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**Reviving Cultural Connections and the Need to Advocate for
Cultural Reports under Section 27 of the Sentencing Act 2002
for Reimagining Whanaungatanga**

A thesis

submitted in partial fulfilment

of the requirements for the degree

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He Kōrero Whakarāpoto—Abstract

This thesis critically questions whether the incorporation of whanaungatanga can lead to a more equitable New Zealand criminal justice system for Māori. Associated with this aim, this thesis explores how a better understanding of whanaungatanga could improve the prison system and the current Māori overrepresentation in it. The thesis argues that an enhanced understanding of whanaungatanga and its utilisation under s 27 of the Sentencing Act 2002 can reframe interpretation of and response to Māori prisoner statistics. Furthermore, it is suggested that whanaungatanga can offer a Te Ao Māori framework that can complement a Western legal paradigm to provide a basis for holistic and more equitable reasoning within the criminal justice system.

The research addresses the broader historical context in which colonial constructs have impacted traditional Māori legal norms such as tīkanga and whanaungatanga. The historical context offers a perspective for examining the relationships between Māori and colonial settler laws, shedding light on the current social inequalities. The research aims to investigate the reasons for Māori over-representation in the New Zealand prison system and suggests alternative pathways for transformative, equitable outcomes. As a way forward, in contrast to the current approaches that reference tīkanga in different legal disciplines, this research aims to establish common ground for whanaungatanga and its acceptance in society and the courts. In investigating the potential role of whanaungatanga in s 27 of the Sentencing Act 2002, this study reviews literature on whanaungatanga and compares it with traditional knowledge of whanaungatanga as a legal norm, value system and range of practices. Further, the literature examines challenges associated with the application of tīkanga in sentencing and clarifies the meaning of whanaungatanga and its potential employment in sentencing decisions.

The study employs three data sets. The first data set consists of population census surveys of the 19th century. I present this data in Te Ūpoko Tuawhā/Chapter Four. The data is compared with Māori prison population statistics in the 19th, 20th and 21st centuries. The comparative analysis of this data provides an empirical foundation for examining differences and similarities between data sets, as well as

identifying problematic trends. This data establishes the foundation for investigating some early New Zealand trials and the systemic deprivation experienced by Māori, discussed in Te Ūpoko Tuarima/Chapter Five. The second set of data comprises records of three categories: cases when s 27 cultural reports are applied; cases when cultural reports are considered but not applied; and cases when cultural reports are not considered. The qualitative analysis in Te Ūpoko Tuaono/Chapter Six of the differences in sentencing decisions for similar offences raises concerns about social justice.

The third data set is based on interviews with judges which were designed to investigate the factors influencing sentencing decisions (Te Ūpoko Tuawhitu/Chapter Seven). Thematic analysis of this data provided the basis for identifying patterns and recommendations for improvements. The research findings revealed that whanaungatanga plays a significant role in s 27 cultural reports compared with pre-sentence reports that do not provide judges with causative material. Although s 27 cultural reports focussed on having cultural speakers, cultural reports were argued by participants to be more reliable because they are a permanent record. Furthermore, defendants could read their reports and sometimes find out their whakapapa (genealogical ties) for the first time.

Research findings suggest that society could understand whanaungatanga easily because the process is already happening in the courts and the communities. The study also found that a breach of the right to a fair trial, if impacted by the court's reluctance to accept a s 27 cultural report, would lead to a criminal case review pending legal aid assistance. A further finding was that the sentencing discrepancies for similar offences raise concerns about recidivism, remand prisoners, and intergenerational trauma affecting children was more prevalent amongst low socio-economic whānau families. The study found that debate about the relative fiscal costs of accommodating prisoners and money spent on cultural reports bypasses the main issue. Māori over-representation in the prisons will not be reduced unless society acknowledges a consistent application of whanaungatanga as a transformative approach to changing the status quo.

Tuhipoka Hira: Important Note

Unlike the English language, Te Reo Māori, or the Māori language, is the official de jure language of Aotearoa, New Zealand. Therefore, I write the chapter headings in Te Reo Māori, followed by an English translation.

While I prefer consistency with macrons for Māori words, in this thesis, it is impossible to maintain this. This is because in references and quotes, macrons are sometimes missing or missing in links. Although double vowels are present in the text, they remain unchanged.

He Mihi Maioha

Pepeha: Acknowledging the physical location and origins of my tūpuna ancestors.

Ko Maungapiko te maunga	Maungapiko is the mountain,
Ko Po Hurihanga te tangata	Po Hurihanga, captain of
Ko Kurahaupo te waka	the Kurahaupo canoe
Ko Pārengarenga te wahapū	the Pārengarenga harbour near
Ko Te Hapua te papakāinga	Te Hapua, the hometown,
Ko Te Hiku o Te Ika te marae	Te Hiku o Te Ika, the meeting place
Ko Te Reo Mihi te whare tūpuna	Te Reo Mihi, the ancestor house
Ko Ngāti Murikahara,	Ngāti Murikahara, Te Mahoe and
Te Mahoe, me Patukirikiri ōku hapū	Patukirikiri, are the hapū I belong to
Ko Ngāti Kuri te iwi	I am of Ngāti Kuri descent.

In turn, knowledge of my origins allows me to connect with my tūpuna (ancestors) through time and the places and people they came from. I understand my place in the world. It grounds me. In that regard, I acknowledge them all.

He Mihi Maioha

To my mother, I miss your guidance and support and am grateful for your lessons. My children, thank you for supporting me. I appreciate it.

To my iwi—Ngāti Kuri, Te Aupōuri, Te Rarawa and Ngāti Rēhia—ka nui te mihi ki a koutou katoa!

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1 Ūpoko Tuatahi—Chapter One

1.1 He Kōrero Timatanga—Introduction

Since the mid-1980s, the intention and approaches of Parliament to reduce Māori over-representation in New Zealand’s prison population has not changed the status quo, even after the introduction of the Sentencing Act 2002.¹ In 2017, the Waitangi Tribunal *Tu Mai Te Rangi!—Report on the Crown and Disproportionate Reoffending Rates* expressed concerns about the over-representation of Māori in the criminal justice system.² The current research study is built on the premise that the unchanged statistical data necessitates an alternative approach to address the over-representation of Māori in prisons, and examines how and why social inequalities hinder transformative outcomes.

This introductory chapter concerns Māori over-representation in the criminal justice system and establishes the parameters for the research inquiry. The chapter begins by outlining the fundamental shortcomings in the current application of *tikanga* in the criminal justice system. A brief canvas of the literature, key issues and barriers leads to a discussion on the statistical data on the prison population, the significance of the research, the aims and objectives of the thesis, the methodology, structure, and conclusion. Although the thesis was initiated before the new government of 2023, the changes they intend to make are relevant for discussion in the recommendations proposed in *Te Ūpoko Tuawaru/Chapter Eight*. The conclusion offers some considerations in light of the political context.

¹ To address Māori over-representation within the justice system, Parliament introduced the Criminal Justice Act 1985, s 16—the predecessor to s 27 of the Sentencing Act 2002.

² Waitangi Tribunal *Tu Mai Te Rangi!—Report on the Crown and Disproportionate Reoffending Rates* (WAI2540, 2017). The report responds to the WAI 2540 claim made by retired probation officer Tom Hemopo. The main reasons given were based on the crown breaches of the principle of equity and active protection by omission and the omission to the reduction of Māori reoffending rates. Available at <www.waitangitribunal.govt.nz>.

1.2 Context: Tikanga in a Pluralistic State: Application and Limitations

This section provides an introductory picture of the current application of tikanga in the criminal justice system to set the scene for the thesis inquiry and proposals. Highlighting the challenges associated with the application of tikanga and concerns about the traditional Māori values and practices, Sir Tipene O'Regan succinctly asserts:³

... the dynamic and evolving character of traditional Maori values... [It] is the capacity or dynamic adaptation which is the particular genius of Maori culture and its associated values. ... [W]e should follow the historical precept of our tupuna and permit our values to flourish in accordance with the changing environment and the expansion of human knowledge and capacity.

It is undisputed that tikanga is the first law of Aotearoa, New Zealand, and is part of the common law.⁴ The legal role of tikanga is evident in several ways. The *Ellis v R*⁵ case reaffirms this legal position. Colonial tests no longer apply in Māori customary property interests,⁶ and aspects of tikanga are not excluded from Parliamentary Acts.⁷ Unless expressly extinguished by an unambiguous provision

³ Sir Tipene O'Regan's comments are taken from *Te Runanganui o Taranaki Whanui Ki Te Upoko o Te Ika A Maui Inc v Wellington Regional Council* (1999) 3 BRMB 10; See also Trevor Gould and Trevor Daya-Winterbottom "Blood, Sweat, and Fears" [1999] NZLJ 342 at 343.

⁴ Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Belgrave M, Kawharu M, and Williams D, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) at 330; *Public Trustee v Loasby* (1908) 2 NZLR 801 and the Australian case of *Manktelow v Public Trustee* [2001] WASC 290; *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 84; [2019] 1 NZLR 116 at [77] per Elias CJ; *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [177].

⁵ *Ellis v R* [2022] NZSC 114.

⁶ At [21]. In *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [49], according to Elias CJ, local circumstances in 1840 displaced the Crown's right to the foreshore and seabed. See *Nireaha Tamaki v Baker* [1901] NZPCC 371; *Re the Ninety-Mile Beach* [1963] NZLR 461; *Kauwaeranga Case* (1984) 14 VUWLR 227; *Te Runanga o te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20.

⁷ *Ellis v R*, above n 5, at [88]. See *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* (No 2) [2021] NZHC 291 at [43]. Palmer J opined that tikanga is not only recognised within the common law but also in Parliamentary Acts. These include the Resource Management Act 1991, Te Ture Whenua Māori Act 1993 and Marine and Coastal Area (Takutai Moana) Act 2011. See *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 per Churchman J at [278].

in a statute,⁸ tikanga can, for example, “shape public law decision-making, in a range of ways, as permissible or mandatory considerations.”⁹ Consequently, legislation must take Te Tiriti/Treaty of Waitangi 1840 (hereafter, the Treaty of Waitangi) into account, and statutes must be interpreted accordingly.¹⁰

Despite these certainties and the pervasive presence of tikanga in legal processes, its application has often been inconsistent or problematic. Tikanga has been subject to varying degrees of application, as demonstrated in the shift from its limited application in *Takamore v Clarke*¹¹ to a posthumous recognition of a person’s mana (status) in the *Ellis v R*¹² case. This case recognised tikanga as a legal norm according to community values and practices. As a result, tikanga superseded the outdated common law principle that an action lapses after death.¹³ Subsequent decisions will increase the acceptance of tikanga as a legitimate means of resolving disputes. However, and this is a fundamental problem, unlike whanaungatanga, tikanga is not universal due to its flexibility according to hapū and iwi. Therefore, these variations impact the effectiveness of tikanga in sentencing decisions. Furthermore, the current prison statistics reflect the limited application of tikanga in a sentencing context.¹⁴

These realities contradict the principles affirmed by the Supreme Court in *Ellis v R*¹⁵ and will remain the norm if the same thinking reproduces it. However, it is argued that the common law is not moving in the same direction as tikanga, contributing to inequitable outcomes and disproportionate representation of Māori in the prison system. The challenges with the application of tikanga highlight the need for a viable and authentic alternative approach to ensure that cultural

⁸ Sections 5 and 9 of the Crimes Act 1961 have extinguished Māori customary practices, preventing the application of tikanga. See *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464. In this case, no consideration was given to s 27 of the Sentencing Act 2002. See *Ellis v R*, above n 5, at [98].

⁹ *Ellis v R*, above n 5, at [89].

¹⁰ Above, at [99].

¹¹ *Takamore v Clarke* [2012] NZSC 116.

¹² *Ellis v R*, above n 5.

¹³ Philip Joseph *Joseph on Constitutional and Administrative Law* (Thomson Reuters, Wellington, 2021) at 33.

¹⁴ *Mason v R*, above n 8.

¹⁵ *Ellis v R*, above n 5.

considerations are incorporated into the sentencing processes. It is in this context that this thesis proposes that a solution may derive from the legal norm of whanaungatanga and investigates how it could become accepted in the criminal justice system.

This thesis critically questions whether whanaungatanga can lead to a more equitable New Zealand criminal justice system for Māori. The research study inquires whether whanaungatanga can help to restore balance and social justice within communities and enhance understanding of how and why it is significant under s 27 of the Sentencing Act 2002.

1.3 Literature Review

Māori overrepresentation in New Zealand's criminal justice system is a multiplex issue. Most of the literature on the topic does not consider the application of whanaungatanga in s 27 of the Sentencing Act 2002. Nonetheless, there are topical themes linked to the current research, such as bias and cultural insensitivity, social, economic, and cultural factors, and gang affiliations. The literature review is thematically organised to highlight the problematic trends that reflect the status quo.

Bias and cultural insensitivity are central problems in the criminal justice system.¹⁶ In 2015, Riki Mihaere questioned whether the current use of Māori cultural identity in the justice system was to reduce Māori offending and imprisonment to meet the Treaty of Waitangi obligations.¹⁷ In another study, Dannette Marie et al found that people of Māori and other cultural background are at greater risk of violence and property crimes than those of solely Māori cultural identification.¹⁸

¹⁶ Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou: A New Perspective Part 1* (Department of Justice, Wellington, 1987).

¹⁷ Riki Mihaere "A Kaupapa Māori Analysis of the Use of Māori Cultural Identity in the Prison System" (Thesis (Phd) University of Victoria, Wellington, 2015).

¹⁸ Dannette Marie, David Fergusson and Joseph Boden "Ethnic Identity and Criminal Offending in A New Zealand Birth Cohort" (2009) 42 (3) *Australian & New Zealand Journal of Criminology*, 354.

Other studies have highlighted particular aspects related to the Māori prison population, such as financial factors, gang affiliation, rehabilitation programmes and cultural trauma. For example, Nakhid and Shorter's study of Māori ex-inmates' narratives illustrated how financial resources and gang connections influenced reoffending.¹⁹ In a completely different study, Inwood, Oxley and Roberts examined prison records and the differences between Māori and Pākehā over 130 years. The authors demonstrate the changes over time in convictions and physical height.²⁰

The varying effects of rehabilitation programmes suggested that historical, cultural, and socioeconomic issues play a role in developing constructive interventions. Research by Morseu-Diop concerned rehabilitation and restoration services to address the overrepresentation of Aboriginal, Torres Strait Island, and Māori in the New Zealand prison system.²¹ The post-custody interviewees discussed the benefits of the programmes.

Intergenerational trauma can deeply impact whānau, hapū and iwi. The systemic trauma effects of Māori examined by Farrelly, Rudegeair and Rickard concluded that "the fundamental trauma to Māori has been cultural" trauma.²² The impact of this trauma adds more force to the unequal power relations especially amongst incarcerated Māori women. As an example, McIntosh and Curcic focussed on the over-representation of Māori women in prison in New Zealand and examined their experiences of confinement and silencing.²³

¹⁹ Camille Nakhid, Lily Tairiri Shorter "Narratives of Four Māori Ex-inmates About Their Experiences and Perspectives of Rehabilitation Programmes" (2014) 58 (6) *International Journal of Offender Therapy and Comparative Criminology*, 697.

²⁰ Kris Inwood, Les Oxley and Evan Roberts "Physical Growth and Ethnic Inequality in New Zealand Prisons, 1840-1975" (2015) 20 (2) *The history of the family*, 249-269.

²¹ Noritta Morseu-Diop "Healing in Justice: An International Study of Indigenous Peoples' Custodial Experiences of Prison Rehabilitation Programs and the Impact on Their Journey from Prison to Community" (Thesis (Phd) University of Queensland, Australia, 2010.

²² Susan Farrelly, Thomas Rudegeair, Sharon Rickard "Trauma and Dissociation in Aotearoa (New Zealand) (2006) 4 (3-4) *Journal of Trauma Practice*, 203-220.

²³ Tracey McIntosh and Maja Curcic "Prison as Destiny? Descent or Dissent? in Lily George, Adele N Norris, Antje Deckert, Juan Tauri (eds) *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Springer International, Switzerland, 2020) at 223-238.

There is limited contemporary literature that discusses whanaungatanga as part of s 27 of the Sentencing Act 2002, and the currently available published material on whanaungatanga presents controversial views. Although there is an increasing amount of online published literature including Parliamentary debates and material produced in a variety of institutions, there is no general agreement about the meaning of whanaungatanga or consideration of its application under s 27 of the Sentencing Act 2002.

Within a mainstream context, whanaungatanga is interpreted without definitive meaning. The interpretations reflect a non-uniform understanding of whanaungatanga, which appears to reflect the court's historical approach to tīkanga. Māori academics, for example, Rangihau,²⁴ Hirini,²⁵ Mead,²⁶ and Wilson-Hokowhitu²⁷ provide different versions of and or aspects of whanaungatanga, generally expressed as notions of connectedness. Similarly, Jackson²⁸ and Quince²⁹ discuss the significance of whanaungatanga in relation to other values and concepts in dispute resolution. They argue that the concept of whanaungatanga is integral to Māori dispute resolution, as it focuses on the interconnectedness and interdependence of individuals and groups. Therefore, this concept is essential to provide a holistic approach to resolving disputes, as it helps to ensure that the outcome is beneficial for all involved.

In contrast, non-Māori experts such as Williams³⁰ exclude a description of whanaungatanga, whereas Metge provides a clinical version, arguing that

²⁴ John Rangihau "Being Māori" in Michael King (ed) *Te Ao Hurihuri: Aspects of Māoritanga* (Reed Publishing, Auckland, 1992) at 183-190.

²⁵ Paul Hirini "He Whakaaro mo te Aria Whanaungatanga: He ata Rapu" (1997) 2 He Pūkenga Kōrero: A Journal of Māori Studies 2 at 44.

²⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 32.

²⁷ Nālani Wilson-Hokowhitu, "He Pukoa Kani 'āina" (2012) 8 AlterNative: An International Journal of Indigenous People 137 at 143.

²⁸ Moana Jackson He Whaipaanga Hou: Māori and the Criminal Justice System: A New Perspective Part 2 (Wellington, Ministry of Justice, 1988).

²⁹ Khylee Quince "Māori Disputes and Their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University, Victoria, 2007).

³⁰ Herbert Williams *A Dictionary of the Māori Language* (Government Printer, Wellington, 1957) at 487.

‘whanaunga’ does not derive from whānau.³¹ Both authors do not consider this concept necessary, instead focusing on the more formal, judicial aspects of dispute resolution. Their reconstruction departs from the traditional meaning of whānau or family. Without an understanding of the basic tenets of whānau, the concept of whanaungatanga as a process to impact dispute resolution is minimised. By disregarding the concept of whānau, the reconstruction fails to consider the spiritual and cultural values essential for effective dispute resolution. Furthermore, the authors fail to recognise the unique role of elders in resolving disputes in a culturally appropriate way. This illustrates how whanaungatanga can easily be misunderstood and misapplied in a variety of contexts, including criminal justice.

Current analysis indicates that the literature focuses on non-traditional understandings of whanaungatanga. Due to the limited scope and depth of meaningful interpretations, these are unhelpful. The linear approach ignores the complexity of whānau needs and aspirations. In contrast, to effectively support balance in communities, a holistic approach is necessary. Whanaungatanga should not be considered in terms of its fit with a Western paradigm, as this impedes recognition of how whanaungatanga could play a pivotal role in s 27 of the Sentencing Act 2002.

Overall, such definitions are unsatisfactory because some authors engage only superficially with whanaungatanga, without addressing its foundational source and associated meanings. To gain a more comprehensive understanding of the concept, it is important to explore the cultural foundations of whanaungatanga. This includes understanding the different dimensions of Māori culture, such as the Treaty of Waitangi, and how it shapes whanaungatanga. This is important because it helps to explain why Māori culture values whanaungatanga so strongly, and why it is so important to Māori communities. It also helps us to understand how important it is for Māori people to build and maintain strong relationships with each other and with their environment. For example, the Treaty of Waitangi established a

³¹ Joan Metge *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington 1995) at 52.

partnership of mutual respect between Māori and the Crown. This partnership is the foundation for Māori culture, relationships and wellbeing. This can be compared with the roots of a tree. These roots form a deep and unbreakable bond with the soil and provide a strong foundation for the tree to grow and thrive.

The Treaty of Waitangi, therefore, serves as a reminder of the importance of building strong relationships and connections with our surroundings. This is where the whakapapa, which refers to genealogical and whanaungatanga kinship relationships originated. The gaps or shortfalls in our understanding of whānaungatanga can be addressed through a deeper engagement with the cultural foundation from which it arises. This foundation includes the genealogy, the kinship, and the relationships that form the basis of whānaungatanga. Therefore, this thesis proposes that a uniform understanding of whanaungatanga must derive from a mix of traditional and contemporary views acceptable to society. Such an understanding of whanaungatanga needs in turn to be contextualised under s 27 of the Sentencing Act 2002.

The following section outlines the key issues and barriers Māori face in the New Zealand criminal justice system. The discussion then outlines the proposal that underpins this thesis: the incorporation of whanaungatanga as a more detailed and context specific application of tīkanga.

1.4 Key Issues and Barriers

Imprisonment is a longstanding reaction to crime in many societies and in Aotearoa, New Zealand, the overrepresentation of Māori in the prison statistics is deeply disturbing. It is argued that the application of whanaungatanga in sentencing could help to reduce this disproportionate representation, as opposed to the limited application of tīkanga. An associated challenge to address is the nature of the statistics the government agencies provide. If statistics consistently provided disaggregated data to show outstanding themes that require change, society would understand the significance of whanaungatanga in a s 27 context. The research inquiry includes how the system overrepresented Māori in the New Zealand prison system in the first place. It would be impossible to expect society to ignore the

relevance of the common law. Similarly, advocates for traditional Māori values cannot expect non-Māori to assimilate into their ways and vice versa. If we can imagine a prison-less Māori society existing before 1840, we can imagine a modern version of society accepting the legal norms of whanaungatanga within a s 27 context.³²

The proposed incorporation of whanaungatanga into s 27 requires contextualisation within the history of attention to extra-legal factors, such as early census surveys, and pre-sentence reports³³ in the New Zealand sentencing process. Therefore, this research inquiry begins by examining themes and disaggregating the data for analysis. The data will provide accurate, transparent results to illustrate the issues hidden in the statistics. This research does not intend to have all the answers to the problem but is primarily a way of encouraging society to see things differently.

1.5 Statistical data

The persistent problem of Māori overrepresentation in the criminal justice system is more concerning when statistics do not provide information relevant to a particular offender's socio-economic disadvantages. This is a crucial piece of information to understand the causes of this phenomenon. Furthermore, it is imperative to consider the underlying factors that put Māori at a higher risk of incarceration to address the issue effectively. Māori are disproportionately likely to suffer from poverty and inequality.³⁴ They are more likely to become victims of crime and find themselves in the justice system. This further entrenches the cycle of disadvantage, and the government must take urgent action to create real and lasting change. Therefore, systemic change and an increased focus on understanding the causes of offending are imperative. As discussed above, New Zealand has witnessed a transition from a prison-less Māori society to one in which

³² *Ellis v R*, above n 5. Refer to the Appendix: Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara at 96.

³³ Heather Deane "The Influence of Pre-Sentence Reports on Sentencing in a District Court in New Zealand" (2000) 33 (1) *Australian & New Zealand Journal of Criminology* 91 at 92.

³⁴ Liesle Theron "Does New Zealand's use of Imprisonment Breach the New Zealand Bill of Rights Act?" 07 June 2019 LawTalk 929. Available at <www.issuu.com/nzlawsociety/docs/lawtalk_929>.

Māori constitute the majority of the prison population. However, statistical data alone does not reveal the causes of offending. Since 2017, Māori people have constituted around 15.4% of the national population and exceeded more than 50% of sentenced prisoners in New Zealand's correction system.³⁵

Statistical data also reflect the inescapable truth of an alarmingly high rate of sentenced Māori re-offenders. In 2017, 63.2% /of sentenced Māori prisoners reconvicted within two years of release, compared with 49.5% of non-Māori reconvicted within the same period. Reconviction after five years for Māori was at an alarming rate of 80.9%. In comparison, for sentenced non-Māori prisoners who are reconvicted after five years, the rate is 67.7%.³⁶

Statistics New Zealand, the New Zealand Justice Department and the Department of Corrections analyse different trends in the prison population statistics, but their analysis does not provide any explanation for the glaring overrepresentation of Māori in the prison system. The information offered is restricted to numerical data organised into certain categories. For example, at the end of June 2021, statistics revealed certain information. In this data, the estimated Māori population was 875,300 or 17.1 % of the national population.³⁷ Compared to a 0.6% increase in the national population, the Māori population increased by 2.4%. By September 2022, Māori made up 53.2% of the total prison population, Europeans made up 29.8%, and Pacific people made up 11.6%, followed by others at 4.5% and 1.1% whose cultural identity was unknown. In the study, Māori males averaged 25.3 years of age, and Māori females averaged 27.3 years of age. Māori have a younger median age of 36.7, compared to the national average of 38.8.³⁸ In 2013, the Ministry of Justice provided data on the prison population disaggregated by age, sex, and ethnicity. However, no further updates have been made to reflect more current results. This categorical breakdown does not illuminate the causes of offending or

³⁵ Department of Corrections "Prison facts and statistics – March 2017" Prison Statistics/ Department of Corrections. Available at <www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics>.

³⁶ Stats New Zealand "Crime and Justice". Available at <www.stats.govt.nz/topics/crime-and-justice>.

³⁷ Above, n 36.

³⁸ Above, n 36.

the limits of tikanga under s 27 of the Sentencing Act 2002. In addition, the lack of disaggregated data is evident on the Department of Corrections website.³⁹ More recently, information on prison facts and statistics for 31 March 2023 focus on:

- (a) the number of prisoners in each location by custody status.
- (b) the total prison population.
- (c) prison population by age group.
- (d) prison population by ethnicity.
- (e) prison population by offence type and—
- (f) security classification of sentenced prisoners.

The following table shows the ethnicity of prisoners at this point in time:

Prison facts and statistics – March 2023

Prison population by ethnicity	Māori	European	Pacific	Other	Unknown
Total=100%	52.8%	30.1%	11.2%	4.4%	1.5%

Table 1: Composition of the Prison Population Disaggregated by Ethnicity as of March 2023.

The table only displays the prison population categorised by ethnicity without any other accompanying data. The data neither indicates nor links these statistics to any potentially pertinent factors such as socio-economic disadvantages. Without context, numbers have limited meaning. Without meaningful information, we cannot understand why Māori overrepresentation in the prison system continues to be a problem. It is argued that it is imperative to include information about the causes of Māori incarceration to gain insight into the problem and to develop

³⁹ Department of Corrections “Keeping Communities Safe and Changing Lives”. Available at <www.corrections.govt.nz>.

effective solutions. Data should include information about the type of offences, the age of the perpetrators, and the effect of the criminal justice system on Māori. Moreover, the table illustrates that programmes or efforts for change are not making a substantial difference in reducing Māori over-representation in the prison system. Similarly, the information provided by the Ministry of Justice also reflects the status quo.

These statistics have prompted thought-provoking consideration over whether s 27 of the Sentencing Act 2002 has been utilised effectively to reduce Māori over-representation in the prison system.⁴⁰ Although judges have discretion over cultural assessment reports, they reach different outcomes for similar offences, reflecting judicial inconsistency.⁴¹

1.6 Significance of the Research

E tū ki te kei o te waka kia pakia koe e ngā ngaru o te wā.

Stand at the stern of the canoe and feel the spray of the future biting at your face.

—Apirana Mahuika.⁴²

The impact of the colonial criminal justice system, the common law and legislation on tikanga and the whanaungatanga processes has contributed to the intergenerational trauma of Māori.⁴³ The words of the Honourable Justice Joseph Williams (now a Supreme Court Judge of Aotearoa, New Zealand) help frame the goals of the current research inquiry. In 2015, he spoke to members of Te Hunga Roia Māori (Māori lawyers). His Honour referred to his article, “Can you see the island?” and talked about how the ancestor Kupe and his followers who came across on the Matawhaorua waka canoe, had no idea where they were heading but knew

⁴⁰ Nicholas Chisnall “The Mitigatory Effect of Social Disadvantage” (2016) Criminal Law Symposium 129.

⁴¹ See *Fane v R* [2015] NZCA 561.

⁴² Dr Apirana Mahuika was a tribal leader of Ngāti Porou descent.

⁴³ See Appendix 7: Judge Response “E” and Judge Response “H.”

an island existed.⁴⁴ Discussed further in Ūpoko Tuatoru/Chapter Three, I retrace these navigational narratives here to establish a metaphor for this research inquiry and the search for a different kind of island that can be located within the New Zealand criminal justice system.

As mentioned earlier, there is no existing literature that covers an analysis of whanaungatanga practices and principles related to s 27 of the Sentencing Act 2002. Second, consistency in sentencing and an understanding of the cultural background of offenders are imperative if we are to change the statistical data. In addition, the research proposes that the overall sustainability of transformative changes for Māori would benefit society.

1.6.1 Experience of Whanaungatanga: A Personal Perspective

As a prelude to this research inquiry, it is useful to clarify my personal understanding of whanaungatanga that I bring to this thesis. The experience of whanaungatanga has been part of and central to my life within my whānau, hapū, extended whānau connections, and iwi. Whanaungatanga espoused notions of aroha-love, manākitanga, to care for others and the importance of recognising those principles and values. Everyone knew who they belonged to, where they were from and their place in their whakapapa. As the eldest child in my whānau, meeting my four siblings for the first time reinforced those whanaungatanga relationships. My cultural identity developed as I received layers of future cultural information that deepened and reinforced my understanding of whanaungatanga.

Within the hapū context, knowing who everyone was, and how we were connected assured the whakapapa, the genealogical connections. Kanohi-ki-te-kanohi (face-to-face relationships) enhance whanaungatanga through attendance at a tangihanga (funeral). A kaikaranga, or female calling manuhiri (visitors) to the marae sets the scene of a spiritual calling to the atua, gods, and tūpuna to support the kaupapa or cause for their actions, where the wairua or spiritual connectedness was strongly

⁴⁴ Joseph Williams “Can you see the island?” (2015) Māori Law Review.

felt. The responding kaikaranga for the manuhiri visitors replies by calling the wairua, and the deceased spirit returns to the homeland of Hawaiikiniui, Hawaiikiroa, and Hawaiikipamamoa.⁴⁵ The karanga is a call to unite the living for a tangihanga and acknowledge the deceased. The connections people make through a hongī (pressing of noses) revives memories of those who had passed on while simultaneously carrying on whanaungatanga relationships. The hongī was a physical reminder of the shared ancestry and connection to the land. It was also a sign of respect concerning the deceased and the living. This shared expression is a powerful reminder of the bond between people.

At a tangi, the taumata kaumātua (seniors) would recite their pepeha (story about where they are from) and whakapapa and explain their connection to the deceased. Those whanaungatanga relationships remain relevant through the shared memories and connections formed with that person. Sometimes waiata (songs, chants, or incantations) were performed to affirm whakapapa and whanaungatanga connections across the metaphysical, physical, and human. The marae environment provided a safe place to observe the tīkanga involved in a tangihanga.

Kaimahi or food caterers played a role in maintaining whanaungatanga relationships. Whanaungatanga meant that everyone knew who the skilled hunters, gatherers, and kitchen workers were. These experiences of whanaungatanga reasserted my cultural identity and cultural background through whakapapa, the spiritual connectedness to the metaphysical, appreciation of the environment, and the respected relationships of those connected to me. Whanaungatanga then provided a template for me to model those relationships with both kin and non-kin.

The essence of whanaungatanga and the experience of whanaungatanga offer personal knowledge of a person's cultural background and others' cultural background and identity. Therefore, a more credible narrative is persuasive when

⁴⁵ Mead, above n 26, at 57; See also Bruce G Biggs, "Maori Myths and Traditions" in A H McLintock (ed) *Encyclopaedia of New Zealand* (Government Printer, Wellington, 1966) at 448.

Māori write about their whanaungatanga experiences in contrast to non-Māori authors who define whanaungatanga without experiencing its value processes.

1.7 Research Aims and Objectives of the Thesis

This research critically investigates the philosophical underpinnings of both common law and tikanga Māori. It also assesses whether a more consistent and uniform application of whanaungatanga could be achieved under s 27 of the Sentencing Act 2002. The aim of the research is to deepen understanding of whanaungatanga in s 27 of the Sentencing Act 2002 throughout the judicial system and for all members of society. Thus, the thesis proposes the possibility of easy navigation between whanaungatanga and the common law to show how they can help mitigate social inequalities and intergenerational incarceration.

An analysis of whanaungatanga history through a Te Ao Māori lens illustrates the realities of Māori relationships. Such an analysis can also highlight the effects of disciplinary practices. The analysis includes the court approaches to s 27 of the Sentencing Act 2002 to identify trends that may require amendment. Therefore, the goal is to make transformative recommendations for policy changes that benefit Māori and other defendants beyond the court system. Such a change will enable Māori to avoid reoffending or consider a different pathway away from crime. In finding alternative pathways, reducing inequities, and changing the status quo, society could see the current pattern of Māori over-representation in a way that differs significantly from current perceptions.⁴⁶

Objectives

The main objectives of this thesis are to:

- 1) Examine the principles of whanaungatanga in a traditional and contemporary context.

⁴⁶ See Appendix 1: Graph 6. See Appendix 7: Judge Response “F” and Judge Response “I”.

- 2) Investigate the data on Māori prison population statistics of the 19th, 20th and 21st century and census survey statistics of the 19th century.
- 3) Determine whether a more consistent uniform application of whanaungatanga within s 27 of the Sentencing Act 2002 would make a difference to Māori prison population statistics.
- 4) Examine whether a better understanding of whanaungatanga and use under s 27 of the Sentencing Act 2002 would promote transformative outcomes.
- 5) Provide recommendations for positive transformative change.

1.8 Methodology

This thesis examines 2002 to 2017 as s 27's formative period — the critical window during which systematic underutilisation became entrenched. The central question is not merely to document that failure, but to interrogate why it occurred and what structural potential was lost. The 2024 decision to defund s 27 cultural reports illustrate precisely what was at stake: the justification that seven million dollars had been spent without measurable benefit reflects a conception of s 27 as a device for individual mitigation rather than the instrument of structural analysis Parliament intended. Had courts robustly applied s 27 to document colonial causation and intergenerational deprivation, those reports would have generated aggregated evidence capable of compelling systemic reform. Judicial resistance foreclosed that possibility, creating the conditions for the provision's eventual delegitimisation. Where post-2015 scholarship maps the consequences of a persisting problem, this thesis excavates the ground on which it was built.

To ensure reliable results, the research methodology I have chosen is mixed-methods research.⁴⁷ My proposed research is empirical and employs a combination of quantitative and qualitative data and analytical tools.⁴⁸ It is hoped that this

⁴⁷ Alan Bryman *Social Research Methods* (5th ed, Oxford University Press, Oxford, 2016).

⁴⁸ Anselm Strauss and Juliet Corbin *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage, London, 1998) at 3.

approach ensures outcomes that are unbiased and equitable and can inform policy, practice, and community decisions. The methodology guides my research to explain my choice of methods, how I find answers to the research questions and how knowledge will be obtained.⁴⁹ My research has a social dimension and allows for a historical analysis of the political nature of the law and policy.

Quantitative Research

A quantitative methodology generates numbers for analysis and provides both a coherent overview of the subject and comparisons across numerous groups of people. Quantitative data can provide objective information from which to draw generalised conclusions.⁵⁰ These data can help to illuminate causal relationships.

The quantitative data and analysis are presented in Ūpoko Tuawhā/Chapter Four. The data were drawn from the prison population statistics of Māori in the 19th, 20th and 21st centuries and Māori involvement and non-involvement in the early population census surveys of the 19th century. A comparative analysis of these statistics over time was then conducted. These quantitative data and the comparative analysis highlight the growing problematic trends in the currently available published statistics.

The comparative analysis was undertaken to investigate the exclusion of Māori in census surveys. The controversial ‘one law for all’ policy design and its impact, as evidenced by the early prison statistics of Māori, highlight the difficulty in acknowledging tikanga Māori law within New Zealand’s legal system. The trends provide a factual basis to compare Māori to other groups in society to help identify the reasons for the disparity. This method highlights the realities of inconsistencies in the law and how whanaungatanga may assist with determining a just sentencing under s 27 of the Sentencing Act 2002.⁵¹

⁴⁹ Above, n 48.

⁵⁰ Daniel Muijs *Doing Qualitative Research in Education with SPSS* (2nd ed, Sage, London, 2011). Available at www.sagepub.com/sites/default/files/upmbinaries/36869_muijs.pdf.

⁵¹ See Ūpoko Tūaono/Chapter Six.

There are considerable advantages to complementing quantitative research with a qualitative approach.⁵² A qualitative research method provides significant insights into various aspects of social life and captures perceptions, feelings, and experiences. Qualitative research, therefore, allows me to explore and understand “the meaning individuals or groups ascribe to a social or human problem.”⁵³

One-on-one semi-structured interviews were conducted with a sample of judges from undisclosed District Courts in the North Island of New Zealand. The interview questions were designed to gain an in-depth knowledge of the practical realities of how the current law operates in a comparative assessment of experiments with cultural reports.⁵⁴ The qualitative analysis of the philosophical underpinnings of the two world views illustrates the different legal systems used and the different views on the approaches to offending. In determining the current understanding of whanaungatanga compared with the traditional aspects of whanaungatanga, the aim is to posit an interpretation that has a uniform application under s 27 of the Sentencing Act 2002 and is acceptable to society.

Three categories were used to identify cases where judges either applied a sentencing discount under s 27 of the Sentencing Act 2002, considered s 27 but declined to apply a sentencing discount, or refused to consider a s 27 cultural report. Identifying inconsistent sentencing decisions for similar offences highlights the different approaches judges take in statutory interpretation.

An interdisciplinary approach is essential to this research because no disciplinary perspective or branch of knowledge can adequately address this topic. The data gathered from the research questions are sourced from primary sources (domestic

⁵² KF Punch *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, London, 1998) at 4.

⁵³ John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (4th ed, London, Sage, 2014); See also John W Creswell *A Concise Introduction to Mixed Methods Research* (Sage, London, 2014) at 2.

⁵⁴ See Appendix 7: Interview Questions and Responses.

laws, case law), secondary sources, and tertiary sources, including legal reports, books, official government documents and reports, journal articles, news articles and non-legal material. To test whether my hypothesis is accurate, the outcome of this research will indicate a realistic approach to falsifying and rebutting those assumptions.⁵⁵

1.9 Limitations

The researcher acknowledges that this thesis has limitations. First, it concerns judges' understanding and application of s 27 of the Sentencing Act 2002. This small sample of judges relies on their subjective interpretations. Nonetheless, there is much more to be gleaned from the interviews.

1.10 Chapters

The following section outlines each thesis chapter. Ūpoko Tuatahi/Chapter One introduces an overview of the current problematic issues of applying tīkanga in a criminal context, and states how society would benefit from whanaungatanga, including cultural reports, under s 27 of the Sentencing Act 2002. Central to this thesis, Ūpoko Tuarua/Chapter Two examines s 27 of the Sentencing Act 2002 where the juridical character of whanaungatanga as a pre-colonial legal norm grounded in traditions of family ties, kinship, communal obligation, and the restoration of social balance, intersects with the contemporary criminal justice system. In doing so, it tests their capacity to accommodate it.

Ūpoko Tuatoru/Chapter Three comprises an analysis of the legal norm of whanaungatanga and its current understandings, to illuminate the differences between traditional and contemporary interpretations of whanaungatanga. The main goal of this chapter is to show how the relationships between the courts and the offenders reflect the relevance of whanaungatanga relationships under s 27 of the Sentencing Act 2002. It also examines how modern perceptions of whanaungatanga

⁵⁵ Mark Van Hocke *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline* (Hart Publishing, Oxford, 2011) at 17.

can help understand the concept as applied to criminal justice, specifically s 27 of the Sentencing Act 2002. Ūpoko Tuatoru/Chapter Three and Ūpoko Tuawhā/Four also function as a literature review for this thesis. Ūpoko Tuatoru/Chapter Three reviews tīkanga, as the first law of Aotearoa, New Zealand.

Ūpoko Tuawhā/Chapter Four provides a review of Māori within the criminal justice system since 1840 and examines how the system has impacted them overall. The chapter analyses the statistical data of the Māori prison population to understand the underlying reasons for social inequalities.

Ūpoko Tuarima/Chapter Five analyses the pluralistic tensions operating between tīkanga, the common law and legislation. This chapter is pivotal for understanding the conflict and how a reimagined formulation of two worldviews can agree on transformative outcomes of whanaungatanga under s 27 of the Sentencing Act 2002. It also examines early New Zealand trials. Legal archaeology is discussed as a way of looking at early examples of what could be viewed as a s 27 cultural report today. A focus on Justice Christian Whata's extrajudicial writings serves as a guide to demonstrate how these values have become accepted as legal norms in New Zealand courts. Recent developments in the common law affecting Māori are highlighted in the Supreme Court judgments, providing a contextual basis for bridging the understanding of the two worlds.

Ūpoko Tuaono/Chapter Six deals with statutory interpretation and criminal judicial review to understand the different approaches to sentencing that Ūpoko Tuaono/Chapter Six outlines. In this chapter, I discuss the origins of statutory interpretation, including statutes' influence on the common law and vice-versa. The chapter then explores some problematic issues surrounding specific sections of the Sentencing Act 2002.

Ūpoko Tuawhitu/Chapter Seven focuses on the current legal practices and the data mined from the interviews with judges from the New Zealand District Courts. The interviews provide a rich basis for analysing current legal practices and the practical realities of how the current law operates in the courts. Consequently, the chapter identifies reasons for sentencing discrepancies for similar offences based on the data

gathered from current legal practices. Ūpoko Tuawaru/Chapter Eight discusses some key findings, the implications drawn from the research, recommendations and the possibilities for future research. In addition, the chapter brings together the analysis by highlighting what we already know and how we can develop a more meaningful understanding of how the incorporation of whanaungatanga can lead to a more equitable criminal justice system for Māori in Aotearoa, New Zealand. The chapter concludes with final comments.

1.11 Conclusion

Despite decades of legislative intent, Māori continue to represent over 50% of New Zealand's prison population while comprising only 15-17% of the national population. Courts' failure to interpret tīkanga uniformly under s 27 of the Sentencing Act 2002 is itself a driver of this disparity, and existing literature on whanaungatanga remains too narrow. This thesis argues that a uniform application of whanaungatanga offers the most transformative path toward equity in the criminal justice system.

Having established the persistence of Māori overrepresentation and the limitations placed on the current application of tīkanga, I will now turn to the statutory mechanism at the heart of this thesis. Ūpoko Tuarua/Chapter Two undertakes a close examination of s 27 of the Sentencing Act 2002, a provision through which cultural background may formally enter the sentencing process. Specifically, the chapter will investigate why s 27 has consistently underdelivered on its transformative potential, and how principled, uniform engagement with whanaungatanga as a pre-colonial legal norm could lead toward restorative and equitable outcomes for Māori.

2 Ūpoko Tuarua—Chapter Two: Section 27 of the Sentencing Act 2002

The introductory chapter demonstrated that Māori overrepresentation in New Zealand’s prison system is not merely a product of legislative failure – it is actively compounded by the courts’ inconsistent engagement with tīkanga, which has reduced whanaungatanga from a substantive legal framework to an incidental consideration, not uniformly applied and without principled direction across the sentencing process.

Section 27 of the Sentencing Act 2002 is the central mechanism through which this chapter’s analysis is conducted. The provision offers offenders the opportunity to place their personal, whānau, community, and cultural background before the court at sentencing — a statutory recognition that culpability cannot be understood in isolation from the conditions that shape it. For Māori offenders, this carries particular significance: s 27(1)(b)’s causative nexus requirement demands that courts identify a direct relationship between an offender’s background and the offending itself — an exercise that is, by its nature, relational. This chapter will examine whether s 27 has been applied with the consistency and purposive intent Parliament intended, interrogating whether judicial resistance to the purposive application frustrated that intent and the contested relationship between ss 8(i), 26, and 27 through which that resistance operated. Throughout, the legal norm of whanaungatanga provides the normative reference point against which the provision’s application is measured. Its full juridical character is examined in the following chapter; here, it serves to illuminate what is lost when s 27 is reduced to a procedural formality rather than the transformative sentencing instrument it was designed to be. That loss is most acutely felt in the severing of the whānau, hapū, and iwi relationships through which whanaungatanga operated as a living legal norm; the very relational architecture that a purposive application of s 27 has the capacity, and the obligation, to restore.

This chapter comprises two sections. The first examines whanaungatanga as a pre-colonial legal norm and investigates whether courts have applied s 27 consistently

and purposively. The second addresses the structural conditions – including colonial causation and intergenerational deprivation that generate and maintain social inequalities for Māori offenders – and analyses the Treaty of Waitangi principles underpinning s 27, the inconsistent use and funding of cultural reports, the provision’s underutilisation, and the conflicting interpretations of ss 26, 27, and 8(i) of the Sentencing Act 2002 that frustrate Parliament’s intent.

Before examining the application of s 27, it is necessary to establish the normative framework against which that application must be measured. Whanaungatanga, as a pre-colonial legal norm, provides that framework – for without understanding what s 27 was designed to give effect to, it is impossible to identify precisely what is lost when the provision is applied inconsistently or reduced to a procedural formality.

2.1 Normative Value of Whanaungatanga

The whanaungatanga process is a pre-colonial legal norm. Tikanga has value within the justice system and whanaungatanga interconnects with tikanga. Both are flexible as they are associated components of relationality. The whanaungatanga processes are entrenched patterns and standards of social behaviour in a community which are accepted as unofficial customary laws of immemorial usage or practice. The process incorporates collective responsibility.⁵⁶ The remedy concerns reciprocal obligations for social cohesion. The role of kaitiakitanga or guardianship involves the practical application of the operative principles of tikanga to restore balance in society via whanaungatanga processes. Tikanga is activated through the common threads of cultural precepts developed to reproduce the normative values of whanaungatanga relationships for current and future generations.

In traditional Māori society active leaders participated in the process to help restore balance.⁵⁷ The process is no different to what Māori carry out today across different social contexts. Within the justice system, a s 27 cultural report highlights the

⁵⁶ Refer to Ūpoko Tuatoru/Chapter Three and Ūpoko Tuawhā/Chapter Four.

⁵⁷ *Ellis v R*, above n 5.

whanaungatanga process that underpins and anchors normative values. However, the current legal practices do not reflect a consistent interpretation of the whanaungatanga process in s 27 of the Sentencing Act 2002.

2.1.1 Consistent Interpretation of s 27 of the Sentencing Act 2002?

A consistent interpretation of s 27 requires the statutory purposive approach.⁵⁸ This aligns with Parliament's intention to reduce Māori overrepresentation in the prison system. Parliament's intention also presupposes a uniform application of tikanga, although this was under-recognised in law until the *Ellis* case.⁵⁹ Section 27 cultural reports are a way to rectify the imbalances in the system and lead to a more consistent approach.

A consistent interpretation of s 27 requires the statutory purposive approach for a uniform application of s 27 across the courts. The cultural assessments concerning the body of the common law should deal with the normative values of whanaungatanga to align with s 27. The purposive approach reflects compatibility with the common law philosophy where the legal norm of whanaungatanga can be easily identified in s 27. Therefore, s 27 reflects the normative values and practices of whanaungatanga relationships to address disparities and causes of the wrongdoing that does not impact the common law. As mentioned earlier, the current practices do not demonstrate consistent interpretation of a s 27 cultural report. There are differences in sentencing outcomes across the courts that contradict the purposive approach of statutory interpretation and impact on the defendant's rights to access to justice.

2.1.2 Summary

In summary, it is clear the current legal practices do not reflect (a) the normative value of customary law encapsulated in s 27; (b) a consistent interpretation of s 27, and (c) the issues concerning judicial review and the High Court's reluctance to

⁵⁸ Interpretation Act 2019.

⁵⁹ *Ellis v R*, above n 5.

grant mandatory orders. The normative value of customary law concerning the whanaungatanga process reflects s 27 of the Sentencing Act 2002 and is subject to different interpretations and approaches and creates a judicial review vacuum of unresolved issues. The underlying approaches to s 27 limits its significant role in the sentencing process and increases the possibility of social inequalities. In support of this analysis, according to one judge, “this system is so entrenched” that “expecting a government department to reform itself, forget it!”⁶⁰

2.2 Conditions Leading to Social Inequalities

This section examines how colonial legislation systematically displaced tīkanga-based justice and, generating the structural conditions – systemic deprivation, socioeconomic marginalisation, land alienation, urban displacement, and institutional racism – that causatively produce and perpetuate the patterns of Māori offending that the criminal justice system has failed to adequately address.

2.2.1 The Principles of the Treaty of Waitangi 1840

The Treaty of Waitangi establishes the rights of Māori and should be upheld in judicial decision-making processes. Section 27 of the Sentencing Act 2002 is designed to reflect the Treaty of Waitangi in the justice system. In the *New Zealand Māori Council v Attorney-General*⁶¹ case, the court defined the Treaty of Waitangi principles of partnership, protection, and participation. The principle of partnership reflects Parliament’s intention⁶² to reduce Māori overrepresentation through the court system by identifying any cultural background factors that allude to reasons for the offending. Protection under the New Zealand Bill of Rights Act 1990 confirms the certainty of the right to a fair trial according to ss 24(e), 25 (a) and (e). Finally, s 27 of the Sentencing Act 2002 demonstrates the partnership principle of two laws operating in a pluralistic state.

⁶⁰ See Appendix 7: Judge Response “J”.

⁶¹ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

⁶² Criminal Justice Act 1985, s 16—the predecessor to s 27 of the Sentencing Act 2002.

The introduction of s 27 of Sentencing Act 2002 was necessitated because of the long history of Māori overrepresentation in the prison system and the possible inequities in the delivery of the criminal justice system. Researchers and the courts have recognised that since 1840, the empirical evidence shows that the causes of systemic Māori deprivation are based on the historical impact of colonisation.⁶³ Mead claims that Elsdon Best's description of the traditional control system contrasts with the "Pakeha law that controls behaviour throughout the country."⁶⁴ Therefore, this historical process has caused the disenfranchisement of Māori customary law, the foundations of *tikanga* and the normative values of the *whanaungatanga* process.⁶⁵ Notwithstanding this empirical evidence of deeply rooted problems behind Māori offending, typically, since the 1980s, the New Zealand criminal justice system has responded to criminality with a catch- and-release system.⁶⁶ While criminal law is not universal,⁶⁷ the entrenched system relies on reviews, reports,⁶⁸ case law and commissions⁶⁹ which lack substantial reforms. As a result, it has caused legal practitioners and judges to look outside the mainstream government department processes. Consequently, some judges have centre-staged s 27 cultural reports rather than applying the harsh compliance regime.

Parliament's intent to initially address these issues under s 16 of the Criminal Justice Act 1985 was a positive move. For the connection between these principles and s 27 of the Sentencing Act 2002 to be realised, Article 1 requires an equal partnership relationship between Māori and the state to address issues that impact Māori

⁶³ *R v Maketū* SC Auckland, 1 March 1842. Available at www.victoria.ac.nz/law/nzlostcases/; See Appendix 7: Judge Response "D", Judge Response "E", Judge Response "F", Judge Response "G", Judge Response "H", Judge Response "I", and Judge Response "J"; *R v Heta* [2018] NZDC 11085.

⁶⁴ Mead, above n 26, at 327.

⁶⁵ See Appendix 1: Graph 1.

⁶⁶ See Appendix 7: Judge Response "J".

⁶⁷ Andrew Novak *International Criminal Court: An Introduction* (Springer, New York, 2015) at 34.

⁶⁸ Clinton Roper *Prison Review: Te Ara Hou=The New Way* New Zealand Committee of Inquiry into the Prison System (New Zealand Government Printer, Wellington, 1989); "Office of the Prime Minister's Chief Science Advisor" Professor Sir Peter Gluckman Using Evidence to Build a Better Justice System: The Challenge of Rising Prison Costs (March 2018) at 9.

⁶⁹ Jackson, above n 28.

overrepresentation in the prison system. However, the inconsistent court approaches to statutory interpretation over time led to inconsistency of sentencing outcomes.⁷⁰ By the time the Sentencing Act 2002 was introduced, it is clear that it took some time for the courts to grapple with s 27 and a more consistent application of its provision. The expectations that the courts will attempt to reduce Māori overrepresentation in the prisons is sometimes subject to limits. For example:⁷¹

If that person does not have the support in the community or an address or an appropriate address, then there's no choice but to put them in prison.

Using a comparative analysis of s 27 of the Sentencing Act 2002 and the Treaty of Waitangi document, it is apparent that both hold similar notions of whanaungatanga, first in s 27 of the Sentencing Act 2002, and secondly, in the Treaty of Waitangi's three main principles of partnership, protection, and participation. In this context, s 27 cultural reports can demonstrate the social inequalities arising from the state's implementation of the norms of social behaviour perceived as legal.⁷² These are inequalities connected to the past imperfectly observed articles of the Treaty of Waitangi. Despite Treaty Settlements, the partnership principles of Article 1, the participation principles of Article 2 and the protection principles under Article 3 demonstrate the reasons for applying the whanaungatanga context when dealing with offenders in s 27 of the Sentencing Act 2002.

The traditional approach to sentencing centred on social constructs. For example, regardless of their disadvantaged background, 17-year-olds were held responsible for their actions.⁷³ This approach displaced the customary law of whanaungatanga values and practices as the dominant philosophy of one law for all theory

⁷⁰ See Appendix 4, Appendix 5, and Appendix 6.

⁷¹ See Appendix 7: Judge Response "F".

⁷² It also includes the subjects of the relationships that it regulates, the mutual rights and duties of the subjects, and the sanctions for failure to perform a duty.

⁷³ See Appendix 7: Judge Response "J".

prevailed.⁷⁴ Therefore, the conditions for transformative outcomes were not promising.

2.2.2. Increasing use of s 27 of the Sentencing Act 2002

In response to Nicholas Chisnall's 2016⁷⁵ proposal that courts should utilise s 27 of the Sentencing Act 2002 more often, judges began commissioning cultural reports more frequently. The Public Defence Services (PDS) helped the registry find report writers. The pragmatic approach for more exposure was preferable to the brief pre-sentence reports judges received from the Department of Corrections.⁷⁶ The government's position that s 26 probation reports from corrections should include s 27 reports appear to be to save costs at the expense of an offender's rights to access justice. There are also challenges associated with Department of Corrections reports. The Corrections Department has a history of using an American Risk of Reconviction and Risk of Imprisonment (ROC*ROI) assessment. This does not mean that the department cannot train staff to write proper cultural reports. The main issue is the risk of arbitration, which is not independent but with two contrasting sections which could increase the risks for judicial review.

The government's position that reports from Corrections should include s 27 considerations is problematic. The reports are based on two different frameworks. The Sentencing Act 2002 in s 26 focuses on socioeconomic factors that are usually negative narratives, such as unemployment. Some judges "have no time for probation reports" because a huge majority of them do not "include the causes of offending or the narrative that led to systemic deprivation."⁷⁷

⁷⁴ Paul Heath "One law for all - Problems in Applying Māori Custom law in a Unitary State" (2011) 15 Yearbook of New Zealand Jurisprudence 194 at 199.

⁷⁵ Chisnall, above n 40.

⁷⁶ See Appendix 7: Judge Response "H"; Leigh-Marama McLachlan "Pre-sentencing reports for offenders criticised by judges and lawyers" (29 April 2019) Radio New Zealand. Available at www.rnz.co.nz/news/national/387988/pre-sentencing-reports-for-offenders-criticised-by-judges-and-lawyers.

⁷⁷ See Appendix 7: Judge Response "J".

2.2.3 Funding for Cultural Reports

Adequate funding for cultural reports is essential to achieving Parliament's original intent, access to justice and the right to a fair trial.⁷⁸ Despite the recent 2024 changes to government funding for s 27 cultural reports,⁷⁹ the judge requires crucial cultural background information that fills the gap of information missing from s 26 pre-sentence or a Provision of Advice to Courts (PAC) report. Most judges relied on the s 27 cultural reports, and they have to be funded.⁸⁰ To obtain funding, the Public Defence Services (PDS) and legal aid are independent entities and receive funding from the Ministry of Justice.⁸¹ The PDS also deals with appeal decisions and receives the statutory limit of up to 50% of approved criminal legal aid cases within their regional offices.⁸² If the PDS declines a cultural report application, there are reconsideration processes that require further information. The other 50% of funding is allocated to private lawyers. The task of lawyers seeking a written cultural report is made easier with legal services if there is a direction made by the judge.⁸³

However, defence counsel as sole arbiters⁸⁴ will utilise their networks and apply for funding either privately or through an application for legal aid⁸⁵ for disbursement under the criteria of an expert type of evidence.⁸⁶ There is no guarantee that all legal aid applications are approved. The PDS and the legal aid services use academics,⁸⁷ youth court advocates, and businesses that can provide 27 written cultural reports.⁸⁸

⁷⁸ New Zealand Bill of Rights Act 1990, ss 24 and 25.

⁷⁹ See Te Ūpoko Tuawaru/Chapter Eight.

⁸⁰ See Appendix 7: Judge Response "D".

⁸¹ Available at www.pds.govt.nz.

⁸² There are 10 offices across New Zealand.

⁸³ See Appendix 7: Judge Response "G".

⁸⁴ See Appendix 7: Judge Response "E".

⁸⁵ See Appendix 7: Judge Response "E" and Judge Response "H".

⁸⁶ See Appendix 7: Judge Response "I".

⁸⁷ For instance, Khylee Quince, the Dean of Law at Auckland University of Technology.

⁸⁸ Specialist Reports Ltd was established by Director Shelley Turner.

2.2.4 Significance of 27 of the Sentencing Act 2002

Section 27 of the Sentencing Act 2002 is an appropriate device for mitigating a sentence⁸⁹ and assists judges with rehabilitative options.⁹⁰ The Sentencing Act 2002 allows for discount sentences for social disadvantage.⁹¹ Judges will look for “an authoritative report that explains a person’s social disadvantage background in detail.”⁹² In this respect, s 27 is a way of recognising socio-economic disadvantages when making sentencing decisions. Although each case requires a thorough weighing of factors,⁹³ a cultural report is a backfilling mechanism that offers information that identifies the causal links to the offending. According to one judge:⁹⁴

... you just get so much more helpful information that you would never get either from the probation report or the counsel because people really, just don’t open-up. But they do with these reports.

Judges want “the story of that person’s life”.⁹⁵ Cultural reports are likely to reduce a defendant’s sentence based on an alternative plan and with rehabilitative programmes.⁹⁶ Furthermore, helping to reduce recidivism is also possible. Additionally, there is the potential that if cultural reports are applied more widely, the courts are likely “to see an impact of the reports of the rate of imprisonment”.⁹⁷ In contrast, sentencing someone without a report marginalises the sought-after information judges require to “know why it is that they have done what they have done.”⁹⁸

⁸⁹ *Chisnall*, above n 40.

⁹⁰ See Appendix 7: Judge Response “H”.

⁹¹ See Appendix 7: Judge Response “J”.

⁹² Above, n 91.

⁹³ *Chisnall*, above n 40, at 146.

⁹⁴ See Appendix 7: Judge Response “D”.

⁹⁵ See Appendix 7: Judge Response “J”.

⁹⁶ See Appendix 7: Judge Response “H”.

⁹⁷ See Appendix 7: Judge Response “H”.

⁹⁸ See Appendix 7: Judge Response “H”.

2.2.5 Signaling a s 27 Cultural Report

The process of requesting a cultural report affects its application. Calling for a cultural report is counsel's responsibility. Previously, the judges commissioned cultural reports until the Ministry of Justice stopped funding them to do this after a controversial debate.⁹⁹ This was because the judges had no statutory authority.¹⁰⁰ It was then decided it was up to the lawyers to request them. The reports provided a comprehensive overview of the cultural background of a case, including any cultural factors relevant to the case. This proved valuable information for lawyers and judges.

With regard to funding, the Public Defence Services (PDS) must approve a financial cost before the commissioning of a cultural report can take place. Judges may signal that a s 27 report may be helpful, but do not have any sway over whether defence counsel will take advantage of the opportunity. The reliance on defence counsel as the sole arbiters¹⁰¹ for signalling a s 27 report leaves the field wide open to debate as to whether defence counsel will take action and provide the information according to the section.¹⁰² An offender's background can have a real impact on how a judge deals with the case. However, if defence counsel contemplates a s 27 report nearer to the sentencing date, practical issues may slow down the process, but it is a way of utilising s 27 more effectively.¹⁰³

Not all judges are interested in the benefits of cultural reports.¹⁰⁴ The High Court has already pushed back seriously violent cases¹⁰⁵ that will not necessarily "carry much weight" in terms of a sentencing discount.¹⁰⁶ For example, in *R v Hone*,¹⁰⁷ Venning J dismissed the defence counsel's notification for the preparation of a cultural report. The controversial pushbacks raise concerns over a defendant's right

⁹⁹ See Appendix 7: Judge Response "F" and Judge Response "H".

¹⁰⁰ Judges did not have the statutory power to commission cultural reports.

¹⁰¹ See Appendix 7: Judge Response "D".

¹⁰² See Appendix 7: Judge Response "F".

¹⁰³ See Appendix 7: Judge Response "I".

¹⁰⁴ See Appendix 7: Judge Response "J".

¹⁰⁵ Above, n 104.

¹⁰⁶ Above, n 104.

¹⁰⁷ *R v Hone* [2018] NZHC 2605.

to access justice and a fair trial under s 25 of the New Zealand Bill of Rights Act 1990, including international and constitutional rights instruments, statutory interpretation issues, and the three principles discussed earlier, drawn from the Treaty of Waitangi. It is of particular interest to note ss 24(e) and 25(a) and (e) of the New Zealand Bill of Rights Act 1990. First, s 24(e) of the New Zealand Bill of Rights Act 1990 states that the person charged is entitled “to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more”.

Second, s 25 of the New Zealand Bill of Rights Act 1990 states:

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) the right to a fair and public hearing by an independent and impartial court: ...

(e) the right to be present at the trial and to present a defence:

As defendants have the right to present a defence, denying them access to justice and a fair trial undermines the rule of law. Also, certain risks may arise, such as the defendant's missed opportunity to present a defence that might attract a sentencing discount. Conditions that sustain existing social inequalities are inevitably maintained and reproduced. Parliament's intention to reduce Māori overrepresentation in the criminal justice system is part and parcel of Treaty of Waitangi obligations. A ritual nod of acknowledgement may be given to international and constitutional rights instruments from time to time.

2.2.6 Is s 27 Underutilised?

Not all judges accept that s 27 of the Sentencing Act 2002 is underutilised.¹⁰⁸ Yet,

¹⁰⁸ See Appendix 7: Judge Response “J”.

as one interviewee noted, “s 27 is a way to address the balance for sentencing of Māori offenders”.¹⁰⁹ The heading in s 27 of the Sentencing Act 2002 states that an offender may request the court to hear about their personal, family, whānau, community, and cultural background. However, offenders sometimes decline cultural reports, and some are unaware of the usefulness of a s 27 report. This conclusion is noted by a judge who stated:¹¹⁰

... it’s hard to know whether they are under utilised because there may be those people who just think no thank you, I don’t want to do that versus those who don’t know about it.

A s 27 report lacks uniform application, remaining underutilised in some cases and areas. As noted by one of the judges:¹¹¹

... you could say that previously it was underutilised, why it would currently be underutilised, may just be the different perspectives in different regions in different courts.

It is unfortunate if s 27 Sentencing Act 2002 is underutilised because the philosophy of just deserts does not solve the problems of prison costs¹¹² and recidivism.¹¹³

The regular application of s 27 of the Sentencing Act 2002 is strongly dependent of defence. Ultimately, there is responsibility on the defence counsel to explain the benefits¹¹⁴ to their client even though a sentencing discount or a reduced sentencing length may not occur. This responsibility relates to the fundamental principles of access to justice and a fair trial which are demonstrated in s 27 of the New Zealand Bill of Rights Act 1990. A problem is that defence counsel may lack the motivation to obtain information or may not take further steps if the funding for a cultural report

¹⁰⁹ Above, n 108.

¹¹⁰ See Appendix 7: Judge Response “I”.

¹¹¹ See Appendix 7: Judge Response “I”.

¹¹² *Gluckman*, above n 68.

¹¹³ *Theron*, above n 34.

¹¹⁴ See Appendix 7: Judge Response “G”.

is declined.¹¹⁵ The lack of commission creates inconsistencies in legal practice and missed opportunities for a whānau member or kaumātua to speak or provide information to the judge.

Summary

Cultural reports highlight systemic deprivation themes related to unequal social, cultural, economic, and educational issues. Beneath the surface are narratives that illustrate the constitutional and international rights inequalities that potentially underpin offending because of cultural and social deprivation. Cultural reports can provide a picture of an offender's intergenerational ordeals and experiences of inequality. The report writer links those experiences with the reasons why the offending occurred. The information and the type of offending play a role for judges in determining either rehabilitation, home detention or imprisonment. Therefore, judges expect relevant information.¹¹⁶ Systemic Māori deprivation, the social and economic impact of generational and intergenerational urban shift experience has increased the conditions of the possibility of social injustice outcomes.

2.2.7 Conflicting Interpretations of s 26, s 27 and s 8(i) of the Sentencing Act 2002

The most salient issue that contributes to the possibility of social inequalities concerns the conflicting interpretations of ss 26, 27 and 8(i) of the Sentencing Act 2002. Section 27 has no statutory guidelines for judges to direct a report.¹¹⁷ However, in the *Heta*¹¹⁸ case, according to Whata J, s 8(i) mandates the consideration of s 27 for sentencing discounts.¹¹⁹ Similar views are voiced by Chisnall¹²⁰ and Harder JJ who note that:¹²¹

¹¹⁵ See Appendix 7: Judge Response “F”.

¹¹⁶ See Appendix 7: Judge Response “D”.

¹¹⁷ See Appendix 7: Judge Response “H”.

¹¹⁸ *R v Heta*, above n 63.

¹¹⁹ Above, n 63.

¹²⁰ *Chisnall*, above n 40, at 145.

¹²¹ Justice Harder “Indigenous Social Disadvantage” [2013] NZLJ 408 (December) at 410.

... it is the combined effect of ss8(i) and 27 that enables a remedial approach in line with that under the Criminal Code to be utilized.

Section 8(i) of the Sentencing Act 2002 states that the court—

must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and ...

In comparison, s 26 (2)(a) states that a pre-sentence report *may* include—

(a) information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender

A pre-sentence report may include s 26 (2)(a) and is different from s 8(i) which mandates a s 27 report. Nonetheless, while s 26 is mandatory, s 27 is supported by the mandatory provision of s 8(i) of the Sentencing Act 2002.

There is a taken-for-granted assumption that a pre-sentence report covers all aspects of sentencing. However, s 8(i) signals a direct reference to s 27 cultural reports to provide background information that links the causes of offending with the defendant. However, the lack of consistent application of both sections is frustrated by s 26(2)(a) and disrupts the proper processes and access to justice that impact on human rights. Therefore, s 8(i) and s 27 of the Sentencing Act 2002 should be read together as a uniform application sourced from Parliament's intent, the purposive approach, and an individual's rights of access to justice. Furthermore, concerns about inconsistent sentencing outcomes of offenders for similar offences illustrate the social inequalities that are more than likely to result in recidivism. The difference between offenders with cultural reports and cultural speakers and those who do not have them has a significant impact on the likely outcome of a sentencing or the probability of incarceration.

2.3 Conclusion

This chapter has demonstrated that s 27 of the Sentencing Act 2002, while a significant statutory recognition of whanaungatanga, remains underutilised and inconsistently applied. The modest uptake of cultural reports after 2014 does not displace the foundational underutilisation that characterised the provision since 2002. The absence of uniform judicial interpretation, structural funding barriers, the unresolved tension between ss 8(i), 26, and 27, and the reliance on defence counsel as sole arbiters of the process have collectively frustrated Parliament's purposive intent – reproducing the social inequalities that s 27 was designed to address and sustaining entrenched Māori overrepresentation in the prison system.

Without a uniform interpretive commitment, s 27 risks remaining a procedural formality rather than the transformative sentencing instrument Parliament intended. The following chapter will turn to discussing the pre-colonial foundations of whanaungatanga, examining its juridical character, its principles of relational accountability, and the normative depth that a purposive application – including contextual aid of s 10(1) of the Legislation Act 2019 – demands but has yet to realise. What remains critically absent is the recognition that whānau, hapū, and iwi are not peripheral supports to sentencing but the foundational relational architecture through which whanaungatanga restores balance: and that s 27, purposively applied, is the statutory mechanism through which the criminal justice system can uphold, rather than continue to sever, those connections.

3 Ūpoko Tuatoru—Chapter Three: The Legal Norm of Whanaungatanga-a Central Aspect of Tīkanga

3.1 Introduction

Ūpoko Tuarua/Chapter Two established the issues concerning s 27 of the Sentencing Act 2002, identifying the limitations placed on tīkanga within sentencing decisions and proposing that the principled application of whanaungatanga offers a more consistent and restorative pathway forward. Tīkanga is not a uniform body of law; it varies across iwi and hapū,¹²² shaped by distinct histories and inherited traditions that require years of immersion to understand, and it has not been consistently accepted as a substantive norm within sentencing practice. Whanaungatanga, by contrast, is a more universally applicable principle. The absence of dedicated literature on a whanaungatanga framework is itself the gap this thesis seeks to address – examining the concept in both its traditional and contemporary dimensions contexts to evaluate the practical feasibility of its uniform application within the sentencing process.

Chapter Overview

In this chapter, I begin by discussing the dynamic and evolving nature of tīkanga and how it developed when Kupe and his followers discovered an imagined island. To appreciate the role of both tīkanga and whanaungatanga in regulating traditional Māori society, an understanding of Te Ao Māori, the Māori world view is important. Correspondingly, this chapter explains the significance of key components of Te Ao Māori. Of primary importance in Te Ao Māori, is understanding the relationship between the metaphysical, physical and human descendants. This chapter also discusses Māori cosmology, deities, mythology, and central aspects of tīkanga. These selected topics are necessary for the research

¹²² *Ellis v R*, above n 5. Refer to the Appendix: Statement of Tīkanga of Sir Hirini Moko Mead and Professor Pou Temara at 96.

inquiry because they help to illuminate whanaungatanga and how it could play a significant role under s 27 of the Sentencing Act 2002.

To provide a foundational understanding of whanaungatanga, this chapter examines its operation in traditional Māori society, the relationship between tikanga and whanaungatanga, the contemporary understandings of whanaungatanga by both non-Māori and Māori, and the implications for the legal system and the Sentencing Act 2002.

Te Ao Māori, the Māori view of the world, tikanga and whanaungatanga are the cornerstones of Māori society. They offer a structure for Māori identity, values, and beliefs that guide decision-making and a way of life. These concepts also create a sense of unity and interconnection between people, land, and spiritual realms. In Māori culture, tikanga and whanaungatanga indicate moral compasses, guiding interactions with the environment and people. This framework helps ensure harmonious relationships between people, their land, and the spiritual realm and is integral to Māori identity and culture. Understanding these principles is pertinent for considering their application in the criminal justice context.

In this section, I discuss the relevance of tikanga and whanaungatanga by providing a whakapapa or genealogical, context of the metaphysical and physical elements that are commensurate with building relationships to balance and restore their communities.

Māori Marsden's insights provide a helpful starting point for this discussion:¹²³

Māori conceive[s] the origin of the universe of at least a two-world system in which the material proceeds from the spiritual and the spiritual (which is the higher order) interpenetrates the material physical world of Te Ao Marama.

¹²³ Māori Marsden "God, Man and Universe: A Māori View" in Michael King *Te Ao Hurihuri: Aspects of Māoritanga* (Penguin Group, New Zealand, 2011) at 134. Māori Marsden was an Anglican Minister, rangatira (leader) and tōhunga (expert) of Ngai Takoto descent.

We may also conclude from the concepts of mana and tapu, and the nature of the creative acts of Io and his regents, that while the Māori thought of the physical sphere as subject to natural laws, these could be affected, modified, and even changed by the application of the higher laws of the spiritual order.

In some sense, I suspect the Māori had a three-world view of potential being symbolised by Te Korekore, the world of becoming portrayed by Te Po, and the world of being, Te Ao Māori.

Marsden explains that in Te Ao Māori, whanaungatanga was applied to reinforce the tīkanga of appropriate behaviour. The procedural realities of a connected three-fold kinship system which Marsden observed are:

a) First Dimensional View: Metaphysical Ancestors

The acknowledgement of primordial deities is recited through oral tradition and manifested through creation stories. The oral tradition also cements the spiritual, metaphysical, and ancestral relationships to the atua through whakapapa (genealogy).

b) Second Dimensional View: Whakapapa

The spiritual relationship of Māori to mountains, lakes, and rivers signifies what the ancestors first sighted when they arrived in Aotearoa, New Zealand. Through whakapapa, past, present, and future generations can maintain a spiritual connection with their physical and spiritual ancestors.

c) Third-Dimensional View: Kinship/Non-Kinship Relationships

The world of being, Te Ao Māori involved a continuous stream of interconnected elements comprising whanaungatanga values and practices as an intricate part of tīkanga. When settlers arrived and forged new relationships, non-kinship connections with the Western world developed.

I begin the following section by introducing our ancestor Kupe, who discovered Aotearoa, New Zealand. This narrative recounts how tīkanga was established and offers a metaphor for how we can imagine whanaungatanga playing a pivotal role under s 27 of the Sentencing Act 2002. The story illuminates how the Māori community viewed the world and their place in it. This was often illustrated through their creation myths, which helped them understand their position in the world. By adhering to certain principles and values, the Māori community was able to reach a final decision through the process of tīkanga. The concept of kaitiakitanga, which means guardianship, was an important part of this process. It involved the tīkanga and whanaungatanga relationships that were formed through community decision-making.

The pre-eminence of tīkanga in Māori society was established from the time of the arrival of Kupe and his followers.¹²⁴ Kupe landed at Waitangi and returned to his Polynesian homeland to inform others of the signposts. The second ancestral waka canoe migration may have arrived between A.D. 800 and 900,¹²⁵ earlier, or possibly afterwards.¹²⁶ Other waka canoes, such as the Kurahaupo landed at Rangitahua, on the Kermadec Islands.¹²⁷ It was imperative that the descent line of those on the waka canoes survived.¹²⁸ This is an example of tīkanga operating at a time when they had not reached their destination.

Kupe set a precedent that tīkanga would be followed accordingly. This narrative about Kupe provides a fitting metaphor for the journey that will challenge the status quo of Māori over-representation in the criminal justice system by navigating

¹²⁴ Mead, above n 26, at 57; see also Biggs, above n 45, at 448. Māori settlers brought with them tropical cultigens such as kumara, taro, aute, yam, and gourd, including ti pore. See Louise Furey *Māori Gardening* (Dept of Conservation, Wellington, 2006) at 10-16.

¹²⁵ Ranginui Walker *Ka Whawhai Tonu Mātou* (Penguin, Auckland, NZ, 2004) at 28.

¹²⁶ For example, Ngāti Kuri claim they are the direct descendants of an ancient Iwi who whakapapa back to the original Ariki, paramount chief Ruatāmore of the waka Taikoria. Te Ngake (or Te Ngaki) of the waka, Tahirirangi, arrived in Aotearoa soon after. See Dorothy Ulrich Cloher *The Tribes of Muriwhenua* (Auckland University Press, Auckland, NZ, 2002) at 18. However, their time of arrival is unknown. See Elizabeth Rata *A Political Economy of Neotribal Capitalism* (Lexington Books, Lanham, 2000) at 158.

¹²⁷ Cloher, above, at 16. Some of the passengers boarded another waka (vehicle) such as the Mataatua waka.

¹²⁸ Above, n 16.

readers to an imagined bi-legal island of the law that incorporates the whanaungatanga within s 27 of the Sentencing Act 2002. The expression of heavy seas and dark starless nights is a metaphor for the conflict and interpretation of and between tīkanga, the common law, and legislation. Imagining Kupe combating potential challenges on his journey is helpful. He knew where he was heading and remained focussed; the more radical the challenges of the journey, the clearer the island image became for him.

Recognising the existence of metaphysical, physical, and human descendants is part of many important events. Acknowledgement of these connections is a vital aspect of such occasions. For example, whaikorero or Rangatira (chief's) speech acknowledges the ancestors, the environment, lands, and human beings and recognises the connections of the ancestors to creation myths. For Māori this is an expected and appropriate way of paying tribute to the entities that have shaped our existence. The following is an example of a whaikōrero or speech.

1) *Metaphysical*

Ko ngā atuaanga o te Ao Māori
Kei te mihi atu kia koutou katoa
Ka tangi te titi, Ka tangi te kaka
Ka tangi hoki ahau
Tihei Mauri Ora!

Gods of the Māori world
greetings to you all,
the titi and the kaka bird cries.
I also, cry.
Behold the life force!

2) *Physical*

Ki te wheiao, Ki te ao marama
tēna koutou, tēna koutou,
tēna koutou katoa.

the expanse of the world of light
greetings, greetings
to you all.

3) *Human Descendants*

E ngā mana, e ngā reo,
e ngā karangaranga maha,
tēna koutou, tēna koutou,
tēna koutou katoa.

Greetings to the multitude,
the many speakers
Greetings, greetings.
to you all.

The relevant connections are whakapapa (genealogy) and whanaungatanga relationships. Throughout history, whanaungatanga and whakapapa have played a significant role in balancing communities and ensuring sustainability. Whaikōrero acknowledges the ancestors and the connection to creation myths, the environment, lands, and human beings. Creation stories should not be classified as non-legal writings, as the source of tikanga stems from creation stories that, in turn, transform into legal norms of customary practice. Therefore, legal Māori writings can be sourced from creation stories to justify the existence of tikanga and whanaungatanga. The inclusivity of those connections contributes to a sense of belonging through shared experiences.

In establishing the foundation for the proposal to apply whanaungatanga in sentencing, it is important to understand its workings in traditional Māori society. Te Ao Māori concerns traditionally significant components that are relevant to Māori ways of living. These include te reo Māori, tikanga processes and practices, cultural identity, and marae involvement.¹²⁹ Before the advent of English laws, whanaungatanga was the guiding pillar for all relationships of supernatural and genealogical ancestry. It shaped the lives of past, present, and future generations.¹³⁰ Whanaungatanga operated as part of tikanga and was primarily based on traditional oratory.¹³¹ Māori perceived tikanga as a directive legal norm endorsed by the past actions of their tūpuna (ancestors) and monitored by the Rangatira (chiefs) and tōhunga¹³² experts of tikanga Māori.

The body of oral literature included, for example, haka (performance), waiata (songs), poroporoaki (farewell), whakapapa (genealogy), and whaikōrero (speech).

¹²⁹ Mead, above n 26.

¹³⁰ Ani Mikaere *Colonising Myths—Māori Realities* (Huia Publishers and Te Wānanga o Raukawa, Wellington, 2011).

¹³¹ Richard Boast “Māori Land and the Treaty of Waitangi” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004) at 3; See also Michael King *Nga Iwi O Te Motu: 1000 Years of Māori History* (Reed, Auckland, 2001) at 36. The traditional oratory was alien to the colonial newcomers. Many orators used proverbs as metaphors to express the loss or concerns of a specific matter.

¹³² Kelly Frances Mitchell “Distinguishing ‘Expertise’ in Te Reo Māori: Tohunga, Pu and Rehe” (2021) 130 (2) *Journal of the Polynesian Society* 137-148; See also Paul Moon *The Tohunga Journal: Hohepa Kereopa, Rua Kenana, and Maungapohatu* (David Ling, Auckland, 2008); S Percy Smith *On the Tohunga Māori 1840-1922* (Kiwi Publishers, Christchurch, 2001).

Each generation was responsible for reciting them.¹³³ The narration and recitation of whakapapa linked whanaungatanga connections to others and things. The connections captured the significance of identity, balanced society, and recognised epistemological agents such as Ranginui, the sky father, and Papatuanuku, the earth mother.

The foundational framework of Māori society was based on:¹³⁴

... strong family affiliations. Whakapapa provided the organising principle for the establishment and perpetual continuation of physical relationships between past, present and future generations of Māori. While whakapapa provided the structural framework within which Māori society existed, whanaungatanga (kinship) provided the moral and ethical framework within which daily interaction occurred between people who were related to each other. Whanaungatanga acted as the overriding principle by which ‘right’ and ‘wrong’ actions toward relations were determined. Whanaungatanga practices were those that encouraged the members of a group to uphold family relationships to maximise the welfare of the group.

These understandings governed society and relationships before the Treaty of Waitangi, where Māori had political, economic, social, cultural, and military power. Whanaungatanga formed the basis of Māori corporate existence.¹³⁵ This system grew out of Māori societal structure with its intergenerational obligations.¹³⁶ Māori societal structure was flexible and dynamic as well as communal and collective. The whānau or hapū unit was the primary political and economic unit of traditional Māori society.¹³⁷ The intergenerational obligations of whānau, hapū, and iwi

¹³³ Timoti Karetu “Language and Protocol of the Marae” in Michael King *Te Ao Hurihuri: Aspects of Māoritanga* (Penguin Group, New Zealand, 2011) at 28.

¹³⁴ *Quince*, above n 29, at 259-260.

¹³⁵ William Lee Rees “Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws: Subdivision” [1891] AJHR G-01 at xviii.

¹³⁶ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore. Nineteenth Session July 18, 2011, Geneva.

¹³⁷ Angela Ballara Iwi: *The Dynamics of Māori Tribal Organisation from c.1769 to c.1945*, (Victoria University Press, Wellington, 1998) at 179.

strengthened and balanced the governance structures set up through whanaungatanga to maintain social, cultural, political, environmental, and economic accord.

The political context was the result of Māori loyalty to the constitutional arrangements that transpired through tīkanga Māori.¹³⁸ The lands, fisheries, and natural resources were under the authority of tino rangatiratanga of hapū and iwi. In the pre-market economy, Māori did not practice commercial market transactions, as they were adept at bartering or gift exchanges.¹³⁹ Gardening played a significant role in discharging social obligations.¹⁴⁰ During this period, people were more important than goods.

Māori lived in a complex social system of customary laws.¹⁴¹ Abstract reasoning became an adaptive device that helped Māori cope with the demands of daily living.¹⁴² The valued system of tīkanga varied in different locales¹⁴³ according to the social, cultural, and economic requirements of a particular tīkanga.¹⁴⁴

Whānau were the primary economic unit and the building block of hapū.¹⁴⁵ Hapū were the independent political units.¹⁴⁶ Māori loyalty to their constitutional arrangements transpired through tīkanga law.¹⁴⁷ All aspects of life were interconnected.¹⁴⁸ The kaitiakitanga (stewardship) of lands, fisheries, and natural resources was also subject to tīkanga law. Tīkanga law incorporated principles for

¹³⁸ *Mikaere*, above n 4 at 330.

¹³⁹ Brian Easton “Economic History - Early Māori Economies” (13 July 2012) Te Ara Encyclopedia of New Zealand.

¹⁴⁰ *Furey*, above n 124, at 10 -16.

¹⁴¹ The rangatira chiefs were the first law practitioners of Aotearoa. This is affirmed in the 1808 Te Whakaminenga and the 1835 He Whakaputanga o te Rangatiratanga o Nu Tirenī.

¹⁴² Nin Tomas “Key Concepts of Tikanga Māori and Their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau, Past and Present” (Thesis (Phd) University of Auckland, 2006) at 35.

¹⁴³ *Mead*, above n 26, at 8.

¹⁴⁴ Hirini Moko Mead “The Nature of Tikanga” (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 72.

¹⁴⁵ Richard Benton and others *Te Matapunenga* (Victoria University Press, Wellington, 2013) at 521.

¹⁴⁶ Above, n 145, at 179.

¹⁴⁷ *Mikaere*, above n 4, at 330.

¹⁴⁸ Alice Mills *New World Mythology* (Global Book Publishing, Australia, 2009) at 60.

determining justice¹⁴⁹ in a prison-less society. Legal precedents were validated by more than one generation or made subject to conditions depending on the affairs of a group or an individual.¹⁵⁰ For example, Māori relationships with communal lands¹⁵¹ attracted ownership of rights and the exercise of mana over them.¹⁵²

The Indigenous ethics of *tikanga* helped differentiate between right and wrong to restore balance in the Māori communities. The idea of *tapu* created a sense of respect and humility, and *utu* restored balance in the community. Practices and cultural values like these have been passed down through generations and still play an important role in Māori society.

3.1.1 Tuki's Map

The story of Tuki's map provides helpful insights into Māori ways of understanding the world. According to Judith Binney, images are a necessary part of historical writing.¹⁵³ The rediscovery of Aotearoa, New Zealand by European explorers in 1769 compelled interactions with a group of people "who possessed no name for themselves" but could sketch an outline of their islands.¹⁵⁴

It was an exchange with colonisers that led to the creation of the first map of the North Island. The colonisers were well known for exchanging items during colonial interactions, as John Lutz states:¹⁵⁵

Something was always exchanged on the first contact. Often the

¹⁴⁹ E Cooper, S Rickard, W Waitoki "Māori Psychology and the Law: Considerations for Bicultural Practice" in Seymour, F, Blackwell, S, Thorburn, J, (eds) *Psychology and the Law in Aotearoa New Zealand* (Wellington, New Zealand, 2011) at 36.

¹⁵⁰ *Mead*, above n 144.

¹⁵¹ Eddie T Durie "Custom Law: Address to the New Zealand Society for Legal & Social Philosophy" (1994) 24 VUWLR 325 at 329.

¹⁵² Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004) at 42-43; see *Mead*, above n 26, at 275.

¹⁵³ Judith Binney "Tuki's Universe" in *Stories Without End Essays 1975–2010* (Bridget Williams Books, Wellington, 2016) Chapter 3. Binney notes the essay was first published in Keith Sinclair *Tasman Relations: New Zealand and Australia, 1788-1988* (Auckland University Press, Auckland, 1987); Caroline Daley and Deborah Montgomerie (eds) "Korero in Honour of Judith Binney" (2004) 38 (2) *New Zealand Journal of History*, 121-305.

¹⁵⁴ *Binney*, above, at 45.

¹⁵⁵ John S Lutz *Myth and Memory* (UBC Press, Vancouver, 2007) at 7.

exchange included goods, but it always involved attempts at communication, usually very deliberately contrived. Even Indigenous people, who often had less time to prepare for the encounters, were quick to assemble their chiefs or ceremonial speakers, don their regalia, and marshal their symbols of wealth and power. Both sides to the encounter had much at stake: trying to suggest that they were powerful though not threatening and interested in exchange though not to be tested.

Consequently, Captain James Cook acquired the first charcoal-drawn map of the North Island ('Aotea') from chiefs at Whitianga on the deck of the Endeavour.¹⁵⁶ Later, referring to Lieutenant-Governor King's kidnapping of Tuki Tahua and Ngāhuruhuru¹⁵⁷ in 1793, it is noted that King was keen to learn how Māori processed flax¹⁵⁸ and that they might teach female convicts how to weave flax into garments.¹⁵⁹

Binney notes that:¹⁶⁰

The chiefs were insulted by the manner of their removal, and at first, refused to give King any information. But, he wrote, by taking 'every pain ... to attach them to us', by having them eat with him at his table, and by leaving them to their ... inclinations, he induced them gradually to become more sociable.

Reciprocity of interactions between King and Tuki signified a non-kinship relationship, a challenge Abel Tasman could not achieve. However, Tuki drew a map in pencil to explain how Māori understood the world from a holistic perspective.¹⁶¹

¹⁵⁶ Binney, above n 153, at 45.

¹⁵⁷ Malcolm McKinnon, Barry Bradley and Russell Kirkpatrick *Bateman New Zealand Historical Atlas, Ko Papatuanuku e Takoto Nei*, (eds) (Dept of Internal Affairs, Auckland, 1997) at 8.

¹⁵⁸ Above, n 157.

¹⁵⁹ Jo Kamira "Māori in Sydney" (2010) 3 (1) Sydney Journal at 23. Available at <www.epress.lib.uts.edu.au/journals/index.php/sydney_journal/issue/view/142>.

¹⁶⁰ Binney, above n 153, at 45.

¹⁶¹ McKinnon *et al*, above n 157, at 8.

Binney further explains that:¹⁶²

... Tuki's chart revealed a knowledge of the physical world and an imaginative attachment to it. He drew a land which was, in one map, both actual and mythological. It was a Māori world, and one whose boundaries, both physical and spiritual, would be utterly changed within half a century.

For King to comprehend the world of the Māori, Tuki's drawing was an attempt to explain how he saw the world, and his mode of interpretation, working from the 'familiar, the family, outward.'¹⁶³ Marsden noted that creation stories underpinned Māori ways of thinking and understanding of the procedural realities of how relationships developed.

Marsden stated that:¹⁶⁴

... the ancient Māori seers, like the later modern physicists, created their sets of symbols to provide them with their maps/models to portray each state in this evolutionary process. These representations were the means by which they could elucidate the various worlds, and grasp what they perceived as [the] ultimate reality.

Tuki's knowledge of his whakapapa, genealogy, and the environment¹⁶⁵ signified his relationships with others, the natural and the metaphysical world. Tuki's illustration "captures a rich tapestry of information based on whanaungatanga (relationships) from the perspective of Māori from the north of New Zealand."¹⁶⁶ Thorough knowledge of his whakapapa, kinship relationships, and resources, he

¹⁶² Binney, above n 153, at 45.

¹⁶³ Mckinnon *et al*, above n 157, at 8.

¹⁶⁴ Māori Marsden "The Natural World and Natural Resources: Māori Value Systems and Perspectives" in Royal T (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (The Estate of Rev. Māori Marsden, Wellington, 2003).

¹⁶⁵ Mckinnon *et al*, above n 157, at 8.

¹⁶⁶ Waitangi Tribunal *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 11.

connected the whanaungatanga relationships with the land and the environment from a Māori world lens.¹⁶⁷

3.2 The Narrative of Tikanga: First Tikanga Law Practitioners

From a Māori world lens, Rangatira (chiefs) were the first tikanga law practitioners of Aotearoa, New Zealand. This is clearly expressed in the 1808 Te Whakaminenga (the General Assembly of the Tribal Nations) and 1835 He Whakaputanga o te Rangatiratanga o Nu Tirenī, (Declaration of Independence). The formation of both the assembly of hapū and the declaration demonstrate the whanaungatanga process of building relationships between hapū and Europeans through knowledge of an individual's whakapapa or genealogy.

Diplomatic trading with the Europeans opened a floodgate of Western exploitation of Aotearoa, New Zealand's land, resources, Māori customary law, title, and rights according to Māori sovereignty. Māori customary law and native title to land, as recognised by Privy Council cases,¹⁶⁸ demonstrated that these rights remained unaffected.

As a result of a visit to Lieutenant-Governor King in Sydney in 1805, the rangatira chief of Ngāpuhi, Te Pahi, established Te Whakaminenga in 1808.¹⁶⁹ Te Whakaminenga o Ngā Hapū o Nu Tirenī was an assembly of the tribal nations.¹⁷⁰ The establishment of Te Whakaminenga marked a significant step in maintaining tribal independence and ensuring that all mana and Kingitanga (sovereign power and authority) belonged to them. The assembly agreed to meet annually at Waitangi to create laws for justice, peace, and good order. They also declared that no one else could make laws for their territories except themselves. Government powers could not be exercised by anyone other than the government, unless delegated to an

¹⁶⁷ Mckinnon *et al*, above n 157, at 8.

¹⁶⁸ See Native Lands Court Kauwaeranga Judgment Chief Judge Fenton. Daily Southern Cross, Volume XXVI, Issues 4158, 10 December 1870; *Nireaha Tamaki v Baker*, above n 6.

¹⁶⁹ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 72–75.

¹⁷⁰ Above, n 169, at 176.

appointed representative.¹⁷¹ In addition, they sought protection from King George IV against threats to their mana in exchange for their promise to protect British subjects.¹⁷² Without mana, it would not have been possible, under the auspices of Te Whakaminenga, Te Pahi and Hongi Hika, to meet King George IV of the United Kingdom in 1820.¹⁷³

Te Pahi learned about the experiences and kidnapping of Tuki Tahua and Ngāhuruhuru by King to Norfolk Island in 1793.¹⁷⁴ Because hapū were the primary political units, the positive impact of diplomatic trading with other hapū extended to European trading. Consequently, diplomatic relationships began with the kidnapping of Tuki and Ngāhuruhuru.¹⁷⁵ Through tīkanga, whanaungatanga was the process through which those relationships could develop.

Te Pahi and his four sons spent time in Paramatta exchanging his knowledge about the “process of working wool and making cloth” with John Mcarthur.¹⁷⁶ Te Pahi was not impressed with the death sentence given to three convicts accused of stealing food. He did not view stealing food or kai as a significant offence. Nonetheless, Te Pahi attempted to restore the tīkanga, the right thing by offering to whāngai (adopt) them and have them transported to his homeland but was not successful.¹⁷⁷

After leaving Sydney in 1806, Te Pahi returned in 1808 with three of his sons. They sought to right the wrong committed by the lawlessness of Pākehā, including the kidnapping of his daughter Te Atahoe, for international slavery.¹⁷⁸ Te Atahoe (Mary Bruce) arrived in Sydney with her husband in 1810 but missed seeing her father and brothers. They had already returned home. Due to Lieutenant-Governor King’s failure to change the status quo of slavery, Te Pahi and others established Te

¹⁷¹ Above, n 169, at 181.

¹⁷² Above, n 169, at 154.

¹⁷³ Above, n 169, at 72–75.

¹⁷⁴ Above, n 169, at 69–70.

¹⁷⁵ Above, n 169.

¹⁷⁶ *Kamira*, above n 159, at 24.

¹⁷⁷ Above, n 159.

¹⁷⁸ Above, n 159.

Whakaminenga (noted above) in 1808 in pursuit of discussing diplomatic relationships with the Europeans.¹⁷⁹ Te Whakaminenga also brought hapū together to share hosting responsibilities.¹⁸⁰

In 1809, Te Pahi, wrongly accused of ordering the killings of several Pākehā as revenge for the ill-treatment of a young Māori chief on the sailing ship *Boyd*, was executed in the Bay of Islands in 1809 by whalers.¹⁸¹ There are two themes which emerge from these narratives. The first theme concerns the unlawful kidnapping of Māori to acquire their knowledge of sought-after resources. The second theme relates to the first time tīkanga was applied offshore.

First, the kidnapping of Tuki Tahua and Ngāhuruhuru¹⁸² was well planned as:¹⁸³

King's careful courting of Tuki meant he now had knowledge of rich resources, all of which would eventually contribute to the colony. King sent Tuki back with gifts, which had been meticulously and deliberately chosen. These included wheat, maize, peas, sows, and boars, as well as hand axes, carpenters' tools, scissors, razors, spades, and seeds. King was deliberately introducing items for which a demand would grow.

The onset of the exploitation of Māori knowledge of resources expanded the British Empire, increased trading and demand for tools, and severed Māori constitutional arrangements that led gradually to the alienation of Māori whenua, land through New Zealand legislation.¹⁸⁴ The second theme that emerges here is an example of the first attempt to apply tīkanga in a country that had no distinction between crimes and less serious ones. For Te Pahi, it seemed unacceptable that kidnapping was not a crime, but stealing food was. Te Pahi sought to correct the wrong. While nothing came of it, the encounter illustrates a connection between tīkanga and

¹⁷⁹ Some of the hapū included Ngai Tahu, Ngāti Tuwharetoa, Ngāti Porou, Hauraki, and Waikato.

¹⁸⁰ *Waitangi Tribunal*, above n 169, at 176–177.

¹⁸¹ *Kamira*, above n 159, at 25.

¹⁸² *Mckinnon*, above n 157, at 8.

¹⁸³ *Kamira*, above n 159, at 25.

¹⁸⁴ *Walker*, above, n 125.

whanaungatanga relationships and the traditional ways of tīkanga law practitioners who applied tīkanga for specific purposes.

As concerns grew around protecting Māori from being exploited, these tīkanga law practitioners took pragmatic approaches to respond to those concerns. The establishment of the 1835 He Whakaputanga o te Rangatiratanga o Nu Tireni (Declaration of Independence) asserted the need to promote and protect the constitutional and administrative rights of Māori for future successors of their inherent real estate under customary law. More importantly, there was a pressing need to protect the sovereignty of the Māori people under the Declaration.¹⁸⁵ The challenges that arose in 1805 resulted in their loss of sovereignty and people being sent into international slavery. The attempt to apply tīkanga offshore was unsuccessful in producing any significant results. Nonetheless, Māori chiefs had sovereignty¹⁸⁶ over Aotearoa, New Zealand. Hapū, or subtribes saw the Declaration as a vehicle to assert collective independence from Pākehā settlers. The constitutional arrangements underpinned the legitimacy of Māori independence and sovereignty, as recognised through their social and political organisations such as the Māori Congress.¹⁸⁷

The articles of He Whakaputanga o te Rangatiratanga o Nu Tireni established several important principles. In the first article, the chiefs declared the land of Aotearoa, New Zealand, Te whenua o te Rangatira, as an independent state. The sovereign power collectively held by the Rangatira (chiefs) was asserted in Article 2. Article 3 stipulated that Congress would annually convene to draft new laws. Article 4 mandates forwarding a copy of the Declaration to the King of England, William IV. The declaration draws attention to the significance of what tīkanga law and its connection with whanaungatanga means between hapū and the expectations that settlers recognise Māori sovereignty and Māori law-making in Aotearoa, New Zealand. The existence of sovereignty and the rights it implied derived from the

¹⁸⁵ Boast, above n 131, at 3.

¹⁸⁶ Rachel Standfield “*Warriors and Wanderers: Making Race in the Tasman World, 1769-1840*” (Thesis (Ph D) University of Otago, 2009).

¹⁸⁷ King William IV gazetted the Declaration in 1836.

oral histories of tribes and the social order that prevailed. Māori sovereignty originates from a legal system derived from Te Ao Māori. Central to Te Ao Māori is the philosophical study of the nature of the universe and creation stories.¹⁸⁸

Māori philosophy and rationalisation of Māori knowledge¹⁸⁹ underpin their relationships between people, the environment, and the spiritual world through whakapapa or genealogy.¹⁹⁰ Mature Māori governance systems existed before English rule.¹⁹¹ Effective sovereignty after tribal warfare in 1836 lay not with the United Tribes but with the chiefs of individual hapū and iwi. Community debates¹⁹² over governance structures were frequently held and based on the traditional law of tīkanga Māori.¹⁹³

The themes surrounding Tuki Tahua, Ngāhuruhuru, and Te Pahi's experiences dealing with kidnapping and colonial requests for land and resource information illustrate how tīkanga and whanaungatanga were the cultural blueprints of whānau (family members) looking after one another to maintain balance. The relevance of a whānau member bearing testimony of their whakapapa and the story behind a person's experiences through time, place, and location protected their psychological security through whanaungatanga. Whanaungatanga is a source of sovereignty and the Rangatira of hapū assertion in maintaining and rebalancing social order. Therefore, whanaungatanga contained no boundaries or time frame that limited its fluidity in Te Ao Māori and continuity as a legal norm.

3.3 Tīkanga Law

An appreciation of tīkanga law is necessary to understand the relevance of tīkanga, its place in the criminal justice system and its application in s 27 of the Sentencing Act 2002. Tīkanga law is the law of kin communities, by kin communities, based

¹⁸⁸ Alice Mills *New World Mythology* (Global Book Publishing, Australia, 2009) at 80.

¹⁸⁹ *Mead*, above n 26, at 3.

¹⁹⁰ New Zealand Law Commission 2003 at 30.

¹⁹¹ *Rees*, above n 135.

¹⁹² Eddie T Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago Law Review 449 at 83.

¹⁹³ Tīkanga derives from the base word 'tika', which means "right" or "correct".

on custom and traditions.¹⁹⁴ The word *tika* means to do what is right or correct the wrong done.¹⁹⁵ *Tika* has a further meaning of “straight, direct, keeping a direct course.”¹⁹⁶ The plural form of *tika*, *tikanga*, has its origins in the spiritual realms of the atua, gods, handed down from relative tūpuna (ancestors) to the present.¹⁹⁷ Ngā tikanga means the practices carried out to give effect to life, custom, method, rule, values, norms, obligations, and law.¹⁹⁸

Hirini Moko Mead succinctly asserts that tikanga law concerns:¹⁹⁹

... tools of thought and understanding...packages of ideas, which help to organise behaviour and provide some predictability in how certain activities are carried out ... provide templates and frameworks to guide our actions.

Māori relationships with communal lands²⁰⁰ led to usage rights and the exercise of mana over it.²⁰¹

Tikanga law does not constitute inflexibility and certainty²⁰² but has its origins in the spiritual realms of the atua (gods), handed down from tūpuna (ancestors) to the present.²⁰³ Woven into the collective set of objectives,²⁰⁴ tikanga law is about the articulation of Māori philosophy regarding the nature of the universe, creation stories, and the rationalisation of Māori knowledge through Te Ao Māori.

¹⁹⁴ Chief Judge Joe Williams “The Māori Land Court - A Separate Legal System?” July 2001 Occasional Paper No 4 in “New Zealand Centre for Public Law Te Wananga o Nga Kaupapa Ture a Iwi o Aotearoa.”

¹⁹⁵ Mead, above n 26, at 12.

¹⁹⁶ Benton, above n 145, at 74.

¹⁹⁷ Above, n 145.

¹⁹⁸ Above, n 145.

¹⁹⁹ Mead, above n 26, at 12.

²⁰⁰ Durie, above n 151, at 329.

²⁰¹ Erueti, above n 152 at 42-43; see Mead, above n 26, at 275.

²⁰² Ministry of Justice “He Hinatore o te Ao Māori A Glimpse into the Māori World” 2001. Available at <www.justice.govt.nz/publications/publications-archived/2001/he-hinatore-ki-te-ao-māori-a-glimpse-into-the-māori-world>.

²⁰³ Mead, above n 26, at 3.

²⁰⁴ Durie, above n 192, at 452.

Tikanga and the associated values, practices, and principles of whanaungatanga are inseparable. Accordingly, whanaungatanga was and still is “the glue that held the system together” with “the idea that makes the whole system make sense—including *legal* sense.”²⁰⁵

Philip Joseph notes:²⁰⁶

Tikanga Māori is a source of common law that derives from New Zealand’s bicultural foundation. Tikanga was customary law that governed pre-European Māori society, and this law continued to regulate Māori following the establishment of British rule. New Zealand was a hybrid form of settled colony, with English law applying to the settler community and tikanga applying to the native population. However, it was always envisaged that English law would supersede tikanga under a legal system founded on common law principles. Under the common law doctrine of aboriginal rights, Māori progressively brought themselves under English law through their social and commercial intercourse with the settler community.

3.3.1 Io: The Parentless

It is worth noting that for some scholars, a further dimension to understanding tikanga law is Io, the parentless. Io the parentless is a supernatural god that predates the three cycles of cosmogonic genealogies.

According to Marsden:²⁰⁷

In the beginning, Io existed alone in the realm of Te Korekore in his passive state as Io-matamoe, Io-mata-ane, Io-kore-te whiwhia (Io of the slumbering countenance, Io of the calm and tranquil countenance, Io the unchanging and unadulterated in whom there is no confusion and

²⁰⁵ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 WLR 1 at 4; *Re Edwards Whakatohea* [2022] 2 NZLR 772 at [283].

²⁰⁶ *Joseph*, above n 13, at 33.

²⁰⁷ *Marsden*, above n 123, at 130-131.

inconsistency). Nothing existed before Io ... His essence flowed forth to fertilise Te Korekore. Then he spoke his command and the Io of the night was increased. Thus were the essential foundations of the universe laid ... he recited (tapatapa) the names of the different foundations of things: of the night and of light, of the earth and sky and waters, of the depths and heights, of the expanse of the skies and borders of the seas. Thus became differentiated and took form.

There is debate about the place of Io in pre-contact Māori philosophy. Te Rangi Hiroa²⁰⁸ and Richard Taylor²⁰⁹ argue that Io was not part of the pre-contact Māori philosophy. However, Michael Shirres concluded that the Io tradition is authentic and pre-dates Christian influences.²¹⁰

3.3.2 Cosmologies – Deities

Understanding the place of whanaungatanga and tikanga in Te Ao Māori also requires awareness of Māori deities. A helpful source for understanding Māori cosmologies is the manuscript written in 1849 by Wī Maihi Te Rangikāheke of Ngāti Rangiwehi entitled *Ngā Tama a Rangi, the Sons of Heaven*. The document concerned the origins of gods and the first human beings. The script, according to Bruce Biggs:²¹¹

... gives a clear and systematic account of Māori religious beliefs and beliefs about the origin of many natural phenomena, the creation of woman, the origin of death, and the fishing up of lands. No other version of this myth is presented in such a connected and systematic way, but all early accounts, from whatever area or tribe, confirm the general validity of the Rangikāheke version. It begins as follows: ‘My friends, listen to me. The Māori people stem from only one source, namely the Great-heaven-which-stands-above, and the Earth-which-lies-below.

²⁰⁸ Te Rangi Hiroa *The Coming of the Māori* (Whitcombe and Tombs Ltd, Wellington, 1949) at 526-536.

²⁰⁹ Richard Taylor *Te Ika a Maui* (Wertheim and MacIntosh, London, 1855) at 13.

²¹⁰ Michael P Shirres “An Introduction to Karakia” (Unpublished Thesis (PhD) University of Auckland 1986).

²¹¹ Biggs, above n 45, at 448.

According to Europeans, God made heaven and earth and all things.
According to the Māori, Heaven (Rangi) and Earth (Papa) are themselves the source’.

Biggs identifies three cycles of cosmogonic genealogies of the origins of gods and the first human beings.²¹² These relate to Ranginui, the sky father and Papatuanuku, the earth mother, the Māui complex of myths, and the Tāwhaki complex of myths.²¹³

3.3.3 Māori Mythology

Ralph Piddington asserts that the significance of mythology lies:²¹⁴

... not - in the precision of its content but in its symbolic expression of social values relating present-day practice and belief to events in the distant past in such a way that the full significance of neither can be understood without reference to the other.

Māori mythology plays a significant role in understanding the genesis from which whanaungatanga relationships with ancestral gods and human beings. and physical realities. Familiarity with this mythology is therefore pertinent for understanding the richness and complexity of whanaungatanga within traditional Māori society, which was “inherited from a Polynesian homeland and adapted and developed in the new setting.”²¹⁵ There are two main streams of Māori philosophical thought concerning the origins of gods and human beings, Ranginui sky father and Papatuanuku earth mother and Io, the parentless. Both streams of thought have some value for capturing the relationships that underpin whanaungatanga.

²¹² Above, n 45.

²¹³ Above, n 45.

²¹⁴ Ralph Piddington *An Introduction to Social Anthropology* (Oliver and Boyd, Edinburgh, 1952-57) at 374.

²¹⁵ Biggs, above n 45, at 448.

3.3.4 *Whakapapa*

In a belief system in which the past and the present are interwoven, whakapapa is paramount. Ani Mikaere asserts that whakapapa dictates that relationships are of paramount importance.²¹⁶ This author claims that “relationships between past, present, and future generations—which include by necessity, relationships between humans and atua, gods and, therefore, between humans and all other living things—must be, nurtured.”²¹⁷

In a similar vein, Cleve Barlow explains:²¹⁸

It is through genealogy that kinship and economic ties are cemented and that the mana or power of a chief is inherited. Whakapapa is one of the most prized forms of knowledge and great efforts are made to preserve it. All the people in a community are expected to know who their immediate ancestors are, and to pass this information on to their children so that they too may develop pride and a sense of belonging through understanding the roots of their heritage.

Therefore, whakapapa knowledge is the recitation or presentation of a genealogy.²¹⁹ Whakapapa serves as a functional medium for the transfer of such knowledge from one generation to another via celebrations in wānanga, song, and chant.²²⁰ Pertinent to rebalancing communities and individuals, the meaning of ‘hara’ and ‘hē’ are integral concepts of tikanga and restoration of balance. From the wider perspective of this research, these concepts are important for understanding how traditional Māori society had ways of managing behaviours and restoring social harmony. Hara means:²²¹

²¹⁶ *Mikaere*, above n 130, at 204.

²¹⁷ Above, n 130.

²¹⁸ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) at 174.

²¹⁹ *Benton*, above n 145, at 504.

²²⁰ Above, n 145, at 540.

²²¹ Above, n 145, at 74; See *Ellis v R*, above n 5, at [185].

... offence, primarily resulting from the violation of tapu (whether or not this was done intentionally), but also disrupting social relationships.

Christianity added the meanings of sin, as deliberate offending against the law, and violation of rules or conventions.²²² As the current research inquiry focuses on the impact of the contemporary corrections system on Māori society, it is important to highlight the approaches to correcting wrongs and restoring balance in the traditional Māori context. The clarification of rules involved to address the ‘hara’ or wrong is explained as follows by Moana Jackson:²²³

Māori philosophy of law ... Like an intricate taniko pattern, ... was interwoven with the reality of kinship relations and the ideal of balance for those within such relationships. It provided sanctions against the commission of hara or wrongs which upset that balance, and it established rules for negotiation and agreement between whanau, hapu, and iwi. It formulated a clear set of rights which individuals could exercise in the context of their responsibility to the collective. It also laid down clear procedures for the mediation of disputes and ... adaption to new and different circumstances.

As this extract emphasises, central to the restoration of harmony is the principle of kinship relationships and responsibility to the collective. These approaches are important principles for the argument of this thesis for the application of whanaungatanga to s 27 of the Sentencing Act 2002.

The tikanga concepts Mead refers to are ‘manaakitanga and whanaungatanga’, ‘mana’, ‘tapu’, ‘utu’, ‘noa’, and ‘ea’.²²⁴ These conditional elements form the fundamental principles of whanaungatanga. Notably, whanaungatanga is the glue that binds them together.²²⁵ It is with these fundamental principles of

²²² Above, n 145.

²²³ Moana Jackson “The Treaty and the Word: The Colonisation of Māori Philosophy” in G Oddie and R Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) at 1.

²²⁴ Mead, above n 26, at 33.

²²⁵ Williams, above n 205, at 4.

whanaungatanga that the following section summarises the features of each of these elements.

3.3.5 *Manākitanga*

Manākitanga is the “process of showing and receiving care, respect, kindness, and hospitality.”²²⁶ The term ‘manāki’ is formed from the word ‘mana’ and “underlines the idea that the giving and acceptance of kindness and hospitality bestows mana on both host and guest.”²²⁷

According to Mead, all tīkanga are underpinned by manaakitanga. The nurturing of relationships is the central focus to ensure others are carefully treated.²²⁸ Muru, (a process used to remove objects of value for a wrong), and aroha play a significant role in restoring balance. Manaakitanga is highly valued because the standard of behaviour must remain intact regardless of the circumstances that may arise.

3.3.6 *Mana*

Mana is a central concept in Māori thinking. A key philosophical concept, mana encompasses power, authority, influence, prestige, and the ability to control people and the environment.²²⁹

According to Marsden:²³⁰

Mana in its double aspect of authority and power may be defined as lawful permission delegated by the gods to their human agents and accompanied by the endowment of spiritual power to act on their behalf and in accordance with their revealed will.

²²⁶ *Benton*, above n 145, at 205.

²²⁷ Above, n 145.

²²⁸ *Mead*, above n 26, at 29.

²²⁹ *Benton*, above n 145, at 154.

²³⁰ *Marsden*, above n 164, at 4; see *Ellis v R*, above n 5, at [185].

The passing down of authority to perform ceremonies was believed to confer upon the Rangatira the status of an intermediary between the gods and humans.

Also, Khylee Quince observed:²³¹

The ultimate aim of the rangatira was always to maintain the integrity of the whakapapa line, to keep strong the obligations of whanaungatanga amongst the individuals of the group, and to uphold and extend the mana of the group. In this way, a state of ora would be retained or restored to the group.

These principles are core to whanaungatanga and the argument for its application of s 27 of the Sentencing Act 2002. The Rangatira (chiefs) were responsible for guiding their group and were a powerful symbol of unity and authority, particularly during conflicts. Their knowledge of whakapapa (genealogy) was crucial in resolving disputes, as highlighted by Marsden. The Rangatira relied heavily on this knowledge to bring about peaceful resolutions. For instance, if there was a dispute over land usage rights, whakapapa determined the outcome of those rights. As native assessors, the Rangatira ensured that their day-to-day activities adhered rigorously to the mana of their people. The dynamics of relationships relevant to contemporary criminal justice are captured in whanaungatanga, one of the key points highlighted by Marsden, and the Rangatira, or tribal leaders, relied heavily on this knowledge to bring about peaceful resolutions.

The relevance of mana in a contemporary legal context was recognised in *Ellis v R*,²³² which epitomises mana in posthumous restoration. The fact that tīkanga asserted that a person's mana exists after death²³³ also indicates that whanaungatanga relationships served the interests of the deceased's whānau. Upon emphasising the concept of mana, in *Ellis v R*, the Supreme Court noted:²³⁴

²³¹ *Quince*, above n 29, at 11.

²³² *Ellis v R*, above n 5.

²³³ *Joseph*, above n 13, at 33.

²³⁴ *Ellis v R*, above n 5, at [141].

In the instant case, Te Hunga Rōia Māori submits that fundamental tikanga principles such as mana, whakapapa and whanaungatanga are engaged and should be accorded significant weight. These principles recognise that the appellant's reputation survives his death and influences the mana of his whānau and potentially others close to him. As the appellant never admitted any wrongdoing, the complainants' mana is also impacted.

In essence, tikanga law was practised by acknowledging Peter Ellis's mana and the impact on his whānau's mana. The submission that whakapapa and whanaungatanga apply to everyone, including Māori and non-Māori, underpins those relationships.²³⁵ The importance of this case will be discussed in a subsequent chapter of the thesis (Ūpoko Tuarima/Chapter Five).

3.3.7 Tapu

The term tapu indicates “states of restriction and prohibition whose violation will automatically result in retribution, unless mitigated by appropriate karakia and ceremonies.”²³⁶ Other meanings include sacred, ritual restriction, or prohibition.²³⁷ A violation of tapu constituted a wrong or hara. In contrast with contemporary meanings, the traditional uses of hara did not imply moral turpitude or intention on behalf of the offender. Mead suggests that the term tapu has “both religious and legal connotations” and states:²³⁸

A person, place, or thing is dedicated to a deity and by that act, it is set aside or reserved for the sole use of that deity. The person or object is thus removed from the sphere of the profane and put into the sphere of the sacred. It is untouchable, no longer to be put in common use. It is this untouchable quality that is the main element in the concept of tapu.

²³⁵ Above, n 5.

²³⁶ *Benton*, above n 145, at 404.

²³⁷ Above, n 145.

²³⁸ *Marsden*, above n 164, at 5.

The legal aspect Mead suggests, pertains to:²³⁹

... a contractual relationship that has been made between the individual and his deity” whereby a person dedicates himself or an object to the service of a deity in return for protection against malevolent forces and the power to manipulate his environment to meet needs and demands.

Accordingly, the tapu of someone who has been affected²⁴⁰ signifies a person’s state of being.

According to Quince, in traditional societies, violating mana and tapu rules had spiritual and temporal consequences, including death. Penalties are extended to living relatives and future generations. Disputes, settled through utu (exacting punishment), meant that liability was collective and intergenerational. The resolved disputes included peaceful negotiations and examination of whether actions were considered violations of mana and tapu. Physical force was used as a last resort to enforce rights.²⁴¹

However, civil, and criminal jurisdictions outflanked Māori values and principles.²⁴² Over time, these core cultural precepts were subsumed and distorted by Western discourses, and any future application of whanaungatanga will need to restore the centrality of these core values. The severing of the rules and practices of mana and tapu distorted the fundamental values associated with whakapapa and whanaungatanga.²⁴³

3.3.8 Noa

Noa means freedom from restriction, uncertainty, indefiniteness, or randomness. It is the reciprocal principle of tapu indicating emancipation from a restricted state of

²³⁹ Above, n 164

²⁴⁰ *Mead*, above n 26, at 337-338.

²⁴¹ *Quince*, above n 29, at 7.

²⁴² Above, n 29, at 13.

²⁴³ Above, n 29.

being or a state of freedom from tapu.²⁴⁴ Noa indicates finality or closure but can also indicate “an indefinite extension of a state, or the crossing of a boundary between one state and another.”²⁴⁵ The term *noa* suggests that once a crisis has passed, equilibrium is reestablished.²⁴⁶

3.3.9 *Utu*

Utu means the “return for anything, satisfaction, ransom, reward or a response.” Although the term has neutral connotations of reciprocity, it is closely associated with notions of vengeance.²⁴⁷

The concept of utu is part of the whanaungatanga process intending to restore and maintain balance, including restoration of a person’s affected mana.

Mead explains:²⁴⁸

Utu is a response to a take [cause of action] and that once the take is admitted the aim is to reach a state of ea, which might be translated as restoring balance and thereby maintaining whanaungatanga.

The concept of utu played a vital role in maintaining the Māori legal order. According to Eddie Durie:²⁴⁹

From the law of utu came responsibilities for the regular performance of social obligations; and from the principles of manaakitanga came the need to respect and care for others, or conversely, not to advantage oneself to others detriment.

²⁴⁴ *Benton*, above n 145, at 266.

²⁴⁵ Above, 145.

²⁴⁶ *Mead*, above n 26, at 31.

²⁴⁷ *Benton*, above n 145, at 467.

²⁴⁸ *Mead*, above n 26, at 31.

²⁴⁹ *Durie*, above n 151, at 331.

3.3.10 *Ea*

The primary meaning of *ea* is to ‘appear above water or the horizon’.²⁵⁰ The authors Benton, Frame, and Meredith state:²⁵¹

Among a number of metaphorical and analogous extensions is a very significant socio-legal concept, that of having brought a process or series of transactions to completion, expressed in English translation as ‘avenged, requited, paid for, satisfied’, with the implication of a definitive end, a ‘full’ and final settlement of a debt or grievance.

This specific facet of *whanaungatanga* asserts the finality and closure of the issue. Within the context of the law of *whanaungatanga*, *hara* means:²⁵²

An offence, primarily resulting from the violation of *tapu* (whether or not this was done intentionally) but also disrupting social relationships. After contact with Christianity, the meaning of this word was widened to include sin and deliberate offending against the law, or any kind of violation of rules, regulations, or conventions.

3.3.11 *Hē*

Hē is a general term for mistakes, faults, and being in the wrong. *Whakahē* is about misleading or causing another to err and condemning an errant person.²⁵³ The explanation of the *tikanga* concepts ties in with *kaitiakitanga*.

This section has provided a summary overview of the *tikanga* principles that underpin *whanaungatanga*. Closely associated with these principles is the concept of *kaitiakitanga*. The next section explores the meaning of *kaitiakitanga*.

²⁵⁰ *Benton*, above n 145, at 58.

²⁵¹ Above, n 145.

²⁵² *Heath*, above, at 74; see *Ellis v R*, above n 5, at [185].

²⁵³ *Benton*, above n 145, at 85.

3.4 Kaitiakitanga: Guardianship

Kaitiakitanga means guardianship or preservation.²⁵⁴ The kaitiakitanga (guardianship)²⁵⁵ over the environment demands constitutional arrangements and administration responsibilities of kaitiaki to look after the environment in exchange for its protection and access to its resources. The evolving and intergenerational appreciation of the relationships between human beings, the metaphysical, and the environment anchored those relationships.

According to Merata Kawharu:²⁵⁶

Kaitiakitanga is a body of lore maintained by sanctions and by careful observation of appropriate rituals so that relationships, not only between the group and the environment but also within the kin group.

The prescriptive rules of behavioural practices derive from the acceptance of supernatural and genealogical ancestry.

Douglas Sinclair explains:²⁵⁷

The Māori of old accepted the responsibilities of his supernatural ancestry that made him guardian priest of the deities that controlled the relationships among the human, animal, vegetable, insect, reptile, fish, bird, mineral, and spiritual world. It was because of these ancestral and spiritual relationships that the Māori fished, hunted, and cultivated only to the degree necessary to secure his well-being.

²⁵⁴ Marsden, above n 164, at 67.

²⁵⁵ Above, n 164.

²⁵⁶ Merata Kawharu “Kaitiakitanga: a Māori Anthropological Perspective of the Māori Socio-Environmental Ethic of Resource Management” (2000) 109 *The Journal of the Polynesian Society* 349 at 352.

²⁵⁷ Douglas Sinclair “Land: Māori View and European Response” in Michael King *Te Ao Hurihuri: Aspects of Māoritanga* (Penguin Group, New Zealand, 2011) at 64.

The complex body of traditional knowledge determined the governance and social relationships of Māori. Māori upheld tradition as it was a record of past events dictating proper behavioural practices of *tikanga*.

The core aspects of traditional Māori life highlighted the significance of balancing the social-cultural, political, environmental, and economic entities through *whanaungatanga*. The term ‘*kai*’ means food caretaker, or guardian and the root word ‘*tiaki*’ means to preserve, care for, and shelter.²⁵⁸ Therefore, the person, or group of people, acting on behalf of the ‘thing’ requiring protection, acts as guardian or conservationist.²⁵⁹ Consequently, *kaitiaki* was the governing mechanism for continual maintenance of protective security for people living on the *whenua*, land.

The purpose of *kaitiaki* is to govern and ensure the maintenance of values, practices, and principles; it cannot work on its own as *kaitiakitanga* is a unique law. The governing social contract between Ranginui and Papatuanuku governs on behalf of the *whanaungatanga* elements that intersect with *kaitiaki*. Therefore, *whanaungatanga* is associated with the connectedness and sense of well-being, and works around the enhancement and maintenance of principles, for example, *wairua* (spirituality), *mana* (status), and *tapu* (sacredness).

Within a traditional context:²⁶⁰

... *kaitiaki* were the non-human guardians of the environment (e.g. birds, animals, fish, and reptiles) which, in effect, communicated the relative health and vitality of their respective environments to local *tohunga* and *rangatira* who were responsible for interpreting the “signs” and making decisions accordingly.

²⁵⁸ *Marsden*, above n 164, at 67.

²⁵⁹ *Kawharu*, above n 256, at 350; See Mere Roberts, Wairete Norman, Nganeko Minhinnick, Del Wihongi and Carmen Kirkwood “*Kaitiakitanga: Māori Perspectives on Conservation*” (1995) 2 *Pacific Conservation Biology* 7 at 12.

²⁶⁰ Cited in “*Wāhi Tuawhā Part 4: Ngāi Tahu me ngā Rawa Taiao* (Ngāi Tahu and Resource Management) at 51. Available at <www.mahaanuiukurataiao.co.nz/wp-content/uploads/2019/09/Mahaanui-IMP-web_Part6.pdf>.

A proactive requirement by Kaitiaki is to carry out the day-to-day management of the resources. Whanaungatanga is central to the connection between human beings and natural resources and its protection for current and future generations. It includes, for example, kaitiaki (guardianship) of human rights upheld through national and international instruments.²⁶¹

3.4.1 How the Law Applies in the Māori Legal Space

The preceding discussion established the meaning of tīkanga principles in traditional Māori society. The following section looks at the principles of tīkanga and whanaungatanga in the modern era. The discussion then examines whanaungatanga and its place in the legal system. This discussion contributes to the goal of this thesis to propose alternative pathways to reduce Māori over-representation in the prison system. Understanding how the law applies in a Māori legal context is crucial to finding alternative pathways to address this issue.

The principles of partnership, participation and protection between the government and Māori reflect a Māori legal space.²⁶² The government must consult Māori and consider their values and interests when making law and policy decisions. In accordance with the Treaty of Waitangi, Māori rights and interests are protected.

Durie identifies concepts of Māori law as conceptual regulators of tīkanga.²⁶³ These include whanaungatanga, mana, manaakitanga, aroha, mana tūpuna, wairua, and utu.²⁶⁴ A list of core values of tīkanga Māori compiled by the Law Commission include whanaungatanga, mana, tapu, utu, and kaitiakitanga.²⁶⁵ However, it is not an exhaustive list.²⁶⁶ The purpose of whanaungatanga is undoubtedly to restore

²⁶¹ Mead, above n 26, at 327.

²⁶² *New Zealand Māori Council v Attorney-General*, above n 61; Treaty of Waitangi Tribunal Act 1975.

²⁶³ Durie, above n 151, at 5.

²⁶⁴ Above, n 151.

²⁶⁵ Joe Williams “He Aha te Tīkanga Māori” (unpublished paper for the Law Commission, 1998) at 9.

²⁶⁶ Law Commission, *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 28. Original reference cited in Eddie T Durie, “Custom Law: Address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 VUWLR 325.

balance to society and meet community needs, which is one of the main components of tika. However, it cannot function on its own.

3.4.2 Tika in the Modern Era

Tika is the chief regulator of customary legal norms of social behaviour and underpins inseparable principles and concepts.²⁶⁷ A collective understanding of tika is that it means the right way of doing things.²⁶⁸ Through whakapapa (genealogy), whanaungatanga, and tika, the pragmatic actions of leaders were aimed at settling disputes and restoring balance in communities. Historically, in the New Zealand legal system, tika was not recognised as a law, but over time it has been incrementally recognised in various statutes, and in cases such as *Ellis v R*.²⁶⁹ It is argued that there are benefits in considering whanaungatanga under s 27 of the Sentencing Act 2002 as an alternative.

3.5 The Concepts of Manakitanga, Mana, Tapu, Noa, Utu, Ea and He in the Law of Whanaungatanga Context

In the discussion of traditional Māori society, the tika concepts Mead refers to, showed the whanaungatanga relationships that are attached to each of the concepts. For example, manakitanga incorporates the building of whanaungatanga relationships with manuhiri visitors. Mana or status can be lost, maintained or levelled up. The concept of noa neutralises the tapu of something. Utu is the remedy or compensation imposed to assert the finality or ea of a situation. These tika concepts play an important role in asserting the legal norm of whanaungatanga that the criminal justice system could utilise to bridge uncertainty around tika application. In asserting the legal norm of whanaungatanga, understanding Te Ao Māori or the Māori view of the world is a stepping stone toward understanding it within a s 27 cultural report context.

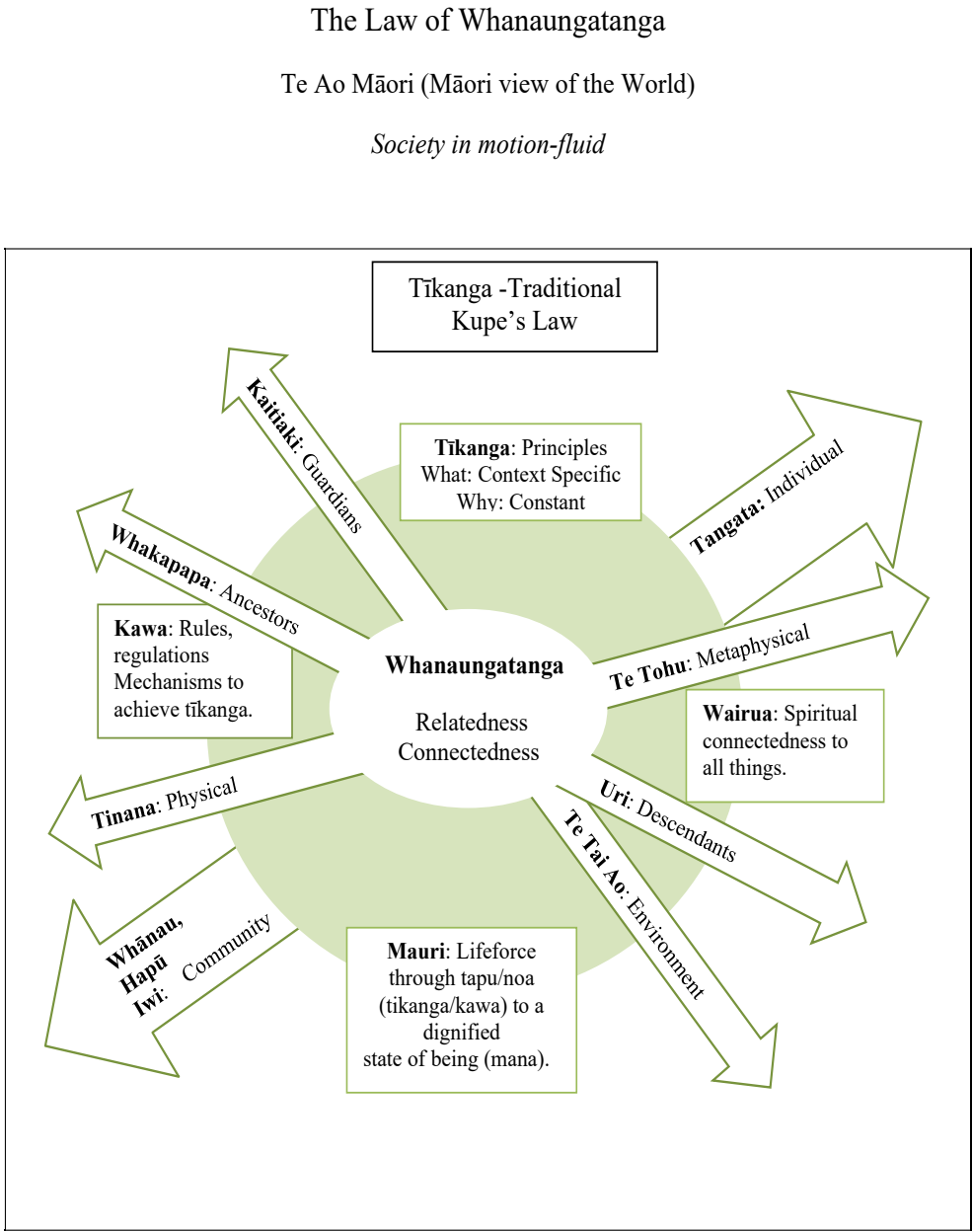
²⁶⁷ Mead, above n 26.

²⁶⁸ Above, n 26.

²⁶⁹ *Ellis v R*, above n 5.

Figure 1 below illustrates the interconnected relationships between whānau, hapū and iwi and the individual, the physical and the metaphysical, ancestors and descendants, guardianship and the environment. The principles and protocols of tikanga, mauri, kawa and wairua represent interwoven threads that revolve and connect to regulate and restore balance in each field.

Figure 1: The Law of Whanaungatanga Diagram



From a Te Ao Māori view of the world, whanaungatanga is a gift or a ‘taonga tuku iho’ handed down from tūpuna (ancestors). It espouses interrelationships between metaphysical, physical, and human descendants as an acceptable norm.²⁷⁰ The whanaungatanga norm requires descendants to maintain those relationships. A balance between communities is essential for sustainability and cultural preservation. Whakapapa and whanaungatanga are integral to understanding the interconnectedness of all living things and are the foundations of kaitiakitanga (guardianship). It ensures environmental sustainability for future generations. This is for sustainability and cultural maintenance of communities. Whakapapa and whanaungatanga are integral to understanding the interconnectedness of all living things and are the foundations of kaitiakitanga guardianship. They ensure the sustainability of the environment for future generations.²⁷¹

Therefore, the law of whanaungatanga concerns the relationality of kinship and non-kinship relationships between past, present, and future generations. Among the salient features of whakapapa and whanaungatanga are individual and collective affiliations to tribal lands.

3.5.1 The Connection Between Tikanga and Whanaungatanga:

Whanaungatanga as an Alternative Approach

Whanaungatanga has always been a part of the criminal justice system. This process typically happens in the courts every day without people realising that it is occurring. If society as a whole accepted whanaungatanga, the interpretation under s 27 of the Sentencing Act 2002 would recognise Treaty rights and whanaungatanga as a legal norm. Accepting whanaungatanga as an alternative is necessary before society can see transformative results.

²⁷⁰ Walker, above n 125.

²⁷¹ See **Figure 1**. The Law of Whanaungatanga Diagram.

As has been stated, this thesis argues for the application of whanaungatanga to s 27 of the Sentencing Act 2002. To establish the grounds for this alternative, the impact of colonisation on Māori first needs to be understood.

Analysis: Colonisation

It is undisputed that colonisation and dominant systemic norms have weakened tikanga and whanaungatanga. This has impacted Māori self-esteem, ethnic identity, and their socioeconomic positions. The socio-economic status of Māori has been significantly influenced by historical events. This has led to the connection between ethnic identity, poverty, and the crimes committed by Māori. As a result, the sentences given to Māori offenders are often harsher. The repercussions of imprisonment have a collective impact on whānau and family members, including social exclusion, impaired mental health, and a lack of opportunity to achieve reasonable socio-economic status compared to the dominant group.²⁷²

These effects were reiterated in the report of the National Health Committee Review and noted.²⁷³

The majority of prisoners of any country, including New Zealand, are those that come from a context already shaped by *social exclusion*. [emphasis added]. Among other things, they are likely to be from an ethnic minority, have limited education and a history of instability, unemployment or underemployment, substandard diet and housing conditions, and inferior medical access. Their health reflects this disadvantage and like them, tends to be poor.

Parliament's intentions to reduce the over-representation of Māori in the prison system coincide with the mass incarceration of Māori. The disproportionate treatment of Māori reflects the current status quo. Before the *Ellis v R*²⁷⁴ decision,

²⁷² Khylee Quince "*Māori and the Criminal Justice System in New Zealand*" in W Brookbanks and J Tolmie (eds.) *Criminal Justice in New Zealand* (LexisNexis, Wellington, New Zealand) at 335.

²⁷³ National Health Committee Review of Research on the Effects of Imprisonment on the Health of inmates and their families (Ministry of Health, Wellington, 2008) at 10.

²⁷⁴ *Ellis v R*, above n 5.

the under-recognised law of *tikanga* in criminal justice presented an obstacle to the associated principles of *whanaungatanga* that remained an invisible alternative to criminal justice practices that affected Māori.

The legal system needs to address this invisibility. For example, the Coat of Arms is a heraldic symbol with no legal force, though the general public may perceive it as a pillar of an equitable justice system.²⁷⁵ Notions of equality would mean equality of opportunity, equality in decision-making, relationship building, and relationship management as primary indicators of the *whanaungatanga* relationships built between Māori, Pākehā, and the justice system. Currently, the claim of ‘one law for all’, is questionable because of social inequalities.²⁷⁶ A realistic lens suggests that if there was genuine equality, the overrepresentation of Māori in the prison system would not exist. While the Coat of Arms presents the image of a bicultural society, it is suggested that current legal practices conflict with the notion of an equitable criminal justice system.²⁷⁷ In support of this view, Moana Jackson notes that equal justice under the law is a fundamental principle, but it is not always upheld in practice. The definition of equality in the legal system is influenced by various moral and cultural beliefs and correspondingly, complete equality cannot be achieved.²⁷⁸

3.6 Whanaungatanga is a Legal Norm and a Central Element of Tikanga

The *Ellis v R* case established that a posthumous restoration of a person’s *mana* could be restored based on the *tikanga* of the community. This finding was important because the Supreme Court noted that:²⁷⁹

Whanaungatanga is fundamental, creating rights and responsibilities within and between *whānau*. Whanaungatanga focuses upon the maintenance of properly tended relationships. Whanaungatanga means

²⁷⁵ New Zealand Ministry for Culture and Heritage Te Manatu Taonga “New Zealand coat of arms.” Available at <www.teara.govt.nz/en/ephemera/2575/new-zealand-coat-of-arms>.

²⁷⁶ *Heath*, above n 74 at 199.

²⁷⁷ For more information on the current legal practices, refer to *Ūpoko Tuawhitu/Chapter Seven*.

²⁷⁸ *Jackson*, above n 28, at 266.

²⁷⁹ *Ellis v R*, above n 5, at [134].

that, when hara is committed, it not only impacts the individuals involved (offenders and victims), but also the broader collectives of these individuals including whānau, hapū and iwi, that is, their communities. A community is always responsible to some degree for the wrongdoing of its members because they too are part of the community. It also means that a community must share the burden borne by any of its members who are victims of offending.

3.7 Whanaungatanga and its Place in the Legal System

The Treaty of Waitangi recognises two pluralistic legal systems: Māori customary law or tikanga and the law of the Crown. Whanaungatanga is a legal norm that is part of tikanga.²⁸⁰ Developing inclusive policies for Indigenous communities requires adherence to specific norms. These norms dictate the relationships between Māori and others when settling disputes and conflicts. They are also a source of tikanga Māori law, the first law of Aotearoa, New Zealand.²⁸¹ Contemporary judicial issues can thus be addressed using Māori legal norms.²⁸²

Unlike tikanga, whanaungatanga has a universal application. Whanaungatanga is a good alternative because tikanga is flexible and is applicable on a case-by-case analysis, unlike legislation. Whanaungatanga is the foundation of Māori culture which allows for the open exchange of ideas, values, and experiences. It also helps to build relationships and trust between individuals and groups and enables collective decision-making based on consensus. Whanaungatanga inherently forms part of tikanga and allows for a more holistic approach to decision-making.²⁸³ It also allows for greater participation in decision-making and ensures all voices are heard and respected.²⁸⁴ Whanaungatanga fosters understanding, respect, and empathy for other people and creates a strong sense of community and belonging. Therefore,

²⁸⁰ Mamari Stephens “Kei A Koe, Chair!”: The Norms of Tikanga and the Role of Hui as a Māori Constitutional Tradition (2022) VUWLR 53 (4) at 463.

²⁸¹ *Mikaere*, above n 4, at 330.

²⁸² *Ellis v R*, above n 5.

²⁸³ For example, the Waitangi Tribunal (Waitangi Act 1975).

²⁸⁴ Treaty of Waitangi 1840.

equality, rights, and social justice are at the heart of the legal norm of whanaungatanga.

There needs to be definitional clarity about whanaungatanga so that its potential application in the criminal justice system can be understood properly. This section will draw attention to varying definitions and emphasise the Māori understanding of the word and its associated values and principles.

A discussion on Māori dispute resolution methods, restorative justice and rights and obligations of whanaungatanga will illustrate that a Western definition of whanaungatanga prescribes meanings for its use in many institutions which may diminish its value as a principle of Māori philosophy. It is important to ascertain and promote public understanding of whanaungatanga and consider how society could accept it as part of a trend that already exists in the courts. The argument is that this reality just needs formal recognition. The challenge for post-settlement governance entities' obligations to the Crown was that it was difficult for hapū and iwi to be involved in supporting Māori offenders in the courts. The presumption is that it was not tīkanga Māori focused.

The recent establishment of the Waikato Rangatahi Court located at Kirikiriroa Marae in Hamilton in 2023 provides insights into the beneficial outcomes for other groups of society, as s 27 of the Sentencing Act 2002 has general application. The next section explores what whanaungatanga principles and processes would look like under s 27 of the Sentencing Act 2002. It is an agent of change in contemporary criminal contexts. Therefore, the discussion and analysis move from the theory and practice of whanaungatanga law to the notion of applying whanaungatanga jurisprudence under s 27 of the Sentencing Act 2002.

To help readers capture the connection between tīkanga and whanaungatanga, the starting point in unravelling the interrelationships between the concepts is understanding the tīkanga process of whanaungatanga.

3.7 1 The Tikanga Process of Whanaungatanga: Inclusive of All People

In some cases, the courts have explicitly acknowledged whanaungatanga. For example, in *Re Edwards Whakatohea*, the court acknowledged David Williams's discussion on whanaungatanga and noted:²⁸⁵

Within iwi, hapū and whānau — the collective entities of Māori society — whanaungatanga operates like a magnet. The most notable orators are always able to emphasis commonality of whakapapa and interconnectedness, thus downplaying the separation between groups. It is accordingly extremely difficult to exclude individuals from collective membership because of the pervasiveness of the whanaungatanga ethic. Thus, the definition of membership of one hapū rather than another and of one iwi rather than another is always somewhat vague — broad and grey definitions rather than black and white distinctions. This also contributed to the difficulty Māori have in laying down territorial boundaries with the precision which might be required for the borders of a nation State. Whanaungatanga emphasises the inclusiveness which permeates Māori values — an inclusiveness which extends to whakapapa links with non-human resources and beings. Whanaungatanga is opposed to exclusiveness.

Also:²⁸⁶

... whanaungatanga was, in traditional Māori society, not just about emotional and social ties between people and with the environment. It was just as importantly about economic rights and obligations. Thus rights depended on right holders remembering their own descent lines as well as the descent lines of other potential claimants to the right.

The Court noted the extrajudicial writings by Williams J:²⁸⁷

²⁸⁵ *Re Edwards Whakatohea* [2022] 2 NZLR 772 at [288].

²⁸⁶ Above, n 285, at [283].

²⁸⁷ Above, n 285, at [306].

The unifying idea of tikanga was whanaungatanga, the principle of kinship. This was the infrastructure around which the Māori values and legal system hung. Not just as between people, but also as between people and their dead, their as yet unborn, their environment and their conceptual world. This is true still. Relationships are not contractual or proprietary. They are not freely entered into. They are blood relationships in which the relationship itself dictates its terms and conditions. Other values such as mana, tapu, utu and kaitiakitanga should really be seen as effects or consequences of whanaungatanga. This is important to understand.

3.7.2 The Narrative of the Law of Whanaungatanga

Knowledge of a person's whakapapa, genealogy, including others, helped clarify rights and obligations concerning usage rights claim to a parcel of land.²⁸⁸ A person's rights and obligations to community members were defined by the underlying principle of whanaungatanga.²⁸⁹ A person's rights depended on how well they remembered their whakapapa and how they connected to the land and resources. The associated values and principles of whanaungatanga is much more than a fundamental law in maintaining relationships:²⁹⁰

Every time a person stands on a marae, every time a kuia calls, she speaks to the dead because of the law of whanaungatanga because whanaungatanga reaches into the past and reaches into the future. It creates rights and obligations with respect to your dead and with respect to your yet born ... whanaungatanga is the way in which those old people explained their relationships with the physical environment. They had no idea about me owning that mountain. They had no idea about me owning that river. Had a very, good idea about the river owning me. But the idea of property in something actually belonged to

²⁸⁸ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

²⁸⁹ Joe Williams, Te Ritorito 2017: 'The Treaty of Waitangi and Whānau, Hapū and Iwi Wellbeing' May 12, 2017. Available at <www.youtube.com/watch?v=LnlMa5jJu_k.

²⁹⁰ Above, n 289.

the northern hemisphere. What these people did would say is “I am related to that thing.” So, when they talked about maunga [mountain] A or B, they said e kore, e Kui, when they talked about it they would say, ko au, ko te awa, ko te awa, ko au.

Ko au, ko te awa, Ko te awa, ko au means “I am the river, and the river is me.”

The Ministry of Justice notes:²⁹¹

... every individual in some degree with every other one, at varying degrees of remove from whanau, hapū and iwi, and linking every individual to a line of ancestors stretching back to Ranginui and Papatuanuku.

Also, whanaungatanga is of fundamental significance because it determines and connects a person to kin groups from immediate to extended family, to hapū and iwi. This provides people with a sense of belonging. It developed because of kinship rights and obligations, which strengthen each member of the kin group, as well as the kin group who shared such values as aroha, pono and tika with each other. Māori cultural identity includes a “complex whole of beliefs /attitudes/values/mores/customs/knowledge acquired ... and transmitted.”²⁹²

The law of whanaungatanga is referred to by Justice Williams as comprising diverse characteristics of a system of values, law, and social organisation that Kupe and his wife Kuramatorini brought with them from tropical Polynesia.²⁹³ These were the inaugurally entrenched laws that “are deeper than what the Treaty carries.”²⁹⁴ The law of whanaungatanga is the cultural, ancestral blueprint of spatial connections through whakapapa, genealogy that asserts cultural identity.²⁹⁵ Therefore, the law of whanaungatanga is about “the centrality of kinship and careful attention to

²⁹¹ *Ministry of Justice*, above n 202, at 41.

²⁹² *Marsden*, above n 164.

²⁹³ *Williams*, above n 289.

²⁹⁴ Above, n 289.

²⁹⁵ *Mead*, above n 26, at 331.

relationships above all else.”²⁹⁶ The *R v Maketū*²⁹⁷ case sheds some light on how the legal norm of whanaungatanga was a significant part of Māori life which impacted individual and community well-being, and dispute resolution mechanisms to rebalance society. Through whakapapa these relationships evolved as a foundational point of reference that grounded and bound people to reciprocal obligations. The hereditary chiefs used the whanaungatanga process to support the tikanga law. However, this process was not acknowledged or understood by the newly implemented colonial court system. The colonial system of isolating offenders was the antithesis of the relationship principles of whanaungatanga.

The WAI262 report provides additional insights into the workings of whanaungatanga. The Report describes Māori tradition as whanaungatanga or kinship values where:²⁹⁸

Its defining principle, and its lifeblood, was kinship – the value through which the Hawaiians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science, and technology, its own bodies of sacred and profane knowledge.

These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human

²⁹⁶ *Williams*, above n 289.

²⁹⁷ *R v Maketū*, above n 63. Available at www.victoria.ac.nz/law/nzlostcases/.

²⁹⁸ *Waitangi Tribunal*, above n 288, at 5.

responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

The conflict between traditional process and the colonial legal system is evidenced in the *Takamore*²⁹⁹ case, (considered further in Ūpoko Tuarima/Chapter Five) which illustrates the limited recognition of tikanga under the common law. Whanaungatanga played a significant role in asserting the customary burial precedent. However, tikanga was seen as having less weight than the common law,³⁰⁰ and the common law was given precedence in the decision. In this instance, the common law overruled the tikanga law of a tūpāpaku, deceased person.

3.8 The Essence of the Law of Whanaungatanga

Whanaungatanga contains both personal and external values and practices. Each whānau member has his or her own whakapapa that identifies where they are from, when they were born, and with whom they are related. The law of whanaungatanga is an ancient cultural practice that connects associated values of reciprocity, restoration, reconciliation and whānau and community involvement. As part of tikanga, each value is derived from the legal norm of whanaungatanga. Therefore, the values and principles require the maintenance of social, economic, cultural, political, constitutional, environmental, and administrative entities by monitoring individual and community behaviour through whanaungatanga.

Whānau, hapū, or iwi were not forced to submit to tikanga Māori law. The law of whanaungatanga was a bonding device. Individuals would listen to their parents' whakapapa and stories of their grandparents, and so forth. The marae provided a social whanaungatanga setting where people would meet their relations for the first time and listen to the whaikorero speeches.

These relationships were an acknowledgement of what their tūpuna (ancestors) first sighted on their arrival in Aotearoa, New Zealand, and were recalled through an

²⁹⁹ *Takamore v Clarke*, above n 11.

³⁰⁰ Above, n 11, at [94] per Elias J.

introductory pepeha or story that connected the individual to their waka, hapū, and iwi. The significance of the pepeha identifies an individual's connection to their maunga, awa, and marae. The law of whanaungatanga ensured psychological security through a person's whakapapa that triggered those interactive relationships between the physical, metaphysical, and human beings.

3.8.1 Sources and Definitions of Whanaungatanga

As indicated, whanaungatanga has different understandings, with varying definitions emphasising nuances. According to Paul Hirini, whanaungatanga is “a value, which reinforces the commitment whānau members have to each other”³⁰¹ and is central to ongoing communication for meaningful relationships and beneficial outcomes. Whanaungatanga “generates observable behavioural processes through which whānau functioning is promoted and enhanced”.³⁰² Wilson-Hokowhitu notes that the Hawaiian expression of mo‘okū‘auhau and spiritual understandings is similar to Bishop’s³⁰³ reference to whanaungatanga as “connectedness and kinship”.³⁰⁴

Similarly, Tuffin and Brittain suggest that whanaungatanga means relationship and family connections.³⁰⁵ According to Jamieson, whanaungatanga has been described as the “most pervasive” value of tīkanga Māori.³⁰⁶ The author claims that whanaungatanga values remain strong in modern Māori society. Whanaungatanga continues to inform the relationships between people and their ancestral lands. Likewise, Linda Te Aho notes that whanaungatanga is a theme that permeates significant developments in Māori law and society concerning Māori land, climate

³⁰¹ Hirini, above n 25, at 44.

³⁰² Above, n 25.

³⁰³ R Bishop “A culturally responsive pedagogy of relations” in D Fraser & C McGee (eds) *Professional practice of teaching* (Thomson Learning, Australia. (2008).

³⁰⁴ Nālani Wilson-Hokowhitu, “He Pukoa Kani ‘āina” (2012) 8 *AlterNative: An International Journal of Indigenous People* 137 at 143.

³⁰⁵ Keith Tuffin, Eleanor Brittain “Ko tēhea te ara tika? A discourse analysis of Māori experience in the criminal justice system” (2017) 46 *New Zealand Journal of Psychology* 99 at 106.

³⁰⁶ Jemima Jamieson “The Role of Indigenous Communities in the Pursuit of Sustainability” *New Zealand Journal of Environmental Law* 14 at 161.

change, crown forests, and consultation.³⁰⁷

Richard Benton and others describe whanaungatanga as the state or circumstances of being a relative; that is, kinship and the rights, responsibilities, and expected modes of behaviour that accompany the relationship.³⁰⁸ The base term ‘whanaunga’ applies to blood relationships. The Hawaiian word ‘hanauna’ is similar, referring to a consanguineous kin group. Kin-like reciprocal relationships among people are a general norm in society. The concept appears to be genealogically based while at the same time implying the presence of special social solidarity.³⁰⁹

Benion claims that whanaungatanga, manaakitanga, and kaitiakitanga reflect reciprocity, stewardship, and cohesiveness.³¹⁰ Durie correlates the term haputanga with whanaungatanga.³¹¹ John Rangihau asserts that cultural identity is a fundamental component of whanaungatanga.³¹² Barrett-Aranui describes whanaungatanga as interrelationships.³¹³ The common thread that pervades these interpretations is the emphasis on connections between whakapapa and whanaungatanga that form part of cultural identity and spiritual connectedness.

The contemporary definitions of whanaungatanga have slightly different meanings from traditional practices that stood for centuries until the 20th century. Definitions are available in a range of sources such as online Māori dictionaries,³¹⁴ Parliamentary debates, Waitangi Tribunal publications,³¹⁵ research institutions, legal scholarship publications, commissioned reports, and a host of websites, such

³⁰⁷ Linda Te Aho “Contemporary Issues in Māori Law and Society Crown Forests, Climate Change, and Consultation - Towards More Meaningful Relationships” (2007) 15 Waikato Law Review: Taumauri 138.

³⁰⁸ Benton, above n 145, at 524.

³⁰⁹ Above, n 145.

³¹⁰ Tom Benion “Who Represents Māori Groups?” (1994-1995) Māori Law Review at 3.

³¹¹ Mason H Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

³¹² Rangihau, above n 24, at 183-190.

³¹³ Hinekahukura Barrett-Aranui *A Gossamer of Wisdom: Truths Enshrouded Within the Ancestral House of Ngaati Maniapoto* (Waikato Print, University of Waikato, 1999) at 4.

³¹⁴ Te Aka Māori Dictionary. Available at www.maoridictionary.co.nz/.

³¹⁵ Waitangi Tribunal “Publications & Resources”. Available at www.waitangitribunal.govt.nz/publications-and-resources/.

as youth development.³¹⁶ Whanaungatanga has also been implemented in a digital marketing platform concerning the role of social media in Māori political empowerment,³¹⁷ a restorative justice model for social work practice,³¹⁸ science projects, educational platforms, bio-heritage learning, Māori customary interests, rights, and values based on kaitiaki per, “the tīkanga of whanaungatanga,”³¹⁹ family law and guardianship issues,³²⁰ and considerations of the Māori approach to land transactions under whanaungatanga and whakapapa.³²¹

Ritchie’s description of whanaungatanga defines it as the “basic cement that holds things Māori together.”³²² In contrast, Metge defines whanaunga as relatives connected by descent and sometimes by marriage.³²³ The author describes the five separate meanings of whānau in contemporary usage as consistent with pre-colonial Māori. However, Metge argues that whanaunga is not sourced from the word whānau and contradicts her argument (drawing on Williams’s definition) that the term whānau means “to lean together.”³²⁴ Her separation of the term from its significant associated values suggests how whanaungatanga can be easily misunderstood or misapplied in several contexts, including the criminal justice system.

The term whanaungatanga cannot be defined separately without its parent root word and other values and principles attached to it. Furthermore, the authors who make this distinction do not provide the source of whanaungatanga and the connections between humans, the physical, and the metaphysical. The scientific-clinical breakdown of the word whanaungatanga or whanaunga fragments the whole

³¹⁶ Arataiohi “Whanaungatanga”. Available at www.arataiohi.org.nz/research/aotearoa-youth-research/whanaungatanga/.

³¹⁷ Krystal Warren, Jo Waitoa, Regina Scheyvens “E-Whanaungatanga: The Role of Social Media in Māori Political Empowerment” (2015 03) 11 *AlterNative: An International Journal of Indigenous Peoples* 45.

³¹⁸ Katherine van Wormer “Restorative justice: A Model for Social Work Practice with Families” (2003) 84 *Families in Society* 441 (Matua Whangai FGC).

³¹⁹ *Bayne v Trustees of the Ngāti Rehua Ngāti Wai Ki Aotea Trust* (2019) Chief Judge’s MB 1432 (2019 CJ 1432).

³²⁰ *Chief Executive of Oranga Tamariki-Ministry for Children v ZM* [2020] NZFC 2.

³²¹ Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 26.

³²² James E Ritchie *Becoming Bicultural* (Huia, Wellington, 1992) at 67.

³²³ Metge, above n 31, at 52.

³²⁴ Above, n 31.

meaning of what whanaungatanga originally meant. In this way some non-Māori academics sever the fluidity of its meaning and associated values and principles that derive from the connection people made between each other, the physical and the metaphysical. These observations suggest that Metge's definition of whanaungatanga would not be helpful to the application of its principles in a contemporary context.

Clearly definitional clarity of whanaungatanga is crucial for its application. According to McNatty and Roa, whanaungatanga can be easily misunderstood by people "who lack an intimate understanding of the philosophical base in Māori culture."³²⁵ However, the main problem occurs when words are uprooted from their cultural baseline, as may occur in a Western social science construct, where, consequently, their spiritual meaning can be overlooked.

A similar concern has been voiced by Te Rangi Hiroa:³²⁶

Much error already has been handed on in ethnological writings through inexact translations of Māori words. In cases where the European and Māori look at a question from an entirely different viewpoint, the use of particular English words often gives to the general European reader the impression that the Māori shares the view that the word conveys to him; when in reality their ways may be as divergent as the poles.

Williams describes whānau³²⁷ but excludes whanaungatanga.³²⁸ However, there is a challenge in which whakawhanaungatanga may be acknowledged but tested for durability.³²⁹ Williams describes whanaunga as a relative, blood relation.³³⁰ The

³²⁵ William McNatty and Tom Roa "Whanaungatanga: An Illustration of the Importance of Cultural Context" (2002) 3 (1) *He Puna Korero: Journal of Māori and Pacific Development* 88-96.

³²⁶ Te Rangi Hiroa "The evolution of Māori clothing" *The Journal of Polynesian Society* (1925) VI, 34, 1 at 101.

³²⁷ *Williams*, above n 30, at 487.

³²⁸ Above, 30.

³²⁹ Anne Salmond *Hui: A study of Māori Ceremonial Gatherings* (Reed, Auckland, 1975).

³³⁰ *Williams*, above n 30, at 487.

suffix ‘tanga’ referred to by Williams³³¹ which may apply to different conditions illustrates that there are no universally understood definitions of whanaungatanga.³³²

In contrast, many authors ascribe references to values as a central focus within whanaungatanga. For example, Durie correlates haputanga with whanaungatanga.³³³ Rangihau asserts that cultural identity is a fundamental component of whanaungatanga.³³⁴

According to the Muriwhenua Land Report Wai 45, Waitangi Tribunal Report 1997:³³⁵

Whanaungatanga stressed the primacy of kinship bonds in determining action and the importance of whakapapa in establishing rights and status. Whakapapa was the basis for hapu allegiance, for establishing that all Māori are related, and for demonstrating the connection of Māori to elements of the universe.

From an environmental perspective, whanaungatanga links creation traditions with whakapapa.³³⁶ Further discussions on whanaungatanga refer to, but are not limited to, corporate governance and commercial objectives,³³⁷ Māori constitutional tradition,³³⁸ therapeutic jurisprudence,³³⁹ its relevance as part of the first law of Aotearoa New Zealand,³⁴⁰ the environmental impacts on Te Ao Māori,³⁴¹ and questions under the New Zealand Qualifications Authority (NZQA) unit

³³¹ Above, n 30, at 354.

³³² Above, n 30.

³³³ Durie, at n 311.

³³⁴ Rangihau, above n 24, at 183-190.

³³⁵ Waitangi Tribunal *Muriwhenua Land Report*, above n 321, at 26.

³³⁶ *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 73.

³³⁷ Linda Te Aho “Corporate Governance: Balancing Tikanga Māori with commercial objectives” (2005) 23 YNZJ 300.

³³⁸ Carwyn Jones “A Māori Constitutional Tradition” (2014) 12 NZJPIL 187-203.

³³⁹ Valmaine Toki “Will therapeutic jurisprudence provide a path forward for Māori?” (2005) 13 WLR 169.

³⁴⁰ Jacinta Ruru “First Laws: Tikanga Māori in/and the Law” (2018) 49 VUWLR (2).

³⁴¹ Landcare Research “Reporting Environmental Impacts on Te Ao Māori: A Strategic Scoping Document. Available at <https://envirolink.govt.nz/assets/Envirolink/Priorities-for-Te-Ao-Maori-Reporting.pdf>.

standard.³⁴² These examples provide a panoramic view of insightful clues to how society perceives whanaungatanga.

3.8.2 *Whanaungatanga and Whakapapa*

Any definition of whanaungatanga must incorporate a recognition of the related principle of whakapapa. According to Mead, whanaungatanga and whakapapa are inseparable principles that operate under tīkanga Māori law³⁴³ that restores balance in relationships.

The author notes:³⁴⁴

Whanaungatanga embraces whakapapa and focuses upon relationships. Individuals expect to be supported by their relatives near and distant, but the collective group also expects the support and help of its individuals. This is a fundamental principle.

Māori identity and self-esteem derive from the whānau, family, the wider hapū or the extended whānau, and iwi, tribe context. The maintenance values of whanaungatanga relationships upheld overall social cohesion and Māori corporate existence. The importance of kinship relationships is also highlighted by Rose Pere, who notes:³⁴⁵

The kinship network as far as the extended family (tribal group in this context) is concerned, is one that gives a feeling of belonging, value, and security. Knowing one's genealogical ties is important to the Māori who identifies with his/her ... heritage.

³⁴² Students are required to describe the way Māori interact with the natural world.

³⁴³ Mead, above n 26, at 32.

³⁴⁴ Above, n 26, at 28.

³⁴⁵ Rose T Pere *Te Wheke: A Celebration of Infinite Wisdom*. Gisborne, New Zealand (Ao Ako Global Learning New Zealand Limited, Gisborne, 1991) at 26: See Matiu McCully and Margaret Mutu *Te Whānau Moana: Ngā Kaupapa me ngā Tikanga – Customs and Protocols* (Reed Publishing, Auckland, 2003) at 163.

Within this context, whanaungatanga is the state or circumstances of being a relative.³⁴⁶ The associated principles are kinship, rights, responsibilities, and expected modes of behaviour that accompany the relationship.³⁴⁷ In a modern context, the term is “used more widely, to cover, when appropriate, kin-like reciprocal relationships among people generally.”³⁴⁸ This broader understanding of kin is relevant to my proposal to apply whanaungatanga to s 27 of the Sentencing Act 2002. The process of rebalancing individuals and hapū communities through the whanaungatanga process was a salient feature of tikanga law. More importantly, it is utilised as a form of social control to monitor people’s behaviour.³⁴⁹ Through whakapapa, tikanga applied to the whanaungatanga process that comprised the whole spectrum of associated values and principles of the law of whanaungatanga.³⁵⁰

A reference to whakapapa in a legal context is evident in the Supreme Court’s decision in *Ellis v R*. The Supreme Court noted that whakapapa³⁵¹

... is often translated as genealogy. Māori place great importance on genealogy and kinship relationships with the concept of whakapapa being central to Māori and identity. This creates responsibilities of manaaki (care and nurturing) within the whānau. When the mana of an individual within a whānau increases or decreases, so too does the mana of the whānau. And when a whānau member commits a hara, the responsibility to restore ea is the responsibility of the whole whānau.

3.8.3 Kinship/Non-Kinship Relationships

Understanding whakapapa involves recognising the nature of kinship relationships. According to Ranginui Walker, relationship management and the generational

³⁴⁶ *Benton*, above n 145, at 524.

³⁴⁷ Above, n 145.

³⁴⁸ Above, n 145.

³⁴⁹ *Furey*, above n 124, at 10-16.

³⁵⁰ *Ellis v R*, above n 5. Refer to the Appendix: Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara at 97.

³⁵¹ Above, n 5.

succession of governing principles of tikanga were paramount to the success of promoting meaningful kinship relationships with others, and the atua.³⁵² Grant Young claims that the first law of Aotearoa,³⁵³ New Zealand is an abstract idea.³⁵⁴ Nin Tomas argues that abstract thinking is essential for problem-solving and decision-making, and that it is the foundation of scientific and technological thought. It is essential for understanding and creating original concepts, and only human beings can do this.³⁵⁵

Marsden states:³⁵⁶

The human mind creates maps/model/formulae as a means of grasping...both the worlds of the senses and the real world...The Māori developed his sets of symbols in the form of a genealogical tree to portray the process by which the world of sense perception came into being.

The whanaungatanga process highlights a moral and ethical framework of interactive connections with relatives.

While Quince notes:³⁵⁷

While whakapapa provided the structural framework within which Māori society existed, whanaungatanga (kinship) provided the moral and ethical framework within which daily interaction occurred between people who were related to each other. Whanaungatanga acted as the overriding principle by which ‘right’ and ‘wrong’ actions toward relatives were determined. Whanaungatanga practices were those that

³⁵² Walker, above n 125, at 11-23.

³⁵³ G Young, “A Short History of Post-Treaty Māori Customary Rights to Land”, in *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, ed. M Belgrave, M Kawharu and D Williams (Oxford University Press, Melbourne, 2004) at 250-251.

³⁵⁴ Mikaere, above n 4, at 330.

³⁵⁵ Tomas, above n 142, at 35.

³⁵⁶ Marsden, above n 164, at 110-111.

³⁵⁷ Quince, above n 29, at 3.

encouraged the members of a group to uphold family relationships and maximise the welfare of the group.

3.8.4 Whenua, Whānau, Hapū, and Iwi: The Importance of Kaitiakitanga

Recognising the connection to nature promotes caring for the land and its resources. For example, whanaungatanga relationships ensure that future generations have access to the same resources, and that kaitiakitanga values are upheld. Therefore, recognising that everything has a whakapapa or genealogy connects people with the land, the animals, the birds, the forests, the mountains, the lakes, the rivers, the oceans, the spiritual world, and the environment.

As Pat Hohepa notes, from a Te Ao Māori worldview, land alienation and full ownership rights did not exist:³⁵⁸

For Māori, whenua has an added meaning, being the human placenta or after birth. Through various birth ceremonies, the placenta is returned to the land and that results in each Māori person having personal, spiritual, symbolic, and sacred links to the land where their whenua (placenta) is part of the whenua (land). The words “nooku teenei whenua” (This is my land) [are] given as much stronger meaning because of the above extensions. Having ancestral and birth connections the above is also translated as “I belong to this land, so do my ancestors, and when I die I join them so I too will be ... part of this land”.

The term whenua has two complementary meanings: (i) land, ground, or country and (ii) placenta or after birth.³⁵⁹ Ngāi Tahu people refer to the meaning of whenua as the womb. The meaning is also associated with birthplace. Many other Indigenous groups also have spiritual ties to the land, for example, the Navaho

³⁵⁸ Law Commission “The taking into Account of Te Ao Māori in relation to reform of the law of succession (NZLC WP6, 1996) at 10.

³⁵⁹ *Benton*, above n 145, at 504.

Indians³⁶⁰ who practice the same traditional custom as Māori in terms of burying a child's umbilical cord near the child's place of birth.³⁶¹

Māori cultural values underpin the significance of interconnectedness within an Indigenous worldview. The relevance of whenua relates to the intimate attachment Māori have to their lands. From this, the belief ensues that the creation, maintenance, and reproduction of values, laws, and institutions were and are pertinent to the cultural wellbeing of whānau, hapū, and iwi.³⁶² The word whānau needs to be understood from this perspective. First, the term whānau means 'to give birth.' In some parts of Polynesia, the term is extended to include children or offspring, and then family groupings.³⁶³ Concerning a kin-based unit, the term encompasses complex and contrasting sets of interpersonal relationships in modern Māori society. The term whānau was the primary economic unit of traditional Māori society and became the building block of hapū. From an anthropological perspective, Metge claims that an extension of whānau includes non-kin-based groups acting as if they were a traditional whānau.³⁶⁴

Similarly, Benton, Frame, and Meredith conclude:³⁶⁵

...various special interest groups whose members to some extent function as if they were close kin, but these extensions have all stemmed from the notion of an 'extended family' – a multi-generation group consisting of parents, children (including adopted ones), and their spouses, and grandchildren. The distinguishing features of the kin-based whānau are a common living or very recent ancestor (except for the spouses and adopted children who do not belong to the same descent

³⁶⁰ Peter Matthiessen *Indian Country* 4th eds (Penguin Books, New York, 1984) at 45; Eddie T Durie "The Law and the Land", in Jock Phillips (ed) *Te whenua, Te Iwi: The Land and the People* (Allen & Unwin, Wellington, 1987) at 78.

³⁶¹ Robert S McPherson "Sacred Land, Sacred View: Navajo Perceptions of the Four Corners Region 4" (1992) at 14.

³⁶² There is the view that whenua is integral to a person's livelihood, cultural wellbeing, and holistic understanding of Te Ao Māori.

³⁶³ *Benton*, above n 145, at 521.

³⁶⁴ *Metge*, above n 31, at 291.

³⁶⁵ *Benton*, above n 145, at 521.

group), and a shared interest in keeping the group viable (in the old days, this usually meant shared or contiguous residence).

The term hapū means ‘pregnant,’ ‘conceived in the womb’ and a ‘section of a large tribe, clan, or secondary tribe’.³⁶⁶

Angela Ballara argues that hapū does not mean sub-tribe or super-tribe, as it trivialises the significance of traditional hapū which were independent political units.³⁶⁷ The hapū unit was the most important and powerful independent political unit descent group before 1840 and for a brief period after this time.³⁶⁸

As Ballara states:³⁶⁹

... whether they were relatively large, long established and ramified descent groups or groups that were relatively small, recently developed and still living as one body, all hapū were politically independent corporate and social groups which also regarded themselves as categorically identified with a wider set of people.

Hapū descent groups evolved after the migration so that descendants could link themselves back to one of their earlier tūpuna (ancestors).³⁷⁰ Rangatira (chiefs) were regarded as possessing mana, leadership qualities, and tapu, sacred knowledge qualities over places and people,³⁷¹ and were normally those whose whakapapa connected to the founding ancestor more closely than most of the members within a hapū.³⁷² These developments gave substance to the notion that hapū had a strong sense of belonging to a particular place or tūpuna, ancestor (usually after an event that happened) within their respective communities, and the whakapapa connections

³⁶⁶ Above, n 145, at 71.

³⁶⁷ Above, n 145, at 179.

³⁶⁸ Ballara, above n 137, at 179.

³⁶⁹ Above, n 137, at 71.

³⁷⁰ Above, n 137, at 114.

³⁷¹ Benton, above n 145, at 521.

³⁷² Ballara, above n 137, at 161.

they had to a past tūpuna. Indeed, hapū redevelopment was inevitable. All descent groups other than whānau had been hapū at a certain stage of their development.³⁷³

According to Mead,³⁷⁴ iwi means ‘bone’ or ‘tribe.’ Over time the terms ‘nation’ and ‘people’ replaced the term ‘tribe.’ More importantly, the metaphor for the social unit of iwi is ‘bone.’³⁷⁵ Iwi did not function as political units because people moved to other areas and lived as a hapū or in a community with other hapū.³⁷⁶ In contrast, hapū were recognised as powerful political units through exercising their traditional practices of ‘tino rangatiratanga,’ or sovereignty.

In summary, the definitions and preceding discussion highlight that the most important source of whanaungatanga is the family, which is the primary source of support, guidance, and protection. Other sources of whanaungatanga include wider social networks, such as hapū and iwi, and even spiritual connections or forces. These sources are all interconnected and are essential to the well-being of individuals and society.

3.8.5 Kanohi-ki-te-kanohi Relationships

In exploring the complex attributes of whanaungatanga, it is significant to understand the principle of kanohi-ki-te-kanohi. Whanaungatanga includes the principle of discussions with another person, group or kinship group. This is vastly different from contemporary social media platforms such as Facebook, where people do not necessarily know who they have sponsored. Kanohi-ki-te-kanohi, focuses on the actual experiences of meeting someone in person and negotiating relationships with others, regardless of status, on an equal footing. Problematic issues may arise where subjective value processes of Māori conflict with Western objective values. Such differences in values may result in conflicting constructions of what has been said or promised and should be delivered.

³⁷³ Above, 137.

³⁷⁴ Mead, above n 26, at 219.

³⁷⁵ Ballara, above n 137, at 161.

³⁷⁶ Angela Ballara *Pomare II* (Dictionary of New Zealand Biography Te Ara Encyclopedia of New Zealand, 2012) at 124.

The impact of kanohi-ki-te-kanohi can be important in sentencing decisions. Through whanaungatanga, kanohi-ki-te-kanohi can mitigate some of the issues in ss 27 and 25 of the Sentencing Act 2002. Judges may request rehabilitation programmes under s 25 of the Sentencing Act 2002. If a defendant completes the course, they are in a more favourable position to argue for non-imprisonment. The face-to-face consultations reflect the kaitiaki, or guardianship role of the judge monitoring the offender's attendance at a programme, the level of commitment, reciprocal obligations, and the whānau support role person ensuring the offender attends the programme.

3.8.6 Ora: Wellbeing

Whanaungatanga enables the psychological well-being of an individual and community.

According to Quince:³⁷⁷

Living according to the principles of whanaungatanga produced a state of ora (wellbeing) in which the physical, mental, spiritual, and emotional aspects of an individual were balanced and in harmony. This state of harmony and equilibrium within the individual radiated outwards to affect other members of the whanau. It resulted in unity of purpose, and peace and harmony amongst the members of the group. This was the state that one set out to achieve in all aspects of life, both as an individual and as part of a group. In these conditions, the corporate body thrived.

3.8.7 Māori Dispute Resolution Methods and Restorative Justice

Colonisation disrupted the whanaungatanga process of Māori dispute resolution methods. In a Te Pu Wānanga discussion for the Te Matahauariki Institute, Dr. Merimeri Penfold commented on the way disputes were dealt with during her

³⁷⁷ Quince, above n 29, at 4.

childhood in the 1930s:³⁷⁸

Every Sunday they would have this gathering of elders and bring up elements that need to be addressed by them – like these guys who had been tampering with Māori tapu or raiding the hen run So when things like that happened the teacher would bring it up to the [kaumātua]. And they would deal with it at that level. He never dealt with it and he never brought the police in. When they go home, this is the talk around the family, everybody knows about [the family member involved] and he was brought to meet the elders after church and that was sort of punishment, too. There was no bureaucratic interference, it was dealt with there, and it was finished. There was nothing hanging on to them ... after confession, you know – kua mutu kua ea [it's finished and completely done with]. You start another [page].

The law of whanaungatanga illustrates community involvement and the capability of elders to deal with such issues.

Restorative Justice

Restorative justice principles were a significant feature of disputes resolution in traditional Māori society. Consedine's research concludes that whanaungatanga became a vehicle akin to the restorative philosophy for stabilising Māori communities. According to the author, the traditional system used a form of restorative justice that included crucial elements to ensure the social fabric's integrity. Decisions were made through family or wider family meetings, and sometimes tribal meetings, where consensus was reached. The primary goal was to restore prestige or authority and take measures to restore the future social order of the wider community. Retribution against an individual offender was not seen as the primary mechanism for achieving justice, and the group compensated the aggrieved party on behalf of the offender. These concepts had meaning in the

³⁷⁸ Te Pu Wānanga Transcript No. 8, Seminar with Dr Merimeri Penfold, 12 July 2002, unpublished transcript, Te Matahauariki Research Institute, University of Waikato.

context of the group, making the system more effective.³⁷⁹ In a modern context, the discussion gives rise to the notion of whanaungatanga jurisprudence.

3.8.8 Applying Whanaungatanga in a Treaty Partner Context

In a Treaty partner contemporary society, the law of whanaungatanga facilitates the ongoing implementation of whanaungatanga jurisprudence. However, aspects of the relationship among Indigenous customary law, English custom, and common law, have led to difficulties in promoting ancient practices in contemporary society. The cultural principles clashed with English customs and the common law that arrived years after Indigenous laws existed.

Aotearoa, New Zealand is a unitary state that contrasts with the cultural precepts of whanaungatanga.³⁸⁰ Indigenous customary law and aboriginal rights doctrine are part of the vast array of customary laws and written and unwritten laws³⁸¹ that the British Empire has been obliged to consider. Indigenous customary law and the doctrine of aboriginal rights have always subject to the common law. As long as the customary laws were not seen to be repugnant to the common law or replaced by statute, colonial courts and the Privy Council recognised them.³⁸² In theory, Indigenous customary laws were analogous to English customs.³⁸³

However, the judges and magistrates who were administering customary law were applying a system which was alien to them, leading to culturally uninformed court decisions.³⁸⁴ The issues were due to the complexities of different societal, tribal laws. They also included consideration of which English laws could tolerate

³⁷⁹ Jim Consedine *Restorative Justice: Healing the effects of crime* (Ploughshares Publishing New Zealand, 1999) at ch 6. See also NZ Māori Council “Restorative Justice: A Māori Perspective” in Helen Bowen and Jim Consedine (eds) *Restorative Justice: Contemporary Themes and Practice* (Lyttleton, Ploughshares, 1999) at 8.

³⁸⁰ Heath, above n 74, at 194.

³⁸¹ Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) at 19.

³⁸² Above, n 381.

³⁸³ Above, n 381.

³⁸⁴ A N Allott “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 *Modern Law Review* 244.

evolving customary law. In contrast, the common law illustrates similarities with *tikanga* Māori or Māori customary law.

Justice Heath notes that:³⁸⁵

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.

3.8.9 Summary

In summary, *tikanga* law concerns the theoretical expression of doing things right. It is the law of *whanaungatanga* that activates the *tikanga* by applying kinship agreement in exercising processes to restore balance in communities. The *whanaungatanga* process, with its associated values and principles, are utilised to resolve an issue. *Whanaungatanga* law is integral to Māori law, woven into its very fabric.

Therefore, it highlights connections to Te Ao Māori through which *whānau*, *hapū* and *iwi* are engaged with ethical foundations to resolve disputes and conduct social justice. The ancient cultural precepts illustrate that *whanaungatanga* is a pre-colonial legal norm. The focus is on restoring relationships between people rather than punishing the wrongdoer. This law aims to heal and understand all parties involved.

3.9 Whanaungatanga in a Legal Context

The thesis explores the impact of past court processes of varying conclusions, the census surveys and the prison population statistics of Māori in the 19th, 20th and

³⁸⁵ *Heath*, above n 74.

21st centuries, New Zealand common law and legislation, statutory interpretation and current legal practices to assert how whanaungatanga could have benefited Māori defendants. This exploration aims to improve present and future outcomes.

It is important to note that the general views about whanaungatanga do not reflect a uniform appreciation that it is a legal norm. This inattention indicates the generalisation that whanaungatanga has no pre-colonial legal importance. The fact that whanaungatanga is a central element of tūkanga, within the context of law, whanaungatanga influences a revisit of traditional methods that bridge the continuity of building relationships that advocate for non-adversarial approaches and can lead to balancing the disjunct between actions people have committed to rebalance social cohesion. More importantly, addressing the need to reduce Māori overrepresentation in the criminal justice system through the law of whanaungatanga.

These controversial issues are identified in the recent Waitangi Tribunal's *Tu Mai Te Rangi!* —Report on the Crown and Disproportionate Reoffending Rates,³⁸⁶ which highlights the Crown's Treaty obligations to prioritise reducing Māori reoffending rates.

The *Tu Mai Te Rangi* claim was one of four urgent hearings that resulted in reports as follows:

- (a) WAI1024: Offender Assessment Policies (2005).
- (b) WAI2417: Whaia Te Mana Motuhake (2014), Māori Community Development Act 1962.
- (c) WAI2540 : *Tu Mai Te Rangi!* (2017), Crown actions to reduce disproportionate Māori reoffending and
- (d) WAI2870: *He Aha I Pērā Ai?* (2019), Māori prisoner voting rights.³⁸⁷

³⁸⁶ *Waitangi Tribunal, Tu Mai Te Rangi*, above n 2.

³⁸⁷ In *Attorney-General v Taylor* [2018] NZSC 104, the Supreme Court determined that the senior courts have the power to issue a declaration of inconsistency with the right to vote affirmed by s 12(a) under the New Zealand Bill of Rights 1990. See also the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 introduced by MP Kris Faoi on 18th March

The non-binding character of the Waitangi Tribunal recommendations means that there is no certainty that the government of the day will take action. The main concern is that the high imprisonment rates of Māori remain unchanged. This conclusion is indicative of the range of applications that have arisen concerning justice sector issues in the recent WAI3060 claim.³⁸⁸ The failure to reduce Māori disproportionate representation in the prison statistics points to a need to address broader underlying causes. As Jackson explains, Māori individuals believe that the emotional and behavioural consequences of separation from their papakāinga (home) and whanaunga (relatives) are not solely caused by the pain itself, but rather by the societal forces that led to the separation. He argues that the challenges faced in urban settings are not due to their cultural vulnerability, but rather to society's failure to accommodate their unique kinship structures.³⁸⁹

As has been mentioned, an article was written by Justice Williams, now a Supreme Court judge, entitled "Can You See the Island?" His Honour challenged Māori legal practitioners to push the boundaries of the current legal system and develop Kupe's first law alongside the second law.³⁹⁰ There were parallels of withheld justice that encouraged a revisiting of the ancient cultural precepts of tīkanga and whanaungatanga, and the transformed realities of a prison-less Māori society into one full of Māori prisoners.

This challenge gained some traction in the ground-breaking Supreme Court decision that set a precedent for the incorporation of tīkanga Māori, quashing the convictions of a Pākehā in the *Ellis* case, which declared the posthumous restoration of his mana, clearing his name.³⁹¹ The case illustrates the significance of applying tīkanga to both Māori and non-Māori, concerning the relationships between kinship and non-kinship relationships. The example resonates with the general application of s 27 of the Sentencing Act 2002. As Mead points out, the concept of

2020. Available at <www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_96241/new-zealand-bill-of-rights-declarations-of-inconsistency>.

³⁸⁸ WAI3060 Kaupapa inquiry into claims concerning the justice system directed by the Chairperson of the Waitangi Tribunal, Chief Judge Isaac, commenced on 5th August 2021.

³⁸⁹ *Jackson*, above n 16, at 34.

³⁹⁰ *Williams*, above n 44, at 21-28.

³⁹¹ *Ellis v R*, above n 5.

whanaungatanga includes non-kin relationships,³⁹² or as Carwyn Jones suggests, other types of relationships where reciprocal obligations apply.³⁹³ However, this depends on whether there is a clear understanding of what whanaungatanga law means and the type of interaction undertaken. The fact that tikanga has a place in New Zealand law, as recognised in *Takamore v Clarke* and *Ellis v R*, provides a realistic opportunity for incorporating the legal norm of whanaungatanga within s 27 of the Sentencing Act 2002.³⁹⁴

Integrating whanaungatanga into the legal framework is crucial to ensure equitable outcomes for Māori in the criminal justice system. Without a clear understanding of whanaungatanga, a disconnect between what worked traditionally for Māori within Te Ao Māori and how the traditional context has relevance in the current legal context will prevail. As such, it is timely that the recent establishment of the Te Ao Mārama model provides a new means of connecting Māori to the justice system through a Te Ao Māori context.

3.10 Te Ao Mārama Model

The Te Ao Mārama model, introduced by Chief District Court Judge Taumaunu, focuses on the needs of “a multi-cultural and vibrant society.”³⁹⁵ With “the two founding cultures bound together by the principle of partnership based on the Treaty of Waitangi,”³⁹⁶ everyone “can come to seek justice”³⁹⁷ and not leave “the current system feeling unheard and unappreciated.”³⁹⁸ In this model, solution-focused justice through specialist courts strengthens access to justice and care for the vulnerable. The model demonstrates the importance of a holistic approach to justice and emphasises evidence-based practices tailored to individual and community needs. The model also reflects the early establishment of native assessors sitting

³⁹² Above. Refer to the Appendix: Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara at 97.

³⁹³ Jones, above n 338, at 191.

³⁹⁴ *Takamore v Clarke*, above n 11; *Ellis v R*, above n 5.

³⁹⁵ Heemi Taumaunu “Calls for transformative change and the district court response” (2021) 29 WLR Taumauri 115 at 118.

³⁹⁶ Above, n 395.

³⁹⁷ Above, n 395, at 116.

³⁹⁸ Above, n 395, at 120.

alongside judges in the Magistrates Court.³⁹⁹ Discussed further in Te Upoko Tuawhitu/Chapter Seven, one aspect of the model envisions “[G]reater use of cultural speakers through s 27 of the Sentencing Act.”⁴⁰⁰ Judges see value in cultural speakers as “they can be extremely powerful.”⁴⁰¹ As was also noted, “Māori place great stock in oral advocacy” and “[s]o too does the criminal court.”⁴⁰² A complication is that the justice system is built on conventions of written material. This point has been observed by a judge who comments that:⁴⁰³

... we have a justice system that is not oral, that does not really rely on oral information that we are given in court, we have a justice system that is European and relies on written material that judges can hang their hats on, not like the Polynesian cultures, which are oral, that doesn’t to me, I don’t think that that has the same value in this justice system.

Time constraints are also an issue for judges who cannot give cultural speakers the attention they deserve.⁴⁰⁴ In contrast, s 27 cultural reports are prepared well before the day of sentencing.⁴⁰⁵ These concerns lead to the consideration of developing ideas about whanaungatanga jurisprudence.

3.11 Developing Ideas About Whanaungatanga Jurisprudence

The problems with applying Māori custom law in a unitary state, leads to a discussion of whanaungatanga jurisprudence.⁴⁰⁶ The fact that two legal systems operate in a pluralistic state creates challenges for achieving socio-economic equality. The difficulty of the situation is reflected in the underutilisation of s 27 cultural reports, which continued until momentum gathered to support their wider application after 2017. Despite the 27% increase in cultural reports between June

³⁹⁹ Refer to Number “V.—*Appointment and Jurisdiction of Native Assessors*” of the Native Circuit Courts Act 1858 and the Native Districts Regulations Act 1858.

⁴⁰⁰ *Taumaunu*, above n 395, at 120.

⁴⁰¹ See Appendix 7: Judge Response “F”.

⁴⁰² See Appendix 7: Judge Response “G”.

⁴⁰³ See Appendix 7: Judge Response “H”.

⁴⁰⁴ See Appendix 7: Judge Response “H”.

⁴⁰⁵ For further information, see Ūpoko Tuawhitu/Chapter Seven.

⁴⁰⁶ *Heath*, above n 74.

30, 2022, and June 30, 2023,⁴⁰⁷ the twelve-year drought of underutilisation of such reports was not questioned. The catch-and-release system operating before 2017 might have saved money, but it did not affect the statistics.

Recognition of *tikanga* in *Takamore* and the *Ellis* case provides a catalyst for investigating whanaungatanga jurisprudence. The scope of values and practices of whanaungatanga provides us with historical records that suggest commonalities with English jurisprudence that focuses on identity, well-being, and social justice within a human rights and constitutional space.

Lani Guinier and Gerald Torres analyse the powerful and overlooked impact of social movements influencing law-making as crucial markers to changing the legal landscape and how those social movement campaigns drove the civil rights era from sources of law.⁴⁰⁸ Their analysis is a supplement to Professor Ackerman's book concerning the constitutional moment of legal changes accorded by Supreme Court decisions.⁴⁰⁹ The authors claim that the social movement's influence on legal changes helped shape the constitutional moment that derived from racial justice jurisprudence advocates of non-elite backgrounds and the court response in acknowledging civil rights and social justice movements.

Civil rights and social justice campaigns for equality within the criminal justice system barely make the headlines and are challenged by political agendas that rely on public reliance on keeping communities safe. Therefore, based on Justice Heath's comments above,⁴¹⁰ more needs to be understood by multiple team players of the justice system if substantive law can become infused with the bi-legal precepts of English law and *tikanga* Māori.

⁴⁰⁷ Jenni McManus "Incoming govt faces battle on cultural reports, three strikes and discount caps." (27 Oct 2023) Available at <https://thelawassociation.nz/incoming-govt-faces-battle-on-cultural-reports-three-strikes-and-discount-caps/>.

⁴⁰⁸ Lani Guinier and Gerald Torres "Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements" (2014) YLJ 123 (8) 2740-2804.

⁴⁰⁹ Bruce Ackerman *We the People, Volume 2 Transformations* (Harvard University Press, Cambridge, 2015).

⁴¹⁰ Heath, above n 74.

3.11.1 Why Whanaungatanga Jurisprudence is Significant

Due to the way in which the law of whanaungatanga has been perceived by society, or perhaps ignored in various institutions, and its changes over time, it is appropriate to consider whanaungatanga jurisprudence. One of the main reasons is that whanaungatanga jurisprudence consists of the central elements of societal balances of identity, well-being, and community well-being and captures the narratives of systemic deprivation.⁴¹¹

Whanaungatanga comprises conceptual interwoven threads that encapsulate significant principal elements of tikanga, the common law, and legislation. First, the tikanga dictates the process which the actors (offender, key speakers, whanau members) involved in the whanaungatanga process must follow. Second, the merge of the whanaungatanga process with the common law demonstrates the likelihood of a compromise between judge-made law in sentencing and whānau and community-led participation in recommending and supporting offender rehabilitation. Third, the legislative provision of s 27 of the Sentencing Act 2002 requires cultural background information and secures the right to representation by a cultural report writer or speaker representation. Section 8(i) of the Sentencing Act 2002 mandates s 27 and activates the principles of natural justice and judicial transparency in converting those rights into a cultural report or speaker report (not commonly used).

Within a whanaungatanga jurisprudence context, Jackson notes that:⁴¹²

The rights of individuals, or the hurts they may suffer when their rights were abused, were indivisible from the welfare of the whanau, the hapu, the iwi. Each had reciprocal obligations found in a shared genealogy, and a set of behavioural precedents established by common tipuna. They were based too on ... specific belief that all people had an inherent

⁴¹¹ For a detailed account on systemic deprivation, see Ūpoko Tuarima/Chapter Five.

⁴¹² Moana Jackson “Criminality and the Exclusion of Māori” in N Cameron (ed) *Essays on Criminal Law in New Zealand: Towards Reform* (Victoria University Press, Wellington, 1990) at 32.

tapu that must not be abused, and on the general perception that society could only function if all things, physical and spiritual were held in balance.

As part of *tikanga*, whanaungatanga values and practices are an Indigenous holistic model that provides for social and economic justice. However, the carceral nature of the criminal justice system inevitably blocks the cultural transmission of laws, language, and ideologies. Drawing on the traditional, transactional, and transformative modes of whanaungatanga, the associated values and practices of an individual's experiences in time, location, and place in the world, for most Māori, there is an understanding of the whanaungatanga paradigm. Whakapapa or genealogy and the *tikanga* of whanaungatanga derive from its philosophical origin in a Te Ao Māori world of creation stories.

3.11.2 The Implications of Whanaungatanga

Whanaungatanga is a legal norm that emphasises building and maintaining relationships within a community. Whanaungatanga recognises that we are all interconnected and that our relationships with others contribute to our overall well-being and sense of identity. It fosters inclusivity, unity, and collective responsibility.⁴¹³ It encourages individuals to prioritise and nurture their relationships with their immediate family, extended family members, friends, colleagues, and the wider community. This is encouraged by the application of the Te Ao Mārama Model in the District Courts.⁴¹⁴

Whanaungatanga emphasises reciprocal relationships, mutual support, and respect among individuals, contributing to collective well-being and community participation. Therefore, whanaungatanga is essential for human connection for a more inclusive and supportive society. As a result, individuals are valued and connected to different social contexts. It builds a strong sense of belonging and identity, allowing meaningful relationships to form. Pre-1840, contemporary and

⁴¹³ *Ellis v R*, above n 5.

⁴¹⁴ *Taumaunu*, above n 395.

transformative understandings of whanaungatanga can inform the sentencing process and lead to more positive outcomes while maintaining public safety. This narrative can also help the offender take responsibility and understand the consequences of their actions. An analysis of whanaungatanga in a Treaty partnership context assessed how it operated in the past, its perception in contemporary society and the transformative impact it could have within the criminal justice system and s 27 of the Sentencing Act 2002.

The Writ of Kalikasan and Whanaungatanga

As mentioned earlier, the physical environment is a significant aspect of Te Ao Māori. Philippine law provides an interesting comparative context as to how recognition of the physical environment can be incorporated into a legal system. Under Philippine law, a writ of Kalikasan—nature, is a legal remedy that provides constitutional protection for an individual’s right to a healthy environment.⁴¹⁵ Section 16, Article 11 of the 1987 Constitution of the Republic of the Philippines, states that the “state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”⁴¹⁶ In contrast to constitutional rights that are rooted in European and Latin American law, the writ of Kalikasan originates from Chief Justice Reynato Puno of the Supreme Court of the Philippines. Chief Justice Reynato Puno created Rule 7 of the Rules of Procedure for Environmental Cases as s 16, Article 11 of the Constitution of the Philippines did not have immediate effect.

⁴¹⁵ Nicholas A Robinson “Ensuring Access to Justice Through Environmental Courts” (2012) 29(2) Pace Envtl. L Rev 363. See also Hilario G Davide “The Environment as Life Sources and the Writ of Kalikasan in the Philippines” (2012) 29 Pace Envtl L Rev 592 at 601. The article discusses the significant contributions of Professor Nicholas Robinson, a pioneer in environmental law, who played a crucial role in the Manila case petition. Professor Robinson provided essential legal insights and strategic guidance, emphasising the need for effective legal mechanisms to address environmental challenges. His influences inspired the Global Legal Action on Climate Change as government authorities had to set up rainwater catchment ponds and rainwater collectors in the Philippines. His unwavering dedication to environmental justice and sustainability has contributed significantly to global environmental governance. See Nicholas A Robinson “Symposium on Indigenous Rights Introduction” (2010) 28 Pace Envtl. L Rev 324.

⁴¹⁶ Official Gazette of the Republic of the Philippines. Available at www.officialgazette.gov.ph/constitutions/1987-constitution/.

There are important observations about the writ of Kalikasan that correspond with the “Law of Whanaungatanga Diagram.”⁴¹⁷ Arguably, the writ of Kalikasan is helpful when considering the nature of rights to a healthy environment and consideration for socio-economic parity.

Whanaungatanga emphasises social inclusion and collective participation over individual endeavour.⁴¹⁸ Kaitiakitanga or guardianship motivates the responsibility to care for the environment to exact reciprocal obligations for community well-being. Rangatira (chiefs) used ancestral knowledge or mātauranga Māori to negotiate solutions. Māori dispute resolution became a natural part of the fabric of legal norms. Social inclusion was the blueprint of the law of whanaungatanga, which enabled cultural, economic, and political prosperity in the communities.

3.12 Conclusion

This chapter establishes that whanaungatanga is a legal norm based on collective responsibility. It involves an approach to problem-solving and understanding the importance of relationships, interconnectedness, and collective responsibility. Recognising these principles establishes a foundation for the argument of the thesis which proposes applying whanaungatanga to s 27 of the Sentencing Act 2002. This chapter therefore begins the argument for applying whanaungatanga as a therapeutic tool for transformative solutions.

The analysis illustrates how whanaungatanga was instrumental in maintaining balance in a prison-less society compared with punitive laws despite Parliament’s intent to increase Māori under-representation in prisons. Tikanga, the first law of Aotearoa, New Zealand, judge-made law, and state law—the Sentencing Act 2002, have something in common—whanaungatanga based on kinship and non-kinship relationships.

⁴¹⁷ Refer to **Figure 1**. The Law of Whanaungatanga Diagram.

⁴¹⁸ *Ellis v R*, above n 5.

The discussion considered the obligations and challenges of implementing different legal inheritances within the judicial system. It was noted that generally precedents were given to the common law over customary law. Embedding whanaungatanga in the sentencing process could help to redress this imbalance.

In examining whanaungatanga, this chapter discussed the multiple definitions of whanaungatanga and showed that through a Western lens, a clinical approach to defining a word, such as whanaungatanga, alters its meaning. The impact of colonisation on the whanaungatanga process and the varying degrees of interpretation by non-Māori authors illustrated how a misunderstanding of whanaungatanga can arise. For example, some definitions of whanaungatanga are subject to slightly different meanings, resulting in less than equal outcomes.

The chapter also considered the role of whanaungatanga within the legal system. Importantly, it was shown that in a modern context, the law of whanaungatanga extends the understanding of “the centrality of kinship and careful attention to relationships.”⁴¹⁹ It was also shown that whanaungatanga can accommodate non-kinship relationships. This chapter also showed that no published research currently exists on the impact of whanaungatanga in s 27 of the Sentencing Act 2002.

The next chapter will explore how the two legal systems interacted in response to social, economic, and political changes in the 19th and 20th century. A study of the New Zealand Prison Population Statistics of Māori and the early Population Census Surveys provide the background to the philosophical underpinnings of both systems. They also identify potential conflicts or areas where both systems overlap and share common principles. By examining the interaction and intersection between tīkanga Māori, the concept of whanaungatanga, and colonial law, the next chapter aims to examine problematic trends. The chapter will also highlight the impact of two different data sets and the circumstances that led to Māori over-representation in the New Zealand prison system.

⁴¹⁹ *Williams*, above n 289.

4 Ūpoko Tuawhā—Chapter Four: 19th Century Census Surveys; Prison Population Statistics of Māori in the 19th, 20th and 21st Century, Legislation and Cases

The previous chapter primarily focused on the meaning of whanaungatanga and tīkanga in traditional and contemporary society as well as the impact of colonisation. This chapter will analyse two data sets and discuss the undermining of whanaungatanga and the current statistics we see today. The two data sets are the Census Population Statistics in the 19th century and the statistics of the New Zealand Prison Population of Māori in the 19th century. The purpose of selecting the datasets was to determine whether the justice system in New Zealand was equitable for all citizens and whether changes were needed to ensure equitable practices. To this end, an analysis of the early New Zealand census surveys of the 19th century is provided, along with an examination of how the philosophical underpinnings of the law influenced and coincided with the rise of the Māori prison population statistics. In addition to these data sets, relevant Acts and cases will be examined to investigate the possible conflict between two legal systems. Other sources for analysis are Public Policy Chronology and Parliamentary Debates. The aim is to investigate inconsistencies in sentencing and show how the legal norm and visionary scope of the whanaungatanga process could be accommodated within s 27 of the Sentencing Act 2002, discussed in detail in Ūpoko Tuarua/Chapter Two.

4.1 Population Surveys 19th Century: Exclusion and Inclusion of Māori, Legislation and Cases

In the first section of this chapter, the data analysed are the 19th century population surveys. The study aims to examine the problematic trends and understand the reasons why some surveys excluded Māori and others did not. The historical population context of New Zealand and highlights the origins of the approaches taken and underpinning philosophies affecting Māori. Finally, the potential impact of these disparities on Māori people's social and economic wellbeing will be analysed. The exclusion of Māori in the population surveys occurred in 1851, 1861, 1864, 1867 and 1871, which coincides with the introduction of legislation that

served colonial interests.⁴²⁰ The first 1851 colony of New Zealand census only surveyed European New Zealanders. This survey marginalised Māori and their right to thrive in their communities as equal subjects according to Article 3 of the Treaty of Waitangi. This exclusion contributed to undermining Māori whanaungatanga relationships. Furthermore, the exclusion of Māori from the survey illustrates the pluralistic tensions between *tikanga*, the common law, and legislation, it was presumed that excluding Māori from the survey would not impact Māori communities. However, the exclusion ignored *tikanga* and Māori rights as British subjects.

Dispossession and effects of Colonisation under Acts

Before the population surveys and the exclusion of Māori, concerns regarding the amenability of *tikanga* to British law and policies for holding Māori accountable for their crimes did not prevent the acquisition of Māori lands⁴²¹ to secure British sovereignty⁴²² under the Land Claims Ordinance 1841. Māori sanctions of *hara* were swiftly changed under the Native Exemption Ordinance 1844⁴²³ and reflected some ideas created by Plato.⁴²⁴ Other exceptional laws of 1844 included

⁴²⁰ “An Ordinance for taking a Census of the Colony of New Zealand” (30 August 1851) 561 (7) *New Zealand Gazette*.

⁴²¹ Vincent O’Malley *The Meeting Place* (Auckland University Press, 2013) at 30. Enacting legislation to procure Māori lands was a more viable option to appease the settlers demand for land; Richard Boast “The Evolution of Māori Land Law 1862-1993” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004) at 66.

⁴²² Richard Boast “Māori and the Law, 1840-2000” in Peter Spiller, Jeremy Finn, and Richard Boast (ed) *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 137. Colonial official opinion was divided. Acting Governor Edward Shortland’s assertion that all Māori were subject to English law contrasted with Attorney-General William Swainson’s argument that hapū representatives, who had not signed the Treaty had independent governance status; See Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University Press, New York, 2004) at 168. Acting Governor Edward Shortland’s assertion that all Māori were subject to English customary law contrasted with Attorney-General William Swainson’s argument that hapū representatives, who had not signed the Treaty had independent governance status; McHugh argues that when the crown procured sovereignty over Aotearoa, New Zealand, tribal land ownership, ‘dominium’ was to remain in place while the crown enjoyed imperium rights.

⁴²³ Native Exemption Ordinance 1844 7 Vict 18, s 9; See *R v Te Mania*, 20 February 1844, County Court, Auckland.

⁴²⁴ Imprisonment for theft was very unpopular with Māori.

the Jury Amendment Ordinance⁴²⁵ and the Unsworn Testimony Ordinance.⁴²⁶ However, policy exemptions for Māori and Māori views of maintaining restorative justice principles conflicted with the ‘one law for all’ theory.⁴²⁷ The incorrect interpretation of *utu* required Māori to pay four times the value of the stolen goods.⁴²⁸ As a result, Māori were placed into a difficult position, where they could not seek justice through the formal justice system. This situation further perpetuated the inequality between Māori and non-Māori in Aotearoa, New Zealand.

4.2 Prison Population Statistics of Māori 19th and 20th Century and Legislation

This section examines the Prison Population Statistics of Māori in the 19th and 20th centuries. The study considers whether there is a causal connection between the anomalies and outcomes of the 19th Century Population Surveys and the Prison Population Statistics of Māori in the 19th and 20th centuries. The data sources are significant because the study aims to illustrate that without whanaungatanga relationships, the problematic trends of disconnection from cultural values and exclusion from early surveys contributed to the over-representation of Māori in prisons. This history supports the need for recommendations to provide a pathway that mitigates the discrepancies for Māori.

Māori prisoners represented a small percentage of the population during the early 19th century.⁴²⁹ Provoked by the New Zealand wars in the 1860s⁴³⁰ and the first

⁴²⁵ Jury Amendment Ordinance 1844 7 Vict 2. Some Māori were exempted from land ownership status to serve in mixed juries. In the contemporary context, Moana Jackson claims that jury composition in New Zealand is flawed due to the monocultural bias produced by the method of jury selection. See *Jackson*, above n 28.

⁴²⁶ Unsworn Testimony Ordinance 1844 7 Vict 16. The pagan evidence rule was set down in the English decision of *Omichund v Barker* (1744) Willes 538, 125 ER 1310. However, in *R v John McCarthy* SC Wellington 17 April 1844, Chapman J excluded non-Christian Māori from giving evidence. Available at <www.wgtn.ac.nz/law/nzlostcases/search_cases.aspx>.

⁴²⁷ *Heath*, above n 74, at 194-212.

⁴²⁸ Shaunnagh Dorsett “R v E Hipu - Supreme Court Wellington, 1 December 1845” (2010) 41 VULR 89 at 92; Shaunnagh 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.

⁴²⁹ Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand Since 1840* (Dunmore Publishing, Wellington, 2007) at 55-56.

⁴³⁰ For example, the war at Rangiriri 1864.

Parihaka passive resistance during the 1880s,⁴³¹ the legislation increased the number of Māori prisoners. Imprisoned Māori experienced short prison stays during this period.⁴³² The results of the Māori Prisoners Trials Act 1879, the Confiscated Lands Inquiry and Māori Prisoners Trials Act 1879, the Māori Prisoners Act 1880, the Māori Prisoners Detention Act 1880, the West Coast Settlement Act 1880, and the resistance to dog tax in 1898⁴³³ indicate the first spike of Māori imprisonment during this era.⁴³⁴

4.2.1 Māori Prisoners Act 1880 (44 VICT 1880 No 4)

Under s 3 of the Māori Prisoners Act 1880, incarcerated Māori, including those awaiting trial, were deemed lawfully detained. Section 4 stated that no Court could release prisoners. According to the Act:

3. All the said Natives so committed for and waiting trial as aforesaid, and all other the Natives so detained in custody as aforesaid, for default of entering into sureties to keep the peace, shall be deemed and taken to have been lawfully arrested and to be in lawful custody, and may be lawfully detained.

4. No Court, Judge, Justice of the Peace, or other person shall during the continuance of this Act discharge, bail, or liberate the said Natives so in custody as aforesaid without an order from the Governor in Council, any law or statute to the contrary notwithstanding.

This Act allowed for incarceration and sentencing of Māori for minor offences, such as intoxication or petty theft. It also provided for the forced removal of Māori

⁴³¹ Peter Clayworth “Prisons - Māori imprisonment” Te Ara - the Encyclopedia of New Zealand. Available at <www.TeAra.govt.nz/en/zoomify/36774/maori-prisoners-of-war-1864>.

⁴³² Te Ara Encyclopedia of New Zealand “Māori imprisonment” Available at www.teara.govt.nz/en/prisons/page-5#ref1.

⁴³³ National Library “Policemen with a group of Māori who participated in the Dog Tax Rebellion.” Available at <https://natlib.govt.nz/records/22917541>.

⁴³⁴ See Appendix 1: Graph 1. The non-violent protest in Parihaka, Taranaki is a contributory factor. Māori resistance to a dog tax imposed by the Hokianga County Council resulted in the incarceration of five men in 1898.

children from their families to attend reformatories. Therefore, the Act marked the beginning of mass Māori incarceration. The illustrative changes in the Māori prison statistics are shown in **Graph 1** (Appendix 1). The Act had a significant and lasting impact on Māori communities, further exacerbating the disparities between Māori and other New Zealanders.

The increase in Māori prison statistics became more noticeable during the 20th Century. A series of graphs illustrate the increase in the Māori prison population in the 20th century and their proportion in relation to the overall prison population statistics (See Appendix 1). By 1936, the Māori prison population had reached 11% of the overall prison population.⁴³⁵ Māori urbanisation and the increase of Māori prisoners resulted from the impact of the Second World War.⁴³⁶ By 1945, Māori only made up 6% of New Zealand's total population but 21% of the prison population. The second noticeable spike occurred in 1945.⁴³⁷ By 1971, the prison population of Māori was 40%, while Māori made up only 10% of New Zealand's total population. By 1980, Māori represented about half of the prison population.⁴³⁸ The problematic trend showed no sign of improvement as the third noticeable spike occurred in 1997,⁴³⁹ two years after the 'tough on crime' introduction of the Domestic Violence Act 1995. According to Gary Hook, the New Zealand judiciary criminalises Māori males. This is evidenced by the excessively high conviction rates for domestic violence and the bias in sentencing that targets Māori.⁴⁴⁰ It is argued that this disproportionate rate of Māori imprisonment results from social issues, including poverty, racism, and inequality.

The historical statistics illustrate a direct link between intergenerational forms of systemic Māori deprivation caused by social injustices and the displacement of Māori from their land. The reproduction and maintenance of reactive policies, such

⁴³⁵ *Te Ara Encyclopedia of New Zealand*, above n 432.

⁴³⁶ Above, n 432.

⁴³⁷ See Appendix 1: Graph 1.

⁴³⁸ *Te Ara Encyclopedia of New Zealand*, above n 432.

⁴³⁹ See Appendix 1: Graph 1.

⁴⁴⁰ Gary ER Hook "The Criminalization of Māori and Pacific Islanders Under the Domestic Violence Act 1995" (2009) 3 MAI Review.

as tough-on-crime policies, are not evidence-based⁴⁴¹ and have influenced the ongoing social, economic, and educational disparities, access to justice issues, and human rights issues. Attitudinal views against Māori are primary indicators of what has led to the current high incarceration rates of Māori. Colonial influences, neo-liberalism, and penal populism developed without including Māori leaders or professional Māori advisors as part of solutions.

4.3 Prison Population Statistics of Māori 21st Century (2001-2018)

The third section of the chapter analyses data from the Prison Population Statistics of Māori in the 21st Century to examine the use of s 27 of the Sentencing Act 2002. The currently available prison population statistics of Māori (2001-2018) define the growing problematic trends. The reason for selecting this dataset was to understand why it took over a decade for the courts to realise the significance of s 27 cultural reports. Since the introduction of the Sentencing Act 2002, by 2011, 51% of imprisoned Māori represented 15% of the New Zealand population.⁴⁴² The Department of Corrections responded by establishing Māori Focus Units aimed at changing prisoner behaviour through *tikanga* programmes.⁴⁴³ However, the prison rate of Māori continues to increase despite these efforts.

New Zealand's prison population rate exceeds the OECD average of 121 prisoners per 100,000 of the general population⁴⁴⁴ and is ranked the fifth highest at 220 per 100 000, just below Chile. In 2018, there were 3,031 remanded male prisoners and 6,805 sentenced males. In the same year, there were 285 remanded female prisoners and 524 sentenced female prisoners.⁴⁴⁵ Since 2002, the recorded offence rate dropped considerably from 440,129 to 350,389 and peaked in 2009 at 451,405. In

⁴⁴¹ *Gluckman*, above n 68, at 9.

⁴⁴² *Te Ara Encyclopedia of New Zealand*, above n 432.

⁴⁴³ Above, n 432.

⁴⁴⁴ See Appendix 1: Graph 2.

⁴⁴⁵ See Appendix 1: Graph 3. Compared with other Western economies, the cost of New Zealand's imprisonment is disproportionate to the population of remanded offenders in prisons.

2014, the resolved offences dropped to 145 367, lower than the recorded rate of 184,465 in 2002.⁴⁴⁶

In 2018, Chief Science Advisor, Professor Sir Peter Gluckman stated:⁴⁴⁷

There is strong scientific evidence for putting resources into crime prevention, early intervention (identifying and mitigating risk), and a smarter approach to rehabilitation and subsequent social inclusion for those already in the criminal-justice system – not for building more prisons.

Geoff Adlam notes that the total New Zealand prison population reached 9,857 by 31 December 2019.⁴⁴⁸ Male inmates comprised 93.2%.⁴⁴⁹ The remand prison rate comprised 36.4% of the prison population, an increase of 30.1%.⁴⁵⁰ Additionally, there are disparities between Māori and Pākehā concerning gender, age, ethnicity, the sentencing court, and the type of offence.⁴⁵¹ The increase in sentence lengths has also impacted Māori. Adlam noted regional differences concerning the justice service area of imposed imprisonment sentences for most serious offences. For example, the Taitokerau service area comprises 17.6% sentenced Māori compared with 11.9% of sentenced Pākehā.⁴⁵² In 2019, 78.8% of offences committed by adults were serious offences. There was relatively little difference between men and women across age groups.

In addition, Māori were most likely to receive a community-based sentence for their most serious offences, accounting for over half of the sentences imposed on Maori in 2019.⁴⁵³ The data indicates that s 27 of the Sentencing Act 2002 may have influenced the outcome.

⁴⁴⁶ See Appendix 1: Graph 4.

⁴⁴⁷ *Gluckman*, above n 68, at 4.

⁴⁴⁸ Geoff Adlam “Conviction, Sentencing and Imprisonment of Adults in 2019” May 2020 LawTalk 939 at 59. Available at <www.issuu.com/nzlawsociety/docs/lawtalk_939>.

⁴⁴⁹ Above, n 448.

⁴⁵⁰ Above, n 448.

⁴⁵¹ Above, n 448.

⁴⁵² Above, n 448.

⁴⁵³ Above, n 448.

The differences in sentencing for youth with a long history of previous convictions also raise concerns. In the case of *Marsters v Police*,⁴⁵⁴ Whata J found that the increase in the length of the sentence for former and current offending was inappropriate. In contrast, in *Rarere v New Zealand Police*,⁴⁵⁵ the Court of Appeal granted a 20 % discount to reflect impulsive behaviour.

The difference in the imprisonment rate between Māori and Pākehā is also seen in the variations in relation to age. Since 2002, the annual sentenced prison population aged 0-20 years indicates a peak in 2007 and a gradual decline to almost half that amount recorded in 2017.⁴⁵⁶ However, the 20-29 age group peaked twice, both in 2007 and 2010, reaching the same level recorded in 2010.⁴⁵⁷ Within these statistics, there are differences between Māori and Pākehā. The highest age cohort of a sentenced Māori male is 20-29, followed by the 30-39 and 40-49 age groups.⁴⁵⁸ The 20-29 age cohort had increased by 2016.⁴⁵⁹ The highest age cohort of a sentenced Māori female is also 20-29 years, followed by the same sequence as Māori males. This age group peaked in 2007 and decreased to a total recorded ten years earlier.⁴⁶⁰ The 30-39 age cohorts of Māori peaked twice in 2005 and 2009 and further increased in 2017.⁴⁶¹ The 40-49 age groups of Māori peaked in 2007 and 2010-2011, then rose to a higher level in 2017.⁴⁶² However, the 50+ age group changes where Pākehā exceed Māori, Pacific Island, and other age groups.⁴⁶³

The total of sentenced adults convicted by sentence type declined after peaking in 2009. By 2010, the monetary fines dropped, while community sentences increased.⁴⁶⁴ However, between 2002 and 2013, the total offences committed by

⁴⁵⁴ *Marsters v Police* [2014] NZHC 3273.

⁴⁵⁵ *Rarere v New Zealand Police* [2012] NZHC 779.

⁴⁵⁶ See Appendix 1: Graph 9.

⁴⁵⁷ See Appendix 1: Graph 10.

⁴⁵⁸ See Appendix 1: Graph 7.

⁴⁵⁹ Above, n 458.

⁴⁶⁰ See Appendix 1: Graph 8.

⁴⁶¹ See Appendix 1: Graph 11.

⁴⁶² See Appendix 1: Graph 12.

⁴⁶³ See Appendix 1: Graph 13. See also Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013). The author explains that gang members who started their membership at an early age tend to retire around the 50 plus age cohort.

⁴⁶⁴ See Appendix 1: Graph 14.

Māori illustrated the overrepresentation of Māori receiving increased sentencing lengths.⁴⁶⁵ The rate of Māori sentenced for less than six months imprisonment illustrates an increase in 2006 and a decrease in 2016.⁴⁶⁶ Māori sentenced for 6 to 12 months increased by 2016, compared with Pākehā sentenced in the same sentencing type.⁴⁶⁷ From 2014-2017, there was an increase of Māori sentenced in the 12 to the 24-month category.⁴⁶⁸ Māori sentenced between 24 to 36 months also increased in 2016.⁴⁶⁹ The rate of Māori sentenced between 36 to 60 months indicates a peak in 2009 despite a drop recorded in 2016.⁴⁷⁰ The number of Māori imprisoned for more than 60 months peaked in 2009 and decreased by 2016.⁴⁷¹ In 2002, 2006, 2007, 2010 and 2016, Pākehā life term sentences exceeded Māori.⁴⁷²

The statistical data evidence Māori over-representation in the prison system. No initiatives thus far have addressed the problem apart from political parties promoting tough-on-crime policies months before elections.⁴⁷³

4.3.1 Legislation and Cases and Population Surveys

In addition to prison data, another indicator of the losses experienced by Māori in the colonisation process is relevant legislation and significant case decisions. Legislation in the 1850s which indicate exclusion of Māori include the Building and Land Societies Act 1851, Crown Lands Amendment and Extension Act 1851, Land Fund Appropriation Act 1851, and the New Zealand Company's Land Claimants Act 1851. The English Laws Act 1858 solidified the predominance of English law in New Zealand despite Māori pre-colonial customary law practices.

⁴⁶⁵ See Appendix 1: Graph 15.

⁴⁶⁶ See Appendix 1: Graph 20.

⁴⁶⁷ See Appendix 1: Graph 21.

⁴⁶⁸ See Appendix 1: Graph 22.

⁴⁶⁹ See Appendix 1: Graph 23.

⁴⁷⁰ See Appendix 1: Graph 24.

⁴⁷¹ See Appendix 1: Graph 25.

⁴⁷² See Appendix 1: Graph 26.

⁴⁷³ Mark Quinlivan "Election 2023: Labour and National's crime messages and how they're trying to break through to New Zealand voters" (16 September 2023) Newshub, www.newshub.co.nz.

Earlier cases had accepted some aspects of customary law. The *R v E Hipu*⁴⁷⁴ case is the first Supreme Court decision to apply s 9 of the Supreme Court Ordinance 1841,⁴⁷⁵ despite the first recorded decision in *R v William Osborne*.⁴⁷⁶ Deposits made under bail conditions before trial allowed for public benefit and government support.⁴⁷⁷ The recognition of *utu* as compensation for injured parties resulted from an amendment to the Fines for Assault Ordinance 1844.⁴⁷⁸ It included contract breaches and assault cases. This amendment allowed for the recovery of damages from the wrongdoer. It also protected victims, as they could seek compensation from the wrongdoer for expenses resulting from the offence. The amendment also ensured that offenders would be held accountable for the harm they caused.

Over time, the judicial construction of jurisdiction over Māori during the 19th century bolstered colonisation by using population statistics to establish policies and legislation to serve colonial-settler interests. The first population surveys, as well as the communication of statistical information became available to the public in 1890 through the New Zealand Official Yearbook.⁴⁷⁹ The first Census Ordinance of 1851⁴⁸⁰ excluded Māori, while they were included in the 1858 census.⁴⁸¹

In the years following the exclusion of Māori in census surveys, over the course of the 19th century, legislation continued to serve the interests of the colonists. The approach illustrates the deep-seated political and policy agendas that paved the foundation for further legislation to impact on Māori. Similarly, the inclusion of Māori in the 1858 census confirmed the status of English law under the English Laws Act 1858. This census inclusion marked the beginning of a new era for Māori

⁴⁷⁴ *R v E Hipu* SC, 1 December 1845.

⁴⁷⁵ Supreme Court Act 1841 5 Vict 1.

⁴⁷⁶ *R v William Osborne* Police Magistrate Auckland, 6 February 1845 reported in the *Auckland: Daily Southern Cross* (Auckland, 8 February 1845) at 3.

⁴⁷⁷ *Ordinance*, above n 423, s 8.

⁴⁷⁸ Fines for Assaults Ordinance 1844 8 Vict 7; Cited in Shaunnagh Dorsett “*R v E Hipu* - Supreme Court Wellington, 1 December 1845” (2010) 41 VULR 89 at 91.

⁴⁷⁹ David Green *Statistics Count: An Illustrated History of Statistics New Zealand* (Statistics New Zealand, Wellington, 2002).

⁴⁸⁰ *Census Ordinance*, above n 420.

⁴⁸¹ Census Act 1858 (21 and 22 Victoriae 1858 No 20; Crown Grants Correction Act 1858 (21 and 22 Victoriae 1858 No 46); Bay of Islands Settlement Act 1858 (21 and 22 Victoriae 1858 No 79); Boundaries of Provinces Act 1858 (21 and 22 Victoriae 1858 No 19); Confiscated Lands Act 1867 (31 Victoriae 1867 No 44).

in New Zealand, as Māori were now recognised as citizens and entitled to the same rights and privileges as non-Māori.

The overall picture was one of English legal dominance. However, there was some potential for recognition of Māori processes with Sir George Grey's 1861 plan for a rūnanga system.⁴⁸² Under this proposal, state authority would be devolved based on tino rangatiratanga.⁴⁸³ The plan indicated genuine attempts to address the relevance of tikanga and Māori self-government.⁴⁸⁴ It is pertinent to note that legislation that settled land claims advanced Crown control over the North Island.⁴⁸⁵ The acquisition of Māori land, the setting up of government and courts, banks, institutions, councils, and defining boundaries illustrate a government of themselves at the expense of marginalised Māori who were impacted by the law and the justice system. These processes perpetuated a different beginning for dispossessed Māori as they were not consulted or given a voice in the process.

The predominant outcome was that Māori did not have the same opportunities or access to resources as non-Māori.⁴⁸⁶ At times when Māori were included in the population surveys, this did not serve the interests of Māori. The impact of intergenerational trauma is related to the impacts of the exclusion and inclusion of Māori in the population surveys. The long-term result is that Māori are more likely to be poorer, have lower educational attainment, and have a lower life expectancy.

4.4 Public Policy Chronology (1 Jan 2002-31 Dec 2018)

The analysis of the previous section ties in with the fourth section that analyses Public Policy Chronology (1 Jan 2002-31 Dec 2018) and the consequences of the 'Three Strikes Law'. This section aims to ascertain whether public policy has

⁴⁸² The only exception was 71 of the New Zealand Constitution Act 1852 (now repealed by the New Zealand Constitution Act 1986) which provided for districts to be set apart in which Māori could govern themselves according to their tikanga.

⁴⁸³ Absolute sovereignty.

⁴⁸⁴ Alan Ward *A Show of Justice* (Auckland University Press, Auckland, 1973) at 125.

⁴⁸⁵ *O'Malley*, above n 421, at 30. O'Malley provides examples of Waikato Māori who were impoverished overnight.

⁴⁸⁶ Toon van Meijl "Culture Versus Class: Towards an Understanding of Māori Poverty" (2020) 62 (1) *Race and Class* 78.

prevented increases in recidivism and if prison rehabilitative programmes have a transformative impact. Public policy chronology is relevant for examination because the problematic trends emphasise the need to change the status quo.

The chronology of public policy from 2002 to 2018 illustrates that the punitive approach that held offenders accountable for their crimes has been adopted based on the view that it will ensure public safety. However, these policies have contributed to the increase in the Māori prison population.⁴⁸⁷ The Bail Act 2000, the Sentencing Act 2002, the Parole Act 2002, the Justice (Special) Offences 2004, the Sentencing Amendment Act 2004, the Parole (Extended Supervision) Amendment Act 2004, and the increased police powers under the Local Government Act 2002 Amendment Act 2004 are examples of this approach.

According to an analysis of the public policy chronology,⁴⁸⁸ the enactments do not prevent increases in recidivism despite the internal rehabilitation programmes and relaxed support for former offenders.

Public policy does not seem to be ensuring rehabilitation. Exclusive internal rehabilitative programmes do not appear to have any transformative impact on offenders and communities. Additionally, there are no realistic backup systems for offender rehabilitation into the communities to assist an offender's transition from imprisonment to release. This is apart from monitoring of their behaviour by probation officers and social workers, should the occasion arise. Consequently, the catch and release system may enable the reproduction of social inequalities that will affect public safety and future victims. There is pressure on communities to provide resources for rehabilitation programmes and expectations of whānau members who generally live at the lower end of the economic scale. They are required to support the offender, and failure to provide this support may result in recidivism. A more transformative approach to releasing someone requires a universal application of

⁴⁸⁷ See Appendix 1: Graph 1.

⁴⁸⁸ See Appendix 2.

transition into the community with the assistance of interconnected agencies. This is needed to ensure successful rehabilitation.

Three Strikes Law

In 2010, the National government passed the Sentencing and Parole Reform Act 2010 which introduced a three-strikes law sentencing regime for repeat offenders. Concerns were raised around the law's inability to reduce serious crimes or determine a sentence based on individual circumstances and context. The legislation limited the judiciary's ability to consider circumstances and context when dealing with the over-representation of Māori in the group of offenders with a strike. Several courts, including the Supreme Court, held that the sentences imposed under the regime violated the New Zealand Bill of Rights, and disregarded the fact that the Courts could already impose sentences equivalent to those under the three strikes law when necessary.⁴⁸⁹ There was no substantial evidence of its effectiveness nationally or internationally.⁴⁹⁰ The policy modified the Sentencing Act 2002 and the Parole Act 2002 to increase penalties for repeat offenders. The Labour government repealed the three strikes legislation but during its duration, it undermined the possibilities offered by s 27 cultural reports. Currently, it is anticipated that the newly formed coalition government of 2023 plans to reinstate the 'three strikes' law. Therefore, the 'three strikes' law will continue to be a topic of future debate, whether it is repealed or not.

Unlike other laws, the 'three strikes' law did not distinguish between minor offences and more serious ones. The regime departed from the central principle of proportionate responses to wrongdoing.⁴⁹¹ There was minimal attention paid to the "aggravating and mitigating factors relevant to assessing the relative gravity of a criminal wrong."⁴⁹² The imposition of disproportionate punishment for a strike three

⁴⁸⁹ Ministry of Justice "Repeal of the three strikes law". Available at <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/repeal-of-the-three-strikes-law/>.

⁴⁹⁰ Radio New Zealand "Parliament repeal three strikes law." Available at <https://www.rnz.co.nz/news/political/472539/parliament-repeals-three-strikes-law>.

⁴⁹¹ Warren Brookbanks and Richard Ekins "Criminal Injustice and the Proposed "Three Strikes" Law" Maxim Institute, Guest Paper, Faculty of Law, The University of Auckland, April 2010 at 1.

⁴⁹² Above, 491.

minor offence was unjust if all three strike offences were not serious. Consequently, Māori offenders were more affected by the ‘three strikes’ regime regardless of the nature of the offence.

Compared with Pākehā, Māori people were 6.68 % more likely to be first strikers. Pasifika people were 4.49 times more likely to be affected.⁴⁹³ The overrepresentation of both Māori and Pasifika is like the prison statistics of African Americans’ prison statistics under Californian three-strikes law.⁴⁹⁴ Issues of statutory interpretation and strike offences “may be higher than the statistics indicate”,⁴⁹⁵ although there is an expectation for “striker demographics to resemble those of the prison population.”⁴⁹⁶

Warren Brookbanks sums up by stating that:⁴⁹⁷

... the three strikes law is being applied to the same kinds of offences that fill our prisons, while there are also indications that it is being used for common offending. Rather than targeting the worst of offenders, three strikes appears to be targeting mainly young and Māori or Pasifika male offenders, who in many cases have committed pretty typical, albeit serious, offences of their type, but hardly qualifying as the “worst-of-the-worst”!

The merger of minor offences with serious offences results in disproportionate levels of punishment, which can negatively impact an offender's rights to justice. These arguments explain why the ‘three strikes’ law was perceived as unfair and undermined the concept of just sentencing, including the human right to proportionate sentence lengths. There is no evidential link between the New

⁴⁹³ Warren Brookbanks “Three Strikes –Five Years On” (Inaugural Greg King Memorial Lecture, Victoria University of Wellington, Faculty of Law, 30 September 2015) at 6.

⁴⁹⁴ James C Oleson “Habitual Criminal Legislation in New Zealand: Three Years of “Three Strikes” (2015) 48(2) Australian and New Zealand Journal of Criminology 277 at 285; Cited in Warren Brookbanks “Three Strikes –Five Years On” (Inaugural Greg King Memorial Lecture, Victoria University of Wellington, Faculty of Law, 30 September 2015) at 6.

⁴⁹⁵ Brookbanks, above n 493, at 4.

⁴⁹⁶ Oleson, above n 494, at 285.

⁴⁹⁷ Brookbanks, above n 493, at 6.

Zealand prison policies and the recorded crime rate that has fallen⁴⁹⁸ since the early 1990s.⁴⁹⁹ However, there is a parallel link to Western societies since the late Middle Ages⁵⁰⁰ that reflects “structural, social, and cultural ways”⁵⁰¹ and march to the same distant drums without recognising what they are doing.⁵⁰² For example, many countries across borders share a view that social and economic disasters, for example, will reduce crime.⁵⁰³

If the purpose of statistical prison data is to find trends for policy recommendations but does not change the status quo, then any possible downward trend in Māori incarceration rates cannot be realised.⁵⁰⁴ Statistically, apprehension, arrest, alleged charges, conviction, and imprisonment⁵⁰⁵ are three times more likely to happen to a Māori.⁵⁰⁶ The current policies illustrate repeated patterns of social inequalities that are more significant than concerns about penal populism, public safety, and retribution. Likewise, these current policies do not focus on the possibility of effective rehabilitation and reducing the impact on families of sentenced parents.⁵⁰⁷

4.5 Imprisonment and its Effects

Drawing on the statistical data and Public Policy Chronology (1 Jan 2002-31 Dec 2018) in the previous sections, this section examines the impact of imprisonment on the offenders, whānau, extended whānau and communities. The study examines how retribution can be minimised, lengthy incarceration rates reduced and

⁴⁹⁸ *Gluckman*, above n 68, at 9.

⁴⁹⁹ See Appendix 1: Graph 2.

⁵⁰⁰ Michael Tonry “Why Crime Rates Are Falling throughout the Western World” (2014) 43 *Crime and Justice*, 1 at 1.

⁵⁰¹ Above, n 500, at 2.

⁵⁰² Above, n 500, at 3.

⁵⁰³ Above, n 500, at 2.

⁵⁰⁴ Criminal Justice Act 1995, s 16; Sentencing Act 2002 ss 25, 26, 27.

⁵⁰⁵ Kim Workman. See Department of Corrections “Over-representation of Māori in the Criminal Justice System: An exploratory report, (Policy, Strategy and Research Group Department of Corrections September 2007) Part 2 “Criminal Justice Bias and Accumulation.” Available at https://www.corrections.govt.nz/data/assets/pdf_file/0014/10715/Over-representation-of-Maori-in-the-criminal-justice-system.pdf.

⁵⁰⁶ *Quince*, above n 272, at 9-13.

⁵⁰⁷ *Theron*, above n 34.

sentenced and remanded prisoners rehabilitated and reintegrate. In these ways, it is also likely that recidivism can be reduced.

Nils Christie notes a traditional interpretation of prison figures as follows:⁵⁰⁸

... increase in imprisonment is seen as indicating that crime has increased, while a downward trend indicates that the crime situation has changed for the better. Or, at the same historical point in time, societies with a high level of punishment are seen as having a high level of crime, while those with low levels are probably peaceful ponds in a turbulent world.

The New Zealand prison system operates under punitive laws. However, the legal system results in an alarming increase in recidivism rates and difficulty in reducing an already crowded prison population. Alternative solutions include applying whanaungatanga within the scope of s 27 of the Sentencing Act 2002. It may not be the whole answer to the problem, but it should clearly explain what statistical data does not. These statistical data are non-disaggregated data that do not provide the crucial narratives which may underlie offending.

The intersection between whanaungatanga and the New Zealand justice system forges a trilemma. Three taxonomies generate pluralistic tensions: tikanga, common law, and legislation. This trilemma is challenging to reconcile, as each of the three taxonomies carries a different but equally valid meaning. However, whanaungatanga, if accepted by society and the courts, can be the change agent for transformative outcomes. It can help reset and balance a just society and open-up an era of justice and equity. Therefore, it will allow those affected to find justice in an historically oppressive system.

The fiscal impact on society of penal populism, retribution, lengthy incarceration rates, sentenced and remanded prisoners illustrates the succession of harsh government policy regimes and the impacts on families of incarcerated parents. The

⁵⁰⁸ Nils Christie *Crime Control as Industry: Towards Gulags, Western Style?* (Routledge, London, 1993) at 48-49.

failure of these policies to bring about changes in prison statistics has been commented on by various analysts.

According to Gluckman:⁵⁰⁹

Successive governments of different political orientations have supported a progressively retributive rather than a restorative approach to crime with unsupported claims that prisons can solve the problems of crime.

As a result, it is contended that offenders are imprisoned, “in response to dogma, not data.”⁵¹⁰ The underlying philosophy of deterrence is not supported by the statistics. The increases in the certainty of apprehension and punishment are held out to “demonstrate a significant deterrent effect.”⁵¹¹ However, the impact of imprisonment does not produce deterrence⁵¹² but increases the severity of penalties, such as increasing the length of terms. The shift from evidence-based approaches to “prevention, intervention, imprisonment, and rehabilitation” is downplayed through shifting policies and media hype.⁵¹³

Also, long-term imprisonment does not promote the purposes set out in s 7 of the Sentencing Act 2002, and cannot be justified in its entirety if basic, fundamental human rights are affected, such as those in s 5 of the New Zealand Bill of Rights Act 1990.⁵¹⁴ As a whole, there is no conclusive evidence that long sentences rehabilitate, deter, or increase community protection or prevent recidivism.⁵¹⁵

Imprisonment has poor rehabilitative effects⁵¹⁶ and contributes to an offender's disconnection from society and weakens public safety in the community.⁵¹⁷ Prison rehabilitation programmes have minimal effects on offenders. In contrast,

⁵⁰⁹ *Gluckman*, above n 68, at 4.

⁵¹⁰ Above, n 68.

⁵¹¹ *Theron*, above n 34.

⁵¹² Above, n 34.

⁵¹³ *Gluckman*, above n 68, at 4.

⁵¹⁴ *Theron*, above n 34.

⁵¹⁵ *R v Wellington* [2018] NZHC 2196.

⁵¹⁶ *Theron*, above n 34.

⁵¹⁷ Above, n 34.

community-driven rehabilitation programmes are likely to have positive outcomes outside prisons.⁵¹⁸

Lengthy sentences that undermine deterrence, rehabilitation, and reintegration are unjustified by prison costs that far exceed the public's protection.⁵¹⁹ It would appear that evidence-based approaches to sentencing, such as the whanaungatanga rehabilitation process encapsulated in s 27 of the Sentencing Act 2002, would be seen by some as undermining the 'tough on crime' policy. However, the recourse to lengthy sentences cannot be substantiated "with no evidence of benefit."⁵²⁰ Although penal populism suggests that a higher level of punishment will lead to a reduction in the levels of crime, "prisons overall reduce public safety by their criminogenic effects (both on the individual and subsequent generations)."⁵²¹ A more uniform application of s 27 of the Sentencing Act 2002, could prevent these costs. The approach would not detract from responding to serious offenders where imprisonment is necessary to protect the public.⁵²² Penal populism creates a rivalry between which political party will be the toughest on crime. The arguments about approaches to imprisonment become entangled in political; campaigns and appeals to the public. The political resonance of binary policy responses for political positioning and public demand is the result of "the systemic and cumulative impact of successive policy decisions."⁵²³ Eighty-five % of the New Zealand population has an unfair advantage over the 15 % Māori population in terms of the likelihood of the majority voting for the political party promoting tough on crime policies. Therefore, penal populism impacts minority populations, among whom Māori constitute the majority of prisoners.⁵²⁴

Contributing to the raft of complex and multifaceted issues of imprisoned Māori:⁵²⁵

⁵¹⁸ *Theron*, above n 34.

⁵¹⁹ *Gluckman*, above n 68, at 4.

⁵²⁰ Above, n 68, at 23.

⁵²¹ Above, n 68.

⁵²² Above, n 68, at 4.

⁵²³ Above, n 68.

⁵²⁴ *Theron*, above n 34.

⁵²⁵ Above, n 34.

... statistics also raise wider questions about the experience of indigenous people, minorities, victims and the poor and powerless of our criminal justice system generally. As a country which prides itself on its fair, tolerant and inclusive approach, we need to confront these issues. But in the meantime they underscore the need to urgently address how and why we are imprisoning so many people, at such enormous cost to society.

These issues lead to broader concerns, for example, an offender's experience in prison and the psychological impact of the system failing to address a series of generational and intergenerational mental health issues.

According to Gluckman:⁵²⁶

... prisons act as recruitment centres for gangs (especially for young offenders) and underpin the illegal drug trade. Imprisonment leaves those incarcerated with high rates of undiagnosed and untreated alcohol/drug addictions and mental illness. They have a negative impact on the next generation, given that a high percentage of people in prison are parents. These issues disproportionately affect Māori.

Empirical evidence suggests that the intergenerational impact of undiagnosed and untreated recipients of the prison system has resulted in a lack of attention to the Treaty of Waitangi principles and the breach of constitutional rights. Arguably, the differential treatment and compromise have resulted in secondary rights for Māori. The fact that Māori prison population statistics have shown no change indicates a lack of willingness to accept Māori input and find an appropriate solution, such as fusing the legal norm of *whanaungatanga* into the sentencing matrix.

Compared with similar departments worldwide, the Department of Corrections received a revenue of \$1.2 billion for the financial year ended 30 June 2015. This amount exceeded the supplementary estimates by \$3.9 million. The increase in revenue was mainly due to higher-than-targeted forestry logging volumes,

⁵²⁶ *Gluckman*, above n 68, at 4.

additional livestock sales, and the gain recognised from the sale of Tongariro/Rangipo land.⁵²⁷ If the cost of incarceration per person per year is approximately \$150,000, and the cost of a cultural report ranges from \$880 to \$3,000, the fiscal benefits of the application and the interpretation of s 27 of the Sentencing Act 2002 are obvious.

Unjustified lengthy incarceration rates of parents have a psychological impact on children's behaviour and can lead to a future of adolescent mental health issues. Undetected pre-existing mental health issues can increase the chances of reoffending of first-offender children of incarcerated parents.⁵²⁸ Three generations of incarcerated whānau members will experience socio-economic harm once released. The varying degrees of mental health issues that incarcerated parents may develop, or the impact on pre-existing mental health conditions, are not considered. Consequently, unjustified excessive incarceration rates disrupt whānau units and can incur psychological costs as well as being a breach of their civil and political rights under the New Zealand Bill of Rights Act 1990. The long-term consequences of physical and mental health issues are highly likely. The lack of economic productivity and increase in poverty also impact the social and economic well-being of whānau units.

Since 2013, the remand prison population has steadily increased.⁵²⁹ The Bail Amendment Act of 2013 made it difficult for alleged offenders to obtain bail. Remand prisoners become candidates for and teachers of criminal careers that severely impact the societal structures of “employment, accommodation, and family prospects and compounding mental health and substance use issues.”⁵³⁰ Māori prisoners exceed every other ethnic group of the remand and sentenced

⁵²⁷ Ara Poutama Aotearoa Department of Corrections “Financial Overview” Annual Report 2014/2015. Available at https://www.corrections.govt.nz/resources/strategic_reports/annual-reports/annual_report_201415/financial_overview#Overall%20Results.

⁵²⁸ *Theron*, above n 34.

⁵²⁹ See Appendix 1: Graph 5.

⁵³⁰ *Gluckman*, above n 68, at 4.

prison population.⁵³¹ The financial costs in remanding individuals without conviction also have no logic.

According to Liesle Theron:⁵³²

... there are very significant costs to society in terms of lost jobs, inability to secure jobs in future, adverse health impacts, harm to families and increased recidivism. Māori have borne the brunt of the human cost, with devastating consequences.

As of 31 December 2018, 30% of prisoners were held on remand.

Furthermore:⁵³³

There is reason to expect that remand is disproportionately costly to society in terms of its impact on individuals and the functioning of already struggling communities. Poorer people are less likely to meet bail requirements and are therefore more likely to lose jobs, custody of their children and housing while held on remand. They are also more likely to plead guilty to something they didn't do and face the life-long consequences of a conviction.

The incarceration of Indigenous peoples also occurs on a global level. Compared with Canada, Australia, and the United States, New Zealand has the highest rate of female prisoners who are Indigenous. For example, while more than 30 % of inmates in Canadian prisons are Indigenous, the statistics for Indigenous women represent 42% of the female prison population.⁵³⁴ Indigenous women prisoners in Australia make up less than 3% of the population but represent almost a third of the total female prison population. A 66% increase in Indigenous female prisoners included a proportion of remand prisoners. Most Indigenous women on remand

⁵³¹ See Appendix 1: Graph 5 and Graph 6.

⁵³² Theron, above n 34.

⁵³³ Above, n 34.

⁵³⁴ The Guardian 'National travesty': report shows one third of Canada's prisoners are Indigenous. Available at <https://www.theguardian.com/world/2020/jan/22/one-third-canada-prisoners-indigenous-report>.

who waited between 34 to 58 days were not incarcerated.⁵³⁵ Of the total New Zealand female prison population, 62 % are Māori, while the Māori male imprisonment statistics remain static. The spike in Māori female prisoners causes severe disruption to whānau members reliant on familial roles of motherhood.

Statistics conceal the ongoing ripple effect of systemic Māori deprivation. Canada, Australia, New Zealand, and the United States (CANZUS) voted against the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in September 2007. However, Australia endorsed the document in 2009, followed by the other countries in 2010.

4.6 Section 25 and Issues of “Remand Convicted Prisoner”

The fifth section analysed the effects of imprisonment and relates to this sixth section that identifies the intergenerational and socio-economic effects on families of imprisoned parents and the communities. This section also provides insights into issues concerning s 7 of the Sentencing Act 2002 and s 5 of the New Zealand Bills of Rights Act 1990.

Under s 25 of the Sentencing Act 2002, rehabilitation programmes are at risk if the offender is a remand convicted prisoner. For example, in *R v Parker*,⁵³⁶ Whata J accepted a s 27 report of the Act and applied a discount accordingly.⁵³⁷ On a side note, the judge reiterated the offender’s agreement to undergo a programme when the offender first appeared for sentence. Three assessors were required to produce reports concerning an appropriate rehabilitation programme.⁵³⁸ However, the judge noted that “a remand convicted prisoner” does not meet the criteria for rehabilitation programmes as advised by the Corrections Department.

⁵³⁵ Phillipa McDonald “Urgent action needed over high proportion of Indigenous women in prison, report says” (31 March 2020) ABC News. Available at <www.abc.net.au/news/2020-03-31/urgent-action-needed-over-indigenous-women-in-jails/12103372>.

⁵³⁶ *R v Parker* [2018] NZHC 2035.

⁵³⁷ Above, n 536, at [22] per Whata J.

⁵³⁸ Above, n 536, at [2].

The judge then stated:⁵³⁹

This effectively precluded the opportunity, expressly envisaged by s25(1)(d) and I of the Sentencing Act 2002, for an adjournment of sentencing to “enable a rehabilitation programme ... to be undertaken” and therefore to enable the Court to “take account the offender’s response” to that programme.

Whata J asserted that “the effectiveness of s 25 as a tool for sentencing is undermined” by the Correction’s policy under the Corrections Act 2004: however, the judge meant no criticism of Corrections as their “management task is very complex and large.”⁵⁴⁰ The judge sentenced the offender “without the full benefit of understanding” the offender’s “response to the rehabilitation recommended by the three assessors.”⁵⁴¹

4.7 Hansard Debates and Other References to Whanaungatanga

The statistics which demonstrate both the over-representation of Māori in the prison system and the failure to change these statistics, support the need for more constructive partnership with Māori principles in sentencing decisions. Correspondingly, these statistical data provide a strong case for applying whanaungatanga to s 27 of the Sentencing Act 2002. In the parliamentary context, much attention has been given to the principle of whanaungatanga. Discussions about whanaungatanga in Hansard Debates are significant for understanding the pivotal role whanaungatanga plays in restoring balance in communities. The debates provide insight into how stakeholders can work together to achieve a common goal and provide valuable feedback that can be used to build meaningful and lasting relationships.

In the parliamentary context, much attention has been given to the principle of whanaungatanga. There are over 550 Parliamentary select committee discussions

⁵³⁹ *Parker*, above, n 536, at [3].

⁵⁴⁰ Above, n 536, at [4].

⁵⁴¹ Above, n 536.

and developments concerning whanaungatanga.⁵⁴² The references either acknowledge the relevance of whanaungatanga deriving from various institutional streams or sometimes refer to it for a different purpose.⁵⁴³ For example, Dame Tariana Turia opposed organ donation after death as the debate raised serious issues about whanaungatanga and whānau.⁵⁴⁴ Specifically in relation to prison statistics, in the first reading of the Corrections Amendment Bill 2006, Te Ururoa Flavell noted:⁵⁴⁵

In a population where incarceration rates have been so high for so long, we need to consider what the effect of this is upon the next generation—the impact does not end with the generation that is in prison now ... the impact will continue to be felt by every child who has been deprived of a parent, who has seen their parent locked up, who has known what it is to fear the justice system. When mothers are given a jail sentence, their children are given a life sentence. They are sentenced to the effects of family separation, and the strength of whanaungatanga is restricted by the barriers of cell walls.

Whanaungatanga has also been raised in other areas concerning Māori well-being. For example, political and select committee discussions and developments regarding changes in the practice and delivery of health services highlighted the failure of health boards to meet the needs of Māori.⁵⁴⁶ In June 2020, the Family Lay Advocate and Court Registry Handbook introduced three new principles: mana tamaiti (tamariki), whanaungatanga, and whakapapa. This was almost a year after the Oranga Tamariki Legislation Act 2019 came into force in July.

⁵⁴² (13 May 2009) 654 NZPD 3433, Hon Parekura Horomia (Labour—Ikaroa-Rāwhiti); (23 Aug 2007) 641 NZPD 11469, Te Ururoa Flavell (Māori Party—Waiariki), Family Courts Matters Bill — First Reading; (23 Nov 2006) 635 NZPD 6808, Hone Harawira (Māori Party—Te Tai Tokerau), Evidence Bill — Third Reading.

⁵⁴³ New Zealand Parliament. Available at www.parliament.nz/en/site-search?term=whanaungatanga.

⁵⁴⁴ (3 May 2006) 630 NZPD 2754; (14 Nov 2006) 635 NZPD 6472.

⁵⁴⁵ (28 Jun 2006) 632 NZPD 4036.

⁵⁴⁶ Select Committee 19 Feb 2020 Waikato Te Korowai Health System Plan at 135.

Māori legal scholar Jacinta Ruru refers to the New Zealand Law Commission's description of whanaungatanga and highlights the significance of Māori customary family law where whanaungatanga is the underlying concept.⁵⁴⁷ One of the most important events of the late 1980s concerned Jackson's report on Māori and the criminal justice system.⁵⁴⁸ In a similar vein, the Pūao-te-Āta-tū Report⁵⁴⁹ 1986 is the founding document of Māori social work in Aotearoa New Zealand, illustrating the significance of Treaty partnership.⁵⁵⁰ More importantly, it is second only to Te Tiriti o Waitangi in its significance for Māori social workers.⁵⁵¹ The New Zealand Gazette describes whanaungatanga as "the extended family which takes responsibility for its members"⁵⁵² and must know their whereabouts.

In the examples discussed, not one of the interpretations refers to whanaungatanga as a legal norm or an ancient cultural practice in any institutional context. However, in a Parliamentary debate, these values became more explicit in support of amending the defence of self-defence under s 48 of the Crimes Act 1964. The Māori Party electorate of Waiariki, the Honourable Te Ururoa Flavell, delivers a statement that reflects notions of whanaungatanga within s 27 of the Sentencing Act 2002 and states:⁵⁵³

Section 27 of the Sentencing Act 2002 makes it explicit that offenders may request that the court hear views on the personal, family, community, and cultural background of the offender. That can ensure that the background may be related to the offence, and, importantly, processes are available to resolve issues relating to the offence, involving the offender and his or her family or community, and the

⁵⁴⁷ Jacinta Ruru "Corporate Governance: Balancing Tikanga Māori with Commercial Objectives" *Yearbook of New Zealand Jurisprudence* (2005) 8 (2) 300-315.

⁵⁴⁸ *Jackson*, above n 16.

⁵⁴⁹ John Rangihau *Puao-te-ata-tu Day Break: the Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Government Print, Wellington, 2001).

⁵⁵⁰ *New Zealand Māori Council v Attorney-General*, above n 61. The Court of Appeal delivered a landmark decision where the Treaty of Waitangi 1840 reflected a partnership between Māori and the successive government of the day.

⁵⁵¹ *Rangihau*, above n 549.

⁵⁵² "District Health Boards: Advice Notices to Oral Health Providers" (7 November 2003) 151 *New Zealand Gazette* 4215 at 4225.

⁵⁵³ (18 August 2009) 656 NZPD 5656.

victim or victims of the offence. These are really important provisions that allow for social considerations. Therefore, because there is already provision within the Sentencing Act, albeit provision that is tragically underused, we do not think the concerns around cultural knowledge justify retaining the defence of provocation.

The fact that s 27 of the Sentencing Act 2002 has been underutilised illustrates the courts' misunderstanding, misapplication, or non-application of a provision that requires, through whanaungatanga, the detailed exploration and application of cultural information to explain the causes of the offending.

In a significant statement in Parliament, Dame Tariana Turia spoke of the core principles of Te Ao Māori. It is the argument of this thesis that the considerations she refers to here are the ones that need to be strengthened in the criminal justice system.⁵⁵⁴

The partnerships we have with the peoples of Te Moana-nui-a-Kiwa provide us with an enduring foundation from which to tackle the global challenges that threaten the sustainability of our world—issues like climate change, the commercial overfishing of the high seas, the peril of global economics, and the rush for growth. The emphasis on manaakitanga, as observed in hospitality and generosity, on kotahitanga, the sense of purpose and unity, and on whanaungatanga, nurturing positive relationships between peoples, are all basic values that we will forever uphold. As the independent voice of Māori in Parliament, we endeavour to influence through the promotion of kaupapa such as these. We stand strong in our responsibility to protect the natural world that our ancestors left to us to look after for future generations.

⁵⁵⁴ (30 Jul 2008) 648 NZPD 17562.

4.8 Analysis of Data

The analysis of the data demonstrates the omission of the whanaungatanga process. The first data set illustrated that the current over-representation of incarcerated Māori cannot be isolated from the early colonial influences at the conflict of philosophical values among tīkanga, common law, and ordinances/legislation. Contained within Western practices are notions of colonialism, neoliberalism, institutional racism, and penal populism. Furthermore, analysis of a 19th-century human population survey provides insights into the ongoing reproduction of reactive policies that continuously resulted in social inequalities and human rights issues. The intergenerational trauma of spiritual and socio-economic injustices reflected in the maintenance and reproduction of legislation, exclusion and inclusion, did not serve the interests of Māori.

4.9 Conclusion

This chapter examined different data sources to investigate the social inequalities experienced by Māori and the overrepresentation of Māori in the prison system. The chapter also developed further understanding of whanaungatanga and how it could be applied to address the social inequities, prison statistics and their long-term impact on Māori society. The population surveys indicated the negative impact of both exclusion and inclusion on the well-being of Māori communities. The prison population statistics revealed an increasingly high rate of incarceration of Māori people and discrepancies with sentences given to non-Māori. A theme that emerged from the legislation was that many legislative decisions were determined by dogmatic ideology rather than by empirical evidence. Public policy chronology demonstrated a punitive approach which did not lead to a reduction in prison numbers. The last section of the chapter returned to the concept of whanaungatanga and its potential for healing and reducing intergenerational trauma. This section of the chapter considered the use of the term in a variety of forums including the Hansard Debates.

The next chapter will examine how New Zealand's common law and legislation impact tīkanga, including social justice and equality in the justice system.

5 Ūpoko Tuarima—Chapter Five: The Impact of New Zealand Common Law and Legislation

Ūpoko Tuawhā/Chapter Four examined the prison population statistics of Māori, the impact of early population surveys, legislation and cases, the historical circumstances that led to systemic deprivation, prison fiscal responsibility issues for society, and the current intergenerational consequences on families of sentenced parents and communities. The analysis suggests that power and control over Māori and their resources impacted their ability to maintain and reproduce whanaungatanga connections and restore balance in their communities according to traditional Māori values and practices.

This chapter will examine the impact of the New Zealand common law and legislation on tīkanga and will include a study of social justice issues and equality in the New Zealand justice system. In examining social justice issues and equality, in this chapter I use legal archaeology to help explain the socio-historical context to construct the narrative of the circumstances that led to the offending.

The first section of this chapter demonstrates the aspiration for equality in the judicial system as embodied in the New Zealand Coat of Arms. Section two explains the approach of legal archaeology. The field of legal archaeology scholarship is relevant to this study as it assists with identifying the historical, economic, and social context. Additionally, this approach helps to establish the relationship between the offence and the cultural background, as recognised in s 27 of the Sentencing Act 2002, discussed in detail in Ūpoko Tuarua/Chapter Two. Before looking at the process of abrogation of Māori rights, a summary is provided of the rights accorded by the early Declaration of Independence and the Treaty of Waitangi. The fourth section of the chapter explores early trials in New Zealand, including an analysis of the *Maketū* case to identify any possible similarities to the application of s 27 of the Sentencing Act 2002. This is followed by an analysis of systemic deprivation and the impact of the Whig Paradigm in the fifth section. The section examines the appointment of Assessors and the connection with s 27 cultural reports under s 27 of the Sentencing Act 2002. Privy Council judgments

and ordinances are discussed in the sixth section to illustrate the conflicts between *tikanga*, the common law, and legislation in section seven. Section eight looks at conflicting traditions in the criminal justice system since 1840 and concludes with an examination of the connection between *Mokomoko*⁵⁵⁵ and the *Ellis v R*⁵⁵⁶ case. The analysis then restates the proposition of *whanaungatanga* under s 27 of the Sentencing Act 2002 as an alternative.

5.1 The New Zealand Coat of Arms: The Promise of Equality Before the Law

It is worth noting that the New Zealand Coat of Arms embodies the aspirations of the New Zealand justice system, though as the following demonstrates, the reality for Māori has fallen significantly short of that aspiration.⁵⁵⁷ Notions of equality would mean equality of opportunity, equality in decision-making, relationship building, and relationship management. These features would be primary indicators of the *whanaungatanga* relationships built between Māori, Pākehā, and the justice system, and the acceptance of diverse cultural values and compromise in matters of material concern. Equality of this kind would provide a strong foundation for a fair and just justice system. Māori and Pākehā, and all stakeholders would be equals. However, analysis suggests that the foundational principle of ‘one law for all’ resulted in inequalities.⁵⁵⁸ The overwhelming number of underlying nuances in case law concerning Māori offenders necessitates a better understanding of the significance of the *whanaungatanga* process in s 27 of the Sentencing Act 2002.

Legal archaeology is relevant for several reasons. First, the construction of the narrative on the socio-historical context of a case under legal archaeology is in keeping with a s 27 cultural report under the Sentencing Act 2002. The lens of legal archaeology could help to demonstrate that *tikanga* law was the first law of Aotearoa, New Zealand, and *whanaungatanga* is a legal norm that predates the 1840

⁵⁵⁵ Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 also known as Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) 2013.

⁵⁵⁶ *Ellis v R*, above n 5.

⁵⁵⁷ *New Zealand Ministry for Culture and Heritage*, above n 275.

⁵⁵⁸ *Heath*, above n 74, at 194-212.

Treaty of Waitangi and the Western justice system.⁵⁵⁹ Second, legal archaeology could show the conflict of interest between *tikanga*, the common law and legislation and the interpretation of statutes. A historical survey and analysis can show these conflicts being played out and their impact on Māori systemic deprivation. The chapter discusses the *R v Maketū*⁵⁶⁰ and the *Takamore v Clarke*⁵⁶¹ cases to examine the tension between different philosophical and legal systems.

The different philosophical views of *tikanga*, the common law, and legislation provide challenges for *whanaungatanga* to be widely accepted and applied by the courts, which also needs to consider ss 7, 8, 9, 10, 21, 25, 26, and 27 of the Sentencing Act 2002. To assist in explaining the *whanaungatanga* process, legal archaeology has been chosen as a tool. The origins and development of legal archaeology are explained, as well as its application to this research.

5.2 Legal Archaeology: Origins and Development

Legal archaeology is a term created by law Professor Brian Simpson.⁵⁶² This groundbreaking study has sparked the interest of legal archaeology enthusiasts, creating a new group of scholars passionate about this field. Renowned legal archaeologists Threedy⁵⁶³, Novkov⁵⁶⁴, Lombardo⁵⁶⁵, Maute⁵⁶⁶, Linzer⁵⁶⁷, and Danzig⁵⁶⁸, provide a rationale for its value in uncovering what may lie behind a

⁵⁵⁹ *Mikaere*, above n 4, at 330.

⁵⁶⁰ *R v Maketū*, above n 63.

⁵⁶¹ *Takamore v Clarke*, above n 11.

⁵⁶² Brian Simpson *Leading Cases in the Common Law* (Clarendon Press, Oxford, 1995).

⁵⁶³ Debora L Threedy “Legal Archaeology: Excavating Cases, Reconstructing Context” (2005) 80 Tul L Rev 1197.

⁵⁶⁴ Julie Novkov “Legal Archaeology” (2011) 64 Political Research Quarterly 348. Novkov explains that legal archaeology empirically clarifies how the relationship among culture, legal institutions, and ideologies produces state policies.

⁵⁶⁵ Paul A Lombardo “Legal Archaeology: Recovering the Stories Behind the Cases” (2008) 36(3) Journal of Law, Medicine & Ethics 589. Lombardo asserts that the study is a critique of how the law has been applied.

⁵⁶⁶ Judith L Maute “Response: The Values of Legal Archaeology” (2000) Utah L. Rev. 223 at 224.

⁵⁶⁷ Peter Linzer “Hadley v Baxendale and the Seamless Web of Law” (2004) 11 Tex. Wesleyan L. Rev. 225.

⁵⁶⁸ Richard Danzig “Hadley v Baxendale: A Study in the Industrialization of the Law” (1975) 4 The Journal of Legal Studies 249. Danzig highlights deep-seated issues regarding case law issues of the slavery trade and refers to the historical context, connections, and influences of counsel and judges. The author’s assessment demonstrates how the rule of the case became widely accepted.

particular case. In demonstrating this process at work, Nelles⁵⁶⁹ analysed a case study to describe the historical context of an 1806 case of *Commonwealth v Pullis*,⁵⁷⁰ also known as the Philadelphia Cordwainers case. In this case, the bootmakers and shoemakers conspired to increase their wages. The adversarial relationship between employers and workers reflected common themes in other common law countries at the time, such as Australia⁵⁷¹ and Canada.⁵⁷² The findings attracted enthusiasm from legal archaeological proponents determined to recover significant cases concerning socio-economic issues.

Legal archaeologists show that excavating an individual case requires analysing and rebuilding its historical, economic, and social context.⁵⁷³ In this approach researchers investigate the background of an individual or group, the reasons for bringing a case, and what happened afterwards.⁵⁷⁴ The excavation may reveal omissions in court reports⁵⁷⁵, and prompt questioning of the accuracy of court decisions.⁵⁷⁶ A significant part of legal archaeology is that it encourages dialogue amongst legal scholars about how it can serve, help design, and assess completed projects or reports.⁵⁷⁷

Paul Lombardo asserts:⁵⁷⁸

Doing legal archaeology helps us understand the context of seminal cases more completely, and it helps students develop a healthy scepticism about the facts as stated, and constantly ask whether the

⁵⁶⁹ Walter Nelles “The First American Labor Case” (1931) 41 Yale L. J. 165 at 166.

⁵⁷⁰ *Commonwealth v Pullis* Philadelphia Mayor’s Court (1806). Bootmakers and shoemakers of Philadelphia were indicted for conspiring to raise their wages.

⁵⁷¹ *Electrolux Home Products Pty Ltd v Australian Workers’ Union* [2004] HCA 40; 221 CLR 309; 209 ALR 116; 78 ALJR 1231.

⁵⁷² *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers* 2013 SCC 62.

⁵⁷³ *Threedy*, above n 563, at 36.

⁵⁷⁴ For example, David Williams monograph on *Wi Parata v Bishop of Wellington* (1877) 3 NZJR 72 (SC); See David V Williams *A Simple Nullity?* (Auckland University Press, Auckland, 2013).

⁵⁷⁵ *Threedy*, above n 563.

⁵⁷⁶ *Lombardo*, above n 565, at 591.

⁵⁷⁷ *Threedy*, above n 563, at 1200.

⁵⁷⁸ *Lombardo*, above n 565, at 591.

court's decision was based upon assumptions about the facts which could not withstand careful scrutiny.

Similarly, Debora Threedy cites James Boyd White, who states:⁵⁷⁹

What is needed here is ... a responsible way of paying attention to what is before us: to the social and cultural context of the text, in as much fullness and detail as we can manage; to the "unsaid" that can render a simple statement complex, or ... to the nature ... of the relation between text and world. The legal archaeology perspective recognises that an examination and reconstruction of the historical, economic, and social context⁵⁸⁰ assists researchers to find any existing themes, nuances, misunderstandings, or contrasting visions of equality and rights of a case.

For the current study, legal archaeology can dig up empirical evidence of pre-colonial legal norms integral to the whanaungatanga process, which s 27 of the Sentencing Act 2002 encapsulates.

Legal archaeologists help to uncover the underlying issues in seminal cases. Simpson notes that the philosophical interest "in the casuistic processes of the common law" and the precedents established "is little furthered by the elaboration of imaginative abstract theories, which have little connection with anything but themselves."⁵⁸¹ Simpson criticises the anti-empirical tradition of academic law and legal theory and suggests that more can be discovered from the study of cases than what is provided by law reports.⁵⁸²

The rationale for legal archaeology is elaborated on by other proponents of the approach. Novkov asserts that legal archaeology empirically clarifies how the relationships among cultures, legal institutions, and ideologies produce state

⁵⁷⁹ Cited in Debora Threedy, James Boyd White "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life" in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 107,122 (1985) 82 *Michigan Law Review* 1669.

⁵⁸⁰ *Threedy*, above n 563.

⁵⁸¹ *Simpson*, above n 562, at vii.

⁵⁸² Above, n 562.

policies.⁵⁸³ Lombardo questions whether the court decisions are based on assumptions about the facts⁵⁸⁴ as there is too much reliance on those facts.⁵⁸⁵ Maute⁵⁸⁶ and Linzer⁵⁸⁷ refer to the historical context, connections, and influences of counsel and judges, and question whether a particular decision should continue to apply in the modern context. The relationships between judges and juries⁵⁸⁸ illustrate the acceptance of the rule of the case.

A pertinent study about legal archaeology is Lewellyn and Hoebel's research on the conflict between common law and the legal/non-legal interests of the Cheyenne people.⁵⁸⁹ They challenged the common law and the need for reform after comparing it with Cheyenne law to define an area of control for the Cheyenne. The Navajo court system⁵⁹⁰ uses traditional policies to address contemporary issues, distinguishing it from other court systems.⁵⁹¹ In another instance, the tort remedy case study of *United States v Hatahley*⁵⁹² illustrates past injustices. The case relates to a group of individual Navajos who sued under the Federal Tort Claims Act 1946. This was for the destruction of over a hundred horses and burros.⁵⁹³

The author explains:⁵⁹⁴

The Hatahley case involves ... racial conflict. Moreover, it is an utterly enthralling and practically unknown story and one that deserves to be better known. The case has much to teach us about how societal racism infects, in indirect and subtle ways as well as in obvious ways, the

⁵⁸³ Novkov, above n 564.

⁵⁸⁴ Lombardo, above n 565, at 591.

⁵⁸⁵ Above, n 565.

⁵⁸⁶ Maute, above n 566, at 245.

⁵⁸⁷ Linzer, above n 567.

⁵⁸⁸ Danzig, above n 568, at 250.

⁵⁸⁹ Karl N Llewellyn and Edward Adamson Hoebel *The Cheyenne Way* (University of Oklahoma Press, Norman, 1941).

⁵⁹⁰ Daniel L Lowery "Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992" (1993) 18 American Indian Law Review 2, 379-446.

⁵⁹¹ Raymond D Austin and Robert A Williams *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota, Minneapolis, 2009).

⁵⁹² *United States v Hatahley* 257 F 2d 920 (10th Cir 1958) at 925.

⁵⁹³ Debora L Threedy "United States v Hatahley: A Legal Archaeology Case Study in Law and Racial Conflict" (2009) 34 American Indian Law Review 1 at 3.

⁵⁹⁴ *Ellis v R*, above, at 5.

administration of justice. At the same time, the case shows that law can be a tool, albeit a flawed and compromised one, in the fight to combat injustice arising from that racism.

The Supreme Court reports were cited the most frequently in more than two hundred lower-court opinions and nearly one hundred secondary sources.⁵⁹⁵ Threedy concludes that the *Hatahley* case is about societal racism that affects the administration of justice⁵⁹⁶ and that the Anglo-American remedies law is incompatible with Native Indian culture.⁵⁹⁷ Therefore, communal harm cannot be considered a valid reason for damages, even if cultural differences exist. The work challenges the notion of communal well-being by highlighting Native Indian connections to animals. The Anglo-American attitude, which ignores this connection or whanaungatanga, turns community well-being upside down.

Legal archaeology provides fertile ground for understanding court relationships. It supports the inquiry of this study into the potential application of whanaungatanga to s 27 of the Sentencing Act 2002. Legal archaeology extends beyond judicial cases. It digs up relevant information for future policy considerations and can help restore the whanaungatanga process. Although legal archaeology is a non-Indigenous paradigm, legal archaeology resembles cultural background reports. The legal norm of whanaungatanga or relatedness highlights individual social, economic, and cultural experiences. This paradigm focuses on a holistic approach that captures the essence of individual life and identity. The approach is beneficial in criminal cases as it provides valuable insights into the circumstances.

5.2.1 Summary

Legal archaeology is a field of study that involves delving into the historical, economic, and social aspects of individual cases to gain a better understanding of

⁵⁹⁵ *Threedy*, above n 593, at 4.

⁵⁹⁶ *Ellis v R*, above, at 5.

⁵⁹⁷ The District Court judge was not impartial and failed to apply an equal award to each plaintiff.

their context. Legal archaeologists aim to reconstruct the circumstances associated with a case and shed light on factors that influenced its outcome.

In the realm of criminal law, legal archaeology can play a significant role in interpreting and applying legislation. One such example is its relationship to whanaungatanga under s 27 of the Sentencing Act 2002 in Aotearoa, New Zealand. Whanaungatanga is a concept that highlights the significance of familial connections, relationships, and interdependence within a community. Section 27 of the Sentencing Act 2002 acknowledges whanaungatanga in the sentencing process. It requires the courts to consider the impact of the offender's cultural background and their connection to their community when determining an appropriate sentence. Legal archaeology can assist by examining the historical, economic, and social factors influencing the offender's upbringing and community ties.

Legal archaeologists can gain valuable insights into an offender's cultural background, community dynamics, and personal circumstances. This information is essential to informing the court's decision on the appropriate sentence. Legal archaeology in s 27 of the Sentencing Act 2002 means understanding the historical, economic, and social context of the offender's behaviour and illustrating the nexus between the offence and the cultural background.⁵⁹⁸ A legal archaeologist is engaged in a process which resembles that undertaken by the writers of cultural reports.

Cultural report writers can help judges understand the impact of systemic deprivation and the loss of whanaungatanga on an offender, contributing to a more culturally sensitive sentencing process. Likewise, legal archaeology illustrates how the dominant system has functioned in relation to the experiences and philosophies of Indigenous communities.⁵⁹⁹ In this vein, the current research aims to illuminate the historical, social, and economic factors surrounding the early trials in New

⁵⁹⁸ See Appendix 7: Judge Response "F", Judge Response "G" and Judge Response "H".

⁵⁹⁹ Gordon Christie, "Indigenous Legal Theory" in B Richardson, S Imai, K McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Portland, 2009) at 231.

Zealand and how the intersection of different perspectives revealed a clash between tikanga and the common law. The research also explores the perceptions of the court on tikanga.

Legal archaeology provides a significant lens for revealing relevant messages within the context of a justice system. The study of legal archaeology provides scope and depth for exploring and unpacking themes, nuances, misunderstandings, and contrasting visions of equality and rights.

Legal archaeology enables an Indigenous perspective which allows for a jurisprudential interrogation of how the criminal justice system would look for all members of the New Zealand population. In summary, legal archaeology is pertinent to s 27 of the Sentencing Act 2002. It is crucial to consider the significance of culture and its impact on communities while determining the sentence. There should be options that promote healing and reconciliation rather than punishment and should be consistent with the principles of interrelatedness and connectedness central to the functioning of the communities. Moreover, the importance of accommodating culturally sensitive solutions and restorative justice strategies would align with the principles of whanaungatanga law.

5.3 He Whakaputanga o Rangatiratanga o Nu Tireni 1835/Te Tiriti o Waitangi 1840: The Declaration of Independence 1835/Treaty of Waitangi 1840

It is helpful to highlight the rights of Māori established in these early declarations and the Treaty of Waitangi to see how these rights were subsequently abrogated. Before colonial domination, recognition of Māori rights and governance had been established by Rangatira. Before 1835, the lawlessness of British subjects in New Zealand and the trade requirement of a legal flag for Māori ships were concerns for Māori chiefs. He Whakaputanga o Rangatiratanga o Nu Tireni, the 1835 Declaration of Independence, became an internationally recorded constitution for Māori to govern themselves and enact laws in an independent state protected by King William IV. Based on the presumption that Māori ceded sovereignty, the Te

Tiriti o Waitangi/Treaty of Waitangi protects the Declaration of Independence 1835.⁶⁰⁰ (These have been alluded to in Ūpoko Tuatoru/Chapter Three).

King William IV recognised the Declaration in a letter from Lord Glenelg following consideration of the Declaration by the House of Lords on May 25, 1836. Lord Glenelg wrote:⁶⁰¹

I have received a letter from Mr. Busby, enclosing a copy of a Declaration made by the chiefs of the Northern parts of New Zealand, setting forth the Independence of their country, and declaring the Union of their respective tribes into one State, under the designation of The United Tribes of New Zealand.

I perceive that the chiefs at the same time came to the resolution to send a copy of their Declaration to His Majesty, to thank him for his acknowledgment of their Flag, and to entreat that, in return for the friendship and protection which they have shown, and are prepared to show, to such British subjects as have settled in their country or resorted to its shores for the purposes of trade, His Majesty will continue to be the parent of their infant State, and its Protector from all attempts on its independence.

With reference to the desire which the chiefs have expressed on this occasion to maintain a good understanding with His Majesty's subjects, it will be proper that they should be assured, in His Majesty's name, that He will not fail to avail himself of every opportunity of showing his goodwill, and of affording to those chiefs such support and protection as may be consistent with a due regard to the just rights of others, and to the interests of His Majesty's subjects.

⁶⁰⁰ *Waitangi Tribunal*, above n 169.

⁶⁰¹ Lord Glenelg, in a letter to Major-General Sir Richard Bourke, Governor of New South Wales, 25 May 1836.

The feudal title⁶⁰² and fiduciary duties⁶⁰³ indicate the international recognition given to the Declaration of Independence 1835 by the Crown and King William IV⁶⁰⁴ and the purpose of Te Tiriti o Waitangi, the Treaty of Waitangi.

Te Tiriti o Waitangi/Treaty of Waitangi

The preamble of the Treaty of Waitangi guaranteed Māori asset protection. There was an obligation for the Crown to protect Māori as prisoners escaped from Australian prison colonies and other immigrant settlers arrived with them. The Treaty of Waitangi ensured Māori the right to have their laws, courts, and land protected under Article 2. It also promised Māori compensation for any losses they might suffer due to Crown actions. In spite of the recognition of Māori rights and the protection offered by the Treaty of Waitangi, there were early indicators of conflicting philosophies which were to gradually undermine Māori. For example, since the Crown had no jurisdiction before 1840, Māori usage rights based on oral tradition clashed with paperwork titles.

Section 37 of Queen Victoria Royal Charter 1840

Another document at this point in time which was intended to guarantee Māori rights was s 37 of Queen Victoria's Royal Charter of November 1840, which stated that:⁶⁰⁵

... nothing in the said charter contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony to the actual-occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony then actually occupied or enjoyed by such natives.

⁶⁰² The Standing orders were made by Lord Glenelg to Major General Bourke to protect the Māori people by military might.

⁶⁰³ The Letters Patent were issued by Lord Normanby to Lieutenant Consul William Hobson in 1839.

⁶⁰⁴ The signatories sent a copy of the document to King William IV requesting him to act as the protector of the new infant state.

⁶⁰⁵ Section 37 of Queen Victoria's Royal Charter dated 16 November 1840.

However, the legal protections were undermined by practical realities. The guarantees in the charter were rapidly abrogated by practices. In 1841, Māori were taxed 20 pounds per year for buildings made of raupo, nikau, toetoe, wiwi, kakaho, straw, or thatch of any description.⁶⁰⁶ These homes were argued to be a fire risk to nearby homes, a factor which took precedence over Māori living conditions. The tax law demonstrates deliberate division, exclusion, and the colonial failure to adhere to the Queens Royal Charter of 1840. In imposing a tax on Māori customary law, it paved the way for future patterns of oppressive legislation that seriously marginalised the psychological well-being of Māori kinship communities. This kind of legislation overshadowed tīkanga or Māori customary laws which dictated the behaviour and kaitiaki roles on Māori customary land.

5.4 Early New Zealand Trials: The Maketū case

This case provides an example of the contestation between different systems and philosophies in the legal arena. The *R v Maketū*⁶⁰⁷ case primarily illustrates the common law debate about which tīkanga laws the Western system would tolerate or abrogate. Consequently, the trial was dependent on whether Māori would accept British criminal justice.⁶⁰⁸ The case also involved the presumption of innocence and the right to silence.⁶⁰⁹

According to recently retired Chief Justice Sian Elias, Chief Justice Martin wanted to prove to Māori the virtues of British justice and its superiority over the Māori system of kin responsibility:⁶¹⁰ Māori were impressed by the ambiance of the court process, the ‘calmness’ and care in the process of proof in public before a judge and

⁶⁰⁶ Raupo Houses 1842 5 Vict 17.

2. On a day to be named in such Proclamation, not being less than Tax on raupo six calendar months from the date thereof, and on the same day in every succeeding year, there shall be levied in respect of every building constructed wholly or in part of raupo, nikau, toetoe, wiwi, kakaho, straw, or thatch of any description, and situate within the boundaries so defined, the sum of twenty pounds.

⁶⁰⁷ *R v Maketū*, above n 63.

⁶⁰⁸ Sian Elias *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge, Cambridge University Press, 2018) at 3.

⁶⁰⁹ Above, n 608, at 55.

⁶¹⁰ *Elias*, above n 608, at 105-106.

jury.”⁶¹¹ Although Chief Justice Sian Elias stated that “equal treatment was demonstrated under the law,”⁶¹² it was not equal in its effects on the lives of Māori impacted by colonisation and legislation. As opposed to the whanaungatanga process, the state replaced it with a “public forum for determination by a jury of twelve” and “what was ‘fair and just’ was done between prosecutive and defence.”⁶¹³

5.4.1 Background Information on Maketū

The background information of *Maketū*’s case is interesting when seen in the light of s 27 cultural reports of the Sentencing Act 2002. The analysis illustrates the connections that can be made by tikanga law practitioners and cultural report writers or speakers to draw on the law of whanaungatanga and provide the required information for assessment.

In this case, Maketū Wharetotara had executed five people on Motuarohia Island (Robertson Island, Bay of Islands). One was a Ngāpuhi chief’s granddaughter.⁶¹⁴ Mrs Robertson, a widow, employed Maketū to work on her farm. Also living on the island were her two children and a servant named Thomas Bull. Thomas Bull continually ill-treated Maketū. Bull’s actions were perceived as an insult to Maketū’s mana.⁶¹⁵ Consequently, Maketū exacted *utu* for the *hara* Thomas Bull committed. The execution of Rewa’s granddaughter led to inter-tribal hostility. After a hui meeting at Paihia in 1841, Ngāpuhi leaders Pomare II, Waikato, Tamati Waka Nene, Rewa, Ruhe, and others dissociated themselves from Maketū’s action. To avoid war with Rewa, Ruhe surrendered his son.

The resolution was a result of Ngāpuhi leaders conducting a lengthy, heated debate as to whether Maketū should be tried in a Pākehā court system.⁶¹⁶ The chiefs iterated

⁶¹¹ Above, n 608.

⁶¹² Above, n 608.

⁶¹³ Above, n 608.

⁶¹⁴ *R v Maketū*, above n 63.

⁶¹⁵ Maurice Lennard *Motuarohia: An Island in the Bay of Islands, Sometime Known as Robertson Island* (Pelorus Press, Auckland, 1959) at 18.

⁶¹⁶ Paul Moon “Maketū’s Execution and the Extension of British Sovereignty in New Zealand” (2013) 6 *Te Kaharoa*.

they had “no mischievous intentions towards the Europeans” and that Maketū’s actions were of his own accord.⁶¹⁷ Despite the chief’s deliberations, the courts made no distinction between the jurisdiction over the settler victims and Rewa’s granddaughter.⁶¹⁸

During Maketū’s trial, Māori witnesses were asked whether they were Christians, and if they were, they were expected to kiss the Bible. However, the rule set down in the English decision of *Omichund v Barker*⁶¹⁹ meant that pagan evidence was permissible if a witness was not Christian. The Pākehā understanding of Christianity was different from how Māori acknowledged the several gods through Te Ao Māori, the Māori view of the world. For Māori, there were many gods, for example, Tawhiri-matea who represented the wind and respect for the environment. Māori flexibility in understanding Christianity illustrates a bi-cultural understanding of religion and karakia. However, it did not have much influence over the Christian belief system.

Māori first encountered Christianity through a speech delivered by Reverend Samuel Marsden in the Bay of Islands in 1814.⁶²⁰ As a result, the Courts became a common ground for ushering in the ‘swearing on the Bible’ to commit one, to tell the truth, or face harsh consequences.

From the perspective of legal archaeology, which identifies the omissions from official court reports,⁶²¹ it is illuminating that missionary George Clarke Junior noted that Maketū and his whānau may have suffered from mental health issues.⁶²² There was the presumption that asylums did not accommodate Māori.⁶²³ The chiefs’ dissociation from Maketū’s action did not necessarily mean they were handing over

⁶¹⁷ Above, n 616.

⁶¹⁸ Cyril Guy Lennard *Sir William Martin; The Life of the First Chief Justice in New Zealand* (Whitcombe and Tombs, Christchurch, 1961) at 15–22.

⁶¹⁹ *Omichund v Barker* (1744) Willes 538, 125 ER 1310.

⁶²⁰ JB Marsden, James Drummond *Life and Work of Samuel Marsden* (Whitcombe and Tombs, Christchurch, 1913).

⁶²¹ *Threedy*, above n 563.

⁶²² George Clarke *Notes on Early Life in New Zealand* (Walch, Hobart, 1903) at 41.

⁶²³ New Zealand Ministry for Culture and Heritage Te Manatu Taonga “Lunatic asylums, 1840s to 1900s.” Available at www.teara.govt.nz/en/mental-health-services/page-2.

their rangatiratanga to the British justice system. In a modern context, the omission of official reports and background information aligns with the need to rectify this through s 27 of the Sentencing Act 2002.

Jackson argues that rangatiratanga (sovereignty) was transformed into a nodal discourse and subsumed into various smaller discussions.⁶²⁴ As an example, the court officials presumed that the chiefs' resolution (not written by them) was a way of upholding British sovereignty by detribalising the mana of Rangatira (chiefs) without their consent.⁶²⁵ Therefore, the state would control the justice system and presumably provide equal treatment for its British subjects. This loss of control by Māori has led to the emergence of concepts and ideas around sovereignty, such as self-determination, self-governance, and autonomy. These discourses have become a cornerstone of Māori political identity and have shaped Māori strategies and approaches to land and resource management.

The challenge for Māori leadership is transferring values and practices into the court system that society accepts as valid ways of including tikanga under s 27 of the Sentencing Act 2002. If we imagine whanaungatanga as a transformative tool for understanding relationships, society may get closer to equality and access to justice. The more information the judge can receive about the defendant, and depending on the seriousness of the offence, the judge may apply s 25 of the Sentencing Act 2002 to help reduce the length of the sentence.

The question of fairness in the implementation of British justice also arose in the case of Richard Cook. Māori contrasted the execution of Maketū with the failure of British justice to convict and execute Richard Cook for the murder of Te Rauparaha's niece, Rangihaua Kuika, at Wairau in April 1843.⁶²⁶ Despite overwhelming evidence of guilt, Samuel Ironside describes how the disqualification of Cook's Māori wife, Kataraina as a chief prosecution witness against her husband

⁶²⁴ Anne-Marie Jackson "A discursive analysis of rangatiratanga in a Māori fisheries context" (2013) MAI Journal.

⁶²⁵ Elias, above n 608, at 3.

⁶²⁶ Hilary Mitchell and Maui John Mitchell *Te Tau ihu o te Waka: A History of Māori of Nelson and Marlborough* (Huia Publishers, Wellington, 2007) at 83.

created an injustice. Consequently, Cook was released.⁶²⁷ Yet, an 1840 trial occurred in a church concerning a Māori offender's alleged execution of Patrick Rooney.⁶²⁸ The outcome triggered ongoing unrest, and the Wairau incident occurred the same year. According to Ironside, Rangihaeata sought utu (revenge) because the court failed to punish Cook.⁶²⁹

The conduct of these trials can be compared with several instances of so-called trials conducted by Busby in the 1830's and noted by Ward.⁶³⁰ The communities were involved in an informal setting which was not so intimidating. In these gatherings, Busby gained the confidence of the people and acquired knowledge of the area. In another instance, in 1840, a trial of a "native" was conducted in a church in Kororariki [sic].⁶³¹ These examples suggest the continuity of the whanaungatanga cultural practices that illustrate the legal norm operating before the introduction of the colonial judicial system.

The execution of Maketū led the colonial government to believe that the extension of British law into Māori communities was made possible by the resolution endorsed and signed by around twenty chiefs in December 1841.⁶³² In comparison, fast forward to the 21st century, the connection between the historical context and the current recognition of tikanga as part of the common law⁶³³ indicates the shift from the colonial era of controlling the application of tikanga to how the common law, state law and Parliament engage with tikanga.

5.4.2 Further Early Trials: Judicial Bias

Potentially, application of whanaungatanga in sentencing may help to ameliorate judicial bias. In an historical example, the notion of judicial bias against Māori as

⁶²⁷ Above, n 626.

⁶²⁸ "Colonial News" (13 June 1840) 10 *New Zealand Gazette* 2.

⁶²⁹ WA Chambers *Samuel Ironside in New Zealand, 1839-1858* (Ray Richards Publisher, Auckland, New Zealand) at 137-8.

⁶³⁰ Ward, above n 484, at 26; Cyril Guy Lennard *Sir William Martin; the life of the first Chief Justice on New Zealand* (Whitcombe and Tombs, Christchurch, NZ, 1961) at 10.

⁶³¹ *New Zealand Gazette and Wellington Spectator*, Volume I, Issue 10, 13 June 1840, at 2.

⁶³² *New Zealand Herald and Auckland Gazette* (19 January 1842) at 2.

⁶³³ *Ellis v R*, above n 5.

witnesses is evident in the 1844 larceny case of *R v John McCarthy*.⁶³⁴ Under the Unsworn Testimony Ordinance,⁶³⁵ a Māori witness who had insufficient Christian religious conviction could provide evidence without taking the oath. However, it was decided that two out of four Māori witnesses could not give evidence because they shrugged their shoulders. The controversial ruling of Chapman J sidestepped a 1744 precedent held in *Omichund v Barker*.⁶³⁶ That case permitted pagan evidence rules despite the absence of religious persuasion, a principle subsequently followed by Martin CJ in *R v Maketū*.⁶³⁷ Māori could hardly have agreed that the principles and practices developed by the courts were ‘fair and just’ between prosecution and defence. It would have been inconceivable at the time for anyone to consider testing whether the legal practices reflected equality, access to justice, human rights, and social justice under the Treaty of Waitangi.

In the case of *R v Rangitapiripiri* in 1847,⁶³⁸ the offender was on trial for drowning Kopereme. Rangitapiripiri was acquitted because this was an inter se case and consequently Māori jurisdiction prevailed. Despite Chapman J’s efforts to assert British criminal law, it was ultimately recognised that nothing could challenge *utu*

⁶³⁴ *R v John McCarthy* NZLostC 39 (17 April 1844) Supreme Court, Wellington, Chapman J. McCarthy was indicted for larceny. The case involved four potential Māori witnesses, which was determined prior to the passing of the Unsworn Testimony Ordinance 1844 7 Vict 16. The Ordinance allowed Māori to give evidence without taking the oath where they had insufficient religious conviction to come within the common law rules. The case highlights Chapman J’s comments on the ‘pagan’ or ‘infidel’ evidence rule. Two witnesses confirmed they were Christians while the other two were reported to have shrugged their shoulders and replied with “au” or “aua” which means, “I don’t know”, and were excluded from giving evidence. Yet, regardless of the yet-to-be-established Ordinance, Chapman J’s controversial ruling sidestepped a 1744 precedent held in *Omichund v Barker*, above n 426. Pagan evidence rules were permitted despite the absence of religious persuasion; that which was followed by Martin CJ in *R v Maketū* SC Auckland, 1 March 1842. Available at www.victoria.ac.nz/law/nzlostcases/. See also Damen Ward “Witnessing Power: Imperial Policy, Colonial Government and Indigenous Testimony in South Australia and New Zealand, c 1834-58” in Shaunnagh Dorsett, Ian Hunter *Law and Politics in British Colonial Thought*.

⁶³⁵ Unsworn Testimony Ordinance 1844 7 Vict 16.

⁶³⁶ *Omichund v Barker*, above n 426.

⁶³⁷ *R v Maketū*, above n 63.

⁶³⁸ *R v Rangitapiripiri* SC Wellington 1 December 1847. Available at www.wgtn.ac.nz/law/nzlostcases/search_cases.aspx.

in *inter se* cases.⁶³⁹ Chapman J noted for himself, “this only indicated that as between the settlers, or the settlers and Māori that English law should be applied.”⁶⁴⁰

Judicial bias prevailed in native districts, although enforced against both Māori and Pākehā. For example, in 1857, Governor Gore Browne, in a memorandum to his Ministers, opined that “the ‘Natives’ required a code of laws adapted to their present condition and circumstances which would be binding on both Māori and Pākehā residing in native districts”.⁶⁴¹ The code of laws ranged from “drunkenness and violence by Europeans,” the “use of that peculiar form of swearing considered so heinous by the Natives”, “the responsibility of relatives for offences committed by individuals without their knowledge or consent“ to “prohibition of Tapu except in very special cases”.⁶⁴² The codes illustrate the erosion of *tikanga* practices and the repetitive patterns and utilisation of nodal discourse that isolated the tribal leaders knowledge and skills of the values and practices of the *whanaungatanga* process.

5.5 The Origins of Māori Systemic Deprivation and Loss of Cultural Norms

This section examines the early relationships between successive monarchs, the chiefs, the colonial officials, and successive governments to understand the history of and reasons for Māori systemic deprivation, and correspondingly to show why Māori offenders do not benefit equally in the court system. As part of this process, it will be seen how legislation, colonial attitudes, and successive governments repudiated decisions made by the English Privy Council, Royal Orders and Standing Orders. Consequently, these actions removed power and control from Māori communities.

Legislation was enacted which overrode the rights available to Māori based on the common law. As Māori customary land evoked strong emotions among Māori who

⁶³⁹ [H.S. Chapman] Notebook entitled Criminal Trials No. 5 1847–49, Hocken Library, Dunedin (HL), MS-0411/013, entry for Wed. 1 Dec. 1847, 23–36.

⁶⁴⁰ Above, n 639.

⁶⁴¹ *Benton*, above n 145, at 74.

⁶⁴² Cited in Richard Benton, Alex Frame and Paul Ed T. Gore Browne, ‘Correspondence Explanatory of the Relations between His Excellency and His Responsible Advisers in reference to Native Affairs’, AJHR 1858, E-5, at 7.

lived upon it,⁶⁴³ the introduction of the Māori Lands Act 1862 and the Native Rights Act 1865 severely disrupted and psychologically impacted Māori spiritual and cultural ties with the whenua (land). Only legislation could achieve the end goal of separating the kinship lifeblood of customary values and practices on Māori customary lands⁶⁴⁴ and accepting laws foreign to their own. The common law recognised the native title, but the New Zealand government refused to accept that its unreviewable prerogative power could not extinguish it.

The development of non-Māori institutions became dominant and has been one of the “recurring cycles of conflict and tension against a backdrop of ongoing deprivation.”⁶⁴⁵ Land alienation and the shutdown of Māori socio-economic corporate existence, which led to urban migration and assimilation policies, became the taproot of Māori dependency on the state and increased incarceration rates after the socio-economic and “cultural fabric of the Māori” was destroyed.⁶⁴⁶

As noted previously, some of those in colonial society explicitly felt there was a need to eradicate traditional Māori lifestyles and norms.⁶⁴⁷ William Rees noted the deliberate and ongoing destruction of well-established communal processes:⁶⁴⁸

Every tribe was a quasi-corporation. It needed only to reduce to law that old system of representative action practiced by the chiefs, and the very safest and easiest mode of corporate dealing could have been obtained. So simple a plan was treated with contempt. The tribal existence was dissolved into its component parts. The work, which we have, with so much care, been doing amongst ourselves for centuries, namely the binding together of individuals in corporations, we deliberately undid in our government of the Māoris. Happily, there is yet an opportunity to retrace our steps, to get back into the old paths.

⁶⁴³ *Mead*, above n 26, at 40.

⁶⁴⁴ *Boast*, above n 421, at 66.

⁶⁴⁵ *Rangihau*, above n 549, at 57.

⁶⁴⁶ *Above*, n 549.

⁶⁴⁷ *Above*, n 549, at 58.

⁶⁴⁸ *Rees*, above n 135.

The diminution of Māori communal processes was part of a broader philosophy of assimilation, which led to further inequalities and breaches of the Treaty of Waitangi. The ongoing deprivation of Māori continued in parallel with colonial ambitions.

The drive toward assimilation was commented on by Rangihau:⁶⁴⁹

As the deprivation of the Māori became unacceptably obvious, solutions were sought in the “modernisation” of a backward people in need of “development”. Policies aimed at redefining land ownership, converting a communal culture to an individualistic one, fostering new forms of leadership and educating Māori children out of their essential Māoriness were rooted in the concept of “assimilation”. The underlying idea of assimilation was that Pakeha culture and ways were “modern” and “forward-looking” and therefore superior as compared with “traditional” Māori ways which were no longer “relevant.”

Assimilation policies created more unequal rights and breaches of the Treaty of Waitangi principles of participation, protection, and partnership. It explains, for example, why many Māori have limited or no knowledge of their whakapapa, or the location of their marae. It also brought about the notion that what was not worth knowing at school, such as cultural knowledge, was not worth knowing.

5.5.1 The Whig Paradigm and its Impact on Māori Customary Law

From a legal perspective, the common law was given precedence over other laws. According to Paul McHugh, this was associated with the Whig paradigm that ultimately “sidesteps the question of constitutional origins through the presumptive force of classical common law notions of custom and immemoriality.”⁶⁵⁰ The paradigm “draws on the common law to provide a legitimating account of

⁶⁴⁹ Rangihau, above n 549, at 57.

⁶⁵⁰ Paul McHugh “The Historiography of New Zealand's Constitution” in Philip A Joseph *Essays on the Constitution* (Brookers, Wellington, 1995) at 346.

historically validated, contemporary constitutional form”⁶⁵¹ and deliberately buries Māori constitutional rights.⁶⁵² Since the New Zealand Parliament acquired full powers in 1947, the New Zealand Constitution became identical in content to the British.⁶⁵³ McHugh argues that their “inter-temporal” law views are erroneous and have no substantive claim.⁶⁵⁴ The Whig view that the Treaty of Waitangi is not valid because, “in 1839-1840, international law deemed, as it still does, that savage tribes are incapable of exercising sovereignty”⁶⁵⁵ purposely steers clear from questions of origin.⁶⁵⁶

The argument that the Treaty of Waitangi cannot be a founding document as it lacks juridical status reflects the “constitutional histories of New Zealand that uniformly re-enact the Whig Dream.”⁶⁵⁷ The re-enactment of the Whig caveat overrides aboriginal rights to connect to traditional tribal societies’ sources of origin, handing over those rights to destined “classical notions of immemoriality.”⁶⁵⁸ The mechanism allows the “Commonwealth Courts to construct a contemporary doctrine of aboriginal rights whilst professing to do no more than declare principles which have always been immanent in Crown title relations.”⁶⁵⁹

The Whig paradigm espoused by earlier generations⁶⁶⁰ remains in Indigenous legal memory with its view that aboriginal rights did not have an inalienable existence beyond British rule. The Whig paradigm and its perceptions of aboriginal rights is entrenched in national constitutional history to “reflect the epistemological properties of the common law.”⁶⁶¹

⁶⁵¹ Above, n 650.

⁶⁵² Above, n 650, at 348.

⁶⁵³ John Robson *New Zealand: the Development of its Laws and Constitution* (Stevens, London, 1954).

⁶⁵⁴ *McHugh*, above n 650, at 348.

⁶⁵⁵ Above, n 650.

⁶⁵⁶ Above, n 650, at 349.

⁶⁵⁷ Above, n 650, at 353.

⁶⁵⁸ Above, n 650, at 354.

⁶⁵⁹ Above, n 650, at 357.

⁶⁶⁰ Above, n 650, at 360.

⁶⁶¹ Above n 650, at 358.

The result was ongoing systemic deprivation for Māori. Although the British Government was eager to uphold Māori rights, colonial officials in New Zealand had different plans. For example, the New Zealand Constitution Act 1846 limited the power of colonial officials from governing over Māori due to Article 2 of the Treaty of Waitangi. However, Governor George Grey suspended the Act. The minority population of 13,000 settlers could not govern in the interests of the majority Māori population.⁶⁶² Aboriginal title was recognised in *R v Symonds*⁶⁶³ but overturned in *Wi Parata v Bishop of Wellington*.⁶⁶⁴ Māori did not have property rights due to a lack of recognition of their customary law. The loss of recognition of their law, lore, and resources, including their land, caused intergenerational trauma. This environment fostered imbalance, inequality, and insecurity.

New Zealand Constitution Act 1852

The New Zealand Constitution Act 1852 restrained colonial officials from governing Māori, as settlers were not allowed to purchase Māori customary lands. Preserved by Article 2 of the Treaty of Waitangi, the Act did not extinguish Māori land title. Section 71 of the New Zealand Constitution of 1852 states:

... 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, 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

⁶⁶² Ian Pool and Tahu Kukutai “Taupori Māori – Māori population change – Population changes, 1769-1840 Te Ara Encyclopedia of New Zealand. Available at <https://teara.govt.nz/en/taupori-maori-maori-population-change/page-1>.

⁶⁶³ *R v Symonds* (1847) NZPCC 387 (SC): Joseph, above n 13, at 72.

⁶⁶⁴ *Williams*, above n 574.

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.

Accepted ⁶⁶⁵ Māori customary laws and practices in native districts would deal with *inter se* concerns.⁶⁶⁶ Her Majesty the Queen issued Letters Patent for international recognition of those laws. The laws could be incorporated into the laws of England across the Commonwealth of the United Kingdom and enforced in Aotearoa New Zealand.

1858 Native Districts Regulations Act and the Native Circuit Courts Act

The significance of appointing native assessors indicated a commitment by the government to strengthen the whanaungatanga relationships, while simultaneously diminishing through the legislation the customary right for Māori to live on their land based on tīkanga. By maintaining and reproducing oppressive legislation, these mechanisms contributed to systemic deprivation. This departure from Māori customary title recognition is evident in Privy Council judgments.⁶⁶⁷ Under the Native Districts Regulations Act 1858, Māori governments could appoint native assessors to create jurisdiction in summary proceedings as long as the native title remained unextinguished. Accordingly, the Native Circuit Courts Act 1858 provided for one magistrate and one native assessor. Number “V.—*Appointment and Jurisdiction of Native Assessors*” of the Native Circuit Courts Act 1858 states:⁶⁶⁸

XXX1. Appointment of Assessors.

XXX11. Assessors Court.

XXX111. Powers of Assessors’ Court.

⁶⁶⁵ New Zealand Constitution Act 1846 (UK) 9 & 10 Vict c 103, ss 2 and 11.

⁶⁶⁶ Section 10 of the New Zealand Constitution Act 1846 (UK) 9 & 10 Vict c 103 is similar to Governor FitzRoy’s 1844 Ordinance.

⁶⁶⁷ For example, the Native Lands Court Kauwaeranga Judgment Chief Judge Fenton. Daily Southern Cross, Volume XXVI, Issues 4158, 10 December 1870.

⁶⁶⁸ Native Circuit Courts Act 1858 (21 and 22 Victoriae 1858 No 42).

These provisions are reflected in s 32 of Te Ture Whenua Māori, Māori Land Act 1993. Section IV of the Native Circuit Courts Act 1858 states:⁶⁶⁹

IV. Provided that Lands granted by the Crown to any person of the Native Race, or to any person or Body Politic in trust for religious educational, or charitable purposes or in respect of any purchase made prior to the proclamation of the Queen's Sovereignty, or specially granted as Homesteads to persons of European Race domiciled in Native districts, shall, where the same respectively abut upon lands over which the Native title has not been extinguished be deemed for the purposes of this Act to be lands over which the Native title has not been extinguished, and may accordingly be included within any such District as aforesaid.

The unequal participation of native assessors⁶⁷⁰ or cultural ambassadors led to the first intake of Māori prisoners.⁶⁷¹ The analysis suggests that systemic deprivation grew in part from the disconnection Māori experienced in the justice system. The growing problematic trends reveal a history of excluding Māori in decision-making.

Circling back to the promise of equality in the New Zealand Coat of Arms, Māori did not have equal court representation to challenge the society's understanding of what it means to be involved in an equitable justice system. Prima facie, the involvement of Māori in the administration of their new roles did not take effect immediately. By the 1860s, frustration grew over the controversial court debates about Māori customary title. It could be argued that the only modern legacy of the early introduction of native assessors are cultural report writers or speakers.

Although the overall pattern was one of systemic deprivation, there were a few early judgments that acknowledged Māori rights over land and customs. As mentioned previously, Māori have a strong relationship with ancestral land. The controversy

⁶⁶⁹ Above, n 668.

⁶⁷⁰ Above, n 668.

⁶⁷¹ See Appendix 1: Graph 1.

of whether native title rights existed was confirmed by the common law but not until 1870 in the *Kauwaeranga* judgment of Fenton J who stated that:⁶⁷²

... the doctrines of feudalism can have no application to the lands of New Zealand, and that neither English law nor the Civil Law can be allowed to influence the rights of Māoris to lands which, in the words of the statute, they own according to their customs and usages.

Similarly, in *Nireaha Tamaki v Baker*,⁶⁷³ Lord Davey concluded that the unreviewable prerogative power of the Crown grant did not extinguish the native title. This position recognised that Māori customary laws on customary lands pre-date the arrival of the second law. Aboriginal title was also recognised in *R v Symonds*.⁶⁷⁴

Despite these more positive examples, aboriginal title rights were overturned in *Wi Parata v Bishop of Wellington*.⁶⁷⁵ Māori were denied property rights because they were viewed as ‘barbarians’ with no essence of customary law. In 1861, Sir George Grey planned for a rūnanga system,⁶⁷⁶ but this would have delayed the advancement of effective Crown control over the North Island. Enacting legislation was a more viable option to appease settler demand for land. According to Vincent O’Malley:⁶⁷⁷

... the rūnanga had never quite proved to be the compliant creatures of the state, which Crown officials had hoped to establish. The process of appropriation of unofficial rūnanga by the state and the corresponding re-appropriation of the official rūnanga system by northern Māori had, in the end, done little to advance effective Crown control over the North. The Native Land Court, followed by widespread land alienation and significant Pākehā migration into the district after 1865, would eventually do the job instead.

⁶⁷² *Kauwaeranga Judgment*, above n 667; *Joseph*, above n 13, at 79.

⁶⁷³ Above, n 667.

⁶⁷⁴ Above n 663.

⁶⁷⁵ Above n 574.

⁶⁷⁶ *Ward*, above n 484, at 125.

⁶⁷⁷ *O’Malley*, above n 421, at 30.

5.6 Privy Council Judgments, Ordinances and Acts

Privy Council judgements also give insight into the relationship between Māori and the legal system. The pattern suggests that initially there was recognition of distinctive Māori values, rights, and process, but over time these were abrogated by the colonial government. The 1870 *Kauwaerenga* judgment recognised native title, settling the controversy regarding native title under the common law. Similarly, in *Nireaha Tamaki v Baker*,⁶⁷⁸ Lord Davey (in the Privy Council judgment concluded that the unreviewable prerogative power of the Crown grant did not extinguish the native title. Similarly, in *Hineiti Rirerire Arani v Public Trustee*,⁶⁷⁹ Lord Phillimore acknowledged the existence of Māori customary laws. Māori communities could change practices as Māori custom did not follow the English notion that for custom to exist, it must have been in place since time immemorial.

Accordingly, he opined:⁶⁸⁰

It may well be that this is a sound view of the law, and that [Māori] as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the customs of such a race is not to be put on a level with the custom of an English borough...which must stand as it has always stood, seeing that there is no quasi-legislative internal authority which can modify it.

A series of ordinances were passed and provide insights into the changing position of Māori law. In addition to land rights, another important area in which traditional Māori lore was different from the English justice system was in relation to wrongdoing. The English justice system did not accommodate collective whānau responsibility for wrongdoing. Māori did not recognise wrongdoing as a crime unless the actions breached the mana of a person or a collective. Despite this difference, initially, *tikanga* was recognised as part of Māori customary law within

⁶⁷⁸ *Nireaha Tamaki v Baker*, above n 6.

⁶⁷⁹ Above, n 6.

⁶⁸⁰ *Hineiti Rirerire v Public Trustee of New Zealand* [1920] AC 198 (PC) at 5.

a Western legal system⁶⁸¹ and temporarily woven into the Native Exemption Ordinance Act of 1844.⁶⁸² The Native Exemption Ordinance 1844 allocated two chiefs from the tribe the offender was affiliated with to address the issues if the victim was Māori.⁶⁸³ Māori offenders were “apprehended and brought before the Police Magistrate of the district” by chiefs with compensation for a sum of money according to the scale in the annexed Schedule.⁶⁸⁴ Under s 12 of the same ordinance, a judgment made against Māori, whether civil or criminal, exempted them from imprisonment and substituted the sentence with payment of a fine.

The Resident Magistrates Courts Ordinance of 1846⁶⁸⁵ provided for summary jurisdiction over disputes between Māori and non-Māori. The Resident Magistrates Act of 1867⁶⁸⁶ also provided resident magistrates summary jurisdiction over disputes between Māori and non-Māori. Though these provisions did not last, whanaungatanga relationships developed, presenting a system more attuned to restoring balance in the communities. On the other hand, subsequent legislation undid the provisions.

Over time, the New Zealand government continued to legislate independently of Britain, denying Māori the rights to govern themselves in their communities and thereby contributed to systemic Māori deprivation. Prison population statistics for Māori rose due to legislatively imposed socio-economic deficits. The removal of the British as the legislator for New Zealand led to the repeal of s 71 of the 1852 Constitution Act and the continued Māori systemic deprivation. For example, the New Zealand government ratified the Statute of Westminster 1931 through the Westminster Adoption Act 1947 to create laws and remove the ability of the British Parliament to legislate for the Dominion of New Zealand. Section 8, “*Saving for*

⁶⁸¹ *Williams*, above n 574; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655.

⁶⁸² The defendant paid four times the value of goods taken in lieu of other punishment. See *R v E Hipu* SC, 1 December 1845; *New Zealand Spectator and Cook’s Strait Guardian*, Volume II Issue 61 (6 December 1845) at 3; Shaunnagh Dorsett “*R v E Hipu: Supreme Court Wellington*, 1 December 1845” (2010) 41 (1) VUWLR, 89.

⁶⁸³ *Ordinance*, above n 423, s 2.

⁶⁸⁴ Above, n 423, s 4.

⁶⁸⁵ Resident Magistrates Courts Ordinance 1846 10 Vict 16. Resident Magistrates were provided with summary jurisdiction over disputes between Māori and non-Māori.

⁶⁸⁶ *Law Commission*, above n 266, at 19.

Constitution Acts of Australia and New Zealand” of the Statute of Westminster 1931 stated:⁶⁸⁷

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

However, in 1986, the New Zealand government repealed the New Zealand Constitution Act 1852. According to Philip Joseph, by repealing the sources of legislative powers and autonomy, the New Zealand government “may now have factual rather than legal force.”⁶⁸⁸ Therefore, the New Zealand Parliament returned its legislative powers to the British Parliament.

Section 5 of the Application of Imperial Laws Act 1988 meant that the government became subordinate to the Privy Council and the common law of England. This section states:

5 Application of common law of England

After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

The common law of England elevates the constitutional status by three sources: the common law, the ruling of prerogative powers and ancient laws of custom. Therefore, the common law of England reaffirms the laws that still exist today, *inter alia*, s 71 of the Constitution Act 1852, sourced from He Whakaputanga o Rangatiratanga o Nu Tireni 1835, the Declaration of Independence, Māori government appointment of native assessors under the Native Districts Regulations

⁶⁸⁷ Statute of Westminster 1931.

⁶⁸⁸ Philip A Joseph “Foundations of the Constitution” (1989) 4 Canterbury Law Review 73-74.

Act 1858 and the provision for one magistrate and one native assessor under the Native Circuit Courts 1858. These former Acts illustrate the legal threads between the common law recognition of the reciprocal and complementary nature of Māori customary laws practised on Māori land.

In practical terms, there were ongoing challenges in protecting Māori rights. In the consideration of the systemic deprivation of Māori in the judicial system, the extent to which tīkanga was able to protect Māori interests needs to be considered. There are challenges in applying tīkanga. Although more applicable in civil cases, tīkanga is constrained by tests. However, if the tīkanga passes the test, it is subject to change. There is a crossover of common-law tests between tīkanga application to land and criminal behaviour. Tīkanga is, therefore, dislodged from the core of Māori customary laws that existed before the second arrival of the common law of England that currently tests tīkanga, although viewed as analogous to the common law of New Zealand. Several cases illustrate the application of tīkanga. For example, the recognition of tīkanga as an official source of law is evident in *Public Trustee v Loasby*.⁶⁸⁹ The appeal allowed for reimbursement of costs for funeral expenses. The test for tīkanga was whether the alleged custom existed, was contrary to the statute, and whether it was reasonable.⁶⁹⁰ Tīkanga was also reaffirmed by the Court of Appeal in *Ngāti Apa v AG*.⁶⁹¹ In *Te Weehi v Regional Fisheries Officer* 1986,⁶⁹² the treatment of the Indigenous peoples under English common law confirmed that the local laws and property rights of these peoples in ceded or settled colonies were non-existent due to the establishment of British sovereignty.

Both the Native Districts Regulations Act 1858 and the Native Circuit Courts Act 1858 infer that all courts in New Zealand since 1858 should have both representatives sitting up on the bench before any decisions. The fact that courts do not do this suggests that successive governments are ignoring the laws set down by

⁶⁸⁹ *Public Trustee v Loasby*, above n 4.

⁶⁹⁰ The Waitangi Tribunal has relied on Māori custom law values, concepts, and principles in its deliberations over Māori interpretations of Te Tiriti o Waitangi since the establishment of the Treaty of Waitangi Act 1975.

⁶⁹¹ *Ngāti Apa v AG* [2003] 3 NZLR 64.

⁶⁹² *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680 (HC).

the Queen through the Privy Council and the British Commonwealth. Therefore, the breaches of Māori constitutional, human, and Indigenous rights, the rule of law and Article 3 of the Treaty of Waitangi, where Māori should have equal representation in the New Zealand courts, illustrate justice inequalities.

It is contended that the laws existing before the Imperial Laws Application Act 1988 bind the New Zealand Government to recognise Māori customary laws and customary lands that form part of New Zealand common law. The failure to appoint native assessors indicates a gap in the law that does not recognise the legal norms of the whanaungatanga practices and values of native assessors. The omission illustrates the ongoing conflict between tikanga and whanaungatanga, the common law and legislation, and the inability to reduce the overrepresentation of Māori in the prison system.

5.7 Conflicts between tikanga, the Common Law and Legislation

A significant challenge to the application of tikanga in the courts is the tension between the different sources of law. This can be seen in key cases which will be discussed in the following sections. Tomas⁶⁹³ compares an early 20th-century case on burial disputes and the *Takamore v Clarke* case. In 1910, a debate over the disposal of a body arose between two Māori chiefs. A South Island newspaper noted:⁶⁹⁴

A chief named Honana died at Ngaruawahia on April 26th last. A tangi was duly held, ... Ramana Nutana, the leading chief of the Tainuis, desired that the dead Honana should be buried at Raglan, where he had been born, and where his parents were interred, while 'King' Mahuta ordered that the remains be interred in the 'royal' burying ground on Taupiri Mountain.

⁶⁹³ Tomas, above n 142.

⁶⁹⁴ "Quarrel over a Burial" *Colonist* (New Zealand, Volume LII, Issue 12812, 6 June 1910) at 1. Available at paperspast.natlib.govt.nz/newspapers/TC19100606.2.6?end_date=31-12-1920&items_per_page=10&query=Honana&snippet=true&start_date=01-01-1857&title=TC.

No law could override Chief Nutana's desire to bury Chief Honana at his birthplace despite King Mahuta's orders. Chief Nutana reburied Chief Honana alongside his parents. Five Tainui chiefs went either unpunished or had costs against them for breaching the Cemeteries Act 1882. This case reflects the significance of the whakapapa and whanaungatanga relationships discussed in Ūpoko Tuatoru/Chapter Three. Chief Nutana's knowledge of Chief Honana's whakapapa and whanaungatanga relationships with the people of Raglan reunited him with his place of birth.

In a modern case, questions over body disposal were also highlighted in the Supreme Court judgments of *Takamore v Clarke*.⁶⁹⁵ The common law of New Zealand now requires reference to tīkanga,⁶⁹⁶ the values and cultural precepts is a matter weighed in the common law.⁶⁹⁷ Details of the *Takamore* case explain how this unfolded in the court.

James Takamore was born in Taneatua, Whakatane, in the Bay of Plenty. James was of Whakatohea and Tūhoe descent and lived with his partner Denise Clarke and two children in Christchurch. Although Takamore contacted his mother by phone, he preferred not to associate himself with the Taneatua whānau.⁶⁹⁸ Takamore appointed Clarke as his sole executor, but his will did not expressly state the location of his burial. When Mr Takamore passed, some of his immediate whānau members claimed his body to bury him at the Kutarere urupa (cemetery). There was no agreement on this, and the Taneatua whānau took possession of his body. Neither the interim injunction and the disinterment license obtained by Ms Clarke could not be served and actioned.⁶⁹⁹

There is an interesting tension in relation to which laws should prevail in an instance of this kind. The common law asserts that personal representatives have the right

⁶⁹⁵ *Takamore v Clarke*, above n 11.

⁶⁹⁶ Above, n 11, at [164] per Tipping, McGrath, and Blanchard JJ.

⁶⁹⁷ Above, n 11, at [94] per Elias J.

⁶⁹⁸ Above, n 11, at [21]-[31].

⁶⁹⁹ Above n 11, at [31]-[44].

and the duty to dispose of the deceased's body,⁷⁰⁰ including intestacy cases.⁷⁰¹ In contrast, *tikanga* asserts that *whakapapa* is a salient feature that determines the burial site of the deceased. The conflicting philosophies between a personal representative by marriage and a personal representative by *whakapapa* illustrates these tensions. There was no assurance about *tikanga* and customary burial practices being followed because the personal representative was not required to consult with others. Therefore, the personal representative could determine the final burial place⁷⁰² even if there was no agreement.⁷⁰³ An aggrieved person could challenge the personal representative's decision in the High Court.⁷⁰⁴ However, Elias CJ⁷⁰⁵ stated that any exclusive claim to a right to determine disposal over others would not have a legal foundation.⁷⁰⁶ The Court decision held that Ms Clarke had the executrix rights to determine the burial site of the *tūpāpaku*, the deceased person. The fact that Mr Takamore had lived in Christchurch with his wife and children for 20 years was the determinative outcome that carried more weight than any other consideration.⁷⁰⁷ The claim on *whakapapa* was not a strong argument for body disposal.

The *Takamore* case illustrates how the common law confers a personal right to the disposal of the deceased; in the testing of *tikanga* in the courts, the common law rights outflank customary burial laws. *Tikanga*, therefore, is reduced to a lesser form of legal status. The pragmatic approach on *tikanga*⁷⁰⁸ suggested by Sir Tipene O'Regan contrasts with the modern approach by the Courts about the status of *tikanga* and the main reasons for a *tikanga* cause of action.

In *Public Trustee v Loasby*, (1908), the recognition of *tikanga* as an official source of law was affirmed.⁷⁰⁹ The appeal allowed for reimbursement of costs for funeral

⁷⁰⁰ Above, n 11, at 114 per Tipping, McGrath, and Blanchard JJ.

⁷⁰¹ Above, n 11, at 143.

⁷⁰² Above, n 11, at [156]-[158].

⁷⁰³ Above, n 11, at 154.

⁷⁰⁴ Above, n 11, at 160.

⁷⁰⁵ Above, n 11, at 10.

⁷⁰⁶ Above, n 11, at 80.

⁷⁰⁷ Above, n 11, at 169.

⁷⁰⁸ *O'Regan*, above n 3.

⁷⁰⁹ *Public Trustee v Loasby*, above n 4.

expenses. The test for *tikanga* was whether the alleged custom which existed, was contrary to the statute, and was reasonable.⁷¹⁰ The mixture of certainty and uncertainty about *tikanga* caused controversy. *Tikanga* was also reaffirmed by the Court of Appeal in *Ngāti Apa v AG*.⁷¹¹ In contrast, in *Te Weehi v Regional Fisheries Officer* 1986,⁷¹² the treatment of the Indigenous peoples under English common law confirmed that the local laws and property rights of such peoples in ceded or settled colonies did not exist because of the establishment of British sovereignty.⁷¹³ Simpson propounded the following modified view of the common law as a system of customary law:⁷¹⁴

... consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other context. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in a sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as member of the group changes. The ideas and practices that comprise the common law are customary in that their status is thought to be dependent on conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning.

⁷¹⁰ The Waitangi Tribunal has relied on Māori custom law values, concepts, and principles in its deliberations over Māori interpretations of Te Tiriti o Waitangi since the establishment of the Treaty of Waitangi Act 1975.

⁷¹¹ *Ngāti Apa*, above n 691.

⁷¹² *Te Weehi*, above n 692.

⁷¹³ *Trans-Tasman Resources Ltd*, above n 4, at [169]; *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 at [670] per Glazebrook J; *Tukaki v Commonwealth of Australia* [2018] NZCA 324 at [27]; *Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney General* [2019] NZAR 12; *Ngāti Whātua Ōrakei Trust v Attorney General* [2019] 1 NZLR 116 at [77] per Elias CJ and *Ngāti Whātua Ōrakei Trust v Attorney General* [2018] NZSC 84, at [77]. The judge noted that “rights and interests according to *tikanga* may be legal rights recognised by the common law.”

⁷¹⁴ AWB Simpson (ed) *Oxford Essays in Jurisprudence, Second Series* (Clarendon Press, Oxford, 1973) at 94.

Simpson negates the idea that the rules of common law are not *uno ictu* at a single moment in time, unconnected to anything in the past or future. Justice Joseph Williams notes that the view of *tikanga* may be “a flavour in the common law of stronger or weaker effect.”⁷¹⁵

The tensions between customary law and legislation are also evident in the case of *R v Mason*.⁷¹⁶ Heath J concluded that the Māori customary system for addressing alleged violations of societal norms was no longer valid due to the combined effects of ss 5 and s 9 of the Crimes Act 1961. However, traditional practices have the “character and authority of law,”⁷¹⁷ with associated values of *mana*, *mana whenua*, *whakapapa*, and *whanaungatanga*.⁷¹⁸ Ensuring these facets of Māori custom could be assisted by reference to the *whanaungatanga* process in sentencing. It illustrates the impact of post-colonial consequences of systemic Māori deprivation.⁷¹⁹

5.8 Conflicting Traditions in the Criminal Justice System since 1840

The *R v Maketū*⁷²⁰ case demonstrates the connections the Rangatira (chiefs) made between the traditions of *tikanga* and *whanaungatanga*, the normal process that had unfolded before the introduction of a court setting. The *whanaungatanga* process illustrates the collective *whānau* responsibility and acceptance of Rangatira (chiefs) dispute resolution outcomes.⁷²¹ The approach was the significant blueprint for ensuring that the right pathway from wrongdoing would deliver a result that would include psychological security over their social, economic, health, well-being, and environmental concerns.

State prosecutorial independence contrasts with the Māori collective inquisitorial method. The contrasting philosophical views of values, principles, and practices

⁷¹⁵ *Williams*, above n 205, at 16.

⁷¹⁶ *R v Mason* [2012] 2 NZLR 695 at [31]; see *Mason v R*, above n 8, at [39] per Ellen Francis J. The Court of Appeal, after reviewing expert evidence before the sentencing judge about the need to rebuild the practical effectiveness of *tikanga* as a legal process, dismissed the appeal.

⁷¹⁷ Above, n 716, at [13].

⁷¹⁸ Above, n 716, at [21].

⁷¹⁹ *Solicitor-General v Heta* [2018] NZHC 2453 at [41] per Whata J.

⁷²⁰ *R v Maketū*, above n 63.

⁷²¹ *Quince*, above n 29.

restricted continuity of associated values and practices of whanaungatanga restorative justice principles. The presumption that “conspicuous equality of treatment”⁷²² would free kin groups from responsibility affirms prosecutorial independence. However, reality suggests that the exclusion of the law of *tikanga* and whanaungatanga principles created a false reality, an illusion of the state’s role and capacity “to act on behalf of society as a whole.”⁷²³ The illusion was that all citizens would be able “to obtain the right according to law and equality of treatment.”⁷²⁴ The deep-seated problem was that law did not necessarily have the same meaning for the British and Māori who acted upon custom and Māori society values. *Tikanga* law, whanaungatanga and the British justice system were foreign laws to each party.

The *Maketū* case illustrates why the *tikanga*, or the right way of dealing with Māori, was a significant part of the whanaungatanga process. The after-the-fact disclosure made by Clarke that Maketū and his whānau may have faced mental health suggests the possibility of intergenerational traumatic experiences of Māori land loss, resulting from Pākehā ownership of Roberton Island. As this was not disclosed during proceedings, the court could not consider its impact on Maketū’s behaviour. The unimagined concept of absolute ownership contrasted with the different usage rights whānau and hapū had to the same parcel of land.

In summary, the presumption that the new justice system “freed kin groups from responsibility” and the procedures that were put in place⁷²⁵ disrupted the Māori collective inquisitorial method. The kin group responsibility was transferred to the infant state, which gained control over a pluralistic society based on the premise that Western law enabled equality of treatment.⁷²⁶ The exclusion of Māori ways of seeing, being and resolving disputes resulted in inequities for them in the conduct

⁷²² *Elias*, above n 608, at 3.

⁷²³ Above, n 608.

⁷²⁴ Above, n 608.

⁷²⁵ Above, n 608.

⁷²⁶ Above, n 608.

of the justice system. Quince presents a clear explanation of the harm done to Māori rights:⁷²⁷

The imposed new law was a direct threat to collective Māori society and the whakapapa and whanaungatanga principles on which it operated. Māori who were once directly accountable for their actions to whanau and hapu were now also the subjects of Pakeha law. They faced dual accountability under competing systems. They were actively encouraged to put their ... interests first, particularly with regard to claims for land. In 1862 the Native Land Court was established. Its main function was to facilitate the transition of collective ownership of land, previously inalienable except by the rangatira and usually only amongst members of the group, to individualised, alienable, title.⁷²⁸

The perfunctory efforts made by colonial advocates of a two-year-old English criminal justice system seemed enough to persuade Rangatira (chiefs) that the law and equality of treatment would continue in perpetuity. However, this was short-lived as legislation severed the whanaungatanga connections by alienating Māori from their land and influencing a breakdown of the psychological security of Māori and their communities.

Former Chief Judge Durie of the Māori Land Court and Chairperson of the Waitangi Tribunal discussed the difficulty in explaining the laws of the Māori to a non-Māori audience concerning Māori land.⁷²⁹ Notions of euro-centric views of Māori evidence in early Māori land court decisions illustrated that:⁷³⁰

there was little willingness to consider the belief system by which the Māori evidence should properly have been assessed. It is the beliefs and values of a society that furnish its legal norms.

⁷²⁷ *Quince*, above n 29, at 13.

⁷²⁸ Above, n 29.

⁷²⁹ *Durie*, above n 151.

⁷³⁰ Above, n 151.

Those aspects of Māori society “provided the framework for a distinctive set of values or norms that collectively constituted the Māori legal order.”⁷³¹ According to Durie:⁷³²

From the concept of whanaungatanga or kinship, came several principles that assume the primacy of kinship bonds in determining personal action, responsibility, mana (or status and self-esteem), and social rights, including the right of individuals to validate their identity within a chosen descent group.

The success of maintaining sustainable living conditions, in conjunction with environmental and reciprocal obligations, depends on committed whānau working with one another for the common good. Whanaungatanga demonstrated that the forging of those relationships secured balance and community well-being.

The *Maketū* case also illustrates that, within a Treaty partnership context, the missing link, the whanaungatanga process was not fully appreciated and did not fit into the court setting, in which there was no representation of whānau, and family support. The inattention to tikanga and the whanaungatanga process has echoes of the interest in punishing Maketū under penal law. Within a whanaungatanga context, the Rangatira (chiefs) would have dealt with the *Maketū* issue immediately rather than a long-drawn-out court process involving public attendance at an execution.⁷³³ The same result would have occurred, but in a private setting. Therefore, whanaungatanga was and still is, a significant part of the Māori process. The whanaungatanga process reinforced the belief system of tikanga and whanaungatanga, a reminder of the consequences of wrongdoing and the sequenced process of tikanga stages of applied principles that included mana, or individual status and closure or noa. These values and the process highlight the relevance of whanaungatanga as a pre-colonial legal norm.

⁷³¹ Above, n 151.

⁷³² Above, n 151, at 330-331.

⁷³³ *R v Maketū*, above n 63.

Māori custom predated the arrival of English common law, sourced from English custom.⁷³⁴ The shifting relationship between the different legal inheritances can be seen in the posthumous restoration of mana in the *Ellis case* and its connection with the Mokomoko case. The Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 reasserts the tīkanga in relation to the wrongful conviction of Rangatira (chief) Mokomoko. The Mokomoko Pardon Bill (Restoration of Character, Mana and Reputation) was introduced to the House of Representatives on 12 October 2011 to restore his character, mana, and reputation.⁷³⁵ Statutory recognition of the pardon affirmed his innocence following allegations of his involvement in the death of Reverend Carl Volkner in 1865. Despite the therapeutic outcomes, the fact Mokomoko was convicted and executed denotes the under-recognition of tīkanga law.⁷³⁶ Whanaungatanga could have possibly allowed for more clarity in the original case

5.9 Conclusion

This chapter examined the philosophical underpinnings of two different legal systems with different views about how to address crime. The chapter established the contrasts with notions of equality in the courts and the different treatment of Māori in the courts. The chapter also examined legal archaeology that supports the legal norm of the whanaungatanga process, and the similarities found in a s 27 cultural report under the Sentencing Act 2002. The discussions around He Whakaputanga o Nu Tirenī and the Treaty of Waitangi illustrate the gradual abrogation of Māori rights determined by legislation and common law. In addition, an overview of the early New Zealand trials established the conflicting traditions in the criminal justice system. A discussion about the origins of systemic Māori deprivation illustrated the marginalisation of Māori well-being and social justice. Also, a discussion about breaches of constitutional rights and the failure to appoint native assessors revealed the ongoing pluralistic tensions between the tīkanga of

⁷³⁴ Neil Duxbury “Custom as Law in English law” 2017 76(2) CLJ 337-359 at 342.

⁷³⁵ (24 October 2012) 685 NZPD 6187.

⁷³⁶ *Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013*, above n 555.

whanaungatanga, the common law, and the legislation outlined in early and contemporary cases.

While major themes are identified, a thorough investigation of statutory interpretation is required to appreciate why sentencing decisions are not consistent in relation to the type of offence committed. The next chapter will attempt to analyse the major themes and central aspects of whanaungatanga as a legal norm. The whanaungatanga process does not challenge the criminal codes and s 27 of the Sentencing Act 2002. Instead, the whanaungatanga process provides an interactive system that adds value to the sentencing matrix.

6 Ūpoko Tuaono—Chapter Six: Statutory Interpretation

Ūpoko Tuarima/Chapter Five examined the New Zealand criminal justice system and discussed how it has led to unequal experiences for Māori. The approach of legal archaeology was introduced, and its usefulness as a tool for revealing what factors lie behind particular cases and judgments was discussed. The chapter also looked at the history of systemic deprivation of Māori as a factor contributing to the inequalities experienced by Māori in the criminal justice system. The chapter also considered the conflict between the common law, *tikanga*, and legislation, and its potential impact on equality before the law and sentencing for Māori.

Ūpoko Tuaono/Chapter Six will focus on issues related to statutory interpretation and assess the extent to which these factors have impacted on inequalities for Māori in the criminal justice system. To examine the impact of statutory interpretation on Māori experience of justice, the chapter will have a number of components. The first part explains statutory interpretation and the different elements that influence its operation; this section explains statutory interpretation, statutory framework, the purposive approach, extrinsic materials, legislative history, statute influence on the common law, and the common law influences on the statute. The second part examines the statutory framework, followed by a discussion on the influence of legislation on sentencing. An analysis of the goals of sentencing leads to an examination of qualitative research that looks at the underlying considerations that impact on an interpretation of s 27 of the Sentencing Act 2002, examined in detail in Ūpoko Tuarua/Chapter Two, and, therefore, the need for a change in the principles that are applied. The sections further analyse variations in the application of s 27 and the associated concern about different sentencing decisions for similar types of offences.

A discussion on Australian and Canadian jurisprudence highlights the similar challenges confronting Indigenous offenders and the related narratives of systemic deprivation. The discussion leads to an analysis of restorative justice and retribution, criminal judicial review, and a conclusion.

6.1 Statutory Interpretation

Examining statutory interpretation is relevant to this research, as it investigates how the inconsistency in sentencing decisions evolved. As statutory interpretation is central to sentencing decisions, it is useful to explain its role in the New Zealand criminal justice system. New Zealand has relied upon statute law⁷³⁷ regarding the construction and progression of statutory interpretation. Statutory interpretation is a significant yet indirect contributor to constitutional law.⁷³⁸ Judges use various tools and methods of statutory interpretation to resolve ambiguities of the legislation. The significance of statutory interpretation was highlighted by Sir Robin Cooke in *New Zealand Māori Council v Attorney-General*,⁷³⁹ who said it was as “important for the future of our country as any that has come before a New Zealand Court”.⁷⁴⁰ The significance of statutory interpretation was reinforced after empirical research by Russell and Barber found that at least 60% of all appeals involved the issue of statutory interpretation.⁷⁴¹ The Supreme Court Act was enacted in 2003, and the New Zealand Supreme Court came into force on 1 January 2004, although it could not hear appeals until 1 July 2004.⁷⁴²

This chapter aims to analyse the workings of statutory interpretation and its impact on sentencing and argue for ways of achieving more consistent sentencing outcomes. A brief history of statute law of New Zealand is provided as an introductory background. The first section examines the statutory framework of New Zealand, the purposive approach and Parliament’s intentions and expectations from the courts when interpreting a statute. An examination of the place of extrinsic materials and an account of legislative history offers insights into how statute can influence common law and how common law can influence statute.

⁷³⁷ Sian Elias “Transition, Stability and the New Zealand Legal System”(F W Guest Memorial Lecture, Dunedin, 23 July 2003) 10.

⁷³⁸ *Joseph*, above n 13, at 37.

⁷³⁹ *New Zealand Māori Council v Attorney-General*, above n 61.

⁷⁴⁰ Above, n 61, at 651 (CA) per Cooke P.

⁷⁴¹ M Russell, M Barber “Empirical Analysis of Supreme Court Decisions” in *The Supreme Court of New Zealand: 2004–2013* (Thomson Reuters New Zealand, Wellington, 2015) at 19.

⁷⁴² Supreme Court Act 2003, s 55.

6.1.1 History of New Zealand's Statute Law

This section considers the history of statute law, the dominant law in the legal system and therefore critical in sentencing decisions. The New Zealand Parliament directed that in interpreting legislation judges should “adopt a purposive approach to their task”⁷⁴³ under s 5(7) of the Interpretation Act 1888.⁷⁴⁴ Section 6(i) of the Acts Interpretation Act 1908⁷⁴⁵ and s 5(j) of the Acts Interpretation Act 1924,⁷⁴⁶ with the smallest of drafting changes, reiterated those directions.⁷⁴⁷ Three-quarters of a century later, s 5(1) of the Interpretation Act 1999 (“Interpretation Act”) altered s 5(j) of the Acts Interpretation Act 1924. The treatment of the traditional canons of statutory interpretation, the literal rule,⁷⁴⁸ the golden rule,⁷⁴⁹ and the mischief rule,⁷⁵⁰ sometimes resulted in less than satisfactory outcomes. The literal rule concerns words that are given an ordinary meaning but have no regard for the results of that interpretation.⁷⁵¹ The literal rule dominated the approach to statutory interpretation and guaranteed the separation of powers doctrine. The golden rule means trying to avoid an absurd outcome by allowing a broader meaning.⁷⁵² The mischief rule advances the remedy where words should be interpreted to suppress the mischief.⁷⁵³ The interpretation of words in their literal sense and the protection of values conflict with the other approaches to statutory interpretation. For example, the golden rule narrowly construed penal statutes. The courts, if determined to protect fundamental values,⁷⁵⁴ would decide a strained, rather than a liberal interpretation.⁷⁵⁵

⁷⁴³ New Zealand Law Commission *A New Interpretation Act to Avoid “Prolivity and Tautology”* (NZLC R17, Wellington, 1990) AJHR 1990 E 31L [NZLC R17] at 20, para 33.

⁷⁴⁴ Interpretation Act 1888 (52 VICT 1888 No 15).

⁷⁴⁵ Acts Interpretation Act 1908 (No 1).

⁷⁴⁶ Acts Interpretation Act 1924 (15 GEO V 1924 No 11).

⁷⁴⁷ *Law Commission*, above n 743.

⁷⁴⁸ Michael Zander *The Law-Making Process* (6th ed, Cambridge University Press, Cambridge, 2004) at 130.

⁷⁴⁹ John F Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at 114.

⁷⁵⁰ Above, n 749, at 133.

⁷⁵¹ *Zander*, above n 748.

⁷⁵² *Burrows*, above n 749, at 114.

⁷⁵³ Francis Bennion *Understanding Common Law Legislation – Drafting and Interpretation* (4th ed, Oxford University Press, Oxford, 2001) at 133.

⁷⁵⁴ For example, rights to legal advice and legal representation.

⁷⁵⁵ John F Burrows “The Changing Approach to the Interpretation of Statutes” (2002) 33 VUWLR 981 at 982.

Literalism could result in a deviation from the purpose of the statute⁷⁵⁶ and was in operation until at least the middle of the twentieth century.⁷⁵⁷ This is what Burrows describes as a value-based interpretation.⁷⁵⁸ The value-based approach concerns the rights of the individual but can frustrate the legislative purpose of serving the interests of the public.⁷⁵⁹ The golden rule allows for a literal approach under circumstances that would lead to an unjust result and may conflict with the values of the New Zealand Bill of Rights Act 1990.⁷⁶⁰ Although legally permissible, the restrictions do not hold any authority over Parliament's legislative powers.⁷⁶¹ All Acts must comply with the Bill of Rights Act unless there is an irreconcilable inconsistency, in which case the Act will override the Bill of Rights.⁷⁶²

The mischief rule of statutory interpretation established in the *Heydon Case*⁷⁶³ applied in cases of the ambiguity of a statute as it was the role of the Court to advance a remedy.⁷⁶⁴ The mischief rule is closely associated with the purposive approach that indicates a social or economic purpose. The material extrinsic to the statute was supplementary to the mischief rule.⁷⁶⁵

The reports of Parliamentary proceedings as extrinsic evidence were frowned upon by the courts.⁷⁶⁶ The exclusionary restrictions⁷⁶⁷ illustrated the courts' unwillingness to give effect or meaning to the legislation proposed.⁷⁶⁸ The courts would invoke whichever rules would produce a result that satisfied its sense of justice of a

⁷⁵⁶ Above, n 755, at 983.

⁷⁵⁷ Above, n 755, at 981.

⁷⁵⁸ Above, n 755, at 1001.

⁷⁵⁹ Above, n 755, at 983.

⁷⁶⁰ Above, n 755, at 1001.

⁷⁶¹ *Joseph*, above n 13, at 610.

⁷⁶² Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, Lexis Nexis, Wellington, 2021) at 31.

⁷⁶³ *Heydon's Case* [1584] EWHC Exch J36.

⁷⁶⁴ See for example, *Corkery v Carpenter* [1951] 1 KB 102; *Elliot v Grey* [1960] 1 QB 367.

⁷⁶⁵ *Burrows*, above n 755, at 985.

⁷⁶⁶ John F Burrows and John G Fogarty *Statutory Interpretation* (New Zealand Law Society, Wellington, 2001) at 15; John F Burrows *Statute Law in New Zealand* (2nd ed, Butterworths, Wellington, 1999) at 165-170.

⁷⁶⁷ *Burrows*, above n 755, at 981.

⁷⁶⁸ Ross Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 278-279; *Burrows*, above n 755, at 981.

case.⁷⁶⁹ Consequently, the courts did not justify the reasons for their use, nor indicate which rule would be adopted.

According to Lord Diplock in *Duport Steels Ltd v Sir*,⁷⁷⁰ the courts must enforce the law as it is written and avoid attempts to interpret it contrary to its plain meaning. Judges should be vigilant to ensure they are not substituting policy preferences for the law. Lord Diplock asserted that Parliament's intent was crucial to the statutory interpretation of an Act, as a deviation of the literal rule would prevent certainty and an increase in litigation. Similarly, in the *Sussex Peerage Case*, Tindal CJ noted that:⁷⁷¹

... the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

However, the idea of a literal meaning in an Act did not provide a shield or negate contestability, nor did it free it from value judgments. The presumption that words will always have a plain meaning was untenable.⁷⁷² Lord Reid iterated in *DPP v Ottevell*⁷⁷³ that drafting any provision without ambiguity would be difficult due to the imprecision of the English language. There were also dissenting judgments over the literal meaning of statutes,⁷⁷⁴ loopholes in the law,⁷⁷⁵ injustice,⁷⁷⁶ and a lack of public confidence that resulted from the literal rule.

Other judicial figures have advocated for the golden rule. In *Mattison v Hart*,⁷⁷⁷ Jervis C J used the golden rule, which stated that the words used should have a plain

⁷⁶⁹ John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1.

⁷⁷⁰ *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157B-158C.

⁷⁷¹ *Sussex Peerage Case* (1844) XI Clark & Finnelly, 144 at [143] at 1057.

⁷⁷² *DPP v Ottevell* [1970] AC 642.

⁷⁷³ Above, n 772, at 649.

⁷⁷⁴ *R v Maginnis* (1987) 1 All ER 907 HL.

⁷⁷⁵ *Fisher v Bell* (1961) 1 QB 394; *Partridge v Crittenden* (1968) 2 All ER 421.

⁷⁷⁶ *London and North Eastern Railway v Berriman* (1946) AC 278.

⁷⁷⁷ *Mattison v Hart* [1854] 14 C.B. 357 at 385.

meaning unless absurdity results. Similarly, Lord Wensleydale stated the golden rule in *Grey v Pearson* as:⁷⁷⁸

The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther.

However, the rule created differences in judicial opinions. In *Hill v East & the West India Dock*,⁷⁷⁹ Lord Bramwell stated that absurdity meant different things to different people. The application of the mischief rule appeared to be problematic as well. According to Lord Denning in *Letang v Cooper*,⁷⁸⁰ it “does not help very much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief.”⁷⁸¹

The purposive approach is the development of the old mischief rule which relied on the text of the Act. New Zealand has shifted to a purpose-based approach to statutory interpretation.

6.2 Statutory Framework

6.2.1 The Purposive Approach

The statutory framework of New Zealand plays a significant role in shaping the legal system as it encompasses common law and statute law. In looking at sentencing decisions, it is pertinent to recognise the principles that judges draw on when interpreting statutes. The history of statutory interpretation since 1851 illustrates that the modern purposive approach is the predominant approach in New

⁷⁷⁸ *Grey v Pearson* (1857) HL Cas 61; See also *R v Allen* (1872), a more just outcome closely aligned with Parliament’s intentions.

⁷⁷⁹ *Hill v East and West India Dock* (1884) 9 App. Cas. 448.

⁷⁸⁰ *Letang v Cooper* [1964] 2 All ER 929.

⁷⁸¹ Above, n 780.

Zealand courts⁷⁸² to keep up with the times.⁷⁸³ John Burrows provides a distinct methodology of interpretive aids for statutory interpretation. The purpose and scheme of the Act and the use of extrinsic materials are what Sir Ivor Richardson describes as the twin pillars of modern interpretation.⁷⁸⁴ The aim of the purposive approach is to enable the interpretation of statutes in a manner that is true to Parliament's purpose,⁷⁸⁵ and to discern how the provision in question applies to the fact situation.⁷⁸⁶ Once interpreted, the judge aims to give effect to the statutes purpose as this has been understood.⁷⁸⁷ New Zealand may have been more conservative in changing the wording of a statute to ensure consistency.⁷⁸⁸ However, every Act is a composite product of the legal landscape.⁷⁸⁹ The purposive approach allows the court to give words a secondary meaning to give effect to the purpose of the Act⁷⁹⁰ and "mitigate the severity of some of the old presumptions of strict construction".⁷⁹¹

The courts must reflect Parliament's intent.⁷⁹² The use of the⁷⁹³ purposive approach risks eroding Parliament's legislative framework. Furthermore, it can lead to court decisions inconsistent with legislative intent. The courts will attempt to impose fewer restrictions on protected fundamental values,⁷⁹⁴ even if Parliament did not intend the legislation to protect fundamental rights.⁷⁹⁵ Optimally, courts must

⁷⁸² *Burrows and Fogarty*, above n 766, at 13.

⁷⁸³ *Burrows*, above n 755, at 985; *Carter*, above n 768, at 286.

⁷⁸⁴ Ivor Richardson "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Aust Tax Forum 3.

⁷⁸⁵ *Burrows*, above n 755, at 988.

⁷⁸⁶ John F Burrows "The Interpretation Act 1999" in Rick Bigwood *The Statute Making and Meaning* (LexisNexis, Wellington, 2003) at 216.

⁷⁸⁷ *Burrows and Fogarty*, above n 766, at 13.

⁷⁸⁸ John F Burrows and Ross Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009) at 363–365.

⁷⁸⁹ *Burrows and Fogarty*, above n 766, at 3.

⁷⁹⁰ *Burrows*, above n 755, at 984.

⁷⁹¹ *Burrows and Fogarty*, above n 766, at 14.

⁷⁹² Above, n 766.

⁷⁹³ *Burrows*, above n 786, at 216.

⁷⁹⁴ *Choudry v Attorney-General* [1999] 2 NZLR 582.

⁷⁹⁵ *O'Brien v Police* [1999] 1 NZLR 56 at 60.

adhere to Parliament's original intent when interpreting the law. The relevance of Parliament's intent is distinct from the court's intention.⁷⁹⁶

In ensuring consistency with the purpose of an Act, judges need to be cautious of focusing on specific sections but must instead recognise the intent of the Act as a whole. In this regard, Burrows notes there is not one word in an Act that can be interpreted out of context.⁷⁹⁷ Placing meaning on a single section isolates the surrounding provisions and the whole context of the scheme of the Act. Burrows notes as follows:⁷⁹⁸

1. A study of the act as a whole may reveal a consistent theme or purpose. The section in question should be read consistently with that, if possible.
2. The 'first blush' impression made by a section when read on its own may have to be modified in the light of other sections which qualify it or are even apparently inconsistent with it.
3. Provisions which are ambiguous or vague may have their meaning clarified when they are set alongside other provisions of the same act.⁷⁹⁹

While most schemes are coherent, some sections are not expressed clearly and may be difficult to reconcile.⁸⁰⁰ However, s 5 (3) of the Interpretation Act 1999 reinforces the significance of the enactment.⁸⁰¹

6.2.2 Extrinsic materials

Extrinsic materials must be relevant and not cloud the purpose of the Act.⁸⁰² These may include:⁸⁰³

⁷⁹⁶ *Burrows and Fogarty*, above n 766, at 14.

⁷⁹⁷ *Burrows*, above n 749, at 119.

⁷⁹⁸ Above n 766, at 15.

⁷⁹⁹ *Quilter v Attorney-General* [1998] 1 NZLR 323.

⁸⁰⁰ Above n 766, at 15.

⁸⁰¹ Above, n 766.

⁸⁰² Above n 766, at 16-17.

⁸⁰³ Above, n 766, at 15.

1. The circumstances, social and economic, which existed at the time the Act was passed.⁸⁰⁴
2. The circumstances in which the act must continue to operate.
3. The law preceding the Act.
4. The current law, both common law and statute law, on analogous subjects.
5. International conventions.
6. Legislative history.

6.2.3 *Legislative History*

Applying evidence of parliamentary history materials to a statute can help determine its meaning.⁸⁰⁵ Parliamentary history materials consist of law reforms,⁸⁰⁶ explanatory notes,⁸⁰⁷ amendments to a Bill, select committee comments on a Bill,⁸⁰⁸ debates during the passage of a Bill, cabinet memos, and the minutes of the proposed legislation.⁸⁰⁹ The materials are used to provide contextual background and evidence of the genesis of the Bill in question.⁸¹⁰ The statements in the documents are Parliament's authority in relation to the words used in the legislation it passes. Parliamentary history materials include reports by the Attorney-General under s 7 of the Bill of Rights Act 1990 in cases of ambiguity.⁸¹¹

Burrows explains that Parliamentary documents may help to shed light on the intentions of an Act in cases where there is a high level of ambiguity.⁸¹² Although Hansard reports are not binding, they accompany the purposive style of

⁸⁰⁴ For example, s 16 of the Criminal Justice Act 1985 was replaced by s 27 of the Sentencing Act 2002 is evidence of the mischief of the act that was passed to remedy the purpose underlying the provision.

⁸⁰⁵ *Burrows*, above n 749, at 172. Presentation of New Zealand Statute Law September 2007, Wellington, New Zealand Issues Paper 2.

⁸⁰⁶ Recommendations are made by law reform bodies for a particular law to be passed to cure the mischief or solve a problem. The law reform bodies may include Green Papers and White Papers, Royal Commission reports, Law Reform Committees, and the Law Commission, established in 1985 as New Zealand's first permanent law reform body. The various bodies are referred to as pre-Parliamentary history materials and are distinguished from other Parliamentary history materials. For a detailed account of the various law reform bodies; see *Burrows and Carter*, above n 788, at 43-57.

⁸⁰⁷ *Burrows and Carter*, above n 788, at 67.

⁸⁰⁸ Above, n 788, at 75-76.

⁸⁰⁹ *Burrows*, above n 755, at 986.

⁸¹⁰ Above, n 755.

⁸¹¹ Above n 788, at 258.

⁸¹² *Burrows*, above n 755, at 987.

interpretation.⁸¹³ Public sources illuminate Parliament's intent to canvas the social or economic objectives of an Act.⁸¹⁴

6.2.4 Statute Influence on the Common Law

Traditionally, statute law had little impact on the common law. Judges relied on precedents⁸¹⁵ despite statutes that were analogous to the common law.⁸¹⁶ The change of approach to statutory interpretation is to ensure that the "common law and statute are as far as possible consistent and that the body of our law as a whole can develop consistent principles rather than being just a mix of disparate ad hoc rules."⁸¹⁷ For example, there has been a tendency for courts to use an analogy of a particular Act even though that Act is not directly applicable.⁸¹⁸ Therefore, a statute likely to change with a successive government has no basis for the development of the common law.⁸¹⁹ And if an analogy is applied, it must be appropriate. Extending a statute does not lead to a principal development.⁸²⁰

6.2.5 Common Law Influence on Statute

When the legislature has enacted a statute that has encroached on areas covered by the common law, it is difficult to terminate those fundamental principles relating to human rights and freedoms.⁸²¹ Therefore, "legislation must be expressed in the clearest possible terms before it will hold to have removed or truncated those value rights."⁸²² A discussion of the following fundamental principles outlines the common law's influence on the statute.

⁸¹³ Above, n 755, at 987-988.

⁸¹⁴ *Burrows and Carter*, above n 788, at 261-262.

⁸¹⁵ John F Burrows "Common Law Among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401 at 404.

⁸¹⁶ *Burrows and Fogarty*, above n 766, at 20.

⁸¹⁷ Above, n 766.

⁸¹⁸ Above, n 766.

⁸¹⁹ Above, n 766.

⁸²⁰ Above, n 766.

⁸²¹ Above, n 766.

⁸²² Above, n 766, at 21.

It was common for penal statutes to result in a narrow interpretation. The interpretative approach applied to codes depends on the context. For example, if the code were to replace an unsatisfactory common law rule that was interpreted to conform with the common law, it would frustrate the statutory purpose.⁸²³ Long-established rules that do not come within the scope of fundamental principles of legality “may have life even after attempts to convert the area into a statutory one.”⁸²⁴ The common law can resist any statutory regime. Disposal is not an option.⁸²⁵ With statutes not expressed as a code, reliance on the common law depends on Parliament’s intentions when enacting the statute. The alternative will depend on whether the statute is inconsistent with the common law and how fundamental the common law is.⁸²⁶

Where a statute has replaced the common law, reviving the common law rule depends on the construction of the relevant legislation.⁸²⁷ Section 17(2) of the Interpretation Act 1999 does not restrict the temporary displacement of a common law rule.⁸²⁸ Another aspect of the common law which underpins statutory interpretation is the doctrine of stare decisis.⁸²⁹ The approach taken by New Zealand judges involves a combination of the purposive or integrated approach, a values-based interpretation of individual rights, and references to restorative justice. Notwithstanding these principles, there are still inconsistent sentencing decisions for similar types of offences.

(1) Summary

This section primarily investigated the variety of sources that can serve as legal aids for statutory interpretation. The discussion demonstrated that the purposive approach includes paying attention to the scheme, and drawing on extrinsic

⁸²³ *Burrows and Carter*, above n 788, at 547.

⁸²⁴ *Burrows and Fogarty*, above n 766, at 21.

⁸²⁵ Above, n 766.

⁸²⁶ Above, n 766, at 22.

⁸²⁷ Above, n 766.

⁸²⁸ Above, n 766, at 23.

⁸²⁹ John F Burrows “The Interrelation between Common Law and Statute” (1973) 3 *Otago L Rev* 593 at 598; Jonathan Law, Elizabeth A Martin (eds) *Oxford Dictionary of Law* (7th ed, Oxford University Press, New York, 2009).

materials, and legislative history. This section also discussed the legal machinery of a statutory framework, the influences of a statute over the common law, and the common law influences over a statute. The discussion of statutory interpretation connects with the consideration of the Interpretation Act 1999 in the following section.

6.3 Legislation and its Influence on Sentencing

In addition to the principles and sources discussed in the previous section, interpretation of statutes is also assisted by specific legislation. The Legislation Act 1999 was the primary source of the rules of statutory interpretation. The Legislation Act 2019 replaced the former Act. [Section 4 of the Criminal Justice Act 1985 protects against retrospective increases in criminal penalties, although penalties increased in 1999].⁸³⁰ While there have been changes under the 2019 Act, the Sentencing Act 2002 was subject for 17 years to the guidelines laid out in the 1999 legislation. The details of this legislation and its impact will therefore be examined in the following sections.

Due to the issues arising from crime in New Zealand during the 1980s and 1990s, statutory interpretation, and the statutory framework required a new interpretation Act. The chief rule of interpretation is in s 5 (1) of the Interpretation Act 1999 and stated:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

Section 5 (1) of the Interpretation Act 1999 replaced s 5(j) of the Acts Interpretation Act 1924.⁸³¹ The Acts Interpretation Act 1924 s 5 (j) stated:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of

⁸³⁰ See *R v Pora* [2001] 2 NZLR 37 (CA).

⁸³¹ *Burrows and Carter*, above n 788, at 199-200.

anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

In 1990, the New Zealand Law Commission viewed context as part of the process of finding meaning.⁸³² The New Zealand Law Commission recommended that 5(1) of the Interpretation Act 1999 should read:⁸³³

The meaning of an enactment must be ascertained from its text and in the light of its purpose and its context.

In 1998, the New Zealand Law Society also argued for the relevance of context.⁸³⁴ However, the select committee argued for the omission of words about context and noted that:⁸³⁵

a direction to take ‘context’ into account may lead to a more liberal approach to statutory interpretation that departs from the words of the statute and therefore the purpose of Parliament.

The omission of context in s 5(1) of the 1999 Act would not make a difference to the interpretation. The actual substance has not changed much from that of its predecessor.⁸³⁶ The drafters of the legislation did not mean anything else in s 5 (1) of the current statute other than a modern restatement of s 5 (j) of the Acts Interpretation Act 1924.⁸³⁷

⁸³² New Zealand Law Commission *A New Interpretation Act to Avoid “Prolivity and Tautology”* (NZLC R17, Wellington, 1990) AJHR 1990 E 31L [NZLC R17] at 32.

⁸³³ *Burrows and Fogarty*, above n 766, at 29.

⁸³⁴ New Zealand Law Society "Submission on the Interpretation Bill" (3 April 1998) at para 21.

⁸³⁵ New Zealand Historical Bills, Interpretation Bill 1998 no. 90-92 at iii.

⁸³⁶ *Burrows and Fogarty*, above n 766, at 28.

⁸³⁷ Above, n 766, at 29.

Therefore, s 5 (1) of the Interpretation Act 1999 enjoins s 5 (j) of the Acts Interpretation Act 1994, although the wording is different.⁸³⁸ Both provisions have the same meaning and must be read in the context of the Act as a whole. The rationale behind “the art of interpretation lies in abandoning one’s ... prejudices and preconceptions and fully appreciating the direction of the legislature’s thinking.”⁸³⁹ The extrinsic materials are valuable in helping courts understand a statute; some require evidence and explanations⁸⁴⁰ to examine the social and economic facts⁸⁴¹ and the context in which the statute must operate.⁸⁴²

The Bail Act 2002, the Sentencing Act 2002, the Parole Act 2000, and the Criminal Justice Reform Act 2000 were “a direct response to the 1999 criminal justice referendum”.⁸⁴³ The harsh penalties were introduced to address serious offenders.⁸⁴⁴ The Criminal Justice Reform Bill of 2002 provided a range of sentencing options to reduce the number of offenders sent to prison.⁸⁴⁵ However, the Sentencing Amendment Act 2007 made no difference apart from reiterating home detention that had already been introduced by the Criminal Justice Amendment Act 1999.⁸⁴⁶

The Sentencing Act 2002 removed community-based sentences, resulting in no identifiable sentences before prison.⁸⁴⁷ According to O’Driscoll, Hall, and Mellor, the Sentencing 2002 Act reduced the sentencing options available to the courts for financial payments of a fine. However, s 14 (2) of the Sentencing Act 2002 allows for a waiver of a financial penalty if the offender cannot pay. The courts must impose a community-based sentence⁸⁴⁸ and sentence the offender to make

⁸³⁸ *Burrows*, above n 786, at 212.

⁸³⁹ *Burrows*, above n 755, at 985.

⁸⁴⁰ Above, n 755.

⁸⁴¹ Above, n 755.

⁸⁴² Above, n 755.

⁸⁴³ Stephen O’Driscoll, Geoffrey G Hall, Tracy Mellor *Sentencing Update* (New Zealand Law Society, Wellington 2007) at 3.

⁸⁴⁴ Above, n 755.

⁸⁴⁵ Above, n 755.

⁸⁴⁶ Above, n 755.

⁸⁴⁷ Above, n 755.

⁸⁴⁸ Above, n 755.

reparation.⁸⁴⁹ O'Driscoll, Hall, and Mellor also note that the Cabinet Policy Committee acknowledged, "there was no longer a community-based option that had punishment or restriction of freedom as an explicit purpose."⁸⁵⁰ Quince asserts the difficulties for low socio-economic offenders who do not have the means to pay a fine.⁸⁵¹ Māori are more likely to be given a custodial sentence upon conviction than be granted leave for home detention or to receive a fiscal penalty.⁸⁵²

The Criminal Justice Reform Bill of 2006 was an attempt to address the fast-growing rate of imprisonment that did not reflect the long-term overall decline in New Zealand's crime rate.⁸⁵³ In 2007, the Sentencing Amendment Act introduced a set of sentencing regimes. The regimes concerned intensive supervision,⁸⁵⁴ community detention,⁸⁵⁵ and home detention,⁸⁵⁶ which were to be determined by the sentencing judge.⁸⁵⁷ The Sentencing Amendment Act of 2007 was aimed to mitigate the harshly punitive focus of earlier legislation.

Section 3(a) of the Sentencing Act 2002 is a substantive marker that sets out the purposes for which offenders may be sentenced or otherwise dealt with and is the crucial component in monitoring the sentencing process. Section 5 (1) of the Interpretation Act 1999 has a similar meaning in s 3 (a) of the Sentencing Act 2002.

⁸⁴⁹ Sentencing Act 2002, s 14 (2).

⁸⁵⁰ *O'Driscoll et al*, above n 843, at 4.

⁸⁵¹ *Quince*, above n 272, at 3.

⁸⁵² Above, n 272, at 2.

⁸⁵³ (5th December 2006) 636 NZPD 6831; *O'Driscoll et al*, above n 843, at 2.

⁸⁵⁴ This includes standard and special conditions, including programmes.

⁸⁵⁵ An electronically monitored curfew may apply.

⁸⁵⁶ *O'Driscoll et al*, above n 843, at 21. According to the authors the definition of relevant occupant in s 26A (4) for the purposes of home detention, is problematic. A relevant occupant, with respect to non-family residences is defined, somewhat tautologically, as someone whom the probation officer identifies as being a relevant occupant for the purposes of s 26A (3). The unusual breadth of this definition, it is thought, is because the legislature is attempting to deal with the situation where some occupants (of nursing homes, half-way houses and the like) may not be capable of giving consent.

⁸⁵⁷ Above, n 843, at 1.

6.3.1 Summary Overview of Changes in New Zealand's Approach to Statutory Interpretation

The New Zealand courts abandoned the strict exclusionary rule during the 1980s and admitted various types of legislative history and Parliamentary speeches for statutory interpretation.⁸⁵⁸ This decision coincided with the Criminal Justice Act 1985,⁸⁵⁹ which was eventually replaced by the Sentencing Act 2002. The problematic issues arising from the literal rule, the golden rule, and the mischief rule approach to statutory interpretation signified the need for the New Zealand judiciary to adopt a purposive approach. It became more apparent after the Constitution Act 1986. The 1987 General Election did not address public concerns over crime incidences and the perception that criminals benefit from taxpayers.⁸⁶⁰ The current needs of the welfare state prevailed over the public interest in law and order. Despite the 1990 New Zealand Bill of Rights Act, the crime rate increased by 76 %—a trend that began in 1972.⁸⁶¹

Summary

This section identifies the judicial tensions between the three main rules of statutory interpretation and the need for New Zealand courts to apply an alternative approach. The contestation between constitutional rights, protests for tough-on-crime policies and competing demands for political interests, create a tension between combination of individual/social justice and public safety issues.

To navigate these tensions, balancing individual rights and public safety would require the court to consider the social implications, while also acknowledging the political, social, and economic contexts that underpin the legal ruling. While the contextual background forms the basis of the statutory framework, the courts must

⁸⁵⁸ *Carter*, above n 768, at 282.

⁸⁵⁹ The Criminal Justice Act 1985 was repealed on 1 July 2013 by section 411 of the Criminal Procedure Act 2011 (2011 No 81).

⁸⁶⁰ John Pratt and Phillip Treacher “Law and Order and the 1987 New Zealand Election” (1988) 21(4) *Australian and New Zealand Journal of Criminology* 253.

⁸⁶¹ Claire Hamilton *Reconceptualising Penalty: A Comparative Perspective on Punitiveness in Ireland, Scotland, and New Zealand* (Ashgate, Surrey, 2014) at 83.

make a decision that is fair and just. Therefore, the right to a fair trial is the primary focus of any defendant's counsel,⁸⁶² and s 27 of the Sentencing Act 2002 underpins that certainty.

6.4 Section 27 of the Sentencing Act 2002

The material discussed in the previous sections highlights relevant interpretation themes in the Sentencing Act 2002. The Legislation Act 2019 has been made more accessible for interpreters and should theoretically ensure that there are no inconsistent sentencing decisions of similar offence types between Māori and non-Māori. This section analyses the sentencing decisions of similar offence types in relation to s 27 of the Sentencing Act 2002 to examine potential inconsistencies in sentencing for similar offences and to investigate the reasons for such inconsistencies. An interpretation according to Parliament's intent is necessary for a purposeful interpretation of s 27 of the Sentencing Act 2002.⁸⁶³ It is necessary to read every section to look for a consistent theme throughout the whole scheme of the Sentencing Act.⁸⁶⁴ Section 27 of the Sentencing Act 2002 concerns the social-cultural and economic circumstances of both Māori and non-Māori offenders.⁸⁶⁵ The extrinsic materials⁸⁶⁶ are complementary and capture legislative history. Therefore, extrinsic materials are seen as accurate sources of information and are commensurate with the purpose which the Sentencing Act 2002 aims to promote. The circumstance in which the Act must continue to operate derives from the law preceding the Act.⁸⁶⁷

Section 27 of the Sentencing Act 2002 reiterates the purposive approach of the previous legislation (s 16 of the Criminal Justice Act 1985) to reduce Māori over-representation and seek alternative restorative pathways with stakeholder involvement.

⁸⁶² New Zealand Bill of Rights 1990, s 25(a).

⁸⁶³ *Burrows and Fogarty*, above n 766, at 13.

⁸⁶⁴ Above, n 766, at 15.

⁸⁶⁵ Above, n 766.

⁸⁶⁶ Above, n 766.

⁸⁶⁷ Above, n 766.

6.4 The Goals of Sentencing

To extend understanding of sentencing processes, interpretation, and decisions, it is helpful to clarify the goals of sentencing. Sentencing is a state intervention based on the premise that wrongdoing deserves punishment in proportion to the wrongdoing.⁸⁶⁸ Further, “denunciation acts principally for the benefit of the general population by publicly reinforcing the boundaries between acceptable and unacceptable behaviour.”⁸⁶⁹

According to Hall:⁸⁷⁰

... deterrence, incapacitation, and rehabilitation ... pursue crime reduction goals through sentencing. Restitution is primarily aimed at making redress to victims of crime. These systems justify sentencing on the basis of the end goals it is supposed to achieve, and thus they are often labelled as utilitarian.

Retribution is offender-orientated and is relevant to the justice system. The philosophy of punishment seeks to rebalance the moral wrong committed by the offender. Therefore, a retribution sentence must not be disproportionate to the harm of the wrong committed.⁸⁷¹

6.4.1 Sentencing Criteria

It is crucial to examine sentencing criteria because judges play a critical role in sentencing processes. They must consider cultural background factors when making decisions. This is important because the purposive approach enables judges to acknowledge how the offender ended up in court in the first place. Through

⁸⁶⁸ *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, Wellington, 1997) at 37.

⁸⁶⁹ Above, n 868.

⁸⁷⁰ Above, n 868.

⁸⁷¹ Michael Tonry, “The Questionable Relevance of Previous Convictions to Punishments for Later Crimes” in Julian V Roberts and Andrew Von Hirsch (eds) *Previous Convictions at Sentencing Theoretical and Applied Perspectives* (Oregon Hart Publishing, Oxford Portland, 2010) at 91.

understanding their socio-economic status, and family background, judges can consider the circumstances that led to the offending.

The next section examines the sentencing criteria used by judges for all offenders. The section provides an overview of the principal statute, the framework, and the functions of the Sentencing Act 2002. The Act governs the preliminary sentencing criteria of sentencing purposes and principles and provisions of general application under Part 1.⁸⁷²

The Sentencing Act 2002 provides a distinct regime that clarifies the purposes of the Act as set out in s 3:

3 Purposes

The purposes of this Act are—

- (a) to set out the purposes for which offenders may be sentenced or otherwise dealt with; and
- (b) to promote those purposes, and aid in the public's understanding of sentencing practices, by providing principles and guidelines to be applied by courts in sentencing or otherwise dealing with offenders; and
- (c) to provide a sufficient range of sentences and other means of dealing with offenders; and
- (d) to provide for the interests of victims of crime

The words “otherwise dealing with an offender” or “other means of dealing with an offender” mean an offence committed following a finding of guilt or a plea of guilty instead of imposing a sentence.⁸⁷³

The application of the Act under s 5 binds the Crown. However, it does not apply to proceedings under the Armed Forces Discipline Act 1971⁸⁷⁴ or proceedings on

⁸⁷² Sentencing Act 2002, ss 3 to s 31.

⁸⁷³ Sentencing Act 2002, s 4 3(a), 3(b).

⁸⁷⁴ Navy, army, and air force personnel come under the jurisdiction of this Act. See s 6 of the Armed Forces Discipline Act 1971.

appeal from any decision under that Act, except as expressly provided in that Act.⁸⁷⁵ Section 6 of the Act provides for a lesser penalty if there is a variation between the offence and sentencing.⁸⁷⁶ Section 7 of the Act “reflects the philosophical purposes of sentencing, consistent with long-established case law and jurisprudential principles”.⁸⁷⁷ An appropriate sentence⁸⁷⁸ derives from restorative principles of justice,⁸⁷⁹ and retribution.⁸⁸⁰ The sentencing purposes of accountability,⁸⁸¹ denunciation⁸⁸², deterrence⁸⁸³, rehabilitation and reintegration⁸⁸⁴, reparation⁸⁸⁵, responsibility⁸⁸⁶, and protection of society⁸⁸⁷ are part of the principles.

6.4.2 Section 16 of the Criminal Justice Act 1985: A Precursor to s 27 of the Sentencing Act 2002

A highlight of s 16 of the Criminal Justice Act 1985 was Parliament’s intent to reduce Māori over-representation in the prison system. The Criminal Justice Act 1985 was the act which would subsequently be replaced by s 27 of the Sentencing Act 2002. Section 16 of the Criminal Justice Act 1985 reflects Parliament’s acknowledgement and expectations that the Courts will address Māori overrepresentation by considering an offender’s cultural background through representation or a cultural report.⁸⁸⁸ The rationale for s 27 of the Sentencing Act 2002 can be illuminated by looking at the genesis of its predecessor (The Criminal Justice Act of 1985). The genesis of s 16 of the Criminal Justice Act 1985 can be seen in the Justice Department’s submissions to the Statutes Revision Committee, as it was not included in the original Bill of 1983 or the subsequent Bill of 1984. Of

⁸⁷⁵ Sentencing Act 2002, s 5 (1) (2); Geoff Hall *Sentencing Law and Practice* (3rd ed, LexisNexis, Wellington, 2014) at 456.

⁸⁷⁶ Sentencing Act 2002, s 6 (1). This section reflects s 25 (g) of the Bill of Rights Act 1990 and the Crimes Amendment Act (No 2) 2008, s 17.

⁸⁷⁷ Hall, above n 875, at 461.

⁸⁷⁸ Above, n 875, at 101.

⁸⁷⁹ Sentencing Act 2002, s 7 (1) (b) and (c); above n 809, at 131.

⁸⁸⁰ Sentencing Act 2002, s 7 (1) (a) and (e); above n 809, at 102-105, 133.

⁸⁸¹ Sentencing Act 2002, s 7 (1) (a).

⁸⁸² Sentencing Act 2002, s 7 (1) (e).

⁸⁸³ Sentencing Act 2002, s 7 (1) (f); above n 809, at 105-126.

⁸⁸⁴ Sentencing Act 2002, s 7 (1) (h); above n 809, at 135-140.

⁸⁸⁵ Sentencing Act 2002, s 7 (1) (d); above n 809, at 130-131.

⁸⁸⁶ Sentencing Act 2002, s 7 (1) (c).

⁸⁸⁷ Sentencing Act 2002, s 7 (1) (g); above n 809, at 126-130.

⁸⁸⁸ *Wells v Police* [1987] 2 NZLR 560 (HC).

pertinence to this research, the Justice Department's report in the "Sentencing Trends in District Courts 1979-1983 (Males)" identified the disproportionate rates between Māori and non-Māori prisoners and emphasised the need for different options to close the disparities.⁸⁸⁹ The Justice Department noted:⁸⁹⁰

... that Māori offenders appearing before the Court for sentence should be entitled to have a person who is familiar with the case advise the Court on the offender's family circumstances and cultural background and on such other matters as the Court considers relevant. Such a right would be in addition to the right to legal representation.

The above statement suggests that information on an offender's cultural background, and on how that background relates to the offence had the potential to prevent re-offending.⁸⁹¹ Also, the Justice Department suggested that a general application for 'any offender' would counteract any debate concerning an unfair advantage toward Māori offenders.⁸⁹² The approach was a "conscious attempt to recognise the importance of trying to meet the needs of Māori offenders".⁸⁹³ The focus of the bill that originally introduced s 16 of the Criminal Justice Act 1985 (which is the predecessor to section 27) was:

... the conscious attempt to recognise in particular the importance of trying to meet the needs of Māori offenders, and more particularly young Māori offenders, who form such a disproportionately large element within the prison population and the population coming before the courts, to the shame of us all.

Therefore, the purpose of the new provisions was to "secure the co-operation of Māori people seeking ways to find alternatives to imprisonment."⁸⁹⁴ The legislation of the 1985 Criminal Justice Act explicitly acknowledged the need to look at the

⁸⁸⁹ Department of Justice *Criminal Justice Bill No.2* (22 April 1985) at 3.

⁸⁹⁰ Above, n 889, at 2.

⁸⁹¹ Honourable Geoffrey Palmer (23 July 1985) 464 NZPD 5834.

⁸⁹² Above n 889, at 2.

⁸⁹³ (12 June 1985) 463 NZPD 4759.

⁸⁹⁴ Above n 889, at 2.

cultural background of offenders. However, in practice, this intent was often ignored. For example, Parliamentary signals to address Māori overrepresentation were re-highlighted by the High Court in *Wells v Police*.⁸⁹⁵ A cultural ‘baseline’ was meant to outline the offender’s social and cultural background as well as the systemic disadvantages affecting Māori for the judges. The review proceedings concerned the correct interpretation of s 16 of the Criminal Justice Act 1985. Smellie J held that a person called to speak was not required to take an oath⁸⁹⁶ or be subject to, the rules of evidence for that purpose.⁸⁹⁷ Section 5 (j) of the Acts Interpretation Act 1924 indicates what the interpretation of s 16 of the Criminal Justice Act 1985 should be.

According to Smellie J:⁸⁹⁸

... the beneficial and remedial effects of s 16 of the Criminal Justice Act, associated as it is with the new community-based sentences would be significantly diminished if the interpretation espoused by the learned District Court Judge in this case was upheld.

Smellie J also noted:⁸⁹⁹

[T]here is, today, a growing (and some would say long overdue) recognition that the Court system in this country based as it is on the Anglo-Saxon traditions of the common law is not always flexible enough to ensure fair and appropriate treatment for all New Zealanders.

⁸⁹⁵ *Wells v Police*, above n 888.

⁸⁹⁶ Above, n 888, at 21. The expression “to speak” contrasted with the Oaths and Declaration Act 1957. The first case concerning the notions of “witness” and “evidence rule” were understood in a different context and is highlighted in *R v John McCarthy* SC Wellington 17 April 1844. In this case, the defendant was indicted for larceny. The case involved four potential Māori witnesses. The Unsworn Testimony Ordinance 1844 7 Vict 16 had not been passed. The Ordinance allowed Māori to give evidence without taking the oath if they had insufficient religious conviction to come within the common law rules. The case highlights Chapman J’s comments on the pagan evidence rule. Two witnesses confirmed they were Christians while the other two were excluded from giving evidence.

⁸⁹⁷ Above n 888, at 24.

⁸⁹⁸ Above, n 888, at 27.

⁸⁹⁹ Above, n 888, at 26-27.

Smellie J's comment probes to the heart of this thesis inquiry. He clearly states the limitations of the one law approach because of its inheritance from the Anglo-Saxon system. His view illustrates what frequently happens for Māori when they have to navigate a system which is not tailored to their cultural values and language. The slow pace of court proceedings and the lack of access to justice for lower-income individuals also make it difficult for many people to resolve their disputes on time. Therefore, it is important that s 27 cultural reports are recognised to accommodate and compensate for the inflexibility of the courts.

As a result of *Wells v Police*,⁹⁰⁰ the sentence squashed the sentencing process, which was not correct. The learned District Court Judge's interpretation did not reflect the legislature's thinking.⁹⁰¹ The purpose of s 16 of the Criminal Justice Act 1985 was reducing Māori over-representation and is the foundation of its successor, s 27 of the Sentencing Act 2002. The next section discusses pertinent cases to show how challenges about applying and interpreting the recognition of cultural factors continue under s 27 of the Sentencing Act 2002.

The *R v Bhaskaran*⁹⁰² case highlighted the controversy over the general application to all offenders under s 27 of the Sentencing Act 2002. The submissions focused on the sentencing process and substance⁹⁰³ after the judge denied supportive representatives of the Whakatohea Māori Trust Board.⁹⁰⁴

According to Anderson J:⁹⁰⁵

Implicit in counsel's submission is that such a procedure may be capable of mitigating a sentence and the appellant was deprived of the opportunity of the Court's consideration of any mitigating aspects of a rehabilitative programme.

⁹⁰⁰ Above, n 888.

⁹⁰¹ *Burrows*, above n 755, at 985.

⁹⁰² *R v Bhaskaran* Court of Appeal, 25/11/2002, (2002) CA333/02.

⁹⁰³ Above, n 902, at [9] per Anderson J.

⁹⁰⁴ Above, n 902, at [6 and 7].

⁹⁰⁵ Above, n 902, at [10].

Section 27 of the Sentencing Act 2002 confirms the statutory entitlement⁹⁰⁶ to representation⁹⁰⁷ and the information that was relayed to the judge who noted:⁹⁰⁸

We are troubled that the Judge thought it unnecessary to hear from representatives of the Whakatohea Trust Board. The appellant did have a presumptive right pursuant to s 27 of the Sentencing Act to have representations on relevant matters, indicated in that section, placed before the Court. Community support for rehabilitation may be very relevant to the nature or length of sentence. Where, as in this case, there is a bad past record, support systems to assist rehabilitation upon release from prison could tend to mitigate a sentence influenced by considerations of personal deterrence and rehabilitation. This of course is recognised by the present s 27 and its statutory predecessor, s 16 of the Criminal Justice Act 1985. Moreover, a Court must be astute to recognise the valuable assistance it may obtain from another cultural, ethnic, or other community insight, including on matters of penal concern.

Accordingly, the judge addressed the overlooking of the sentencing process and stated:⁹⁰⁹

A Court must hear from a person or persons called under s 27 unless the Court is satisfied that there is some special reason that makes this unnecessary or inappropriate (ss (3)). If it declines to hear a person, the Court must give reasons (ss (4)). In this case no reasons were given and there were no special reasons apparent. The apparent overlooking of the section and its requirements was unfortunate.

The substantive ground upon which the appellant sought a remedy concerned a real discount for timely guilty pleas. Anderson J noted that discounts were manifestly

⁹⁰⁶ Above, n 902, at [14].

⁹⁰⁷ Above, n 902, at [18].

⁹⁰⁸ Above, n 902, at [13].

⁹⁰⁹ Above, n 902, at [15] per Anderson J.

inadequate as the victim would not need to give evidence at trial.⁹¹⁰ Also, the judge addressed other indications for making allowance by asserting that:⁹¹¹

... the saving in public expense and inconvenience in respect of a trial, the ability to redeploy law enforcement and judicial resources in another way, and the value of public acknowledgement of fault in order to assist closure for victims and rehabilitation of offenders.

This case illustrates that s 27 of the Act 2002 is a mitigating tool and contributory factor in reducing the likelihood of a victim having to provide evidence from an early guilty plea. The early guilty plea justifies attention to the sentencing process provided that the substance of the sentence is adequate. The clear directions given by the Court of Appeal in *R v Bhaskaran*⁹¹² regarding s 27 of the Sentencing Act 2002 exemplify alternative sentencing options as a last resort to imprisonment. If, for example, an offender cannot undertake the rehabilitative programme, the sentencing process allows for discounts depending on the type of offence.

In this case, the judge's approach to s 27 of the Act demonstrates the resurgence of the golden rule. Parliament cured the mischief by introducing s 16 of the Criminal Justice 1985 and continued to expand on this in s 27 of the Act. The material (extrinsic) to the current Act illustrates the legislative history, the legislature's thinking, and the Parliament's endorsement of the words that it passed. The judge created a precedent until the Court of Appeal overturned the rule.

In *R v Evans*,⁹¹³ Winter J noted there was "a dearth of legal precedent discussing either the principle or application of s 27 Sentencing Act 2002" and referred to the case of *Wells v Police*⁹¹⁴ to gain some insight surrounding the Parliamentary intent

⁹¹⁰ Above, n 902, at [11].

⁹¹¹ Above, n 902, at [16].

⁹¹² Above n 902.

⁹¹³ *R v Evans* [2017] NZDC 21170 [19 September 2017] at [16] per Winter J.

⁹¹⁴ *Wells v Police*, above n 888, at 24-27.

behind the section. Winter J summarised the general application of s 27 of the Act by stating:⁹¹⁵

It is no doubt ... that s 27 Sentencing Act 2002 was the wise step taken by our lawmakers to try and provide some balance. This section has often been criticised as not providing equal treatment of all citizens. That sort of argument collapses around the discussion of what equality means. Equality does not mean sameness. This case was found on the like for like. Equality must always mean that there is a respect across difference, and where there is difference, particularly when it comes to sentencing, then a *purposive reading of s 8(i) and s 27 requires that there be an appropriate discount* given for offenders who have provided the Court with a proper sense of mitigating matters that engage their personal, family, whānau, community and cultural background against the provisions of s 27 of the Act. [Emphasis added].

Winter J commended that the cultural report is an “excellent example of how one family can establish their whakapapa and recent history, and their strong sense of whanaungatanga, into an appropriate plan.”⁹¹⁶ A discount was awarded.⁹¹⁷

According to O’Driscoll J, writing extrajudicially:⁹¹⁸

Section 27 does not seek to reduce sentences for Māori or for those from other cultures; the section attempts to provide a court with relevant and appropriate material. A court can then give appropriate weight to that material and take the material into account along with all the other material placed before it. In this way the court is likely to impose a more relevant, meaningful, and appropriate sentence than it would without the material ... if the sentence more readily and appropriately addresses the causes of offending and reduces the likelihood of further offending, that must be in the interests of the community.

⁹¹⁵ *R v Evans*, above n 913, at [23].

⁹¹⁶ Above, n 913, at [25].

⁹¹⁷ Above, n 913, at [30].

⁹¹⁸ Stephen O’Driscoll “A Powerful Mitigating Tool” (2012) NZLJ 358 at 360.

6.4.3 Sections 7, 8, 9, 10, 25, 26: Implications for s 27 of the Sentencing Act 2002.

For judges making sentencing decisions, they are required to balance complex considerations and simultaneously deliver justice. According to Sarah Krasnostein and Arie Freiberg:⁹¹⁹

Sentencing ... is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.

According to Geoff Hall, the Sentencing Act 2002 lacks a comprehensive sentencing policy.⁹²⁰ The current purposes and principles under ss 7 and 8 are of little assistance to sentencing judges. Risk assessment statistics are in danger of generalisation. For example, s 7 (h) of the Sentencing Act 2002 provides discounts, generally between 10-20%.⁹²¹ Where an offender shows they have taken reasonable steps towards rehabilitation, the judges will weigh up the circumstances. For example, in *R v Hill*,⁹²² a discount of 35% was allowed for unusual personal circumstances prior to any allowance for guilty pleas.

Section 7 (1) (g) of the Act requires judges to “limit the imposition of punishment to the minimum necessary to achieve” the fundamental concepts of justice and mercy.⁹²³ Section 7(1)(i) of the Act allows judges to adopt two or more purposes as

⁹¹⁹ Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 Law and Contemp Probs 265 at 265.

⁹²⁰ Hall, above n 875, at [1.3].

⁹²¹ Handout from “Te Hunga Roia Māori o Aotearoa Hui-a-Tau Conference” on 16-18 November 2017 at the AUT South Campus, Manukau City, Auckland.

⁹²² *R v Hill* [2008] 2 NZLR 381.

⁹²³ Hall, above n 875, at 100; Sentencing Act 2002, s 16(1); See *R v Pawa* [1978] 2 NZLR 190 (CA).

outlined in paragraphs (a) to (h). The nature and type of offence and the circumstance of the offender dictate the predominant purpose or purposes.⁹²⁴ Section 7(2) of the Act implies there is no hierarchy as each purpose is of equal standing.⁹²⁵

The sentencing principles of s 8 of the Sentencing Act 2002 are mandatory. Sections 8(a) and 8(b) of the Act are about the degree of culpability. Sections 8(c) and (d) are subject to s 8(j). The courts must take into account any outcomes of restorative justice processes, including without limitation anything referred to in s 10 of the Act. Section 8(e) of the Act asserts consistency⁹²⁶ and the promotion of the rule of law.⁹²⁷ The maximum penalties are imposed unless the offender's circumstances make it inappropriate.⁹²⁸

Section 8(f) provides the courts with information concerning the effect of the offending on the victim. Section 8(g) of the Act requires that the court impose the least restrictive outcome that is appropriate in the circumstance.⁹²⁹ Section 8(h) encourages the avoidance of sentencing that would be disproportionate to an offender's particular circumstances. Section 8(i) provides a basis for consideration of cultural information. Section 8(i) mandates s 27, whereas s 26(2)(a) is not an obligatory request.

The aggravating and mitigating factors of the common law are in s 9 of the Act,⁹³⁰ and are not viewed as separate principles.⁹³¹ As a matter of sentencing policy, the principle of punishment is pursued by either the legislation or the

⁹²⁴ Above, n 875, at 102.

⁹²⁵ *R v Taueki* [2005] 3 NZLR 372 (CA).

⁹²⁶ Above n 875, at 471.

⁹²⁷ Joseph Raz "The Rule of Law and its Virtue" in Aileen Kavanagh and John Oberdiek (eds) *Arguing About Law* (Routledge, Abingdon, 2013) 181 at 183.

⁹²⁸ Jonathan Eaton and Fred McElrea *Sentencing: The New Dimensions* (New Zealand Law Society, Wellington, 2003) at 20; above n 809, at 150.

⁹²⁹ The section includes an express reference to the hierarchy of the offences according to the seriousness of the harm in s 10A and s 24A of the Sentencing Act 2002.

⁹³⁰ Above n 875, at 482.

⁹³¹ Above, n 875, at 148.

judiciary.⁹³² Public confidence in the administration of justice is a precursor of balancing aggravating and mitigating factors.⁹³³

The mandatory provision of s 10 of the Sentencing Act 2002 may be helpful for judges constrained by precedents, tariffs, and concerns about making amends on the basis of information from the offender's counsel. The offer to make amends may include monetary reimbursement, performance, or other measures to compensate for the harm. However, the reparation to make amends must be genuine.⁹³⁴

Concerning Māori offenders, defence counsel does not raise s 10 submissions because of the Treaty of Waitangi. Section 10 of the Sentencing Act 2002 is quite specific and concerns the acceptance of the provision that a defendant is willing to commit to making amends. In comparison, s 27 of the Sentencing Act 2002 is not specific and is much broader. The cultural information about the background of the offender is a narrative that explains a range of social inequalities like differential treatment, addictions, and behavioural attitudes.

Section 21 of the Act limits the court's powers to make any order on the conviction of any person⁹³⁵ based on multiple sentences. Section 21(b) limits the power of a court to make any order empowered to make on the conviction of any person, whether under the Act or any other enactment.

Section 25(1)(b) of the Act allows adjournment of proceedings to enable restorative justice processes to proceed. If the offender completes the programme, the judge will consider this before sentencing.

Section 25 allows for a power of adjournment for inquiries concerning a suitable punishment. The Matariki Court in Kaikohe allows the offender to participate in a culturally appropriate rehabilitation programme under s 25 of the Act. The judge may still sentence the offender even though an adjournment has happened. An adjournment can provide real opportunities for rehabilitation. In *Berkland v R*, the

⁹³² Above, n 875.

⁹³³ Above, n 875, at 147.

⁹³⁴ Above, n 875, at 134.

⁹³⁵ Above, n 875, at 539.

Supreme Court noted that a sentencing judge can use the adjournment power in s 25 to obtain information about an aspect of the offender's background and their rehabilitation readiness. This has a double advantage: first, the offender has a real incentive to complete any rehabilitative programme; and second, the sentencing judge can evaluate the offender's prospects for rehabilitation and reintegration before deciding whether to sentence them to community service.⁹³⁶

Also:⁹³⁷

... s 25 is not just about alternatives to incarceration, though that will be its primary focus. It can also be used to facilitate restorative justice processes, to obtain better background information about the offender, to allow a relevant community organisation to work with the offender, or to enable a remand prisoner to successfully complete Department of Corrections rehabilitative programmes. As we will come to, Mr Berkland's is a case in point with respect to the last mentioned option. Even if imprisonment is unavoidable, an offender who demonstrates a commitment to rehabilitation may appropriately receive a reduced sentence.

Section 26 of the Sentencing Act 2006 concerns pre-sentence reports based on the ROC*ROI assessment by probation officers. Within the Department of Corrections, ROC*ROI is widely used as a measure of risk. It combines two separate measures: ROC (Risk of Reconviction) and ROI (Risk of Imprisonment). As indicated by the asterisk, the measures are multiplied together. Thus ROC*ROI describes an offender's combined chances of reoffending and imprisonment. The risk assessment considers a variety of factors, such as social and demographic variables, criminal records, and potential for future offending, to provide a more comprehensive view of risk. However, an offender's noncompliance with the rigid standards of assessment inevitably results in recommendations for imprisonment.⁹³⁸

⁹³⁶ *Berkland v R* [2022] NZSC 143 at [132].

⁹³⁷ Above, n 936, at [133].

⁹³⁸ See Appendix 7: Judge Response "J".

The information included in a pre-sentencing report⁹³⁹ may concern restorative justice, agreements, responses, or measures to amend.⁹⁴⁰ Under s 26(2)(a) of the Act, pre-sentence reports have been referenced as a “Māori Cultural Report.”⁹⁴¹ Section 10 of the Sentencing Act 2002 is not utilised by Māori offenders because s 27 highlights the conditions for the possibility of transformative outcomes. Section 26 refers to pre-sentence reports written by probation officers. However, it is crucial as a narrative baseline of information must be available for the judge before sentencing.

Section 27 of the Sentencing Act 2002 allows for a cultural background report for judges to consider the associated disadvantages of Māori offenders. However, this section also has a general application for all offenders. Section 27 (1) provides that an offender may request the court to hear a person provide information concerning the personal, family, community, and cultural background of the offender. Specifically, a speaker may discuss:

- (a) the personal, whanau, community, and cultural background of the offender:
- (b) the way in which that background may have related to the commission of the offence:
- (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 family, whanau, or community and the victim or victims of the offence:
- (d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:
- (e) how the offender’s background, or family, whanau, or community support may be relevant in respect of possible sentences.

Section 27 of the Sentencing Act 2002 allows for judicial discretion. Also, any person, including a kin member of the offender’s whānau, hapū or iwi, may provide cultural information to the judge. The interactions indicate the whanaungatanga

⁹³⁹ Sentencing Act 2002, s 26 (2) (c).

⁹⁴⁰ Sentencing Act 2002, s 10.

⁹⁴¹ *R v Tareha* [2015] NZHC 676 High Court, Napier, 31/3/2015, CRI-2014-020-430 per Toogood J at [17].

process unfolding to help the judge determine a sentence. The court may decline to hear a person if circumstances suggest otherwise and must give reasons for the decision.⁹⁴² An adjournment of the proceedings enables arrangements to be made to hear a person speak on the offender's behalf. Under s 27(5), the courts must hear a person called by the offender on any of the matters specified in s 27(1) (a) to (e) of the Act.

6.4.4 The Challenge of Recognising the Impact of Systemic Deprivation in Sentencing Decisions

While s 27 allows for cultural reports, it is unclear whether it can accommodate recognition of the effects of systemic deprivation of Māori. Whata J recognised the systemic deprivation of Māori which was reflected in the loss of land and other tribal resources and the “effects of tikanga on Māori communities”.⁹⁴³ The impact with the “destruction of traditional social structures, tikanga, culture, and language” has “preceded widescale migration from tribal rohe (districts) to urban areas.”⁹⁴⁴

Also:⁹⁴⁵

... the normative basis for recognition of systemic Māori deprivation as a mitigating sentencing factor is not dependent on racial or ethnic classification. Rather, it is the presence of systemic deprivation in the lives of Māori offenders and their whānau that may trigger the potential for a differential sentencing response.

Therefore, it is imperative that the courts consider:⁹⁴⁶

... the full background of the offender, the relationship of that background to the commission of the offence, the processes used to resolve the offence, and the role of whānau and community to prevent further offending and in respect of possible sentences.

⁹⁴² Sentencing Act 2002, s 27 (1) (3).

⁹⁴³ *Solicitor-General v Heta*, above n 719, at [40].

⁹⁴⁴ Above, n 719.

⁹⁴⁵ Above, n 719, at [43].

⁹⁴⁶ Above, n 719, at [37].

In the absence of statutory direction, s 27 cultural reports enable background information about offenders to be presented to a judge. The information is evaluated to determine whether it complies with the Act's purposes and principles. Section 27(2) requires hearing from a person called by the offender under s 27(1), unless unnecessary or inappropriate. The provision emphasises that each of these matters plays a critical role in sentencing.⁹⁴⁷

Whata J assessed s 27 information by stating:⁹⁴⁸

In this regard, s 27 information has been applied in respect of the following sentencing criteria:

- (a) Section 8(a) — the degree of the offender's culpability;
- (b) Section 8(g) — the least restrictive sentence possible;
- (c) Section 8(h) — the circumstances of the offender that would mean a sentence is disproportionately severe;
- (d) Section 8(i) — the offenders personal, family, whānau, community and cultural background with a partly or wholly rehabilitative purpose;
- (e) Section 9(2)(f) — remorse /offers to make amends by the offender/whānau.

Whata J noted:⁹⁴⁹

... any binding direction to be found in *Keil* must consider the facts treated by the Court as material and the Court's decision as based on them ... *Keil* contains no detailed survey of sentencing authorities that might indicate that the Court was laying down a general rule about discounts for personal background factors.

⁹⁴⁷ Above, n 719, at [38].

⁹⁴⁸ Above, n 719, at [39].

⁹⁴⁹ Above, n 719, at [57].

In *Keil v R*,⁹⁵⁰ the defendant could not receive an enhanced discount for the hardship as a Māori offender. Whata J concluded that (a) Keil did not preclude discounts of 30% for s 27 factors and (b) the sentence was not so inadequate as to require adjustment.⁹⁵¹ There is no clear unifying principle for applying discounts for deprivation.⁹⁵² The combination of deprivation factors, such as trauma, drug, and alcohol abuse, are difficult to separate from other factors.⁹⁵³ The defendant's "difficult upbringing" did not attract an extra discount of 30 % except for a 10 % discount for participation in the restorative justice process.⁹⁵⁴ The personal mitigating factors identified under s 27 of the Sentencing Act 2002 are not independent of one another.

The positive outcome of restorative justice processes can accommodate the remaining legislative concerns about accountability, deterrence, denunciation, and public protection.⁹⁵⁵

6.4.5 The Application or Non-Application of s 27

The high numbers of Māori offenders mean that the judges see them daily in the courts. Based on whanaungatanga, a concept akin to restorative justice, there is a potential to produce societal outcomes to reduce sentence lengths for all offenders, not just Māori. So, s 5(1) of the Interpretation Act 1999 implies a purposive approach, and the crucial question is:

Where the Sentencing Act 2002 is to find out how s 27 applies to the fact situation, has the Act been interpreted to give effect to its purpose, and if not, which one of the approaches are judges taking into account in cases?

⁹⁵⁰ *Keil v R* [2017] NZCA 563 at [58].

⁹⁵¹ *Solicitor-General v Heta*, above n 719, at [67] to [68].

⁹⁵² Above, n 719, at [63].

⁹⁵³ Above, n 719.

⁹⁵⁴ Above, n 719, at [64].

⁹⁵⁵ Above, n 719, at [66].

This section identifies and examines three categories that demonstrate how the courts have addressed the issues raised by s 27 in available case law to determine the current state of knowledge in this field. It is proposed that discussion of the issues emerging in the application of s 27 of the Sentencing Act 2002 can provide a foundation for examining the possibility of uniform acceptance of whanaungatanga values and practices. The cases are categorised as follows:

1. Cases considered s 27 of the Sentencing Act 2002 and applied (1st July 2002 to 1st March 2019).
2. Cases considered s 27 of the Sentencing Act 2002 but not applied (1st July 2002 to 1st March 2019).
3. Cases not considered s 27 of the Sentencing Act 2002 but could have (1st July 2002 to 1st March 2019).

The cases which are considered in the next section involve s 27 of the Sentencing Act from 1 July 2002 to 1 March 2019. Before examining the cases, a brief summary is provided of the research process that identified these cases.

The research undertaken on cases involving s 27 of the Sentencing Act from 1 July 2002 to 1 March 2019 was conducted using the Westlaw database. The keywords ‘sentencing’ and ‘cultural’ generated 169 results which led to *Wells v Police*.⁹⁵⁶ Under the “Refine your Search” heading, I entered the research term “s 27”, and the search results displayed 38 cases. Of those 38 cases, five were unrelated to “s 27”, and twenty involved the application of “s 27”. *R v Evans*,⁹⁵⁷ was discovered on the District Court’s website.

Thirteen of s 27 reports examined did not show a discount. The cases that could have applied s 27 generated 39 after entering the term ‘Māori’ initially came up with 159 results. The results are not conclusive because several unreported cases did not appear. According to the findings, there is enough data to analyse the similarities and differences between the three approaches, including some

⁹⁵⁶ *Wells v Police*, above n 888.

⁹⁵⁷ *R v Evans*, above n 913.

anomalies. From January 2019 to March 2019, only one case received an application of s 27 of the Sentencing Act 2002. In 2018, there were nine cases involving consideration and application of s 27, seven in 2017, one in 2014, one in 2012, and one in 2002.

6.5 Cases considered s 27 of the Sentencing Act 2002 and applied (1st July 2002 to 1st March 2019)⁹⁵⁸

6.5.1 Restorative Approaches

Restorative approaches impact sentencing outcomes. In *R v Cameron*,⁹⁵⁹ despite no evidence of a cultural report, van Bohemen J awarded a discount. In *Taylor v R*,⁹⁶⁰ a pre-sentence report⁹⁶¹ and an s 27 cultural report⁹⁶² led to a discharge without conviction. Recognition of victim impact statements⁹⁶³ and letters of apology⁹⁶⁴ assisted the defendant with a discount from the matters raised in an s 27 cultural report.⁹⁶⁵ Also, in *R v Te Pania*,⁹⁶⁶ under s 25 of the Sentencing Act 2002, a hearing was scheduled to take place on a marae with a request for an s 27 cultural report. Therefore, in some instances judges are taking a restorative approach by acknowledging the significance of a s 27 cultural report.

6.5.2 Section 8(i) of the Sentencing Act 2002

In *R v Taulapapa*,⁹⁶⁷ reference was made to s 8(i) of the Sentencing Act 2002. The judge saw no reason not to consider s 27 of the Sentencing Act 2002.⁹⁶⁸ Two affidavits were accepted,⁹⁶⁹ although the offender's cultural background was no

⁹⁵⁸ See Appendix 4.

⁹⁵⁹ *R v Cameron* [2018] NZHC 2046 at 48 per van Bohemen J.

⁹⁶⁰ *Taylor v R* [2018] NZHC 688.

⁹⁶¹ Above, n 960, at [16] per Thomas J.

⁹⁶² Above, n 960, at [9, 10 and 11].

⁹⁶³ *R v Ngatai* [2017] NZDC 18290 at [2].

⁹⁶⁴ Above, n 963, at [3].

⁹⁶⁵ Above, n 963, at [5] and [8].

⁹⁶⁶ *R v Te Pania* [2015] DCR 25 District Court, Kaitiaia, 13/8/2014, CRI-2014-029-730, CRI-2013-029-766. This case was an offence against "Fisheries." A hearing was held at Roma marae.

⁹⁶⁷ *R v Taulapapa* [2018] NZHC 834.

⁹⁶⁸ Above, n 967, at [27] per Woodhouse J.

⁹⁶⁹ Above, n 967, at [28].

excuse for the conduct.⁹⁷⁰ The information was necessary to assess the reasons for the conduct and the extent of the offender's culpability.⁹⁷¹

In *R v Alexander*,⁹⁷² Davidson J noted that a cultural report is seldom obtained and underutilised and found the information beneficial for analysis.⁹⁷³ This view resulted from an informal conversation between the judge and the cultural report writer. The judge stated that:⁹⁷⁴

... cultural information must be considered by the Court when sentencing, and s 8(i) of the Act is to ameliorate the over representation of Māori in prison, and to encourage judges to adopt a restorative approach in sentencing. This Report is significant. It has been said by His Honour Judge O'Driscoll in the District Court that s 27 of the Act is one of the most under-utilised and unknown provisions of the Sentencing Act, and in my view, it squarely bears on the sentence in your case.

A cultural report could help to address the fact that Māori are over-represented in prisons and emphasises that judges should consider cultural information in sentencing. The report also highlights the importance of a restorative approach in sentencing. As a result, the report reinforces the idea that cultural information should be considered at the sentencing stage, as well as s 8(i) of the Act, which speaks to the sentencing of Māori offenders.

Many judges acknowledge the impact of disconnection from their whānau and cultural links on offenders. For example, in *R v Alexander*,⁹⁷⁵ the offender's cultural background was discussed,⁹⁷⁶ despite the offender's lack of knowledge of his own

⁹⁷⁰ Above, n 967, at [29]

⁹⁷¹ Above, n 967, at [30].

⁹⁷² *R v Alexander* [2018] NZHC 1584.

⁹⁷³ Above, n 972, at [7] and [66] per Davidson J.

⁹⁷⁴ Above, n 972, at [77].

⁹⁷⁵ Above n 972.

⁹⁷⁶ Above, n 972, at [67-77] per Davidson J.

culture.⁹⁷⁷ Similarly, in *R v W*,⁹⁷⁸ a written cultural report⁹⁷⁹ was accepted by the judge who observed:⁹⁸⁰

... how someone without connection to whanau, hapū or iwi is a “non-person” in Māori epistemology, being outside of the collective structures of social groupings, meaning that the person is also disconnected from the protection and censure offered by the group to assist them to develop a pro-social identity, where the interests and wellbeing of the collective group are paramount.

A pre-sentence report also indicated the offender’s circumstances. Muir J adopted a starting point of six years and two months’ imprisonment.⁹⁸¹ After considering the cultural report, the judge gave discounts for a guilty plea and remorse and sentenced W to five years and two months.⁹⁸² As the judge’s comments emphasise, cases like this illustrate how disconnection from whānau impacts the offender’s cultural identity and the approach can assist the restoration of cultural identity.

The restoration of cultural identity is a theme found in helpful cultural reports.⁹⁸³ In the case of *R v Hurrell*,⁹⁸⁴ Davidson J noted that the defendant’s removal from whānau and whakapapa denied his fundamental right to be brought up around his culture.⁹⁸⁵ The disconnection with his whānau, hapū, or iwi and knowledge of his whakapapa⁹⁸⁶ meant the defendant was regarded as a non-person.⁹⁸⁷ The defendant was allowed to address his compromised Māori cultural identity,⁹⁸⁸ develop knowledge of Te Ao Māori,⁹⁸⁹ and move toward rehabilitation.⁹⁹⁰

⁹⁷⁷ Above, n 972, at [73].

⁹⁷⁸ *R v W* [2018] NZHC 1945.

⁹⁷⁹ Above, n 978, at [11] per Muir J.

⁹⁸⁰ Above, n 978, at [12].

⁹⁸¹ Above, n 978, at [32].

⁹⁸² Above, n 978, at [63]– [64].

⁹⁸³ *R v Hurrell* [2018] NZHC 2505 at [40].

⁹⁸⁴ Above, n 983, at [40].

⁹⁸⁵ Above, n 983, at [45].

⁹⁸⁶ Above, n 983, at [41].

⁹⁸⁷ Above, n 983, at [43].

⁹⁸⁸ Above, n 983, at [51].

⁹⁸⁹ Above, n 983, at [50].

⁹⁹⁰ Above, n 983, at [52].

6.6 Cases considered s 27 of the Sentencing Act 2002 but not applied (1st July 2002 to 1st March 2019)⁹⁹¹

In comparison with the first set of cases discussed, the following cases illustrate the underlying considerations that conflict with the legal norm of the whanaungatanga process under s 27 of the Sentencing Act 2002.

The *Fane v R*⁹⁹² case illustrates the conflict of interpretation between s 26 and s 27 of the Sentencing Act 2002. Although a cultural report was not requested,⁹⁹³ the pre-sentence report and the psychiatric report commissioned under s 38(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003⁹⁹⁴ did not alter⁹⁹⁵ the judge's approach to the mandatory mitigating factors under s 8(i) of the Sentencing Act 2002.⁹⁹⁶

Similarly, in the case of *R v Hone*,⁹⁹⁷ s 27 was described as an informal process⁹⁹⁸ and would not have provided the court with any further assistance.⁹⁹⁹ Venning J stated:¹⁰⁰⁰

... the structure of the Act suggests that where cultural and family information is required to be provided in a formal report to the Court it is to be provided in the pre-sentence report called for and provided for under s26.

The main issue is that s 26(2)(a) does not oblige the report writer to canvass the cultural background information and could bury what could have been vital information for sentencing. If the structure of the Act means that s 26 has priority

⁹⁹¹ See Appendix 5.

⁹⁹² *Fane v R*, above n 41.

⁹⁹³ Above, n 41, at 27.

⁹⁹⁴ Above, n 41, at 29.

⁹⁹⁵ Above, n 41, at 43.

⁹⁹⁶ Above, n 41.

⁹⁹⁷ *R v Hone*, above n 107.

⁹⁹⁸ Above, n 107, at [7].

⁹⁹⁹ Above, n 107, at [9].

¹⁰⁰⁰ Above, n 107.

over s 27, then the inconsistent sentencing decisions will prevail and are not reflective of Parliament's intent.

Even though judges cannot direct a report,¹⁰⁰¹ while the wording in both s 26(2)(a), and s 27(1)(a) appears repetitive,¹⁰⁰² the main difference is that s 8 (i) mandates s 27 of the Sentencing Act 2002. Despite a judge's discretion in sentencing discounts, the substitution of s 27(1)(a) for s 26(2)(a) alters the correct interpretation of s 27 where s 8(i) mandates the report. Therefore, an incorrect statutory interpretation of s 27 can undermine the possibility of transformative outcomes.

According to the legislative policy of s 27:¹⁰⁰³

... background factors, such as the presence of systemic deprivation, may be relevant to individualised justice ... the presence of deprivation, systemic or otherwise, in the lives of all Māori offenders cannot be assumed. This brings back into focus the significance of s 27. It mandates and enables Māori (and other) offenders to bring to the Court's attention information about ... the presence of systemic deprivation and how this may relate (if at all) to the offending, moral culpability, and rehabilitation. Thus, the cogency of any s 27 information, and the likely presence of systemic deprivation and strength of the linkages between (among other things) that deprivation, the offender and the offending, together with the availability of rehabilitative measures to specifically address the effects of systemic deprivation, will be critical to the assessment.

Furthermore, the High Court noted that it is not necessary to elaborate on the presence of systemic deprivation (or social disadvantage generally) upon an offender. The symptoms of systemic Māori deprivation are self-evident, for example, intergenerational social and cultural dislocation of the whānau. Family

¹⁰⁰¹ Above, n 107, at [6].

¹⁰⁰² Above, n 107, at [7].

¹⁰⁰³ *Solicitor-General v Heta*, above n 719, at [49].

evidence is sufficient, although there must be some evidence of systemic deprivation in the offender's background.¹⁰⁰⁴

The ground of appeal in *RS (CA21/2014) v R*,¹⁰⁰⁵ counsel for the defendant argued that s 27(5) imposed “a discretion on a sentencing judge to suggest to an offender that it may be of assistance to the court to hear submissions on the matters provided for in s 27(1).”¹⁰⁰⁶ Section 27(5) of the Act states:

(5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

Sections 27(1)-(4) allow an offender to request the sentencing court to hear any person speak about his or her cultural background. The judge is required to give reasons should the request be declined.¹⁰⁰⁷ However, the lack of reference to ethnic or cultural matters did not signal discretion in s 27(5) of the Act.¹⁰⁰⁸ The Court of Appeal noted:¹⁰⁰⁹

The starting point is that where no request is made under s27(1) the court “may” suggest to the offender that it may be of assistance to the court to hear from a person on any s27(1) matters. But in this case, there was nothing before Judge Adeane which might or should have prompted him to consider exercising his discretion under s27(5).

It is unrealistic to expect a judge to impose s 27(5) on appeal if defence counsel did not suggest that a cultural report may be of some assistance to the court. To rebut the presumption that there was no causal link between the offender's background and the offending,¹⁰¹⁰ the availability of a cultural report would have highlighted

¹⁰⁰⁴ Above, n 719, at [50].

¹⁰⁰⁵ *RS (CA21/2014) v R* [2014] NZCA 484.

¹⁰⁰⁶ Above, n 1005, at [8].

¹⁰⁰⁷ Sentencing Act 2002, s 27 (3).

¹⁰⁰⁸ Above n 1005, at [14].

¹⁰⁰⁹ Above, n 1005, at [17].

¹⁰¹⁰ Above, n 1005, at [18].

the systemic deprivation that led to the offending. It is unclear why cultural background factors should not be grounds for a discount on a sentence.¹⁰¹¹

In the *Police v Hati*¹⁰¹² case, Rollo J stated that an s 27 report was not a defence to the charges.¹⁰¹³ However, the cultural report highlights the degrees of systemic deprivation that led to the offending and rehabilitation programmes that could have addressed the defendant's behaviour. In this case, a prison sentence of 21 months that replaced the original sentencing of home detention and community work illustrates the punitive approach rather than a rehabilitative approach to sentencing.

In *R v Jolley*,¹⁰¹⁴ the judge considered the s 27 cultural report¹⁰¹⁵ but declined to determine a discount. The judge preferred to follow *Mika v R*¹⁰¹⁶ by stating:¹⁰¹⁷

the Court of Appeal rejected the proposition that the sentencing Judge should have discounted a sentence by 10 per cent, from an otherwise appropriate starting point, to reflect Mr Mika's Māori heritage and the associated social and economic disadvantages he had suffered. The Court's view in essence, was that some form of generic or global discount in respect for such factors was of such fundamental and far-reaching importance that it could only be sanctioned by Parliament. I am guided by that decision in reaching a similar conclusion in this case although, as I have noted, I have had some regard to those factors in declining to uplift your sentence in light of your extensive criminal history.

The judge's last sentence indicated an irrelevant reference to past criminality, a comment which contradicts s 26(2) of the New Zealand Bill of Rights Act 1990 which states:

¹⁰¹¹ Above, n 1005.

¹⁰¹² *Police v Hati* District Court, Whakatane, 30/4/2009, CRI-2009-087-793.

¹⁰¹³ Above, n 1012, at [7] per Rollo J.

¹⁰¹⁴ *R v Jolley* [2018] NZHC 93.

¹⁰¹⁵ Above, n 1014, at [77] per Katz J.

¹⁰¹⁶ *Mika v R* [2013] NZCA 648.

¹⁰¹⁷ *R v Jolley*, above n 1014, at [79].

Retroactive penalties and double jeopardy

- (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

The key issue in the *Mika v R*¹⁰¹⁸ case was that the Court of Appeal neglected the important provision of sentencing, s 27 cultural reports. In this case, both courts declined the defendant's request for a 10 percent discount to reflect systemic deprivation. Although the offender could request someone to speak on his behalf, because the lawyer did not commission one, this did not mean that the judge could sidestep the discretion under s 27(5) of the Sentencing Act 2002. Parliament expected that s 27(5) was for the court to address Māori over-representation in the prison system. Generic discounts should be determined case-by-case. If Parliament intended to reduce Māori over-representation in prisons, the court should not have the power to decide when a generic discount is appropriate.

The appeal was dismissed based on the notion that social disadvantages and Māori heritage were irrelevant. The case contrasts with Parliament's intent because Māori offenders have longer jail terms than non-Māori offenders.¹⁰¹⁹

In the *R v Mason*¹⁰²⁰ case, the accused applied for a ruling that the charges under tikanga Māori were available and that the pre-existing customary criminal justice system existed for Māori. The question concerned whether the customs existed in the trial or the sentencing process.

Heath J notes:¹⁰²¹

While many New Zealanders are still coming to grips with cross-cultural issues, it is clear that those who live at the crossroads of the two cultures tend to see the world in different ways. I accept tikanga is a

¹⁰¹⁸ *Mika v R*, above n 1016, per Harrison, Simon France, and Dobson JJ.

¹⁰¹⁹ *Theron*, above n 34.

¹⁰²⁰ *R v Mason* [2012] NZHC 1361 per Heath J.

¹⁰²¹ *R v Mason* [2012] NZHC 1849 at [38].

living concept. I accept the importance of wairua. I accept the ties of whanaungatanga that exist in te ao Maori.

According to Joseph:¹⁰²²

Recognising tīkanga in the criminal justice context would pose problems of both a practical and ethical nature. Localised marae-based justice would encounter evidential and burden of proof issues that could not be resolved without the division of function between judge and jury. There would also be ethical issues ... allowing Māori to opt out of the state system in favour of a customary one would challenge the principle of the equal application of the laws.

Heath J concluded that a Māori customary system for addressing wrongs did not exist by necessary implication through the combined effect of ss 5 and 9 of the Crimes Act 1961. The judge expressed more confidence in the capacity of sentencing to integrate tīkanga Māori considerations per the Sentencing Act 2002.

Heath J also observed that a parallel criminal justice system gave rise to practical problems that could result in a conflict of laws between custom and statute. This case signifies a shift away from the previous approach that some courts have taken to applications on customary law.¹⁰²³

6.61 *Mason v R* [2012] NZHC 1849

In response, the case was taken to the Court of Appeal in *Mason v R*.¹⁰²⁴ The Court of Appeal concluded that “tīkanga is not presently a viable legal process for serious crime”¹⁰²⁵ after reviewing expert evidence before the sentencing judge about the need to rebuild the practical effectiveness of tīkanga as a legal process¹⁰²⁶ and dismissed the appeal. Ellen France J also pointed out that apart from the practical difficulties that arise under the current framework, if Mason could choose a

¹⁰²² *Joseph*, above n 13, at 124.

¹⁰²³ *Wallace v R* [2011] NZSC.

¹⁰²⁴ *Mason v R*, above n 8.

¹⁰²⁵ Above, n 8, at [41].

¹⁰²⁶ Above, n 8, at [39].

different system, there may be an issue as to whether it is necessary to show continuity of custom. However, the existing laws already cover the subject matter comprehensively in cases like *Takamore*¹⁰²⁷ and *Ngāti Whātua Ōrākei Trust v Attorney General*.¹⁰²⁸ According to Philip Joseph:¹⁰²⁹

Tikanga has relevance in informing equity and the common law but not where applicable legislation “covers the field”, or where it is contrary to statute or to fundamental principles and policies of the law. Contrary to an earlier line of authority, the courts will declare an iwi’s mana whenua where overlapping iwi claims are made in Treaty settlement negotiations.

In *R v Taiapa*,¹⁰³⁰ a cultural report was considered beneficial¹⁰³¹ but only in appropriate cases. The link between a person’s cultural background and the offending could provide grounds on which a court might reduce a sentence¹⁰³² but it did not constitute a discretionary discount about the cultural factors that may have contributed to the offending.¹⁰³³

6.7 Cases not considered s 27 of the Sentencing Act 2002 but could have (1st July 2002 to 1st March 2019)¹⁰³⁴

This section focuses on grievous bodily harm offences in different cases which resulted in different sentencing outcomes and drew on s 27 of the Sentencing Act 2002 in contrasting ways. In the following cases involving grievous bodily harm, s 27 was applied in *R v Sanders*,¹⁰³⁵ *R v Heta*,¹⁰³⁶ and *Keil v R*.¹⁰³⁷ In *Fane v R*,¹⁰³⁸ and

¹⁰²⁷ *Takamore v Clarke*, above n 11.

¹⁰²⁸ *Ngāti Whātua Ōrākei Trust v Attorney General*, above n 4.

¹⁰²⁹ *Joseph*, above n 13, at 33.

¹⁰³⁰ *R v Taiapa* [2018] NZHC 1815.

¹⁰³¹ Above, n 1030, at [37] per Lang J.

¹⁰³² Above, n 1030, at [39].

¹⁰³³ Above, n 1030.

¹⁰³⁴ See Appendix 6.

¹⁰³⁵ *R v Sanders* [2019] NZHC 164.

¹⁰³⁶ *R v Heta*, above n 63.

¹⁰³⁷ *Keil v R*, above n 950.

¹⁰³⁸ *Fane v R*, above n 41.

R v Raharui,¹⁰³⁹ s 27 was considered but not applied. The cases that could have included a s 27 cultural report but did not are *R v Karekare*,¹⁰⁴⁰ *R v Poarau*,¹⁰⁴¹ and *R v Clarke*.¹⁰⁴²

The case of *Solicitor-General v Heta*¹⁰⁴³ concerns the relevance of the information supplied under s 27 to sentencing¹⁰⁴⁴ in *R v Heta*.¹⁰⁴⁵ In this case, the Solicitor-General referred to *Keil v R*.¹⁰⁴⁶ On this basis, the Solicitor-General submitted that a discount of 30 % for personal circumstances was too high¹⁰⁴⁷ and suggested that a 10 % discount for social deprivation was, at most, available and “ought to be in line with discounts given in other cases”.¹⁰⁴⁸ Relying upon the authority held in *Keil v R*, the Solicitor-General noted:¹⁰⁴⁹

Our sentencing regime cannot be seen to condone a particular group’s use of violent force to exact physical retribution. Similarly, cultural norms cannot excuse that conduct for some groups but not for others. While those norms may help to explain, they can never justify offending of such severity as occurred here.

The court’s resistance to applying s 27 because of a perception of special treatment is problematic. Whata J noted that since Parliament intended to reduce Māori overrepresentation, although not mentioned in the Heta case,¹⁰⁵⁰ the effects of systemic deprivation and incarceration had not improved.¹⁰⁵¹ The Solicitor General accepted that a 30 % discount would reflect “the need to recognise the Māori post-colonial experience and Parliament’s intention underlying s 27.”¹⁰⁵²

¹⁰³⁹ *R v Raharui* [2017] NZDC 26061.

¹⁰⁴⁰ *R v Karekare* [2018] NZHC 1364.

¹⁰⁴¹ *R v Poarau* High Court, Rotorua, 15/3/2016, CRI-2015-463-62.

¹⁰⁴² *R v Clarke* High Court, Auckland, 7/4/2011, (2011) CRI-2010-090-1184.

¹⁰⁴³ *Solicitor-General v Heta*, above n 719.

¹⁰⁴⁴ Above, n 719, at [34].

¹⁰⁴⁵ *R v Heta*, above n 63.

¹⁰⁴⁶ *Keil v R*, above n 950, at [58].

¹⁰⁴⁷ Above n 719, at [3], [27].

¹⁰⁴⁸ Above, n 719, at [29].

¹⁰⁴⁹ Above n 950, at [58].

¹⁰⁵⁰ Above n 719, at [27].

¹⁰⁵¹ Above, n 719, at [28].

¹⁰⁵² Above, n 719.

6.8 Comparison with Other Jurisdictions

It is useful to consider the impact of systemic deprivation in other countries with Indigenous communities such as Australia. This study is pertinent to the research inquiry because cultural reports are significant for all Indigenous groups impacted by colonisation. Although there are similar debates held in Australian and Canadian jurisprudence, the High Court of Australia rejected the systemic deprivation of Aboriginal Australians in the case of *Bugmy v The Queen*¹⁰⁵³ and viewed that the approach in sentencing Aboriginal offenders would cease to involve individualised justice.¹⁰⁵⁴

The Court's reluctance to consider systemic issues is outlined in the following where the judge opined:¹⁰⁵⁵

Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about the particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation to mitigate sentence, it is necessary to point to material tending to establish that background.

However, the judicial comments made it clear that Aboriginal Australians may require some degree of special consideration. The Australian High Court observed that:¹⁰⁵⁶

... the circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.

¹⁰⁵³ *Bugmy v The Queen* [2013] HCA 37.

¹⁰⁵⁴ Above, n 1053, at 592.

¹⁰⁵⁵ Above, n 1053, at 594.

¹⁰⁵⁶ Above, n 1053, at [40].

The recognition of cultural differences for the culpability of an offender only goes so far and there is some reluctance to consider systemic issues. This section is pertinent to the study to illustrate how the maintenance and reproduction of socio-economic inequality continue. However, introducing similar cultural reports in Australia could bring about change and promote the notion of Indigenous common law.

Unlike Australia, Canada's sentencing regime provides cutting-edge resolutions that may inspire change in other countries. Canadian sentencing laws show that a mitigated sentence or an alternative to imprisonment will help improve the social well-being of Indigenous offenders and the public. Section 718(2)(e) of the Canadian Criminal Code 1985 is similar to s 27 of the Sentencing Act 2002. The Canadian Criminal Code differs from New Zealand's pre-sentence reports (our s 26 pre-sentence report). In the *Ipeelee v R*¹⁰⁵⁷ case, the majority of judges of the Supreme Court of Canada reinforced the earlier jurisprudence held in the *R v Gladue*¹⁰⁵⁸ case. The court applied s 718(2)(e)¹⁰⁵⁹ of the Canadian Criminal Code 1985 and observed:¹⁰⁶⁰

Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their culpability.

The jurisprudence in *R v Gladue*¹⁰⁶¹ highlighted consideration of the social and economic circumstances of an individual's aboriginal status in determining a sentence. The Supreme Court of Canada stated that the fundamental purpose of s 718(2)(e) of the Canadian Criminal Code 1985 was to treat aboriginal people fairly

¹⁰⁵⁷ *Ipeelee v R* [2012] 1 SCR 433.

¹⁰⁵⁸ *R v Gladue* [1999] 1 SCR. 688.

¹⁰⁵⁹ This section is also referred to as the "Aboriginal sentencing section".

¹⁰⁶⁰ Above, n 1057, at [73].

¹⁰⁶¹ Above, n 1058.

by considering their differences.¹⁰⁶² For example, the comparison between the incomes of aboriginal and non-aboriginal offenders was viewed a unique circumstance.¹⁰⁶³ Therefore:¹⁰⁶⁴

Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider “the circumstances” for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

The mandatory provision suggests that judges must also consider all available sanctions other than imprisonment that are reasonable in the circumstances.¹⁰⁶⁵ The Criminal Code addresses the overrepresentation of aboriginal people in Canadian prisons.¹⁰⁶⁶ The traditional sentencing principles held by Indigenous offenders and their communities’ contrast with Western ideals of deterrence, separation, and denunciation. The Indigenous conceptions of sentencing focus on restorative justice.

6.9 Restorative Justice v Retribution

This section provides insights into restorative justice and retribution to highlight the importance of a cultural report for the restorative process. In contrast to retribution, restorative justice focuses on holistic healing through therapeutic jurisprudence.¹⁰⁶⁷

¹⁰⁶² Above, n 1058, at [87].

¹⁰⁶³ Above, n 1058, at [37].

¹⁰⁶⁴ Above, n 1058.

¹⁰⁶⁵ Above, n 1058, at [82].

¹⁰⁶⁶ Above, n 1058, at [50].

¹⁰⁶⁷ Valmaine Toki “Will therapeutic jurisprudence provide a path forward for Māori?” (2005) 13 WLR 169.

The aim of this section is to illustrate the impact on restorative justice when an offender's right to be heard through cultural report representation is denied.

The concept of restorative justice, initially introduced in the family courts, was later incorporated into the criminal courts.¹⁰⁶⁸ For practitioners to understand its relevance and social value, Judge McElrea studied and disseminated his knowledge of the topic at national and international levels.¹⁰⁶⁹ In 1995, McElrea J succinctly asserted that:¹⁰⁷⁰

... criminal justice has been divorced from the community for far too long. Justice has come to be seen as a contest between the State and the defendant. Largely ignored is the forgotten party, the victim, and the community to which they both belong. Justice should be something which we claim for ourselves and strive to enhance, but at present the ordinary person feels little sense of ownership of justice. It is seen as a legalistic system of rules governing this *State v Defendant* contest. As a result, there is little incentive for anyone to take responsibility for the offending itself or for putting right the wrong. By contrast restorative justice is essentially a community-based model that encourages the acceptance of responsibility by all concerned and draws on the strengths of the community to restore peace.

The four main headings underpin restorative justice are as follows:¹⁰⁷¹

1. Restorative justice as a framework for criminal law.
2. Accountability through court processes, old and new.
3. The State, the individual and the community.
4. Taking responsibility for offending.

¹⁰⁶⁸ FWM McElrea, *Accountability in the Community: Taking Responsibility for Offending* A paper prepared for the Legal Research Foundation's Conference "Re-thinking Criminal Justice: a Conference on New Initiatives in Criminal Justice" 12 and 13 May 1995 Auckland, New Zealand. Re-thinking Criminal Justice Institute of Criminology Legal Research Foundation (1995).

¹⁰⁶⁹ Above, n 1068.

¹⁰⁷⁰ Above, n 1068, at 1.

¹⁰⁷¹ Above, n 1068.

McElrea argued that the Western model of criminal justice would not hold offenders accountable in a meaningful way.¹⁰⁷² Instead, the restorative justice model would reduce the prison population.¹⁰⁷³ Restorative justice could allow punishment a proper place in the process of “making things right” without it dominating the criminal justice agenda.¹⁰⁷⁴ Similarly, the whanaungatanga process would also allow for culturally sensitive responses to crime within the one overall system of justice.¹⁰⁷⁵

McElrea suggested that “there will never be meaningful alternatives to prisons until there is an alternative model of justice”¹⁰⁷⁶ and noted comments made by Williamson J who preferred:¹⁰⁷⁷

... a restorative justice system rather than a retributive or deterrent system. The object of the new provisions was to enable victims and the community, as well as young persons, to participate in a process which would help them and heal the damage caused by their offences. An essential part of this process is a negotiated community response at a family group conference. It is a system which operates in a vastly different way to that which Courts are required to use in dealing with adult offenders.

According to recently retired Chief Justice Dame Sian Elias:¹⁰⁷⁸

... it is necessary to be careful that panic about crime does not erode the standards of ‘a progressive and self-confident society’ Criminal justice comes to be considered today in a climate of anxiety, in which professionals, including judges and lawyers, are not trusted to have answers. The procedural law of criminal justice protects those who are not popular. It expresses values which are fundamental to fair trial and

¹⁰⁷² Above, n 1068, at 4.

¹⁰⁷³ Above, n 1068.

¹⁰⁷⁴ Above, n 1068, at 3.

¹⁰⁷⁵ Above, n 1068, at 4.

¹⁰⁷⁶ Above, n 1068, at 2.

¹⁰⁷⁷ *Re v Police* (unreported, Christchurch Registry, AP 328/94, 2 March 1995, Williamson J) at 1 cited in FWM McElrea, above n 1068, at 2.

¹⁰⁷⁸ *Elias*, above n 608, at 62-63.

the rule of law, and which are also human rights. They cannot be rationed in application to actual cases according to notions of utility or majoritarian preference without undermining the integrity of the legal order. These are conditions of some peril for the criminal justice system we have unless there is widespread commitment to the ends it serves and a willingness to allow it to evolve to meet changing circumstances, to the end that what is fair and just is done between prosecutors and accused.

In addition, Sian Elias says:¹⁰⁷⁹

Today, too much criminal justice is conducted out of the public gaze and with outcomes that are not sufficiently explained, and which may be discriminatory in effect. Those involved in the system are under pressures that risk error. This is an area where we cannot afford to be indifferent to error without compromising the legitimacy of the legal order. There is particular risk to legitimacy if more punitive outcomes fall disproportionately on distinct populations. If it is cost pressures that are leading to justice out of public sight and at the discretion of law enforcement officers, then ... if civil justice is even more urgent in the case of criminal justice: 'How much justice can we afford to forego?'

Insufficiently explained discriminatory outcomes are disguised from public scrutiny and compromise the legitimacy of the legal order. There is a risk of error if the laws that generate compliance are punitive.

Concluding Statement

It is apparent from the preceding discussion that statutory interpretation of s 27 of the Sentencing Act 2002 has, at times, been influenced by concern with punitive outcomes which conflict with the purposive approach provision under the Acts Interpretation Act 1999. The differences between sentencing outcomes for the same offence category are because of the variation of interpretation between cases.

¹⁰⁷⁹ Above, n 608, at 167-168.

Further, a cultural report may be the difference between imprisonment and non-imprisonment.

The process is not working as well as it should for Māori. It is argued that the application of whanaungatanga could enable s 27 of the Sentencing Act 2002 to achieve game changing results.

The ongoing pluralist tensions between tīkanga, the common law, and the statutory rights of individuals for a proper interpretation of s 27 of the Sentencing Act 2002 are evident in many cases. The whanaungatanga process provides a cultural background that helps to identify the causes of the offending. The whanaungatanga process is a simple way of highlighting the rehabilitative process without crossing over to tīkanga principles and practices for analysis, intervention, or determining whether tīkanga in a criminal context is appropriate.

6.10 Criminal Judicial Review

This section continues to examine the potential for whanaungatanga as a legal norm in sentencing decisions of Māori offenders. The themes of human social, constitutional/public law rights for judicial review¹⁰⁸⁰ highlight the need for changes in current policy. The issues of proportionality, the glaring absence of uniform sentencing decisions in low and high-end offences,¹⁰⁸¹ the relevant case law that contrasts with legal norms, legal institutions, doctrines, practices, the role of law, the rule of law and principles of natural justice meant to promote consistency suggest a need for a critical investigation of criminal judicial review.

The topic of judicial review has steadily widened its ambit within the system for the administration of criminal justice¹⁰⁸² by replacing the ancient prerogative

¹⁰⁸⁰ Richard Wilson QC in Piers Von Berg ed *Criminal Judicial Review: A Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014) at 11.

¹⁰⁸¹ See Appendix 4, Appendix 5, and Appendix 6.

¹⁰⁸² Piers Von Berg ed *Criminal Judicial Review: A Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014) at v.

writs.¹⁰⁸³ Criminal judicial review is a distinctive subject area¹⁰⁸⁴ and different from criminal court proceedings.¹⁰⁸⁵ The criminal judicial review concerns the decisions¹⁰⁸⁶ of public authorities connected to the criminal justice system.¹⁰⁸⁷ This portion of the criminal justice system¹⁰⁸⁸ can assist multiple team players involved with the court system concerning principles of administrative law.¹⁰⁸⁹ Likewise, public law specialists can benefit from how the courts apply principles to statutory frameworks.¹⁰⁹⁰

Within the District Court, there is no even-handedness in the judicial method concerning judicial criminal review. Judicial review of a decision to prosecute or not to prosecute is arguably already available for proceedings in a District Court.¹⁰⁹¹ However, according to the 2000 Law Commission Report 66:¹⁰⁹²

The issue of judicial review of prosecution decisions perhaps attracted more adverse comments than any other proposal in the Discussion Paper. There were fears expressed that it would become a routine tactic in criminal cases, placing another obstacle in the path of prosecutions. Several respondents implied that judicial review was not now available. Either way, it is certainly not used now as a routine tactic. The Department of Labour believed that any move to open up legal avenues for external review should be resisted. The police were of a similar view.

The report contradicts the availability of judicial review in the case of *C v Wellington District Court*¹⁰⁹³ and conflicts with the control of the Court proceedings involved with criminal judicial review.¹⁰⁹⁴ These approaches have ultimately

¹⁰⁸³ Above, n 1082.

¹⁰⁸⁴ Above, n 1082.

¹⁰⁸⁵ *Wilson*, above n 1080, at 10; Jeremy Horder “Rationalising Judicial Review in Criminal Proceedings” 2008 13 (4) *Judicial Review* 207-213.

¹⁰⁸⁶ Above, n 1080, at 10.

¹⁰⁸⁷ Above, n 1080, at 9.

¹⁰⁸⁸ Above, n 1080, at 10; Ashworth and Redmayne *The Criminal Process* (4th ed, Oxford University Press, Oxford, 2010) at 1-2. The authors explain the difference between the criminal processes and aspects of the criminal justice system.

¹⁰⁸⁹ Above n 1082, at vii.

¹⁰⁹⁰ Above, n 1082.

¹⁰⁹¹ *C v Wellington District Court* [1996] 2 NZLR 395.

¹⁰⁹² Law Commission *Criminal Prosecution* (NZLC Report 66, 2000) at 27.

¹⁰⁹³ *C v Wellington District Court*, above n 1091.

¹⁰⁹⁴ *Law Commission*, above n 1092, at 27.

breached the right to criminal judicial review for almost twenty years. This is unfortunate because the court has inherent power to prevent abuse of its process to ensure judicial review accountability.¹⁰⁹⁵

Whether all prosecuting agencies should be amenable to judicial review creates some tension concerning exemption from judicial review under s 20 of the Serious Fraud Act 1990. Section 20 of the Serious Fraud Office Act 1990 allows for the review of the director's decision not to prosecute,¹⁰⁹⁶ and suggests that prosecution decisions are not reviewable. Nonetheless, criminal judicial review concerns the decisions of *all* public authorities.¹⁰⁹⁷ The lack of legislative intervention conflicts with the rule of law, constitutional and international human rights, and the principles of natural justice.

In this regard, s 27 (1) and (2) of the New Zealand Bill of Rights Act 1990 states:

- (2) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- (3) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

The right to a fair trial without prejudice is fundamental to the court's exercise of proper functions.¹⁰⁹⁸ If a right, obligation, or interest protected by law has been affected, the right to judicial review applies under s 27 (2) of the New Zealand Bill of Rights Act 1990.¹⁰⁹⁹ Similarly, Article 6 of the European Convention promotes the right to a fair trial.¹¹⁰⁰

¹⁰⁹⁵ The five principles of the rule of law concerns measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

¹⁰⁹⁶ *Law Commission*, above n 1092, at 27.

¹⁰⁹⁷ *Wilson*, above n 1080, at 9.

¹⁰⁹⁸ New Zealand Bill of Rights Act 1990, s 27 (1); See above n 13, at 241. Joseph discusses the elements of a fair trial.

¹⁰⁹⁹ New Zealand Bill of Rights Act 1990, s 27 (2).

¹¹⁰⁰ European Convention on Human Rights 1953: Article 6 Right to a fair trial.

Furthermore, under the High Court Rules 2016, Part 30 Judicial review, section 30.3 Procedure states:

- (1) An application for judicial review under the Judicial Review Procedure Act 2016 and an application for an extraordinary remedy must be commenced by statement of claim and notice of proceeding in accordance with Part 5 of the rules.
- (2) The heading of an application for review under the Judicial Review Procedure Act 2016 must state that it is an application for review.
- (3) A statement of claim seeking an extraordinary remedy may claim more than 1 of those remedies and may claim any other relief (including damages) to which the plaintiff may be entitled.
- (4) Section 9 of the Judicature Amendment Act 1972 applies in respect of an application for review under Part 1 of that Act as if the reference to a motion were a reference to a notice of proceeding filed in accordance with the rules.

The rules set out under the High Court Rules 2016 are straightforward. Criminal judicial review compels a Magistrates Court or Crown Court to state a case where it refuses to follow a mandatory provision.¹¹⁰¹ The crucial question is, “If s 27 is mandatory, should cases having not considered a cultural report or where defence counsel or a judge who ought to have requested one be subject to judicial review?”

According to Whata J in *Solicitor-General v Heta*:¹¹⁰²

There is no express requirement to have regard to systemic Māori deprivation in sentencing. However, the Court when fixing sentence may consider “any aggravating or mitigating factor the court thinks fit.” Section 27 then mandates consideration of the full social and cultural matrix of the offender and the offending. There is no obvious reason why this should exclude evidence of systemic Māori deprivation and how (if at all) this may have contributed to the offending. On the contrary, inclusion of all material background factors in the assessment aligns with the underlying premise of s 27 just mentioned and it better serves the purposes and principles of sentencing to identify and respond

¹¹⁰¹ David Ball and Piers von Berg in Piers Von Berg, ed *Criminal Judicial Review: A Practitioner’s Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014) at 115.

¹¹⁰² *Solicitor-General v Heta*, above n 719, at [41].

to all potential causes of offending, including where relevant, systemic Māori deprivation. It may inform, among other things, the actual and relative moral culpability of the offender and the capacity for rehabilitation.

The High Court exercises supervisory jurisdiction¹¹⁰³ and control over the administrative decisions of public entities and private individuals.¹¹⁰⁴ A Court enforces the rule of law by protecting the rights and legitimate interests of those affected¹¹⁰⁵ by the public authorities' exercise or misuse of power. However, the High Court is disinclined to grant mandatory orders. The preference for declarations indicates reluctance for such orders through case law. Policy-based arguments, for example, the lack of resources beyond their control, are debatable.¹¹⁰⁶

If a court cannot state where it has refused to follow a mandatory provision, then any non-application or exclusion of considering s 27 cultural reports may be held unlawful. The fact that the High Court issues judicial review claims that are unlawful, it must examine the principles of public and administrative law as developed by case law.¹¹⁰⁷ The Courts may grant relief by quashing the decision or awarding damages.¹¹⁰⁸

However, according to the 2000 Law Commission Report 66:¹¹⁰⁹

... it is very rare that the High Court will use its civil jurisdiction to intervene in the exercise of the court's criminal jurisdiction by way of judicial review under the Judicature Amendment Act 1972 and the High Court Rules ... such judicial review would be exceptional and at most available only if no reasonable agency could have made such a prosecution decision.

¹¹⁰³ *Wilson*, above n 1080, at 7.

¹¹⁰⁴ A court or tribunal is a public authority for the purposes of the Human Rights Act 1993.

¹¹⁰⁵ Richard Wilson QC "Judicial Review: An Introduction to the Key Principles" in Piers Von Berg ed *Criminal Judicial Review: A Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014) at 11.

¹¹⁰⁶ *Ball*, above n 1101, at 115.

¹¹⁰⁷ *Wilson*, above n 1080, at 6.

¹¹⁰⁸ Above, n 1080.

¹¹⁰⁹ *Law Commission*, above n 1092, at 27-28, [61] to [66].

The case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹¹¹⁰ highlights judicial review. The High Court's reluctance to intervene detracts from the application of legal norms it is meant to uphold and highlights the conflict with individual rights. The fact that the High Court contradicts ss 27(1) and (2) of the New Zealand Bill of Rights Act 1990 and Part 30 of the High Court Rules 2016 suggests that it does not follow its own rules to protect individual and fundamental rights to judicial review.

If the courts incorrectly interpret the statute, criminal judicial review is part of the remedy in the High Court. However, the High Court's reluctance to comply with judicial review decisions delays access to justice and does not answer legal issues. The whole system relates to the fact that the High Court is a public authority. Therefore, there may be no closure for applicants contemplating criminal judicial review if, as the current practices indicate, there are delayed rights to justice. Another issue concerns an economic cost barrier for many applicants. The uniform application of a s 27 cultural report would not delay access to justice because the judge would consider conditions of the possibility of game-changing rehabilitative outcomes or imprisonment depending on the seriousness of the offence.

The lack of criminal judicial accountability already available through the High Court Rules 2016 compromises individual rights, weakens public confidence and detracts from the rule of law. To help prevent this, a more uniform application of s 27 of the Sentencing Act 2002 is desirable rather than the delayed outcomes from the High Court.

6.11 Criminal Cases Review Commission

Another initiative to enable greater fairness in the execution of criminal justice is the Criminal Cases Review Commission. The Criminal Cases Review Commission Act 2019 ("CCRC"), Te Kāhui Tātari Ture, established by Royal Assent on 16 November 2019, came into force on 1 July 2020.¹¹¹¹ This Commission was

¹¹¹⁰ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB223.

¹¹¹¹ The Commission is based in Hamilton.

established partly because the power of the Governor-General to refer a conviction or sentence back to appeal courts was removed under s 406 of the Crimes Act 1961. Some of the main reasons for government intervention centers around the public's perceived lack of independence, lack of timeliness, lack of resources, and lack of transparency.¹¹¹² The CCRC reflects similar models set up in the United Kingdom, Scotland, and Norway.¹¹¹³

Governed by a board of appointed commissioners,¹¹¹⁴ the CCRC will investigate possible miscarriages of justice by reviewing convictions and sentences¹¹¹⁵ and decide whether to refer the cases back to the appeal court.¹¹¹⁶ According to Chief Science Advisor for the Ministry of Social Development, Dr McIntosh, one of the advantages of the Commission will be an opportunity to revisit legal decisions through a different lens.¹¹¹⁷ There would be “a greater enquiry into applications” to reflect an inquisitorial process¹¹¹⁸ rather than an adversarial one. The independent inquiries would bring attention to the issues surrounding inconsistent sentencing decisions of similar offence types and discounts that could have resulted in rehabilitative outcomes rather than imprisonment. Section 5(1) of the Criminal Cases Review Commission Act 2019 (“CCRC Act”) states that the Commission may regulate its procedures for performing its functions and duties as the Commission considers appropriate. It must be consistent with the rules of natural justice and the Treaty of Waitangi (te Tiriti o Waitangi) principles under s 5(3). Section 12 confers on commissioners the power to initiate and conduct inquiries into general matters or make initial inquiries into a conviction or sentence under s 27(1) if it is satisfied that those inquiries are in the public interest. Furthermore, s

¹¹¹² Cited in “Coversheet: Criminal Cases Review Commission” at 9-10. Stuart McGilvray Policy Manager, Criminal Law Criminal Justice Ministry of Justice 26 July 2018. www.justice.govt.nz/assets/Documents/Publications/RIS-Criminal-Cases-Review-Commission-v2.pdf.

¹¹¹³ Above, n 1112, at 12.

¹¹¹⁴ The appointment of five inaugural Commissioners to the CCRC are Kingi Snelgar, Tangi Utikere, Nigel Hampton CNZM OBE QC, Professor Tracey McIntosh, Dr Virginia Hope MNZM. Colin Carruthers QC is CCRC's Chief Commissioner.

¹¹¹⁵ Criminal Cases Review Commission Act 2019, s 11.

¹¹¹⁶ Section 17.

¹¹¹⁷ University of Auckland “Strong social justice background informs new role” 9 June 2020. Available at www.auckland.ac.nz/en/news/2020/06/09/strong-social-justice-background-informs-new-role.html.

¹¹¹⁸ Above, n 1117.

10 (1) states that the Commission may appoint qualified persons, as required, to assist the Commission with any of its functions or duties by advising about cultural, scientific, technical, or other matters that involve expertise. Therefore, an expert's advice on cultural aspects will shed light on the significance of s 27 cultural reports and how they can make a difference between imprisonment and non-imprisonment, the relevance of sentencing discounts, and rehabilitation.

The key provision that helps determine grounds for referring a conviction or sentence to the appeal court is s 17 of the CCRC Act:

17 Ground for referring conviction or sentence to appeal court

- (1) The Commission may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so.
- (2) In deciding whether to refer a conviction or sentence, the Commission must have regard to—
 - (a) whether the eligible person has exercised their rights of appeal against the conviction or sentence; and
 - (b) the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence; and
 - (c) the prospects of the court allowing the appeal; and
 - (d) any other matter that the Commission considers relevant.

If the question is a question of law, applying relevant legal principles to the interpretation of ss 27 and 8(i) of the Sentencing Act 2002 is necessary. Most claims occur when the applicant raises questions concerning the proceedings relating to a conviction or sentence.

Based on the Commission's decisions, compensation for a wrongful conviction, imprisonment and applications for the Royal prerogative of mercy is subject to the

government's discretion through ex gratia payment. The compensation is payable to claimants who:¹¹¹⁹

- i. are imprisoned following a wrongful conviction that is subsequently set aside.
- ii. are, at a minimum, innocent on the balance of probabilities.

There are Cabinet guidelines that determine whether an applicant receives compensation for wrongful conviction and imprisonment and the amount of compensation they may receive.¹¹²⁰ There are three types of compensation for successful claimants:¹¹²¹

- i. Payments for non-pecuniary losses following conviction (for example, loss of liberty or emotional harm) – based on a starting figure of \$100,000 for each year in custody.
- ii. Payments for pecuniary losses following conviction (for example, loss of livelihood and future earnings)
- iii. A public apology or statement of innocence.

The Ministry of Justice will work closely with the King's Counsel for advice based on the initial assessment and merits of the claim. The King's Counsel will recommend an appropriate amount of compensation if they are satisfied that the applicant is innocent. Cabinet makes the final decision based on the Minister's recommendation.¹¹²²

The preceding discussion suggests that the Commission provides a positive option for redressing problematic decisions. However, the application process to the Commission may not address the low number of Māori applicants that make up 60% of the prison population and comprise a small proportion of applications, estimated at 11-16%.¹¹²³ A defendant's possible lack of awareness of the process, the proof and cost burden, language, and cultural problems highlights the need for

¹¹¹⁹ Ministry of Justice "Constitutional Issues & Human Rights: Compensation for wrongful conviction & detention." Available at <www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/miscarriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment/>.

¹¹²⁰ Above, n 1119.

¹¹²¹ Above, n 1119.

¹¹²² Above, n 1119.

¹¹²³ Simon Mount "A Criminal Cases Review Commission for New Zealand" (2009) 3 NZLR455 at 474.

an understanding of cultural background and information about socio-economic systemic Māori deprivation. Arguably, including whanaungatanga under s 27 of the Sentencing Act 2002 as a legal norm would promote balance and increase awareness of the process to help explain the offending rather than ignoring it.

Compared with the High Court and its reluctance to grant mandatory orders, there is more scope for Māori applicants to have their cases independently reviewed under CCRC. However, the preliminary process requires applicants to have exhausted the right to appeal first¹¹²⁴ before applying for a review under CCRC. Therefore, based on human rights and constitutional rights issues, Parliament intent and statutory interpretation, Māori should be encouraged to apply for judicial review. Greater use of the review process by Māori would also help to ameliorate inconsistent sentencing decisions for similar offences, prison cost accountability, penal populism, effects of imprisonment on families and encourage rehabilitation-orientated programmes.

There are still some uncertainties around the role of the Criminal Cases Review Commission. Although the Criminal Cases Review Commission Act 2019 refers to the process of an appeal, it is unclear whether a declaration of wrongful conviction and imprisonment would come under the High Court Rules for a mandatory order or whether the appeal court or CCRC deals with the matter. To gain confidence from the public, transparency and consistency in the process are crucial to the overall integrity of the justice system.

Another challenge that needs to be addressed is the low threshold of Māori applying for judicial review and not being able to take advantage of a referral to an appeal court under the CCRC. Consequently, delays in achieving social justice, including the negative results for families impacted by the imprisonment of a caregiver, parent or parents, job losses, and community well-being, may influence a pattern of disinclination to apply for equitable outcomes. The likelihood of this outcome far outweighs mainstream fears that judicial review or referrals would become a routine

¹¹²⁴ Criminal Cases Review Commission Act 2019, s 17(2)(a).

tactic¹¹²⁵ or result in the litany of relitigation. Arguably, the basic tenet in rolling out justice for Māori sits at the heart of the whanaungatanga process encapsulated in s 27 of the Sentencing Act 2002. Therefore, the CCRC may be the drawcard in attracting a better understanding of s 27 of the Sentencing Act 2002. The procedure could break the recycled chain of transmission of the conditions of the possibility of social inequalities.

At the same time, a more consistent application of s 27 of the Sentencing Act 2002 could help reduce the need for mandatory orders or an investigation by the CCRC. If a uniform application of s 27 of the Sentencing Act 2002 was adopted, consistent with statutory interpretation and perceived as a mandatory provision, it could help to identify systemic Māori deprivation and causes of the offending. This would help to ensure the legal norm of whanaungatanga remains part of the common law and those rights and freedoms encapsulated, for example, in the New Zealand Bill of Rights Act 1990.

6.12 Conclusion

This chapter established the different influences on and sources of statutory interpretation. The statutory framework was explained as well as legislation and its influence on sentencing. One of the highlighted issues was the challenges that judges face when balancing all the different components of s 27 of the Sentencing Act 2002. In the course of this discussion, attention was drawn to the potential impact of some features of sentencing on Māori offenders. The focus of the discussion then shifted to s 27 of the Sentencing Act 2002 and its application in the courts. It was demonstrated that there was considerable variation by judges in the application or non-application of s 27. The underlying principles of restorative justice and retributive justice were discussed.

The final section discussed the judicial review process, the options for redress that it provided as well, the challenges for its use by Māori offenders. Attention was

¹¹²⁵ *Law Commission*, above n 1092, at 27.

given to the initiative of the Criminal Cases Review Commission and its potential. Finally, it was asserted that the need for judicial review could be minimised if full use was made of s 27 of the Sentencing Act 2002.

Understanding how s 27 operates in theory is one thing – how it is applied in practice by those responsible for its application is another. The following chapter will analyse current legal practices through interviews conducted with District Court judges, bringing empirical grounding to the theoretical and statutory analysis developed thus far.

7 Ūpoko Tuawhitu—Chapter Seven: Current Legal Practices Analysis

The previous chapter examined the New Zealand courts' approach to statutory interpretation that led to concerns about the application or non-application of s 27 of the Sentencing Act 2002, examined in detail in Ūpoko Tuarua/Chapter Two. Analysis suggests that current legal practices result in inconsistencies in sentencing outcomes throughout the courts. Correspondingly, this chapter will discuss whether a more uniform application of s 27 of the Sentencing Act 2002 is achievable to assist legal practitioners, judges, and stakeholders with a better understanding of whanaungatanga as a legal norm.

The discussion draws on findings from interviews with District Court judges (their anonymity is protected). The full transcript of the interviews is included in the appendices. Readers may find it helpful to read the appendices with the interview reports before reading this chapter. The appendices provide helpful information on the current legal approaches to s 27 of the Sentencing Act 2002. The detailed interview notes provide the empirical evidence for the findings. The critical point to emphasise, based on the findings, is that s 27 cultural reports can be the difference between imprisonment and non-imprisonment.

This chapter comprises six sections. The first section analyses the existing tensions between the normative value of whanaungatanga, statutory interpretation of s 27, and criminal judicial review. The discussion draws on a seven-point-themed analysis of the data mined from the interview reports including human rights instruments and their relevance to s 27 of the Sentencing Act 2002. The second section examines empirical evidence by looking at social inequalities. The third section examines the historical differences and issues between oral tradition and written tradition. Section four provides a fresh glimpse of the possibility of transformative outcomes, highlighting pre-emptive rehabilitation programmes and the pragmatic approach which judges take in helping reduce sentencing lengths or prevent imprisonment. The fifth section identifies the differences between cultural report writers and probation report writers. The discussion demonstrates the

consistency required to produce a well-written cultural report in a context in which demand for them has increased. This is discussed in the sixth section.

The next section analyses interview reports to probe the current application of s 27 of the Sentencing Act 2002.

7.1 Thematic Analysis

The purpose of thematic analysis is to identify the patterns, themes, and underlying meanings mined from the interviews for analysis. The aim is to extract meaningful themes to facilitate a deeper understanding of the underlying meanings and patterns. This data-driven approach allows themes to emerge from the data which may not be immediately apparent from individual interviews.

Section 27 of the Sentencing Act 2002 draws on aspects of human and international rights, social justice concerns, and the Treaty of Waitangi principles to illustrate and bring attention to the reasons why policy reform is necessary. The purpose of the thematic analysis is to find crucial clues and themes to capture a better understanding of why these deep-seated issues require attention to change the status quo.

There are seven major themes drawn from the interview reports. These are as follows:

1. Anglo-Saxon Legal System.
2. International Human Rights/NZ Bill of Rights.
3. Cultural Speakers.
4. Cultural Speakers v Cultural Reports.
5. Cultural Reports v Pre-sentence Reports,
6. Cultural Report Writers v Probation Report Writers.
7. Amateur Reports v Professional Cultural Reports.

A thematic analysis of the judges' interviews suggests that s 27 requires more than just a heightened awareness of the availability of a cultural report and the different approaches taken to address s 27 of the Sentencing Act 2002.

7.1.1 Historical Context: Anglo-Saxon Legal System.

This section examines how and why written and oral reports were accepted in the courts over time. The Anglo-Saxons were illiterate¹¹²⁶ due to the lack of contemporary written evidence.¹¹²⁷ The primary contextual source of information derived from later authors such as Bede¹¹²⁸ were quite fragmented and incomplete.¹¹²⁹ Consequently, the criminal procedure came in the form of written material based on the collection of oral testimonies or pleadings recorded in a judge's notebook¹¹³⁰ and was construed as precedents.¹¹³¹ The transfer of uncodified oral history to written reports¹¹³² as a valuable source¹¹³³ meant that judges could refer to the material during sentencing. The oral transfer of knowledge was valuable for those engaged in the law.

This theme emerged from the interviews, providing insights into the Anglo-Saxon period and reasons for how and why the court accepts oral and written reports. For example, with reference to a cultural report, one judge explained:¹¹³⁴

... lawyers who take comfort in paper, the trend is to put forward a written report ... everyone wants a permanent record. So, if there's a written report, it goes on the file. Later on, it can be easily searched, picked over, a little more difficult to do with an oral report. There's audio recording of course. But they're not as easy to search as the written hard copy file.

¹¹²⁶ David Wilson *Anglo-Saxon Paganism* (Routledge, London and New York, 1992) at 2; Audrey Meaney "Paganism" in (eds) Michael Lapidge, John Blair, Simon Keynes, Donald Scragg *The Blackwell Encyclopaedia of Anglo-Saxon England* (Blackwell, Oxford, and Malden, 1999) at 351-352.

¹¹²⁷ Ronald Hutton *Pagan Britain* (Yale University Press, London, 2013) at 297.

¹¹²⁸ Sharon M Rowley *The Old English version of Bede's Historia Ecclesiastica* (Cambridge, New York, 2011) at 673-735.

¹¹²⁹ Hutton, above n 1127, at 297.

¹¹³⁰ [H.S. Chapman] 'Criminal Trials No. 5' (1847-49) Hocken Library, Dunedin (HL) MS-0411/013, entry for 1 December 1847, 23-36.

¹¹³¹ Stephen Odgers "The High Court on Crime in 2021" (2022) 46 (1) *Criminal Law Journal* 7-17.

¹¹³² Above, n 1130.

¹¹³³ Peter Spiller "Realism Reflected in the Court of Appeal: the Value of the Oral Tradition" (1998) *NZYBJ* 3 (1998) 2 31 at 32.

¹¹³⁴ See Appendix 7: Judge Response "G".

In addition, another judge commented that a cultural speaker:¹¹³⁵

... makes it more real. ... Certainly, if there is someone who is willing to speak for someone, a defendant, and give all the whakapapa background, it just brings to life that would otherwise be on a A4 sheet of paper. ... Māori place great stock in oral advocacy. So too does the criminal court. We, the court, it's a forum for oral advocacy. I, in many instances, would prefer oral speakers to a written report. I'm buried in paper as it is ... But that view has to be tempered with ... a preference for a written and complete and unambiguous paper report which is what you get in paper form. So, I'm not critical of other lawyers who rely more heavily on written material.

Disregarding the question of whether Māori oral tradition should evolve the same way, judicial criminal procedural writings have the same rationale as a cultural speaker. It is a matter of "natural humanity."¹¹³⁶ Reference to Parliament's initial intent and s 16 of the Criminal Justice Act 1985 is just as important as it was then as it is now. Consequently, the cultural information of an offender's background¹¹³⁷ is a positive aspect¹¹³⁸ that allows for the delivery of cultural information through a cultural report or a cultural speaker.¹¹³⁹ The courts rely on them all the time.

7.1.2 International Human Rights/New Zealand Bill of Rights 1990

The International Bill of Human Rights 1948¹¹⁴⁰ and the New Zealand Bill of Rights Act 1990 are significant human rights treaties and provide key reference points when considering equitable treatment in the criminal justice system. The International Covenant on Civil and Political Rights (ICCPR) reaffirms the

¹¹³⁵ Above, n 1134.

¹¹³⁶ See Appendix 7: Judge Response "J".

¹¹³⁷ Criminal Justice Act 1985, s 16.

¹¹³⁸ See Appendix 7: Judge Response "F".

¹¹³⁹ Criminal Justice Act 1985, s 16.

¹¹⁴⁰ The International Bill of Human Rights consists of three declarations: the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and two Optional Protocols.

conditions of the possibility of equality where New Zealand recognises the “inherent dignity” and “the equal and inalienable rights of all members of the human family.”¹¹⁴¹

Under the Universal Declaration of Human Rights equality can only be achieved if everyone enjoys their civil, political, economic, social, and cultural rights and can freely pursue them.¹¹⁴² These declarations produce the normative values of the duty of the community to enable each person to develop their rights freely and fully under the aim and purpose of International Human Rights. A concern explored here is whether the different interpretation of s 27 enables New Zealand to meet these international standards of human rights.

The different interpretations and outcomes concerning s 27 of the Sentencing Act 2002, and whether they represent a reasonable limit on a right to access to justice under the New Zealand Bill of Rights Act 1990, may cast doubt on the current legal practices in the courts. Section 6 of the New Zealand Bill of Rights Act 1990 requires that wherever an enactment can be given a meaning that is consistent with rights and freedoms contained in the NZBORA, that meaning shall be preferred. Section 4 prevents the courts from striking down legislation that is inconsistent with NZBORA. Section 27 of the Sentencing Act 2002 contains unambiguous language but is subject to different meanings identified in case law. Section 5 requires that a limit on a right must be reasonable.

Sections 4, 5, and 6 of the New Zealand Bill of Rights Act 1990 (NZBORA) do not hinder Parliament’s intent, as s 4 ensures that parliamentary will, once clearly expressed, always prevails. Furthermore, s 27(2) of the NZBORA limits judicial review if an inconsistent sentencing outcome of the same offence type impacts Māori, who often lack the funds to apply for judicial review. The main question concerns what elements justify a reasonable limit on a right to access justice, when a meaning under s 6 of NZBORA can be clearly understood under s 27 of the Sentencing Act 2002. In other words, what constitutes a reasonable limit under s 5

¹¹⁴¹ International Covenant on Civil and Political Rights, Preamble.

¹¹⁴² International Covenant on Civil and Political Rights, Part 1, Article 1.

of the NZBORA where a cultural report could be the difference between imprisonment and non-imprisonment? The main problem is that the limited rights are further limited and contained within the context of possible social inequalities.

From a Māori perspective, this is significant as these limited rights contradict Article 3 of the Treaty of Waitangi. This article declares equal rights for Māori as British subjects and the notion that they should have access to justice. Therefore, there is a direct link between human rights and customary law which demonstrates how they interrelate with an individual, situation, and place. While imprisonment may be necessary for the worst offences, it does not provide social equilibrium or restore balance to enable for the possibility of transformation. A cultural report may not necessarily result in a discount or a reduced sentence length. However, a defendant has the right to have his or her cultural background read by the judge and considered in sentencing decisions.

7.1.3 Cultural Speakers

Another consideration in implementing s 27 is the role of cultural speakers. In general, defence counsel can arrange for cultural speakers, and this is unlikely to involve a financial component.¹¹⁴³ Likewise, the PDS works within the ideological framework that s 27 requires a speaker. If there is no speaker available, both counsel and the PDS will seek professional, and sometimes amateur reports. Whānau members, kaumātua elders, hapū, and iwi representative leaders can speak on behalf of the defendant.¹¹⁴⁴ According to one judge:¹¹⁴⁵

We should have cultural speakers and the good thing about the ability to have those cultural speakers in court is that more than one person can do it, you know, families can do it together, if they are prepared, families can get up and speak about the defendant and I think the benefit then again is the same. More information for the judge so that the judge truly knows who this person is, and we don't just get the behaviour, we

¹¹⁴³ See Appendix 7: Judge Response “H” and Judge Response “I”.

¹¹⁴⁴ See Appendix 7: Judge Response “H”.

¹¹⁴⁵ See Appendix 7: Judge Response “H”.

don't just get the crime, we get what's behind it, how did it get to this place? And I guess having the cultural speakers in court, yeah, I think both are really, important.

Although this may save costs, judges rarely experience listening to a cultural speaker,¹¹⁴⁶ as there are very few available across the courts. Amateur cultural speakers may take up the challenge. However, some are not well educated or confident and may not know if something is relevant or not.¹¹⁴⁷ Also as one interviewee noted:¹¹⁴⁸

... if they don't know the person or haven't got time to know the person then sometimes there's a disconnect between the culture factors and what is really required from us to be able to link the cultural factors to the offending.

Some defendants are reluctant to disclose sensitive information that may not be well known to whānau family members.¹¹⁴⁹ As there are huge expectations placed on whānau members, there is real merit in having a professional person to write up the cultural report.¹¹⁵⁰ The information has a better chance of being disclosed to an outsider or someone who has a cultural understanding of that defendant.¹¹⁵¹

These issues illustrate the possibility of missed opportunities for transformative outcomes. Despite the encouragement to have cultural speakers take the stand, their effectiveness depends on the level of professionalism and relevant cultural information that they can offer. There is no guarantee that all the information required under s 27 of the Sentencing Act 2002 will be covered by the cultural speaker. The justice system tends to value cultural reports over the oral tradition.¹¹⁵²

¹¹⁴⁶ See Appendix 7: Judge Response "F".

¹¹⁴⁷ See Appendix 7: Judge Response "H".

¹¹⁴⁸ See Appendix 7: Judge Response "F".

¹¹⁴⁹ See Appendix 7: Judge Response "H".

¹¹⁵⁰ See Appendix 7: Judge Response "H".

¹¹⁵¹ See Appendix 7: Judge Response "H".

¹¹⁵² See Appendix 7: Judge Response "H".

7.1.4 *Cultural Speakers v Cultural Reports*

Judges have different views about cultural speakers and cultural reports.¹¹⁵³ Whether they rely on either or both, may depend on the time allocated at sentencing.¹¹⁵⁴ For example:¹¹⁵⁵

Usually, we have a list with 15 sentencings, maximum 15 minutes each which goes for 4-5 hrs. There are time pressure issues. I prefer a cultural report because you don't know how long things are going to take. It just adds pressure in the backend.

Realistically, judges do not have the time to assess the relevance in advance of the cultural speaker's delivery of information raised at sentencing.¹¹⁵⁶ Based on the uncertainty and varying degrees of professionalism executed by the speaker, this could potentially weaken the potential for the judge to contemplate transformative outcomes before delivering the sentence. It is more helpful for judges to have a cultural report in advance of sentencing in order to assess the relevance of the sentencing.¹¹⁵⁷ The sentencing process requires certainty and cultural reports which fit the criteria. A cultural report enables a judge to make timetabling directions and arrange distribution to the court, crown counsel, or the police in good time and be aware of the information before sentencing.¹¹⁵⁸

Judges who receive a cultural report have time to read and digest the material and weave it into the preparation of their decision.¹¹⁵⁹ It is unrealistic to expect judges to incorporate all of the information on the day within the sentencing matrix as there are many variables' judges must balance. Therefore, judges are more prepared with cultural report information than listening to cultural speakers for the first time.¹¹⁶⁰

¹¹⁵³ Above, n 1149.

¹¹⁵⁴ Above, n 1149.

¹¹⁵⁵ See Appendix 7: Judge Response "E".

¹¹⁵⁶ See Appendix 7: Judge Response "H".

¹¹⁵⁷ See Appendix 7: Judge Response "H".

¹¹⁵⁸ See Appendix 7: Judge Response "H".

¹¹⁵⁹ See Appendix 7: Judge Response "H".

¹¹⁶⁰ See Appendix 7: Judge Response "H".

The courts tend to prefer professional advice to give judges information as opposed to a cultural speaker's submission. The preference may conflict with the process, but current legal practices rely on the former. Judges' reliance on independent professionals appears to be the norm and accepted within the legal system.¹¹⁶¹ As professionals receive the information from family members and the defendant, more value is placed on the substantive material articulated and delivered by a professional. In contrast, an audio recording of the report is not as easy to search for compared with a written hard copy file or permanent record.¹¹⁶² Until judges change their approach in terms of valuing oral submissions, judges will continue to rely on written reports to "elevate that information to a different place."¹¹⁶³

A cultural report can be the difference between a custodial and non-custodial sentence. The economic and social consequences of the sentencing outcome are multiple. Compared with a defendant who enters the prison system for \$150k per year,¹¹⁶⁴ the cost of a cultural report ranges between \$880 to \$3,500. Furthermore, a report could make a difference between rehabilitation, reducing recidivism, and dealing with social and economic disruption, and the ongoing trauma children experience as a result of incarcerated parents.¹¹⁶⁵ The resultant long term impact of imprisonment is perhaps even more significant, as research indicates that children of an incarcerated parent or both parents are likely to commit a crime.¹¹⁶⁶ Cultural reports may not necessarily mean a reduced sentence length or non-imprisonment. However, the judge has more time to address the relevant issues¹¹⁶⁷ and consider the possibility of transformative outcomes for offenders and their families.

7.1.5 Cultural Reports v Pre-sentence Reports

Probation officers were part of a stand-alone service until incorporated into the Department of Corrections in 1995. However, the adoption of the American

¹¹⁶¹ See Appendix 7: Judge Response "H".

¹¹⁶² See Appendix 7: Judge Response "G".

¹¹⁶³ See Appendix 7: Judge Response "H".

¹¹⁶⁴ *Gluckman*, above n 68.

¹¹⁶⁵ *Theron*, above n 34.

¹¹⁶⁶ Above, n 34.

¹¹⁶⁷ See Appendix 7: Judge Response "H".

ROC*ROI approach changed the underlying philosophy of these reports.¹¹⁶⁸ A pre-sentence report can cover all the issues Whata J discussed in the *Heta* case.¹¹⁶⁹ However, it is a rare experience that a judge picks up a pre-sentence report and feels informed enough to know what or why someone has offended and why they have ended up in court.¹¹⁷⁰ The lack of quality in the report¹¹⁷¹ is not helpful¹¹⁷² and does not cover a great deal of information required by judges.¹¹⁷³ A typical probation report provides a summary page, recommendations, domestic circumstances, relationships, and employment. The data fed into the Rock Roy Scale system measures whether someone is a high-risk, medium, or low-risk offender.¹¹⁷⁴ However, the probation reports are negative and punitive with repeatedly cut and pasted examples of a high risk of further offending, non-compliance, and recommendations for imprisonment.¹¹⁷⁵ According to one judge, the probation reports are “cold”¹¹⁷⁶, “clinical”¹¹⁷⁷, “impersonal”,¹¹⁷⁸ “incredibly inaccurate” and “clumsy assessment tools”.¹¹⁷⁹

Many offenders are non-compliant and breach their sentences. One of the main reasons is that most probation officers do not build a good rapport with offenders who, in the words of one of the judges, view probation officers as “prison officers in a suit.”¹¹⁸⁰ Probation reports are based on a tick box system and fail to address information on systemic Māori deprivation and the causes of offending.¹¹⁸¹ Pre-sentence reports are only useful if they are written properly by highlighting a defendant’s background and circumstances that led to the offending.¹¹⁸² The

¹¹⁶⁸ See Appendix 7: Judge Response “J”.

¹¹⁶⁹ See Appendix 7: Judge Response “E”.

¹¹⁷⁰ See Appendix 7: Judge Response “H”.

¹¹⁷¹ See Appendix 7: Judge Response “I”.

¹¹⁷² See Appendix 7: Judge Response “J”.

¹¹⁷³ See Appendix 7: Judge Response “F”.

¹¹⁷⁴ See Appendix 7: Judge Response “J”.

¹¹⁷⁵ See Appendix 7: Judge Response “J”.

¹¹⁷⁶ See Appendix 7: Judge Response “J”.

¹¹⁷⁷ See Appendix 7: Judge Response “J”.

¹¹⁷⁸ See Appendix 7: Judge Response “J”.

¹¹⁷⁹ See Appendix 7: Judge Response “J”.

¹¹⁸⁰ See Appendix 7: Judge Response “J”.

¹¹⁸¹ See Appendix 7: Judge Response “J”.

¹¹⁸² See Appendix 7: Judge Response “G”.

information a judge requires is, on most occasions, available in a cultural report and signals a “greater utilisation of sentences other than imprisonment.”¹¹⁸³

As opposed to probation reports, s 27 reports restore some humanity to the process, which contrasts with depersonalising the Provision of Advice to Courts (PAC) process of assessment and the processing of people.¹¹⁸⁴ The cultural reports contain more detailed information.¹¹⁸⁵ Section 26(2) of the Sentencing Act 2002 does not require the pre-sentence report include cultural background information. In this section, the word ‘may’ suggests there is a choice. The perception that probation reports cover cultural background information¹¹⁸⁶ undermines the mandatory requirement of s 8(i) that is linked with the possibility of transformative outcomes in s 27 of the Sentencing Act 2002. Combined with s 27, s 8(i) of the Sentencing Act 2002 prompts the recognition of Parliament’s intent, the rules of statutory interpretation, and social justice principles and reflects the legal norm of the whanaungatanga process.

7.2 Conditions for the Possibility of Transformative Outcomes

Establishing the conditions for the possibility of transformative outcomes is imperative. This can be achieved by having Māori practitioners working in the courts and ensuring that Māori values are taken into consideration when sentencing. Additionally, Māori leadership must ensure that there is a comprehensive approach to sentencing that includes restorative justice. Finally, Māori leadership should advocate for greater involvement of Māori in the judicial process.

7.2.1 The Courts, Rehabilitation and Community Benefits

District Court judges are adopting a rehabilitative mindset because as one interviewee explained “that is what is going to work”.¹¹⁸⁷ Although the superior

¹¹⁸³ Above, n 1182.

¹¹⁸⁴ See Appendix 7: Judge Response “J”.

¹¹⁸⁵ See Appendix 7: Judge Response “J”, and Judge Response “F”.

¹¹⁸⁶ See Appendix 7: Judge Response “J”.

¹¹⁸⁷ See Appendix 7: Judge Response “H”.

courts are gradually taking notice of this quiet revolution, there is the likelihood of more sentence appeals that would be reverting to “the old tariffs and keep everyone in prison”, as described by one judge.¹¹⁸⁸ The theme of rehabilitation indicates the emergence of transformative conditions that make it possible for defendants to want to turn their lives around and which can help reduce Māori over-representation.¹¹⁸⁹ Defendants benefit from reading their reports and this is more so for those who do not know their cultural background.¹¹⁹⁰ Cultural reports can create a mind shift for those willing to rehabilitate.¹¹⁹¹

7.2.2 Rehabilitation Programmes Benefit the Community

Cultural reports are most persuasive where a defendant is on the cusp of a sentence of imprisonment, or home detention, and the information provided can tip the balance between the former and the latter.¹¹⁹² As long as cultural reports provide appropriate rehabilitation and support mechanisms, offenders who turn away from crime and complete rehabilitative programmes benefit their community.¹¹⁹³ Cultural reports allow judges to tailor a defendant’s sentence, and either reduce the length of the prison sentence or allow home detention.¹¹⁹⁴ Some cultural reports do not suggest alternatives to imprisonment.

Alternatively, as an interviewee explained, many cultural reports suggest connections to a marae, or “make some inroads with te reo (Māori language), or their identity” to help them connect with their whānau better.¹¹⁹⁵ Furthermore, “a good cultural report will not only link the background and the offending” but will also recommend courses, such as a tikanga course. If a judge decides to change focus from punishment to rehabilitation, and can do so, then that would help reduce

¹¹⁸⁸ Above, n 1187.

¹¹⁸⁹ See Appendix 7: Judge Response “I”.

¹¹⁹⁰ See Appendix 7: Judge Response “H”, and Judge Response “E”.

¹¹⁹¹ See Appendix 7: Judge Response “H”.

¹¹⁹² See Appendix 7: Judge Response “F”.

¹¹⁹³ See Appendix 7: Judge Response “D”, Judge Response “F” and Judge Response “H”.

¹¹⁹⁴ See Appendix 7: Judge Response “H”.

¹¹⁹⁵ See Appendix 7: Judge Response “H”.

Māori over-representation in the prisons.¹¹⁹⁶ As noted by one of the judges, rehabilitation programmes benefit the community based on the notion that:¹¹⁹⁷

If we can save one person through a report by putting in place appropriate rehab and support, that's a save in their community. When every person you can turn away from crime, that helps the community in every way.

7.2.3 Section 25 Adjournment

Compared with heavy-duty psychological reports, judges will adjourn a sentence under s 25 as there is often a delay in receiving s 27 cultural reports.¹¹⁹⁸ Although the Ministry of Justice may prefer an “efficient conveyor belt justice system”,¹¹⁹⁹ cultural reports provide rehabilitative programmes and home detention instead of imprisonment.¹²⁰⁰ There is no benefit in rushing sentencing cases through the justice pipeline if there is an opportunity for a potentially reduced sentencing length¹²⁰¹

7.2.4 Cost Benefit Analysis

A cultural report may be the difference between imprisonment and non-imprisonment.¹²⁰² Not sending someone to prison eliminates the imprisonment costs of approximately \$150,000 per year per inmate, and prevents disruption to a defendant's employment, whānau and extended whānau and their children's lives.¹²⁰³ If a parent or both parents are incarcerated, this has a huge psychological impact on children who are taken into care.¹²⁰⁴ Many youth offenders are also victims and are subject to care and protection issues, neglect, abuse, and exposure

¹¹⁹⁶ See Appendix 7: Judge Response “I”.

¹¹⁹⁷ See Appendix 7: Judge Response “D”.

¹¹⁹⁸ See Appendix 7: Judge Response “F” and Judge Response “J”.

¹¹⁹⁹ See Appendix 7: Judge Response “J”.

¹²⁰⁰ See Appendix 7: Judge Response “G”.

¹²⁰¹ See Appendix 7: Judge Response “J”.

¹²⁰² See Appendix 7: Judge Response “G”.

¹²⁰³ *Theron*, above n 34.

¹²⁰⁴ Above, n 34.

to violence.¹²⁰⁵ A cultural report provides judges, including experts, with a different understanding of their experiences.

7.2.5 The Pragmatic Approach

In general, judges will focus on removing the responsibility of monitoring defendants from probation officers and encourage face-to-face interactions with motivated supporters who are required to turn up to court for the offender.¹²⁰⁶ The pragmatic approach reflects the whanaungatanga process for establishing the conditions for the transformative outcomes for the offender and the communities. Judges will actively look for community programmes that are available instead of what one judge termed, the “brutal compliance regime.”¹²⁰⁷ The main purpose behind this approach is about “taking it away out of the probation officer’s hands” so that the judges can monitor the sentence.¹²⁰⁸

Judges who focus on alternatives to imprisonment walk alongside the offender and whānau members as key cultural mentors monitoring the restoration of balance for community well-being. Also, a judge will find ways to justify discounting sentences below two years by diverting offenders under programmes away from the Corrections Department and looking for an alternative sentence.¹²⁰⁹ The pragmatic approach is a cost-benefit to society and can disrupt the impact of social inequalities, and the possibility of recidivism. Rehabilitating an offender in the community rather than imprisonment offers a better chance of balancing society. The possibility of transformative outcomes is infinitely preferable to challenge of rehabilitating someone after several years in prison.

Recognising social inequalities is significant in cases of youth offenders. Youth offenders are also victims, and are subject to, for example, care and protection

¹²⁰⁵ See Appendix 7: Judge Response “H”.

¹²⁰⁶ See Appendix 7: Judge Response “J”.

¹²⁰⁷ See Appendix 7: Judge Response “J”.

¹²⁰⁸ See Appendix 7: Judge Response “J”.

¹²⁰⁹ See Appendix 7: Judge Response “J”.

issues, neglect, abuse, and exposure to violence.¹²¹⁰ The impact of a cultural report provides judges, including experts, with a different understanding of their experiences. The gravity of their experiences demands crucial intervention before entering adult life.

7.2.6 Knowing the Offender

Cultural reports that do not lead to any significant discount are helpful for judges before sentencing to learn about the defendant and how they have ended up in court.¹²¹¹ On very few occasions, offenders who show no reason for the offending, will affect the weight a judge gives to sentencing. Therefore, judges need referable information that is related to the offending¹²¹² or the prospective rehabilitative programme.¹²¹³ In situations where a co-defendant asks for an s 27 report, this encourages the other co-defendant to ask for one as well. The judge will adjourn the case to the same sentencing date to allow everyone to collate the paperwork for what they want to offer.

Summary

Section 27 requires a mind shift for judges to treat offenders differently.¹²¹⁴ Although there is a strong focus on consistency, the only way to help offenders to stop offending is for judges to help rehabilitate them. However, the responsibility should also be shared with iwi and hapū representatives to help Māori offenders rehabilitate.¹²¹⁵ Judges are also taking a pragmatic approach to sentencing. The judge will adjourn the case to the same sentencing date to allow everyone to collate the paperwork for what they want to offer.

7.3 Cultural Report Writers v Probation Report Writers

¹²¹⁰ See Appendix 7: Judge Response “H”.

¹²¹¹ See Appendix 7: Judge Response “I”.

¹²¹² See Appendix 7: Judge Response “E”.

¹²¹³ See Appendix 7: Judge Response “I”.

¹²¹⁴ See Appendix 7: Judge Response “H”.

¹²¹⁵ See Appendix 7: Judge Response “H”.

7.3.1 Cultural Report Writers

For judges to compile cultural information in response to the statutory criteria, the report writer must apply the background information to specific sections of s 27 of the Sentencing Act 2002. Section 27(1) of the Sentencing Act 2002 grants an offender the presumptive right for a representative to provide background information. Professional cultural report writers working from outside the justice system are more likely to gain an offender's trust, build rapport, ask the right questions, and extract the information a judge may never receive from any other source.¹²¹⁶ In contrast, offenders are less likely to co-operate with and disclose information to police, counsel, and probation officers who are not removed from the process and whose relationships may be tarnished due to past generational experiences.¹²¹⁷

Professionally written cultural reports help judges excavate the information and assess whether some discount for past learned behaviour is warranted. Depending on the seriousness of the offence, past trauma, and alienation from cultural ties may not always attract any additional discounts. According to one judge:¹²¹⁸

... the scope of what discounts that can be given to defendants in a very detailed way .. is that any material in the report that ... might be attached to a discount has to be referable to the offending ...there was a history of alcohol abuse which was learned through the defendant's parent ... but His Honour went on to say that in that case that past trauma and alienation from cultural ties, systemic Māori deprivation didn't ... attract any additional discounts.

The cultural matching of a report writer is relevant in terms of the whanaungatanga process. One of the advantages of having a Māori report writer is that clients appear more relaxed than they would be with a probation officer.¹²¹⁹ Consequently, Māori

¹²¹⁶ See Appendix 7: Judge Response "H".

¹²¹⁷ See Appendix 7: Judge Response "H".

¹²¹⁸ See Appendix 7: Judge Response "E".

¹²¹⁹ See Appendix 7: Judge Response "D".

report writers add value to the process. Depending on the seriousness of the offence, professionally written reports may be the gamechanger for a non-custodial sentence. Therefore, it is more than likely that defence counsel will prefer a professionally written cultural reports. A professionally written cultural report may be the difference between imprisonment and non-imprisonment.

7.3.2 Cultural Report Writer Issues

There are key elements of a cultural report that need to be present to ensure its effectiveness. Some s 27 reports are explicit. However, other reports do not show the link to the diverse sections to explain how the defendant's cultural background has caused the offending.¹²²⁰ The relevance of demonstrating the link¹²²¹ is for judges to consider the conditions for the possibility of transformative outcomes. According to a District Court judge:¹²²²

.. the s27 reports are generally much fuller, contain a lot of background information, and, also, they contain the relevant information relating to how the cultural factors have impacted on the offending. The effects of colonisation: those kinds of things, or personal experiences which can be linked, and directly contributable to culture which can be directly linked to the offending.

In addition, there is a tremendous advantage when a good report:¹²²³

will suggest programmes or a course which may assist the defendant moving forward to support them in their rehabilitation and those sorts of things.

As cultural reports are one-offs, there should be no opportunity lost for offenders to have their cultural background reported to the judge. More attention is required

¹²²⁰ See Appendix 7: Judge Response "G".

¹²²¹ See Appendix 7: Judge Response "I".

¹²²² See Appendix 7: Judge Response "F".

¹²²³ See Appendix 7: Judge Response "F".

from cultural report writers to understand the purpose of the cultural report. In general, judges and defence counsel rely on quality professional reports. Therefore, the standard of work produced by cultural report writers must be of high quality.

7.3.3 Probation Report Writers

As mentioned earlier, probation report writers rely on criminogenic assessments that reflect punitive approaches to sentencing and do not canvass information about systemic deprivation.¹²²⁴ The approach discourages defendants from disclosing the information that probation officers could receive.

Cultural report writers give “much more helpful information”¹²²⁵ than what is provided in a probation report in which the assessment relies heavily on risk factors that diminish opportunities for rehabilitation. In some respects, when weighing the balance of probabilities between a punitive outcome and a rehabilitative outcome, both reports provide judges with crucial information before sentencing. Hence the reason why s 27 of the Sentencing Act 2002 should have a uniform application for all offenders in the sentencing matrix.

7.4 Amateur Reports v Professional Cultural Reports

7.4.1 Demand for Cultural Reports

The demand for professional cultural report writers is increasing, some are snowed under and are unable to meet the deadline date or take on more work. Consequently, there are delays in delivering those reports.¹²²⁶ The reputation and availability of professional cultural report writers are relevant for sentencing purposes. The majority will address all the relevant issues set out in s 27 of the Sentencing Act 2002 and indicate realistic recommendations. Due to the limited availability of

¹²²⁴ *Mihaere*, above n 17, at 52; Elizabeth Stanley and Riki Mihaere “The Problems and Promise of International Rights in the Challenge to Māori Imprisonment” 2019 8 (1) *International Journal for Crime, Justice and Social Democracy* 1 at 9.

¹²²⁵ See Appendix 7: Judge Response “H”.

¹²²⁶ See Appendix 7: Judge Response “G”.

professional cultural report writers, defence counsel may have to resort to commissioning amateur report writers. However, there are some risks involved.

The fact that there are no prescriptions or templates for cultural report writers to follow, should not leave the writing field open to debate as s 27 of the Sentencing Act 2002 provides the signposts for report writers to provide the relevant information according to the provisions. As noted in *Berkland v R*:¹²²⁷

There is no rigid formula for the provision of s 27 information. Interventions can be informal — oral comments from the body of the court, or a letter provided by a member of the offender’s family, whānau or community and spoken to at court. Or they can be in report form. The report writer may be from within the offender’s community — for example, an employee of a social service provided by iwi, urban Māori, church or other community-based organisation or from a writer with expertise in the general subject of criminal justice, but who is otherwise unrelated to the offender or their community. However presented, the judge must receive that information unless there is a good reason not to.

Amateur reports that indicate missing pieces of information are a challenge for judges in balancing a just sentence. The information about an offender’s cultural background that judges are looking for is crucial in determining, if possible, a sentencing discount. The omissions create unwanted gaps between amateur reports and professional reports and may increase, for example, missed opportunities for transformative outcomes, possibilities of incarceration, and increased incarceration costs and interruptions to family settings. Where the report writing depends on the skills of the report writer, there are no second chances for a cultural report to be rewritten or resubmitted. Therefore, the omissions may lead to a tipping point difference between imprisonment and non-imprisonment; if professionally written, this may be the gamechanger for attaining a non-custodial sentence.

¹²²⁷ *Berkland v R*, above n 936, at [141].

In summary, professionally written reports can be powerful and carry a lot of weight for the defendant. Depending on the seriousness of the offence, professionally written reports can be effective as judges rely on those reports to assist their sentencing decisions. In 2019 there was a delay in receiving cultural reports due to the dearth of cultural report writers. Since then, there has been an increase in the number of cultural report writer specialists throughout the country.¹²²⁸ It is imperative to note the writers must have the relevant knowledge according to a work-in-progress guideline sheet suggested by the Supreme Court in *Berkland v R* to achieve the section's three-purpose framework as follows:¹²²⁹

- (a) the writer's knowledge of the offender's background and their offending;
 - (b) the extent of their engagement with the offender and their family or whānau for the purposes of compiling the report, and whether the report is supported by the family or whānau;
 - (c) the specific background of the offender including socio-economic context, educational qualifications and cultural context — if Māori, the offender's marae, hapū and iwi and extent of connection with them (if the offender does not know, the report writer should find out through their own networks);
 - (d) family or whānau history, including economic, cultural and social circumstances;
 - (e) any relevant comments or insights about the offender's circumstances and the drivers of their offending provided by family, whānau or wider community spokespeople;
 - (f) information about relevant historical sources of offending which may help establish a causative contribution to the offending, for example, if the offender is Māori, a summary of the colonial experience of their iwi. As we have said, this can be obtained without unnecessary difficulty from treaty settlement deeds, Waitangi Tribunal reports, kaumātua or iwi organisations;
- and

¹²²⁸ See for example, Sentence Equality. Available at www.sentencingequality.co.nz

¹²²⁹ *Berkland v R*, above n 936, at [143].

(g) details of consultation with the offender’s community, including relevant community organisations and any proposals they may have in relation to achieving sentencing purposes such as rehabilitation or reintegration, or to assist the Court in any other way in arriving at a just sentence.

7.4.2 Why s 27 Professional Cultural Reports are more Important Than Amateur Reports

In highlighting the relevance of s 27 cultural reports, in *Berkland v R*, the Supreme Court asserted that:¹²³⁰

Section 27 is a sophisticated provision. It was designed, first and foremost, to draw the offender’s community — including, where appropriate, whānau, hapū and iwi — into the courtroom to provide insights into the offender and to share responsibility for addressing the offender’s needs. It contains three elements: court-community engagement; obtaining relevant background information about the offender; and identifying community resources relevant to sentence.

Judges rely on crucial information that provides the nexus between the deprivation and the offending:¹²³¹

Thus s 27 interventions can reveal offender background relevant to the consistency and retributive principles of sentencing; they can suggest how the offender’s community might help the offender to address their offending; and they can propose alternative sentencing options (as well as pre and post-sentencing options) about which the judge might otherwise have been unaware. Options might include enrolling the offender in community-based programmes, connecting them to more informal community support networks to aid in rehabilitation and

¹²³⁰ Above, n 936, at [138].

¹²³¹ Above, at [139]; See Appendix 7: Judge Response “F”, Judge Response “H”, Judge Response “I”, and Judge Response “J”.

reintegration, or to pro-social mentoring from within the community in order to bring the offender to a better understanding of their own responsibility for the offending. Such options can also serve other sentencing purposes such as deterrence and community protection.

Also:¹²³²

... s 27 was designed to be a means by which the court might draw on connections between the offender and their community to better achieve the purposes and principles of sentencing. None of this is new. Specialist therapeutic courts here and overseas have used these kinds of connections to address offender and community needs for many years. They work. Current proposals in the District Court — a package of procedural and other reforms called Te Ao Marama — are designed to bring these therapeutic approaches into the mainstream. The proposal may have a Māori name but it is context driven. It will apply equally to all offenders from all communities no matter how composed.

In the *Berkland v R*¹²³³ case, systemic deprivation and intergenerational trauma of loss were shown to be contributing factors to the behaviour. Section 27 of the Sentencing Act 2002 is important to sustain the fundamental guidelines outlined in the *Berkland* case and for future case study research. Major themes and policy implications can be drawn from the findings. To reduce Māori over-representation in the criminal justice system, a combination of applying legal archaeology, reiterating Parliament's intent and society's will in accepting whanaungatanga as part of the sentencing regime could be a major stepping stone to transformative progress. By observing the history of the criminal justice system and the origins of current legislation, one can see that the existing inequalities are evident. As the existing inequalities has led to Māori over-representation, the information can then be used to develop more effective solutions.

¹²³² *Berkland v R*, above n 936, at [140]; See Appendix 7: Judge Response "F", Judge Response "H", Judge Response "I", and Judge Response "J".

¹²³³ Above, n 936.

This demonstrates the unique potential for the criminal justice system to include s 27 cultural reports as a way of preventing the increase of Māori over-representation in the prison system. Imagining whanaungatanga under s 27 of the Sentencing Act 2002 provides a realistic approach to support changing the current status quo for transformative results.

7.4.3 Analysis of Data

The data suggests a turning of the tide against the Ministry of Justice reliance on “an efficient conveyor belt justice system”.¹²³⁴ Several themes emerged from the gold nuggets of information received from the interviews. There are powerful messages about changing the status quo to achieve transformative outcomes. Sharing these themes with a broader audience creates meaningful change. Society becomes more aware of the socio-economic circumstances that prevent positive change and more ready to accept alternative options to negate the status quo.

Social inequalities are the result of different interpretations of the Treaty of Waitangi, international human rights, and the New Zealand Bill of Rights Act 1990. The fact that an s 27 report requires a correct interpretation to avoid inconsistent sentencing outcomes is paramount in helping reduce Māori over-representation. The thematic analysis indicates that a uniform application of s 27 should avoid the different sentencing outcomes in different circuits. The power of having cultural reports for reference is the gem that, depending on the seriousness of the offence, can influence a rehabilitative programme, benefit communities, and save prison costs for society.

A punitive approach to sentencing does not reflect human rights and the Treaty of Waitangi principles of protection, participation, and partnership. Recidivism, high prison costs, public safety issues, mental health issues, employment, and intergenerational trauma increase the conditions of the possibility of social inequalities. If probation reports were of gold standard, there would be no need to

¹²³⁴ See Appendix 7: Judge Response “J”.

request a s 27 report. The thematic analysis suggests that the whanaungatanga process is a pre-colonial legal norm and has a transformative space in s 27 of the Sentencing Act 2002.

7.5 Breaking the Cycle: Utilising Whanaungatanga in s 27 of the Sentencing Act 2002

The subsections above have demonstrated the impacts that Māori have confronted when they come before the justice system. They have also highlighted the lack of cultural responsiveness for Māori within the justice system and the need for a system to reflect their Te Ao Māori principles and values. There is a justice disconnect for Māori that causes a cultural disconnect that displaces their understanding of how actions and repercussions for those actions are dealt with when taken out of the Te Ao Māori context. These impacts affect offenders, also their whānau and the community around them.

Whanaungatanga was introduced earlier in the thesis to indicate its importance as a legal principle as part of tīkanga. Whanaungatanga has a crucial legal role in improving engagement and interactions within the justice processes.

As previously mentioned, there is no specific literature on how the whanaungatanga process can play a role in reducing sentencing lengths or result in non-imprisonment based on a s 27 cultural report. There is also very little literature that explains how and why an s 27 cultural report can highlight systemic deprivation of an offender's socio-economic and cultural experiences that influenced the offending. Furthermore, there is no research on how s 27 of the Sentencing Act 2002 should be interpreted, or whether a cultural speaker should be cross-examined.¹²³⁵

Overall, most definitions do not connect to the law of whanaungatanga in a way that enhances or promotes its traditional existence as a legal norm. Some writers may confuse readers if the description indicates just relationships or values. The

¹²³⁵ See Appendix 7: Judge Response “D”, Judge Response “E”, Judge Response “F”, Judge Response “G”, Judge Response “H”, Judge Response “I”, and Judge Response “J”.

generalisations used to explain whanaungatanga can limit understanding of the source or the origin of whanaungatanga. Further, whanaungatanga may not be taken seriously by some people, while others would acknowledge its traditional significance.

One of the reasons that non-Māori descriptions of whanaungatanga lack depth of meaning compared with the accounts of Māori writers is because the latter experience whanaungatanga daily, with their whānau, on the marae, or at hui or meetings. A uniform understanding of whanaungatanga is necessary before an application in s 27 of the Sentencing Act 2002.

If whanaungatanga became acceptable to society, it could be an intervention to mitigate the impact of youth offenders entering the prison system.¹²³⁶ Although we have Rangatahi Courts, we could potentially have fewer Māori prisoners on remand,¹²³⁷ see fewer differences between Māori/European imprisoned in the period of less than six months,¹²³⁸ and few differences between Māori/European imprisoned between six and twelve months.¹²³⁹ The application of whanaungatanga could also potentially result in fewer differences between Māori/European incarcerated for between twelve to twenty-four months¹²⁴⁰ and fewer sentencing differences between Māori/European imprisoned between twenty-four to thirty-six months¹²⁴¹ and fewer sentencing differences between Māori/European from thirty-six to sixty months based on data gathered from 2002-2017.¹²⁴²

Utilising whanaungatanga as a transformative tool could have some impact, not only in the criminal justice system but also in other social contexts.

¹²³⁶ For example, *Marsters v Police*, above n 454; See Appendix 7: Judge Response “F”, Judge Response “H” and Judge Response “J”. See Appendix 1: Graph 7, Graph 8, and Graph 9.

¹²³⁷ See Appendix 1: Graph 5.

¹²³⁸ See Appendix 1: Graph 20.

¹²³⁹ See Appendix 1: Graph 21.

¹²⁴⁰ See Appendix 1: Graph 22.

¹²⁴¹ See Appendix 1: Graph 23.

¹²⁴² See Appendix 1: Graph 24.

The Significance of s 27 Cultural Reports

Whanaungatanga derives from ancient wisdom. Part of the significance of cultural reports are the guiding principles of whanaungatanga. When more importance is placed on the quality of reports where offenders could be dealt with differently in the criminal justice system, this could reduce the focus on the statistics. Also, there would be a much better focus on rehabilitation, preventing recidivism and looking at sentencing differently.

The exclusion of youth offenders from the adult programme suggests the significance of the restorative justice concepts where whanaungatanga can play a role in dealing with an alleged offender differently.¹²⁴³ This leads to considering the impact whanaungatanga would have in current legal practices.

Effectiveness of s 27 of the Sentencing Act 2002

The effectiveness of s 27 of the Sentencing Act 2002 in reducing Māori over-representation in prisons has prompted evaluation in the light of current statistics.¹²⁴⁴ Social disadvantage was a mitigating factor among Māori offenders.¹²⁴⁵ Although judges have discretion over cultural assessment reports, there are still differences in outcomes for similar offences, reflecting an inconsistency in the judicial system.¹²⁴⁶

The underutilisation of s 27 has left a gap in the use of cultural reports.¹²⁴⁷ The inconsistency of the courts in raising a s 27 report suggests that the opportunity for a sentencing discount is slim. These inconsistencies are of paramount concern and do not reflect Parliament's intentions to reduce Māori over-representation in New Zealand's prison population.¹²⁴⁸

¹²⁴³ See Appendix 7: Judge Response "I."

¹²⁴⁴ *Chisnall*, above n 40.

¹²⁴⁵ Above, n 40.

¹²⁴⁶ See *Fane v R*, above n 41.

¹²⁴⁷ *R v Mika* [2013] NZHC 2357. For further comments refer to Ūpoko Tuaono/Chapter Six. See Appendix 5; see also *Mika v R*, above n 1016.

¹²⁴⁸ To address Māori over-representation within the justice system, Parliament introduced the Criminal Justice Act 1985, s 16—the predecessor to s 27 of the Sentencing Act 2002.

Would Whanaungatanga Have an Impact on Current Legal Practices?

The current legal practices could improve as those working in the courts come to understand whanaungatanga better and its application in s 27 of the Sentencing Act 2002.¹²⁴⁹ Defence counsel, prosecution and judges could look at the cultural reports that speak to systemic Māori deprivation differently.¹²⁵⁰ It would be a reminder of Parliament's intent to curb Māori over-representation in the prisons.

Two narratives have been examined: the legal norms of whanaungatanga, as part of tikanga, and the common law or judge-made law based on statutory interpretation. Both narratives are significant. Although there are different views, Parliament's intent to reduce Māori over-representation in the prison system coincides with what we see. The pluralistic tension between Western approaches and whanaungatanga values contributes to the disjunction when dealing with Māori offenders. The reimagined island of whanaungatanga within s 27 of the Sentencing Act 2002 suggests there is scope for imagining a transformative lens for transformative outcomes.

7.6 Conclusion

This chapter looked at the practical application of cultural reports in the criminal justice system and highlighted reasons for its importance. The chapter located cultural reports in the context of the Treaty of Waitangi and the New Zealand Bill of Rights 1990. The themes in this chapter were informed by interviews with District Court judges who shared their understanding of the workings of the cultural reports, the challenges and the sorts of processes that need to be in place. Some particular issues highlighted were the difference between an oral and a written report, the distinction between professional and amateur report writers and the difference between cultural reports and probation reports. Based on the insights, from the interviews, this chapter has reinforced the importance of cultural reports for equity in the justice system and for individual and social transformation.

¹²⁴⁹ See Appendix 7: Interview Questions and Responses.

¹²⁵⁰ The judges' responses are key to helping improve the understanding of whanaungatanga.

The final chapter will review the thesis, consider the implications of the findings, and make recommendations both for practice and future research.

8 Ūpoko Tuawaru-Chapter Eight: Conclusion

Introduction

The goal of this thesis was to examine the proposition that the application of whanaungatanga to s 27 of the Sentencing Act 2002, examined in detail in Ūpoko Tuarua/Chapter Two, could strengthen the Te Ao Māori framework and ensure a more consistent use of cultural reports. In the bigger picture, it was proposed that reference to whanaungatanga in this context could impact on prisoner statistics and help to achieve transformative outcomes for offenders. The previous chapter was primarily based on interviews with District Court judges and focused on their understanding of s 27 of the Sentencing Act of 2002. The feedback from the judges provided insights into the way cultural reports work in the system, the associated challenges, and what needs to be done to ensure their effectiveness. Drawing on these findings, the chapter highlighted some specific areas. These included the question of whether oral or written reports are preferable and the differences between amateur and professional reports. Judges' comments demonstrated their awareness of the profound impact of cultural alienation and social inequities on Māori. Overall, the judges' comments showed their recognition of the importance of cultural reports and finding ways to make them work more effectively and consistently to achieve transformative outcomes for offenders and society.

This concluding chapter discusses the key findings of the thesis and the implications for stakeholders. The chapter makes some recommendations for practice, suggests possibilities for future research and concludes with final comments.

Limitations of the Research

Limitations of the study are acknowledged. Due to practical and time constraints, this paper does not provide a comprehensive review of the data mined from the limited sample of the judges' interviews. Firstly, the sample size does not represent the entire population of judges and may demonstrate biased and inaccurate results. Secondly, the data obtained might not accurately reflect the interviewee's

perspectives. Thirdly, subjective viewpoints may make it difficult to draw objective conclusions.

Also, practical and time constraints prevented the inclusion of other stakeholders, for instance, government ministers, policymakers, judges, lawyers, iwi and hapū leaders, offenders, their whanau and the wider community. Gaining valuable insights and feedback might have enriched the study to develop more effective and sustainable solutions. Nonetheless, the practical shortcomings of the study present a foundation for future research. Based on the findings, future research may be able to determine the significance of data in improving an understanding of whanaungatanga as defined by s 27 of the Sentencing Act 2002.

8.1 Findings

History

This thesis located the importance of recourse to whanaungatanga in s 27 of the Sentencing Act 2002 in the historical context. Ūpoko Tuarua/Chapter Two highlighted the underutilisation of whanaungatanga within the context of relational accountability Parliament embedded in s 27 of the Sentencing Act 2002. The inconsistent application of whanaungatanga arises from its lack of recognition as a juridical norm suitable for doctrinal application. This reduces a transformative sentencing instrument to a procedural formality. Ūpoko Tuatoru/Chapter Three discussed the ways in which whanaungatanga and Te Ao Māori principles maintained social harmony in traditional Māori society. Chapters Ūpoko Tuatoru/Three, Ūpoko Tuawhā/Four and Ūpoko Tuarima/Five demonstrated how colonisation and successive legislation eventually excluded this process from the legal system. The exclusion of Māori in decision-making fragmented tīkanga. The marginalisation of Māori processes for managing conflict was part of a far-reaching destruction of traditional Māori practices which over time dismantled the array of principles and practices that resonated with Māori. The dominance of Western ideologies led to the exclusion of tīkanga, whanaungatanga and whakapapa in decision making. The interference with Māori governance of their people impacted their psychological security, disempowering their mana (status)

and what it meant to them and their communities. As was discussed in Ūpoko Tuawhā/Chapter Four, the exclusion of Māori in the early 19th-century census population surveys served colonial interests. It was contended that these surveys were preserved and reproduced to galvanise authority over Māori and their land and perpetuated an incorrect narrative about the Māori population. These early surveys contributed to the impression that Māori land was not valuable and that Māori were not contributing to the development of the country. The ongoing omission from decision-making undermined the resilience of Māori to imprisonment, and further weakened the Māori population, leading to their eventual displacement and dispossession (see a detailed discussion in Chapters Ūpoko Tuawhā/Four and Ūpoko Tuarima/Five). The colonial socio-legal structures continued to be an instrument of control long after the foundation of Aotearoa, New Zealand and suppressed the vibrancy of tīkanga. Contrary to this longstanding historical pattern, the *Ellis* case demonstrates the evolving recognition of the importance of tīkanga, its equality in relation to the common law, and its ability to enhance the law of Aotearoa, New Zealand.

It was argued that this historical overview is important for the proposition of the thesis in several ways. The historical perspective establishes the importance of recognising and restoring Māori processes for managing disputes in the New Zealand judicial system. The incorporation of whanaungatanga in the application of s 27 of the Sentencing Act 2002 would be one strategy for aligning the justice system with Māori legal norms. The historical record also highlights the significance of cultural reports in recognising the consequences of cultural alienation and social deprivation on offenders.

8.2 What have we learned about s 27 of the Sentencing Act 2002?

As s 27 of the Sentencing Act 2002 is at the heart of this research inquiry, key findings about its application need to be reiterated as a step towards reform. Section 27 is restated here as a reminder of what it envisages.

Section 27(1)(a) and (b) of the Sentencing Act 2002 states:

27 Offender may request the court to hear the person or personal family, whanau, community, and cultural background of the offender

- (1) 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, whanau, community, and cultural background of the offender
- (b) the way in which that background may have related to the commission of the offence:

As has been established in the chapters, judges require relevant information to determine an appropriate sentence. To this end, an expert cultural report writer can emphasise systemic deprivation as part of the offender’s cultural background under s 27(1)(b) of the Sentencing Act 2002. There are challenges related to how this is presented. When a cultural speaker presents the information, there are time pressures on the judge which impair their ability to use the information efficaciously in sentencing.¹²⁵¹ Therefore judges rely on a cultural report “because it is a complete and unambiguous paper report.”¹²⁵² This preference can also be linked to a long tradition of written material within the New Zealand legal system. At the same time, there are shortcomings in not being able to listen to a cultural speaker, who, as noted by one judge, can “bring[s] to life that would otherwise be on an A4 sheet of paper.”¹²⁵³ A cultural speaker is also in keeping with the importance of oral advocacy for the Māori community.¹²⁵⁴

It was suggested that a cultural report can also help to prevent reoffending and contribute to the well-being of the community:¹²⁵⁵

[T]he way in which that background may have related to the commissioning of the offence, another part, that’s very important

¹²⁵¹ See Appendix 7: Judge Response “D”, Judge Response “G”, and Judge Response “H”.

¹²⁵² See Appendix 7: Judge Response “G”.

¹²⁵³ See Appendix 7: Judge Response “G”.

¹²⁵⁴ See Appendix 7: Judge Response “G”.

¹²⁵⁵ See Appendix 7: Judge Response “F”, Judge Response “H” and Judge Response “J”.

because if you get that link of how the cultural aspects may have contributed to the commissioning of the offence, you can sometimes find pathways and programmes to ensure that rehabilitation is focused and avoid reoffending because there are specific things you can do and of course the community benefits from somebody who no longer continues to offend.

The interviews with the judges indicated their recognition of the value of a cultural report. The legislation is very clear about the need for the court to hear a cultural report. Section 27 (2) and (3) of the Sentencing Act 2002 states:

- 2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.
- (3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.

The thesis revealed a troubling certainty that not all judges will give reasons for declining to hear a person called by the offender under s 27(3). Ūpoko Tuaono/Chapter Six examined the problems associated with s 27(5) of the Act in that context. It was contended that it is unhelpful that the onus is on the offender to request a cultural speaker or a cultural report. Some offenders are not aware that a s 27 cultural report exists. There is an expectation that the defence counsel will ask for a cultural report.

Section 27(5) is only effective if the judge is open to a s 27 cultural report because it is not mandatory. The court is not required to suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in s 27(1). Alternatively, defence counsel can suggest the commissioning of the cultural report to the judge.

To ensure greater certainty, there needs to be a memorandum of understanding that all lawyers should request a s 27 cultural report, rather than relying on the defendant who requires legal representation. On rare occasions, a judge will refuse to give a discount because the defendant already had a lot of wrap-around support before the

offence was committed.¹²⁵⁶ It would not be appropriate if criteria were developed for lawyers to ascertain whether a cultural report would produce a difference. It is up to the judge to decide.

Potential inconsistencies in the use of cultural reports also depend on the attitudes, disposition, and initiative of the judges. Some judges take a proactive approach which is enabled by s 27 (4) of the Sentencing Act 2002. In these instances, judges adjourn a case and go into the community to find suitable programmes.¹²⁵⁷ In this way, judges can become more connected with the community in a whanaungatanga context because the goal of achieving rehabilitation for offenders is already in motion, and the community can heal. This is a telling example of whanaungatanga at work, and it is a process that could be used more widely and consistently. The support person or person can then speak or report on the offender's progress which is likely to attract a sentencing discount.

Following on from s 27(4) of the Sentencing Act 2002, s 25 provides game-changing results for offenders willing to commit to changing their lives. The law of whanaungatanga is community-based and reflects a defendant's opportunity to undertake rehabilitative programmes under s 25 of the Sentencing Act 2002. The judge's power of adjournment for inquiries as to suitable punishment is a call for whānau and extended members to ensure ongoing wrap-around support is available that convinces the judge that rehabilitation will suffice before sentencing.¹²⁵⁸ As one interviewee explained:¹²⁵⁹

when you talk about the broader sense, the community benefit, I think the biggest benefit is probably to the defendant themselves and hopefully that then creates someone who is open minded and willing to rehabilitate, if they know who they are, and the value of themselves, then that might change their mind set and make them just a little bit more responsible or whether they're going to prison as part of the

¹²⁵⁶ See Appendix 7: Judge Response "I".

¹²⁵⁷ See Appendix 7: Judge Response "J".

¹²⁵⁸ See Appendix 7: Judge Response "F", Judge Response "G" and Judge Response "H".

¹²⁵⁹ See Appendix 7: Judge Response "I".

sentencing, you'd like to hope that in terms of rehabilitation, motivation and willingness to do that, the process itself is helpful.

8.3 Implications and Recommendations

*Whakataukāki: Kotahi te kohao o te ngira e kuhuna ai te miro ma, te miro pango, te miro whero.*¹²⁶⁰

Through the eye of the needle pass the white thread, the black thread, and the red thread.

Metaphorically, the pluralistic nature of the legal systems in Aotearoa, New Zealand, can be seen to represent the interconnected legal threads of whanaungatanga, the common law and legislation.

This section draws together the key implications of the thesis and sets out three interconnected recommendations for reform. The analysis has demonstrated that the failure to give effect to whanaungatanga within the sentencing process is structural – it cannot be resolved by any single provision acting alone. Accordingly, the recommendations that follow operate as a package: a judicial note attached to s 8(i) to provide the interpretive direction courts have consistently lacked; amendment of s 25 to provide explicit procedural authority for tīkanga-based restorative processes; and policy and regulatory reform to ensure that s 27 cultural reports are adequately funded and consistently applied. Together, these three mechanisms are designed to bring ss 8, 25 and 27 into genuine alignment and give the legal norm of whanaungatanga its proper place within the sentencing framework. Education and capacity-building across all stakeholders underpin each of them.

¹²⁶⁰ This proverb was expressed by Kingi Pōtatau Te Wherowhero at Ngaruawahia in 1858.

8.3.1 Judicial Note

As established in Ūpoko Tuarua/Chapter Two, s 27's persistent underutilisation reflects not a textual deficiency but a prevailing judicial disposition and interpretive practice that has consistently fallen short of Parliament's purposive intent. The judicial note proposed here is directed at closing the gap — not by amending the statute, but by providing the interpretive direction that courts have consistently lacked.

Legislation: The Case for a Judicial Note

Empirical findings illustrate that the history of the non-application of s 27 cultural reports depart from the right to natural justice and removes the offender's presumptive right to representation by a cultural report writer or speaker.¹²⁶¹ The ongoing pluralistic tensions should not exist. There is potential to reach a compromise to ensure that the uniform application of s 27 cultural reports contains relevant information for judges. Such compromise could include a subsection of s 27 that requires judges to consider *tikanga* and *whanaungatanga* when making decisions. In addition, it is noteworthy that discounts in sentencing are permissible because "there is no provision in the Sentencing Act 2002 that states judges are not allowed to discount sentences for social disadvantage."¹²⁶²

There is no application of *tikanga* principles in the criminal justice system except for s 27 of the Sentencing Act 2002. It is the only place to talk about *tikanga* Māori and it operates after the offence is committed. There is no reference to *tikanga* in substantial crimes apart from the defence counsel's request to act on behalf of the defendant for a cultural report or cultural speaker. The Sentencing Act 2002 provides the court's processes and roles, but *whanaungatanga* as part of *tikanga* should be working alongside the criminal justice framework instead of operating behind the scenes and after the fact. It is left too late when the defendant proceeds through the court process. This will inevitably result in both legal norms having

¹²⁶¹ *Mika v R*, above n 950.

¹²⁶² See Appendix 7: Judge Response "J".

indirect influence. A memorandum of understanding of whanaungatanga should address this when the offence is committed. Introducing legislation so that whanaungatanga could be brought in earlier in the criminal process could make a significant difference to its impact and to the potential for more effective outcomes.

The case law and judicial practice examined throughout this thesis – from the role of kanohi-ki-te-kanohi in mitigating sentencing barriers, to the adjournment power recognised in *Berkland v R*,¹²⁶³ to the marae-based hearing in *R v Te Pania*,¹²⁶⁴ to the practical delays in receiving cultural reports that prompt adjournment under s 25 – collectively demonstrate that s 25 is already being used, unevenly and without principled direction, as a vehicle for relational engagement. What is absent is not the practice, but the framework. A judicial note would transform these isolated instances of good practice into a principled and uniform approach.

The key legislative mechanism proposed is a judicial note attached to s 8 (i) of the Sentencing Act 2002. Section 8 (i) requires a sentencing judge to take into account the offender’s personal, family, whānau, community, and cultural background where a sentence has a partly or wholly rehabilitative purpose. This provision is not merely procedural – it is the legislative entry point through which tūkanga Māori, and specifically whanaungatanga, can be meaningfully brought into the sentencing process. Yet in practice, this connection is consistently lost. Judges who engage with s 8(i) frequently fail to draw the link between “cultural background” and s 27, which provides for the reception of cultural reports. Even where that link is made, few judges proceed to engage substantively with whanaungatanga as the relational and accountability framework that gives cultural background its meaning and its practical application.

The Sentencing Act 2002 is rooted in common law principles that construct the criminal process as bilateral – governing the relationship between the offender and

¹²⁶³ *Berkland v R*, above n 936.

¹²⁶⁴ *R v Te Pania*, above n 966.

the Crown. Section 8 which establishes the purposes and principles of sentencing, reflects this architecture. It directs the court to consider personal mitigating factors relating to the offender, but it does not extend beyond the individual. It overlooks the obligations connecting the offender to their whānau, hapū, and iwi, and does not acknowledge those collectives as having a legitimate restorative interest in the sentencing outcome. Under Te Ao Māori, this is precisely the gap that matters most – because responsibility is not confined to the individual, and restoration that addresses only the individual cannot achieve the reintegration of that person into the relational network their offending has disturbed. Section 8(i) is the closest the provision comes to acknowledging this – but as the evidence in this thesis demonstrates, the connection between s 8(i) and s 27 is consistently lost in practice, and the connection between s 8(i) and s 25 has never been made at all.

A judicial note attached to this provision would make explicit what it implies but does not state: that “cultural background” for Māori offenders must be understood through the lens of whanaungatanga – the network of relational obligations and accountabilities that connect the individual to whānau, hapū, and iwi. The note would guide judges to understand that this is not about reducing culpability or diminishing the position of the victim, but about engaging with the full trilogy of victim, offender, and community that underpins restorative and rehabilitative sentencing goals. This single judicial note has the potential to change lives. It would not require amending primary legislation through Parliament. It is a precise, targeted instrument that draws tikanga further into the common law – not by creating a parallel system, but by integrating tikanga’s values into existing legal structures in a way that preserves their integrity and mana. Where a s 27 report has not been obtained and cultural background is relevant, the note would also serve as a prompt for judges to consider whether judicial review of that omission is warranted.

Tikanga in Decision-Making

The relevance of tikanga Māori in assessing the continuance of an appeal after the death of a non-Māori appellant was the inclusion of native assessors or tikanga

experts who decided that ‘mana’ endures beyond death. Considering that Peter Ellis claimed there had been ‘hara’ or an alleged wrong that convicted him, it was argued that the appeal should continue to reach ‘ea’—or closure. The decision contrasts with how tīkanga was appraised in the *Takamore*¹²⁶⁵ case. Nonetheless, the agreement with the Supreme Court judges, tīkanga experts and Te Hunga Rōia Māori (Māori Law Society) representatives reined in the precedent to provide a safety net for some of the uneasiness about tīkanga being misinterpreted or misconstrued. The Supreme Court’s decision to move forward with Ellis’s posthumous appeal illustrates a non-confrontational environment in one respect: the promotion of a third type of law— a transformative one. The *Ellis* case suggests that not only does tīkanga apply to common law development—but it requires updating. From a tīkanga perspective, the question of whether a case can continue after death is not in question. This is because when people die, things do not die with them. The current law has not kept up to date with the notion that while a person’s interest dies with them, and if any financial interest involves inherent beneficiaries, money appears to be more important than the deceased’s mana. The *Ellis*¹²⁶⁶ appeal sought ‘ea’—closure and balance based on the premise that *hara* or the wrong was committed against him.

The *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*¹²⁶⁷ case exemplifies that iwi are hapū and are inherently kaitiaki guardians. Generally, tīkanga applies to common law development. Not only do judges draw on England’s principles, but thinking about and developing the law can also be drawn from concepts involving tīkanga and whanaungatanga.

Interpreting and Applying Tīkanga

While mana is upheld by iwi and hapū in Treaty of Waitangi issues, reducing the risk of tīkanga being misinterpreted and misapplied in circumstances where the applicants are Māori, but the presiding judges are non-Māori, should take

¹²⁶⁵ *Takamore v Clarke*, above n 11.

¹²⁶⁶ *Ellis v R*, above n 5.

¹²⁶⁷ *Trans-Tasman Resources*, above n 4, at [177].

precedence. Safeguarding tikanga is of paramount importance.¹²⁶⁸ In the longer term, an implication is that more Māori need to be appointed to the judiciary. More broadly, this also has implications for legal education which needs a stronger focus on tikanga law and its application.

One of the challenges facing Māori lawyers is to find innovative ways to reconcile the traditional—first law and transactional—second law aspects of the legal norm of whanaungatanga into a more transformative—third law workable pluralistic system that reality tests the probable outcomes between the conditions of the possibility of social inequalities and the conditions of the possibility of transformative outcomes in the criminal justice system.

The risk of misapplication, compounded by the absence of any procedural framework to guard against it, makes the architecture of s 25 necessary. Without a structured mechanism through which tikanga can operate on its own terms, judges remain the only safeguard, as their best intentions cannot alone produce consistency within a whanaungatanga framework.

Section 25: The Procedural Architecture for Relational Accountability

Sections 8, 25, and 27 of the Sentencing Act 2002 are most properly understood not as discrete and independent provisions, but as a statutory trilogy – each provision incomplete without the others, and each capable of giving full effect to the legal norm of whanaungatanga only when read together with the remaining two.

Section 25 of the Sentencing Act 2002 is the provision that makes this different treatment procedurally achievable. It empowers a court adjourn sentencing proceedings for specified purposes, including, under paragraphs (a), (b) and (c) of s 25(1), to enable inquiries into the most suitable method of dealing with the case, to enable a restorative justice process to occur or be completed, and to enable a restorative justice agreement to be fulfilled. None of these paragraphs expressly references whanaungatanga, tikanga, or Te Ao Māori – but critically, neither do

¹²⁶⁸ Above, n 4.

they exclude them. The language is deliberately open, and that openness is where the provision's transformative potential lies.

Paragraph (b)'s reference to "a restorative justice process" has never been judicially interpreted to encompass a tīkanga-based hui engaging whānau, hapū, and iwi as active participants – and paragraph (c)'s adjournment power has never been used to hold procedural space for the fulfilment of a relational agreement. These are the specific gaps the judicial note is designed to close.

Read together, paragraphs (a), (b), and (c) describe a coherent sequence: inquiry leads to process, process leads to agreement, and agreement is fulfilled before sentencing is imposed. A court applying this sequence with relational accountability in mind – drawing on whānau, hapū and iwi as active participants rather than background – is not straining the statutory text. It is giving effect to what the provision was designed to enable. The difficulty is that the courts have not been guided to read it that way. For over fifteen years, the same pattern of neglect that has characterised s 27 has equally characterised s 25 – both provisions existing in the statute, neither being applied to their restorative potential.

This is particularly significant given that s 8, which governs every sentencing exercise provides no equivalent direction. Because s 8 is oriented toward the individual offender and contains no mechanism for engaging with relational obligations, the open-textured language of s 25 becomes the primary statutory vehicle through which whanaungatanga can enter the sentencing process. The two provisions must be read together precisely because s 8's silence on relational accountability makes s 25's interpretive openness indispensable.

The judicial note proposed below addresses both provisions together, because neither achieves its purpose alone. Section 27 supplies that relational context; s 25 supplies the procedural time and architecture for that context to generate genuine restoration. Treating offenders differently, in the sense this thesis proposes, requires both.

The Case for Amending Section 25

While the judicial note attached to s 8(i) represents the most immediately achievable mechanism for reform, it cannot, by itself, provide the structural foundation that lasting change requires. Section 25 of the Sentencing Act 2002 must also be amended – not because it is fundamentally deficient, but because its current language, while open, is not directive. Openness invites inconsistency. What the provision needs is explicit recognition that its restorative architecture can accommodate *tikanga*-based processes, so that courts are not merely permitted to engage with *whanaungatanga* but are positively guided to consider whether doing so is appropriate.

The specific amendment required is to s 25 (1) (b), which currently empowers the court to adjourn proceedings to enable “a restorative justice process” to occur or be completed. That phrase has never been judicially interpreted to include a *tikanga*-based hui involving *whānau*, *hapū*, and *iwi* as active participants in a process of relational accountability. The amendment proposed is therefore precise: s 25(1)(b) should be amended to provide that a restorative justice process may include a process structured according to *tikanga*, and that in cases involving Māori offender where the relational dimensions of the offending are significant, the court must consider whether such a process is appropriate before proceeding to sentence. This is not a radical departure from the provision’s existing purpose – it is a clarification that gives effect to what the provision was always capable of enabling.

Critically, this amendment does not stand alone. It is the procedural counterpart to the judicial note proposed for s 8(i), and together the two instruments form a coherent legislative package. The judicial note ensures that judges understand *whanaungatanga* as the relational framework that gives “cultural background” its meaning under s 8(i). The amended s 25(1)(b) ensures that once that understanding is engaged, the court has explicit procedural authority to create the time and space for *whanaungatanga* to operate before sentencing is imposed. Section 27 then supplies the relational content – the voices of *whānau*, *hapū*, and *iwi* – that the adjourned process is designed to receive. Amended together, ss 8, 25, and 27 cease

to be three provisions that point toward the same goal without connecting and become instead a unified statutory framework through which the legal norm of whanaungatanga can operate with consistency, integrity, and the full force of legislative intent behind it.

Offenders Need to be Treated Differently: Implications for Judges and Māori Leaders

Arguably, s 27 requires a mind shift where “offenders need to be treated differently”.¹²⁶⁹ Although there is a strong focus on consistency, the only way to help offenders stop offending is for judges to be more courageous in helping to rehabilitate them. This should not rest entirely on judges as the responsibility should also shift to iwi representatives and leaders to help Māori offenders rehabilitate.¹²⁷⁰ The involvement of Māori leaders is facilitated by s 27 which “allows Māori to have input and to be a part of the process and offer solutions if they can”.¹²⁷¹ Further, it allows iwi and the wider whānau to express how they lost their land, how their community has suffered and their willingness to support the offender, according to s 25 of the Sentencing Act 2002. In this way, those involved “feel a part of this justice system”.¹²⁷² Such a process acknowledges that for many Māori and Pacific Islanders, the system is foreign and scary. However, s 27 allows the participants to have a say, provide some insight and explain to the judges so they can understand why the offender has ended up in court.¹²⁷³

Therefore, a forward-thinking approach to successfully rehabilitate offenders and protect the community so they do not return to the system should involve all stakeholders.¹²⁷⁴ Section 27 of the Sentencing Act 2002 revives rehabilitative opportunities that judges may have overlooked in the past for judges and lawyers to treat offenders differently from what they have been dealing with, in s 27 of the

¹²⁶⁹ See Appendix 7: Judge Response “H”.

¹²⁷⁰ See Appendix 7: Judge Response “H”.

¹²⁷¹ See Appendix 7: Judge Response “H”.

¹²⁷² See Appendix 7: Judge Response “H”.

¹²⁷³ See Appendix 7: Judge Response “H”.

¹²⁷⁴ See Appendix 7: Judge Response “H”.

Sentencing Act 2002.¹²⁷⁵ These implications are important for all stakeholders as the profession needs to be accepting of treating people differently.¹²⁷⁶

Timing of Cultural Reports and the Case for Frontloading

Section 27 cultural reports provide a sense of healing as individual impacts are huge. Unfortunately, the reports operate near the end of the decision of the case. It is argued that the whole process could work better for all involved if contextual factors were addressed at the beginning of a case. Therefore, unless we can fix the frontload, we still need s 27 cultural reports.

Within this context, whanaungatanga should be acknowledged as a mechanism for redress before the sentencing date. This would signal that the courts are taking a pragmatic approach toward reducing Maori imprisonment rates. If whanaungatanga as part of tīkanga is frontloaded at the beginning of the offence, mitigating or aggravating factors will play a critical role in helping the courts determine a just sentence. Iwi leaders and leading communities can play a vital role in supporting a cultural report or having cultural speakers report at least before the day of sentencing. However, financial resources are required for this to have any impact.

Furthermore, training for judges on tīkanga and whanaungatanga is paramount so that there is a uniform understanding of culturally relevant information. Additionally, creating an advisory panel for judges to consult on cultural matters, similar, to native assessors, will demonstrate cooperation between the Treaty partners.

¹²⁷⁵ See Appendix 7: Judge Response “H”.

¹²⁷⁶ See Appendix 7: Judge Response “H”.

8.3.2 Policy and Regulatory Amendments

A judicial note alone, while significant, will not achieve systemic change unless it is supported by complementary policy and regulatory reform. Two areas require particular attention.

Implications for Funding

“We Know That What We Are Doing Is Not Working”¹²⁷⁷

As noted by one of the interviewees, many judges are aware that “because the percentage of Māori people in prison is increasing still and the rate of recidivism is high”, they “need to look at the problem differently and be courageous in the way that” they “approach it”.¹²⁷⁸ There are implications of funding for the availability of more rehabilitative programmes before sentencing under s 25 of the Sentencing Act 2002 and after release to prevent, for example, recidivism, the intergenerational trauma of third generation prisoners and the recycled inheritance of children living in broken families. Therefore, the implications of continuous funding are crucial. Judges require the causative material to assess appropriate rehabilitation programmes that must be available pre-sentencing and post release.

Implications for Stakeholders

Within a whanaungatanga framework, all stakeholders need to collaborate for an outcome that can help to restore health and community balance to society. The findings of this thesis have implications for all parties that contribute to the workings of the criminal justice system. Stakeholders include government, defence lawyers, judges, iwi and hapū leaders, offenders and their whānau and the wider community. The implications of this thesis are that all groups need greater education about the processes of the criminal justice system and about the role that tikanga law can play in healing society.

¹²⁷⁷ See Appendix 7: Judge Response “H”.

¹²⁷⁸ See Appendix 7: Judge Response “H”.

More Involvement of Hapū and Iwi

In considering the cultural input, iwi and hapū leaders should play a role in Aotearoa, New Zealand's solution to the high incarceration rates of Māori. While noting that each iwi and hapū will have a different perspective on tikanga, collective representations would anchor the traditional legal norm of whanaungatanga in the court system. It would reflect ancient traditions, and the approaches judges take to prevent imprisonment. The support from iwi and hapū leaders and communities would illustrate the purposeful, productive, and constructive effect that the legal norm of whanaungatanga could have. The longstanding practical use restores balance in society. For achieving transformational outcomes, this could be the breakthrough required to develop innovative approaches that promote the well-being of individuals and communities. It could also lead to greater recognition of the importance of Hauora (health) for Māori, but this may also require a greater number of te reo Māori speakers to support it. Finally, it could create economic opportunities that benefit all New Zealanders.

Increased participation of hapū and iwi leaders would embrace the relevance of s 27 cultural reports and sentencing decisions. Their involvement will ensure that the sentencing process considers the cultural values of hapū and iwi, tying in with rehabilitation and promoting equitable treatment of Māori in the criminal justice system. Informal restorative justice or whānau or family hui rather than a formal restorative justice programme could be a viable option for healing between the victims and the defendants.¹²⁷⁹

Concerning iwi and hapū leaders in post-Treaty settlement governance, some issues may arise with the expectation of their involvement in the Te Ao Mārama model. The presumption that iwi and hapū leaders have the resources to support the Te Ao Mārama model contrasts with the post-Treaty-settlement entities policy designed to increase wealth and deal with administrative and legal matters.

¹²⁷⁹ See Appendix 7: Judge Response "F".

Smaller hapū are less likely to be affected by the Treaty post-settlement obligations, so they have more time for supporting whānau. With iwi, it is a little trickier because trustees have a huge portfolio to update and maintain. Although many post-Treaty-settlement-entities iwi provides educational and environmental programmes, unless there are monetary resources available to accommodate the model, then the proposed framework may not work.

In the urban space, there are three concerns. Larger iwi, for example, Tainui, have a range of skilled professionals with commitments dedicated to their portfolios. However, the chances of getting a leader or cultural speaker in the courts are very slim. Many post-settlement-government entities iwi are tied up with business, administration and legal duties. Therefore, their availability is already stretched to the limit. In addition, the Waipareira Trust, for example, acts as a surrogate entity for different hapū and iwi members who have moved into the West Auckland district. The Trust tries to fulfil its duty as a central place for all hapū and iwi members.

The Te Ao Mārama model embraces whanaungatanga where judges and law practitioners must work within the framework.¹²⁸⁰ However, the problem is the capacity and resources of hapū and iwi to be able to provide community support for offenders. This problem can be addressed by creating opportunities for meaningful dialogue between the judges and iwi and hapū, as well as providing resources to support those affected. These recommendations draw attention to whanaungatanga jurisprudence. For maintaining and restoring social justice principles and balancing society, Indigenous legal systems administer values and practices. Therefore, whanaungatanga jurisprudence supports s 25 of the Sentencing Act 2002 in conjunction with the historical, cultural baseline of information under s 27 of the Sentencing Act 2002.

¹²⁸⁰ *Taumaunu*, above n 395.

Regulated Cultural Reports Funding

Although there has been funding for the s 27 cultural reports since 2002, the application and funding of these have been severely underutilised. Utilisation of these reports and the suggestions the judges could make based on them could have saved the justice system in the long term more money than the cost of the reports themselves. However, the National government claimed that “there is no evidence cultural reports reduce reoffending and cutting money for them will save money”.¹²⁸¹

On March 7th, 2024, the New Zealand government passed the Legal Services Amendment Act 2024. Section 99(4) (ca) of the Act authorises the Legal Services Commissioner to reject any claim for payment related to a cultural report or a statement made by someone called by an offender under s 27 of the Sentencing Act 2002. Therefore, the Legal Services Commissioner will not fund reports or speakers as of March 22nd, 2024. However, as previously mentioned, s 8(i) of the Sentencing Act 2002 mandates s 27 of the Sentencing Act 2002. Therefore, further research is required to ascertain whether cultural reports reduce reoffending and how the judges can deliver a just sentence if they do not have access to cultural reports from those who cannot afford them.

This thesis has demonstrated that the National-led government may have misinterpreted the impact of these reports. The information gleaned from the judges would suggest that s 27 cultural reports have been beneficial and greater study of the impacts would be important to understand how much impact these reports have had on the system overall. The cutting of funding may result in further costs in the criminal justice system for the government in the long term.

As youth offending increases, it signals that the entrenched social inequalities and past trauma have not been addressed, and therefore, it is reflected in the criminal justice statistics today.¹²⁸² The foreseen recycling of breaches of human rights and

¹²⁸¹ Radio New Zealand “No evidence ‘cultural reports worked – Justice Minister”. 8th February 2024. www.rnz.co.nz/news/political/508631/no-evidence-cultural-reports-worked-justice-minister.

¹²⁸² *Gluckman*, above n 68, at 4.

the breach of a right to a fair trial, the challenges for judges to apply s 27(4) and s 25 may perpetuate drawn-out court hearings if offenders decide to self-represent or use McKenzie friends as an optional substitute for legal representation. A recommendation for regulated funding should be available for offenders who cannot afford them. Otherwise, the overrepresentation of Māori in the criminal justice system will continue to increase disproportionately.

In addition to the regulation of cultural reports, the connection between s 8(i) and whanaungatanga must be embedded into the criminal justice process at its earliest point – not reserved solely for the sentencing stage. Police policy, including operational manuals, should be amended to reflect the significance of relational accountability at the front end of intervention. By embedding this understanding earlier in the process, opportunities for diversion, early engagement with whānau, and community-led responses can be more effectively utilised. This is both a more efficient and a more just use of the framework that already exists. Regulatory standards for cultural reports should also be developed in partnership with iwi and hapū to set minimum content requirements, ensure authentic engagement with relational accountability, and provide for the involvement of the relevant community in the report's preparation. This would preserve the integrity of tikanga as it enters the legal process, ensuring it retains its values and its mana in community decisions.

8.3.3 Education and Intervention Recommendations

Even the best-designed judicial note and the most precise regulatory changes would have minimal impact if those tasked with enforcing them do not grasp the significance of whanaungatanga, why it even matters, and how it operates within the context of relational accountability. It is for this reason that education is not a peripheral recommendation in this thesis – it is a precondition for the effectiveness of everything else this thesis has proposed. Without that foundational understanding, the judicial note remains ineffective words on a page, and the regulatory amendments remain unrealised in practice. The three mechanisms this

thesis recommends are interdependent, and education is the thread that binds them together.

Wānanga: Education, Training and Development

The Ministry of Justice has been doing their best to de-escalate the overgrowing prison population. Preventing recidivism or addressing systemic deprivation can be assisted by the reference to a cultural report. Therefore, there is a need to continue funding cultural reports. The message from Sir Tipene O'Regan reiterates the notion that to ensure Māori historical precepts flourish through “the changing environment and the expansion of human knowledge and capacity”, Māori must actively embrace change, while still retaining the core values and beliefs which have shaped Māori culture.¹²⁸³

For the judiciary, ongoing and structured education is needed on the substantive meaning of whanaungatanga and its significance within tikanga Maori. This must go beyond surface-level cultural awareness and engage with the relational obligations that connect the individual to whānau, hapū, and community. Judicial education should address how whanaungatanga functions not as a mitigating label, but as a living framework of accountability that, properly understood, serves the rehabilitative and restorative purposes that the Sentencing Act 2002 is designed to achieve.

For iwi and hapū, education and capacity-building are equally essential. Communities must be supported and resourced to participate meaningfully in the processes that affect their members – from the preparation of cultural reports to engagement at sentencing and beyond. The recommendations in this thesis are premised on integration, not separation: tīkanga is drawn further into the common law not by establishing a separate justice system, which raises significant questions of resource and practical division, but by ensuring that where tīkanga is

¹²⁸³ O'Regan, above n 3. Tipene O'Regan's suggestion of a pragmatic approach aligns with the tikanga/whanaungatanga approach that should be adopted in sentencing.

integrated, it does so on its own terms with full community involvement and without the dilution of its content or values.

For transformative outcomes to be consistently achieved for changing the statistics of Māori overrepresentation in the criminal justice system, it is proposed that several wānanga are held throughout the country to ascertain the practical ways in which judges, lawyers, and communities can assert and assist with a uniform application of the legal norm of whanaungatanga under s 27 of the Sentencing Act 2002 to achieve transformative outcomes of social and economic equality for Māori in the prison system.

Intervention Programmes for Rehabilitation

In the recent past, there was some urgency in breaking the chain of inconsistent utilisation of s 27 of the Sentencing Act 2002.¹²⁸⁴ This increased the level of awareness of the need for a more uniform understanding of Parliament's intentions, statutory interpretation, social justice, and pro-rehabilitation principles.

To assist prisoner rehabilitation, intervention programmes are important. As part of early intervention programmes, incarcerated individuals should have access to education, job training, and treatment programmes. The process of reintegrating people into society after being in prison involves building whanaungatanga relationships to become productive citizens. Whanaungatanga is crucial for offenders from apprehension to release. Additionally, providing resources such as housing assistance, healthcare access, and financial support can reduce recidivism rates.

Furthermore:¹²⁸⁵

Greater understanding is likely to breed confidence. With education, understanding and confidence on the part of all participants, it may be

¹²⁸⁴ Chisnall, above n 40.

¹²⁸⁵ Heath, above n 74.

possible to find a significant place for Māori within the New Zealand judicial system.

The example of Finland provides insights into strategies for reducing prison rates. Finland's dramatic decrease in imprisonment, without the crime rate rising¹²⁸⁶ "was attributable to a unique combination of historical antecedents, ideological constellations, and also hard work of several dedicated individuals."¹²⁸⁷ According to the report from the Justice Ministry of Justice Criminal Justice Policy Group 1998:¹²⁸⁸

The decisive factor in Finland was the attitudinal readiness of the civil servants, the judiciary and the prison authorities to use all available means in order to bring down the number of prisoners. Through the efforts of a group of key individuals it had become possible to define Finland's prisoner rate as a problem and that problem conception in turn produced a number of activities, ranging from law reforms to low-level day-to-day decisions, which all contributed to the end result."

The above statement suggests the way whanaungatanga relationships can be incorporated, from building an understanding of collaboration to enabling a pathway forward. Public education, awareness and understanding of *tikanga* and the legal norm of whanaungatanga values and practices would help the majority of society understand the widespread social inequalities that have led to Māori over-representation in the prison system. Ideally, "the attitudinal readiness"¹²⁸⁹ of all stakeholders would set a cutting-edge example for other societies impacted by colonisation to follow. As retired Heath J states, "Education and intellectual flexibility are key allies in the challenge to apply custom."¹²⁹⁰ It is important to note that education should include teaching the good and not-so-good stories about the impact of colonisation. It is not about blaming, but accepting what has happened in

¹²⁸⁶ *Gluckman*, above n 68, at 4.

¹²⁸⁷ *Christie*, above n 508, at 52.

¹²⁸⁸ *Above*, n 508, at 53.

¹²⁸⁹ *Above*, n 508, at 48.

¹²⁹⁰ *Heath*, above n 74.

the past requires a whanaungatanga lens into what is possible for transformative outcomes.

Concluding Statement

These three recommendations – a judicial note, policy and regulatory reform, and education and intervention – work together to create a cohesive and supportive framework. Their collective impact is to transform this thesis into a tangible reality: the approach that aims to reduce the negative impacts experienced by those who have committed offenses, those who have been affected by the harm, and communities alike, and that brings tikanga Maori into the law in a way that is principled, practical, and lasting.

The non-kinship relationships of whanaungatanga accommodate the overlay of two systems that should work together to find creative solutions to reduce Māori over-representation in the criminal justice system. The challenges in protecting society and imprisoning offenders demand a reset in imagining that the collective support of whānau, hapū, iwi, and other representatives should help mitigate the likelihood of imprisonment. Such an approach would echo the Te Ao Mārama Model established by Chief District Court Judge, His Honour Justice Taumaunu. To prevent recidivism, internal and external rehabilitation programmes should be synergistic. There should be synergy with whanaungatanga and s 27 of the Sentencing Act 2002 to reflect the Treaty of Waitangi principles determined in 1987.¹²⁹¹

Reflection on the findings has revealed crucial information about current practices that will assist future legal practices. The pillars of justice and whanaungatanga practices require the commitment of legal practitioners, judges, and stakeholders. Otherwise, the current structural system will continue to collapse within an already broken system. Within this context, whanaungatanga is a therapeutic source and a starting point to reignite Māori pragmatic approaches¹²⁹² to help reduce Māori

¹²⁹¹ *New Zealand Māori Council v Attorney-General*, above n 61.

¹²⁹² *O'Regan*, above n 3.

imprisonment rates. Whanaungatanga reflects partnership models to strengthen relationships and mitigate and resolve systemic deprivation.

8.4 Further Research

The investigation of the application of s 27 of the Sentencing Act 2002 and the application of whanaungatanga to the process have revealed complex considerations. The concerns identified many opportunities for further research.

8.4.1 Benefits from future research findings

The recommendations in subsection 8.3.2 pose challenges for offenders not qualified for private legal aid assistance. As previously mentioned, the National government claim that there is no evidence that cultural reports reduce reoffending. However, this claim requires further investigation to ascertain whether there is some empirical evidence that validates this claim or whether it is a presumption.

Society can benefit from future research findings when analysis of the cultural reports indicates the transformative changes required to balance affected communities through law reform. The proposed recommendations for wananga to be held throughout the country should accommodate the needs of the affected communities. Additionally, extensive research will inform the processes to ensure that the benefits of any transformative changes are socially equitable.

8.4.2 Research on finding ways of balancing the common law and whanaungatanga

For consistency in sentencing and the well-being of communities, it is paramount to ensure the balance between the common law and whanaungatanga. Research on whanaungatanga and the common law can help enrich existing knowledge and enhance the understanding of traditional whanaungatanga practices among court workers. Such research could advance public understanding of whanaungatanga and strengthen the resolve to address the inter-generational transfer of social inequalities. The outputs of research of this kind could also be used in education

and training court workers to help them understand traditional whanaungatanga practices.

8.4.3 High Court Rules or Criminal Cases Review Commission

As mentioned previously, there are concerns around direction under the High Court Rules or the Criminal Cases Review Commission (discussed in Ūpoko Tuaono/Chapter Six) about wrongful conviction and imprisonment. The concerns require further research to test whether a declaration of wrongful conviction and imprisonment should come under the High Court Rules for a mandatory order or whether the appeal court or CCRC should deal with the matter. In addition, further research is necessary to ascertain how the Criminal Cases Review Commission deals with the impact on the rights of wrongly convicted and imprisoned people. This relates to cases where decisions concerning a s 27 cultural report have resulted in non-application or exclusion that may be unlawful.

8.4.4 Role of Criminal Cases Review Commission

It is contended that further research is required to find out whether the role of the Criminal Cases Review Commission has impacted positive outcomes for Māori or whether there is a slow uptake for applications by Māori offenders after they have exhausted their right to appeal.¹²⁹³ The research would help further develop educational tools or policies around promoting more effective use of the review process. In addition, this research would be a stepping stone in the right direction to ascertain whether the issue of appeals involved in statutory interpretation could have been prevented if s 27 of the Sentencing Act 2002 was uniformly applied.

8.5 Conclusion

In writing this thesis, I aimed to critically examine whether whanaungatanga can have a radical impact on the New Zealand criminal justice system to address the well-documented over representation of Māori prisoners in prison statistics and the

¹²⁹³ Criminal Cases Review Commission Act 2019, s 17(2)(a).

associated systemic and social inequities. This thesis tested the proposition that the legal norm of the whanaungatanga process should be applied to s 27 of the Sentencing Act 2002.

To help establish the value of incorporating whanaungatanga in the sentencing process, the methods of resolving disputes in traditional pre-colonial society were described in Ūpoko Tuatoru/Chapter Three. The underlying principles of restoring balance and harmony to the community were explained. This discussion helped to build the argument for helping to revitalise these principles in the Aotearoa New Zealand criminal justice system through the application of whanaungatanga in sentencing decisions. The discussion also highlighted the traditional concern with the collective good as opposed to the principle of isolating individuals in prison. It was argued that whanaungatanga could restore some of the focus on collective needs and solutions. The historical overview also illustrated the dislocation and alienation of Māori as a result of colonisation and the resultant social, economic and systemic inequities experienced by Māori. (Chapters Ūpoko Tuatoru/Three, Ūpoko Tuawhā/Four, Ūpoko Tuarima/Five, Ūpoko Tuaono/Six and Ūpoko Tuawhitu/Seven). This discussion helped to develop the argument for an approach to sentencing which recognises the potential impact of this disruption and inequities on behaviour. The inquiry then moved to a close focus on the workings of the criminal justice system in Aotearoa New Zealand, its impact on Māori, and the failure to reduce the over representation of Māori in the prison system.

The sentencing process was explained in Ūpoko Tuaono/Chapter Six to establish the argument for a better recognition of whanaungatanga. Central to the inquiry was an examination of the application of s 27 of the Sentencing Act 2002 to investigate whether it is consistently applied and to examine the challenges that may be associated with its application. The evidence for this section was drawn from interviews with judges from a District Court.

This chapter drew together the significant insights from this thesis and made suggestions for the future. A key insight and signposting for the future is that improvements must go beyond the provisions and enactment of s 27 of the Sentencing Act 2002. The argument is that whanaungatanga must be embedded

throughout the criminal justice system to ensure the rehabilitation possibilities envisaged in s 27 of the Sentencing Act 2002. It is suggested that whanaungatanga processes need to be in place from the time of the offending and not just as a final consideration. The system needs to be working *with* offenders from the outset not just consigning them to the courts and imprisonment. Equally, whanaungatanga needs to be at work in the collaboration of judges, Māori leaders, whānau and communities to find and provide the best support options for offenders.

Can you (now) see whanaungatanga in s 27 of the Sentencing Act 2002?

The legal norm of whanaungatanga has been tested in various contexts to demonstrate its resilience and incorporation in s 27 of the Sentencing Act 2002. Recalling the journey of Kupe and his followers who faced challenges with no knowledge of their destination but with assurance that an island existed, is an inspiration for the journey towards a more equitable criminal justice system.¹²⁹⁴ The correlation between whanaungatanga and s 27 of the Sentencing Act 2002 emphasises the potential for a harmonious system of Māori and non-Māori ways of doing things. This approach can promote balance and understanding of the diverse cultures in New Zealand and foster public confidence and acceptance of whanaungatanga as a normal pathway within s 27 of cultural reports. Whanaungatanga in s 27 of the Sentencing Act 2002 could build trust between Treaty partners in the accommodation of Māori and Pakeha views on sentencing. It can be seen as a step towards dialogue, an essential component of any genuine partnership.

Whanaungatanga can influence transformative change and has important implications for organisations seeking to promote positive social change. The law of whanaungatanga is community-based and reflects a defendant's opportunity to undertake rehabilitative programmes under s 25 of the Sentencing Act 2002. Whanaungatanga jurisprudence revives the values and practices required to

¹²⁹⁴ *Williams*, above n 44.

maintain and restore social justice principles and balance society. This is important in a criminal justice context.

The urgency for change demands equilibrium between consistent sentencing results and an understanding of an offender's cultural background. There is no empirical evidence that suggests that a Western framework works for Māori in the prison system. Reoffending will also increase with many convicted offenders experiencing longer prison terms than their peers.¹²⁹⁵ It is crucial that the criminal justice system is fair and just for all New Zealanders and that Māori are not disadvantaged or disproportionately targeted. The proposal for whanaungatanga in s 27 of the Sentencing Act 2002 has the potential to be transformative and recognise the weaving together of two sets of laws.

A comprehensive pathway based on whanaungatanga would diffuse pluralistic tensions. This is because the New Zealand legal system is a blend of two binary elements – whanaungatanga as part of tikanga and state law, subdivided into common law and statute law.

The Te Ao Māori view of whanaungatanga provides a relevant basis for the balance required for healing. The global context is not only a significant contribution to the justice system and society of Aotearoa, New Zealand but it can be recognised as a gift to other nations to conceptualise a reframing of their justice system. The whanaungatanga perspective on s 27 of the Sentencing Act 2002 can establish a justice system that is more just and prioritises restorative justice over retribution. By decreasing crime rates and fostering a sense of unity and cooperation, it could have a positive impact on society. The legal norm of whanaungatanga has the potential to make a unique contribution to international justice. The criminal justice system of Aotearoa, New Zealand could become a leader in this area. Therefore, this country can set an example for other nations to follow and demonstrate how to create a more equitable and just society.

¹²⁹⁵ *Theron*, above n 34.

Pukapuka-Bibliography

A Cases

1 New Zealand

Attorney-General v Ngāti Apa [2003] 3 NZLR 643 (CA).

Attorney-General v Taylor [2018] NZSC 104.

Bayne v Trustees of the Ngāti Rehua Ngāti Wai Ki Aotea Trust (2019) Chief Judge's MB 1432 (2019 CJ 1432).

Berkland v R [2022] NZSC 143.

C v Wellington District Court [1996] 2 NZLR 395.

Chief Executive of Oranga Tamariki-Ministry for Children v ZM [2020] NZFC 2.

Choudry v Attorney-General [1999] 2 NZLR 582.

Ellis v R [2022] NZSC 114.

Fane v R [2015] NZCA 561.

Hineiti Rirerire v Public Trustee of New Zealand [1920] AC 198; (1919) NZPCC 16.

Hohepa Wi Neera v Bishop of Wellington (1902) 21 NZLR 655.

Kauwaeranga Case (1984) 14 VUWLR 227.

Keil v R [2017] NZCA 563.

Marsters v Police [2014] NZHC 3273.

Mason v R [2012] NZHC 1849.

Mason v R [2013] NZCA 310; (2013) 26 CRNZ 464.

Mika v R [2013] NZCA 648.

Motiti Rohe Moana Trust v Bay of Plenty Regional Council [2020] NZEnvC 73.

New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, (1987) 6 NZAR 353.

Ngāti Apa v AG [2003] 3 NZLR 64.

Ngāti Whātua Ōrakei Trust v Attorney-General [2018] NZSC 84; [2019] 1 NZLR 116.

Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2) [2021] NZHC 291.

Nireaha Tamaki v Baker [1901] NZPCC 371.

O'Brien v Police [1999] 1 NZLR 56.

Police v Hati District Court, Whakatane, 30/4/2009, CRI-2009-087-793.

Proprietors of Wakatū v Attorney-General [2017] 1 NZLR 423.

Public Trustee v Loasby ((1908) 2 NZLR 801).

Re the Ninety-Mile Beach [1963] NZLR 461.

Quilter v Attorney-General [1998] 1 NZLR 323.

Rarere v New Zealand Police [2012] NZHC 779.

Re Edwards (Te Whakatōhea No. 2) [2021] NZHC 1025.

Re the Ninety-Mile Beach [1963] NZLR 461.

Re v Police (unreported, Christchurch Registry, AP 328/94, 2 March 1995, Williamson J).

R v Alexander [2018] NZHC 1584.

R v Allen (1872) LR 1 CCR 367.

R v Bhaskaran Court of Appeal, 25/11/2002, (2002) CA333/02.

R v Cameron [2018] NZHC 2046.

R v Clarke High Court, Auckland, 7/4/2011, (2011) CRI-2010-090-1184.

R v E Hipu SC, 1 December 1845.

R v Evans [2017] NZDC 21170.

R v Heta [2018] NZDC 11085.

R v Hill [2008] 2 NZLR 381.

R v Hone [2018] NZHC 2605.

R v Hurrell [2018] NZHC 2505.

R v John McCarthy SC Wellington 17 April 1844.

R v Jolley [2018] NZHC 93.

R v Karekare [2018] NZHC 1364.

R v Maketū SC Auckland, 1 March 1842.

R v Mason [2012] NZHC 1361.

R v Mason [2012] 2 NZLR 695.

R v Mika [2013] NZHC 2357.

R v Ngatai [2017] NZDC 18290.

R v Parker [2018] NZHC 2035.

R v Pawa [1978] 2 NZLR 190 (CA).

R v Poarau High Court, Rotorua, 15/3/2016, CRI-2015-463-62.

R v Pora [2001] 2 NZLR 37 (CA).

R v Raharui [2017] NZDC 26061.
R v Sanders [2019] NZHC 164.
R v Symonds (1847) NZPCC 387 (SC).
R v Taiapa [2018] NZHC 1815.
R v Tareha [2015] NZHC 676 High Court, Napier, 31/3/2015, CRI-2014-020-430.
R v Taueki [2005] 3 NZLR 372 (CA).
R v Taulapapa [2018] NZHC 834.
R v Te Mania Police Magistrates Court, Auckland, 8 January 1844.
R v Te Pania [2015] DCR 25 District Court, Kaitaia, 13/8/2014, CRI-2014-029-730, CRI-2013-029-766.
R v W [2018] NZHC 1945.
R v Wellington [2018] NZHC 2196.
R v William Osborne Police Magistrate Auckland, 6 February 1845 reported in the *Auckland: Daily Southern Cross* (Auckland, 8 February 1845).
RS (CA21/2014) v R [2014] NZCA 484.
Solicitor-General v Heta [2018] NZHC 2453.
Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733.
Taylor v R [2018] NZHC 688.
Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohū Inc v Attorney General [2019] NZAR 12.
Te Runanganui o Taranaki Whānui Ki Te Upoko o Te Ika A Maui Inc v Wellington Regional Council (1999) 3 BRMB 10.
Te Runanga o te Ika Whenua Inc Society v Attorney General [1994] 2 NZLR 20.
Te Weehi v Regional Fisheries Officer (1986) 1 NZLR 680 (HC).
Trans-Tasman Resources v Taranaki-Whanganui Conservation Board [2020] NZCA 86.
Tukaki v Commonwealth of Australia [2018] NZCA 324.
Wallace v R [2011] NZSC.
Wells v Police [1987] 2 NZLR 560 (HC).
Wi Parata v Bishop of Wellington (1877) 3 NZ JR 72 (SC).

2 Australia

Bugmy v The Queen [2013] HCA 37.

Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40; 221 CLR 309; 209 ALR 116; 78 ALJR 1231.

Manktelow v Public Trustee [2001] WASC 290.

3 Canada

Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers 2013 SCC 62.

Ipeelee v R [2012] 1 SCR 433.

R v Gladue [1999] 1 SCR 688.

4 United Kingdom

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB223.

Corkery v Carpenter [1951] 1 KB 102.

DPP v Ottevell [1970] AC 642.

Duport Steels Ltd v Sirs [1980] 1 WLR 142, 157B-158C.

Elliot v Grey [1960] 1 QB 367.

Fisher v Bell (1961) 1 QB 394.

Grey v Pearson (1857) HL Cas 61.

Heydon's Case [1584] EWHC Exch J36.

Hill v East and West India Dock (1884) 9 App. Cas. 448.

Letang v Cooper [1964] 2 All ER 929.

London and North Eastern Railway v Berriman (1946) AC 278.

Mattison v Hart [1854] 14 C.B. 357.

Omichund v Barker (1744) 1 Willes KB 85 (95 ER 506).

Partridge v Crittenden (1968) 2 All ER 421.

R v Maginnis (1987) 1 All ER 907 HL.

Sussex Peerage Case (1844) XI Clark & Finnelly, 144.

5 United States

Commonwealth v Pullis Philadelphia Mayor's Court (1806).

United States v Hatahley 257 F 2d 920 (10th Cir. 1958).

Waitangi Tribunal

Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).

Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).

Waitangi Tribunal *Tu Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017).

Waitangi Tribunal *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).

Unpublished

Eddie T Durie “Custom Law” (Unpublished paper for Waitangi Tribunal members and later referred to the Law Commission) January 1994.

Historic judgments reported in newspapers

R v William Osborne Police Magistrate Auckland, 6 February 1845 reported in the *Auckland: Daily Southern Cross* (Auckland, 8 February 1845).

Transcripts

Te Pu Wānanga Transcript No. 8, Seminar with Dr Merimeri Penfold, 12 July 2002, unpublished transcript, Te Matahauariki Research Institute, University of Waikato.

B Legislation

Acts Interpretation Act 1908 (No 1).

Acts Interpretation Act 1924 (15 GEO V 1924 No 11).

Armed Forces Discipline Act 1971.

Bay of Islands Settlement Act 1858 (21 and 22 Victoriae 1858 No 79).

Boundaries of Provinces Act 1858 (21 and 22 Victoriae 1858 No 19).

Census Act 1858 (21 and 22 Victoriae 1858 No 20).

Census Ordinance 1851 15 Vict 8.

Confiscated Lands Act 1867 (31 Victoriae 1867 No 44).

Crimes Act 1961.

Criminal Cases Review Commission Act 2019.

Criminal Justice Act 1985.

Crown Grants Correction Act 1858 (21 and 22 Victoriae 1858 No 46).

Humans Rights Act 1993.

Interpretation Act 1888 (52 VICT 1888 No 15).

Interpretation Act 1999.

Interpretation Act 2019.

Jury Amendment Ordinance 1844 7 Vict 2.

Fines for Assaults Ordinance 1844 8 Vict 7.

Land Claims Ordinance 1841.

Māori Prisoners Act 1880 (44 VICT 1880 No 4).

Māori Prisoners Detention Act 1880.

Māori Representation Act 1867 (31 Victoriae 1867 No 47).

Marine and Coastal Area (Takutai Moana) Act 2011.

Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013.

Native Circuit Courts Act 1858 (21 and 22 Victoriae 1858 No 42).

Native Districts Regulation Act 1858 (21 and 22 Victoriae 1858 No 41).

Native Exemption Ordinance 1844 7 Vict 18.

New Zealand Bill of Rights Act 1990.

New Zealand Constitution Act 1846 (UK) 9 & 10 Vict c 103.

New Zealand Constitution Act 1852.

Raupo Houses 1842 5 Vict 17.

Resident Magistrates Courts Ordinance 1846 10 Vict 16.

Resource Management Act 1991.

Sentencing Act 2002.

Supreme Court Ordinance 1841 5 Vict 1.

Te Ture Whenua Māori Act 1993.

Treaty of Waitangi Tribunal Act 1975.

Unsworn Testimony Ordinance 1844 7 Vict 16.

West Coast Settlement Act 1880.

Department of Justice *Criminal Justice Bill No.2* (22 April 1985).

Other Official Sources

Hansard Debates

(24 October 2012) 685 NZPD 6187.

(18 August 2009) 656 NZPD 5656.

(13 May 2009) 654 NZPD 3433.

(30 Jul 2008) 648 NZPD 17562.

(23 Aug 2007) 641 NZPD 11469.

(14 Nov 2006) 635 NZPD 6472.

(23 Nov 2006) 635 NZPD 6808.

(28 Jun 2006) 632 NZPD 4036.

(3 May 2006) 630 NZPD 2754.

(23 July 1985) 464 NZPD 5834.

(12 June 1985) 463 NZPD 4759.

(5th December 2006) 636 NZPD 6831.

Government Publications

Law Commission *Criminal Prosecution* (NZLC R66, 2000).

Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) 15.

Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2009).

“Office of the Prime Minister’s Chief Science Advisor” Professor Sir Peter Gluckman *Using Evidence to Build a Better Justice System: The Challenge of Rising Prison Costs* (March 2018). <www.pmcsa.org.nz/wp-content/uploads/Using-evidence-to-build-a-better-justice-system.pdf>.

Clinton Roper *Prison Review: Te Ara Hou=The New Way New Zealand Committee of Inquiry into the Prison System* (New Zealand Government Printer, Wellington, 1989).

Kim Workman. Department of Corrections “Over-representation of Māori in the Criminal Justice System: An exploratory report, (Policy, Strategy and Research Group Department of Corrections September 2007) Part 2 “Criminal Justice Bias and Accumulation.”

National Health Committee Review of Research on the Effects of Imprisonment on the Health of inmates and their families (Ministry of Health, Wellington, 2008).

New Zealand Gazette

“Colonial News” (13 June 1840) 10 *New Zealand Gazette* 2.

“The Resolutions agreed upon by the Chiefs of Ngapuhi, assembled at Paihia on the 16th Dec 1841” (19 January 1842) 44 *New Zealand Herald and Auckland Gazette* 2.

“District Health Boards: Advice Notices to Oral Health Providers” (7 November 2003) 151 *New Zealand Gazette* 4215 at 4225.

“An Ordinance for taking a Census of the Colony of New Zealand” (30 August 1851) 561 (7) *New Zealand Gazette*.

Treaties

Te Tiriti o Waitangi/Treaty of Waitangi 1840.

Declaration

He Whakaputanga O Te Rangatiratanga O Nu Tireni 1835—Declaration of Independence).

C Books and Chapters in Books

Bruce Ackerman *We the People, Volume 2 Transformations* (Harvard University Press, Cambridge, 2015).

Andrew Ashworth *The Criminal Process* (4th ed, Oxford University Press, Oxford, 2010).

Raymond D Austin and Robert A Williams *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota, Minneapolis, 2009).

David Ball and Piers von Berg “Remedies” in Piers Von Berg (ed) *Criminal Judicial Review: A Practitioner’s Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014).

Angela Ballara Iwi: *The Dynamics of Māori Tribal Organisation from c.1769 to c.1945*, (Victoria University Press, Wellington, 1998).

Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991).

Hinekahukura Barrett-Aranui *A Gossamer of Wisdom: Truths Enshrouded Within the Ancestral House of Ngaati Maniapoto* (Waikato Print, University of Waikato, 1999).

Francis Bennion *Understanding Common Law Legislation – Drafting and Interpretation* (4th ed, Oxford University Press, Oxford, 2001).

Richard Benton, Alex Frame and Paul Edward Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* Te Mātāhauariki Research Institute University of Waikato (Victoria University Press, Wellington, 2013).

Bruce G Biggs “Maori Myths and Traditions” in A H McLintock (ed) *Encyclopaedia of New Zealand* (Government Printer, Wellington, 1966).

Judith Binney “Tuki’s Universe” in *Stories Without End Essays 1975–2010* (Bridget Williams Books, Wellington, 2016).

R Bishop “A Culturally Responsive Pedagogy of Relations” in D Fraser & C McGee (eds) *Professional Practice of Teaching* (Thomson Learning, Australia, 2008).

Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001).

Richard Boast “Māori and the Law, 1840-2000” in Peter Spiller, Jeremy Finn, and

Richard Boast “Māori Land and the Treaty of Waitangi” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004).

Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999).

Richard Boast “The Evolution of Māori Land Law 1862-1993” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004).

Alan Bryman *Social Research Methods* (5th ed, Oxford University Press, Oxford, 2016).

John F Burrows and John G Fogarty *Statutory Interpretation* (New Zealand Law Society, Wellington, 2001).

John F Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003).

John F Burrows “The Interpretation Act 1999” in Rick Bigwood *The Statute Making and Meaning* (LexisNexis, Wellington, 2003).

Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, Lexis Nexis, Wellington, 2021).

Ross Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015).

WA Chambers *Samuel Ironside in New Zealand, 1839-1858* (Ray Richards Publisher, Auckland, New Zealand) at 137-8.

Nils Christie *Crime Control as Industry: Towards Gulags, Western Style?* (Routledge, London, 1993).

Gordon Christie “Indigenous Legal Theory” in B Richardson, S Imai, K McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Portland, 2009).

George Clarke *Notes on Early Life in New Zealand* (Walch, Hobart, 1903).

Dorothy Ulrich Cloher *The Tribes of Muriwhenua* (Auckland University Press, Auckland, 2002).

Jim Consedine *Restorative Justice: Healing the Effects of Crime* (Ploughshares Publishing New Zealand, 1999).

E Cooper, S Rickard and W Waitoki “Māori Psychology and the Law: Considerations for Bicultural Practice” in F Seymour, S Blackwell and J Thorburn (eds) *Psychology and the Law in Aotearoa New Zealand* (Wellington, New Zealand, 2011).

John W Creswell *A Concise Introduction to Mixed Methods Research* (Sage, London, 2014).

John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (4th ed, London, Sage, 2014).

Eddie T Durie “The Law and the Land” in Jock Phillips (ed.) *Te Whenua, Te Iwi: The Land and the People* (Allen & Unwin, Wellington, 1987).

Mason H Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

Jonathan Eaton and Fred McElrea *Sentencing: The New Dimensions* (New Zealand Law Society, Wellington, 2003).

Sian Elias *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge, Cambridge University Press, 2018).

Andrew Erueti “Māori Customary Law and Land Tenure: An Analysis” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004).

Louise Furey *Māori Gardening* (Dept of Conservation, Wellington, 2006).

Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013).

David Green *Statistics Count: An Illustrated History of Statistics New Zealand* (Statistics New Zealand, Wellington, 2002).

Geoff Hall *Sentencing Law and Practice* (3rd ed, LexisNexis, Wellington, 2014).

Claire Hamilton *Reconceptualising Penalty: A Comparative Perspective on Punitiveness in Ireland, Scotland, and New Zealand* (Ashgate, Surrey, 2014).

Te Rangi Hiroa *The Coming of the Māori* (Whitcombe and Tombs Ltd, Wellington, 1949).

Ronald Hutton *Pagan Britain* (Yale University Press, London, 2013).

Moana Jackson “Criminality and the Exclusion of Māori” in N Cameron (ed) *Essays on Criminal Law in New Zealand: Towards Reform* (Victoria University Press, Wellington, 1990).

Moana Jackson “The Treaty and the Word: The Colonisation of Māori Philosophy” in G Oddie and R Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992).

Philip Joseph *Joseph on Constitutional and Administrative Law* (Thomson Reuters, Wellington, 2021).

Timoti Karetu “Language and Protocol of the Marae” in Michael King *Te Ao Hurihuri: Aspects of Māoritanga* (Penguin Group, New Zealand, 2011).

Michael King *Nga Iwi O Te Motu: 1000 Years of Māori History* (Reed, Auckland, 2001).

Maurice Lennard *Motuarohia: An Island in the Bay of Islands, Sometime Known as Robertson Island* (Pelorus Press, Auckland, 1959).

Cyril Guy Lennard *Sir William Martin; The Life of the First Chief Justice in New Zealand* (Whitcombe and Tombs, Christchurch, 1961).

Karl N Llewellyn and Edward Adamson Hoebel *The Cheyenne Way* (University of Oklahoma Press, Norman, 1941).

John S Lutz *Myth and Memory* (UBC Press, Vancouver, 2007).

Matiu McCully and Margaret Mutu *Te Whānau Moana: Ngā Kaupapa me ngā Tīkanga—Customs and Protocols* (Reed Publishing, Auckland, 2003).

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

Paul McHugh “The Historiography of New Zealand’s Constitution” in Philip A Joseph *Essays on the Constitution* (Brookers, Wellington, 1995).

Malcolm McKinnon, Barry Bradley and Russell Kirkpatrick (eds) *Bateman New Zealand Historical Atlas, Ko Papatuanuku e Takoto Nei* (Dept of Internal Affairs, Auckland, 1997).

Māori Marsden “God, Man and Universe: A Māori View” in Michael King *Te Ao Hurihuri: Aspects of Māoritanga* (Penguin Group, New Zealand, 2011).

JB Marsden and James Drummond *Life and Work of Samuel Marsden* (Whitcombe and Tombs, Christchurch, 1913).

Māori Marsden (edited by Te Ahukaramū Charles Royal) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev. Māori Marsden, Otaki, 2003).

Elizabeth A Martin (eds) *Oxford Dictionary of Law* (7th ed, Oxford University Press, New York, 2009).

Peter Matthiessen *Indian Country* (4th ed, Penguin Books, New York, 1984).

Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003).

Audrey Meaney “Paganism” in Michael Lapidge, John Blair, Simon Keynes, Donald Scragg (eds) *The Blackwell Encyclopaedia of Anglo-Saxon England* (Blackwell, Oxford, and Malden, 1999).

Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington 1995).

Ani Mikaere *Colonising Myths—Māori Realities* (Huia Publishers and Te Wānanga o Raukawa, Wellington, NZ, 2011).

Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Belgrave M, Kawharu M, and Williams D *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005).

Alice Mills *New World Mythology* (Global Book Publishing, Australia, 2009).

Hilary Mitchell and Maui John Mitchell *Te Tau ihu o te Waka: A History of Māori of Nelson and Marlborough* (Huia Publishers, Wellington, 2007).

Paul Moon *The Tohunga Journal: Hohepa Kereopa, Rua Kenana, and Maungapohatu* (David Ling, Auckland, 2008).

Daniel Muijs *Doing Qualitative Research in Education with SPSS* (2nd ed, Sage, London, 2011).

Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand Since 1840* (Dunmore Publishing, Wellington, 2007).

New Zealand Māori Council “Restorative Justice: A Māori Perspective” in Helen Bowen and Jim Consedine (eds) *Restorative Justice: Contemporary Themes and Practice* (Ploughshares, Lyttleton, 1999).

Andrew Novak *International Criminal Court: An Introduction* (Springer, New York, 2015).

Stephen O’Driscoll, Geoffrey G Hall, Tracy Mellor *Sentencing Update* (New Zealand Law Society, Wellington 2007).

Vincent O’Malley *The Meeting Place* (Auckland University Press, 2013).

Rose T Pere *Te Wheke: A Celebration of Infinite Wisdom*. Gisborne, New Zealand (Ao Ako Global Learning New Zealand Limited, Gisborne, 1991).

Ralph Piddington *An Introduction to Social Anthropology* (Oliver and Boyd, Edinburgh, 1952-57).

KF Punch *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, London, 1998).

John Robson *New Zealand: the Development of its Laws and Constitution* (Stevens, London, 1954).

M Russell, M Barber “Empirical Analysis of Supreme Court Decisions” in *The Supreme Court of New Zealand: 2004–2013* (Thomson Reuters New Zealand, Wellington, 2015).

Sentencing Policy and Guidance: A Discussion Paper (Ministry of Justice, Wellington, 1997).

Brian Simpson *Leading Cases in the Common Law* (Clarendon Press, Oxford, 1995).

AWB Simpson (ed) *Oxford Essays in Jurisprudence, Second Series* (Clarendon Press, Oxford, 1973).

Douglas Sinclair “Land: Māori View and European Response” in Michael King *Te Ao Hurihuri: Aspects of Māoritanga* (Penguin Group, New Zealand, 2011).

Keith Sinclair *Tasman Relations: New Zealand and Australia, 1788-1988* (Auckland University Press, Auckland, 1987).

Anselm Strauss and Juliet Corbin *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage, London, 1998).

Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *The New Zealand Criminal Justice System* (LexisNexis, Auckland, 2007).

Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University, Victoria, 2007).

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

John Rangihau *Puao-te-ata-tu Day break: the Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Government Print, Wellington, 2001).

Elizabeth Rata *A Political Economy of Neotribal Capitalism* (Lexington Books, Lanham, 2000).

Joseph Raz “The Rule of Law and its Virtue” in Aileen Kavanagh and John Oberdiek (eds) *Arguing About Law* (Routledge, Abingdon, 2013).

James E Ritchie *Becoming Bicultural* (Huia, Wellington, 1992).

Sharon M Rowley *The Old English Version of Bede's Historia Ecclesiastica* (Cambridge, New York, 2011).

Anne Salmond *Hui: A study of Māori Ceremonial Gatherings* (Reed, Auckland, 1975).

S Percy Smith *On the Tohunga Māori 1840-1922* (Kiwi Publishers, Christchurch, 2001).

Richard Taylor *Te Ika a Maui* (Wertheim and MacIntosh, London, 1855).

Michael Tonry "The Questionable Relevance of Previous Convictions to Punishments for Later Crimes" in Julian V Roberts and Andrew Von Hirsch (eds) *Previous Convictions at Sentencing Theoretical and Applied Perspectives* (Oregon Hart Publishing, Oxford Portland, 2010).

Mark Van Hocke *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing, Oxford, 2011).

Piers Von Berg, ed *Criminal Judicial Review: A Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014).

Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin, Auckland, 2004).

Alan Ward *A Show of Justice* (Auckland University Press, Auckland, 1973).

Herbert Williams *A Dictionary of the Māori Language* (Government Printer, Wellington, 1957).

David V Williams *A Simple Nullity?* (Auckland University Press, Auckland, 2013).

David Wilson *Anglo-Saxon Paganism* (Routledge, London and New York, 1992).

Richard Wilson QC “Judicial Review: An Introduction to the Key Principles” in Piers Von Berg ed *Criminal Judicial Review: A Practitioner’s Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart Publishing, Oxford, 2014).

G Young “A Short History of Post-Treaty Māori Customary Rights to Land” in *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, M Belgrave, M Kawharu and D Williams (eds) (Oxford University Press, Melbourne, 2004).

Michael Zander *The Law-Making Process* (6th ed, Cambridge University Press, Cambridge, 2004).

D Journal Articles

AN Allott “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 *Modern Law Review* 244.

Tom Benion “Who Represents Māori Groups?” (1994-1995) *Māori Law Review*.

John F Burrows “The Changing Approach to the Interpretation of Statutes” (2002) 33 *VUWLR* 981.

John F Burrows “The Interrelation between Common Law and Statute” (1973) 3 *Otago L Rev* 593.

Nicholas Chisnall “The Mitigatory Effect of Social Disadvantage” (2016) *Criminal Law Symposium* 129.

Caroline Daley and Deborah Montgomerie (eds) “Korero in Honour of Judith Binney” (2004) 38 (2) *New Zealand Journal of History*, 121-305.

Richard Danzig “Hadley v Baxendale: A Study in the Industrialization of the Law” (1975) 4 *The Journal of Legal Studies* 249.

Hilario G Davide “The Environment as Life Sources and the Writ of Kalikasan in the Philippines” (2012) 29 Pace Envtl L Rev 592

Heather Deane “The Influence of Pre-Sentence Reports on Sentencing in a District Court in New Zealand” (2000) 33 (1) Australian & New Zealand Journal of Criminology 91.

Shaunnagh Dorsett “R v E Hipu - Supreme Court Wellington, 1 December 1845” (2010) 41 VULR 89.

Shaunnagh 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.

Eddie T Durie “Custom Law: Address to the New Zealand Society for Legal & Social Philosophy” (1994) 24 VUWLR 325.

Eddie T Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago Law Review 449.

Neil Duxbury “Custom as Law in English law” 2017 76 (2) CLJ 337.

Susan Farrelly, Thomas Rudegeair, Sharon Rickard “Trauma and Dissociation in Aotearoa (New Zealand) (2006) 4 (3-4) Journal of Trauma Practice, 203-220.

Trevor Gould and Trevor Daya-Winterbottom “Blood, Sweat, and Fears” [1999] NZLJ 342.

Lani Guinier and Gerald Torres “Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements” (2014) YLJ 123 (8) 2740-2804.

Justin Harder “Indigenous Social Disadvantage” (2013) New Zealand Law Journal 408.

Paul Heath “One law for all - Problems in Applying Māori Custom law in a Unitary State” (2011) 15 Yearbook of New Zealand Jurisprudence 194.

Paul Hirini “He Whakaaro mo te Aria Whanaungatanga: He ata Rapu” (1997) 2 He Pūkenga Kōrero: A Journal of Māori Studies 2.

Te Rangi Hiroa “The Evolution of Māori Clothing” (1925) 34 The Journal of Polynesian Society 61.

Gary E R Hook “The Criminalization of Māori and Pacific Islanders under the Domestic Violence Act 1995” (2009) 3 MAI Review.

Jeremy Horder “Rationalising Judicial Review in Criminal Proceedings” (2008) 13 (4) Judicial Review 207.

Kris Inwood, Les Oxley and Evan Roberts “Physical Growth and Ethnic Inequality in New Zealand Prisons, 1840-1975” (2015) 20 (2) The history of the family, 249-269.

Anne-Marie Jackson “A discursive analysis of rangatiratanga in a Māori fisheries context”(2013) MAI Journal.

Jemima Jamieson “The Role of Indigenous Communities in the Pursuit of Sustainability” New Zealand Journal of Environmental Law 14.

Carwyn Jones “A Māori Constitutional Tradition” (2014) 12 New Zealand Journal of Public and International Law 187.

Philip A Joseph “Foundations of the Constitution” (1989) 4 Canterbury Law Review 73-74.

Jo Kamira “Māori in Sydney” (2010) 3 (1) Sydney Journal.

Merata Kawharu “Kaitiakitanga: a Māori Anthropological Perspective of the Māori Socio-Environmental Ethic of Resource Management” (2000) 109 *The Journal of the Polynesian Society*.

Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 *Law and Contemp Probs* 265.

Peter Linzer “Hadley v Baxendale and the Seamless Web of Law” (2004) 11 *Tex. Wesleyan L. Rev.* 225.

Paul A Lombardo “Legal Archaeology: Recovering the Stories Behind the Cases” (2008) 36(3) *Journal of Law, Medicine & Ethics* 589.

Daniel L Lowery “Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992” (1993) 18 *American Indian Law Review* 2, 379-446.

Tracey McIntosh and Maja Curcic “Prison as Destiny? Descent or Dissent? in Lily George, Adele N Norris, Antje Deckert, Juan Tauri (eds) *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Springer International, Switzerland, 2020) 223.

William McNatty and Tom Roa “Whanaungatanga: An Illustration of the Importance of Cultural Context” (2002) 3 (1) *He Puna Korero: Journal of Māori and Pacific Development* 88.

Robert S McPherson “Sacred Land, Sacred View: Navajo Perceptions of the Four Corners Region 4” (1992).

Dannette Marie, David Fergusson and Joseph Boden “Ethnic Identity and Criminal Offending in A New Zealand Birth Cohort” (2009) 42 (3) *Australian & New Zealand Journal of Criminology*, 354.

Judith L Maute “Response: The Values of Legal Archaeology” (2000) Utah L. Rev. 223.

Kelly Frances Mitchell “Distinguishing ‘Expertise’ in Te Reo Māori: Tohunga, Pu and Rehe” (2021) 130 (2) Journal of the Polynesian Society 137-148.

Paul Moon “Maketū’s Execution and the Extension of British Sovereignty in New Zealand” (2013) 6 Te Kaharoa.

Simon Mount “A Criminal Cases Review Commission for New Zealand” (2009) 3 NZLR455.

Camille Nakhid, Lily Tairiri Shorter “Narratives of Four Māori Ex-inmates About Their Experiences and Perspectives of rehabilitation Programmes” (2014) 58 (6) International Journal of Offender Therapy and Comparative Criminology, 697.

Walter Nelles “The First American Labor Case” (1931) 41 Yale L. J. 165.
Commonwealth v Pullis Philadelphia Mayor’s Court (1806).

New Zealand Law Commission *Māori Custom and Values in New Zealand Law*, Wellington, March 2001 in ET Durie “Custom Law: Address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 VUWLR 325.

New Zealand Law Commission “A New Interpretation Act to Avoid “Prolivity and Tautology” (NZLC R17, Wellington, 1990) AJHR 1990 E 31L [NZLC R17].

Julie Novkov “Legal Archaeology” (2011) 64 Political Research Quarterly 348.

Stephen Odgers “The High Court on Crime in 2021” (2022) 46 (1) Criminal Law Journal, 7.

Stephen O’Driscoll “A Powerful Mitigating Tool” (2012) NZLJ 358.

James C Oleson "Habitual Criminal Legislation in New Zealand: Three Years of "Three Strikes" (2015) 48(2) Australian and New Zealand Journal of Criminology 277.

John Pratt and Phillip Treacher "Law and Order and the 1987 New Zealand Election" (1988) 21(4) Australian and New Zealand Journal of Criminology 253.

Ivor Richardson "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Aust Tax Forum 3.

Mere Roberts, Wairete Norman, Nganeko Minhinnick, Del Wihongi and Carmen Kirkwood "Kaitiakitanga: Māori Perspectives on Conservation" (1995) 2 Pacific Conservation Biology 7.

Nicholas A Robinson "Ensuring Access to Justice Through Environmental Courts" (2012) 29(2) Pace Envtl. L Rev 363.

Nicholas A Robinson "Symposium on Indigenous Rights Introduction" (2010) 28 Pace Envtl. L Rev 324.

Jacinta Ruru "First Laws: Tikanga Māori in/and the Law" (2018) VUWLR 49 (2).

Jacinta Ruru "Corporate Governance: Balancing Tikanga Māori with Commercial Objectives Yearbook of New Zealand Jurisprudence (2005) 8 (2) 300-315.

Peter Spiller "Realism Reflected in the Court of Appeal: the Value of the Oral Tradition" (1998) 2 NZYBJ 31.

Elizabeth Stanley and Riki Mihaere "The Problems and Promise of International Rights in the Challenge to Māori Imprisonment" (2019) 8 (1) International Journal for Crime, Justice and Social Democracy 1.

Mamari Stephens "Kei A Koe, Chair!": The Norms of Tikanga and the Role of Hui as a Māori Constitutional Tradition (2022) VUWLR 53 (4).

Heemi Taumaunu "Calls for transformative change and the district court response" (2021) 29 WLR Taumauri 115.

Linda Te Aho “Contemporary Issues in Māori Law and Society Crown Forests, Climate Change, and Consultation - Towards More Meaningful Relationships” (2007) 15 Waikato Law Review: Taumauri 138.

Linda Te Aho “Corporate Governance: Balancing Tikanga Māori with commercial objectives” (2005) 23 YNZJ 300.

Debora L Threedy “Legal Archaeology: Excavating Cases, Reconstructing Context” (2005) 80 Tul L Rev 1197.

Debora L Threedy “United States v Hatahley: A Legal Archaeology Case Study in Law and Racial Conflict” (2009) 34 American Indian Law Review 1.

Valmaine Toki “Will therapeutic jurisprudence provide a path forward for Māori?” (2005) 13 WLR 169.

Michael Tonry “Why Crime Rates Are Falling throughout the Western World” (2014) 43 Crime and Justice 1.

Keith Tuffin and Eleanor Brittain “Ko tēhea te ara tika? A discourse analysis of Māori experience in the criminal justice system” (2017) 46 New Zealand Journal of Psychology 99.

Toon van Meijl “Culture Versus Class: Towards an Understanding of Māori Poverty” (2020) 62 (1) Race and Class 78.

Katherine van Wormer “Restorative Justice: A Model for Social Work Practice with Families” (2003) 84 Families in Society, 441. (Matua Whangai Family Group Conference).

Krystal Warren, Jo Waitoa, Regina Scheyvens “E-Whanaungatanga: The Role of Social Media in Māori Political Empowerment” (2015) 11 AlterNative: An International Journal of Indigenous Peoples 45.

James Boyd White “The Judicial Opinion and the Poem: Ways of Reading, Ways of Life” in *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* 107,122 (1985) 82 Michigan Law Review 1669.

Joseph Williams “Can you see the island?” (2015) Māori Law Review October 21.

Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 WLR 1.

Joseph Williams “The Māori Land Court - A Separate Legal System?” July 2001 Occasional Paper No 4 in “New Zealand Centre for Public Law Te Wananga o Nga Kaupapa Ture a Iwi o Aotearoa.”

John Willis “Statute Interpretation in a Nutshell” (1938) 16 Can Bar Rev 1.

Nālani Wilson-Hokowhitu “He Pukoa Kani ‘āina” (2012) 8 AlterNative: An International Journal of Indigenous People 137.

Unpublished Papers

Theses and research papers

Riki Mihaere “A Kaupapa Māori Analysis of the use of Māori Cultural Identity in the Prison System” (Thesis (Phd) University of Victoria, Wellington, 2015).

Noritta Morseu-Diop “Healing in Justice: An International Study of Indigenous Peoples’ Custodial Experiences of Prison Rehabilitation Programs and the Impact on Their Journey from Prison to Community” (Thesis (Phd) University of Queensland, Australia, 2010).

Michael P Shirres “An Introduction to Karakia” (Unpublished Thesis (Phd) University of Auckland 1986).

Rachel Standfield “Warriors and Wanderers: Making Race in the Tasman World, 1769-1840” (Thesis (Phd) University of Otago, 2009).

Nin Tomas “Key Concepts of Tikanga Māori and Their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau, Past and Present” (Thesis (Phd) University of Auckland, 2006).

Conferences and speeches

Warren Brookbanks and Richard Ekins “Criminal Injustice and the Proposed “Three Strikes” Law” Maxim Institute, Guest Paper, Faculty of Law, The University of Auckland, April 2010.

Warren Brookbanks “Three Strikes – Five Years On” (Inaugural Greg King Memorial Lecture, Victoria University of Wellington Faculty of Law, 30 September 2015).

Nicholas Chisnall “Criminal Law” (paper presented to Criminal Law Symposium, Wellington, 2016).

Nicholas Chisnall “The Mitigatory Effect of Social Disadvantage” (paper presented to Criminal Law Symposium” Wellington, New Zealand, 2016).

Sian Elias "Transition, Stability and the New Zealand Legal System" (F W Guest Memorial Lecture, Dunedin, 23 July 2003) 10.

Hirini Moko Mead “The Nature of Tikanga” (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000).

See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore. Nineteenth Session July 18, 2011, Geneva.

E Parliamentary and Government Materials

Moana Jackson *The Māori and the Criminal Justice System: He Whaipāanga Hou: A New Perspective Part 1* (Department of Justice, Wellington, 1987).

Moana Jackson *He Whaipāanga Hou: Māori and the Criminal Justice System: A New Perspective Part 2* (Ministry of Justice, Wellington, 1988).

New Zealand Law Society “Submission on the Interpretation Bill” (3 April 1998).

William Lee Rees “Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws: Subdivision” [1891] AJHR G-01.

Select Committee 19 Feb 2020 Waikato Te Korowai Health System Plan.

Justice Joe Williams “He Aha te Tīkanga Māori” (unpublished paper for the Law Commission, 1998).

F Internet Resources

Ara Poutama Aotearoa Department of Corrections “Financial Overview” Annual Report 2014/2015.

<www.corrections.govt.nz/resources/strategic_reports/annual-reports/annual_report_201415/financial_overview#Overall%20Results>.

Arataiohi “Whanaungatanga”. <www.arataiohi.org.nz/research/aotearoa-youth-research/whanaungatanga/>.

Department of Corrections “Keeping Communities Safe and Changing Lives.” <www.corrections.govt.nz>.

Department of Corrections “Prison facts and statistics – March 2017” Prison Statistics/ Department of Corrections.
<www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics>.

Geoff Adlam “Conviction, Sentencing and Imprisonment of Adults in 2019” May 2020 LawTalk 939. <www.issuu.com/nzlawsociety/docs/lawtalk_939>.

Ministry of Justice, He Hinatore o te Ao Māori A Glimpse into the Māori World, 2001. <www.justice.govt.nz/publications/publications-archived/2001/he-hinatore-ki-te-ao-māori-a-glimpse-into-the-māori-world>.

Joe Williams, Te Ritorito 2017: ‘The Treaty of Waitangi and Whānau, Hapū and Iwi Wellbeing’ May 12, 2017. <www.youtube.com/watch?v=LnlMa5jJu_k>.

Phillippa McDonald “Urgent action needed over high proportion of Indigenous women in prison, report says” (31 March 2020) ABC News.

<www.abc.net.au/news/2020-03-31/urgent-action-needed-over-indigenous-women-in-jails/12103372>.

Leigh-Marama McLachlan “Pre-sentencing reports for offenders criticised by judges and lawyers” (29 April 2019) Radio New Zealand.

<www.rnz.co.nz/news/national/387988/pre-sentencing-reports-for-offenders-criticised-by-judges-and-lawyers>.

Jenni McManus “Incoming govt faces battle on cultural reports, three strikes and discount caps.” (27 Oct 2023). <www.thelawassociation.nz/incoming-govt-faces-battle-on-cultural-reports-three-strikes-and-discount-caps/>.

Landcare Research “Reporting Environmental Impacts on Te Ao Māori: A Strategic Scoping Document.

<www.envirolink.govt.nz/assets/Envirolink/Priorities-for-Te-Ao-Maori-Reporting.pdf>.

Liesle Theron “Does New Zealand’s Use of Imprisonment Breach the New Zealand Bill of Rights Act?” 07 June 2019 LawTalk 929.

<www.issuu.com/nzlawsociety/docs/lawtalk_929>.

Ministry of Justice “Constitutional Issues & Human Rights: Compensation for wrongful conviction & detention.” <www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/miscarriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment/>.

Ministry of Justice “Repeal of the three strikes law”.

<www.justice.govt.nz/justice-sector-policy/key-initiatives/repeal-of-the-three-strikes-law/>.

National Library “Policemen with a group of Māori who participated in the Dog Tax Rebellion.” Available at <https://natlib.govt.nz/records/22917541>.

New Zealand Ministry for Culture and Heritage Te Manatu Taonga “Lunatic asylums, 1840s to 1900s.” <www.teara.govt.nz/en/mental-health-services/page-2>.

New Zealand Ministry for Culture and Heritage Te Manatu Taonga “New Zealand coat of arms.” <www.teara.govt.nz/en/ephemera/2575/new-zealand-coat-of-arms>.

Official Gazette of the Republic of the Philippines.
<www.officialgazette.gov.ph/constitutions/1987-constitution/>.

Radio New Zealand “No evidence ‘cultural reports worked – Justice Minister’”.
8th February 2024. <www.rnz.co.nz/news/political/508631/no-evidence-cultural-reports-worked-justice-minister>.

Radio New Zealand “Parliament repeal three strikes law.”
<www.rnz.co.nz/news/political/472539/parliament-repeals-three-strikes-law>.

Department of Corrections “Prison facts and statistics – March 2017” Prison
Statistics/Department of Corrections.
<www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics>.

Sentence Equality. <www.sentencingequality.co.nz>.

Stats New Zealand “Crime and Justice”. <www.stats.govt.nz/topics/crime-and-justice>.

Te Aka Māori Dictionary. <www.maoridictionary.co.nz/>.

Te Ara Encyclopedia of New Zealand “Māori imprisonment”.
<www.teara.govt.nz/en/prisons/page-5#ref1>.

The Guardian ‘National travesty’: report shows one third of Canada’s prisoners
are Indigenous. <www.theguardian.com/world/2020/jan/22/one-third-canada-prisoners-indigenous-report>.

University of Auckland “Strong social justice background informs new role” 9
June 2020. <www.auckland.ac.nz/en/news/2020/06/09/strong-social-justice-background-informs-new-role.html>.

“Wāhi Tuawhā Part 4: Ngāi Tahu me ngā Rawa Taiao (Ngāi Tahu and Resource Management) at 51. <www.mahaanuiukurataiao.co.nz/wp-content/uploads/2019/09/Mahaanui-IMP-web_Part6.pdf>.

Waitangi Tribunal “Publications & Resources”.
<www.waitangitribunal.govt.nz/publications-and-resources/>.

Mark Quinlivan “Election 2023: Labour and National’s crime messages and how they’re trying to break through to New Zealand voters” (16 September 2023) Newshub <www.newshub.co.nz>.

News Articles and Magazines

Leigh-Marama McLachlan “Pre-sentencing reports for offenders criticised by judges and lawyers” 29 April 2019 Radio New Zealand.

Native Lands Court Kauwaeranga Judgment Chief Judge Fenton. Daily Southern Cross, Volume XXVI, Issues 4158, 10 December 1870.

“Quarrel over a Burial” Colonist (New Zealand, Volume LII, Issue 12812, 6 June 1910).

Other

European Convention on Human Rights 1953.

[H.S. Chapman] Notebook entitled Criminal Trials No. 5 1847–49, Hocken Library, Dunedin (HL), MS-0411/013, entry for Wed. 1 Dec. 1847, 23–36.

Lord Glenelg, in a letter to Major-General Sir Richard Bourke, Governor of New South Wales, 25 May 1836.

International Covenant on Civil and Political Rights.

New Zealand Spectator and Cook’s Strait Guardian, Volume II Issue 61 (6 December 1845).

FWM McElrea *Accountability in the Community: Taking Responsibility for Offending* A paper prepared for the Legal Research Foundation's Conference "Re-thinking Criminal Justice: A Conference on New Initiatives in Criminal Justice" 12 and 13 May 1995 Auckland, New Zealand. Re-thinking Criminal Justice Institute of Criminology Legal Research Foundation (1995).

Ian Pool and Tahu Kukutai "Taupori Māori – Māori population change – Population changes, 1769-1840 Te Ara Encyclopedia of New Zealand. <www.teara.govt.nz/en/taupori-maori-maori-population-change/page-1>.

New Zealand Historical Bills, Interpretation Bill 1998 no. 90-92 at iii.

G Other Resources

Dictionary/Encyclopaedia

Angela Ballara *Pomare II* (Dictionary of New Zealand Biography Te Ara Encyclopedia of New Zealand, 2012).

Peter Clayworth "Prisons - Māori imprisonment" Te Ara - the Encyclopedia of New Zealand. Accessed 2 April 2023. <www.TeAra.govt.nz/en/zoomify/36774/maori-prisoners-of-war-1864>.

Brian Easton "Economic History - Early Māori Economies" (13 July 2012) Te Ara Encyclopedia of New Zealand.

"National travesty: report shows one third of Canada's prisoners are Indigenous <www.theguardian.com/world/2020/jan/22/one-third-canada-prisoners-indigenous-report>.

Phillippa McDonald "Urgent action needed over high proportion of Indigenous women in prison, report says" (31 March 2020) ABC News. <www.abc.net.au/news/2020-03-31/urgent-action-needed-over-indigenous-women-in-jails/12103372>.

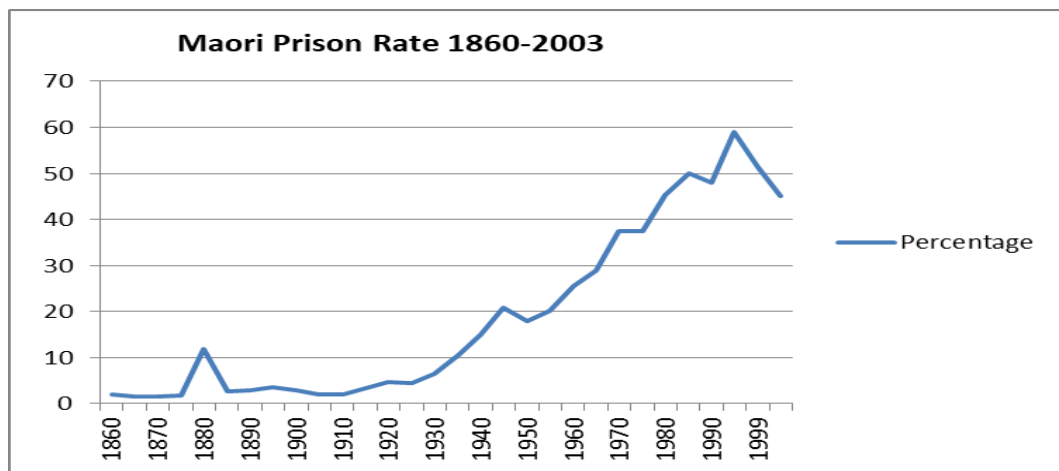
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Appendix 1.

Graph 1.

Māori Prisoner Rates at Percentage of Prison Population 1860-2003.

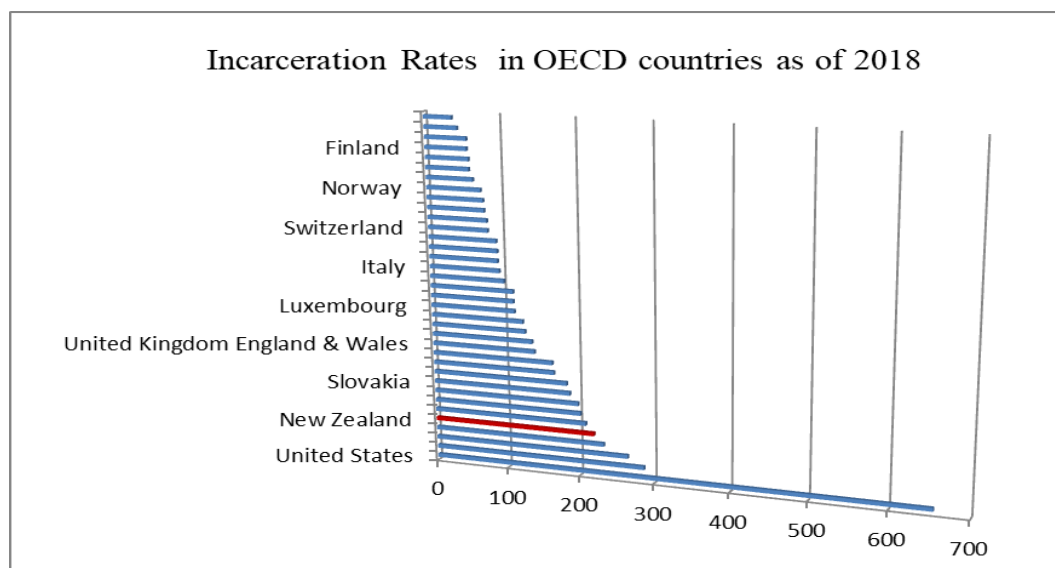


Source: Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand since 1840* (Dunmore, Wellington, 2007) at 55–56. From 1980 onward the percentage rate remained above 45%.

<https://teara.govt.nz/en/graph/36775/maori-as-a-percentage-of-total-prison-population-1860-2008>

Graph 2.

Incarceration rates in OECD countries as of 2018.

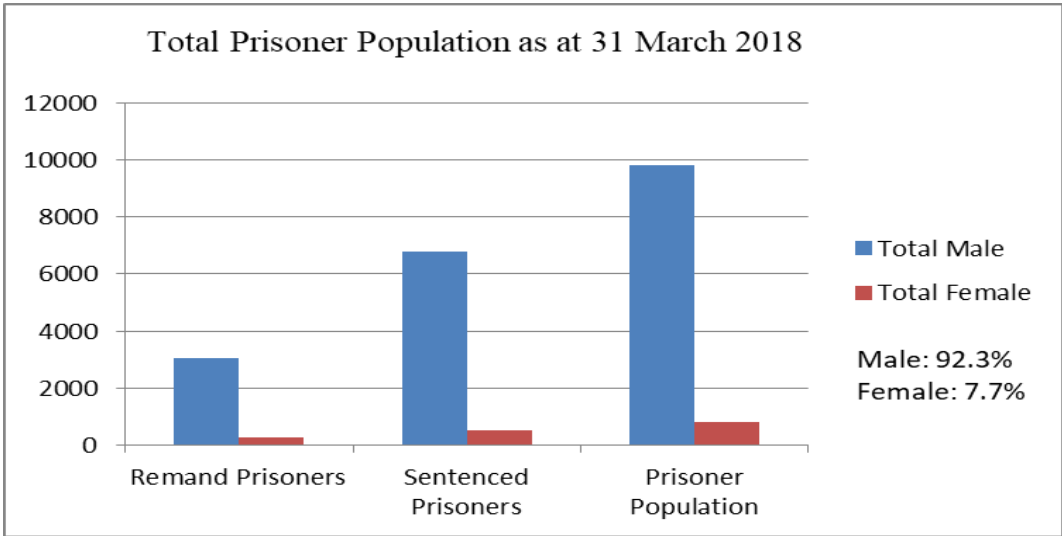


Source: Statista. Average Calculated: $4,387/36=121.86$.

<https://www.statista.com/statistics/300986/incarceration-rates-in-oecd-countries/>

Graph 3.

Total Prisoner Population as at, 31 March 2018.

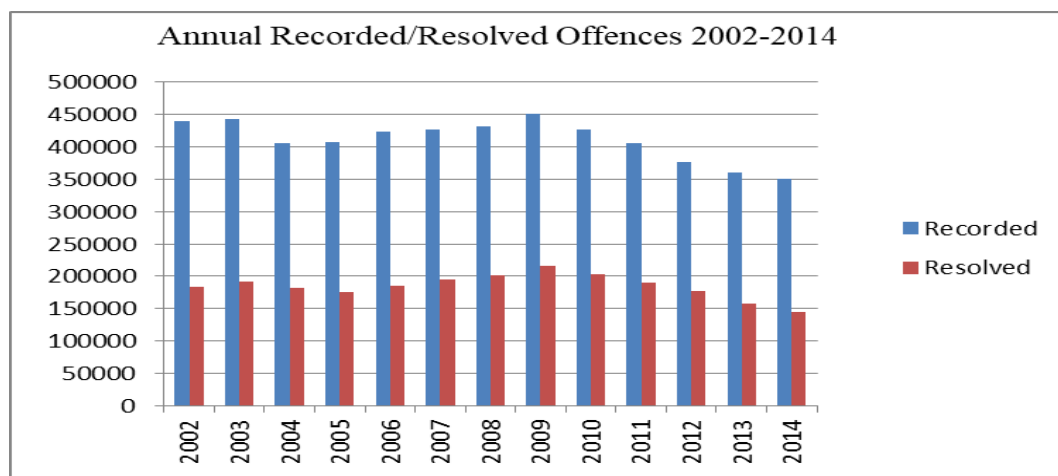


Source: Department of Corrections Statistics.

http://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2018.html#age

Graph 4.

Annual Recorded/Resolved Offences 2002-2014.

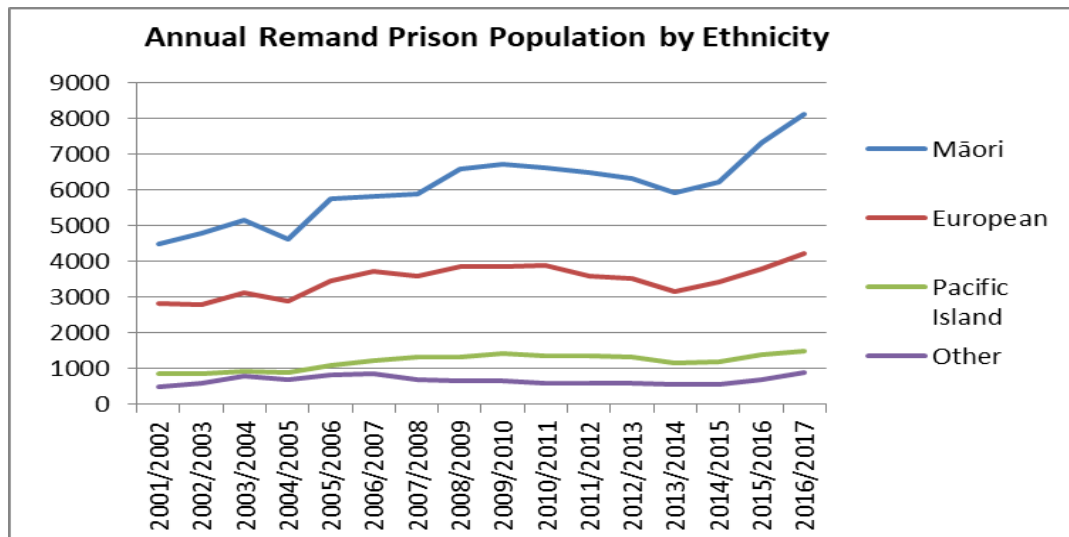


Source: NZ Statistics.

<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7405>

Graph 5.

Annual Remand Prison Population by Ethnicity 2001-2017.

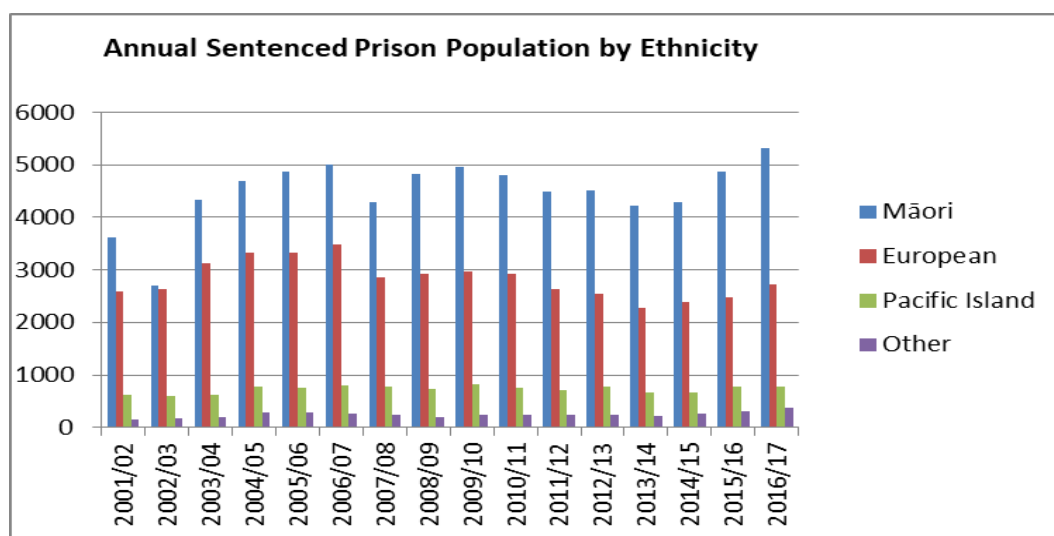


Source: NZ Statistics.

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Graph 6.

Annual Sentenced Prison Population by Ethnicity 2001-2017.

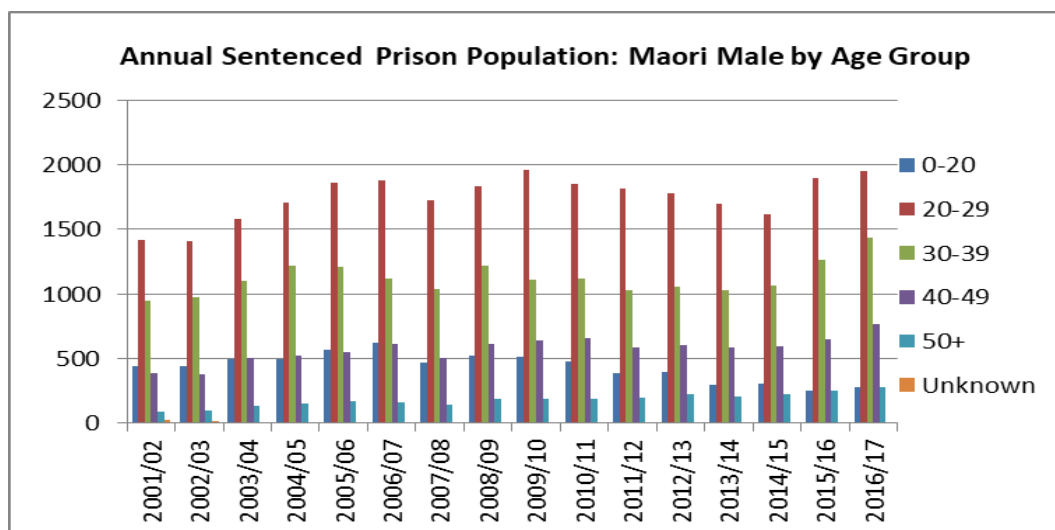


Source: NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 7.

Annual Sentenced Prison Population: Māori Male by Age Group 2001-2017.

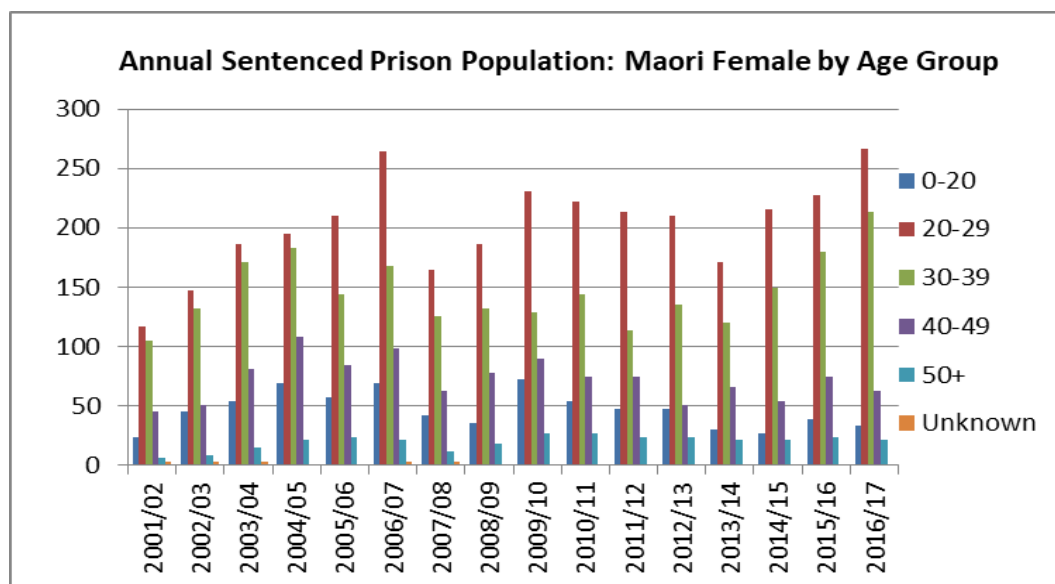


Source: NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 8.

Sentenced Prison Population: Māori Female by Age Group 2001-2017.

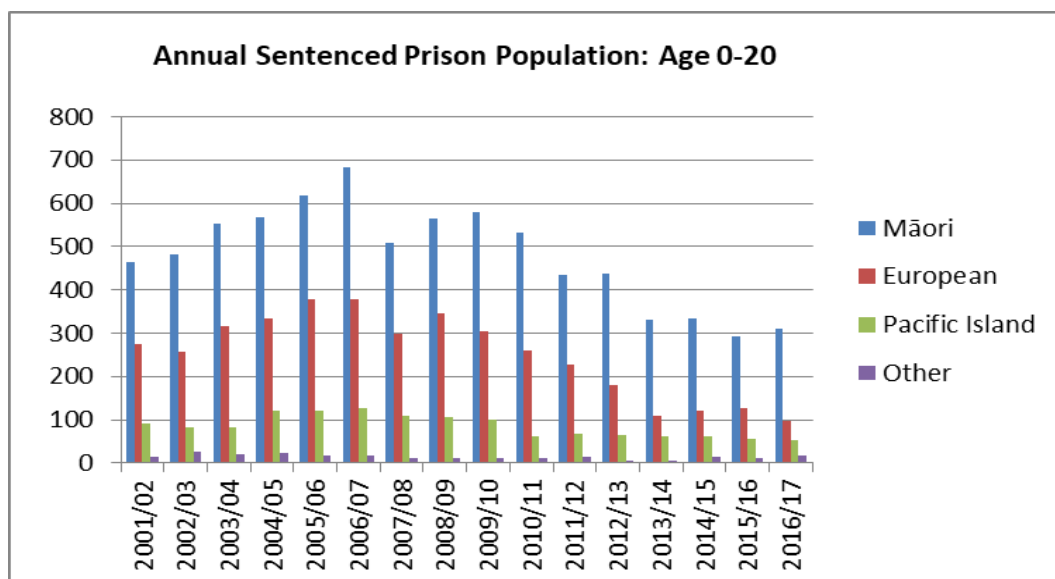


Source: NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 9.

Annual Sentenced Prison Population: Age 0-20 (2001-2017).

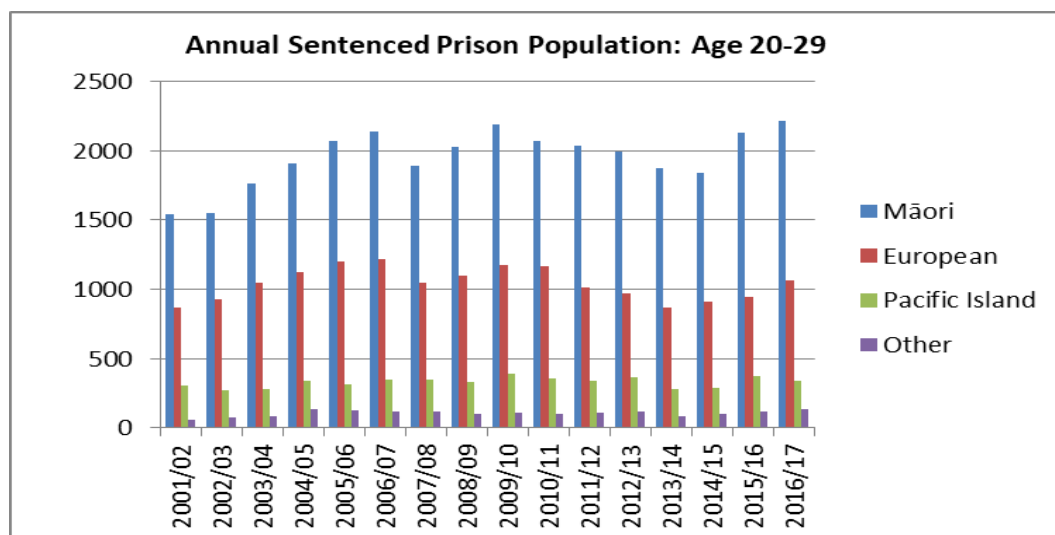


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 10.

Annual Sentenced Prison Population: Age 20-29 (2001-2017).

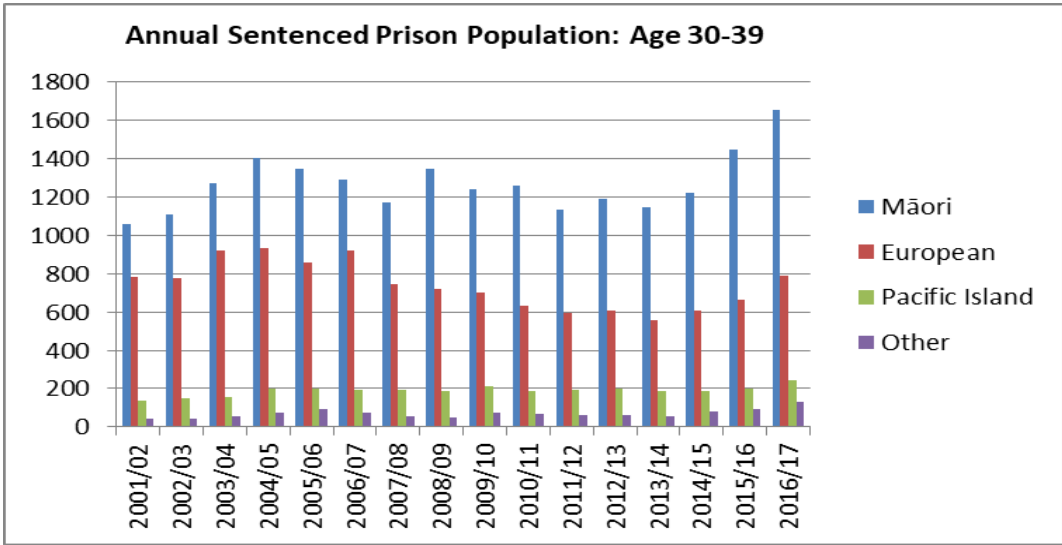


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 11.

Annual Sentenced Prison Population: Age 30-39 (2001-2017).

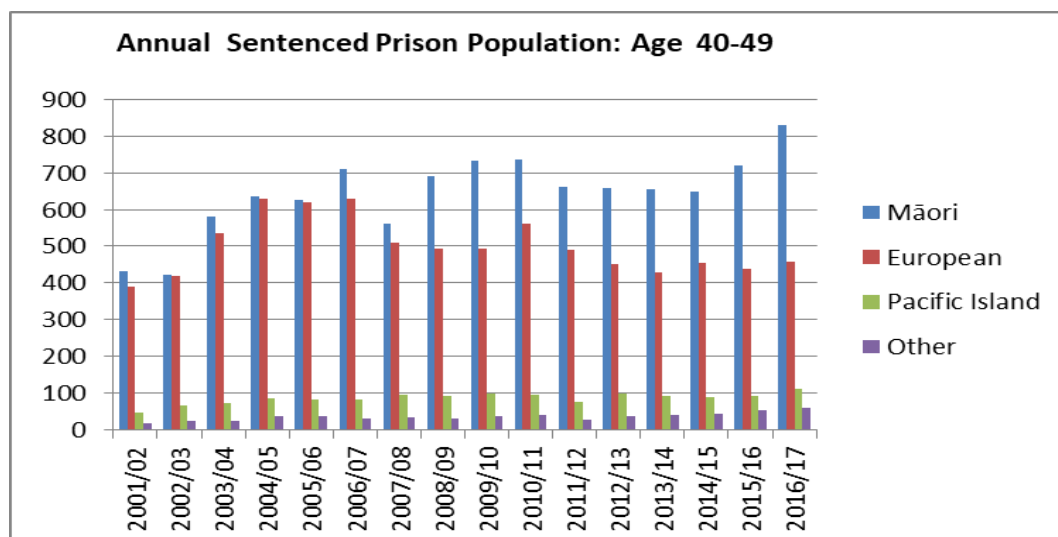


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 12.

Annual Sentenced Prison Population: Age 40-49 (2000-2017).

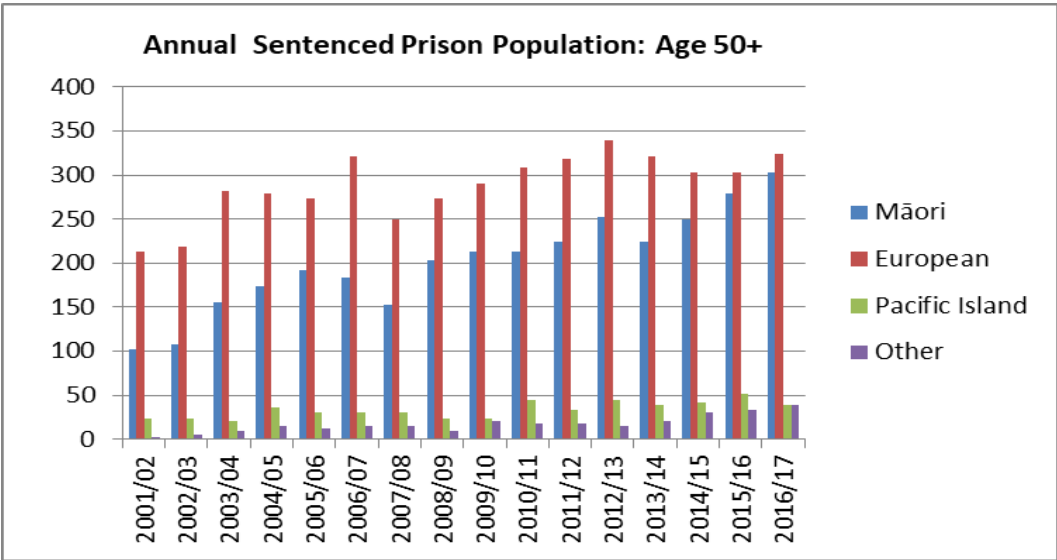


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 13.

Annual Sentenced Prison Population: Age 50+ (2001-2017).

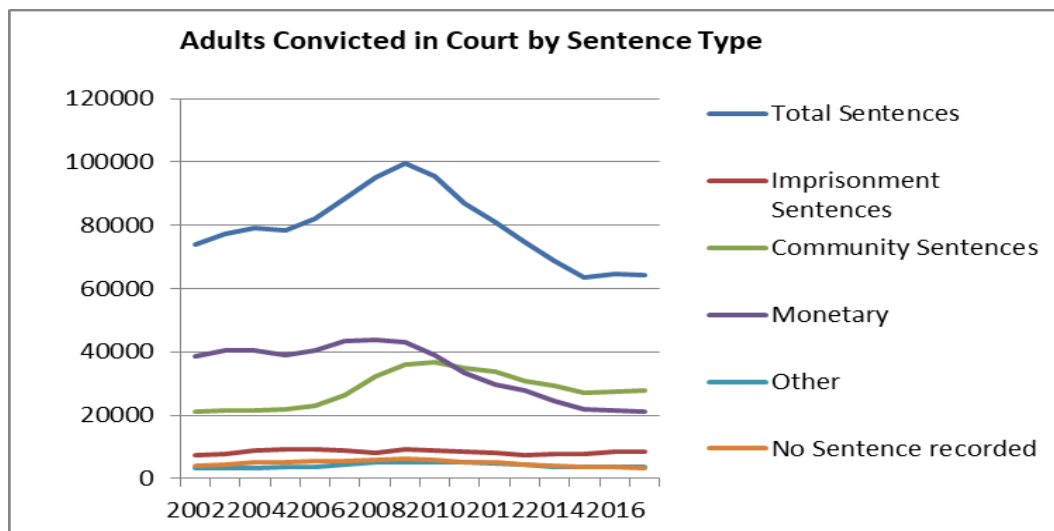


Source: NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 14.

Adults Convicted in Court by Sentence Type 2001-2017.

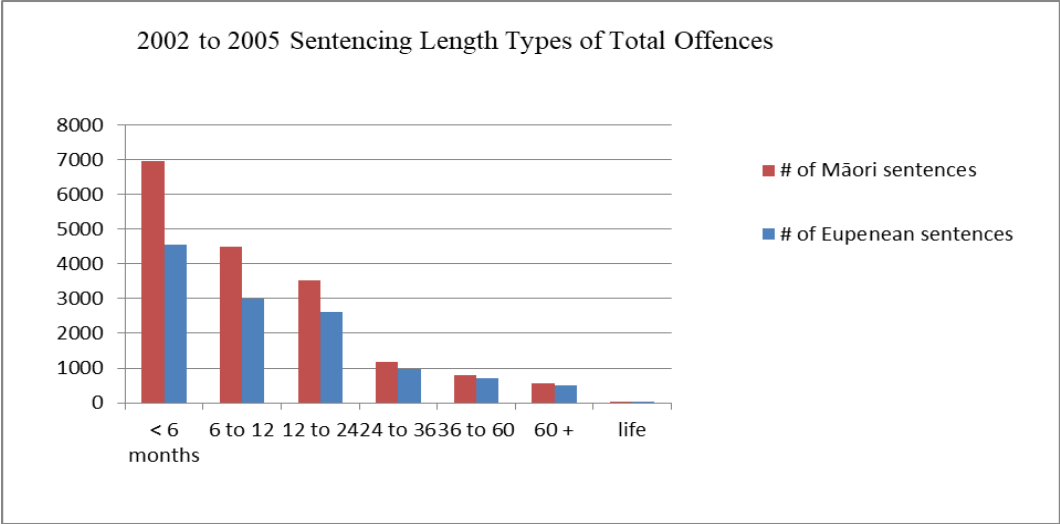


Source: NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7353&_ga=2.172203043.1258154679.1530156919-1370627089.1521938362&_gac=1.260132351.1530233015.CjwKCAjwma3ZBRBwEiwA-CsblJFQWhM5_PdUt8ORvBv8B0y8kBwXw2hd0c-Mrymi6zq4436cBSmowxoCRKsQAvD_BwE

Graph 15.

Sentencing Length Types of Total Offences 2002-2005.

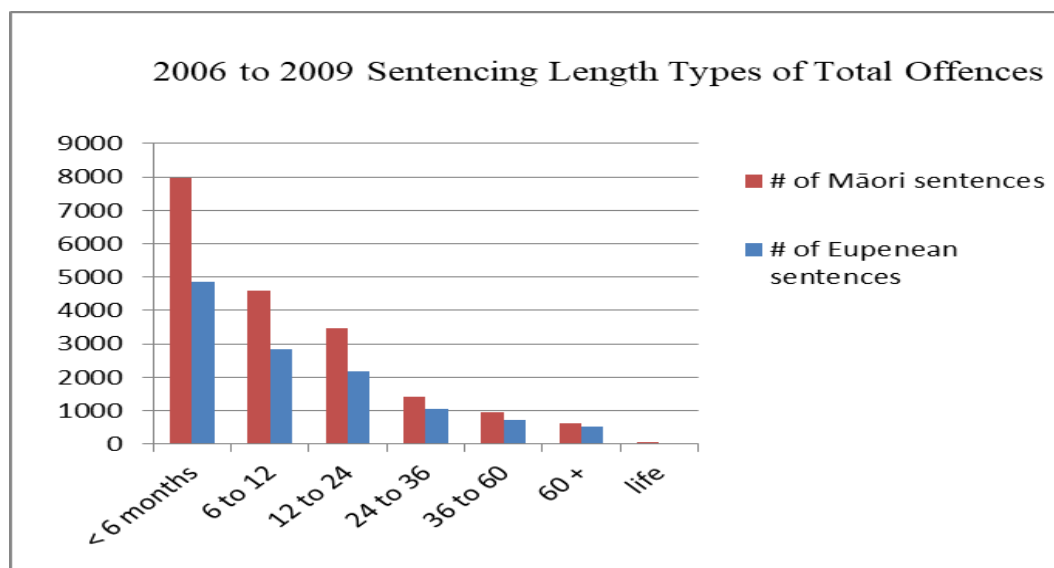


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 16.

Sentencing Length Types of Total Offences 2006-2009.

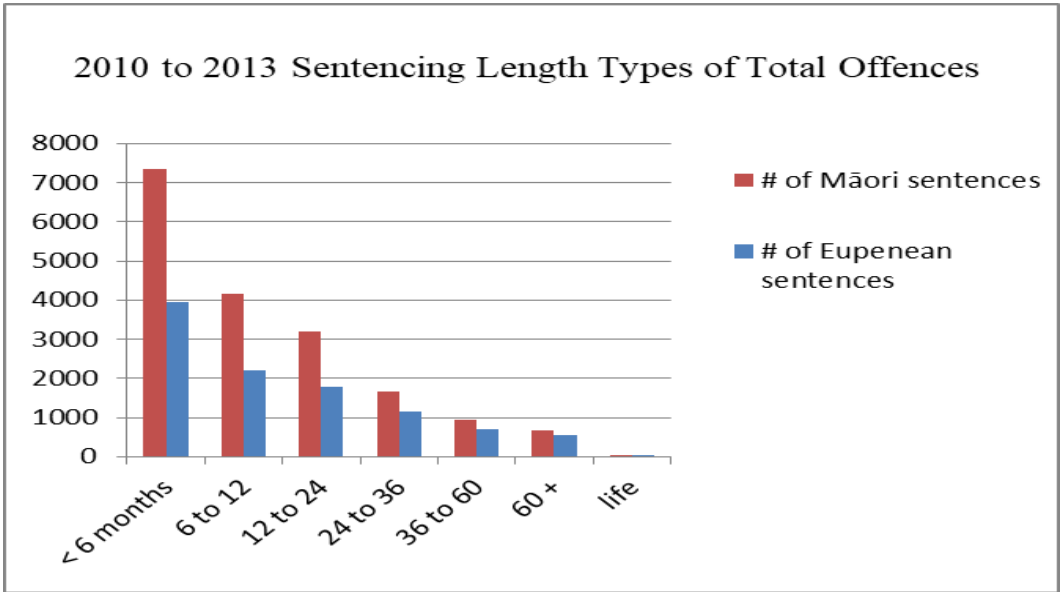


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 17.

Sentencing Length Types of Total Offences 2010-2013.

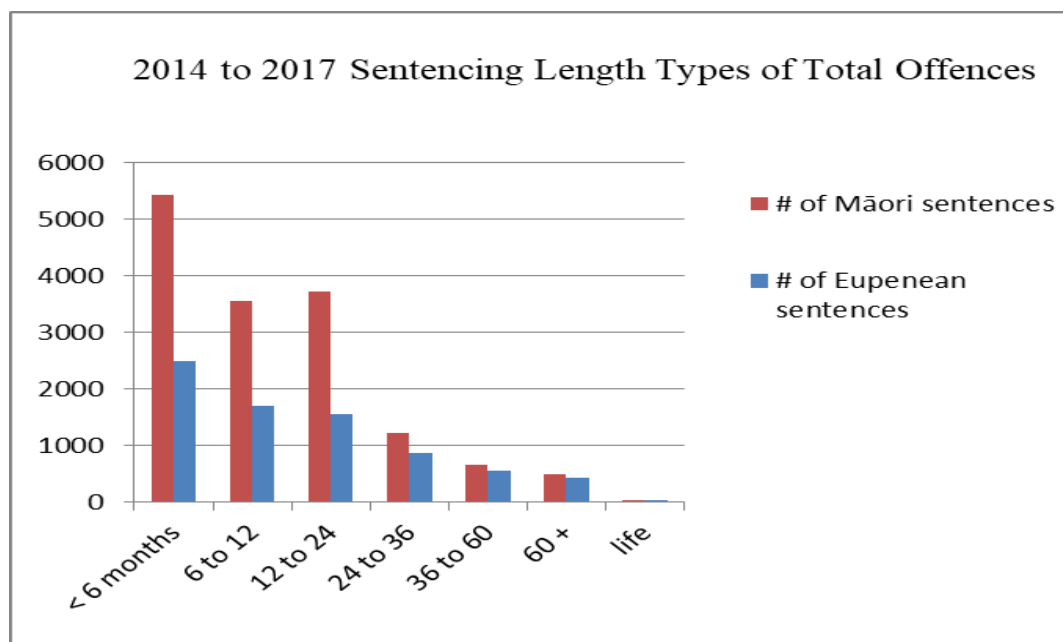


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 18.

Sentencing Length Types of Total Offences 2014-2017.

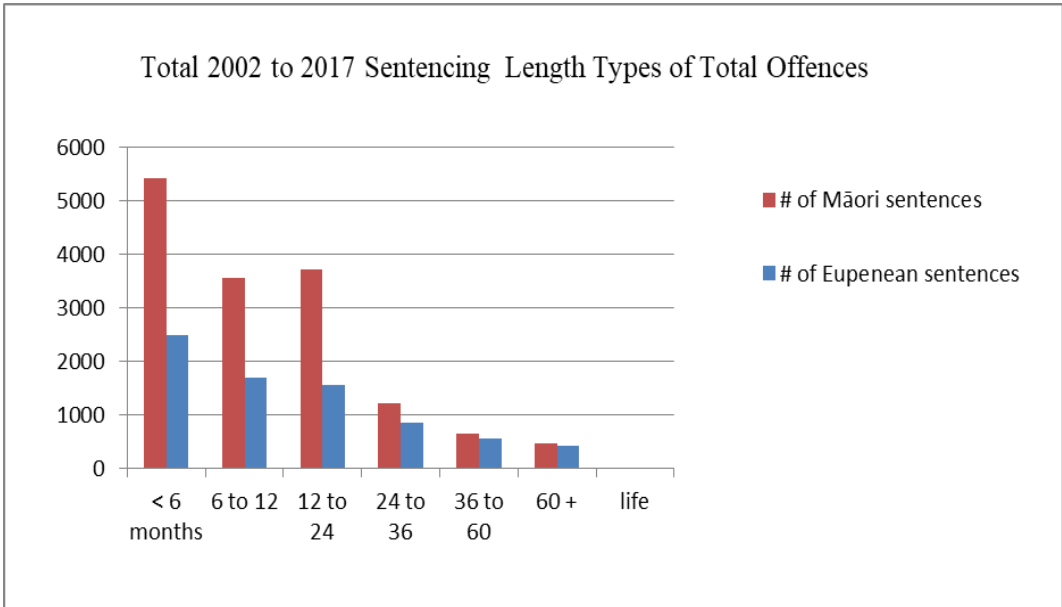


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 19.

Total Sentencing Length Types of Total Offences 2014-2017.

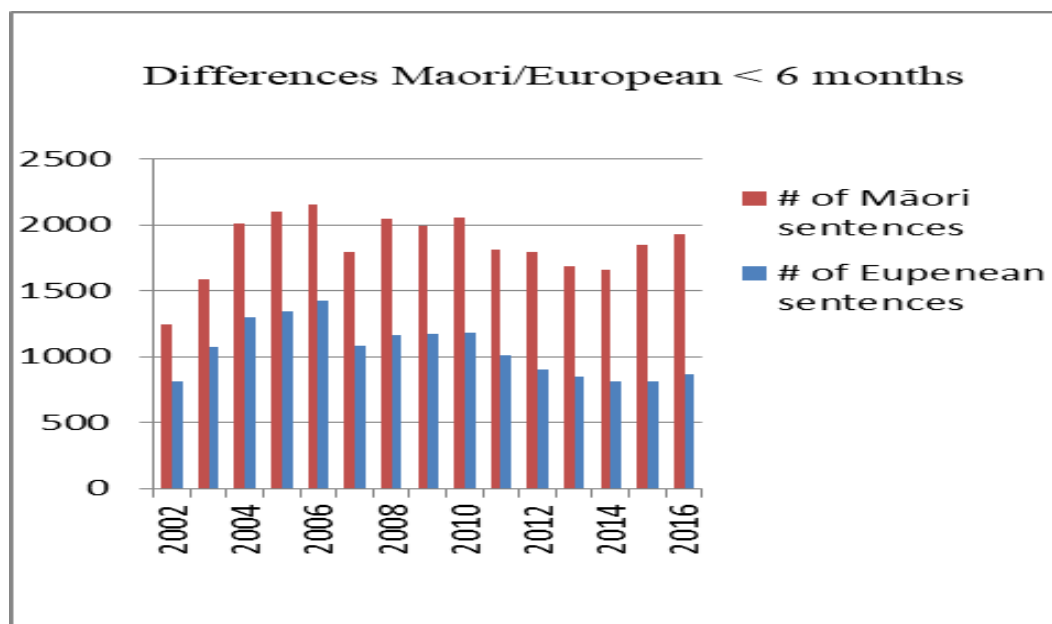


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 20.

Sentencing Differences Māori/European < 6 months 2002-2017.

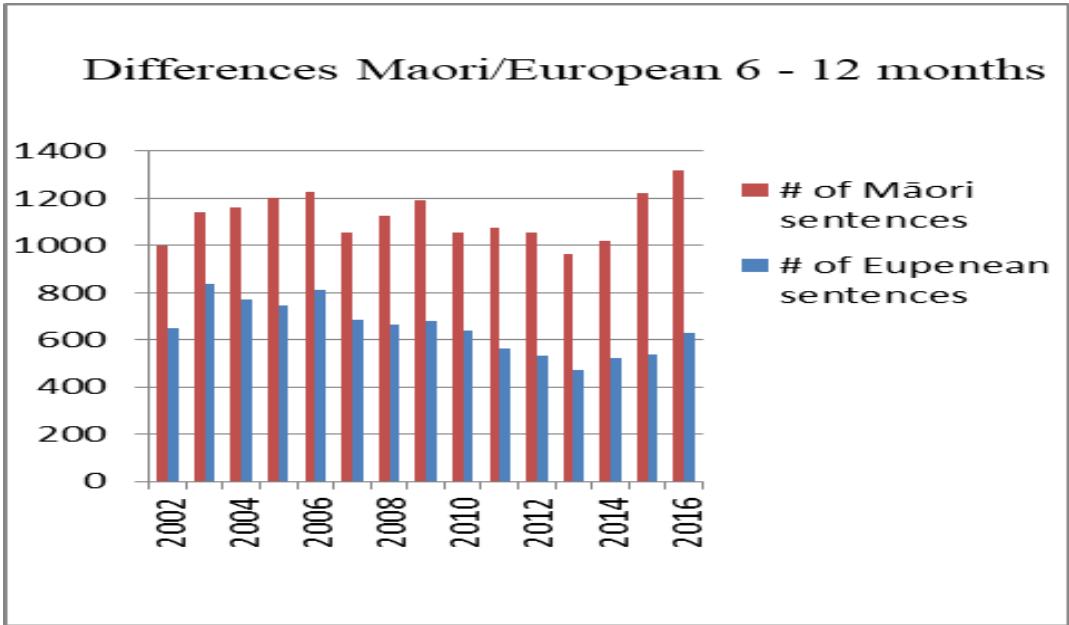


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 21.

Differences Māori/European 6-12 months 2002-2017.

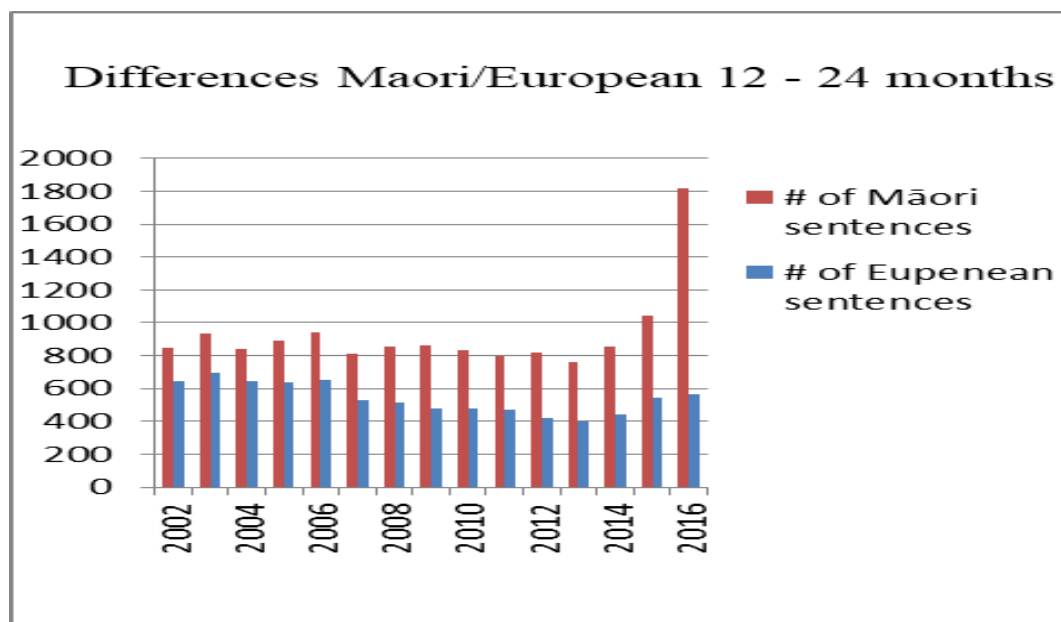


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 22.

Sentencing Differences Māori/European 12-24 months 2002-2017.

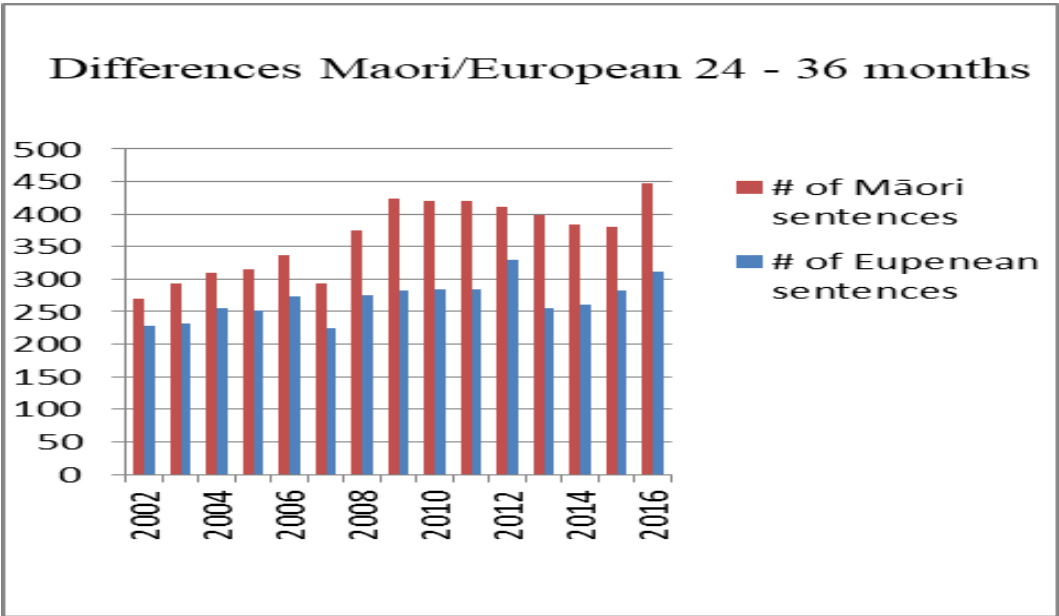


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 23.

Sentencing Differences Māori/European 24-36 months 2002-2017.

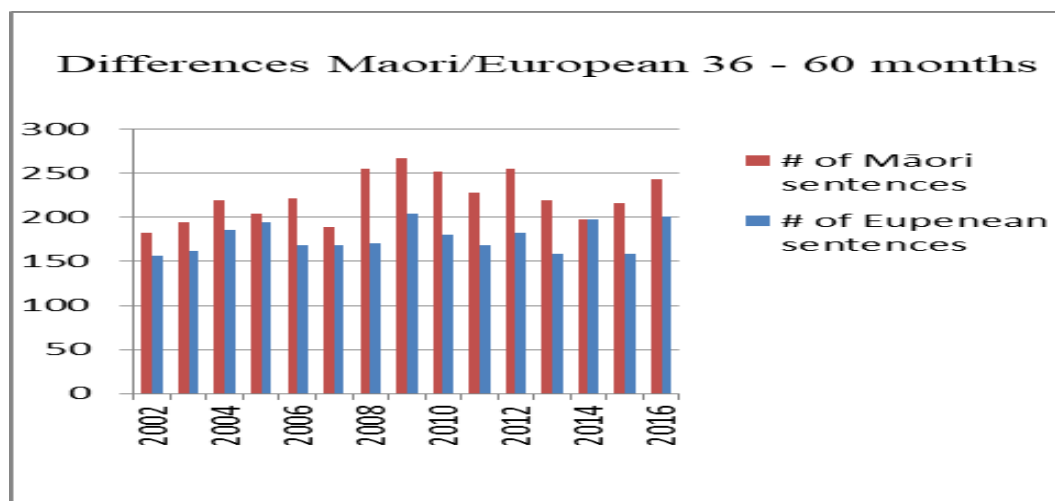


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 24.

Sentencing Differences Māori/European 36-60 months 2002-2017.

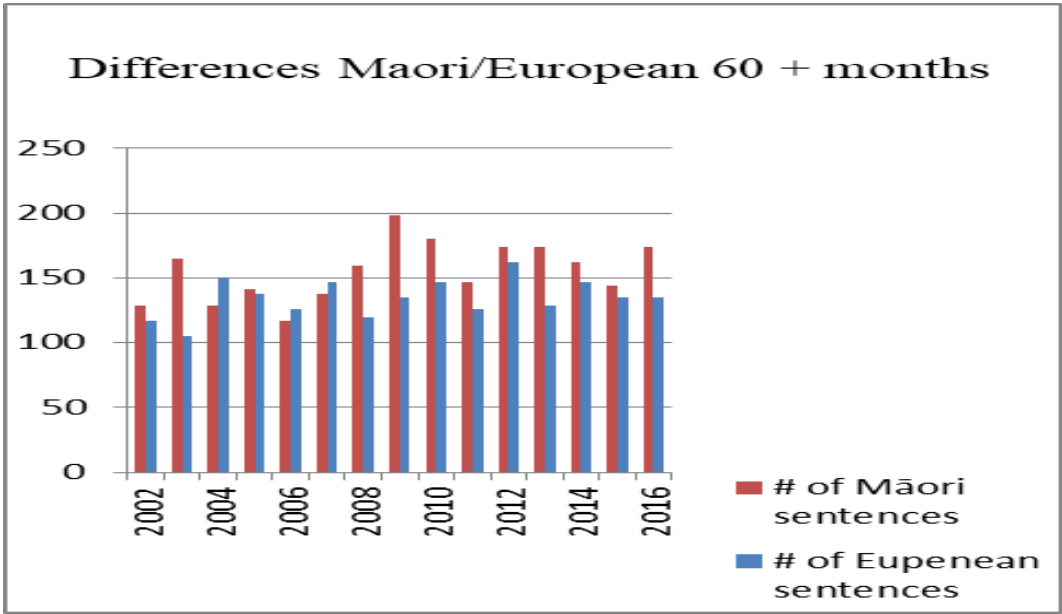


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 25.

Sentencing Differences Māori/European 60+ months 2002-2017.

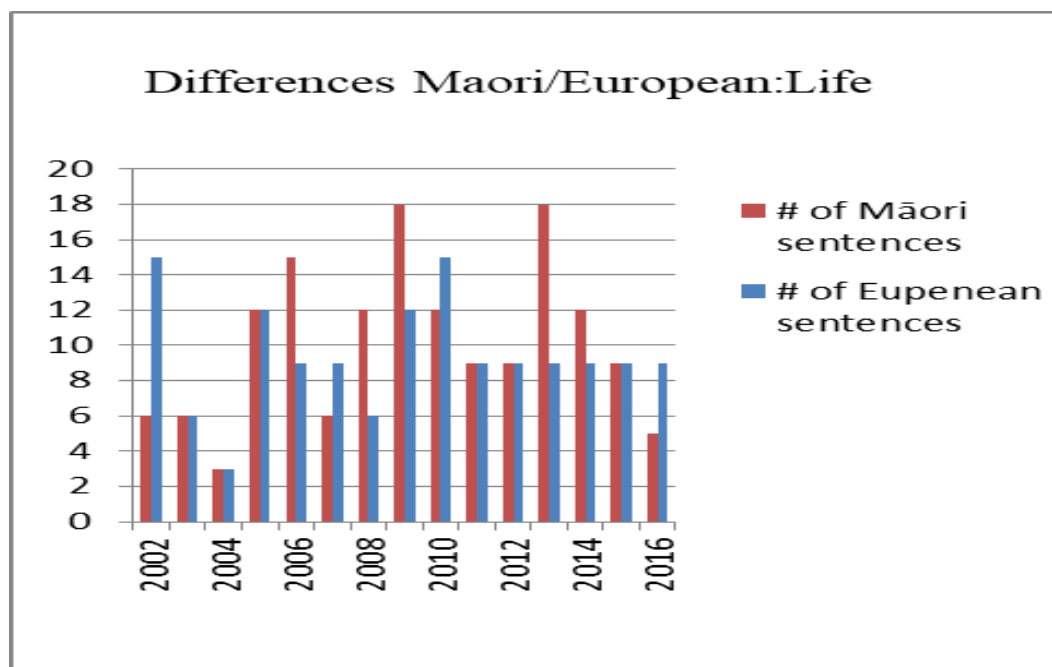


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 26.

Sentencing Differences Māori/European 'Life' 2002-2017.

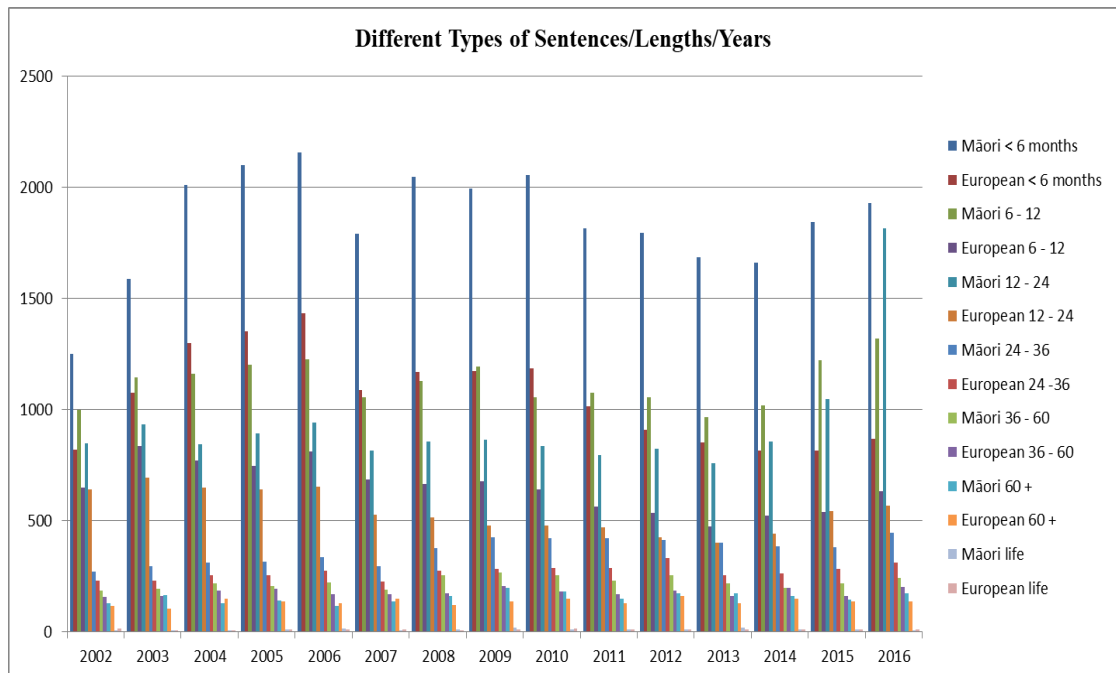


Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Graph 27.

Total of Different Types of Sentences per 2002-2017.



Source : NZ Statistics.

http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7321&_ga=2.157827647.466832892.1529319575-1193544294.1521933639&_gac=1.60418527.1529320187.CjwKCAjwgYPZBRBoEiwA2XeupdALaUIamU2-hkB7aQdrvB_ftRHpNq9PMR70QN9-xtBOnvmTrPHmWxoCEToQAvD_BwE

Appendix 2: Public Policy Chronology 2002-2018

2002

Crimes Amendment Act 2002 No 20.

Parole Act 2002 No 10.

Proceeds of Crime Amendment Act 2002 No 25.

Sentencing Act 2002 No 9.

Terrorism Suppression Act 2002 No 34.

Victims' Rights Act 2002 No 39.

2003

Bail Amendment Act 2000 No 60.

Crimes Amendment Act 2003 No 39.

Crimes Amendment Act (No 2) 2003 No 105.

Criminal Procedure (Mentally Impaired Persons) Act 2003 No 115.

Mental Health (Compulsory Assessment and Treatment) Amendment Act 2003 No 85.

Misuse of Drugs Amendment Act 2003 No 86.

Misuse of Drugs Amendment Act (No 2) 2003 No 107.

Sentencing Amendment Act 2003 No 109.

Summary Proceedings Amendment Act 2003 No 110.

Terrorism Suppression Amendment Act 2003 No 106.

2004

Care of Children Act 2004 No 90.

Children, Young Persons, and Their Families Amendment Act 2004 No 39.

Corrections Act 2004 No 50.

Criminal Records (Clean Slate) Act 2004 No 36.

Family Courts Amendment Act 2004 No 44.

Parole (Extended Supervision) Amendment Act 2004 No 67.

Sentencing Amendment Act 2004 No 68.

2005

Care of Children Amendment Act 2005 No 5.

Corrections Amendment Act 2005 No 97.

Crimes Amendment Act 2005 No 41.

Criminal Investigations (Bodily Samples) Amendment Act 2005 No 98.

Misuse of Drugs Amendment Act 2005 No 81.

Crimes Amendment Act 2006 No 6.

Crimes (Intimate Covert Filming) Amendment Act 2006 No 75.

Crimes of Torture Amendment Act 2006 No 68.

Evidence Act 2006 No 69.

Misuse of Drugs Amendment Act 2006 No 10.

Parole Amendment Act 2006 No 88.

Sentencing Amendment Act 2006 No 12.

Sentencing Amendment Act (No 2) 2006 No 89.

Summary Proceedings Amendment Act 2006 No 13.

Summary Proceedings Amendment Act (No 2) 2006 No 91.

2007

Bail Amendment Act 2007 No 26.

Care of Children Amendment Act 2007 No 44.

Children, Young Persons, and Their Families Amendment Act 2007 No 46.

Court Martial Act 2007 No 101.

Court Martial Appeals Amendment Act 2007 No 99.

Crimes (Repeal of Seditious Offences) Amendment Act 2007 No 96.

Crimes (Substituted Section 59) Amendment Act 2007 No 18.

Evidence Amendment Act 2007 No 24.

Parole Amendment Act 2007 No 28.

Prisoners' and Victims' Claims Amendment Act 2007 No 29.

Sentencing Amendment Act 2007 No 27.

Succession (Homicide) Act 2007 No 95.

2008

Bail Amendment Act 2008 No 107.

Children, Young Persons, and Their Families Amendment Act 2008 No 76.

Corrections (Mothers with Babies) Amendment Act 2008 No 88.

Corrections (Social Assistance) Amendment Act 2008 No 24.

Court Martial Appeals Amendment Act 2007.

Crimes Amendment Act 2008 No 8.

Crimes Amendment Act (No 2) 2008 No 37.

Criminal Disclosure Act 2008 No 38.

Criminal Investigations (Bodily Samples) Amendment Act 2008 No 9.

Domestic Violence Amendment Act 2008 No 77.

Juries Amendment Act 2008 No 40.

Misuse of Drugs Amendment Act 2008 No 13.

Misuse of Drugs (Classification of BZP) Amendment Act 2008 No 5.

Policing Act 2008 No 72.

Sentencing (Offences Against Children) Amendment Act 2008 No 109.

Summary Offences (Tagging and Graffiti Vandalism) Amendment Act 2008 No 43.

Summary Proceedings Amendment Act 2008 No 18.

Summary Proceedings Amendment Act (No 2) 2008 No 41.

Victims' Rights Amendment Act 2008 No 42.

2009

Anti-Money Laundering and Countering Financing of Terrorism Act 2009 No 35.

Bail Amendment Act 2009 No 45.

Care of Children Amendment Act 2008 Commencement Order 2009 Legislative Instrument SR 2009/77.

Corrections Amendment Act 2009 No 3.

Corrections (Contract Management of Prisons) Amendment Act 2009 No 59.

Corrections (Use of Court Cells) Amendment Act 2009 No 60.

Crimes Amendment Act 2009 No 47.

Crimes (Provocation Repeal) Amendment Act 2009 No 64.

Criminal Investigations (Bodily Samples) Amendment Act 2009 No 46.

Criminal Proceeds (Recovery) Act 2009.

District Courts (Criminal Proceeds (Recovery) Act 2009).

Domestic Violence Amendment Act 2009 No 43.

Parole (Extended Supervision Orders) Amendment Act 2009 No 6.

Sentencing Amendment Act 2009 No 10.

Sentencing Amendment Act (No 2) 2009 No 44.

Sentencing Amendment Act (No 3) 2009 No 49.

Sentencing (Offender Levy) Amendment Act 2009 No 42.

Sentencing (Vehicle Confiscation) Amendment Act 2009 No 37.

Summary Proceedings Amendment Act (No 2) 2008.

Summary Proceedings (Vehicle Seizure) Amendment Act 2009 No 38.

2010

Children, Young Persons, and Their Families Amendment Act 2010 No 102.

Corrections Amendment Bill 2010 No 243-3D.

Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Amendment Act 2010 No 59.

Criminal Investigations (Bodily Samples) Amendment Act 2009.

Misuse of Drugs Amendment Act 1978 Amendment Bill 2010 No 147-3L.

Misuse of Drugs Amendment Act 2010 No 72.

Sentencing Amendment Act (No 2) 2010 No 84.

Sentencing and Parole Reform Act 2010 No 33.

Sentencing (Offender Levy) Amendment Act 2009.

Summary Proceedings Amendment Act 2010 No 87.

Summary Proceedings Amendment Act (No 2) 2010 No 121.

2011

Bail Amendment Act 2011 No 82.

Children, Young Persons, and Their Families Amendment Act 2011 No 33.

Children, Young Persons, and Their Families Amendment Act (No 2) 2011 No 83.

Corrections Amendment Act 2011 No 84.

Corrections (Mothers with Babies) Amendment Act 2008.

Crimes Amendment Act 2011 No 29.

Crimes Amendment Act (No 2) 2011 No 34.

Crimes Amendment Act (No 3) 2011 No 79.

Crimes Amendment Act (No 4) 2011 No 85.

Criminal Disclosure Amendment Act 2011 No 86.

Criminal Investigations (Bodily Samples) Amendment Act 2009.

Criminal Procedure Act 2011 No 81.

Criminal Procedure (Mentally Impaired Persons) Amendment Act 2011 No 87.

Criminal Proceeds (Recovery) Amendment Act 2011 No 35.

Domestic Violence Amendment Act 2011 No 58.

Evidence Amendment Act 2011No 89.

Misuse of Drugs Amendment Act 1978 Amendment Act 2011.

Misuse of Drugs Amendment Act 2011 No 40.

Misuse of Drugs Amendment Act (No 2) 2011No 54.

Misuse of Drugs Amendment Act 1978 Amendment Act 2011 No 41.

New Zealand Bill of Rights Amendment Act 2011 No 92.

Policing (Storage of Youth Identifying Particulars) Amendment Act 2011 No 65.

Prisoners' and Victims' Claims Amendment Act 2011 No 43.

Sentencing Amendment Act 2011 No 47.

Sentencing Amendment Act (No 2) 2011 No 93.

Sentencing Amendment Act 2011 Commencement Order 2011 Legislative Instrument SR 2011/392.

Sentencing Amendment Bill (No 2) No 319-3D [enacted].

Victims' Rights Amendment Act 2011 No 95.

2012

Children, Young Persons, and Their Families Amendment Act 2012 No 99.

Crimes Amendment Act 2012 No 8.

Criminal Proceeds (Recovery) Amendment Act 2012 No 9.

Domestic Violence Amendment Act 2012 No 10.

Dumping and Countervailing Duties Amendment Act 2012 No 101.

Misuse of Drugs Amendment Act 2011.

Sentencing (Aggravating Factors) Amendment Act 2012 No 74.

Summary Offences (Alcohol Reform) Amendment Act 2012 No 122.

2013

Anti-Money Laundering and Countering Financing of Terrorism Amendment Act 2013 No 106.

Bail Amendment Act 2013 No 66.

Care of Children Amendment Act (No 2) 2013 No 74.

Children, Young Persons, and Their Families Amendment Act 2013 No 76.

Corrections Amendment Act 2013 No 5.

Crimes Amendment Act 2013 No 27.

Criminal Disclosure Amendment Act 2013 No 28.

Criminal Investigations (Bodily Samples) Amendment Act 2013 No 112.

Criminal Procedure Amendment Act 2013 No 25.

Criminal Procedure (Mentally Impaired Persons) Amendment Act 2011
Commencement Order 2013.

Domestic Violence Amendment Act 2013 No 77.

Evidence Amendment Act 2013 No 29.

Family Courts Amendment Act 2013 No 78.

Family Dispute Resolution Act 2013 No 79.

Family Proceedings Amendment Act (No 2) 2013 No 80.

Habeas Corpus Amendment Act 2013 No 9.

Misuse of Drugs Amendment Act 2013 No 31.

Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013
No 36.

Prohibition of Gang Insignia in Government Premises Act 2013 No 56.

Protection of Personal and Property Rights Amendment Act 2013 No 83.

Psychoactive Substances Act 2013 No 53.

Sentencing Amendment Act 2013 No 32.

Summary Offences Amendment Act 2013 No 33.

2014

Children, Young Persons, and Their Families Amendment Act 2014 No 36.

Children, Young Persons, and Their Families (Vulnerable Children) Amendment Act 2014 No 41.

Crimes (Match-fixing) Amendment Act 2014 No 67.

Parole Amendment Act 2014 No 37.

Parole (Extended Supervision Orders) Amendment Act 2014 No 69.

Psychoactive Substances Amendment Act 2014 No 24.

Sentencing Amendment Act 2014 No 38.

Victims' Orders Against Violent Offenders Act 2014 No 45.

Victims' Rights Amendment Act 2014 No 35.

Vulnerable Children Act 2014 No 40.

2015

Anti-Money Laundering and Countering Financing of Terrorism Amendment Act 2015 No 96.

Crimes Amendment Act 2015 No 95.

Crimes (Indecency) Amendment Act 2015 No 44.

Criminal Investigations (Bodily Samples) Amendment Act 2015 No 98.

Criminal Proceeds (Recovery) Amendment Act 2015 No 99.

Misuse of Drugs Amendment Act 2015 No 106.

Misuse of Drugs Amendment Act 1978 Amendment Act 2015 No 25.

Parole Amendment Act 2015 No 4.

Policing Amendment Act 2015 No 108.

Sentencing Amendment Act 2015 No 34.

Summary Proceedings Amendment Act 2015 No 35.

2016

Bail (Drug and Alcohol Testing) Amendment Act 2016 No 83.

Child Protection (Child Sex Offender Government Agency Registration) Act 2016 No 42.

Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Act 2016 No 98.

Children, Young Persons, and Their Families Amendment Act 2016 No 56.

Children, Young Persons, and Their Families Amendment Act (No 2) 2016 No 75.

Criminal Procedure Amendment Act 2016 No 61.

District Court Act 2016.

Evidence Amendment Act 2016 No 44.

Misuse of Drugs Amendment Act 2016 No 80.

Sentencing (Drug and Alcohol Testing) Amendment Act 2016 No 85.

Sentencing (Electronic Monitoring of Offenders) Amendment Act 2016 No 47.

Anti-Money Laundering and Countering Financing of Terrorism Amendment Act 2017 No 35.

Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 No 6.

2017

Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 No 31.

Crimes Amendment Act 2017.

Substance Addiction (Compulsory Assessment and Treatment) Act 2017 No 4.

Vulnerable Children Amendment Act 2017 No 32.

2018

Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 No 7.

Substance Addiction (Compulsory Assessment and Treatment) Act 2017 No 4.

Vulnerable Children Amendment Act 2017 No 32.

Appendix 3: s 27 of the Sentencing Act 2002

27 Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender

- (1) 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, whanau, community, and cultural background of the offender:
 - (b) the way in which that background may have related to the commission of the offence:
 - (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, whanau, or community and the victim or victims of the offence:
 - (d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:
 - (e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.
- (2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.
- (3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.
- (4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.
- (5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

**Appendix 4: Sentencing Cases: From 1st July 2002 to 1st March 2019
(Westlaw).**

1. Cases considered s 27 of the Sentencing Act 2002 and applied.

<i>Case Name/Citation</i>	<i>Offence/s</i>	<i>Judge</i>	<i>S 27 applied. at para;</i>
<i>R v Sanders</i> [2019] NZHC 164, 2019 WL 651362 High Court, Auckland, 15/2/2019, CRI-2018-044-2957, CRI-2018-044-2649.	Grievous bodily harm.	Jagose J.	[35]. Maximum term of 14 years imprisonment, minimum period of imprisonment of seven years. [36]. Assault with intent to injure, 12 months' imprisonment. [37]. Sentences to be served concurrently with each other.
<i>R v Duff</i> [2018] NZHC 2690 High Court, Rotorua, 18/10/2018 (2018) CRI-2017-069-543.	Murder/daughter.	Downs J.	[19]. 17 years.
	Manslaughter.	Brewer J.	[27].

<i>R v SM</i> [2018] NZHC 3345 High Court, Hamilton, 17/12/2018, (2018) CRI-2017-219-209.			2 years, 11 months.
<i>R v Cameron</i> [2018] NZHC 2046 High Court, Whangarei, 9/10/2018, (2018) CRI-2017-088-1600.	Aggravated robbery, kidnapping.	van Bohemen J.	[48]. S 27 not prepared: judge considered systemic Māori deprivation.
<i>R v Hurrell</i> [2018] NZHC 2505 High Court, Christchurch, 25/9/2018, (2018) CRI-2017-009-2687.	Manslaughter.	Nicholas Davidson J.	[40].
<i>R v Heta</i> [2018] NZDC 11085. <i>Solicitor-General v Heta</i> [2018] NZHC 2453 High Court, Auckland, 18/9/2018, (2018) CRI-2018-404-211.	Grievous bodily harm. Grievous bodily harm.	Moala J. Whata J.	[30]. [64] – [67]. S 27 argument that discount was manifestly excessive, but Whata J disagreed.
<i>R v Parker</i> [2018] NZHC 2035 High Court, Auckland, 10/8/2018, (2018) CRI-2016-055-662.	Sexual Offence.	Whata J.	[22].
	Sexual Offence.	Muir J.	[11], [33].

<i>R v W</i> [2018] NZHC 1945 High Court, Auckland, 1/8/2018, (2018) CRI-2017-092-8078.			25 percent discount for guilty plea.
<i>R v Alexander</i> [2018] NZHC 1584 High Court, Timaru, 29/6/2018, (2018) CRI-2016-009-9101.	Murder.	Davidson J.	[66].
<i>R v Taulapapa</i> [2018] NZHC 834 High Court, Auckland, 27/4/2018, (2018) CRI-2017-004-12360.	Kidnapping, burglary.	Woodhouse J.	[27].
<i>Taylor v R</i> [2018] NZHC 688 High Court, Gisborne, 18/4/2018, CRI-2018-416-6.	Possession of meth/ discharge without conviction.	Thomas J.	[9].
<i>Keil v R</i> [2017] NZCA 563 Court of Appeal, 5/12/2017, (2017) CA117/17, CA201/17, CA211/17.	Grievous bodily harm.	Kós P, Harrison J, Gilbert J.	[51].
<i>Oneroa-Hill v District Court at Tauranga</i> [2017] NZHC 2471 High Court, Tauranga, 16/10/2017, CRI-2017-070-15.	Substantial traffic fines.	Moore J.	[46].
<i>R v Evans</i> [2017] NZDC 21170 CRI-2016-292-000303 CRI-2016-004-012927 19 9 2017 District Court, Papakura.	Kidnapping, aggravated robbery.	Winter J.	[30].

<i>Solicitor General of New Zealand v</i> SC [2017] NZHC 2252 High Court, Hamilton, 18/9/2017, (2017) CRI- 2017-419-45.	Assault.	Whata J.	[42], [53].
<i>R v Ngatai</i> [2017] NZDC 18290 District Court, Manukau, 15/8/2017, CRI-2017-024-43.	Aggravated robbery.	Patel J.	[7].
<i>R v Simon</i> [2017] NZHC 235 High Court, Rotorua, 22/2/2017, CRI- 2015-063-2259.	Attempted murder.	Katz J.	[28].
<i>R v Tareha</i> High Court, Napier, 31/3/2015, CRI-2014-020-430.	Sexual offences, burglary, assault.	Toogood J.	[17]. Judge referred to Māori Cultural Report under s 26(2)(a) of the Sentencing Act 2002. [97]. 12 years, nine months with minimum imposed of 8 years.
<i>R v Rakuraku</i> [2014] NZHC 3270 High Court, Napier, 12/12/2014, CRI-2011-020-3916.	Kidnapping, murder.	Williams J.	[29].
		Davis J.	[7], [28].

<i>R v Rewiri</i> District Court, Kaikohe, 23/7/2012, (2012) CRI-2011-027-1264.	Aggravated robbery.		
<i>R v Bhaskaran</i> Court of Appeal, 25/11/2002, (2002) CA333/02.	Assault.	Anderson J. Williams J. Baragwanath J.	[15].

Appendix 5: Sentencing Cases: From 1st July 2002 to 1st March 2019 (Westlaw).

2. Cases considered s 27 of the Sentencing Act 2002 but not applied.

<i>Case Name/Citation</i>	<i>Offence/s</i>	<i>Noted at para;</i>	<i>Not applied at para;</i>
<i>R v Hone</i> [2018] NZHC 2605 High Court, Rotorua, 5/10/2018, (2018) CRI-2017-063-3504.	Murder.	[6].	[6]. Venning J.
<i>R v Jolley</i> [2018] NZHC 93. High Court, Rotorua, 9/2/2018, CRI-2015-063-3678.	Murder, attempted murder, offensive weapons, participation in criminal group.	[77].	[81]. Katz J.

<i>R v Taiapa</i> [2018] NZHC 1815. High Court, Tauranga, 20/7/2018, CRI-2017-016-1092.	Manslaughter.	[37].	[39]. Lang J.
<i>R v Wereta</i> [2017] NZHC 935, 2017 WL 1929161 High Court, Palmerston North, 10/5/2017, CRI-2015-054-1747.	Kidnapping, sexual offences, wounding with intent to injure.		[56]. Thomas J. Imprisonment of 13 years together with a minimum period of six years, six months imprisonment.
<i>Fane v R</i> [2015] NZCA 561, 2015 WL 8128721 Court of Appeal, 23/11/2015, CA62/15.	Grievous bodily harm.		[29]. [43]-[47]. France P, Asher J, Collins J.
<i>RS (CA21/2014) v R</i> [2014] NZCA 484 Court of Appeal, 1/10/2014, (2014) CA21/14.	Sexual violation, burglary, breach of protection order.	[5], [8].	[18]. Harrison J. Goddard J. Venning J.

<i>R v Mika</i> [2013] NZHC 2357. High Court, Christchurch, 10/9/2013, (2013) CRI-2013-009-1924.	Motor manslaughter.	[66].	[67]. Gendall J.
<i>Mika v R</i> [2013] NZCA 648. Court of Appeal, 12/12/2013, (2013) CA688/13.	Motor manslaughter.	[12], [14].	[15]. Harrison J, France J, Dobson J.
<i>Mason v R</i> [2013] NZCA 310, (2013) 26 CRNZ 464 Court of Appeal, 17/7/2013, (2013) CA558/2012.	Murder.	[37].	[41]. France J. Stevens J. Miller J.
<i>Taikato v District Court at Tauranga</i> [2012] NZHC 560, [2012] NZAR 471 High Court, Tauranga, 27/3/2012, (2012) CIV-2012-470-109.	Breach of home detention.	[42].	[53]. Wylie J.
<i>Police v Hati</i> District Court, Whakatane, 30/4/2009, CRI-2009-087-793.	Driving excess breath alcohol.	[7].	[10]. Rollo J.
<i>R v P</i> (CA400/08) [2008] NZCA 469 Court of Appeal, 5/11/2008, CA400/08.	Sexual offence.		[] Baragwanath J, Priestley J, Venning J.
<i>R v Raharui</i> [2017] NZDC 26061 District Court, Papakura.	Grievous bodily harm.	[26].	[26]. McGuire J.

<i>R v Takao</i> High Court, Rotorua, 19/9/2003, T030733.	Unlawful detention.		Randerson J.
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Appendix 6: Sentencing Cases: From 1 July 2002 to 1 March 2019 (Westlaw).

3. Cases not considered s 27 of the Sentencing Act 2002 but could have.

<i>Case Name/Citation</i>	<i>Offence/s</i>	<i>Judge</i>	<i>At para/sentence</i>
<i>R v Karekare</i> [2018] NZHC 1364 High Court, Tauranga, 11/6/2018, (2018) CRI-2016-087-1518.	Grievous bodily harm.	Whata J.	[11]. Defendant did not take the opportunity to engage in the preparation of a s 27 report.
<i>McLean v Police</i> [2018] NZHC 102 High Court, Wellington, 13/2/2018, (2018) CRI-2017-441-45.	Assault with intent to injure.	Churchman J.	[48]. Successful appeal against 12 months imprisonment; substituted with four and a half months home detention.
<i>R v Houia</i> [2018] NZHC 1056 High Court, Hamilton, 15/5/2018, (2018) CRI-2016-019-5890.	Aggravated robbery.	Jagose J.	[47].

			Three years, four months imprisonment.
<i>R v Thomas</i> [2018] NZHC 819. High Court, Hamilton, 27/4/2018, (2018) CRI-2017-019-6387.	Manslaughter, reckless driving.	Moore J.	[84]. Six years and six months imprisonment; minimum period of imprisonment of three years and three months.
<i>Reweti v R</i> [2018] NZHC 809 High Court, New Plymouth, 26/4/2018, (2018) CRI-2018-443-3, CRI-2018-443-4.	Aggravated robbery.	France J.	[1]. Successful appeal against two years nine months sentence. [26]. 10 months home detention.
<i>R v Karauria</i> [2018] NZHC 1184 High Court, Napier, 24/5/2018, (2018) CRI-2017-020-3874.	Murder.	France J.	[24]. Life imprisonment, order to serve 12 years before being eligible for parole.
<i>R v Borell</i> High Court, Christchurch, 12/12/2018, CRI-2016-009-12679.	Murder.	Mander J.	[24]. Life imprisonment, to serve a minimum

			period of imprisonment of 10 years.
<i>R v Wereta</i> [2017] NZHC 935 [2017] NZHC 1762 High Court, Auckland, 28/7/2017, (2017) CRI-2016-044-3270.	Common assault, with weapon.	Woolford J.	[26]. 13 months imprisonment.
<i>Police v Koroheke</i> [2017] NZDC 6903 District Court, Christchurch, 31/3/2017, (2017) CRI-2016-009-8105.	Burglary, receiving.	Garland J.	[30]. Three years and two months.
<i>R v Broughton</i> [2017] NZHC 523 [2017] NZHC 523 High Court, Whangarei, 22/3/2017, (2017) CRI-2015-088-3587.	Supplying class: A drugs.	Toogood J.	[15]. Two years one-month imprisonment.
<i>Wharerau v Police</i> [2017] NZHC 72 High Court, Auckland, 3/2/2017, (2017) CRI-2016-404-403.	Burglary, possession of ammunition, breach of bail.	Downs J.	[18]. Successful appeal allowed and sentence quashed. A term of 22 months imprisonment is substituted instead of a 25-month term of imprisonment.
	Murder.	Brewer J.	[30].

<i>R v Smith</i> [2016] NZHC 2581 High Court, Rotorua, 28/10/2016, (2016) CRI-2016-087-304.			Minimum period of imprisonment of 13 years.
<i>R v Christy</i> [2016] NZHC 2520 High Court, Whangarei, 21/10/2016, (2016) CRI-2016-088-1216.	Wounding with intent, sexual offence, threat to kill.	Whata J.	[67]. Twelve years imprisonment.
<i>Tangitu v Police</i> [2016] NZHC 2484 High Court, Rotorua, 18/10/2016, (2016) CRI-2016-463-37.	Fraud, obtaining by deception.	Palmer J.	[26]. Unsuccessful appeal against 12 months imprisonment.
<i>R v Poarau</i> High Court, Rotorua, 15/3/2016, CRI-2015-463-62. (Successful appeal against home detention).	Grievous bodily harm (daughter).	Brewer J.	[39]. Mr Poarau's criminal history (and pre-sentence report) show that his violent behaviour was not driven by cultural factors. [40]. By allowing a sentencing discount for cultural factors would be tantamount to saying that a person's cultural background can

			excuse (at least in part) violence toward women. Not a case where a discount for cultural factors can be justified. [56]. Brewer J substituted a sentence of three years imprisonment for the quashed sentence of nine months home detention.
<i>Iwikau v R</i> [2016] NZCA 423 Court of Appeal, 8/9/2016, (2016) CA180/16, Wild J, Courtney J.	Sexual offences.	Woodhouse J.	[36]. Unsuccessful appeal against preventive detention.
<i>R v Solomon</i> [2016] NZHC 1653. High Court, Auckland, 19/7/2016, (2016) CRI-2014-092-8748.	Murder/daughter .	Davison J.	[68]. Life imprisonment; minimum serve of 17 years.
<i>R v Rogers</i> [2016] NZHC 1103 High Court, Whangarei, 24/5/2016, (2016) CRI-2014-088-3309.	Misuse of drugs.	Moore J.	[64]. Nineteen years imprisonment.
	Manslaughter.	Lang J.	[25].

<i>R v Hunt</i> [2016] NZHC 881 High Court, Tauranga, 4/5/2016, (2016) CRI-2015-087-885.			Five years, one-month imprisonment.
<i>R v Wright</i> [2013] NZHC 863 High Court, Whangarei, 19/4/2013, (2013) CRI-2011-029-801.	Manslaughter.	Katz J.	[38]. Four years, three months imprisonment.
<i>R v Tapatahi</i> District Court, Kaitaia, 1/2/2012, (2012) CRI-2010-029-1010, CRI-2012-027-228.	Grievous bodily harm.	McDonald J.	[31]. 2 years 10 months imprisonment. On the attempting to pervert the course of justice six months imprisonment. Those terms to be served concurrently.
<i>R v Young</i> [2012] NZHC 1460 High Court, Auckland, 7/6/2012, (2012) CRI-2011-092-1800, CRI-2011-092-1799.	Manslaughter.	Duffy J.	[69]. Nine years imprisonment.
<i>R v RHB</i> High Court, Rotorua, 12/10/2012, CRI-2011-087-1316.	Male assault female.	Duffy J.	[72]. Three years and six months imprisonment.

<i>R v Clarke</i> High Court, Auckland, 7/4/2011, (2011) CRI-2010-090-1184.	Grievous bodily harm, excess blood alcohol.	White J.	[48]. Five years, four months.
<i>R v Kapea</i> High Court, Hamilton, 22/2/2011, (2011) CRI-2009-019-10579.	Manslaughter.	Duffy J.	[80]. Bryce Kapea; 7 years and 3 months imprisonment with a minimum period of imprisonment of 3 years and 7 months imprisonment. [81]. Tauria Kapea; 5 years and 3 months imprisonment. [82]. Terence Beazley; 5 years and 3 months imprisonment.
<i>R v Leaf</i> High Court, Napier, 8/2/2011, (2011) CRI-2011-020-2954.	Theft, assault.	White J.	[65]. 6 years 7 months imprisonment.
<i>R v P-T</i> High Court, Whangarei, 14/5/2010, CRI-2009-088-2118.	Sexual offences.	Gendall J.	[29]. No discount for guilty plea. [31]. Seven years 6 months.

<i>R v Tiatoa</i> High Court, Auckland, 11/10/2010, CRI-2009-055-1007.	Neglect of child.	Venning J.	[37]. Tiatoa, two years, six months. Leathers, two years, six months.
<i>R v Matenga</i> District Court, Palmerston North, 1/5/2009, (2009) CRI-2006-054-1525.	Theft, fraud.	Garland J.	[29]. Two years imprisonment, home detention declined.
<i>R v Putua</i> High Court, Auckland, 22/9/2009, (2009) CRI-2008-092-17198.	Misuse of drugs.	Harrison J.	[16]. Two years imprisonment.
<i>Herewini v Police</i> High Court, Auckland, 7/7/2009, (2009) CRI-2009-404-111.	Misuse of drugs.	Duffy J.	[15]. Successful appeal against a sentence of two years and one month's imprisonment; reduced to 16 months.
<i>MacPherson v Police</i> High Court, Rotorua, 3/10/2008, (2008) CRI-2008-470-29.	Robbery.	Andrews J.	[49]. Successful appeal against sentence of 3 years two months; home detention.
			[91].

<i>R v Martin</i> High Court, Auckland, 18/5/2007, CRI-2006-004-17743.	Burglary, sexual offences.	Winkelman n J.	Five years imprisonment.
<i>R v Amohanga</i> High Court, Hamilton, 6/3/2007, (2007) CRI-2006-019-2933.	Attempted murder.	Cooper J.	[51]. Two years imprisonment; leave granted for application for home detention.
<i>R v Worters</i> High Court, Auckland, 29/8/2006, CRI-2004-092-10022.	Misuse of drugs.	Stevens J.	[15]. 80 hrs community work.
<i>R v Anderson</i> High Court, Hamilton, 14/10/2005, T20514. <i>R v Howe</i> High Court, Hamilton, 14/10/2005, T20514. <i>R v McFall</i> High Court, Hamilton, 14/10/2005, T20514. <i>R v Allmark</i> High Court, Hamilton, 21/10/2005, CRI-2003-019-20514.	Misuse of drugs.	Priestley J.	[48]. Mr McFall; 11 ½ years. [54]. Mrs McFall – 10 years 3 months.
	Sexual offences.	Laurenson J.	[45].

<i>R v Winiata</i> High Court, Auckland, 30/9/2005, CRI-2004-092-14076.			Sixteen years imprisonment; minimum nine years.
<i>R v Prime</i> High Court, New Plymouth, 7/8/2002, (2002) S5/02.	Misuse of drugs.	Laurenson J.	[27]. Two years three months imprisonment.

Appendix 7: Interview Questions and Responses

Questions.

1. How are s 27 reports commissioned?
2. What are some of the advantages and disadvantages, from the Judge's perspective, of receiving an s 27 report?
3. Are, from the Judge's perspective, s 27 reports under-utilised? What are the reasons for any underutilisation?
4. What are the benefits in having cultural speakers under s 27?
5. How does the community benefit if s 27 is addressed?
6. How can s 27 be understood to help reduce Māori over-representation?

Judge Response “D”.

Q1.

When we first started and were encouraged to use them, the court, we would refer the person, we would direct a s 27 cultural report be prepared and at first instance, similar, to legal aid. And because of the expense they decided not to pay.

So now you either have to fund it privately or apply to the legal services agency. I think they are pretty good at allowing them, but it takes so much time to get all those sorts of things done. And it's really the same pool of money. So that's how it's working at the moment.

Q2.

I haven't experienced any disadvantage other than a couple of reports I've had from people who I don't think understood the purposes of it. But the advantages are that particularly for report writers that are Māori, the clients seem to relax in the company of the report writer more than they would with a probation officer. So, if it's a good report and the person has had a good rapport, you get information that you would never ever get and often are quite in depth.

The probation report might say D was abused as a child, but you get it wrong in the detail about it. The advantage of a really, good report, one woman, she goes through the section and relates the information to the section which is incredibly helpful.

So, she actually applies what she had learnt to the various subsections that are found in the Sentencing Act. It's really helpful. But you just get so much more helpful information that you would never get either from the probation report or the counsel because people really, just don't open-up. But they do with these reports.

Q3.

They were until the last 18 months or so. And it's simply because nobody asked, and I think as judges we haven't really thought about the benefits of getting a cultural report. To be perfectly honest, it is not a section that we have seminars alike. It's not a section that has been referred to in the past, but now it has become something that we realise that it is an important part of the sentencing process.

Q4.

I haven't actually; experienced a cultural speaker yet. So, I can't really comment on that. Anecdotally I think provided they can stay focused because time is a real pressure. They can be incredibly helpful from what I've heard and often very powerful. It sounds quite cold but the pressures here are so huge that we aren't given the liberty necessarily to let people possibly address us as long as they might want to.

Q5.

If we can save one person through a report by putting in place appropriate rehab and support, that's, a save in their community. When every person you can turn away from crime: that helps the community in every way.

Q6.

I think the problem is that a lot of people who haven't been exposed to *tikanga* and the like don't have an appreciation of that past, present and future, how it all connects and how Māori connect to their land and their sea, and their water and we deprive people of those things with the results that we see.

So there needs to be more public discussion about it. For instance, there was a letter in the editor today; a young offender had dragged a couple of people out of a van—and he got home detention.

There is a typical letter to the editor saying, "How ridiculous is this?" So, people need to be educated about the effects of colonialism and the fact that we need to address that to try and help the over-representation of Māori in the prisons.

If I try to explain it to some people, family members who possibly don't have the same political lens as me, a couple of them don't really get it. So, it needs to be discussed in a public forum a little bit more. Even if there was an article in the Herald, about one of the report writers, about the impact of what they do, at least some people could understand, you know, here's prison and here's home detention; there are so many variables, and they can be addressed really well in those reports.

We probably need more report writers. Because I know that there's a woman called 'Y' and she wrote a couple of fantastic reports, so I emailed her, and she's snowed under. 'X' is snowed under. So, we need to get some more who are qualified and want to do the job.

If they are properly written, they are very valuable. If you are legally aided, your counsel will apply to fund one. Now that the Ministry are not funding them. I understand that legal aid is pretty much if it's reasonably serious crime they will do that, but you probably need to talk to some of the defense lawyers. So, there is funding available now. There was a slight gap, then there wasn't but I think it's up and running again.

You have to make sure that we see a copy of your thesis when you're finished.

Judge Response “E”.

Q1.

To my knowledge there's been a change in the way they have been commissioned. Up until about a year ago there were requests through the court and funding was provided through the Ministry of Justice. Now that changed to my knowledge after the decision of Justice Venning.

The High Court indicated that the court was no longer able to provide funding for these so, my understanding and I might be wrong is that the counsel then now need to either fund it privately or there needs to be a grant through legal aid and that is how the defendant is funded, counsel's cost. How willing the Ministry of Justice for legal aid in terms of funding such reports, I don't know. So that's my understanding and again I might be wrong, I'm not sure.

Me: Why did the High Court indicate that the court was no longer able to provide funding?

Think about when the funding for the cultural reports were withdrawn, what about rights to representation? Human, constitutional rights.

Q2.

There's been a recent decision of the High court, Justice Whata in Heta that looked at the s 27 reports and the scope of what discounts that can be given to defendants in a very detailed way. And what Justice Whata said there is that any material in the report that ought to, it might be attached to a discount has to be referable to the offending.

In that case there was a history of alcohol abuse which was learned through the defendant's parent and His Honour considered that there ought to be some discount for that because the offending was referable.

One of the reasons for the offending was an alcohol issue that the defendant learned from the parent, but His Honour went on to say that in that case that past trauma and alienation from cultural ties, systemic Māori deprivation didn't in that case didn't attract any additional discounts.

Some of the reports that I have seen have been helpful in that they identified those aspects where Justice Whata has said it can attract discounts. It's also interesting to read about the genealogy of the person involved, the historical background in terms of deprivation, social and cultural but until the High court says that it can attract discounts it remains of interest if anything else.

Q3.

That really lies with counsel. They ought to know the background of the client and they ought to make a call on whether such a report would help. In some respects, a pre-sentence report can cover all the issues Justice Whata talked about.

I had one recently that went into the background of the defendant in considerable detail and that substituted anything for I consider I could have had in a cultural report. It didn't go into systemic Māori deprivation and that sort of thing but in terms of a personal background of the defendant, his parents had been in gangs, his uncle had been in gangs, he had been whangai, had been through foster homes, it went into a considerable amount of detail. So, if you get a good pre-sentence report, it ought to cover all those points.

Getting back to your question, whether underutilised or not, it could be covered in a pre-sentence report, but counsel is the ultimate arbiter of that. The word needs to get out to counsel, I think.

Q4.

I've never had a cultural speaker in court. The information I've received in respect of s 27 has always been a written report but maybe they would cover the same ground. Usually, we have a list with 15 sentencings, maximum 15 minutes each which goes for 4-5 hrs. There are time pressure issues. I prefer a cultural report because you don't know how long things are going to take. It just adds pressure in the backend.

Q5.

Well, it could mean that someone who might otherwise has served a sentence of imprisonment, or a punitive sentence doesn't, or appropriate discounts are given, and the right sentence can be tailored to the offence/s that have been committed and

that's a benefit to the individual and a benefit to his or her whānau and the wider community. Otherwise, we're getting people sentenced to punishment or orders that might not be otherwise appropriate.

It's getting that right fit for the offence and any information that helps us get that right fit is a benefit to everyone. I know for example, the approaches of some judges, some people are more punitive than others and some people have more of a rehabilitative focus. You might get some regional differences, whether that's been documented or not, I don't know.

But I know for example in some courts, that approaches to some offences for example, breach in community work, is far more punitive than here, for example, in the Northland area, I understand that it's not uncommon for people to receive sentences of imprisonment for a second breach of community work offence. Whereas here personally I very rarely imprison people for breach of community work.

Q6.

I don't know how to answer this question. I don't know if this is correct or not, you'll tell me if it is or not. Have you interviewed people that have undergone a s 27 report? *Me: No.*

Are you going to interview someone who has had a cultural report done? *Me: I could look, into that.*

The reason why I ask that question when you asked that last question is that it might be of benefit, well it would be of practical benefit to the person, the defendant, but could there be a situation where this is the first time in the course of the report that a defendant has found out about his or her whakapapa about his or her heritage, about alienation, about the reason he or she is where she is, so it might not only be of benefit to the community at large, but also the particular defendant to open their eyes and ears about who they are and their place in the world; because that could be the first time that someone has found out about that sort of thing—particularly when ties have been broken down, how do you know what your lineage is and that sort of thing.

I did a similar sort of thing the other day with that presentence report. I didn't refer to s 27, but I refer to all the material in the pre-sentence report which is effectively an s 27 report. So yeah, gave this guy quite a considerable amount of discount as a result because he was raised by people from a gang from a very early age, so he didn't really have a chance. He was always going to be a gang member and was always going to lead to a life of crime, so that was referable to the offending. So, I thought I'd ought to give him a discount for that. Still, he ended up having a really, long sentence of imprisonment, but it was less than what it could have been.

Do you have any other questions?

Me: Why are there inconsistent sentencing decisions for similar offenses?

We all have bias. It's all built into us. It's a question of recognising that and trying to step away from it but until you recognise it. What's the point in having it (s 27) unless you're going to get funding to do it? Without the scope of getting those reports, then it's just, it's just a Clayton's provision isn't it?

I don't know the reasons why the court can't fund it, but it will be interesting. I kind of know why Christian didn't provide a discount for social deprivation. I think one of the issues is that "How do you quantify social deprivation?" You know like how do you go from one person to another?

Judge Response “F”.

Q1.

Well, with difficulty, really, simply because the Act doesn't actually say that we have any ability to order s 27 reports. And initially when s 27 reports were starting to become more utilised, counsel, were requesting that we order a s 27 report, which we did, and the Ministry of Justice would pay for them. That created some difficulties in the end.

The Ministry of Justice decided they weren't going to pay for them. So essentially, the way that it works now is that counsel will tell us that they're going to provide a s 27 report. We might suggest that we might very well say we will be helped by a s 27 report. But at the end of the day, it's up to counsel to provide it.

They then would need to, if they don't have private funds, which of course these reports are relatively expensive, they are then required to seek legal aid approval for them. Legal aid will sometimes fund them, sometimes not.

I'm not sure what criteria they adopt, how some get funded, and some don't. That's something you will need to ask legal aid. But if they are funded, we will generally engage with somebody such as 'X' or 'Y' to prepare a very full report.

The other way: that we get s 27 reports, it's a bit of a misnomer to call them reports because they're not really reports but the cultural information can be provided to us by family members or kaumātua, for example, who know the family well. And I have myself experienced very powerful oral s 27 reports.

One file in particular: I remember there were two young men, both Māori, charged with aggravated robbery, it was the first time they were in court. So, they had no previous convictions. Of course, with an aggravated robbery charge and a plea, they were looking at a starting point of somewhere around four and a half years in prison.

At court, in sentencing, both young men both had very strong family support. So, there were potentially half a dozen to a dozen for each of the young men. And members of their family spoke about them, how they planned to support them, what

they planned to do to help them, either if they were sent to prison or not on release or if they weren't imprisoned during the course of any home detention sentence.

It was very powerful, very effective, and enabled me to give quite a significant discount for cultural factors which ultimately ended up with the combined effect of youth, guilty pleas and the cultural aspects raised under s 27 had an end point of home detention. So that's how reports come to us.

Q2.

I'm not sure that there are any disadvantages apart from sometimes is what happens is there is a delay because particularly where there is a report that is commissioned by 'Y', 'X' to write them professionally because I know in particularly 'Y' is quite sought after and so, for example, I had a situation yesterday in court where I was supposed to sentence somebody where a s 27 report had been requested but hadn't been finalised for whatever reason or even started I think. So, counsel is asking for an adjournment. And the report wouldn't be available until the end of September. So, of course that is quite a significant delay. So really, that's the disadvantages that I see.

Advantages, well advantages are many. Under s 26 of the Sentencing Act, we do get information from community probation about cultural factors but often that is not very full enough for us. There is not really a great deal of information, and they tend to be dependent upon how good the report writer is. But under s 26 of the pre-sentence reports, it may include information the whānau, community, and cultural background.

So, these sorts of things are also considered in s 27. That is specifically in presentence reports. And that information, sometimes it's quite good depending upon who writes the report. But generally, it's just based upon talking to the defendant, potentially one or two family members.

Whereas the s 27 reports are generally much fuller, contain a lot of background information, and, also, they contain the relevant information relating to how the cultural factors have impacted on the offending. The effects of colonisation: those

kinds of things, or personal experiences which can be linked, and directly contributable to culture which can be directly linked to the offending.

The advantages are that a tremendous amount of information that we get. Even oral reports from family members, we still get a lot of information about the defendant. And, also what is helpful is some structure about what can help them particularly if there is to be a non-custodial sentence. So, we may couple home detention or community detention or intensive supervision with specific conditions which are focused on cultural aspects.

I often will direct that the defendants engage, they may not necessarily be Māori, but a Māori tikanga course of that sort, or those kinds of things. And a lot of that information can be taken from the s 27 reports. So, we keep referring to them as reports, but the actual Act just really talks to a defendant who may request the court to hear the person or persons speak on those factors.

I think traditionally it was potentially intended to be an oral report in just providing a cultural background but it's sort of morphed into this report which I think is a positive aspect. I think it is something that I would personally like to see added to the legislation as a report. And also, some funding was made available for these reports.

So, the advantages are of course a tremendous amount of information about a defendant because they are a good report. It shows the linking of the offending to the cultural aspects so specific credit can be given for that. And a good report will suggest programmes or a course which may assist the defendant moving forward to support them in their rehabilitation and those sorts of things. I think that really covers that aspect. In short, it's a tremendous advantage if it's a good report.

Q3.

The answer is yes. It's particularly, there are a number, of reasons I think, the first might be:

1. Counsel aren't motivated enough to obtain the necessary information.
2. They may, for example, apply for funding for a report that's declined.

3. But then no effort is made to talk to a whānau member or a kaumātua or someone of that sort to actually, come along, prepare the information, bring it to court and if necessary, even give an oral report to the court.

I think, some of it falls at the feet of counsel. Other of it, is simply, they just can't get the funds. So often, counsel will say they are going to see if they can get funding for a s 27 report from legal aid. And if that funding is not made available, then that report just doesn't happen. If the funding is available and it's been approved, then we get a report.

So, I think and sometimes counsel, although that's becoming less and less the case, are rarely becoming aware of the provisions of s 27 and so they don't realise what's possible under that act, although as I am saying it is becoming less and less. Ok, so now as judges are becoming more in tune with it and are initiating "Have you thought about a cultural report?"

Q4.

Well I suppose that depends on how much knowledge the speakers have of the person, of the culture generally, but of the person, because there might well be some cultural aspects given, but if they don't know the person or haven't got time to know the person then sometimes there's a disconnect between the culture factors and what is really required from us to be able to link the cultural factors to the offending.

But as I've said, I have benefitted in the past from very powerful oral speakers, who have provided a tremendous amount of information about the culture; they've known the person, or they've taken the time to do that. And potential pathways in moving forward and programmes and support they can get.

Q5.

If you look at the provisions of s 27 itself, if you've got information about the personal family whānau and community cultural background of the person that is of great assistance to you because sometimes the pre-sentence report are not as full as they could be.

Again, that's resourcing issues. Sometimes the probation officers run short of time. Sometimes themselves, they don't have the cultural awareness of the knowledge to be able to write the reports. All the training, sometimes, well they're trained but I don't think they've specific training as such or the knowledge such as 'Y' or 'X' who provide very full good reports.

The way in which that background may have related to the commissioning of the offence, another part, that's very important because if you get that link of how the cultural aspects may have contributed to the commissioning of the offence, you can sometimes find pathways and programmes to ensure that rehabilitation is focused and avoid reoffending because there are specific things you can do and of course the community benefits from somebody who no longer continues to offend.

Me: Is that how s 25 is construed relating to adjournment?

We adjourn to get the cultural information. We always adjourn to get either a presentence report or any other information. Sometimes you would adjourn. So, if for example, you've got cultural information which suggests programmes which may help to discount a sentence, sometimes what you can do is use s 25 to adjourn to enable those programmes to be completed.

We will commonly do it for drug offending, so if somebody has a drug addiction or an alcohol addiction, I will sometimes for example, they will plead guilty and then you remand any sentencing off, sometimes for as much as a year, or even longer, to enable them to complete at Odyssey House or something of that sort. So that's where it's commonly used.

But of course, there is nothing to stop you adjourning a sentencing off to enable in particular cultural programmes to be undertaken. But generally, you put that as part of a sentence rather than adjourning it to enable that to happen.

So, I don't generally use s 25 for that purpose because to get a cultural report or adjourning to get that information. So, generally I wouldn't use it, so if I didn't have the information, and at sentence, I could adjourn at that stage. Say for example, someone has asked they've wanted a s 27 report to be able to organise it, I would

then adjourn sentencing to enable that information to be provided. That's the common situation.

I less commonly adjourn for example, a specific tikanga programmes of that sort to be undertaken, but I will very commonly adjourn for drug rehabilitation and alcohol. And of course, that is all beneficial to the community.

So, the information under s 27 can also include, for example, family huis, or meetings, or informal restorative justice rather than doing it through a formal restorative justice programme. Often there are huis with family members and that information is brought to our attention through these reports or through an oral presentation which shows there has been healing already between the victims and the defendants. So sometimes, that can happen.

And the benefit of that of course is again, you have victims who feel they've been heard, and they see benefit in the process and of course you see the defendant whose actually then seen how the offending has impacted on the victim. And that in itself can be sufficient to just to change the way they live their lives and prevent other offending in the future, so they turn over a new leaf so to speak.

And again, in terms of the main ones under s 27 it relates how support from the family or whānau and may be made available to prevent further offending, specific programmes or specific help is offered by the family or supporters. And sometimes it's in the form of people who've had alcohol addictions. They have their sponsors in court who will be supporting them through various programmes to remain alcohol and drug free and those sorts of things.

So, although the Act talks about s 27 reports, it talks about hearing from a person. So often we will invite people to speak, to present that information to us as well. Sometimes the information that we get will enable us to provide specific discounts in sentencing through the s 27 process.

Sometimes, there was one matter I had, there was a very powerful s 27 report and that one was from 'X', and it was a particularly violent, criminal offending. And because of a lot of aspects to that offending, I didn't give any discount for the cultural factors raised but what I was able to do, the Crown was asking for a

minimum non-parole period, it was someone who was sentenced to imprisonment, and they were asking for a minimum non-parole period of something like 3-4 years, otherwise they would be eligible for parole quite a bit earlier.

The effect of that report that I had enabled me to say no I am not going to impose a minimum sentence of imprisonment. What I am going to do is direct that all this information contained in this report be provided to the parole board so that they have this information available to them to decide at what stage the offending would be paroled. So that was the impact of the s 27 report.

Sometimes it can be to reduce the minimum non-parole period. For example, you could be looking at the minimum of five years, the minimum non-parole period may be three years or two years. That could be the impact of the report.

Where I find the reports most persuasive and helpful is that if you are on the cusp of a sentence of imprisonment, or home detention and often the information provided in those reports can tip the balance between sending someone to prison or sending someone to home detention with a structured programmes under conditions. And often that can help with that process and be extremely powerful in that way.

Q6.

I was not quite sure what this question was aimed at; understood. It certainly can, a lot, in terms of judges it's a lot more understood about how powerful it can be and I think it has been used a lot more and initiated a lot more by judges suggesting some of this information, that it would help and of course that would help the situation for over-representation in prison because there's more information available, more structured programmes like anybody, it can help.

Understood to help reduce Māori over-representation; I suppose if I have interpreted the question correctly, understood by the community and by the families, that they are able to provide this information to the court, which could help in terms of specific programmes or support, the family and whānau, the iwi, or which other organisation can provide, to ensure that they remain offence free and

don't fall back into offending. So that's how I would interpret that question although it might be aiming at something different.

Me: It was more aimed at the public. Would it be more beneficial if s 27 was discussed a lot more across the board?

Absolutely! I'm sure it's now taught in law schools because it's become such an important part and there's so much now out there and we had Andrew Little the other day talking about the whole process although I think he does some things wrong. I don't think his understanding was actually very good even though he was talking about it, but I think his focus on s 26 I don't think he understood that we don't often get that information via s 26 reports.

And I don't think he understood that it's not evidence that's given in court in terms of s 27, he seems to be talking about evidence given in sentencing and s 27 but didn't seem to understand that a report as such, the Act doesn't even talk about a report and talks about an oral, talks about providing information, and that can be in the form of a report, of course, but as I've said and some of the most powerful ones I've had have been through oral presentations by kaumātua or family members.

It's also, I know that question is talking about Māori over-representation, but I've had cultural reports of other ethnicities, Samoan, Tongan and it's becoming a lot more understood as well in different cultures and not just Māori and I think it is important because any information we get about an offender at sentencing time is helpful and if we get cultural information.

For example, there was something in the paper yesterday about a Chinese man who had offended in Christchurch and cultural information was provided. It was a 76-year-old man, and a cultural report was provided of Chinese custom that he would not have seen what he had done as wrong in a Chinese man.

Obviously, we need to be careful with that kind of information, but it does help in terms of our understanding of the process and can help by educating people through our judgments and sentencing notes about what is culturally appropriate in New Zealand and what is not culturally appropriate in New Zealand.

And while it might be culturally appropriate in another country, for example, physically discipline is often one that comes up, particularly Pacifica, there is more a theme, or readiness to use physical discipline, whereas here it needs to be understood that while it might be part of the culture where they come from, it is certainly not part of New Zealand's culture.

And so, an education process can help as well. So that's where more knowledge, so communities can help and communities know how to present this information to the court, suggest specific pathways for the offender where they will help and provide the support, or they can gain somebody professionally to write a report knowing that they can do them, they can talk to their lawyers about cultural reports and actually getting the information before the court.

They can also talk to probation officers when they're writing the impact reports, so they can get the reports that way. So, an understanding of cultural aspects can help. The more information you get, and the criminal offending is linked to cultural aspects, you can give allowance for that discount, so the more information you've got, potentially there are significant discounts you can give for cultural factors particularly if they are linked to programmes or specific support.

And in that way, what that means and as I've said, and this is where the reports are most helpful, is the difference between prison or not. Because that means you know you are putting somebody into a situation where they have programmes, they have support, appropriate cultural support.

Because sometimes the courses that are provided aren't always accepted by defendants because of their particular culture. There are language barriers sometimes, so I know for example, there are specific Chinese counselors out there who are providing anger management to people who speak Mandarin or Cantonese, and they may not have had the benefit of those programmes if they were sent to a normal programme which was conducted in English. So those kinds of things can help in terms of cultural aspects but as I say in terms of the over-representation, the more information we have, the more structured and informed we can make sentences which may make the difference between prison or not.

Of course, if you get them on programmes and you get them engaging then that rehabilitation can sometimes be quite far reaching and prevent re offending. I would like to see funding a lot more readily available for these reports. Because I think they can sometimes be extremely powerful and helpful to us and the more information we get the more structured and informed our sentences can be. So, I think that probably covers it unless you've got questions of me that cover a lot of what I want to say about the reports.

Me: Why are there inconsistent sentencing decisions?

If for example, there were no cultural reports or structured programmes, a person may end up with a prison sentence that otherwise may not have been because they didn't have the support in the community. Because sometimes, people, for example, don't have an electronically monitored sentence, so you've got no choice.

So, if you're getting to a state where 24 months or under you can consider an electronically monitored sentence so obviously you will understand how the sentencing process works where you've got a starting point, then you look at deductions for various things and then get to a point where you're 24 months or under you can look at an electronically monitored sentence.

If that person does not have the support in the community or an address or an appropriate address, then there's no choice but to put them in prison. So, if for example, there was iwi involvement in providing accommodation, support, those kinds of things or family involvement, then that person could have avoided being sent to prison.

Even if they are under 24 months doesn't mean that they are automatically given home detention even if they have a home address because if for example, they have been a person who had a previous home detention, numerous breaches or had breaches of community work, court orders, those sorts of things, there may not be a lot of confidence that the person would comply with the conditions to home detention.

But if there was a cultural report that indicated the programmes they were going to do, indicated the support that was available to them, the cultural support, then that

could make a difference, even though in the past they had committed or breached these, we would know then that they didn't have the support, but now they do so that could make quite a difference when we look at a sentence.

So, have you been analysing reports that have made decisions? *Me: Yes.* I have had several cultural speakers and I encourage it and as I say sometimes, they can be extremely powerful. I have a couple of decisions and you may have come across them. It was an appeal to the High court, so I'll give you the reference. It's called [undisclosed court case]. That one looked at, oh no I set it out in quite good detail, however, there is name suppression. I'm not sure if I can give you that one. But if you look in the District Courts, whether it's in there or not, I don't know, but in this one there was a very full report, cultural report was written by 'X', and it was seventeen pages. And as I said it is a compelling document.

The report relates to the relevance of culpability, and it goes a long way in explaining why Māori are over-represented in our prison system. And then I referred quite extensively to the report. "And so, I urged party to counsel a discrete discount for your highly manipulative behavior demonstrated and violent actions, father of your children, to engage in treatment, cultural report, not going to order." To assist in rehabilitation, there is a growing awareness, the parole board, direct cultural report, so parole board is informed. So, release conditions can be formulated. Minimum period of parole is not warranted.

See I've got copies of reports here, but I don't know if I can give them to you. Have you contacted 'Y'? *Me: No.* 'Y' is a company called XXXX. She was at XXXX, but she has now moved to XXXX. She's writing reports, very good reports. Yeah 'Y', she's the managing director of XXXX, she has done some very good reports. So, I'm sure she will be able to help out as well. But this one here, 'X' wrote the report.

Judge Response “G”.

Q1.

The mechanical process is started essentially by the judge directing, calling for an s 27 report. Now that can be triggered by counsel asking for one or sometimes the judge on his or her own initiative thinking that they might be assisted by such a report—asking for one independently of the wishes of counsel. So then, having called for one, I know that there is this issue at the moment as to who pays for it. Initially, our view was that the Ministry would accommodate it, but it was something, that was contemplated by either legislation to be used in the sentencing process.

But after a while I understood there was a pushback which meant that my understanding now is that they are ones called for, privately commissioned by the defendant who wants to take advantage of the contents of the report. Now how that is done is generally in one of two ways, either pay for it themselves privately, or they can persuade legal services to pay for it. And I know that the task of the lawyers is made easier with legal services if there is a direction.

So, I’m happy to give a direction which the lawyer then in turn uses it within the services to persuade them that the legal aid grant should be extended to allow for that. That’s my understanding.

Q2.

The biggest advantage is just knowing a little bit more about the defendant and understanding a little of their whakapapa and who it is in that holistic sense, who we’re looking at and dealing with. The problem I have with some of the reports is that they don’t give me that sense. And that’s probably perhaps because the demand for them is so fresh, those providing them may not know exactly what the court is after.

Because there’s a few cases in this area now, guidance from higher courts saying how a cultural report can be useful. But before those cases a lot of it was that we were flying blind as to what the report should contain. So, I expect therefore then

that since these cases have been published and received more widely, that the quality of reports overall will improve, if that makes sense.

Another disadvantage in calling for the report is that if it's going to be a written report, and because of the dearth of report writers, people who have particular expertise in this area, it will slow the process down. So, there will be an additional delay associated with a s 27 report being called for. And that delay is frustrating for everyone involved.

The judge, court staff, lawyers, and the defendant. So, that's the biggest disadvantage I see. I mean, I'm conscious that the report need not be in writing, it can be a verbal report. But the trend I think, and I can understand why for some lawyers who take comfort in paper, the trend is to put forward a written report.

I guess that's probably in the work that we do, that everyone wants a permanent record. So, if there's a written report, it goes on the file. Later on, it can be easily searched, picked over, a little more difficult to do with an oral report. There's audio recording of course. But they're not as easy to search as the written hard copy file.

Me: Are defendants, if they are unaware of their whakapapa, allowed to read their reports?

As I said, I'm kind of speculating, because when I was in practice, I never really had an understanding, of s 27 as we do now, so there was never an emphasis on it. So, I never guided a client through the process. Given that a report, in theory, should be made with the involvement and participation of the defendant, you would expect the defendant to know what's in it. And you'd expect the defendant to know what was in it, even if he or she didn't personally take part in its preparation. Say for example, the report writer decided not to interview the individual, but interview others, it's a defense commission to report, so it's in the hands of a defense lawyer, you would expect that lawyer to have given a copy of that report to the client, the defendant, so that they knew before sentencing what was in it. So, because we're the last to receive it. So, does that answer your question? *Yes.*

My expectation of good defense counsel is someone who holds their client in every step of the criminal justice process, makes them aware of what is taking place and

why it is taking place. So I would expect counsel to, if they're asked for a report, or even if they haven't asked, if I've decided I think that I might be assisted by a report, they would be expected to explain things to their client and then having obtained the report, give the client a copy of the report and have said to them, please read this, if not read it and let's talk about it, so that the client knows exactly what the report states, and how, in the opinion of the lawyer it might be presented to their best advantage. But I don't see that necessarily as a role of myself to perform in the middle of the sentencing. I would have thought that all of that work should have been frontloaded by the lawyer.

Me: Is there a time allocated if a cultural report was produced?

The court lists are paired with an estimated time per case. The need for a cultural report might extend that time estimate or it might not. It depends on a number of factors as well. So, in terms of the actual hearing time a s 27 report, in my view, doesn't blow the estimate out. In terms of the time, it takes to get to the hearing, yes, the process can be lengthened by several weeks. I know of a case last week, that was called in front of me, and the lawyer stood up and said we've asked for a s 27 report from a writer. The writer is busy and won't be able to produce the work until several weeks out from that day.

So, the hearing will need to be adjourned. And that was the only reason for the adjournment that day, for that report to be prepared. If the hearing was going to go ahead without the s 27 report we could have done it there and then, so as I see, the one disadvantage I see in the s 27 reports is the timeliness, and delays frustrate everybody including the defendant. So, it's just trying to make the defendant aware that the delay here is the need to get all, of the information that everyone thinks to be important, to be reconsidered and made allowances for at a sentencing stage.

Sounds like more report writers are needed and what qualifications would be required or any training that could come from that? I never really thought more widely than what would I do if I were in the shoes of the defense lawyer? Where would I look? How creative could I be in finding people who had the necessary expertise.

That's probably as far as I've ever gone in my own thinking because I've never actually had to find a report writer. I can only trust in the expertise and the thinking of defense lawyers.

Q3.

There's more awareness now and how they can be used more advantageously for a client.

Me: I find it interesting that in the Bhaskaran case, cultural speakers were not allowed, despite a general application for all defendants.

That is not to say that judges were blind in the importance of social deprivation and how that's had an impact. We just don't know, going back and looking at the individual sentencing remarks, and seeing what the judge did or did not take into account, it's difficult to be sure.

Q4.

It makes it more real. Do you know what I mean? Certainly, if there is someone who is willing to speak for someone, a defendant, and give all the whakapapa background, it just brings to life that would otherwise be on a A4 sheet of paper. So, you know, I think Māori place great stock in oral advocacy. So too does the criminal court. We, the court, it's a forum for oral advocacy. I, in many instances, would prefer oral speakers to a written report. I'm buried in paper as it is, do you know what I mean? But that view has to be tempered with I think with what I told you earlier was perhaps a preference for a written and complete and unambiguous paper report which is what you get in paper form. So, I'm not critical of other lawyers who rely more heavily on written material.

Q5.

My view is that what we all strive for is a just result. And that can only be obtained if the court is given all of the relevant information and if we are, then the just outcome benefits society, because everyone gains, confidence is maintained in a system where the penalty metered out is not disproportionately harsh.

Q6.

If there is a tipping point between jail or no jail, and the missing piece of information that makes a difference is something that's buried in a cultural report that a judge would otherwise not see if there wasn't a cultural report then, that fact would point a greater utilisation of other sentences than just imprisonment. That's how I would put it anyway.

Going back to the s 27 report, my only other observation would be is where some of the s 27 reports I've seen are less helpful is when there is no connection drawn between what is in the report and the offender. My view is that there needs to be a bridge. In a lot of instances is where the defendant's cultural background has led to the offending. But sometimes it needs to be spelt out. It really needs to be put into the report and it's not there sometimes.

So we get an impression of the individual's whakapapa, but what has happened to that person's whānau and hapū which has led to that person being an offender, it has not always been there, so the linkage isn't there, there's no causative relationship between the two, so a lot of the reports have these two diverse sections, you know, background offending, but they need to do more, there needs to be a linkage for there to be an explanation about how that background has led to this offender. So, I'd encourage report writers to do more work in that area.

Me: How are s 26 reports written? Are they insufficient as well? Or do they do a little bit better than what you've just mentioned?

I don't know if they do better. I think that s 26 reports are often written with that very connection in mind. And sometimes s 27 reports are not. In my experience, the ones that I have seen. So, there's a disconnect there which is apparent in a lot of sections, not all of them. I don't want to give you that impression, but in some of them there is that disconnect that needs to be better addressed.

Me: Why are there inconsistent sentencing decisions?

I think judges will recognise the importance of being consistent within ourselves, and our brother and sister judges because consistency is important because it feeds into the notions of credible justice system, it's predictable, it's certain. Of course,

there is always going to be disparity sometimes because it is a human process after all.

Do you like cricket? *Me: Yes, I do.*

I kind of liken it to a game of LBW, leg before wickets, right? And some umpires will give it, some won't, and it depends on a whole bunch of factors. It's like rugby and the warriors. Yeah.

There are all sorts of rules about what constitutes a good 'Out' LBW, from where the batsman's hit on the pads, to the time whether it's the bowler bowling the ball, whether it's left arm, right arm, or coming around the wicket, through the wicket, whether it's a spin bowler. And the umpire has to take all of these variables into account based on he or she sees and make a determination whether the batsman's out or not out and you'll get variation. Some umpires will say out, some will say not out, and you know, it's hard to work out why there's inconsistency sometimes, but other times you just simply put it down to, that is what one umpire does and saw where a different umpire would have done and saw.

Judge Response “H”.

Q1.

In [undisclosed District Court] the experience we’ve had is probably a little bit different to other areas. Initially, when I first started kind of looking at s 27, we started directing reports to be done. And the Ministry for a time was prepared to pay for them. So, when we directed them, the Ministry would fund it so long as we could give details as to who would be a suitable report writer and that was done with the help of the lawyers. That soon came to an end, when it got traction and there were a lot of reports being written.

And so, I’m not sure exactly when it was, when the Ministry said no, we would not be funding the reports anymore. I could probably find out and let you know later but yeah, and part of their reasoning was that the actual section does not give power of the court to be able to direct one.

So, the interesting thing from that period because I was one of the strong proponents of directing a report and so I, to my mind it did a lot for the section in terms of exposure, in terms of getting lawyers on board, in terms of, like the reports that we did get, were so good, a lot of them, some of them were not so good. But a lot of them were written by ‘X’ which I’m really thankful about because the quality of her reports, were so good. I think that in that period a lot of lawyers and judges, kind of appreciated and learnt how important those reports were and the difference between those reports and the really, slim pre-sentence reports we were getting from Corrections.

So, while I acknowledge that technically the Ministry didn’t have to fund it, I’m so grateful that they did for those initial reports because it really kind of brought those reports into court and made it something that was, for sentencing, for some of our offenders, it made, those reports take a center stage in sentencing hearings, so I’m really grateful that we had that time because before then, you know, not many people were using them.

Because the other thing that I think about s 27 is that it’s all very well to say, hey, you can have a cultural speaker to speak on your behalf, but we have a justice

system that is not oral, that does not really rely on oral information that we are given in court, we have a justice system that is European and relies on written material that judges can hang their hats on, not like the Polynesian cultures, which are oral, that doesn't to me, I don't think that that has the same value in this justice system.

So that's why that period to me was really, really, important. And that's why I still, I'm of the view that a written report, until judges get to a point where we've changed our approach in terms of valuing oral submissions that we get in court and what the family members actually say. Until we get to that stage, this is what we have, to do in order to elevate that information to a different place.

The other thing too is I think you know the court has a tendency to value a professional, an independent if you like giving you this information as opposed to, for example, a family member, or their mother, or their partner and it shouldn't be the way but this is part of how our legal system is, that we rely on professionals, and we can say yes, that's independent and the weird part about that is that the individual gets the information from the families, and from the defendant, but it's just something that we do in the legal system here.

So, I think now, so that period ended, and we couldn't direct reports and it was paid for by the Ministry, so what then happened is that families would have to either fund it themselves, you know, together with the help of their lawyers, to try and find a suitable person if there isn't one in the family. And legal aid I know that those who have legal aid lawyers can get their lawyers to apply to legal aid under the criteria of an expert type of evidence, expert witness and ask the legal services to fund it.

But it's a lot harder because I'm certainly not seeing as much of the reports now as I was, when we were directing them and getting them funded. So, every time, I get a sentencing where I think a report might make a difference, I suggest it, and what I generally do now is I write on the charging document that the lawyer together with the family will arrange a cultural report just so that it is in the file for the next judge who picks it up. That judge can say hey, what's happened to the cultural report because if I don't do that at the entering of the guilty plea then the sentences will just proceed without one.

So I try and encourage the lawyers if there is especially a young person who is facing a sentence of imprisonment, I would always turn my mind to whether a report should be done to reduce that sentence and to get more information in front of the judge who is going to be sentencing that person, especially if I'm not going to be the one sentencing the person because normally, you have a guilty plea entered and the file could go to anyone.

Some files, we keep, we must sentence, so if for example, I did the trial, then I would keep that for sentencing, but if I don't then another judge will be picking up that file for sentencing and you want to know that the judge is getting good information because I have always from the beginning the cultural report always gave me way more information than I would get from a pre-sentence report.

It is rare that I pick up a pre-sentence report and feel like you know what or why this person has offended and why they have ended up there in front of you. And that process now is largely taken away from us in terms of the commissioning of the report that is now on the lawyers to do that for the defendants. So by and large that's how we get them now.

Q2.

It's the written as opposed to the oral. Written is valued more. It is having an independent professional or expert type person that is valued in our system of justice more than a mother getting up and saying and explaining although I've had two or three good reports from mothers, but for a lot of the defendants families, they are not well educated, they are not confident, they are not, they don't know if something is relevant or not, you know it's a huge expectation, so I think there is real merit in having a semi-professional type person, a person in a, with the caliber of 'X' to do them.

Me: Would that be beneficial if the defendant got the opportunity to read the report, let's say if they did not know about their whakapapa genealogy and if they were going up for probation or looking at release in less amount of time, the pipeline for it in terms of..... yeah, once they're in custody.

The information is always so much better. I assume from the sentencing phase which where we are involved that the lawyer had at least shown the defendant that

report before the sentencing hearing so that's the assumption because all information that are used in sentencing are supposed to have been run past the defendant.

But you're right I guess for things like parole and early release, those sorts of things and even in prison, if they are getting some kind of counseling or doing programmes that kind of information would be useful, to be used after the sentencing. Absolutely, and yeah and I think a big thing is that the impact that a report has on a judge you know, I think we are at that very early stage where judges here are so much better with cultural reports, we're still at that early stage where you know having a really well written report by a professional is going to make a hell of a difference as opposed to a family member doing it. I mean you should be able to get both you know. So those are the advantages and disadvantages.

And I think, one of the advantages of getting a cultural report is, I know certainly with 'X', the reports she has done, she can extract information from these defendants they do not want to give to a probation officer or a department of Corrections probation officer. She is removed from the process, some of these people who have dealt with the police, with corrections for years, or there is generational concern about the way they are dealt with by the system, so having someone outside the justice system doing a report. Someone who is from the same culture as them, someone who is wanting to make things good for them and they know that they can trust this person. They are more likely to disclose things that are really, personal like all sorts of family trauma.

If you can imagine like a son coming up for sentencing and a mother is doing it, there might be some things that the mother doesn't know about their son that the defendant hasn't disclosed to the family. There might be sexual abuse within the family that might not be well known. You know those sorts of things that a defendant would be, really, comfortable talking to an outsider, a professional, someone who has a cultural understanding of that defendant. So, I think that that's a real advantage of you know of getting a report from someone other than the family or someone just getting up and speaking.

Me: There would probably be time issues?

Yes, and the beauty of having a cultural report too is that the judge has time. So, when we have a sentencing, we have to read and prepare the file. If you have a cultural report and it's a good report, you as a judge have time to read it and digest it and make allowances for it and think about it. And that has a different impact on your ultimate decision as opposed to you being on this busy list and someone getting up to talk to you and you have no time to give it the kind of attention that you do if it comes to you in a report beforehand.

So you have time to consider it and weave it into your preparation of your decision because people think that judges, we are not superhuman, we have to be able to gather information, digest it, there are so many things to balance and if you've got written reports, that is a really advanced warning, here, and you are more likely to take it on board than if you are just sitting in court listening to it for the first time. That's too much to ask of us, to then try and incorporate all of that into your decision. Whereas you get it beforehand, because a lot of these reports are lengthy and it's nice to have time to read it, think about it, and digest it before going into court.

It would be good if the section had a provision for us to be able to direct a report because then it can be paid for. That's what I would like to see. I would like to see the ability to be able to order a report because I place a lot of value on those reports. I feel like when I read a report, I feel like I'm sentencing someone I actually know, like I know about that person, because if I sentence someone who doesn't have one, I don't feel like I have enough information to really know why it is that they have done what they have done, and so I place a lot of value on them.

Q3.

You know we're learning more and more about our justice system, about the problems that we have when we just kind of deal with people without looking behind the offending and the causes of the offending and I think there's been a huge development there lately. So I think previously, s 27 didn't have that kind of value because I don't think we understood enough, I don't think we prioritised the causes of the offending and I think we just thought about the behavior of the person and now the understanding of why people offend and you know a lot of these people have struggled since they were born, a lot of them have been in care and so I sit in

the youth court as well, so I see how the causes of the offending are not straightforward, it's not that they're bad people, it's because if you look at their background some stuff has happened to them.

You've just got to look, into our Youth court. A lot of our kids have care and protection issues, you know there's been a lot of neglect, abuse and exposure to violence and that kind of stuff has an impact and so that doesn't go away when they're adults, it just keeps going in this vicious cycle and then they have children that are subjected to all of that because they haven't been exposed to solid good parenting and resourced homes.

So, we know why these people end up in the criminal justice system. There has been stuff that has been done to them. There is cause or causes of offending and I think we are using s 27 more because there is a different understanding not just by the experts but by those that work in the legal justice system including judges.

I know that from the training that we've had, we know that what we are doing is not working, because the percentage of Māori people in prison is increasing still and the rate of recidivism is high. So, we know that the things that we've been doing for years is not working. So, we do need to look at the problem differently and be courageous in the way that we approach it. So, I think it would be good if there was, more resources thrown at the report, the report writers and if it was paid for, we'd have, the ability to direct those reports. Yeah, that would be great.

Q4.

I think both is good. I think the reports are good. I think also having a speaker is also good. Like I said to you before, that's all fine if they're talking to me, but I don't know if all judges would respect the speaker as much as they would in an independent report written by a professional like 'X'. I think both is wonderful.

We should have cultural speakers and the good thing about the ability to have those cultural speakers in court is that more than one person can do it, you know, families can do it together, if they are prepared, families can get up and speak about the defendant and I think the benefit then again is the same. More information for the judge so that the judge truly knows who this person is, and we don't just get the behavior, we don't just get the crime, we get what's behind it, how did it get to this

place? And I guess having the cultural speakers in court, yeah, I think both are really, important.

Me: Is it a situation where you have one or the other?

You can have both in the same way you can get lots of letters which are akin to cultural reports from family members. Oh absolutely, the act provides for a speaker, so if they want to give a cultural report, if people want to speak as well as a written report, that would all be fine in my reading of the section because they're cultural speakers and if the judge doesn't allow someone to speak in terms of s 27 and I think from memory the judge has to give reasons as to why not, so there is a presumption that the cultural speaker will be allowed to address the judge.

Me: What would it look like if we had cultural writers from Pacifica and training?

We've been having cultural writers, we've had Samoan cultural reports, Tongan cultural reports, Indian ones, so it's not just Māori. Obviously, the cultural reports are different and depending on where the cultural reports are from but yeah, we have the whole range and the section doesn't even talk about Māori, it talks about cultural reports and that could be from anyone, so we've had a whole full range. I've had a lot of Samoan ones, and yeah, and all of them have been incredible.

And there's a lot of academics that are prepared to do them, so not just 'X', we've had like graduates and academics write them, the Samoan ones, and the Tongan ones, some of them really good. Some of them not so good. But what we've been doing here at [undisclosed District Court] is that if we get a report that isn't good then we go back to the lawyer and say, hey, these parts of the report are good but I want to know more about these parts and what we encourage them to do is to go through s 27 and use those provisions as headings, the issues covered under s 27 and a lot of them are getting good at that.

They would have those headings in the reports and address them because I don't think they're hard and I think for an academic who knows their culture really well, it's a matter of going through the sections and having those headings and addressing the information that's required from those headings and trying to make some of

those links between that information, that background between cultural background, the way they were raised and the offending.

So, I like it when the report writer can do that, but I don't think it requires specialised kind of training. It needs someone who really understands the culture, whether it's Samoan, or Māori or Tongan and someone who can interview and extract the information well, who's got some human communication and interaction skills, and someone who can make the connections between the cultural background and the offending, how that can be linked to the offending. I think judges still want that.

Q5.

Well, we are imprisoning Māori at a rate that is really unacceptable. And I think the benefit of s 27 is that we begin to understand that we as a society have created this problem and we all have got to be a part of the solution and we should be looking at individuals when we are sentencing, not just saying, hey your behavior is the same as all the other Māori people that are in front of us, therefore, this is the sentence you'll get. It allows us to tailor that sentencing and I'm hoping that it will reduce the lengths of prison sentences and it might reduce a sentence of imprisonment down to sentence of home detention, that's where it would really have its mark and I think, because part of what the section says is, "Are there alternatives?" "Can you come up with an alternative plan that they could do?" And not all reports do that.

But a lot of them suggest that he needs to make connections to his marae, or he needs to make some inroads with te reo or their identity, it will help them connect with their whānau better and a good cultural report will not only make the link between the background and the offending but will also say, hey, if you are thinking about an alternative to prison, I recommend these courses, I recommend a Māori drug and alcohol programme or a te reo class or some of kind of tikanga course.

A good cultural report will offer an alternative to prison because you can't just say to me oh look, this is a cultural report and not give me any options, so if the person recommends some programmes and some courses or some education training or whatever, that is a really good indication that the judge will say, hey, this is a really

good plan, these are the people that are prepared to support you, like, for example if you have family members who are prepared to do all of the driving to and from the courses, so an aunt can say, I'm prepared to pick him up every Thursday to take him to his drug and alcohol course. That's how families can provide an alternative to prison.

So, don't just come and say to me, don't send my son to prison, what will you do? How will you support him so he doesn't reoffend, how will you help his rehabilitation?"

So that is what the section envisages. There are alternatives, give me an alternative and I will use that alternative whether it's to impose intensive supervision or supervision sentence or community detention plus supervision and they can do that plan while they're on it and then it gives you the opportunity to monitor it as well. You can do judicial monitoring and say I want to see a report from you from the probation officer or from your counselor or whoever every three months to see how you're going and I'm going to keep an eye on you.

So, I think that the benefit to the community is that we focus on rehabilitation and that we understand the defendant better and we understand what they need in order to stop offending because we know that prison doesn't work. That's our system of justice and I've sworn an oath to apply the laws, so I do send people to prison, but I know that there are better alternatives and I think that s 27 reports can help us with rehabilitative options.

Q6.

If we get a report, it's likely to reduce their sentence. It's likely to reduce the time that they are getting in prison. If we get a report that has an alternative plan and with rehabilitative programmes, they are going to get a chance of trying to rehabilitate rather than coming out of prison and going back in. So, I do think that it will, if it's applied widely, you know, we will start to see an impact of the reports of the rate of imprisonment.

Me: In terms of s 25, adjournment, does it apply to some offences?

That applies to all offences. That section applies to any charges and it's quite a wide provision and it allows you to adjourn it in order to obtain more information or something as well. Yes, I use that a lot because that is the other option you have is to adjourn it so they can start the rehabilitation programmes or finish it, if you don't trust them. I did a young, he was an 18-year-old. He had sexual offending with his cousin and an aggravated robbery charge.

And I didn't know about the aggravated robbery charge. He had a sexual offending charge. So, I had given an indication of home detention if he was going to do the SAFE programme which is 18 months to two years. And when the aggravated robbery charge came up, I think I got a cultural report then and affidavits of his family and they gave a real clear plan that he was going to live with this aunt and uncle. He's going to go to this SAFE programme, his adopted sister was going to do that, so they gave a clear plan, so I sentenced him on one lot of charges and adjourned the other and put him on home detention and so far, I'm monitoring him because I will sentence him in terms of the aggravated robbery after he has completed the sentence for sexual offending.

So s 25 I've used, yeah, I can use them in order to implement, because if I don't think if an offender is going to be serious about doing an alternative plan, that is an option that is available that you can put them on bail and adjourn the sentencing so they can do the rehabilitation programme so you can check whether they are being serious about rehabilitation or not.

Yeah so, I'm hoping that s 27 can reduce our rate of imprisonment for Māori. We know that that's why the provision was enacted in the first place, to try and address it and I think that we have worked in the justice system, have really failed to use it, and use it well in order to reduce the sentences that some people are getting and be more courageous in terms of the rehabilitative options and not going to prison. So, I'm really hopeful that if we're all using it, it will have some impact.

Me: Would it not be beneficial if it was broadly applied, and someone wrote an article about it?

Yes, I know we got a lot of publicity when the Heta decision came out, but I don't think it's enough, you know. It's all very well to say that there is an authority but

if people are not using it, if people are not asking judges for a discount, if people are not getting cultural reports cultural information in front of the judge, then what's the point? It's got to be applied. We've got to use it as much as possible. Otherwise, it's a waste of time, it's a redundant provision.

When you start in this job you're very concerned about doing the right thing and you don't have the courage to give people chances but once you settle into the job, that's one of the things that I've learnt, I think I have a lot more courage now to give people opportunities to go on a rehabilitative sentence as opposed to when I first started and you're learning and you're overwhelmed and you're finding your feet, and after a while you realise you've got this ability to make things better. You've got this opportunity to give people a chance on a rehabilitative sentence because that's what's going to work. Most of the people who are in front of us would do better with love and support and rehabilitative programme and it's quite a hard thing I think for judges to balance and we all approach it slightly differently, you know which we're all entitled to but I think you will find that there are a lot more of us who are prepared to give people those opportunities because you know that if you offer someone that chance and they take it and they do well, then the community will be protected because they won't be reoffending.

That's the real consequence, that's what we can look forward to if these people are successfully rehabilitated. They won't come back. Then no one will be hurt, rather than acting in fear thinking, Oh I just want to lock this person up. I think it takes a lot of courage and there are very courageous judges here like Judge XXXX.

I think s 27 is hugely important and we've failed in our duties as lawyers and as judges to pay attention and I'm glad it's making this little revival if you like, people are suddenly using it, lawyers are using it in the same way they use it as a discount for a guilty plea, and why wouldn't you?

It's really interesting looking at how this provision which has always been there has really required a mind shift in the way that judges and lawyers deal with it, because that's what we need to do, we need to change that mindset, and not be scared of treating people differently, because of their backgrounds because we and the law have this real focus on consistency, you know, one person gets four years and

everyone gets four years. And I understand why but I think when it comes to sentencing, I think we can be more courageous and say, hey, this person has been through something really, different. They need to be treated differently and we want them to get better, if we want them to stop, we have to help rehabilitate them and take some responsibility for that.

The section allows Māori to have input and to be a part of the process and offer solutions if they can. It allows iwi, it allows the wider whānau to have a say, come and say—this is how our iwi, how our hapū lost our land, and this is how our community has suffered in the next 150 years so it allows them to have a voice, Māori to have a voice, the wider community to have a voice and say, hey we're prepared to take care of this person and help. So, I think that that's really important too because I don't think that our communities, Māori, and Pacific, I don't think they feel a part of this justice system. It is foreign, it is scary, but this little provision allows them to have a say, come along, have a say, have some input, have you got anything to offer, can you help us, can you give us some insight, can you explain it to us so that we can understand why this person has ended up here.

I think that it is a little provision, but it can if we use it properly, I think it can be extremely powerful and if they amend it so that we can direct reports that would be really great. We order all sorts of ridiculous reports about everything, and this would be nice. Section 27 is a cultural gem.

Judge Response “I”.

Q1.

I can only speak from my experience and in the 12 months that I’ve been in this role, there have been very few occasions when at sentencing, I’ve been provided with a s 27 report. Certainly, I have been asked by counsel to order an s 27 report and that’s been quite problematic. So, in answer to your question as to how an s 27 report is commissioned, my understanding is that these reports are not funded by the Ministry of Justice. And because of the way that the provision is currently worded, there is no requirement for there to be a report as such in terms of written report which is distinct from pre-sentence report under s 26 and s 26(a).

So, as I understand it, if a s 27 report in writing is to be commissioned then it is really to defense counsel to utilise their own networks and to also apply for funding to legal services agency to have any financial assistance that they might require, covered by legal services agencies. So, in terms of reports in writing, that’s how I understand how defense counsel obtains those reports.

But of course, it’s open to them to simply have someone come along and speak if they wish to do that which is unlikely to involve any kind of financial component. So, that is my understanding of how they go about commissioning the report. So, there may be circumstances where even though defense counsel, are not signaling to the court that they are looking to offer any information under s 27.

Sometimes if I feel that it could be helpful, it might come up in discussion. But ultimately, I don’t have any sway over whether, or not, defense counsel will take advantage of that opportunity. It’s entirely a matter for them. There are often occasions where there are co-defendants who will ask for a s 27 report prepared and provided to the court and generally there will be a chain reaction which means that the other co-defendant will also ask for that opportunity.

And if that’s so, I’ll put everything off to the same sentencing date so that everyone’s had a chance to get that paperwork of what they want to offer that information. But it does tend to be that if one defendant wants to offer that information, then they generally all will, but it just depends on defense counsel.

Q2.

I don't really see any disadvantages. Generally, and this is from my limited experience as I explained to you earlier before we started to record that I've been in my position for about 12 months. So, I am one of the more junior judges and that in terms of sentencing, although I've done many of them, there have only been a few that have involved a consideration of a s 27 report.

But even if I end up coming to the view that the s 27 report will not necessarily lead to any kind of significant discount when it comes to the sentencing outcome. I nonetheless find them quite helpful because it gives me the advantage of knowing about the person in front of me and how they've come to be there.

And often time when it comes to a defendant and particularly if they're young and wonder how on earth has it come to this. How are you at your young age and I'm talking about the age of 18, 19-year-olds who are before the court for any number of things like aggravated robbery and things like that. And I think to myself, "how have you ended up in this situation?" I want to know more about you and your whānau, what has happened, what has broken down, so that I have a broader view of the person standing in front of me rather than looking at the offence and the harm that has been caused by the offence. I want to know about the offender.

So, on the occasions that I have had s 27 reports provided, I've found them useful regardless of whether I offer them a great deal of weight when it comes to the sentencing outcome because at least I know who I'm dealing with. I know how they've come to be in this position. I know something about their upbringing and their connections.

Sometimes you'll get a s 27 report and actually the person standing in front of you has no reason to have ended up in that situation. So, they've had a good whānau upbringing, that there is good whānau support and they've simply chosen for their own reasons to go down the path that's led them to court. And in those circumstances, I'll refer to all those different issues but that will affect the weight that I give to the report.

Because, if in fact I come to the view having read the report that this person has made their own decisions to move away from a supportive whānau and to offend; so they've chosen the path that they've taken, not because of anything else that has happened, necessarily, then I am unlikely to give a lot of weight to the cultural report; the content because I need to be able to connect the different pieces of information I'm given to the offending or to prospective rehabilitation, so if I can't really do that because a person has just chosen for their own to behave in a particular way, then I'm less likely to give weight to the s 27 report.

But in other cases, you know, someone's background can have a real impact on how you deal with things. So, I don't see any disadvantage. Probably the only thing is the practical issue which tends to be that people don't think about it until you're heading towards the sentencing date, and then belatedly, it will be defense counsel that has realised that actually a s 27 report will be very helpful or the defendant who may or may not have been remanded in custody for a period of time may have made a determination that they would like a s 27 report .

So, it can slow down the process. But that's the only really disadvantage I see and if someone wants one, I'm not going to stop them, so I will give them that time if they want it. But in fairness to the Crown, if it's going to be a written report, then I will generally make timetabling directions to make sure that the report is provided to the court and to crown counsel or the police in good time so they can see what's in it.

So that if there are any issues arising, they can address those issues at sentencing. I'm not of the view that the police or the crown should be taken by surprise by a s 27 report. So, I'm always keen to make sure that everyone in fairness has had an opportunity to look at it beforehand. And there may not be anything much the police or the crown want to say about it because a lot of it is about that person's background and so on.

But in my view, I think it is important that everyone is given a copy of it in advance. And I guess that's the benefit of a written report is that you can do that versus a cultural speaker, for example, who stands up and just starts talking. We really don't have the opportunity to assess the relevance of what they've got to say in advance

and it's very difficult to know what's going to happen. What issues are going to be raised?

So, there are certainly some advantages to having a written report rather than having a cultural speaker. But of course, it depends on what the defendant wants and how the defendant wants to offer that information. But I do think that at least in terms of being able to understand that what's going to be said in terms of assessing the relevance of it for the purposes of the sentencing. But it is helpful to have it in advance of sentencing, in my view.

Q3.

It's hard to tell because it's difficult to know what information will come out from a s 27 report and as I say there are instances where I wouldn't give the content of a s 27 report a great deal of weight. But until you have it, you don't know whether it would have been useful or not. I don't know if that directly answers your question as to underutilisation.

I think there probably have been circumstances where I have thought to myself "actually a cultural report might have been useful here." But I guess it depends on what you mean by underutilisation. Are you talking from a defendant's point of view? Are you talking from a defense counsel's point of view because some defense counsel will always ask for a s 27, report? And some will never ask for a s 27 report. The defendants may or may not know about the availability of a report or having someone speak for them under s 27.

So, it's hard to know whether they are underutilised because there may be those people who just think no thank you, I don't want to do that versus those who don't know about it. I'm not sure. Generally, what the position is. So, there's a difference between defense counsel simply not telling their clients about it and their clients being unaware versus the defense counsel telling their clients about it and the defendant saying no thank you I don't want to do that. So, it's a little bit of a difficult question to answer, I think.

The thing that occurred to me about the heightened awareness about the availability of a s 27 speaker or a report coincides in my view that presentence reports are really brief. They used to be extremely thorough.

And I recall as a young practitioner, the types of pre-sentence reports that you'd get back in the early 90s. This is me when I was practicing as defense counsel, the reports were much more thorough and were more likely to have touched upon these sorts of issues and then for some reason and I'm not sure whether it was Department of Corrections change in approach but they seemed to become very brief but then it wasn't unusual to get a pre-sentence report that had very little detail in it. It was almost at least it was the way I saw it; it was almost a reaction to that and the need for more information relating to your background that more people started to become aware and ask for the ability to be heard under s 27. Because under s 26 as I recall, there is an ability to canvass all these issues in a report but there doesn't appear to be any motivation to do that.

So, I have noticed, just recently however, that the pre-sentence reports are now becoming more thorough. So, I'm not sure what's happening behind the scenes. That will definitely be a Corrections issue which have affected the way in which the pre-sentence reports have been prepared so I don't know what it happening behind the scenes but I've noticed it in practicing and just in my current role, the quality of the pre-sentence reports and I'm not criticising Corrections and it may well be there was some kind of directive given about, it might be a resourcing issue, I don't know, it may well be about the experience of the pre-sentence report writers as well. It could be a matter of things.

So, this isn't a criticism, this is me saying as an observation I certainly notice the difference between presentence report over time and the amount of detail they will go into it. So, it is a shame that more time isn't taken up in the provision of a pre-sentence report to properly canvas these issues but there could be all sorts of reasons why the information won't be forthcoming to a probation officer anyway.

People may not feel comfortable to disclose all of these, details, about their history and their background to a probation officer who in the end is recommending a sentencing outcome. You know it's and different, the environment in terms of the

preparation of a s 26 report and the preparation of a s 27 report, probably very different. But anyway, so in terms of underutilisation, it is clear that there is more awareness now, so I guess that you could say that previously it was underutilised, why it would currently be underutilised, may just be the different perspectives in different regions in different courts. Certainly, this court and the Northland court welcome the provision of s 27 report. I can't really comment on what other causes.

Q4.

If you're talking about the benefit to the court as opposed to the benefit to the defendant and the defendant's whānau. The benefit to the court at least I've noticed because there aren't that many occasions where I have seen a cultural speaker get up and talk but it really changes the climate in the court, I found. And it brings. There's a difference between the presence of someone speaking to you about an issue and someone providing you with papers to read. I mean that's the difference. It is that kanohi ki te kanohi difference, hearing it first-hand from someone who knows the defendant is probably more effective than reading about it in a report, but having said that, some of the reports are very good. So, I'm not taking anything away from that.

But you know sometimes that kanohi-ki-te-kanohi, face-to-face or hearing those submissions face to face have a great impact. So when I talk about changing the climate of the court, I think it really does change the way everyone behaves in the court so you might be more likely to listen to someone standing there speaking and it can have a real impact I think on the prosecution as well and perhaps on the defendant themselves just in relation to the gravity of the situation that person finds them self in.

So that's the benefit. As I said to you earlier, but not knowing what is going to be said is a little bit difficult but you just have to accept that it's just part of the process that someone has brought along with them a cultural speaker and the other thing is that sometimes it can take up time and it's very difficult to know how much time that has to be taken and unless you're told that in advance, it can create issues, but there are some benefits there as well.

Q5.

Well, I mean, before we start recording and I was asking you about your heading of your project which is “Utilising whanaungatanga within the sentencing Act 2002”, so that I understood what you meant by your use of the word whanaungatanga.

To my mind, airing all of these issues which relates to the difficulties the defendants may have had and all of the issues that may have led them to be standing in the dock being sentenced on a particular day, airing those issues and having discussed those issues beforehand is really important because I think that when we were talking about whanaungatanga earlier, in I was talking about my understanding of it, which is that no one is an individual. No one suddenly appears and has been created in a vacuum.

There has been all manner of different things in their history, all number of people who have had an impact on the way they developed, influences, all that sort of thing. And I think there is a real place for collective responsibility so when I had a look at this question how does the community benefits,

I think it's of benefit to the community whether they are the people reading about it in the press or whether they're the people in the court to hear about the issues that people have faced, the hardships that they have faced and maybe giving people a better understanding of how this has happened and therefore how it could be avoided in the future.

What is it that we can do as a community to try to avoid having these 18 and 19-year-olds coming to court, being sentenced to imprisonment for multiple aggravate robbery, so, I think there is some benefit to airing some of these issues which tends to happen more under s 27 than any other section because s 26 is usually about the usual sorts of influences such as drug use and that sort of thing whereas s 27 reports tend to be more looking broader and how a person has been shaped.

So, I think the community benefits from knowing that so they can take some action and I think there is the issue of collective responsibility. And I know back in the responsible for the behavior of that individual. The whānau would have been

responsible for putting that right. Restoration for that wrong, compensation for that wrong and I think it's very easy for someone to sit back and go oh well, so and so did that, that's his or her fault, and actually I don't believe that that's quite right.

So I think it is of benefit that you air all these issues, make everyone aware how this has come about and it maybe that those who are associated with that person will take responsibility, you know, I will often, well you can't expect whānau to front up with the money for the person who has been harmed by the defendant but sometimes you know, I certainly have suggested that they could think about doing that as the whānau of this person, not holding them responsibility, but actually it would be the right thing to do.

But I do think that there is a benefit to all those involved in the sentencing process. As well as the broader community when they hear about what's been going on. And why it happened. And in the same way, I guess that the defendant, so not forgetting the defendant as part of that, can become more connected.

We talked before the recording about this issue of whanaungatanga I mean it's not unusual to find that the defendant knows absolutely nothing, they don't know where they're from, they don't know their reo, they don't know their iwi, they've never been to their marae, all of those things.

I tend to find that where you have a defendant such as that, the process of having a s 27 report prepared helps to connect them and helps to remind them of the importance of where they come from, who they represent and why it is that what they've done is wrong. All of those, sorts of things, personal responsibility as well as collective responsibility.

I'm sure you've heard that story that 'X' talks about where she was interviewing someone for a s 27 report, and he didn't know where he came from, and it was up in 'XXXX'. And he couldn't remember going there because he'd only remembered going to the marae as a child. And she asked, "Did you go over the Harbour Bridge? He said, yes. Did you go over on the ferry? Yes, I did. Did you turn left, or did you turn right? You know that sort of thing. Oh yeah, you're from 'XXXX'.

So for that defendant, it would have been really important, so when you talk about the broader sense, the community benefit, I think the biggest benefit is probably to the defendant themselves and hopefully that then creates someone who is open minded and willing to rehabilitate, if they know who they are, and the value of themselves, then that might change their mind set and make them just a little bit more responsible or whether they're going to prison as part of the sentencing, you'd like to hope that in terms of rehabilitation, motivation and willingness to do that, the process itself is helpful.

Q6.

I think it certainly gives judges more information which can affect a sentencing outcome, which can mean that rather than incarceration, other options are available. So that's one thing, if it changes your focus from punishment to rehabilitation, and it can do, then that would help reduce Māori over-representation, I take it you mean in prison, as opposed to the criminal justice system which is a different issue but if you're talking about incarceration I think that it encourages a different way of looking at the defendant and therefore broadens your mind about what the possible outcomes might be, so where you might think, ooh I can't really see a way around a term of imprisonment a s 27 report can have an impact in terms of the weight you should give to it and therefore a discount might be available and then if they're on the cusp of imprisonment or electronic monitoring sentence then it could make a difference there.

And just the point I was making before about the defendant themselves becoming or being changed by the process can reduce Māori over-representation, if it means that they don't come back again because they are thinking differently and that's another way it could affect it but I'm thinking it's an encouraging way of thinking about sentencing or allowing the judges the opportunity to take a different path than they would have if they didn't have the information.

So, where it's a close call and if you had the information and it allows you to impose a sentence other than imprisonment then that obviously would help reduce over-representation if you chose the least restrictive outcome which is what you are supposed to do under the Sentencing Act anyway.

In terms of the parole board, they are generally quite interested to know what happened at sentencing so they will always have our sentencing notes or sometimes you might in your sentencing make a recommendation about something that could happen once they're released from prison.

So, you might say, you have expressed interest in this type of rehabilitation and although there is no basis before me today that would allow a term of imprisonment it is hoped that once you are released from prison, this type of support will be given to you and you go on to take that rehabilitation so you generally at sentencing decisions you were mention that you would hope that that would happen next and that's sometimes. I mean I don't know.

The parole board may not agree with you. But it might shape the release conditions. I think everyone tries to work together to try and get a good outcome, whether it's immediately or later. There is a misconception that all or most judges want to do is put people in prison. But if you have no other option or anything else that allows for an outcome because of the seriousness of the offending, or you know the harm that has been caused.

The question was whether or not it made a difference as to how a s 27 was structured and I clarified with you that what you were really asking about was the way it was formatted and whether it was easily understood and I agreed that it was helpful but I was commenting that in relation to pre-sentence reports which is the only cross reference that I can think of to make at the moment a well formatted report is not necessarily a good report because it depends on the writer and whether or not what they're recommending is realistic or not. So, it would be helpful definitely if reports were easily able to be understood but like any report it just comes down to content. And how the report writer addresses all the relevant issues. I personally don't think formatting is the be all and end all, it's helpful. I think it's more about content.

Judge Response “J”.

Q1.

So, these 20 files here are mostly people in drug treatment programmes I am monitoring, and I keep a journey in monitoring it until the programmes complete and they're ready to be sentenced and these ones are Crown trial matters, more serious offending and the same kind of approach which is obviously a lot more difficult.

Section 27 is a convenient device for mitigating a sentence.

You know once the level of offending gets up there. So, from my point of view, s 27 is a convenient device, which we use to try and mitigate sentencing. I know it was never intended as that. But judges have kind of appropriated it for their own ends. You know, so that's what's really going on. No one's going to probably acknowledge that at the appellate level. That's my view on it.

Q.2

You know traditionally, we've said that if you're over 17, you are responsible for your actions, you're capable of making morale choices, right and wrong, you are fully responsible, and if you come from a terrible disadvantaged background, then that is too bad, you know, that has been the traditional approach to sentencing. Now, judges are starting to discount sentences for social disadvantage. There's nothing in the Sentencing Act 2002 that says you can't do that.

There is no provision in the Sentencing Act 2002 that states judges are not allowed to discount sentences for social disadvantage. The traditional approach to sentencing centered around the social constructs that 17-year-olds were accountable for their actions regardless of their disadvantaged background.

The social conditions were not factorised into the circumstances that led to the offending. However, in recent years some judges have been discounting sentences for social disadvantage, whereas others are against this principal.

Even if the wording of the s 27 was amended to include a written report, this would not change what judges are looking for; an authoritative report that explains a

person's social disadvantage background in detail. The background information nearly always reflects the same combination of factors, for example, alcohol and drug abuse.

The patterns of recycled social disadvantage are transmitted to the estranged that follow suit in taking drugs and alcohol themselves and sometimes become fodder for the gangs. The repetitious cycle of abuse creates a history of convictions where jail and recidivism become the 'norm'.

So s 27 is a way of addressing traditional constructs that 17-year-olds who are meant to be responsible for their own actions, regardless of their social disadvantages. This would mean that some would have an unfair advantage.

Q.3

Arguably, s 27 is heavily underutilised but not all judges see it this way. The philosophical view of 'just deserts', you do the crime, you do the time reflects a traditional end to a means but not necessarily a solution to the problem, for example, prison costs and reduction.

Section 27 is a way to address the balance for sentencing of Māori offenders. So, is it underutilised? Yes, it is. Are all judges going to see it? I do. Probably not, you know, that there's a very strong just deserts philosophy out there. You do the crime you do the time. And that's what the media want. And that's what the judges will do. Probably not what you're interested in, but that's where I'm coming from.

Are you seeing any judges from the High Court? I mean the one to talk to is Joe Williams, the godfather of all things. He can talk to you about s 27 until the cows come home. You know he is big on this cos he sees it as a way to address the balance for sentencing of Māori offending.

It's not the silver bullet, nothing you can do in the criminal arena will address the social arena, the social disadvantage that's out there. Starting with land grievances right next door. Ihumatao. Any efforts made to address issues in the criminal justice system will not address the social disadvantage, for example, the land grievance issues at Ihumatao.

So how are the reports commissioned? Generally, it is defense counsel who ask for them. It is, I don't think I've independently asked for one. You know I'm always trying to get more information about the defendant's than what is put in front of me in a summary of facts, a criminal history, or a probation report.

Have you seen what a probation report looks like? *Me: No.* So, this is pretty, typical. There will be a summary page and a recommendation and then after that they'll deal with domestic circumstances, relationships, and employment. But you read it and see what you think in terms of detail and compare that with what you would see in a cultural report.

Cultural reports contain a hell of a lot of information than what you would read in a pre-sentence report, like ten times more for a start. You read it and see what it is focusing on. All of these reports are written in the same language but use that construction, you know. About risk assessment,

So, they'll talk about risk of harm, risk of reoffending and they'll talk about compliance with sentences. So, a lot of these guys are very non-compliant, you know, they have a history of breaching their sentences and that's how a lot of them end up in jail.

They're difficult to manage, they're uncooperative, angry, they hate probation officers, because probation officers to them are like prison officers in a suit. They don't relate well to their supervising probation officers, but who could blame them when probation officers write reports like that, you know, which are so kind of impersonal, they just feed the data in, and they get these scores. So, there's a thing called the ROC*ROI Scale. It's an idea we got from America.

Which measures risk on a sort of violence predictive scale and the parole board uses it to decide who gets it or who doesn't, and the probation officers use it to write those reports and tell judges whether someone's a high risk, medium, low risk. They are incredibly inaccurate, clumsy assessment tools in my opinion, but that is what they use.

So, 30 or 40 years ago, when I first started, probation reports weren't like that. Probation reports weren't written in that kind of language. Probation reports were probation officers and would write these detailed professional reports.

A lot of probation officers back then would have had university degrees, arts, sociology, and psychology. They had a rehabilitative focus rather than a punishment compliance focus like these guys have.

So, the reports were totally different, s 27 are kind of like what probation reports used to be, but they didn't have a cultural focus and a lot of detailed information than what we get now, and they argued for a sentencing outcome than a much more nuanced and thorough way than these reports do. You know a lot of these reports would say, there is a high risk of further offending, he is non-compliant and therefore he should be sentenced to imprisonment. Bang! That's what you get over, and over again.

This one recommends community work and supervision. They will also express a lot of concerns about their living situation, you know, not a suitable address, there's gang members there, people with criminal connections, you know they've been busted for drugs, so it has a narky effect, they're narks.

Yeah, this is what our people have to deal with. You know a system that is hammering them at every turn, and you know, why are they non-compliant with finishing their sentences, why are they uncooperative and defiant? You know, self-explanatory when you read that. So, you know, I have no time for probation reports. They are generally useless documents, occasionally they will give you some information here that might help.

He came to New Zealand. He's married. He's got a child. That's useful information. He separated a year ago. Protection order in place. So, it doesn't include the causes of offending or the narrative that led to systemic deprivation. Cultural reports. 'X's is like the best.

So, what does it recommend? Imprisonment, PAC report. That's 'X' who is probably the best of s 27 report writers. Look at the format and the substance (PAC), it's cold, it doesn't care. It's cold, it's clinical and not personal. Restoring some

humanity to the process. It's de-personalising the process (PAC) of assessment and processing of people. They're not all like this, but a huge majority are. You know, every now and then you will read a good pre-sentence report that surprises you with some of the information that you didn't know about and found useful, but by and large they don't. By and large they are entirely predictable, empty vessels.

There appears in the report and offer to rehabilitate. Well, that used to be in the probation officer report, that used to be the role of the probation officer, they used to be actively rehabilitating offenders and not punishing them for non-compliance all of the time and that's how crazy and skewed they are, like they renamed.

There used to be a stand-alone probation service. But then it got incorporated into the corrections department, so they became part of the corrections department and became part of the prisons. And this is around the time they decided to adopt the American ROC*ROI approach so the whole philosophy of the department changed then. We're going to have these rigid standards of assessment and we're going to have standards of compliance, and if they're not met, we're going to have standards of consequences, punishment will just ratchet it up and with people continually non-compliant they will always end up in jail.

Not all judges are going to be interested in this stuff. And I did read something recently from Justice Downs which said that cultural reports won't necessarily carry much weight in terms of serious violence and sexual assault and was quoted to me by the Crown as a reason not to discount a sentence too much. So, you know, there's a bit of pushback already from the high court from there.

What I found interesting in the Heta case. For me, it wouldn't matter if it were dressed up as a cultural report or not, it wouldn't matter if or whether they were Māori or Pacific, could apply to anyone. But what you want is the story of that person's life. That's what we're looking for and you're never going to get that out of the PAC report. Probation officers have been in training for about a year, so things should improve.

You know this system is so entrenched, we've been doing this since the 80s, so expecting a government department to reform itself, forget it. Look at Oranga

Tamariki, how many reviews and reports and commissions have we had to reform CYFPS and has anything substantial changed over those years? I don't think so.

It's been branded and everyone has been retrained, we call it Oranga Tamariki now but are the outcomes any better? No. So we've had to look outside the mainstream government department processes and that's what the cultural reports are doing.

We're looking into the community, and we say what programmes are out there which people can do away from this kind of brutal compliance regime? That's what I'm doing anyway and that's what the drug courts do too, it's taking it away out of the probation officer hands, probation officers don't go near the drug court really, it's the judges who are monitoring the sentence, not the probation officers.

When it comes to funding and counsel may have an application declined, if it is for reasons other than those who can afford it, what happens. PDS have funded some of these reports when the Ministry stopped paying for it. Whether they still do that.

What kind of offences are declined and why? Youth, and rangatahi. Heavy duty psychological reports, but different ball game once go through district court. The advantages are there, but I don't see a disadvantage. Yes, there is often a delay in getting them.

I delay sentencing all the time until I get what I want and that's not a disadvantage. Unless a person is ready to be sentenced, I don't sentence them. You know I know that's not what the courts or the MOJ want, they want cases out, quick report, apply the recommendation, next please, an efficient conveyer belt justice system.

Q.4

Me: Have you had any cultural speakers?

No, I don't think I've ever had. I've had family members and support workers often come and talk to me, like all the time, for purposes of bail or sentencing, or how do I get this guy to a programme, you know, are you on board with him with a programme, will you support him if someone drives him there, I do that all the time.

But that's not a s 27 exercise, it's just trying to make sure this person has some support because people will say, I've got an address, I've got support, but ok, if

they are not motivated enough to come to court to support you, maybe they're not going to actually do anything worthwhile so that's why I want to see them face to face.

Q5.

A cultural report may be the difference between imprisonment and non-imprisonment so what are the benefits to the community of not sending someone to prison or a cost, but disruption to employment, family, children, there are some heavy outcomes on the family for people who go to jail and it's even worse if it's a mother, you know, children taken into care, so those are the benefits I see.

Q6.

Like I said it's a stalking horse for judges who are looking for alternatives to imprisonment. It's a device so you know, until judges start adopting this rehabilitative mindset, and a lot of them are, it's starting to change I can see it. So, it's led by the District Court you know the superior courts haven't cottoned on to it yet. They are starting to realise there's a revolution happening but a bit slow to get with the programme. So, we will start to get our sentences appealed, you know or reversed by these judges in the higher courts to apply the old tariffs and keep everyone in prison.

Why the wording to include a written report would not make much difference because some judges have asked that that be amended so that would be interesting. Like I said, I'm not lying awake at night thinking about the wording of the act, you know, I'm just trying to divert people away from prison any way I can. So, I'm not slavishly applying the wording of the s 27. I couldn't give a rat about the wording. I'm trying to find ways to justify discounting sentencing and usually that's done by diverting people under programmes away from the corrections department just like the drug court do, be it family violence programmes, alcohol and drugs, whatever, complete the programmes, and when you've done it, come back and there's discounts for sentence and when there is enough of that then you can get to a point when you're below two years and then you can look at an alternative sentencing. That's the name of the game. So, I don't get too hung up on this legal definition

framework. That's just a trap, that's just getting in the way, we're conditioned to think that we're all operating to the letter of the law, but some of us aren't.

Rārangi o Whakapoto—List of Abbreviations

Acronyms	
CCRC	Criminal Cases Review Commission
PAC	Provision of Advice to Courts
PSGE	Post Settlement Governance Entity
ROC*ROI	(Risk of Reconviction) and ROI (Risk of Imprisonment)

Whakamāramatanga—List of Māori Words and Translations

Aroha	Love
Atua	God
Haka	Performance
Hapū	Subtribe: Clan
Hongi	Greeting
Kaikaranga	Caller
Kaimahi	Workers
Kaitiaki	Guardian
Kanohi-ki-te-kanohi	Face to face relationships
Kaumātua	Elders
Manākitanga	Hospitality, generosity, kindness
Manuhiri	Visitors
Māori	Indigenous
Marae	Meeting ground
Pākehā	European
Pepeha	Introduction/self
Poroporoaki	Farewell

Rangatira	Leaders
Tangihanga	Funeral
Te Ūpoko	Chapter
Tīkanga	Right
Tōhunga	Expert
Tūpāpaku	Deceased person
Tūpuna	Ancestor
Waiata	Song
Wairua	Spiritual connectedness (ancestors)
Waka	Vehicle
Whaikōrero	Speech
Whakapapa	Genealogy
Whānau	Family
Whanaungatanga	Connectedness: Relationships
Whāngai	Adopt
Whenua	Land