternalistic form of decision-making, where the child's voice must yield to adult perceptions of the child's welfare and best interests.

S 10 of the Act requires a social worker report to be prepared for the Court. However, social workers are tasked with assessing the adult applicants and have no mandatory duty to ascertain the interests of the adoptee themselves. This further constrains the ability of the child to participate in the legal proceedings, as it emphasises that such reports serve the application process as opposed to the child at its centre.

### *C. The Absence of Informed Participation as a Legislative Requirement*

Article 21 of the UNCRC pertains to states which legally recognise adoption. While Article 21(a) requires children to be informed through appropriate counselling, the caveat is that this paragraph only applies to jurisdictions that require the child's consent to the adoption order. As New Zealand does not require the child's consent under s 7(2) of the Act, then it has no obligation under Article 21(a) of the UNCRC to inform and counsel the child. Thus, children are doubly at risk under the current legislation. Although Oranga Tamariki (the Ministry for Children) and select private services offer information sessions to discuss the adoption process, they are aimed toward the expectant parent(s) who are contemplating the placement of their child for adoption and applicants seeking to adopt. There are no equivalent services catered for children specifically, thereby placing an onus on children to gather the information for themselves. The current framework fails to disseminate information to the child in accordance with Articles 13 and 17, obstructing the child's right to informed participation as a whole.

New Zealand's absence of any legislative requirement to inform and counsel the child falters in comparison to overseas jurisdictions. For example, s 55 of the New South Wales Adoption Act 2000 requires the child to consent to the adoption order. Thus in accordance with Article 21(a) the legislation imposes a duty on the Court to provide the child with "adequate information, in a manner and language that the child can understand, concerning the decision".[25] The child must undergo pre-adoption counselling, where they are to be informed of mandatory information including alternatives to the adoption, the possible emotional effects, the legal process itself, and the responsibilities of the applicants and biological parents if an order were to be made.[26] Ghana's Children's Act 1998 provides another example of what such a requirement can look like. Under s 70(1)(b), the Department of Social Welfare must explain the adoption process to the child "in the language within their capacity of understanding".

This statutory omission to inform and counsel the child has had detrimental consequences in practice. In *Application by C & K (Adoption),* three adopted siblings sought to discharge their

[25] Adoption Act 2000 (NSW), s 9(1)(a).
[26] S 63(2)(a)(ii).

adoption orders on the grounds of a mistake of fact and material misrepresentation to the Court.[27] Tangential to this issue was the lack of accurate information that was provided to them when the application was made. At the time of the proceedings the children were 17, 14 and 8 years of age. Aubin J noted that they were "of an age when the full situation could and should have been disclosed to and discussed with them, and it was not".[28] His Honour further highlighted that the children were not made aware of the significance of the granting of an adoption order. "It seems likely that R (17) and G (14) were at least in broad terms cognisant of what it was all about, but there is no reason to come to the view that they had any knowledge of the legal niceties".[29]

In 2021 Oranga Tamariki conducted a qualitative study on 33 young people who were in foster care, are whāngai or are adopted.[30] Although a portion of these interviewees had received some information about the legal proceedings, they regretted that they had not been "provided with more realistic and honest explanations earlier in the process".[31] Furthermore, some respondents "felt patronised by too-simplistic explanations, or explanations being sugar-coated".[32] This illustrates that the current framework does not appreciate the varying levels of understanding that each child holds thereby reducing the dignity of the child.

## *V. Policy Justifications for Strengthening Child Participation*

### *A. From Passivity to Agency: The Evolving Perception of the Child*

Prior to the 18th Century, the prevailing Eurocentric perception was that children were the personal property of their parents and had minimal legal rights which they could assert independently.[33] The onset of the Industrial Revolution brought the fear that children would be increasingly subject to hazardous working conditions and moral corruption. Governments adopted a greater

[27] *Application by C & K (Adoption)* [1984] 3 NZFLR 321, at 321.
[28] At 325.
[29] At 327.
[30] Helen Potter and Míša Urbanová *Making Sense of Being in Care, Adopted or Whangai: Perspectives of Rangatahi, Young People, and Those Who Are Raising Them* (Oranga Tamariki Ministry for Children, October 2021).
[31] At 79.
[32] At 26.
[33] Hanita Kosher, Asher Ben-Arieh and Yael Hendelsman "The History of Children's Rights" in SG Gabel (ed) *Children's Rights and Social Work* (Springer Cham, Denmark, 2017) 9 at 9.

interventionist role by restricting child labour, and criminalizing child abuse and neglect.[34] Notwithstanding these developments, children were yet to be perceived as social actors with views, insights and agency in their own right. Their youth equated to passivity, and legislation focused less on empowering children but instead on protecting their inherent vulnerability.

In the 21st century, children are viewed less as "victims and problems" and instead as "active participants in finding solutions".[35] This perception predominantly results from contemporary international human rights discourse which pushes for greater child engagement within decision-making processes and outcomes. Indeed, former Principal of the Family Court Judge Peter Boshier has commented on the wider recognition that "children, as much as their parents, have rights".[36] New Zealand itself has been a catalyst for greater voice-inclusive practices within the last few decades, with the establishment of family group conferences and child-centered strategies such as Mana Mokopuna by the Children's Commissioner. Although legislative reform to other areas of New Zealand's family law has reflected this contemporary view, the Adoption Act remains frozen in an ideology of child passivity.

### *B. Adoption Reform on the Legislative Backburner*

The Family Court (Supporting Children in Court) Legislation Act was passed in August 2021. Introduced as an omnibus Bill, it made substantial reforms to the Care of Children Act 2004 and the Family Dispute Resolution Act 2013. Both pieces of legislation now expressly recognise Article 12 of the UNCRC and impose positive duties on the Court to reasonably provide participation opportunities and legal representation for the child.[37] The Adoption Act did not fall within the ambit of its response. Thus, the weak legislative provision of s 11(b) sits out of line with the extensive participation rights that have resulted from reform to other statutory regimes.

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[34] At 11.
[35] Mónica Ruiz-Casares, Tara Collins, E. Kay M. Tisdall and Sonja Grover "Children's rights to participation and protection in international development and humanitarian interventions: nurturing a dialogue" (2016) 21 The International Journal of Human Rights 1 at 2.
[36] *E, Re* (1991) 7 FRNZ 530 (FC) at 220.
[37] See ss 4, 6 – 9 of the Family Court (Supporting Children in Court) Legislation Act 2021.

The Care of Children Law Reform Bill[38] was presented to the House in 2013 by Jacinda Ardern but rejected by the National Government due to "priority issues".[39] Furthermore, groups such as the Law Commission, the New Zealand Law Society, and Adoption Action Incorporated have continuously advocated for legislative reform but have been met with little response. This reinforces the insignificance of adoption law reform on previous legislative agendas.

### *C. The Need for Consistency in the Application of s 11(b)*

The extent to which the Court has sought the child's participation within their adoption proceedings has varied over time, owing to the brevity of s 11(b) of the Act. Unfortunately, this essay faces the limitation of minimal case law addressing this procedural issue, and the cases it discusses are dated. Nevertheless, this emphasises the lack of precedent that is available to guide judges of the Family Court in the application of s 11(b).

On one end of the spectrum lie proceedings which give integrity to Article 12. *Waverly v Walter* concerned an application to adopt a thirteen-year-old boy.[40] Russell J opted to see the child in his chambers prior to the proceedings, to ask about the child's experiences and views on the nature of the relationship with the applicants.[41] The child was placed in an environment where he could freely share his wishes with the decision-maker himself. His Honour expressly referenced the child's views in his judgment and found that given the boy's age, "his views and wishes need to be respected".[42]

Yet on the other end of the spectrum lie proceedings that have failed to provide any opportunity for the child to participate. *E, Re* concerned a woman (M) who sought to have her adoption application discharged.[43] M had only discovered that she was adopted upon applying to the Registrar for a copy of her birth certificate, 13 years after the order was given.[44] She argued that

[38] Care of Children Law Reform Bill 2012 (62-1).
[39] Lawtalk Issue 865 "What the Politicians Say" (29 November 2021) New Zealand Law Society <https://www.lawsociety.org.nz/news/lawtalk/issue-865/what-the-politicians-say/> .
[40] *Waverly v Walter* FC Nelson FAM-2018-086-000025, 23 October 2019.
[41] At [20] – [23].
[42] At [26].
[43] *E, Re*, above n 36.
[44] At 218.

"at no time was [she] aware of the application for an adoption order nor was [she] ever asked to consent to such an order, or even how [she] felt about such an order, although [she] was then aged seventeen years and was married".[45]

The Adoption Act 1955 leaves it to the independent mind of the decision-maker to determine if the child's participation is appropriate, and to what degree. Stronger legislative provisions are required to ensure that Article 12 is realised consistently within each adoption proceeding.

## *VI. Pathways for Strengthening the Child's Voice*

In light of these considerations, it is important to analyse the different models of participation that may promote the child's right to participation under Article 12. This next part will examine four different frameworks of consent-based participation. It will then discuss an alternative framework that rejects a consent-based approach and instead imposes statutory duties of care on the Court. The relative strengths and weaknesses of each framework will be analysed.

### *A. Requiring the Child to Consent to the Adoption Order*

In 2014, New Zealand's Human Rights Review Tribunal highlighted that "the lack of any requirement to obtain consent from a prospective adopted child, regardless of their age, is out of step with contemporary children's rights principles, legal frameworks and social values".[46] Submissions for reform have echoed such dismay, arguing for an expansion of s 7(2) of the Act so that children are added to the "persons whose consents to [an adoption] order are required". For example, the New Zealand Law Society argues that consent is paramount to create an Act that is child-centred.[47] Although the Society acknowledges there may be safety concerns rendering their consent as inappropriate in certain circumstances, they emphasise that the requirement must not

[45] At 218.
[46] Russell Wills *Report of the Children's Commissioner Prepared Under Section 12(1)g) of the Children's Commissioner Act 2003* (November 2013) <http://adoptionaction.co.nz/wp-content/uploads/2014/09/50444029_Report-of-Children_s-Commissioner-HRRT-020-11_v1.pdf> at [5].

[47] New Zealand Law Society "Adoption in Aotearoa New Zealand: Submission on the Ministry of Justice's Discussion Document" (31 August 2021) at 12.

be easily circumvented.[48] The Law Commission has also submitted that there is a "real need" for the Court to obtain a child's consent to the adoption, particularly when many adoptions today involve "slightly older children".[49] Upon asking whether the child's consent should be obtained, their survey found that 41 respondents supported this proposal while only three dissented.[50]

Implementing this model of consent-based participation would also necessitate wider obligations to inform and counsel the child, by way of Article 21(a) of the UNCRC as aforementioned. Nevertheless, it raises the question of how to determine if the child has the *capacity* to give their consent. Overseas, the most prevalent method has been to impose a minimum statutory age at which the child is automatically presumed to have capacity. Few overseas frameworks diverge from this age-based presumption of capacity and impose a more general test of competency. The following parts of this essay will examine the merits of these two tests of capacity and assess whether either of them ought to be implemented in New Zealand.

### *1. Statutory age of consent*

Overseas jurisdictions predominantly use minimum statutory ages as an indicator of a child's capacity to consent to an adoption order. This is largely due to its simplicity, for it does not require financial or human resources to undertake complex and individualised capacity assessments.

For example, Article 5(1)(b) of the European Convention on the Adoption of Children (Revised) 2008 requires its signatories to prescribe in law an age at which they deem a child is capable of consenting to their adoption. Although this age may differ amongst the signatories, the Convention requires that fourteen years must be the maximum age above which consent is required. At the time of conducting her research in 2013, Fenton-Glynn found that thirty European countries use age as the sole factor to determine whether they have the capacity to consent, with the statutory threshold varying between 10 years to 15 years old.[51]

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[48] At 12.
[49] Law Commission *Adoption and Its Alternatives*, above n 5, at 445.
[50] At 446.
[51] Claire Fenton- Glynn "The Child's Voice in Adoption Proceedings: A European Perspective" (2013) 21 International Journal of Children's Rights 590 at 594.

Closer to New Zealand's borders are various frameworks within the Pacific Islands that also require the child to give consent to their adoption. Under s 11 of Fiji's Adoption Act 2020, an adoption order cannot be made if a child over 12 years refuses to give their consent. Samoa also has the legislative presumption that a child has the capacity to consent to the order if they are over the age of 12.[52]

Yet despite its widespread application overseas, statutory age limits have often been criticised as an arbitrary and inflexible means of assessing a child's capacity to consent. Although expressed in the context of consenting to medical advice, the comments from Lord Scarman in the famous *Gillick* case (discussed further below) are salient: [53]

> If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.

The insertion of minimum ages to consent risks creating a rigid set of procedural rules, where a child's right to participate in their adoption process depends on the age they are when the application is made. With age is its sole criterion, this model fails to acknowledge the differences in the maturity and understanding between children. Children above the minimum age may be forced to give their consent or dissent against their wishes. In such circumstances, this legal framework would not only act contrary to the child's best interests but runs the risk of inflicting both emotional and psychological harm on the child. This model of participation also presumes that a child below the minimum statutory age is incompetent, without undertaking any individualised competence assessment. Legislating for the ability of the child to displace this age-based presumption may seem like an attractive solution at first glance. Nevertheless, this would shift the burden of proof onto the child to prove that they have capacity despite being younger than the prescribed age. This is heavily inconsistent with the comments of the UNCRC that "any

[52] Infants Ordinance Act 1961, s 8(c).
[53] *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112 (HL) at 421.

analysis of the state must refrain from the base assumption that the child does not have capacity".[54] Evidently, the benefits of its drafting and procedural efficiency are outweighed by its consequences on the child's rights and safety.

### 2. *General test of capacity to consent*

In light of the difficulties that an age-based approach to consent poses, it is more appropriate to measure the child's ability to give consent holistically based on the nature of their understanding. Among the jurisdictions requiring the child's consent for an adoption order to proceed, none impose a general capacity test as their sole legislative criterion. However, these general tests have been implemented for children consenting to medical treatments and participation in research. The next two parts of this essay will examine their operation within their respective spheres and determine whether either model can be implemented within New Zealand's adoption law.

#### (a) Child's consent to medical treatment

*Gillick v West Norfolk and Wisbech Area Health Authority* concerned a minor under the statutory age of consent (16 years) who sought contraception advice from her general practitioner without the knowledge of her parents.[55] Lord Scarman held that a child will have the capacity to consent to medical treatment "if and when they have a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".[56] Yet when consenting to the receipt of contraception advice specifically, the child must not only understand what the procedure involves but also have a "sufficient maturity" to understand the "moral and family questions… long- term problems associated with the emotional impact of pregnancy and its termination… [and] the risks to health of sexual intercourse at her age".[57]

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[54] United Nations Convention on the Rights of the Child General Comment No. 12, above n 3, at [20].
[55] *Gillick v West Norfolk and Wisbech Area Health Authority and another,* above n 53.
[56] At 423.
[57] At 424.

As the New Zealand judiciary has not faced a *Gillick*-like medical situation, Lord Scarman's capacity approach to consent has not been formally adopted into New Zealand's common law.[58] Parliament has also not inserted the test into any of New Zealand's medical legislation.[59] Nevertheless, a capacity based approach to consent has dominated New Zealand's fields of paediatrics, general practice and family planning.[60]

Some have argued that the *Gillick* threshold is unreasonably high for a child to meet, particularly when its policy implications may restrict a minor's access to contraceptive advice and treatment. Freeman argues that it imposes a severe burden on a child that many adults themselves may not be able to discharge.[61] Furthermore, although the model avoids the arbitrary character associated with age-based consent it continues to place the onus on the child to prove their capacity, contrary to the spirit of the UNCRC.

The above criticisms demonstrate that *Gillick* competency has various deficiencies which fail to empower children from a rights-based perspective. This alone provides a convincing argument as to why the model should not be transplanted into New Zealand's adoption context. However, another argument this essay raises is that the two contexts do not operate as simple parallels.

*Gillick* reinforces that a different level of maturity will be required depending on the kind of medical treatment that the minor is seeking (eg. contraceptive advice or otherwise). This reasoning is logical within the medical sphere given that different kinds of medical treatment will procure different physiological consequences for that minor. However, a strict application of *Gillick* to adoption law may lead to the undesirable outcome of different competence assessments being imposed depending on the different kind of adoption orders sought (interim or full). Following the *Gillick* template, a child may only be required to have a sufficient intelligence and understanding of the legal process of adoption before having the capacity to consent to an *interim* order. However, the child may be further required to have a boarder understanding of its long-term implications on

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[58] Kathryn McLean "Children and Competence to Consent: Gillick Guiding Medical Treatment in New Zealand" (2000) 31 V.U.W.L.R 551 at 552.

[59] The statutory rule concerning minors and medical consent is regulated by s 25(1) of the Guardianship Act 1968 which makes no reference to *Gillick* competency.

[60] Kathryn Mclean "Children and Competence to Consent", above n 58, at 553.

[61] Michael Freeman "Rethinking *Gillick*" (2005) 13 The International Journal of Children's Rights 201 at 209.

themselves and their family structure before having the capacity to consent to a *full* order. This creates arbitrary and unnecessary distinctions as the object of the child's consent to both kinds of orders remains the same: to procure the legal transfer of the parent's responsibilities towards them. Therefore, inserting *Gillick* competency into New Zealand's adoption framework is uneasy, and any attempt to do so would require significant adjustments to be made.

### (b) Child's consent to research studies

As a general rule, for a human to participate in research studies the researcher must gain the participant's informed consent. Importantly, research involving children raises ethical concerns and requires approval from an ethics committee such as the Health and Disability Ethics Committee (HDEC) or the Institutional Ethics Committee. New Zealand has no specific legislation governing how a child is to consent to participating in these studies. Instead, there is variation amongst the ethical codes and guidelines that researchers are expected to follow.

For example, the Health Research Council states that a child will have the capacity to consent to participating in the study if they can understand the nature, risks and consequences of the research.[62] In contrast, the HDEC classifies children under the class of those who are unable to give their own consent, thereby requiring the researcher to obtain their proxy consent from the child's parent or legal guardian.[63] Powell and Smith highlight that there is further variation amongst the consent requirements for research undertaken through University institutions.[64] While some universities require the researcher to obtain the child's consent "as far as possible", others only require written consent from " a legal representative, parents, or those acting in *loco parentis*".[65]

This demonstrates that there is no consistent set of national guidelines in respect of child research, regarding the kind of consent required and the processes through which this must occur. While

[62] Nicola Peart and David Holdaway "Ethical Guidelines for Health Research with Children" (2000) 1 New Zealand Bioethics Journal 3 at 4(b)(ii).
[63] HRC *Research Ethics Guidelines* (Health Research Council of New Zealand, March 2021) at 2.1.1(e).
[64] Mary Ann Powell and Anne B. Smith "Ethical guidelines for research with children: A review of current research ethics documentation in New Zealand" (2006) 1 Kōtuitui: New Zealand Journal of Social Sciences Online 125.
[65] At 130.

some guidelines recognise that children are social actors who have the capacity to understand the research process and the implications of their involvement, others continue to frame children as incompetent objects. As a result, the research field offers no congruent model of consent-based participation that can be straightforwardly implemented into New Zealand's adoption law.

### 3. Incorporation of both assessments

A capacity-based approach to consent may be more conducive to the promotion of children's rights. Yet upon acknowledging the legal reality that policymakers prefer the certainty that statutory age limits ensure, the question arises as to whether a hybrid approach to consent may be the more attractive model for reform.

New South Wales is an example of a jurisdiction that has taken both an age-based approach and a capacity-based approach to determining when a child can consent to their adoption order. Under its Adoption Act 2000, a child who is between the ages of 12-18 must consent to their adoption before the Court can make an order.[66] However, if the child is between 12-16 years of age then a report must also be prepared by a counsellor to confirm the child understands the legal effect of signing the instrument of consent, and the effect of the mandatory written information described under s 57(c).[67] The legislation accurately recognises that while age is an important factor to ascertain a child's capacity to consent, it must not be the sole criterion. Nevertheless, the undertaking of this general test of competency is still restricted by age-based parameters. Therefore, it is arguable that this supposed 'hybrid framework of New South Wales is not all that different to other jurisdictions that impose age as the sole criterion.

In New Zealand, Kevin Hague's 2012 Member's Bill[68] attempted to enforce a hybrid framework similar to that of its Trans-Tasman neighbour. Although the Bill was never drawn from the ballot, an examination of its clauses provides insight into how a dual approach to capacity was advanced by New Zealand's policymakers at the time of its drafting. At cl 171(2)(a), a statutory minimum

[66] S 55(1)(c).
[67] The mandatory written information includes the legal process of adoption, alternatives to an adoption order, and the possible emotional effects.
[68] Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 (undrawn Member's Bill, Kevin Hague MP). <http://adoptionaction.co.nz/wp-content/uploads/2018/08/2015-06-23-Care-of-Children-Adoption-and-Surrogacy-Law-Reform-Amendment-Bill_v1.pdf>.

age was proposed so that the persons required to give consent to the adoption order included "the child who is the subject of the adoption application if the child is over the age of 8 years". Yet under cl 173(2), the child would not have the capacity to give consent if they were under the age of eight *and* lacked the maturity to understand the meaning and consequences of an adoption order *and* were unwilling or unable to express a view. Articulating this in the affirmative, the capacity to consent would be determined not only by the child's age but also by their maturity to understand certain information and their willingness or ability to express a view.

However, this third consideration deserves some scrutiny. Under Hague's proposal, a child's willingness to express their views falls under the legal test for capacity to consent. However, the assessment must solely focus on the depth and breadth of the child's knowledge, and not their motivation to share such knowledge with others. A child who understands the process of adoption and its various effects should not be regarded as incapable merely because they are timid by nature or choose not to share their view (as is their right under the UNCRC). In light of this criticism, if a hybrid approach to participation were to be implemented within New Zealand it ought not to replicate the model that Hague proposed in his 2012 Bill.

### *B. Inspiration from the Oranga Tamariki Act 1989*

The above analysis demonstrates that the different approaches to consent-based participation discussed (age-based, *Gillick*-based, research-based and a hybrid) all face inherent difficulties and shortcomings. This suggests that imposing a requirement for the child to consent to the adoption order is not the most appropriate model to promote their participation rights under Article 12, contrary to the views of overseas adoption frameworks and domestic submissions for reform.

An alternative solution is to look inwards at New Zealand's other family law legislation and examine how Article 12 has been upheld within these domestic regimes. This essay will look at the participatory provisions of the Oranga Tamariki Act 1989 (OTA), due to its similar aim of governing care and protection arrangements of children and young people albeit in circumstances of abuse and neglect.

### *1. S 11: a strong statutory commitment*

The OTA has carved out specific provisions to describe how the child can participate in the decision-making process and how they can expect their views to be treated. In particular, s 11 imposes a series of positive duties onto the decision-makers listed in s 11(3).[69] Of primary importance is their duty to encourage and assist the child to participate in the process to the degree appropriate for their age and level of maturity, unless they believe the child's participation is not appropriate in light of the circumstances.[70] Under s 11(2)(aa), the child must be given reasonable assistance to understand the reasons for the process, the options available to the decision-maker, and how these options could affect them. If the child has any difficulties in expressing themselves, they must be provided with access to support and assistance to achieve this end.[71] Any views the child expresses *must* be taken into account, and if the decision-maker does not follow them then their reasons for doing so must be explained within their written judgment.[72]

The extensive protection that the OTA affords is a sharp contrast to the lack of legislative mechanisms under the Adoption Act 1955. The imposition of these positive statutory duties ensures judges and decision-makers maintain a proactive approach to inclusivity. Indeed, it produces the risk that any omission to uphold their statutory duties may amount to their negligence. The OTA also provides rigorous provisions requiring the child to be assisted and informed so that they are aware of the nature of the proceedings and its effects. This is a powerful demonstration of how carefully drafted legislation can successfully promote Articles 12, 13 and 17 of the UNCRC.

Yet it must be acknowledged that although the OTA provides stronger mechanisms to promote Article 12, its provisions are not immune from criticism. For example, the use of the wording 'to the degree appropriate for their age and maturity' in s 11(2)(a) does little to reduce the prevalent misconception that the child's right *in and of itself* is dependent on their age and maturity. Under the same paragraph, the decision-maker is given wide discretion to decide if the child's participation is not appropriate. As the OTA does not indicate what circumstances may justify such

[69] This includes the Judge, a legal representative of the child and the person responsible for convening the family group conference.
[70] S 11(2)(a).
[71] S 11(2)(c).
[72] S 11(2)(d)-(e).

exclusion, it not only engages further controversy over what is 'inappropriate' but further suggests that s 11 is clouded by opacity and continues to be dominated by adults. The imposition of a reasonability standard under s 11(2)(b) is also not conducive to promoting Article 12.[73] This may result in a child being withheld from participating as a result of extraneous reasons that the child cannot control, such as when the nature of the process is urgent or if there is no legal representative available for them.

Notwithstanding these limitations, the participatory provisions within the OTA provide a promising start for a new model of child participation within New Zealand's adoption framework.

## *VII. Evaluation*

In light of the different frameworks of participation discussed throughout Part VI, the following sections will evaluate which, if any, model ought to be implemented in New Zealand's adoption law reform.

### *A. Consent: an Overstep*

This essay argues that requiring the child's consent to the adoption order risks ignoring some of the subtleties embedded within Article 12. Despite overseas legislation implementing consent-based participation and various submissions urging New Zealand to follow suit, it is not the best model for reform.

Having a legislative requirement for the child to consent to their adoption will ensure their voice is not only heard but will have a determinative effect on the outcome of the proceedings. However, Article 12 only creates a *right* of the child to participate in legal proceedings; it does not impose a compulsory *duty* on them.[74] Enforcing this statutory demand may force children to participate against their will. Furthermore, if the child's consent is required to enable the adoption order to be

[73] S 11(2)(b) requires that "the child or young person must be given reasonable opportunities to freely express their views on matters affecting them".
[74] United Nations Convention on the Rights of the Child General Comment No. 12, above n 3, at [16].

made there is an effective abrogation of the UNCRC's requirement to give the child's views 'due weight'. While many children may wish to have their opinions heard, they may not want to be ultimately responsible for the final decision about more complex issues such as their family structure and place of residence.

The introduction of consent-based participation brings a corollary conundrum of how to determine *if* and *when* the child has the capacity to give their consent, and whether there may be circumstances where their consent may be dispensed with. The dominant approach of overseas jurisdictions has been to impose a minimum statutory age at which the child must give their consent. If children fall below this minimum age they are excluded from this consent-based model of participation altogether and an adoption order can be made without reference to their views. These frameworks are deficient from a rights-based perspective, as they fail to recognise that the individually evolving capacity of the child cannot be quantified through age alone. Although this signals that a competency-based approach to consent is preferable, the two options that this essay has examined still face inherent deficiencies. Notably, both *Gillick* competency and research competence base themselves on the presumption that a child is incompetent, which is heavily inconsistent with the ethos of the UNCRC. A consent-based model that incorporates both a statutory age limit and a general competency test may appear to strike a satisfactory compromise. However, it continues risking itself to rigid age parameters upon dictating when a general competency test can be undertaken.

A better model is to impose certain positive duties on pivotal adult figures involved in the adoption process. This will reduce issues of inconsistency and perfunctory engagement, as providing an environment to give the child an option to participate is not merely incentivised but statutorily required. Given that these positive duties can be worded more cautiously than a bare legal requirement of consent, they will also ensure that the concepts of a right and a duty are not conflated.

### *B. Duty 1: to Inform and Counsel the Child*

As discussed in Part III, there is an indivisibility between the child's right to participation and their right to receive information at all stages of the decision-making process. In the context of adoption proceedings, space must be created to ensure the child is empowered to *meaningfully* participate.

The Law Commission emphasised the importance of pre-adoptive counselling for birth parents and adoptive parents but only recommended that child adoptees undergo *post-adoption* counselling.[75] This recommendation is insufficient as it falls short of what informed participation seeks to promote. A child must not be 'left in the dark' as a passive recipient of the outcome. In accordance with Articles 13 and 17 of the UNCRC, they must receive the benefit of being counselled and informed both before and during the legal proceedings as they take place. These requirements must be inserted within the legislative provisions of a reformed Adoption Act.

The nature of the information that a child should be advised of should be akin to the 'mandatory written information' prescribed under s 57 of the Adoption Act 2000 (NSW). This includes the reasons why the application has been filed and the legal consequences of an order should it be granted. The child ought to be informed of other long-term care alternatives that may be available, such as guardianship arrangements, parenting orders or whāngai. The short and long-term emotional effects of adoption should also be signalled, as should the support services open for the child regardless of whether an order is made. The depth and complexity of such information provided to the child must not be determined narrowly by their age, but rather their individual understanding and sensitivities.

It is logical for this duty to counsel and inform the child to fall on that child's legal representative in the Family Court. However, in situations where there are insufficient legal representatives available this duty is at risk of being circumvented altogether. It may be appropriate to extend the scope of the social worker's role beyond conducting a s 10 report on the applicants, to informing and counselling the child as well. This will avoid any circumvention of the duty, as a social worker must already be involved before an application can proceed in Court. It is also important to impose

[75] Law Commission *Adoption and Its Alternatives*, above n 5, at [137] – [138].

this duty onto the Family Court judge, to facilitate greater dialogue between the child and the ultimate decision-maker. In turn, this may reduce the child's perception of the adoption proceedings as daunting and adversarial, and provide them with an environment where their participation can flourish.

### *C. Duty 2: to Provide Opportunities for Participation*

The second positive duty must focus on nurturing a space for children to be provided with sufficient platforms where they can articulate their views. However, it must emphasise that the child will not be disadvantaged or perceived differently if they elect not to participate.

Maintaining this distinction between a right and a duty can be achieved by employing language similar to s 11 of the OTA. Wording such as 'the Court must *encourage* the child to participate in the adoption proceedings' or 'the child must be given the *opportunity* to express their views on the adoption application' will be effective. It is sufficiently wide in scope to indicate that although the Court must advance its best efforts to promote participation, the child nevertheless retains the right to withhold their participation.

If the child chooses to exercise their right under Article 12 and share their views, then further duties ought to fall onto the decision-maker thereby creating a 'two-tiered duty-based model'. Although Article 12 states that after being shared the child's views must be given 'due consideration', the decision-maker must be under a duty to take them into account in the first instance. If the child's views are not followed, the decision-maker must explain the reasons for this in their written decision. This will ensure greater transparency concerning how the child's views are examined in the mind of the decision-maker, and create useful precedents of which future decision-makers can refer to.

However, there are various phrases and concepts expressed within s 11 of the Oranga Tamariki Act that should not be duplicated into this duty-based model. Reform ought to limit the scope of the decision-maker's discretionary power that determines when a child's participation is not

appropriate. By the same token, it should provide clearer guidelines as to the conditions that must be present before such a determination can be reached.

## *VIII. Conclusion*

New Zealand's current adoption framework provides extremely weak legislative mechanisms that fail to promote the exercise of the child's participatory rights prescribed to them under Article 12 of the UNCRC. The Adoption Act 1955 perpetuates the notion that children lack the capacity to contribute to the decision-making process and must remain passive recipients of its outcome. The failure of preceding Governments to redress these shortcomings demonstrates that New Zealand has continually violated its obligations under the UNCRC.

In light of the reform process currently underway, there must be greater recognition that a child is more likely to respect the outcome of an adoption application if they are provided with sufficient opportunities to learn and engage in its process. Contrary to current practice overseas, implementing a consent-based model of participation will fail to observe the nuances contained in Article 12 and the spirit of the UNCRC more generally. Instead, this essay illustrates that a two-tiered duty-based model is better placed to ensure the child is informed, assisted and encouraged to participate at all stages of their adoption proceedings.

## *Word count*

The text of this essay (excluding abstract, table of contents, substantive footnotes, and bibliography) comprises 8,012 words.

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