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*A Case for an Indigenous
Court – a realisation of self-determination?*

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He Kōrero Whakapopoto – Abstract

This thesis searches for appropriate ways to alter entrenched patterns of highly negative outcomes for Māori in the criminal justice system. The statistics demonstrate that proportionately, Māori are much more likely to be apprehended, arrested, prosecuted, convicted and incarcerated than other New Zealanders and ethnic groups, and much less likely to be granted parole.

An overview of the current relationship between Māori and the criminal justice system provides a background to begin understanding these long-standing patterns. An examination of the ancestral conceptions of tikanga Māori, including issues of proper conduct, punishment, behaviour and attaining balance, provides a persuasive framework to positively transform the criminal justice system. In order to understand why tikanga Māori is not meaningfully realised today, an historical review of the introduction of English law and legal systems clarifies the negative and almost fatal impact English law had on tikanga Māori.

An evaluation of two instruments — Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples — provides further context for this dialogue. A specific focus on the right to culture and the right of self-determination, within these two documents, highlights the need to meaningfully revisit and/or realise these rights as a pathway to recognise the concepts of tikanga Māori. A review of comparative jurisdictions indicates existing support for the right to culture and the right of self-determination within respective legal systems and constitutions.

An examination of the current criminal justice initiatives and policies in New Zealand highlights the status quo. This current status quo is set against initiatives in comparative jurisdictions. Following a domestic and international analysis, models underpinned by therapeutic jurisprudence and tikanga Māori, are suggested as a potential way forward for Māori to realise a form of self-determination.

In conclusion, new frameworks are proposed. These may provide an opportunity to apply the philosophy of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court premised on fundamental Māori concepts and doctrine as the most promising way forward for Māori to ameliorate the disproportionate offending rates. A suggested extension to the Māori Land Court to include a criminal jurisdiction or, alternatively, a Tikanga Court is proposed.

Nga mihi ki nga kaitautoko o tēnei tuhituhinga – Acknowledgements

Two components - the continuing injustice to my own and the unfaltering inspiration from my own - have collectively provided the drive for this journey.

Ehara taku toa, he takitahi, he toa takitini

I seek only a moment to consider what should be.

For my own.

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HE KORERO TIMATANGA

INTRODUCTION

“Only the law of the Pākehā custom is recognized [in New Zealand]... The Maori who seeks justice and redress under Pākehā law must rely on the blunt instrument of that very same law which is embedded upon the mechanisms designed for his legal control”

Rev Maori Marsden¹

¹ Maori Marsden “The Natural World and Natural Resources” in C Royal (ed) *The Woven Universe: Selected Writings of Rev Maori Marsden* (Estate of Rev. Maori Marsden, Masterton, 2003) at 101.

Before the arrival of settlers Māori adhered to their own form of ‘law and order’ and a world based on the collective. This changed dramatically with the imposition of a settler form of ‘law and order’ foreign to a Māori world. The control asserted by the settler government resulted in a break down of the collective and social order for Māori. This power and control was manifested in legislation that legitimized land alienations and the ability to incarcerate Māori for various offences. Subsequently Māori became landless and vulnerable to the whims of the settler government. Incarceration rates, for Māori, quickly rose and soon Māori were disproportionately represented within the criminal justice system. This has not changed and warrants an overdue, earnest and thoughtful study.

The central aim of this thesis is to test the proposition that:

Applying the philosophy of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine, is the most promising way forward for Māori to ameliorate the over-representation of Maori in the criminal justice system – A case for an Indigenous Court for Maori.

This thesis suggests that a more meaningful incorporation of concepts that underpin tikanga Maori, within the current criminal justice system, could potentially lead to a reduction in recidivism and offending rates for Māori. This thesis further suggests that the Marae could be the appropriate forum to implement these concepts. A review of comparative jurisdictions lends further support for such an initiative. This proposed marae court or indigenous court, underpinned by tikanga Māori concepts, operating within the current criminal justice system, provides an example of internal self-determination for Māori.

Statistics from the Justice Department and the Department of Corrections in New Zealand indicate Māori are proportionately over-represented as offenders within the

criminal justice system.² This provides an undesirable groundswell and subsequent catalyst that drives this thesis to seek answers. For example, in 1999 the Justice Department in its publication *Responses to Crime: Annual Review* noted:³

Both Māori and Pacific peoples of all age groups from 14 and older are over-represented as offenders. This is particularly so for offenders aged 14 to 16, then again for those aged 40 and over. Māori have particularly high rates of offending, with, for example, a rate of prosecutions for non-traffic offences 5.4 times higher than that of other New Zealanders excluding Pacific peoples. Māori and Pacific peoples are more likely to be victims of violent offences than are New Zealand Europeans, but less likely to be the victims of property offences.

Considering possible initiatives in response to these statistics, the Report notes that:⁴

The relatively high rates of offending by Māori and Pacific peoples and the need for culturally appropriate responses point to the importance of both fostering diverse approaches to offending by these two groups and identifying those approaches that show most promise of reducing their over-participation in the criminal justice system as both offenders and victims.

This indicates that while Māori commit criminal offences at rates higher than those for any other ethnic group in New Zealand, there is a need for consideration for diverse approaches to reduce the over-representation of Māori in the criminal justice system both as offenders and victims.

In its report on the experience of Māori women in the criminal justice system,⁵ the Law Commission concurred with this finding. The report observed that Māori are disproportionately represented in court proceedings, with higher rates of criminal offending and incarceration than other ethnic groups when measured as a proportion

² Ministry of Justice *Responses to Crime: Annual Review* (November 1999) at 7; see also Department of Corrections *Over-Representation of Māori in the Criminal Justice System: An Exploratory Report* (September 2007) <www.corrections.govt.nz>. There has been no noticeable movement in these two sets of statistics. See also <http://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/PS_March_2016.html#ethnicity> that indicates at March 2016, 51 percent of the prison population identified as Maori.

³ Above n 2.

⁴ At 7.

⁵ Law Commission *Justice: The Experience of Māori Women* (NZLC R53, 1999).

of the total population.⁶

A report from the Department of Corrections also noted:⁷

Relative to their numbers in the general population, Māori are over-represented at every stage of the criminal justice process. Though forming just 12.5% of the general population aged 15 and over, 42% of all criminal apprehensions involve a person identifying as Māori, as do 50% of all persons in prison. For Māori women, the picture is even more acute: they comprise around 60% of the female prison population.

The true scale of Māori over-representation is greater than a superficial reading of such figures tend to convey. For example, with respect to the prison population, the rate of imprisonment for this country's non-Māori population is around 100 per 100,000. If that rate applied to Māori also, the number of Māori in prison at any one time would be no more than 650. There are however currently 4000 Māori in prison - *six times* the number one might otherwise expect.

Marie notes that:⁸

The Department of Corrections has adopted a specific theory about the causes of criminal offending by Māori. A major assumption of this theory is that the contemporary overrepresentation of Māori in offending, incarceration, and recidivism rates is best understood as the outcome of Māori experiencing impairments to cultural identity resulting from colonisation. Central to this theory, therefore, is also the assumption that ethnicity is a reliable construct by which distinctions can be made between offenders regarding what factors precipitated their offending, as well as best practices for their rehabilitation.

More recently the following table was provided by the Ministry of Justice noting the composition of the prison population disaggregated by sex, age and ethnicity:⁹

⁶ At ch 5.

⁷ Department of Corrections, above n 2, at 6. See also R Walter and T Bradley "Crime statistics: 'official' and 'unofficial' representations of crime and victimization" in R Walter and T Bradley (eds) *Introduction of Criminological thought* (Pearson Longman, Auckland, 2005) pp 20–22.

⁸ Dannette Marie 'Māori and Criminal Offending: A critical appraisal' (2010) ANZ Jnl of Criminology 43(2) at 283.

⁹ Ministry of Justice *Over representation of Māori in Prison*, chapter 18 <www.justice.govt.nz>.

Age Group	Māori		European		Pacific		Other		Total
	Male	Female	Male	Female	Male	Female	Male	Female	
<20	231	17	87	3	50	1	9	3	401
20-29	1,527	117	773	44	410	7	124	8	3,010
30-39	1,097	81	636	50	282	6	108	8	2,268
40-49	803	49	601	43	143	8	67	4	1,718
50+	383	27	636	23	95	3	45	2	1,214
Total	4,041	291	2,733	163	980	25	353	25	8,611

Table 1: Composition of the Prison Population Disaggregated by Sex, Age and Ethnicity as at 31 March 2013

At the time of this survey, Māori comprised 14 per cent of the population and yet 50 per cent of the male prison population identified as Māori and although women comprised six per cent of the total prison population (504 out of a total population of 8,611), Māori women made up 58 per cent of that female prisoner population (291 out of a total female prison population of 504).¹⁰

Although concerning, Sumner notes that Western criminological theory has nothing to say about this genre of statistics and has little interest to contribute to their analysis.¹¹ Orthodox criminologists are reluctant to examine crimes and the colonial state as “you are returned to the criminal economic system underpinning your own state”.¹² Nonetheless an examination of crime and justice can “contribute to understanding the crimes of the powerful and the pursuit of human rights agendas in criminology”.

This position is similar to that of other indigenous peoples in many post-colonial countries, including Australia and Canada.¹³ Jim McLay, New Zealand’s Permanent

¹⁰ Ministry of Justice *Over representation of Māori in Prison*, chapter 18, above. For a discussion on female offending see Paul Mazerolle ‘The poverty of a gender neutral criminology: Introduction to the special issue on current approaches to understanding female offending’ (2008) 41(1) ANZ Journal of Criminology. In 2016, this statistic increased to 62 percent of women serving custodial sentences and 57 percent of women with community sentences identifying as Maori, see <http://www.corrections.govt.nz/resources/research_and_statistics/womens_experiences_of_re-offending_and_rehabilitation.html>

¹¹ C Sumner (ed) *Crime Justice and Underdevelopment* (London, Heinemann, 1982) as cited by Simone Bull ‘The land of murder, cannibalism and all kinds of atrocious crimes? Māori and Crime in New Zealand 1853 – 1919’, (2004) Brit J Criminol 44, 496.

¹² Bull above n 11, 497.

¹³ See Chapter V ‘Initiatives in Comparative Jurisdictions’ for statistics. Indigenous peoples is a term commonly used to describe any ethnic group who inhabit the geographic region with which they have

Representative to the United Nations, recently reported:¹⁴

Despite many positive developments, we remain realistic about the challenges. We recognise that Māori are over-represented in the criminal justice system, that Māori women and children experience a greater prevalence of domestic violence and that Māori face a higher number of health problems. The New Zealand government is committed to addressing these issues by improving social and economic conditions for Māori.

Of recent note in the Concluding observations of the sixth periodic report of New Zealand the Committee against Torture recommended that:¹⁵

The State party should increase its efforts to address the overrepresentation of indigenous people in prisons and to reduce recidivism, in particular its underlying causes, by fully implementing the Turning of the Tide Prevention Strategy through the overall judicial system and by intensifying and strengthening community-based approaches with the involvement of all relevant stakeholders and increased participation of Māori civil society organizations.

Although it is difficult to ignore the disproportionate nature of these statistics, like many statistical surveys, they are limited by their disaggregation. To this end these statistics do not include whether the offenders are unemployed, uneducated, endure sub standard housing and poverty. Offending rates are instead linked to population proportions and disaggregated by gender, ethnicity and age rather than these social development factors.¹⁶ Simone Bull notes that “as far as our perceptions of Māori offending are concerned, reality has been overtaken by stereotypes and assorted

the earliest historical connection. See also Caecilie Mikkelsen (ed) *The Indigenous World 2013* (Eks-Skolens Trykkeri IWGIA, Copenhagen, 2013).

¹⁴ Jim McLay statement to the Third Committee, 68th session of the United Nations General Assembly under Item 66: Rights of Indigenous Peoples 21 October 2013 (GA/SHC/4074). Media report available at <www.un.org/News/Press/docs//2013/gashc4074.doc.htm>. Also see <www.mfat.govt.nz> See also UN Report on Torture where it was noted at para 14 that: ‘The Committee is also concerned at information received that while making up 15% of the State Party’s population, Māori comprise 45% of arrests and over 50% of prison inmates, moreover more than 60% of female inmates are Māori (arts.2, 11 and 16).’ Available at <<http://tbinternet.ohchr.org/>>

¹⁵ At para 14.

¹⁶ John Braithwaite *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press, 1989) as cited in Simone Bull *Changing the broken record: New theory and data on Māori offending* <<http://igps.victoria.ac.nz>>.

misinformation much of which is generated by corporate media”.¹⁷ According to theorist Jean Baudrillard this ‘hyper-reality’ has become a starting point for research as opposed to a sound evidence base.¹⁸

In light of the absence of disaggregated data and empirical evidence, these assumptions form the basis for criminal justice intervention programmes that target Māori offenders.¹⁹ Despite initiatives by the Justice System, these statistics have not altered much. In the last 30 years, the rate of imprisonment for Māori is 660 per 100,000 whereas for New Zealand Pākehā the rate is less than 95 per 100,000.²⁰ Further, proportionally, prisoners starting a prison sentence who are Māori increased from 47 per cent to 56 per cent between 1983 and 2013.²¹ The United Nations Working Group on Arbitrary Detention has urged the New Zealand government to investigate why Māori are continually over-represented in the nation's prisons.²²

Statistics New Zealand has not signaled any steps to further disaggregate this data, referring instead to maintaining the status quo.²³ As this statistical disaggregation is unavailable, and not likely to be available, for Māori offending rates to be population ‘proportionate’ on the 2013 statistics, based on a prison population of 8,611 the number of Māori inmates would be 1,292 (15 per cent of 8611) rather than the indicated 4,332. This is a drop of 70 per cent. Even if the social factors are taken into account and reflected in the statistics it is suggested that the imprisonment rate for Māori would still figure disproportionately.

It is also acknowledged that to be classified as Māori for the purposes of the statistics requires self-identification. Many Māori, for various reasons, chose not to be identified as Māori, distorting the statistics. Nonetheless, the importance of these social factors on offending is recognised and included in the drivers of crime policy.

¹⁷ Bull above.

¹⁸ Jean Baudrillard *Simulacra and Simulation* (translated by Sheila Glaser) (Michigan, University of Michigan, 1995) as cited above.

¹⁹ Marie above n 8, at 283.

²⁰ Department of Corrections *Trends in the offender population 2013* <<http://corrections.govt.nz>>.

²¹ Above.

²² AAP ‘A UN working group says it wants the NZ government to undertake a review of the degree of systemic bias against Māori in the justice system’. April 2014. <<http://www.sbs.com.au/news/article/2014/04/08/un-wants-review-maori-nz-prisons>>

²³ Statistics New Zealand *Review of crime and criminal justice statistics report* (Wellington, 2009) 22 <www.statistics.govt.nz>

The events of history and humanity, including instances of colonial annexation, reveal the need to control and protect.²⁴ For instance, the passing of legislation such as the New Zealand Settlements Act 1863,²⁵ the Suppression of Rebellion Act 1863 and the Disturbed Districts Act 1869 sanctioned land confiscations and criminalised actions taken by Māori to retain their land²⁶ thus controlling the actions of Māori through legislation and protecting colonial settlers by criminalising the actions of Māori, thereby making the land available for the colonial settlers.

Paul McHugh noted that the colonial legal system is one seeking to establish “a constitutionally homogenised population, one that reflected Anglo-settler values, rather than a pluralistic one with sources of political authority apart from the state.”²⁷

This desire is reflected in respective criminal justice systems, such as those in Australia²⁸ and North America,²⁹ where their accompanying ideologies have been imposed upon existing systems. Professor Robert Miller captures this by noting:³⁰

²⁴ See Te Papatūākehi o te Raki Waitangi Tribunal Report, November 2014, Wai 1040, at 529 ‘Rather, in the explanations of the texts and in the verbal assurances given by Hobson and his agents, it sought the power to control British subjects and thereby to protect Māori.’ However, in ensuing years Māori lost control of their lands, territories and resources through imposed legislation; legislation, which in turn protected British subjects.

²⁵ The New Zealand Settlements Act 1863 was ‘An Act to enable the Governor to establish settlements for colonization in the North Island of New Zealand’. The Act allowed for land confiscation without compensation from iwi who were deemed to be in rebellion against Her Majesty’s authority. Subsequently the Government confiscated vast tracks of land from tribes such as Te Ati Awa, from the Taranaki district, who were passively protesting against the land policies of the Government that resulted in the loss of Māori land.

²⁶ Simone Bull ‘The land of murder, cannibalism and all kinds of atrocious crimes? Maori and Crime in New Zealand 1853 – 1919’, (2004) *Brit J Criminol* 44, 496 – 519, 507. The imposition of policies and legislation to control and criminalise Maori, such as the Dog Tax, resulted in an increase in offending and charge rates for Maori in the 1890s.

²⁷ Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, New York, 2004), at 49.

²⁸ For instance see Australia Law Reform Commission ‘Recognition of Aboriginal Laws’ June 1986 (ALRC Report 31) Chapter 4 where it is noted that ‘The decision to classify the ‘new’ country of Australia as a settled colony, rather than as conquered or ceded, meant that the new settlers brought with them the general body of English law, including the criminal law.’ < <http://www.alrc.gov.au/> > See also *R v Jack Congo Murrell* (1836) 1 Legge 72 where the court held it had jurisdiction to try one aborigine for the murder of another confirming that the law of the colonists applied to the indigenous aboriginal peoples. This has been reaffirmed. See eg *Tuckiar v R* (1934) 52 CLR 335; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 261-2 (Blackburn J); *R v Wedge* [1976] 1 NSWLR 581. In the latter case, Rath J concluded that ‘all the reasons of the court in *R v Murrell* are as valid today as they were when judgment in that case was given’, at 587.

²⁹ See Chris Cuneen ‘Colonial Processes, Indigenous Peoples and Criminal Justice Systems’ in Sandra Buicerious and Michael Tonry (eds) *The Oxford Handbook of Ethnicity, Crime and Immigration* (OUP, New York, 2014) at 386 – 408.

³⁰ Robert Miller and Jacinta Ruru “An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand” (2009) 111 *West Virginia L. Rev* 849 at 914.

... the European colonists pursued a mission to destroy the cultures, laws and governments of Indigenous peoples. A campaign to “civilize” these “others” by making illegal the practicing of their ways of knowing was sought through the means of law.

If a legal system did not conform to a Western jurist’s perception of a legal system, premised on a constitutional framework, then it was not classified as a legal system.³¹ The European claim was that “there is no law until there are courts”.³²

Prior to colonisation Māori had effective legal, political and social systems in place.³³ The Crown government did not encounter “a legal vacuum, unfilled until the exercise of the constituent power.”³⁴ The Māori legal system was based on values rather than rules. Although such laws varied from iwi-to-iwi,³⁵ all Māori followed and adhered to the principles of tikanga Māori, particularly when a breach occurred.

Tikanga Māori is often viewed as Māori customary values and practices. Nonetheless, it is far more complex than a two dimensional definition. Hirini Moko Mead states that:³⁶

... tikanga [Māori] is the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or individual is able to do ... tikanga are tools of thought and understanding. They are packages of ideas which help to organize behavior and provide some predictability in

³¹ Moana Jackson *The Māori and the Criminal Justice System - He Whaipaanga Hou: A New Perspective: Part 2* (Department of Justice, Wellington, 1988), at 37.

³² Sir Clinton Roper Report *of the Ministerial Committee of Inquiry into Violence* (March 1987) at 37-41. Also known as the Roper Report where it was urged that legislation be utilized to the fullest extent. See also Sue Carswell *Family Violence and the Pro-Arrest Policy: A Literature Review* (Ministry of Justice, December 2006) at ch 2.

³³ See Eddie T Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago L Rev 449 at 451. See also discussion in New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) at 17; See also Jackson, above n 31. Wai 1040, above n 24.

³⁴ Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991) at 83.

³⁵ See Hirini Mead *Tikanga Māori Living by Māori Values* (Huia, Wellington, 2003) at 8.

³⁶ At 12.

how certain activities are carried out. They provide templates and frameworks to guide our actions ... they help us differentiate between rights and wrong ... there is a right and proper way to conduct one's self.

This position infers that in order to realise what is right and appropriate, there must be an element of flexibility and adaptability to tikanga Māori.³⁷ A balancing or weighing up would be required to determine the proper actions or responses.

Tikanga Māori is not only conceptual, representing beliefs and customs, but is also manifest in actions and practices.³⁸ The dynamic between the underlying concepts and customs, with actions and practices, assists to discern and maintain social understandings and balance within the community. This balance can change to reflect the mores of the community, but the essence of the concepts remain.³⁹ Tikanga Māori is a relational concept more akin to principles, which prescribed general actions, than rules that prescribed specific acts resulting in, for example, specific regulations and codes.⁴⁰ Upon colonisation most principles of tikanga Māori were neither encouraged nor recognised by the colonial authorities.⁴¹

The colonial values and ethics imported by the settlers were based on Victorian morals.⁴² The introduced beliefs of the Church instilled a sense of religious morality — demanding obedience to God and the will of the Church.⁴³ Central to these morals

³⁷ Above n 35.

³⁸ Mead, above n 35, at 22.

³⁹ For instance, in light of the health statistics, indicating that Māori have disproportionate rates of diabetes, and are three times likely to contract diabetes as non-Māori, warranting kidney transplants, the tikanga attached to organ donation be reassessed. The general view is that, for Māori, the body is to return to Papatūānuku (mother earth) whole. However, as tikanga is flexible we are to perceive organ donation as one of manaakitanga (blessing) and āwhina (help) this would support the activity of organ donation. So, the primacy of the tikanga concepts may have changed but their essence remains the same, resulting in balance that is reflective of social mores.

⁴⁰ Principles are commonly seen to apply from within to internally motivate and are fundamentally different to rules that are commonly seen to apply externally to compel action. For further discussion on the nature of rules see Joseph Raz “Legal Principles and the Limits of Law” (1972) 81 Yale LJ 838.

⁴¹ See also discussion in Nin Tomas “Indigenous Peoples and the Maori: The Right to Self-Determination in International Law - From Woe to Go” [2008] NZ Law Review at 645 – 647 where she notes that ‘colonisation resulted in the decimation of the social, political and legal organization of indigenous societies and their marginalisation within new, imposed colonial regimes’.

⁴² Victorian morals included ‘sexual restraint, low tolerance of crime and a strict code of conduct’ see also J M R Owens “Christianity and the Maori to 1840” (1968) NZJH at 1 – 40 <www.nzjh.auckland.ac.nz>. See also Wai 1040, above n 24, at 248 – 257.

⁴³ See discussion in Michael King *The Penguin History of New Zealand* (Penguin, New Zealand, 2003) at 141 – 146. See also discussion in Leonie Pihema “Tihei Mauri Ora: Honouring Our Voices. Mana Wahine as a Kaupapa Maori Theoretical Framework” (PhD, University of Auckland, 2001) at ch. 6

and values was the notion of the individual and individual rights to property that prevailed in the Victorian era.⁴⁴

For philosophers such as Grotius and Hobbes, the defining “institution of property differentiated the savage state from the more advanced stages in society”.⁴⁵ During this time of enlightenment, ‘savages’ or the ‘uncivilized’, such as Māori, were required to be transformed into a living model of humanity where a ‘pleasanter way of life’ was characterised by individual property rights.⁴⁶

For Māori their cultural definitions and ontological assumptions that shaped notions of criminality and social order, were replaced by these values and morals of the colonising power.⁴⁷ Although the applicability of this new social order and accompanying legal system was resisted, in reality, in many areas, English law was unknown, unenforced and unenforceable.⁴⁸ For a large number of communities, tikanga Māori was the only legal system in place;⁴⁹ nonetheless, this resulted in a changing world for Māori, compounded and exacerbated by events such as urbanisation.

Structure

To examine whether the application of Te Ao Māori philosophy is an appropriate way forward for Māori to ameliorate the disproportionate offending rates, Chapter One will set the scene with an overview of criminality and the relationship between Māori

“Colonisation and the Importation of Ideologies, of Race, Gender and Class”

<www.kaupapamaori.com>. Māori have now internalized these religious values e.g. Ratana Church

⁴⁴ Owens, above n 42. Wai 1040, above n 24, at 38.

⁴⁵ Robert A. Williams Jr *Savage Anxieties: The Invention of Western Civilisation* (Palgrave, New York, 2012) at 204. Although the writings of these philosophers were based in Europe Williams uses this to emphasise the wider effect this philosophy had on Indigenous peoples.

⁴⁶ Williams Jr, above n 45, at 203-204. The alienation was premised on individual property rights doctrine. The Waitangi Tribunal was eventually established to ameliorate the alienation and confiscation of Māori land by the Crown see Treaty of Waitangi Act 1975 s 4.

⁴⁷ See comments by Ranginui Walker in *Ka Whawhai Tonu Mātou - Struggle without End* (Penguin, Auckland, 1990) at 10, where he notes that “the outcome of colonization by the turn of the century was impoverishment of leaders and chiefly authority and a structural relationship of Pākehā dominance and Māori subjection. So in total was Pākehā dominance at a time when Māori population had fallen to its lowest point of 45,549, that the colonizer deluded himself into thinking that he had created a unified nation state of one people...”

⁴⁸ McHugh *Aboriginal Societies* above n 27, at 180.

⁴⁹ McHugh *Aboriginal Societies*, above n 27, at 180 -181.

and the criminal justice system, including areas of criminal offending, parole and mental health before the examination of two primary areas: who are Māori and what is tikanga Māori in Chapter Two. The discussion of Māori ancestral conceptions of tikanga Māori and correct conduct establishes a potential framework for further consideration and is set against more commonly known theories of law: natural law and positivism. Two examples provide an insightful reflection of the implementation of English law on tikanga Māori: first, the changing significance of Māori women in society together with the related problem of domestic violence; and second, the issue of mental health and Māori.⁵⁰

To examine the concerning question of the extent to which tikanga Māori has been marginalised, Chapter Three will provide a historical review of the introduction of English law and legal systems and the adverse impact this has had on tikanga Māori. An analysis of two key documents — the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples — will be undertaken to provide further context to this dialogue. Although the New Zealand government was reluctant to include indigenous rights and the concept of tikanga Māori within a possible written constitution, an examination of comparative constitutions reveals that it is not unusual to entrench indigenous rights. An evaluation of the pivotal right of self-determination, as set forth in the United Nations Declaration on the Rights of Indigenous Peoples, and the rights associated with tino rangatiratanga, in the Treaty of Waitangi provides a contextual right for the return to the philosophy of Te Ao Māori realised by an indigenous legal system.

To provide further context and background, Chapter Four will examine the historical and contemporary criminal justice initiatives, including Māori juries, Māori wardens and Family Group Conferences. It could be that aspects of these initiatives, such as the role of the Māori warden, that have shown success could be employed within a proposed indigenous court. A review of how Hauora Māori (Māori philosophy of health and well-being) adheres to the relational concept of tikanga Māori within the health system provides an interesting comparative analysis. Existing judicial

⁵⁰ The term “*English*” law refers to the law that was derived from the English Westminster system from the United Kingdom that was imported into New Zealand retrospectively clarified by the English Laws Act 1858.

initiatives to address the disproportionate representation of Māori in the criminal statistics will be investigated, including Te Kooti Rangatahi — a youth court held on a marae.

Chapter Five provides a review of initiatives from comparative jurisdictions, such as the Navajo Courts and the Koori Courts, which indicates State support for indigenous people's right to culture and self-determination. This chapter will conclude that given the disproportionate representation of indigenous peoples in areas of crime and mental health, drawing upon indigenous concepts and doctrine may provide an answer.⁵¹ An examination of the Navajo Courts lays the foundation for further discussion.

In light of the preceding dialogue and research, which identifies the concept of therapeutic jurisprudence that underpins specialist courts, Chapter Six suggests that a judicial model, based on therapeutic jurisprudence, could provide a useful way to incorporate tikanga Māori within the criminal justice and court system.

Chapter Seven consolidates this research and tests the implications of a new framework. This includes an extension to the jurisdiction of the Māori Land Court,⁵² or a specialised Tikanga Māori Court,⁵³ in order to provide an answer to the question as to whether:

Applying the philosophy of Te Ao Māori, realized by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine, is the most promising way forward for Māori to ameliorate the disproportionate offending rates.

⁵¹ *Indigenous law* relates to that system of law developed by, and relating to, indigenous peoples. Terms such as Customary Law and Aboriginal Law can also be used. For Maori this system of law is “tikanga”. See also New Zealand Law Commission above n 33 for discussion on tikanga Maori and Maori custom law.

⁵² The jurisdiction of the Maori Land Court is currently to hear matters relating to successions, Title improvements, Maori land sales and the administration of Maori Land Trusts and Incorporations. The jurisdiction also includes cases under the Maori Fisheries Act 2004 and Maori Commercial Aquaculture Claims Settlement Act 2004. An extension to the jurisdiction to capture criminal offending may be suggested. It is acknowledged that the Maori Land Court is based on the notion of individual property rights that is inconsistent with the Maori world and this presents a further challenge.

⁵³ Although phrased as a “new” Indigenous Court there are many such Courts already operating. In Canada the National Judicial Institute provides educational courses for the judiciary on Aboriginal Courts covering the reality, theory and future of these courts.

Methodology

The purpose of this thesis is to understand the reasons for the continual disproportionate offending rates and determine an appropriate framework that may assist to alleviate these rates. As the 'Judicial Participation in Research Projects memorandum' restricted any judicial comment on the existing court structures and comments on any proposed fora, I have deferred to the existing traditional and comparative research methodology as opposed to quantitative or qualitative methodology.

A mix of both a 'black letter' and 'sociological' approach is used throughout the thesis. For example, when describing legal rules and the emergence of legal sources with the aim of identifying whether or not where tikanga Maori is recognised, or not, within the current legal system, reflecting a law and society approach.

This is complemented with a sociological approach. The use of statistics and recent evaluation reports are pivotal, particularly when for instance there is a need to understand why the statistics have not changed over the last thirty years, this highlights the impact of the law, and the role of society and of policy. These two traditional research methodologies are further complemented with a comparative methodology. Particularly as comparisons between legal systems, constitutions and criminal justice initiatives assist to provide contextual understanding that support a suggested model.

All discussions that have previously taken place with the Judiciary reflect comments made either in lectures or conference presentations and have been referenced. Those that cannot be referenced to lectures or conference presentations are formally included in publications such as the Law Commission Report.

Chapter One uses the raft of statistics and recent evaluation reports to highlight any trends or social changes that complements and adds a point of analysis for my thesis. In Chapter Two the significance of Māori women and domestic violence together with the issue of mental health assist to consolidate the contextual understanding of who Māori are. To examine the historical background, a review of the founding document,

the Treaty of Waitangi, is pivotal in Chapter Three, together with the United Nations Declaration on the Rights of Indigenous Peoples as the key international document.

Chapter Four returns to analyse current initiatives in New Zealand. To further test the proposition a comparative methodology is engaged and applied to Australia and Canada as both are Commonwealth jurisdictions to provide these provide beneficial comparatives in Chapter Five. This comparative methodology is further extended to the recent criminal justice initiatives in the United States to provide an added layer of analysis. The discussion of therapeutic jurisprudence as a doctrine with similarities to tikanga Māori is helpful in Chapter Six. This provides a basis to propose possible models in the final chapters.

ŪPOKO TUATAHI

CHAPTER I

MAORI AND CRIMINALITY

A. Criminality and Causes of Offending

Criminality

Schiller notes that the “behavioural definition of crime focuses on, criminality, a certain personality profile” that causes a crime.⁵⁴ The type of “person likely to commit a crime is often a style of strategic behavior characterised by self-centeredness and indifference to the suffering and needs of others”.⁵⁵ More “impulsive individuals are more likely to find criminality an attractive style of behavior because it can provide immediate gratification through relatively easy or simple strategies”.⁵⁶

Some criminologists believe that the orthodox reasons for criminality that relate to sociological, psychological, biological or economic reasons do not explain criminal behaviour.⁵⁷ Rather, they state that the essential element of criminality is the lack or absence of self-control, so those with high self-control consider the consequences of their behaviour as opposed to those with low self-control who do not.⁵⁸ Further, once self-control is learned, it is highly resistant to change.

The indigenous concept of criminality differs from a non-indigenous concept of criminality. For Māori, a crime or hara was inextricably linked to, and explained by further concepts such as tapu and mana and the need to rebalance the harm that the hara has caused, rather than any associated behaviour of the offender.⁵⁹

Nonetheless, it is acknowledged that the behaviour or criminality associated with a hara, such as trespass and taking of resources, could stem from conventional elements of criminality, such as self-centeredness, indifference to the suffering of others and possibly low self-control. However, the requirement to rebalance the harm caused is mandatory and takes precedence over behaviour that may be classified as criminal.

⁵⁴ Johann Schiller ‘Crime and Criminality’ Chapter 16 University of California, Davis<
www.des.ucdavis.edu/faculty/>

⁵⁵ See Michael R Gottfredson and Travis Hirschi *A general theory of crime* (Stanford University Press, USA, 1990

⁵⁶ Schiller above n 54.

⁵⁷ Gottfredson and Travis Hirschi above n 55.

⁵⁸ Above.

⁵⁹ See Chapter II ‘Maori and Tikanga’ for full discussion.

Causes of Offending

Criminology, as a distinct field of study, is devoted to determining the causes of crime. It is no surprise that due to the dynamic and complex reasons why people offend, various theories, such as conflict and group theory, and various factors, such as social and economic factors, can be more heavily weighted than others when determining causes of offending.⁶⁰ Subsequently, sociological and economical theories often describe conditions in which crime frequently occurs, without explaining why it occurs and why some factors affect some people and not others.⁶¹

Further, it is difficult to avoid similarities and overlap in theories; for instance, the concept of conflict, as a reason to offend, is also labelled as critical or radical criminology.⁶² To this end it is problematic to ascribe to one school of criminological thought when determining causes of offending. A closer examination of the different theories and how they may, or may not explain Māori causes of offending will be informative.

Theories that are based on scientific evidence, unfortunately, have provided little value when explaining causes of offending for Māori. The drive to provide a scientific explanation for criminality is a regular feature of the modern discourse on crime.⁶³ During the 2006 Conference of the International Congress of Human Genetics, it was claimed that the presence of a specific gene type, the monoamine oxidase gene, contributed significantly to explaining the criminality of Māori.⁶⁴ This finding was flawed and unnecessarily exacerbated the effect that a gene may have on Māori,⁶⁵ proving unhelpful in terms of seeking a cause of offending for Māori.

⁶⁰ Above. For a discussion on cultural factors see M O'Brien 'What is cultural about Cultural Criminology?' (2005) 45 *British Journal of Criminology* 599.

⁶¹ K.D. Harries, *Crime and the Environment* (Springfield, Illinois: Charles C. Thomas, 1980), 4–5.

⁶² See Werner J Einstader and Stuart Henry 'Criminological Theory: An Analysis of its underlying assumptions' second edition (Rowman & Littlefield, USA, 2006) 236, where it stated that 'the predominant cause of crime according to this perspective is societally generated conflict fuelled by a capitalist system of domination, inequality, alienation and injustice'.

⁶³ Ross Hogg 'The Causes of Crime and the Boundaries of Criminal Justice' in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Lexis Nexis, Wellington, 2007) at 87.

⁶⁴ Hogg, above n 63; See also G Raumatī Hook "Warrior Genes and the Disease of Being Māori" (2009) 2 *Mai Review*, which refers to an Annual Meeting of the American Association of Physical Anthropologists in Tampa, Florida in 2004 where the 'warrior' gene, Monoamine oxidase (MAO) is also discussed.

⁶⁵ See Rod Lea and Geoffrey Chambers 'Monoamine oxidase, addiction, and the "warrior" gene

The functionalist theory suggests that because crime exists in all societies it must have a function, and that function is to help to define what is normal, to make some behaviour more attractive and promote social cohesion.⁶⁶ Whereas the superiority theory suggests that humans are conditioned to strive for superiority, and therefore some people turn to crime as a means of achieving superiority.⁶⁷

For Māori, applying a functionalist theory is problematic as tikanga determines what is normal, not the presence of crime. Similarly the superiority theory suggests that Māori are conditioned to strive to be superior and turning to crime can achieve this. For Māori, committing a crime will not achieve superiority, rather the action of committing good deeds will result in an increase in mana and superiority not committing a crime.

The strain theory suggests that people whose ambitions are severely frustrated will experience anger that will lead to rebellion against the real or perceived causes of those frustrations.⁶⁸ Ambition for Māori is linked to achieving the well-being or 'ora' of the group. If this is not achieved the collective or group are responsible rather than the individuals at large.

Another theory holds that persons will be more likely to conform when they stand to benefit by conforming.⁶⁹ Evidence that violence begets violence is also perceived as a

hypothesis' (2007) *Jnl of the NZ Med Assoc* 120, 1250. See also comments by Dr Sam Hancox 'it is extremely unlikely that a single gene explains anything' in Jon Stokes 'Māori 'warrior gene' claims appalling, says geneticist' *NZH Thursday Aug 10, 2006* <www.nzherald.co.nz>

⁶⁶ Emile Durkheim, "The Normal and the Pathological" (1938), and Robert A. Dentler and Kai T. Erikson, "The Functions of Deviance in Groups" (1959) in Stuart H. Traub and B Craig (eds) *Little Theories of Deviance* (Itasca, Illinois: F.E. Peacock Publishers, 1975) as cited by Paul L. A. H. Chartrand Wendy Whitecloud (Commissioners) *The Aboriginal Justice Implementation Commission 'Report of the Aboriginal Justice Inquiry of Manitoba The Justice System and Aboriginal Peoples'* (2001) <www.ajic.mb.ca>.

⁶⁷ Alfred Adler, referred to in John Braithwaite, *Inequality, Crime and Public Policy* (London: Routledge and Kegan Paul, 1979) as cited by Chartrand above n 66.

⁶⁸ Theodore N. Ferdinand, "The Methods of Delinquency Theory," *Criminology*, 25, 4 (1987): 841–62, at 849.

⁶⁹ Michael Lynch and W. Byron Groves, *A Primer in Radical Criminology*, 2d ed. (Albany, New York: Harrow and Heston, 1989). A related or overlapping theory is the differential association theory that provides that crime is learned by associating with others who have already rejected conduct norms and have committed themselves to deviance as a way to satisfy their desires, see Edwin H. Sutherland, "The Theory of Differential Association" (1947), in Traub and Little above n 66.

cause of offending.⁷⁰ It is difficult to assess the relevance of these theories for Māori without a suitable context. For instance, if an act in self defence was deemed violent, would that then be a cause of offending?

Theories related to culture and social factors are more relevant. For instance, the conflict theory suggests that when a person is influenced strongly by two conflicting cultures, the attachment to the rules of one is weakened and can produce deviant behaviour.⁷¹ For Māori who adhere to tikanga Māori this is usually to the detriment of the existing legal system, subsequently by not abiding by the rules of the existing legal system can result in behaviour classified as deviant or criminal. However, this theory fails to provide reasons why adhering to the other system cannot be accommodated, and thus the resulting actions are not classified as deviant.

For Pākehā, the imposition of legislation⁷² dictated what a crime was. A crime was classified a crime without any consideration of what a crime meant for Māori, thereby marginalising their view. For Māori, a ‘hara’ was not dependent on legislation for legitimisation; a hara was identified as a ‘crime’ if the action or inaction breached a concept or concepts of tikanga Māori. The behaviour or criminality of the offender was secondary.

Historically justice was administered locally as there was no national centralised police system between 1853 and 1876.⁷³ Peaks in offending rates can be directly linked to historical events. Bull identifies four such episodes between 1853 and 1920, mid 1860s, 1881, 1897, and 1911. These periods are linked to gross violations of human rights and the criminalisation of Māori independence.⁷⁴

⁷⁰ Jeffrey Fagan and Sandra Wexler, “Family Origins of Violent Delinquents,” *Criminology*, 25, 3 (1987): 643–69.

⁷¹ Thorsten Sellin, “Culture Conflict and Crime” (1938), in Traub and Little above n 66 at pp. 49–58.

⁷² In New Zealand, today, all crime is codified in statutes and thus it is not possible to be charged with a criminal offence under common law.⁷² A breach of the legislation results in various forms of sentence ranging from community service to imprisonment. Crimes Act 1961 (NZ), s 9 - “Offences not to be punishable except under New Zealand Acts”. See also Crimes Act 1961 (NZ), s 2- For procedural purposes, there are four categories of offence, see Criminal Procedure Act 2011, s 6.

⁷³ S Bull above n 26, at 499.

⁷⁴ S Bull above n 26, at 496.

The first peak corresponds to the anti liquor restrictions that were imposed.⁷⁵ According to classical criminology, “rational hedonism is the primary motivator of crime”. In this light Māori who took pleasure in supplying and consuming alcohol perceived this was a risk worth taking.⁷⁶ However, it is difficult to explain why “special restrictions were imposed on Māori as this is incompatible with the idea that everyone is driven by the same forces”.⁷⁷ This is further compounded by the position of settlers who considered Māori as deviants, or members of a separate society, because they were different and criminalised them accordingly.⁷⁸

The first peak during the 1860s also corresponds to war and the accompanying Suppression of Rebellion Act 1863, Disturbed Districts Act 1869 and the New Zealand Settlements Act 1863 legislation that criminalised Māori resistance to settler encroachment on Māori land.⁷⁹ The Māori Prisoners’ Trial Act and the West Coast Settlement Act 1880 also criminalised these actions. The third peak corresponds to the imposition of the Dog Tax that led to an increase in convictions, as did the Defence Act 1909; in 1911, that coincides with the fourth peak.

The reasons for the imposition of the raft of legislation to control the liquor industry, to provide land for settlement, to raise revenue and for the desire of the New Zealand Government to establish its own armed forces, criminalised what were benign acts, such as owning a dog or passively protesting. Subsequently, Māori were criminalised for their actions, arrested and imprisoned as they came in conflict with legislation passed to promote the interests of the colonisers.

Criminologists seek to explain this through theories, including group conflict theory that states “crime is intimately related to conflict” and critical criminology that holds “unequal distribution of power is causally related to crime and this power needs to be specified”.⁸⁰ While conflict occurred group conflict theory assumes a degree of

⁷⁵ The Sale of Spirits to Natives Ordinance 1847, which prohibited the sale of spirits and limited the sale of other intoxicating liquors to Māori.

⁷⁶ S Bull above n 26, at 502.

⁷⁷ S Bull above n 26, at 502.

⁷⁸ Pratt as cited by S Bull above n 26 at, 505.

⁷⁹ S Bull above n 26, at, 507.

⁸⁰ G B Vold *Theoretical Criminology* (New York, Oxford University Press, 1958) as cited by Bull above n 26 at 498.

political strength that, in reality, was minimal for Māori who had their own existing social, political and legal structures.⁸¹ Notwithstanding from 1911 onwards the dramatic increase in Māori offending rates and the decrease of non-Māori offending is “driven by renewed attention to law and order brought about by political strife”.⁸²

Bull notes that:⁸³

Government harassment of Māori grows ever more subtle ... with a view to endorsing the illusion of state control seemingly innocuous legislation is used to facilitate the over-policing of Māori. Before long, reported offending by Māori is seen as an issue of problem justifying the need for further official intervention and initiating a self-fulfilling prophecy that manifests itself today in the contemporary stereotype of the Māori criminal.

Although historically this may have been the situation for Māori, in contemporary times the orthodox reasons for criminality that relate to sociological, psychological, biological or economic reasons assist to explain the contemporary causes of offending for Māori. However, the examination of the effect of colonisation and the imposition of legislation is required to place causes of offending into context.

Related to the conflict theory is the social disorganization theory that explains deviance as a side effect of rapidly changing society; for instance, industrialisation, urbanisation and rapid technological change.⁸⁴ Films and other forms of media, an example of technological change, can also be sources of criminality.⁸⁵ The ecological theory that identifies conditions in which crime flourishes by focussing mostly on physical conditions as a result of urbanisation, such as high density population, poverty, transience (homeless people), dilapidation and overcrowding, could be an overlapping theory of the social disorganisation theory.⁸⁶

⁸¹ Bull above n 26 at 498.

⁸² Bull above n 26 at 517. See also for offending statistics.

⁸³ S Bull above n 26 at 517.

⁸⁴ W.I. Thomas and Florian Znaniecki, “The Concept of Social Disorganization” (1920), and Robert E. Park, “Social Change and Social Disorganization” (1967), in Traub and Little above n 66.

⁸⁵ See Y Jewkes *Theorising Media and Crime*, 10 -37 < <http://www.sagepub.com>> . Richard Erickson “Mass Media, Crime, Law and Justice an Institutional approach” *Br J Criminol* (1991) 31(3): 219-249. See also Daniel Glaser, “Criminality Theories and Behavioural Images” (1956), in Traub and Little above n 66.

⁸⁶ Rodney Stark, “Deviant Places: A Theory of the Ecology of Crime,” *Criminology*, 25, 4 (1987): 893–909.

Duncan concluded that higher rates of offending resulted from the effect of migration and the movement of Māori from rural areas to urban cities.⁸⁷ O'Malley focused "on culture conflict, recent urbanisation, low socio-economic status, high-risk mores, selective processing by control agencies as contextual factors leading to higher crime rates" for Māori.⁸⁸ This was supported through his examination of Magistrates' Court data revealing higher conviction rates for Māori compared to Pākehā.⁸⁹

The effect of colonisation and urbanisation on Māori is closely tied to the theories of conflict and social disorganisation and assists to explain causes of offending for Māori by colouring these theories with the changing times and a changing society.

Many scholars have sought to understand why Māori are over-represented as offenders in New Zealand.⁹⁰ To determine a single cause of criminal behaviour is problematic as there are "as many causes as there are offenders and each offender's behaviour is in itself the result of several causes".⁹¹

In a study on the causes of youth offending,⁹² various risk factors were identified, including family, school/work, association with peers and biological factors. The more risk factors present, the more likely it is that an offence will be committed. However, with just one factor present, the risk of offending is significantly less. Protective factors such as positive influences or role models can mitigate the risk of

⁸⁷ L Duncan Explanations for Polynesian Crime Rates in Auckland. (1971) *Recent Law*, October 1971 as cited by Department of Corrections (2007) above n 2, 7.

⁸⁸ P O'Malley "The Influence of Cultural Factors on Māori Crime Rates" in S D Webb and J Collette (eds) *New Zealand Society - Contemporary Perspectives* (John Wiley & Sons Australasia Pty Ltd, Sydney, 1973) as cited by Department of Corrections (2007) above n 2, 7.

⁸⁹ O'Malley above n 88 at 7.

⁹⁰ See S Bull "The land of murder, cannibalism, and all kinds of atrocious crimes? Māori and crime in New Zealand" 1853–1919, (2004) *British Journal of Criminology*, 44, 496–519; J K Fifield and A.A Donnell *Socioeconomic status, race, and offending in New Zealand (Research Report No 6)* (Wellington, New Zealand, Government Printer, 1980); D.M Ferguson, F Vitaro, L J Horwood and N Swain-Campbell "Ethnicity and criminal convictions: results of a 21-year longitudinal study" (2003) *Australian and New Zealand Journal of Criminology*, 36, 354–67; Jackson above n 31; K Maynard, B Coebergh, B Anstiss, B, L Bakkerand T Huriwai "Ki te arotu: Toward a new assessment: The identification of cultural factors which may predispose Maori to crime" (1999) *Social Policy Journal of New Zealand*, 13, 43–54; Greg Newbold *The problem of prisons: Corrections reform in New Zealand since 1840* (Wellington, New Zealand, Dunmore Press, 2007); John Pratt "Assimilation, equality, and sovereignty in New Zealand/Aotearoa" in Paul Havemann (ed) *Indigenous rights in Australia, Canada & New Zealand* (Auckland, Oxford University Press, 1999); P Spier *Conviction and sentencing of offenders in New Zealand: 1991 to 2000* (Wellington, Ministry of Justice, 2001).

⁹¹ Jackson above n 31, at 57.

⁹² D.M Fergusson and M T Lunskey "Adolescent Resiliency to Family Adversity" (1996) 37(3) *Journal of Child Psychology and Psychiatry* at 281-292

offending.⁹³ In noting the potential effect of the offender's background, Gendall J stated:⁹⁴

Equality before the law is fundamental to the administration of justice, but ... the penalty must reflect matters of mitigation arising from an offender's background and which recognises the structure and operation of the society within which he lives and in particular the degree to which the cultural or ethnic heritage predominates, in any problems of a cross-cultural nature.

Judge Becroft commented that:⁹⁵

It is very difficult to know which risks are actually causes, and of course, this may differ between individuals. It may be possible to look at a particular individual who has already committed an offence and determine the causes of his or her offending. But at a population level, the best information we can produce is a study of risk factors for offending, and an understanding that the more risk factors an individual possesses, the more likely they are to commit offences. *There is no single factor that can be specified as the 'cause' of anti-social or criminal behaviour...* [emphasis added].

For Indigenous peoples "the causes of offending generally fail to explain crime satisfactorily, in part because there is so much confusion about correlations, causes and crime and when it comes to explaining disproportionate crime rates there can be many different conclusions based on different interpretations of the same data".⁹⁶

⁹³ Te Puni Kokiri *Addressing the Drivers of Crime for Māori* (Working Paper 014-2011, July 2011) identifies similar risks including social, economic and community factors. In attaining answers the focus is on the community who will also design, develop and deliver the initiatives, this is an example of self-determination and will be discussed in a later chapter <www.tpk.govt.nz>.

⁹⁴ *Nishikata v Police* HC Wellington AP126/99, 22 July 1999, at [8].

⁹⁵ Judge Becroft "What Causes Youth Crime and What Can We Do?" (paper presented to NZ Bluelight Ventures Inc – Conference and AGM, Queenstown, 7 May 2009) <<http://www.justice.govt.nz>>. See also Judge Becroft presentation to the International Indigenous Therapeutic Jurisprudence Conference October 9 and 10, University of British Columbia, Canada, 2014 where he states that poverty is a main factor that underpins offending.

⁹⁶ Paul L. A. H. Chartrand Wendy Whitecloud (Commissioners) The Aboriginal Justice Implementation Commission 'Report of the Aboriginal Justice Inquiry of Manitoba The Justice System and Aboriginal Peoples' (2001) <www.ajic.mb.ca>. See also K.D. Harries, *Crime and the Environment* (Springfield, Illinois: Charles C. Thomas, 1980), 4–5.

In order to elicit an improved understanding of the association between Māori ethnicity and offending, attempts have emerged from a number of different disciplines that provide a range of causal theories about criminal offending. What characterises this history, however, is the assumption that the problem is not only best construed and analysed as a population level phenomenon, but also that initiatives developed to address the problem should be targeted toward the population of Māori.

It has been proposed that socio-economic factors, such as unemployment, poverty, poor education, single parent families, and anti-social behaviour by Māori, are the cause of these disproportionately unfavourable outcomes in the criminal justice system. According to Moana Jackson:⁹⁷

These causes are offender specific and attempt to isolate the social and psychological factors that may predispose an individual to commit crime ... they tend to define an offender by his social responses or his psychological makeup and ignore the interrelationships between the two and the role which culture plays in that interrelationship.

The existence of a multiplier or ‘amplifier’ effect between these stages of criminalisation suggests that, once apprehended, Māori are often subjected to harsher treatment than are non-Māori.⁹⁸

A government report noted that systemic factors exist at one or more of the stages in the process.⁹⁹ This serves to increase the likelihood that compared to other ethnic groups, Māori will progress further into the criminal justice system and will be dealt

⁹⁷ Jackson above n 31, 58.

⁹⁸ See Department of Corrections ‘*Over-representation of Māori in the criminal justice system: An exploratory report*’ (Wellington, 2007), 11 – 26 <www.corrections.govt.nz> See also Gabrielle Maxwell ‘Impoverished Lives-Impoverished Childhoods: Research on Social and Economic Inequality and the Occurrence of Crime’ (paper presented to the seminar “Does Inequality Matter? A Policy Forum, Wellington, November 2010) <gps.victoria.ac.nz> See also Kim Workman Māori Over-representation in the Criminal Justice System – Does Structural Discrimination Have Anything to Do with It? (2007) Rethinking Crime and Punishment <<http://www.rethinking.org.nz>>

⁹⁹ For a comparative discussion on systemic discrimination within the criminal justice system for Indigenous peoples in North America see Paul L. A. H. Chartrand Wendy Whitecloud (Commissioners) The Aboriginal Justice Implementation Commission ‘Report of the Aboriginal Justice Inquiry of Manitoba The Justice System and Aboriginal Peoples’ (2001) <www.ajic.mb.ca>.

with more severely.¹⁰⁰ This report further noted, given that there is the potential for some degree of correlation between offender ethnicity and these variables, reasonably sophisticated statistical analysis is required to understand the relative contributions to outcomes that may be made by diverse factors.¹⁰¹ In the absence of such analysis, interpretations of apparent differences must be made with great caution. However, it is clear that if Māori are to be treated equally, some systemic transformations are required, not only at the time of sentencing, but also from apprehension through to imprisonment and parole.

B. Apprehension and Prosecution¹⁰²

Although Māori comprise 15 percent of the New Zealand population, they are over three times more likely to be apprehended for a criminal offence than non-Māori.¹⁰³ In 2006 Māori accounted for 43 per cent of all police apprehensions.¹⁰⁴ From 1997 to 2006 Māori apprehensions increased by 10 per cent, whereas total apprehensions only increased by 4 per cent.¹⁰⁵

Although the number of apprehensions for violent offences increased overall for Māori, the number of violent apprehensions increased by 40 per cent.¹⁰⁶ In 2006 nearly three times as many Māori were likely to be apprehended for robbery than were Pākehā; and more Māori were likely to be apprehended for homicide,

¹⁰⁰ See Department of Corrections, above n 2 <www.corrections.govt.nz>. See also Just Speak – Māori and the Criminal Justice System Position Paper (2012) <www.rethinking.org.nz>. See also AAP ‘A UN working group says it wants the NZ government to undertake a review of the degree of systemic bias against Māori in the justice system’. April 2014. <<http://www.sbs.com.au/news/article/2014/04/08/un-wants-review-maori-nz-prisons>>.

¹⁰¹ Just Speak, above n 100.

¹⁰² Portions of this section are taken from a paper already published Valmaine Toki “Are Parole Boards Working or is it Time for an Indigenous Re Entry Court?” (2011) *International Journal of Law, Crime and Justice* 39 at 230-248

¹⁰³ Pat Doone ‘Hei Whakarurutanga Mo Te Ao Wellington’ (Crime Prevention Unit, 2000) at ch 4.

¹⁰⁴ Kim Workman “Māori Over Representation in the Criminal Justice System” (2009) *Rethinking Crime and Punishment* <www.rethinking.org.nz>. See also Ministry of Justice “Māori over-representation in the Criminal Justice System” *Straegic Policy Brief* (2009) March. <www.justice.govt.nz>

¹⁰⁵ Kim Workman “Māori Over Representation in the Criminal Justice System” (2009) *Rethinking Crime and Punishment* <www.rethinking.org.nz>. See also Ministry of Justice “Māori over-representation in the Criminal Justice System” *Straegic Policy Brief* (2009) March. <www.justice.govt.nz>

¹⁰⁶ *Rethinking Crime*, above n 104.

kidnapping and abduction, as well as grievous and serious assaults.¹⁰⁷ In contrast, Pākehā¹⁰⁸ were more likely to be apprehended for minor assaults, intimidation and threats and the offence of unlawful group assemblies.¹⁰⁹

Of all apprehensions 72 per cent of Māori apprehensions were resolved by prosecution compared with 66 per cent for Pākehā. Moreover, far fewer Māori offenders were diverted, warned or cautioned.¹¹⁰ Arguably, this manifests Moana Jackson's claim that the criminal justice system is institutionally racist toward Māori.¹¹¹

The United Nations Working Group on Arbitrary Detention has recommended a review be undertaken of the degree of inconsistencies and systemic bias against Māori at all levels of the criminal justice system, and further:¹¹²

The working group noted that Māori are over-represented in the prison population and warned that incarceration that is the outcome of bias “constitutes arbitrary detention in violation of international law”.

Māori aged between 17 and 19 are nearly three times more likely to be prosecuted for a criminal offence than non-Māori in the same age bracket. Overall, Māori are over

¹⁰⁷ Rethinking Crime above n 104.

¹⁰⁸ The term Pākehā commonly relates to those of British or European descent.

¹⁰⁹ Rethinking Crime above n 104. Although see section 16 of the New Zealand Bill of Rights Act 1990 which provides for ‘Freedom of Peaceful Assembly’.

¹¹⁰ Rethinking Crime above n 104. See also Gronfors (1973) study cited by Corrections Department above n 2, that states ‘when controlled for socio-economic factors and seriousness of offending, he found that first offenders who were Māori were still significantly less likely than non-Māori first offenders to be discharged without conviction. Neill (1983) found no difference in sentencing according to ethnicity once type of remand, seriousness of offence, previous record, and age were accounted for. However, McDonald (1987), taking type of offence into account but not seriousness of offence and previous convictions, found that Māori offenders received more severe sentences. Lovell and Norris (1990), using a cohort of New Zealand males born in 1957, came up with a finding that, even controlling for nature of offence, age, and prior offending, Māori between the ages of ten and twenty-four appearing in court were more likely than non-Māori to receive a custodial sentence.’ < <http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing>> This indicates that if the seriousness of the offence is known, type of remand, previous record and age are known it is less likely that Māori will receive more severe sentences; however, this is not assured.

¹¹¹ Jackson above n 31.

¹¹² AAP ‘A UN working group says it wants the NZ government to undertake a review of the degree of systemic bias against Māori in the justice system’. April 2014. < <http://www.sbs.com.au/news/article/2014/04/08/un-wants-review-maori-nz-prisons>> The final report will be presented to the Human Rights Council in 2015.

five times more likely to be prosecuted than non-Māori.¹¹³ For all age groups, Māori are more likely to be convicted for a non-traffic criminal offence than non-Māori. Māori aged between 17 and 19 are more than three times more likely to be convicted than non-Māori of this age (excluding Pacific youth).¹¹⁴ For those aged 40 and over, Māori are nearly seven times more likely to be convicted for a criminal offence than non-Māori.¹¹⁵ Māori are nine times more likely than non-Māori to be remanded in custody awaiting trial.¹¹⁶ In 2005, of all the criminal cases that resulted in conviction where the ethnic identity of the offender was known, 43 per cent were Māori.¹¹⁷ Half of the prison population identify as Māori.¹¹⁸

A recent review of the Statistics New Zealand data relating to prosecutions in 2011 revealed that Māori aged between 10 and 16 are significantly more likely to be prosecuted than Pākehā across a wide range of offences.¹¹⁹ In the most extreme example, 46 per cent of Māori who were apprehended for dangerous or negligent acts were prosecuted, compared to 6 per cent of Pākehā offenders.¹²⁰

These statistics indicate that Māori are more likely to be apprehended, prosecuted, convicted and imprisoned than non-Māori. At each stage of the criminal justice process from apprehension right through to prosecution, trial and sentencing, a significant degree of built-in discretion exists with respect to decision-making.¹²¹

¹¹³ Ministry of Justice *Responses to Offending by Māori and Pacific Peoples* (1999) <www.justice.govt.nz>.

¹¹⁴ Ministry of Justice, above n 113.

¹¹⁵ Ministry of Justice, above n 113.

¹¹⁶ Mark Burton, Minister of Justice, “The Effective Interventions Initiatives and the High Number of Māori in the Criminal Justice System” (paper presented to Ngakia Kia Puawai, New Zealand Police Management Development Conference, November 2006).

¹¹⁷ Ministry of Justice *Conviction and Sentencing of Offenders in New Zealand 1996-2005: Executive Summary* (Wellington, 2006) <www.justice.govt.nz>.

¹¹⁸ See <www.stats.govt.nz/browse_for_stats/snapshots-of-nz/yearbook/society/crime/corrections.aspx> that states at 30 June 2012, Māori comprised 51 per cent of the prison population. See also Bronwyn Morrison and others *Conviction and Sentencing in New Zealand: 1997 – 2008* (Ministry of Justice, Wellington, April 2008) at 118 <www.justice.govt.nz>. See also Michael Rich *Department of Corrections, Census of Prison Inmates 1999* (2000) at 43 <www.corrections.govt.nz>.

¹¹⁹ See Lydia Nobbs ‘Just Speak exposes variation in youth prosecution rates’ (2013) April <www.justspeak.org> where she cites Statistics NZ <www.statistics.govt.nz> See also “Young Māori ‘More Likely’ to Be Prosecuted than Pākehā” *Radio New Zealand* (online, New Zealand, 10 April 2013) <www.radionz.co.nz>.

¹²⁰ Above.

¹²¹ See also analysis by McDonald (1987), cited by Corrections Department, that states ‘of 1983 Justice statistics, taking type of offence into account but not seriousness of offence and previous convictions, found that Māori offenders received more severe sentences.’

Upon apprehension the police may exercise judgment about whether or not to detain an individual for questioning.¹²² If an individual is apprehended, there is discretion about whether or not to arrest the person, and later, whether or not to proceed with prosecution. At the prosecution stage, the court may or may not convict the individual. Upon conviction, judges may remit the offender's sentence.

In 2006 over-representation patterns for Māori were evident within the court system. Furthermore, 13 per cent of Māori who were convicted of an offence received a custodial sentence compared with 8 per cent for Pākehā.¹²³

Once sentenced the offender, if applicable, has an opportunity to be released through an application for parole. Although the Annual NZPB Reports do not provide an ethnic breakdown of offenders if Māori comprise 50 per cent of custodial sentences then it is reasonable to assume that at least half of the offenders that come before the Parole Board will be Māori.¹²⁴ This taken together with the fact that more prisoners are serving the length of their sentence, or, alternatively more prisoners are not being granted parole raises concerns for Māori. Despite these disproportionate statistics,¹²⁵ there is no clear policy direction on how the obligations of the Treaty of Waitangi impact on the decision-making processes of the NZPB. Similarly, there are no policy guidelines for cultural consideration. It is now timely to consider the process of parole.

<<http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing>>

¹²² Although you have the right not to be arrested, or detained, without good reason. See New Zealand Bill of Rights Act 1990, s 23 "Rights of Persons Arrested or Detained" which states that 'Everyone who is arrested or who is detained under any enactment (a) shall be informed at the time of the arrest or detention of the reason for it'.

¹²³ Rethinking Crime, above n 104. See also Lovell and Norris (1990), study cited by Corrections Department, above n 2, which stated that 'using a cohort of New Zealand males born in 1957, came up with a finding that, even controlling for nature of offence, age, and prior offending, Māori between the ages of ten and twenty-four appearing in court were more likely than non-Māori to receive a custodial sentence.' <<http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing>> The reference to Pākehā includes all New Zealanders of European or British descent.

¹²⁴ The available statistics are not disaggregated to reflect the percentage of Māori that appear before the NZPB.

¹²⁵ See Department of Corrections above n 2 'from 2004 onwards, [the] proportion of sentence served has crept up and up, and is in fact still rising. Currently, around 30% of prisoners who were eligible for parole are kept in until the entire sentence is served. Average across all parole-eligible prisoners is 75% at present.'

C. Parole¹²⁶

The New Zealand Parole Board (NZPB) can make a decision (now only for transitional cases) to release an offender in home detention cases as long as it is satisfied on reasonable grounds that the offender will not pose an undue risk to the safety of the community or any person or class of persons if he or she is detained on home detention rather than in a prison, or whether the prisoner should be granted an early release.¹²⁷ Parole reports and documents prepared by probation officers and psychologists can also be influential in such decision-making.¹²⁸

As 50 per cent of the prison population identify as Māori,¹²⁹ it is assumed that at least half the offenders that come before the NZPB are Māori. Although there may be a moral incentive, the Parole Act is silent on any specific provision for gender balance and indigenous representation on the NZPB.¹³⁰ Nonetheless, in light of the recent calls to encourage women, and those of an indigenous background to apply for judicial positions,¹³¹ it is presumed that this approach may eventually be entertained for positions on the NZPB. This would reflect gender and ethnic parity.

The role of the NZPB begins not upon incarceration, but when the offender applies for release. Although legislative amendments provide for the NZPB to monitor and, if

¹²⁶ Parts of this section are taken from a paper already published Valmaine Toki “Are Parole Boards Working or is it Time for an Indigenous Re Entry Court?” (2011) 39 International Journal of Law, Crime and Justice at 230-248.

¹²⁷ Section 33(1) of the Parole Act 2002 provides that ‘The Board may impose on an offender the special conditions referred to in [section 15\(3\)\(ab\)](#) (*residential restrictions*) if the residence in which it is proposed that the offender reside is in an area in which a residential restriction scheme is operated by the chief executive.’ From 1 October 2007 home detention was no longer an option for the Board, which now only considers “transitional” cases.

¹²⁸ In light of the number of Māori offenders likely to come before the NZPB it is important that adequate and continual training of parole and probation officers within the area of culture and tikanga issues is accomplished.

¹²⁹ See Department of Corrections above n 2 ‘Māori have constituted 50% of the prison muster since 1985, and it has hardly shifted at all – the rate of imprisonment for Māori is 660 per 100,000 M, and for New Zealand Europeans it is less than 95.’

¹³⁰ See Parole Act 2002 section 111.

¹³¹ See Rod Vaughan ‘Judicial makeover opens more doors to wannabe Judges’ ADLSI 6 September 2013, <http://www.adls.org.nz/for-the-profession/news-and-opinion/2013/9/6/judicial-makeover-opens-more-doors-to-wannabe-judges/> See also District Court Judges - Expressions of Interest The Attorney-General's Judicial Appointments Unit, where it is noted that ‘The Attorney-General is conscious of the value of increasing diversity on the District Court bench generally and therefore seeks to encourage expressions of interest from qualified women as well as those from under-represented ethnic groups.’ June 2013 <<http://www.justice.govt.nz/courts/district-court-judges-expressions-of-interest>>

necessary, recall the offender, hearings are before a panel, not a single judge. Despite the Parole Board's efforts to assess the same recalled parolee, there is no guarantee that the parolee will come before the same Judge and/or the same panel. This reduces the benefits of a powerful 'one on one' relationship with the offender.¹³²

(a) Māori and Parole¹³³

Statistics indicate that the current parole system is not working for Māori.¹³⁴ Under the Parole Act 2002, there is no clear direction within the policies of the NZPB as to how obligations relating to the Treaty of Waitangi¹³⁵ or cultural considerations might impact on the decision-making process. And there is nothing within the raft policy documents¹³⁶ to determine how this is to be achieved and, if it has not been achieved, whether any redress may be available. By default it is assumed that this obligation lies with the decision-maker. There is no specific allocation of Māori representation at the decision-making stage, despite the assumption that up to half of the offenders who appear before the NZPB are Māori. This raises procedural and substantive concerns for Māori about how they are treated in the decision-making processes of the NZPB. In comparison, other jurisdictions, such as Canada, have established a specialised indigenous forum to act as an advisory group on cultural issues that come before the National Parole Board.

Popular disenchantment with the NZPB has led to calls for the overhaul of the New Zealand parole system.¹³⁷ The current framework policy of the NZPB acknowledges that the Treaty of Waitangi gives rise to certain rights and obligations.¹³⁸ It indicates that the NZPB "will always operate in a way that is sensitive to whānau, hapū, and iwi

¹³² For instance, the success of drug treatment courts has been attributed to this one on one relationship.

¹³³ I am grateful for the academic guidance of Judge David Carruthers whilst writing this section and also express my appreciation for the opportunity to observe a Parole Board hearing chaired by Judge Paul.

¹³⁴ See Bronwyn Morrison, Natalie Soboleva and Jin Chong *Conviction and Sentencing Offenders in New Zealand: 1997 – 2006* (Ministry of Justice, 2008) at 120.

¹³⁵ See discussion in Mason Durie *Nga Tai Matatu – Tides of Maori Endurance* (Oxford University Press, Australia, 2005) at 146 for discussion on increasing government consciousness of Treaty obligations.

¹³⁶ See NZPB policies available <http://www.paroleboard.govt.nz/nzpb-policies.html>.

¹³⁷ "Justice groups urge government to tighten parole laws" Radio New Zealand (4 November 2010) <www.radionz.co.nz>.

¹³⁸ NZPB "Framework Policy Covering the Development of the Board's Policies: Policy 1, Introduction" (2009) <www.paroleboard.govt.nz>.

as well as Māori communities”.¹³⁹ The framework policy further states that the NZPB will ensure that Māori cultural concepts, values and practices are respected and safeguarded.¹⁴⁰

The Parole Act 2002 requires the NZPB to develop policies on how it will discharge its functions.¹⁴¹ To achieve this purpose, the NZPB regularly reviews its policies. As part of an effort to improve the decision-making process, the NZPB engaged Professor Jim Ogloff to develop a straightforward, comprehensive and user-friendly methodology for structured decision-making on New Zealand conditions and reflecting New Zealand concerns.¹⁴² It is unclear whether or not this methodology will provide for cultural considerations on decision-making. It would be helpful if part of this review recognised the need to provide for Māori membership on the NZPB.¹⁴³

Māori are not only disproportionately represented as offenders in the criminal justice system but are also disproportionately represented in the forensic mental health facilities. Three out of every five Māori will suffer from a mental disorder during their lifetime (59.9 per cent).¹⁴⁴ Taken separately these are concerning facts. Taken together these issues provide disastrous results. It is timely to now consider criminality and mental health to discern whether the current system affords a meaningful recognition of tikanga Māori.

¹³⁹ Above.

¹⁴⁰ Above.

¹⁴¹ Parole Act 2002, s 109.

¹⁴² Professor Jim Ogloff; Director, Centre for Forensic Behavioural Science, Monash University and Director of Psychological Services. This review was commissioned by Judge David Carruthers, the then Chair of the NZPB, in response to public concern on the release of high-risk offenders. Specifically Graeme Burton who murdered two people in two separate incidents. The second murder occurred 6 months after he was released on parole. See J Johnson and J Ogloff ‘Review of NZPB decision given on 28 June 2006 to release Graeme William Burton on Parole’ (5 March 2007) <www.paroleboard.govt.nz>

¹⁴³ See Parole Act 2002 s 111 that provides for the Membership of the NZPB.

¹⁴⁴ J Baxter *Māori Mental Health Needs Profile. Summary. A Review of the Evidence*. (Palmerston North: Te Rau Matatini, 2008), 6 <www.matatini.co.nz>

D. Mental Health¹⁴⁵

The Mental Health (Compulsory Assessment and Treatment) Act 1992 defines a *mental disorder*, in relation to any person, as:¹⁴⁶

... an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—

- (a) poses a serious danger to the health or safety of that person or of others; or
- (b) seriously diminishes the capacity of that person to take care of himself or herself

...

In New Zealand there are two legislative routes to address the psychological needs of offenders. The first is through generic mental health legislation, permitting the compulsory detention of a person for assessment and treatment of a mental disorder that has manifested, or is at risk of manifesting dangerous behaviour.¹⁴⁷ In such case the focus is on the protection of the individual.

The second route is through criminal justice legislation for people with a mental disorder who have been charged with a criminal offence.¹⁴⁸ For most mentally impaired offenders, the process is one of arrest and initial court appearance in the District Court (criminal jurisdiction). Specialist services¹⁴⁹ are then triggered to assess the offenders' mental health status and, if required, make recommendations for treatment or diversion to either a mental health or a compulsory care facility. A well-integrated system of forensic psychiatric services is available to offenders entering the criminal justice system. Despite the availability of these services, offenders are often required to be processed through the criminal justice system before receiving any

¹⁴⁵ Parts of this section are taken from a paper already published Valmaine Toki "Therapeutic Jurisprudence and Mental Health Courts for Māori" (2010) 33 International Journal of Law and Psychiatry at 440 – 447.

¹⁴⁶ Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.

¹⁴⁷ Warren Brookbanks "Mentally Disordered Offenders" in Julia Tolmie & Warren Brookbanks (eds) Criminal Justice in New Zealand (Lexis Nexis, Wellington, 2007) at 419; Mental Health (Compulsory Assessment and Treatment) Act 1992.

¹⁴⁸ Criminal Procedure (Mentally Impaired Persons) Act 2003.

¹⁴⁹ See Brian McKenna and Kevin Seaton "Liaison Services to the Courts" in Warren Brookbanks and Sandy Simpson (eds) *Psychiatry and the Law* (Lexis Nexis, Wellington, 2005) at 447–448.

mental health assessment.¹⁵⁰ Accordingly, the stress of arrest, remand, the impending court appearance and possible sentencing can all lead to a further deterioration in their mental state.¹⁵¹ There is no dedicated indigenous fora to process Māori with mental disorders.

Although a defendant can be redirected from the criminal justice system through an insanity plea or unfitness to stand trial, the court will still determine whether insanity has been established (on the balance of probabilities) before any orders can be made.¹⁵² A finding of unfitness to stand trial will result in diversion from the trial process. However, judges lack sentencing options to ensure that mentally impaired offenders will receive adequate services.¹⁵³

In New Zealand the Family Court is responsible for the administration of the Mental Health (Compulsory Assessment and Treatment) Act 1992.¹⁵⁴ Although the Family Court has no criminal jurisdiction, it can oversee offenders who have entered the system of compulsory care through the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.¹⁵⁵

In New Zealand Mental Health Tribunals review compulsory treatment orders as well as special and restricted patient orders issued by the Family Court. In certain circumstances these tribunals may discharge offenders who they no longer consider to be mentally ill.¹⁵⁶ These tribunals are subject to the procedural provisions under Schedule One of the Mental Health (Compulsory Assessment and Treatment) Act

¹⁵⁰ McKenna and Seaton, above n 149, at 447-448.

¹⁵¹ See for discussion Luke Birmingham “The Mental Health of Prisoners’ (2003) 9(3) *Advances in Psychiatric Treatment* 191.

¹⁵² Crimes Act 1961, s 23. See also s 20 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, for the new procedure on determining insanity. This is the default for most insanity cases.

¹⁵³ McKenna and Seaton, above n 149.

¹⁵⁴ Section 17 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 provides for “*Applications to be heard and determined wherever practicable by Family Court Judge*”.

¹⁵⁵ Section 74 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 provides for “*Review by Family Court*” and section 76 provides that the “*Family Court may make recommendations*”.

¹⁵⁶ See *Re IM* [2002] NZFLR 846, where the Mental Health Review Tribunal reported on whether the applicant was fit to be released from care and considered the provisions under ss 4, 66, and 77 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care) Bill.

1992.¹⁵⁷ Mental Health Tribunals can discharge civilly committed patients directly if they are no longer mentally disordered but only have the power to make non-binding recommendations in respect of special and restricted patients and their decisions are subject to judicial review.¹⁵⁸

There is no specific reference to the Treaty within this raft of legislation, nor is there any recognition of tikanga Māori. In any event judicial deference is given to cultural identity, personal beliefs¹⁵⁹ and cultural assessment.¹⁶⁰

The policy of de-institutionalisation in New Zealand has led to higher numbers of people with mental illness living in the community.¹⁶¹ As three out of every five Māori will suffer from a mental disorder during their lifetime (59.9 per cent),¹⁶² it is thus no surprise that the policy of deinstitutionalisation may have contributed to the fact that Māori are over-represented among the homeless.¹⁶³

Many refuse to take their medication, and if left unchecked their mental illness can lead to inappropriate behaviour, such as petty theft or urinating in public.¹⁶⁴ The justice system treats such behaviour as ‘criminal’. Social commentators have referred

¹⁵⁷ This includes the power to call for reports, witnesses, evidence, examination of the patient, and attendance of the patient and other persons. The hearings are not open to the public.

¹⁵⁸ *Waitemata Health v Attorney General & Ors* CA [2001] NZFLR 1122. The Court of Appeal reviewed a decision of the Tribunal under the Mental Health (Compulsory Assessment and Treatment) Act 1992 that the patient was no longer mentally disordered and was fit to be released from compulsory treatment.

¹⁵⁹ See Section 5 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, “*Powers to be exercised with proper respect for cultural identity and personal beliefs*”.

¹⁶⁰ See Section 23 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; “*Cultural assessment*” provides that *the coordinator must try to obtain the views of any suitable Māori person or Māori organization concerned with, or interested in, the care of persons who have an intellectual disability.*

¹⁶¹ McKenna and Seaton, above n 149, at 447–448.

¹⁶² J Baxter above n 144.

¹⁶³ Steve Richards *Homeless in Aotearoa: Issues and Recommendations Report for Regional Public Health* (Ministry of Health, Wellington, 2009) <[www. http://nzceh.org.nz/](http://nzceh.org.nz/)>

¹⁶⁴ Bruce Winick and David Wexler (eds) *Judging Law in a Therapeutic Key – Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, North Carolina, 2003) at 59.

to this process of mentally ill offenders re-entering the criminal justice system post de-institutionalisation as “the criminalization of the mentally ill”.¹⁶⁵

The extreme stress of remand, court appearance and possible sentencing can lead to further deterioration among mentally ill offenders. Imprisonment will often be inappropriate for those individuals whose problems stem from their mental illness, as opposed to their criminality, unless the mental illness is treated whilst imprisoned.¹⁶⁶

Psychiatric morbidity¹⁶⁷ within New Zealand prisons reveals a disproportionately high incidence of substance abuse and psychotic illness when compared with the community as a whole.¹⁶⁸ Such prisoners have a greater need for specialist forensic services. This high incidence of mental illness is not confined to the prison population, but as might be expected, extends to parolees and those serving non-custodial sentences.¹⁶⁹

The National Study indicated the need for a:¹⁷⁰

... level of service provision that is quite beyond the capacity of current forensic psychiatric services ... *The high rates of common disorders argue for the use of screening techniques* [emphasis added].

¹⁶⁵ Robert Miller “The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons” (1997) 74 *Denver University Law Review* 4 at 1169–1214. Although see Eric B. Elbogen, PhD; Sally C. Johnson ‘The Intricate Link Between Violence and Mental Disorder Results From the National Epidemiologic Survey on Alcohol and Related Conditions’ *JAMA Psychiatry Feb 2009 Vol 66 No 2*, where they state that recent ‘findings challenge perceptions that mental illness is a leading cause of violence in the general population. Still, people with mental illness did report violence more often, largely because they showed other factors associated with violence.’

¹⁶⁶ See Auditor General’s report ‘Mental Health services for prisoners’ (2008) that found that the most seriously mentally ill prisoners received adequate and prompt treatment. However, there was a risk that prisoners with mental health needs that are not picked up through initial screening or those who develop mental illness during imprisonment will not be identified and get access to treatment. Often for these people imprisonment is inappropriate < <http://www.oag.govt.nz/>>

¹⁶⁷ Psychiatric morbidity or psychiatric illness commonly refers to the occurrence of both physical and psychological deterioration resulting from a mental or psychological condition.

¹⁶⁸ Alexander Simpson and others *The National Study of Psychiatric Morbidity in New Zealand Prisons: An Investigation of the Prevalence of Psychiatric Disorders among New Zealand Inmates* (Department of Corrections, Wellington, 1999) <www.corrections.govt.nz>.

¹⁶⁹ Ministry of Health *Services for People with Mental Illness in the Justice System: Framework for Forensic Mental Health Services* (2001) at 6 <www.moh.govt.nz>.

¹⁷⁰ Simpson and others above n 168, at Executive Summary (13 April 2007) <www.corrections.govt.nz>.

This opens the door for the introduction of an alternative intervention approach, such as a Mental Health Court. As Simpson has noted:¹⁷¹

One way of limiting the entry of mentally ill into the prison system is to establish mental health courts [emphasis added], which link the offender with critically needed medical treatment, apply appropriate release conditions and use the threat of imprisonment as an incentive for compliance.

The onus is upon the criminal justice system and the mental health system to investigate options that allow for the recognition of, and early intervention for the mentally impaired prior to entering the criminal justice system. The lack of successful options of this kind has placed a burden on the criminal justice system,¹⁷² requiring innovative responses. According to Professor Warren Brookbanks:¹⁷³

It is clear ... that the New Zealand correctional system has a significant role in the management of offenders with varying degrees of mental impairment, and that this group makes heavy demands on the use of forensic patient services. The immediate challenge for New Zealand health and justice planners is to explore options which allow for the diversion of mentally impaired offenders from the correctional system. In my view, *mental health courts offer one such option* [emphasis added].

(a) Māori and Mental Health

Three out of every five Māori will suffer from a mental disorder during their lifetime (59.9 per cent).¹⁷⁴ For this reason Māori are disproportionately represented within forensic mental health facilities. Within the health system,¹⁷⁵ recognition of the Treaty is identified with allowing Māori to participate in decision-making and in the delivery

¹⁷¹ Sandy Simpson “A Strategy that Works – Mental Health Courts” *Recap Newsletter: Re Thinking Crime and Punishment in New Zealand* (2008) Issue 35 at <www.rethinking.org.nz>.

¹⁷² McKenna and Seaton, above n 149 at 448.

¹⁷³ Warren Brookbanks “Making the Case for a Mental Health Court in New Zealand” (Paper present to 3rd International Conference on Therapeutic Jurisprudence, 7 – 9 June 2006, Perth, Western Australia).

¹⁷⁴ J Baxter above n 144.

¹⁷⁵ Section 4 of the New Zealand Public Health and Disability Act 2000 provides that “*in order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, Part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services*”.

of health services. In New Zealand District Health Boards must appoint two members who are Māori.¹⁷⁶ The Minister will appoint two Māori members if they have not been elected. Despite this provision, however, there is no clear direction within the policy documents as to how effective this contribution is, and if it has not been effectively achieved, whether any redress may be available.

There is much evidence to suggest that the current mental health framework is not delivering for Māori with mental disorders.¹⁷⁷ According to Dr. R. Tapsell:¹⁷⁸

If some of the disparities currently apparent within our mental health system are to be reversed we must look for *alternative models* [emphasis added] that provide the highest quality of psychiatric care and rehabilitation, *yet reflect the Māori world view...* [emphasis added].

In order to facilitate improvements in Māori health, and especially in mental health, a number of principles have been identified. These include the principles of the Treaty.

It is clear that the New Zealand criminal justice system plays a significant role in the management of Māori offenders with a relatively high prevalence of mental illness. The onus is upon the criminal justice system and the health system to explore options that allow for the early recognition and intervention for the mentally impaired before they enter the criminal justice system. This has placed a burden on the criminal justice system requiring an innovative response.¹⁷⁹

Māori are disproportionately represented in the criminal justice system. Māori are also disproportionately represented in the forensic mental health facilities. Separately, these are concerning facts, but together these issues provide disastrous results. Despite the incorporation of decision-making for Māori within health policies, these facts clearly indicate that another approach is required. Rees Tapsell stated in 2007:¹⁸⁰

¹⁷⁶ See New Zealand Public Health and Disability Act 2000, s 29(4)(b) which provides that ‘In making appointments to a board, the Minister must endeavour to ensure that ... (b) in any event, there are at least 2 Maori members of the board.’

¹⁷⁷ Rees Tapsell “The Treatment and Rehabilitation of Māori” in W Brookbanks and S Simpson (eds) *Psychiatry and the Law* (Lexis Nexis, Wellington, 2007) at 419.

¹⁷⁸ At 419.

¹⁷⁹ McKenna and Seaton, above n 149, at 448-499.

¹⁸⁰ Tapsell, above n 177, at 419.

... the scientific evidence supporting the effectiveness of a specific model for forensic rehabilitation which reflects *the Māori World View does not yet exist* [emphasis added].

Further, Peter Jansen has commented:¹⁸¹

In many ways, the essential aspects of such a model may have universal appeal ... as has been said many times before; *if we can get it right for Māori we will get it right for everyone* [emphasis added].

In his recent New Zealand Country Report, Professor James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, recommended:¹⁸²

In consultation with Māori leaders, the Government should redouble efforts to address the problem of high rates of incarceration among Māori. Specific attention should be given to the disproportionate negative impacts on Māori of any criminal justice initiatives that extend incarceration periods, reduce opportunities for probation or parole, use social status as an aggravating factor in sentencing, or otherwise increase the likelihood of incarceration.

These calls are also echoed by many commentators, including Kim Workman,¹⁸³ who has urged for the establishment of an independent research institute to examine the issues of Māori within the criminal justice system. Workman, of Ngāti Kahungunu and Rangitāne descent, has also highlighted the important role the whānau as a collective might play in reducing the disproportionate criminal offending rates for Māori. In a recent address, he noted:¹⁸⁴

¹⁸¹ Peter Jansen MD Pacific Region Indigenous Doctors Congress, Cairns, 2004, as cited by Rees Tapsell, above 177.

¹⁸² James Anaya *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Māori People in New Zealand* (2011) (A/HRC/18/XX/Add.Y) at 83.

¹⁸³ Kim Workman was the Head of Prison Services between 1989 – 1993, a retired public servant and currently a senior associate of the Institute of Policy Studies at the Victoria University, Wellington.

¹⁸⁴ See Kim Workman "Redemption Denied: Aspects of Māori Over-Representation in the Criminal Justice System" (Paper presented to the Justice in the Round Conference, University of Waikato, Hamilton, 18 – 20 April 2011) at 14 < www.rethinking.org.nz >.

Over many years, the government has introduced policies which have undermined and destroyed whānau as a social construct. It is only in recent times, that there has been official recognition that whānau continues to be a key cultural institution for Māori and is therefore a key (and potentially highly effective) site of intervention and/or development. The recent emphasis on whānau in social policy acknowledges that changes in the antisocial behaviour of individual Māori can be brought about by focusing on the collective of whānau. It is an area of research waiting to be fully explored.

A recent announcement by the Minister for Māori Affairs calls for a review of the criminal justice system stating:¹⁸⁵

For most Māori, justice in New Zealand is not positive; it is a system that is unfair, biased and prejudiced ... the justice system, including the police, courts and corrections, systematically discriminates against Māori.

The current relationship between Māori and the criminal justice system is undeniably problematic on a number of different levels, resulting in and, confirming that Maori are disproportionately represented across all stages of the criminal justice system. The examination of two areas, parole and mental health highlight these issues. To provide further context to this discourse it is timely to unpack who exactly Māori are and explore the concept of tikanga Māori, in order to attempt to understand whether a tikanga approach to crime will assist to ameliorate the disproportionate offending rates for Māori.

¹⁸⁵ See Hansard Sitting date: 04 October 2011. Volume: 676; Page: 21637.

ŪPOKO TUARUA

CHAPTER II

MAORI AND TIKANGA

A. *Who are Māori?*

Māori are the indigenous peoples of Aotearoa, New Zealand.¹⁸⁶ The term Māori, as applied to people, was initially coined by Captain James Cook, an English navigator who sighted New Zealand on 6 October 1769. According to Dame Anne Salmond:¹⁸⁷

... In 1910 ... Te Waaka Te Ranui of Ruatoki wrote a letter to the editor of Te Pipwharauroa, a Māori language newspaper asking “He aha tatou i kiia ai he Māori? Why are we called Māori?” In his letter, Te Waaka offered some answers ... when Captain Cook arrived at Tuuranga-nui in 1769, he was almost out of potatoes, so he asked the local people if they had any. They answered that they had a similar root, and when asked for its name they said it was ‘Māori’ (ordinary). Cook turned to his companions and said “*These people are Maori*” [emphasis added] ... according to Nikora the term Māori was a description for ancient things, ordinary things, things from inland and for local people.

Notwithstanding this unconventional beginning, Māori is now the commonplace term for the tangata whenua, or original peoples, of Aotearoa, New Zealand.

The legal definition of Māori has varied over time.¹⁸⁸ Prior to 1947 the legal term was usually ‘native’. Early electoral provisions determined that to be ‘Māori’ and listed on the Māori roll that person must have more than 50 per cent Māori lineage or blood quantum.¹⁸⁹ If the person had exactly 50 per cent Māori blood quantum, then they could choose to enlist on the Māori or European roll. Prior to 1998 Statistics New Zealand provided the following definition:¹⁹⁰

A person is said to have Māori ancestry if they have any Māori ancestors, no matter how distant.

¹⁸⁶ See Ian Hugh Kawharu *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, USA, 1989) for discussion. See also Manuka Henare “Nga Tikanga me nga Ritenga o te ao Māori: Standards and Foundations of Maori Society” (1988) Vol III Part 1 Royal Commission on Social Policy: Future Directions 3 at 36-69.

¹⁸⁷ Anne Salmond *Between Worlds: Early Exchanges between Māori and Europeans, 1773 – 1815* (Penguin Books, Auckland, 1997) at 21.

¹⁸⁸ For example, the term Māori includes Polynesians, Australasians and Melanesians under s 2 of the Juries Act 1908.

¹⁸⁹ See section 148 Electoral Act 1893 Part V “Māori” means an aboriginal inhabitant of New Zealand, and includes half-castes and their descendants by Natives.”

¹⁹⁰ See Statistics NZ *Maori Descent* at <www.stats.govt.nz>.

To be consistent with the 1993 Electoral Act and the 1974 Māori Affairs Act in 1998, Statistics New Zealand changed this definition to:¹⁹¹

‘Māori’ means a person of the Māori race of New Zealand; and includes any descendant of such a person.

Although this latest definition of Māori is more reflective of what it means to be Māori, for some Māori, identification by iwi was more appropriate. According to John Rangihau:¹⁹²

My being Māori is absolutely dependent on my history as a Tuhoe person as against being a Māori person ... I have a faint suspicion that Māoritanga is a term coined by the Pākehā to bring the tribes together. Because if you cannot divide and rule, then for tribal people all you can do is unite them and rule.

It is acknowledged that in comparative Indigenous jurisdictions, such as First Nations in Canada,¹⁹³ blood quantum will dictate federal recognition as an indigenous person and also membership in a tribal nation.¹⁹⁴ This will allow that person to access certain benefits and resources. Any inter-marriage with a non-indigenous person or a person from a different tribe will reduce that blood quantum, effectively jeopardising the ability to access indigenous or Indian status.¹⁹⁵

In New Zealand blood quantum is not a contentious issue; it is within the purview of that person as to whether or not they identify as Māori.¹⁹⁶ For example, despite the

¹⁹¹ See the Māori Affairs Amendment Act 1974 (No 73) which stated “that the present restriction in the legal application of the term ‘Māori’ to persons of more than a fixed degree of Māori blood should be relaxed”. See also the Electoral Act 1993 where the term ‘Māori’ is defined, in section 3, as a person of the Māori race of New Zealand; and includes any descendant of such a person.

¹⁹² John Rangihau “Being Māori” in Michael King (ed) *Te Ao Hurihuri Aspects of Māoritanga* (Reed Books, Auckland, 1992) at 190.

¹⁹³ The term First Nations refers to various indigenous groups in Canada that are neither Inuit nor Metis.

¹⁹⁴ Paul Spuhan “Legal History of Blood Quantum in Federal Indian Law to 1935” (2006) 51 S.D. L. Rev. 1. See also Hilary N Weaver “Indigenous Identity: What Is It and Who Really Has It?” (2001) 25(2) *The American Indian Quarterly* at 240-255.

¹⁹⁵ Spuhan, above n 194.

¹⁹⁶ In the case of scholarship applications, however, there is usually a requirement to establish your connection with your culture e.g. whakapapa (family tree) and marae. Further see an explanation of Harrison J’s comments in *R v Mika* [2013] NZCA 648 where it was noted “Because he has some Māori blood - and we’re not sure how much - he’s somehow less blameworthy or culpable. That’s an extraordinary proposition” in David Clarkson “Mob member wants short sentence for being Māori” *Stuff.co.nz* (online ed, Auckland, 20 November 2013). See also Tahu Kukutai ‘The Problem of

option for Māori to choose which roll (the Māori Electoral Roll or the General Electoral Roll) to be enrolled on, many Māori elect not to change from the General Electoral Roll.¹⁹⁷ Although factors such as voter apathy contribute to this, arguably this reflects the unwillingness of some Māori to self-identify as Māori and perhaps a reluctance to participate in an indigenous court if such a court was established.

B. *What is Tikanga Māori?*

The Māori legal system is sourced from Te Ao Māori or the Māori World,¹⁹⁸ as opposed to the Māori Worldview, which can imply observing from a distance rather than a turning of the mind to the world in which Māori lived.¹⁹⁹ The Māori World is a complex three-dimensional philosophy that communicates concepts from the ‘inside’, whereas a view necessitates observations from outside.²⁰⁰

Cosmology and the creation accounts are intrinsic to Te Ao Māori. Cosmology establishes the relationships or whakapapa between people, the environment and the spiritual world.²⁰¹ The dynamic between these elements underpins a mechanism similar to that of a social constitution.²⁰²

Tikanga Māori is a contextual concept.²⁰³ The commonly accepted meaning is “straight, direct, tied in with the moral notions connotations of justice and fairness including notions of correct and right”.²⁰⁴ This can, however, vary according to the people involved and in relation to particular circumstances.²⁰⁵

defining an ethnic group for public policy: Who is Māori and why does it matter?’ (2004) Social Policy Journal 23, December 2004.

¹⁹⁷ Section 76 of the Electoral Act 1993 notes that ‘a Māori ... shall have the option of being registered either as an elector of a Māori electoral district or as an elector of a General electoral district’.

¹⁹⁸ Although Te Ao Māori is often referred to as the Māori worldview, Te Ao Māori more correctly is the Māori World.

¹⁹⁹ See M Marsden *God, Man and Universe: A Māori view* in Michael King (ed) *Te Ao Hurihuri Aspects of māoritanga* (Reed Books, Auckland, 1992) 117 - 136.

²⁰⁰ Marsden above.

²⁰¹ See also Wai 1040, above n 24, at 20 – 22.

²⁰² See also Wai 1040, above n 24, at 22 – 25.

²⁰³ See New Zealand Law Commission above n 33. See also H W Williams *A Dictionary of the Māori Language* (7th ed, Government Printer, Wellington, 1971).

²⁰⁴ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law, compiled for Te Matahauariki Institute* (Victoria University Press, Wellington, 2013) at 429.

²⁰⁵ See also submission from Ngati Korokoro in Wai 1040, above n 24, at 495, that stated ‘...many hapu lived side by side practising different tikanga very successfully’.

Correct practices that have been derived from the accounts of how the cosmos emerged are known as ‘ritenga’.²⁰⁶ Whereas tikanga is a system prescribing what is considered normal and right, it is defined and influenced by contextual factors inferring flexibility; ritenga refers to those practices that are similar or equivalent to those followed by ancestors,²⁰⁷ providing a ‘standard’ or ‘precedent’ in the same way as a legal precedent.²⁰⁸ The use and implementation of this standard or ‘precedent’ gives effect to kaupapa, ground rules²⁰⁹ or ‘body of principles that create the law’.²¹⁰

Ritenga, together with kaupapa, provides a framework by which further concepts such as mana, tapu and mauri are given effect. Mana is defined as:²¹¹

A key philosophical concept combining notions of psychic and ritual force and vitality, recognized authority, influence and prestige, thus also power and the ability to control people and events.

However, within the Māori world, mana is simply effective power and authority sourced from the presence of ancestors in a person, taonga, event or place.²¹²

Tapu is:²¹³

... a key concept in Polynesian philosophy ... a term ... used to indicate states of restriction and prohibition whose violation will (unless mitigated by appropriate karakia and ceremonies) automatically result in retribution, often including the death of the violator and others involved, directly or indirectly. Its specific meanings include “sacred, under ritual restriction, prohibited”.

²⁰⁶ Consistent with this view, section 9 of the Marine and Coastal Area (Takutai Moana) Act 2011 defines tikanga as “Māori customary values and practice”. Satisfying the definition of tikanga is pivotal to the success of any claim of customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011. See also Wai 1040, above n 24, at 25 and 47.

²⁰⁷ See also Wai 1040, above n 24, at 25 that notes ‘An example of ritenga, Aldridge said, was the requirement for people who went fishing to return the first fish to Tangaroa’.

²⁰⁸ See Mead, above n 35, at 12.

²⁰⁹ Kaupapa derives from kau’ which means to appear for the first time or be disclosed, while papa is a reference to the Earth or Papatuanuku, So together kaupapa means ‘ground rules’ or ‘first principles’. See Māori Marsden, above n 1, at 173.

²¹⁰ Wai 1040, above n 24, at 25.

²¹¹ Benton and others, above n 204. See also Marsden, above n 1, at 1.

²¹² Marsden above n 1, at 118.

²¹³ Benton and others above n 204, at 404. See also Wai 1040, above n 24, at 23 – 24.

But within the Māori world, tapu simply refers to the presence of ancestors, and the resulting restrictions that their presence places on people, places, taonga or events.²¹⁴ Mauri is:²¹⁵

... a central notion in Māori philosophy ... in its abstract sense [denotes] the essence which gives a thing its specific natural character ... The meaning of the word is difficult to grasp because it encapsulates two related but distinct ideas: the life principle or essential quality of a being or entity, and a physical object in which this essence has been located. Williams defines the abstract sense term first as “life principle”... There is certainly no single English word to express this concept.

The principle of whakapapa is fundamental to Te Ao Māori. It is a complex network of reality linking animate and inanimate objects.²¹⁶ As a relational construct, it provides an explanation of how the universe emerged and how the convergence of complementary, or balancing pairs created new forms of life.²¹⁷

Whakapapa has always been central to the identity of an individual. The individual forms part of the collective and, in turn, is linked to others by whakapapa. These flexible and dynamic collectives, or traditional organisational structures are whānau, hapū and iwi.

So through a ‘legal’ lens, tikanga is the ‘legal’ structure that gives effect to basic principles or ground rules.²¹⁸ And concepts such as mana and tapu assist in the regulation of the relationships or whakapapa between people, the environment and the spiritual world. The aim of tikanga Māori is to achieve balance.²¹⁹ The regulators — tapu and mana — assist in the restoring of any imbalance and are relevant for any dispute resolution process.

²¹⁴ Marsden above n 1, at 119.

²¹⁵ Benton and others, above n 204, at 239.

²¹⁶ In my grandfather’s’ Hohaia Toki Pangari’ writings, he traced this ‘whakapapa’ of inanimate and animate objects from Te Kore to contemporary times. See also Wai 1040, above n 24, at 22 – 25.

²¹⁷ Marsden above n 1, at 117 - 137.

²¹⁸ Marsden, above n 1.

²¹⁹ Wai 1040, above n 24, at 25.

C. Tikanga Māori and Disputes

Tikanga is central to the Māori World, preserving balance (the aim of tikanga) and a positive dynamic. When conduct that is *hee* (a mistake or error) occurs, it destabilises the balance in the relational network constituting a *hara* that needs to be rectified.²²⁰ This imbalance is the central issue in tikanga Māori.

Disputes between people are a manifestation of *hee*, resulting in, for example, an assault, rape or killing. All of these are a *hara* (crime or offence), breaching a personal tapu. This breach results in an imbalance in both the individual and in the community. Eloping, cheating on one's spouse and insults to one's reputation are insults to one's personal mana and a *hara*, also resulting in an imbalance.

Disputes between groups are also a manifestation of 'hee'; for example, when one tribe takes resources from another area without consent. This involves a breach of, and challenge to the collective mana. Historically, a trespass was an affront to the group's 'mana whenua'.²²¹ These collective disputes may be criminally, politically or territorially based.

For Māori, through a tikanga lens, the intention to offend is not important. Rather, it is the action of breaching one's personal honour or authority that is considered relevant. It is this breach of personal or collective mana that forms the basis of disputes. Historically, the collective nature of disputes could result in inter-tribal fighting,²²² and matters would continue to deteriorate until a *rangatira* (leader) intervened. The Wai 1040 Report notes that:²²³

While hapū could cooperate, breaches of tapu and threats to mana (including challenges over territory or resources) could also lead them to conflict. Forceful responses were seen as legitimate and indeed essential means of restoring mana, reflecting universally accepted tikanga. Failure to respond would itself be degrading.

²²⁰ See also Wai 1040, above n 24, at 31.

²²¹ "Mana whenua" defined as trusteeship of land – a phrase that 'links where the political responsibilities to land related authorities' – see Benton and others, above n 204, at 178.

²²² From my history on Aotea (Great Barrier Island) - The taking of a pet pig from a rangatira's daughter led to an inter-hapū war.

²²³ Wai 1040, above n 24, at 33.

A major criticism of the Pākehā criminal justice system is that it does not recognise collective structures such as ‘iwi’ or the relational construct that requires to be ‘rebalanced’.²²⁴ The Child Young Persons and their Families Act 1989 does, however, make a provision for a family group conference to acknowledge the whānau structure.²²⁵

The current criminal justice system, instead, provides a forum in which a series of individual rights become enforceable against other individuals, thereby making strangers of close relatives. To ameliorate this concern, it has been suggested that when Māori are both the offender and victim, a Family Group Conference be convened by Māori to provide more control to Māori, rather than by a coordinator who has no relationship or respect from the parties.²²⁶ However, although Family Group Conferences facilitate the participation of Māori, their control is limited.

Some Māori today, who are not familiar with marae justice, prefer to only use the Pākehā legal system and, for instance, will not opt for a hearing on a marae that the Youth Justice system offers.²²⁷ The various reasons for this include anonymity, privacy and an unwillingness to take responsibility for their actions. In addition, the effects of colonisation²²⁸ and urbanisation on past generations have effectively alienated many urban Māori from tikanga.²²⁹

It is acknowledged that issues of parental neglect, unemployment, poverty, homelessness, and drug and alcohol misuse and abuse are not confined to indigenous

²²⁴ See Kim Workman, Director of Rethinking Crime and Punishment, New Zealand “Restorative Justice: Victims, Violators and Community- The Path to Acceptance” (International Conference and Workshops of Restorative Justice, Human Rights and Peace Education, Chang Jung Christian University, Taiwan, Taiwan, 6th March 2012) at 9 <www.restorativejustice.org>.

²²⁵ Section 20 CYPF Act 1989.

²²⁶ Gale Burford and Joe Hudson *Family Group Conferencing: New Directions in Community-Centered Child and Family Practice* (Transaction Publishers, New York, 2000).

²²⁷ For some urban Māori who do not desire to affiliate to an “iwi” group, it is generally not unusual that they find a marae forum alien and prefer to use the general court system.

²²⁸ For comments on the effect of colonisation see Ani Mikaere “Are We All New Zealanders Now? A Māori Response to the Pākehā Quest for Indigeneity” (Bruce Jessop Lecture, 2004) <www.d.yimg.com>.

²²⁹ The onus is upon the individual to choose to learn their tikanga as opposed to tikanga being a part of everyday life. It is acknowledged that media, including Māori TV and Waatea Radio, and kura kaupapa assist to provide opportunities to reconnect with tikanga; however, it is not the norm but a conscious decision must be made to reconnect. For example, learning te reo is only successful if it is part of everyday life.

people. Rather, these issues pervade all sectors of society. However, in light of the disproportionate social statistics, on these factors, experienced by indigenous peoples generally, this thesis explores an indigenous court as an appropriate vehicle to address these issues for indigenous peoples. As an indigenous court would be underpinned by indigenous concepts, it is suggested that an indigenous court, or similar adjudicative body could potentially be available to non-indigenous people with a provision similar to the Rangatahi Courts²³⁰.

(a) Facilitator

The facilitation of any type of dispute between Māori parties is usually conducted by a rangatira,²³¹ kuia or a kaumātua as an advocate.²³² For most disputes the responsibility lies with the group as a collective.²³³ Most facilitators or rangatira have been born into the role²³⁴ and are trained for this position from an early age. They have acted on behalf of their people in public forums and entered into binding agreements with other hapū. Although the leadership of some rangatira has gone unchallenged, those rangatira that are subjected to tests of character usually emerge with the support and respect of their hapū.²³⁵

The concept of rangatiratanga is complex and interconnected with related concepts, such as awahina (assistance, care, support). For instance, when Sir George Grey retold

²³⁰ The Rangatahi Courts or Te Kooti Rangatahi are youth court proceedings that held on a marae. See Chapter IV ‘Maori and the Current Criminal Justice Initiatives’ for further discussion.

²³¹ “Rangatira” is defined as chief (male or female), noble and a ‘weaver of people’. See Benton and others, above n 204, at 325 and Wai 1040, above n 24, at 31 respectively.

²³² It is acknowledged that s 62(1)(b) of the Te Ture Whenua Māori Land Act 1993 – “*Additional members with knowledge and experience in tikanga Māori*” provides an opportunity for “1 or 2 other members (not being Judges of the Māori Land Court) to be appointed by the Chief Judge”. See also Wai 1040, above n 24, at 30, that stated ‘Within hapū, political leadership was provided by rangatira ... They also mediated in disputes among their people, built consensus in group decision-making, and allocated land and other resources for people to live on within their rohe...’

²³³ Responsibility for the muru and dispute.

²³⁴ It is acknowledged that instances can arise where a rangatira can be appointed by their people for example when a hapū loses a rangatira.

²³⁵ This is commonplace particularly in view of Treaty settlements and the requirement for the rights of iwi members to be efficiently and effectively represented.

the story of Māui,²³⁶ he stated that the virtue of awhina is upheld as the distinctive feature of rangatiratanga.²³⁷

In demonstrating mana and the need to strengthen the cohesiveness of the group, the rangatira demonstrated three principles of whanaungatanga (relatedness). The first was aroha (love), an emotional response instigated by kindness to others. The second was atawhai (foster), the obligation to protect the well-being of their people. The third was manaaki (blessing), the ability to look after those temporarily in your care. A parallel exists here between the rangatira and a judge in a therapeutic jurisprudence forum.²³⁸

In the Pākehā criminal justice system, however, principles such as aroha and atawhai have been replaced by rules of statutory law. It is acknowledged that actors within the criminal justice system, including social workers and probation officers,²³⁹ may exhibit aroha and atawhai. It is also acknowledged that a judge has a certain amount of discretion that could be couched in terms of aroha and atawhai. However, the judge's main task in a dispute is to supervise the proceedings and ensure that procedural fairness is adhered to,²⁴⁰ rather than to provide aroha and atawhai for the parties.

The aim for the rangatira is to secure an outcome that is achieved by consensus and guided by principles of tikanga Māori.²⁴¹ In this way the well-being and balance of the group could be restored to enable the successful functioning of the community.²⁴²

²³⁶ It is understood that in Governor Grey's collection of materials Te Rangikaheke of Te Arawa was the author and source.

²³⁷ Benton and others, above n 204, at 57, where noting, in the story, that the two oldest brothers persuaded the next two that they should not entertain the thought of killing Māui, the fifth and only recently re-discovered child, because of their jealousy of him.

²³⁸ See Chapter VI 'Tikanga Maori and Therapeutic Jurisprudence' for discussion on therapeutic jurisprudence.

²³⁹ Careers NZ indicates that, in 2012, there were 1050 probation officers and 6645 social workers see <www.careers.govt.nz>. The percentage of Māori is not indicated. However, based on Māori comprising 15 per cent of the total population, it is assumed 157 and 985 would be Māori. On this assumption, the numbers are too low to be effective in terms of administering tikanga. Moreover, these workers are required to adhere to the Department of Corrections Criminal Conviction policy.

²⁴⁰ Caslav Pejovic "Civil Law and Common Law Two Different Paths Leading to the Same Goal" (2001) 32 VUWLR at 817 - 840

²⁴¹ Wai 1040, above n 24, at 30.

²⁴² This is analogous to the healing approach inherent in the doctrine of therapeutic jurisprudence. See Chapter VI 'Tikanga Maori and Therapeutic Jurisprudence'.

(b) Forum and Process

The importance of the marae as a forum for resolving disputes cannot be underestimated.²⁴³ It represented the body of ancestors and a world in balance. It was a place where mana could be restored and wairua (spirit) healed. The marae protocol was similar to court protocol in the sense that there was an agreed framework.

The whole point of a marae encounter was to dispel tapu and bring people together, the notion of pae here tangata (binding together). Thus dispute resolutions and marae encounters dispel the tapu of visitors/disputants so that they may unite for a common purpose.

For Māori, the focus of the dispute resolution process is on the source of the problem, seeking the *take* (the reason) for the offending — the cause and the effect. Any reoffending on a regular basis indicates an imbalance of the individual's tinana (body), wairua and mauri (life force). This results in the inability to establish a state of ora (well-being) or balance, which, in turn, creates an imbalance within the community.

Inclusiveness, participation and accountability underpin the process of dispute resolution. All parties to a dispute must be represented and given the opportunity to be heard. These principles are similar to the natural justice requirements under administrative law: the duty to act in good faith and listen fairly to both sides, and the opportunity to be heard.

In contrast to the present criminal justice system, it is not essential that the individual is present. Rather, it is the collective that is the defendant and the plaintiff. In any event, an individual will suffer a loss of mana if they do not attend.

If a person alleges that another has, for example, taken his or her resources, then according to tikanga, they have. This is consistent with the notion of strict liability

²⁴³ In contemporary times, the 'marae' refers to the traditional meeting house (whare nui) and the area in front. However, the orthodox definition of the marae refers to the courtyard or area in front of the whare nui only. See Wai 1040 above n 24, at 211 that describes the marae as a 'centre for debate and discussion'.

under the criminal law.²⁴⁴ Taking responsibility, irrespective of fault, increases one's mana.²⁴⁵ It is through the dispute resolution process that the matter is further discussed.

If the hara or wrong-doing is not admitted by the group or the offender, it is passed on to the living relations through the concept of whanaungatanga. This is because of the obligations between them; that is, an intergenerational relationship. The offender is encouraged to accept responsibility and, in doing so, re-establish mana amongst the group. The group will then decide what actions are required by the offender to establish utu with the victim and their community. The dispute process is one of *pono* (just) and *tika* (right and proper). After the dispelling of tapu between people, visitors and the hosts, food is shared to show acceptance.

Traditionally, 'going through the process' was seen as therapeutic. For Māori, the process by which justice is achieved is just as important as the result. There was no distinction between the procedural or substantive justice. Māori place as much value on the process as on the outcome. Both have to be 'tika' and restore a state of 'ora'. The process is seen as an inherent good because it empowers the parties and the community to take responsibility for the future. Allowing time and resources for a proper airing of the grievance is, of itself, a large part of the healing process.²⁴⁶ In practical contemporary terms, this is demonstrated within the Waitangi Tribunal Claims process,²⁴⁷ where the therapeutic nature of 'airing the grievance' is an essential part of the process, thereby ensuring that healing can occur.²⁴⁸

²⁴⁴ Strict Liability is a rule whereby a person is legally responsible for the damage or loss caused by his or her acts and omissions irrespective of fault.

²⁴⁵ See also Wai 1040, above n 24, at 31, that notes '... mana could [also] grow or diminish depending on exploits in warfare, diplomacy, hospitality, and in making their people more prosperous.'

²⁴⁶ See Benton and others, above n 204, at 63 where a traveller described a Ngapuhi gathering as 'a time when parties joined together for a conversation and grievances were brought forward and rectified and resolutions were made'. See also Marsden, above n 1.

²⁴⁷ See Muriwhenua Waitangi Tribunal Claim Wai 45 particularly submissions given on 7 July 1993. See also Eddie Durie and Gordon Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR at 62 – 81.

²⁴⁸ This fundamental element is also a tenet central to therapeutic jurisprudence. See Chapter VI 'Tikanga Maori and Therapeutic Jurisprudence' for further discussion on therapeutic jurisprudence.

(c) Punishment

Within the criminal justice system, the concept of punishment is not always necessary. For instance, the court may impose a penalty, such as diversion²⁴⁹ or a discharge without conviction.²⁵⁰ But for Māori, a form of *utu* or reciprocity is always necessary to restore balance. Section 106 of the Sentencing Act 2002 provides:

- (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
- (2) A discharge under this section is deemed to be an acquittal.

A 's 106 discharge order' for domestic violence offences includes little by way of offender accountability. Discharges are frequently used in New Zealand family violence courts. For example, in the 'Manukau Family Violence Court 15.9 per cent of offenders were given a Section 106 in comparison to just 1.5 per cent before the introduction of the court'.²⁵¹ Further that "in the first three months of the Auckland court operation, 71 percent of cases were given a recommendation that they complete a treatment programme with an indication that this will result in a Section 106

²⁴⁹ 'Diversion is a scheme that provides an opportunity for Police to deal with some offences and/or offenders without going through formal court prosecution. The purposes of diversion are to:

- address offending behaviour that has resulted in charges
- balance the needs of victims, the offender and their communities
- give offenders an opportunity to avoid conviction
- reduce re-offending.

Diversion involves an offender agreeing to fulfil certain conditions in exchange for the charges being withdrawn. The charges are withdrawn only after the conditions have been fulfilled. The benefit of this scheme is that it provides an incentive for non-recidivist offenders involved with low level offending to be punished and to take responsibility for their actions without receiving a conviction. There are several key criteria for determining when diversion should be considered. Firstly, it is important that there is sufficient evidence and public interest in pursuing the prosecution of the case. Once this has been established the following factors need to be satisfied:

- generally, it is the offender's first offence
- the offence is not serious
- the offender has accepted full responsibility for the offences as described in the summary of facts
- the offender has been explained their legal rights
- the offender agrees to the terms (conditions) of diversion.

²⁵⁰ See Section 106 of the Sentencing Act 2002 and Section 19 of the Criminal Justice 1985 (repealed).

²⁵¹ A Mills, K Thom, C Meehan, and M Chetty (2013). Family Violence courts: A Review of the Literature. Auckland: *Centre for Mental Health Research*, 11. <www.lawfoundation.org.nz>

discharge without conviction”.²⁵² This is inconsistent with tikanga Māori, mainly because reciprocity and balance are always required.

A civil case can also be taken by the victim to seek reparation. However, the offender is not normally in a financial position to pay damages. Although not usually part of a formal order, the court may order the offender to pay reparation to the victim in the case of a s 106 discharge order, a step towards achieving balance.²⁵³ It is suggested that more use could be made of this provision to satisfy the tikanga requirements of reciprocity and balance.²⁵⁴

Both punishment and utu involve a deliberate response to an offence and aim to achieve retribution or to requite the wrong-doing. However, they differ in important aspects. Ethically speaking, punishment may be foregone, but utu cannot. Punishment should be unpleasant enough to deter further offending, but utu may be entirely friendly and welcoming. Punishment should be confined to offenders who have been proven guilty of intentional offences, but utu may be exacted from individuals, as members of a whānau or hapū, who have committed no wrong.²⁵⁵ This alternative conceptual thinking cannot be accommodated within the existing criminal justice system.

Traditionally, muru was used to wipe or rub the hara. In doing so it absolved one of their wrong-doings. By extension muru included the act of ritual seizing to address and correct the imbalance. An early example²⁵⁶ noted that the action of a chief’s wife

²⁵² At 12

²⁵³ Section 106(3) of the Sentencing Act 2002 provides:

A court discharging an offender under this section may—

- (a) make an order for payment of costs or the restitution of any property; or
- (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
 - (i) loss of, or damage to, property; or
 - (ii) emotional harm; or
 - (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property;
- (c) make any order that the court is required to make on conviction.

²⁵⁴ It is not uncommon for a discharge without conviction to be granted by the Court on the condition reparation is paid. e.g. See *Latimer v R* [2013] NZCA 562 where the Court found that the ‘s 106 should be considered, burglary committed was reasonably serious but not premeditated, carpentry course had been completed by the defendant’. Court ordered \$2,500 in reparation and conviction quashed.

²⁵⁵ John Paterson *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992) at 135.

²⁵⁶ Samuel Marsden in a journal entry, 1815, recounting the loss of the fowls given to a head chief as told by Elder 1932 as cited in Benton and others, above n 204, at 255.

remarrying created a 'hee', thereby destabilising the balance constituting a hara manifest in a breach of mana. To address this imbalance, a muru, or raiding party stripped the wife of all her property. Unlike an act of war, a muru was accepted and well-planned. In assessing what muru was to be paid, factors such as precedents, the status of the parties, what could be afforded, and what was appropriate for the type of offending were often considered. This was not always the case, as in some instances, the appropriate muru could be death.²⁵⁷

The penalty agreed upon reflected a 'collective' concern. Muru, like hara, was inter-generational and receiving the penalty also increased the group's mana. It is acknowledged that non-indigenous families will sometimes collectively meet the costs of a fine on behalf of the offender.²⁵⁸ However, it is less likely that the collective would agree to meet the costs of an intergenerational debt.

The primary aim in the breach of hara, as in dispute resolution, is to restore the balance or whakahoki mauri. In other words, restore the mauri of the parties and the kin groups to which they belong, restore both the mana of the offender and the victim so that they can continue to be part of a functioning community and provide a healing approach. The group, as a collective, has an interest to maintain their mauri. Thus utu was an ongoing process of restoring the balance.²⁵⁹

(d) Overall Aim

The overall aim of dispute resolution remains the restoration of mana through utu; to achieve a balance in the relational networks and to achieve a consensus. Although the process can be inquisitorial, it is not usually an adversarial process. When a dispute has adversely impacted on one's spirit and mauri, the question is how to bring it back

²⁵⁷ See Wai 1040, above n 24, at 32 that stated 'The ultimate physical sanction for transgression was to be killed and eaten – an action that resulted in the complete removal of the victim's tapu and its consequent transfer to the victor'.

²⁵⁸ For instance, it is not uncommon for families of non-indigenous university students who have traffic, library, or similar outstanding fines to meet these costs. However, if these fines remain unpaid it is less likely that the following generation will feel obliged to pay these. See also <www.justice.govt.nz> where 'parents interviewed play a financial role in their children's infringement fines. They generally paid in full or significantly contributed to their children's earlier fines and many are still contributing (either directly or through subsidised board)'.

²⁵⁹ Again, this holistic healing approach has similarities with therapeutic jurisprudence. See Chapter VI 'Tikanga Maori and Therapeutic Jurisprudence' for full discussion.

into balance. Regardless of societal level or the status of the parties involved, the same fundamental principle applies, namely, the principle of whakahoki mauri or, restoring the balance.²⁶⁰

Two examples provide an insight into the traditional dispute resolution process. First, the changing significance of Māori women in society and the related problem of domestic violence provide compelling reasons to consider a return to a framework informed by tikanga Māori. The second example views the issue of mental health through a tikanga Māori lens.

D. Tikanga Māori and Women²⁶¹

According to Ani Mikaere, the roles of men and women in traditional Māori society can be understood only in the context of Te Ao Māori, the Māori World, which acknowledged the interrelationship or whanaungatanga of all living things and the overarching principle of balance.²⁶² Both men and women were essential parts of the collective group. They formed part of the whakapapa that linked Māori people back to the beginning of the world, and women, in particular, played a key role in linking the past, present and the future.²⁶³ The survival of the group as a whole was dependent on everyone; they were all part of the collective. In fact, it was a collective responsibility to see that their respective roles were valued and protected.

The gender neutral aspect of Māori language indicates the presence of gender balance, where men were given prominence in some roles and women in others.²⁶⁴ The importance of women is also symbolised by language and concepts expressed through

²⁶⁰ This system is often employed in smaller rural communities, such as at my marae in Motairehe, Aotea, for lesser offences such as burglary. For instance when a person had climbed through a neighbour's window and stole some food the reparation was an apology and community work for two days. See also Stephanie Vieille "Māori Customary Law: A Relational Approach to Justice" (2012) 3 The International Indigenous Policy Journal 3 at 4.

²⁶¹ As currently approximately 60 per cent of incarcerated women in New Zealand identify as Māori, the inclusion of this example assists to unpack this untenable position. Parts of the section have taken from a paper already published Valmaine Toki "Are Domestic Violence Courts Working for Indigenous Peoples?" (2009) 35(2) Commonwealth Law Bulletin 255.

²⁶² Ani Mikaere 'Collective Rights and Gender Issues: A Māori Women's Perspective' in Nin Tomas (ed) *Collective Human Rights of Pacific Peoples* (Indigenous Research Unit for Māori and Indigenous Education University of Auckland, 2004) at 84. See also Ani Mikaere *Colonising Myths Māori Realities He Rukuruku Wahaaro* (Huia Publishers, Wellington, 2011).

²⁶³ Mikaere, above n 262, at pps 79 - 99.

²⁶⁴ Mikaere, above n 262, at pps 79 - 99 .

proverbs. Māori scholar Rose Pere has written on the association of positive concepts with females, highlighting the description of women as *whare tangata* (the house of humanity); the use of the word *whenua* to mean both land and afterbirth, and the use of the word *hapu* as meaning both pregnant and large kinship.²⁶⁵

Instances of abuse against women and children were regarded as *whānau* issues, and action could be taken against the perpetrator. Stephanie Milroy has noted:²⁶⁶

In pre-colonial Māori society a man's house was not his castle. The community intervened to prevent and punish violence against one's partner in a very straight forward way.

Women could retain various roles. However, child rearing was a collective responsibility, with grandmothers, aunts and other females being responsible for all children in the *whānau*. By sharing the workload, mothers could still develop expertise in other areas and perform leadership roles.²⁶⁷ Women had the role of keeping the affairs of the communal group in order and passing on the customs of the ancestors within the *whānau*.²⁶⁸ This role of women conflicted with the colonialists' view that treated the man as head of the family.²⁶⁹

The role of high-ranking women as leaders was challenged by the Europeans' patriarchal views.²⁷⁰ When a woman had a higher social status than her husband, it was common that the line of descent be traced through the woman, rather than through the male.²⁷¹

Unlike Pākehā women Māori women maintained their rights over land and resources. Those rights were passed to her by either parent and remained her property upon

²⁶⁵ Rose Pere "To Us the Dreams are Important" in S Cox (ed) *Public and Private Worlds* (Allen & Urwin, Wellington, 1987) at 53.

²⁶⁶ Stephanie Milroy "Domestic Violence: Legal Representation of Māori Women" unpublished paper 1994, at 12 as cited in Mikaere, above n 262.

²⁶⁷ Mikaere, above n 262, *He Rukuruku Whakaaro*, at 193.

²⁶⁸ See J Binney and G Chaplin *Ngā Mōrehu: The Survivors* (Auckland, Oxford University Press, 1986) at 24

²⁶⁹ Law Commission, above n 5, at [38].

²⁷⁰ Mikaere, above n 262.

²⁷¹ Law Commission above 5, at [46]. See also discussion in Berys Heuer *Māori Women* (Wellington, Reed Publications, 1972) on the importance of leadership and Māori women leaders or *wahine ariki*.

marriage.²⁷² They were not the common property of the marriage or property of the woman's husband. She could then pass those rights on to any or all of her children. Prior to colonisation Māori women had both property and leadership rights. Pākehā women did not enjoy the same level of rights to property and leadership.

The colonisation of Aotearoa changed the order of affairs. The British settlers had culturally specific views on the role and status of women, which did not fit with tikanga Māori. After the arrival of the Pākehā, Māori women continued to play a significant role in Māori society.²⁷³ Heni Pore of Te Arawa fought against the British in the 1860s in support of the Kingitanga movement, and also at the Battle of Gate Pa in 1864.²⁷⁴ Māori women continued to be acknowledged as landowners as well as negotiators and religious leaders. However, the introduction of disease, a new economy, land grabbing and Christianity saw Māori women's role change.²⁷⁵

With respect to landownership, the Native Land Court and accompanying raft of Native Land legislation progressively undermined land rights of Māori women.²⁷⁶ By 1873 the legislation had been amended, with s 86 of the Native Land Act 1973 requiring husbands to be a party to any deed executed by Māori women. However, husbands could dispose of their wife's land interests without any requirement that the wife be party to that deed.²⁷⁷ The move from communal land ownership into individual (usually male) ownership, as opposed to guardianship, further eroded the rights of Māori women.²⁷⁸

Pākehā officials insisted on the use of husbands' surnames for Māori women.²⁷⁹ Pākehā writers rewrote many of the Māori stories and myths to marginalise the role played by women in them.²⁸⁰ The practice of customary marriage was gradually

²⁷² King, above n 26, at 87.

²⁷³ Mikaere, above n 262, at 191.

²⁷⁴ Mikaere, above n 262, at 192.

²⁷⁵ For a comparative perspective see Sarah Carter "Categories and Terrains of Exclusion: Constructing the 'Indian Woman' in the Early Settlement Era in Western Canada" in Mary-Ellen Kelm and Lorna Townsend (eds) *In the Days of our Grandmothers* (University of Toronto Press, Canada, 2006) at 146 – 169.

²⁷⁶ Law Commission, above n 5, at [74].

²⁷⁷ At [75].

²⁷⁸ At [75].

²⁷⁹ Law Commission above n 5 at [59].

²⁸⁰ Ani Mikaere above n 262.

eliminated in law.²⁸¹ The recognition of only legal marriage in accordance with English law contributed to the breakdown of the whānau and hapū unit.²⁸² The legal relationship of marriage places the husband and wife relationship above all others, including those that the woman has with her parents and siblings.²⁸³

The right to vote was extended to Māori men in 1867. In 1893 Meri Te Tai Mangakahia addressed the Māori Parliament to advocate for the right of Māori women to vote. Arguably, the rights of Māori women to property, together with their leadership roles, contributed to the 1893 Electoral Act, which gave all New Zealand women, including Māori, the right to vote.²⁸⁴

A Māori woman was viewed as equal and complementary to her Māori male counterpart. The Common Law notion of individual land ownership and property rights clashed with the relationship of women with the land, as well as the status of women.²⁸⁵

(a) Tikanga Māori and Domestic Violence

As tikanga Māori is sourced from cosmology, issues such as domestic violence are premised on actions and resolutions from stories that underpin relational concepts found in the realm of the cosmos. For instance, domestic violence is an essential component of the story of Mataora and Niwareka where ‘wife beating’ was deemed unacceptable.²⁸⁶ Violence against women was regarded as a ‘hee’ that breached Niwareka’s personal mana. This destabilised the balance for Niwareka and between her and her wider collective, as well as Mataora and his wider collective. This imbalance required reconciliation. It was only after a change in attitude from Mataora that the decision on whether he could return to his wife could be considered by her and her immediate family; the restoration of balance being pivotal.

²⁸¹ Law Commission above n 5 at [66], [79].

²⁸² Ani Mikaere above n 262; see also Law Commission above n 5 at [77].

²⁸³ Law Commission above n 5 at [80].

²⁸⁴ Michael King, above n 26, at 203.

²⁸⁵ Law Commission, above n 5, at [38].

²⁸⁶ Mead, above n 35, at 243.

Upon the introduction of British law and culture to Aotearoa, in particular the Marriage Act 1908, Māori women had no legal personality. They could not enter into contracts, be sued, or own property. Accordingly, the position of Māori women was rendered equivalent to their European counterparts.²⁸⁷

A woman's legitimate sphere of activity was now within the home. This private domain was beyond the reach of the law, where men were able to discipline their spouses and children. As a result of this paradigm shift, the laws of personal tapu and privacy fell apart. No longer was there a requirement to restore balance following a breach of personal tapu, such as wife beating. As such, the imbalance created is not addressed.

Apprehensions and convictions for domestic violence assisted.²⁸⁸ The introduction of social services, such as the Labour Government's Domestic Purposes Benefit in 1973, provided financial assistance for solo parents. Despite some criticism that this benefit created a culture of dependence, it provided economic support for Māori women. Initiatives such as the Māori Women's Welfare League established a cultural reprieve.

However, the social and cultural imbalance has not been addressed.²⁸⁹ In addition, many within Māori society have adopted discriminatory attitudes towards women as a result of colonial views and stereotypes, thereby compounding this imbalance. The detrimental effect of colonisation on Māori women is reflected in the disproportionate statistics, in which 60 per cent of incarcerated women identify themselves as Māori.²⁹⁰ Arguably, the imposition of legislation²⁹¹ that deemed acts such as customary

²⁸⁷ Law Commission, above n 5, at [60].

²⁸⁸ For a review of apprehensions and convictions see <www.justice.govt.nz>

²⁸⁹ It is acknowledged that the gender imbalance exists generally. However, barring equal pay, in theory, women have had equal rights for the last 100 years and yet imbalance remains. For instance, women are still paid less than men. For Māori women they face double discrimination; by gender and also by race.

²⁹⁰ See Department of Corrections *Over-representation of Māori in the Criminal Justice System – An Exploratory Report* (Policy, Strategy and Research Group, Wellington, September 2007) at 6. However, in 2012 58 per cent of inmates identified as Māori and women. See <www.stats.govt.nz>.

²⁹¹ For instance the Adoption Act 1955 provided that, 'since the commencement of the Native Land Act 1909, no person shall have been capable of adopting a child in accordance with Māori custom and with certain exceptions, no adoption is of any force or effect' and Maori Affairs Act 1953 ss 8, 78 and 79 read together with the Marriage Act 1955 resulted in no Māori customary marriage being considered valid for any purpose.

marriage and customary family arrangements as illegal, contributed as causes to these statistics.

E. Tikanga Māori and Mental Health²⁹²

The overall aim of tikanga Māori remains the restoration of mana through utu. This involves a balance of all considerations, with the purpose of achieving a consensus or reconciliation.²⁹³ Historically, this has included conflict or fighting as a means to restore balance. However, it is not necessarily an adversarial process as tikanga Māori is aligned with an inquisitorial model of dispute resolution, in which all parties seek a common goal.²⁹⁴ When there has been a transgression of tapu, or a dispute that has affected one's *wairua* (immaterial element of a person) and *mauri* (life force), the question is how to bring these back into balance. Regardless of the nature of the dispute or who is implicated, the same fundamental principle is involved: the principle of *whakahoki mauri* or 'restoring the life force'.

With respect to mental illness, there is a difference between Māori and non-Māori concepts of health. For Māori, 'health' concerns are based on *mate Māori* or Māori sickness.²⁹⁵ *Mate Māori* is a difficult term to define but may include a spiritual sickness brought about by transgression of tapu, perhaps even unwittingly, by the sufferer. It could also be the result of a *mākutū* or curse placed on the sufferer.²⁹⁶ Due to the collective nature of responsibility, a breach of tapu may not even be brought about by the sufferer. Rather, it may come about as a result of the actions of his or her *tīpuna* (ancestors). Such sickness may be manifested in ways that non-Māori would identify as schizophrenia or other psychiatric disorders, although this is not necessarily the case.

When instances such as *mate Māori* arose often, a 'tohunga' would be called upon to assist in healing. Tohunga were the traditional knowledge holders and were tasked

²⁹² As half the prison population in New Zealand identify as Māori and half of all Māori are predicted to suffer from a mental illness this example assists to highlight this situation.

²⁹³ Paterson, above n 255, at 116–135.

²⁹⁴ Heath J "Problems in Applying Māori Custom Law in a Unitary State" Yearbook of NZ Jurisprudence (2010 and 2011) at 199.

²⁹⁵ See Mason Durie *Whaiora – Māori Health Development* (Oxford University Press, 2006) at 66-73.

²⁹⁶ See Mead, above n 35, at 55.

with restoring balance in the community.²⁹⁷ The introduction of the Tohunga Suppression Act 1907 provided that:²⁹⁸

Every person who gathers Māoris around him by practicing on their superstition or credulity, or who misleads or attempts to mislead any Māori by professing or pretending to possess supernatural powers in the treatment or cure of any disease, or in the foretelling of future events, or otherwise is liable for prosecution.

The penalty included imprisonment. This effectively banned the use of tikanga Māori by tohunga to address Māori health issues. The alienation of Māori from their traditional healing methods and tikanga could provide one reason for their appalling mental health statistics. In fact, it has been suggested that one in every two Māori will suffer from a mental disorder.

F Tikanga Māori in Context

If tikanga Māori is to be considered as the appropriate doctrine to underscore a proposed indigenous court, it is now timely to consider how tikanga, as a discreet system of law, compares with the more orthodox jurisprudential schools of thought and legal sources, such as natural law, positivism and common law, that our current justice system depends on.

(a) Natural Law

At a basic level, tikanga Māori is akin to theories of natural law and positivism. Natural law theorists hold that law is properly understood as having been derived from natural principles, such as divine will and the natural world.²⁹⁹ The Māori legal system originates from Te Ao Māori and embraces the creation stories that determine our relationship to each other, the environment and the spiritual world. In this sense it is comparable to natural law theory; that is, law is determined by nature and so is

²⁹⁷ For comprehensive discussion on Tohunga see Samuel Timoti Robinson *Tohunga: The Revival Ancient Knowledge for the Modern Era* (Reed Publishing, Auckland, 2005).

²⁹⁸ Second clause of the Tohunga Suppression Act 1908.

²⁹⁹ See Lon Fuller *The Morality of Law* (Yale University Press, 1969) for further discussion.

universal. Further, as with natural law, tikanga Māori draws no distinction between law and morality.

(b) Positivism

If one were to draw an analogy with Western concepts of jurisprudence, tikanga would lie midway between natural law and positivism. There is a belief in the nature of humankind and the way we should act. Laws reflect the ancestral precedent from the atua or Gods

Positivism is based on the assumption that the law is properly understood as the positive expression of those who make the law — the sovereign.³⁰⁰ The leadership and decision-making structures in Māori society did not correspond with Austin's idea of law as the command of a sovereign,³⁰¹ as cited by Borrows.³⁰²

At its origin, *a custom is a rule of conduct which the governed observe spontaneously, or not in the pursuance of a law set by a political superior* [emphasis added]. The custom is transmuted into positive law, when it is adopted by the courts of justice ... but before it is adopted by the courts and clothed in legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens ... but deriving the only force which it can be said to possess from the general disapprobation falling on those who transgress it.

However, not all law is deemed valid if created by a sovereign. The Māori social structure revolves around the whānau or extended family, and the hapū is the primary social and economic unit. Tikanga, as a discrete system of law, focused on communities, societies based around smaller social-political groupings, and local economies. The smaller size of the group anticipated consensual enforcement of laws, rather than law enforcement by objective courts and juries. If negotiations reached a stalemate, the rangatira, leaders with mana, would step in and exercise their influence to make a decision.

³⁰⁰ See HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, New York, 1997) for further discussion.

³⁰¹ John Austin is a well known British jurist who wrote extensively on the philosophy of law and jurisprudence. He was a leader in the theory of legal positivism.

³⁰² John Borrows *Canada's Indigenous Constitution* (University of Toronto Press, Canada, 2010) at 12.

Tikanga Māori, a values-based doctrine, provides criteria against which other values are assessed. In this sense Tikanga Māori is could be aligned with Hart’s “rule of recognition”.³⁰³ However, the flexibility of tikanga Māori to change and adapt to novel situations limits this alignment.³⁰⁴ Nonetheless, according to Mamari Stephens:³⁰⁵

... his [Hart’s] rule of recognition also exists subjectively in the beliefs of officials that they are bound by it. For those who perceive the internal aspect of tikanga fluidity presents no fatal uncertainty.

Hart’s rule of change caters for the ability of a legal system to introduce a new primary rule, adapt rules already in use and powers to amend these rules.³⁰⁶ Tikanga Māori provides the ability of the decision maker to adapt values, provided that tikanga was maintained.³⁰⁷ These similarities between tikanga Māori and positivism, although somewhat tenuous, provide a degree of synergy.

According to the Māori worldview, there is a belief in the nature of humankind and the way we should and do act. Laws derived from cosmology and Te Ao Māori established legal precedent, although they were also subject to change. If we are to assume, as previously stated, that tikanga lies between natural law and positivism, then perhaps examining facets of the middle ground can be helpful to assist the incorporation of tikanga concepts.

(c) Common Law

A function of tikanga is to enforce collective values so that communities can live in peace and attain stability.³⁰⁸ This is also analogous to common law. Another similarity is the importance of precedent. The nature of tikanga depends on reference to traditional use and practice. For Māori, the tradition is oral, whereas the existing

³⁰³ See Hart above n 300.

³⁰⁴ Mamari Stephens “Māori Law and Hart: A Brief Analysis” 32 VUWLR 2001 at 861.

³⁰⁵ Mamari Stephens above n 304 at 859.

³⁰⁶ Hart above n 300.

³⁰⁷ Stephens above n 304.

³⁰⁸ See for further discussion Robert Joseph, “Re-creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) 17 Waikato Law Review: Taumauri at 74–97; E W Thomas “The Treaty of Waitangi: E. W. Thomas Reviews Matthew Palmer’s Book” [2009] NZLJ 277.

judicial system relies on a written tradition.³⁰⁹

Common law has been created by judges over the centuries. The landmark cases exhibit spirit and vision that society, once informed, accepts for that reason. For example, in *Oyekan v Adele*,³¹⁰ the Privy Council employed the judge-made concept of aboriginal title to convert indigenous custom into property rights actionable under colonial law.

According to Justice Heath:³¹¹

... Māori custom law and the existing common law are not fundamentally different. While the values that inform it are different, their overriding function (as representing the practices of the community) is identical. Where Parliament permits (or does not prohibit) the development of common law, there is scope in theory for the development of substantive law which infuses European values and tikanga Māori

Notwithstanding the ability of the common law to convert indigenous rights into common law rights, this action still lies within the purview of a non-indigenous decision-maker and a non-indigenous paradigm.

Despite the relevance of common law to the rights of Māori, noted in *Ngati Apa v Attorney-General*,³¹² judges have not kept the common law up to date. This is seen by some as the reason as to why Parliament has, all too often, decided to intervene.³¹³

The intersection between common law and tikanga was recently discussed by the court in *Takamore v Clark*. The issue in that case was whether the recognition of tikanga Māori prevailed over the common law right as to who decides the right to a

³⁰⁹ Heath J, above n 294 at 199.

³¹⁰ *Adeyinka Oyekan v Musendika Adele* [1957] 1 WLR 876, [1957] 2 All ER 785; See also *Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

³¹¹ Heath J, above n 294 at 199.

³¹² *Attorney General v Ngati Apa* [2003] NZCA 117 which overruled the decision of *Re the 90 Mile Beach* [1963] NZLR 461 (CA). *Attorney General v Ngati Apa* determined that the Māori Land Court had the jurisdiction to determine whether Māori held customary title to the foreshore area.

³¹³ This occurs for instance when the common law rights applicable to women and minorities are not recognised by the courts, resulting in parliament seeking changes. See Baragwanath D “Good Faith Symposium” *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 687 A Perspective of Counsel “In Good Faith” (Symposium, University of Otago, Dunedin, 29 June 2007).

deceased's body.³¹⁴

(d) Case Law - *Takamore*

In 2007 Mr James Takamore died in Christchurch, where he had lived with his partner (Ms Clarke) and their children. James was from Whakatōhea and Tūhoe. In accordance with Tūhoe tikanga, Mr Takamore's family collected his body and buried him at Kutarere in the Bay of Plenty. Ms Clarke did not consent and, as the executor of James' will, she initiated proceedings to reclaim his body. In an action before the High Court, Fogarty J found that Mr Takamore's Tūhoe whānau had no right to take his body.

Ms Josephine Takamore (Mr Takamore's sister) appealed Fogarty J's decision to the Court of Appeal, which dismissed the case. In reaching their decision, all three of the justices noted a legal test, that in order to recognise Māori custom as part of the common law of New Zealand, the custom must:

1. be long standing
2. have continued without interruption since its origin
3. be reasonable
4. be certain in its terms; and
5. not have been displaced by Parliament through clear statutory wording.

It was held that the custom or Tūhoe tikanga failed on the reasonableness criteria, in that the perceived use of force was contrary to the rule of law. The application of principles that are not sourced from tikanga, but from New Zealand common law does not provide for parity.

The justices also noted that this conclusion was also reinforced by the need to develop the common law, as far as possible with the Treaty of Waitangi, the importance of recognising the collective nature of indigenous culture (as set forth in the United

³¹⁴ *Takamore v Clarke* [2011] NZCA 587.

Nations Declaration on the Rights of Indigenous Peoples) and by international human rights covenants to which New Zealand is a party.

Leave was granted to Ms. Takamore to appeal the decision of the Court of Appeal to the Supreme Court.³¹⁵ The central issue was whether the Court of Appeal was correct to hold that New Zealand law entitled Ms. Clarke, as executor of Mr. Takamore's Will, to determine his place of burial and to take possession of his remains. The Supreme Court unanimously dismissed the appeal. Accordingly, Ms. Clarke was entitled to collect James' body.

The Supreme Court had the difficult task of balancing the executor's (Ms Clarke) right over the deceased's body and the relevant tikanga protocols. Tipping, McGrath and Blanchard JJ stated:³¹⁶

The common law is not displaced when [emphasis added] the deceased is of Māori descent and the whānau invokes the tikanga [emphasis added] concerning customary burial practices ... Rather, the common law of New Zealand requires reference to any tikanga [emphasis added], along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation. Personal representatives are required to consider these values if they form part of the deceased's heritage...

Elias CJ concluded that Māori custom according to tikanga is a part of the 'values' of New Zealand's common law and is a matter to be weighed.³¹⁷ The exact meaning of 'value' is unclear, as are other 'values' that would need to be weighed or considered.

Despite the recognition tests set out by the Court of Appeal and whether tikanga can indeed satisfy these tests, it is clear that tikanga is now part of New Zealand's common law. This case sets a precedent for tikanga becoming a consideration or part of the 'values' that come to influence outcomes. Perhaps it may be that for a claim under existing legislation such as the Marine and Coastal Area (Takutai Moana) Act

³¹⁵ *Takamore v Clarke* [2012] NZSC 116, [2012] 2 NZLR 733.

³¹⁶ At [164].

³¹⁷ At [94] per Elias CJ.

2011 or Te Ture Whenua Māori Act 1993, tikanga could be submitted as a ‘value’ to be weighed, rather than putting the onus on the claimants to establish tikanga.³¹⁸

Legal scholar, Sir Edmund Thomas notes:³¹⁹

... to vest tikanga Māori with legal status. *As tikanga are essentially principles rather than rules, and those principles are not static, tikanga Māori could readily be absorbed into the common law of this country* [emphasis added]. Again, there is no reason why the judges should not assimilate the principles of tikanga in the development of the law generally so as to *develop an endemic jurisprudence* [emphasis added], just as the judges in days gone by assimilated the customs of the times into the growing body of the common law of England.

Sir Edmund Thomas further noted:³²⁰

The aim would be to *enrich the law by incorporating tikanga as and when appropriate* [emphasis added]. Māori principles regarding respect for the environment, for example, could have much to offer ...

This also suggests that tikanga should be a part of our common law and a value to be considered.

The nature of the Māori legal system is value-based, rather than rule-based. The advantage of a customary law system over a rules-based system that relies on written law and statutes is the flexibility of the former to disregard a custom when it becomes unpalatable, outdated or inconvenient.³²¹ It is acknowledged that some negative customs can be entrenched.³²² However, it could be easier to affect change in instances where there is no longer support for a particular custom.

³¹⁸ It is acknowledged that section 51 of the Marine and Coastal Area (Takutai Moana) Act provides a test to establish a protected customary right. This comprises of three grounds to be satisfied of which tikanga relates to only one ground.

³¹⁹ E W Thomas “The Treaty of Waitangi: E. W. Thomas Reviews Matthew Palmer’s Book” [2009] NZLJ 277.

³²⁰ Thomas, above n 320.

³²¹ This aligns with Hart’s concept of secondary rules allowing for change to laws.

³²² For instance gender based customs in the Pacific. See *Converging Currents Customs and Human Rights in the Pacific* September 2006 NZLC Study Paper 17, at 94 where it is noted that ‘an introduced practice of ‘bride-price’ is now viewed by many men as a licence to treat their wives as property’.

However, there is also an aspect of tikanga that is empirical; it is made and enforced having regard to practical observations in the world around us. This allows some flexibility in the application of laws emanating from principles rather than rules. For instance, where there is a need to be aware of particular circumstances, such as the appropriate time to harvest or impending warfare.

Indigenous traditions have been incorporated to further define the parameters of the common law.³²³ It would follow that tikanga Māori could also be used to inform the common law by enforcing collective values in order to achieve balance and harmony. Alternatively, it could be used as a sword in checking the actions of the Crown if they are inconsistent with tikanga Māori.³²⁴

According to Gordon Christie:³²⁵

Indigenous legal scholars ... have vital work to do in revealing ways in which *the dominant system has functioned to trap Indigenous aspirations within webs of theory and principle* [emphasis added] ... and articulating how indigenous understandings and conceptualisations underpin the theoretical perspectives...

Exploring the questions of who are Maori and what is tikanga Maori is not only insightful but consistent with the philosophy that underpins existing Indigenous justice systems, such as the Navajo Court system.³²⁶ Two examples, the changing significance of Māori women in society and the related problem of domestic violence and the issue of mental health, provide compelling reasons to consider a return to a framework informed by tikanga Māori. Contrasting tikanga Māori against more traditional sources of law such as natural law and positivism assists to illustrate the existing synergies. It provides a persuasive framework and support for the thesis that the application of the philosophy of Te Ao Māori, realised by an indigenous legal

³²³ See Raymond Austin *Navajo Courts and the Navajo Common Law: A Tradition of Tribal Self Governance* (University of Minnesota Press, Minneapolis, 2009) at xxii.

³²⁴ For instance this could be a cause of action taken by iwi groups who are challenging the decisions of the Crown to grant rights to another iwi in an area where they hold mana whenua i.e. overlapping claims when the Crown is failing to consider the tikanga concept of mana whenua and granting rights as a result of a Treaty claim to an iwi who does not hold mana whenua within that region.

³²⁵ Gordon Christie "Indigenous Legal Theory" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law Comparative and Critical Perspectives* (Hart Publishing, Portland, 2009) at 231.

³²⁶ See Chapter V 'Initiatives in Comparative Jurisdictions' for discussion.

system and manifested by an indigenous court, is a way forward for Māori to ameliorate the disproportionate offending rates. It is now timely to consider the constitutional setting to ascertain whether potential support for such an initiative is possible.

ŪPOKO TUATORU

CHAPTER III

MAORI AND INDIGENOUS RIGHTS

A. Introduction of European law

The British sought to establish their own form of legal system upon the colonisation of territories including New Zealand, Australia and Canada.³²⁷ As in the case for Australia,³²⁸ New Zealand was regarded by the British as a settled territory³²⁹ and vacant upon discovery. This is the view maintained by scholars and also by the courts.³³⁰ Scholars, such as Austin, have tended to belittle this approach because societies, such as First Nations peoples and Māori, have been inappropriately labelled as inferior or even savage.³³¹ According to First Nations legal scholar, Borrows:³³²

While Indigenous peoples lived in the territory prior to its colonization it has been said that “*their laws and customs were either too unfamiliar or too primitive to justify compelling British subjects to obey them* [emphasis added]”.

Williams, a Navajo law professor, noted that, in respect of the indigenous Cheyenne peoples:³³³

Cheyenne ... demonstrated the ‘juristic beauty’ ... underlying assumption that the *Cheyenne were not stereotypical lawless savages but sophisticated legal thinkers and actors showed that the evolution and practice of law among the so called primitive*

³²⁷ See Wai 1040, above n 24, at 38 that stated ‘these victories made Britain the world’s pre-eminent imperial and naval power ... provided protection for core elite values such as ... rule of law, sanctity of private property rights and the spread of Christ’s Protestant gospel.’

³²⁸ See *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC) 72; see also discussion in David Williams “Wi Parata is Dead, Long Live Wi Parata” in Andrew Erueti and Claire Charters (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (VUP, Wellington, 2007).

³²⁹ Despite the Treaty travelling around the country and receiving further signatories, Hobson on 21 May 1840 declared the sovereign rights of Britain in two proclamations. One proclaimed sovereignty over the North Island by virtue of cession under the Treaty of Waitangi and the other over the South Island on the ground of discovery. The British Government acknowledged this where the proclamation was published in the London Gazette on 2 October 1840.

³³⁰ See J E Cote “Reception of English Law” (1977) 25 Alberta Law Review 29 at 38. See also, for example, Norman Arthur Foden *New Zealand Legal History* (1642-1842) (Sweet & Maxwell, Wellington, 1965) at 24-25 and 179-190; Alan Ward *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1995); Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland University Press, Auckland, 1977) at chapter 7.

³³¹ John Austin *The Province of Jurisprudence Determined* vol 2, in Wilfrid Rumble (1832 Reprint Cambridge, Cambridge University Press 1995) at 178 as cited in Borrows, above n 302, at 12.

³³² Borrows, above n 302, at 13.

³³³ Robert Williams “Foreword” in Raymond Austin *Navajo Courts and the Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009) at 1.

peoples of the United States was far more advanced and nuanced than had been generally supposed [emphasis added].

This is not the line of reasoning expressed in early New Zealand case law. Richmond J and Prendergast CJ in the 1877 Supreme Court decision of *Wi Parata v Bishop of Wellington*,³³⁴ Professor David Williams noted.³³⁵

In the judgment of Prendergast C.J. and Richmond J., delivered by the Chief Justice, the 1841 Ordinance was said to “express the well-known legal incidents of a settlement planted by a civilised Power in the midst of *uncivilised tribes* [emphasis added].” The Treaty of Waitangi was dismissed “as a simple nullity. *No body politic existed capable of making a cession of sovereignty, nor could the thing itself exist* [emphasis added]”.

And further Williams noted:

Prendergast CJ and Richmond J had opined in 1877, that “the supreme executive Government *must acquit itself as best it may, of its obligation to respect native proprietary rights*, and of necessity must be the sole arbiter of its own justice [emphasis added]”.

However, Borrows commented that:³³⁶

Indigenous legal traditions will not receive the respect they deserve if [emphasis added] governments, courts, lawyers, *political scientists and law professors fail to more fully articulate their place in our country* [emphasis added].

Upon the Crown’s acquisition of sovereignty, the status of tikanga Māori was initially contingent on the common law. The doctrine of continuity recognised that “British

³³⁴ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC) 72.

³³⁵ Williams, above n 333. This perspective is consistent with that of Sir Edward Coke’s report of the Calvin case where Coke asserted that the ‘laws of a conquered Christian nation survived, but the laws of an infidel nation were abrogated’ see Calvin’s Case (1608) 7 Co Rep 1a, 77 ER 377 (Comm Pleas). However, see McHugh Māori Magna Carta, above n 34, at 89 where he notes that Lord Mansfield did not follow this line of reasoning by Coke and Lord Mansfield clarified that Indigenous laws enjoyed the same presumption of continuity as found in *The Case of Tanistry* (1608) Davies 28, 80 ER 516 (KB).

³³⁶ Borrows, above n 235, at 180.

sovereignty ... of itself did not make legal order from chaos, but rather, extended some legal recognition to the pre-existing tribal system of government and law”.³³⁷

Although as Paul McHugh asserts, continuity is “a deep-seated trait of human nature”, tikanga Māori was nonetheless marginalised. To understand why, a historical review of the introduction of British legal systems provides a background to discussing the almost fatal impact British law had on tikanga Māori.

To provide some context for the question of how any domestic and international instruments impacted upon or may recognise ‘culture’ or ‘tikanga Māori’ within the New Zealand justice system, a review of three broad timeframes will assist in ‘setting the scene’. This will also trace the presumed cession of Māori sovereignty and the imposition of a new legal order for New Zealand. The first timeframe covers the pre-Treaty era. The second timeframe ranges from the signing of the Treaty to the year 1900. The third and final period ranges from 1900 to the present day.

Law is generally defined as a system of rules that relate to a community, regulating and determining the actions of its members and enforcing these rules through the imposition of penalties. In contrast, tikanga Māori is a contextual concept derived from a completely different source, with the imposition and consideration of measures to achieve balance. Although there may be some abstract similarities, tikanga Māori and British Law were influenced by different historical and philosophical doctrines.³³⁸ Notwithstanding these differences, it is only through a Westminster or British lens that tikanga Māori can be claimed to be the first ‘law’ of Aotearoa.³³⁹

New Zealand’s present constitutional framework derives from the British Westminster system of government, which advocates parliamentary sovereignty and the rule of law.³⁴⁰ While the judiciary scrutinise the actions of Parliament to ensure

³³⁷ McHugh Māori Magna Carta, above n 34, at 83. See also Waitangi Tribunal Report, Wai 1040, above n 24, at 40 – 44.

³³⁸ For further discussion see Wai 1040, above n 24, at 19 – 47.

³³⁹ Ani Mikaere “The Treaty of Waitangi and the Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Australia, 2005) at 334.

³⁴⁰ See Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd edition, Thomson Brookers, Wellington, 2007).

they are consistent with New Zealand’s constitutional framework (using tools of statutory interpretation and alternative formulations of the rule of law),³⁴¹ the courts inevitably respect parliamentary sovereignty in all its forms — the supreme power of Parliament.

As a British colony and a member of the Commonwealth, New Zealand inherited many of its laws from England at various stages in time.³⁴² English laws were deemed to have been in force in New Zealand from 14 January 1840, at least “so far as applicable to the circumstances of the ... colony”.³⁴³ In addition to its many laws, New Zealand inherited an unwritten constitution that is untidy, inaccessible, sullied by colonisation and not reflective of the community.³⁴⁴ New Zealand’s unwritten constitution is comprised of a collection of statutes, the Treaty of Waitangi, decisions of the courts and certain unwritten constitutional conventions.³⁴⁵ This distinctive feature must be contended with when determining the place of Māori and tikanga Māori within it.³⁴⁶ Further, as the Treaty is only one of many constitutional components, the exact role and constitutional influence the Treaty may hold is unclear.

(a) Pre-Treaty of Waitangi

While Abel Tasman arrived in 1642, it was Captain Cook who was ultimately credited with the ‘discovery’ of New Zealand.³⁴⁷ In the early phases of European settlement, Māori significantly outnumbered the British settlers and Britain’s policy towards New Zealand was one of non-intervention.³⁴⁸ This approach is supported by obiter dicta statements in *R v Symonds*; that is, until 1840, New Zealand was “not within His

³⁴¹ Sections 4, 5 and 6 were intentionally inserted into the New Zealand Bill of Rights Act 1990 to protect the sovereignty of Parliament from such as situation. This being said, the courts will strive to uphold the rights contained therein given the nature and content of the Act. See *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) for further information.

³⁴² For general discussion see Peter Spiller (ed) *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001).

³⁴³ English Laws Act 1854 s 1.

³⁴⁴ Bruce V Harris “The Treaty of Waitangi and the Constitutional Future of New Zealand” [2005] 2 NZLR 189 at 212. See also D V Williams “The Foundation of Colonial Rule in New Zealand” (1988) 13 NZULR.

³⁴⁵ Only two other states have unwritten constitutions: the United Kingdom and Israel.

³⁴⁶ Harris, above n 344, at 212.

³⁴⁷ To provide full context to the time period prior see Anne Salmond *The Trial of the Cannibal Dog: Captain Cook in the South Seas* (Penguin Books, Auckland, 2004). Wai 1040, above n 24, at 57 – 67.

³⁴⁸ Wai 1040, above n 24, at 156, 193, 231, 268,

Majesty's dominions".³⁴⁹ Further, Justice Chapman upheld the notion of native title and observed:³⁵⁰

Whatever may be the opinion of jurists as to the strength or weakness of the *Native title*, whatsoever may have been the past vague notions of the Natives of their country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it *is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers* [emphasis added].

On the matter of the Treaty itself, Justice Chapman declared that it was simply a declaration of the law the court had applied in making its judgment on this matter.³⁵¹

It follows ... that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.

The interventions of the Imperial Statutes of 1817, 1823 and 1828 collectively, founded a paradox: they disclaimed New Zealand as part of the British Empire and not subject to the Queen's writ, yet they extended the jurisdiction of the New South Wales' Courts to punish crimes committed by British subjects in New Zealand.³⁵²

To some extent the only other British intervention was the Declaration of Independence of 1835, He Whakaputanga o te Rangatira o Nui Tirenī ('the Declaration of Independence'). Signed by 34 Māori Chiefs and James Busby, the official British Resident, on 28 October 1835, the Declaration declared independence of the country, confirmed that all sovereign power rested in the hereditary chiefs, agreed to meet regularly in Congress and thanked the King for acknowledging the independence flag of 1834.³⁵³

³⁴⁹ *R v Symonds* (1847) NZPCC 387 at 395. See also D V Williams "Queen v Symonds Reconsidered" 19 Victoria U Wellington Law Review (1989) at 385 – 402.

³⁵⁰ *R v Symonds*, above n 349 at 232.

³⁵¹ At 390.

³⁵² Joseph above n 340, at 39. See also Wai 1040, above n 24, at 326, 504, 108.

³⁵³ See also Wai 1040, above n 24, at 153 – 183.

Thus the Declaration of Independence was a clear articulation binding the Crown and proclaiming the sovereign independence of the signatories (mainly Northern rangatira), and affirming their independence from all other sovereign powers.

The proclamation was recognised by King William IV and perceived as a response to concern over lawless British subjects in New Zealand coupled by fears that France would declare sovereignty over the territory.³⁵⁴ The Declaration of Independence signalled a step towards a formal constitutional relationship with the Crown and affirmation of Māori sovereignty. The Wai 1040 report stated:³⁵⁵

There can be no doubt that the Whakaputanga was a resounding declaration of the mana and rangatiratanga of those who signed it on behalf of their hapū. Nor can there be any doubt that it amounted to a declaration of sovereignty and independence of those hapū.

Although the recent Waitangi Tribunal Report has addressed the debate as to whether the Declaration of Independence secured sovereign rights for Māori,³⁵⁶ for some legal commentators, the Treaty received a greater and wider range of signatories, usurping the status of the Declaration of Independence.³⁵⁷ Some question its validity on the grounds that it is not representative of all Māori. In this way the Declaration of Independence is viewed as a mere step towards the signing of the Treaty of Waitangi.

Nonetheless, the Declaration of Independence provides a clear purpose of the signatories' intention: to declare independence, thereby reinforcing the claim that the Northern chiefs did not cede sovereignty to the Crown when signing the Treaty. The recent Waitangi Report, Wai 1040 stated:³⁵⁸

To those rangatira who signed, none of this – including the agreement to meet annually – would have implied any loss of authority on the part of either themselves or their hapū, or any transfer of authority to a collective decisionmaking body.

³⁵⁴ Wai 1040, above n 24, at 157.

³⁵⁵ Wai 1040, above n 24, at 501.

³⁵⁶ Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010). See also Wai 1040, above n 24.

³⁵⁷ Joseph, above n 340, at 37.

³⁵⁸ Wai 1040, above n 24, at 502.

Rather, the Whakaputanga was an unambiguous declaration that hapū and rangatira authority continued in force – as, on the ground, it undoubtedly did – and that Britain had a role in making sure that state of affairs continued as Māori contact with foreigners increased.

Historian Paul Moon has argued that the Declaration of Independence represented “regional goodwill”.³⁵⁹ This is consistent with Britain’s immediate response to the Declaration that indicated it did not see itself as being bound by the Declaration of Independence.³⁶⁰ The Waitangi Report, Wai 1040 noted that:³⁶¹

The official response to the declaration in 1836 by the Secretary of State for War and Colonies, Lord Glenelg, did not take those commitments any further, and rather signalled only a very conditional willingness to protect Māori independence.

Michael King maintained that the Declaration of Independence had no substance “since there was in fact no national indigenous power structure within New Zealand”.³⁶² King also noted that some of the United Tribes were at war with one another within a year of signing the document.³⁶³

Notwithstanding these views many historians, including Tom Brooking, assert that the Colonial Office accepted that the Confederation of United Tribes, the Māori signatories, retained “title to the soil and sovereignty of New Zealand”.³⁶⁴ Māori have relied on this affirmation of sovereignty in the Declaration of Independence in contemporary legal proceedings.³⁶⁵ For example, although unsuccessful, Ngāti Whātua argued before the High Court that they remained an independent sovereign state under the Declaration of Independence (1835), which preceded the Crown annexation of New Zealand in 1840.³⁶⁶ In light of the Wai 1040 Report,³⁶⁷ although only recommendations, if this case taken by Ngāti Whātua was heard today, the findings from the High Court may have been different.

³⁵⁹ Joseph, above n 340.

³⁶⁰ Wai 1040, above n 24, at 502.

³⁶¹ Wai 1040, above n 24, at 502.

³⁶² See King, above n 26.

³⁶³ See King, above n 26. See also Wai 1040, above n 24, at 157 – 158.

³⁶⁴ Tom Brooking *Māori and Pākehā Relations: 1800-1860* (Ministry of Education, Wellington, 1991).

³⁶⁵ See *Morunga v Police* 16/3/04HC Auckland, CRI-2004-404-8.

³⁶⁶ *Re Manukau* HC Auckland M 1380/92, 10 June 1993.

³⁶⁷ Wai 1040, above n 24.

The Declaration of Independence is a source of indigenous rights. In view of the recent findings from the Waitangi Tribunal³⁶⁸ on its examination of the intersection of the powers successively reserved to Māori in the Declaration of Independence, an examination of the Treaty will be important.

(b) 1840 – 1900

With the signing of the Treaty of Waitangi in 1840, the Crown claimed, contentiously, that Māori ceded sovereignty and the New Zealand Parliament subsequently established. The current Waitangi Tribunal Claim, Te Paparahi o te Raki, Wai 1040, questions whether the Māori signatories of the Treaty did cede sovereignty. Stage one of the Wai 1040 report, released on 14 November, 2014, found that the chiefs who signed the Treaty did not cede sovereignty to the British Crown, but agreed “to share power and authority with Britain”.³⁶⁹ The report further stated that “the detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis”.³⁷⁰ The report is silent on how and when the Crown acquired sovereignty. However, Paul McHugh, in the report, states that “the Crown acquired sovereignty not through the Treaty but a series of jurisdictional steps” so the signature gathering was no longer necessary after securing the following jurisdictional steps and proclamations.³⁷¹ Wai 1040 notes:

Entering into a Treaty with Māori would meet Britain’s self-imposed condition prior to asserting sovereignty, but the assertion of sovereignty itself would be an entirely independent step

In the six months preceding the signing, New Zealand transformed from an independent Māori nation into an appendage of New South Wales before becoming an

³⁶⁸ Wai 1040 above n 24.

³⁶⁹ Wai 1040, above n 24, at 528, 529.

³⁷⁰ Wai 1040, above n 24, at 528.

³⁷¹ Wai 1040, above n 24, at 329, 474 – 475. In a brief statement responding to the report, Attorney-General and Treaty of Waitangi Negotiations Minister Chris Finlayson said: *“There is no question that the Crown has sovereignty in New Zealand. This report doesn’t change that fact”* in Kate Kenny ‘Māori did not give up sovereignty: Waitangi Tribunal’ 14 November 2014 <<http://www.stuff.co.nz/national/politics/63196127/Maori-did-not-give-up-sovereignty-Waitangi-Tribunal>>

infant colony of Great Britain. During this time several proclamations were issued in anticipation of New Zealand becoming a British possession.³⁷²

On 15 June 1839 Letters Patent were issued under the Great Seal, altering the boundaries of New South Wales. Pursuant to the Letters Patent, New Zealand became a British possession as an appendage of the Australian Colony of New South Wales.³⁷³ On 19 January 1840 the Governor of New South Wales, Sir George Gipps, issued three proclamations, which he retrospectively dated to 14 January 1840. The first extended the boundaries of New South Wales to include:³⁷⁴

... any territory which is or may be acquired in sovereignty by Her Majesty... within that group of Islands ... known as New Zealand.

The second and third proclamations announced that he had administered oaths of office to Hobson,³⁷⁵ as Lieutenant-Governor “in and over the same”, and that the Queen would not recognise any title to land purchased directly from Māori after 14 January 1840.³⁷⁶

On 6 February 1840 the Treaty of Waitangi received its first signatories. Despite the Treaty travelling around the country and receiving further signatories, on 21 May 1840 Hobson declared the sovereign rights of Britain in two proclamations.³⁷⁷ One proclaimed sovereignty over the North Island by virtue of cession under the Treaty of Waitangi, and the other over the South Island on the grounds of discovery. The British Government acknowledged Hobson’s proclamations, which were subsequently published in the London Gazette on 2 October 1840.

On 16 June 1840 the Legislative Council of New South Wales passed an Act extending the laws of New South Wales to “Her Majesty’s Dominions in the Islands of New Zealand”.³⁷⁸ New Zealand was now part of New South Wales.³⁷⁹ On 7 August

³⁷² Foden above n 330, at 12-17.

³⁷³ See Joseph above n 340 at 39. Wai 1040, above n 24, at 314.

³⁷⁴ Wai 1040, above n 24, at 314, 340.

³⁷⁵ William Hobson was the first Governor of New Zealand and assisted in the drafting of the Treaty.

³⁷⁶ See Foden, above n 330.

³⁷⁷ At 17-20

³⁷⁸ See Joseph, above n 340, at 40.

1840 the New South Wales Continuance Act of 1840 provided that New Zealand was a separate colony from New South Wales, and now a British Colony.

Hobson was appointed as Governor of the new colony, pursuant to Letters Patent issued on 24 November, 1840, and officially in existence on 3 May, 1841.³⁸⁰ This signalled the beginning of New Zealand as an infant colony.

(c) Constitutional Beginnings

Between 1840 and 1860 New Zealand's constitutional and legal structures provided Parliament the power to pass laws in New Zealand under the English Laws Act of 1858 (UK).³⁸¹ Section 1 of this Act ensured the adoption of the common law in New Zealand.³⁸² The English Laws Act of 1854, the English Laws Act of 1858 and the English Laws Act of 1908 were recognised as part of New Zealand municipal law as of 14 January 1840.³⁸³

It was not until the 1852 Constitution Act (UK) ("1852 Act") that New Zealand's constitutional beginnings were formalised.³⁸⁴ The 1852 Act was the third 'constitutional' Act in New Zealand.³⁸⁵ The first, the Charter of New Zealand 1840, came into force in 1841 when New Zealand was separated from New South Wales and constituted a separate colony. The second constitution passed by the Imperial Parliament (Westminster) was the New Zealand Constitution Act of 1846.³⁸⁶

³⁷⁹ New Zealand Charter 1840 was the first constitutional document, the second was the Constitution Act 1847 (UK) which Governor Grey did not apply, the New Zealand Constitution Act 1852 (UK)

³⁸⁰ See Joseph, above n 340, at 21.

³⁸¹ At 21.

³⁸² See *Attorney General v Ngāti Apa* [2003] 3 NZLR 643 at [17-19]. See also *Fuller v MacLeod* [1981] 1 NZLR 390 where the Court established that subject to statutory limitations there is a common law right, in this instance, for the owner of land fronting a road to have access.

³⁸³ *R v Symonds* (1847) NZPCC 387.

³⁸⁴ See also Phillip A Joseph and Gorder R Walker "A Theory of Constitutional Change (1987) 7 Oxford J. Legal Stud 155 at 157.

³⁸⁵ See Joseph, above n 340.

³⁸⁶ Governor Grey refused to administer the 1846 Act.

(d) Inclusion of Tikanga Māori

The implementation of this constitution did not consider the inclusion of tikanga Māori or the requirement of the “right ways of acting and being”, subsequently marginalising these values. For Māori, if the action did not result in a breach of personal or collective tapu, it was not regarded as a crime. This perception did not always equate with the provisions of the British law that had been imposed upon Māori. Collective responsibility for individual transgressions, in accordance with tikanga Māori, had no place in British law.³⁸⁷

The Native Exemption Ordinance No. 18 came into effect on 16 July, 1844 to assist the “aboriginal native population to yield a ready obedience to the laws and customs of England” as this “may be more speedily attained by gradual rather than immediate enforcement of the law so that in the course of time the native population may willingly submit”.³⁸⁸ Under this Ordinance, if the victim and offender were both Māori, the proceedings could be instigated by two chiefs from the tribe to which the offender belongs.³⁸⁹ This “positioned Māori outside the jurisdictional boundaries”³⁹⁰ and was more consistent with how Māori rangatira perceived their exception rather than subjection to the colonial law.³⁹¹

If the victim was non-Māori, then any action taken was not to disturb the peace of the community.³⁹² The chiefs were remunerated for their time and effort.³⁹³ Consistent with the notion of reciprocity and utu, and in lieu of imprisonment, this Ordinance enabled the payment of a fine for a debt incurred.³⁹⁴ In the case of *R v E Hipu*,³⁹⁵ the court records show that:

³⁸⁷ See Wai 1040, above n 24, at 33 that stated ‘Consistent with the principle of whanaungatanga, utu would be taken against the group, rather than solely against the offending individual if there was one.’

³⁸⁸ Preamble Native Exemption Ordinance (No 18).

³⁸⁹ Native Ordinance, s 1: Mode of procedure in cases of crime committed by the natives inter se.

³⁹⁰ Nan Seuffert *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (2006, Ashgate, Aldershot UK) at 32.

³⁹¹ McHugh *Aboriginal Societies*, above n 27, at 170.

³⁹² Section 2: By Natives against others.

³⁹³ Section 4: Allowance for Chiefs for causing apprehension of offenders.

³⁹⁴ Section 12: Aborigines not to be imprisoned for debt.

³⁹⁵ *R v E Hipu* 1 December 1845 Supreme Court, Wellington, Chapman J. As cited at <www.victoria.ac.nz/law>.

E Hipu, a native, was tried and found guilty of having stolen a piece of print from Mr. Lyon's store about twelve months since, and sentenced (under the Native Exemption Ordinance) to pay eight pounds, or four times the value of the goods stolen. The fine was paid for the prisoner. The prisoner had escaped from custody and was recaptured only a fortnight before trial.

A later Ordinance extended this to include assault.³⁹⁶

In recognition by Governor Fitzroy of the negative effect imprisonment had on Māori, he insightfully noted:³⁹⁷

The Natives [do] not regard imprisonment as we [do], deprivation of personal liberty often ended in the death of the savage; and regarding them in a transitional state, he thought *imprisonment would tend to retard their improvement* [emphasis added].

Today the disproportionate criminal justice statistics for Māori confirm this comment by Governor Fitzroy. Notwithstanding the potential for this Ordinance to assist in achieving balance, it was not popular amongst the settler population.³⁹⁸

This Ordinance was replaced by Governor Grey with the Resident Magistrates Court Ordinance 1846. Perceived as a successful initiative, the 1846 Ordinance sought to incorporate Māori decision-making and tikanga into legislation. The 1846 Ordinance provided that, for disputes involving only Māori, a Resident Magistrate was to sit with two Māori rangatira (chiefs) appointed as Native Assessors. As a non-Māori system, each case was determined according to the principles of equity and good conscience, without being constrained by strictly legal evidence.³⁹⁹ In accordance with s 22, the decision was to be made by consensus. Rangatira were responsible for their own people, delivering to the magistrate those individuals who were guilty of serious

³⁹⁶ Fines for Assault Ordinance 1845

³⁹⁷ Legislative Council Minutes, Tuesday 9 July, printed in the Daily Southern Cross, 13 July 1844 at 3 <www.victoria.ac.nz>. See also comments from Paul Butler '... less punitive crime policy is in our collective self interest' as cited by J Forman in 'Why care about mass incarceration?' (2010) 108 Michigan Law Review, 1009.

³⁹⁸ New Zealand Spectator and Cooks Strait Guardian 15 February 1845, at 2 <www.victoria.ac.nz/law/nzlostcases>.

³⁹⁹ As per ss 7, 10, 13, 19 and 20. See Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa, New Zealand" (2009) 17 Waikato Law Review at 74.

offences against settlers, and reporting regularly on the state of their districts.⁴⁰⁰

The ability to incorporate concepts of tikanga Māori, including the notion of consensus together with strong leadership and the involvement of the Resident Magistrates system with Māori Assessors, all contributed to the success of this Ordinance.

Through seeking to recognise tikanga Māori in *R v Rangitapiripiri*,⁴⁰¹ Chapman J noted that:⁴⁰²

as far as the law to be applied in the new colony, this only indicated that as between the settlers, or the settlers and Māori that English law should be applied.

For matters between Māori, Chapman J stated that “Māori laws and customs remained in place unless specifically abrogated on the basis that they were against the law of humanity”.⁴⁰³ This reasoning supports the notion of a parallel justice system or the application of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court, and premised on fundamental Māori concepts and doctrine, is the appropriate way forward for Māori.

The two constitutions, the Charter of New Zealand 1840 and the New Zealand Constitution Act of 1846,⁴⁰⁴ remained in force until the Constitution Act of 1852 was passed in 1853. The Constitution Act of 1852 established the organs of government. Section 32 of the Constitution Act of 1852 (UK) established a General Assembly consisting of the Governor, the House of Representatives and the Legislative Council. Section 53 granted the General Assembly the power to make laws for New Zealand.

⁴⁰⁰ Joseph, above n 399.

⁴⁰¹ 1 December 1847 Supreme Court, Wellington, Chapman J heard together with *R v Native*

⁴⁰² For further information, see Shaunagh Dorsett "'Sworn on the Dirt of Graves": Sovereignty, Jurisdiction and the Judicial Abrogation of Barbarous Customs in New Zealand in the 1840s" (2009) 30 *The Journal of Legal History* 175; Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', 1 *History Compass* (2003), AU 049, 001 - 024.

⁴⁰³ Shaunagh Dorsett "'Sworn on the Dirt of Graves": Sovereignty, Jurisdiction and the Judicial Abrogation of Barbarous Customs in New Zealand in the 1840s", (2009) 30 *The Journal of Legal History* 175; Ward, above n 402.

⁴⁰⁴ Governor Grey refused to administer the 1846 Act.

Section 71 provided the Governor with the power to set apart ‘Māori districts’, where Māori laws and customs would prevail, stating:⁴⁰⁵

And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, *should for the present be maintained for the government of themselves* [emphasis added], in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

This carried the potential to create domestic dependent Māori nations, analogous to those in the United States.⁴⁰⁶ The provisions for ‘Māori/Native Districts’ implied that Māori customary law could prevail over national laws.⁴⁰⁷

It is suggested that had this statutory intention been realised, Māori would be on par with their Native American counterparts. It is also plausible that a tribal system of governance, such as the Navajo Tribal Court System⁴⁰⁸ which recognises and implements Navajo customary law, could have been accomplished.⁴⁰⁹ Although many Native Americans still experience disproportionate social statistics, a tikanga based court system may have alleviated the current disproportionate social statistics for Māori.

⁴⁰⁵ *Constitutions of Nations Volume II France to New Zealand* (Brill Archive) at [71].

⁴⁰⁶ See Chapter V ‘Initiatives in Comparative Jurisdictions’ for further discussion on the Navajo Courts.

⁴⁰⁷ McHugh *Aboriginal Societies*, above n 27, at 200. See also Jim Cameron *Plural Justice, Equality and Sovereignty in New Zealand* (unpublished paper for the Law Commission, 22 October 1997) at 48.

⁴⁰⁸ See Chapter V ‘Initiatives in Comparative Jurisdictions’ for further discussion.

⁴⁰⁹ See Nicola Roughan “Conceptions of Custom in International Law” <www.ssrn.com> for further discussion including a greater role for ‘custom’.

However, s 71 was never invoked.⁴¹⁰ No districts were ‘set apart’ in terms of the Act, despite the efforts of various Māori groups, including the Kīngitanga movements, to have the provisions of s 71 implemented.⁴¹¹

The Kīngitanga movement attempted to use s 71 in their claims for self-governance. However, that section is no longer available as it was eventually repealed by the Constitution Act of 1986. No analogous section, allowing the legal recognition of customary governance, was included in the 1986 Act.

Despite the fact that s 71 was never implemented, Ngāi Tūhoe has always sought tino rangatiratanga within Aotearoa. The Urewera District Native Reserve Act 1896 (Urewera Act) provided for the “ownership and local government of the native lands in the Te Urewera district”.⁴¹² In recognition of the existing tikanga of Ngāi Tūhoe, the preamble noted:

It is desirable in the interests of the Native race that the Native ownership of the Native lands constituting the Urewera District should be ascertained in such manner, not inconsistent with Native customs and usages, as will meet the views of the Native owners generally and the equities of each particular case, and also that provisions be made for the local government of the said district.

This clear statutory recognition of traditional customary structures within the traditional area or ‘te Rohe Pōtae’⁴¹³ of Ngāi Tūhoe, provided internal self-governance through local government, protecting the Ngāi Tūhoe from external alienation. However, “the Act was designed not to guarantee autonomy to Ngāi Tūhoe, but to open up Te Urewera to the Europeans”:⁴¹⁴

⁴¹⁰ For a current comparative example where laws established by the State recognizing Indigenous rights have not been utilized see the law “On Territories of Traditional Nature Use of Indigenous, Small Numbered Peoples of the North, Siberia and the Far East of the Russian Federation (7 May 2001, No 49-FZ) adopted by Russia in 2001 provided for the creation of Territories of Traditional Natural Use. This law guaranteed land use rights to Indigenous peoples; however, more than a decade after adoption no territory has been established.

⁴¹¹ See New Zealand Law Commission above n 33, at [92]. For a discussion on the development of, and attempts to implement, s 71 of the Constitution Act 1852 see Robert Joseph *Historical Bicultural Developments: The Recognition and Denial of Māori Custom in the Colonial Legal System of Aotearoa/New Zealand* (LIANZ: Te Matahauriki Research Unit, Hamilton, 1998).

⁴¹² Urewera District Native Reserve Act 1896.

⁴¹³ Te Rohe Pōtae is the name given to describe the boundaries of the Tūhoe territory.

⁴¹⁴ Danny Keenan “Autonomy as Fiction: The Urewera Native District Reserve Act 1896” in Keenan (ed) *Terror in our Midst* (Huia Publishers, Wellington, 2008) at 91.

Government policy, however, was firmly focused on the purchase of Urewera land, not on the promotion of Māori development of land and agricultural enterprise (in spite of Tūhoe efforts at Ruatoki). This came in spite of Ngata's assurances in Parliament that section 8 of the Urewera Amendment Act 1909 was 'for the purpose of promoting settlement on their lands by Natives themselves'. From this point onward, Tūhoe non-sellers were placed in a position of reacting to and protesting against aggressive Government purchase policy in the Urewera.

During the reading of the Bill, the then Leader of the Opposition, Captain Russell, focused on the illusion that Tūhoe would be given self-governance and states the Bill:⁴¹⁵

... pretends to confer upon the Native people the complete isolation and control of a portion of the country about 665,000 acres in extent, but I am happy to say it will do no such thing ... To give effect to this Bill we have to make a district with which the land-law of the Native people shall be *absolutely different* [emphasis added] from that in any other part of the colony.

Tūhoe were granted something far less than self-government. The aspirational beginnings of the Urewera Act resulted in legislation with the purpose of gaining land ownership.⁴¹⁶

Unfortunately, the overlaying of non-indigenous values, such as individualism, has led to conflict and the marginalisation of fundamental Māori values, such as reciprocity, relatedness and balance. To meaningfully recognise these fundamental values, concepts based on state and private ownership would need to be abandoned in favour of concepts underpinned by a relational worldview — one that is closely aligned with the indigenous worldview and the Māori world.

Despite this positive intention, it did not translate into meaningful Māori governance structures.⁴¹⁷ What did eventuate were four Māori seats under the Māori

⁴¹⁵ Judith Binney *Encircled Lands: Te Urewera* (Bridget Williams Books, Wellington, 2010).

⁴¹⁶ See Joseph, above n 341, at 74-97 for full discussion.

⁴¹⁷ See Robert Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998) at 2 (abstract).

Representation Act 1867. The 1852 Act disenfranchised Māori from political participation. It stipulated that eligible land ownership was a requirement of the Māori Representation Act 1867.

After the 1852 Act, the judiciary evaded the obligation to continue the application of Māori customary law and usage until customary title was extinguished. In *Re The Landon and Whitaker Claims Act 1871*, the Court of Appeal reasserted:⁴¹⁸

The Crown is bound, both by the common law of England and by its own solemn engagements, *to a full recognition of native proprietary rights* [emphasis added]. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand vested and resides in the Crown, until it be parted with by grant from the Crown.

This judicial recognition of Māori aboriginal or customary title was unfortunately short lived. During the following time frame, Māori customary law was gradually displaced and alienated by a raft of statutes.

(e) 1900 – present day

The beginning of the 20th century marked a period during which New Zealand seceded from the United Kingdom and developed into an independent country. The Constitution Act 1852 gave the New Zealand Parliament the power to pass its own legislation. However, as a dominion of the United Kingdom, Parliament could not pass laws repugnant to the United Kingdom, nor amend the Constitution Act 1852, thus limiting its law making power.

The Imperial Parliament enacted the Statute of Westminster in 1931 to give Great Britain's dominions greater legislative autonomy.⁴¹⁹ This statute purported to allow

⁴¹⁸ *In Re The Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 at 49.

⁴¹⁹ See BV Harris "Law-making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 *Otago LR* 565 at 565-571. See also Joseph and Walker, above n 384, at 157.

laws to be valid even where they were repugnant to the laws of Great Britain.⁴²⁰ However, s 8 of the Statute of Westminster 1931 provided an important qualification to the broadening of local law-making powers.⁴²¹ It did this by articulating that the New Zealand Constitution Act 1852 was only to be altered or repealed in accordance with the law as it existed before the commencement of the 1931 Act.⁴²² This left the then General Assembly without the power to amend or repeal the remaining entrenched provisions of the 1852 Act that limited the law making powers for New Zealand. The passing of the New Zealand Constitution (Amendment) Act 1947 (UK) provided such a power.⁴²³

The New Zealand Constitution (Amendment) Act 1947 (UK) gave Parliament full powers of constitutional amendment, thereby allowing New Zealand to pass laws repugnant to the Constitution Act 1852. While the 1947 Act was considered a breakthrough, it added to the growing number of complex and fragmented sources of New Zealand's constitution.

The Constitution Act 1986 ("1986 Act") provided some clarification by amalgamating the constitution process into a single Act, replacing the 1852 Act, the Statute of Westminster Act 1947 and the New Zealand Constitution (Request and Consent) Act 1947. The 1986 Act removed the power of the United Kingdom to pass laws for New Zealand and consolidated the constitutional sources within a single Act, representing our current constitutional arrangements.⁴²⁴

Although the Ordinances provided for the recognition of tikanga Māori, the 1986 Act does not include any reference to the Treaty. The lack of Māori involvement has been an implicit feature throughout New Zealand's constitutional history. However, during the 1980s there was a period of Māori Renaissance, which led to the establishment of the Waitangi Tribunal, among other innovations.⁴²⁵ In light of this historical context,

⁴²⁰ See section 4 of 1931 Act; Harris, above n 419.

⁴²¹ Harris, above n 419.

⁴²² Harris, above n 419.

⁴²³ Harris, above n 419.

⁴²⁴ See Joseph, above n 340.

⁴²⁵ See Ken A Palmer "Law, Land and Māori Issues" (1988) *Canterbury Law Review* 322. See also McHugh *The Māori Magna Carta*, above n 34. See also discussion in Richard Hill *Māori and the State Crown-Māori Relations in New Zealand/Aotearoa 1950-2000* (Victoria University Press, Wellington,

it is surprising the Treaty was not expressly included in New Zealand's constitutional arrangements.

This very concern was raised with the passing of the Bill of Rights Act in 1990. The Fourth Labour Government, led by Prime Minister David Lange, tabled a White Paper to include the Treaty of Waitangi within the Bill of Rights.⁴²⁶ Under the Bill the Treaty would strike down other Acts that “unreasonably encroached” upon the Treaty.⁴²⁷ However, many Māori did not agree with inserting the Treaty into a rights charter. Some Māori believed that the Treaty had the status as the founding document rather than a mere right.⁴²⁸ No mention of the Treaty was made in this Act, nor has one been made in our current Constitution Act 1986.

Had the 1986 Act and the New Zealand Bill of Rights Act 1990 included a reference to the Treaty of Waitangi, the 1986 Act would have provided effective tools for promoting indigenous rights. A resulting re-focus upon the right of self-determination as the cornerstone for indigenous peoples and Māori rights, supported by international indigenous jurisprudence, may have offered a degree of protection for Māori.

The 1986 Act repealed s 71 of the 1852 Act, which provided for customary Māori governance and the establishment of native districts where the first law — tikanga Māori — would prevail. The repeal of s 71 halted any contemporary devolution of power to uphold customary Māori governance.

The next feature within this period concerns the abolition of the Privy Council as our final appellate court. The Supreme Court Act 2003 established the New Zealand Supreme Court as our final appellate court.⁴²⁹ It was enacted by the Labour Government and ignited a debate in New Zealand society around our constitutional directions. The establishment of the Supreme Court indicated that New Zealand was

2009) on the aspirations of Māori for rangatiratanga with the establishment of, for instance, Māori Womens Welfare League and Māori Committees.

⁴²⁶ See discussion under Entrenchment of the Treaty.

⁴²⁷ See Joseph, above n 340.

⁴²⁸ See discussion under Entrenchment of the Treaty.

⁴²⁹ See Joseph, above n 340, at 24.

becoming more independent.⁴³⁰ The New Zealand court structure is now governed by the Judicature Act 1908 (High Court and Court of Appeal), the District Courts Act 1947 and the Supreme Court Act 2003.

Despite the above issues and recent developments, there remains the thorny obstacle of where the Treaty of Waitangi and tikanga Māori will sit within the unwritten Constitution.⁴³¹ The recent recommendations by the Constitutional Advisory Panel highlighted this issue by noting there is no broad support for a supreme constitution. However, it also noted that there is support for entrenching elements, although this does not include the Treaty of Waitangi or tikanga Māori.⁴³² On the matter regarding the role of the Treaty of Waitangi, the Constitutional Review Panel put forward the following recommendations:⁴³³

- continues to affirm the importance of the Treaty as a foundational document;
- ensures a Treaty education strategy is developed that includes the current role and status of the Treaty and the Treaty settlement process so people can inform themselves about the rights and obligations under the Treaty;
- supports the continued development of the role and status of the Treaty under the current arrangements as has occurred over the past decades;
- sets up a process to develop a range of options for the future role of Treaty, including options within existing constitutional arrangements and arrangements in which the Treaty is the foundation; and
- invites and supports the people of Aotearoa New Zealand to continue the conversation about the place of the Treaty in our constitution.

B. Treaty of Waitangi

In 1840 the Crown and Māori signed the Treaty of Waitangi (the Treaty). This action subsumed the existing social, political, legal and economic rights for Māori into a

⁴³⁰ A major reason was the physical proximity of Privy Council to New Zealand. The Law Lords could not appreciate New Zealand's context.

⁴³¹ For further discussion see <www.beehive.govt.nz>.

⁴³² Ministry of Justice Constitutional Advisory Panel New Zealand's Constitution: A Report on a Conversation (He Kōtuinga Kōrero Mōte Kaupapa Ture o Aotearoa, Wellington, November 2013) at 16

⁴³³ Ministry of Justice, above n 361.

non-Māori paradigm. According to David Williams, the Treaty of Waitangi may be seen as:⁴³⁴

... the starting point and the foundation stone for the legitimacy of an autochthonous constitution that springs from all peoples of this nation.

(a) Text

There were several different texts of the Treaty in English and in Māori. Although it is the English text that is always referred to, for the purposes of the developing jurisprudence, it is the Māori that should be preferred.⁴³⁵

Signed in 1840, Article 1 of the English text stated:⁴³⁶

The Chiefs of the Confederation of the United Tribes of New Zealand ... cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation ... respectively exercise or possess...

In Article 2 the Crown, in exchange, confirmed and guaranteed:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand ... the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess ...

In Article 3, the Crown also extended:

[...] Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

⁴³⁴ David Williams “Indigenous Customary Rights and the Constitution of Aotearoa New Zealand” (2006) 14 *Waikato Law Review* 106 at 132.

⁴³⁵ This is consistent with the contractual doctrine ‘contra proferentum’ which ‘holds that the words of a document are construed more strongly against the party who drafted the document or in whose benefit it is intended to operate’ Spiller *New Zealand Law Dictionary* (Lexis Nexis, Wellington, 2005) at 63.

⁴³⁶ Ian Hugh Kawharu “The Treaty of Waitangi (the text in English) by I Hugh Kawharu” in M Belgrave, M Kawharu and D Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Australia, 2005) at 389–390.

Te Tiriti text stated:⁴³⁷

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o NuTirani - kia wakaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana. Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane, amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atua enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoke ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

⁴³⁷ Distinguished Professor Dame Anne Salmond's Brief of Evidence for the Waitangi Tribunal Wai 1040 dated 17 April 2010 at 4.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru raue wa te kau o to tatou Ariki.

Although not widely acknowledged, a fourth article was added to the Māori text. This stated:

E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki e tiakina ngatahitia e ia,

This has been translated as:⁴³⁸

The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome and also of Māori custom shall alike be protected by him.

Thus Article 4 of the Treaty confirms the support for religious freedom and the ability for Māori to retain their own customs and culture. Notwithstanding this support, it is the first three articles that are referred to by the Crown.

There are several different translations of the Māori text into English. The reconstruction of the Māori text by Sir Ian H. Kāwharu is widely recognised and accepted. The reconstruction states:⁴³⁹

⁴³⁸ Salmond, above 437.

In Article 1:

The Chiefs of the Confederation ... give absolutely to the Queen of England forever the complete government over their land.

Kāwharu noted that Māori signatories had no understanding of ‘government’ in the sense of sovereignty when signing the Treaty. There was no equivalent translation of ‘kāwanatanga’.

In Article 2:

The Queen of England agrees to protect the chiefs ... in the unqualified exercise of their chieftainship over their lands, villages and all their treasures ...

In Article 3:

[...] the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

The exact meaning of the Treaty is often debated.⁴⁴⁰ However, it is commonly accepted that Article 2 confirms and guarantees to Māori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other treasures. The use of ‘taonga’, or treasures, implies a connection between the Treaty and Māori social and economic development. Thus, although Article 2 may seem to be restricted to forests and fisheries, the 1988 Royal Commission on Social Policy broadened the application of Article 2 to conclude that the Treaty also has implications for health and social policies.⁴⁴¹

⁴³⁹ Ian Hugh Kawharu “A Reconstruction of Māori Text” in Michael Belgrave, Merata Kāwharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Australia, 2005) at 389–390.

⁴⁴⁰ See, for example, discussion in Maui Solomon “The Wai 262 Claim” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Australia, 2005) at 216–217.

⁴⁴¹ Royal Commission on Social Policy, the April Report (1988) 11 Future Directions 27 at 80.

Article 3 of the Treaty states that the “Queen of England will protect all Māori of New Zealand and will give them the same rights as those of the people of England.” This not only includes protection and equality, but also, arguably, extends to include the provision of health.⁴⁴² According to Te Kani Kingi:⁴⁴³

It is little wonder, therefore, that Māori have come to view the Treaty as an ideal framework for Māori health development...[;] it is clear that above all else it [the Treaty] is concerned with equity and the promise that Māori can enjoy, at the very least, the same health and well-being as non-Māori.

However, a more accurate translation is provided by Merimeri Penfold and distinguished Professor Anne Salmond:⁴⁴⁴

Victoria the Queen of England in her caring concern [mahara atawai] for the rangatira and the hapū of New Zealand, and in her desire that their chieftainship [rangatiratanga] and their land should be preserved to them, and that lasting peace and also tranquil living [te Rongo... me te Atanoho hoki] should be theirs has thought it right that a Rangatira should be sent — as a mediator [kai wakarite] to the māori people [tangata māori pl.] of New Zealand — that the māori rangatira might agree to the Governorship [Kāwanatanga] of the Queen over all parts of the land and the islands, since many of her people have settled in this land, and others are yet to come.

Now the Queen wishes that the Governorship should be established, so that evil may not come to the māori people and the pākehā who are living without law [ture].

Now the Queen has been pleased that I, William Hobson, a Captain in the Royal Navy, should be sent [tuku] as Governor for all those parts of New Zealand which are now or shall be released [tukua] to the Queen, and declares to the rangatira of the Confederation [whakaminenga] of the tribes [hapū] of New Zealand the laws [ture] that are spoken here:

⁴⁴² Te Kani Kingi *The Treaty of Waitangi and Māori Health* Te Mata o Te Tau Lecture Series, Massey University, New Zealand (2 March 2006). More recently see also Waitangi Tribunal (Wai 2358, 2012) *The Interim Report on the National Freshwater and Geothermal Resources Claim* ‘Treaty conferred a development right’ at 106.

⁴⁴³ Te Kani Kingi, above n 371.

⁴⁴⁴ Salmond, above n 437, at 11.

The first

The rangatira of the confederation and all of the rangatira who have not joined that confederation give completely [tuku rawa atu] to the Queen of England forever — all the Governorship [Kāwanatanga] of their lands.

The second

The Queen ratifies [whakarite] and agrees to the unfettered chiefly powers [tino rangatiratanga] of the rangatira, the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their valuables [taonga]. Also, the rangatira of the Confederation and all the other rangatira release [tuku] to the Queen the trading [hokonga] of those areas of land whose owners are agreeable, according to the return [utu] agreed between them and the person appointed by the Queen as her trading agent [kai hoko].

The third

In recognition of this agreement to the Governorship of the Queen — the Queen will care for [tiaki] all the maori people [nga tāngata māori pl. katoa] of New Zealand and give [tukua] to them all and exactly the same customary rights [tikanga rite tahi] as those she gives to her subjects, the people of England.

[Signed] W. Hobson Consul and Lieutenant Governor

Now we the Rangatira of the Confederation of the hapū of New Zealand assembled here at Waitangi, and also we the Rangatira of New Zealand see the likeness of these words. We accept and agree to all of this, and so we sign our names and marks.

This is done at Waitangi on the sixth day of February in the year one thousand, eight hundred and forty of our Lord [Ariki].

The discrepancies between the English and Māori texts and translations of the Treaty/te Tiriti are to be noted and have caused much debate and misunderstanding.⁴⁴⁵ One of the functions of the Waitangi Tribunal is to have regard to the two texts and the Tribunal has exclusive authority to determine the meaning and effect of the Treaty, as embodied in both texts and to decide issues raised by the differences between them.⁴⁴⁶

According to Professor Salmond, this is due to the fact that the Treaty of Waitangi and Te Tiriti are:⁴⁴⁷

... two very different documents, with divergent textual histories and political implications; and for that reason, it is a mistake to bracket them together. I have observed that this error has led to a confused and confusing historiography of the Treaty, which should not be perpetuated.

From a legal perspective, the most important discrepancy lies within the translation of ‘kāwanatanga’ to mean governorship, and not sovereignty.

According to Professor Salmond:⁴⁴⁸

In summary, one must conclude that in 1840, kāwanatanga was not an accurate or even a plausible translation equivalent for sovereignty — supreme, irresistible, absolute, uncontrolled authority. Rev. Richard Davis’s back translation of Te Tiriti, which translated rangatiratanga (which was guaranteed to the chiefs) as entire supremacy indicates that the missionaries were aware that what was proposed in Te Tiriti was a balance of powers, with the rangatira in the ascendant within their own domains.

The fact that so many subsequent commentators have claimed that at Waitangi and elsewhere, the rangatira ceded the sovereignty of New Zealand to Queen Victoria,

⁴⁴⁵ For discussion, see Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1997) at 32–59 and also *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Te Puni Kokiri, Wellington, 2001) at 37 <www.tpk.govt.nz>. See also Te Paparahi o te Raki Waitangi Tribunal Report, Wai 1040, 348 – 351

⁴⁴⁶ Treaty of Waitangi Act 1975, s 5(2). Section 6 (1) also provides that the jurisdiction of the Tribunal is for actions inconsistent with the ‘principles of the Treaty’ as opposed to the ‘text’.

⁴⁴⁷ Salmond above n 437, at 84.

⁴⁴⁸ Salmond, above n 437 at 26.

tells us more about the political interests involved, the rhetorical dominance of the English draft of the Treaty and perhaps unexamined assumptions about those hands in which goodness, wisdom and power are most likely to be found (to quote Blackstone) than it does about the weight of the evidence ...

And further:⁴⁴⁹

I do not believe, however, that in signing Te Tiriti, the rangatira ceded sovereignty to the British Crown.

If Māori did not, in fact, cede sovereignty as the recent Waitangi Report, Wai 1040, has found, then the Crown's subsequent actions to acquire sovereignty require close scrutiny and review, otherwise these actions can be perceived as illegitimate. For that reason alone, the implementation of an indigenous legal system should be supported.

(b) Entrenchment of the Treaty

In 1985 a government White Paper proposed a Bill of Rights for New Zealand that would control the powers and actions of the legislature as well the executive.⁴⁵⁰ The White Paper's authors dealt with the Treaty of Waitangi in the same way that s 35 of the Constitution Act 1982 (Canada) dealt with the rights of native Canadian peoples and proposed that the Treaty be included within a Bill of Rights. Once enacted, the Bill of Rights would be "supreme law".⁴⁵¹ Irrespective of which text should be entrenched, the added debate on the place of the Treaty in New Zealand's constitutional framework contributes to this confusion.

The majority of submitters to the Justice and Law Reform Committee on the White Paper did not favour this approach. The principal reason was the power the White

⁴⁴⁹ Salmond, above n 437, at 87.

⁴⁵⁰ Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" (1985) 1 AJHR A6; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005) at 27.

⁴⁵¹ Paul Rishworth "The New Zealand Bill of Rights" in Paul Rishworth, Grant Huscroft, Scott Optician and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003); Paul Rishworth "Human Rights" [2003] NZLR 261 at 276; Ripeka Evans "Is the Treaty of Waitangi a Bill of Rights?" in *A Bill of Rights for New Zealand* (Legal Research Foundation Seminar, Auckland, 1985) at 195; Shane Jones "The Bill of Rights and Te Tiriti o Waitangi" in *A Bill of Rights for New Zealand* (Legal Research Foundation Seminar, Auckland, 1985) at 207.

Paper would have given to the judiciary. Including the Treaty in the Bill of Rights also proved unpopular for some Māori. The lack of enthusiasm among some Māori was enough to thwart its enactment as supreme law, the Government having indicated that success of the White Paper proposal would require the support of Māori.⁴⁵²

The long title and preamble of the 1985 Bill read:

Whereas

- (1) New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person;
- (2) New Zealand in 1978 ratified the International Covenant on Civil and Political Rights;
- (3) *The Maori people, as tangata whenua o Aotearoa, and the Crown entered in 1840 into a solemn compact known as te Tiriti o Waitangi, and it is desirable to recognise and affirm the Treaty as part of the supreme law of New Zealand [emphasis added];*
- (4) It is desirable to affirm the human rights and fundamental freedoms of all people of New Zealand without discrimination and to ensure their recognition and observance as part of the supreme law of New Zealand by the Parliament and Government of New Zealand.

Part 2 of the Bill was entitled “The Treaty of Waitangi” and consisted of a single article as follows:

4. The Treaty of Waitangi

- (1) *The rights of the Māori people under the Treaty of Waitangi are hereby recognised and affirmed [emphasis added].*
- (2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.
- (3) The Treaty of Waitangi means the Treaty as set out in English and Māori in the Schedule to this Bill of Rights.

The original Bill recognised both texts of the Treaty, but clause 26 provided that in the event of any inconsistency between an enactment and the Treaty, application

⁴⁵² Paul Rishworth “The New Zealand Bill of Rights” in Paul Rishworth, Grant Huscroft, Scott Optician and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 18.

could be made to the Waitangi Tribunal.⁴⁵³ This avenue would have avoided restrictive judicial interpretations of s 5 of the New Zealand Bill of Rights Act, and the concept of ‘reasonable limits’ that are demonstrably justified in a free and democratic society. However, Māori were unhappy with including the Treaty in a legal system, where it might be subjected to restrictive judicial interpretations, even as supreme law.⁴⁵⁴ Many Māori considered that the matter should be dealt with separately and not subordinated in any way to other constitutional measures.⁴⁵⁵

Bearing in mind the unique place that the Treaty holds for Māori, Geoffrey Palmer, who was the Prime Minister at the time, considered that a Bill of Rights that ignored the Treaty would, at best, be an incomplete document.⁴⁵⁶ By declaring that certain rights were the supreme law of New Zealand and saying nothing about the Treaty, a Bill of Rights could be seen as relegating the Treaty and the rights of Māori to second class citizens.⁴⁵⁷ This would also be consistent with relegating human rights for Māori to an indigenous or minority right. Palmer described the effect of affirming and recognising the Treaty as part of the supreme law of New Zealand:⁴⁵⁸

Governments, Courts and Parliament will no longer be able to claim that these rights are only moral rights and have no substance in law, or that they can be overridden, expressly or impliedly, by the ordinary process of legislation.

Although judicial decisions have limited the application of the Treaty,⁴⁵⁹ there has been legislative recognition of the principles of the Treaty in public and private acts. Although it could be assumed that, if the 1985 proposal was reintroduced today, it would find more support from Māori. The recent report from the Constitutional Advisory Panel indicates this as unlikely, but the discussion should continue.⁴⁶⁰

⁴⁵³ See also Second Reading of the NZ Bill of Rights Bill 14 August 1985. <www.justice.govt.nz>.

⁴⁵⁴ Shane Jones “The Bill of Rights and Te Tiriti o Waitangi” in *A Bill of Rights for New Zealand: a White Paper* (Legal Research Foundation, University of Auckland, Auckland 1985) at 195 and 207; Claire Charters “Māori, Beware the Bill of Rights Act!” [2003] NZLJ 401; Claire Charters “BORA and Māori: The Fundamental Issues” [2003] NZLJ 459.

⁴⁵⁵ Butler and Butler, above n 379, at 27.

⁴⁵⁶ At 27.

⁴⁵⁷ At 30.

⁴⁵⁸ At 30.

⁴⁵⁹ See for example *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318; [2007] NZAR 569 (CA).

⁴⁶⁰ Ministry of Justice Constitutional Advisory Panel New Zealand’s Constitution A Report on a Conversation He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa November 2013 Wellington, 16

The rights indicated in s 4 (1) of the 1985 draft suggest legislative recognition of the Treaty obligations with respect to human rights for Māori. However, if enacted, the principles of the Treaty would need to be applied compatibly with New Zealand's international obligations. It is assumed that the human rights standards contained in the International Covenants, to which New Zealand is a party, together with the general principles of international law that form part of municipal law, without the express words of a statute, provide techniques for balancing interests.⁴⁶¹

The Treaty is the main vehicle through which Māori continue to express their desire to survive as distinct peoples. In this regard the Treaty stands on its own,⁴⁶² as a source of rights and obligations between Māori and the Crown.⁴⁶³

It is clear that the Māori text enables ongoing rangatiratanga of Māori tribes over their possessions and taonga (including intangibles such as language and culture) and that the Crown should protect that rangatiratanga. This also includes the right to self-determination and the right to development. The Crown would receive the right to govern a delegated power, subject to continuing Māori authority.⁴⁶⁴

(c) Rights and Duties Created by the Treaty

The Treaty has significant moral, spiritual and legal force. It is seen as “the founding document of New Zealand” and has been referred to variously as “a constitutional document”.⁴⁶⁵ The late Lord Cooke of Thorndon even referred to the Treaty as “simply the most important document in New Zealand's history”.⁴⁶⁶ It has also been referred to in case law as “essential to the foundation of New Zealand”, “part of the fabric of New Zealand society”⁴⁶⁷ and “of the greatest constitutional importance to

⁴⁶¹ Ian Brownlie *Treaties and Indigenous Peoples* (Oxford University Press, New York, 1992) at 93.

⁴⁶² But see further discussion in point “Legal Status of the Treaty” and *Te Heu Heu Tu Kino v Aotea District Māori Land Board* [1941] NZLR 590.

⁴⁶³ Alison Quentin-Baxter “The International and Constitutional Law Contexts” in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University of Wellington, New Zealand 1998) at 32.

⁴⁶⁴ Salmond above n 437, at 25.

⁴⁶⁵ Geoffrey WR Palmer *Constitutional Conversations* (Victoria University Press, Wellington, 2002) at 22

⁴⁶⁶ Sir Robin Cooke “Introduction” (1990) 14 NZULR 1 at 1-8.

⁴⁶⁷ Chilwell J in *Huakina Development Trust v Waikato Valley Authority & Bowater* [1987] 2 NZLR 188; (1987) 12 NZTPA 129 (HC) especially at [206] and [210]. But see also the obiter

New Zealand”.⁴⁶⁸

Baragwanath J states:⁴⁶⁹

It is time to recognize that the Treaty did not contemplate a society divided on race lines between two groups of ordinary citizens — Māori and non-Māori — set against one another in opposing camps.

Baragwanath J further states:⁴⁷⁰

Because the Treaty itself picked up the need to apply British justice in New Zealand it follows that any construction of the RMA that will work injustice to non-Māori is likely to infringe the principles of the Treaty as injustice to Māori.

The Treaty is designed to ensure unity within the state, while recognising Māori as tangata whenua. It has been proposed as a vehicle that may offer tino rangatiranga (self-governance) for Māori, from which Māori could negotiate the ongoing development of New Zealand, and prescribe a relationship in the form of human rights, social policy, economic policy and indigenous peoples’ rights.⁴⁷¹ Or perhaps even an indigenous court underpinned by tikanga Māori.

Although that option may exist, the realisation and manifestation of tino rangatiratanga is more problematic.⁴⁷²

There are some issues of general principle to consider. Notwithstanding s 7 of the New Zealand Bill of Rights Act 1990 (NZBORA),⁴⁷³ and the now repealed Foreshore

reservations of Casey and Hardie Boys JJ in *Attorney-General v New Zealand Māori Council* (No 2) [1991] 2 NZLR 147 (CA) at [149].

⁴⁶⁸ *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

⁴⁶⁹ *Ngāti Maru ki Hauraki Inc v Kruithof* [2005] NZRMA 1 at [48].

⁴⁷⁰ At [52].

⁴⁷¹ Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Australia, 2005) at 15-16.

⁴⁷² For example even though the Urewera District Native Reserve Act 1896 provided for the “ownership and local government of the native lands in the Te Urewera district” and allow tino rangatiratanga for the Tuhoe people this was eventually to result in the opening up of traditional lands to settlers. Compare Tuhoe Claims Settlement Act 2014; Te Urewera Act 2014, ss 17, 18 (management of Te Urewera).

⁴⁷³ Section 7 provides: Attorney-General to report to Parliament where Bill appears to be inconsistent

and Seabed Act 2004,⁴⁷⁴ it is possible to apply to the High Court to seek a declaration that certain legislation is discriminatory based on the Crown's Treaty obligations.

In examining the relationship between the principles of the Treaty and the International Human Rights Covenants, it would not be impossible to determine whether analysing the principles of the Treaty against international human rights standards would result in the enhancement or subversion of the economic and social rights of Māori.⁴⁷⁵ Nevertheless, there is no domestic legislative direction to uphold to Māori the guarantees of tino rangatiratanga. Māori are reliant on the Treaty principles of partnership, including utmost good faith and reasonableness, active protection and the honour of the Crown.⁴⁷⁶

(d) Status in Law

Initially viewed as a simple nullity,⁴⁷⁷ the orthodox view on the legal status of the Treaty is that unless it has been adopted or implemented by statute, it is not part of domestic law and creates no rights enforceable in Court. In *Te Heu Heu Tukino v Aotea District Māori Land Board*, the Privy Council ruled that:⁴⁷⁸

... it is well settled that any rights purported to be conferred by such a Treaty of cession cannot be enforced by the Courts, except so far as they have been incorporated in municipal law.

with Bill of Rights –

Where any Bill is introduced into the House of Representatives, the Attorney-General shall, –

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill, –

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

⁴⁷⁴ Marine and Coastal Area (Takutai Moana) Act 2011 replaced the Foreshore and Seabed Act 2004.

⁴⁷⁵ Brownlie, above n 390, at 24.

⁴⁷⁶ See Mason Durie *Te Mana, Te Kāwanatanga The Politics of Māori Self Determination* (Oxford University Press, Melbourne, Australia, 1998). See also discussion in Kelly Russ "Modern Human Rights: The Aboriginal Challenge" (LLM unpublished thesis, The University of British Columbia, April 2006) at ch 2.

⁴⁷⁷ *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ. However, see also *R v Symonds* (1847) NZPCC(SC), per Chapman J at 390 for earlier recognition of native title at common law and consideration of the Treaty.

⁴⁷⁸ *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] 2 All E.R. 93 at 98; [1941] NZLR 590.

Viscount Simon LC then quoted the passage from Lord Dunedin's judgment in *Vajesingji Joravarsingji v Secretary of State for India*,⁴⁷⁹ and continued:

So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him.

This view was consistent with the constitutional principle that treaties are not part of the law in New Zealand, and if rights and duties are to be altered, legislation is required.⁴⁸⁰ This was also the view in *Ashby v Minister of Immigration*, where Cooke J commented:⁴⁸¹

... a treaty that Parliament had not incorporated into New Zealand law could not possibly override the broad discretion conferred by Parliament on the Minister.

Sir Kenneth Keith noted that:⁴⁸²

... the Court of Appeal has yet to consider fully the proposition stated by the High Court of Australia that the ratification of a treaty gives rise to a legitimate expectation, in the absence of any legislation or executive indication to the contrary, that the executive would act in accordance with the treaty.

It is now generally accepted that the Treaty has constitutional importance and is part of New Zealand's constitutional arrangements.⁴⁸³ There is, however, major

⁴⁷⁹ *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357.

⁴⁸⁰ See Morag McDowell and Duncan Webb *The New Zealand Legal System* (4th ed, LexisNexis, Wellington, 2006) at 181.

⁴⁸¹ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 224; See also comments by Michael Taggart "Rugby, the Anti-apartheid Movement and Administrative Law" in Rick Bigwood (ed) *Public Interest Litigation* (Lexis Nexis, New Zealand, 2006) at 81 where the conferral of a broad discretionary power does not of itself exclude or displace the interpretive principle.

⁴⁸² Sir Kenneth Keith "Roles of the Courts in New Zealand in Giving Effect to International Human Rights – With Some History" (1999) 29 VUWLR 27; See also *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 (HCA) and *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 184.

⁴⁸³ See comments by GWR Palmer *Constitutional Conversations: Geoffrey Palmer Talks to Kim Hill on National Radio 1994-2001* (Victoria University Press, Wellington, 2002) at 22, and comments by Lord Woolf in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513; [1994] 1 AC 466 (PC) at 516; 469.

disagreement on its precise role and the nature and extent of the importance of the Treaty.⁴⁸⁴

In 1986 the Royal Commission on Electoral Law recommended that:⁴⁸⁵

Parliament and Government should enter into consultation and discussion with a wide range of representatives of the Māori people about the definition and protection of rights of the Māori people and the recognition of their constitutional position under the Treaty of Waitangi.

In 2005 the Constitutional Arrangements Committee recommended that:⁴⁸⁶

... there should be some specific process for facilitating discussion within Māori communities on constitutional issues.

Notwithstanding this recognition, it is the “Principles of the Treaty”⁴⁸⁷ that are referred to in legislation,⁴⁸⁸ and policy documents,⁴⁸⁹ rather than the text of the Treaty itself.

(e) Principles of the Treaty

Legislation and policy require decision-makers to take into account, when appropriate, the principles of the Treaty.⁴⁹⁰ For instance, when assessing an application for resource consent, the decision-maker is required by the Resource Management Act 1991 to take into consideration the principles of the Treaty.⁴⁹¹

⁴⁸⁴ See notes on the presentation by Sir Geoffrey Palmer, “The Treaty of Waitangi – Where to from here? Looking Back to Move Forward” (Presented to Te Papa Treaty of Waitangi Debate Series, 2 February 2006) at [25].

⁴⁸⁵ *Royal Commission on the Electoral System: Towards a Better Democracy* (1986) at [3.111].

⁴⁸⁶ See “Inquiry to Review New Zealand’s Existing Constitutional Arrangements” (2005).

⁴⁸⁷ See decision of Cooke P in *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 64.

⁴⁸⁸ For example Conservation Act, s 4; State Owned Enterprises Act, s 9.

⁴⁸⁹ For example see the policy for the Office for Disability Issues where the Treaty underpins the development of their Strategy and is consistent with the relevant principles of the Treaty at <www.odi.govt.nz>.

⁴⁹⁰ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, (CA).

⁴⁹¹ Resource Management Act 1991, s 8. For general discussion see Mason Durie *Nga Tai Matatu – Tides of Māori Endurance* (Oxford University Press, Australia, 2005).

The Ministry of Health strategy *Moving Forward: the National Mental Health Plan for More and Better Services*, identified the Treaty of Waitangi as its fourth principle to satisfy.⁴⁹² Both of the Ministry of Health Strategies, *Moving Forward* and *An Approach for Action*, describe the principles of the Treaty as relevant to mental health programmes. Nonetheless, the Treaty reference is general, rather than specific.⁴⁹³ Although this is positive for Māori, it is a strategic, as opposed to a legislative recognition.

A breach of Treaty obligations by the Crown, such as failing to provide for the health and well-being of Māori, can be heard by the Waitangi Tribunal. The Tribunal then recommends to the Crown the appropriate form of redress.⁴⁹⁴ This could include negotiations to address health inequalities and the inclusion of Māori within the decision-making process.⁴⁹⁵ It would follow that the consideration of the principles of the Treaty is vital when providing adequate care for Māori mental health.

Although the courts have rejected the argument that s 5(2) of the Treaty of Waitangi Act 1975 requires the Waitangi Tribunal to apply the principles of the Treaty or consider them a mandatory relevant consideration,⁴⁹⁶ Baragwanath J, in considering s 6(6) of the Act, found that it does not actually remove the jurisdiction of the Tribunal to consider a claim at a time when a Bill to settle a claim or a related one is before Parliament, confirming the right of legal access.⁴⁹⁷

Partnership reflects the purpose of the Treaty, where Māori and the Crown have equal roles with “responsibilities analogous to fiduciaries”.⁴⁹⁸ The principle of partnership is arguably the most important principle. In *New Zealand Māori Council v Attorney-General*, the Court of Appeal unanimously held that:⁴⁹⁹

⁴⁹² Mason Durie *Mauri Ora: The Dynamics of Māori Health* (Oxford University Press, 2005) at 258-259.

⁴⁹³ At 259.

⁴⁹⁴ See Waitangi Tribunal, Contemporary Aspects of the Napier Hospital and Health Services Report (Wai 692). The claim concerned the Crown’s treaty obligation to Māori in respect of health services.

⁴⁹⁵ Waitangi Tribunal, Contemporary Aspects of the Napier Hospital and Health Services Report (Wai 692) above n 494.

⁴⁹⁶ *Attorney General v Mair* [2009] NZCA 625 per Chambers and O’Regan JJ.

⁴⁹⁷ See also Natalie Baird “Administrative Law” [2010] NZLJ.

⁴⁹⁸ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR at 664 per Cooke P (CA).

⁴⁹⁹ At 641 per Cooke P (CA).

The Treaty signified a partnership between races ... the issue becomes what steps should have been taken by the Crown, as a partner acting towards the Māori partner with the utmost good faith which is the characteristic obligation of partnership ...

The principle of partnership acknowledges both parties and requires that the Crown and Māori act towards each other reasonably and with the utmost good faith. Justice Casey noted that the partnership principle required the Crown to recognise and actively protect Māori interests. In his Honour's view, to assert this was "to do no more than assert the maintenance of 'the honour of the Crown' underlying all its treaty relationships".⁵⁰⁰ Justice Richardson also agreed, stating that the concept of the honour of the Crown.⁵⁰¹

... [C]aptures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country [emphasis added]. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field ... there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith [emphasis added]. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions.

Referring to Richardson J's comments, Gendall J stated.⁵⁰²

The Lands case recognises that the Treaty created a continuing relationship of a fiduciary nature, akin to a partnership, and that there is a positive duty to each party to act in good faith, fairly, reasonably and honourably towards the other.

Māori are reliant on the Treaty principles of partnership, such as utmost good faith and reasonableness, active protection and the honour of the Crown.⁵⁰³ The strict application of partnership, half the representation in Parliament, would be difficult to

⁵⁰⁰ At 703 per Casey J (CA).

⁵⁰¹ At 682 per Richardson J (CA).

⁵⁰² *New Zealand Māori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 at [62].

⁵⁰³ See Mason Durie *Te Mana, Te Kāwanatanga The Politics of Māori Self Determination* (Oxford University Press, Melbourne, Australia, 1998) at 183. See also discussion in K Russ "Modern Human Rights: The Aboriginal Challenge" (LLM Thesis, The University of British Columbia, 2006) at ch 2.

justify. The intention of this principle is to promote greater protection and participation by Māori.

Sir Robin Cooke (as he was at the time) also noted that the Treaty must be viewed as a living document capable of adapting to new circumstances. As a living document, it is proposed that the new circumstance of Māori as a minority should neither diminish their status as tangata whenua and Treaty partner, nor the rights of partnership. This would necessarily include Māori's rights to participation and representation within the rule-making and decision-making bodies.

Although partnership is given a range of legislative expressions, the reality is that political power is not shared equally as partners.⁵⁰⁴ The Treaty partnership is also subject to the constitutional norm of parliamentary sovereignty,⁵⁰⁵ which gives little status to rangatiratanga (Māori self-determination). The former New Zealand Deputy Solicitor-General, Matthew Palmer, has summarised the position at the constitutional level:⁵⁰⁶

Because of the political nature of the New Zealand constitution, I conclude that Māori political representation is the most significant manifestation of the Treaty of Waitangi in New Zealand's constitution in reality. This accords with representative democracy and parliamentary sovereignty being fundamental norms of New Zealand's constitution. Māori political representation relies on representative democracy to access influence over the exercise of parliamentary sovereignty. Māori have managed to convert a pragmatic Pākehā initiative, the Māori seats, into a symbolic representation of their own identity and political relationship with the State. MMP has broadened that representation and given it real political power. This ensures that Māori have a voice in the constitutional dialogue in New Zealand — in the branch of government that speaks the loudest, Parliament.

⁵⁰⁴ See Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington, Victoria University Press, 2008) at 85-151 for an overview of this material.

⁵⁰⁵ See Constitution Act 1986, s 15(1) which states 'the Parliament of New Zealand continues to have full power to make laws.'

⁵⁰⁶ Palmer, above n 504, at 291.

Palmer does, however, sound a note of caution:⁵⁰⁷

However loudly Māori voices are heard within Parliament, that institution is ultimately ruled by the majority and Māori do not now constitute a majority in New Zealand. A group of people that consistently forms the majority [i.e Pākehā] has few incentives not to exploit, or ignore a group of people that consistently forms a minority.

As a minority in Parliament, Māori concerns are at the whim of Parliament and dependent on the political mood, and Māori may suffer in consequence. High Court Justice, David Baragwanath, echoed this point, commenting that:⁵⁰⁸

The Treaty should like any other treaty be a mandatory consideration when it is relevant to decision-making, including adjudication ... it is an expression of the rule of law: a statement that Western norms do not exhaust the values of society: that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.

However, Williams observes that “it appears that the Treaty is a mandatory relevant consideration, unless the context otherwise requires but it will not sustain a separate cause of action”.⁵⁰⁹

Māori are reliant on the principles of the Treaty, but as Professor James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, recently noted:⁵¹⁰

From what I have observed, the Treaty’s principles appear to be vulnerable to political discretion, resulting in their perpetual insecurity and instability.

⁵⁰⁷ Palmer, above n 504, at 292. See also comments by Philip A Joseph *The Māori Seats in Parliament: A Study of Māori Economic and Social Progress* (Working Paper 2, New Zealand Business Roundtable, 2008) where he advances the proposition that separate seats are unnecessary to secure effective Māori representation. <www.nzinitiative.org.nz>.

⁵⁰⁸ Hon Justice David Baragwanath “The Evolution of Treaty Jurisprudence” (2007) 15 Waikato Law Review 1 at 10.

⁵⁰⁹ Joseph Williams “Māori in New Zealand Law at the End of the Cooke Era – Where Have We Got to?” in Rishworth, P. (ed.) *The Struggle for Simplicity in Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) at 168.

⁵¹⁰ Statement of the United Nations Special Rapporteur on the Situation of the Human rights and Fundamental Freedoms of Indigenous Peoples, Professor James Anaya, upon conclusion of his visit to New Zealand, 22 July 2010 at 9.

The principle of partnership and the guarantee of rangatiratanga from the Treaty have established limited mechanisms that facilitate a distinct Māori voice in both central and local government decision-making to achieve the implementation of tikanga. However, there is no special constitutional protection for the Treaty. There is, on occasion, a lack of support and political will to implement measures to ensure effective participation.⁵¹¹ And a simple Act of Parliament can revoke the protection for Māori measures in government.⁵¹² Nevertheless, this does not detract from the fundamental right of Māori to engage in the implementation of tikanga Māori — their legal system. Yet there are hurdles and challenges in the road ahead.

(f) Treaty - Summary

The Treaty has a significant moral, spiritual and legal force, encapsulating many rights for Māori that complement indigenous peoples' rights.⁵¹³ It is viewed as “the founding document of New Zealand”,⁵¹⁴ “a constitutional document”,⁵¹⁵ “simply the most important document in New Zealand’s history”,⁵¹⁶ “essential to the foundation of New Zealand”, “part of the fabric of New Zealand society”⁵¹⁷ and “of the greatest constitutional importance to New Zealand”.⁵¹⁸ The Treaty is now a vehicle for Māori to negotiate the ongoing development of New Zealand, prescribing a relationship in the form of human rights, social policy, economic policy and indigenous peoples' rights.⁵¹⁹ It also provides a platform for the right to implement tikanga Māori within an indigenous court.

⁵¹¹ See Hon Peter Salmon, Dame Margaret Bazley and David Shand *Royal Commission Report on Auckland Governance* (March 2009) that recommended three Māori seats on the new Auckland Council. Nonetheless lack of political will to support this recommendation resulted in no Māori seats allocated. In its stead a Maori Advisory Board was established.

⁵¹² For instance the ongoing dialogue to remove the dedicated Māori seats in Parliament as noted in speech from National Party Leader Don Brash, Orewa Rotary Club, Auckland 7.30pm January 27, 2004. Also see the Foreshore Seabed Act 2004 which although now repealed vested ownership of the foreshore into the Crown (section 13).

⁵¹³ See discussion in “Status in Law” for further discussion.

⁵¹⁴ Morag, McDowell and Webb, above n 410, at 194.

⁵¹⁵ Geoffrey W R Palmer *Constitutional Conversations* (Victoria University Press, Wellington, 2002) at 22.

⁵¹⁶ Sir Robin Cooke “Introduction” (1990) 14 NZULR 1 at 1–8.

⁵¹⁷ See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, especially at 206, and 210. But see also the obiter reservations of Casey and Hardie Boys JJ in *Attorney General v New Zealand Māori Council (No 2)* [1991] 2 NZLR 147 at 149.

⁵¹⁸ *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513, 516 (PC).

⁵¹⁹ Belgrave, Kawharu and Williams, above n 471, at 15-16.

The Māori text of the Treaty provided for the continuing rangatiratanga of Māori tribes over their possessions and taonga and that the Crown would protect that rangatiratanga. The Crown received the right to govern — a delegated power — subject to continuing Māori authority.⁵²⁰

The Waitangi Tribunal found that Māori did not cede sovereignty.⁵²¹ Subsequently the ensuing actions by the Crown to secure sovereignty require close examination, otherwise all actions by the Crown may be considered illegitimate.

However, it is the English text that is preferred and the principles of the Treaty that are included in domestic legislation, not the text itself, further diluting the rights guaranteed to Māori. The Treaty stands on its own as a source of rights and obligations between Māori and the Crown,⁵²² including the principle of partnership and participation. The Crown's duty to Māori is analogous to a fiduciary duty that informs the key characteristics arising from the relationship between Māori and the Crown, including that of reasonableness and consultation.⁵²³

Claims before the Waitangi Tribunal,⁵²⁴ with respect to resources and rights guaranteed by the Treaty, have had mixed results.⁵²⁵ Despite the provision enabling the Waitangi Tribunal to pass binding recommendations for claimants, recent case law highlights the reluctance of the Waitangi Tribunal to do so.⁵²⁶

Irrespective of the positive social, economic and cultural obligations provided for in the Treaty, these obligations and rights for Māori are not always realised through a Treaty claim. Māori social, economic and cultural rights are often marginalised to

⁵²⁰ Salmond above n 437, at 25.

⁵²¹ Wai 1040 above n 24.

⁵²² See *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 for further discussion

⁵²³ *NZMC v Attorney General* [2008] NZLR 318 (CA) at [81] per O'Reagan J. See also *Greenpeace v Minister of Energy* CIV-2011-485-1897 [22 June 2012] HC Wellington where Gendall J describes active protection as akin to a fiduciary duty.

⁵²⁴ Waitangi Tribunal was established in 1975 pursuant to the Treaty of Waitangi Act 1975 to hear breaches of the Treaty. See Fisheries Claim and see also Taranaki Petroleum claim.

⁵²⁵ The "Sealord" or Fisheries claim was perceived by most Maori as a successful outcome for iwi Māori. For discussion of claim see M Robinson "The Sealord Fishing Settlement an International Perspective" (1992) AULR at 559–566. However, the Taranaki Treaty claim to petroleum was unsuccessful. See Waitangi Tribunal, *The Petroleum Report* (Legislation Direct, Wellington 2003) at 44–64.

⁵²⁶ *Haronga v Waitangi Tribunal and Others* (SC54/2010) [2011] NZSC 53.

that of a minority group.⁵²⁷ Māori are not a minority group, but first and foremost tangata whenua — the indigenous peoples of Aotearoa.⁵²⁸ For this reason Māori should be accorded these rights that may support an indigenous court structure.

Although indigenous rights for Māori are marginalised within our domestic legislation, comparative jurisdictions in the seven regions, recognised by the United Nations, have acknowledged indigenous rights within their respective constitutions.⁵²⁹

C. UN Declaration on the Rights of Indigenous Peoples

While there is no separate treaty to provide for indigenous rights, there is the United Nations Declaration on the Rights of Indigenous Peoples 2007 (Declaration).⁵³⁰ As a Declaration the orthodox view is that it will not be legally binding upon the States.⁵³¹ However, the Declaration provides a benchmark against which indigenous peoples can measure state action as well as a means of appeal in the international arena.⁵³² It may also represent binding international law.⁵³³

⁵²⁷ Don Brash, National Party Leader (Orewa Rotary Club, Auckland, 7.30pm January 27, 2004) where he noted that the Treaty should not create any greater right for Māori than any other New Zealander – in doing so relegating Māori to a minority group.

⁵²⁸ See Mikaere, above n 339, at 334 - 337.

⁵²⁹ See report written for the United Nations Permanent Forum on Indigenous Issues by Professor Megan Davis, Simon William M'Viboudoulou, Valmaine Toki, Paul Kanyinke Sena, Edward John, Álvaro Esteban Pop and Raja Devasish Roy "Study on National Constitutions and the United Nations Declaration on the Rights of Indigenous Peoples" (2013) E/C.19/2013/18. I would also like to acknowledge the assistance of Professor Brad Morse in writing this section and the provision of the research material that has been reproduced in particular the Technical Report "Indigenous provisions in constitutions around the world".

⁵³⁰ United Nations General Assembly Resolution 61/295 of 13 September 2007: the full text is available at <www.un.org/esa/socdev/unpfii/en/drip.html>.

⁵³¹ Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

⁵³² See generally Megan Davis "United Nations Reform and Indigenous Peoples" (2005) 6 (14) *Indigenous Law Bulletin* at 12–16.

⁵³³ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 80 (emphasis added). See also Kiri Toki "What a Difference a Drip Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 16 *Auckland UL Rev* at 243–273; See also Paul McHugh *The Māori Magna Carta* (Oxford University Press, 1991) for a general discussion on the development of indigenous rights through international instruments, at 203–227.

(a) Background⁵³⁴

The Declaration on the Rights of Indigenous Peoples was the initiative of the Working Group on Indigenous Populations (WGIP). Established in 1982 the mandate of the WGIP was to develop international standards concerning indigenous peoples' rights. The Declaration was a manifestation of this mandate and a clear articulation of international standards on the rights of indigenous peoples. It was not until 25 years later, in September 2007, that the final text was adopted by the United Nations General Assembly, with a majority of 143 states in favour. Eleven states abstained,⁵³⁵ while four states opposed the Declaration altogether: Australia, Canada, the United States of America (the United States) and New Zealand.

This position has now changed with Australia,⁵³⁶ New Zealand,⁵³⁷ Canada⁵³⁸ and the United States⁵³⁹ all signalling their support for the Declaration. While perceived as a major moral victory, a closer analysis of the wording for support of the Declaration provides concern about intentions to meaningfully recognise the indigenous rights articulated in the Declaration.

To ascertain whether these rights can support the implementation of culture and tikanga Māori, after providing a background to the genesis of the Declaration and highlighting the key provisions, including that of self-determination and participation, this section will analyse the wording of the support that has been offered by Australia, New Zealand, Canada and the United States. The legal effect of the Declaration will be examined and some thoughts will be provided as to a creative way to realise the indigenous rights articulated in the Declaration, including the provision that will support the application of the philosophy of Te Ao Māori.

⁵³⁴ Parts of this section have now been published. See Valmaine Toki "Indigenous Rights – Hollow Rights?" [2011] 19 Waikato Law Review 29 at 29 – 44.

⁵³⁵ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

⁵³⁶ Jenny Macklin "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (2009) at <www.jennymacklin.fahcsia.gov.au>.

⁵³⁷ "Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples" at <www.converge.org.nz>.

⁵³⁸ "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (2010) at <www.ainc-inac.gc.ca>.

⁵³⁹ Susan E Rice "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples" (2010) at <usun.state.gov>.

(b) Indigenous Peoples – Indigenous Rights

The Declaration provides no definition of indigenous peoples. Sha Zukang offers the following definition:⁵⁴⁰

Indigenous communities, peoples and nations are those which, having a historical continuity with pre- invasion and pre- colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

A Background Paper noted that:⁵⁴¹

In the thirty-year history of indigenous issues at the United Nations, considerable thinking and debate have been devoted to the question of definition of “indigenous peoples”, but no such definition has ever been adopted by any UN-system body.

One of the most cited descriptions of the concept of the term indigenous was given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Study on the Problem of Discrimination against Indigenous Populations.

Significant discussions on the subject were held during the drafting of the Declaration. After consideration of the issues involved, the Special Rapporteur offered a working definition of “indigenous communities, peoples and nations”. In doing so, he expressed a number of basic ideas to provide the intellectual framework for this effort, which included the rights of indigenous peoples themselves to define

⁵⁴⁰ Sha Zukang “State of the World’s Indigenous Peoples” ST/ESA/328 (Department of Economic and Social Affairs, Division for Social Policy and Development, United Nations, New York, 2009) at v.

⁵⁴¹ See PFII/2004/WS.1/3 - (New York, 19-21 January 2004).

what and who is indigenous. The working definition of “indigenous communities, peoples and nations” read:⁵⁴²

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence on certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

During the period leading up to the formulation of the Declaration, many indigenous organisations rejected the idea of a formal definition of indigenous peoples that would

⁵⁴² See Special Rapporteur, Mr. José Martínez Cobo *Study of the Problem of Discrimination Against Indigenous Populations*. Final report submitted by the Introduction 30 July 1981E/CN.4/Sub.2/476 10 August 1982E/CN.4/Sub.2/1982/2, 5 August 1983E/CN.4/Sub.2/1983/21.

be adopted by States. Similarly, government delegations expressed the view that it was neither desirable nor necessary to elaborate a universal definition of indigenous peoples.

Finally, at its fifteenth session in 1997, the Working Group concluded that a definition of indigenous peoples at the global level was not possible at that time, and certainly not necessary for the adoption of the Draft Declaration on the Rights of Indigenous Peoples. Article 8 of the Draft Declaration, stated that:

Indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

International Labour Organisation (ILO) Convention No. 169 — a legally binding instrument that articulates the rights of indigenous and tribal peoples — provides a statement of coverage rather than a definition. Article 1 states that the Convention applies to:⁵⁴³

a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1 also indicates that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply. The terms ‘indigenous peoples’ and ‘tribal peoples’ are used by the ILO as there are tribal peoples who are not ‘indigenous’ in the literal sense, but who

⁵⁴³ International Labour Organization Indigenous and Tribal Peoples Convention No. 169 (opened for signature 27 June 1989, entered into force 5 September 1991), art 1.

nevertheless live in a similar situation. An example would be Afro-descended Saramaka Peoples (Suriname); or tribal peoples in Africa such as the San (Botswana) or Maasai (Kenya and Tanzania) who may not have occupied the region they currently inhabit longer than other population groups. Cultural difference is a criteria required by the ILO Convention to determine an indigenous or tribal people as opposed to a group of people who have occupied an area since time immemorial. Nevertheless, many of these peoples refer to themselves as “indigenous” in order to fall under discussions taking place at the United Nations.⁵⁴⁴

For practical purposes, the terms ‘indigenous’ and ‘tribal’ are used as synonyms in the UN system when the peoples concerned identify themselves as indigenous. The lack of formal definition of ‘peoples’ or ‘minorities’ has not been crucial to the organisation’s successes or failures in those domains, nor to the promotion, protection or monitoring of the rights recognised for these groups. With regard to the concept of ‘indigenous peoples’, the prevailing view today is that no formal universal definition is necessary. For practical purposes the common understanding of the term is the one provided in the Martinez Cobo study mentioned above.

The rights of indigenous peoples that have been recognised are essentially those associated with and intrinsic to their custom and culture, such as control over their lands and resources.⁵⁴⁵ For the Sami peoples (Norway, Sweden, Finland and Russia), it was the watershed *Alta* case that provided the catalyst for recognition of their indigenous rights to natural resources.⁵⁴⁶ In Australia the Aboriginal peoples have sought recognition of title to their traditional lands in a series of cases illustrated by *Mabo*,⁵⁴⁷ and in Canada, recognition was sought through the *Calder* case.⁵⁴⁸ In New

⁵⁴⁴ Andrew Erueti ‘The Demarcation Of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles Of Demarcation With Emerging Principles Of International Law’ *Arizona Journal of International and Comparative Law* Volume 23, Number 3, Fall 2006 p.543

⁵⁴⁵ The realisation of these rights is recognised as a form of self-determination.

⁵⁴⁶ Henry Minde “The Challenge of Indigenism: The Struggle for Sami Land Rights and Self-Government in Norway 1960–1990” in Svein Jentoft, Henry Minde and Ragnar Nilsen (eds) *Indigenous Peoples, Resource Management and Global Rights* (Eburon, Netherlands, 2003) at 75.

⁵⁴⁷ *Mabo v Queensland* (No 2) (1992) 175 CLR; *Wiks Peoples v Queensland* (1996) 121 ALR 129.

⁵⁴⁸ *Calder v Attorney General of British Columbia* [1973] SCR 313.

Zealand, the *Attorney General v Ngati Apa* case⁵⁴⁹ also centred on determining land and resource rights as well as the rights of due process.⁵⁵⁰

(c) UN Declaration on the Rights of Indigenous Rights

Perceived as a major triumph, the Declaration⁵⁵¹ is the only international instrument that views indigenous rights through an indigenous lens.⁵⁵² As a Declaration the orthodox view is that it will not be legally binding upon the States.⁵⁵³ However, it provides a benchmark as an international standard, against which indigenous peoples can measure State action, and a means of appeal in the international arena.⁵⁵⁴ Parts of the Declaration may also represent binding international law. According to Professor James Anaya:⁵⁵⁵

... the Declaration may be understood to embody or reflect, to some extent, customary international law [emphasis added]. A norm of customary international law emerges – or crystallizes – when a preponderance of states ... converge on a common understanding of the norm’s content and expect future behaviour to conform to the norm ... [emphasis added]

The Declaration opens with general statements. Articles 4 and 5 then provide fundamental additions from the perspective of indigenous people’s rights:

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

⁵⁴⁹ *Attorney General v Ngati Apa* [2003] NZCA 117.

⁵⁵⁰ These instances of progress have sometimes been reversed; for example, the ensuing Foreshore and Seabed Act 2004 vested ownership of the foreshore in the Crown, limiting any customary claim. Although this Act has now been repealed, with the Takutai Moana Act, customary claims are still limited.

⁵⁵¹ “United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 September 2007” (2007) <www.un.org>.

⁵⁵² It is acknowledged that ILO Conventions 107 and 169 also recognise indigenous rights. However, unlike ILO Conventions 107 and 169, the Declaration has been adopted and/or endorsed by the majority of States.

⁵⁵³ Brownlie, above n 390, at 4.

⁵⁵⁴ See generally Davis, above n 460, at 12.

⁵⁵⁵ Anaya, above n 461, at 80; Toki, above n 464, at 243; Claire Charters “Developments in Indigenous Peoples’ Rights under International Law and Their Implications” (December 2005) 21 NZULR at 519.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Other articles build upon these basic provisions, including the rights against assimilation or destruction of indigenous culture and effective redress for past breaches of this right (Art 8), the right to practice and revitalise the cultural traditions and customs of indigenous peoples is also accompanied by redress for past removal of cultural property (Art 11),⁵⁵⁶ and the right to establish their own media (Art 16). It is clear that cultural rights are central to the Declaration. In relation to other economic, social and cultural rights, Art 21 provides that:

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

This is supplemented by other specific rights, including rights to presently occupied lands as well as rights to lands that were traditionally, but no longer occupied by the indigenous peoples concerned (see Arts 26–28).

The Declaration clarifies and places indigenous peoples within a human rights framework.⁵⁵⁷ In doing so it recognises Māori, the indigenous peoples of New Zealand, as a collective, not just as individuals.

⁵⁵⁶ See also art 13, relating to the protection of the histories, languages, philosophies, and art 14, relating to educational systems; art 31 provides for the protection of traditional knowledge, including sciences and technologies.

⁵⁵⁷ Rainforest Foundation US “Promoting Indigenous Rights Worldwide: S. James Anaya” (7 July 2009) Blogging the Rainforest <www.rainforestfoundationus.wordpress.com>.

The Declaration contains more than 20 provisions affirming indigenous peoples' collective right to participate in decision making. It emphasises indigenous peoples' right to participate as a core principle of international human rights law. In particular, Article 18 provides:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Further provisions supporting indigenous peoples' right to participation include Articles 19 and 20 of the Declaration. Article 19 states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The more significant right is contained in Article 20. This provides:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

The lynchpin of the Declaration, however, is contained in Article 3, which provides:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The principle of participation in decision-making has a clear relationship with indigenous peoples' right to self-determination, which includes, the right to autonomy or self-government (Arts 4 and 5), and the State's obligation to consult indigenous peoples in matters that may affect them based on the principle of free, prior, and informed consent (Art 19). These legal concepts are integral to the right of indigenous peoples to participate in decision-making.

It is acknowledged that the Declaration provides no explicit text to establish a judicial system for criminal or civil matters beyond or outside the existing respective judicial or legal system. Nonetheless Article 5 (right for indigenous peoples to maintain their own distinct legal institutions, such as tikanga Māori), when read together with Article 20 (right to develop this legal institution) and Article 3 (right to freely pursue their culture), provides support for the implementation of an indigenous court underpinned by tikanga Māori within our current legal system.⁵⁵⁸

(d) Legal effect of the Declaration

The orthodox view is that the Declaration is soft law⁵⁵⁹ and will not be legally binding upon the State unless it is incorporated into domestic legislation.⁵⁶⁰ The doctrine of state sovereignty provides a restriction on international instruments, such as the Declaration, to regulate matters within the realm of the state.⁵⁶¹

⁵⁵⁸ It is acknowledged that the right of indigenous peoples to use their own systems of law is also recognized by the International Labour Organization Convention No. 169. Articles 8 and 9 of ILO C169 outline the right of indigenous peoples to preserve and apply their legal system. However, this right is not absolute, as its exercise must not be incompatible with fundamental national and international human rights. Art. 8(1) "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws." Art. 8(2) "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights".

⁵⁵⁹ The term "soft law" refers to quasi-legal instruments that do not have any legally binding force. The term is traditionally associated with international law including most resolutions and declarations of the United Nations General Assembly.

⁵⁶⁰ Brownlie, above n 390, at 4. It is acknowledged that in June 2006 the International Law Association Executive Council approved the establishment of a Committee on the Rights of Indigenous Peoples. At the first meeting of the Committee (Pretoria, 2007), it was decided that the Committee would focus on the actual legal meaning of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007. This work is currently in progress focusing on relevant cases that may reviewed and evaluated against the UNDRIP.

⁵⁶¹ S James Anaya "The Rights of Indigenous People to Self-determination in the Post-Declaration Era" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs,

(e) Incorporation

In Bolivia the recently promulgated Constitution has fully incorporated the collective rights of indigenous peoples, including those rights contained in the Declaration.⁵⁶² Bolivia's Electoral Transition Law created seven special indigenous electoral districts. For the first time, the indigenous peoples of Bolivia have direct representation in the Legislative Assembly. Nonetheless, indigenous leaders believe that the current number of electoral districts does not give indigenous peoples enough voice in the Assembly. The intention is that the new electoral law will propose a fairer representation system.⁵⁶³ Ecuador has also incorporated the Declaration into its Constitution, the Constitution of the Republic of Ecuador 2008.

If New Zealand followed this approach and incorporated the Declaration into domestic legislation, the onus would be on the New Zealand government to provide Māori the ability to fully participate in decision-making matters that may affect them socially, politically and economically. This could be achieved through the meaningful application of Te Ao Māori. As in Bolivia, discrete legislation could be enacted to ensure meaningful indigenous representation in government.⁵⁶⁴

Copenhagen, 2009) at 194. See also International Law Association "The Hague Conference (2010): Rights of Indigenous Peoples" Interim report (2010) <www.ila-hq.org>.

⁵⁶² United Nations High Commissioner for Human Rights "Report of the United Nations High Commissioner for Human Rights on the Activities of Her office in the Plurinational State of Bolivia" (2010) United Nations Human Rights Council A/HRC/13/26/Add.2 18 at [4] <<http://daccess-dds-ny.un.org>>.

⁵⁶³ At [16].

⁵⁶⁴ Also see discussion by Naomi Kupuri "The UN Declaration on the Rights of Indigenous Peoples in the African context" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, Copenhagen, 2009) at 255, on the Ilchamus (indigenous) community who successfully claimed that their rights to political representation had been violated. The presiding judge took into consideration the then draft Declaration to determine this case in favour of the Ilchamus community.

(f) Legal Reception⁵⁶⁵

How the Declaration is received depends, in part, on the respective jurisdictions of the area.⁵⁶⁶ For instance, notwithstanding the current status of the Declaration as soft law, Chief Justice Conteh in the Supreme Court of Belize found that:⁵⁶⁷

Given the Government's support of the *Declaration on the Rights of Indigenous Peoples* [emphasis added] ... which embodies the general principles of international law relating to Indigenous peoples ... *the Government will not disregard the Declaration* [emphasis added].

Belize is a common law jurisdiction. Should reliance be placed on the Declaration, this decision could provide a persuasive authority for extending the ability for Māori to fully participate in decision-making affairs, as one example.

Furthermore, Bolivia and Ecuador have incorporated the Declaration into domestic law,⁵⁶⁸ with Ecuador also incorporating the Declaration into its legislative framework.⁵⁶⁹ In 2010 Professor James Anaya, the Special Rapporteur, visited New Zealand and commented that:⁵⁷⁰

⁵⁶⁵ It is acknowledged that a growing body of case law from all jurisdictions is currently being collated in the form of a database. See UNDRIP Online Public Database

<<http://www.ilc.unsw.edu.au/research/undrip-online-public-database>>

⁵⁶⁶ See *Indigenous Peoples' Human Rights in Domestic Courts* above n where it is noted that 'in Latin America, although variable between regions, there is a body of developing jurisprudence on the recognition of indigenous peoples' rights and those incorporated in UNDRIP. For instance, under the guidance of its Constitutional Court, in Colombia reference to the UNDRIP and to the Inter American jurisprudence is common. In the recent *Tres Islas* case in Peru, the Constitutional Court interprets the provisions of the Constitution in the light of the Inter American jurisprudence, but also on Articles 3 and 4 of UNDRIP. Undoubtedly, the progressive interpretation of the Inter American human rights system has been instrumental for these developments, as well as the constitutional and legal recognition in the countries of the region. Nevertheless, reference to the UNDRIP, in domestic courts reasoning is non-existent in many of the countries in the region'. See also Megan Davis "To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 *Austl.Int'l L.J* 17 at 31.

⁵⁶⁷ *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct) at [132].

⁵⁶⁸ New Political Constitution of the State Act 2009 (Bol), s 1(1), art 2.

⁵⁶⁹ Anaya, above n 461.

⁵⁷⁰ Statement of the United Nations Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples, Professor James Anaya, upon conclusion of his visit to New Zealand 22 July 2010 at [4]. <www.ohchr.org>.

It should be noted that certain initiatives underway in New Zealand represent important steps towards advancing the purpose and objectives of the United Nations Declaration on the Rights of Indigenous Peoples. This Declaration, far from affirming rights that place indigenous peoples in a privileged position, aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights. I am, of course, very pleased to note that New Zealand recently declared its endorsement of the Declaration, thus joining the overwhelming majority of States that have expressed their support for this historic instrument.

In New Zealand the utilisation of the Declaration in a judicial forum is not novel.⁵⁷¹ The Waitangi Tribunal has positively referred to the then Draft Declaration in respect to claims relating to tino rangatiratanga.⁵⁷² The High Court decision of *Ngai Tahu Māori Trust Board v Director General of Conservation* also referred to the Draft Declaration.⁵⁷³ More recently the Supreme Court, in referring to the Declaration, noted that.⁵⁷⁴

... whether Ms. Clarke's decision as executor as to the burial of Mr. Takamore was one to which she was entitled to come, in application of common law principles as developed in conformity with human rights norms, the Treaty of Waitangi, and the Declaration of the Rights of Indigenous Peoples (which recognises the interest of many indigenous peoples in the repatriation of human remains and which emphasises the collective nature of the rights of indigenous peoples).

If Māori engaged in a judicial challenge to realise their right to participate fully in the decision-making process, reliance could be placed on Conteh CJ's comments in *Cal & Ors v the Attorney General of Belize & Anor*.⁵⁷⁵ Māori could argue that, as New Zealand has endorsed the Declaration, the government should not disregard the general principles contained therein.

⁵⁷¹ See also reference to the Declaration in *Takamore v Clarke* SC 131/2011 [2012] NZSC 116, [2012] 2 NZLR 733 at [12] and [35].

⁵⁷² "The Taranaki Report: Kaupapa Tuatahi" (Waitangi Tribunal, Wellington, 1996) Wai 143 <www.waitangi-tribunal.govt.nz>

⁵⁷³ *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553.

⁵⁷⁴ *Takamore v Clarke* [2012] NZSC 116 at [35] per Wild J and Glazebrook J.

⁵⁷⁵ *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct) at [132].

In the absence of direct incorporation by statute, there are different methods of recognising international human rights instruments, including recourse through administrative law. First, the (outdated) concept of legitimate expectation in Australia⁵⁷⁶ and mandatory relevant consideration in New Zealand⁵⁷⁷ have been utilised to treat unincorporated international obligations as considerations for the decision maker. Also the presumption of consistency, a common law principle of statutory interpretation, recognises that Parliament is presumed not to legislate intentionally in breach of its obligations.⁵⁷⁸ In *Zaoui v Attorney-General*, the Supreme Court applied this presumption using New Zealand's international law obligations.⁵⁷⁹

Notwithstanding the successful application of administrative law to recognise international obligations in *Zaoui*, Gieringer expresses some concern with the application of the principle of mandatory relevant considerations.⁵⁸⁰ Based on this analysis, recourse to the principle of mandatory relevant consideration to recognise the Declaration's provisions could provide a useful option for Māori. Through this, the New Zealand Courts could uphold Māori rights to full participation in decision-making, as per Article 20 of the Declaration.

D. *Can the principles of the Treaty be used as an aid to clarify and import the rights contained in the UN Declaration on the Rights of Indigenous Peoples?*

Wilton Littlechild proposes that the application of Treaty principles, such as partnership, can assist to bridge the gap between the recognition of an indigenous right and the relevant article in the Declaration.⁵⁸¹ Is this a viable perspective for Māori?

⁵⁷⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

⁵⁷⁷ *Tavita v Minister of Immigration* [1994] 2 NZLR 257; (1993) 11 FRNZ 508; (1993) 1 HRNZ 30 (CA).

⁵⁷⁸ Joseph, above n 340, at 533; Treasa Dunworth "Public International Law" [2000] NZLR 217 at 225, states this area is shrouded in much uncertainty. See, for example, *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (UK).

⁵⁷⁹ *Zaoui v Attorney-General* [2004] 2 NZLR 339. See also Claudia Gieringer "International Law through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 318.

⁵⁸⁰ Claudia Gieringer "International Law through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 318. Although Gieringer still considers *Tavita* to be good law above n 452.

⁵⁸¹ Oral statement provided to the pre-sessional meeting of the UNPFII, Ottawa, Canada, March 2011. Wilton Littlechild is a past member of the United Nations Permanent Forum for Indigenous Issues and

(a) Treaty of Waitangi

Viewed as a simple nullity,⁵⁸² unless the Treaty has been implemented by statute, it creates no enforceable rights.⁵⁸³ It is the “Principles of the Treaty”⁵⁸⁴ that are referred to in legislation⁵⁸⁵ and policy documents,⁵⁸⁶ rather than the text of the Treaty itself. Professor James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recently noted:⁵⁸⁷

From what I have observed, the Treaty’s principles appear to be vulnerable to political discretion, resulting in their perpetual insecurity and instability.

Nevertheless, this does not detract from the ability of the Treaty principles to provide clarity on the rights articulated in the Declaration. The principles of the Treaty could be imported to provide clarity and act as a bridge between the recognition of Māori rights and the relevant Articles of the Declaration.

In the case of *Huakina v Waikato Valley Authority*, Chillwell J noted that.⁵⁸⁸

The Treaty is a part of the fabric of New Zealand society and can provide judicial aid in interpreting statutes ‘when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material’.

During a recent United States Senate Committee meeting, Professor James Anaya noted:⁵⁸⁹

current Chair of the United Nations Expert Mechanism on the Rights for Indigenous Peoples, a well-respected indigenous leader.

⁵⁸² *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ. However, see also *R v Symonds* (1847) NZPCC (SC), per Chapman J at 390 for earlier recognition of native title at common law and consideration of the Treaty.

⁵⁸³ *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] 2 All E.R. 93 at p 98; also [1941] NZLR 590 per Viscount Simon LC,

⁵⁸⁴ See decision of Cooke P in *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641.

⁵⁸⁵ For example, Section 4 Disability Act 1987; Section 9 State Owned Enterprises Act 1986.

⁵⁸⁶ For example, Office for Disability Issues “New Zealand Disability Strategy Discussion Document: Incorporating the Treaty of Waitangi” at <www.odi.govt.nz>.

⁵⁸⁷ James Anaya “New Zealand: More to be Done to Improve Indigenous Peoples’ Rights Says UN Expert” (2010) Office of the High Commissioner for Human Rights <www.ohchr.org>.

⁵⁸⁸ *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

⁵⁸⁹ “US Senate Committee Holds Controversial Hearing on UN Indigenous Declaration” (10 June 2011) <www.bsnorrell.blogspot.com>.

[T]he courts should take account of the Declaration in appropriate cases concerning indigenous peoples, just as federal courts, including the Supreme Court, have referred to other *international sources to interpret statutes* [emphasis added], constitutional norms, and legal doctrines in a number of cases.

It would then follow that the principles of the Treaty could also, where appropriate, be used as an aid to provide clarity and support for the rights articulated in the Declaration.⁵⁹⁰

For example, if the New Zealand government were to grant rights over matters that affected Māori without their participation and if the legislation directed that the principles of the Treaty of Waitangi have to be taken into account, then Māori could place reliance on Article 18 to contextualise these rights. Article 18 of the UNDRIP recognises the right for indigenous peoples to participate in decision-making in matters which would affect their rights.⁵⁹¹

(b) Status Quo

The Declaration does not create any new rights,⁵⁹² but it is the only international instrument that views indigenous rights through an indigenous lens:⁵⁹³

The Declaration ... will go a long way in consolidating gains made by indigenous peoples in the international arena toward rolling back inequities and oppression. It builds upon numerous decisions and other standard setting measures over recent decades by a wide range of international institutions that are favourable to indigenous peoples' demands ...

⁵⁹⁰ Despite the requirement for domestic legislative recognition, the Waitangi Tribunal established under the Treaty of Waitangi Act 1975 can hear and make recommendations as to claims relating to acts or omission of the Crown that breach the promises made in the Treaty. See also article 37 of the United Nations Declaration on the Rights of Indigenous Peoples that recognizes indigenous peoples' treaty rights.

⁵⁹¹ See also Valmaine Toki "Indigenous Rights – Hollow Rights?" [2011] 19 Waikato Law Review 29 for a further example.

⁵⁹² The rights affirmed are those derived from human rights principles that are deemed of universal application, such as those contained in the Universal Declaration on Human Rights.

⁵⁹³ Anaya, above n 461, at 63.

There should not have been a Declaration on the Rights of Indigenous Peoples, because it should not be needed. But it is needed. The history of oppression cannot be erased, but the dark shadow that history has continued to cast can and should be lightened.

The Declaration simply affirms rights derived from generic human rights principles, such as equality and self-determination.⁵⁹⁴ The Declaration seeks to recognise indigenous peoples' rights and contextualises those rights in light of their particular characteristics and circumstances, and promotes measures to remedy the rights' historical and systemic violation.⁵⁹⁵

The significance of the Declaration lies in its normative effect. The Declaration provides a benchmark, as an international standard, against which indigenous peoples may measure State action. State breach of this standard provides indigenous peoples with a means of appeal in the international arena.⁵⁹⁶

Recognised and supported by United Nations member states,⁵⁹⁷ the Declaration contains norms that are already binding in international law. Thus the Declaration provides an additional international instrument for indigenous peoples when their rights, such as the right to participate fully in decision-making, have been breached. Indigenous peoples can now argue that not only have international treaties been broken, but a breach of a right in the Declaration has occurred. The available remedy is uncertain; nonetheless, it would be reasonable to conclude that this would provide an avenue to engender effective dialogue between the State and indigenous peoples.⁵⁹⁸

⁵⁹⁴ Although see also Karen Engle "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22 *EJIL* 141 – 163 where she examines the limitations of the Declaration and that notes it 'temporarily mediates multiple tensions' but there may still be some potential.

⁵⁹⁵ Anaya, above n 461, at 63.

⁵⁹⁶ Three United Nations Indigenous mechanisms that can be petitioned to when breaches occur include the United Nations Permanent Forum on Indigenous Rights, the United Nations Expert Mechanism on the Rights of Indigenous People and the United Nations Special Rapporteur on the Rights of Indigenous Peoples.

⁵⁹⁷ 148 member states have adopted/supported the Declaration. Columbia and Samoa have reversed their abstention leaving nine states still abstaining. See <www.un.org>.

⁵⁹⁸ The recent support of the World Conference Outcome Document/High Level Plenary Meeting Document by the General Assembly of States in September 2014 signals a further recognition by States of these fundamental rights.

In any event the Declaration provides indigenous peoples with an international arena to shame or embarrass a government.⁵⁹⁹

(c) Summary

The recent support of the Declaration by Australia, New Zealand, Canada and the United States is significant. Their actions contribute a moral air of robustness to the indigenous rights articulated in the Declaration.

The orthodox position on the Declaration is that it will not be legally binding upon the State,⁶⁰⁰ unless it is incorporated into domestic legislation. Notwithstanding this position, principles of administrative law provide a window to import the rights contained in the Declaration. Adopting the perspective of Wilton Littlechild, the principles of the Treaty can be employed to provide clarity and act as a bridge to the rights articulated in the Declaration.

According to Sir Taihākurei (Eddie) Durie:⁶⁰¹

We have completed the trilogy. The 1835 Declaration acknowledged indigenous self-determination. The 1840 Treaty upheld it within the structures of a State. This Declaration now confirms it and says how it should be applied. As rights go, that's a big step. It fills the gaps in the Treaty of Waitangi. It is something to, famously, applaud.

Already it has had practical effect. Last week it was the basis for submissions before the Waitangi Tribunal in North Auckland, to support a more principled approach to managing Treaty settlements, and before the Māori Affairs Select Committee in Wellington, to support a greater Māori role in Māori policy development.

⁵⁹⁹ As happened on 11 March 2005, when the United Nations Committee on Elimination of Racial Discrimination concluded, in its 66th session, that New Zealand's Foreshore and Seabed Act 2004 contained discriminatory aspects against Māori. See "Committee on the Elimination of Racial Discrimination: Decision on Foreshore and Seabed Act 2004" Sixty Sixth session Decision 1 (66): New Zealand CERD/C/DEC/NZL/1. <www.converge.org.nz>.

⁶⁰⁰ Brownlie, above n 390, at 4.

⁶⁰¹ Eddie Taihakurei Durie "Address on the Declaration" Statement given May 2010. Parliament Buildings.

Irrespective of the concerns surrounding the wording of support given to the Declaration, and the legal effect of the Declaration itself, it is without a doubt the most significant document on the rights of indigenous peoples. The current perspective of States and United Nations Agencies⁶⁰² is one of support and willingness to engage and implement the rights contained in the Declaration. The challenge ahead will be the practical manifestation of these rights for indigenous peoples and, in particular, whether applying the philosophy of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court and premised on fundamental Māori concepts and doctrine is the most promising way forward for Māori to ameliorate the disproportionate offending rates.

Self-determination has been identified as a key provision in the Declaration. Tino rangatiratanga is a key provision in the Treaty of Waitangi. A closer analysis of the synergy between these two concepts may assist to inform this discourse.

E. Self-Determination

The right of self-determination is provided for in Article 3 of the Declaration:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

According to Professor James Anaya:⁶⁰³

Understood as a human right the essential idea of self-determination is that human beings, individually and as groups, are equally entitled to be in control of their own destinies and to live within governing institutional orders that are devised accordingly.

⁶⁰² For example, a recommendation from the recent 10th session of the United Nations Permanent Forum on Indigenous Issues noted “The Permanent Forum welcomes the World Intellectual Property Organization facilitating a process, in accordance with the Declaration, to engage with indigenous peoples on matters including Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore”.

⁶⁰³ Anaya, above n 461 at 187.

The term self-determination is synonymous with terms such as equality and freedom.⁶⁰⁴ There is no definition of self-determination within the Declaration. However, there are different schools of thought as to its meaning, namely ‘external’ self-determination, or the right to secede, and ‘internal’ self-determination. As an alternative, Professor Anaya articulates ‘substantive’ versus ‘remedial’ self-determination.

The underlying rationale for ‘substantive’ versus ‘remedial’ self-determination derives from “the substance of the right of self-determination, as opposed to any remedies that may have resulted from violations of the right of all peoples to control their own destinies under conditions of equality”.⁶⁰⁵ The process of decolonisation reversed the process of colonialism and the associated implementation of foreign rule. This was a process that did not, on its own, address the substantive right of self-determination. Rather, it was a remedy to address the violation of rights that existed prior to colonisation. Anaya argues that rather than self-determination requiring that each group form its own state or enjoy external self-determination, self-determination provides the right for people to be entitled to participate freely and equally in the constitution and governing institutional order of the State. However, those peoples who have suffered extreme violations of their right to self-determination would be entitled to a regime separate from the existing regime as would those peoples who have been denied effective remedies within the existing regime. Anaya appears to be insinuating that the more serious the violations of basic human rights, the more likely the group would be entitled to external self-determination. Conversely, those groups who have not suffered from similar human rights violations would be entitled to exercise self-determination within the existing regime.

For Māori, the latter form of self-determination would apply, thereby allowing them to exercise self-determination within the existing regime.⁶⁰⁶ Extensions to the

⁶⁰⁴ See also discussion by Federico Lenzerini ‘The Trail of Broken Dreams, the Status of Indigenous Peoples in International Law’ in Federico Lenzerini (ed) *Reparation for Indigenous Peoples International and Comparative Perspectives* (Oxford University Press, Oxford, 2008) at 98 – 102.

⁶⁰⁵ S James Anaya ‘The Right of Indigenous Peoples to Self-determination in the Post Declaration Era’ in Claire Charters and Rudolfo Stavenhagen (eds) *Making the Declaration Work The United Nations Declaration on the Right of Indigenous Peoples* (IWGIA, Copenhagen, 2009) at 189.

⁶⁰⁶ This is consistent with comments by Jeremy Waldron ‘The Cosmopolitan Alternative’ in Will Kymlicka *The Rights of Minority Cultures* (OUP, New York, 1995) at 103 where he notes that

jurisdiction of the Māori Land Court or the creation of a Tikanga Court provide two such examples of this form of self-determination. That is, a form of self-determination captured in the United Nations Declaration on the Rights of Indigenous People.

(a) Self Determination and Tino Rangatiratanga

According to Article 2 of the Treaty of Waitangi (Māori text), Māori retain their ‘tino rangatiratanga’. In contrast, the English version only guarantees to Māori possession over their lands and estates.

Tino rangatiratanga and self-determination are both rights that have not yet been incorporated by the State into domestic legislation. To this end, both are aspirational rights, representing ideals as opposed to fixed standards.⁶⁰⁷ Both advocate for legal pluralism, thereby enabling iwi to practice internal self-government and manage their own affairs.⁶⁰⁸ However, they differ slightly.

It is suggested that tino rangatiratanga provides the stronger claim for Māori.⁶⁰⁹ The Waitangi Tribunal has acknowledged that sovereignty was acquired subject to tino rangatiratanga and more recently that Māori did not cede sovereignty to the Crown.⁶¹⁰ This implies that tino rangatiratanga can exist independently to State sovereignty.

In contrast, the right of self-determination derives from, and exists under sovereignty.⁶¹¹ Furthermore, self-determination has clear boundaries; it can either prevail or fall when in conflict with other human rights. In the context of tino rangatiratanga, it is uncertain whether such boundaries exist.⁶¹² Finally, tino rangatiratanga expresses the unique Māori concept of rangatiratanga that relates to

‘indigenous communities make claims for special provision and for the autonomous direction of their own affairs ... and must accept some responsibility to participate in ... [the] wider life’.

⁶⁰⁷ Toki above n 464 at 256.

⁶⁰⁸ The Waitangi Tribunal has defined tino rangatiratanga as “self-determination”. See Waitangi Tribunal *Taranaki Kaupapa Tuatahi Report* (Wai 143, 1996) at 307. Also Toki above n 464, at 256.

⁶⁰⁹ Toki above n 464, at 256.

⁶¹⁰ See the Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) and Wai 1040, 2014.

⁶¹¹ Toki, above n 464.

⁶¹² The Waitangi Tribunal sees the Crown’s right to govern may only override rangatiratanga as a last resort. Waitangi Tribunal *The Whanganui River Report* – Wai 167 (1999), 330. The Tribunal saw the “national interest in conservation [was] not a reason for negating Maori rights of property”.

concepts such as leadership and governance. Self-determination, however, is a creation of a Western paradigm.⁶¹³

While self-determination acts and strives for similar goals, it is philosophically distinct from tino rangatiratanga. Nonetheless, the right of self-determination will support and complement Māori claims to tino rangatiratanga. Mason Durie regards the Treaty Settlements as the perfect union between tino rangatiratanga and self-determination.⁶¹⁴ They provide for tino rangatiratanga in the sense that they recognise the mana of the Māori people and often provide an economic basis for their development.

Thus Treaty Settlements could provide an opportunity for iwi to financially support an initiative, such as an indigenous court, either as a pan iwi Court or an iwi jurisdictional Court. However, the settlements themselves require legislation and delegated authority. In this way the two concepts support each other.

This analysis shows that tino rangatiratanga is the stronger right for Māori, unlike self-determination. Self-determination does not fundamentally change the nature of existing indigenous Māori rights. Rather, it supports and complements tino rangatiratanga.

(b) A Right to Secede

Many Māori commentators, such as Andrea Tunks,⁶¹⁵ have argued that Māori do not seek secession, but rather tino rangatiratanga. According to Moana Jackson, tino rangatiratanga is more akin to sovereignty.⁶¹⁶ Such an approach would facilitate the implementation of tikanga Māori.

⁶¹³ Toki, above n 464.

⁶¹⁴ Mason Durie, *Te Mana Te Kāwanatanga* (Oxford University Press, Auckland, 1998).

⁶¹⁵ Andrea Tunks “Pushing the Sovereign Boundaries in Aotearoa” (1999) 4(23) *Indigenous Law Bulletin* 15 at 69

⁶¹⁶ Moana Jackson “Where Does Sovereignty Lie?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 196 – 197.

Brookfield acknowledges that, prior to the Declaration, a right of self-determination and the right to secession for indigenous peoples was uncertain.⁶¹⁷ Nonetheless, in light of its development, some states considered that the Declaration would provide indigenous peoples with a similar right to secede from the encapsulating State.⁶¹⁸ This would impact on concepts such as state sovereignty and political unity.

The right to secession is limited by existing international law norms and is confined to particular peoples such as those who are subject to ‘alien domination’.⁶¹⁹

According to Anaya, secession is available when it is remedial in nature,⁶²⁰ and distinguishes this from a substantive form, in which self-determination is a human right. When this substantive form of self-determination is denied, a breach occurs, requiring a remedy. This remedial form of self-determination is proportionate to the nature of the breach or violation.⁶²¹ Following this reasoning, secession would only be invoked when the nature of the violation was so great that secession, or external self-determination, is the only remedy.

In order for Māori to claim secession, the violations and actions, or inactions, by the Crown would need to be viewed as so harmful that secession or external self-determination is justified. Although it is uncertain when this would apply, alternatives such as self-government, legal pluralism⁶²² or internal self-determination may be appropriate. An indigenous court, premised on fundamental Māori concepts and doctrine through an extension to the jurisdiction of the Māori Land Court or a Tikanga Court, could be an example of such a situation.

The key distinction between internal and external self-determination is that internal self-determination operates within the existing legal framework.⁶²³ ‘Internal self-determination’ or self-government is viewed as the right for a people to freely choose

⁶¹⁷ FM (Jock) Brookfield *Waitangi & Indigenous Rights* (updated ed, Auckland University Press, Auckland, 2006) at 77.

⁶¹⁸ Brookfield, above n 540.

⁶¹⁹ Claire Charters “The Rights of Indigenous Peoples” October 2006 NZLJ 335 at 336.

⁶²⁰ Anaya, above n 461, at 189.

⁶²¹ At 189.

⁶²² See Chapter III ‘Maori and Indigenous Rights’ for further discussion on Legal Pluralism.

⁶²³ Toki, above n 464.

their own political and economic regime.⁶²⁴ Internal self-determination is consistent with Article 46 of the UN Declaration on the Rights of Indigenous Peoples:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.

And, also Article 4:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

It would appear that the Declaration provides for two schools of self-determination. An external form of self-determination may be more difficult to achieve, nonetheless an internal form of self-determination is also available.

Thus Article 4 bestows the ability for indigenous peoples to realise their right of autonomy or self-government over their internal and local affairs. Read together with Articles 5, 18 and 19, the Declaration provides for indigenous people the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State, and to participate in all decisions affecting them or their rights. Although the orthodox concept of self-determination was important in mobilising the international indigenous movement, it does not capture or reflect the diversity within national systems.⁶²⁵ This provides fertile grounds for the ability of Māori to apply their philosophy of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine at the same time as their right to participate in external decision making processes and the political order of the State.

⁶²⁴ See Cassese *Self Determination of Peoples* (Cambridge University Press, Cambridge, 1995) at 101.

⁶²⁵ Malgosia Fitzmaurice “The Question of Indigenous Peoples Rights: A Time for Reappraisal?” in *Statehood and Self-Determination* (Cambridge University Press, Cambridge, 2013) at 350

The thrust of self-determination is to enable indigenous peoples to be in control of their destinies and to create their own political and legal organisation of their territories.⁶²⁶ This does not necessarily amount to separate statehood, although that possibility remains.⁶²⁷ Erica Irene Dias argues that indigenous peoples have a mutual duty to share power with the existing state and perceives Article 3 as grounds for an argument for external self-determination.⁶²⁸ Further, Professor James Anaya argues, that although secession often is not the intention of indigenous peoples, it has, nevertheless, held a symbolic rhetoric.⁶²⁹

(c) Self-Determination: A Human Right

Despite the text of the articles in the Declaration, the Declaration couches the right of self-determination as a fundamental human right for indigenous peoples. To this end attributes of statehood or sovereignty are, at the most, instrumental to the realisation of these values. But according to Professor James Anaya, they are not the essence of self-determination for indigenous peoples.⁶³⁰

And for most peoples, especially in light of cross cultural diverse identities, full self-determination, in a real sense, does not justify a separate state and may even be impeded by a separate state. It is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states.

The objective of this section is to ascertain whether the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples could support the implementation of an indigenous court, premised on fundamental Māori concepts and doctrine. Intrinsic to this review is the right of self-determination provided in international documents. In this regard the internationally recognised right to self-

⁶²⁶ See discussion by Iris Marion Young ‘Together in Difference: Transforming the Logic of Group Political Conflict’ in Will Kymlicka *The Rights of Minority Cultures* (OUP, New York, 1995) at 155 – 175 where she notes that ‘what a bicultural society means... for Māori ... has not ended’ highlighting the importance for Indigenous peoples to be in control of their destinies.

⁶²⁷ See also discussion by James Tully “Indigenous Peoples and Freedom” in J Tully (ed) *Public Philosophy in a New Key* (Cambridge University Press, New York, 2008) at 285 – 287.

⁶²⁸ As cited in Fitzmaurice, above n 548. See also Charters and Stavenhagen, above n 530.

⁶²⁹ Anaya, above n 461.

⁶³⁰ Anaya, above n 461, at 60.

determination is fundamental to recognising and realising the rights of indigenous peoples, including that of culture, tikanga Māori. Achieving self-determination would allow Māori to freely choose and determine their own political and legal systems. The synergy with tino rangatiratanga provided for in the Treaty of Waitangi further supports this dialogue.

New Zealand's legal system ascribes to parliamentary sovereignty⁶³¹ and the rule of law as articulated in the Constitution Act 1986, which stipulates that the Parliament continues to have full power to make laws.⁶³² The duties and obligations contained in the Treaty recognise the human rights responsibilities between the Crown and Māori. It is suggested that to alleviate the disproportionate social and economic statistics of Māori, the entrenchment of fundamental indigenous rights, including that of self-determination, is required. In the absence of entrenchment, it is foreseeable that applying the text of the Treaty consistently with the United Nations Declaration on the Rights of Indigenous People could provide an avenue for Māori to attain self-determination.⁶³³

The Declaration on the Rights of Indigenous Peoples simply affirms rights derived from human rights principles such as equality and self-determination. These basic rights have been denied to indigenous peoples and the Declaration on the Rights of Indigenous Peoples seeks to recognise such rights and contextualises them in light of their particular characteristics and circumstances.⁶³⁴ Moreover, the Declaration promotes measures to remedy the historical and systemic denial of indigenous people's rights.⁶³⁵

The Declaration on the Rights of Indigenous Peoples is the only United Nations document dedicated to indigenous human rights and addresses indigenous-specific

⁶³¹ Supreme Court Act 2003, s 3(2).

⁶³² Constitution Act 1986, s 15(1).

⁶³³ With the support of the provisions in the ICCPR and ICESCR. However, the ICESCR and ICCPR contain general human rights and, on their own, do not meet the cultural and political concerns of indigenous people. However, considered in light of favourable general comments and creative legal interpretations of treaty monitoring-body decisions can, advance indirectly indigenous rights.

⁶³⁴ Anaya above n 461.

⁶³⁵ Anaya, above n 461, at 63.

concerns. The Declaration does not create any new rights; however, it is the only international instrument that views indigenous rights through an indigenous lens.⁶³⁶

Professor James Anaya stated:⁶³⁷

I have observed several positive aspects of New Zealand's legal and policy landscape, as well as ongoing challenges, in relation to Māori issues. A unique feature of New Zealand is the Treaty of Waitangi of 1840, which is understood to be one of the country's founding instruments. The principles of the Treaty provide a foundation for Māori self-determination based on a real partnership between Māori and the New Zealand State, within a framework of respect for cross cultural understanding and the human rights of all citizens. I have learned of steps being taken within this framework, which can be described as constituting a good practice in the making, and I hope that concerted efforts will continue to be made in this regard.

If the right, for Māori, of self-determination was realised through a Treaty partnership, this would result in a pluralistic society. It is now timely to consider the concept of pluralism.

(d) Pluralism

Sally Engle Merry describes legal pluralism as “a situation in which two or more legal systems coexist in the same social field”⁶³⁸. However, Anne Griffiths notes that “legal pluralism has been invoked to uphold notions of authority and legitimacy, to favour or promote one set of legal claims over another, or to validate and acknowledge the existence of alternative or coexisting forms of legal ordering within a particular domain”.⁶³⁹ This raises questions regarding the power to make law and who is to benefit. As the formulation of law is underscored by differing epistemologies if

⁶³⁶ At 63.

⁶³⁷ Statement of the United Nations Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples, Professor James Anaya, upon conclusion of his visit to New Zealand, 22 July 2010

⁶³⁸ Sally Engle Merry “Legal Pluralism” (1988) 22 *Law and Society Rev* 869 at 870. See also Nicole Roughan ‘Conceptions of Custom International Law’, <http://ssrn.com/abstract=1072965>, for an interesting discussion on compound custom and community 84 – 88.

⁶³⁹ Anne Griffiths presentation to *Human Rights and Legal Pluralism in Theory and Practice Conference 5th to 6th December 2014*, Norwegian Centre for Human Rights (NCHR) in co-operation with the Rights, Individuals, Culture and Society Research Centre (RICS) at the Faculty of Law, University of Oslo.

claims are made that are inconsistent with the dominant legal order, they will be ignored.⁶⁴⁰ Anne Griffiths further contends that “with the rise of the nation-state a particular paradigm of law became predominant, one in which state law acquired jurisdiction and took precedence over other forms”.⁶⁴¹

With the use of case studies from Australia and Canada, Kristen Anker provides convincing dialogue on ways to make space for indigenous legal traditions within a sovereign nation.⁶⁴² Anker states:⁶⁴³

that an approach to law known as ‘legal pluralism’ provides a more apt language for treating ‘the justice question’ of the place of Indigenous law than orthodox legal theory because, in the way I conceive it, a legal pluralist recognition is an engagement about the nature of law and not about a formal relationship between two fixed entities.

She ‘looks out’ to other laws and the second ‘looks in’ towards the nature of state law.⁶⁴⁴ Whilst this may be logically sound, on a practical note, within a legal system that fiercely adheres to the principle of Parliamentary Sovereignty underpinned by legal positivism, entertaining the notion of legal pluralism in New Zealand to accommodate tikanga Māori appears unworkable.⁶⁴⁵

Equally, in order to adopt legal pluralism, Māori would be required to accept a legal system that was responsible for land alienation and displacement of their customs. Although Eddie Durie contends that “the Treaty of Waitangi is not just a Bill of Rights for Māori but also for Pākehā too”⁶⁴⁶ and to this end if the Treaty of Waitangi was entrenched constitutionally it could realise a legal pluralism within New Zealand

⁶⁴⁰ Griffiths above.

⁶⁴¹ Griffiths above.

⁶⁴² Kirsten Anker *Declarations of Interdependence A Legal Pluralist Approach to Indigenous Rights* (2014, Ashgate Publishing, UK).

⁶⁴³ Above.

⁶⁴⁴ Above.

⁶⁴⁵ Also Nicole Roughan “The Association of State and Indigenous Law: A Case Study in ‘Legal Association’” (2009) 59 *UTLJ* 135 at 143

⁶⁴⁶ New Zealand 1990 Commission The Treaty of Waitangi: The Symbol of our life together as a Nation, Wellington: NZ 1990 Commission, 1989 14.

society,⁶⁴⁷ Ani Mikaere and Moana Jackson are skeptical of any benefits in legal pluralism for Māori and depict it as “inherently assimilative and racist”.⁶⁴⁸ Moana Jackson further contends that under “a guise of sensitivity and good faith the colonial certainty of overt dismissal [tikanga Māori] has been replaced by a new-age legalism”.⁶⁴⁹ Further Jackson has stated that:⁶⁵⁰

The redefinition and incorporation of basic Māori legal and philosophical concepts into the law is part of the continuing story of colonization. Its implementation by government, its acceptance by judicial institutions, and its presentation as an enlightened recognition of Māori rights are merely further blows in that dreadful attack to which colonization subjects the indigenous soul.

Despite the international jurisprudence and constitutional examples articulating the recognition of indigenous rights,⁶⁵¹ including that of self-determination, the right to implement the philosophy of Te Ao Māori within the criminal justice system in New Zealand is still unclear.

It is appropriate to now consider the current legal provisions, practices and policies that have been historically and currently implemented in the New Zealand criminal justice system to alleviate the disproportionate statistics.

⁶⁴⁷ R Stavenhagen ‘Mission to New Zealand’ in United Nations Economic and Social Council, Commission on Human Rights, Indigenous Issues (62nd session, item 15) 13 March 2006 para 85.

⁶⁴⁸ Moana Jackson “Changing Realities: Unchanging Truths” in Commission on Folk Law and Legal Pluralism (ed) Papers Presented to the Congress at Victoria University of Wellington, August 1992: Volume II (Law Faculty, Victoria University of Wellington, Wellington, 1992) at 444.

⁶⁴⁹ Moana Jackson above n 648.

⁶⁵⁰ Moana Jackson “Justice and political power: Reasserting Māori legal processes” in Kayleen M. Hazlehurst (ed) Legal pluralism and the colonial legacy: Indigenous experiences of justice in Canada, Australia and New Zealand (Avebury, Aldershot, 1995) at 254.

⁶⁵¹ See Chapter VI ‘Tikanga Maori and Therapeutic Jurisprudence’ for further discussion.

ŪPOKO TUAWHA

CHAPTER IV

MAORI AND THE CURRENT CRIMINAL JUSTICE INITIATIVES

Prior to the arrival of the British, Māori adhered to the realm of the Māori world. Colonisation impacted negatively on the realm of the Māori world, marginalising tikanga Māori.⁶⁵² Subsequent laws and policies were introduced, alienating Māori from their land and resources.⁶⁵³ The failure to recognise tikanga Māori also resulted in the breakdown of existing familial structures and the legacy of violence in contemporary families is also attributed to colonisation.⁶⁵⁴

The Hunn Report recommended that New Zealand move beyond assimilation and towards integration where the two cultures would become one.⁶⁵⁵ As Māori were the minority, the effect was the gradual erosion of tikanga Māori. This was reflected in the report's lack of provision to protect Māori identity and culture — tikanga Māori.⁶⁵⁶ Ralph Piddington, a former Professor of Anthropology at the University of Auckland, stated that for most Pākehā, “Māori are envisaged as dark-skinned Pākehā, having no distinctive cultural characteristics of their own”.⁶⁵⁷

The establishment of the Māori Education Foundation and New Zealand Māori Council provided positive vehicles for Māori to assert their rights. However, in 1965, 85 per cent of Māori children left school without any formal qualifications,⁶⁵⁸ and the offending rates for Māori were still disproportionately high.⁶⁵⁹ Not surprisingly the increase in Māori criminality, most noticeable in youth offending, continued unabated through the 1960s where Māori youth represented 1,269 or 23 per cent of the ‘distinct cases’ dealt with by the Children’s Court.⁶⁶⁰ By 1970 these figures had increased to 4,866 and 42 per cent respectively.

⁶⁵² See Iris Marion Young *Five Faces of Oppression* in Lisa Heldke and Peg O’Connor (ed) *Oppression, Privilege and Resistance* (McGraw Hill, Boston, 2004) for discussion on marginalization.

⁶⁵³ See for example David V Williams *Te Kooti Tango Whenua: The Native Land Court 1864 – 1909* (Huia Publishers, Wellington, 1999) for discussion on the alienating legislation. Williams coins the Native Land Court “the Engine of Destruction”. See also for example ss 102 – 103 Public Works Act 1928 where Maori land could be taken by an Order in Council without provision for any statutory notice or objection rights which were accorded to the owners of non-Māori.

⁶⁵⁴ See for example Te Puni Kokiri *Rangahau Tukino Whanau Maori Research Agenda on Family Violence* (2008) at 4 <www.tpk.govt.nz>. For general discussion see also Walker, above n 25.

⁶⁵⁵ See discussion in Hill, particularly the Hunn Report (1960), above n 425.

⁶⁵⁶ See Walker, above n 30; Jarod Gilbert *Patched: The History of Gangs in New Zealand* (AUP, Auckland, 2013) at 46 <www.press.auckland.ac.nz>.

⁶⁵⁷ Gilbert, above n 656, at 46

⁶⁵⁸ At 47.

⁶⁵⁹ See NZDP 323 (1960) 1414 -7; Mason (1965), 23 as cited in Antje Kampf *Mapping out Venereal Wilderness: Pubic Health and STD in New Zealand 1920 – 1980* (Transaction Publishers, London, 2007) at 184.

⁶⁶⁰ Gilbert, above n 656.

Ranginui Walker stated:⁶⁶¹

In 1970, there were 9,094 young Māori offenders before the Children's Court. The following year ... the offending rate of Māori boys under 16 years was 5.1 times the rate of Pākehā ... for Māori girls the rate was higher at 7.4.

Even though colonisation had a negative effect on Māori identity⁶⁶² and tikanga Māori, it also provided an impetus for Māori to protect and assert their identity.⁶⁶³ This is reflected in historical events, including Māori Land March and the establishment of groups such as Ngā Tamatoa to promote Māori rights.

Since colonisation the subsuming of tikanga Māori into the existing legal system has resulted in chequered policies seeking to oppress and also assist tikanga Māori, such as those included in the Hunn Report (1960). Notwithstanding these policies and contemporary social problems, such as unemployment and drug and alcohol addiction, the disproportionate offending rates of Māori remain.⁶⁶⁴

A. Current Legal Provisions, Practices and Policies – New Zealand

The express and meaningful recognition of indigenous law/tikanga Māori within the justice system varies from recognition of Māori customs and values⁶⁶⁵ to rejecting claims based on lack of jurisdiction.⁶⁶⁶ Within the criminal justice system, this is further limited to incorporation into programmes by the Corrections Department,⁶⁶⁷ and more recently inclusion in the Youth Court at sentencing. This thesis may suggest

⁶⁶¹ Walker, above n 30, at 208.

⁶⁶² For example, Māori were punished by the colonists for speaking their language in schools thereby alienating Māori from their language. My father, Aterea Toki, recalls such events.

⁶⁶³ T Moeke Pickering *Māori Identity within the Whanau: A Review of Literature* (Hamilton: University of Waikato, 1996) <www.researchcommons.waikato.ac.nz>.

⁶⁶⁴ For a contemporary discussion, 1994 – 2009, of Maori rights see Margaret Mutu *The State of Māori Rights* (Huia Publishers, Wellington, 2011).

⁶⁶⁵ T Bennion “Ngati Hokopu ki Hokowhitu v Whakatane District Council” *Māori Law Review* July (2003) at 2 – 8.

⁶⁶⁶ *R v Toia* CRI 2005 005 000027 Williams J HC Whangerei 9 August 2006. See also *Hunt v R* [2011] 2 NZLR 499 at [82] and [85] for discussion breach of tikanga, this claim was rejected by the Court.

⁶⁶⁷ For example Te Whanau Awhina. See also domestic violence programmes at <<http://www.justice.govt.nz>>

that, if Māori are to be fairly treated, some transformations are required not only at sentencing, but also from the time of apprehension through to imprisonment.

The term tikanga is incorporated into various statutes; however, only half of these provide a definition of tikanga and refer to concepts such as culture and custom. The inclusion of tikanga Māori can be found within a raft of Acts.⁶⁶⁸ Within these Acts the inclusion of tikanga varies from tikanga being an express and relevant consideration in decision-making⁶⁶⁹ to ensuring a knowledge base of tikanga exists on certain statutory boards⁶⁷⁰ to where tikanga forms part of a policy directive.⁶⁷¹ These references are more descriptive than definitive.⁶⁷² This undermines the consistency and intention of the legislative provision.

As Māori are disproportionately represented in the prosecution process and in light of calls for a return to an all Māori jury, this would appear to support this thesis' proposition that the application of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine is the only way forward for Māori. A review of whether, or how the current legislative initiatives and programmes recognise Te Ao Māori and tikanga Māori will inform this analysis.

As offending is often linked to social and environmental factors, such as excessive alcohol or drug use, prevention of causative factors is of relevance to the rate of Māori offending and incarceration. Māori Committees established by the Māori Community Development Act 1962 provided a forum to address low level offending.⁶⁷³ Māori wardens, also established by the Māori Community Development Act 1962, provided a voluntary service to the community to control disruptive social behaviour that may result from excessive alcohol and drug use by Māori. To this end, an examination of these two roles will be informative.

⁶⁶⁸ It is acknowledged that tikanga Māori also exists within the Māori prose of legislation, such as the Waikato Claims Settlement Act and the preamble to Te Ture Whenua Māori Act 1993.

⁶⁶⁹ For example Te Ture Whenua Māori Act 1993, ss 106, 107, 114, 129

⁶⁷⁰ For example the Education Act 1989, s 61.

⁶⁷¹ For example Historic Places Act 1993, s 42.

⁶⁷² See Fiona Wright "Law, Religion and Tikanga Māori" (2007) 5 NZJPIL at 261 – 299.

⁶⁷³ An example of low level offending could be shoplifting.

(a) Māori Wardens

Created by an Act of Parliament, the Māori Community Development Act 1962, the Māori warden programme attracts a voluntary status. Viewed as agents of social control, Māori wardens were perceived as continuing the policing role that had existed amongst various iwi, including the Ringatū and the King Confederacy.⁶⁷⁴ This legislative recognition was seen to consolidate the historical commitment to utilise iwi leaders to maintain public order.⁶⁷⁵

The provision of legislation allows Māori wardens to exercise control over other Māori and perform minor policing duties, such as the control of drunken behaviour and discouraging crime on the streets.⁶⁷⁶ The role of the Māori warden is often applauded, with comments by Douglas Graham to the inaugural meeting of Security New Zealand in 1996, entitled “The Role of the Private Sector in Law and Order” where he noted:⁶⁷⁷

Here in New Zealand, Māori wardens are one of the most successful examples of the role of the private sector in law and order. They were established in 1945 by the Māori Social and Economic Advancement Act at a time when more than 80 per cent of Māori were living in rural areas. The wardens were well known to all members of the tribe by virtue of the fact that they had grown up within the community with a reputation established by ancestry and leadership qualities.

Over the last 30 years there has been a spectacular movement of Māori people to the cities and the work of the wardens has become largely an urban function. Today they carry a heavier workload than their rural counterpart as they cope with some of the less savoury aspects of life in the city.

Māori wardens were not introduced with the intention of usurping the duties of the

⁶⁷⁴ Augie Fleuras “Māori Wardens and the control of Liquor among the Māori of New Zealand” (1981) 90(4) at 495.

⁶⁷⁵ Fleuras, above n 674, at 495. See also Hill, above n 425, at 128.

⁶⁷⁶ Sian Elias “Equality under Law” (2005) 13 Waikato Law Review 1 at 7. For a comparative perspective on the effectiveness of indigenous community based policing groups - the presence of the Regional Coordinating Body of the Community Authorities/Community Police in Mexico has, due its presence, reported a 90 per cent decline in common crime.

⁶⁷⁷ As cited by Tom Bennion “Law and Order Māori and the Private Sector” (April 1996) Māori Law Review at 1.

Police, but rather they are an influence among the people in maintaining law and order.

Their powers of arrest are only those of members of the public ... On many occasions I and the officials who accompanied me on this character-building exercise were extremely grateful for the presence of Māori wardens — backed up by kuia when the going got really tough ...

The State observed Māori protocol and a potentially dangerous situation was diffused by skilful handling and a lot of wisdom and humour from kuia and Māori wardens.

Although the role of the Māori warden declined in the 1970s, it has enjoyed a recent resurgence, assisted in part by the announcement in 2008, by the then Minister of Justice, Annette King, that NZ\$2.3 million would be allocated to strengthen the capacity and capability of Māori wardens.⁶⁷⁸

However, the establishment of a Māori Warden's branch in Queensland, Australia, to promote safer communities, has been challenged by the broader community with allegations of racism and arrogance.⁶⁷⁹ Nonetheless, the importance of their role is the subject of a current review by Te Puni Kōkiri, which is currently seeking feedback on the strengthening of their current role.⁶⁸⁰

Māori wardens contributed positively to the Māori Committee and Māori Courts' initiative. It is suggested that this role could be revived and accommodated within an indigenous court as a lay advocate to support the offender between arrest and appearance before a judge or within a marae forum.⁶⁸¹

⁶⁷⁸ Tom Bennion "Editorial" (May 2008) *Maori Law Review* at 6.

⁶⁷⁹ "Māori Wardens in Queensland under Fire" *Radio NZ News* (online, New Zealand, 18 July 2013) <www.radionz.co.nz>.

⁶⁸⁰ There are currently 883 warranted Māori wardens who are engaged on a voluntary basis. See Te Puni Kōkiri Māori Wardens Options for Change (2013) <www.tpk.govt.nz>. Current funding is \$1,000,000 per annum to assist Māori Wardens deliver 'community based services, improve organizational capacity and capability'. See <<http://www.tpk.govt.nz/en/in-print/our-publications/publications/maori-wardens-project-funding-programme/page/1>>

⁶⁸¹ See Chapter VII 'A New Framework' on a proposed model.

(b) Māori Courts

Historically Māori Committees, constituted under the Māori Community Development Act 1962, adjudicated on low level offending and were informally referred to as Māori Courts.⁶⁸² Chaired by at least three Māori Committee members, the intention was to prevent and deflect offenders from the criminal justice system. With the assistance and support of the community, the offender was reintegrated into the community. Māori wardens often contributed to the Māori Courts. However, the then Secretary for Māori Affairs, Jock McEwen, noted that the Māori Courts were struggling as the “traditional authority exercised by elders had been lost”.⁶⁸³ Despite the positive effect of the Māori Committees, a lack of funding and resources together with continual dislocation of Māori from their culture, and an unwillingness by some Māori to fall under the jurisdiction of the Māori Committee, led to its demise.⁶⁸⁴ Notwithstanding this, it is suggested that a similar forum could be revisited.

Considering that the jury system, as a collective, provides a means to impart community norms and values into a judicial proceeding, a review and analysis of the historical involvement of Māori within this system is helpful.

(c) Māori Juries

Prior to 1844 Māori were unable to serve on ordinary juries. However, in 1844 the Native Exemption Ordinance was passed. This was one of a suite of exceptional laws; the others being the Unsworn Testimony Ordinance,⁶⁸⁵ the Cattle Trespass Amendment Ordinance⁶⁸⁶ and the Jury Amendment Ordinance. The Jury Amendment Ordinance authorised the Governor to exempt certain Māori from the property-ownership requirements and allow Māori to serve on mixed juries. Although no proclamation was ever made to authorise this, it was declared that any Māori whose capability was certified would qualify to serve on a mixed jury for the trial of any case

⁶⁸² Hill, above n 425, at 130.

⁶⁸³ At 131.

⁶⁸⁴ At 134.

⁶⁸⁵ The Unsworn Testimony Ordinance enabled Māori who had no religious beliefs to provide sworn evidence

⁶⁸⁶ The Cattle Trespass Ordinance required settlers to keep their cattle fenced in, rather than requiring Māori to fence them out of their cultivations.

in which the property or person of a Māori might be affected.⁶⁸⁷

Section 2 of the Juries Act 1908 provided a definition of Māori to include persons of the aboriginal race of New Zealand, including Polynesian, Melanesian and Australasian races as well as half castes, provided they lived with a Māori tribe or community.

According to Dr Ken Palmer:⁶⁸⁸

The significance of the categorisation, is to allow for an all Māori jury in a criminal case involving Māori offending against another Māori, with like provision for civil cases. Where a civil case involves one Māori against a non-Māori, a mixed jury of races may be allowed but no equivalent provision applied to criminal charges involving non-Māori people.

A Māori accused of a crime against another Māori could claim trial before an all-Māori jury. However, no Māori could serve on a jury if either the accused or the victim was a non-Māori.⁶⁸⁹

In civil cases a Māori jury could be claimed if both parties were Māori, and a mixed jury if one party was Māori.⁶⁹⁰ The law remained in this form for nearly a century. In 1962 legislation abolished separate Māori juries and placed Māori on an equal footing for jury service, including cases involving non-Māori.⁶⁹¹

Although regarded as equals, research has since confirmed that Māori are still under-represented on both panels of potential jurors as well as on trial juries.⁶⁹² This is a result of bias at both the out-of-court and the in-court selection stage.⁶⁹³ The

⁶⁸⁷ Shaunnaugh Dorsett “R v E Hipu Supreme Court Wellington’ 1 December 1845” (2010) 41(1) VUWLR 89 at 91

⁶⁸⁸ Ken Palmer ‘Law Land and Māori Issues’ (1988) Canterbury Law Review at 323

⁶⁸⁹ S Dunstan, J Paulin and K Atkinson Trial by Peers? The Composition of New Zealand Juries. (Department of Justice: Wellington, NZ, 1995).

⁶⁹⁰ Dunstan, Paulin and Atkinson, above n 689.

⁶⁹¹ Mark Israel ‘Ethnic Bias in Jury Selection in Australia and New Zealand (1998) International Journal of the Sociology of Law 26 at 35 – 54. The special provisions for Māori juries were abolished with effect from the end of 1964 by the Juries Amendment Act 1962.

⁶⁹² See Dunstan, Paulin and Atkinson, above n 689.

⁶⁹³ Israel, above n 691. See also, Paulin and Atkinson, above n 689, for empirical study.

underlying reasons are many, including the nature of the boundaries of the jury districts, the exclusive use of the electoral roll as the source list and the criteria adopted for excluding people from the jury list.⁶⁹⁴ However, a significant source of under-representation also derives from the use of challenges by prosecuting counsel.⁶⁹⁵

In 1988 a report written by Moana Jackson for the Department of Justice drew attention to fears that the continuing prevalence of monocultural juries might be denying Māori people a fair trial.⁶⁹⁶ Jackson argued that an all-Māori jury should again provide for Māori defendants.

(d) CYPF Act and Family Group Conferences

A Family Group Conference (FGC) is a meeting where a young person who has offended, their family, victims and other people meet to discuss how to assist the young offender to take responsibility for their actions and implement practical ways to make amends.⁶⁹⁷ The objective is to reach a group consensus on an outcome.

The preamble to the Children, Young Persons and their Families Act 1989 Act (CYPF) states that the purpose of the Act is to:

advance the well-being of families and the wellbeing of children as young persons as members of ... whānau, hapū, iwi ... make provisions for whānau, hapū, iwi ... and the matters to be resolved where possible by their own... whānau, hapū, iwi...

Section 13 of the Act refers to principles and makes it clear that the primary role for caring and protecting the child or young person lies with the whānau, hapū or iwi.

⁶⁹⁴ Dunstant, Paulin and Atkinson, above n 689.

⁶⁹⁵ Dunstant, Paulin and Atkinson, above n 689.

⁶⁹⁶ Jackson above n 31.

⁶⁹⁷ See also Ministry of Justice 'The Family Group Conference in Youth Justice.'
<www.justice.govt.nz>.

Various programmes, such as FGC,⁶⁹⁸ are also provided for in the CYPF Act that acknowledge and support the participation of whānau.⁶⁹⁹

Involving the victim in the process and encouraging mediation of concerns between the victim, the offender and their families is a means to achieve reconciliation, restitution and rehabilitation.⁷⁰⁰ The FGC allows for the participation of whānau and iwi. There is also provision for the FGC to be held on a marae.

The success of the FGC and its adoption by other jurisdictions is to be applauded and adds weight to the case for an indigenous court⁷⁰¹. However, in practice, “levels of restorativeness vary between FGCs as approximately half of FGCs do not have the victim or victims’ representative present, thereby diminishing the effectiveness of the restorative initiative”⁷⁰².

Notwithstanding the inclusion of a marae setting, there is no impetus to connect the offender with their cultural identity. And although tikanga may be implicit, there is no explicit mention of ‘tikanga’ within the CYPF Act 1989.

(e) Restorative Justice⁷⁰³

Central to restorative justice is the objective for the victim and the offender to meet face-to-face and restore the relationship, focusing on redress for the harm done to the victim, while holding the offender accountable and repairing any damage to the community.⁷⁰⁴ As a voluntary process, both the victim and the offender must agree

⁶⁹⁸ The immense contribution of Judge Mick Brown and Judge Fred McElrea to the area of Youth Offending and the Family Group Conference initiative has been invaluable. It was their pioneering approach that led to these reforms.

⁶⁹⁹ Specifically Part Two of the Act and ss 256 Procedure and 258 Functions.

⁷⁰⁰ Youth Court of New Zealand ‘Family Group Conferences’ < www.justice.govt.nz >.

⁷⁰¹ FGC have been adopted in the United Kingdom and also United States where they are known as Family Guided Decision Making.

⁷⁰² Yvette Tinsley and Elisabeth McDonald ‘Is there any other way? Possible alternatives to the current criminal justice process’ vol 17, 2011, *Canterbury Law Review*, 204.

⁷⁰³ It is acknowledged that Restorative Justice is similar to Therapeutic Jurisprudence. However, this thesis will be confined to Therapeutic Jurisprudence as it provides a ‘broader umbrella’ and more appropriate to consider for the purposes of this thesis.

⁷⁰⁴ Ministry of Justice “Restorative Justice” < www.justice.govt.nz >. See also discussion in Helen Bowen and Jim Considine *Restorative Justice Contemporary Themes and Practice* (Ploughshare Publications, New Zealand, 1999). See also Gabrielle Maxwell and James Liu (Eds) *Restorative Justice*

and the offender must admit responsibility prior to the process. The outcome of a Restorative Justice Conference is taken into account by the judge at sentencing.

In recognition of the positive effect restorative justice can have, this process will soon be available in every court across New Zealand.⁷⁰⁵ This is unsurprising given that benefits identified include:⁷⁰⁶

- 20 per cent reduction in reoffending by those who participated. The frequency of those who did reoffend dropped by nearly a quarter
- 77 per cent of victims were satisfied with their overall experience, before, during and after the conference
- 74 per cent of victims said they felt better after attending the conference
- 80 per cent of victims said they would be likely to recommend Restorative Justice to others in a similar situation

More recently a follow up study by the Ministry of Justice confirmed the positive effect of a restorative justice process finding that:⁷⁰⁷

On average, offenders who participated in a Police or court-referred restorative justice conference committed 23 per cent fewer offences than comparable offenders over the following 12 month period; and had a 12 per cent lower rate of reoffending than comparable offenders over the following 12 month period.

Despite statistical threshold requirements the Report further noted:

The percentage difference in the frequency of reoffending remained stable over the four-year period of the study. Although the two to four-year results did not meet the threshold for statistical significance, nevertheless the findings suggest that restorative justice may continue to have a positive impact on the number of offences committed over time.

Practices in New Zealand: Towards a Restorative Society (Institute of Policy Studies, Wellington, 2007) for discussion of New Zealand experiences and perspectives.

⁷⁰⁵ Frank Neill “Restorative Justice: Chance to Help Clients Turn Their Lives Around” *Law Talk* (New Zealand, November 2013) at 9. Also noteworthy is the Government’s funding of 4.4 million investments in adult pre sentence Restorative Justice.

⁷⁰⁶ Neill, above n 705, at 12.

⁷⁰⁷ Ministry of Justice *Reoffending Analysis for Restorative Justice Cases 2008 – 2011* (April 2014) <www.justice.govt.nz>.

The study also suggested that conferenced offenders were 28 per cent less likely to be imprisoned for reoffending over the following 12 month period than comparable offenders. However, again that result was not statistically significant. It also needs to be viewed in light of the reoffending rates for high-level offending, which suggest restorative justice has no significant impact on the seriousness of reoffending.

Although restorative justice like tikanga may be implicit in legislation, such as the CYPF Act 1989, there is no explicit mention of restorative justice nor tikanga within the CYPF Act 1989.

Notwithstanding, the positive aspects of restorative justice and suggestion that tikanga Māori is consistent with restorative justice,⁷⁰⁸ academics contend that through a tikanga Māori lens, the concept of restorative justice is incompatible with tikanga Māori.⁷⁰⁹ Restorative justice infers that something has been broken and needs to be restored. For Māori, conduct that is *hee* unbalances the relational network. This conduct is not perceived as broken, but conduct that requires balance — the aim of tikanga Māori through the use of further tikanga concepts. Further, Juan Tauri contends that restorative justice was imposed upon Māori, is not community driven and is an adjunct rather than an alternative to conventional criminal justice.⁷¹⁰

B. Programmes

Before addressing how the criminal justice system has included tikanga within various programmes, the presence of tikanga values, such as ora, implemented by the Ministry of Health, Hauora, Māori Health Care Providers and Whānau Ora, as a firm policy directive, provides an interesting example.

⁷⁰⁸ See David Carruthers “Restorative Justice: Lessons from the Past, Pointers for the Future” (2012) 20 Waikato Law Review: Taumauri at 1, who acknowledges that the principles underpinning restorative justice are consistent with those of tikanga Māori.

⁷⁰⁹ See Yvette Tinsley and Elisabeth McDonald ‘Is there any other way? Possible alternatives to the current criminal justice process’ vol 17, 2011, *Canterbury Law Review*, 206 who state that there is limited research on whether restorative justice is compatible with indigenous notions of justice.

⁷¹⁰ Juan Tauri ‘Family Group Conferencing: A Case Study of the Indigenisation of New Zealand’s Justice System (1998) 10 CICJ 168 as cited by Tinsley and McDonald above n 709, at 206.

(a) Hauora – Māori Health

A recent survey revealed that over 80 per cent of New Zealanders reported good health.⁷¹¹ For Māori, however, high smoking rates (two in five or 41 per cent of Māori adults are current smokers), obesity rates (44 per cent), mental health rates (Māori adults have higher rates of psychological distress than other adults, with one in ten Māori affected) indicate that Māori are disproportionately represented in adverse health statistics. This study confirms that Māori have the poorest health of any ethnic group in New Zealand.⁷¹²

Māori health providers are contracted to deliver health services, predominantly to Māori under the Hauora scheme. According to Māori Marsden:⁷¹³

... a synonym for mauri in certain contexts is hau (breath). ‘Hau-ora’ the breath of life is the agent or source by and from which mauri (life principle) is mediated to objects both animate and inanimate ... and hauora as applied to animate objects are synonymous ... mauri is applied to inanimate objects; whilst hau is applied only to animate life ... mauri was the force or energy mediated by hauora – the breath of the spirit life.

Anne Salmond noted:⁷¹⁴

... The hau, like the tapu and mana of the ancestors, was once dispersed throughout the kin group ... *gifts or insults to any part of the group thus affected the hau of the entire kin group* [emphasis added] ... in this way utu, *reciprocal exchange, required the return of hau* [emphasis added] whether by gifts or insults. Insults diminished the rangatira’s hau and had to be requited. Gifts, by embodying mana and carrying the donor’s hau created an obligation for return gifting... *If gifts were not requited this was hau whitia ... in such a situation, the source of life was weakened, causing misfortune, even dying* [emphasis added].

⁷¹¹ Ministry of Health ‘The Health of New Zealand Adults 2011/12 - Conclusions’ at 130 < www.health.govt.nz >.

⁷¹² At 130.

⁷¹³ Marsden above n 1, at 44.

⁷¹⁴ Salmond, above n 520, [at 176 – 177].

In more recent times, the term *hauora* has been further developed into a model of general well-being prescribing four dimensions: Taha Tinana (physical well-being — health), Taha Hinengaro (mental and emotional well-being — self-confidence), Taha Whānau (social well-being — self-esteem) and Taha Wairua (spiritual well-being — personal beliefs).⁷¹⁵ Should one component become damaged, a person or the corresponding collective will become unbalanced and feel unwell, thus requiring a re-balance.⁷¹⁶ This model recognises the importance of the relational dynamic and ultimately the need for balance: the aim of tikanga.

The fundamental philosophy is consistent with tikanga values and programmes such as He Korowai Oranga: Maori Health Strategy. This programme provides a framework for the public sector to participate in supporting the health status of Māori with an overall aim of whānau ora: Māori families achieving well-being. Whānau ora is a strategic tool for the health and other government sectors to work together with iwi Māori providers and Māori communities as well as whānau to reduce the disproportionate health statistics for Māori. The Māori Action Plan Whakatātaka Tuarua 2006 – 2011 further contributes by setting objectives.⁷¹⁷

In response to Māori over-representation within the health system, the Ministry of Health has implemented programmes and strategies that are underpinned by tikanga values to reduce the disparity. The approach is relational, premised on the interconnectivity of the four dimensions. Notwithstanding the similar rates of disparity for Māori and offending rates, the Ministry of Justice does not provide comparable programmes and plans.

The Department of Corrections has recently evaluated two programmes.⁷¹⁸ The first, Te Whare Ruruhau o Meri, is a dynamic programme that offers a Whānau Reconciliation Support Service. The programme recognises that many women want to return to their partners and the Service needs to support them to do so, while providing them with the best possible opportunity to be free from violence. The

⁷¹⁵ See Mason Durie ‘Te Whare Tapa Whā Māori Health Model Hauora Māori’ Ministry of Health. Available at www.health.govt.nz/system/files/documents/pages/maori_health_model_tewhare.pdf

⁷¹⁶ Durie, above n 638.

⁷¹⁷ See Ministry of Health, Whakatātaka Tuarua: Māori Health Action Plan 2006-2011 (Wellington, 2006) < www.health.govt.nz > for full discussion.

⁷¹⁸ Ministry of Health, above n 717.

second programme, Tu Tama Wahine o Taranaki, provides a support network for Māori respondents.

An exciting initiative between Te Whare Whakaruruhau (Māori Women's Refuge in Hamilton) and prisoners within the Māori Focus Units has emerged. This initiative permits the members of the Māori Focus Units to perform work tasks, such as gardening and furniture removal, within the confines of Te Whare Whakaruruhau. Although still in its early days and under close scrutiny and monitoring, the 'relationship' between these two vehicles has provided a 'healing' process for the prisoners in the Māori Focus Units. Through this relationship the participants within the Māori Focus Units who provide this assistance become 'more aware' of the difficulties and trauma faced by the victims of domestic violence.

The Domestic Violence (Programmes) Regulations 1996 specify that Māori values and concepts are to be taken into account.⁷¹⁹ Three key principles evident in these programmes are the use of te reo (Māori language), the importance of kaupapa (Māori culture) and the provision of healing for both the individual and the collective. This incorporation of tikanga has led to a favourable review.⁷²⁰

A recent evaluation of the Department of Correction's community-based tikanga Māori programmes shows that offenders with a heightened awareness of their Māori heritage are more likely to choose law abiding lifestyles.⁷²¹ By encouraging offenders to increase their cultural knowledge and reconnect with whānau, the report finds that tikanga Māori programmes are changing lives for the better. For Māori, the learning of pepeha (identify) and whakapapa (family lineage) is about reaffirming a connection with their tribes, ancestors and history.⁷²²

The Ministerial Review for Tikanga Māori Programmes (TMP) has confirmed that

⁷¹⁹ The Domestic Violence (Programmes) Regulations 1996, r 27 and 28.

⁷²⁰ See Report by Fiona Cram, Leonie Pihema, Kuni Jenkins and Matewiki Karehana *Evaluation of Programmes for Māori Adult Protected Persons under the Domestic Violence Act 1995* (Ministry of Justice, June 2002) <www.justice.govt.nz>.

⁷²¹ See Department of Corrections *Underpinning the Department's Five-Year Strategic Business Plan is the Recognition that "To Succeed Overall We Must Succeed for Māori Offenders"* (2010). <www.corrections.govt.nz>.

⁷²² Department of Corrections, above n 721.

TMPs:⁷²³

- a) are motivational programmes incorporating principles that acknowledge Te Reo, Tikanga Māori solutions and whānau involvement;
- b) are programmes tailored to Māori offenders to motivate them to address the underlying causes of their offending behaviour;
- c) have been operating nationally (male offenders) and locally (women) within the Public Prisons Service and the Community Probation Service;
- d) are well structured, and incorporated a range of active, passive and interactive teaching methods such as haka, waiata and kōrero to help increase responsivity; and
- e) are consistent with Corrections legislation.

One particular initiative which provides for assistance prior to release from prison is Whare Oranga Ake. This involves the establishment of kaupapa Māori centres to reintegrate Māori prisoners back into their communities. This initiative by Minister of Māori Affairs, Dr. Peter Sharples, has attracted NZ\$19.8 million to build and run two 16-bed units in Auckland and the Hawkes Bay.⁷²⁴

Integration has been identified as a problem with many prisoners not wanting to return to their dysfunctional families and peer groups.⁷²⁵ During a recent visit to the Māori Focus Units the lack of support for offenders released into the community was identified as the major hurdle facing inmates. If there is no assistance for newly released offenders the slide back into an environment that fosters offending and

⁷²³ Department of Corrections *Report on Tikanga Māori Programmes* (2010) <www.ssc.govt.nz>. See also see Department of Corrections above n 2 'Tikanga based programmes share in a budget \$100 million'.

⁷²⁴ Department of Corrections *Whare Oranga Ake* (2011) <www.corrections.govt.nz>.

⁷²⁵ Department of Corrections *Māori Focus Leads to Positive Gain* (2010) <www.corrections.govt.nz>. See also comments by Nigel Latta in Jimmy Ryan *Nigel Latta picks lock on prison system* <www.stuff.co.nz> where he noted that 'to reduce offending, the issues driving criminal behavior have to be resolved... the need for a solid support structure that is there for inmates upon their release, which, if not present, can leave them between a lock and a hard place.'

recidivism is inevitable.⁷²⁶ Although newly released offenders do not desire to reoffend if they are released into the same environment in which they offended, the probability of reoffending is high. On its own, initiatives such as Whare Oranga Ake are not enough. Whare Oranga Ake needs to be complemented with a wider education and support structure that will encompass the family, community and environment into which the offender is released.

It is acknowledged that initial problems with Whare Oranga Ake are inevitable. However, this should not stifle the enormous benefit this offers to prisoners re-integrating into society.

(b) Youth Action Plan

Chester Borrows, the past Associate Justice Minister, released a Youth Action Plan to identify three strategies to influence how youth crime should be addressed. This initiative includes partnering with communities. In recognising the success of the youth justice system, Mr Borrows, as part of the Partnering with Communities strategy, announced a NZ\$400,000 "innovation fund" to finance community-based youth justice initiatives. Further, Mr Borrows notes:⁷²⁷

This plan brings together the gains we've made in youth justice recently, through initiatives like our Fresh Start reforms, Policing Excellence, and the Children's Action Plan, and looks at the gaps, challenges and opportunities that remain.

Statistics released with the plan indicate a decrease in criminal charge rates, down from 2007 (the highest proportion of 116 charged per 10,000 young people), and also down from 2011 (with 3,577 charged, representing 86 per 10,000) to 3,016 young people charged in court in 2012, which equated to a rate of 74 per 10,000 young people.

⁷²⁶ See Department of Corrections above n 2, 'the recidivism rates for Māori are higher than any other ethnicity in New Zealand and furthermore that within a 12 month period the impact on reoffending and prison rehabilitation falls between 0.0 – 3.3 for Māori Focus Units'.

⁷²⁷ Chester Borrows 'Action Plan the next step forward for youth justice' 31 October, 2013 <www.beehive.govt.nz>

Whilst such initiatives and reports may be applauded, these programmes are the exception to what is generally available for Māori. Mainstream programmes offered by providers lack substance and often contribute to the disproportionate offending rates of indigenous peoples, especially for women.⁷²⁸ The Human Rights Commission has also suggested that many of these programmes that are focused on individual victims and offenders, rather than on broader relationships, are unlikely to satisfy the ambitions of those who seek the introduction or extension of programmes based on tikanga Māori and further that appropriate programmes should seek legislative backing.⁷²⁹

Further, Justice Joe Williams noted recently that despite the current legislative mechanisms in place, the judiciary is not being creative enough and is failing to make use of these provisions to encourage Māori participation and Māori self-governance.⁷³⁰ The inclusion of tikanga Māori within our justice system was recently considered by the High Court.⁷³¹

(c) Tikanga Māori in the Criminal Justice System⁷³²

Māori have long advocated that tikanga Māori, the first law of Aotearoa New Zealand,⁷³³ be meaningfully recognised within the New Zealand legal system. The case of *R v Mason* revisits the applicability of tikanga Māori within our current

⁷²⁸ Such as “Preventing Violence in the Home” programme. The Montgomery House violence prevention programme is a joint project between the New Zealand Department of Corrections and the New Zealand Prisoners’ Aid and Rehabilitation. The programme is an 8-week group based intervention established upon social learning and cognitive behavioural principles. Due to concerns the programme now includes a Te Whare Tapa Wha aspect that seeking to address te taha tinana (physical), te taha hinengaro (psychological), te taha wairua (spiritual), and te taha whanau (familial) needs of all residents. See The Montgomery House violence prevention programme <www.corrections.govt.nz>.

⁷²⁹ Human Rights Commission “Submission to the Justice and Electoral Select Committee on the Victims’ Rights Bill, 6 March 2001” at [9] <www.hrc.co.nz>.

⁷³⁰ See Joseph Williams, Honourable Justice of the High Court of New Zealand “Lex Aotearoa: a Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law” (Harkness Henry Lecture 2013, Te Piringa Faculty of Law, University of Waikato, 7 November 2013). Justice Williams was referring to provisions such as s 33 of the Resource Management Act 1991 that allows the transfer of powers to iwi from Local Council and ss 8(i) and 27 of the Sentencing Act 2002 that requires the Courts to take an offender’s cultural background into account for rehabilitative purposes, and allows the court to hear from any person on behalf of the offender thereby recognising that an offender’s cultural background may contribute to offending, respectively.

⁷³¹ *R v Mason* [2012] 2 NZLR 695.

⁷³² This section contains portions of an article already published Valmaine Toki “A Breath of Fresh, or Recycled Air – R v Mason” *NZLJ* (December 2012).

⁷³³ Mikaere, above n 339, at 331–332. See also Ani Mikaere ‘Tikanga as the first law of Aotearoa’ 24 (2007) *Yearbook of NZJ*

criminal justice system.⁷³⁴ Referring to oral evidence provided by Moana Jackson, and writings of Māori academics, Dr Robert Joseph and Matiu Dickson, the case provides fertile ground for an invigorated and fresh judicial discussion of an area often traversed.

The case involved an application for a ruling to enable the accused charged with murder and attempted murder, to be dealt with in accordance with tikanga Māori. The court considered that for the appellants to succeed, two distinct propositions would need to be met:⁷³⁵

- (a) that around the time He Whakaputanga o Nga Hapu o Niu Tireni (the Declaration of Independence of 1835) and Te Tiriti o Waitangi (the Treaty of Waitangi 1840), there was a developed Māori legal system (the customary system) that could investigate and impose sanctions for serious criminal conduct; and
- (b) the customary system continues in force today and represents a parallel system of criminal justice by which Māori charged with serious criminal offences may elect to be tried.

The second proposition can be split into two further subgroups:

- (a) whether Māori themselves practice tikanga Māori within a criminal context; and
- (b) whether the law of New Zealand allows tikanga Māori to be practiced.

Noting that there was a general acceptance that existing customary practices (tikanga Māori) had “the character and authority of law”,⁷³⁶ the court referred to a dispatch from Lord Russell, on behalf of the British Government, to instruct Governor Hobson to recognise the customs developed by Māori.⁷³⁷ From this point on, the court also referred to the form of the 1873 judicial oath and the adoption of the term “usages”,

⁷³⁴ Past examples include the current Rangatahi Courts held on a Marae. This seeks to incorporate the tikanga of the Marae within the current criminal justice system see *R v Mason* above n 731, at [41]-[42].

⁷³⁵ *R v Mason*, above n 731, at [10].

⁷³⁶ At [13].

⁷³⁷ At [13].

within that oath, as more likely to apply to Māori than the European settlers.⁷³⁸ Section 71 of the Constitution Act 1852 and the recent cases of *Attorney-General v Ngati Apa*⁷³⁹ and *Takamore v Clark*⁷⁴⁰ were also referred to as acknowledging the existence of laws, customs and usages of aboriginal or native inhabitants, and Māori customary title to land and customs associated with burial, respectively.⁷⁴¹

The court found that there was:⁷⁴²

no doubt that before the 1835 Declaration and the Treaty, Māori operated a customary system that could deal, for the social purposes of the time, with alleged breaches of societal norms of type now characterised as ‘serious crime’.

However, the court notes that the combined effect of ss 5 and 9 of Crimes Act 1961 extinguished the customary system, so it was not possible to regard the customary system as an existing parallel system.⁷⁴³ In doing so the court clearly negated the continuance of any customary system by which Māori charged with serious criminal offences may elect to be tried.

The court accepted that the first proposition was likely to be satisfied,⁷⁴⁴ but found it more difficult to accept the second proposition, referring to the Crimes Act 1961 as extinguishing this ability.

In order to affirm the second proposition, regard must be paid to the first proposition together with the existence of any reliance between the two propositions.

The court accepted that at the time of the signing of the Treaty of Waitangi, Māori had a developed legal system. For Māori, reliance was placed on the imposed legal system to meaningfully recognise their own developed legal system — tikanga Māori.

⁷³⁸ At [14].

⁷³⁹ *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA).

⁷⁴⁰ *Takamore v Clarke* [2011] NZCA 587; [2012] 1 NZLR 573 (CA).

⁷⁴¹ *R v Mason*, above n 731, at [14].

⁷⁴² At [28].

⁷⁴³ At [31] and [37]. See also comments by Max Harris ‘More on Mason Cultural factors in sentencing’ (2013) Māori Law Review Feb. Available also < maorilawreview.co.nz/2013/02/more-on-mason-cultural-factors-in-sentencing/>

⁷⁴⁴ At [28].

Notwithstanding this reliance, successive Court decisions and legislation have negatively impacted and effectively extinguished their legal system. If it was not for the Crown's reluctance to meaningfully accept the Māori's pre-existing system of law, it is highly likely that it would still exist, to the same degree, today.

It is acknowledged that Article III of the Treaty of Waitangi bestows on Māori the same rights and privileges of British subjects. However, the Māori text of the Treaty of Waitangi (Te Tiriti) guarantees to Māori “nga tikanga katoa rite tahi ki ana mea, ki nga tangata o Ingarangi” (the same customary rights as those given to the British). By implication, this bestowal could displace any existing system of law. However, when read together with Article I, where Māori arguably have not ceded sovereignty but governorship, this displacement is less clear.

If this “reliance” was meaningfully considered by the court, it would follow that the second proposition should be rephrased as:

(b) absent the incorrect legal findings⁷⁴⁵, the customary system would have continued in force today, representing a parallel system of criminal justice by which Māori charged with serious criminal offences may elect to be tried.

The initial direction to acknowledge pre-existing Māori “customs and practices” originated from the British Government in 1840.⁷⁴⁶ This direction was pitted against a backdrop of a need to secure land for European settlers. Consistent with this direction, early case law indicates the acceptance of existing native customs and practices and rights to land at a time when Māori still comprised the majority of the population.⁷⁴⁷

After the Constitution Act 1852, the judiciary evaded the obligation to continue the

⁷⁴⁵ See *Wi Parata v Bishop of Wellington* where the existing political, social and legal systems by Māori were found not to exist.

⁷⁴⁶ *R v Mason*, above n 731, at [13]; Lord Russell was Home Secretary and then Leader of the Opposition.

⁷⁴⁷ *R v Symonds* (1847) NZPCC 387.

application of Māori customary usage and law.⁷⁴⁸ The seminal case of *Wi Parata* in 1877 was decided against a very different backdrop when Māori were no longer the majority. Prendergast CJ found that Māori had no “body politic”, reversing any prior acknowledgement of tikanga Māori. This finding was reinforced in *Rira Peti v Ngaraihi Te Paku*,⁷⁴⁹ where Prendergast CJ denied any recognition of Māori custom law, despite s 10 of the New Zealand Government Act 1846.⁷⁵⁰ His Honour stated:⁷⁵¹

... The natives are British subjects; their relations to each other are governed by the laws of the land, and not by their usages.

This statement was a clear rejection of Māori custom. It was not until 1941 when *Te Heu Heu Tu Kino v Aotea District Land Board* was decided by the Privy Council, that recognition of tikanga Māori re-emerged.⁷⁵²

It would be inappropriate to cast aside the 70 years between *R v Symonds*,⁷⁵³ and *Te Heuheu Tu Kino v Aotea District Land Board*⁷⁵⁴ without due consideration of the detrimental effect on tikanga Māori and Māori land rights. The raft of statutes,⁷⁵⁵ consistent with Government’s land acquisition policies, provided legitimate avenues for the Crown to continue the alienation process.⁷⁵⁶ Redress for the wrongful acquisition of lands is addressed today through the Treaty Settlement process.

Had it not been for the imposition of a later incorrect legal finding — a finding “which can no longer be sustained”⁷⁵⁷ — tikanga Māori would continue to be in force today and would represent a parallel system of criminal justice. It is acknowledged that tikanga Māori would have evolved considerably since 1840.

⁷⁴⁸ Robert Joseph “The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852” (Te Matahauariki Institute Monograph Series, University of Waikato, 2002) at 54.

⁷⁴⁹ *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235 as cited in Joseph, above n 748.

⁷⁵⁰ Section 10 recognised the laws, customs and usages of Māori in native districts.

⁷⁵¹ *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9.

⁷⁵² *Te Heu Heu Tu Kino v Aotea District Land Board* [1941] AC 308.

⁷⁵³ (1847) NZPCC 387.

⁷⁵⁴ [1941] AC 308.

⁷⁵⁵ See for example Public Works Act 1928.

⁷⁵⁶ See discussion in David Williams *Te Kooti Tango Whenua* (Huia Publishing, Wellington, 1999)

⁷⁵⁷ *R v Mason*, above n 731, at [16].

Tikanga Māori is not dependent on a statute for its existence. The failure of our current criminal justice system and legislative framework to recognise tikanga Māori does not minimise or detract from its existence. Developing case law observes that statutes, although addressing the general subject area, do not extinguish certain rights.⁷⁵⁸ In this way the courts have confirmed this position, thus providing a small window to import the recognition of tikanga Māori.

In *R v Mason*, the court noted that:⁷⁵⁹

... [there is a need to] identify some problems that emerge from both the academic literature and the evidence of Mr. Jackson. I identify them by reference to my own starting point: nothing should be done to move away from a core criminal justice system that is applicable to all New Zealanders.

Had the court turned its mind to the principles that underpin tikanga Māori that share similarities with the developing “main stream” initiatives, such as therapeutic jurisprudence,⁷⁶⁰ then perhaps the court might have adopted a different perspective. It is difficult to ignore the over-representation of Māori within all stages of the criminal justice system. This places a further obligation to meaningfully consider alternative discourses that have shown success in comparative jurisdictions.

With the promise of a fresh perspective on a well-worn request, the case delivered a recycled argument using different ingredients to reach the same conclusion.

C. Specialist Courts and the New Zealand Judicial System

Courts are the guardians of the rule of law, providing a check and balance on the actions of the government and upholding the separation of powers. If the High Court were to be replaced by a specialised court, the High Court would become redundant and a constitutional conundrum would result.⁷⁶¹ This is perceived as an obstacle for

⁷⁵⁸ See *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA) and *Paki and Ors v Attorney-General of New Zealand for and on behalf of the Crown* - [2012] NZSC 50 - Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

⁷⁵⁹ *R v Mason*, above n 731, at [46].

⁷⁶⁰ See Winick and Wexler above 164 for discussion.

⁷⁶¹ See also Paul McHugh “Court Structure” Editorial NZLJ August 2001 at 261.

the establishment of specialised courts.

The role of a specialist court is largely determined by substantive law and is usually to be found in areas where the rule of law is weak and the role of discretion and policy is strong.⁷⁶² The spread or implementation of specialised courts, such as Drug Courts, indicate that both practitioners and judges wish to expand the role of discretion and that the rule of law is weak.

It is acknowledged there are some compromises to the rule of law when specialised courts are implemented. However, if the benefits of specialised courts include the reduction of the offending and recidivism rates, then this must outweigh any compromise to the rule of law.

(a) Family/Domestic Violence Courts

The repetitive nature of offending in a family violence context suggests that the conventional sentencing practices have been ineffective deterrents. Judge Mather noted that while recidivism is a feature of general criminal offending, it is particularly concerning when one victim (usually a partner or former partner) is the object of repeat offending against a number of victims/partners.⁷⁶³ According to Judge Mather, it was these concerns, as well as the high failure rate for family violence prosecutions due to the refusal, or unwillingness of complainants to give evidence, that led to a new approach. This resulted in the establishment of a pilot Family Violence Court at Waitakere in 2001. These courts “specifically aim to respond quickly to cases of family violence, while ensuring the victims’ safety and encouraging offenders to take responsibility for their actions in a coordinated way”.⁷⁶⁴

The Family Violence Court and the Drug Court have no specific statutory recognition. An administrative action allows the judges to specialise procedures in anticipation of better outcomes. The continuation of these arrangements is not entrenched in

⁷⁶² At 261.

⁷⁶³ Judge David Mather “*The Waitakere Family Violence Court: A More Focused Approach*” (Paper presented, 22 October 2005, District Court of New Zealand) <www.justice.govt.nz>.

⁷⁶⁴ Elizabeth Richardson, Katey Thom and Brian McKenna “Problem-Solving Courts in New Zealand and Australia: A Trans-Tasman Comparative” in Richard Wiener and Eve Brank (eds) *Problem Solving Courts* (Springer, USA, 2013) at 193.

legislation and reliant on the commitment by the judges, officials or community groups. It is suggested that should these specialised courts or a proposed indigenous court prove successful then legislation be promulgated and adequate resourcing allocated.

In 2004 Judge Johnson called for a new, effective and workable model for processing family violence cases in the criminal court.⁷⁶⁵ Basic certainty should be provided and the fear of unknown characteristics should be removed. According to Judge Johnson, any new system should provide immediacy of response, safety for victims, accountability for guilty defendants, consistency and co-ordination of information sharing, and community involvement. There should also be a therapeutic sentencing regime, properly balanced by traditional sentences, such as incarceration. In addition, the responses should be culturally workable.

Family Violence Courts have been established in Waitakere in 2001, Manukau in 2005 and Auckland in March 2007. Currently, the Family Violence Courts hear criminal cases in eight District Courts, with a dual focus on both the victim and offender.⁷⁶⁶

The attention paid to details, such as venue, rostering, and the communication and reflective processes between all the stakeholders (judges, defence bar, duty solicitors, family law, probation, victim advisors, Preventing Violence in the Home, prosecution, Legal Aid Services and court staff) contribute to the initial success of such a Court. As in Canada this continual sharing and communication between the stakeholders is viewed as key to the ongoing success.⁷⁶⁷

Whilst many aspects of the new Family Violence Courts are working well, there are fundamental problems that could seriously impede their long-term success.⁷⁶⁸ One

⁷⁶⁵ Catriona MacLennan “Judge Says Domestic Violence Court Process a ‘Masquerade’” (2004) Auckland District Law Society Issue 18 <www.adls.org.nz>.

⁷⁶⁶ P Boshier (2011). Investing in Life: Meeting the Cost of Family Violence. NZ Lawyer Extra, 39 (25 Nov 2011). See also Richardson, Thom and McKenna, above n 764, at 193

⁷⁶⁷ Judge Lex de Jong “*Family Violence Court Forum*” (Paper presented to an Auckland District Law Seminar, Building, 9th April 2008, Auckland). See also Mills, A.; Thom, K.; Meehan, C. and Chetty, M. (2013). Family Violence courts: A Review of the Literature. Auckland: Centre for Mental Health Research, 7.

⁷⁶⁸ See T Knaggs, F Leahy and N Soboleva ‘The Manukau Family Violence Court: An Evaluation of

problem included the stopping violence programmes, as research has found that these do not guarantee success.⁷⁶⁹ It is clear that most family violence occurs under the radar of the criminal justice system. The use of s 106 of the Sentencing Act 2002 (discharge without conviction) is of concern as it provides little in the way of offender accountability. In addition, s 106 orders do not leave an accurate record of offending which is required in order to make appropriate decisions about future offending.

Finally, there appears to be an emphasis and reliance on the role of the judge.⁷⁷⁰ First, judges take proactive steps to monitor and encourage feedback from the stakeholders, thus ensuring the workability of the Family Violence Court. Secondly, judges consistently tell offenders that they must take responsibility for their abusive behaviour and that crimes of violence towards family members are unacceptable. Without firm sentencing directives or Family Violence Court policy guidelines, there is no guarantee that all judges who sit in the Family Violence Court will adopt the same practices.

According to Judge Lex de Jong, Family Violence Courts are here to stay and over the next few years the numbers of such courts will increase.⁷⁷¹ Co-operation between the stakeholder groups in monitoring the process and consistency from the judiciary are keys to the success of the Family Violence Courts. It is suggested that the shortcomings identified, such as offender accountability, reliance on stopping violence programmes and decisions relating to future offending, can be met through the implementation of a tikanga based approach. Notwithstanding this success, attributed largely to the role of the judge, the ability to sustain this consistency can be problematic. It is suggested that the use of a traditional forum and tikanga practices can alleviate this concern.

the Family Violence Court Process' (August 2008) *Ministry of Justice*, Wellington, where they note that the 'Manukau Family Violence Court is providing an alternative response to family violence and most key informants believed this court's approach was very positive because it attempted to respond to family violence holistically'.

⁷⁶⁹ Deborah Mackenzie and Holly Carrington "Monitoring Report for the Auckland Family Violence Court The First Three Months 27 March 2007 – 30 June 2007" (Preventing Violence in the Home, Auckland, November 2007).

⁷⁷⁰ Like many specialist courts a factor of a Family Violence Court is one judge, one court and the use of treatment and education programmes.

⁷⁷¹ Judge Lex de Jong, above n 767.

(b) Drug Courts

A recent New Zealand study indicated that 80 per cent of crime is driven by alcohol and other forms of drugs.⁷⁷² Alcohol and other forms of drugs feature in 33 per cent of all fatal road crashes and in 21 per cent of serious injury crashes with a social cost of \$875 million, including costs for minor injuries.⁷⁷³ The victims' costs are estimated at \$400 million each year, and for alcohol and other forms of drugs, the overall cost to society is \$6.88 billion.⁷⁷⁴ In referring to recent statistics, a former Labour spokesman for the courts, Rick Barker noted:⁷⁷⁵

The cost per year per prisoner is \$91,000;⁷⁷⁶ \$44 million per year could be saved by reducing recidivism from its current rate of 68 per cent (74 per cent for Māori) to 20 per cent; and only 6.1 per cent of the Department of Corrections budget goes to 'reintegration', almost none of which is for low-level offenders.

Taken in context there are clear reasons for their introduction, according to Hon. Peggy Fulton Hora, Judge of the Superior Court of California (Ret.), we have 'Drug Courts' because:⁷⁷⁷

Alcohol, other drugs and crime is [sic] too broad for any single agency to tackle alone, incarceration doesn't prevent crime for those with substance use disorders; and Drug courts bring judges, prosecutors, defense attorneys, court personnel, probation and treatment providers together to solve the problem.

In New Zealand there are two drug courts that operate within the youth justice system. One is based in Christchurch and focuses on enhancing the treatment of offenders

⁷⁷² See Gerald Waters "The Case for Alcohol and Other Drug Treatment Courts in New Zealand" (2011) <www.drugcourts.co.nz>

⁷⁷³ See Gerald Waters "The Case for Alcohol and Other Drug Treatment Courts in New Zealand" (2011) <www.drugcourts.co.nz>.

⁷⁷⁴ Walters, above n 694.

⁷⁷⁵ Rick Barker, cited in Waters above n 694, at 14. See also New Zealand Labour Party *Barker Asks Committee to Hold Recidivism Inquiry* (press release, 15 December 2010) <www.scoop.co.nz>. See also positive comments made by Rick Barker on Drug Courts in New Zealand Labour Party '*A Pilot isn't a Policy*' (press release, 20 October 2011 <www.scoop.co.nz>.

⁷⁷⁶ See Department of Corrections *Men's Prison at Wiri: Facts and Factsheets* (2014) <www.corrections.govt.nz>.

⁷⁷⁷ Hon. Peggy Fulton Hora Judge of the Superior Court of California (Ret.) "Adult Alcohol and Other Drug Treatment Courts: Will They Work in New Zealand?" (Seminar given at University of Auckland, School of Law, 28 April 2011).

who have a serious drug dependency that has contributed to their repeated offending.⁷⁷⁸ The other is based in Auckland for ‘at risk’ youth with mental health and/or drug and alcohol issues, called the Intensive Monitoring Group.⁷⁷⁹

Appearances before these two courts are accepted following recommendations from FGCs. To be eligible the youth must be a repeat offender and exhibit a moderate to serious drug dependency.⁷⁸⁰ These courts, like other specialised courts, hold the offender accountable, whilst addressing the concerns and interests of the victims. The victim has opportunities to attend the initial FGC and together with the other stakeholders, including police, court staff and health agencies, will assist in the development of a treatment plan for the offender. After the successful completion of the treatment plan, balance or healing should be realised for the offender, victim and community.

A pilot Alcohol and Other Drug Treatment Court has been established in Waitakere. Again it is still early days, but it is suggested that, following international trends, some degree of success will be expected. A recent documentary on Māori Television of the pilot Alcohol and Other Drug Treatment Court suggests that the pilot is achieving success and if the offender successfully completes their treatment the probability of re-offending is low.⁷⁸¹

(c) Māori Land Court⁷⁸²

The Māori Land Court was established in 1865 as the Native Land Court of New Zealand with the primary purpose of changing title from Māori ancestrally owned land into individual titles to generate land availability for settlers. This purpose has now changed where the general objective of the Court is to retain Māori land and ensure its effective use.⁷⁸³

⁷⁷⁸ Richardson, Thom and McKenna above n 764, at 190.

⁷⁷⁹ At 190

⁷⁸⁰ Becroft, above n 120.

⁷⁸¹ ‘Drug Court’ Māori Television screened Monday 1 September, 2014.

<https://www.maoritelevision.com/tv/shows/pakipumeka-aotearoa-new-zealand-documentaries/S01E001/drug-court>

⁷⁸² See also Chapter VII ‘A New Framework’ for a discussion on a possible extension of the Māori Land Court jurisdiction to include criminal and civil cases.

⁷⁸³ Te Ture Whenua Māori Act 1993, s 17.

The jurisdiction of the Māori Land Court does not extend to criminality, but involves claims in law or equity related to the ownership of Māori freehold land, claims to recover damages for trespass to Māori freehold and to determine any proceedings founded on contract or tort where the damage relates to Māori freehold land.⁷⁸⁴ Nonetheless, Te Ture Whenua Māori Act 1993 adheres to tikanga Māori values throughout. For instance, there is a provision for additional members to be called upon when the matter referred is one of tikanga Māori.⁷⁸⁵ In light of the legislative inclusion of tikanga Māori within the Act, if the jurisdiction of the Court was expanded to initially include summary offences and available also to non-Māori, similar to the marae based Courts, this potentially provides a basis for an indigenous court.

(d) Children and Young Persons Families Act 1989 – Youth Court

The Youth Court is a division of the District Court⁷⁸⁶ and hears most criminal cases involving young people between the ages of 14 and 16, including serious offences.⁷⁸⁷ The public are generally excluded⁷⁸⁸ as youth are seen as “less responsible than adults and may have offended as a result of disadvantage, or deficiencies in their background”.⁷⁸⁹ Further public access may impact negatively on rehabilitation for the offender.

Upon first appearance the young person is asked to plead ‘denied’ or ‘not denied’. If not denied then the Judge will adjourn the case to allow a Family Group Conference (FGC) to be convened.⁷⁹⁰ As long as the youth admits the offence, the FGC then has the task of agreeing on the appropriate actions and or sanctions that should result and

⁷⁸⁴ Section 17.

⁷⁸⁵ Section 32.

⁷⁸⁶ Children Young Persons and their Families Act 1989 s 329. See also recent presentation by Judge Becroft ‘Signed, sealed (but not yet fully) delivered’ at the Judges at the Healing Courts and Plans People, International Therapeutic Jurisprudence Conference October 9 – 10, First Nations Long House, Vancouver, British Columbia, Canada.

⁷⁸⁷ See Institute of Judicial Studies Youth Court Bench Book (3rd ed, Institute of Judicial Studies, Wellington, 2008) for an example as cited by Yvette Tinsley and Elisabeth McDonald ‘Is there any other way? Possible alternatives to the current criminal justice process’ vol 17, 2011, *Canterbury Law Review*, 204.

⁷⁸⁸ Children Young Persons and their Families Act 1989 s 258 (d).

⁷⁸⁹ New Zealand Law Commission *Seeking Solutions Options for change to the New Zealand Court System* December 2002 Preliminary Paper 52, 149.

⁷⁹⁰ Children Young Persons and their Families Act 1989 s 258 (d) and 259 (1).

subsequent recommendations are provided to the court.⁷⁹¹ A FGC can be ordered by the Judge at any stage of the proceedings if the Judge deems it warranted.⁷⁹²

If the charge is denied then a court date is set and the matter proceeds to a defended hearing. If the offence is proved, the Judge will adjourn the case and refer it to a FGC,⁷⁹³ which will decide how the youth should be dealt with and provide recommendations to the court.⁷⁹⁴ The Judge is not bound by these recommendations but must have regard for them.⁷⁹⁵

If the requirements of the FGC have been satisfied within the agreed timeframe, the case is usually discharged.⁷⁹⁶ However, the Judge makes further orders where the FGC plan has not been completed successfully, such as imposing a fine, disqualification of driving or community work.⁷⁹⁷

Although there is no explicit mention of restorative justice in the CYPF Act, McElrea categorises three elements of the CYPF Act as restorative in nature. First, “the transfer of state power from the courts to the family and community; second, group consensus decision-making in the FGC; and third, the involvement of victims leading up to a healing process”.⁷⁹⁸

Notwithstanding the positive effect and inclusion of FGC in the court process, the current legal system sidelines the essence of tikanga Māori in favour of a law devoid of, and not grounded in indigenous values. Indigenous peoples, such as Māori, are unduly susceptible to government interference. Those who first created and administered the law did not ensure that indigenous people were granted the necessary

⁷⁹¹ At s 258 (d).

⁷⁹² At s 281B.

⁷⁹³ At s 247 (e).

⁷⁹⁴ At s 258 (d).

⁷⁹⁵ At s 279.

⁷⁹⁶ At s 282 or 283 (a).

⁷⁹⁷ At s 283 for full list.

⁷⁹⁸ F W M McElrea ‘A New Model of Justice’ in F W M McElrea and B J Brown (eds) *The Youth Court in New Zealand: Four Papers* (Legal Research Foundation, Auckland, 1993) as cited by Yvette Tinsley and Elisabeth McDonald ‘Is there any other way? Possible alternatives to the current criminal justice process’ vol 17, 2011, *Canterbury Law Review*, 204

structures to maintain and promote their identity against the assimilative pressures of the majority.⁷⁹⁹

The absence of provisions to protect indigenous rights has resulted in an unacceptable socio-economic status for indigenous peoples within a generally prosperous society.

Despite the statistics that indicate indigenous people are disproportionately represented in the criminal justice system, unlike Australia, New Zealand has not yet developed or proposed an indigenous court to address this issue. The recent initiative to establish a Drug Court in Auckland builds on the presence of the existing Drug Court in Christchurch. The drugs courts and marae based courts, as alternatives to the Youth Court, are the only other specialised courts in New Zealand with respect to criminal offending.

The underlying philosophy of the Drug Court model is therapeutic jurisprudence. This approach recognises that the court processes, and in particular, the role of the judge can be used to facilitate treatment processes. Reports indicate that the rate of offending was lower for young people who attended the Youth Drug Court.⁸⁰⁰ The key feature was the consistency of appearing before the same judge on a regular basis. The recent justice initiative of ‘marae based courts’ provides an interesting alternative.

(e) Marae Based Courts – Ngā Kooti Rangatahi⁸⁰¹

The call for an alternative criminal justice system for Māori is not new. In 1988 Puao Te Ata Tu stated that:⁸⁰²

Māori law observance depended on the maintenance of the mores of communal society. The Western Response ... was individuals distanced from their communities but later to be inflicted back on them ... It is not suggested that the old Māori ways

⁷⁹⁹ John Borrows *Drawing Out the Law* (University of Toronto Press, Toronto, 2010) at 21.

⁸⁰⁰ Ministry of Justice *Publications and Reports* (2004) <www.justice.govt.nz>.

⁸⁰¹ I am grateful to Judge Heemi Taumaunu for the opportunity to visit and attend the recent sitting of Te Kooti Rangatahi at Waipareira in December 2013.

⁸⁰² The Report of the Ministerial Advisory Committee on a Māori perspective for the Department of Social Welfare (Wellington, 1988) at 74 <www.msd.govt.nz>.

should now be restored, but that ought not inhibit the search for a greater sense of family and community involvement and responsibility in the maintenance of law and order.

The marae based courts originated from the Marae Youth Monitoring Court as a specialist Youth Court. The initiative to convene a specialised problem-solving Youth Court sitting at Poho-o-Rawiri Marae, Gisborne was piloted by Judge Heemi Taumaunu in 2008. There are now 12 operating in the North Island and the first South Island marae based court was opened in Christchurch on 28 April 2014 with the first sitting. Former Minister Chester Borrows commented that:⁸⁰³

... the establishment of the latest court is a positive step for addressing youth offending in Christchurch. I want to congratulate Judge Taumanu and Principal Youth Court Judge Andrew Becroft, who have driven the successful expansion of the Rangatahi court programme, and thank them once for their commitment to helping our young people who have lost their way.

Marae based courts are an initiative of the judiciary that builds on existing programmes for offenders⁸⁰⁴ and are informed by the Koori Courts in Australia.⁸⁰⁵

This is the first time that a New Zealand Court has conducted criminal cases on a marae within the jurisdiction of the Youth Court. Most offenders referred to the programme are Māori and the process incorporates Māori tikanga (customs and protocols).

The judges of Ngā Kooti Rangatahi consider that “*rangatahi* (youth) offending is related to lack of self-esteem, a confused sense of self identity and a strong sense of

⁸⁰³ See New Zealand Law Society “First South Island Rangatahi Court for Christchurch” (24 March 2014) <www.my.lawsociety.org.nz>.

⁸⁰⁴ For example Te Whānau Āwhina programme, a restorative justice programme that involves the voluntary participation of the victim of the crime and the offender and whānau in discussions, usually within a marae setting, to "restore" the relationship, fix the damage that has been done and prevent further crimes from occurring.

⁸⁰⁵ Evaluation of the early outcomes of Ngā Kooti Rangatahi. Submitted to the Ministry of Justice 17 December 2012 at 8.

resentment which in turn leads to anger and ultimately leads to offending”.⁸⁰⁶ Judge Bidois noted:⁸⁰⁷

Most offending is feelings based. Resentment, anger, greed, and hate are common feelings that motivate offending. To change an offender one therefore needs to change how they feel. The best way to encourage this change is to place the offender in a community of people who understand and recognise his or her feelings, but who also have the power and respect to alter those feelings. With understanding comes a commitment to accept the burden of punishment and with support comes the commitment to accept the burden of rehabilitation. There needs to be inclusion rather than exclusion to effect change. This process can be achieved on a marae.

The ability to reconnect the offender with their identity and whānau is seen to contribute positively to the success of the process. The ultimate outcome for the judge is “for the rangatahi to be empowered to achieve their potential”.⁸⁰⁸ Challenges including adequate resourcing and continuing support by the whānau and wider community, however, will influence the outcome.⁸⁰⁹ According to Judge Clark:⁸¹⁰

Of course Te Kooti Rangatahi cannot ‘just’ happen. We rely heavily on the support of a number of people and organisations. Kirikiriroa Marae and marae whānau, the kuia, the kaumatua and the trustees have been all embracing of this initiative. The Courts, Ministry of Justice, Child Youth and Family, Police Youth Services, Iwi Liaison Officers, Iwi Social Services, Programme Providers, Youth Advocates and our Lay Advocate are all critical to this initiative happening to give our rangatahi and their whānau the opportunity to have cases heard in arguably a more appropriate way and with the opportunity for greater rangatahi whānau and community engagement and involvement.

⁸⁰⁶ At 8 – 9.

⁸⁰⁷ At 25.

⁸⁰⁸ At 9.

⁸⁰⁹ See also Study by the Expert Mechanism on the Rights of Indigenous Peoples ‘Access to justice in the promotion of indigenous peoples, restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities’ A/HRC/27/65 August 2014 that notes ‘An additional crucial hurdle is the financing of indigenous juridical systems. Without sufficient resources, these systems are not sustainable and their contribution to ensuring access to justice is compromised.’

⁸¹⁰ At 74.

(i) Process⁸¹¹

The marae process is open to all, providing a possibility that non-Māori may also seek to be heard in this process. Although Ngā Kooti Rangatahi are designed specifically to support tikanga Māori, they are available to any young person, regardless of their ethnicity or identity. There is no mandatory requirement for young people to be dealt with on the marae. If this option is not sought, the normal Youth Court process applies.

Before the consideration of a marae as a venue, the process adheres to the normal Youth Court procedures. Upon appearance at the Youth Court, the rangatahi is assigned an advocate and the case is remanded.

The charges are usually for lower level offending; for instance, burglary, unlawful interference with motor vehicles, traffic offences, shoplifting, theft and wilful damage. However, more serious charges, including aggravated robbery and cases of serious offending by 12 and 13 year olds, may also be heard.

The charge is usually not denied or admitted in the normal manner in the Youth Court. If the charge is admitted, a lay advocate is still appointed.

A Family Group Conference (FGC) is convened and held in the normal manner where the young person who has offended and their family, victim, agencies, social worker and advocate discuss and approve a FGC plan. The aim of the plan is to encourage the young person to accept responsibility for their actions, find practical ways to rectify the situation, ascertain why they have offended and how amends can be made.⁸¹² The marae hearings are designed to monitor the young person's performance of the FGC plan and also to sentence the young person on completion of the FGC plan. If the victim disagrees with the referral to Ngā Kooti Rangatahi, the rangatahi will not be referred. The presiding judge, after considering the FGC plan, will make the final decision on the eligibility of the rangatahi to have their case monitored by Ngā Kooti

⁸¹¹ Judge Heemi Taumaunu 'Te Kooti Rangatahi o Hoani Waititi Ka pu te ruha, ka hao te rangatahi!' (2010) unpublished.

⁸¹² See Ministry of Justice *Rangatahi Court: Evaluation of the Early Outcomes of Te Kooti Rangatahi* (17 December, 2012) at 21.

Rangatahi. If the referral is accepted, the rangatahi is remanded until the next sitting date. Whilst on remand the rangatahi is encouraged to learn their whakapapa (family tree) and pepeha (sayings) to inform the judge when they appear before him or her.⁸¹³ Unlike the Koori Courts in Australia, the presiding judge does not meet with the Elder and Respected Persons (ERP) to discuss the list commencing each morning.

Similar to the Koori Courts and in accordance with Māori protocol, the marae hearings begin with a pōwhiri (a formal Māori welcome) that is initiated on the morning of the court hearing. A kuia (respected female elder) stands outside the whare nui (traditional meeting house) and calls the judge, court staff, lawyers, social workers, lay advocates, respected elders, as well as young people appearing and their families onto the marae. The pōwhiri is supported by the tangata whenua (local people).

A kuia from the visitor group will respond to the call of welcome. All those present then move inside the whare nui where formal speeches are conducted. Once the formalities are completed, everyone proceeds to the dining hall for a cup of tea.

The court then convenes and the proceedings commence inside the whare nui. The kaumatua (respected elder), who also assists in the Marae Court process, then recites a karakia (a prayer). When each case is called, the kaumātua, who sits next to the judge, will give a specific speech of welcome to the young person and their family.

The young person is encouraged to respond to the welcome by saying a mihi (a Māori speech). This is aimed at re-establishing the young person in their identity as a Māori. The young person and his or her family are invited to participate fully in the hearing, as are all of the professionals. Together with the whānau (families), hapū (sub-tribes) and iwi (tribes), solutions are actively sought with the co-operation of agencies.

Additional applicable principles include holding the young person accountable for their actions, ensuring the victim's issues and interests are recognised and addressing

⁸¹³ At 21.

the underlying causes of the offending behaviour. The ultimate goal is to keep communities safer by reducing recidivism.

The judge will then sum up the proceeding by noting the next date for appearance of the rangatahi. At the completion of the hearing, whānau members are invited to address the rangatahi.

The hearing concludes with the kaumātua and judge participating in a hongī (a pressing of noses symbolising the meeting of mauri) with the young person and their families, and finally a karakia. This is in accordance with Māori protocol.

Holding the process in the whare nui on the marae is a positive step. It provides an environment that seeks to reconnect the offender with their culture and community. The implementation of the Māori language, tikanga Māori (Māori practices and protocols) into the court process further consolidates this reconnection. Encouraging the offender to be accountable and addressing the underlying reasons for offending also contribute to the positive nature of marae based courts. The environment of the marae has engendered the ability for rangatahi to engage, with one rangatahi noting:⁸¹⁴

It's easier to stand up in court cause [sic] you feel like everyone is your family. You're able to let it out. Go hard – let it out. Youth Court is a cold court. The judges and lawyers - everyone is more subdued and long faced. We all share kai here. It makes a huge difference to how you feel. A far better process. When we hongī we are connecting our mana to one another. It's less tense. Obviously we are willing to speak a bit freer, more comfortable. (Male rangatahi)

The criminal justice system should be applauded for seeking a creative path to assist Māori youth offending. However, tikanga Māori and the realm of Te Ao Māori are far more complex than expressed in the current marae-based court process.⁸¹⁵

The marae based procedure is time consuming and lengthy thus restricting the ability to effectively reduce the long hearing lists. This would need to be factored in and

⁸¹⁴ Ministry of Justice, above n 812, at 36.

⁸¹⁵ Matiu Dickson “The Rangatahi Court” [2011] 19 Waikato Law Review at 86 – 107.

economically weighed against the costs of incarceration if a marae based indigenous court was to be established.

(ii) Case Study⁸¹⁶

A 14-year-old who has admitted a charge of graffiti crime stands before Judge Heemi Taumaunu.

“Have you got your mihi ready to go today?” the judge asks.

“No.”

“I’m sure we can help your maunga”

“My what?”

“Your maunga.”

“Not too sure.”

“You knew it last time. Have you forgotten it?” the judge says, referring to the boy’s previous appearance on the same charge in May.

“Yep.”

“What’s the name of your marae?”

“I dunno.”

“Have you ever been to it?”

“Nah.”

Kaumātua Denis Hansen, who sits alongside the judge, stands and recites the entire mihi, naming the boy’s mountain, river, marae, iwi and hapū.

Then he tells the boy: “Lunch is at one o’clock. Don’t go away after that. You’re going to have a bit of whakapapa education.”

⁸¹⁶ Marty Sharp “Rangatahi Courts: A Quiet Revolution in Teen Justice” *NewsWire* (online, New Zealand, October 2011) <www.newswirenz.wordpress.com>.

“Matua will teach you your mihi,” the judge says. “After that you can go away. We’re going to see a lot of improvement next time. We expect that from you. I expect you to be able to say the mihi the kaumatua just said to you,” the judge says.

He says that the boy, who is Ngati Kahu, needs more monitoring.

The boy’s advocate, Steve Trent, says he has improved attendance of his alternative education course, turning up 80 per cent of the time.

What was ...[a] zero attendance a few months ago, the judge [now] ... expects 100 per cent attendance and [enquires] ... why this is not happening. The boy says he has lost his bus pass.

When the boy first appeared, he was sentenced to 80 hours community work, and was ordered to attend courses on life skills as well as alternative education. He was also put under a 24-hour curfew.

It transpired that he had not been completing his community work.

After a brief conversation involving elders, a social worker and the judge, a kaumatua volunteers to collect the boy from his home each weekend to bring him to the marae where he can carry out his community work. The kaumatua says this will also provide an opportunity for him to teach the boy his mihi.

Judge Taumaunu is pleased with that and adds that it has been three months since the boy last offended. He remands him on bail to reappear on October 6.

(iii) Evaluation

Offences before the marae based court system are confined to those perpetrated by youth.

While the Rangatahi Court process is focused on Māori youth, both Māori and non-Māori are eligible. This is an attempt to overcome the perception that separate procedures or special treatment have been instituted. It is suggested that this should also apply to any indigenous court that is established.

The key findings of the recent Rangatahi Court Evaluation Report noted:⁸¹⁷

Rangatahi reported experiencing positive outcomes as a result of their engagement with Ngā Kooti Rangatahi. The outcomes reported by rangatahi were consistent with the views of youth justice professionals and the observations of the evaluation team.

The significant factors of success included the marae as a venue, the positive impact of kaumatua on the rangatahi, the impact of the lay advocates, and the collective commitment of the participants.⁸¹⁸ A fuller explanation of the actual outcomes noted that.⁸¹⁹

the levels of attendance by rangatahi and whanau were high and rangatahi felt welcome and respected. Rangatahi experienced a sense of pride and achievement as a result of delivering their pepeha and felt better connected to their culture. Rangatahi understood the court process showing improved behavior and positive attitude, taking responsibility for their offending and its impact. When nearing the end of the FGC monitoring process rangatahi showed improved communication skills.

Notwithstanding the recognition of tikanga, the underlying principle that applies to this approach is not based on tikanga, but on the law; that is, to honour and apply the objects and principles in the Children and Young Persons Act 1989. Although this project represents an attempt to incorporate Māori tikanga within the law, it is not designed to abandon the law and start a tikanga-based court. That is beyond the jurisdiction of the Rangatahi Court.

When tikanga is placed under the auspices of legislation, the robust nature of any tikanga-based outcome will become compromised.⁸²⁰ Further, if the *kawa* (protocol) or tikanga is not one to which they adhere, this may undermine the respect that any

⁸¹⁷ Ministry of Justice, above n 812, at 9.

⁸¹⁸ Ministry of Justice, above n 812, at 60 as cited in *NZ Lawyer Magazine* Issue 200 (25 Jan 2013) <www.nzlawyermagazine.co.nz>.

⁸¹⁹ Ministry of Justice, above n 812, at 10.

⁸²⁰ Primarily because the decision maker inevitably will be non-Māori and also when concepts are translated the meaning can be lost. See N Tomas 'Māori Concepts of Rangatiratanga, Kaitiakitanga the Environment and Property Rights' in David Grinlinton and Prue Taylor *Legal Aspects of Sustainable Development Property Rights and Sustainability The Evolution of Property Rights to meet Ecological Challenges* (Martinus Nijhoff Publishers, 2011, Netherlands) 219 – 249.

offender or whānau will have for an outcome based on a hybrid process. At this stage it is not clear whether such concerns have been addressed.

It is difficult to overlay two different worldviews; that of Te Ao Pākehā over Te Ao Māori.⁸²¹ There are questions about how to handle urban Māori who do not identify with tikanga or the notion of the collective, and where they fit in a marae court process.⁸²² One might also ask, which kawa (protocol) is to be adopted during the marae court process? The local marae protocol, that of a court, or a protocol with elements of both? What if the kawa of the offender does not align with the kawa of the marae court process? If the process is to be a marae process, then this implies that a kaumatua, rather than a judge, should lead the process. In such a situation, if a person who does not affiliate with the marae or the offender leads the process, this is a slight and a trampling on the mana (ancestral power) of the kaumatua and the whānau.

Ideally, the kaumatua should be connected to the offender through whakapapa as it is the kaumatua who holds the responsibility for the offender. It is difficult to understand how, in a marae court, the judge can have the same status as a kaumatua, when there is no whakapapa connection or kin-based sense of responsibility.⁸²³

In smaller communities, such as the hapū (sub tribe) of Ngati Rehua on Aotea (Great Barrier Island), this is even more pronounced. Primarily because in these small communities, kuia and kaumatua are often intimately linked to the offender and a judge is effectively viewed as an outsider, attracting a lesser standing. In this instance it is difficult for the offender to respect the judge as the offender often perceives their kuia or kaumatua as having the mana (prestige) not the judge. And further, the marae is his tūrangawaewae (place to stand) and not that of the judge.

⁸²¹ Nin Tomas above.

⁸²² See discussion Juan Tauri “Reforming Justice the Potential of Māori Processes” in Eugene McLaughlin, and others (eds) *Restorative Justice Critical Issues* (Sage Publications, London, 2003).

⁸²³ See also discussion in New Zealand Law Commission *Converging Currents* (NZLC SP 17, Wellington, 2006), at 207 where it notes that ‘Although expatriate judges are cultural outsiders which may make this task more challenging, some national judges may be cultural outsiders too. In countries with a multiplicity of different customs it is just as difficult for a local judge from a different part of the country to rule on matters of custom as it is for an expatriate judge.’

According to Matiu Dickson.⁸²⁴

... Judges are doing the kaumatua's job and thus taking away the last bastion of Māori ownership of the process.

On a marae, he says, all decisions are made by people who are affiliated to the marae, but the final decision rests with the kaumatua who hold the mana of the pā ... the marae community should have the right to decide how low-risk young offenders are dealt with.

Although anecdotal evidence and the Rangatahi Court Evaluation Report indicate some level of success for marae based courts, and this initiative should be applauded, concerns still exist. Dickson stipulates two conditions that should be satisfied prior to the establishment of a marae based court: that the court should “retain mana and authority for decisions made concerning the young offender”, and that “the young offender should be connected by whakapapa to the marae”.⁸²⁵ The use of the marae as a forum will attract respective kawa of the relevant iwi group. However, there are concerns when court protocol can supercede the kawa of the marae.⁸²⁶

Marae courts build on the precedent of the Koori Courts in Australia, but do not tackle the root problems of indigenous offending, such as the legacy of government oppression and the effects of colonisation.⁸²⁷ This is a view shared by Marchetti and Daly, who state:⁸²⁸

any effort to address the over-representation of Indigenous people in the criminal justice system must also confront a legacy of government policies and practices over the past two centuries, which systematically disadvantaged and oppressed Indigenous people.

⁸²⁴ “Judges Doing Kaumatua’s Job in Youth Courts” *Radio NZ* (online, New Zealand, 13 October 2011). <www.radionz.co.nz>.

⁸²⁵ Dickson, above n 815.

⁸²⁶ Judge Stephanie Milroy ‘Nga Tikanga Māori and the Courts’ (2007) *Yearbook of NZJ*, 18 where she notes can one feel comfortable telling a kaumatua (elder) to sit down as it is not his turn to speak?

⁸²⁷ See discussion in Juan Tauri and R Webb “A Critical Appraisal of Responses to Māori Offending” (2012) 3(4) *The International Indigenous Policy Journal*.

⁸²⁸ Elena Marchetti and Kate Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model’ (2007) 29(3) *Sydney Law Review* 415 at 443.

Also, these courts may place further strain on indigenous communities who are already affected by economic marginalisation and have few social services/resources. Often kuia and kaumatua voluntarily contribute their time and efforts to this process, thus compounding the economic strain on small indigenous communities. Unlike the Koori Courts where ERPs are statutorily appointed and are paid a sitting fee, the kuia and kaumatua from the marae based courts are not.

Having regard to the growing success of these courts and the subsequent increase in numbers of both offenders accessing this court and courts themselves, the economic impact this will have on small regional communities will only be exacerbated. It is notable that the Rangatahi Court Evaluation Report provides positive outcomes for the participants. Although hard statistical data on recidivism rates is notably absent, the former Minister of Justice, Judith Collins, announced that the government's Drivers of Crime progress report indicated that the offending rates for Māori youth between 2008 and 2012 had decreased by 32 per cent.⁸²⁹

Notwithstanding the critique, if a marae based court led by a kaumatua who was linked by whakapapa to the offender can reduce the offending and recidivism rates for Māori, this would contribute to confronting the legacy of government policies and practices that have systemically disadvantaged indigenous people. This would result in Māori administering tikanga values, imbuing a sense of identity for the offender with the aim of achieving balance in the individual and within the community. Further, if successful, these courts should be adequately resourced to, at the minimum, alleviate the strain on the marae and accompanying support people who currently provide these services voluntarily.

Judge Andrew Becroft recently noted that:⁸³⁰

his [Rangatahi Court] is a significant step and there is much overseas interest. That said, I am concerned that in this evolutionary development of Rangatahi Courts the community understands more clearly what Rangatahi Courts are and what they aren't.

⁸²⁹ Judith Collins and Pita Sharples "Youth Māori Offending Down 32 per cent" (press release, 20 August 2013) <www.beehive.govt.nz>. See also Drivers of Crime Progress Report December 2012 Cabinet Social Policy Committee

⁸³⁰ The Rangatahi Newsletter "Special Edition: Rangatahi Courts Hui" at 2 <www.justice.govt.nz>.

They are not a fully-fledged separate youth justice system, and neither are they a sentencing Court [emphasis added]. None of those involved in Rangatahi Courts (Judges included) are ‘imposing a sentence’ as is the process in an adult Court. *Those Rangatahi who come to a marae have already undergone a family group conference and it is that conference that has set in place a comprehensive plan to ensure the young person is held to account and that the causes of his/her offending are addressed [emphasis added].* In the youth justice system (unlike the adult system) the quality of the response to a young person’s offending will usually stand or fall on the quality and appropriateness of the family group conference plan. In most cases, it is FGC plan which is accepted by the Youth Court as constituting the complete and the appropriate intervention. The Youth Court imposes no ‘sentence’ as such other than approving the FGC plan. In a few cases where there can be no agreement as to the components of the plan or the offending is too serious the Court will need to impose a formal Youth Court order which can include a conviction and transfer of the young person to the District Court. But *the Rangatahi Court process is reserved for those young people who admit their offending and who have an appropriate family group conference plan in place [emphasis added].* The Rangatahi Court aims to ensure that this plan is completed and the young person and their family are supported during their journey to fulfil every aspect of the plan. In this sense, *the Rangatahi Court is not a sentencing Court, but it is a Court that helps empower and galvanise a community based response to the young person’s offending [emphasis added];* it supports and monitors all the components of the family group conference plan formulated in response to the young person’s offending.

We have much to learn. We will doubtless make many mistakes as we continue to develop and adjust the Rangatahi Court role and process. But we have begun a journey that we cannot retreat from. To change metaphors, we are all on something of a wave that is now bigger than any of us. We are now riding that wave to its conclusion, and landfall can only be when the disproportionate rates between Māori and non-Māori in the youth justice process are eliminated.

It may be the case that these courts will achieve a transformation of the law in a way that reduces the disproportionately negative outcomes for Māori. Only time will tell.

(f) Matariki Courts

In Kaikohe an initiative led by the former Chief Judge of the District Court, the late Judge Johnson, was the establishment of a Matariki Court. This specialist court, which opened in February 2012, deals with cases involving adult Māori offenders, both prior to sentencing and in potential sentencing options, by focusing on ss 27 and 25 of the Sentencing Act 2002. Of interest is the ability of this court to consider sentencing when the offender has committed a serious violent offence.⁸³¹

Importantly, this court has the support and involvement of the local iwi, Nga Puhi and Te Mana o Ngāpuhi Kowhao Rau (TMONK), who work with the offender to address the underlying issues during the sentencing phase. By December 2012 four hearings had been held.

Section 27 stipulates:⁸³²

If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—

- (a) the personal, family, whānau, community, and cultural background of the offender:

- (b) the way in which that background may have related to the commission of the offence:

⁸³¹ Williams above n 730. The Crimes Act 1961 section 2 defines a *serious violent offence* as any offence—

- (a) that is punishable by a period of imprisonment for a term of 7 years or more; and
- (b) where the conduct constituting the offence involves—
 - (i) loss of a person's life or serious risk of loss of a person's life; or
 - (ii) serious injury to a person or serious risk of serious injury to a person; or
 - (iii) serious damage to property in circumstances endangering the physical safety of any person; or
 - (iv) perverting the course of justice, where the purpose of the conduct is to prevent, seriously hinder, or seriously obstruct the detection, investigation, or prosecution of any offence—

⁸³² Judge David Carruthers “Community Involvement in Treatment of Offenders Prior to Sentencing: The New Zealand Experience” (paper presented to UNAFEI 147th International Training Conference, Japan, 13 January – 10 February 2010) <www.unafei.or.jp/english>.

(c) any processes that have been tried to resolve or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whānau, or community and the victim or victims of the offence:

(d) how support from the family, whānau, or community may be available to help prevent further offending by the offender:

(e) how the offender's background, or family, whānau, or community support may be relevant in respect of possible sentences.

This provides a chance for the offender's whānau, hapū and iwi to address the court.

Section 25 stipulates:

Power of adjournment for inquiries as to suitable punishment

(1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:

(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:

(b) to enable a restorative justice process to occur:

(c) to enable a restorative justice agreement to be fulfilled:

(d) to enable a rehabilitation programme or course of action to be undertaken:

(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:

(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

The programme offers four options for the offender, ranging from no involvement with sentencing proceeding to full involvement with both the victim and offender participating and completing participation prior to sentence. The four options are:⁸³³

Option 1 – the defendant declines a section 27 hearing then the sentencing process would proceed in the usual way.

Option 2 – the defendant chooses a section 27 hearing, they may have a member of their whānau to speak on their behalf. If the speaker is there then the sentencing is likely to go ahead on that day. Alternatively, counsel may ask for an adjournment so that the support person can attend. There are no referrals; however, the defendant may offer restorative justice if the victim is willing.

Option 3 – the defendant chooses a section 27 hearing. An initial assessment is made by the court Kairuruku (co-ordinator), who talks to the defendant about what section 27 offers as well as what community services and other agencies are available to help or support the defendant. The Kairuruku then connects the defendant with these services as required, which could include restorative justice. Either the Kairuruku or defence counsel will then stand up and suggest to the Judge that option 3 is the pathway for that particular offender. The sentencing is then adjourned to give the defendant time to complete any programmes that may be deemed to be helpful.

Option 4 – the defendant chooses a section 27 hearing. This is a much more intensive option and requires a commitment from both the defendant and their whānau. This is where Te Mana o Ngāpuhi Kowhao Rau (TMONK) get involved. They are very clear with the defendant that this opportunity is not a “get out of jail free card” and that they will commit to the process as long as the defendant and their whānau commit to the work. This then involves the sentencing being adjourned to an interim date. This is to give TMONK time to start working with the defendant and their whānau and to complete a report which includes a plan that will help the defendant to address any underlying courses [sic] to their offending. If this report and plan is accepted by the Judge then the sentencing is adjourned again so that the plan can be completed. An important part of this process is that the work is completed before the sentencing, this gives the defendant the opportunity to prove their commitment, to the victim, their whānau and the court.

⁸³³ Hauauru Takiwa *Te Kooti o Matariki* (Report No 1210, 16 October 2012) <www.hauauru.org>.

This provides an opportunity for the offender to access available community services in order to address their social needs and the underlying causes of offending. By addressing the cause of offending together with the support of the whānau, it is suggested that this will help reduce the recidivism and disproportionate offending rates for Māori.

By increasing the involvement of whānau, including the use of te reo,⁸³⁴ and assisting the offender with available services, this Court seeks to empower the community. As such, it is unsurprising that early results have been positive. However, unlike the Rangatahi Courts where the victim's consent is required, in the Matariki Court, the victim's consent is not required for the offender to fall within the jurisdiction of the court.⁸³⁵

Institutions such as courts and correctional facilities often perform roles of local communities in identifying and dealing with their own problems, particularly for less serious offences.⁸³⁶ The challenge, according to Judge Carruthers, is returning that power and responsibility back to the communities from which these offenders originate.⁸³⁷ It is acknowledged that many players within the criminal justice system, including judges, probation officers and officials, support and include the involvement of the community and Māori. The Matariki Courts are an example of this. It is unfortunate that in these early stages accurate statistics are not available.⁸³⁸

In light of the paucity of statistics, reflecting on how this court would operate, a suggestion on how existing cases may be processed by a Matariki Court may prove helpful. In this regard the following section analyses two cases *Tutakangahau v R*⁸³⁹ and *R v Wawatai*⁸⁴⁰ against the Sentencing Act and Bail Act respectively.

⁸³⁴ See section 3 of the Māori Language Act 1987 that provides for the Māori Language to be an official language of New Zealand; and section 4 of the Māori Language Act 1987 provides for the right to speak Māori in legal proceedings.

⁸³⁵ Williams above n 730.

⁸³⁶ Carruthers, above n 753.

⁸³⁷ Carruthers, above n 753.

⁸³⁸ The Ministry of Justice acknowledges the difficulty in recording the data from the Matariki Courts and therefore cannot provide accurate statistics of utilisation or results but are endeavouring to find methods to do so. At the time of writing these were not available. <http://www.justice.govt.nz/>

⁸³⁹ *Tutakangahau v R* [2014] NZCA 279.

⁸⁴⁰ *R v Wawatai* [2014] NZHC 2374 [3 October 2014]

(g) Sentencing Act 2002

R v Wawatai

The offender, Mr Wawatai,⁸⁴¹ has been charged with manslaughter, arson and male assaults female.⁸⁴² After considering the offending, the impact of the offending and personal circumstances the court begins to determine the appropriate sentence with reference to previous case law, elements of premeditation, violence and vulnerability. A sentence of 13 years imprisonment is passed after no mitigating factors could be found.

Had this case been determined by a Matariki Court, in light of the seriousness of the offending, it would be recommended that Option 4, a much more intense option, be taken. Any sentencing would be deferred until a later date to allow an organisation, such as TMONK, to work with the offender and whānau to address underlying issues. From the facts it appears that the offender has the support of his family.⁸⁴³ It may be that an anger management or a male against violence course is planned for the offender. As alcohol was identified as linked with the offending⁸⁴⁴ an appropriate Drug and Alcohol rehabilitation course should also be undertaken.⁸⁴⁵ It may also be that some form of ‘muru’ is paid to the victim’s family; this may assist to overcome the ill feelings held by the victim’s family.⁸⁴⁶ Muru could be a form of financial payment, together with work related assistance for the family and regular group or community meetings. This plan and report from TMONK would then be submitted to the Judge who, if accepted, will adjourn the sentencing so the plan can be completed.

Alternatively, if the offender chose option 1, the provisions of the Sentencing Act 2002 would apply. The Sentencing Act provides a raft of sentencing options,⁸⁴⁷ including imprisonment, home detention, home detention or community based

⁸⁴¹ Although not explicit it is understood that the offender is of Māori descent.

⁸⁴² Respective penalties are Crimes Act 1961, s 177(1). Maximum penalty is life imprisonment, Section 267(1). Maximum penalty is 14 years’ imprisonment and Section 194. Maximum penalty is two years’ imprisonment *R v Wawatai* para 1.

⁸⁴³ Para [13], [17].

⁸⁴⁴ Para [18].

⁸⁴⁵ The nature of offending is serious and unlikely that a deferral to the existing AODT Court would be an option, nonetheless the programmes utilized by the Court may be instructive for cases such as this.

⁸⁴⁶ Para [14].

⁸⁴⁷ Section 10A (2) lists the hierarchy of sentences.

sentences that includes community work, supervision, intensive supervision or community detention,⁸⁴⁸ a fine⁸⁴⁹ and or a combination of these options.⁸⁵⁰ If the offender presents with, for instance, a mental illness, the judge can intervene and commit the offender to a programme, such as Odyssey House, and impose judicial monitoring.⁸⁵¹ If successfully completed this may provide grounds for variation or cancellation of their sentence.⁸⁵²

Mr Wawatai has been charged with an offence punishable by imprisonment, so it is highly unlikely that any option other than prison would be considered by the court. However, if he was to apply for supervision,⁸⁵³ this could be granted if the court was satisfied that a sentence of supervision would reduce the likelihood of his reoffending through rehabilitation and reintegration of the offender.⁸⁵⁴ As Mr Wawatai is charged with more than one offence, the offences would be served concurrently.⁸⁵⁵ If supervision was granted, the sentence would be not less than six months but not more than one year, substantially less than 13 years sentence imposed by the court. The standard reporting conditions would be required to be followed, including reporting and residential address notification.⁸⁵⁶

It would be assumed that in light of the nature of the offender and the offence committed, special conditions are imposed,⁸⁵⁷ including counselling⁸⁵⁸ and placement within a marae environment to take advantage of any existing programmes, such as Te Whānau Āwhina.⁸⁵⁹ If the offender was unable to fulfil these requirements the supervision sentence can be cancelled and the original sentence of 13 years imprisonment reinstated.⁸⁶⁰

⁸⁴⁸ Section 44 (a), (b), (c), (d).

⁸⁴⁹ Section 39 as a monetary penalty.

⁸⁵⁰ Although it is noted that a prison sentence can not be combined with any option except some form of reparation and fine only if authorized by an Act specifying the offence. Also home detention cannot be combined with supervision, intensive supervision or community detention.

⁸⁵¹ Subpart 2B Sentencing Act 2002.

⁸⁵² Section 80ZM.

⁸⁵³ Section 45 (1) (a).

⁸⁵⁴ Section 46.

⁸⁵⁵ Section 47.

⁸⁵⁶ Section 49.

⁸⁵⁷ Section 50.

⁸⁵⁸ Section 51 (a).

⁸⁵⁹ Section 51 (c) (ii).

⁸⁶⁰ Section 54.

If a supervision sentence was not granted due to the seriousness of Mr Wawatai's offending, he could apply for a sentence of intensive supervision.⁸⁶¹ The requirements and access to programmes are similar to that of supervision,⁸⁶² but the time period is longer and the reporting obligations more rigorous. In light of Mr Wawatai's alcohol problem, the judge could impose a special condition that Mr Wawatai be subject to judicial monitoring. Nonetheless, again due to the seriousness of his offence and the purpose of the Act, balancing public safety, deterrence and rehabilitation,⁸⁶³ it is unlikely that a sentence other than prison is imposed. It is more probable that a supervised sentence would apply to *Tutakangahau v R* (below), as the offence is less serious.

The provisions of the Sentencing Act 2002 support the use of programmes that are centred around the marae and iwi and hapū groups. The ability to address any psychiatric or addiction issue is also available, as is judicial monitoring. These attributes would underpin a proposed indigenous court. It could be that if such a Court was established, reliance could be placed on these provisions of the Sentencing Act 2002.

Nonetheless, although the Act contains provisions for marae programmes and iwi and hapu, these are very, very seldom used, indicative of an unwillingness of the judge to commit to these alternatives.⁸⁶⁴ Although there is provision for judicial monitoring, unlike a specialist court that is underpinned by therapeutic jurisprudence, there is no requirement or obligation on the judge to entertain a relationship with the offender or with community members in a marae setting. On the occasion a marae based sentence is imposed, there is often challenges from other players within the justice system.⁸⁶⁵ It is suggested that a more inclusive approach, such as that of the Matariki, Te Kooti Rangatahi and AODT Court, be adopted. This would require a change in behaviours.

⁸⁶¹ Section 54B.

⁸⁶² Sections 54B – 54L.

⁸⁶³ Section 7 and 8.

⁸⁶⁴ This is based on a raft of personal court observations and also academic discussions with counsel attending court.

⁸⁶⁵ See 'Police unhappy at marae sentence' NZH Nov 27, 1999. Judge Unwin granted a marae based sentence and a 15 month suspended prison sentence for two years.

Although these programmes could contain a requirement to provide reparation services to the victim, it is not explicit.⁸⁶⁶ Reparation, as *murū*, may be necessary to fulfill any reciprocity obligations. Further, there is a lacuna between arrest and sentencing where there is no express provision for *iwi* involvement or support that an indigenous court could potentially oversee.

Tutakangahau v R

The offender, an 18-year-old Māori youth, was convicted of two counts of burglary, pleaded guilty, was sentenced to 11 months imprisonment and now appeals this sentence to the Court of Appeal.⁸⁶⁷ In reviewing the previous lower court's decision, the Court of Appeal found that there has been no recognition of the fact that one of the reasons identified for a discount for youth was the greater capacity for rehabilitation.⁸⁶⁸ Further, that it was not clear that any uplift for that offending would cancel outright the discount for youth.⁸⁶⁹ In conclusion, the Court found that a lesser sentence of imprisonment should have been imposed.

Had this case been determined by a Matariki Court, option 3 would be suggested. After an initial assessment is made by the Kairukuruku they will then advise the offender of the provisions in section 27 as well as the community services and agencies that can support the offender.

Although the Matariki Court focuses on section 27 of the Sentencing Act, it is not mandatory for the sentencing officer to offer a section 27 process to the offender nor draw attention to that process.⁸⁷⁰ If the Matariki Court shows signs of success, it is anticipated that this finding could be revisited.

The process of restorative justice between the offender and victim should be, in my opinion, mandatory. Upon the court hearing, the defence counsel will then suggest to the sentencing Judge that option 3 is the pathway for the offender. Subsequently the

⁸⁶⁶ Although available within a sentence of community work see Section 55.

⁸⁶⁷ *Tutakangahau v R* at para [2].

⁸⁶⁸ Para [45].

⁸⁶⁹ Para [45].

⁸⁷⁰ *RS v R* [2014] NZCA 484.

sentencing Judge will adjourn to allow the defendant time to complete any programmes or community service that may be helpful.

It is noted that in this case bail was refused. Before proceeding to consider comparative jurisdictions a review and contextual analysis of the bail proceedings is helpful.

(h) Bail

The Children, Young Persons and their Families Act 1989 requires, where possible, that all policies and services provided have particular regard for the values, culture and beliefs of the Māori people and support the role of whānau, hapū and iwi.⁸⁷¹ The Sentencing Act 2002 also contains provision where culture can be considered by the court.⁸⁷²

In New Zealand the Bail Act 2000 was introduced in order to reduce rates of offending by persons released on bail by raising the threshold for release on bail.⁸⁷³ However, it contains no provision for the decision maker to take into account cultural factors when determining a bail application.⁸⁷⁴ Unlike comparative jurisdictions there remains a paucity of case law to support the consideration of cultural factors during a bail application.⁸⁷⁵

It is acknowledged that even if granted bail, often, the offender is bailed to the existing environment in which they offended, increasing the likelihood of re-offending whilst on bail. Dr Johnson has noted that:⁸⁷⁶

⁸⁷¹ Children Young Persons and Their Families Act 1989 sections 7 (c) (ii) and (iii).

⁸⁷² Sentencing Act 2002 in particular Section 27 (a) and (e).

⁸⁷³ See Department of Corrections above n 2.

⁸⁷⁴ However see section 7 (5) Rules as to granting bail, which states ‘a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention.’ In view of *R v Sim* it could be argued that culture may account as a reason for not continuing detention.

⁸⁷⁵ *R v Sim* [2005] OJ No 4432 (Ont CA).

⁸⁷⁶ Dr Peter Johnston ‘The NZ Department of Corrections Role and purpose in the criminal justice pipeline’ presentation to the Auckland Law Faculty, University of Auckland, Part 2 Criminal Law students October 2014. See also Department of Corrections above n 2.

92% of people charged with criminal offences are granted bail and do not spend time in custody remand; of these however, around a fifth commit new offences while on bail; of this offending, approximately 15% of this offending is violent in nature.

These statistics are not disaggregated for Māori; however, in light of the disproportionate rates of offending for Māori, an intervention during the bail application could include that the offender is bailed to a local marae, such as Waipereira, as a condition of bail. This is similar to when an at-risk offender is bailed to Odyssey House and subject to judicial monitoring under the Sentencing Act 2002. When the offender reappears before the Judge, any programme they may have undertaken during a supervised bail term can be taken into account. It is suggested that there could be a provision within the Bail Act where culture can be a factor in considering a bail application and thereby support an application to a local marae as a bailable option.

Had this provision been available in the case of *Tutakangahau v R*, it is suggested that the offender could have been bailed into a marae programme and when he reappeared for sentencing there would have been an opportunity for counsel to submit that in view of the community work and/or programmes undertaken, including a restorative approach, this should mitigate any sentence. Arguably a marae programme would offer more opportunity for rehabilitation than a short prison term. Further, a marae programme is consistent with tikanga and its aim of balance. The intervention of a culturally appropriate model such as this is not novel. The evaluation of the Australian Murri Courts noted:⁸⁷⁷

While the program was initially conceived as a more culturally-appropriate alternative to mainstream court processes for sentencing Indigenous offenders, stakeholders involved in the Murri Court program identified *a trend towards an expanded intervention model involving the use of bail programs* [emphasis added], case management plans and pre- and post-sentence *support provided by Elders, CJG members and community based organisations* [emphasis added].

⁸⁷⁷ Evaluation of the Queensland Murri Court: Final report Anthony Morgan Erin Louis (2010) Australian Institute of Criminology, Australian Government, Reports and Technical Background Paper 39, Key issues , xii

An examination of the current initiatives, within the criminal justice system, reveal some exciting and promising developments. In the next section, a review of comparative jurisdictions of the constitutional recognition for the right to implement indigenous courts will assist to contextualise the potential development of an indigenous court.

ŪPOKO TUARIMA

CHAPTER V

INITIATIVES IN COMPARATIVE JURISDICTIONS⁸⁷⁸

⁸⁷⁸ See report written for the United Nations Permanent Forum on Indigenous Issues by Professor Megan Davis, Simon William M'Viboudoulou, Valmaine Toki, Paul Kanyinke Sena, Edward John, Álvaro Esteban Pop Ac and Raja Devasish Roy (2013) "Study on National Constitutions and the United Nations Declaration on the Rights of Indigenous Peoples" E/C.19/2013/18. I would also like to acknowledge the academic conversations with Professor Brad Morse and the provision of the research material that has been reproduced, in particular the Technical Report "Indigenous provisions in constitutions around the world".

A. Constitutional Recognition of Indigenous Rights

It is clear that some settler nations are taking steps to recognise indigenous rights within their respective constitutions. Some constitutions, such as in Ecuador, are explicit, providing constitutional recognition of an indigenous legal system. Moreover, the interim Constitution of Nepal makes provision for indigenous courts.⁸⁷⁹

Whilst some countries have incorporated the rights articulated in the Declaration on Rights of Indigenous Peoples, such as Congo,⁸⁸⁰ others, such as Chile and Bangladesh, are not so progressive in including these rights. Although indigenous peoples within jurisdictions, such as the United States, already enjoy a level of self governance and have established tribal courts, incorporation of indigenous rights within domestic constitutions would support any initiative to establish an indigenous court. It is suggested that States that do not currently recognise indigenous peoples or indigenous rights in their constitutions should move towards a constitutional reform process in consultation with indigenous peoples.⁸⁸¹

Countries including Canada, Australia and the United States have moved towards implementing an indigenous court.⁸⁸² In parts of Malaysia, native courts have been established primarily to deal with breaches of native law and customs.⁸⁸³ In addition,

⁸⁷⁹ Although not explicit, some constitutional provisions, such as in the Norwegian Constitution, when read together with other articles, provide tentative opportunities for the implementation of an indigenous court.

⁸⁸⁰ Congo-Brazzaville as opposed to Democratic Republic of Congo.

⁸⁸¹ It is noted that New Zealand and Australia have recently undertaken a review of their “constitutional” position. For New Zealand this has included questioning the place of the Treaty of Waitangi within a constitution. One of the recommendations from the Report above was that Indigenous Peoples should be recognised in national constitutions and States that do not currently recognise Indigenous rights in their constitutions should move towards a constitutional reform process, in consultation with Indigenous People, and entrench the Declaration in national constitutions. See also Patricia Borrás and Loreta Ferrer (ed) *Indigenous Peoples’ Human Rights in Domestic Courts* (Human Rights Office of the Spanish Ministry of Foreign Affairs and Cooperation 2013) that reviews the incorporation of the international standards for the protection of indigenous rights in the decisions of domestic courts.

⁸⁸² See discussion on Koori Courts, Gladue and Cree Courts in Chapter V ‘Initiatives in Comparative Jurisdictions’.

⁸⁸³ ‘In Sarawak and Sabah, the Native Courts were set up primarily to deal with breaches of native law and customs.’ See Ramy Bulan Associate Professor Director, Centre for Malaysian Indigenous Studies “*Indigenous Peoples and the Right to Participate in Decision Making in Malaysia*” Discussion paper prepared for International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, Thailand, 20-22 January 2010. See also presentation given to the International Expert Seminar on Access to Justice including Truth and Reconciliation Processes (University of Columbia, New York, 27 February – 1 March 2013).

a number of indigenous courts have emerged across the African continent, dealing exclusively with indigenous law.⁸⁸⁴ In terms of their success, the anecdotal evidence is positive. Like the Rangatahi Courts in New Zealand; however, most are relatively new initiatives and reliable statistical information is lacking.

Constitutional recognition of an indigenous right to culture and a right of self-determination provides fertile ground for the meaningful implementation of cultural concepts to address the over-representation of indigenous peoples within the criminal justice system. Two progressive jurisdictions are Ecuador and Bolivia. Some states in the Pacific, such as Vanuatu, have also recognised a right to culture in their constitution⁸⁸⁵.

(a) Ecuador

The common denominator in the Ecuadorian Constitution is the idea of increased inclusion of people and nature in a participatory democratic project.⁸⁸⁶ Drawing on the commonality of a global culture, the Constitution aims to construct an ecological citizenship, recognising the interconnectedness of all peoples to nature.

Two indigenous terms, *pacha mama* and *sumak kawsay*, are included in the preamble of the Ecuadorian Constitution. The preamble “celebrates nature, the *pacha mama* (Mother Earth) of which we are a part and which is vital to our existence”. Further, the preamble builds on “a new form of public coexistence, in diversity and in

⁸⁸⁴ However, the Traditional Courts Bill has caused controversy. See Siphon Khumalo “Activists Berate Traditional Courts Bill” *The Mercury* (online ed, South Africa, 12 April 2012). It is also acknowledged that the jurisprudence recognising Indigenous peoples rights is just emerging and beyond well known cases in South Africa or Botswana it is difficult to find any single decision in domestic courts which takes UNDRIP into account. The lack of a legal framework which recognises the existence and rights of Indigenous peoples is an important obstacle in this context. However, the Endorois decision, will have an impact.

⁸⁸⁵ See Part II Section 7 Fundamental Duties Every person has fundamental duties to ... support and assist ... culture and custom of the people of Vanuatu and Chapter 5 Section 30 Functions of Council ‘... may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages.’

⁸⁸⁶ This is an ongoing project. Rafael Correa: “I maintain that Ecuador and Latin America have elections but have yet to arrive at what is democracy. In truth, I don’t believe that there is democracy in a country where there is so much injustice, so much inequality.” Justin Delacour (trans), “Interview with Ecuadorian President Rafael Correa” (North American Council on Latin America, June 18 2009) <www.ecuador-rising.blogspot.com>. For discussion on reaching legal pluralism in Ecuador see Marc Simon Thomas, *Legal Pluralism and the Continuing Quest for Legal Certainty in Ecuador: A Case Study from the Andean Highlands*, (2012) 7 Onati Socio-Legal Series 57.

harmony with nature to achieve the good way of living the *sumak kawsay*'.

Pacha Mama broadly translates as 'Mother Earth' and in this sense is analogous with Papatūānuku (earth mother) for Māori. Although often translated as 'good life' or 'living well', the term *sumak kawsay* is from the Kichwa language relating to an ancestral Andean term that highlights the importance of harmony with nature and communities. Together with the further "recognition of our age-old roots" within the preamble, this concept confirms the relatedness between humans and nature. In this sense, it is closely aligned with *whakapapa* and *whanaungatanga* for Māori.

The concept of *sumak kawsay*, which is referred to five times in the Constitution (once in the preamble and in four articles), encapsulates and reflects an indigenous worldview. Although the right to a healthy environment is codified in other constitutions, the Ecuadorian constitution is unique in that it connects the environment to cultural/spiritual principles in the realisation of the *sumak kawsay*.

'Living well' is ecocentric and holistic in nature and is based on an ontological assumption of 'relationality', that "all beings exist always in relation and never as 'objects' or individuals".⁸⁸⁷ This relational understanding is also at the core of nature as Pachamama.⁸⁸⁸ Arturo Escobar suggests that a relational worldview must lead to a 'politics of responsibility' that is "a sequitur of the fact that space, place, and identities are relationally constructed".⁸⁸⁹ A relational awareness such as this implicates us in acting responsibly towards all other living beings, both human and non-human.⁸⁹⁰

⁸⁸⁷ Arturo Escobar, "Latin America at a Crossroads: Alternative Modernizations, Post-Liberalism, or Post-Development?" (Revised version of paper prepared for the Wayne Morse Center for Law and Politics and presented at the Conference, "Violence and Reconciliation in Latin America: Human Rights, Memory, and Democracy," University of Oregon, Eugene, January 31- February 2 2008) at 38.

⁸⁸⁸ A close analogy can be drawn between Pachamama and Papatūānuku of Māori cosmology. Similarly, a relational responsibility of *kaitiakitanga* as care for Papatūānuku is analogous to the *sumak kawsay* or *suma quemaña* care for Pachamama.

⁸⁸⁹ Escobar, above n 807, at 41.

⁸⁹⁰ See Chapter II 'Maori and Tikanga' on *What is Tikanga?* which notes the interrelatedness of animate and inanimate objects, the concept of *whanaungatanga* and *whakapapa*.

Article 14 notes:

The *right of* [emphasis added] the population *to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay)* [emphasis added], is recognized.

Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

Article 250 provides:

The territory of the Amazon provinces is *part of an ecosystem that is necessary for the planet's environmental balance of the planet* [emphasis added] [sic]. This territory shall constitute a special territorial district, for which there will be integrated planning embodied in a law including social, economic, environmental and cultural aspects, with land use development and planning *that ensures the conservation and protection of its ecosystems and the principle of sumak kawsay* [emphasis added] (the good way of living).

Section VII, "The Good Way of Living System", of the Constitution is an example of framing otherwise ephemeral principles in the language of human rights. This serves two purposes.

First, it makes the rights justiciable. Although the *sumak kawsay* will be interpreted and practiced in ways unique to the Amerindian peoples living relatively autonomously in the Amazon and remote Andean regions, it will also increasingly be brought for determination in the courts.⁸⁹¹ Second, it brings the system of rights into line with the international regime of rights as expressed in the International Labour Organisation Convention 169, the Universal Declaration of Human Rights,⁸⁹² the International Covenant on Economic, Social and Cultural Rights, and the United

⁸⁹¹ Particularly the newly created Environmental Court.

⁸⁹² For instance, second and third generation rights.

Nations Declaration on the Rights of Indigenous Peoples.⁸⁹³

Remarkably, in the section on development, *sumak kawsay* is cited as a primary consideration to guide decision makers.

Article 275 notes:

The development structure is the organized, sustainable [emphasis added] and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (sumak kawsay) [emphasis added].

The State shall plan the development of the country to assure the exercise of rights, the achievement of the objectives of the development structure and the principles enshrined in the Constitution. Planning shall aspire to social and territorial equity, promote cooperation, and be participatory, decentralized, deconcentrated and transparent.

The good way of living shall require persons, communities, peoples and nationalities to effectively exercise their rights and fulfill their responsibilities within the framework of interculturalism, respect for their diversity, and harmonious coexistence with nature [emphasis added].

One of the main concerns with the statement of a general principle that is not amenable to clear and easy interpretation in the context of an existing, property-focused legal system is that it is left to be defined, interpreted and implemented in a non-specific time frame and manner. Alternatively, this flexibility may be a significant advantage, allowing the concept to be adapted to novel situations and emerging social perspectives without the concepts being ‘frozen’ in time.⁸⁹⁴

The *sumak kawsay* is not to be rooted solely in ‘ancient’ or ‘traditional’ practices. Article 387 renders it the responsibility of the State to promote and generate

⁸⁹³ For a summary of the insistence of the Latin American countries on the inclusion of these rights during the negotiation of the terms of the Universal Declaration of Human Rights, see Geoffrey Robinson *Crimes Against Humanity*, (3rd ed, Melbourne, Penguin 2008) at 37-38.

⁸⁹⁴ For the New Zealand interpretations addressing this concern see, Ministry for the Environment *Case Law on Tangata Whenua Consultation* (Wellington, 1999).

knowledge in terms of the ‘good life’ through science and technology and provides:

The following shall be *responsibilities of the State* [emphasis added]:

1. To facilitate and promote incorporation into the knowledge society to achieve the objectives of the development system.
2. *To promote the generation and production of knowledge* [emphasis added], to foster scientific and technological research, and *to upgrade ancestral wisdom to thus contribute to the achievement of the good way of living (sumak kawsay)*... [emphasis added].

The Ecuadorian Constitution also enables indigenous groups to practice their own traditional justice in their territories and their decisions and punishments are to be respected by State bodies, except where they substantially clash with other provisions of the Constitution. Article 57(10) provides that:

Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights...

To create, develop, apply and practice their own legal system or common law, which cannot infringe constitutional rights, especially those of women, children and adolescents.

The constitutional right to nature provided by the Ecuadorian Constitution, driven by a right that recognises their indigenous legal system, provides an opportunity to import indigenous concepts, such as reciprocity, harmony and balance, so as to attain environmental sustainability.

Concepts such as balance, harmony, and healing are intrinsic to the philosophy of all indigenous peoples. For jurisdictions like Ecuador, appealing to environmental values and a right to nature provides an innate conduit for the recognition of indigenous values within a constitution. The embrace of these articles would lead to a re-imagining and re-founding of the State by abandoning conventional development

narratives based on State and private ownership. Instead, a collective and relational worldview would be cultivated, focusing on the aims of solidarity, complementarity, co-operation and in particular, self-determination.⁸⁹⁵

Notwithstanding the environment falling outside the jurisdiction of the criminal justice system,⁸⁹⁶ this example provides a clear and tangible analogy and application of tikanga Māori concepts. Furthermore, there is an extensive decentralisation of power to localities with the freedom to choose representative, direct, communal or indigenous versions of democracy for governance of local affairs.⁸⁹⁷ Indigenous groups are able to practice their own traditional justice in their territories and their decisions and punishments are to be respected by representative bodies, except where they substantially clash with other provisions of the constitution.

Notwithstanding the right of self-determination to implement constitutional indigenous rights, comparative jurisdictions, including those of Bolivia, engage concepts of plurination⁸⁹⁸ and culture within their constitution to achieve the same.⁸⁹⁹ This is not dissimilar to the notion of legal dialogue in the courtroom to legitimise state practices and judicial authority as a means to embed legal practices.

(b) Bolivia

The 2001 census indicated that 62 per cent of the Bolivian population is of indigenous origin.⁹⁰⁰ The Constitution of Bolivia provides:⁹⁰¹

⁸⁹⁵ See also Chapter II ‘Maori and Tikanga’ on *What is Tikanga Māori?* and the discussion of the Māori world.

⁸⁹⁶ However see *Auckland Regional Council v Holmes Logging Limited* HC Auckland CRI-2009-404-3 where failure to comply with the legislation and/or breaches of the Resource Management Act 1991 can lead to criminal charges.

⁸⁹⁷ Title IV, Part One ‘Participatory Democracy’, Articles 95 -117 generally.

⁸⁹⁸ Plurination is the coexistence of two or more national groups within a community.

⁸⁹⁹ Although see comments in Will Kymlicka *Liberalism, Community and Culture* (Oxford University Press, New York, 1989) where he defends the idea of minority rights with a discussion of the example of ‘the special status of First Nations Peoples as opposed to the segregation of blacks’. See also Will Kymlicka *Minority Rights* (Oxford University Press, New York, 1995) particularly Part III discussion on Forms of Cultural Pluralism and Legal Pluralism at 123 – 155.

⁹⁰⁰ See Cæcilie Mikkelsen (ed) *The Indigenous World* (International Work Group for Indigenous Affairs, Copenhagen, 2013) at 150. See also <http://www.ine.gov.bo/>.

⁹⁰¹ Article 99 (I). The terms are used twenty-four times in the Bolivian constitution, primarily in the sections on education: Articles 77 - 98.

Cultural diversity is an essential foundation of the Plurinational State Community. Interculturality is the instrument for cohesion and harmony and balance between all peoples and nations. Interculturality will take place with respect to differences and equal footing.

The 1994 constitutional reform recognised Bolivia as an alternative to the nation-state; that is, a plurinational state.⁹⁰² This model offers the coherence of the State, but also allows for difference by way of indigenous ‘nations’ in a way that the assimilationist tendency of nationalism does not. It is recognition of the ethno-ecological identity of the indigenous peoples of the plurination.⁹⁰³ A concept originally developed by Confederation of Indigenous Nationalities of Ecuador (CONAIE),⁹⁰⁴ plurinationality is defined as:⁹⁰⁵

The recognition of a multicultural society in the insoluble political unity of the state that recognises and promotes unity ... equality and solidarity among all existing peoples and nationalities ... regardless of their historical, political and cultural differences.

The concept of an indigenous ‘nation’ existing within the ‘nation-state’ is affirmed in Article 9 of the Declaration on the Rights of Indigenous People. It provides:

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

⁹⁰² Article 1 of the 2009 Constitution reads: ‘Bolivia, free, independent, sovereign, multi-ethnic and pluricultural, embodied in a single republic, adopts representative democracy as its form of government, based on the union and solidarity of all Bolivians.’ See also Giselle Corradi ‘The right to a fair trial in legally plural jurisdictions: the case of Bolivia’ presentation at *Human Rights and Legal Pluralism in Theory and Practice Conference 5th to 6th December 2014*, Norwegian Centre for Human Rights (NCHR) in co-operation with the Rights, Individuals, Culture and Society Research Centre (RICS) at the Faculty of Law, University of Oslo.

⁹⁰³ New Zealand can (contentiously) be considered a ‘plurination’. The Māori electoral option to register to vote within a Māori list is an unusual measure among the world’s democracies. See also Catherine Walsh, “The Plurinational and Intercultural State: De-Colonisation and State Re-Founding in Ecuador” (2009) 6 *Kult* 65 at 71-73 where Walsh suggests that Belgium, Finland (The Saami Parliament), Switzerland, and Canada may also be considered to be plurinational to a greater or lesser degree.

⁹⁰⁴ The Spanish initials for the Confederation of Indigenous Nationalities of Ecuador, the country’s largest Indigenous federation.

⁹⁰⁵ Confederation of Indigenous Nationalities of Ecuador (CONAIE) *Políticas para el Plan de Gobierno Nacional. El Mandato del CONAIE*, January 2003 at 2. Quoted from Walsh, above 828, at 78.

community or nation concerned. No discrimination of any kind shall arise from the exercise of such a right.

The ability of indigenous peoples who claim membership of an indigenous nation is not to be impaired in their right to hold citizenship of the State in which they live.⁹⁰⁶

The Bolivian Constitution cements many of the rights outlined in the Declaration on the Rights of Indigenous Peoples,⁹⁰⁷ thus supporting the notion of indigenous self-government and self-determination. Importantly, the Constitution affords indigenous people organised in an autonomous territory the right to compose their own statutes, provided these do not violate any laws or the Constitution.

The Bolivian Constitution includes not only an indigenous right to culture, but also in Article 30(II) a right to exercise their political, legal and economic system. When read together with the right to self-determination (Article 30(II)), it establishes a clear right for the indigenous peoples of Bolivia to an indigenous legal system and an indigenous court. It would be appropriate to realise an indigenous court within an autonomous area, for instance in Awas Tingi, established pursuant to the Constitution in Nicaragua.⁹⁰⁸

By embedding many of the articles from the Declaration on the Rights of Indigenous Peoples within its constitution, Bolivia has substantiated a clear acceptance and support of the fundamental rights and freedoms of indigenous peoples, including that of respect and promotion of traditional knowledge.

(c) Pacific

Historically states such as Fiji have implemented Fijian Magistrates and Fijian Courts. After the Native Affairs Department was established in 1874, the primary purpose

⁹⁰⁶ UNDRIP, Arts 6 and 33(1); Constitution of Bolivia Art 30(II)(3).

⁹⁰⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295 UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/295 (2007).

⁹⁰⁸ In 2001, the Inter-American Court of Human Rights (“IACHR”) delivered a landmark judgment in *Mayagna (sumo) Awas Tingni Community v The Republic of Nicaragua* (“*Awas-Tingni*”) Inter-American Court of Human Rights No 79 (31 August 2001). The IACHR extended the universal human right of property consistently with emerging indigenous rights, to include an indigenous right to property. Subsequently an autonomous zone was created for the Indigenous peoples.

was to impress upon the ‘Natives and High Chiefs of Fiji’ the need to have a separate institution so that the interests and welfare of the native population could be protected and to reduce colonial government interference in matters affecting native rights”.⁹⁰⁹ The office of the Fijian Magistrate was created in 1876, and subject to some limitations, Fijian Magistrates were given the same powers as European Magistrates.⁹¹⁰

The Native Courts Regulations 1927 outlined the powers of the Native Magistrates and the practice and procedure of the Native Court. These included the power to try persons charged with an offence such as assault and disorderly conduct. This Regulation also enabled the Court to take into account Fijian custom. For instance, in lieu of a punishment, the Court could direct the person to supply turtles or make mats.⁹¹¹ Tikina Courts were a place where a Fijian Magistrate sat alone⁹¹² and Provincial Courts with three Fijian Magistrates were also established.⁹¹³ It was not until independence that the Fijian Courts ceased to function. Consequently, Fijians are now served by the police and the central justice system.⁹¹⁴

Unlike New Zealand, an important characteristic of the legal systems of the Pacific and Melanesian culture is the continued use and support of customary law systems within a Westminster structure.⁹¹⁵ Furthermore, various constitutions in the Pacific, including those of Vanuatu, the Solomon Islands, Tonga and Papua New Guinea, recognise customary law systems or *kastom*,⁹¹⁶ particularly in relation to areas of conflict.⁹¹⁷

⁹⁰⁹ Guy Powles and Mere Pulea (ed) *Pacific Courts and Legal System* (Institute of Pacific Studies USP, Suva, 1988) at 78.

⁹¹⁰ At 79.

⁹¹¹ At 80.

⁹¹² Jurisdiction included lower level offending.

⁹¹³ Jurisdiction included more serious offending and could be heard by two Magistrates and a District Court Officer.

⁹¹⁴ Powles and Pulea, above n 829.

⁹¹⁵ See New Zealand Law Commission above n 823.

⁹¹⁶ Sinclair Dinnen “Restorative Justice in the Pacific Islands” in Sinclair Dinnen, Anita Jowitt and Tess Newton Cain (eds) *A Kind of Meaning: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003) at 14.

⁹¹⁷ See Tui Efi and others (eds) *Pacific Indigenous Dialogue on Faith, Peace, Reconciliation and Good Governance* (USP, Samoa, 2007). See also *Converging Current* above n 830 for further discussion.

Several authors note that “the struggle is not to persuade a coloniser state to provide space for the recognition of Indigenous interests but to adjust the state to fit the needs of the Indigenous community”.⁹¹⁸ This is perhaps reflective of some States enjoying post-colonial independence and reverting to older, familiar justice systems after independence.⁹¹⁹

It is not a novel idea that the recognition of culture and tikanga Māori through the right of self determination be realised to allow Māori to address the disproportionate social statistics.⁹²⁰ The implementation of the philosophy of Te Ao Māori, realised by an indigenous legal system and manifested by an indigenous court for Māori, should be pursued and supported within the domestic legal framework of New Zealand’s justice system. A review of existing judicial initiatives in comparative jurisdictions to address the over-representation of indigenous peoples within respective criminal justice systems in the areas of criminal offending, women and parole provides a helpful indication for the validity of the research question.

B. Criminology Statistics

(a) Indigenous offending

The over-representation of indigenous peoples in prisons is endemic.⁹²¹ In Fiji approximately 54 per cent are native Fijians and Indo-Fijians comprise 38 per cent. Out of a total prison population of 1,279, indigenous Fijians made up 984 prisoners of all prisoners (nearly 80 per cent), while only 222 were Indians (17 per cent).⁹²² A cross sectoral programme formed in 2003, and working with the formal institutions of

⁹¹⁸ Dinnen, above n 836, at 44.

⁹¹⁹ At 14.

⁹²⁰ See Nin Tomas “Indigenous Peoples and the Maori: The Right to Self-Determination in International Law - From Woe to Go” (2008) N.Z. L. Rev 639.

⁹²¹ “*Indigenous peoples*” is a term commonly used to describe any ethnic group who inhabit the geographic region with which they have the earliest historical connection.

⁹²² Ratu Filimone Ralogaivau “Problem Solving Courts of the Fiji Islands: Blending Traditional Approaches to Dispute Resolution in Fiji with Rule of Law – The Best of Both Worlds” 5 (July 2007). <www.ajja.org.au>.

the Government of Fiji, identified the need to establish policies to reduce the over-representation of indigenous Fijians in conflict with the criminal justice system.⁹²³

In other jurisdictions the statistics for the imprisonment of indigenous women are even more alarming. It is well established in international literature that the offending and imprisonment rates for indigenous peoples far surpass those for non-indigenous peoples.⁹²⁴ Furthermore, in a number of 'nation-states', statistics indicate that for indigenous women, the rates of apprehension, prosecution and recidivism surpass those not only for non-indigenous women, but also for indigenous men.

In Australia, for instance, where the indigenous population comprises a mere 2.5 per cent of the population,⁹²⁵ the imprisonment rate for indigenous or Aboriginal adults is approximately 15 times higher than that for non-indigenous Australian adults.⁹²⁶ Of the prison population in Australia, 24 per cent identify as aboriginal.⁹²⁷ In 1989 Aboriginal women represented 16.3 per cent of the female prison population, while Aboriginal men comprised 14.1 per cent of the total male prison population. This indicates that the situation for Aboriginal women is much worse than that for Aboriginal men.⁹²⁸

In Canada and the United States of America where indigenous people comprise 3.6 and 1.7 per cent of the population respectively,⁹²⁹ their over-representation in prisons and jails is well documented.⁹³⁰ The following statistics indicate that the over-representation of indigenous people in the Canadian prison system is growing at a

⁹²³ Ralogaivau, above n 842, at 4. Law and Justice Sectoral Objectives – No 11. Formulated in consultation with the law and justice agencies across the Fiji Islands in conjunction with the Australia Fiji Law and Justice Sector Program.

⁹²⁴ See for example William Tyler 'Aboriginal Criminology and the Postmodern Condition: From Anomie to Anomaly' *Australian & New Zealand Journal of Criminology* August 1, 1999 vol. 32 no. 2 209-221 where he notes that the 'very high rates of Aboriginal over-representation in the criminal justice systems of the white 'settler' societies are conventionally explained in terms of pervasive effects of cultural dispossession and social and economic disadvantage and dislocation.'

⁹²⁵ Human Rights and Equal Opportunity Commission *Face the Facts* (2005) <<http://www.hreoc.gov.au>>.

⁹²⁶ See Chris Cuneen 'Conflict, Politics and Crime: Aboriginal Communities and the Police' (2001). Sydney: Allen and Unwin. Available at SSRN: <http://ssrn.com/abstract=2196235>

⁹²⁷ Law and Justice *Fact Sheet* (2010) <www.reconciliation.org.au>.

⁹²⁸ S Payne "Aboriginal Women and the Law" in *Law and Justice Section Aboriginal and Torres Strait Islander Commission* Canberra (1993) at 66 <www.aic.gov.au>.

⁹²⁹ Mikkelsen above n 815, at 54 and 44.

⁹³⁰ Carol La Prairie "The Impact of Aboriginal Justice Research on Policy: A Marginal Past and an Uncertain Future (1999) *Canadian Journal of Criminology* 252.

faster rate for women than for men. In the provincial system in 2005, for instance, 30 per cent of female prisoners were Aboriginal,⁹³¹ while in the federal system in 2006, 25 per cent of female inmates identified as Aboriginal. Among federally sentenced women prisoners in Canada (those serving two years or more), over 30 per cent are Aboriginal women,⁹³² whereas 21 per cent of the male prisoner population identified as indigenous.⁹³³ American Indians and Alaska Natives are 2.5 times more likely to be a victim of violent crimes than other ethnic groups.⁹³⁴

As at February 2013 Aboriginal women represented 33.6 per cent of all federally sentenced women in Canada. According to Statistics Canada, “the disproportionate number of Aboriginal people in custody [is] consistent across all provinces and territories and particularly true among female offenders”.⁹³⁵

In New Zealand the situation is similar. Apprehension rates for Māori women far surpass those for non-Māori women. While Māori women comprise just 15 per cent of the female population,⁹³⁶ in 1996, they constituted 44.4 per cent of female apprehensions, and 45.83 per cent in 2005. In the same year, 50.52 per cent of Māori women apprehended were prosecuted, compared to 40.1 per cent of non-Māori women. Of custodial sentences 58 per cent were given to Māori women and only 36 per cent to non-Māori women.⁹³⁷ In 2005 58 per cent of the 329 female inmates in the New Zealand prison system identified as Māori.⁹³⁸

These statistics indicate that indigenous women are more likely to be apprehended, prosecuted and imprisoned than non-indigenous women. As such, earnest

⁹³¹ Statistics Canada (2010) <<http://www.vcn.bc.ca>>.

⁹³² The Elizabeth Fry Society of Manitoba, Canada “A Canadian Perspective on Addressing the Overrepresentation of Indigenous Women and Girls in the Canadian Criminal Justice System.” (2009) at 7 (2009) <www.aija.org.au>.

⁹³³ Statistics Canada (2010) <www.vcn.bc.ca>.

⁹³⁴ Greenfeld, L. A., & Smith, S. K. *American Indians and Crime* (NCJ 173386. Washington, DC, Department of Justice, Bureau of Justice Statistics, 1999) <www.bjs.ojp.usdoj.gov>.

⁹³⁵ Office of the Correctional Investigator “Background: Aboriginal Offenders a Critical Situation” (2012) <www.oci-bec.gc.ca>.

⁹³⁶ Department of Statistics “Ethnic Diversity of Women” (2010) <www.stats.govt.nz>.

⁹³⁷ N Soboleva, N Kazakova and J Chong *Conviction and Sentencing of Offenders in New Zealand: 1996 to 2005* (Ministry of Justice, Wellington 2006) at 116.

⁹³⁸ These statistics have not significantly changed. See Ministry of Justice *Over Representation of Māori in Prison* as at 31 March 2013 Māori women made up 58 per cent of that female prisoner population (291 out of a total female prison population of 504).

consideration of gender and cultural issues should be given and reflected in the formulation of the relevant policies and legislation.

(b) Criminology and Indigenous Women – International Response

In October 2005 the United Nations Human Rights Committee noted its concern that, in Canada, Aboriginal women were far more likely to experience a violent death than other non-Aboriginal women.⁹³⁹ The Committee recommended that accurate statistical data be collected and that the root of this problem be fully addressed; namely the economic and social marginalisation of Aboriginal women, and the need for effective access to justice. The Committee also expressed concern about the situation of Aboriginal women in prisons, and recommended independent adjudication for decisions related to involuntary segregation or alternative models.⁹⁴⁰

The Committee on the Elimination of Racial Discrimination (CERD)⁹⁴¹ recently noted that.⁹⁴²

... the Committee remains concerned about serious acts of violence against Aboriginal women, who constitute a disproportionate number of victims of violent death, rape and domestic violence. Furthermore, the Committee is concerned that services for victims of gender-based violence are not always readily available or accessible, particularly in remote areas.

The United Nations Declaration on the Rights of Indigenous People provides three instances where indigenous women are specifically mentioned:⁹⁴³

Article 21(2) calls upon States to pay “particular attention” to the “rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the context of special measures to improve economic and social conditions”.

⁹³⁹ Office of the High Commission of Human Rights *UN Human Rights Committee: Concluding Observations, Canada (CCPR/C/CAN/CO/5)* (2006) at [23] <www.pch.gc.ca>.

⁹⁴⁰ At [18].

⁹⁴¹ At [12].

⁹⁴² CERD Report CERD/C/CO/18 25 May 2007 Seventieth Session 19 February – 9 March 2007 at Point 20 <www.unhcr.org>.

⁹⁴³ *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007).

Article 22(1) indicates that particular attention should be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of the Declaration; while Article 22 (2) provides that States should take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Read together, Articles 21(2) and 22(1) emphasise the ‘rights and special needs’ of indigenous women.⁹⁴⁴ The inclusion of “full” and “all forms” in Article 22(2) provides further supports the State’s to provide particular protection to indigenous women.⁹⁴⁵

Article 22(2) also derives from an extensive body of international human rights law relating to the protection from, and the elimination of, all forms of violence and discrimination.⁹⁴⁶ This includes general prohibitions against violence and discrimination contained in the Universal Declaration on Human Rights,⁹⁴⁷ as well as the two International Covenants

Article 22(2) is also supported by general international law pertaining to women-specific rights and protections against violence and discrimination,⁹⁴⁸ as well as children-specific rights and protections.⁹⁴⁹ This body of law includes the Declaration on the Elimination of Violence Against Women, the Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW) and extensive treaty body

⁹⁴⁴ I am grateful for the advice and expertise from Professor Megan Davis in writing this section. See also Eva Biaudet and others “Study on the Extent of Violence against Indigenous Women and Girls in Terms of Article 22 (2) of the UNDRIP” (2013) (UNPFII Report, E/C.19/2013/9).

⁹⁴⁵ At 8.

⁹⁴⁶ At 9.

⁹⁴⁷ UNDRIP, Articles 2, 3, 5 and 7.

⁹⁴⁸ General Women’s rights and protections are included in Article 3 International Covenant on Civil and Political Rights; Art 3 International Covenant on Economic and Social Rights; Human Rights Committee, General Comment 28: Equality of Rights Between Men and Women (Article 3), 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); and the Convention on the Elimination of All Forms of Discrimination Against Women as cited in report above n 864.

⁹⁴⁹ Biaudet and others, above n 864, at 9.

comments including General Recommendation 19: Violence Against Women of the Committee on the Elimination of All Forms of Discrimination Against Women.⁹⁵⁰

Despite these provisions to protect indigenous women against violence and discrimination, indigenous women are disproportionately represented in the criminal justice system.

C. Canada⁹⁵¹

(a) Background on Indigenous Offending

The Canadian Centre for Justice Statistics indicates that indigenous peoples constitute only 3 per cent of the total population, but comprise 19 per cent of federal prisoners. Between 1997 and 2000 indigenous peoples were ten times more likely to be accused of homicide than non-indigenous peoples. The rate of indigenous peoples in Canadian prisons climbed 22 per cent between 1996 and 2004, while the general prison population dropped 12 per cent.⁹⁵² As at February 2013, this figure had risen slightly, with 23.2 per cent of the federal inmate population identifying as indigenous.⁹⁵³

Statistics Canada indicates that the overall rate of domestic violence between 1999 and 2004 remains unchanged.⁹⁵⁴ Aboriginal women continue to be victims of domestic violence.⁹⁵⁵ In her work with native women, Jacobs illustrates this problem by noting that:⁹⁵⁶

... the vast majority of incarcerated aboriginal women, who make up a staggering 30 per cent of female prisoners in Canada, are locked up for addiction-related crimes or for self-defense in a situation of domestic violence.

⁹⁵⁰ 11th sess (1992), UN Doc A/47/38 at 1 (1993) as cited in report Biaudet and others, above n 719.

⁹⁵¹ Parts of this section have been already published in V Toki “Are Domestic Violence Courts Working for Indigenous Peoples?” (2009) 35(2) Commonwealth Law Bulletin at 255–286.

⁹⁵² Melissa Gorelick *Discrimination of Aboriginals on Native Lands in Canada: A Comprehensive Crisis* UN Chronicle (2007) <www.un.org>.

⁹⁵³ Office of the Correctional Investigator, above n 835.

⁹⁵⁴ See “Domestic Violence Rate Unchanged Statistics: Canada Report” *CBC News* (online, Canada, 14 July 2005) <www.cbc.ca>.

⁹⁵⁵ Phil Lane, Judie Bopp and Michael Bopp *Aboriginal Domestic Violence in Canada* (Aboriginal Healing Foundation, 2003).

⁹⁵⁶ Gorelick, above n 872, at 7.

More recently Professor James Anaya noted:⁹⁵⁷

Canada's relationship with the indigenous peoples within its borders is governed by a well-developed legal framework a number of policy initiatives that in many respects are protective of indigenous peoples' rights. But despite positive steps, daunting challenges remain ... The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the last several years, treaty and aboriginals claims remain persistently unresolved, indigenous women and girls remain vulnerable to abuse, and overall there appear to be high levels of distrust among indigenous peoples toward government at both the federal and provincial levels.

In light of this, and in recognition of the failure of traditional criminal and civil justice proceedings to appropriately address domestic violence matters, it is no surprise that Dawson⁹⁵⁸ states that much of the legal research on indigenous peoples and the criminal justice system have been undertaken in North America.⁹⁵⁹ Despite the Aboriginal Justice programmes and policies that have been implemented, the disproportionate rate of Aboriginal offending and incarceration rates have not decreased.⁹⁶⁰ As a result Stewart argues that governments have followed a trend towards focussing on specific areas to redress the situation, with the establishment of specialist problem solving courts for crimes committed by offenders with social problems like drug addiction.⁹⁶¹ The notion of healing courts has also been adopted by some jurisdictions in applying particular processes for dealing with indigenous defendants.⁹⁶²

Spiteri argues that while First Nations people have not been able to implement a system of Aboriginal justice, it is apparent that concessions have been made within the criminal justice system to address the system's deficiencies and its inability to

⁹⁵⁷ James Anaya *The Situation of Indigenous peoples in Canada* A/HRC/27/52/Add.2

⁹⁵⁸ Myrna Dawson and Ronit Dinoitzer "Victim Cooperation and the Prosecution of Domestic Violence in a Specialised Court" (2001) 18 *Justice Quarterly* 3 (September Issue) at 593 – 622.

⁹⁵⁹ See *Human Rights Watch* 'Those Who Take Us Away: Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada' (2013) for discussion on the high rates of violence against Indigenous and women and girls and the failure of law enforcement to deal effectively with this problem.

⁹⁶⁰ La Prairie, above n 850, at 258. See also Carol La Prairie 'Aboriginal Over Representation in the Criminal Justice System' (2002) April *Canadian Journal of Criminology* 181 – 208.

⁹⁶¹ J Stewart *Specialist Domestic Violence Courts within the Australian Context* (2008) Issues Paper 10 at 4. <www.austdvclearinghouse.unsw.edu.au>.

⁹⁶² At 4.

take into account the unique problems faced by First Nations communities.⁹⁶³ These include sentence advisory committees, community mediation/diversion programmes, sentencing panels and sentencing circles. Sentencing is an area that lends itself, at least to some degree, to the application of elements associated with the idea of Aboriginal justice. Perhaps that is why the majority of the Aboriginal Justice Initiatives in Canada deal with sentencing reflected in the changes made to the sentencing provisions of the Canadian Criminal Code. These changes were designed to address the issue of over-representation of First Nations within the sentenced prison population. Section 718.2 (e) of the Criminal Code provides that:⁹⁶⁴

... all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

This supports the need to investigate the implementation of an intervention prior to sentencing. The recent majority decision of the Canadian Supreme Court in *Ipeelee v R* affirmed that s 718(2)(e) of the Criminal Code is:⁹⁶⁵

a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

Similarly, in New Zealand s 8(i) of the Sentencing Act 2002 provides a series of principles for the judge to consider when passing a sentence including:⁹⁶⁶

... the offender's personal, family, whānau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.

In light of the Supreme Court's reasoning in *Ipeelee v R*, it is contended that s 8(i) of the Sentencing Act 2002 could provide the same ameliorative impulse as s 718.2 (e)

⁹⁶³ Melanie Spiteri *Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Framework* (2008) <www.iirp.org>.

⁹⁶⁴ Criminal Code RSC 1985 c C- 46, s 718.2(e).

⁹⁶⁵ *Ipeelee v R* 2012 SCC 13, at [59].

⁹⁶⁶ Sentencing Act 2002, s 8(i).

of the Canadian Criminal Code.⁹⁶⁷ Although s 8(i) contains no express reference to Māori offenders, the inclusion of ‘whānau’ and ‘cultural background’ provides an opportunity to import tikanga Māori and explore a proposed intervention prior to sentencing. This could include a marae based forum or similar structure.

Nonetheless, developing these ‘cultural’ provisions within this s 8(i) limits the ability of the sentencing judge and the judiciary as an institute, to address the core problems associated with offending. This provides support for an alternative forum to meaningfully address and ameliorate the underlying reasons of offending for Māori.

(b) Circle Sentencing

Circle sentencing is an updated version of the traditional sanctioning and healing practices of Aboriginal peoples in Canada. It is a holistic, re-integrative strategy designed not only to address the criminal and delinquent behaviour of offenders, but also to consider the needs of victims, families and communities. Within the ‘circle’ victims, offenders, their family and friends, justice and social service personnel, and interested community residents can speak from the heart in a shared effort to uncover the event. By working together all stakeholders can identify the steps necessary to assist in healing the affected parties and prevent future crimes. The significance of the circle is more than symbolic; all circle members, including police officers, lawyers, judges, victims, offenders, and community residents, participate in deliberations to arrive at a consensus for a sentencing plan that addresses the concerns of all interested parties.

In analysing Canadian circle sentencing, Ross Green observes that:⁹⁶⁸

A prominent goal of circle sentencing is to promote both community involvement in conducting the circle and consensus among participants during the circle.

⁹⁶⁷ Just Speak – Māori and the Criminal Justice System Position Paper (2012) at 35 <www.rethinking.org.nz>.

⁹⁶⁸ Ross Green *Justice in Aboriginal Communities: Sentencing Alternatives* (Canada, Purich Publishing, 1998) at 72.

He also emphasises the role of indigenous community engagement and participation in justice practices.

Circle Sentencing operates within the Canadian criminal justice system, and therefore within the parameters set out by the Canadian Criminal Code. This process often takes the place of court sentencing hearings once guilt has been established.

Judge Cunliffe Barnett (1995) claimed that the term “circle sentencing” entered legal vernacular when Judge Barry Stuart embarked upon a circle format for sentencing after realising how rigid the sentencing process was, and how it leads to the dominance of the court system over Aboriginal peoples.⁹⁶⁹ In *R v Morin*,⁹⁷⁰ the Judge claimed that this focus on healing and restoration was in sharp contrast to the punishment and retribution of the Canadian Justice System. Nevertheless, the practice of circle sentencing has been described by the Chief Justice Bayda of Saskatchewan Court of Appeal as:⁹⁷¹

... part of the fabric of our system of criminal justice and ... a recognised and accepted procedure.

This discretion of the judge and the community in sentencing circles to impose non-custodial sentences paves the way for incorporating aspects of an Aboriginal justice system. This is recognised by Luke McNamara as:⁹⁷²

... a shift away from culturally inappropriate and unfair non Aboriginal sentencing processes towards processes that embrace a genuine respect for, and meaningful cooperation with, Aboriginal law and justice values and processes.

Part XXIII of the Canadian Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by the judge in determining a sentence that is fit for the offender and the offence. This enables the

⁹⁶⁹ See *R v Moses* (1992) 71 CCC (3d) 347 (Yukon Territorial Court).

⁹⁷⁰ *R v Morin* [1995] S.J. No 457.

⁹⁷¹ *R v Morin* (1995) 4 CNLR 37 at 68-69 (Saskatchewan Court of Appeal).

⁹⁷² Luke McNamara “The Locus of Decision Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines” (2000) 18 Windsor Yearbook of Access to Justice 60 at 61.

judge to be creative and consider alternative methods of sentencing other than imprisonment for Aboriginal offenders.

(c) Gladue Reports

In 1999 the Supreme Court of Canada released its decision on a sentence appeal from the British Columbia Court of Appeal which involved the appropriateness of a three year jail sentence for an Aboriginal woman convicted of manslaughter in the stabbing death of her common law husband. In determining the effect of s 718(e) of the Canadian Criminal Code, the Court in *R v Gladue* stated that:⁹⁷³

It [s. 718.2 (e)] is remedial in nature and is designed to ameliorate the serious problem of over representation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

The Supreme Court further noted that the method of analysis for determining a sentence for an Aboriginal offender must be twofold. First, the consideration of the offender's circumstances that may have been conducive to the offending, and second, the consideration of alternatives to imprisonment; and if there are no alternatives, the length of incarceration must be revisited.⁹⁷⁴ This places a burden on the prosecutors, defence counsel and the community to provide relevant information on the accused's cultural background to the judge.⁹⁷⁵ Often this information is presented as an aptly named 'Gladue Report'.⁹⁷⁶ The Supreme Court also ruled that this section only applies to non-violent and minor offending. However, Larry Chartrand notes that many Aboriginal offenders commit violent and/or serious crimes and have long criminal records.⁹⁷⁷

⁹⁷³ *R v Gladue* [1999] 1 S.C.R 688 Lamer C.J and L'Hereux-Dube, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ, at 400 and 409. See also above n 859 and discussion of s 718 (e).

⁹⁷⁴ At 417- 418 and 423.

⁹⁷⁵ See *R v Kakekagamick* [2006] OJ No 3346 (Ont CA) where the Court held that there is a positive duty on counsel to assist the sentencing judge in gathering information as to the Aboriginal offender's circumstances. See also Themla Chalifoux "A Need for Change: Cross-cultural Sensitization of Lawyers" (1994) 32(4) *Alberta Law Review* at 762-781; K Roach and J Rudin 'Gladue: The Judicial and Political Reception of a Promising Decision' (2000) July *Canadian Journal of Criminology* at 355-388.

⁹⁷⁶ See Appendix for two examples of Gladue Reports.

⁹⁷⁷ Larry Chartrand "Aboriginal Peoples and Mandatory Sentencing" (2001) 39(2/3) *Osgoode Law Journal* 456.

For various reasons the general academic opinion is that *Gladue* reports have failed to make a substantial impact.⁹⁷⁸ These reasons range from the relatively high costs in compiling such a report, the fact that the consistency of the reports are not monitored, the violence of the offending can overshadow any benefit, and the community call for race neutral advocacy.⁹⁷⁹

The effect of the *Gladue* decision has been incorporated within the wider justice system. For instance, in a youth bail decision,⁹⁸⁰ and in the case of *R v Sims* where the Ontario Court of Appeal extended the reach of *Gladue* to decisions of the Ontario Review Board stating that Gladue principles are to be considered whenever the decision maker is dealing with the liberty of an Aboriginal person at any stage of the justice system.⁹⁸¹ In New Zealand the Bail Act 2000 contains no provision for the decision maker to take into account cultural factors when determining a bail application.⁹⁸² This approach would be welcomed in any proposed Indigenous Court.

Although it can be argued that the Gladue Reports have not assisted to reduce the disproportionate offending rates and can be perceived as the ‘ambulance at the bottom of the cliff’, it is suggested that this ability to consider an indigenous approach should be extended to all aspects of the criminal justice system and not be confined to sentencing or bail applications.

Ideally this would include the training of lawyers and the judiciary to better understand the effects of domestic violence from an indigenous perspective. The flow on from this would bring a fuller understanding of the broader causes of crime and its relationship, especially with colonisation.

⁹⁷⁸ Rana McDonald *The Discord Between Policy and Practice: Defence Lawyers' Use of Section 718.2(e) and "Gladue"* (University of Manitoba, 2008).

⁹⁷⁹ David Milward and Debra Parkes “*Gladue: Beyond Myth and Towards Implementation in Manitoba*” (2011) 35(1) *Man LJ* 84.

⁹⁸⁰ See *R v Bain* [2004] OJ No 6147 (Ont SC) on a bail review. See also *R v RRB* [2004] BCJ No 2024 (BC Prov Ct) Youth bail hearing.

⁹⁸¹ *R v Sim* [2005] OJ No 4432 (Ont CA).

⁹⁸² However, see section 7 (5) Rules as to granting bail, which states ‘a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention.’ In view of *R v Sim* it could be argued that culture may account as a reason for not continuing detention.

The ability to apply indigenous concepts that have been realised by an indigenous legal system, and within the appropriate forum, is pivotal to address those areas of Aboriginal over-representation such as the incarceration of indigenous women resulting from domestic violence issues.

(d) Case Studies

(i) Hollow Water

The Royal Commission on Aboriginal Peoples in Canada notes an example where a First Nations community, Hollow Water, had to address persistent sexual abuse within the community.⁹⁸³ In Hollow Water 75 per cent of the residents were victims and 35 per cent were offenders. The residents, which comprised mostly of women, developed an approach to address this situation, requiring that the offender acknowledge responsibility and over time, be accepted by the group. The offender would then be allowed to stay in the community, but subject to a thirteen-step process that would take five years to complete. The process is described as:⁹⁸⁴

The [Community Holistic Circle Healing] is not a program or project. It is a *process with individuals coming back into balance, a process of the community healing itself* [emphasis added]. It is a process which one day will allow our children and grandchildren to once again walk with their heads high as they travel around the Medicine Wheel of Life.

(ii) Innu Community of Sheshashit⁹⁸⁵

A non-Native offender confessed that he had committed an act of sexual abuse. He elected to be tried in the Supreme Court. He entered a guilty plea and applied for a ‘sentencing circle’. After the Crown opposed the motion, an application was made for

⁹⁸³ Royal Commission on Aboriginal Peoples *Bridging the Cultural Divide: Aboriginal People and Criminal Justice in Canada* (Canada Communications Group, Ottawa 1996) at 159 – 167.

⁹⁸⁴ Royal Commission on Aboriginal Peoples, above n 903.

⁹⁸⁵ Wanda McAuslin “Community Peacemaking” in W McAuslin *Justice as Healing Indigenous Ways; Writings on Community Peacemaking and Restorative Justice from the Native Law Centre*” (Living Justice Press, St Paul, Minnesota, 2005) at ch 6.

an informal ‘healing circle’ to take place. The Crown opposed this request, suggesting that the offender be tried by ordinary court methods. The Judge notified both counsel that they could attend.

In considering sentencing Judge O’Regan found that:

... [he was] cognizant of the fact that [the offender] did grow up in the community of Sheshashit and was exposed to Innu culture and thus can benefit from the community’s involvement in such thing as the healing circle.

Judge O’Regan accepted the recommendations of the healing circle and imposed a non-custodial sentence. This confirms the ability of the Innu nation to develop and deliver justice based on their custom in order to meet the needs of their community. This provides fertile ground to support the implementation of an indigenous legal system that could cater for non-indigenous, as well as for indigenous peoples.⁹⁸⁶

(e) Specialised Court – Domestic Violence Courts

In general, domestic violence courts are designed to remove domestic violence cases from the day-to-day court process. The underlying objective is to ameliorate the victims’ experiences of the legal system and re-direct offenders into treatment, with the intention of providing better outcomes for victims and perpetrators, while operating within the criminal justice system. This distinguishes domestic violence courts from other problem solving courts, in that the safety of the victim and the offender’s responsibility and accountability are treated equally.

In 2002 there were specialist domestic violence courts in Winnipeg, Manitoba; London, Toronto and Ottawa, Ontario; and Calgary and Edmonton, Alberta. Ontario's Domestic Violence Court is the most extensive programme in Canada. It facilitates the prosecution of domestic assault cases and the early intervention of abusive

⁹⁸⁶ See also Sakeq Henderson *First Nations Jurisprudence and Aboriginal Rights* (Native Law Centre, Canada, 2006) for discussion on the creation of Constitutional space for the inclusion of First Nations jurisprudence.

domestic situations, thereby providing better support to victims and increasing offender accountability.

An operational domestic violence court comprises an assortment of components: a Domestic Violence Court Advisory Committee, especially trained domestic violence prosecutors; Victim/Witness Assistance Program staff and interpreters; specialised evidence collection and investigation procedures by police; case management procedures to coordinate prosecutions and ensure early intervention; a Partner Assault Response intervention programme and the expanded training for police; Crown Victim/Witness Assistance Programme staff; court staff, Probation and Parole staff, and interpreters. These teams of specialised personnel work together to ensure priority is given to the safety and needs of domestic assault victims and their children. This aspect is not dissimilar to circle sentencing where circle members include a vast array of people who participate in deliberations to arrive at a consensus for a sentencing plan that addresses the concerns of all interested parties. Although it may be too soon to gauge the success or otherwise of these courts, there is good reason to be optimistic about its future. In fact, the Ontario government is currently committed to investing CA\$10 million annually into the Domestic Violence Court programme.⁹⁸⁷

The success of the implementation and use of domestic violence courts is not confined to Canada. For instance, statistics from domestic violence courts in the United Kingdom suggest that dedicated domestic violence courts are achieving conviction rates of about 70 per cent on average.⁹⁸⁸ This is a dramatic improvement when compared with only 46 per cent of cases being prosecuted successfully in December 2003.

In Canada there is no specialist court to address indigenous offending related to domestic violence. There is debate that indigenous courts are not focused on “problem solving”; if there is a problem to be solved, it is the failure of the criminal justice system to accommodate the needs of the Aboriginal people to ensure that they are

⁹⁸⁷ See <www.ontla.on.ca>.

⁹⁸⁸ “Domestic Violence Court Success” *News in Brief: The Evening Standard* (online ed, London, 9 March 2008) <www.thisislondon.co.uk>.

fairly treated within that system.⁹⁸⁹ Any specialty recourse lies in the domestic violence courts within the Canadian Justice System.

Notwithstanding the provisions in the Indian Act (R.S.C., 1985, c. I-5) that provide for the appointment of indigenous Justices of the Peace who have limited jurisdiction to try offences under that Act,⁹⁹⁰ only a few have ever been appointed, and they do not have jurisdiction to apply indigenous law. Other than the discretion of the judges at sentencing,⁹⁹¹ there is no direction to take indigenous issues into consideration.

(f) Canada – Conclusion

Indigenous women are over-represented in the Canadian penal system. The majority of Aboriginal women, which make up 30 cent of female prisoners in Canada, are incarcerated for substance or addiction-related crimes or for excessive use of self-defence in a situation of domestic violence. International bodies recommend effective access to justice for Aboriginal women.

In Canada there are no courts to adjudicate disputes on the basis of indigenous law, such as the Navajo Tribal Courts⁹⁹² and other Indian Tribal courts in the United States of America.⁹⁹³ A recent development in the Indian Tribal Courts in the United States establishes new laws, effective in March 2015, to restore to tribes the ability to prosecute non-Indians who commit domestic violence on the reservation.⁹⁹⁴ However, there are some specialist courts that adjudicate disputes and sentence convicted people

⁹⁸⁹ See Western Australian Law Reform Commission *Aboriginal Customary Laws* (Discussion Paper, (Report No 94, 2005) at 146.

⁹⁹⁰ Indian Act RSC 1985, c I-5, s 107.

⁹⁹¹ See Criminal Code RSC 1985 c C-46, s. 718.2(e)

⁹⁹² See Chapter V ‘Initiatives in Comparative Jurisdictions’ for further discussion.

⁹⁹³ For example Ordinance 21 of the Hopi Indian Tribe Law and Order Code was passed in 1972 to provide for the establishment of Hopi tribal courts, a police force, judges, tribal prosecutors, and the provision of a criminal code as discussed see Justin Richland *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (University of Chicago Press, Chicago, 2008).

⁹⁹⁴ Personal academic communication with Melissa Tatum, University of Tuscon, Arizona who has completed an information road show on this issue. This ability to prosecute non-Indians was also articulated during the *Conference on Indigenous Sustainability: Implications for the Future of Indigenous People and Native Nations* Arizona State University 5th – 7th October, 2014.

on the basis of Canadian law, but have indigenous judges and are situated in places where many indigenous people reside.⁹⁹⁵

The problems associated with domestic violence are multiple and complex. Responsibility for addressing such problems involves a complex array of services and agencies to provide a vast assortment of culturally appropriate services. Recognition of customary law to address indigenous over-representation is confined to “circle sentencing” or “healing circles”.

Chartrand is skeptical of s 718 (e) of the Canadian Criminal Code, arguing that the sentencing guidelines have remained the same for everyone and do little, or nothing to address offending rates.⁹⁹⁶ He argues that the only way to reduce the high incarceration rates of indigenous peoples is to attack the root causes of crime. This is a view shared by Marchetti and Daly, who state:⁹⁹⁷

... any effort to address the over representation of Indigenous people in the criminal justice system must also confront a legacy of government policies and practices over the past two centuries, which systematically disadvantaged and oppressed Indigenous people.

In acknowledgment of these statistics, Canada has implemented specialist domestic violence courts. However, this does not address the over-representation of Aboriginal women in prisons for offences relating to domestic violence.

In order to address this over-representation, the indigenous principles and the legal system that underpin circle sentencing should be extended to all levels of the criminal justice system. This is particularly so, as Marchetti and Daly note that:⁹⁹⁸

⁹⁹⁵ For example, see the Cree court in Saskatchewan, where Gerry Morin is the Cree speaking judge. Saskatchewan is also to establish a Dene court. There is a second Cree Court now, with Judge Bird. See http://www.sasklawcourts.ca/default.asp?pg=pc_div_cree_court for full discussion of Cree Courts.

⁹⁹⁶ Paul Chartrand “Canada and Aboriginal Peoples: Recognition and other Constitutional and Legal Challenges” (Paper presented at a Staff Seminar, Faculty of Law, University of Auckland, 28th March 2008).

⁹⁹⁷ Marchetti and Daly, above n 828, at 443.

⁹⁹⁸ At 429.

... indigenous sentencing courts have the potential to empower Indigenous communities to bend and change the dominant perspective of “white law” through Indigenous knowledge and modes of social control, and come to terms with a colonial past.

As a result of the dissatisfaction with the mainstream criminal justice process,⁹⁹⁹ alternative approaches to addressing criminal behaviour have been proposed, including therapeutic jurisprudence, non-adversarial justice, restorative justice and problem solving initiatives.¹⁰⁰⁰

These initiatives also include specialist or problem-solving courts such as drug courts, mental health courts, domestic violence courts and indigenous courts. The emergence of courts that seek to incorporate traditional law and culture, such as the Gladue Reports process, alongside a number of these specialist courts, reflects a “recognition that the traditional adversarial system, in structure, style and service delivery” may not be appropriate for all offenders.¹⁰⁰¹ The move is to focus on and address the underlying behaviour.¹⁰⁰² Whilst there is debate about whether indigenous courts can be characterised as problem-solving due to the historical context of colonisation,¹⁰⁰³ the move to incorporate culture in the Cree Courts of Saskatchewan or through the Gladue Reports signals philosophical changes in the criminal justice system.

It is timely to engage shifting understandings and realities that characterise the Aboriginal experience across Canada; regarding issues of culture and tradition. Cultural difference arising from different traditions of conflict resolution are often central to explanations of not only why Aboriginal people clash more often than non-Aboriginal people with Canadian laws, but why the processes linked to those laws are

⁹⁹⁹ Andrew Goldsmith, Mark Israel and Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (3rd ed, Lawbook Company, Sydney, 2006) at 440.

¹⁰⁰⁰ For example, see Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (Federation Press, Australia, 2009) at 21; for more detail see, for example, ch 2 (‘Therapeutic Jurisprudence’), ch 3 (‘Restorative Justice’), ch 4 (‘Preventative Law’), ch 5 (‘Creative Problem Solving’), ch 9 (‘Problem-Oriented Courts’).

¹⁰⁰¹ See Michael King, Arie Freiberg, Becky Batagol and Ross Hyams *Non-Adversarial Justice* (Federation Press, Australia, 2009), at 21; for more detail.

¹⁰⁰² See Arie Freiberg “Problem-Oriented Courts: Innovative Solutions to Intractable Problems?” (2001) 11 *Journal of Judicial Administration* 8 at 8–9.

¹⁰⁰³ Marchetti and Daly, above n 828; Elena Marchetti and Kathleen Daly, *Indigenous Courts and Justice Practices in Australia: Trends and Issues* (2004) *Crime and Criminal Justice* 277; Law Reform Commission of Western Australia, at 142–157 (‘Aboriginal Courts’).

not working for them.¹⁰⁰⁴

D. Australia

As is the case in New Zealand, the Australian criminal justice system is, for the most part, the same model inherited from the British Westminster system. Since the 1980s Australia's criminal justice system has come under increasing scrutiny for failing to resolve, or indeed to reduce the perceived problem of crime.

This situation is exacerbated with the "getting tough on crime" rhetoric that has resulted in a worldwide burgeoning of prison populations.¹⁰⁰⁵ In Australia between 1982 and 1998 it is estimated that the number of inmates rose by 102 per cent.¹⁰⁰⁶

Jeffries stated that drivers behind this push have included governmental failure to deal with crime and thus reduce offending rates, managerialist drives for savings and efficiency, calls from consumer groups for their needs to be recognised, and a better court service to be provided.¹⁰⁰⁷ In addition to the political, economic and social landscape, changing intellectual paradigms are also having a substantial impact on the criminal court practice.

This current system also consistently yields high rates of recidivism by Aboriginal and Torres Strait Islander people.¹⁰⁰⁸ As the prison population and the fear of crime increases, it becomes clear that the traditional methods of delivering justice are not working, particularly for the indigenous peoples. Indigenous Australians comprise 2.2 per cent of the population. An Indigenous Australian is 11 times more likely to be in prison than a non- Indigenous Australian; and in June 2004, 21 per cent of prisoners

¹⁰⁰⁴ See Jane Dickson-Gilmore and Carol La Prairie "Will the Circle Be Broken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change (University of Toronto, Canada, 2005).

¹⁰⁰⁵ Home Office *World Prison Population List* (London, 2002) <www.homeoffice.gov.uk>.

¹⁰⁰⁶ Carlos Carcach and Anna Grant "Imprisonment in Australia: Trends in Prison Populations and Imprisonment Rates 1982 – 1998 Canberra" (Australian Institute of Criminology, Australia, 2000).

¹⁰⁰⁷ Samantha Jeffries "Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change" Post-Doctoral Fellow thesis <www.criminologyresearchcouncil.gov.au>.

¹⁰⁰⁸ See Human Rights Equal Opportunity Commission *Face the Facts* (2005) <www.hreoc.gov.au>.

in Australia were indigenous.¹⁰⁰⁹ Family violence is also widespread. In 2002 one out of every five (21 per cent) indigenous Australians aged 15 years and over reported that family violence was a common problem.¹⁰¹⁰ This over-representation of Indigenous Australians in prisons was brought to public attention by the 1987 – 1991 Royal Commission Report on Aboriginal Deaths in Custody.¹⁰¹¹ One of the Royal Commission's main findings was that the high number of deaths of Aboriginal people in prisons was a result of the high rate of imprisonment of Aboriginal Australians rather than different treatment for Aboriginal prisoners.

The Report:¹⁰¹²

identified the history of '*domination*' over *Indigenous people as the underlying basis for the disadvantage* [emphasis added] ... found that the *current socio-economic disadvantage stemmed from the social and economic disempowerment of Indigenous people after British arrival, the dispossession of Indigenous people from traditional lands* [emphasis added] (through violence, disease and the imposition of discriminatory policies and practices) and the subsequent erosion of Indigenous social controls, cultural identity and economic independence... found that the legacy of violence, government intervention and control had a lasting influence on Indigenous interaction with the criminal justice system... recognised, for example, a continuing hostility between police and many Indigenous communities, which affected the preparedness of some Indigenous people to identify as Indigenous when in police custody... identified a lack of faith by Indigenous people in court and corrections processes... [noted that] the Criminal justice processes, including court, sentencing and policing procedures, were also found to influence, or at least potentially influence, Indigenous over-representation... determined *that court processes were culturally insensitive, intimidating and alienating for many Indigenous people. To address the high numbers of Indigenous persons in custody* [emphasis added] ... made 339 recommendations addressing the underlying causes of Indigenous disadvantage and *modifying criminal justice processes* [emphasis added].

¹⁰⁰⁹ Australian Bureau of Statistics *Australian Social Trends* (2008) <www.abs.gov.au>.

¹⁰¹⁰ Australian Bureau of Statistics, above n 929.

¹⁰¹¹ Royal Commission Report on Aboriginal Deaths in Custody Report <www.austlii.edu.au>.

¹⁰¹² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, Final Report (1991) at [1.3.7]–[1.4.20], [1.7.6]; see further vol 2, ch 10. Also [1.4]; vol 2, ch 10; vol 2, ch 13; vol 3, [21.2.4]–[21.2.5]; vol 3, [22.4]. As cited in Dennis Byles and Tai Karp *Sentencing in the Koori Courts Division of the Magistrates Court* (Sentencing Advisory Council, Melbourne, 2010) <<http://www.sentencingcouncil.vic.gov.au>>.

To eliminate indigenous disadvantage, the Royal Commission called for empowerment, the associated right to self-determination and reconciliation.¹⁰¹³

(a) Recognition of Aboriginal/Indigenous Law

In 1986 the Australian Law Reform Commission completed a 10 year inquiry into processes for recognising Aboriginal Customary Law.¹⁰¹⁴ The Social Justice Commissioner made a lengthy submission to the Northern Territory Inquiry stating that:¹⁰¹⁵

...there is currently a crisis in Indigenous communities. It is reflected in all too familiar statistics about the over representation of Indigenous men, women and children in criminal justice processes ... ultimately these statistics reflect the breakdown of indigenous community and family structures ... *customary law should be treated by the Government as integral to attempts to develop and maintain functional self determining Aboriginal communities...* [emphasis added].

This Report also supported the Northern Territory Government for its statements that:

... in accordance with Australian and international law, Aboriginal Customary Law should be recognised consistent with universally recognised human rights and fundamental freedoms' and that it believes that 'there is much value in supporting and sustaining Aboriginal Customary Law, and that the knowledge contained in Aboriginal Customary Law can be of mutual benefit to all citizens of the Northern Territory as well as its custodians'.

The disproportionate representation of indigenous peoples in detention centres, together with the need for a better court service against the background of changing political and intellectual paradigms, have contributed to the recognition of Aboriginal customary law and the establishment of Indigenous Sentencing Courts.

¹⁰¹³ Above at vol 1, [1.7.6]–[1.7.9]; vol 4, ch 27; vol 5, ch 38.

¹⁰¹⁴ See Australian Law Reform Commission *The Recognition of Aboriginal Customary Law* (31 Sydney, 1986) <www.austlii.edu.au>.

¹⁰¹⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner *Submission to the Northern Territory Law Reform Committee Inquiry into the Recognition of Aboriginal Customary Law* (Human Rights Equal Opportunity Commission, Sydney, 2003) <<http://www.humanrights.gov.au/legal>>.

There are two overriding principles at all stages of development and evaluation of an Aboriginal or Torres Strait Islander Court. First, that the court is a special measure enabling Aboriginal and Torres Strait Islander peoples to enjoy their rights to equality before the law. Secondly, equal treatment before the court. Intrinsic to these two principles is the right of self-determination for the Aboriginal and Torres Strait Islander Peoples afforded by these courts, particularly as Brennan J stated:¹⁰¹⁶

The purpose of securing advantage for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefits. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material foisted upon them.

The first urban Indigenous Sentencing Court was convened in South Australia in 1999 and all but one state (Tasmania) has established some type of indigenous justice practice.¹⁰¹⁷ There are various degrees to which these fora implement indigenous justice; these vary from a more formalised practice for sentencing indigenous offenders to a less formalised practice, where judicial officers elicit sentence related information from indigenous people. Hybrid forms have also developed with the introduction of circle courts.

The doctrine of therapeutic jurisprudence has recently provided legitimacy and a framework for the new indigenous courts. Problem solving courts are not a novel idea and have become increasingly common in Australia.¹⁰¹⁸ The main themes of therapeutic jurisprudence and problem solving courts include a shift of court practice away from the traditional adversarial model, a commitment to achieving offender rehabilitation, a focus on achieving tangible outcomes (i.e., reduce indigenous over-

¹⁰¹⁶ *Gerhady v Brown* (1985) 57 ALR 472 at 514, 516 and 522 Australian High Court per Brennan J.

¹⁰¹⁷ See Marchetti and Daly, above n 828, at 416.

¹⁰¹⁸ For an interesting comparison between New Zealand and Australian problem solving courts see Richardson, Thom and McKenna above n 764, at 185 – 210.

representation), and the use of judicial authority to solve problems and change offender behaviour.¹⁰¹⁹

A discussion paper confirms that the evolution of Australia's 'new' indigenous courts occurred in response to the problem of indigenous over-representation in the criminal justice system.¹⁰²⁰ Both the Murri (Queensland) and Koori Court (Victoria) were initiated in response to the Royal Commission into Aboriginal Deaths in Custody and subsequent undertakings (formalised Indigenous Justice Agreements) by both Queensland and Victoria to reduce indigenous over-representation. In South Australia the Nunga Court also grew out of concerns over high rates of indigenous offending, but did not result directly from a State Justice Agreement.¹⁰²¹

(b) Koori Court (Victoria)

The Koori Court model was established in 2002 as a direct consequence of the Victorian Aboriginal Justice Agreement.¹⁰²² The Koori Court was designed to ensure, among other things, greater indigenous involvement in the criminal justice system and the integration of the government service provision into the indigenous community.¹⁰²³ It was described as a major initiative and was designed to minimise indigenous over-representation in the criminal justice system through the application of mainstream law in a more appropriate way for the Koori people.¹⁰²⁴ The Koori Court is more comprehensive than either the Nunga or Murri Court because it is enshrined in legislation. The Magistrates' (Koori Court) Act of 2002 provides for the establishment of a Koori Division of the Magistrates' Court and defines the jurisdiction and procedure of the Koori Division.¹⁰²⁵

¹⁰¹⁹ CJR Information paper *Juxtaposition between Sentence Severity and Therapeutic Jurisprudence* (2003) as cited in "Australia's 'New' Indigenous Courts" <www.cjrn.unsw.edu.au>.

¹⁰²⁰ CJR, above n 939.

¹⁰²¹ Mark Harris "From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?" (2004) 16(1) *Current Issues in Criminal Justice* 26 at 26-41.

¹⁰²² See SA Council above n 932 at 8 for further discussion.

¹⁰²³ Mark Harris "The Koori Court and the Promise of Therapeutic Jurisprudence" (2006) 1 *Murdoch University Electronic Journal of Law* 129.

¹⁰²⁴ The Office of the Attorney-General "*Hull Opens Melbourne's First Koori Court*" (press release, March 4, 2003).

¹⁰²⁵ See Magistrates Court (Koori Court) Act (Vic) 2002 <www.legislation.vic.gov.au>.

Australian jurisdictions that have set up specialist courts to deal with the sentencing of Aboriginal peoples have yielded far lower recidivism rates.¹⁰²⁶ Anecdotal evidence supports the findings that these courts are showing signs of success.¹⁰²⁷ Chief Justice Wayne Martin noted recently that:¹⁰²⁸

All the research that I have seen conducted on the outcomes of problem solving approaches to sentencing in Drug Courts and Domestic Violence Courts shows that they have been successful in reducing the risk of re-offending.

However, he also stated that with respect to indigenous offending rates:

...unless and until a whole of Government approach is taken to these issues in a *conscious and deliberate attempt to restore traditional culture and lore, the over-representation of Aboriginal people in the justice system is likely to continue* [emphasis added]. However, there are things that can be done within the court system to improve the situation. Amongst them is the adoption of an approach in which Aboriginal people are given a greater sense of participation in the justice process through the adoption of sentencing processes such as those utilised in Circle Courts or Koori Courts which have been successful in other jurisdictions.

(i) Court jurisdiction

The Koori Court Division of the Magistrates' Court¹⁰²⁹ was established pursuant to the Magistrates' Court Act 1989.¹⁰³⁰ In order to appear before the court, the defendant

¹⁰²⁶ See Mark Harris *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004* (Victorian Department of Justice, Melbourne, 2006) at 15 <www.justice.vic.gov.au>.

¹⁰²⁷ Rachael Mazza "Deadly Yarns launch and the Koori Court" ABC Network (online ed, Australia, 22 April 2005) <www.abc.net.au>. See also comments by Bonnie S. Fisher, Steven P. Lab, Barry A Fisher in *Encyclopedia of Victimology and Crime Prevention* (Sage Publications, 2010) pp 628 – 629 where they note the complexity involved in the accurate evaluation of of Koori Courts.

¹⁰²⁸ Hon Wayne Martin CJ "The Magistrates of Western Australia Annual Conference 2006" (paper presented at Annual Conference, 8 November 2006) <www.supremecourt.wa.gov.au>.

¹⁰²⁹ For discussion on general background see Marchetti, Elena, and Kathleen Daly *Indigenous Courts and Justice Practices in Australia* (Australian Institute of Criminology, 2004) <www.aic.gov.au>; See also K Auty and D Briggs "Koori Court Victoria: Magistrates Court (Koori Court) Act 2002" (2004) 8(1) Law Text Culture Challenging Nation 7 <www.ro.uow.edu.au> for the views of the first sitting Magistrate and first enabling Aboriginal Justice Officer. See also Sentencing Council of Australia *Report Sentencing in the Koori Court Division of the Magistrates Court* (2010) at ch 3; Department of Justice, Victoria, 'Overview of the Koori Court', Brochure (2006); Department of Justice Victoria "Koori Court – A Defendant's Guide' Brochure" (2008).

¹⁰³⁰ Magistrates' Court Act 1989 (Vic), s 4D.

must be Aboriginal,¹⁰³¹ consent to the proceedings being heard in the Koori Court¹⁰³² and plead guilty.¹⁰³³

The legislation provides that the Court is to be conducted with as little formality, technicality and with as much expedition as the requirements of the legislation and proper consideration of the matters before the Court permit.¹⁰³⁴ The proceedings must be comprehensible to the defendant, family members and other Aboriginal persons who are in attendance.¹⁰³⁵

The Court may regulate its own procedure.¹⁰³⁶ The Koori Court has the power to hear all matters within the jurisdiction of the Magistrates' Court, with the exception of sexual offences and offences against the Crimes (Family Violence) Act.¹⁰³⁷

In relation to sentencing, the Koori Court may consider "any oral statement made to it by an Aboriginal elder or respected person",¹⁰³⁸ and the court may inform itself in any way it thinks fit.¹⁰³⁹ Unlike the marae based court, which is not driven by legislation, the Magistrates' Act provides for a number of persons who might be heard, including health workers, corrections officers, the victims and family members of the accused.¹⁰⁴⁰

Legislation, like the Magistrates' Court Act (Vic) 1989, provides a clear directive and certainty to the judge and those involved within the criminal justice system. It is suggested that, should any indigenous court be established within New Zealand, similar legislative provisions should be implemented.

Victoria currently has nine Koori Courts, seven adult Courts and two Children's Courts. The adult courts are located in the rural areas of Shepparton, La Trobe Valley,

¹⁰³¹ Section 4F(1)(a).

¹⁰³² Section 4F(1)(d).

¹⁰³³ Section 4F(c).

¹⁰³⁴ Section 4D(4).

¹⁰³⁵ Section 4D(5).

¹⁰³⁶ Section 4D(6).

¹⁰³⁷ Section 4D(1).

¹⁰³⁸ Section 4G(2).

¹⁰³⁹ Section 4G(3).

¹⁰⁴⁰ Section 4G(3).

Mildura, Bairnsdale, Swan Hill, Warrnambool (including a circuit to Portland and Hamilton) and the metropolitan region of Broadmeadows; the Children's Courts are located at Melbourne and Mildura. The setting of the location of the Koori Courts occurs through community consultation via the Aboriginal Justice Forum.

The Aboriginal Justice Forum is the body responsible for supervising the development, implementation and direction of Koori initiatives under the Victorian Aboriginal Justice Agreement (AJA). The Forum meets regularly to review its progress and report to the Victorian Government on Koori justice outcomes. Its key roles are to:¹⁰⁴¹

- promote best practice approaches in program development and service delivery
- promote cross-program linkages and the development of a whole-of-government approach
- monitor and report on implementation and justice outcome data.

Elders and Respected Persons (ERPs) are recruited through advertising in local communities. The ERPs assist the court in relation to cultural and community issues, but have no role in sentencing. Unlike kuia and kaumatua from the marae based courts, ERPs are statutorily appointed and are paid a sitting fee. The ERPs undergo a week-long professional training regime and ongoing professional development is available.

Similar to the training programme for the judiciary in New Zealand, magistrates also undergo continuing professional development. However, the Victorian scheme is quite distinct from the Maori Land Court in New Zealand, where the judges are required to be well versed in tikanga Māori and have an understanding of te reo (the Māori language). Section 7(2A) of Te Ture Whenua Māori Act 1993 provides:

A person must not be appointed a Judge unless the person is suitable, having regard to the person's knowledge and experience of *te reo Māori*, *tikanga Māori* [emphasis added], and the Treaty of Waitangi.

¹⁰⁴¹ See Department of Justice Website for further discussion <www.justice.vic.gov.au>.

A day-long training programme is conducted for magistrates who have previously presided over a Koori Court hearing, and it is recommended to all magistrates that they observe at least one full day's hearing before presiding over Koori Court. The Judicial College of Victoria conducts a biennial cross-cultural immersion programme over three days. Koori Court magistrates have three days per year set aside for meetings, in which to discuss issues pertinent to the Koori Court and to undergo further professional development.

It is acknowledged that the Judicial College of Victoria also conducts seminars in relation to Aboriginal issues and the Koori Court. In addition, the College supports the Judicial Officers' Aboriginal Cultural Awareness Committee, which is chaired by Justice Stephen Kaye of the Victoria Supreme Court.

(ii) Court Procedure¹⁰⁴²

The Victorian model complies with the requirements of the legislation.¹⁰⁴³ Each Koori Court has a Koori Court Officer (KCO) who prepares the list and liaises with defendants and their families, legal practitioners, prosecutors, corrections officers and service providers. The KCO ensures that any issues relating to the establishment of Aboriginality or conflict of interest are resolved before the hearing. Where appropriate, the KCO arranges services and makes referrals on behalf of the defendant.

Prior to the list commencing each morning, the magistrate meets with the KCO and the Elder and Respected Persons (ERP) who will be sitting with the magistrate later that day. The KCO provides a summary of the allegations, charges, prior convictions (if any) and any reports listed for the day with respect to each defendant. The documents are read and each case is discussed. The magistrate will explain any legal issues relating to the individual cases to the ERPs as well as any unfamiliar terminology. The magistrate also broadly discusses what the sentencing range might be for each case.

¹⁰⁴² I am grateful for the assistance and academic conversations with Magistrate Jelena Popovic and acknowledge her support with this reproduction. See also Bridget McAsey "Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court" (2005) 10(2) Deakin Law Review.

¹⁰⁴³ Magistrates' Court Act 1989 (Vic), s 4D- Koori Court.

The Magistrate will ascertain which order the ERPs wish to enter the courtroom, how the ERPs wish to be addressed, whether the ERPs wish to be introduced by the magistrate or would prefer to introduce themselves, whether they wish the persons in the courtroom to stand or remain seated upon the entrance of the magistrate and ERPs into the court room.

The Bar table is set up as follows:

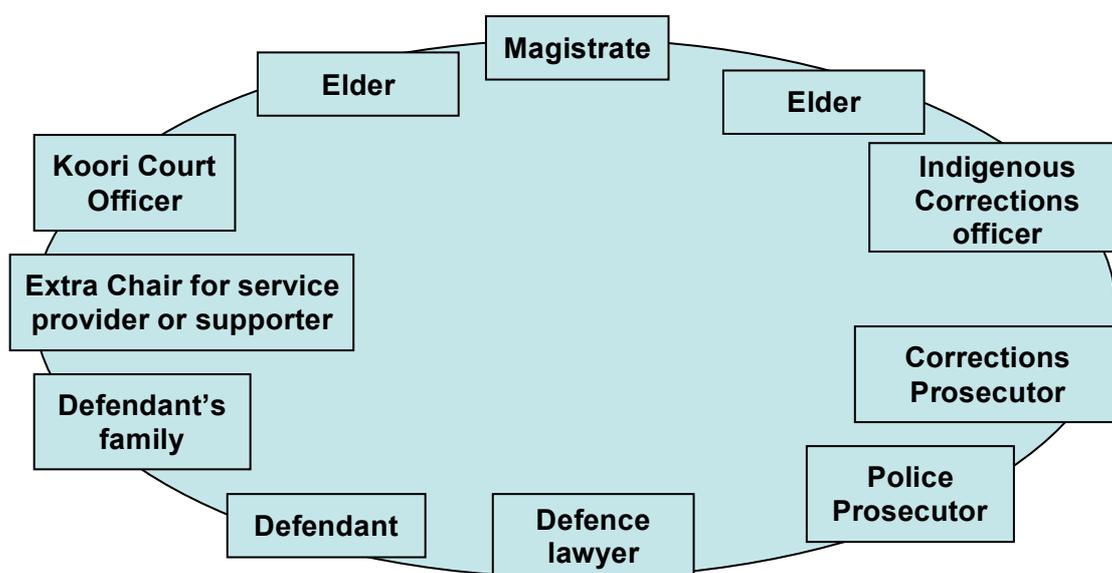


Table 2: Diagram of Koori Courts (Department of Justice, Victoria, Australia November 2012)

Similar to the mihi in marae based courts, each case commences with an acknowledgment of country,¹⁰⁴⁴ as well as traditional owners, ancestors and elders. This is usually provided by the magistrate or by an elder. Reference is made to the court having been smoked,¹⁰⁴⁵ the physical layout of the courtroom, and the artwork which is being displayed as an acknowledgment of the importance of culture and traditional beliefs; and the local Aboriginal community's approval of the Koori Court being conducted at the court house. This "redefinition" of the environment is similar to the use of the 'whare nui' for marae based courts.

¹⁰⁴⁴ Country is similar to when Māori refer to their iwi or tribal area.

¹⁰⁴⁵ Smoking is a process of lighting special native plants to cleanse the area or process.

The reference to the court having been smoked is highly significant. The smoking ceremony is conducted by an elder of the local community and involves eucalyptus leaves being lit and carried throughout the interior of the courthouse. This is similar to the smudging ceremony performed by First Nation peoples in Canada.¹⁰⁴⁶ In addition to demonstrating the acceptance of the local community for the important business to be conducted in the court house, it is similar to a 'karakia' for Māori. Smoking clears away bad spirits, purifies the surroundings and establishes the way for a fresh beginning.

The magistrate ascertains the defendant's consent to having the matter dealt with in Koori Court. The case then proceeds as it would normally in the magistrates' court; with pleas of guilty being entered, the prosecution summary of facts being read out and adopted, and any prior convictions tendered.

The legal representative commences the plea. This may be interrupted by contributions or questions from the magistrate, elders, the defendant's family, community members, police officers and prosecutors as appropriate.

The KCO advises the court of arrangements which have already been put in place and of any programmes available to the defendant. Representatives of any other support agencies are also invited to speak, as are family members and any other community members. The most powerful aspect of the proceedings is when the ERPs address the defendant.

The court allows sufficient time for ERPs, family members and community members to participate fully and feel confident to speak. The magistrate can assist with this process by asking individuals directly if they wish to add anything. Often magistrates will need to remain silent and allow for quiet so that others have the chance to speak. If the victim is present, an opportunity to be heard will be provided. The defendant is asked what he/she would like to say and is encouraged to speak. The ERPs may speak to the defendant regarding his or her conduct.

¹⁰⁴⁶ See Wanda McAuslin (ed) *Justice as Healing Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native law Centre* (Living Justice Press, St Paul, Minnesota, 2005).

The ERPs and the magistrate then confer audibly and openly at the bar table to discuss rehabilitation, community and family considerations. Conditions attached to orders may also be discussed at the table. The expertise of Community Corrections may be called upon. Everyone present in the courtroom is given the opportunity to be involved in the problem solving process.

After everyone who wishes to have input has been heard, the magistrate will announce the defendant's sentence. The defendant may again be asked to speak to ensure that he or she fully understands the nature of the sentencing order.

At both the lunch adjournment and after the last case has been heard, the magistrate, ERPs and KCO will have the opportunity for a debriefing.

(iii) Case Studies¹⁰⁴⁷

Scenario 1: The Koori Court changing offending patterns

On the day of the offence, the Defendant had been consuming alcohol and decided to ride his motorbike to another nearby town and back again. While driving through the town, he lost control of the motorcycle and ran onto the footpath.

The Defendant sustained minor injuries as a result of the collision and was taken by ambulance to a hospital. A sample of his blood was tested and it was subsequently found that his blood-alcohol levels were more than double the legal limit. At the time of the offence, the Defendant had been disqualified from holding a motorcycle license, and the motorbike that he was riding at the time of the accident was not registered.

The Defendant initially denied that he had been driving the motorcycle at the time of the accident.

¹⁰⁴⁷ I am grateful to Magistrate Jelena Popovic for the reproduction of these case studies which are also cited by Harris above n 1026, at 96 <www.justice.vic.gov.au>.

Charges

- Careless driving
- Exceed prescribed concentration of alcohol
- Driving whilst disqualified
- Driving an unregistered motorcycle

Sentencing Considerations

It was noted that the Defendant had four previous drink driving convictions. It was revealed in the course of the proceedings that the Defendant's father-in-law had been killed in an accident, and that the Defendant had ridden his motorcycle to the scene of the accident.

The incident that led to the Defendant being charged took place on the same day. In addressing the Koori Court, the Defendant noted that, at the time of the offence, he was "out of my mind with grief". In speaking to the Defendant, one of the elders drew his attention to the fact that they were related. The elder noted that he had been through similar experiences in his own life.

Elder:

We're related. I looked you know through our family trees and stuff ... I was like you too, I mean I used to drink and I was pretty angry with myself and everybody else around me, but you know you've gotta pull yourself out of it, you get emotional.

I attended alcoholics anonymous and that helped me in lots of ways you know, I was just sort of suggesting about what he was thinking, you know, I mean you could have killed someone, kids and things like that you know, and I done the same thing, I pinched a car and rolled it and you know, but I thought about it later, I could have killed myself or I could have killed someone else.

The other elder in attendance during the hearing noted that there were two laws: white law and Aboriginal law. He went on to say that he followed Aboriginal law, but that in offences like driving cars, he and the Defendant had to accept that it was the

‘white law’ that had to apply, even though he felt that he may well have done exactly the same thing as the Defendant in the circumstances.

The magistrate then addressed the Defendant:

I wonder if anybody’s ever sat in this court as you have today and had such significant things said to them by members of their community who are such respected members. I wonder if it had ever been the case that they’d been told that those members of the community are going to support you but also tell you, you’ve gotta behave responsibly. Uncle ---- talked to you about the differences in white and Aboriginal law (and)... Aunty ---- talked to you from the bottom of her heart about what she’s been through...

The Defendant was asked whether he had anything he wished to say to the elders at the conclusion of the hearing, and he said:

Like they’ve made sure that I’ve been keeping out of trouble, I’ve made another appointment for the drug and alcohol counselling, which I’ve gotta go back on Monday and I asked them if I can keep on attending so I can improve myself and suppose to say to the community and to me Elders that you know, I’m making a step, so that way I can just get on the right track, not the wrong one and by doing that I’ll make sure I’m gonna not ride me motorbike.

In a subsequent media interview, the Defendant observed the impact that the Koori Court sitting had upon him. He said:

Well in the Koori Court like you feel like the size of an ant. When they talk to you, you do, you start getting a lump in your throat, you feel like you know, crying. I’ve cried even in there, and they make you understand, we’re not above the law, and we get up and say what we have to say about ourselves, and they listen to what we say.

Scenario 2: The Koori Court and the importance of family and community in sentencing.¹⁰⁴⁸

The Defendant appeared at the Koori Court in relation to a number of charges. The first group of matters related to his driving at an excessive speed through a school area — a 40 kilometre zone. The vehicle he was driving at the time was also unregistered and had false registration plates. The second group of charges related to the actions in the early hours of a morning when he assaulted and abused two women in a nightclub. After being ejected from the nightclub, the Defendant became aggressive, took his shirt off, and abused the security personnel. A young woman, who approached him to tell him to put his shirt back on, was subsequently punched in the face.

Charges

- Intentionally causing injury (two counts)
- Assault with a weapon
- Driving while disqualified
- Use of an unregistered motor vehicle
- Fraudulently altering/using identification.

Proceedings

In this case the Defendant came from a well-known Koori family from the region. The Defendant was very keen to ensure that his father did not attend the court and had not told him of the seriousness of the charges.

The Defendant also initially refused to accept one of the elders who had been listed to sit in at the hearing, alleging that there was a history of conflict between his family and that of the elder. As the summaries of the charges were read out, the father became quite distressed, both by the nature of the offences and by the fact that his son had received two severe beatings by unknown males after the nightclub assault.

During the course of the hearing, it was made quite clear that there was a real prospect that the Defendant might be sentenced to imprisonment for his offences.

¹⁰⁴⁸ Harris, above n 1026, at 101.

Elder One: “Cos you know I’ve been through a lot of things with, with drinking alcohol, nearly killed myself, you know, jumpin’ off bridges and doing all them things.”

Elder Two: “I had a good talk to [defendant’s name] and I told him that these are very serious charges, and I told him that the ----family were a very respectable family ... they were all the family that came over here, the [family name] came to Shepparton when things were *really* tough, when racism was very bad ... and they held their head up to everything ... they challenged everything that come in front of them, and they were all good sportsmen and respectable people, and I don’t have to tell you any more, he knows what I said to him ... that more or less he was degradin’ his grandfather and his grandmother and for what he’d done”.

Defendant: “I’m just ashamed of what I’ve done ... I’ve let a lot of people down and I know I’ve done the wrong thing. I’ve just got to learn by it, and so, and I apologise to youse for putting my family in pain yesterday.”

Father of Defendant: “I’d like to first of all acknowledge the Elders as well and ... I’d just like to acknowledge and thank my other community members here of the support they’ve had as for, for us here and as in the (family name). And I’d also like to acknowledge the concept of the Koori Court, I think it’s very, very good and, your Worship yourself, the cultural understanding of the issues, I think you can have these sorts of processes in place but I think that it takes that kind of partnership to understand some of the things ...”

Sentence

The Defendant was placed on a Community Based Order (CBO) with conviction for twelve months, 150 hours of unpaid community work and a fine of AU\$184.00.

Observation

From the initial possibility that the Defendant might be imprisoned, the Defendant was given a CBO. The magistrate observed, in handing down the sentence:

if you were here by yourself, standing in the back of the Court with a Magistrate hearing a submission in relation to submission, I think you'd be struggling to stay out of gaol. It's down to your community that you're not going to gaol.

This case was a clear illustration of the importance of the Koori Court process in determining the underlying facts behind the case. The facts that were subsequently revealed in the course of the hearing were invariably highly emotional and ultimately influenced the magistrate not to order a term of imprisonment.

This case also gives a strong indication of the importance of community. Even though the family no longer had such strong links with the local Koori community, they were placed in a network of shared history.

The case was also significant for the conversation that occurred between the elders and the Defendant, and the father of the Defendant and the elders. Such was the intensity of this case that the magistrate commented in closing that: "It takes a bit of courage to come in here, and it takes a lot of guts to submit yourself to your Elders and we acknowledge that too." Cases such as this one are a clear indication that the Koori Court is anything but the soft option that it is sometimes referred to.

Scenario 3 The Koori Court giving the Defendant a chance to turn their life around.¹⁰⁴⁹

The Defendant had a long history of drug use. She appeared in the Koori Court in relation to a number of incidents.

The first matter arose when the Defendant and her partner became embroiled in a dispute whilst walking along the street. The Defendant pulled a knife from her backpack and slashed her own arm. After police attended she refused to drop the knife and was holding the knife to her throat when the police intervened with pepper spray. She was then taken to the local hospital.

¹⁰⁴⁹ Harris, above n 1026, at 106.

The second lot of charges related to an argument between the Defendant and two other persons, who she alleged had stolen some of her possessions. Upon arrival the police observed that the Defendant had a knife in her hand. She was ordered to place the knife on the ground. She complied. The Defendant was charged with using offensive language under the Summary Offences Act (Vic) 1966.

The third incident occurred when the Defendant followed another person from an office and abused her. The Defendant grabbed the victim's hair as she attempted to get into her car and struck her on the nose.

The fourth incident involved the Defendant going to a store and taking a power tool without paying. When confronted by security staff, she refused to return to the store and left the premises. After police were contacted, they visited her home address where she confessed to the theft.

The final incident involved theft of grocery items from a supermarket. The Defendant took the items from the shelves, placed them in her handbag and left the store without paying. When confronted by a staff member, the Defendant became abusive but then agreed to hand over the stolen goods. Police subsequently arrested her in relation to this matter and she was charged with theft.

Charges

- Two counts of shoplifting
- Possession of a controlled weapon without lawful purpose
- Possession of a dangerous article
- Use of indecent language in a public place
- Possession of a prohibited weapon
- Unlawful assault

Sentencing Considerations

The elders and respected persons expressed their concern at the Defendant's history of self-harm and substance abuse. There was reference to a history of sexual assault and the pain suffered by the Defendant. However, the Court also insisted that it was time for her to take responsibility for the events in her life.

Elder: “It’s really heartbreaking to see you destroy, you’re trying to destroy yourself the way you do ... I hate to see you hurt, hurting yourself. And I really do love you [defendant’s name], I do love you. But, I want to see you pick yourself up and make your decisions for you.”

Sentence

The Defendant was convicted and placed on a Community Based Order (CBO) for a period of 12 months, which was to include psychological counselling through the Corrections Department of Victoria. In addition, the Defendant was referred to other service providers, including a detoxification programme for her drug and alcohol problems. The Defendant entered into a nine-month residential programme to combat her substance abuse.

Observation

A remarkable feature of this Koori Court case was the manner in which the elders affirmed their love for the Defendant, but also insisted that she take responsibility for her own life. It was then possible for the Koori Court to tailor a comprehensive order that addressed the underlying problems of substance abuse and made provision for a mental health assessment. At the end of the sentencing order, after the Defendant had thanked the elders, one of them responded from around the table that she should persevere with the psychological help, even though, they noted, “it’s not going to be easy”. The elder concluded by saying, “I think you’re beautiful and you are ... you are a valued member of our community.”¹⁰⁵⁰

In a subsequent interview, the Defendant observed that the Koori Court had been a positive experience because it gave her the chance to tell her story. She said, “It gives you the chance to tell ‘em what you are and who you are and, you know, what you’ve been through and that.”¹⁰⁵¹

¹⁰⁵⁰ Harris, above n 1026.

¹⁰⁵¹ Harris above n 1026.

The Defendant also emphasised the fact that the elders had been there as an important part of the experience, because “they live in it, they’re the same, they’re Aboriginal themselves. And they understand”.¹⁰⁵²

(iv) Evaluation of the Existing Koori Courts

As with the establishment of the marae based courts, the catalyst for the Koori Courts has been the disproportionate offending rates of Aboriginal peoples. Victoria was chosen as the pilot court, mainly due to the ‘alarming statistics’ relating to indigenous offending in the State.¹⁰⁵³ Since the first Victorian Koori pilot courts commenced in 2002 and 2003, there has been a keen interest in their progress and effectiveness.

Commissioned by the Victorian Department of Justice, a formal evaluation was undertaken by Dr Mark Harris of the two pilot Koori Courts in Shepparton, a regional city, and Broadmeadows, a suburb of Melbourne. The 2006 Report, titled ‘A Sentencing Conversation’ noted a significant reduction in recidivism rates from those two courts.¹⁰⁵⁴ The rate of reoffending for participants in the Koori Court was substantially less than the recidivism rates for the general population.¹⁰⁵⁵ There was also a reduction in Koori offenders breaching correctional orders and a reduction in failures to appear in court. The positive evaluation resulted in the repeal of the sunset clause that prevented the Koori Court from operating beyond 30 June 2005.¹⁰⁵⁶

It is noted that the methodologies employed by Dr Mark Harris were questioned, in particular, for counting court files rather than individual defendants; using inadequate follow-up periods; and employing an ‘inappropriate comparison group’.¹⁰⁵⁷ Despite this criticism, the sunset clause was repealed without opposition.

¹⁰⁵² Harris above n 1026.

¹⁰⁵³ Victoria, Parliamentary Debates, Legislative Council, 29 May 2002, 1282 (Justin Madden); Victoria, Parliamentary Debates, Legislative Assembly, 24 April 2002, 1129 (Rob Hulls) as cited in Sentencing Council of Australia, above n 927, at 3.

¹⁰⁵⁴ Harris above n 1026.

¹⁰⁵⁵ The rate from Shepparton Koori court was found to be 12.5 per cent and from Broadmeadows it was 15.5 per cent. In comparison, the recidivism rates for all Victorians was said to be 29.4 per cent.

¹⁰⁵⁶ Courts Legislation (Miscellaneous Amendments) Act 2005 (Vic), s 9.

¹⁰⁵⁷ See Jacqueline Fitzgerald “Does Circle Sentencing Reduce Aboriginal Offending?” (2008) 115 Crime and Justice Bulletin 2; Marchetti and Daly, above n 828 at 419; Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (Federation Press, Australia, 2009) at 92.

In addition to an examination of the available statistics about offending and re-offending, the Review included a collation of questionnaires and qualitative feedback from the various parties involved in the Koori Courts. Some of the qualitative observations are reproduced below:¹⁰⁵⁸

.... Consistent themes that emerge from the additional comments made by the defendants on their questionnaires were the importance of the role of Elders and cultural factors in their court appearance and the fact that they had the opportunity to speak and that they felt the Magistrate was listening to them. Significantly a number of the defendants indicated that they had a long prior history of involvement with the criminal justice system (ranging from 10 to 43 years) and they felt that the Court represented a significant and different justice experience for them.

The Elders were unanimous in their belief that the Koori Court had improved relations between the local Koori community and the police. However, they were less emphatic on the question of whether they thought that the court was well understood and accepted by the local non-Indigenous community; with only one replying that they thought it was accepted, while six replied that they were “not sure”.¹⁰⁵⁹

In summary, the elders’ questionnaire indicated that they believed the Koori Court to be a success and that their role was respected and valued by the defendants and other court personnel.¹⁰⁶⁰ Significantly, they believed that the Koori Court had improved relations with the local police force, although there was less certainty as to the degree that the Koori Court was understood and accepted amongst the wider non-indigenous community.¹⁰⁶¹

The Report also contained 19 recommendations ranging from extending the Koori Court initiative to the provision of more Magistrates’ Court locations. This would place the Koori Court on stronger financial grounds as well as extending the jurisdiction to the Children’s Court.

¹⁰⁵⁸ Harris above n 1026.

¹⁰⁵⁹ Harris above n 1026. See also recent comments by Andrew Thompson in ‘Elders Want Koori Court to Stay’ *The Standard* (online ed, Australia, 27 April 2013).

¹⁰⁶⁰ Harris, above n 1026.

¹⁰⁶¹ Harris above n 1026, at 93.

Statistics and measures of success

One of the ongoing challenges is the collection of sufficiently accurate statistics and demographic information to inform future decisions. The Australian Bureau of Statistics defines an indigenous person as a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives. There are three components to the definition: descent, self-identification and community acceptance.

As with many Māori, it is not uncommon for an Aboriginal person to not self-identify as one upon arrest. Anecdotal reasons suggest that this is due to an unwillingness to become a victim of a negative stereotype, enforced by the over-representation within the criminal justice system, and thus classified as a problem. This presents a hurdle not only when comparing Aboriginals going through Koori Courts system with Aboriginals appearing in mainstream courts, but also in ascertaining accurate rates of criminality. Nonetheless, the recent report from Victoria indicate that over the last two years there has been a reduction of sitting days in the Koori Courts.¹⁰⁶² Although this is not conclusive, it supports anecdotal evidence that the Koori Courts reduce recidivism rates. Deputy Chief Justice Jelena Popovic further relates that:¹⁰⁶³

I met the mother of a young man whose case was heard before a magistrate and Elders at Koori Court several years ago. The young man's mother said that, as an Aboriginal person, the most significant development in Aboriginal social justice was the introduction of Koori Courts. It was her firm belief that her son's life may have taken a different turn entirely had his offending been dealt with in a conventional manner. The family had been part of the Stolen Generation and as a result, the son had not been particularly cultural before the Koori Court hearing. The hearing changed his life. For the first time in his life, the Elders connected him up to his elders and family members and he felt a sense of inclusion. Actually, he was made to feel valued by the community. The Elders told him about his family, provided him with support and reinforced community expectations. His sentence was deferred, during which period he attended Koori specific drug and alcohol counselling. He left

¹⁰⁶² See The Magistrates Court of Victoria Annual Report 2012/13 'A varied, substantial and extensive jurisdiction' 58.

¹⁰⁶³ Ibid at 57.

the Court not only with a sense of identity, but of pride, purpose and belonging. He has not reoffended, has completed a trade and has a family of his own. This story encapsulates what Koori Court means to me as a magistrate. It demonstrates how powerful a culturally appropriate court process can be. The young man did not become a statistic in the substantial overrepresentation of Aboriginal persons in custody. The process connected him to his culture and community and assisted him to become a contributing member of the wider community. His response to the Koori Court had the further effect of allaying his mother's concerns about his drug and alcohol abuse and his diminished future prospects.

Magistrates' resources, court staff and training

Support for magistrates who have had previous experience working with Aboriginal peoples or receiving cross-cultural awareness training is crucial.¹⁰⁶⁴ A Koori Court Benchbook would ensure a level of consistency in the court process. Court Registrars and Community Corrections Officers would also be beneficial to the process.¹⁰⁶⁵

Support programmes

An Integrated Services Programme that dovetails the various programmes needed to support a person's housing, their physical, mental and educational well-being, as well as other pertinent issues in a holistic way would be beneficial. This is seen as an essential way to reduce offending patterns and behaviours — both for Koori and mainstream offenders.

Guilty plea

The possibility of extending the Koori Courts beyond hearing matters where the defendant pleads guilty is considered. As the 'success' of Koori Courts continues, the academic interest in widening this jurisdiction beyond sentencing will also increase.¹⁰⁶⁶

¹⁰⁶⁴ Harris above n 1026, recommendation 4.

¹⁰⁶⁵ Recommendation 5.

¹⁰⁶⁶ Recommendation 10 and 11.

Offence exclusion

The report recommended continuing the existing exclusion of sexual offences and family violence crimes from the Koori Courts.¹⁰⁶⁷ This area remains problematic.

Indigenous academics such as Dr Kylie Cripps expressed concern during a recent Court of Appeal case in which an Aboriginal man, who was serving time for violently assaulting a fifteen year old girl, received a lesser sentence. This was in part because his shaming in the Koori Court constituted an additional customary punishment.¹⁰⁶⁸ This decision was in conflict with the official assurances that Koori Courts had nothing to do with customary law.

Professor Marcia Langton further commented that:¹⁰⁶⁹

You cannot downgrade assaults on women and say it's just a minor matter... – downgrading the seriousness of violence against women. She questioned why violent Aboriginal men were offered alternative court proceedings where the men are regarded as victims.

(c) Specialised Court – Domestic Violence

In Australia specialised family violence courts operate in New South Wales, Victoria, Queensland, Western Australia, South Australia, Northern Territory and the Australian Capital Territory. In Western Australia there are customised programmes for indigenous persons and members of other cultural groups.¹⁰⁷⁰ Notwithstanding this provision, the ability of these specialised courts to consider an indigenous legal system remains problematic.

¹⁰⁶⁷ Recommendation 12.

¹⁰⁶⁸ See R Guillnat “Aboriginal Courts Fail to Deter Offenders” *The Australian* (online ed, Australia, 23 October 2010) <www.theaustralian.com.au>.

¹⁰⁶⁹ Gullinat, above n 838.

¹⁰⁷⁰ For full discussion see Australian Government *Family Violence – A National Legal Response* (ALRC Report 114, 2010) <www.alrc.gov.au>.

(d) Where the Future in Australia is Heading

As Chief Magistrate Ian Gray has observed, there has been a paradigm shift in sentencing in the last 10 to 20 years. Moreover, “the growing realisation that crudely punitive sentencing is not a reliable way of dealing with recidivism, has led to the introduction into courts of various modes of therapeutic and restorative justice”. Koori Courts share many of the characteristics of the new form of rehabilitative sentencing that has been termed “therapeutic jurisprudence”.

Clearly, the innovative approach of the Koori Court is more than just ‘special treatment’ or a ‘soft option’, but is, in fact, reflective of international trends in sentencing and legal development. What distinguishes the Koori Court, however, is the importance of the indigenous community and the role played by the elders and respected persons. It is therefore important to distinguish the Koori Courts as more than just an example of restorative justice or therapeutic jurisprudence and recognise the Koori Courts as *sui generis*.¹⁰⁷¹ Although the Koori Courts are progressive, they have the potential to further address the raft of issues faced by Aboriginal peoples within the legal system, particularly that of power imbalance.¹⁰⁷²

E. United States of America

(a) Re-entry Courts – Specialised Courts

Re-entry courts are modelled from the same principle that underpins drug courts. That is, they are designed to assist ex-prisoners to participate in a judicially supervised parole programme to promote their successful integration into the community.¹⁰⁷³ They are specialised courts established in the United States that help to reduce recidivism and improve public safety through judicial oversight. The Hon. Richard Gebelein has stated:¹⁰⁷⁴

¹⁰⁷¹ Harris above n 1026, at 134.

¹⁰⁷² McAsey, above n 962, at 685.

¹⁰⁷³ Terry Saunders “Re Entry Court” in Bruce Winick and David Wexler (eds) above n 164, at 67.

¹⁰⁷⁴ Shadd Maruna and Thomas P LeBel “Welcome Home? Examining the ‘Reentry Court’ Concept from a Strengths Based Perspective” (2003) 4(2) *Western Criminology Review* 91 at 92.

...drug courts have succeeded because, unlike previous failed rehabilitative efforts, the drug court movement has been able to provide a narrative of what is causing the criminal behaviour of the drug court clients and what they need to get better.

For Maruna and LeBel, the critical question about re-entry courts becomes: “... is there a similar narrative for how and why re-entry should work?”¹⁰⁷⁵

The responsibilities generally assigned to re-entry courts include:¹⁰⁷⁶

- (a) A review of the offender’s re-entry progress and problems;
- (b) The ordering of offenders to participate in various treatment and reintegration programs;
- (c) The use of drug and alcohol testing and other checks to monitor compliance;
- (d) The application of graduated sanctions to offenders who do not comply with treatment requirements; and
- (e) The provision of modest incentive rewards for sustained clean drug tests and other positive behaviour.

Conventionally, the judiciary has no role beyond sentencing of an offender, at which point responsibility for the offender ends. In New Zealand the Department of Corrections takes over responsibility for the offender. Despite more prisoners being incarcerated and serving longer sentences before becoming eligible for parole,¹⁰⁷⁷ the availability of treatment programmes in prisons in New Zealand and the USA is questionable, and programme participation among prisoners has been declining over the past decade.¹⁰⁷⁸

Countries such as the United States of America have shown that re-entry courts can assist released offenders to deal with a variety of problems that, if left unresolved,

¹⁰⁷⁵ At 92.

¹⁰⁷⁶ “Office of Justice JD Programs, Model Programs Guide” <www.dsgonline.com>.

¹⁰⁷⁷ Parole Act amendments now require the offenders to serve a greater proportion of their sentence before being eligible for parole, see Parole Act 2002, s 20.

¹⁰⁷⁸ James P Lynch and William J Sabol *Prisoner Re-entry in Perspective: Crime and Policy Report Volume 3* (the Urban Institute, Washington DC, 2001).

could significantly interfere with their successful re-integration into the community.¹⁰⁷⁹ The long term benefits of successful re-entry into the community are viewed as outweighing the costs associated with establishing and operating a re-entry court.

The goal of re-entry courts is to reduce recidivism and the costs of incarceration and community disrepair, thus building a safer community in the process.¹⁰⁸⁰ To date, the supervision of offenders on parole has been poor.¹⁰⁸¹ These factors have given rise to a new approach to court management in which judges actively become involved in supervising the transition of the offender.

This is not a novel idea. Specialised courts such as the drug court and domestic violence courts operate in this fashion. A key component in this type of court is that the court holds the judicial authority to which offenders respond positively.¹⁰⁸² In addition, frequent appearances before the court with the offer of assistance, coupled with the knowledge of the predictable and prudent consequences for failure, assist the offender in the re-entry process.

A re-entry court can take various forms. A “Case Defined” Court provides for the judge to retain jurisdiction over a case during the entire life of the sentence.¹⁰⁸³ A “Stand Alone” Court allows the judge to maintain exclusive jurisdiction over re-entry cases.¹⁰⁸⁴ Another type involves parole boards working with the judiciary to develop quasi-courts through the use of an administrative law judge. This is similar to the situation in New Zealand where the Parole Board consists of members of the judiciary as well as community members to consider offenders for parole. All forms offer a unified and comprehensive approach to managing offenders from first appearance to

¹⁰⁷⁹ See for example discussion by Judge Terry Saunders on the *Harlem Reentry Court* in Winick and Wexler, above n 164, at 67 – 72.

¹⁰⁸⁰ This is consistent with New Zealand. See *Reid v Parole Board* (CA 247/05, 29 June 2006) where the Court of Appeal held that the Parole Board’s sole focus should be the recidivism risk of the individual offender.

¹⁰⁸¹ See “Report Finds Failure in Parole Management” *Newstalk ZB/One News* (New Zealand, February 17, 2009) <www.tvnz.co.nz>.

¹⁰⁸² OJJDP Model Programs Guide *Re Entry Court* <www.dsgonline.com>

¹⁰⁸³ OJJDP, above n 1002.

¹⁰⁸⁴ OJJDP, above n 1002.

incarceration and back into the community, exploring a new approach to improving offender reintegration into the community.

The goal is to establish a seamless system of offender accountability and support services throughout the re-entry process. Important elements of a re-entry court include the assessment of the offender's needs and planning for release; active judicial oversight of offenders during the period of supervised release, including the use of graduated and stringent sanctions for violation of release conditions; a broad array of supportive services with community involvement; and positive judicial reinforcement of successful completion of re-entry court goals.¹⁰⁸⁵

(b) Procedure – An Example

In February 2000 the Office of Justice Programs in the United States of America launched a re-entry court initiative to explore a new approach to improving offender re-integration into the community. One of the Delaware Superior Court re-entry pilots is the New Castle County Re-Entry Court Program, in which case managers' work with offenders to create re-entry court plans. The probation officer works closely with the community police to enhance offender monitoring.

This re-entry court process incorporates three tiers of supervision:

- (a) Phase I – participants meet weekly with the judge and probation officer
- (b) Phase II – participants meet every fortnight for three months and, if necessary, have further status conferences with the probation officer
- (c) Phase III – monthly status conferences are held at thirty day intervals

Case managers act as service brokers and report directly to the re-entry judge on the appropriate services and treatment for participating offenders.

The re-entry courts are situated in the heart of the community, close to where parolees live, receive services and work. This provides both convenience and a familiar setting

¹⁰⁸⁵ “Delaware State Courts *Re Entry Courts* <www.courts.delaware.gov>.

for the parolees. The period of time post release has been identified as a critical time for parolees; the provision of a quick and smooth transition is vital.

(c) Current (Indigenous) Re-entry Models

(i) A Spanish Comparison – Juez de Vigilancia Penitenciaria (JVP)

Creative initiatives from jurisdictions, such as Spain, have extended the reach of the judiciary in re-entry courts. David Wexler has proposed that the legal structure of Spain's JVP could be used as the foundation for a re-entry court.¹⁰⁸⁶

The JVP law in Spain was created to provide judicial watchfulness over prisoner rights and liberties, and is responsible for monitoring the prisoner's progress through an active treatment programme. One of the most remarkable features of the JVP is the prisoner's active participation in the planning and execution of the programme.¹⁰⁸⁷

The JVP may impose relevant conditions on release, such as prohibiting contact with the victim, participation in particular programmes and periodic appearances before the JVP.¹⁰⁸⁸

The role of the JVP begins upon incarceration. Conditional release is not automatic once the offender has served a certain length of his or her sentence, nor does release lie in the unfettered discretion of the JVP. Conditional release authority resides in a single judge, rather than in a multi-member board. It is not the judge's role to recall an offender.

Although this option is somewhat underdeveloped, according to David Wexler:¹⁰⁸⁹

... the enviable JVP legal structure deserves to be studied seriously by those in the United States and in other Anglo American legal systems contemplating reform of the re-entry process.

¹⁰⁸⁶ See Organic Law of Spain 1/1979, Art 76.

¹⁰⁸⁷ Bruce J Winick and David Wexler (eds) *Law in a Therapeutic Key* (Carolina Academic Press, 1996) at 3.

¹⁰⁸⁸ Winick and Wexler above n 1087, at 3.

¹⁰⁸⁹ Winick and Wexler above n 1087, at 7.

(ii) Tohono O’odham Nation

The Tohono O’odham Nation in the United States has a Law and Order Code and retains jurisdiction over many criminal offences.¹⁰⁹⁰ The re-entry of these offenders is a community concern. This Law and Order Code¹⁰⁹¹ allows a tribal court to “parole” offenders after successfully serving a portion (typically one half) of the imposed sentence.¹⁰⁹² Upon parole application, a tribal judge will typically grant or deny parole. Recently, the Tohono O’odham judiciary has been contemplating the use of the (tribal) Law and Order Code parole provision to facilitate and create a re-entry court where the judges would play an active role.¹⁰⁹³ The sovereign powers and jurisdiction of the Nation lies within their boundary. This would only extend to persons outside this boundary by consent.

There are obvious issues that flow from such a proposition. These include the type of cases a re-entry court may best begin with, the nature of a judicial parole hearing, the type of preparation an offender should engage in, the kind of parole conditions that may be imposed, the role of the community and the follow up process between the offender and the judge.¹⁰⁹⁴

(d) Navajo Courts¹⁰⁹⁵

Prior to the arrival of the Spanish (1598) and the Anglo-Saxons (1846), Navajos governed themselves and resolved disputes in their own way. They lived in family groups and clans, and resolved disputes by ‘talking things out’. The judges were the hozhoji’ Naat’aah, or peace chiefs. They were leaders, chosen by community

¹⁰⁹⁰ Tohono O’odham Nation comprises of a group of Native Americans who reside primarily in the Sonoran Desert of South East Arizona and northwest Mexico.

¹⁰⁹¹ Tohono O’odham Law and Order Code 1.15 (5) 1994 “a person convicted of an offence and sentenced to jail may be paroled after he or she has served at least half of the particular sentence with good behaviour”.

¹⁰⁹² Bruce J Winick and David Wexler ‘Practice Settings and Clinical Opportunities’ in David Wexler (ed) *Rehabilitating Lawyers Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, North Carolina, 2008) at 313.

¹⁰⁹³ Wexler above n 1092, at 314.

¹⁰⁹⁴ See Wexler above n 1092, at 316 for discussion.

¹⁰⁹⁵ For a similar example see also the Hopi Courts who have established both a civil and criminal jurisdiction and rely on Elders for the implementation of Hopi custom law. See Justin B Richland *Arguing with Tradition: the Language of Law in Hopi Tribal Court* (University of Chicago Press, Chicago, 2008) at 46-47 for further discussion.

consensus because of their wisdom, spirituality, exemplary conduct, speaking ability, and skill in planning for community survival and prosperity. They mediated disputes by encouraging people to discuss their problems fully in order to reach agreed settlements and restore harmony throughout the community.

The Constitution and later federal laws granted local sovereignty to tribal nations, but not full sovereignty identifying them as ‘domestic dependent nations’. The Indian Reorganisation Act 1934 was enacted to support Native American self-government and self-management of assets. In 1953 the United States Federal Code granted full effect to Native American laws and customs, provided that they were not inconsistent with respective state laws.

Any decision by a Tribal Court was recognised by State and Federal Courts and Native tribes held exclusive jurisdiction to pass laws and prosecute within their tribal boundaries. In cases where the offender was Native American and the victim non-Native American, or for serious offences, such as manslaughter or murder, the jurisdiction of State law applied. However, if the offender and victim were both Native American, but from different tribes, the respective tribal court jurisdiction applied.¹⁰⁹⁶

Unlike European law, traditional Navajo law was based not on power, but on relationships, respect and mutual need.¹⁰⁹⁷ By the early 1980s members of the Navajo Nation Council, judges and the Navajo people themselves sought to revive traditional Navajo justice methods. As part of this initiative, local judges began to apply traditional Navajo legal principles in their decisions. They did so in the English language. These decisions provided a great deal of insight into Navajo common law.

According to Justice Austin:¹⁰⁹⁸

¹⁰⁹⁶ See *Means v Nation* 432 F 3d 924, 933 (9th Cir 2005) where following an appeal by an Oglala-Sioux member against a Navajo Nation criminal prosecution for assault under the Navajo Nation Code the United States Supreme Court held that tribal court jurisdiction applies to all Native Americans.

¹⁰⁹⁷ Chief Justice (Emeritus) Robert Yazzie “History of the Courts of the Navajo Nation” (Paper prepared for the Orientation of the Judiciary Committee of the Navajo Nation, February 11 2003) <www.navajocourts.org/>.

¹⁰⁹⁸ Raymond D Austin “ADR and the Navajo Peacemaker Court” (1993) 32(2) *The Judges’ Journal* at 47- 48.

The Navajo experience is one of going back to fundamental values. Given the disruptions of non-Indian schools ... destruction of tribal land bases ... Indians have many barriers to overcome. All those influences have eroded traditional values ... so long as Navajos preserve their language, religion, traditions and culture they retain the framework for successful modern approaches. Navajo common law is not something quaint or curious – it is alive and vibrant ... it adapts to the present and it will adapt to the future ... this is a process of going back ... back to the future.

Three foundational Navajo doctrines are hozho (harmony, balance and peace), k'e' (unity through positive values) and k'e'i (kinship or clan system). These concepts are equivalent to their Māori counterparts; namely, whakapapa, whanaungatanga, rangimarie, kotahitanga and balance — the ultimate aim for tikanga. These three doctrines have been incorporated by Navajo judges in a Navajo adjudicatory system that is designed for American style litigation.¹⁰⁹⁹ The written decisions of the Navajo Courts provide information on how these doctrines provide tools for “healing” and attaining harmony within the community. In seeking answers for disproportionate rates of criminality and mental health issues, the potential answers lie not in the non-Indian system that oppressed the people, but in their own languages, philosophies and cultural practices that are intrinsic to the three underlying doctrines applied in these courts.

The Navajo Nation identifies and codifies the common law doctrines.¹¹⁰⁰ In addition, a traditional system is annexed to the modern court system to promote and facilitate the holistic use of Navajo culture, language, common law and spirituality. Unsurprisingly, restorative justice is a core responsibility of the Navajo justice system.

¹⁰⁹⁹ See *In re Mental Health Services of Bizardi* 8 Nav. Rptr (Nav. Sup. Ct. 2004) where the court referred to the principle of hozho, “bringing people in dispute back to harmony” as cited in Raymond Austin *Navajo Courts and the Navajo Common Law* (University of Minnesota Press, Minneapolis, 2009) at 65.

¹¹⁰⁰ For example, ‘The Navajo Indian Nation recognize[s] common-law marriages between tribal members living on the reservation if these marriages meet the elements universally recognized as constituting a common-law marriage (agreement to be married, cohabitation, and holding out to the public as being married). Such a marriage may be validated by the Courts of the Navajo Nation upon application and submission of proof that the persons involved have entered into such a marriage and are recognized as husband and wife in their community.’ GN 00305.080 Navajo Tribal Common-Law Marriages <<http://policy.ssa.gov/poms.nsf/lnx/0200305080>>.

For example, in response to a request by the Navajo Supreme Court to review juvenile detention, the probation and peacemaking functions of the process were merged. This was to promote rehabilitation of offenders.¹¹⁰¹ During this review many offences on the Navajo Nation were decriminalised and directed to restorative justice solutions, community participation and *nalyeeh*.¹¹⁰²

A study undertaken of Navajo Peacemaking noted that “peacemaking participants show a rate of reoccurrence of the presenting problem of 29%, while those processed through the Family Court show a rate of 64%”.¹¹⁰³ The study further suggests that “Peacemaking offers individuals and groups experiencing conflict a compelling opportunity to achieve resolution and community/family justice” and that the process offered.¹¹⁰⁴

a pervasive sense of fairness, experiencing higher levels of case settlement ... [and] that Peacemaking allowed them to communicate their feelings much more freely and maintained the centrality ... as essential to the process. These data are bolstered by the fact that many of the Peacemaking participants had previously dealt with family conflict within Family Court and had a personal basis of comparison.

F. Comparative Jurisdiction Conclusion

In Canada international bodies recommend effective access to justice for Aboriginal women.¹¹⁰⁵ As a way to achieve this goal, the Canadian Criminal Code supports the implementation of circle sentencing. Evidence suggests that the use of circle sentencing can contribute to lower recidivism rates.¹¹⁰⁶

¹¹⁰¹ “*Nábináhaazláago*” Initiative Services to Youth in Detention
<<http://www.navajocourts.org/Nabinahazlaago%20Files/Nabinahaazlaago.html>>

¹¹⁰² Initiative Services to Youth in Detention, above n 1021.

¹¹⁰³ Eric K. Gross Evaluation/Assessment of Navajo Peacemaking April 5, 2001. Available also at <<https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf>>, 46. Although the issue of selection bias was raised the author’s fieldwork dismissed this issue.

¹¹⁰⁴ *Ibid*, 44.

¹¹⁰⁵ For instance, the United Nations Declaration on the Rights of Indigenous People and also the Convention on the Elimination of All Forms of Discrimination Against Women.

¹¹⁰⁶ See Carol La Prairie and Julian Roberts “Sentencing Circles: Some Unanswered Questions” (1996) 39 *Criminal Law Quarterly* 69 at 73.

The Australian Law Reform (1986)¹¹⁰⁷ recognises the importance of customary law in addressing disproportionate offending rates. The Magistrates' (Koori Court) Act 2002 provides for the establishment of Koori Courts to operate during sentencing. Evidence indicates that the Koori Courts assist in issues of identity, the increase in community values and a contribution to the lowering of recidivism rates.

In the United States the concept of self-governance, a form of self-determination, is supported and has manifested in the Navajo Courts.¹¹⁰⁸ The jurisdiction of these courts is not confined to sentencing, but applies throughout the justice process. The concepts underpinning and actively employed by the Navajo Courts are similar to tikanga Māori.

Research indicates that circle-sentencing defendants in Canada re-offended at the same rate — 40 per cent — as Aboriginal defendants in the mainstream court system. On the other hand, Queensland's Attorney General, Cameron Dick, states the Murri Courts have better attendance, are valued by their communities and deliver culturally relevant sentences.¹¹⁰⁹

In a recent review of Queensland's Murri Courts, however, it was concluded that they did not reduce Aboriginal offending.¹¹¹⁰ This is consistent with recent findings from New South Wales, Victoria and Western Australia¹¹¹¹. The report found that two thirds of those appearing before these courts reoffended within twelve months. This is similar to the reoffending rate of mainstream courts.

¹¹⁰⁷ Australian Law Reform Commission *The Recognition of Aboriginal Customary Law* (31 Sydney, 1986) <www.austlii.edu.au>.

¹¹⁰⁸ Tribal nations are recognised as "domestic dependent nations" by the Federal Government and has established a number of laws attempting to clarify the relationship between the federal, state, and tribal governments.

¹¹⁰⁹ R Guillatt 'Aboriginal courts fail to deter offenders' *The Australian* October 23, 2010. <<http://www.theaustralian.com.au/national-affairs>>

¹¹¹⁰ *Evaluation of the Queensland Murri Court: Final report* Anthony Morgan Erin Louis (2010) Australian Institute of Criminology, Australian Government, Reports and Technical Background Paper 39, xv, where the report noted that 'appearing for sentence in the Murri Court had no impact on reoffending among indigenous offenders, at least in the short term.'

¹¹¹¹ See J Fitzgerald Does Circle Sentencing Reduce Aboriginal Offending? (2008) *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* no 115, May 2008: 1-12 as cited by Elena Marchetti Indigenous Sentencing Court Brief 5 December 2009 <www.indigenousjustice.gov.au>

While the recommendations of the 1986 Australian Law Reform Commission Report enjoy wide support from indigenous communities, indigenous customary law receives only limited recognition through the existing criminal justice system. Australia's 'new' indigenous courts operates within the existing Magistrates' Court systems in South Australia, Victoria and Queensland. These courts are responsible for sentencing only and require offenders to admit their guilt. They can be seen as a therapeutic response to the problem of indigenous over-representation within a more urban/mainstream location. The 'new' indigenous courts are also said to reflect the partnership practices that were recommended in Justice Agreements between State governments and indigenous organisations.

As in the marae based courts, available research indicates some level of success, although a number of concerns have also been highlighted. These include the criticism that the new indigenous courts are simply a European justice initiative dressed up as an indigenous one, and do not tackle the root problems of indigenous offending, such as the legacy of government oppression and the inter-generational effects of colonisation.¹¹¹²

In addition, these courts may place further strain on indigenous communities that are already affected by economic marginalisation and have few social services/resources. Ironically, the current locations of the indigenous courts may not be suited to an urban setting and, in the case of the Nunga and Murri Courts, a lack of formalised legislation could potentially pose problems. Marchetti and Daly argue that these courts have broader aims and objectives, in that they seek to achieve a cultural and political transformation of the law.¹¹¹³

In general, these courts address minor offences. However, various issues concerning whether the court's jurisdiction should be extended to include serious offences that warranted a jury have been raised.¹¹¹⁴ As these courts could be available to both indigenous and non-indigenous offenders, then theoretically, the composition of any

¹¹¹² Marchetti and Daly, above n 828.

¹¹¹³ Marchetti and Daly, above n 828.

¹¹¹⁴ See for example Criminal Procedure Act 2011 ss 71 – 74 that provides for four categories of offences attracting Judge alone or a Jury trial. It is envisaged that the proposed model would initially be open to Category 1 offences only (minor offences), with a review if the model proves successful.

jury should not present an issue. However, as these courts are primarily designed to address the disproportionate offending statistics of indigenous peoples, it is suggested that any jury convened should reflect an indigenous selection and composition. As the court is underpinned and directed by principles of healing, harmony and balance, any non-indigenous offender should not be disadvantaged. In any event the defendant may still choose to be tried in mainstream courts.

Although some indigenous courts indicate signs of success, it is suggested that a similar forum that is underpinned by customary law, but positioned outside the colonial justice system, may provide a way forward.

By identifying the ingredients of current initiatives from the comparative jurisdictions that have shown success and developing them further, it is suggested that the current implementation of traditional practices, such as circle sentencing, should be extended. Furthermore, a return to the concepts that underpin tikanga — an indigenous legal system — is pivotal to addressing disproportionate offending and imprisonment rates among indigenous peoples.

G. *A model for Māori?*

In the abstract, the model of a Navajo Court is amenable to a concept of an indigenous court for Māori. Notwithstanding this possibility, there are a few concerns.

To retain the integrity of tikanga, it should not be subject to codification or interpretation by the legal profession. First, there is the danger that important concepts will be lost in translation, which invariably results in some redefinition of the original concept or term.

In general, the incorporation of tikanga into Pākehā law implies a degree of acceptance and understanding of tikanga, which may not always be the case.

Second, the isolation of one concept or term from tikanga is an unnatural separation of the concept from its tikanga roots, its philosophical underpinnings and cultural constructs.

Third, the codification or placement of tikanga within mainstream legislation is only one factor to be considered amongst many others. This is also unnatural and degrading to tikanga.

The major problem with codifying tikanga is that these ‘right, proper’ ways of doing things are fundamentally contextual, rather than absolute. Like any other system of law, they depend on the context, including the nature of the offence, the individuals and kin groups involved, their previous transactions with each other and the particular expectations about ‘proper’ behaviour that have been discussed in this case.

The underlying tenets of customary law are common to all indigenous peoples. For the First Nations Peoples of Canada:¹¹¹⁵

Our traditions must be lived to be relevant, but it requires great effort to acquire and apply them. You have a choice about what laws you should follow ... those choices are strengthened when they remain connected to the earth and all we can learn from her ...

Law is most successful when it reflects the values and mores of those it serves.

The concept of therapeutic jurisprudence underpins the specialised courts and bears similarities with tikanga Māori. An examination of whether this doctrine of therapeutic jurisprudence can be used as a vehicle to import tikanga Māori concepts will inform the remainder of this thesis.

¹¹¹⁵ Borrows, above n 721, at 47.

ŪPOKO TUAONO

CHAPTER VI

TIKANGA MAORI AND THERAPEUTIC JURISPRUDENCE

A. *What is Therapeutic Jurisprudence?*¹¹¹⁶

Therapeutic jurisprudence was developed out of the mental health system. American Professors Bruce Winick and David Wexler, both mental health law academics, were the pioneers of this movement. During their practice within the American health system, they conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players, including lawyers, judges and the offender.¹¹¹⁷ This impact could be both therapeutic or anti-therapeutic.¹¹¹⁸ Thus a system that is designed to help people recover or improve their mental health often backfires and has the opposite effect.¹¹¹⁹

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences.¹¹²⁰ Sometimes these consequences fall within the realm of what we call ‘therapeutic’. At other times anti-therapeutic consequences are produced.¹¹²¹ Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way, so long as other values, such as justice, can be fully respected.¹¹²² For Māori, this means that the law should aspire to generate a state of ora (well-being) as opposed to an aggravated state of mate (ailing, ill). It does not trump other considerations or override important societal values, such as due process or freedom of speech and press.¹¹²³ Therefore therapeutic jurisprudence is the study of therapeutic and non-therapeutic consequences of the law.

¹¹¹⁶ Parts of this chapter have already been published Valmaine Toki “Therapeutic Jurisprudence and Mental Health Courts for Māori” (2010) 33 *International Journal of Law and Psychiatry* at 440 – 447.

¹¹¹⁷ Winick and Wexler above n 164, at 7.

¹¹¹⁸ Brian McKenna, Sandy Simpson and John Coverdale “Implementing Civil Commitment: Doing with Not Doing to” in Brookbanks and Simpson (eds) *Psychiatry and the Law* (Lexis Nexis, Wellington, 2007) at 72.

¹¹¹⁹ Alan Feuer “The Revolving Door” in Bruce Winick and David Wexler (eds) *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, USA, 1996) at 13–19.

¹¹²⁰ Bruce Winick *Civil Commitment* (Carolina Academic Press, North Carolina, 2005) at 6.

¹¹²¹ McKenna and Seaton above n 149, at 449.

¹¹²² Winick and Wexler above n 164.

¹¹²³ William Schma “Judging for the New Millennium” (2000) 37(1) *Court Review*.

Therapeutic jurisprudence is thus described as the “study of the role of law as a therapeutic agent”.¹¹²⁴ One author offered the following definition as best capturing the essence of therapeutic jurisprudence:¹¹²⁵

... the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.

In this sense therapeutic jurisprudence is more of a descriptive and instrumental tool than an analytical theory.¹¹²⁶ It focuses on the impact of law on emotional life and psychological well-being.¹¹²⁷ Therapeutic jurisprudence can be thought of as a lens through which to view regulations and laws, as well as the roles and behaviour of legal actors: the legislators, lawyers, judges and administrators.¹¹²⁸ It is through this lens that an indigenous legal system such as tikanga Māori can be implemented.

(a) Disadvantages and Criticisms

Support for therapeutic jurisprudence varies within academic circles from enthusiasm to mixed reviews. One of the early criticisms of therapeutic jurisprudence was that it was paternalistic. Perhaps this was a confusion in the title itself, which may have suggested a return to a therapeutic state.¹¹²⁹ The State legal system is paternalistic, so if the implementation of a therapeutic jurisprudential approach is successful in reducing Māori offending rates and those relating to domestic violence, then the positive outcome of restoring a state of ora would outweigh any criticism of paternalism.

¹¹²⁴ Winick and Wexler, above n 164.

¹¹²⁵ Christopher Slobogin “Therapeutic Jurisprudence: Five Dilemmas to Ponder” (1995) 1 *Psychol., Pol and Law* 193 at 196.

¹¹²⁶ Warren Brookbanks “Therapeutic Jurisprudence: Implications for Judging” (paper presented at the District Court Judge’s Triennial Conference, Rotorua, 1 April 2003).

¹¹²⁷ Winick and Wexler, above n 164.

¹¹²⁸ Schma, above n 1123.

¹¹²⁹ Dennis P Stolle and others “Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering” in Dennis P Stolle, David B Wexler and Bruce J Winick (eds) *Practicing Therapeutic Jurisprudence Law as a Helping Profession* (North Carolina Academic Press, Durham, 2000) at 8.

In his article Judge Arthur Christean¹¹³⁰ outlined a number of criticisms, such as issues of due process and constitutional infringements, which are also echoed by David Wexler.¹¹³¹ These criticisms involve the use of therapeutic jurisprudence within a specialist court setting. They include the belief that therapeutic jurisprudence puts a tremendous strain on resources and judicial collegiality, because of the ‘one court, one judge’ concept common to most specialised courts.

In New Zealand there is a move towards a proliferation of specialised courts.¹¹³² A specialist judge creates consistency of response. This is pivotal to the success of the Family Violence Court, where the judge is proactive in monitoring and the success of the court hinges on consistency from the bench. In a recent evaluation of the Waitakere Family Violence Court, Morgan found that:¹¹³³

Consistency of approach among the judiciary is very important. If we have visiting judges we do whatever we can to make sure they don’t go into the Family Violence Court.

Whilst this may seem to exacerbate the strain on judicial resources, the importance of specialist courts and the long term benefits outweigh this concern.

Christean further added that therapeutic jurisprudence works against the goal of a unified court system in the direction of specialised courts. These courts operate on a different judicial philosophy from other courts within the same district. However, proponents of problem solving courts have been quick to defend critics’ attempts to pick apart these new initiatives by comparing them to an idealised vision of justice that does not exist in real life.¹¹³⁴

There is also the concern that therapeutic jurisprudence undermines the separation of powers by asking the courts to fashion solutions to social problems, rather than

¹¹³⁰ AG Christean *Therapeutic Jurisprudence: Embracing a Tainted Ideal* (2002) The Sutherland Institute <<http://www.sutherlandinstitute.org>>.

¹¹³¹ Wexler and Winick, above n 164, at 80.

¹¹³² Family Court, Youth Court, Environment Court, Maori Land Court, Domestic Violence Court

¹¹³³ Mandy Morgan, Leigh Coombes and Sarah McGray “An Evaluation of the Waitakere Family Violence Court Protocols” (Massey University and WAVES, Palmerston North, May 2007).

¹¹³⁴ Winick and Wexler, above n 164, at 82.

leaving the legislature to deal with them.¹¹³⁵ Christean states that the line between the judicial and executive branch is blurred whenever courts become service providers, intent on achieving specific outcomes. In this regard the judge becomes part of a treatment team and assumes the responsibility for overseeing programmes sponsored by the team, thus exercising both an executive and a judicial function.

Notwithstanding this criticism, it may be that therapeutic jurisprudence is being identified or conflated with drug courts or other problem-solving courts, where the judicial officer is more actively involved than are the judges in mainstream courts.

Berman has acknowledged these concerns of impartiality, including coercion, paternalism and zealous advocacy.¹¹³⁶ However, Berman is also an advocate for therapeutic jurisprudence and problem solving courts, suggesting that better planning and dissemination of best practice standards can assist to allay these concerns.¹¹³⁷

This occurs in New Zealand within the youth justice sector as well as in the family court jurisdiction. In a family violence court, the effectiveness of its programmes is discussed regularly between the stakeholders. Judges make policy by taking advantage of the discretion that has traditionally been afforded to them over sentencing in order to craft more meaningful sanctions, or to direct programme changes.¹¹³⁸

There is merit in maintaining clear boundaries with respect to the doctrine of parliamentary sovereignty¹¹³⁹ and the separation of powers.¹¹⁴⁰ But in a therapeutic problem solving court, this could undermine the relational element that is necessary between the judge and the offender. By stating clear boundaries and defining roles at

¹¹³⁵ Although there are sometimes blurred lines, the role of the Court is to apply the law whereas the legislature ‘makes’ the law.

¹¹³⁶ Winick and Wexler, above n 164, at 80–83; See also Greg Berman “Redefining Criminal Court: Problem-Solving and the Meaning of Justice” (2004) 41 Am.Crim.L.Rev 131.

¹¹³⁷ Berman, above n 1136; See also Kathryn Sammon “Therapeutic Jurisprudence: An Examination of Problem Solving Justice in New York” (2008) 23(3) Journal of Civil Rights and Economic Development.

¹¹³⁸ Winick and Wexler, above n 164.

¹¹³⁹ See Phillip Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company, Sydney, 1993) at 418; Parliamentary Sovereignty - ‘Parliament enjoys unlimited and illimitable powers of legislation.’

¹¹⁴⁰ Joseph, above n 1139 at 208; Separation of Powers - ‘the doctrine of separation of powers seeks a unified reconciling theory of constitutional government – the separation of powers identifies the legislative, executive and judicial functions of government – it provides a check and balance system.’

the outset, this problem may be overcome and the judge's position of respect maintained. In addition, therapeutic jurisprudence does not trump long-standing notions of due process or the rule of law. However, in order to work strictly within the current Westminster system, a compromise must be made.

It has been claimed that therapeutic jurisprudence compromises the objectivity and impartiality of judges. Christean argues that the collaborative process requires the judge to act as part of the therapeutic team. In doing so the judge cannot avoid unethical *ex parte* communications that are traditionally a serious ethical breach of the judge's role. However, such communications form a regular part of the therapeutic process.¹¹⁴¹ When the judge becomes the enforcer of the treatment team's decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. To the defendant the judge becomes one of them. On the other hand, this can also be seen to be an effort by the judge to deal more effectively and humanely with the people who come before the court.

It is also argued that the new model substitutes a judge's subjective judgment for the time honoured due process checks. This eliminates a vital check on the abuse of government power. Christean is concerned that judges cannot effectively act as impartial and detached officers to hear and rule on the competing claims of adversaries when they simultaneously function as advocates and defenders of the programmes and procedures under challenge. Beneficial intent, rather than legal soundness is seen to be the benchmark of the effectiveness of any treatment regimes that are imposed.¹¹⁴²

Finally, therapeutic jurisprudence is said to abandon the role of equal justice under the law; that is, programmes are necessarily limited to those offenders who qualify rather than to all defendants who would like to participate. This implies that some defendants will be treated differently from others, depending on whether they are deemed to be worthy candidates for available programme openings. Christean suggests that difficult or resistant candidates are 'screened out' in favour of presenting

¹¹⁴¹ Christean, above n 1130.

¹¹⁴² Brookbanks, above n 1126, at 9. It is noted that Professor Brookbanks now offers a Masters Paper at the University of Auckland in Therapeutic Jurisprudence.

a public face to a programme that may be attractive to the media and an endorsement of the programme's success. However, there would be no reason why the jurisdiction could not be widened to include all offenders once the programme becomes successful.

The author acknowledges the validity of these criticisms; therapeutic jurisprudence advocates are currently addressing them.¹¹⁴³ Nonetheless, one should not lose sight of the aim and should bear in mind that law does not exist in a vacuum and is ever changing. If therapeutic jurisprudence has the desired healing effect, this will result in less offending. The flow on from this will be a lighter case load and a lessening strain on resources, and arguably, one justification against these criticisms.

However, according to David Wexler:¹¹⁴⁴

... a therapeutic approach should be taken whenever such an approach is consistent with other values, considerations and understandings of justice, such as the rule of law.

If this is the case, it seems possible from a policy perspective that therapeutic jurisprudence can be mainstreamed. This rationalisation is not new. The mainstreaming of restorative justice into the Sentencing Act of 2002 (NZ) requires the Court to take into account offer, agreement and response to make amends.¹¹⁴⁵ Also the Canadian Criminal Code directs a consideration of sanctions, other than

¹¹⁴³ See B Arrigo, B. (2004) The ethics of therapeutic jurisprudence: A critical and theoretical inquiry of law, psychology and crime. *Psychiatry, Psychology and Law*, Vol. 11, No 2, 23-43 for further critique. See M. King (2003), Applying therapeutic jurisprudence in regional areas in the Western Australian experience, *Murdoch University Electronic Journal of Law*, 10, 2, also Winick and Wexler, above n 164. Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (Federation Press, Australia, 2009) ch 2 ('Therapeutic Jurisprudence'),

¹¹⁴⁴ David Wexler "An Orientation to Therapeutic Jurisprudence" (1994) 20 *New Eng J on Crime and Civil Confinement* 259. See also Bruce Winick "The Jurisprudence of Therapeutic Jurisprudence" in Bruce Winick and David Wexler (eds) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (North Carolina, Carolina Academic Press, 1996) at 665.

¹¹⁴⁵ See John Braithwaite "Restorative Justice and Therapeutic Jurisprudence" (2000) 38(2) *CLB* 244 – 262. Restorative Justice defined as "a process where all stakeholders involved in an injustice have an opportunity to discuss its effect on people and to decide what is to be done to attempt to heal those hurts"; Sentencing Act 2002, s 10.

imprisonment, that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders.¹¹⁴⁶

Whilst there has been enthusiastic support for therapeutic jurisprudence, a common response is that therapeutic jurisprudence is a re-branding of previous models or a soft approach to crime. In a scathing critique, Hoffman criticised therapeutic jurisprudence as possessing a “New Age pedigree” and for being both anti-intellectual and wholly ineffective.¹¹⁴⁷ This critique fails to acknowledge the favourable evidence that drug courts have achieved in regard to keeping offenders in treatment, reducing drug use, reducing recidivism rates and saving prison costs.¹¹⁴⁸

These criticisms should not discount the possibility that therapeutic jurisprudence may assist in reducing Māori offending rates. The commonalities between the philosophy behind therapeutic jurisprudence and Te Ao Māori will show that therapeutic jurisprudence should not be dismissed as an irrelevant and ineffective model.

(b) Advantages and Suitability

From a practical point of view, a significant advantage of therapeutic jurisprudence is that it co-exists with the existing legal system. This would answer the political arguments against a separate system for Māori. Additionally, therapeutic jurisprudence simultaneously allows for the incorporation of tikanga Māori. The inclusion of tikanga can occur, *prima facie*, at all levels of the criminal justice process.

Collectivity and relationality are central tenets to Māori. Therapeutic jurisprudence is asserted as being a relational based construct.¹¹⁴⁹ Te Ao Māori, like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness, and the notion of whanaungatanga or relatedness. This move away from a rule based approach

¹¹⁴⁶ Section 718 (2) (e).

¹¹⁴⁷ Morris B Hoffman “Therapeutic Jurisprudence, Neorehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous” (2002) *Fordham Urban Law Journal* at 2063.

¹¹⁴⁸ Winick and Wexler above n 164, at 80.

¹¹⁴⁹ Warren Brookbanks “Therapeutic Jurisprudence: Conceiving an Ethical Framework” (2001) 8(3) *Jnl of Law and Medicine* at 328 – 341.

towards a principle or relational approach is consistent with Māori tikanga. Thus, from a conceptual point of view, therapeutic jurisprudence represents a movement away from a heavily rule based approach to one that is more collective, relational and principle based.

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Māori conceptual framework is at odds with the existing monocultural justice system in New Zealand. It is acknowledged that the CYPF Act 1989 provides for concepts of support and involvement of iwi and hapū groups. Section 16 of the Criminal Justice Act 1985 (now repealed) also allowed an offender's supporter to present information at sentencing relating to their ethnic or cultural background to help avoid future offending.

However, in a review of section 16 of the Criminal Justice Act 1985, now repealed and replaced by section 27 of the Sentencing Act 2002, the paucity of its use was noted.¹¹⁵⁰ There was no mandatory requirement that the offender's cultural background be considered as a mitigating factor in sentencing. The application of this section was at the discretion of the judge and the cultural information regarding an offender was but one factor to consider.¹¹⁵¹ However, when the section was employed and the cultural background of the offender was taken into consideration, it was not uncommon for the sentence to be suspended.¹¹⁵²

Notwithstanding these provisions, issues central to Māori, such as reciprocity, have no equal in the State justice system. The judge is the ultimate decision-maker under the CYPF Act 1989 and the Sentencing Act 2002¹¹⁵³. So it is evident that there are differences in approach and differences in how justice should be administered between the Māori and State systems.

¹¹⁵⁰ Alison Chetwin, Tony Waldegrave, Kiri Simonsen with Strategic Training and Development Services and the Family Centre Social Policy Research Unit *Speaking about Cultural Background at Sentencing* (Ministry of Justice, November 2000) <www.justice.govt.nz>.

¹¹⁵¹ Interpretation confirmed in *RS v R* [2014] NZCA 484. This "balancing act" also occurs under the Resource Management Act 1991 when the Judge in attaining the purpose of the Act considers various factors including principles of the Treaty (section 8), the concept of kaitiakitanga (section 7) when reaching a decision. These concepts are but one to be considered in a raft of many.

¹¹⁵² Chetwin, Waldegrave and Simonsen, above n 1070. See now ss 8(i) and 27 of the Sentencing Act 2002 which illustrates the intention to incorporate tikanga Maori into the sentencing process.

¹¹⁵³ Section 27 of the Sentencing Act 2002 replaces section 16 of the Criminal Justice Act 1985.

Therapeutic jurisprudence, like tikanga Māori, is a forward looking process. In comparison, the criminal justice system looks back, punishing the offender for past actions and focusing on the penalty. Tikanga Māori, like therapeutic jurisprudence, is not penalty orientated. It looks for the 'right' or tika way of doing things, ultimately resulting in a healing or restoration of balance and ora for the participants.

Two important issues can be drawn from this. The first is that the commonalities between therapeutic jurisprudence and tikanga Māori allow both systems to work in tandem. This also provides a window for the introduction of tikanga programmes that focus on indigenous law as a basis to understand why the crime or hara should not be committed. Acknowledging the effect of colonialism and the law on the role of women is instrumental in understanding the true 'hara' or 'crime' that underlies domestic violence. This primarily turns on the breakdown of the whānau.¹¹⁵⁴

The second issue is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well-being of communities, thereby empowering Māori to look after one another.¹¹⁵⁵ The challenge will be the realisation, implementation and practicality of therapeutic jurisprudence in a suitable court forum.

Addressing the criticisms for therapeutic jurisprudence from a tikanga perspective, the facilitator of a dispute is usually a rangatira, tohunga, kaumatua or kuia.¹¹⁵⁶ The set of principles attached to resolving disputes is supported by other principles that traditionally provided the guidelines for actions amongst individuals and groups throughout Māori society. Principles provide flexibility as to the appropriate choice of action. For this reason, Māori society is often described as "principle based" as opposed to "rule based". There is less emphasis on rules, but more emphasis on principles. Thus within a tikanga Māori perspective, the principle of a healing outcome would outweigh rules, such as those based on the notion of unethical ex parte communications.

¹¹⁵⁴ Ani Mikaere 'Māori Women Caught in the Contradictions of a Colonized Reality' (1994) 2 Waikato Law Review.

¹¹⁵⁵ Mikaere, above n 1154.

¹¹⁵⁶ "Tohunga" defined as expert.

Asher J viewed ex parte communications as a necessity to achieve justice.¹¹⁵⁷ However, ex parte communications with a judge can result in disciplinary actions.¹¹⁵⁸ On motions to dismiss, Judge Silvia Cartwright, sitting in the Cambodian Supreme Court, noted that ex-parte communications “create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge and for that reason alone should cease”.¹¹⁵⁹

The collectivity tenet is central to tikanga Māori, together with the principle of everyone being on the same level. This effectively assists to dispel the criticism of therapeutic jurisprudence that the defendant perceives the judge becoming the same as them. Further it dispels the objectivity and impartiality criticism.

Therapeutic jurisprudence, like tikanga Māori, is a relational ethic. In a submission on the Victims’ Rights Bill to the Justice and Electoral Select Committee, the New Zealand Human Rights Commission considered that a therapeutic jurisprudence model was appropriate and could be addressed through progressive amendments to the justice system.¹¹⁶⁰

It is noted that section 9 of the Victims’ Rights Act 2002 makes provision for meetings to resolve issues relating to the offence. Viewed in isolation this is similar to the provisions of a family group conference in the CYPF Act 1989 and consistent with tikanga Māori. Further provisions of the Victims’ Rights Act 2002 include the provision for Victim Impact Statements, to be placed before the court on sentencing, which potentially offers an opportunity to seek balance for the victim and offender — the aim of tikanga Māori.

The programmes currently in place for Māori offenders may be stemming the tide but are not solving the problem. Over the generations the physical and spiritual move of

¹¹⁵⁷ *Du Claire v M Palmer and Crown Law Office* [2012] NZHC 934 per Asher J para [105].

¹¹⁵⁸ See comments made by Judge David Harvey ‘Social Media and the Judiciary’ *NZL* (28 April, 2013).

¹¹⁵⁹ *Decision on Motions for Disqualification of Judge Silvia Cartwright* [2012] Extraordinary Chambers in the Courts of Cambodia (ECCC) (Extraordinary Chambers in the Courts of Cambodia - Supreme Court Chambers) at [24].

¹¹⁶⁰ John Galtry “Submission of the Human Rights Commission on: Victims’ Rights Bill to the Justice and Electoral Select Committee” March 2001 at 9 <www.hrc.co.nz>.

Māori away from their turangawaewae (ancestral place to stand) has alienated many urban Māori from their culture. The result of this is manifested, in part, by some Māori who perceive a marae setting for the Te Āwhina Whānau programme as strange as a courtroom. Consequently, the whole process is seen as having an anti-therapeutic effect. This is but one reason to support the need for an alternative system to address the disproportionate rates of Māori offending.

It is acknowledged that Te Puni Kokiri has delivered many services to Māori and advises on policy affecting Māori well-being, including Whanua Ora. Funding is also available to assist whānau towards greater self-reliance and self-management by building and strengthening whānau connections to achieve goals and aspirations.¹¹⁶¹

The Law Commission has noted that:¹¹⁶²

Māori should retain the right to organise as Māori, and to administer and manage their own affairs ... The establishment of specific Māori services to provide access to justice would be a further indicator of progress in this outcome category.

Notwithstanding these initiatives by Te Puni Kokiri and the recommendations by the Law Commission, the statistics, which indicate that Māori are over-represented in criminal proceedings, are difficult to ignore.¹¹⁶³

Therapeutic jurisprudence has encouraged people to think creatively about how to bring promising developments into the legal system. The use of tools from social sciences to promote psychological and physical well-being opens the door to tikanga Māori. In doing so therapeutic jurisprudence may be able to offer a vehicle that will ultimately decrease Māori offending rates. It is pertinent to note that David Wexler stated:¹¹⁶⁴

In many respects, the roots of this *new judicial approach can be traced back to indigenous and tribal justice systems* [emphasis added], including noteworthy

¹¹⁶¹ See <<http://www.tpk.govt.nz/en/services/wiie>>

¹¹⁶² Law Commission, above n 5, at [425].

¹¹⁶³ See statistics noted by Department of Corrections above n 2.

¹¹⁶⁴ Winick and Wexler, above n 164, at 3.

examples in what today constitutes the United States, Canada, Australia, and *New Zealand* [emphasis added] ... and a serious effort is now underway to learn from those systems and to introduce some of their perspectives and techniques into western judicial structures.

B. *Can Therapeutic Jurisprudence, as a vehicle for an indigenous legal system such as tikanga Māori, be effective for a Domestic Violence Court? A Proposed Model*

On average, in New Zealand, 10 children and 14 women are killed every year in domestic violence.¹¹⁶⁵ In 2013 Women's Refuge assisted 20,000 women and children in one year.¹¹⁶⁶ With regard to victimisation:¹¹⁶⁷

- Māori women are over-represented among victims of domestic violence and are more likely to experience repeat victimisation from a partner.
- A higher proportion of Māori women than non-Māori women apply for protection orders under the Domestic Violence Act 1995.
- Māori women and children are heavy users of Women's Refuge Services. There is some evidence that Māori women do not access other services for victims at the rate that might be expected.

With regard to offending:¹¹⁶⁸

- Both female and male Māori youth are far more likely to be apprehended and prosecuted than their non-Māori counterparts.
- Māori women are five times more likely to be prosecuted for an offence than non-Māori women, and Māori men are over three times more likely to be prosecuted than non-Māori men.
- Although far fewer Māori women than Māori men offend, there are some indications that Māori women are becoming increasingly involved in offending.

¹¹⁶⁵ Womens Refuge New Zealand Domestic Violence Statistics. <<https://womensrefuge.org.nz>>

¹¹⁶⁶ New Zealand Police *Protection Orders and the Domestic Violence Act* <<http://www.police.govt.nz>>. Also above.

¹¹⁶⁷ Hon Lalia Harre Minister of Women's Affairs speech *Māori Women: Mapping Inequalities and Pointing Ways Forward* (Report released September 26, 2001) <www.executive.govt.nz>.

¹¹⁶⁸ Above.

- Māori women make up over 60 per cent of the women prison population, a higher percentage than Māori men compared to non-Māori men (around 50 per cent).

Establishing and maintaining sustainable families, whānau and communities is seriously threatened by:

- The high incidence of domestic violence experienced by Māori women.
- The disproportionately high representation of Māori women in offending.
- The significant and rising over-representation of young Māori women in the criminal justice system.
- Impacts of the offending of male partners on Māori women.
- Impacts of Māori offending on children.
- High rates of Māori reoffending.

Domestic violence is a different crime, partly because the lives of the perpetrator and the victims are usually intertwined. A domestic violence court would bring cases before a judge more quickly than in the ordinary courts. Importantly, as Rivera notes:

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... it would keep the victim working with the same judge and prosecutor; that means the victim doesn't have to repeat the story of abuse over and over, sometimes to the point of giving up.

(a) Domestic Violence

Here it would be valuable to look at how effectively tikanga ensured that Māori women and children were cared for and valued. Strong evidence from the early contact period indicates that women and children were not hit and abused, with the exception of taurekareka (war captives) who had lost their mana.¹¹⁷⁰ According to many early European commentators, relations within the kin group were generally harmonious. Things have changed drastically since then.

¹¹⁶⁹ Ray Rivera "Our View: Boise Needs New Method to Stop Domestic Violence" in Bruce Winick and David Wexler (ed) *Judging in a Therapeutic Key, Therapeutic Jurisprudence and the Courts* (Caroline Academic Press, North Carolina, USA, 2003) at 58.

¹¹⁷⁰ This is from personal knowledge and teachings from my kuia (respected elder).

It has to be said, though, that the sanctions for breaches involved actions now regarded as illegal; for example, muru raids, in which property was confiscated and the guilty party was humiliated and perhaps beaten (although they were not badly hurt) before being brought back into the kinship fold.

This section of the thesis suggests the application of a therapeutic jurisprudence approach as a vehicle to implement tikanga Māori within a specialised court setting, such as a domestic violence court, and alleviate the alarming rates of domestic violence in New Zealand. The use of therapeutic jurisprudence in a domestic (family) violence court is not a novel idea.¹¹⁷¹ Both South Australia and Western Australian domestic (family) violence courts are inter-agency and community initiatives aimed at reducing violence in families by integrating treatment into the court process. Unlike the ordinary criminal courts, the domestic violence court seeks not only to punish and rehabilitate the offender, but also to provide support and services required by the victim after physical or psychological abuse.¹¹⁷²

The current trial process for domestic violence offences has an anti-therapeutic effect on victims. The ‘crime against the state’ perspective on prosecution disempowers victims and closes any avenue to seek balance for both the victim and defendant. There are many negative effects from the current system that tend to fracture and permanently end relations, rather than heal or restore them to balance.

The domestic violence courts operating throughout New Zealand are problem solving courts and generally focus on the underlying behaviour of the defendant. It is acknowledged that victim support agencies are attached to these courts. However, such agencies operate quite separately and are distinct from the justice process. Acting on the input of a team of experts from the community, a problem-solving court judge orders the defendant to comply with an individualised plan, such as anger management, and then the judge (with the assistance of the community team)

¹¹⁷¹ See Micheal King Applying therapeutic jurisprudence from the Bench, Challenges and Opportunities. www.austlii.edu.au/au/journals/

¹¹⁷² Law Reform Commission of Western Australia – Court Intervention Programs: Consultation Paper, Chapter Four Domestic and Family Violence Court Intervention Programs, at 145. <<http://www.lrc.justice.wa.gov.au>>. Also under the Crime Compensation Act victims of domestic violence in Victoria may be entitled to compensation of up to \$70,000.

exercises intensive supervision over the defendant to ensure compliance with the terms of the plan.¹¹⁷³

(b) Model

The proposed model of this thesis is comprised of two components. First, a ‘re-tuned’ domestic violence court that incorporates the doctrine of therapeutic jurisprudence. Secondly, this doctrine might then support the implementation of tikanga in a similar way to that of circle sentencing in Canada or indigenous sentencing courts, in Australia. However, I suggest that the application of tikanga is extended to include the whole criminal process, not just at the sentencing phase of the justice system. Ultimately, legislative recognition will provide certainty for this process.¹¹⁷⁴

Ideally, this would include the training of lawyers and the judiciary to better understand the effects of domestic violence and battered women’s syndrome from an indigenous perspective. The positive flow-on effect would be a broader understanding of the causes of crime and its relationship with colonisation, in particular the effect colonisation had on the position of Māori women in society and the Māori concept of property.

From a practical point of view, this model will utilise the relevant systems and framework already in place, including the existing court forums, marae, Māori Committees, and legislative provisions such as the Community Development Act 1962. Local evidence suggests that although this mechanism (Community Development Act and Māori Committees) is already in place, it is under-utilised, due in part to under-resourcing.¹¹⁷⁵

Ideally, the judges would be Māori. However, it is acknowledged that there is a shortage of Māori judges. Considering the education and ongoing training of judges in the fields of tikanga, te reo and marae protocol, it is possible that non-Māori judges

¹¹⁷³ Daniel J Becker and Maura D Corrigan “Moving Problem Solving Courts into the Mainstream” (2002) 39(1) Court Review 4.

¹¹⁷⁴ Legislative recognition of indigenous practice is not new. See Magistrates Court (Koori Court) Act 2002.

¹¹⁷⁵ For example small town “Māori Committees” such as the Aotea Māori Committee are usurped by “Marae Committees” primarily due to better access to funding sources.

could fill the roles. However, they would need to be well-versed in tikanga Māori. In the alternative, kaumatua or a panel of kaumatua could assist a non-Māori judge in an advisory capacity.¹¹⁷⁶ This is not novel as the Resource Management Act of 1991 provides for a similar option, even if this option is not often exercised.¹¹⁷⁷ This would allay current concerns regarding the consistency of judges in a domestic violence court and address the problem of increased workloads identified in the Australian domestic violence courts.

(c) Procedure – Tikanga Māori Component

The jurisdiction would ideally be open to all offenders. One of the criticisms of the domestic violence court is the limitation to less serious offences¹¹⁷⁸ and the inability to deal with serious offences.¹¹⁷⁹ Whilst this concern may be warranted, the practical difficulty of dealing with hardened criminals alongside first-time offenders is acknowledged.

In the initial stages, the jurisdiction could be confined to the less serious or Category 1 offences with the anticipation that, once the success of this model has been proven, the jurisdiction could be widened to include more serious offences.¹¹⁸⁰ In light of the statistics that indicate the recidivism rates for Māori are higher than any other ethnicity in New Zealand and that Māori are more likely to commit more serious offences there is a need for an indigenous court to eventually address serious offences.¹¹⁸¹

This would address the criticism of the jurisdictional limitations identified by the Australian domestic violence courts. At such time necessary provisions for security of the offender and community would need to be addressed.

¹¹⁷⁶ Te Ture Whenua Māori Land Act 1993, s 62 – “Additional members with knowledge and experience in tikanga Māori.”

¹¹⁷⁷ Resource Management Act 1991, ss 252 and 269(3), which provides for the consideration of tikanga values.

¹¹⁷⁸ For example, ‘failing to stop for red and blue flashing lights’ classified as a Category 1 offence. See section 71 Criminal Procedure Act 2011.

¹¹⁷⁹ For example, murder or manslaughter classified as a Category 4 offence. See section 74 of the Criminal Procedure Act 2011

¹¹⁸⁰ Such as Category 2, 3 and 4 offences. See sections 72, 73, and 74 of the Criminal Procedure Act 2011 respectively.

¹¹⁸¹ See Department of Corrections above n 8.

This model and the accompanying processes are entirely integrated. The model takes effect at the beginning of the criminal procedure, upon the arrest of the offender. The arresting officer would enquire as to whether the offender identifies himself, or herself, as Māori and advise them of the process. If the offender does not self-identify as Māori, irrespective of their appearance, then that person would fall within the general criminal justice process or in this instance, the domestic violence court.

If the offender identifies as Māori, it would be mandatory for a Māori representative or warden to be called in. It would also be mandatory for the offender to become part of the programme.¹¹⁸² This is similar to the juvenile arrest process adopted by the New Zealand Police.¹¹⁸³ It would be helpful, but not vital, that the representative be from the legal profession. This representative would become responsible for the offender until their first court appearance.

If the offender is ostensibly non-Māori but self-identifies as Māori, this should not inhibit the offender from partaking in the process, primarily because it is a principle based process. If successful, there should be no reason why this model ought not to be extended to non-Māori. As the statistics indicate, however, it is Māori offending and Māori victim rates that are of the greatest concern. As such, Māori offenders would need to be targeted and prioritised

The offender would be assessed within the local marae forum, allowing for whānau involvement. Initially the offender would have no choice as to which marae he/she would appear.¹¹⁸⁴ In Auckland there are several “pan” iwi marae that cater for Māori from all different iwi.¹¹⁸⁵ These marae are typically urban based. It is envisaged that initially a “pan” iwi marae would be used consistent with the concept of

¹¹⁸² See for discussion of powers for mandatory involvement to compel whanau to attend, etc and employ Māori justice practices see Tauri, above n 710, at 204.

¹¹⁸³ For comparative instances see Anne Skelton “Reforming the Juvenile Justice System in South Africa: Policy, Law Reform and Parallel Developments” Resource Material 75 (paper presented to UNAFEI 136th International Training Conference, Japan, 23 May to 28 June 2007) at 43 for the discussion on the use of home based supervision as an alternative to detention upon the arrest of juveniles as a result of an amendment to the Probation Services Act <www.unafei.or.jp>.

¹¹⁸⁴ This is similar to the Māori Focus Units in prisons where upon sentencing the offender has no choice but is allocated to an area where his protocol or kawa may or may not apply.

¹¹⁸⁵ For example see Hoani Waititi Marae in West Auckland.

whanaungatanga (kin-like reciprocal relationships).¹¹⁸⁶ The offender could then be transferred to a tribal, or iwi specific marae if he/she requested, provided that funding resources are available.

As with the indigenous courts model, both parties would sit at eye level (*kanohi ki te kanohi*). The use of existing indigenous fora, such as a marae, addresses those concerns associated with unsuitable locations, as identified by the siting Koori Courts. The arresting warden would assist to ensure that the offender, victim and both of their families do not feel uncomfortable in such a setting. This would allow all parties to address any feelings of alienation from the process, consistent with the concept of *manaakitanga* (process of showing care, respect, kindness and hospitality).¹¹⁸⁷ Unlike actors within the mainstream criminal justice system, these actors would not be constrained by existing policies. For instance, Probation Officers are guided by the Correction Department policies.

After the ‘intake’ has been completed, an appropriate programme would be specified for the offender, consistent with the concept of *kaitiakitanga* (watch or guard).¹¹⁸⁸ This takes on board the success from Te Whānau Āwhina Programmes and utilising existing Youth Programmes.¹¹⁸⁹ At this point it would be crucial for the offender to understand, from a tikanga perspective, the nature of his or her crime, take responsibility for his or her actions, face the victim and address the need for utu and balance, and importantly, understand the role of women prior to colonisation. The underlying tikanga or cultural perspective of these programmes will address the safety needs of the victim and the future well-being of the offender. This could also include programmes to address issues such as drug and alcohol addiction. These are shortcomings of the Australian system, as identified by Stewart.¹¹⁹⁰

For the model to be successful, this stage requires legislative promulgation, similar to the legislative provisions acknowledged by the Koori Court Act 2008 (Vic). This

¹¹⁸⁶ Benton and others, above n 204, at 524.

¹¹⁸⁷ At 205.

¹¹⁸⁸ At 105.

¹¹⁸⁹ He Tete Kura Mana Tangata Programme for Māori violent offenders based at Nga Whare Waatea Marae in Mangere Auckland. See Department of Corrections *Judges Update Information for the Judiciary* (Issue 3, 2001) <www.corrections.govt.nz>.

¹¹⁹⁰ Stewart, above n 881.

would provide appropriate recognition and give a clear direction to the court to follow the recommendations given.

The current “stopping violence” programmes used by the domestic violence court can also be undertaken in conjunction with any tikanga based programme. The difference, however, is that in this model, the participation of the offender would be monitored. If, as research suggests, such programmes show no guarantees of success, this will be identified by the monitoring offender participation.

Intrinsically, tikanga-based programmes encompass the concept of an offender taking responsibility for his/her actions. Although this directive given by the judge in domestic violence cases is often criticised, if successful, this is a shared feature between mainstream and tikanga judicial proceedings.

The process demonstrates direct intervention, the administration of tikanga Māori and the notion of Māori looking after one another. This overcomes the criticisms that are levelled at indigenous sentencing in which indigenous courts are not seen as adopting customary laws. Rather they are seen as using Australian criminal laws and procedures when sentencing indigenous people while allowing indigenous elders to participate in the process.

At this point there is room for the adoption of Moana Jackson’s concept of a marae based model of diversion.¹¹⁹¹ Māori Committees established under legislation, such as the Māori Social and Economic Advancement Act 1945 and its successor the Māori Welfare Act of 1962, could easily be reconstituted as community or marae-based committees. These committees would then have the right to hear all charges under the Māori Community Development Act 1962, instead of processing the charges under

¹¹⁹¹ See Jackson above n 31 – although see Courts Consultative Committee Report (1991) on He Whaipanga Hou, Wellington, Department of Justice that recommended to the then Minister of Justice that culturally appropriate responses to Māori offending was achievable through existing state mechanisms and further recommended against transferring criminal justice-centred processes into Māori setting, specially marae settings being used for court cases, as cited by Juan Tauri above n 827. The Committee was comprised of judges, lawyers and community representatives.

the Domestic Violence Act 1995.¹¹⁹² Its jurisdiction could also extend to cover a broader range of offences, such as those set forth in the Summary Offences Act 1981.

Where the offender is Māori, there is no conventional question of guilt. In accordance with tikanga Māori, if you are alleged to have committed an act or offence then you must take responsibility. The offender would enter into a marae based programme. There is no question of guilt or innocence, it is rather a question of mana and instituting a process to achieve balance. It may be that the person did not commit the offence alleged. This will be uncovered during the process and the ensuing actions or muru will reflect this.

If the person refuses to accept responsibility at the initial stage and disputes the allegations then a tikanga programme can not apply and the offender will be subject to the general court jurisdiction.

The philosophy behind this “First Intervention Step” or “Pre-Plea” is twofold. First, it provides for the involvement of whānau and implementation of tikanga Māori. This moves towards satisfying the call for the administration of justice for Māori and by Māori. Secondly, it recognises the fact that defendants often come before the court with problems that place them at risk of reoffending. In the case of domestic violence, the victim is also often at risk and there is a need to ensure their safety. If left without treatment, such defendants may well find themselves back before a court, having been charged with further offences while on bail. Early treatment or intervention may prevent this situation from occurring and reduce reoffending statistics while on bail.¹¹⁹³ This may also eliminate the jurisprudence on bail conditions and breaches thereof.¹¹⁹⁴

¹¹⁹² If these marae committees had the same standing as the New Zealand Māori Council, for the purposes of the Māori Community Development Act 1962, then these marae committees could ‘collaborate with and assist State Departments, such as Justice and Corrections, and other organisations in the assistance of Māoris in the solution of difficulties or personal problems, such as those associated with domestic violence – see section 18 (1) (d) (vii).

¹¹⁹³ Ministry of Justice *Trends in the Use of Bail and Offending While on Bail: 1990 – 1999* (Research and Evaluation Unit, January 2003) indicates that 21 per cent of people offended while on bail.

<<http://www.justice.govt.nz>>

¹¹⁹⁴ See *Sen v Police* [2007] NZFLR 733 – 736 Lang J; *Kerisiano Aeau v The Police* HC, CRI 2007-404-247 11 September 2007, Winkelmann J.

Ideally, admission to this first intervention stage would be contingent upon the offender having a problem that places them at risk of offending. Also, the offender's acknowledgement of the existence of the problem, a commitment to its resolution and participation in a marae or other suitable programme would be required.

Upon the offender's court appearance, the judge would call for a report from the Māori representative (similar to a probation report). Taking into account the findings of the report, the judge would then assess the effectiveness of the programme and if satisfied, the offender could be returned to the community and be convicted and discharged.¹¹⁹⁵ Proposed legislation would, at this stage, provide clear directions for the judge.

(d) Domestic Violence Court – Therapeutic Jurisprudence

It is acknowledged that there will be offenders who have not satisfactorily completed the programme for various reasons. The marae forum, for instance, may be alien for both the offender and the victim. The offenders, together with those who chose not to participate in the tikanga Māori component, would then be subject to a domestic violence court based on the doctrine of therapeutic jurisprudence. The victim, in this instance, would accordingly have recourse to support through victims support services. In May 2011 the former Minister of Justice, Simon Power, announced new initiatives for victims of serious crime, including trauma counselling, discretionary grants, court attendance grants, travel assistance and a victim emergency grant.

Although that particular proposed tikanga programme may not have worked,¹¹⁹⁶ the judge still has the opportunity to incorporate other programmes or social sciences to assist in further treating the offender. For instance, in recognising that the offender's adverse behaviour has led to the offending, the judge could adopt a preventive approach, such as confining the offender to home detention on the days that he or she

¹¹⁹⁵ Sentencing Act 2002 section 106

¹¹⁹⁶ Unlike the Youth Court, where the judge does not tend to depart from the Family Group Conference Report, the discretion would be broader here for various reasons; one being there is still another step before the General Court process would come into effect and secondly the offender would not always be a youth.

is more likely to reoffend.¹¹⁹⁷ Alternatively, for domestic violence cases, the imposition of a protection order by the court could be imposed.

The judge could also incorporate tikanga Māori. For instance:

- Kanohi ki te kanohi encounter (face to face or at eye level)
- Maintaining the importance of reciprocity between the offender and victim
- Adhering to the principles used by rangatira such as aroha, atawhai and manaaki.

By considering the notion of utu, the judge could also incorporate the offender's wider family in assisting the offender to complete the programme. This is based on the understanding that utu may be exacted from those who have done no wrong. In this regard, utu can be seen as a mechanism for restoring lost mana — a healing tool.

The judge would take a more active role with the offender, similar to the probation or re-entry courts, by using a court processes aimed at promoting the rehabilitation/crime prevention programmes. These processes would seek to facilitate the offender's participation in such programmes to maintain the offender's dignity and to promote the offender's trust.

Upon entry into the programme, the offender would sign a behavioural contract, agreeing to comply with the programme agenda.¹¹⁹⁸ The offender could also be encouraged to participate in the development of the programme. This programme could be tailored to suit the problem or offence as relevant to the offender and could be specific, such as participation in an anger management course. Part of the programme would include regular court appearances for review that would decline in regularity as progress is made.

Participants would be actively involved in the process and provide input into the programme for changes to be made. The judge would interact with the offender

¹¹⁹⁷ See for discussion Wexler and Winick, above n 164.

¹¹⁹⁸ See also David B Wexler "Robes and Rehabilitation How Judges Can Help Offenders Make Good" (Spring 2001) Court Review at 19 for discussion also see David B Wexler "Therapeutic Jurisprudence: An Overview" (2000) 17 TM Cooley Review at 131.

expressing interest in his/her life and praising any progress that has been made. This would be an endeavour to establish the ‘tika’ or correct approach.

Successful completion of the programme could be acknowledged with the award of a “graduation certificate”. This approach is based on the ethic of care and the central tenet of therapeutic jurisprudence, given its ‘relational-based’ construct. The ethic of care approach is capable of offering such an alternative approach to legal problem solving, which is more overtly relational and deliberately less adversarial.¹¹⁹⁹

Notwithstanding every effort to adhere to the tenets of therapeutic jurisprudence, it is acknowledged there will be occasions when the offender has made no progress in the programme. In such cases the programme would be terminated and the offender subjected to the jurisdiction of the general courts.

A similar model in Geraldton, Western Australia integrated therapeutic jurisprudence into a sentencing regime that showed promising results.¹²⁰⁰ This is comparable to what happens in the drug courts, using therapeutic jurisprudence to import holistic concepts, such as transcendental meditation. This approach is based on the premise that alleviating stress-related problems of the mind, body and behaviour, as well as promoting overall growth in life, can remove the underlying causes of substance abuse and offending.¹²⁰¹

Introducing a mix of tikanga Māori values and problem solving skills or other more mainstreamed legal practices is not a new concept. Rather, it conforms to the long-term plans to integrate problem-solving courts into established judicial systems.¹²⁰² Judge Joe Williams, the Chief Judge of the Māori Land Court, in reflecting upon the future of the Māori Land Court, proposed a model which would incorporate principles from equity and public law, mixed with tikanga values.¹²⁰³ The changes also envisaged the inclusion of a name change and move towards a Waitangi Tribunal-like

¹¹⁹⁹ Brookbanks, above n 1069.

¹²⁰⁰ Micheal King “Geraldton Alternative Sentencing Regime: Applying therapeutic and holistic jurisprudence in the Bush” (Oct 2002) 26(5) *Crim LJ* at 260; also Micheal King and Steve Ford “Exploring the concept of wellbeing in therapeutic jurisprudence: The example of the Geraldton Alternative Sentencing Regime” (2006) *E LJ*, Vol. 1.

¹²⁰¹ King, above n 1200, at 267.

¹²⁰² Becker and Corrigan above n 1173, at 7.

¹²⁰³ Chief Judge Joe Williams “Māori Land Court” (Lecture given at the Law School, University of Auckland, on 24th July 2003).

forum. This would incorporate more of a community or people's court notion. Maintaining the integrity of a tikanga approach within the current criminal justice process addresses the criticism levelled at Koori Courts, that they are European or non Indigenous justice dressed up as indigenous courts and do not tackle the underlying causes of indigenous offending.¹²⁰⁴ The current mainstreaming of therapeutic jurisprudence within the general court system, as an evolving model, is consistent with this development.¹²⁰⁵

An analysis of the practicalities of government resourcing for such a model is beyond the scope of this paper. Except to note that it is a problem recognised by the government, which is continually engaged in criminal law reform,¹²⁰⁶ as well as allocating resources to reduce Māori offending.¹²⁰⁷ If this system is shown to be effective, then the end result should contribute towards outweighing any resource or budget constraints.

(e) **Victim**

Therapeutic jurisprudence can apply equally to the victim as to the offender. The focus is on the offender whose liberty is at risk. However, victims of crime also experience a negative effect on their well-being. This is often manifested in feelings of anxiety, fear and powerlessness, requiring treatment or a similar process to re-establish well-being and balance within the victim. In this way the victim can become a contributing member of society.

¹²⁰⁴ Marchetti and Daly, above n 828.

¹²⁰⁵ The AODT Courts, Family Violence Courts and the Homeless Courts (Te Kooti o Timatanga Hou) was established in 'Auckland in 2010 and aimed at defendants who have pleaded guilty; have committed on going, low level reoffending within Auckland's inner city; are homeless and/or have no fixed address; are affected by mental health concerns and/or intellectual disability; and are affected by chronic alcohol and/or substance abuse') are examples of the mainstreaming of therapeutic jurisprudence into the general court system. See K Thom, A Mills, C Meehan, and B McKenna *Evaluating problem-solving courts in New Zealand: A synopsis report* (Centre for Mental Health Research, Auckland, 2013).

¹²⁰⁶ See "Major Project to Simplify Criminal Procedure" *Law Talk* (Issue 707, 5 May 2008) at 1. See also Drivers of Crime Progress Report December 2012 Cabinet Social Policy Committee which allocated '10 million package of initiatives to improve access to alcohol and drug assessment and treatment for offenders; significant expansion of Incredible Years and Triple P Positive Parenting programmes through health and education settings; and an extra 600 restorative justice conferences per year to achieve a total of 2,000 in 2012/13'.

¹²⁰⁷ Such as the Tahua Kaihoatu Fund that is administered by Te Puni Kokiri. Te Whare Ruruhou o Meri and Tu Tama Wahine are examples of funded programmes that have a tikanga component.

The victim can experience a myriad of issues, including violation, re-victimisation, a need to tell their story, loss of control, emotional distress, helplessness and post-traumatic stress. The criminal justice system may provide funding for the victim. However, victims are often treated in ways that are distressing and demeaning, with many victims finding the criminal justice system as an assault on their dignity and unfair.¹²⁰⁸ As the prosecutor rarely consults with the victim, this contributes to feelings of helplessness.

To avoid further re-victimisation, therapeutic jurisprudence suggests that more attention and procedural information¹²⁰⁹ be shared with the victim and adequate training by players within the criminal justice system be performed, including the police, prosecutors, corrections and the judge. This will contribute to a feeling of empowerment for the victim.

Therapeutic jurisprudence advocates that “treating victims with procedural justice can help to ameliorate their psychological stress and restore their emotional equilibrium”.¹²¹⁰ The ability of the victim to face the offender also contributes to a feeling of empowerment and a step towards re-establishing balance. Bruce Winick notes:¹²¹¹

Unlike the retributivist focus of many criminal justice systems, this model [therapeutic jurisprudence] gives *greater recognition to the fact that a crime has harmed the victim and upset the equilibrium of the community, and seeks to address these through victim/offender conferencing* [emphasis added] ... Such victim/offender conferencing typically includes family and other support group members of both victim and offender. It provides victims an opportunity to describe to the offender the harm they experienced as a result of the crime and the feelings it produced. This sometimes provokes feelings of empathy in the offender and sometimes an apology. An acknowledgement of wrongdoing and a genuine apology can allow victims to heal. When the defendant pleads not guilty and seeks a trial to contest the charges,

¹²⁰⁸ Bruce J Winick “Therapeutic Jurisprudence and Victims of Crime” (7 March 2008) Social Science Research Network <www.ssrn.com>.

¹²⁰⁹ See Victims Rights Act 2002 section 11. See also ss 7 – 11 and 12.

¹²¹⁰ Winick, above n 1208.

¹²¹¹ Winick, above n 1208.

such victim/offender conferencing would likely be unavailing and it may not be possible to compel the defendant to participate. However, when the defendant has pled guilty and is facing a future sentencing, such conferencing with the victim might provide the defendant with an incentive to apologize and provide the victim with a healthy opportunity to express feelings.

As Māori are also disproportionately represented as victims in the criminal justice system, it is recommended that therapeutic jurisprudence principles apply equally to the victim as the offender.

The offending rates for Māori, and Māori women in particular, are disproportionately high. After an analysis of comparative jurisdictions and the judicial process for indigenous peoples, this thesis proposes a model that may offer one solution to address disproportionate rates of Māori offending.

There are Māori actors within the criminal justice system including court officials, prosecutors, lawyers and judges. The Māori Language Act 1987 provides for the ability to address the court in Te Reo.¹²¹² From July 2012 opening and closing announcements in the District, Family and Youth Courts were provided in Te Reo.¹²¹³ These provide positive steps to engage with tikanga Māori.

Notwithstanding this inclusion, elements of the existing system, such as the inaccessibility of the judge to the offender, the alien court process and the lack of concern or relationship with the offender after their court appearance, have been shown to be mono-cultural and inconsistent with tikanga Māori.¹²¹⁴

¹²¹² Māori Language Act 1987, s 4: right to speak Māori in legal proceedings. See also Natalie Akoorie and Teuila Fuatai “Jury’s Out on Compulsory Use of Māori in Court” *New Zealand Herald* (online ed, Auckland, July 18 2012).

¹²¹³ Ministry of Justice Media Release “Te Reo Introduced into District Court” (press release, 19 July 2012) <www.justice.govt.nz>.

¹²¹⁴ See comments by Judge Stephanie Milroy ‘Nga Tikanga Māori and the Courts’ 15 (2007) *Yearbook of NZJ* where she notes ‘... a court setting is a really strange experience ...’

Given a criminal justice system which lacks any appreciation or analysis of the broader role that colonisation has played in contributing to the high rates of offending, the persistence of these elements has resulted in anti-therapeutic outcomes.¹²¹⁵

Despite the connection between colonisation and Māori offending, courts have found that “it does not logically follow that a person is more likely to be at a disadvantage and to offend simply by virtue of his or her Māori heritage. To some such a proposition may appear offensive”¹²¹⁶.

Therapeutic jurisprudence as a vehicle allows:

- Māori offenders to take responsibility for their actions;
- formal recognition of the validity and applicability of tikanga Māori;
- a fully integrated bicultural approach;
- involvement of Māori through the whole process;
- Māori administering justice;
- the placing of decision-making back in the community; and
- a system predicated upon tikanga Māori as well as Māori people.

The most important commonality between tikanga Māori and therapeutic jurisprudence is the recognition of collective responsibility or communitarianism, and the healing process. Therapeutic jurisprudence allows the underlying reasons for Māori offending to be addressed in a Māori way. The goal for both therapeutic jurisprudence and tikanga Māori is whakahoki mauri or restoring the balance and returning the mauri. This enables the offender to participate successfully in the community.

The model incorporates the doctrine of therapeutic jurisprudence within a court setting. It is through the vehicle of therapeutic jurisprudence that a separate

¹²¹⁵ For instance, the raft of English law statutes did not recognise tikanga and custom. Māori women as property owners and equivalent to, and not the property of, men was not recognised. The replacement of extended family support structures by nuclear families is an example of the internalisation of colonial values. This breakdown of the family structure together with the alienation of Māori from their land through the Native Land Court legislation and policies have contributed to the widening the socio economic gap between Māori and non Māori, increasing vulnerability to crime and associated drug, alcohol and poverty issues. See Jackson above n 31. See also Maynard and others above n 90.

¹²¹⁶ *Mika v R* [2013] NZCA para 12.

indigenous legal system — tikanga Māori — is incorporated. This incorporation of tikanga is legislated to provide greater certainty.

The high rates of Māori offending challenge both our politicians and the judiciary to implement and embrace legal systems that have shown success, but which lie outside the Westminster structure.

Indigenous courts are underpinned by therapeutic jurisprudence and offer one such option. Evaluations of indigenous courts, suggest that they have:¹²¹⁷

both criminal justice aims (reducing recidivism, improving court appearance rates and reducing the over-representation of Indigenous people in the criminal justice system) and community building aims (providing a culturally appropriate process, increasing community participation and contributing to reconciliation). Of the criminal justice aims, only the impact of the courts on re-offending has been assessed.

The adoption of tikanga Māori and a therapeutic jurisprudential approach within a New Zealand court setting could effectively open a pathway for tikanga Māori to walk together with te ture (law) Pākehā to step towards reducing the disproportionate offending rates of Māori and contribute to reconciliation and balance within the community.

Many challenges are involved in this, but it is a step in the right direction in terms of creating a new criminal justice system that incorporates the values of all members of our society.

C. An Indigenous Reentry Court for Māori?

Indigenous re-entry courts are based on indigenous legal systems. Since half of all offenders before the NZPB will be Māori, the question now becomes

¹²¹⁷ Elena Marchetti Indigenous Sentencing Court Brief 5 December 2009
<www.indigenousjustice.gov.au>

Will an indigenous re-entry court for Māori underpinned by tikanga Māori assist Māori to re-enter the community successfully and reduce recidivism?

(a) Proposed Model

Upon the incarceration of an offender, a kaumatua/judge would co-ordinate, monitor and motivate the offender's progress within the correctional facility. This would require the offender to participate in various tikanga programmes within the correctional facility, such as the Māori Focus Units,¹²¹⁸ and concentrate on identified areas of rehabilitation, such as drug treatment. As in the JVP programme, through periodic review hearings, the kaumatua/judge could help instill in the offender a vision of eventual release.¹²¹⁹ This could be a healing process in itself.

Ideally, this model would involve all offending, but in the early stages, it would be limited to less serious offending. The kaumatua/judge would be a different person from the sentencing judge, who might be viewed by the offender in a negative light, whereas the monitoring judge would be perceived to 'care' or maintain an 'ethic of care' in regard to the prisoner's rights.

Upon entry into the programme, the offender would sign a behavioural contract agreeing to comply with the programme agenda.¹²²⁰ The offender could also be encouraged to participate in developing the programme and have the ability to set release conditions. The release conditions would require the taking of responsibility as a collective (whānau). Like the JVP, the ability to set release conditions allows for the possibility of dialogue between the court and offender, and enables a conditional release to be conceptualised as a bilateral behavioural contract, rather than a unilateral judicial fiat. Such a conceptualisation is likely to promote an offender's sense of fairness and participation, and should enhance the offender's compliance with the release conditions.

¹²¹⁸ Department of Corrections *Māori Focus Units* (2009) <www.corrections.govt.nz>.

¹²¹⁹ Winick, above n 856, at 4.

¹²²⁰ See also David B Wexler "Robes and Rehabilitation: How Judges can Help Offenders Make Good" (2001) 38(1) Court Review 18.

Such a programme could be ‘tailor-made’ to suit the problem or offence relevant to the offender, and could be specific to include tikanga programmes within the correctional institute that focus on anger management and other behavioural problems.

The offender’s genuine involvement in correctional programmes would have a bearing on the prisoner’s progress through the levels, and on their prospect of eventual release.¹²²¹

The kaumatua/judge would take on a more active role with the offender by using the court processes aimed at promoting the rehabilitation of the offender or the prevention of crime. These processes would seek to facilitate the offender’s participation in a programme, to maintain the offender’s dignity, and to promote the offender’s trust.

Part of the programme would include regular court appearances for review that would decline as progress is made. Participants would be actively involved in the court process and provide input into the programme for changes. In an endeavor to establish the ‘tika’ or correct approach, the judge would interact with the offender, expressing interest in their life and praising any progress that has been made.

This philosophy is based on the “ethic of care” approach and the central tenet of therapeutic jurisprudence, of it being a ‘relational-based’ construct. The ethic of care approach recognises, and is capable of offering, an alternative method to legal problem-solving that is more overtly relational and less adversarial.

If parole is granted and the offender’s release conditions are subsequently breached, a process of deferred revocation similar to that suggested by David Wexler could be adopted.¹²²² This envisages a clinical approach where the burden lies on the offender to defer revocation of parole based on a rehabilitative plan that the offender, with support and help of the collective (whānau). Assistance for hearing preparation would be provided by a clinic, composing possibly of law students, where advocacy could be

¹²²¹ Winick, above n 856, at 6.

¹²²² David Wexler and Bruce Winick *Rehabilitating Lawyers Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, North Carolina, 2008) at 312.

enhanced through a therapeutic viewpoint.¹²²³

Although therapeutic jurisprudence may provide a window to import tikanga Māori concepts, the question arises as to why therapeutic jurisprudence is required? A preferred reform would be to apply tikanga Māori in the first instance.

¹²²³ At 314.

ŪPOKO TUA WHITU

CHAPTER VII

A NEW FRAMEWORK

The similarities between tikanga Māori concepts and therapeutic jurisprudence suggest that tikanga Māori concepts are valuable and effective principles when addressing indigenous issues. As a principle based doctrine, tikanga is comprised of concepts working together to achieve balance. It is premised on, and reflective of social and environmental mores. Orthodox legal systems are also reflective of social mores.

The recognition of tikanga and indigenous concepts is sanctioned in instruments such as the United Nations Declaration on the Rights of Indigenous Peoples and Te Tiriti o Waitangi. Both instruments support the right of self-determination and tino rangatiratanga. Various jurisdictions have formalised this recognition through domestic legislation and have been manifested with the implementation of indigenous courts, such as Koori Courts (Australia), Gladue Courts (Canada) and Navajo Courts (United States of America).

As part of this final chapter, it is timely to identify what is feasible and applicable within a New Zealand context. It is proposed that the clear directive to consider indigenous concepts during sentencing, for instance in the Koori Courts, is extended to the arrest stage. This is similar to the proposed therapeutic jurisprudence models and the Navajo Courts. It is suggested that an extension of jurisdiction to the Māori Land Court or a formal establishment of a Tikanga Māori Court could provide such a vehicle.

A. Overview

This thesis tests the proposition that:

Applying the philosophy of Te Ao Māori, realised by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine is the most promising way forward for Māori to ameliorate the disproportionate offending rates — a case for an indigenous court for Māori.

B. Social statistics – A Catalyst

In 2006 the Te Rau Hinengaro report suggested that Māori have a higher level of mental health needs than non-Māori.¹²²⁴ This is reflected in the over-representation of Māori within forensic mental health facilities.¹²²⁵ Māori are also disproportionately represented in the prison population, with half the prison population identifying as Māori.¹²²⁶ For Māori women the statistics are as high as 60 per cent of all women who are incarcerated. The incidence of mental illness within the criminal justice system is also disproportionately high.¹²²⁷

Taken separately, these statistics are of concern. Taken cumulatively, the statistics are tragic, indicating that an unacceptable number of Māori are within the criminal justice system, with a correspondingly higher incidence of mental illness than the rest of the population.

Both judges and solicitors, as officers of the court, lament at the continual high numbers of Māori that appear before them or they represent within the criminal justice system.¹²²⁸ Irrespective of these initiatives, it is clear that an alternative forum underpinned or driven by more holistic principles, such a tikanga Māori, is required. This thesis suggests that the concepts of tikanga Māori be applied within a suitable forum.

Borrows suggested that:¹²²⁹

¹²²⁴ Joanne Baxter and others “Ethnic Comparisons of the 12 month prevalence of mental disorders and treatment contact in Te Rau Hinengaro: the New Zealand Mental Health Survey” (October 2006) 40(1) *Australian and New Zealand Journal of Psychiatry* at 905–913.

¹²²⁵ Baxter and others, above n 1224.

¹²²⁶ Bronwyn Morrison, Natalie Soboleva and Jin Chong *Conviction and Sentencing Offenders in New Zealand: 1997 – 2006* (Ministry of Justice, 2008) at 118; See also Michael Rich *Census of Prison Inmates 1999* (Department of Corrections SAS Policy Development, Wellington, December, 2000) at 43 <www.corrections.govt.nz>.

¹²²⁷ Baxter and others, above n 1224.

¹²²⁸ See also comments by the Judges at the Healing Courts and Plans People, International Therapeutic Jurisprudence Conference October 9 – 10, First Nations Long House, Vancouver, British Columbia that also reluctantly recognize the continual high number of indigenous offenders that appear before them.

¹²²⁹ Borrows, above n 235, at 181.

... both indigenous and other Canadian governments could enact legislation or undertake similar official acts that recognise and harmonise Indigenous legal traditions with the common law ... *I also suggest that Indigenous Courts, along with federal and provincial courts, could better implement Indigenous law by applying appropriate interpretive mechanisms* [emphasis added] and ensuring that at least some of those who are appointed to the bench have a knowledge of receptivity to Indigenous legal traditions ... Indigenous governments and the Canadian Parliament should pass *Indigenous law recognition legislation to facilitate the rule of law's* [emphasis added] development in Canada.

Justice Heath notes that tikanga Māori aligns more closely with an inquisitorial model seeking to achieve a common and mutually beneficial goal, as opposed to the current adversarial system. In proposing two avenues to incorporate Māori customary law, Justice Heath proposes that the entire judicial system could be overhauled, and either parallel systems of adjudication be developed or a stand-alone system of adjudication be created, which takes equal account of Māori custom and "European" values.¹²³⁰ Second, the existing framework could be modified, thereby permitting Māori concepts and custom to operate in the appropriate circumstances.¹²³¹ Considering the first option as unlikely for a number of reasons, including the current political climate, Justice Heath considers that option two is the only politically viable solution. His Honour notes that:¹²³²

While this could be seen as consigning Māori custom and values to a gap-filling role, I am more sanguine about the prospects of producing a more substantive solution.

The incorporation of Māori concepts into legislation by the government acknowledges and promotes Māori cultural identity and gives practical effect to the Treaty of Waitangi within its legislative frameworks.¹²³³ However, there is no nexus between the passage of domestic legislation and tikanga Māori. The doctrine of parliamentary sovereignty does not require Parliament to consider tikanga Māori before passing legislation. Further, when tikanga is included within legislation, it is often only one

¹²³⁰ Heath above n 294 at 200.

¹²³¹ At 209.

¹²³² At 200.

¹²³³ Arnu Turvey "Te Ao Māori in a Sympathetic Legal Regime: The Use of Māori Concepts in Legislation (2009-2010) 40 Victoria U. Wellington L. Rev. 531.

factor to be satisfied or considered by the decision maker. Likewise, whether or not the definition of tikanga is satisfied is determined by the decision maker. Taking concepts such as tikanga or kaitiaki out of context runs the risk of mistranslation.¹²³⁴

Paul McHugh describes this process as “a conscious effort by government and Māori to move from the embattled processes of rights recognition to reconciliation”.¹²³⁵ This process is achieved through the development of a "sympathetic legal regime" that "accommodates the cultural disposition" of indigenous groups.¹²³⁶

Despite the two texts of the Treaty of Waitangi, it is the English version — in which Māori cede sovereignty to the Crown — that is most often referred to. There is no impetus on the Crown to consider tikanga Māori from a Treaty perspective.

The monopoly of the government and its agencies interpret tikanga Māori in accordance with the underlying values and interests of the dominant group, rather than promoting tikanga Māori culture.¹²³⁷ The meaning of the terms themselves become subservient to the political objectives of a government that, while sympathetic to Māori interests, is determined to steer away from the underlying questions of tino rangatiratanga.¹²³⁸

C. Equality

Before addressing an extension of the jurisdiction of the Māori Land Court, it is important to discuss the issue of equality and whether the establishment of an indigenous court is an anathema to equality and the rule of law, which includes the

¹²³⁴ See Nin Tomas “Tangata Whenua Issues: Implementing Kaitiakitanga under the RMA” (1994) July New Zealand Environmental Reporter at 39-42 where Nin discusses the problems of importing Māori concepts into legislation in particular that of kaitiaki

¹²³⁵ McHugh above n 12

¹²³⁶ McHugh, above n 12, at 55.

¹²³⁷ Turvey, above n 1233. See also Jeremy Waldron "One Law for All? The Logic of Cultural Accommodation" (2002) 59 Wash & Lee L Rev 3 at 3 where he notes that the policy behind legislation can be culturally biased. He states "one law for all" ... is the inherent ally of state law, rather than an independent consideration that helps settle the issue between state law and its cultural competitors.

¹²³⁸ Turvey, above n 1233.

principle of “one law for all” and the position that humans are all basically alike.¹²³⁹

Justice Heath echoes a commonly held perspective:¹²⁴⁰

In my view, New Zealanders generally will not accept a system whereby different laws are applied to different classes of people ... if there are laws for Māori and other laws for other New Zealanders, what happens when the two collide? Which law prevails? Indeed, how can two legal systems founded on race and culture be justified on a principled basis?

For Māori, the whakataukī “me haere whakamuri kia haere whakamua” (we must journey back, or understand our past before we can move forward) is instrumental when considering the relevance of “one law for all”.

Whilst there are competing arguments that range from consideration of culture will result in greater differences¹²⁴¹ to the call for indigenous people to embrace self-determination and establish their own systems of governance,¹²⁴² there is an underlying need to consider the context against which the laws of New Zealand were crafted.

In the colonial era, a raft of legislation alienated Māori from their land and resources. Many early government policies were also discriminatory towards Māori. It would be disingenuous to claim that at this time the principle of equality applied when, in particular, Māori were subject to policies that resulted in land alienation. Similarly the application of “one law for all” in the criminal context is clearly not working.

It is superficial to claim that the recognition of Māori rights will discriminate against

¹²³⁹ See Jeremy Waldron “Basic Equality” Nellco Legal Scholarship Repository New York University Public Law and Legal Theory Working Papers 19 December 2008, at 44. Available also <www.lsr.nellco.org> for further discussion.

¹²⁴⁰ Heath, above n 294, at 201.

¹²⁴¹ Brian Barry *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press in association with Blackwell Publishers, Cambridge, 2001).

¹²⁴² See for instance Taiaiake Alfred Peace, Power and Righteousness: An Indigenous Manifesto (2nd ed, Oxford, Oxford University Press, 2008). See also Brad Morse “Regaining Recognition of the Inherent Right of Aboriginal Governance” in Yale Belanger (ed) *Aboriginal Self-Government in Canada: Current Trends and Issues* (Oxford University Press, Oxford, 2004)

non-Māori before understanding the justifications for those rights.¹²⁴³ Furthermore, the Human Rights Act 1993, that generally prohibits discrimination on the grounds of race, does recognise an exception for affirmative action programmes and provisions done in good faith to assist or advance persons who need assistance or advancement to achieve an equal place with other members of the community.¹²⁴⁴

There is usually little obstacle to a parallel or separate criminal justice system when the offender and victim are both Māori and there is no dispute as to the offender's guilt.¹²⁴⁵ Current legislative provisions, including Sentencing Act 2002¹²⁴⁶ and the Māori Community Development Act 1962, permit Māori committees to impose penalties on Māori for certain conduct falling within the Summary Offences Act 1981 and the CYFP Act. This provides for the inclusion of customary law or tikanga Māori within the justice system. The Sentencing Act further supports the use of marae programmes, iwi and hapū involvement.¹²⁴⁷ Despite these incremental steps to recognise tikanga Māori, it is difficult to ignore the persistent disproportionate offending rates for Māori.

Justice Heath noted that:¹²⁴⁸

Education and intellectual flexibility are key allies in the challenge to apply custom. Greater understanding is likely to breed confidence. With education, understanding and confidence on the part of all participants, it may be possible to find a significant place for Māori within the New Zealand judicial system. But it will be a significant challenge to do so.

It is unlikely that a right to secede or a right to external self-determination manifest in an indigenous court will be realised for Māori. Nonetheless, a form of internal self-determination could be achieved through an extension of the existing legal forum,

¹²⁴³ Claire Charters “Do Māori Rights Racially Discriminate against Non-Māori? (2009-2010) 40 Victoria U. Wellington L. Rev. 649 at 668.

¹²⁴⁴ Human Rights Act 1993 section 73.

¹²⁴⁵ Jackson above n 31.

¹²⁴⁶ Section 10 – this would assume that the offender would appear before a Māori Committee and the Māori Committee could then impose actions upon the offender to compensate, apologise or ‘make good the harm’ this can then be taken into account by the sentencing judge.

¹²⁴⁷ Sentencing Act ss 51 (c) and 54H (c).

¹²⁴⁸ Heath, above n 294, at 212.

where the right to culture and the principles that underpin tikanga Māori are appreciated.

This next section will consider two possibilities: an extension of the jurisdiction of the Māori Land Court and the introduction of a ‘specialist’ Tikanga Court that has similarities with the current Rangatahi Court, as well as the Alcohol and other Drug Treatment Court. If successful, it is proposed that like the Rangatahi Courts, the jurisdiction would be open to both Māori and non-Māori, thereby complying with the principle of “one law for all”.

D. Māori Land Court: An Extension of Jurisdiction or a Tikanga Court?

Various pieces of legislation, including the Native Land Court Act of 1865, sought to simplify tikanga Māori and ‘freeze’ Māori entitlements to deal with their land by requiring alienation to be made to the Crown (by sale and at time confiscation) with the approval of the early Native Land Courts. This was facilitated by assimilating native or customary title into an individualised system of land tenure and then vesting Māori land into Crown ownership.¹²⁴⁹ This process ‘fast tracked’ the alienation of Māori land and had an enduring detrimental effect on Māori society and, consequently, re-defined the nature of tikanga Māori.

The Māori Land Court is a creature of statute with the authorisation to be a court of record under Te Ture Whenua Māori Act 1993.¹²⁵⁰ Today the Act provides for a different philosophy. Underpinned by tikanga values, the preamble notes:

... And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a

¹²⁴⁹ See D Williams *Te Tango Kooti Whenua* (Huia Publishers, Wellington, 1999). See also discussion by Richard Boast ‘Evolution of Māori Land Law 1862 – 1993’ in Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith (eds) *Maori Land Law* (2nd edition, Lexis Nexis, New Zealand, 2004) at 65 – 117 where he noted that “... difficulties associated with the management and development of Māori freehold land are not likely to be readily or easily overcome”.

¹²⁵⁰ Te Ture Whenua Māori Act 1993, s 6.

court and to establish *mechanisms to assist the Māori people to achieve the implementation of these principles* [emphasis added].

(a) Background

When President John Rogan of the then Native Land Court was appointed on 25 June 1864, so too were four Māori judges: Wiremu Tipene, Matikikuha, Te Keene of Orakei and Tamati Reweti. On 25 October 1864 a further seven Māori judges were appointed: Hone Mohi Tawhai, Penetana Papahurihia, Hoterene Tawatawa, Wepiha Pi, Tango Hikuwai, Riwhi Hongi and Tamatai Huingariri. It was not until 15 August 1974 that Edward Taihakurei Durie, the next Māori judge, was appointed to the bench.

Today judges, such as the Chief and Deputy Judges of the Māori Land Court, are appointed by the Governor General.¹²⁵¹ Furthermore, the Te Ture Whenua Māori Act 1993 provides that:¹²⁵²

... the person must not be appointed unless the person is suitable, having regard to the person's knowledge and experience of te reo Māori, tikanga Māori ...

Cases before the Māori Land Court can be complex and often involve tikanga or customary concepts. The judge will determine the conduct of the hearings that are usually held within existing court rooms in the Māori Land Court districts. Rules of marae kawa may be applied by the judge as considered appropriate, including a karakia (prayer) to commence and mihi whakatau (greetings). Te Reo Māori (the Māori language) is often used in court.

Since the passing of the Native Lands Act 1862, the Māori Land Court (Te Kooti Whenua Māori) and the Māori Appellate Court (Te Kooti Pira Māori) have continued in various forms under Te Ture Whenua Māori Act 1993 (TTWM Act).

¹²⁵¹ Te Ture Whenua Māori Act 1993, s 7(1).

¹²⁵² Section 7(2A).

The Māori Land Court has jurisdiction to hear matters relating to Māori land, including successions, title improvements, Māori land sales, and the administration of Māori land trusts and incorporations.¹²⁵³ More specifically the Māori Land Court is to:¹²⁵⁴

- Administer and apply Te Ture Whenua Māori Act 1993 and other relevant legislation;
- Maintain the records of title and ownership information of Māori land;
- Make available Māori land information held by the Māori Land Court; and
- Facilitate Māori land administration and development through the professional delivery of services to Māori land owners, their whānau or hapū.

The TTWM Act is a comprehensive piece of legislation but does not codify all Māori land issues. The application of other statutes, such as the Income Tax Act 2007, Land Transfer Act 1952 and the Property Law Act 2007, is not excluded by the TTWM Act and it must be read in conjunction with these and other relevant statutes.¹²⁵⁵ The TTWM Act has been amended to include sections on the ‘Jurisdiction of the Court under the Maori Fisheries Act 2004’ and the ‘Jurisdiction of the Court under the Māori Aquaculture Claims Settlement Act 2004’. The Court has exclusive jurisdiction to advise on disputes referred to it under the Māori Fisheries Act 2004 and the Māori Aquaculture Claims Settlement Act 2004.¹²⁵⁶ As a court of record, the Māori Land Court’s decisions are subject to judicial review.

McGuire described the Māori Land Court as:¹²⁵⁷

... a special class of administrative court designed to administer and implement policy ... It deals with a particular class of case where it is essentially an alternative to the ordinary courts.

¹²⁵³ See also Jeremy McGuire “The Status and Functions of the Māori Land Court” (1993-1996) 8 Otago L. Rev. 125.

¹²⁵⁴ See Judge N F Smith “Māori Land Court Jurisdiction and Procedure” in Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis, New Zealand, 2004) at 121 – 149 for full discussion on the jurisdiction of the Māori Land Court; also Māori Land Court see <<http://www.justice.govt.nz/courts/maori-land-court>>

¹²⁵⁵ McGuire, above 1253, at 125.

¹²⁵⁶ Te Ture Whenua Māori Act 1993, ss 26B and 26P.

¹²⁵⁷ McGuire, above n 1253, at, 128.

Looking to an expanded Māori Land Court jurisdiction, as an answer an appropriate starting point to consider, this possibility is noted by Joe Williams, the then Chief Judge of the Māori Land Court:¹²⁵⁸

It seems to me therefore that there is a real argument for a new form of Māori Land Court — a judge sitting with two or more pūkenga or experts — adjudicating, facilitating, and mediating through issues confronting the new tribal organisations in respect of the new tribal asset. What is genuinely exciting is that the Court would be applying and developing a separate system of law — a system which is a mix of those aspects of tikanga Māori which continue to inform the lives of Māori today and those principles of the common law which have stood the test of time. A system which, as the Treaty directed, draws on the best of both worlds.

(b) Procedure

The Māori Land Court is comprised of judges who are Māori, well-versed in tikanga Māori and guided by a preamble that seeks to establish mechanisms to assist Māori litigants. It is proposed that in view of the recent amendments to extend the jurisdiction of the Māori Land Court, a further amendment is needed to extend the jurisdiction to include criminal and civil matters for Māori.

(c) Criminal

The procedure would mirror the proposed model outlined in Chapter Seven. Ideally, the jurisdiction would be open to all offenders with the anticipation that, after the success of this model has been proven, the jurisdiction would be widened to include more serious offences. So initially it is recommended that only the lesser offending would apply. Upon review the jurisdiction could be extended to include more serious violent offences provided for in the Crimes Act 1961.¹²⁵⁹

This model and the accompanying process would be entirely integrated. The jurisdiction would be open to both Māori and non-Māori as the principles applied

¹²⁵⁸ Chief Justice Joe Williams “The Māori Land Court – A Separate Legal System?” (Occasional Paper 4, The New Zealand Centre for Public Law, VUW, July 2001) at 11.

¹²⁵⁹ It is noted that the Matariki Court already considers serious violent offenders.

therein are universal. Upon arrest, an advocate, warden or similar person would be contacted. This advocate would be responsible for the offender until his or her next court appearance. This is not novel. The Child and Young Persons and their Families Act, although relating to young persons and children, allows the child to be delivered to any iwi social service or cultural social service with the child's agreement following arrest.¹²⁶⁰

The offender would be assessed within the local marae forum, allowing for whānau involvement. Initially, the offender would have no choice as to which marae he/she would appear in,¹²⁶¹ but could be transferred to a tribal or iwi specific marae if he/she requested. In view of recent Treaty Settlements, the ability for Iwi to fund and support this marae based initiative within their respective area is encouraged to complement government support.

All parties, including the kaumatua panel and the offender, would sit at eye level or *kanohi ki te kanohi*. An advocate would assist to ensure that the offender and their families do not feel uncomfortable in such a setting and alleviate any feelings of alienation from the process. This would be consistent with the concept of *manaakitanga* — the process of showing care, respect, kindness and hospitality.¹²⁶²

During this marae based phase, community members and the disputants would be encouraged to talk things through with the help of respected members of the community in order to reach a consensual agreement.¹²⁶³ The consensus of the participants is the culmination of collective decision-making. This goal is similar to the Peacemakers Court; the achievement of *hózhóji k'é náhóodleel* (peacemaking), much like the tikanga Māori concept of rebalancing. This step is seen to empower the community and encourage the principle of inclusivity and reciprocity.

¹²⁶⁰ Section 234 (c) (ii) Children, Young Persons, and Their Families Act 1989.

¹²⁶¹ This is similar to the Māori Focus Units in prisons where upon sentencing the offender has no choice but is allocated to an area where his protocol or *kawa* may or may not apply.

¹²⁶² Benton and others, above n 204 at 205.

¹²⁶³ It is noted that section 4A of the District Courts Act 1947 provides for Judge alone criminal or civil proceedings to be heard at another convenient place, this provision could be adapted and included to enable the express use of a marae as a forum.

Also during this stage, an appropriate programme would be specified for the offender, consistent with the concept of kaitiakitanga (watch or guard).¹²⁶⁴ At this point it would be pivotal that the offender understands, from a tikanga perspective, the nature of his or her crime, take responsibility for his or her actions, face the victim, and address the need for utu and balance. The composition and underlying tikanga or cultural perspective of these programmes will assist in addressing the safety needs of the victim and the future well-being of the offender. Intrinsically tikanga-based programmes encompass the concept of the offender, taking responsibility for his or her actions.

This process recognises that defendants often come before the court with problems that place them at risk of reoffending. Any additional problems, such as drug or alcohol dependency, can be identified and the appropriate programmes recommended. If left without treatment, defendants may well find themselves back before a court, charged with further offences. For instance, early treatment or intervention may prevent this situation from occurring and reduce the statistics of offending while on bail.¹²⁶⁵

Upon the offender's first court appearance, the judge would call for a report from the Māori representative (similar to a probation report). Taking into account the findings of the report, the judge would then assess the effectiveness of the programme and if satisfied, the offender could be returned to the community after being convicted and discharged.¹²⁶⁶

(d) Issues

Although the preamble of the TTWM clearly indicates an onus to adhere to principles of tikanga Māori, this is within a 'land' or civil context, not a criminal one. Incarceration is not consistent with tikanga Māori. Further, it is likely that a Māori Land Court judge would not be comfortable with sentencing an offender.

¹²⁶⁴ Benton and others, above n 204 at 105.

¹²⁶⁵ Ministry of Justice *Trends in the Use of Bail and Offending while on Bail 1990 – 1999* (Research and Evaluation Unit January 2003) indicates that 21 per cent of people offended while on bail.

<<http://www.justice.govt.nz>>

¹²⁶⁶ Sentencing Act 2002 section 106.

Currently, the Māori Land Court is not associated with Police, Corrections, Crime and Prison, and as such, does not attract the negative connotations. If the Māori Land Court was associated with such themes, the negative stigma would follow.

The Māori Land Court judges would need to be ‘warranted’ within this jurisdiction. Unlike the District Court, the associated court machinery and administration services would need to be established.

(e) Civil

An extension of the Māori Land Court’s jurisdiction to include civil matters, including contractual and commercial issues, may be more difficult. Like the Māori Fisheries Act 2004 and the Māori Aquaculture Claims Settlement Act 2004, the court’s jurisdiction would need to be confined to the resolution of disputes in the first instance. A respective amendment may also be required in the corresponding legislation to recognise the extended jurisdiction of both criminal and civil trials.

It is encouragingly noted that a special session of the Kaitaia District Court at Roma Marae in Ahipara, held in November 2014, was a New Zealand legal first where the District Court heard civil charges on the marae. Mr Tepania, a small-time commercial fisherman, appeared before Judge Greg Davis on six Fisheries Act charges relating to the late filing of fishing returns on six occasions between February 2012 and January 2013.¹²⁶⁷ He also faced three more serious charges of filing a return more than a month late that carried a maximum penalty of a \$100,000 fine and forfeiture of his boat. He had earlier pleaded guilty and was appearing for sentencing.

It was noted by the court that Mr Tepania was a highly regarded conservationist and community worker and was discharged without conviction and ordered to pay zero dollars in costs to the Ministry of Primary Industries.

¹²⁶⁷ *R v Te Pania* – [2015] DCR 25. See also Peter de Graf No conviction for conservationist Nov 26, 2014 Northern Advocate < <http://www.nzherald.co.nz/>>

It is noted, however, that the current purview of the Māori Land Court includes reference to provisions of the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.¹²⁶⁸

Both Māori and non-Māori applicants would need to apply to the court to have the matter determined. Matters or disputes concerning property, equity, contract and related civil matters that concern Māori, either as plaintiff or defendant, or the subject-matter of the proceeding, e.g., land, would fall under the jurisdiction of this new framework. If one party is non-Māori, then the other party would need to seek their consent before proceeding with an application.

The application would need to be first accepted by the Māori Land Court.¹²⁶⁹ If the application fails, then the general jurisdiction of the District or High Court would apply. Once an application is lodged, the applicants would need to undergo mandatory mediation or arbitration prior to any court hearing. Mediation or arbitration will follow the same process as the current marae based court model and be consistent with the Peacemakers Court, with the appropriate support people. These requirements would be mandatory.

During this marae based phase, like a Peacemakers Court, it is envisaged that this route may be used to resolve many issues, including land use permits, validation of paternity and marriage, dissolution of marriage, correction of records, traditional adoption, guardianship, declaration of death and probate.¹²⁷⁰ This step is seen to empower the community and encourage the principle of inclusivity and reciprocity.

If no resolution can be reached, a court date will be set. The court process is underpinned by tikanga and its aim is to achieve balance — the goal of tikanga Māori. Similar to that of the Navajo jurisdiction and customs, tikanga Māori could be employed by the judges to assist the court.

¹²⁶⁸ Te Ture Whenua Māori Act, s 106.

¹²⁶⁹ It is acknowledged that a set of regulations and guidelines would need to be established.

¹²⁷⁰ It is noted that s 4A of the District Courts Act 1947 provides for Judge alone criminal or civil proceedings to be heard at another convenient place, this provision could be adapted and included to enable the express use of a marae as a forum.

Similar to the Tribal Courts in the United States where two judges may sit, one from a state court and one from a tribal court, section 26G of the TTWM Act 1993 provides the opportunity for kaumatua to sit alongside the judge:¹²⁷¹

The court may, of its own motion or at the request of any party to the proceeding, appoint 1 or more additional members (not being Judges of the Māori Land Court) who have *knowledge of relevant tikanga Māori or other expertise to assist the court* [emphasis added].

Assisted by two experts, a ruling can be made within the current legislative framework.¹²⁷² Until appropriate the “tikanga” is infused, and the legislation is promulgated, legal adjudicators will need to make every effort to utilise the common law principles that support tikanga.

Appeals would be available to the Māori Appellate Court.¹²⁷³

(f) Issues

It is anticipated that a wider civil jurisdiction would require the support of Māori and adequate resourcing. An extension to include family issues would be more consistent than criminal issues.

Currently the Resource Management Act 1991 contains provisions where the expertise of a Māori Land Court judge can be called upon when the case involves tikanga Māori. It may be that similar to the Environment Court when a case before, for instance, the Family Court involves tikanga Māori the expertise of the MLC judges is required and called upon. It may also be that in criminal cases involving tikanga Māori, such as *R v Mason*, a Māori Land Court judge is requested to sit with

¹²⁷¹ Te Ture Whenua Māori Act 1993, ss 26G, 26S, 26T(4), 26U(5), 32 and 62.

¹²⁷² Akin to Magistrates Court Act 1989 (VIC), s 17A: Appointment of Aboriginal Elders or Respected Persons.

¹²⁷³ A review of Te Ture Whenua Māori Land Act 1993 has just been completed and is now open to submissions and consultation. The focus of this review was to enable Māori land to be available for commercial use.

the judge. The Law Commission foreshadows the potential use of the Māori Land Court to determine issues pertaining to burial.¹²⁷⁴

As the review of the TTWM is in progress, it is suggested that some of the administrative aspects of the Māori Land Court could be removed and replaced with a mediation role for disputes. Such a transformation would result in the court no longer being a “land court”. Despite this potential change of jurisdiction, it is anticipated that the underpinning concepts of tikanga Māori would remain.

(g) Conclusions

It is envisaged that an extension of the Māori Land Court would include the following:

- (a) Expansion of jurisdiction to include civil and criminal areas; akin to the jurisdiction of the District Court;
- (b) Within these two areas — speciality ‘courts’ to hear cases on environmental, family and employment matters; and
- (c) Change of name to ‘Te Kooti Māori’.

It is acknowledged that this would increase the workload of the judges and it is suggested that more Māori judges be appointed. But the inclusion of kaumatua is pivotal, particularly in youth criminal offending cases, as the kaumatua, through tikanga and whakapapa, is ultimately responsible for the offender. It is suggested in such cases, the kaumatua be afforded the mana to adjudicate.

As for a proposed solution, there are no hard statistics to support such an initiative. Nonetheless, the identification of serious issues, such as alcohol abuse and offending, has led to the establishment of the Alcohol and other Drug Treatment Courts.

¹²⁷⁴ Law Commission Report *Burial in New Zealand Today* (NZLC IP34) at 32, 45, 46, 73. See also comments from Mihiata Pirini in Law Commission looks at burial rights 4 August 2014 Radio NZ. <<http://www.radionz.co.nz/>> who noted that ‘the (Law) commission wanted to see a judge from the Family Court and another from the Māori Land Court together to hear claims over burial rights ... the Law Commission was tweaking its original proposal so that the onus was put on having a judge from each court where there was a dispute involving tikanga and Pākehā.’

Similarly, the marae courts initiative was launched to address the issue of youth offending, in particular, that by Māori youth. Judges and legal counsel are well aware of the over-representation of Māori in the criminal justice system and support an initiative to address this problem.

Recent specialised courts, such as Alcohol and other Drug Treatment Court and the marae courts have been established as a response to social and community difficulties. Anecdotal evidence suggests that these initiatives are working. Comparative jurisdictions confirm the success of these so-called ‘specialised courts’.

E. Specialist ‘Tikanga Māori’ Court

Building on the success of the Rangatahi, Matariki, and Alcohol and other Drug Treatment Courts (AODTC), the proposed Tikanga Court, as a stand alone court, would operate in a similar way with an initial focus on criminal offending.¹²⁷⁵ The underlying purpose of this court is to provide a forum where principles of tikanga can be meaningfully implemented and applied to achieve balance, healing or harmony within the individual and the community. Like the AODTC, the Tikanga Court would also focus on the root cause of the offending.¹²⁷⁶

(a) Procedure

The jurisdiction would be open to both Māori and non-Māori as the principles applied are universal. The process would commence upon arrest, where the offender would be offered the option to appear before a judge and two kaumatua at a Tikanga (marae) based court, or fall under the general jurisdiction of the District or High Court.

By choosing the option of a Tikanga (marae) based court, the defendant would need to enter a guilty plea. This reflects an important concept of tikanga Māori; namely, if one is charged with or alleged to have committed an act, then that person must take

¹²⁷⁵ Section 4D of the Magistrates Court Act 1989 (Vic) provides for the establishment of Koori Courts – similar provisions could be enacted.

¹²⁷⁶ See Chapter I ‘Causes of offending’.

responsibility. This is similar to a strict liability offence under criminal law; however, assuming responsibility increases a person's mana.

If the offender chooses the marae based option, they would then register with a 'Marae Services'¹²⁷⁷ facility. The Marae Services would provide all administrative assistance including compiling a court list for marae sittings and maintaining all files for the offenders. It is suggested that a District Court registrar be part of the Marae Services to ensure consistency between the two facilities (District Court and Marae Court). This is important, particularly if the offender chooses to opt out of the marae process for the general court jurisdiction.

The Marae Services would advise the offender at the time of registration of the next available date for the initial hearing, in accordance with the 'heard as soon as practicable' provision.¹²⁷⁸ At this point a lay advocate,¹²⁷⁹ such as a kaitiaki, would be assigned and become responsible for the offender. The Marae Services would then provide the file to either the lay advocate or the marae where the offender would remain.

The lay advocate would assist to ensure that the offender and their families are familiar with the process that lies ahead.¹²⁸⁰ This would also include appearing with them in support (awhi and manaaki) and during the next step, the hearing at the marae.¹²⁸¹ The lay advocate would also provide support (awhi) to the victim and their families in a similar fashion, as it is expected that the victim would also appear.

The procedure for the marae hearing would be similar to that of the Rangatahi Courts with a pōwhiri, mihi, kai, korero and poroporoaki. The judge would sit with two community members and preside over the hearing. Like the Rangatahi Courts, if

¹²⁷⁷ This would be similar to the service offered by the District Court.

¹²⁷⁸ New Zealand Bill of Rights Act 1990 s 23 (3).

¹²⁷⁹ Section 163 CYPF Act 1989 provides for the appointment of a lay advocate. It is envisaged a similar provision could be enacted alternatively this section could be amended to include a lay advocate for a Tikanga Court.

¹²⁸⁰ Section 327 CYPF Act 1989 provides for representation of the offender's interest. Again it is envisaged a similar provision could be enacted, alternatively this section could be amended to include a lay advocate for a Tikanga Court

¹²⁸¹ In light of the review of the role of Māori wardens, it is submitted that Māori wardens could provide their services as a support role within a Tikanga Court.

relevant, a member from Hauora (Ministry of Health) and social support services as well as members from the community would take an active role in promoting the principle of inclusivity. This would provide support to the offender for behaviour related issues, such as mental health and anger management problems or alcohol and drug addictions. This could also encompass an offender with domestic violence charges who suffers from mental health issues. It is anticipated that existing programmes could be used.

The judge, together with the two community members and support services, will determine a suitable programme/s for the offender. With the appropriate support of the respective programme representatives and potential supervision of the lay advocate and/or the marae, the offender will commence the programmes and then report back to the Marae Court once completed.

Upon the offender's next Marae Court appearance, the Judge and two kaumatua would review the offender's progress, programme completion and also take into account any reports from the programme leaders. At this point it could be determined that the offender be released without conviction¹²⁸² or it may be that a further programme is suggested to the offender for completion. If the offender has successfully completed their programme this would be noted on his file and the file returned to Marae Services or a similar justice depository for any future reference should it be warranted.

Ideally, legislation similar to that of the Koori Court Act would be promulgated to provide certainty and a clear direction for the court.

At any stage the offender should have the chance to opt for the general jurisdiction of the District or High Court. Alternatively, if the offender fails to comply with the process, then they could be reassigned to the general District Court process.

Similar to the Alcohol and Other Drug Treatment Court (AODTC) pilot scheme, a Tikanga Court pilot could sit weekly at Hoani Waititi and Orakei (or alternatively

¹²⁸² Similar to a section 106 Sentencing Act 2002.

Kaikohe) as these are venues already successfully utilised by Te Kooti Rangatahi. This could potentially cater for 100 participants each year. It is accepted that unforeseen glitches will arise if a Tikanga Court pilot is realised. And despite the positive nature of a Tikanga Court, a major challenge will be finding the adequate funding and resources, particularly to support the community services. However, it is proposed that the benefits of a Tikanga Court would outweigh the costs involved, particularly since the existing infrastructure (e.g., marae, social services, Corrections, judiciary) is already established.

Moreover, the District Court judges have the required judicial criminal and trial warrants. Further, the machinery and administrative support is already in place.

Comparative jurisdictions have found positive experiences with similar initiatives, although statistics show that disproportionate offending rates persist. The Ministry of Justice recognises that culturally appropriate responses are required. Collectively, this supports such an initiative as a Tikanga Court.

(b) Hypothetical Example

Hemi is a twenty-year-old unemployed Māori male.

He lives at home with his mother and six younger siblings. His father, when he visits, routinely abuses Hemi's mother and siblings. Although he was the top student in his class, Hemi left school at 14 to find work and raise his siblings. Recently, Hemi has been enticed by a local gang to sell drugs.¹²⁸³ However, Hemi has also become an addict, using more drugs than he can sell. To bridge the loss, Hemi decides to rob the local dairy. He is caught and charged.

For Hemi, the option of a marae based court would be ideal. It would give him the opportunity to undertake the necessary rehabilitative drug programmes, and provide information and support on completing his education. This option would also provide

¹²⁸³ Cannabis, a class C drug.

advice to his mother regarding the ongoing abuse from his father as well as any possible housing issues. Depending on the quantity of drugs sold, and in view of the potential damage to the community, it would be suggested that Hemi engage in anti-drug treatment programmes. It would be hoped that, after the completion of these programmes, Hemi and his family will become positive members of the community.

Like the Matariki Courts, the victim's consent would not be required for acceptance into the Tikanga Court process. However, the victim would have the chance to face the offender and provide input into any programme. This could include reparation payment of the goods stolen. As offenders are often unemployed and without funds, appropriate work, such as cleaning the shop or stacking shelves, could be considered to satisfy the principle of reciprocity and balance. This situation would be preferable to a possible prison or community detention sentence with limited opportunity for rehabilitation.

Anecdotally, members of the judiciary have commented on the disproportionate representation of Māori within their courts¹²⁸⁴ and welcomed the need to employ creative solutions to reduce recidivism rates.

A proposed Tikanga Court reflects a merging of two existing initiatives — Te Kooti Rangatahi and the Matariki Courts. This is a logical step. 'When', however, is another question.

¹²⁸⁴ For example *Mika v R* [2013] NZCA 648 at para [12] where Justice Harrison notes the awareness of judges to the disproportionate offending rates for Maori and accepts that economic, social and cultural reasons contribute to this offending. However, he does also note that 'the virtue of being Maori' is not a reason to be at a disadvantage.

HE KORERO WHAKAMUTUNGA

CHAPTER VIII

CONCLUSION

This thesis seeks to test the proposition that:

Applying the philosophy of Te Ao Māori, realized by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine, is the most promising way forward for Māori to ameliorate the over-representation of Māori in the criminal justice system — A case for an Indigenous Court for Māori.

Chapter One sought to introduce the validity of this proposition. An overview of the current relationship between Māori and the criminal justice system provided a backdrop to test this proposition. This included areas of criminal offending, parole and mental health together with the relevant legal provisions, practices and policies and statistical and qualitative information that confirm Māori are disproportionately represented across all stages of the criminal justice system. Fundamental to Chapter One is the discussion on causes of offending.

In Chapter Two, after discourse answering two fundamental questions: ‘Who are Māori?’ and ‘What is tikanga Māori?’ the part examined ancestral conceptions of tikanga Māori and correct conduct. This established a potential framework for further consideration. Two examples provided an insightful reflection and confirmation of the detrimental effect of British law on tikanga Māori. First, the changing significance of Māori women in society and the related problem of domestic violence; and second, the issue of Māori mental health.

The concept of tikanga was set against more commonly known theories of law — natural law and positive law — to provide a benchmark as to where tikanga sits within a non-indigenous legal world. It was established that although tikanga shared concepts with both theories of law, it was still marginalised within our current criminal justice system.

Chapter Three employed a discussion of New Zealand’s constitutional history to determine where an alternative system, predicated on tikanga Māori, may sit within the legal system of Aoteroa, New Zealand. This historical review of the introduction

of British law and legal systems clarified the negative and almost fatal impact that colonisation had on tikanga Māori.

The analysis of two key documents — the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples — firmly established indigenous peoples' right to culture. The evaluation of the pivotal right of self-determination, contained in the United Nations Declaration on the Rights of Indigenous Peoples and the analogous right of tino rangatiratanga in the Treaty of Waitangi, supported a contextual right for the return to the philosophy of Te Ao Māori, realised by an indigenous legal system.

Although New Zealand is reluctant to include international standards on indigenous peoples' rights or the concept of tikanga Māori within a written constitution, an examination of comparative constitutions reveals that it is not uncommon to include indigenous rights within national constitutions. International jurisprudence and constitutional examples confirm and entrench indigenous peoples' rights. The right to implement tikanga Māori meaningfully through an indigenous court within the criminal justice system in New Zealand was still unclear.

Chapter Four considered the historical and contemporary criminal justice initiatives, including Maāri Juries, Maori Wardens and Family Group Conferences; and the use of alternative judicial fora such as Te Kooti Rangatahi, demonstrated a willingness from the criminal justice system to meaningfully include tikanga concepts. Te Kooti Rangatahi provided a convincing vehicle within the current criminal justice system in which offenders could reconnect with their culture. Anecdotal evidence suggests this initiative was helpful in reducing recidivism rates. The recent opening of additional Te Kooti Rangatahi in Christchurch indicates political support. The availability of the Rangatahi Court to both Māori and non-Māori offenders alleviates concerns over equal treatment under the law.

Chapter Five investigated comparative jurisdictions, such as Bolivia and Ecuador, which have incorporated and entrenched similar concepts to tikanga Māori in their constitutions. This includes the importance of Earth Mother and balance and harmony. A review of comparative jurisdictions revealed that vehicles such as Koori

Courts in Australia employ culture within the criminal justice process. The use of alternative judicial fora in comparative jurisdictions, such as Koori Courts, not only supported the right to culture and the right of self-determination, but also provided interesting and practicable precedents for further consideration in Aotearoa, New Zealand. Given the disproportionate representation of indigenous peoples in areas of crime and mental health, it was suggested that drawing upon indigenous concepts, such as *hozho* (healing) and similar doctrine, may provide an answer.¹²⁸⁵ A discussion of the Navajo Court system in the United States was informative. This prompted the question on whether the solution may lie in the realisation of self-determination and the ability for Māori to make decisions over their own political and legal structures. Tikanga Māori, as a discreet system of law together with the existing court systems from comparative jurisdictions, supported a return to an indigenous legal paradigm.

The discussion in Chapter Six on therapeutic jurisprudence within domestic violence courts and re-entry courts highlighted the similarities between therapeutic jurisprudence and tikanga Māori. It was suggested that because therapeutic jurisprudence already exists within the criminal justice system, it may provide a window to import tikanga Māori. In addition, proposed models for domestic violence and re-entry courts were advanced. These models were underpinned by tikanga Māori and could be worked in conjunction with the current legal system. Rather than rely on a doctrine to import tikanga concepts, it was proposed that these concepts should apply directly.

Constitutional rights are derived from the people themselves. It was concluded that tikanga Māori is intrinsic to all Māori. Its concepts or principles should be included to strengthen the laws of New Zealand and promote harmony and healing.

Nonetheless, the negative aspects of this initiative were reviewed. This included a revisiting of the rule of law, the issue of equality, together with practical considerations, such as financial resources. It was determined that a focus on an existing court structure with legislation clearly directing the consideration of tikanga

¹²⁸⁵ *Indigenous law* relates to that system of law developed by, and relating to, indigenous peoples. Terms such as Customary Law and Aboriginal Law can also be used. For Māori this system of law is “tikanga”. See also New Zealand Law Commission above n 33 for discussion on tikanga Māori and Māori custom law.

Māori by judges versed in tikanga Māori, such as the Māori Land Court, was a viable option. It was suggested that a focus on existing court structures, coupled with clear legislation requiring judges to both consider and be well-versed in tikanga Māori, would render the Māori Land Court a credible forum.

Chapter Seven consolidates this research and tests the possibility of a new framework; either an extension of the Māori Land Court's jurisdiction¹²⁸⁶ or a specialised Tikanga Court¹²⁸⁷ with similarities to the AODTC and the Rangatahi Court. Like an extension to the Māori Land Court's jurisdiction, a Tikanga Court would be underpinned by important concepts, such as manaakitanga, kaitiakitanga and whanaungatanga. Further, the requirement to attain healing, harmony and balance at both an individual and community level is also intrinsic. Through drawing and building upon the positive developments of the Rangatahi Court, as well as the AODTC pilot, a Tikanga Court could empower the community with decision-making. In this sense it would be consistent with the right of self-determination.

The Māori Land Court is comprised of judges who are Māori and well-versed in tikanga Māori. The preamble of the TTWM Act seeks to establish mechanisms to assist Māori. Importantly, the personnel, infrastructure and legislation are already in place.

An extension to the jurisdiction of the Māori Land Court to include criminal and civil matters, together with respective amendments in corresponding legislation, would be required.¹²⁸⁸ Until appropriate 'tikanga-infused' legislation is promulgated, every effort to utilise the common law principles that support tikanga would need to be employed. A change of name to 'Te Kooti Māori' to reflect the extended jurisdiction is also proposed. It is acknowledged that a number of difficulties lie ahead.

Nonetheless, the extended jurisdiction of the Māori Land Court would embrace both

¹²⁸⁶ The jurisdiction of the Māori Land Court is currently to hear matters relating to successions, Title improvements, Māori land sales and the administration of Māori Land Trusts and Incorporations. The jurisdiction also includes cases under the Māori Fisheries Act 2004, Māori Commercial Aquaculture Claims Settlement Act 2004. An extension to the jurisdiction to capture criminal offending may be suggested.

¹²⁸⁷ Although phrased as a "new" Indigenous Court there are many such Courts already operating. In Canada the National Judicial Institute provides educational courses for the Judiciary on Aboriginal Courts covering the Reality, Theory and Future of these Courts.

¹²⁸⁸ For example, the Māori Fisheries Act 2004.

Māori and non-Māori applicants and would be underpinned by concepts such as healing, harmony and balance.

These proposed models recognise that a separate system may not be practical for Māori. The biggest obstacle being political will.¹²⁸⁹ However, the meaningful implementation of tikanga concepts ‘by Māori, for Māori’ and fully supported by the community, provides an answer to the following question:

Applying the philosophy of Te Ao Māori, realized by an indigenous legal system, manifested by an indigenous court, premised on fundamental Māori concepts and doctrine, is the most promising way forward for Māori to ameliorate the disproportionate offending rates.

¹²⁸⁹ Heath above n 294.

Concluding Recommendations

The historical and continual disproportionate statistics across all stages of the criminal justice system are notorious and unjust. Arguments based on race, unemployment, social problems, as well as those that insist we already recognise tikanga within our current legal system cannot ignore these continuing statistics. Returning to an indigenous legal system is not novel. A return to the principles that underpin an indigenous legal system — Te Ao Māori — is warranted. In extending this approach to non-Māori, two quotes from wahine toa (female leaders) are advanced.

First, Justice Rothstein of the Supreme Court of Canada notes:¹²⁹⁰

the goal of aboriginal ... jurisprudence should not be to separate Canadians into two camps with two competing interests but rather to unite them with the shared goal of a just peaceful and safe society ...

Second, Professor Dame Anne Salmond recommends a more balanced approach in an attempt to grapple with the following questions: “What is it to be human, what do we have in common and what divides us?”¹²⁹¹ Human understanding and reciprocal exchange is required. Anne Salmond notes that:¹²⁹²

... in New Zealand, at least, collaboration between Māori and Western knowledge seems possible. It may lead, eventually, to studies of cross-cultural encounters that do justice to the ancestors on both sides.

Finally Professor John Borrows notes that the thesis of his work¹²⁹³ “Canada’s Indigenous Constitution” is that Indigenous laws can be recognized and affirmed in a Canadian legal context, and can also be justified through Western legal argumentation”. He further notes that:¹²⁹⁴

¹²⁹⁰ *R v Ipeelee* 2012 SCC 13 [2012] 1 SCR 433.

¹²⁹¹ Salmond, above n 128, at 513.

¹²⁹² Salmond, above n 128.

¹²⁹³ Borrows above n 799 at xiv.

¹²⁹⁴ Borrows above n 799 at 69.

... Indigenous peoples' law has been scattered by the prevailing order. It was believed to be insubstantial in comparison with the developing common law and constitutional structures... perhaps the most promising development for the maintenance and extension of Indigenous stories comes at those moments when Indigenous law's elements mingle with the land and those of the non-Indigenous jurisprudential order”

It is acknowledged that, in 2015, a return to an indigenous court within a separate criminal justice system might not be practical. However, an extension of an existing forum, such as the Māori Land Court or establishing a specialist Tikanga Court to meaningfully incorporate Te Ao Māori, may indeed provide an opportunity to return to an indigenous legal system, a return to Te Ao Māori, and a return to a *sui generis* Indigenous court.

Applying the philosophy of Te Ao Māori, realised by an indigenous legal system, manifested by a *sui generis* Indigenous Court — an extension to the Māori Land Court or a specialised Tikanga Court — premised on fundamental Māori concepts and doctrine is an appropriate way forward for Māori to ameliorate the disproportionate offending rates.

What is now required is political will.

‘He moana pukepuke e ekengia e te waka’

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Appendix 1

**Gladue Report
regarding
CARSON M.**

Presiding Justice: The Honourable Justice Kenneth G. Lenz

Report Requested By: Dwayne Jacobs, Legal Counsel

Sentencing Date: June 15, 2005

Prepared By: Mandy Eason, Gladue Caseworker, Aboriginal Legal Services
of Toronto

Introduction:

As per the request of Mr. Dwayne Jacobs legal counsel for the accused on May 4, 2005, Aboriginal Legal Services of Toronto submits the following Gladue Report regarding Carson M. The information compiled within this report was gathered through interviews with Mr. M and relevant third parties. As the Gladue Caseworker assigned carriage of this file I performed all interviews and necessary preparation for the report.

The purpose of this report is to provide the court with information regarding the life circumstances of the accused, Carson M., an Aboriginal offender, in compliance with the Supreme Court of Canada's ruling in R. v. Gladue¹²⁹⁵. The report is consistent with the Court's interpretation of section 718.2(e) of the Criminal Code, which directs the courts when sentencing, to explore alternatives to imprisonment, where appropriate, with special attention to the life circumstances of Aboriginal offenders.

¹²⁹⁵ *R. v. Gladue*, [1999] 1 SCR 688.

Background:

Carson M., is a 27-year-old man, of Mohawk ancestry and is a registered member of Six Nations of the Grand River First Nation near Brantford, Ontario.

The Six Nations of the Grand River Territory is the largest populated First Nation in Canada, with a total membership population of 21, 785, over half of whom reside in the community.¹²⁹⁶ The First Nation's membership is comprised of six Iroquois Nations: the Mohawk, Onondaga, Seneca, Cayuga, Oneida and Tuscarora nations.¹²⁹⁷

On May 4, 2005, before the Honourable Justice Kenneth G. Lenz, Mr. M. pled guilty to the charges of:

- Assault With A Weapon;
- Breach of Probation and
- Unlawfully at Large

Mr. M. was arrested on January 22, 2005, and remanded into custody at the Brantford Jail. At the time of sentencing, Mr. M. will have spent nearly five months in pre-trial custody.

Family and Life Circumstances:

Carson M. Jr. was born on November 22, 1977, in Brantford. He is the eldest of three children born to Judy M. and Carson M. Sr. Both of who are Mohawk and registered members of the Six Nations First Nation.

Carson's two younger sisters are Hope M, born on March 14, 1980 and Loretta M. born August 10, 1990. In addition to their three children together,

¹²⁹⁶ Six Nations Council, "Community Profile," online: Six Nations Council <<http://www.sixnations.ca>>.

¹²⁹⁷ McMaster University, "Six Nations of the Grand River Reserve," online: The Pauline Johnson Archive, McMaster University <<http://humanities.mcmaster.ca>>.

both Judy and Carson Sr. each have children from other relationships. In total, Carson has five siblings.

At the time of Carson's birth, his father Carson Sr. worked with Six Nations' Public Works Department, where he continues to work, while Judy was a stay-at-home mother.

Carson's earliest memories of childhood are marked by abuse perpetrated by his father, which his mother confirms took place:

I was thrown around and slapped around...just by my dad though...I can't remember when it started, but it happened as far back as I can remember...I remember once I got belted upside the head. I was in the bedroom with my mom and my father walked in, his fly was down, I was laughing and the next thing I know he strapped me in the head with a belt, I went flying off the bed. I asked him what that was for but he never answered. I was probably around six or seven years old.

Carson made no mention of whether his father was abusive towards his sisters and he is uncertain whether Carson Sr. abused Judy in the same way on a regular basis; however Carson clearly recalls witnessing one incident of abuse against his mother: "I only saw it happen one time and she got stitches."

Over the course of his childhood, Carson recalls the family relocating a few times but each move was always to a residence on the reserve.

In 1990, when Carson was 14 years old, the family moved to a house on Chiefswood Road. Over the course of the following year, Carson's parents' marriage began to dissolve: "I guess they weren't getting along for a while. He'd sleep on the couch a lot."

Parallel to the problems at home, Carson was having difficulty at school. He was enrolled at Mackinnon Secondary School in Caledonia for approximately five years; however, he did not obtain his secondary school

diploma.: “I was an average student before high school...but in high school it was all I could do to get by...the school standards on reserve are below the off-reserve schools.”

During the first year of high school, Carson began to experiment with drugs and alcohol: “I was smoking weed and I drank one time in grade nine...after mom and dad split up I went back to drinking alcohol...I’d drink a lot a house parties.”

In 1991, Judy and Carson Sr. divorced. Judy along with the two girls, Hope then 10 years old and 2 year-old Brooke, left the home and moved in with Judy’s sister Shirley temporarily, before securing an apartment in nearby Caledonia, while Carson remained at the house with his father.

According to Judy, this arrangement of Carson residing with his father was at Carson Senior’s request: “I let him stay with his father because his dad asked me if Carson could stay with him – he needed a father figure so I said OK...fine. But it only lasted a few months.”

Both Carson and Judy say that Carson Sr. was frequently absent from the home during this time: “I didn’t like it because he was never around. But I could come and go as I please. I’d go to school for half a day the other half I’d sit around school getting high...sometimes I’d go back to class.” Of himself, during this time, Carson says he had a bad attitude towards everyone. Although it would have been beneficial to the report to include comments from Carson Sr. unfortunately, despite a number of attempts on both our parts, I was unable to speak with him directly for comment.

Shortly after his parent’s separation, Carson began counselling sessions with Penny Hill, a counselor at New Directions on Six Nations: “I had sporadic

contact with Carson between 1993 and 1998. I met him at the high school for counseling it was some what of a self-referral.” Of his need for counseling

Ms. Hill says:

Carson definitely has family problems and issues. More so because he had an inconsistent home life. He was living with his parents at different times and other times with extended family. Alcohol was an issue at home. But his problems related to him not getting what he wanted and being left out. He can go from 0 to 90 in anger.

Within a few months of his parents separating, Carson was suspended from school: “That’s when I said it’s enough. His father was never around so I told him you’re coming to live with me,” says Judy. However, after a few months Judy found the task of single handedly caring for three children to be overwhelming: “It got out of hand...they didn’t want to listen to me so I asked their dad to take him in for a while.” Judy adds that a contributing factor to the stress was the limited amount of space in the house they were living at that time.

A short time later, Judy was able to secure a house with much more space than the previous residence and Carson returned again to live with his mom and sisters.

In 1996, at the age of 16 years old, Carson had his first brush with the law: “We were sitting outside, back behind the arcade, when the cops stopped me and my friend. He told us they got a call we were being too noisy. We were both fined for drinking under age.”

In 1997, Judy and the children moved back to Six Nations, living on Bicentennial Trail. At this time Judy began a relationship with Sonny H. and within the year he and his son Eli moved in with them.

Over the course of the next few years, Carson would frequently argue with his mother about various issues and on at least two occasions he was asked to leave the house. During such times he usually stayed with Crystal M., his aunt: "The first time was probably when he was around 17 or 18 years old. His mother had a new life with her new man. I took him in to give them some time together," says Crystal.

Initially, Sonny and Carson did not get along: "At first it wasn't so good...not for a while. I think Sonny didn't like me because I had a fight with Eli." Sonny's son only lived with them a short time before leaving to live with his mother. However, the tension between Sonny and Carson remained: "We didn't talk much...I didn't even like being in the same room as him. If I'd ask him a question he'd ignore me or if he did answer he would tell my mom his response...never talking to me."

Frustrated by their inability to get along, Judy discussed the matter with Sonny and eventually Carson and Sonny developed a civil relationship which over the past few years has become much better: "Now we're on the same wavelength," says Carson of his relationship with Sonny.

In 1998, the family relocated to a house on First Line where they continue to reside today. On March 1, 1998, Judy gave birth to her and Sonny's only child together Charlie Anita Dawn H. During this time Carson was living with his aunt Crystal when he met Krissy H., 16 years old at the time and they began a tumultuous seven year relationship. Krissy is the victim in the current matter before the court and is no relation to Carson's step-father Sonny H.

Of their relationship Carson says: "It's been rough all the way through...cheating here and there...her cheating then I'd go and cheat. She cheated while I was doing weekends! We've been off and on over the years."

Sarah Doxtater, Victim Rights Advocate with Aboriginal Legal Services of Toronto, spoke with Krissy on June 9, 2005. During that interview Krissy confirmed that her relationship with Carson has been unstable over the past several years.

In 1999, Carson found employment with the Lumber Yard, located on Mohawk Road, on Six Nations. According to Carson, he worked at the Lumber Yard for approximately four years before his employment was terminated due to his arriving late for work.

On May 16, 2003, Krissy gave birth to the couple's first child, Jersey. By February 2004, Carson had started employment as an ironworker with Sonny's company Eagle Welding and Steel Erecting.

The following year, on May 27, 2004, Krissy gave birth to twins, Jaycee Ryan and Jewellz Reed. Despite the fact that Carson and Krissy share three children together, their relationship is still beset with problems. On October 10, 2004, Carson was charged with Uttering Threats, the threats were made against Krissy. According to Krissy, the incidents that make up the charges before the court are the only time Carson has been physically abusive towards her: "That was the first time. But I noticed his temper about a month into our relationship."

The couple's three children all reside with Krissy who has full custody of Jersey while the matter of custody over the twins remains outstanding. When asked whether he is involved in his children's lives, Carson replied: "I'd say

I'm there for them. When we're together its not a problem but when I'm not living with her she won't let me see them...I have to stay there in order to see them she wouldn't let me take them anywhere else..."

Regardless of a court order stipulating Carson was not to have contact with Krissy, stemming from the October 2004 incident, both of them confirm he was living there prior to and including the day of the January incident. Carson says he was living at the house since November 2004: "We were together before I came in and I was living at the house even though we both knew I wasn't suppose to be there." Krissy confirms Carson was living at the house with her and the children at the time of current matter but says he only returned to live there in December 2004.

Previous Matters Before The Courts:

In 1997, at the age of 20 years old, Carson M. had his first criminal conviction for the charges of Assault and Theft Over, he was sentenced to 7 days on each charge and a term of one-year probation.

Carson has no recollection of the details regarding the Theft Over charge; however of the assault charge, Carson says: "It was self-defence, I even had scratches all over my neck. But everyone [referring to the Judge and Duty Counsel] was telling me you can't put your hands on a woman."

According to Carson, the victim in the matter was his then girlfriend Larissa L. Notwithstanding the fact that Carson was convicted of assaulting Larissa, he says they continued dating for some time after the incident.

As a gesture to illustrate there were no hard feelings, Larissa took him out for an evening of bowling and drinks upon his release from jail. That same

night on December 18, 1997, he was charged with Mischief Under for an incident at the bowling alley. Of that charge and his subsequent seven convictions, Carson says he was consuming alcohol during the time leading up to each offence.

Current Matter Before The Court:

The following summary recounts the facts agreed upon at the time of plea, as well as the accused's comments regarding the incident.

During the evening of January 21, 2005, the day immediately prior to the date from which the current charges stem, the accused was out for an evening of entertainment and drinking in Brantford. First attending a local bowling alley then to the Rodeo Bar. At approximately 2 a.m. the accused left the bar, receiving a ride to the reserve: "I got dropped off at my mom's house but nobody was answering the door so I walked over to Glenn's house on First Line." Glenn is Krissy's father. While at Glenn's house, the accused consumed a few more beers before calling the victim informing her that he was on his way home: "It must have been around 6 a.m. or 7 a.m. by the time I left. At that point I had close to 24 beers over the past 9 hours."

The accused took a taxi from Glenn's house to the victim's residence on Seneca Road:

She let me in...she says I was getting mad first – she broke my cigarette. I was just following her around, being a pest and I ended up getting a backhand across the face. Then I blacked out...I guess I went ape shit...it's very rare that I can't remember what I did, it only happens when I get pissed off.

The accused does recall climbing through the basement window back into the house: "I saw Jaycee sitting in her stroller, nobody was around...I picked her up and held her, I had her sitting on my lap.

According to the synopsis, on Saturday January 22, 2005, the Six Nations Police received information that a Domestic Assault was occurring at the residence of Krissy H. involving threats made by the accused Carson M. with "a large knife." The threats were made against the victim, Krissy.

While enroute to the residence Police were advised that the accused was then inside of the basement of the house.

Upon arrival, Police were directed by the victim to break the door down as she could not get it open. According to the police, the victim appeared very upset and distraught informing them that the accused was in the basement with their 8-month-old daughter and she did not know where the knife was which he had been using in attempt to pry off the doorknob to gain entry into the residence. Although the accused's attempts to gain entry through the front door failed he entered the house through an open basement window.

The synopsis goes on to state that the police located the accused in the basement with the child. He appeared intoxicated and when police spoke to the accused about the incident he began crying and then regained composure. Police asked the accused where the knife was to which he replied: "What knife?" Police were able to remove the child from the accused and return her to the victim. No knife was ever recovered.

The police then escorted the accused outside the residence and advised him of the assault complaint. The accused denied the allegation saying the victim hit him first. Police observed evidence of an assault on the victim's

face, neck and arm. The accused was arrested for Domestic Assault, and advised he would be held for a bail hearing.

Investigation revealed the accused was on probation with conditions to keep the peace and be of good behaviour, abstain from alcohol and abstain from communication with the victim. The police received an audio taped statement from the victim indicating the accused threatened to kill her as well as assaulting her and brandishing the large butcher knife. Thus, the accused was charged accordingly and detained for a bail hearing.

Victim's Response To The Current Matter Before The Court:

As already indicated, Ms. Doxtater, Victim's Rights Advocate spoke with the victim, Krissy about the current matter before the court. Krissy admits that she and the accused have maintained regular communication by telephone during his detention at the Brantford Jail, saying he typically calls her twice a week, to speak with her and the children.

Although she readily speaks with the accused and does not fear for her safety, she does not want Carson to reside with her and their children upon his release: "I've told him that he must quit drinking first...I don't want any drinking at home."

Of Carson's drinking habits, Krissy says: "He's a huge drinker he goes and he can't stop." Krissy described occasions where he would start drinking on the weekend and she would have no contact with him until the following Wednesday or sometimes he'd be gone for an entire week.

Apart from the alcohol related issues, Krissy says their relationship is stable: "When he's not drinking our relationship is pretty solid." When asked whether they are a couple, Krissy said "yes." Krissy also indicated that she was open to the possibility that the accused might one day return to live with her and their children.

Recommendations:

Carson M., the accused before the court, was remanded into custody after being denied bail for the present charges. At the time of sentencing the accused will have spent nearly five months in pre-trial custody at the Brantford Jail.

During his detention, Carson has been working towards his General Equivalency Diploma. According to Carson, he is now only four credits short of obtaining his GED.

In addition to the educational upgrading he has had regular contact with Kelly Curly, the Native Inmate Liaison Officer. According to Mr. Curly, he has been counseling Carson extensively on a one-to-one basis: "When I've talked with him he has a lot of repressed anger towards his parents. The reason I believe is because of their divorce...he's looking for some sort of validation to comfort him that he wasn't the reason for their break-up. But he's looking in the wrong places."

During the course of preparing this report, it became apparent that Carson has an addiction to alcohol and that this addiction is a major contributing factor to his continued involvement with the criminal justice system. Based on his contact with Carson, Mr. Curly concurred that alcohol is a major issue that much be addressed.

Mr. Curly is of the opinion that Carson would benefit from a residential treatment program, suggesting Native Horizons Treatment Centre, located on the Mississaugas of the New Credit First Nation, to address his alcohol addiction. The program is a six-week residential program.

When asked directly whether he has an addiction to alcohol Carson stated: "Everybody says I have a problem with alcohol but I don't think I do...I like to drink but who doesn't like to drink?...Maybe I carry it to far." Later on the topic of treatment was discussed with Carson and he expressed a preference for a non-residential treatment programming, specifically individual counseling.

As part of researching appropriate recommendations the following service providers were consulted: Mr. Fred Lascelles, Aboriginal Addictions Counsellor with St. Leonard's Community Services and Ms. Doris Henry, Director at Ganohkwásra Family Assault Support Services.

With regard to addictions counselling, Mr. Lascelles indicated that if Carson were to be released into the community, he could access the addictions counseling services offered at St. Leonard's Community Services. Carson would be required to undergo an assessment as to the severity of his addiction and to identify his specific needs. Following the assessment a treatment plan would be developed to address the identified needs. Should a residential treatment program be deemed appropriate at a later date, Mr. Lascelles would assist Carson in the application process.

Part of the reason Carson is partial to participating in counseling rather than a residential treatment program is that the former would allow him to resume employment as an iron worker. Sonny H., Carson's stepfather and employer confirms that a job is available for him upon release with Sonny's company, Eagle Welding and Steel Erecting. Furthermore, should a non-custodial sentence be imposed, Sonny says that Carson may reside with him and Judy at their home on First Line Road.

Ms. Doris Henry, Director at Ganohkwásra Family Assault Support Services described the services available at that organization that would be appropriate for Carson. The programs offered at Ganohkwásra apply a holistic approach based on Ogwehó:weh teachings integrating the mind, body and spirit. Moreover, the teachings combine mainstream counseling techniques providing a basis for assisting the individual to accept responsibility for their

actions. There is no determinate time for counseling as each counselling program is based upon client specific issues and needs.

Ms. Henry indicates there is a Men's Program offered at the Centre called Saho nikonri:ion e (His Mind, Body and Spirit Has Been Healed). There is both individual and group counseling offered. Ms. Henry confirms that Carson would be eligible for the Men's Program saying: "He simply has to go through the intake process and that only takes about one hour." The program accepts individuals who attend of their own accord as well as those ordered to do so by the courts.

Carson M., a 27 year-old man of Mohawk ancestry is contending with an alcohol addiction and issues related to his perpetrating acts of domestic violence. He has accepted responsibility for his actions as expressed in his guilty plea entered on May 4, 2005, before the Honourable Justice Kenneth G. Lenz.

In light of the life circumstances of the accused, the following recommendations are respectfully submitted to the court for consideration in imposing sentencing on Carson M., an Aboriginal offender:

- Consult Fred Lascelles, of St. Leonard's Community Services/Addictions Services for an intake assessment regarding addictions issues and to adhere to recommendations for appropriate addictions counseling;
- Consult Ganohkwásra Family Assault Support Services for an intake assessment regarding counseling to address the issues of domestic violence and to participate in the Men's Program at the Centre;
- To seek and secure gainful employment, or training/education to gain employment; and
- To reside at the First Line residence of Judy M. and Sonny H.

Respectfully,
ABORIGINAL LEGAL SERVICES OF TORONTO

Mandy Eason, Gladue Caseworker

Gladue Report

Regarding

Myrna S.

Prepared for Justice Vaillancourt
Defense Counsel Rebecca Rutherford
By Kris Pheasant
Submitted July 29, 2008
Aboriginal Legal Services of Toronto

As per the request of defense counsel Rebecca Rutherford, the following Gladue report regarding Ms. Myrna S. has been prepared to provide an overview of Ms. S.'s life circumstances. The information provided here was gathered by way of one in-person interview, several telephone interviews, as well as follow-up telephone interviews with family members and other relevant third parties. Kris Pheasant, Gladue Caseworker from Aboriginal Legal Services of Toronto (ALST), conducted all the interviews relied on in this report.

The intent of this document is to provide information to the court, for sentencing purposes, regarding the life circumstances of Myrna S., an Aboriginal offender. This report is produced in accordance with the Supreme Court of Canada's ruling in *R. v Gladue* (1999), specifically pertaining to the interpretation of section 718.2 (e) of the Criminal Code, which directs the courts to explore alternatives to imprisonment with special attention to the circumstances of Aboriginal offenders. In addition, this report contains recommendations for the Court's consideration during sentencing.

Ms. S. pled guilty to possession for the purposes of trafficking; unlawfully in dwelling, and one gun charge¹²⁹⁸ before Justice Vaillancourt at the Ontario Court of Justice, College Park.

Background

Myrna S., 34, was born June 30, 1974 to Francois S. and Laura S. nee I.. Myrna has two brothers born of this union: older brother John S., and younger brother Trevor S.. Myrna has one older half sister on her mother's

¹²⁹⁸ Ms. S. has been charged with a number of gun charges. This writer was informed by defense counsel that Myrna pled to one of these charges. It was not specified which charge she pled to.

side, Melissa I.. She had a half brother on her father's side, James S., now deceased.

Myrna is of Cree ancestry from both sides of her family; she is a registered status Indian with band membership with Fort Albany First Nation. Laura S. is a registered member of the Moose Cree First Nation.¹²⁹⁹ Laura's parents are Minnie I. (maternal name unknown) and Billy I.. Myrna believes both of her maternal grandparents attended residential school, but does not know where they attended or for how long. She does not believe her mother was forced to attend.

Francois S. has roots in both the Attawapiskat¹³⁰⁰ and Fort Albany First Nations¹³⁰¹. His mother, Jean S., is originally from Attawapiskat. Upon her marriage to Mr. S.¹³⁰² she became a registered member of his band, the Fort Albany First Nation. The practice of dissolving an Aboriginal woman's band membership upon marriage was in effect until 1985.¹³⁰³

Myrna's father Francois was forced to attend residential school for eight years as a child. He began to attend at age seven. Francois attended the St. Anne's Indian Residential School, located in Fort Albany. Myrna does not know very much about her father's time in residential school. She knows

¹²⁹⁹ Moose Cree First Nation is located approximately 530 kilometers north of Sudbury, Ontario on the south west side of James Bay. It is a small community. A 2005 community census states the total population is 3, 562 people, of whom 1, 500 live on reserve.

¹³⁰⁰ Attawapiskat First Nation is an isolated, fly-in community located approximately 720 kilometers north of Sudbury on the west side of James Bay. The Department of Indian Affairs and Northern Development (DIAND) June 2008 census lists the total registered population of this reserve to be 2, 963. Of this number, 1, 359 members live on the reserve.

¹³⁰¹ Fort Albany First Nation is an isolated fly-in community located approximately 570 kilometers north of Sudbury, Ontario. It is located to the west of James Bay. Further recent demographic information could not be found regarding Fort Albany.

¹³⁰² Myrna was not sure the name of her grandfather.

¹³⁰³ The federal legislation governing First Nations peoples is the Indian Act. The Indian Act, including amendments, can be viewed on the Department of Justice Canada webpage at: <http://laws.justice.gc.ca/en/I-5/>

that he had a difficult time there, as he told her he was abused, but notes that he is very reluctant to discuss his time there in any detail.

When speaking with this writer Mr. S. declined to disclose details of his time at St. Anne's Indian Residential School, saying only "it was a rough time." It should be noted however that this school was home to some of the worst abuses inflicted upon its young wards, and all students were therefore likely subject to the climate of fear that existed in this institution.

A 2005 article published by Persons Against Ritual Abuse-Torture gives a detailed description of some of the horrors children were exposed to at St. Anne's:

One specific example of acts of child torture which were called acts of abuse is taken from media articles discussing the Cree and Ojibwa children from Fort Albany First Nation who attended St. Anne's Residential School operated by the Roman Catholic Church from 1904-1973. Victimizations reported consisted of severe beatings – being punched, strapped, kicked, hit with a ruler, hair pulled, and their heads pushed into walls; whippings to their bare buttocks with a wire strap; forced immobility – forced to kneel on a concrete floor for hours, and locked overnight in an unlit basement. Electric shocking delivered to children strapped into a homemade electric chair was used for punishment and for the entertainment and pleasure of staff and visiting dignitaries. These are acts of physical torture not abuse. Sexualized torture including fondling, forced masturbation, and heterosexual and homosexual rapes, and forced impregnations and abortions. Mind-spirit dehumanization occurred when children were forced to eat their own vomitus, when forced to eat off the floor while being told to "eat like a dog", when forced to stand with their underpants over their heads if their underpants had fecal stains, and when they were laughed at during electric shocking.¹³⁰⁴

¹³⁰⁴ Sarson, J., MacDonald, L. (2005). *Torture and ritual abuse-torture: Perpetrators who are "religious" men and/or women*. Persons Against Ritual Abuse-Torture. <http://www.ritualabusetorture.org/religion.pdf>.

For more information on the use of an electric chair on Aboriginal children see: Moon, P. (1996, October 21). School's Electric Chair Haunts Natives. The Globe and Mail.

Mr. S. did recount one story to his daughter Myrna. Myrna recalls her father telling her that he was forced by a nun to eat his own vomit after throwing up the rotten food they were fed. He was told if he didn't eat the vomit he would not be allowed to see his mother. A 1997 Globe and Mail article confirms that other residential schools survivors have come forward to share similar stories publicly.¹³⁰⁵

When asked how his time in residential school influenced him as an adult and as a parent Francois stated "it didn't affect my family." It is not uncommon for survivors of residential school to downplay or even ignore their history of past attendance and the impact it had, as the memories are too painful. Myrna believes that both of her parents were affected by the residential school legacy, for "how could it not have?"

The basic premise of the Indian Residential School system was to eradicate all traces of Aboriginal culture and assimilate First Nations people into mainstream society by attacking their most vulnerable members, the children.

The British Crown and then the Canadian government established residential schools as part of a broader plan to assimilate Aboriginal people.¹³⁰⁶ The object of residential school system was to sever the artery of culture that ran between generations, the connection between parent and child sustaining family and community.¹³⁰⁷

¹³⁰⁵ Appleby, T. (1997, September 19). *Former Staff of Ontario Residential Facility Accused*. *The Globe and Mail*.

¹³⁰⁶ Duncan Campbell Scott – the powerful and influential Deputy Superintendent General of Indian Affairs – said in 1920, "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question."

¹³⁰⁷ *Royal Commission on Aboriginal Peoples, Part Two: False Assumptions and a Failed Relationship, Chapter 10 Residential Schools, Discipline and Abuse*.

A part of this assimilation was to convert Aboriginal people to Christianity; therefore the government along with several churches and religious orders co-operated to operate the residential schools. The schools used excessively strict discipline practices to attempt to convert the children. In addition to the physical, mental and emotional abuse, many children were also sexually abused in these schools. While attending these schools contact, if any, with family was limited.

According to the findings compiled in *Reclaiming Connections: Understanding Residential School Trauma Among Aboriginal People*,¹³⁰⁸ the inter-generational impact of residential school is threefold: the trauma experienced at the school effects the individual, the family and the community. The detrimental effects of residential school include, but are not limited to:

- Communication barriers, especially an inability to express affection;
- Families where no nurturing or affection was present for generations;
- Discomfort expressing love for children in physical ways, especially hugs;
- Lack of communication within the family;
- Children taken into custody by the Children's Aid Society; and
- Addictive and self-destructive behaviors...¹³⁰⁹

According to the research gathered in *Reclaiming Connections*, increasingly psychological trauma is understood as an affliction of the powerless. Trauma can be a one-time occurrence or a series of on-going experiences over the life span of an individual as well as across generations:

In the context of residential school abuse and forced relocation, there are survivors who attended residential

¹³⁰⁸ *Reclaiming Connections: Understanding Residential School Trauma Among Aboriginal People* was published by the Aboriginal Healing Foundation. A copy of this report can be found on their home page of: www.ahf.ca.

¹³⁰⁹ Ibid, 46-47.

schools, as well as their descendants who have suffered the historical or inter-generational impacts.¹³¹⁰

As noted above, the impact of residential school was not just felt by those who attended the schools – but their children as well. *Pathways to Healing: A mental health guide for First Nations People*, a publication of the Canadian Collaborative Mental Health Initiative, describes the impact on the next generation as follows:

As these residential school children grew up, most of them did not have the skills, knowledge, or emotional strength to parent their own children. In many communities, our next generation of children were raised in families with chaos, substance abuse, and violence. Parents, unable to care for themselves, leave children to care for each other. Kids turn to alcohol, drugs, unsafe sex, and acting out as a means of coping and numbing their pain. This is how they see their parents cope...Violence has replaced the true strength that comes from knowing who you are as a person and as a people: to know where one belongs in the world; to find one's place and create a healthy space.¹³¹¹

The federal government issued a formal apology to the survivors and family of residential schools on June 11 this year. Prime Minister Stephen Harper noted that the harms of residential school remain present to this day:

The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.

While some former students have spoken positively about their experiences at residential schools, these

¹³¹⁰ Ibid.

¹³¹¹ *Pathways to Healing: A mental health guide for First Nations people* was published by the Canadian Collaborative Mental Health Initiative. This report can be found at: http://www.ccmhi.ca/en/products/toolkits/documents/EN_PathwaystoHealing.pdf.

stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.¹³¹²

To the best of Myrna's recollection neither Francois nor Laura practiced their Aboriginal culture or spirituality, nor were they involved with the Aboriginal community. Francois recalls that he would speak to Myrna in Cree when she was a child in an attempt to teach her the language, but "she lost the language growing up."

Both Laura and Francois grew up on their reserves. Francis remained in Fort Albany until he was sixteen years old, when his father died. He had to leave his community to find work elsewhere so he could support his mother and siblings.

Laura and Francois met, and married, and began their family in Moosonee, Ontario.¹³¹³ When Myrna was about two years old the family relocated to Toronto. It was at this point that her sister Melissa re-joined the family – she had been living with her grandmother prior to this. Francois worked as a butcher and Laura worked as a health aide for seniors.

The S.s settled into a subsidized Native housing unit run by Wigwamen Housing. Melissa and Myrna both have childhood memories of their parents

¹³¹² House of Commons Debates. VOLUME 142. NUMBER 110. 2nd SESSION 39th PARLIAMENT. Full transcript can be found at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Pub=hansard&Ses=2&DocId=3568890&File=0>

¹³¹³ Moosonee is a small town located along the Moose River. It is a ferry ride north of Moose Factory. The population is approximately 3,000 people. Eighty five person of the population is Cree, and there is also a small French Canadian presence as well. Moosonee is the main arrival and destination point for the James Bay area communities and reserves as it is accessible by train as well as by air and water.

abusing alcohol. They recall many incidents of drunkenness in the home, arguing and physical fighting between Laura and Francois, especially late at night when they came home from the bar.

With the adults incapable of or unwilling to attend to domestic duties, young Melissa would be left to look after her siblings. She recalls being frequently left to babysit and having to enforce house rules and curfews. Melissa was also being sexually abused by her stepfather Francois. She does not know if he was also abusing Myrna, but she did her best to protect her siblings from possible abuse. She recalls going to Myrna's room to stay with her "to make sure he didn't bother [her]." Melissa tried to speak to her mother about the abuse but would be "ignored". She believes Laura was in denial and must have known about the sexual abuse. Melissa refused to keep silent and confronted Laura with her abuse again when she was fourteen. They ended up getting into a fight. Melissa moved out at age sixteen to escape the abuse.

Myrna's paternal grandmother Jean S. was aware that her son and daughter-in-law were abusing alcohol and neglecting their children. Jean lived in Toronto and did what she could to help her grandchildren. "I used to look out for them because they [Francis and Laura] were drinking back then. I would take food over to them because there would be no food in the house." Jean also kept her doors open to the children, and Myrna would frequently stay at her home to escape the alcohol-fueled chaos of her own home. Melissa would make the same offers when she was eighteen and had a place of her own.

Myrna considers her parents to be alcoholics but is not sure what, if any, kind of insight they have into their addictions. She provided the contact

information for her parents but cautioned this writer that her parents would probably downplay their negligence and alcoholism.

Laura S. agreed to be interviewed, but after being asked one question said she had to “leave” and concluded the conversation.¹³¹⁴ Francois S.’s first language is Cree he but also speaks English. For his part, he offered that family life was fine. He asserts that no one in his family has any addictions, that he and Laura got along “alright”, and that they would only drink on weekends and when the children were in bed – “but we still looked after them.”

Francois and Laura were evicted from Wigwamen Housing for failure to pay rent. After a brief stay in Dwight, Ontario¹³¹⁵ they came back to the Greater Toronto Area and settled into Gabriel Dumont Native housing in Scarborough.

When Myrna was about twelve years old her parents split up. Laura took the separation very hard and became depressed. Melissa remembers she would stay in her room crying. She had just given birth to her youngest son Trevor. At this time Laura was diagnosed with schizophrenia.

History began to repeat itself as many of the childcare responsibilities fell to Myrna now that Melissa had left home. Francois was not paying child support nor did he have joint custody. No one explained to Myrna what was happening to her mother: “I just knew I had to look out for my brother.”

Laura struggled with managing her mental illness. She would go off and on her prescribed medications and began to drink more heavily. Her

¹³¹⁴ Further attempts were made to contact Laura S. and she did not keep a pre-arranged interview time. She does not have a phone message service. No calls were answered when repeated calls were made.

¹³¹⁵ Dwight, Ontario is located approximately 20 kilometers east of Huntsville, Ontario.

periods of instability and psychosis were frightening to her children. Melissa recounts one such experience. “She was hearing voices, seeing people looking in through the windows, getting paranoid.” Her siblings called her over, saying “mom’s acting weird.” Melissa came to the house to find Laura screaming that there was a fire in the kitchen although there was in fact no fire at all. Melissa called 911 but when the ambulance arrived Laura refused to go with them to hospital and the emergency team starting to leave. “As soon as they left she started screaming and freaking out, throwing things, flipping the kitchen table over to get at the fire. That’s when they took her.” The emergency crew was re-summoned and this time took Laura to hospital where she was formed into acute care and held for three weeks of observation and for stabilization.

Myrna does not recall any additional social service support being offered to her or her family during these difficult times. Her father would take the children during crises and return them to Laura shortly afterwards, relying on Myrna to take care of herself and her brothers. Melissa sympathizes: “I know she’s had a really hard life. She had to do a lot of growing up too fast at age twelve, thirteen.”

Torpedoed into a pseudo-adulthood as a pre-teen, Myrna began to seek out ways and opportunities to have some fun. Following the only model she knew, she turned to alcohol. Myrna began drinking socially with friends when she was about thirteen years old. They would get together to drink and party on weekends. Myrna was never disciplined for her underage drinking: her father was not present, and her mother was too ill to notice. With no limits

being set, Myrna's drinking quickly escalated and by age fifteen she was drinking "quite a bit".

Myrna recalls that she did well in Catholic grade school but her education took a turn for the worse after her mother became ill. She began to miss a lot of school, and later began to skip school to play hooky and drink with her friends. She attended public high school in grade nine but dropped out; she does not believe she earned any grade nine credits.

Myrna became pregnant at age sixteen and gave birth to her first child, Dylan S., born April 16, 1991. Vaughn St. is Dylan's father. Myrna was still living with her mother in Gabriel Dumont. Vaughn was in and out of jail throughout her pregnancy. When Dylan was six months old Vaughn was sentenced to six months time and Myrna decided to end the relationship.

Myrna quickly became pregnant again and on December 13, 1992, gave birth to her second son Christopher S.. Christopher's father is Aaron D.. Aaron and Myrna ended their relationship when she was six months pregnant. Aaron moved back to his reserve, Wikwemikong Unceded Indian Reserve, and Myrna began a new relationship with Jim Sm..

Shortly after Christopher's birth, Myrna came to the attention of the Catholic Children's Aid Society (CCAS) because "I was drinking at the time." A neighbour called CCAS to make a complaint about Myrna being out late at night with her children and frequently leaving them with babysitters. CCAS records note "protection concerns included poor parenting skills, exposure to domestic violence and neglect of the children, and parental drug and alcohol abuse." Christopher and Dylan were apprehended in August of 1993 and remained in care until March of 1995.

Myrna took the apprehension of her children as a wake up call and began to seek sobriety. She cut down on drinking on her own and sought out third party assistance. In late 1993 she attended a twenty eight day outpatient program at the Addiction Research Foundation (ARF)¹³¹⁶, followed by eight weeks of aftercare. Myrna was able to maintain her sobriety for the next several years.

Myrna applied for her own subsidized housing with Wigwamen. Once she was housed she was able to regain custody of her children and began to make a home with Jim Sm. Their first child Justine S. was born February 28, 1995, followed quickly by Damien Sm., born June 26, 1996. Myrna has registered all her children with the Fort Albany band office.

Jim and Myrna were together for the next ten years. They both describe their relationship as loving but simultaneously troubled. They were charged with domestic assaults against one another. Both resolved the charges by having them stayed; they both successfully completed the Partner Assault Response Service (PARS) through Native Child and Family Services of Toronto. Jim was grateful to have received this therapeutic intervention: “I think I was a better man after that.” He believes it also made him a better parent.

When her two youngest children were old enough to attend the Nativity of Our Lord Catholic School, Myrna began to volunteer at there. She would help the children in their arts and crafts, read stories, and supervise lunch and recess periods. “I really enjoyed it”, Myrna says, “I was a very responsible

¹³¹⁶ The Addiction Research Foundation (ARF) was formed in Ontario in 1949 with the mandate to study the scope of alcoholism. In 1961 it expanded its mission to include drug abuse as well. In 1998 ARF was merged with the Donwood Institute, the Queen Street Mental Health Centre and the Clarke Institute of Psychiatry to form the Centre for Addiction and Mental Health (CAMH).

person once upon a time.” Myrna chose to put her children into the Catholic school system as she had also attended Catholic school and enjoyed it. Myrna recalls feeling like she had so little experience as a girl in school herself that she quite liked being back in a school environment with her children. She continued to volunteer until approximately 2002, when she began to abuse substances again.

In 2002 Myrna began to drink again socially with Jim. They began to argue frequently and decided to break up. Jim states “I thought it would be better for us to go our separate ways.”

In May of 2003 Myrna was introduced to crack cocaine by an “acquaintance”. She became addicted straightaway, possibly “as an excuse to get out and party and have fun.” By June she had left Jim and the children and was using crack daily. Jim assumed guardianship of all four children as Myrna took to disappearing for weeks and months at a time. She also began to come into conflict with the law.¹³¹⁷

Jim did not have custody of all the children for long. Dylan went to live with his father and later his father’s girlfriend’s parents. Christopher spent some time living with his father in Michigan and other relatives before being apprehended again by CCAS in 2006. Jim maintained custody of Justine and Damian.

In 2005 Myrna first used powder cocaine and liked it. She went on a three month binge. She began dating a man named John who she says supported her habit socially and financially. She began to visit with her younger children less and less and her older sons cut ties with her, angry at

¹³¹⁷ Unfortunately further details cannot be provided as this writer was not provided with a copy of Ms. S.’s criminal record.

the way she was acting. Myrna continued to use both crack and powder cocaine on a daily basis for the next few years. She also began to inject cocaine as her tolerance grew.

It was about this time that Myrna learned she had Hepatitis C. She was informed by Dr. Jeu, her G.P. She says she was shocked to find out she had the disease and left the office without learning more about the illness and how to manage it. Instead Myrna tried to forget the news in a haze of drugs. Continuing to neglect her health care needs regarding this disease is dangerous.¹³¹⁸

Myrna continued to be influenced by the men she dated. She was introduced to intravenous heroin use by another boyfriend. They would also inject Oxycontin when heroin was not available. Myrna overdosed twice while using heroin and crack. Both times her partner failed to bring her to hospital. Myrna eventually broke up with this man and stopped using opiates.

In February of 2006 Myrna sought treatment for her drug use. She entered a residential treatment program at Destiny Manor as part of a court order.¹³¹⁹ Myrna discharged herself from the program after two weeks. When asked why, she said that she was not ready for treatment or to confront the

¹³¹⁸ Frequently Asked Questions About Hepatitis C. Public Health Agency of Canada. www.phac-aspc.gc.ca.

What happens if you don't treat hepatitis C? It is difficult to predict, and each individual is different. Approximately 15-25 percent of people infected with HCV appear to clear or resolve their infection without treatment. The majority (75 to 85 percent) progresses to chronic infection. The course of the chronic disease is generally slow, without symptoms for two or more decades after infection. However, once symptoms develop, the quality of life generally decreases, with chronic fatigue, abdominal pain, and nausea being the main symptoms. The disease attacks the liver, which causes inflammation. This inflammation causes scarring of the liver (called fibrosis), which in turn affects how the liver functions. The scarring caused to the liver can progress into cirrhosis, and makes the liver more susceptible to cancer.

¹³¹⁹ Destiny Manor provides drug and alcohol treatment services for women. The facility is located in Whitby, Ontario.

reasons she uses drugs. Myrna returned to the streets and began using crack and cocaine heavily once again.

Myrna says she has been “bouncing around” places of residence for the last five years. She spent time living with Jim Sm., other friends or boyfriends, and with an ex boyfriend of her mother.

In April of 2007 Myrna went to the Woman’s Own Withdrawal Management Centre¹³²⁰ and participated in the day program for one week before leaving. She continued to use both alcohol and cocaine and crack.

On December 5, 2007, Myrna was arrested and held in custody pending sentencing.

Previous Matters Before the Court

ALST was not provided with a copy of Myrna’s criminal record, and so cannot comment on any previous matters before the court.

Current Matters Before the Court

Myrna comes before the court with guilty pleas for possession for the purposes of trafficking; unlawfully in dwelling, and one gun charge. She has been in custody since December 5, 2007.

Myrna says she was staying at the place she was arrested at after moving out of her boyfriend’s place due to a cockroach infestation. She had been there for a couple of days smoking crack and drinking prior to being arrested.

¹³²⁰ The Woman’s Own Withdrawal Management Centre is run by the Toronto Western Hospital.

Present Circumstances

Myrna has been making good use of her time in custody. Ms. Charlene Ninham has known Myrna for about five years in her capacity as Vanier's Native Inmate Liaison Officer. She has seen Myrna come and go over the years. Charlene states that she has seen a positive change come over Myrna during this last period of incarceration. Myrna has become a regular and involved participant in the Native programming offered by Charlene; she has completed the program and re-enrolled to attend it once more so as to have continued access to Native teachings, cultural activities and smudging. Charlene confirms that Myrna has also completed the Inner Child Healing program, which runs for twelve sessions. Charlene has also assisted Myrna in completing the 8 Tools Assessment so that Myrna can attend a substance abuse treatment program. "She's very motivated to get into treatment" says Charlene. "She's really trying this time. This is the hardest she has tried."

Myrna has also been working with the Charlene and Vanier social worker Ms. Tina Wong to arrange for treatment and apply for housing. Myrna has filled out several applications for subsidized and Native housing in the Hamilton area and has been placed on waiting lists. She has also successfully secured a place in a residential treatment facility for substance abuse treatment. Myrna has been accepted to the Kii-Kee-Wan-Nii-Kaan Southwest Regional Healing Lodge for August 4th.

Tina also confirms that Myrna has completed the anger management and substance abuse programs.

Myrna has also begun to attend to her health care needs. She spoke with the Vanier doctor about her Hepatitis C and is learning about how to

manage the illness independently. She intends to return to see Dr. Jau upon her release. She has also secured a placement at Kii-Kee-Wan-Nii-Kaan to learn how to manage her diabetes. Myrna has also been taking steps to address her mental health needs. She has been having one-to-one counseling sessions with the Vanier psychologist to discuss her drug use triggers and relapse prevention strategies.

Tina Wong has also assisted Myrna in keeping in contact with her family lawyer so that she can know the whereabouts of her son Christopher and re-establish regular contact and custody of him. Myrna has been in regular contact with Justine and Damian by telephone. Jim is glad they are speaking often and says their children are “ready to give her a second chance.” He has offered to let Myrna stay with him until she is able to attend the Healing Lodge. He says he and Myrna still care for one another and he wants to be there as a support for her as she begins her recovery process.

Both Jim Sm. and Melissa are invested in assisting Myrna to get clean and stay sober. Jim believes that Myrna will learn to feel better about herself in treatment. Melissa believes that Myrna is finally ready to make lasting changes. “She’s talked about it before. She is sounding serious now. This time, she’s listening to what she is being told by the counselors. She’s more open now.” She notes that Myrna is finally demonstrating that she is ready to confront the demons of her past. “It [their conversations] gets uncomfortable because she is revisiting the stuff in the past, things that make her use.”

Myrna has made an application to receive individual therapy at Breakaway¹³²¹, but is also open to receiving services from the Centre for Addiction and Mental Health.

Recommendations

The following recommendations are made for the courts consideration upon sentencing:

- That Myrna reside at the home of Mr. Jim Sm. at 4201 Kingston Road, apartment 207, section B, in Scarborough until she leaves to attend residential treatment;
- That Myrna attend the Traditional Healing Lodge Program at the Kii-kee-wan-nii-kaan Southwest Regional Healing Lodge.¹³²² The program begins August 4th and ends August 22nd. The Gladue Aftercare Program budget can cover the cost of transporting Myrna to this facility. The Gladue Aftercare Worker will make the travel arrangements;
- That Myrna attend the Diabetes Residential Healing Program at the Kii-kee-wan-nii-kaan Southwest Regional Healing Lodge. This program begins August 24th and ends September 12th.¹³²³ and
- That Myrna seek out counseling services for individual therapy. She can access services at the Centre for Addiction and Mental Health (CAMH) through the Aboriginal Services department. The direct line for Aboriginal Services is 416.535.8501 ext. 7652. The office is located at 393 King Street East. She can also access services through Breakaway, upon her receipt of a letter of acceptance.

Submitted respectfully

Kris Pheasant, B.A.
Gladue Caseworker
Aboriginal Legal Services of Toronto

¹³²¹ Breakaway offers out-patient substance abuse counseling services.

¹³²² The Kii-kee-wan-nii-kaan Southwest Regional Healing Lodge is located in Muncey, Ontario, approximately 40 kilometers southwest of London.

¹³²³ There is a one day/two evening gap in time between the completion of one program and the beginning of the next. Myrna will be able to stay at the Healing Lodge for that day.

Appendix 2

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in

international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be

subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and

control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining

to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of Indigenous Peoples contained in treaties, agreements and constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith

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Glossary

Ariki	chief of noble birth, priest
Aroha	love, Affection for others
Atawhai	foster, caring for the welfare of others
āwhina	help
Atua	deity, god/s
Hangi	earth oven
Hapu	subdivision of a tribe, or sub tribe
Hara	crime or offence
Hee	mistake/error
Hongi	a greeting, by the pressing of noses
Hui	gathering together of people for discussion, or to socialise
Iwi	a tribe which traces descent from a common ancestor or ancestors
Kai	food
Kaitiaki	caretaker/guardian
Kaumatua	male elders
Kawa	symbol, sign, protocol
Kuia	female elders
Korero	talk/speak
Mana	prestige, authority, power or psychic force
Manawhenua	having mana or prestige/power over the land
manaaki	blessing
Mauri	life force
Marae	sacred meeting place, situated within a village, traditional meeting house, area in front of the whare
Moko	tattoo, which can be either on the face, arms, thighs or buttocks
Mokopuna	grandchild
Muru	wipe or rub; seizing of goods to address an imbalance

Ora	well being
Pa	a village; settlement or fortified area of a tribe or sub-tribe
Pae here tangata	to bind people together
Papatūānuku	mother earth
Pakeha	person of English descent (also used in earlier times as reference to traders, settlers, missionaries)
Pono	just
Powhiri	ritual ceremony of encounter.
Rahui	prohibition; the setting aside of a place or thing for a specified time ; permanent reservation of land for a specific purpose
Rangatira	leader, person of senior lineage
Rangatiratanga	leadership authority
Take	reason
Tangata whenua	literally, a person of the land or people belonging to a tribal region; hosts as distinct from visitors
Tangi	to weep, grieve, mourn or cry
Tangihanga	a ceremony of mourning
Tapu	Set aside - sacred
Tika	correct/right
Tikanga	principles, truth, customary practice
Tinana	body
Tohunga	a healer or a priest ; an expert in traditional lore or a person skilled in a particular activity
Utu	revenge, recompense, reward, price, payment ; repayment in goods ; retribution in battle to the death
Waiata	song ; to chant or to sing
Wairua	spirit, spirituality
Whakahoki mauri	restoring the balance
Whakapapa	layer – family tree

Whanau	literally - to be born or to give birth, family or an extended family
whanaungatanga	relatedness
Whare	a house, or a dwelling
Whare wananga	a university, or a learning place
Whenua	literally - afterbirth; land, ground, earth, a country