Marae-based Courts and the Sentencing Act 2002: Paving a way to Parallelism?

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Introduction

Today’s offending statistics indicate that New Zealand’s criminal justice system is failing its population, and specifically Māori. While constituting 15 per cent of the overall population of New Zealand, Māori offenders make up approximately half of the male prison population and 63 per cent of the female population.\footnote{Statistics New Zealand. 2016 Remand and Sentenced Prisoner Tables. Wellington: Statistics New Zealand. <www.stats.govt.nz>} As at June 30 2017, Māori comprised 15.3 per cent of the population and in any 1 year, roughly 55.7 per cent of prisoners are Māori.\footnote{Above n 1.}

Despite this distressing statistic, few criminal justice initiatives effectively target Māori recidivism. This paper will explore the extent to which New Zealand’s criminal justice mechanisms perpetuate disproportionate levels of Māori incarceration, and the extent to which Māoridom and Indigenous frameworks may inform criminal justice reform. In 2017, the Ministry of Justice failed to meet a target of reducing the re-offending rate by 25 per cent, reaching only 4.3 per cent at its June deadline.\footnote{Ministry of Justice “Measuring BPS results” (2017). <www.justice.govt.nz>}

Once dismissed as mythology, the Western world is increasingly recognising the value of Indigenous knowledge.\footnote{Ambelin Kwaymullina Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country (2005) Indigenous Law Bulletin 6(11) at 13.} Indigenous land management practices, plant knowledge, worldviews, and medical healing have informed modern understandings for a range of purposes. Recent movements within international criminal justice are also aligning with Indigenous perspectives. In New Zealand, however, tikanga Māori remains a rich yet underutilised resource on the periphery of criminological theorising and development.

It is argued that therapeutic jurisprudence (“\textit{TJ}”) and the ensuing problem solving court movement may provide the theoretical basis for ‘mainstreaming’ Indigenous knowledge in matters of criminal justice. Recognising the psychological effects of legal processes and courtroom procedures on those involved, both theories have
synergies with practices of tikanga Māori.\textsuperscript{5} Akin to Māori dispute resolution, TJ calls for a more holistic judicial role, recognising that judicial interactions present a unique opportunity for intervention and addressing non-legal issues such as drivers to offending and rehabilitation.

New Zealand’s legislative framework, particularly the Sentencing Act 2002, provides scope for therapeutic interactions with Māori offenders. Such engagement already occurs within two solution focused specialist courts in New Zealand, (the Rangatahi Courts and Matariki Court), which incorporate Indigenous perspectives in addressing the cyclic nature of offending. Such ‘problem solving’ courts impose rehabilitative frameworks within both the youth and adult criminal jurisdictions, and provide a developmental pathway for a novel marae-based sentencing framework applying tikanga Māori within New Zealand’s mainstream criminal justice practice.

The first chapter of this research examines the broader issue of Māori re-offending, focusing on how present criminal justice processes contrast with tikanga Māori dispute mechanisms. The second chapter will assess the justifications for a Māori-targeted response. The third chapter covers recent initiatives such as the Rangatahi Courts and the Matariki Court, then proposes a novel framework of sentencing procedure.

The fourth chapter discusses the appropriateness of a court-based response to the issue of Māori recidivism. The impact of New Zealand’s socio-political realities such a proposal are then canvassed in the final chapter. This research argues that Indigenous perspectives are marginalised from justice both procedurally and substantively. A ‘mainstreaming’ of tikanga values in New Zealand’s sentencing practice can play an important role in responding to the Māori re-incarceration crisis.

\textsuperscript{5} Bruce Winick and David Wexler “Drug Treatment Court: TJ Applied” (2015) 18 Touro L. Rev. 479 at 479.
Chapter One: Distilling the Issue of Māori Re-Offending

“(There exists) ... a gap in the state of criminology in New Zealand, [that gap being] the paucity of researched information in relation to Māori.”

Seeking to understand Māori re-offending is elusive within the current academic setting. Theories based on scientific evidence have provided little value in explaining causes of re-offending for Māori. This chapter therefore adopts Moana Jackson’s empirical perspective in calling for further recognition of tikanga Māori to reduce re-offending within New Zealand’s monocultural practice of criminal justice.

A. The Numbers on Māori Re-Offending

The proportion of sentenced Māori prisoners reconvicted after release from prison after two years is 63.2 per cent, while the proportion of sentenced Māori prisoners reconvicted after five years is 80.9 per cent. This contrasts with 49.5 per cent non-Māori sentenced prisoners reconvicted two years after their release, and 67.7 per cent after five years. Most recently the Briefing to the Incoming Minister for Corrections 2017 stated:

The current reimprisonment rate for Māori (within 12 months) is 36.5%, compared to 25.3% for NZ Europeans.

Thus it is clear that Māori offending is vastly disproportionate to the Māori population in New Zealand.

B. A Multi-leveled Explanation for Disproportionate Māori Re-offending

“The causes of offending generally fail to explain crime satisfactorily, in part because there is so much confusion about correlations, causes and crime and when it comes to explaining

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Explanations for disproportionate Māori re-offending rates are divided. Some emphasise the importance of developmental pathways in offending behaviour, tied to poor performance in a range of social indicators – family dysfunction, neurological development, educational achievement, and developmental disorders are some well-traversed examples. The Department of Corrections’ 2007 Report into Māori incarceration attributes heightened involvement in criminal behaviour to exposure to these risk factors.

By comparison, Moana Jackson highlights a deeper structural bias in New Zealand, and seeks to understand the Māori offender as a product of social, economic and psychological forces – a distinctive “cultural milieu”. Jackson argues further that the replacement of a fully integrated value system with foreign frameworks of expectation and behaviour resulted in a dispossession of Māori knowledge and wealth. Part of this social upheaval was the imposition of a monocultural system of justice, in which little investigation of Māori offenders interacting with justice processes has been undertaken. For Jackson, the values underpinning and application of today’s criminal law through courtroom procedure explain the disproportionality of re-offending between Māori and non-Māori.

Echoing Jackson’s historic claims, research undertaken by Te Puni Kokiri and the Ministry of Justice is equally critical of the nature of procedures within these judicial institutions. Many Māori believe the responses of the criminal justice system do not

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14 Moana Jackson, Māori and the Criminal Justice System: A New Perspective, He Whaiapaanga Hou (New Zealand Department of Justice Policy and Research Division, Wellington 1987) at 40.
15 Above n 14, at 44.
16 Above n 14, at 15.
17 Jackson part 2 n 8, at 57-59.
18 Above n 17 at 127.
adequately address social harm.\textsuperscript{20} Ineffective criminal justice agencies are thus seen to contribute to the current disparity in re-offending and victimisation between Māori and non-Māori.\textsuperscript{21} In summarising such responses, Tauri levels similar criticisms as those outlined in Jackson’s seminal work \textit{He Whaipaanga Hou}:\textsuperscript{22}

\begin{itemize}
  \item[a)] the protocol under which the court system operates is alienating for many Māori;
  \item[b)] the behaviour of lawyers, court staff, and the judiciary is often culturally inappropriate; and
  \item[c)] Māori offenders often receive inappropriate sentences that do not meet their cultural and rehabilitative needs, imprisonment being the prime example.
\end{itemize}

Criticisms of agencies within the New Zealand’s Department of Corrections raise similar issues of cultural inappropriateness:\textsuperscript{23}

\begin{itemize}
  \item[a)] lack of acknowledgement of Māori philosophies and approaches to dealing with Māori offending;
  \item[b)] a focus on individualised programmes and interventions, at the expense of whānau, hapū and iwi involvement in the rehabilitation of Māori offenders; and
  \item[c)] the lack of Māori involvement in the design of policy and the development of programmes.
\end{itemize}

These institutional critiques suggest that a meaningful incorporation of tikanga Māori is an effective response to Māori re-offending.

**C. Two Frameworks of Justice Within New Zealand’s Criminal Justice System**

\textsuperscript{20} Pania Te Whaiti & Michael Roguski \textit{Māori perceptions of the Police} (Victoria Link, September 1998) <www.police.govt.nz>.

\textsuperscript{21} Juan Tauri \textit{Indigenous Perspectives and Experience: Māori and the Criminal Justice system} in Reece Walters and Trevor Bradley (eds) \textit{Introduction to Criminological Thought} (North Shore: Pearson Education, 2005) at 131.

\textsuperscript{22} Tauri n 21 above, at 131.

\textsuperscript{23} Tauri n 21 above, at 131.
Criminal justice is a system of law and administration involved in the maintenance of social control. In the manner in which a government maintains order through the criminal system depends crucially on the assumptions upon which it bases its crime control policies. In order for a punishment (in the form of a sentence) to achieve its aim of maintaining social control, an offender must “reasonably be expected to understand and speak for herself as a language of public values that are or could be her own”. Today a discord persists between European and Indigenous frameworks of justice in New Zealand, particularly tikanga Māori, resulting in a justice process that fails to “speak” to Māori.

1. Tikanga: A form of Māori social control

For Māori, tikanga is a system of law, order, and justice fully integrated into everyday life – the legal structure that gives effect to basic principles of behaviour. Tikanga is inseparable from spirituality, facilitating a high level of social control and discipline within Māori society. Conduct breaching such guidelines through breach of personal or collective tapu (sacredness) destabilises the balance within the relational network constituting a ‘hara’ that requires rectification. The pursuit of balance is an essential aim of tikanga Māori, regulated through ‘tapu’ and ‘mana’. In regards to dispute resolution, the following aspects ensure justice is meted out.

Relational Justice

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24 Mel Smith Ombudsman Following A Reference By The Prime Minister Under Section 13(5) Of The Ombudsmen Act 1975 For An Investigation Into Issues Involving The Criminal Justice Sector (December 2007) at 7.
27 Jackson above n 17, at 57-59, and 127.
32 Toki above n 30, at 57.
Primarily, tikanga is a form of relational justice. 33 Māori are related by whānaungatanga (kinship) to each other and the environment. It is in the interest of all to act in ways that strengthen and sustain relationships, whether with other human beings or the natural world. 34 The whānau, to Māori, is a pivotal social and cultural force that gives its members a sense of identity and safety. 35 Relationships within this unit must be both maintained and strengthened to achieve justice. Crime is therefore not a breach of codified and objective laws, but conceptualised as a ‘breakdown in relationships’. 36

Community involvement

Tikanga thus places the individual within a collective, requiring every member of the community to uphold and protect its values. 37 Crime is not the fault of the individual but a lack of balance in the offender’s social and family environment. 38 As such, offenders’ whānau and wider community experience derivative responsibility for crime until balance is collectively restored.

The principle of kotahitanga (inclusiveness) in participation and accountability is thus central to processes of Māori dispute resolution. 39 For matters of justice, consensus on the appropriate response involves the whole community and repairing community ties rather than focusing on the individual offender. 40 Essentially, this community involvement preserves whānaungatanga, based on ideals of communal responsibility for crimes and their resolution. Collective participation in the justice process manifests itself in the use of marae as the location of dispute resolution, whereby a process of

33 Tribunal report above n 31 at 5.
34 Tribunal report above n 31 at 6.
35 Tribunal report above n 31 at 6.
oral exchange between members of both the offender and victim’s community ensures harmony is restored. 41

Harmony and Rehabilitation

Crime is representative of an imbalance within the community that must be redressed. 42 An individual’s re-offending indicates an imbalance of their tinana (body), wairua (spirit), and mauri (life force). 43 Effective dispute resolution must therefore identify the causes of the dispute or reasons for re-offending in order to uncover and address the source of the imbalance. 44

This process is characterised by the operation of ‘muru’, which shares elements of reparation recognised in the purposes and principles of sentencing within the Sentencing Act 2002. 45 The use of a muru, and the incorporation of group responsibility to an aggrieved victim rather than a distant symbol of the State, helps heal the hurt caused by breach of tapu in a way not often possible in New Zealand’s existing adversarial system (outlined below). 46 Offenders are not passive recipients of a sentence, but active participants in the process of achieving justice. 47 Offender participation and recognising underlying causes of offending are consistent with a solution-focused model of justice. 48

2. New Zealand’s adversarial and retributive underpinnings

Steadily introduced in New Zealand since 1840, the British criminal law brought with it a judiciary characterised by its “centralised, bureaucratic and largely impersonal institutions”. 49 Arie Freilberg provides a summary of the adversarial paradigm within British criminal law, and subsequently New Zealand: 50

41 Toki above n 30, at 62.
43 Toki above n 40, at 175.
44 Tomas above n 39, at 229.
45 Sentencing Act 2002, s 7(1)(d).
46 Jackson part 2 above n 17 at 217.
The adversarial system embodies a range of processes and practices that are both historical and cultural and carries with it both positive and negative connotations. Its strengths lie in the concepts of the independence of the Bar and Bench from governments, the autonomy of the parties, the power of examination and cross-examination to elicit facts and the understanding that the observance of law, rather than the attainment of justice, is a more realistic and achievable goal for any community. Its detractors argue that a system based on conflict and confrontation rather than cooperation is not conducive to a harmonious society, that truth is rendered subservient to proof, that game-playing and tactics are elevated above the interests of the victims and defendants who are alienated from the process. The system as a whole is regarded as being too limited in its vision of resolving conflicts rather than of solving the problems of which the conflicts may be symptomatic.

Moana Jackson adds that each of these steps in the criminal justice process are moulded by Pākehā values, upholding Pākehā traditions and concepts of justice. Steeped in the age of enlightenment, individual liberty underpins the processes of today’s criminal law. Penal reformers were historically interested in establishing individual justice. With moral individualism as its core tenet, state intervention in the private sphere requires good reason. In attributing liability, an assessment of an offender’s mental state is often essential. Hart thus provides:

(It must be proved) that the person broke the law by an action which was the outcome of his free choice.. it is a requirement of justice.

Such procedural mechanisms sit neatly within the substantive goals of sentencing practice, emphasising retribution, public safety, and denunciation. While rehabilitation and reintegration are relevant considerations, there is no explicit

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51 Jackson part 2 above n 17, at 154.
53 Above n 52, at 13.
55 Sentencing Act 2002, s 7. See also Hall and O’Driscoll The New Sentencing and Parole Act (NZLS seminar booklet, June 2002); Norrie above n 52, at 24.
56 Sentencing Act 2002, s 7(1)(b).
requirement for the judiciary to “address the underlying factors that contribute to offending” akin to youth justice proceedings.\(^5^7\) Indeed, Judge McElrea sees this as a fatal flaw in Western conceptions of justice and holding offenders accountable in a ‘meaningful way’.\(^5^8\)

**D. The Recognition of Tikanga Today**

Clearly, traditional Pākehā retributive frameworks of criminal justice are vastly different to tikanga conceptions of justice.\(^5^9\) Jackson proposes that New Zealand’s “monocultural” subscription to Western ideals at the expense of tikanga principles of justice is a fundamental reason for rates of Māori re-offending.\(^6^0\)

1. **Contrasting perspectives of justice**

More specifically, within the Pākehā system, there exists a ‘responsible individual’, regarded in isolation from both moral and social context.\(^6^1\) Particularly concerning for Māori, crime is removed from social circumstance and the community, preventing a collaborative response. Jackson posits:\(^6^2\)

> The procedures which individuate the offence and isolate the offender, are products of an English tradition frequently inconsistent with that of the Māori.

Rather than using a communal network to derive a more rehabilitative and informed justice process, offenders under Western frameworks become a passive recipient of justice processes. Within this environment, such offenders may distance themselves from the human repercussions of their actions.\(^6^3\) For this reason, Jackson argues that the disconnect between tikanga and Pākehā systems of justice contribute to Māori recidivism.

\(^5^7\) Oranga Tamariki, Minstry for Vulnerable Children “Youth Court” <www.orangatamariki.govt.nz>.
\(^5^8\) “Judge McElrea Restorative Justice - a New Zealand perspective” a paper for the conference Modernising Criminal Justice - New World Challenges London, June 2002 at 1.
\(^6^0\) Jackson part 2 above n 17, at 261.
\(^6^1\) Toki above n 40, at 35.
\(^6^2\) Jackson part 2 above n 17, at 343-344.
2. Towards a modern system of dispute resolution

In response to this adversary system devoid of tikanga Māori dispute resolution processes, Thomas and Quince suggest modern systems of dispute resolution must incorporate:\(^{64}\)

(1) Community input and responsibility – the Māori community must own the processes by which conflicts amongst its members are resolved, with the participants needing to have input into defining the system and its outcomes.

(2) Reciprocity and balance – the aim of dispute resolution must be to restore participants or disputants to their communities. Once decisions are made, with individual and community input, all parties must work together to implement the decisions.

(3) Process – the principle of kotahitanga (inclusiveness) in participation and accountability will underpin any process of Māori dispute resolution. It is important to note that Māori place much value on the process itself, as distinct from its outcomes. The process itself is seen as an inherent good, because it empowers the parties and community to take responsibility for the future.

(4) Appropriate forms and structures – both the physical environment and the forum must reflect Māori principles. In traditional Māori society the marae fulfilled this function and in modern society it remains the most appropriate environment, for reasons which have stood the test of time.

(5) Representation and leadership – it is fundamental to the resolution of any dispute, particularly with respect to enforceability and acceptability of any outcome, that those with grievances be properly represented and that those who lead are properly mandated by their constituency.

\(^{64}\) Thomas above n 39, 228-233.
Despite these academic calls for change, the adult criminal jurisdiction has remained rigidly tied to Pākehā principles of criminal justice. In the following chapter, the author discusses why a more proactive judicial practice consistent with Thomas and Quince’s recommendations is necessitated.
Chapter Two: A Necessitated Response

“Any effort to address the over-representation of Indigenous people in the criminal justice system must also confront a legacy of government policies and practices over the past two centuries, which systematically disadvantaged and oppressed Indigenous people.”

This chapter discusses the political, legal and economic imperatives underpinning the criminal justice reform argued for by Thomas and Quince. It is argued that a raft of legal instruments and political factors stand today as a strong justification for criminal justice initiatives that specifically targeting Māori re-offending.

A. Treaty of Waitangi

Debate surrounding Māori issues involve such as re-offending require testing the scope and relevance of the Treaty of Waitangi. As Sir Geoffrey Palmer provides “Treaty business will never be finished”. The primary source of the duty to address rates of Māori re-offending is the partnership established by the signing of the Treaty of Waitangi in 1840. Having expressly incorporated its principles into present legislation, and committing arms of government to Crown obligations, it would appear that the Treaty remains a legally enforceable document. Ceding sovereignty came with the benefit of an obligation on the Crown to guarantee the rights recognised in the Treaty for Māori. Arguably, this confers a duty on the Crown to actively engage and consult with Māori in designing and applying criminal justice initiatives. A Treaty-based justification can be utilised in arguing for both self-determination and preservation of Māori justice processes within New Zealand.

Article III of the Treaty grants equal citizenship to Māori. This equality is compromised where criminal policy and law enforcement have considerably differential impacts on Māori, which is evidenced by the mass incarceration and societal marginalisation of Māori in New Zealand. Dyhberg comments that the New

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Zealand adversarial system is antithetical to tikanga practices, resulting in Māori disproportionality in the criminal justice system. Article III therefore mandates a review of current criminal justice practice.

Further, as explained by Lord Woolf for the Privy Council in *New Zealand Māori Council v Attorney General*, the Crown is obliged to act where taonga is in a ‘vulnerable state’. Under the Māori text of Article II, Māori retained tino rangatiratanga over taonga - “[authority] to control [their possessions] in accordance with their own customs and having regard to their own cultural preferences”. Explaining Māori dispute resolution process as taonga, McMullan argues it is worthy of both support and active protection given its vulnerability. He states Māori systems have suffered, with ‘mainstream’ judicial processes taking little account of an offender’s culture or cultural practice. This exclusion operates to the detriment of tikanga Māori’s survival as a taonga, inconsistent with Article II.

The Waitangi Tribunal has recently submitted that the Government’s current response to Māori re-offending fails to adequately address the current inequity between Māori and non-Māori re-offending rates. Argued on the basis of a Crown obligation to actively protect Māori interests, the Tribunal calls for Māori-specific targets to reduce re-offending. Critical of generalised reform in reducing re-offending by 25 per cent, the report states it “seems to have been made under the assumption that Māori offenders would respond at the same or better rate as non-Māori.” Going on to conclude the Crown’s actions and omissions breach the Treaty principles of active protection and equity, the Tribunal proposes that Corrections must work together

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70 [1994] 1 NZLR 513 (NZPC), holding Article II of the Treaty guarantees Māori a form of self-determination over their taonga.


73 Sam McMullan “Māori Self-Determination and the Pākehā Criminal Justice Process” (2011) 10(1) Indigenous Law Journal 73 at 80. See also Quince Dispute Resolution above n 39, at 269, explaining that Māori dispute resolution processes are in a vulnerable state.

74 Tu Mai Te Rangi above n 9, at 63-64.

75 Tu Mai Te Rangi above n 9, at 83.

76 Tu Mai Te Rangi above n 9, at 83.
with Māori at a high level to achieve their mutual interests in reducing Māori re-offending – a strong justification for government proactivity.

B. International Law

International instruments also found a case for Māori-specific policy targeting re-offending.

1. The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) codifies a number of legally binding agreements that New Zealand has already ratified.\(^\text{77}\) Various articles require signatory states to provide for the protection and autonomy of Indigenous peoples.\(^\text{78}\)

Endorsed as an ‘aspirational document’ at the press release, declarations such as the UNDRIP are part of the development of international legal norms.\(^\text{79}\) By voting in favour of the UNDRIP, states have indicated a commitment to uphold the rights enshrined within the instrument. Elements of the Declaration may, according to Professor James Anaya represent binding international law through customary practice. He states:\(^\text{80}\)

The Declaration may be understood to embody or reflect, to some extent, customary international law. A norm of customary international law emerges – or crystallizes – when a preponderance of states … converge on a common understanding of the norm’s content and expect future behaviour to conform to the norm.


Under New Zealand’s second Universal Periodic Review (“UPR”) within the Human Rights Council, responsible for reviewing the human rights records of all UN member States, 991 recommendations on Indigenous peoples have been made during its first two cycles.\(^8\) Specific to New Zealand, among the 155 recommendations made in the latest Report, the Council called for stronger efforts to prevent discrimination against members of the Māori and Pasifika communities in the criminal justice system and, in particular, high rates of incarceration. The 2014 National Government specifically endorsed this commitment.\(^8\) As this practice of affirming recommendations crystallises amongst signatory states, it is reasonable to assume that New Zealand will face mounting pressure to meet its obligations under the Declaration. This change in approach, when compared to the National Party’s caveated endorsement of the declaration in 2010,\(^8\) signals that international pressures have the ability to effect substantive change in New Zealand.

2. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The United Nations Committee Against Torture similarly criticises New Zealand’s compliance with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which New Zealand ratified in December 1986.\(^8\) Its concluding observations were particularly concerned with New Zealand’s disproportionately high rate of Māori imprisonment.\(^8\)

\[
\text{[New Zealand] should increase its efforts to address the overrepresentation of Indigenous people in prisons and to reduce recidivism, in particular its underlying causes … by intensifying and strengthening community-based approaches with the involvement of all relevant stakeholders and increased participation of Māori civil society organizations.}
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\(^8\) Database accessed from <https://www.upr-info.org>.
\(^8\) “New Zealand Government Response to 2014 UPR recommendations” <www.hrc.co.nz>.
\(^8\) (20 April 2010) 662 NZPD 10229.
\(^8\) Committee against torture Fifth periodic report of New Zealand CAT/C/NZL/5 (17 August 2007) at 6.
\(^8\) Above at 5.
The reporting functions of the United Nations under this instrument has the ability to mount further pressure on the Government to take a proactive stance on issues of Māori re-offending.

C. An Economic Rationale

An economic imperative further incentivises Government proactivity with targeted responses to Māori re-offending. Discussed by Chief Science Advisor Sir Peter Gluckman in his report into rising prison costs, the costs of prisons has doubled since 2005, and tripled since 1996. Corrections is the fastest growing category of cost than any other at three times the rate of GDP. The average daily cost of a sentenced prisoner is $307, and in excess of $100,000 annually. From a political standpoint, it must be assessed whether the rising costs of prisons is an effective use of public resources.

Implementing a cost-benefit analysis within the United Kingdom, Marsh found the financial burden and wider social harm of imprisonment outweighed the alleged benefits of public safety and deterrence for low to moderate offenders. Gluckman has further recognised that incarceration imposes direct and indirect costs on inmates (e.g., loss of income, stigmatisation), while their families are placed under enormous financial pressure. A recent Health in Justice report refers to the disproportionate effects of imprisonment on whānau:

The large proportion of Māori in New Zealand prisons means the impacts of imprisonment fall disproportionately on Māori whānau and communities, resulting in many living on the verge of crisis.

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90 National Health Committee Health in Justice: Kia Piki te Ora, Kia Tika! – Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau (Ministry of Health, Wellington, 2010) at 112.
The impact of imprisonment and re-offending on children is significant and well documented.\(^91\) Information on the numbers of children of prisoners is not routinely collected internationally or in New Zealand, making a comprehensive picture of the effects difficult.\(^92\) However, New Zealand studies have found that the impacts of imprisonment differ depending on the age of children, but include violence, trauma and lower educational achievement.\(^93\) These behaviours are recognised as potential precursors to offending behaviours later in life.\(^94\) Further research by Te Puni Kokiri suggests children whose parents have been imprisoned are significantly more likely to be imprisoned than children of parents who have never been imprisoned.\(^95\) Research highlighting the links between parental imprisonment and risk factors in future offending behaviour by their children favours investment in crime prevention.\(^96\)

Government proactivity in regards to Māori re-offending is further supported by the regularly asserted ‘criminogenic effect’ of prisons, whereby individuals gain more criminal skills and build offender-based social networks when imprisoned.\(^97\) While it is not proposed that imprisonment is the sole cause of re-offending, prisons are criticised for being “breeding grounds for violence, abuse and emotional degradation.”\(^98\) From this perspective imprisonment offers less support offenders in changing offenders’ behavioural tendencies.

\(^{91}\) John Hagan, Ronit Dinovitzer “Collateral Consequences of Imprisonment for Children Communities, and Prisoners” (1999) Crime and Justice 26, at 121. See also David Farrington, Maria Ttofi, Rebecca Crago & Jeremy Coid “Intergenerational similarities in risk factors for offending” (2015) Journal of Developmental Life Course Criminology 48, showing that family criminality is an important predictor of criminal and anti-social behaviour.


\(^{93}\) National health committee above n 90, at 5.

\(^{94}\) Fleur Chauvel and Michael Roguski The Effects of Imprisonment on Inmates’ and their Families’ Health and Wellbeing (Litmus Ltd, Wellington, 2009).


\(^{96}\) Māori are nearly eight times more likely to be given a custodial sentence than non-Māori: Te Puni Kokiri above at n 12. In a small sample of 137 prisoners, 87 per cent of women and 65 per cent of men were parents (Gordon above n 95).


In light of these imperatives necessitating a specifically Māori response to Māori re-offending, there are two noteworthy developments within New Zealand’s criminal justice system exploring ideals of Indigenous justice frameworks. In the following chapter, their developmental potential is assessed and a novel framework proposed.
Chapter Three: Contemporary Approaches within the Criminal Justice System

“There is substantial room for tikanga to speak in the sentencing process and therefore, for whānau and hapā to wrest some measure of control back to the kin group… finding means by which that kin group can participate in sentence selection process, whether therapeutic or otherwise, assists the kin group and therefore the wider community to take responsibility for offenders in a manner consistent with tikanga Māori.”

New Zealand’s judiciary has provided innovations that are worthy of development. Such inventions attempt to remedy the issue of Māori re-offending by initiating culturally appropriate measures throughout the sentencing process. Synergies exist between these initiatives as frameworks of tikanga dispute resolution and TJ implemented within a ‘problem solving’ court setting, providing guidance as to a more culturally effective framework of criminal justice. The trajectory of these movements arguably recognises a failure of traditional court processes to cope with major social problems. This chapter concludes with a proposal of a novel framework of sentencing under the Sentencing Act 2002 designed to ensure a more comprehensive response to recidivism amongst Māori, adopting insights from these existing frameworks.

A. Therapeutic Jurisprudence

While adversary methods pervade the application of justice in New Zealand, Wexler and Winnick provide that the operation of law and its accompanying legal processes can have a direct psychological impact on all involved. TJ therefore sees law as a social force producing behaviours and consequences. TJ treats the legal process itself as subsumed in ‘law’, the behaviour of legal actors such as the judiciary may be criticised if it imparts negative effects on participants. By measuring ‘the potential

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99 His Honour Justice Joe Williams Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern NZ Law (Henry Harkness Lecture, 2013) at 29.
103 Winick above, at 7.
beneficial and harmful impacts of justice intervention itself’, TJ calls for the need to seek and apply law in a manner consistent with the interests of mental health and well-being. Importantly, however, these interests must be weighed against the necessities of achieving justice and due process.

TJ within a court setting emphasises the importance of process in regards to public trust of the criminal justice system. To Freiberg, this calls for courtroom procedure that is courteous, dialogues that are meaningful and court officers who subscribe to an ethic of care. Such ensures that participants appreciate the dispute process as both fair and open, to the potential effect that they are more accepting of adverse decisions. As such, law applied anti-therapeutically “may well inhibit the achievement of justice system outcomes such as the prevention of crime… and respect for the law.” TJ thus calls for a general understanding of human behaviour and how sentences have effects for the rehabilitation of the offender and their ability to overcome the causes of re-offending.

B. ‘Problem Solving’ Courts

Labeled as a “revolving door” it is argued that traditional adversarial justice gives rise to cyclic offending. This system both neglects the underlying causes of offences, and fails to equip an individual with the tools necessary to deal with these problems. ‘Problem solving courts’ therefore prioritise intervention and rehabilitation in response to this revolving door of offending.

‘Problem-solving’ courts operate upon a “multidisciplinary partnership between the justice system and the community to promote offender accountability… (and) address

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104 Brian McKenna, Claire Meehan Alice Mills & Katey Thorn Evaluating Problem-Solving Courts in New Zealand: A Synopsis Report (Centre for Medical Health Research, University of Auckland, 2013) at 9.
105 Winick above n 101 at 59.
109 Michael King and others Non-Adversarial Justice (The Federation Press, Sydney, 2009) at 27.
110 Winick above n 101, at 13.
111 Annalise Johnston Beyond the Prison Gate, Reoffending and Reintegration in New Zealand (The Salvation Army Social Policy & Parliamentary Unit, December 2016).
the underlying issues behind an offender’s appearance before the court”. Beyond deciding facts, the judiciary addresses the human problems underpinning offending, future behaviour of litigants, and ensures the well-being of communities. ‘Problem solving’ courts conceive that court processes may be catalysts for change at times of crisis – an opportunity for offenders to confront their problems.

TJ has been labeled as the theoretical grounding for this judicial movement. The two movements may be aligned on their goal to ensure a process of justice as an instrument to heal, but are not identical. As per Freiberg, TJ is the philosophical underpinning that guides the court in developing its procedures. The problem-solving court movement is therefore a practical recognition that TJ philosophies are appropriate in targeting localised and problematic offending trends.

C. Synergies of ‘Problem-solving Courts’ with Tikanga Processes of Justice

The constricting nature of New Zealand’s adherence to traditional criminal justice processes differs from Māori conceptions of justice. Māori experience of law within institutions designed and largely enforced by Western virtues therefore has the capacity to have “anti-therapeutic” effects. Wexler provides that “therapeutic jurisprudence … [is similar] to concepts such as restorative justice … concepts that originated in tribal justice systems of Australia, New Zealand, and North America”. The synergies between tikanga and ‘problem-solving’ courts provide a foundation for change in New Zealand’s criminal justice system.

1. Collectivity

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116 Freiberg above n 100 at 11.
117 Anti-therapeutic effects have been noted by Jessica Reid An Argument for Therapeutic Jurisprudence in Aotearoa: A Māori Mental Health Court Underpinned by Principles of Tikanga and Therapeutic Jurisprudence (LLB, University of Auckland 2012) <www.paclii.org>.
Collectivity and consensus in responding to harm is central to Māori justice. This process seeks to ensure mutual understanding and respect between participants through whānaungatanga. TJ promotes itself as a relational-based method. It considers emotional wellbeing during interactions between judicial officers, litigants and witnesses, and interactions between lawyer and client. On a wider relational basis, ‘problem-solving’ courts similarly aim to connect offenders with community resources within a collaborative and multi-disciplinary team approach.

2. Value-laden

The conceptual basis of ‘problem solving’ courts represents a move away from the strict application of rules within criminal justice and instead supports a more principled approach in dealing with offenders. This focuses on a therapeutic process and using the tools of social science to promote psychological and physical well-being. In a problem-solving court environment, this requires a holistic and involved judicial approach. Judges within these courts thus play an instrumental role in motivating individuals to seek help. Similar to tikanga, this opens the door for the utilisation of key dispute resolution values such as utu (reciprocity), mana (authority) and tapu (sacredness). Under a broad interpretation of ‘rehabilitation’, such values can be met by a ‘problem solving’ court.

3. A forward-looking doctrine

Compared to retributive systems of justice fixated on punishing past conduct, both ‘problem-solving’ courts and tikanga dispute resolution are orientated around healing participants and the community generally. This is premised on a future perspective
and reintegration of the individual, a ‘solution focused’ style of judging.” ¹²⁷ A problem-solving court judge addresses the root cause of an individual’s offending, understanding the milieu in which offending has occurred to prevent future offending.¹²⁸ Tikanga notions of justice are based on the same ideal – that the root causes of offending must be addressed to achieve harmony within the individual and the community.¹²⁹ The pursuit of harmony in this context is a forward-looking enterprise.

Such factors express the clear overlap between problem solving courts applying therapeutic practices and principles of tikanga Māori.

**D. Development in today’s criminal justice system**

These synergies have been harnessed by two sentencing procedures in New Zealand – Ngā Kooti Rangatahi and Te Matariki Court, providing a foundation for further development

1. *Te Kooti Rangatahi*

24 per cent of the 10-16 year old population in New Zealand are Māori,¹³⁰ yet Māori constituted all appearances in four of New Zealand’s Youth Courts in 2017, while the disproportion of Māori representation in the Youth Court has increased from 44 per cent in 2005 to 66 per cent in 2017.¹³¹ Initiated by Judge Heemi Taumaunu, Ngā Kooti Rangatahi seek to address the issue of Māori re-offending within the youth criminal justice context.

*The court process*

Rangatahi Courts are not a separate system of youth justice.¹³² The process simply incorporates the marae and the surrounding community once a young person has appeared in the Youth Court and a Family Group Conference

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¹²⁸ Winnick above n 101, at 3.
¹²⁹ Toki above n 119, at 9.
¹³² Judge Hemi Taumaunu “Te Kōti Rangatahi, the Rangatahi Court, Best Practice” (2015) at 3.
(“FGC”) plan is formulated. The Rangatahi process requires victims’ agreement that the Rangatahi Court will overlook its implementation, applying the principles in the Oranga Tamariki Act 1989 (“OTA”). Upon agreement, the Rangatahi Court and its marae-networks are responsible for monitoring the completion of the FGC plan and sentencing the young person upon its conclusion.

**Legislative backing**

Hearings are held on marae under s 72(1) of the District Court Act 2016, which provides that “a Judge may hold or direct the holding of a particular sitting of a court at any place he deems convenient”. Under the OTA, measures of the Youth Court for dealing with offending by children should be designed to strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned, and foster the ability of the same people to develop their own means of dealing with offending by their children and young persons. 133 Youth Courts are also guided to impose measures that address the causes of the underlying offending. 134

**Incorporation of Tikanga**

Central to those responsible for the establishment of Rangatahi Courts is the notion that Māori youth offending is tied, in part, to a lack of self-esteem, a confused sense of self-identity, a strong sense of resentment and cultural dislocation. 135 The Rangatahi Court seeks to address these concerns by reconnecting and engaging adolescent Māori offenders with their self-identity as Māori through culturally appropriate processes and fostering respect for the rule of law by facilitating tikanga conceptions of justice and promoting community involvement through Te Ao Māori.

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133 Oranga Tamariki Act 1989, s 208(c)(i) and (ii).
134 Oranga Tamariki Act 1989, s 208(fa).
135 Taumaunu above n 132, at 4.
A pōwhiri (welcoming ceremony) initiates the process, where the hau kainga (local people) welcome the manuhiri (visitors), including young people, their families and other supporters police, youth advocates, lay advocates and agency representatives. All visitors are called onto the marae, and welcomed into the whare nui (main house). Respected elders are encouraged to sit alongside presiding judges and provide insight from a traditional Māori perspective to the young person and his or her whānau. Individuals perform a pepehā before meeting, seeking to establish the young person’s self-identity.

Beyond the procedural incorporation of tikanga, its underlying principles of justice are present. Partnership and problem solving are at the core of community justice. Involvement of marae elders and the use of lay advocates to monitor completion of FGC plans are a “flax-roots” empowerment strategy, seeking to galvanise a community response to offending. This partnership occurs alongside efforts to address the underlying causes of offending. The goal for both TJ and tikanga Māori is whakahoki maori or restoring the balance through healing. Through this process the wider community provides input to restoring balance and achieving justice by monitoring participants’ progress with FGC plans.

Evaluation of the Rangatahi Courts

The Rangatahi Courts were subject to qualitative review in 2012 by Kaipuke Consultants for the Ministry of Justice. As outlined in the review, it would be an oversimplification to evaluate success by assessing the re-offending rates of individuals who have completed the procedure. A number of core outcomes have been met by the Rangatahi process. At the majority of hearings, youth had whānau support, contrasting with the findings of Youth Court research which identified a drop off in family attendance,
particularly for recidivist offenders. Whānau were more engaged in the process than within general Youth Court jurisdiction. Although difficult to quantify, connection with culture was an element of the process recognised by those passing through the Rangatahi Courts.

While further statistical insight into impacts on recidivism is needed, the Ministry of Justice’s 2014 quantitative evaluation estimated that young people that appeared in the Rangatahi Court were 11 per cent less likely to reoffend.\textsuperscript{142} The improvements already made by the Rangatahi Court indicate favourably for development in the area.

2. \textit{The Matariki Court}

Pioneered by the late Judge Johnson, the Matariki Court operates within Kaikohe. Founded on the underutilisation of sections 8, 25, and 27 of the Sentencing Act 2002, the Matariki Court seeks to offer sentencing measures that are more appropriate for Māori offenders, involving local iwi Nga Puhi and Te Mana o Ngāpuhi Kowhao Rau (“\textit{TMONK}”). While the Matariki Court process is similar to that of the Rangatahi Court by involving karakia and the marae community, perhaps the strongest incorporation of tikanga occurs externally. Marae-based support networks are responsible for providing wraparound rehabilitative frameworks for offenders who are accepted into the programme. Completion of these rehabilitative schemes is recognised at sentencing.

\textit{Legislative backing}

Section 16 of the Criminal Justice Act 1985 was introduced “largely because of the disproportionately high rate of imprisonment of Māori and … encouraging the use or the availability of alternatives to imprisonment for Māori offenders”.\textsuperscript{143} Section 27 of the Sentencing Act 2002, as a

\textsuperscript{142} District Courts of New Zealand Annual Report (Ministry of Justice, Wellington, 2015) at 68
\textsuperscript{143} Hansard (12 June 1985) 463 NZPD 4759 where Dr Cullen commented on the report of the Statutes Revision Committee that “the Committee had made a conscious attempt to recognise in particular the importance of trying to meet the needs of Māori offenders, and more particularly young Māori offenders”.

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reformulation of this provision was intended to ensure that courts receive information on alternative programs for the rehabilitation of Māori offenders.\textsuperscript{144} Section 25 provides for an adjournment of proceedings to undertake rehabilitation of offenders.\textsuperscript{145}

\textit{The court process}

The Matariki Court offers a range of procedures incorporating varying levels of community intervention, including the following possibilities:\textsuperscript{146}

1. The defendant declines a s 27 hearing, and the sentencing process proceeds normally.

2. The defendant chooses a s 27 hearing, and may have a member of their whānau speak on their behalf. There are no referrals; however, defendants may be offered restorative justice if the victim is willing to participate.

3. The defendant chooses a s 27 hearing. Following an assessment by the court Kairuruku (co-ordinator), the offender is made aware about what s 27 offers and the community agencies available. The offender is then connected with these agencies, and the Kairuruku or defence counsel suggest to the judge that option 3 is the preferred pathway. Sentencing is then adjourned to allow the offender time to complete any programmes that are deemed helpful.

\textit{A case study: R v Adlam}\textsuperscript{147}


\textsuperscript{145} See Appendix I.

\textsuperscript{146} Hauauru Takiwa Te Kooti o Matariki (Report No 1210, 16 October 2012) <http://www.hauauru.org>.

\textsuperscript{147} R v Adlam [2018] NZDC 8037.
The process undertaken in Adlam is the most intensive option available within the Matariki Court, whereby TMONK is involved with the rehabilitation and reintegration process. Appearing before the Matariki Court on charges of burglary and unlawful entry into motor vehicles, Ms Adlam’s sentencing hearing was adjourned to engage in TMONK’s rehabilitative framework, focusing on the underlying causes of her offending. Programmes spanning from whānau reconnection, to drug, alcohol and trauma counselling were recommended as part of Ms Adlam’s rehabilitative plan. Upon the plan’s acceptance before the court, progress with the report was monitored over a period of 15 months. In passing sentence, Davis J considered completion warranted a discount of one year, as part of his preference for home detention over imprisonment.

3. Contrasting ‘mainstream’ approaches: R v Mika and Solicitor General v Heta

In contrast to these innovative responses, mainstream utilisation of sections 25 and 27 is limited. Their treatment, or lack thereof, is demonstrated in both R v Mika and Solicitor General v Heta.

Section 27 was absent from the sentencing process in Mika. Responding to defence’s submission seeking a fixed 10 per cent discount based “on Māori heritage and thus social disadvantage”, Gendall J in the High Court provides, “the law in this country is clear that no special discount for race, culture or ethnicity matters alone is appropriate”. In declining the appeal, the Court of Appeal again focused on dispelling any notions of an ethnic “sentencing discount”. This was to the exclusion of any meaningful interaction with s 27, which is alarming where it is the court’s prerogative to do so under s 27(5).

The general application of s 27 was recently considered in Heta. Highlighting that the provision does not “enunciate a Māori response to the issue of Māori re-offending”, Whata J instead focuses on systemic disadvantage as part of the factual matrix to consider in seeking more appropriate sentences. Swiftly reframing the issues of

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148 Adlam, at [22].
149 R v Mika [2013] NZHC 2357.
151 Mika, at [10].
ethnicity confronted by the court in Mika, Whata J recognises the prevalence of systemic deprivation faced by Māori in New Zealand. Upon proving the links between deprivation and the offending, Whata J finds deprivation as a mitigating factor, which is not “dependent on racial or ethnic classification”.\textsuperscript{152} Without a clear explanation as to why this is the case, it seems that the effect of such a distinction in sentencing practice would likely be both expansive and ethnically guided, given the socio-economic realities from which Māori offenders are derived. Combined with the breadth of deprivation in New Zealand and the open-textured analysis advocated for, the approach adopted in Heta arguably operates with the same effect as that discussed (and ultimately rejected) in Mika, albeit in a more nuanced manner.

Whata J’s efforts represent a more meaningful engagement with the principles of s 27. It is however, a ‘halfway house’ between Mika and the approaches enshrined in New Zealand’s ‘problem solving’ frameworks, highlighting the rigidities within which ‘mainstream’ judges operate. Specifically, the approaches in Mika and Heta overlook the anti-therapeutic effects of traditional courtroom processes, whānau and community involvement in justice, and fail to take advantage of the courts as a healing agent. While systemic disadvantage, restorative processes and rehabilitative potential were part of the reasoning in Whata J’s decision to mitigate the offender’s sentence, this required considerable action on the part of Ms Heta. There is no evidence that s 25 and rehabilitative programs were recommended. Not only was Ms Heta’s 27 report tabled by Khylee Quince, but restorative measures and rehabilitation were undertaken on her own accord, supported by newfound whānau involvement.\textsuperscript{153} It is unlikely that this mirrors the realities of the majority of Māori offenders, and contemporary demands for judicial methods that meet the needs of Māori.\textsuperscript{154}

Systemic deprivation is a strong justification for judicial intervention. The Sentencing Act 2002 contains a raft of provisions for marae programmes, iwi, and hapū that are seldom used in combatting systemic deprivation.\textsuperscript{155} Heta is a step towards this

\textsuperscript{152} Heta, at [43].
\textsuperscript{153} Heta, [64].
\textsuperscript{154} As Michael Cullen said at the second reading of the Criminal Justice Bill in regards to s 26, “the Committee had made a conscious attempt to recognise in particular the importance of trying to meet the needs of Māori offenders, and more particularly young Māori” (1985) 463 NZPD 4795.
\textsuperscript{155} In a survey about the use of the s 27 equivalent in 2000, almost half of respondents said it was underutilised because of lack of awareness of the provision: Alison Chetwin, Tony Waldegrave & Kiri
utilisation, but highlights the need for a streamlined approach in providing restorative and rehabilitative processes. This would ensure that less fortunate offenders are given equal opportunity to confront the causes of their offending.

**E. A Novel approach: Merging the Rangatahi and Matariki Processes**

While steps towards Thomas and Quince’s recommendations have been made, the author proposes that processes of both the Rangatahi and Matariki Court can be amalgamated to generate an effective sentencing alternative for all Māori. Statements made within the 1988 Puao Te Ata Tu report are relevant today in defining the parameters of reform:156

> It is not suggested that the old Māori ways should now be restored, but that ought not inhibit the search for a greater sense of family and community involvement and responsibility in the maintenance of law and order.

It is proposed a division of the District Court, “Te Kooti o Te Ara Hou” (Court of New Paths) is established under similar legislation as the Koori Courts in Victoria, Australia.157 Te Kooti o Te Ara Hou would operate as sentencing courts sitting on marae, designed to fully utilise sections 8, 25 and 27 of the Sentencing Act through self-designed courtroom procedures consistent with tikanga Māori. Such courts would operate as a division under the District Courts Act 2016.158 involving initial sittings, monitoring hearings, and final sentencing.

1. **Entry to the process**

To ensure utilisation of the provisions highlighted above, it is recommended that both ss 26 and 26A are amended to require that pre-sentence reports include information about s 27 hearings, and the potential for alternative marae-based sentencing procedures where the offender self-identifies as Māori.

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157 Magistrates Court (Koori Court) Act 2002 (Vic).
158 “The New Path Court”, established under a legislative framework similar to the Koori Courts in Victoria. See Appendix II for proposed legislation establishing these Courts. It is envisaged that such courts will be established at marae participating within the Rangatahi framework.
Where offenders notify defence counsel of their desire for a s 27 hearing, this must be outlined in pre-sentence written submissions to the court. Submissions must be made three working days before sentencing. Amendment to 5.A5(2) of the Criminal Procedure Rules may be required to ensure that sentencing memoranda include a summary of what will be heard under the s 27 hearing. Where there is no “special reason” that makes s 27 unnecessary or inappropriate, and the legislative requirements of “Te Kooti o Te Ara Hou” processes are met, sentencing hearings will continue on marae within “Te Kooti o Te Ara Hou” Divisional Courts.

The Kairuruku (co-ordinator) is responsible for networking with appropriate marae organisations, such as TMONK, after the s 27 hearing. Judges within these courts would have a variety of options available, similar to that of the Matariki Court – the extent to which these marae organisations become involved with the offender is a collaborative exercise between the Court Kairuruku and the judge. Where there is no recommendation for rehabilitation, the s 27 report is heard, followed by sentencing.

Where rehabilitative programmes are recommended, the sentencing hearing is adjourned under s 25. Recommendations to the judge must be accompanied by a report derived from the offender, their whānau, and the victim, including a plan to address any underlying causes to offending. Marae organisations (such as TMONK) linked to marae hearings are responsible for the development and delivery of rehabilitative programs. Provided the Judge accepts the report and plan, completion of the programme provides an offender with the opportunity to prove their commitment to the victim, their whānau and the court. Similar to the Matariki Court, participation in this process is not contingent on the victim’s approval, and entry is not contingent on a guilty plea.

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159 It is envisaged that practitioners will use the He Puka mō te Aromatawai Aruhea: A Booklet for Cultural Assessment <www.borrinfoundation.nz> to extract s 27 information.
160 Sentencing Act 2002, s 27(2).
161 In the United States, the defence bar has criticised making treatment contingent on a guilty plea. Among the reasons advanced are a concern that coerced treatment is unlikely to be successful, that defendants should not have to forfeit procedural rights to obtain treatment, and a concern that treatment failures would be punished more severely than if the defendant had been convicted without participation in treatment: National Association of Criminal Defence Lawyers America’s Problem Solving Courts: The Criminal Costs of Treatment and The Case for Reform (2009), at 25-26 <www.nacdl.org>.
2. Monitoring completion of rehabilitation programmes

Upon acceptance of the report, participants’ progress is monitored through marae hearings, similar to the monitoring of FGC plans within the Rangatahi Court. It is envisaged that these hearings would occur with the same regularity as Rangatahi Courts, whereby judges are able to monitor behavioural development alongside the marae community responsible for its application.

3. The final Te Kooti o te Ara Hou hearing

Te Kooti o te Ara Hou apply the Sentencing Act 2002. Under ss 8(i) and (j), completion of marae-based rehabilitation frameworks must be considered. The final sentencing hearing is likely to be similar to that of the Rangatahi procedure, although Te Kooti o te Ara Hou Divisional Courts are given appropriate latitude to invent mechanisms consistent with the Sentencing and District Court Acts in sentencing offenders.162

4. A ‘mainstreaming’ introduction

McNamara proposes the implementation of aboriginal perspectives within Canadian criminal law frequently occurs by an ad hoc judicial response, rather than a deliberate course of progressive law reform of the State.163 Judge Greg Davis appropriately provides in relation to the utilisation of provisions within the Sentencing Act:164

“If we are going to address the rate of Māori imprisonment... we have to be doing this at every sentencing - otherwise we’re just going to fiddle with the edges and nothing more.”

The author submits that New Zealand’s judicial innovations are similarly ad-hoc. Founding Te Kooti o te Ara Hou through the legislation proposed meets demands for procedure that adopts tikanga practices, and calls for the increased utilisation of ss 8, 25, and 27 of the Sentencing Act. Legislative support similar to Australia’s Koori

162 See guiding legislation Appendix II.
164 Judge Greg Davis Our prison rates are on Judges, too (Sir Peter Williams QC Penal Reform League annual conference, Russell, 9 June 2018).
Court Act is therefore appropriate. The appropriateness of such a judicial attitude within Te Kooti o te Ara Hou and its consistency with the commitments of the criminal justice system is therefore evaluated in the next chapter.
Chapter Four: Is a Marae-based ‘Problem Solving’ Approach Appropriate?

“[Presiding] as judge, mentor, supervisor and service broker threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive. In what role do judges act when they seek or arrange the provision of services? ”\textsuperscript{165}

This chapter traverses the appropriateness of a court-based response to Māori re-offending in New Zealand such as the proposal in chapter three. While a number of criticisms can be made against a judicial attitude that seeks to solve the problems of those who come before the court, it is argued that a number of factors ensure the effectiveness of a court-based response. Maximising effectiveness, however, requires legislative amendment.

A. An Appropriate Judicial Role?

1. The constitutionality of marae-based ‘problem solving’ courts

In attempting to solve the social issues of re-offending through a number of executive-initiated programmes, the separation of powers is arguably strained.\textsuperscript{166} Judges are no longer expected to simply interpret and apply the law, but play a wider role than sentencing. Judges within Te Kooti o te Ara Hou are responsible for monitoring the process of participants and oversee their interaction with rehabilitation plans and reports. They are arguably caught in the mix of trying to solve society’s problems – a function typically reserved for legislatures and executives.\textsuperscript{167}

However, a cultural response to re-offending is contemplated by the legislation. Sir Michael Cullen, in discussing the sections 14 and 16 of the Criminal Justice Bill, which were forerunners to ss 25 and 27 of the Sentencing Act, stated that the provisions were specifically enacted to reduce the imprisonment of young people.\textsuperscript{168}

\textsuperscript{165} Freiberg above n 100, at 23.
\textsuperscript{166} Berman above n 113, at 134.
\textsuperscript{168} (12 June 1985) 463 NZPD 4759.
There is a better recognition of Māori cultural patterns by changes to clause 2 as to the kinds of programme on which people may be placed… a recognition of the importance to the appropriate ethnic group such as the iwi, the hapū, the extended whānau or marae and a recognition of the possibility of peoples entrusted to the care of the Kaumatua. The Select Committee made a conscious attempt to recognise the importance of trying to meet the needs of Māori offenders.

Submissions made by the Department of Justice to the Statutes Revision Committee on the Criminal Justice Bill in 1985 are indicative of s 27’s underpinnings:

Although Māori offending (measured in convictions) is markedly higher than that of the general population, we think that part of the answer to the problem is to place more emphasis on the use of alternatives to imprisonment for Māori offenders…

Within the proposed framework, courts do not act as a treatment provider, but rather take account of the treatment within the framework of sentencing. The level of judicial involvement therefore does not breach the separation of powers, for the development occurs within a legislative landscape that contemplates court procedures more consonant with a Māori reality, wherein judges are largely guided by discretion.\textsuperscript{169} King submits that as substantive law develops to tackle societal issues, so too should its practice, “judging and legal processes, like other social processes, are not static... they adapt to the need of a particular society and time”.\textsuperscript{170} The reframed role of judges is therefore a valid exercise of the judicial function within the separation of powers.

2. \textit{Consistent with due process?}

The therapeutic underpinnings of Te Kooti o te Ara Hou are innately inconsistent with due process values within a criminal justice system.

\textit{Impartiality}


Although renowned as ‘problem solving’ courts’ most effective measure, placing judges as the “principal mechanism for delivering behaviour change”171 risks the appearance of judges as “impartial referees of the litigant led battle”.172 As Professor Julian Roberts notes, a central part of earning legitimacy is to maintain notions of fairness and integrity.173 This is strained where judges form relationships with offenders.

Duffy interprets this risk as one of countertransference, proposing that:174

There is danger in a problem-solving court judge transferring or externalising their feelings onto a participant, where those feelings stem from the judge’s prior experiences and relationships. A positive experience with a rehabilitated drug court participant may see a problem-solving court judge ‘buy in’ to their own ability to reform and rehabilitate other drug court participants.

As recognised by Silver, the effect of previous relationships on future interactions means that previous experiences within the proposed court may colour how a judge interacts with one participant over another, to the detriment of impartiality.175 This is clearly a risk for all judges in any context, although in this empathetic landscape the risk of its impact is higher.176

**Victim participation**

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Victims have an expressive role in mainstream proceedings through “Victim Impact Statements”, while judges within Te Kooti o te Ara Hou may consider statements or evidence from victims during sentencing proceedings.\(^{177}\) Allowing victim participation in the creation of rehabilitative programmes is a step beyond expression. A potentially consultative role arguably risks the traditional retributive framework of criminal justice, whereby the state is entrusted with meting out justice.\(^{178}\)

However, while these are relevant concerns, the position is arguably overstated. The marae-based sentencing courts proposed require a defendant to consent to a s 27 hearing, unique court procedures and rehabilitative measures – which indicates that departures from normal procedural fairness processes can be contextualised.\(^{179}\) Moreover, the reality is that a problem-solving court judge is a facilitator of positive behavioural change, rather than an institution that makes the change.\(^{180}\) Duffy also draws a distinction between internal reactions and external behaviours relating to countertransference, arguing that emotionally intelligent judges are capable of self-regulation in this therapeutic environment by ensuring their behaviour is fair towards participants, independent of their beliefs.\(^{181}\) Neither is the role of victims properly characterised as consultative as per Edwards. Victims may influence appropriate mechanisms within the rehabilitative programme, but cannot expect to consult on the final sentence.

The overarching interest of ‘problem solving’ courts is to “seek to open the courthouse doors, bringing new tools and new ways of thinking into the courtroom”.\(^{182}\) Justice Richard J Goldstone of the Constitutional Court in South Africa recognises that traditional frameworks of understanding will inevitably be challenged: “one thinks of justice in the context of deterrents, of retribution. But too infrequently is justice looked at as a form of healing.”\(^{183}\) Strict adherence to due process would

\(^{177}\) “Te Kooti o te Ara Hou” Bill, s 5(2) Appendix II.
\(^{179}\) Duffy above n 174.
\(^{180}\) King above n 127, at 162.
\(^{181}\) Duffy above n 174.
\(^{182}\) Berman above n 122 at 35.
undermine the relational element that is necessary between the judge, victim and the offender needed to heal participants.\textsuperscript{184} The presented risk to due process is therefore not fatal to the development of marae-based sentencing courts.

\textbf{B. Is Justice Meted out?}

Some argue that a focus on therapy and rehabilitation detracts from founding principles of “accountability and punishment”.\textsuperscript{185} Accountability envisages sentences that recognise harm to the victim and community arising from offending.\textsuperscript{186} Deterrence recognises that punishment signals the consequences of offending behaviour to wider society. A ‘problem-solving’ approach that does not centralise punishment and accountability is not entirely consonant with a retributive perspective of criminal justice.\textsuperscript{187} The author submits, however, that the proposed sentencing procedure provides outcomes encompassing the core values of accountability and deterrence.

\textit{1. The proposed framework and deterrence}

As a factor of mitigation in sentencing, it could be argued that the proposed framework would fail to deter the wider public from crime or be seen as a “soft option”. Using \textit{Adlam} as an example, however, the Matariki Court imposed strict requirements. Ms Adlam was made to confront the factors and influences of her offending, partake in trauma, drug and alcohol counseling (subjected to random testing), reconcile with whānau and culture, and face accountability from victims over a period of 15 months. Non-compliance with provisions set by the marae community warranted her exclusion from the programme, similar to the AODT Court. Completion of the programme entitled Ms Adlam to a one-year reduction in her sentence of home detention.

Weighing the programme’s length and stringency of requirements against its reduction of sentence upon completion, there is significant challenge to any notion that the novel framework is “soft on crime”. As demonstrated in the distinction

\textsuperscript{184} Toki above n 40, at 169.
\textsuperscript{185} Timmins above n 172, at 130.
\textsuperscript{186} Sentencing Act 2002, s (7)(1)(a).
\textsuperscript{187} Lisa W. Lunt \textit{Preserving the Dignity of the Mentally Unwell: Therapeutic Opportunities for the Criminal Courts of New Zealand} (Fulbright New Zealand, Wellington, 2017) at 25.
between discounts applied in *Heta* and *Adlam*, significantly larger discounts can be granted within ‘mainstream’ processes, allaying concerns of disparate outcomes between courts. The proposed framework is therefore consistent with current sentencing levels demanded by deterrence.

In addition to general deterrence, marae-based sentencing courts provide offenders with ‘specific deterrence’ through positive behavioural change, rather than fear of punishment.\(^\text{188}\) Such an approach reframes ideas of deterrence within the overarching goal of public safety.

*Court process as a deterrent?*

Tikanga Māori as ‘law’ emphasises the importance of process.\(^\text{189}\) So too, does TJ consider ‘law’ to include legal rules, legal procedures, and the roles and behaviour of legal actors such as the judiciary.\(^\text{190}\) Therefore, the *process* by which the criminal law is administered is equally important for punishment to achieve its aim (of deterrence). Participants must “speak the same language” to achieve deterrence.\(^\text{191}\) Today’s anti-therapeutic and mono-cultural processes involved in meting out punishment fail to ‘speak’ to Māori. Judge McElrea provides:\(^\text{192}\)

> “The traditional western model of criminal justice does not in my view hold offenders accountable in a meaningful way. We may think that the traditional court system holds offenders accountable but it has become too ritualised, too de-personalised, and too much like a game to succeed in many cases. The problem lies in the very model of justice which we use.”

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\(^{189}\) Toki above n 40, at 176.

\(^{190}\) Winick above n 101, at 7.


\(^{192}\) Restorative Justice above n 58, at 10.
A lack of cultural knowledge, awareness, or competency regarding Indigenous peoples on the part of the foreign justice system creates a blind assumption that punishment equally affects all persons. ¹⁹³ McMullan employs H.L.A Hart’s notion of obligation to the law in concluding that laws that lack legitimacy will lose quality of obligation. ¹⁹⁴ By extension, court processes subsumed in the criminal law that ignore Indigenous frameworks of justice fail to foster respect for the law. Deterrence therefore begins with ensuring parties are speaking the same language in enforcing society’s broad consensus on basic social values are enshrined within criminal laws.

The author submits that tikanga procedures within Te Kooti o te Ara Hou would enhance the deterring qualities of sentences. Through s 27 hearings, participation in marae-based rehabilitative schemes and marae-ownership of tikanga-procedures, Te Kooti o te Ara Hou allow for effective communication between participants and those imparting justice. The involvement of the victim, wider whānau and the marae community in assessing such core issues is essential, especially where mainstream courts ignore the capacity of offenders to provide input into dealing with their own offending, and meaningfully address resulting harm ‘kanohi to kanohi’.

‘Culturalisation’ as a deterrent?

Marie is critical of that ethnicity based arguments in the disproportionality of offending such as ‘cultural impairment’, and the preference for cultural practices of rehabilitation are misplaced without empirical support. ¹⁹⁵ Coining this the “wishing-well” approach, she doubts that cuturalisation can address offending behaviour by Māori. ¹⁹⁶ Limiting her critique to Corrections Policies, Marie is wary of assuming individual deterrence. ¹⁹⁷

¹⁹⁶ Above n 195, at 283.
¹⁹⁷ Above n 195, at 292.
Whether this is an accurate summation of Corrections Policy is beyond the scope of this research. It is relevant, however, to assess whether this criticism may be leveled against a novel marae-based sentencing framework. Reconnection to culture is a specific target of the Rangatahi Courts, and an indirect goal of the Matariki Courts through its marae-based rehabilitation strategy. Reconnection to culture within these courts, however, is not the sole yardstick of success within the procedure. As expressed earlier, ‘culture’ is used as a mechanism to galvanise a community response to re-offending – whānau involvement, monitoring by elders, principles of restoration of harmony under the rubric of tikanga. The proposed sentencing framework does not frame ‘culture’ as an explanatory tool of offending, but instead as a guide for sentencing to encourage reintegration and rehabilitation consistent with tikanga Māori.

New Zealand’s re-offending statistics portray that its criminal justice system largely fails to deter individuals, and particularly Māori from re-offending. As explained, Te Kooti o te Ara Hou processes can achieve deterrence on both a general and individualised basis, consistent with the overarching public safety rationale of deterrence.

2. Accountability

Justice demands that offenders are held accountable for criminal behaviour. Goodyer criticises traditional criminal justice methods for presenting crimefactually, logically, and dispassionately in court, allowing offenders to distance themselves from the human repercussions of his/her actions. Goodyer is thus wary of “generic punishment”, which fails to hold offenders accountable and is unable to prevent offenders from interacting with the 'conveyor belt' of crime. Problem-solving courts, by contrast, deliver specialised community sentences, holding offenders accountable and providing a more effective deterrent.

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199 Studies have emphasised the probability of punishment, rather than its severity is a more reliable source of deterrence: Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, P-O Wikstrom, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (Hart Publishing, Oxford, 1999); see also Marsh above n 88.
200 Goodyer above n 61; Hudson above n 63, at 240.
accountable through regular monitoring by judges.\textsuperscript{202} Perhaps the strongest element of accountability within the proposed framework is that offenders must face their core issues before whānau and their communities.\textsuperscript{203} The flexibility of rehabilitative programmes and a collaborative approach to justice allows for punishment to meet the context-specific demands of accountability.

C. A History of Judicial Proactivity

Having considered and countered potential criticisms of the ‘problem solving’ approach, the author argues that New Zealand’s judiciary is aptly placed to advance the appropriateness of a court-based response to Māori recidivism. Having played an integral role in combatting youth re-offending through structural change and incorporating cultural perspectives, successful intervention in the youth context favours a similar court-based response in the adult jurisdiction.

1. Similar underpinnings: an issue of monoculturalism

Heralded as “New Zealand’s Gift to the World”,\textsuperscript{204} the Family Group Conference signalled a change in government policy more consonant with a Māori worldview, calling for a “truly bicultural system” within the Te Whainga I Te Tika Report of 1986 preceding the 1989 CYFS Act. Today, the Youth Court lists its key objective as “providing services which are appropriate (to the offender’s) cultural needs… and dealing with young people who commit offences in a way that acknowledges their needs and enhances their development”. Doolan, an architect of the changes under CYFS Act describes the introduction of FGC as to empower the family in a culturally alien process, which has been largely successful today.\textsuperscript{205} As discussed in chapters one and two, dissatisfaction with a monocultural system similarly underpins the adult criminal jurisdiction today.

\textsuperscript{202} Justice Innovation above n 171, at 3.
\textsuperscript{203} See generally, Jim Boyack Drug Court Poems: A Journey to Recovery (BookPrint, Auckland, 2016).
\textsuperscript{205} Michael Doolan Restorative Practices and Family Empowerment: Both/and or either/or? (Family Rights Group, London, 2003); In studying the effect of the CYFS Act, Maxwell and Morris found family group conferences contributed to reducing the chance of reoffending even when other important factors identified by the literature on reoffending, such as adverse early experiences and early offending, were taken into account: Gabrielle Maxwell & Allison Morris “Restorative justice and reconviction” (2002) 5(2) Contemporary Justice Review 133, at 133-146.
2. Guiding the adult jurisdiction

There are similarities in the style of judicial intervention envisaged by the FGC processes and the proposed rehabilitative framework. Both recognise the benefits of conflict dispute resolution within the same community or cultural groups. Outlined by Clear and Karp, such benefits include the potential to foster respect for the law and law enforcement by providing active participation in crime prevention and conflict resolution in the community. Within such a process, recidivism may be reduced through community galvanisation and culturally appropriate sentencing. Given the relative success of judicial interventions in the Youth Court, judges evidently have the capacity and experience needed to effect change in offenders. The marae support networks already galvanised by the Rangatahi Courts ensure a streamlined introduction of the proposed sentencing framework. As discussed, without legislative amendment judges experienced in ‘problem solving’ interventions are lacking an equivalent mandate to effect a solution based approach in the adult jurisdiction.

D. Are Methods from the Youth Jurisdiction Transferable to the Adult Court?

Described as “an international trendsetter”, New Zealand’s tolerant youth jurisdiction stands in contrast to its punitive adult counterpart. Given the stark distinction between jurisdictions, it is arguable that youth justice operates within its own specific field of practice. Upon this rationale, the adoption of marae-based sentencing courts is arguably inappropriate in the adult context, for it adopts both procedural and substantive processes borne out of the Youth Court – a specific legislative and contextual framework. The author argues this is in fact not the case, given the trajectory of responses within the adult criminal jurisdiction.

1. Effectiveness barrier

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209 Charlotte Johnson Are we Failing Them? An Analysis of the New Zealand Criminal Youth Justice System: How can we Further Prevent Youth Offending and Youth Recidivism? (Ba(Masters), Massey University, 2015) at 43.
It may be argued that differing practices are based upon the assumption that the social contexts of young Māori offenders are fundamentally different to their adult counterparts. The corollary of such a position is that Youth Court procedures will be ineffective in an adult context, for they address unique issues of youth. There is a fundamental similarity in the adult jurisdiction through the Matariki Court’s networking with TMONK, and the monitoring of FGC plans within the Rangatahi Court – both methods centralise rehabilitation through a community-enforced programme. So too are both methods sufficiently flexible to address the particular needs of each offender. The author submits that given these similarities and academic calls for the extension of Rangatahi processes to the adult jurisdiction, measures taken under Te Kooti o te Ara Hou can be equally effective.\textsuperscript{210}

2. Legislative limitations

Arguably the proposed judicial function is prevented through differing legislative guidance. The OTA provides Youth Courts with broader legislative provisions allowing for a ‘problem solving’ approach, emphasising the strength and maintenance of iwi, hapū and whānau and requiring consideration of how decisions may impact on a child’s welfare, and seeking to make provision for offending to be resolved by their own family, whānau, hapū or iwi.\textsuperscript{211} The legislation also requires the court to consider holistically age, identity, cultural connections, and cognitive development.\textsuperscript{212} Its introduction was described as representing a ‘major change in policy towards Māori family forms and tikanga.\textsuperscript{213} This particular legislative framework has developed a specialised view on welfare, care, protection, punishment and rehabilitation policies in youth matters. While judicial officers have the skills and experience to apply a more holistic approach, those within the general adult jurisdiction do not benefit from the same legislative mandate.

The author stresses that while the introduction of s 25 sought to highlight the importance of whānau, hapū and iwi groups in selecting the type of rehabilitative

\textsuperscript{210} See Rangatahi Court 'should be used for adults' <www.radionz.co.nz> for statements by Khylee Quince. See also, Judge John Walker Taking Lessons From the Rangatahi Courts <www.adls.org.nz>.
\textsuperscript{211} Oranga Tamariki Act, s 208(c)(ii).
\textsuperscript{212} Oranga Tamariki Act, long title.
\textsuperscript{213} Donna Durie-Hall, Joan Metge Kua Tutu re Puehu, Kia Mau: Māori aspirations and family law in Mark Henaghan and Bill Atkin (eds) Family Law Policy in New Zealand (Oxford University Press, Auckland, 1992).
programmes undertaken, the holistic approach required under the OTA represents a clearer recognition of rehabilitation in dealing with offenders. As Heta evidences, the current application of s 25 as a rehabilitative tool is limited. It is envisaged that legislative guidance will enable similar procedures as were available in Adlam to become ‘mainstream’. Legislative amendment is therefore required to ensure Māori provision and ownership of rehabilitative programmes within Te Kooti o te Ara Hou, and effectively address issues of Māori reoffending.

The author proposes that to achieve this, the establishing legislation adopts a provision clarifying the application of s 25 as part of the functions of Te Kooti o te Ara Hou. It is suggested that the wording in Appendix II, s 3(2) ensures clearer guidance as to the holistic application of s 25, which borrows from the statutory wording of s 208 OTA. Such amendment likens the sentencing procedure within Te Kooti o te Ara Hou to the progressive objectives of New Zealand’s Youth Courts, demonstrating that there can be a judicially led response to issues of systemic Māori re-offending by borrowing from concepts that are already present and practiced within New Zealand’s criminal justice system.

E. The Relevance of an “Indigenous Initiative”

The appropriateness of processes within Te Kooti o te Ara Hou is further supported by its Indigenous underpinnings. Commentators in Australia maintain that Indigenous sentencing courts have a distinctive theoretical and jurisprudential basis, which cannot be simply derived from or subsumed by restorative justice or therapeutic jurisprudence. Such courts seek to solve a problem that is wider than the offender – the failure of western criminal justice systems to accommodate the needs of Aboriginal people.

It is argued that these therapeutic underpinnings lack a political dimension that seeks to bend and change the dominant perspective of ‘white law’ through Indigenous

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214 Cullen Hansard above n 168.  
215 Refer to Appendix II.  
216 Marchetti above n 65, 432–5.  
knowledge and modes of social control. Such arguments maintain that the mandate of Indigenous courts is therefore wider than traditional ‘problem-solving’ courts, thereby encouraging a ‘problem solving rationale’ and opportunities for Indigenous autonomy in criminal justice practice. Given the judiciary’s ability to flexibly adapt the law, promote greater Indigenous participation in the justice system and improve relations between the court and the Indigenous community, it is appropriately placed to combat Māori re-offending. Hence, the judiciary is an appropriate forum for incorporating Indigenous perspectives.

F. The Presence of Alternatives

Rehabilitative programmes targeting Māori have been recently subject to review by the Waitangi Tribunal. Submissions express the reality that many of today’s schemes occur within the prison context, with their design and implementation presided over by Department of Corrections personnel. Such initiatives have been largely ineffective and alien to Māori thinking – a further appeal of the proposed sentencing framework.

Sentencing courts may encourage positive behavioural change, while interpreting the law to fashion appropriate sentences. The “starting point for behavioural change is a person acknowledging their problem and committing to change.” Judicial appearance is a disruptive event, placing judges in a position to “influence and promote the offender’s decision to change”. This stands opposed to the criminogenic environment of prisons discussed. In applying criminal law consistent with tikanga Māori, judges are able to inspire positive change through the involvement of whānau and the community in a cultural setting. For the same reasons, Iwi Justice Panels within the Te Pae Oranga initiative are an appropriate alternative, which can be utilised for diverting offenders from the formal court system.

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218 Marchetti above n 65, at 433.
220 Above n 219 at 732.
222 Lunt above n 187, at 33.
223 Spencer above n 221, at 8.
G. Conclusion

Establishing Te Kooti o te Ara Hou is consistent with the commitments of today’s criminal justice system. The sentencing framework proposed is appropriate on the grounds that it has guidance from the youth context, Indigenous underpinnings, and avoids the inhibiting environment of prison rehabilitation programs to effect positive behavioural change. In order to be effective, however, the courts’ establishment and functions must be clearly delineated by way of legislation establishing Te Kooti o te Ara Hou and specifying its treatment of s 25. Whether this proposed framework is plausible within the socio-political fabric of New Zealand will be analysed in the final chapter.
Chapter Five: A Marae-Based Sentencing Court in Practice

“The statistics suggest trying to do something different on a wider scale cannot possibly do any harm.” 224

While there is a clear theoretical framework within which marae-based sentencing can operate, practical difficulties in implementation remain given New Zealand’s social-political reality. This chapter will assess whether functional marae communities are available for a ‘mainstream’ process. It highlights that there is a significant assumption that marae possess an incumbent network of willing individuals with the requisite knowledge of dispute resolution practices for the effective operation of Te Kooti o te Ara Hou. Whether this network will even open its doors to the criminal justice system, and the public generally is a further assumption. New Zealand’s inhibiting political landscape and the need to address concepts of “victims’ rights”, “monoculturalism” and “legal pluralism” are assessed as part of this analysis.

A. Assuming a Functional Marae Community?

Marae involvement in criminal justice today is widespread. As seen by the proliferation of Rangatahi Courts throughout New Zealand, 15 courts require support from marae and their communities. In 2014 the Ministry of Justice introduced three Te Pae Oranga Iwi Panels to serve the adult criminal jurisdiction (in Gisborne, South Auckland and Hutt Valley) and divert Māori from the court system.225 There are eight panels operating today, with another five planned.226 The marae network is also relied upon within this initiative, whereby kaumatua chair the community process.227 Similarly, Te Whānau Awhina is a marae-based initiative held at marae such as Hoani Waititi Marae. In collaborating with police and the local Safer Community Councils, the court diverts the participant to a community-based panel, before their

224 Justice Williams above n 99, at 29.
225 Minister of justice to the justice and electoral committee Ministry of Justice Annual Review 2013/14 Responses to the standard questions (20 February 2015) at 3 <www.parliament.nz>.
227 James Greenland Justice Panels Innovative way to achieve justice Law talk 881 (New Zealand, 12 February 2016) at 14.
own Māori community, together with their whānau and their victims. In addition, Te Whānau Awhina is a restorative justice programme, drawn directly from the customs of tikanga dispute resolution. This extensive involvement indicates that functional marae communities exist.

Claims are made that a fragmented Māori society makes it difficult to constitute a community response, due to the fact a large proportion of Māori are physically dissociated from their hapū and the collective interest, responsibilities, controls, and authorities are weaker. Recognising the accord between the Department of Corrections and the Kiingitanga, King Tuheitia's private secretary, Te Rangihīroa Whakaruru has stated “We want to put on the table lands, resources and people”. The agreement aims at sharing resources to rehabilitate offenders who affiliate to Waikato-Tainui and the 24 Kīngitanga iwi. The “Iwi Led Crime Prevention Plan (ILCPP)” is further evidence of such ambition, hypothesising that a reconnection to traditional Māori values and social structures is at the heart of reducing Māori participation in crime. This pan-iwi response is a strong response to claims that Māori are fragmented and a community response is difficult. Notably, Judge Rota highlights:

“No Māori is a loner. When they come into the court, when they come to the police station, they have a whānau on their shoulder, whether you can see it or not.”

B. Asks too Much of Marae Communities?

1. Fiscally

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228 The Hon Phil Goff Marae Based Justice (Ngai Tatou 2020: Indigenous Peoples and Justice) at 33 <www.firstfound.org>.
230 Goff, above n 228, 42.
It is arguable that the proposed framework imposes unreasonable strain on marae resources. There are insufficient resources to both monitor and sentence all offences involving Māori offenders via marae court sittings, with over 22,000 cases each year involving Māori offenders. Judge Clark provides in response to the Rangatahi Court’s operations:

We rely heavily on the support of a number of people and organisations. Kirikiriroa Marae and marae whānau, the kuia, the kaumatua and the trustees have been all embracing of this initiative.

This sentiment is reinforced by the providers of iwi panels:

Providers feel the iwi panel initiatives are under-resourced for the effort required to successfully establish and deliver them… and that government gets more than it pays for.

Because of the sheer volume in potential cases, legislative guidance as to who may enter Te Kooti o te Ara Hou and the collaborative approach envisaged between the Court Kairuruku and the judge in deciding entry to the procedure are appropriate. As expressed in R v Parker [2018] NZHC 2035, it is Department of Corrections’ policy that remand convicted prisoners cannot undertake rehabilitative programmes. Arguably the same rationale could be used for the proposed courts, during their early stages.

Two further responses are offered to the concern of funding. Current policy and a commitment to the Treaty of Waitangi indicate that Government fiscal support for marae-based sentencing would be appropriate, and a ‘mainstreaming’ process requires a consolidation of funding initiatives. A body of research has proven that the high costs of crime justify early intervention programmes on a cost-effectiveness

238 Te Kooti o te Ara Hou Bill, s 4. At Appendix II.
Rehabilitative programmes, as alternatives to imprisonment and driven to reduce recidivism ought to receive significant funding. In 1999 the costs of rehabilitative services provided by Hoani Waititi Marae and Te Whānau O Waipareira Trust was $23,000, alongside $60,000 from the Crime Prevention Unit. It was estimated that savings from the project were $193,096.

Associate minister for Justice and Courts William Sio, in discussing a $13.5m increase in budget for the Youth Court highlighted the deterring qualities of the Rangatahi Courts. In response to the Iwi Justice Panel initiative, Police Assistant Commissioner Wallace Haumaha highlighted that “three years' worth of data showed us that we were able to have a downturn in re-offending in the 17 to 24-year-old age bracket by 11.9 per cent.” Last year, the initiative was given a significant funding boost of $5.5m to continue until June 2019.

Evidently, the ability to reduce recidivism was in line with Corrections’ policy to decrease re-offending 25 per cent by 2017. Similarly, Kelvin Davis has recently proposed to “reduce New Zealand’s prison population by 30 per cent over the next 15 years… (by ensuring) there are safe and effective alternatives to prison, while also reducing crime and re-offending.” While Kim Workman highlights that rehabilitation ought not to be defined by a reduction in re-offending, but shaping a person’s capacity to contribute to society, the policy implications of decreasing re-offending bodes well for funding marae-based sentencing courts. Judge Becroft also highlights the Treaty of Waitangi in funding the Rangatahi Courts, and by association wider initiatives:

240 Keating above n 235.
241 Gabrielle Maxwell, Allison Morris and Tracy Anderson Community Panel Adult Pre-Trial Diversion: Supplementary Evaluation, Institute of Criminology (University of Victoria, Wellington, 1999).
242 Hon Andrew Little Better support for youth justice and victims of crime <www.budget.govt.nz>.
243 Iwi panels for offenders to be expanded <www.radionz.co.nz>.
244 In the fledgling marae-based justice system, 'offenders' are instead called 'participants' <www.staff.co.nz/national>
245 Ministry of Justice above n 3.
It is thought that the Treaty of Waitangi is a touchstone against which all Crown actions, including law, policy and practice within New Zealand should be evaluated... arguably the government has a duty to participate in the growing of resources, such as iwi and community services.»

The proposed framework and its ‘mainstreaming’ of marae-based sentencing also alleviates concerns over lack of resourcing. Guided by legislative change, use of marae-based sentencing courts requires a holistic review of court processes and rehabilitative programs. Such widespread introduction of court processes necessitates significant capital investment— a method of funding that differs for pilot programmes. Tauri has duly noted there has only been intermittent support for locally designed, developed and delivered programmes in New Zealand. As such, the vast majority of government spending in New Zealand’s criminal justice system goes to fund the orthodox “Western” derived crime control programmes. Marchetti and Downie highlight the difficulty in developing such initiatives where Governments are solely concerned with re-offending, and fail to allow a sufficient period of time for providers to fulfil their aims and objectives. For Māori, this history has been expensive and mainly unsuccessful in addressing complex issues such as re-offending. The author argues that a “mainstreaming” justification calls for a consolidation of funding initiatives and significant capital investment, securing the tenure of marae-providers.

2. Culturally

Having proposed the likelihood of fiscal support, arguments as to the co-option of tikanga Māori must be canvassed in analysing whether this novel framework will garner Māori support. Academics are generally concerned that assimilating Māori concepts into a Western model presents:

248 Keating above n 235.
249 Tauri above n 198, at 10, referring to the 16-bed Whare Oranga Ake pre-release prison units.
250 Tauri above n 198, at 10.
251 Marchetti above n 65, at 443.
252 Te Puni Kokiri above n 19.
A distinct danger that the meanings and values attached to Māori concepts when used in an iwi and hapū context will be distorted and amenable to manipulation by others when they are used in the official discourse of the state system legal system.

Tauri identifies this as the co-option of Māori culture – “jobbing” on behalf of the state, which is then utilised primarily to satisfy the policy requirements of ministers and their agencies.” He is further critical of relying on a neo-colonial state to dispense justice that has built itself on the disempowerment of its Indigenous population.” This suggests there is a risk that in adopting cultural perspectives, those prevailing atop the discourse are free to demean their underpinnings. Dickson complains that tikanga Māori and the realm of Te Ao Māori are far more complex than expressed in current marae-based court processes. He provides that “(Rangatahi Court) judges are doing the kaumatua’s job and thus taking away the last bastion of Māori ownership of the process”. From this perspective, a “mainstreaming” would solidify the cultural derogation presently occurring, making it difficult to galvanise Māori community support.

In reviewing attempts to improve outcomes for Māori in the criminal justice system, O’Reilly highlights the need for Māori owned, rather than delivered responses. The Waitangi Tribunal levels similar criticisms against today’s criminal justice perspectives, submitting that it has not engaged with Māori at a strategic level and has failed to engage Māori expertise in co-designing kaupapa Māori processes to address the disproportionate re-offending rates. Recent policy-making, for Tauri, is

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254 Tauri above n 198, at 9. See also Juan Tauri and Paora Moyle “Māori, Family Group Conferencing and the Mystifications of Restorative Justice” (2016) 11(1) Victims and Offenders 87, at 102 in presenting Family Group Conferences as excluding community ownership.

255 Juan Tauri Family Group Conferencing and the indigenization of New Zealand’s Justice System (a paper to Māori and Criminal Justice System Conference, Wellington 1998) at 87.

256 Williams above n 253, at 36. See also Tauri above n 198 at 10, for discussion on Western interventions as “orientalised artefacts that enable the state to be seen to do something”.


258 Above n 257, at 87.


260 Te Puni Kokiri above n 19, at 2.
therefore a governmental interpretation of Indigenous knowledge and cultural practice invented by government officials and contractors.261

On this account, the legitimacy of the proposed framework will rest on Māori authority over production and implementation. As noted, much of today’s tikanga-based rehabilitation occurs within the prison context.262 Te tirohanga, Mauri Tū Pae, Te Ihu Waka, Te Ara Māori, Te Kupenga, Whare Oranga Ake, and the Tiaki Tangata Reintegrative Programme are designed by Department of Corrections with iwi “input”.263

By contrast, sufficient freedom exists within the proposed framework for Māori ownership of development. Melissa Harrison, speaking on the recent $6.5 million investment in expanding the Koori Courts in Australia proposes, "A community led approach is an important step towards supporting self-determination".264 To ensure Māori ownership of this process, a Māori-orientated summit would allow for discussion on a general tikanga framework of how trial and rehabilitation could be applied on marae. While each marae is responsible for its own measures, a steering group is proposed in the legislation under s 6 of the Te Kooti o te Ara Hou Bill to maintain consistency between processes.

It is duly noted, however, that this process still occurs under the guise of a judge – a potential embodiment of who truly owns the criminal justice process, and a detraction of Māori ownership of the process. It is envisaged that judges well versed in tikanga sit on such hearings, akin to judges within the Rangatahi Court. As seen in the Matariki Court, completion of a rehabilitative programme must be taken into account, but it is at the judge’s discretion to what extent this reduces the severity of punishment. As seen in Canada, strong judicial guidance is enshrined in case-law within Gladue265 and Ipeelee.266 Just as principles of sentencing discretion can be

261 Tauri above n 198, at 9.
264 Melissa Harrison, Manager, CSV Koori Programs and Initiatives <www.foreignaffairs.co.nz>.
distilled into a framework of considerations, it can be expected that judges within Te Kooti o te Ara Hou will fashion similar responses to completion of rehabilitative programmes, and the recommendations of participants and providers within them.267 Through mainstreaming, a sufficient amount of factual applications can ensure that completion of programmes is consistently accounted for.

Ceding discretion to those of the marae community in how to deal with offenders allays concerns put forward by Quince and others that marae-justice processes would result in rangatahi and their families identifying, consciously or unconsciously, their marae with conflicts, sanctions and social controls exerted by outsiders on them.268 Conflict resolution and the marae are traditionally linked, but under this framework, an element of ownership of this process is retained, with collaboration reinstating the mana of marae.

C. The Politicised Nature of Criminal Justice in New Zealand and Its Impact on Reform

Arguably the political climate in regard to matters of criminal justice inhibits the implementation of the proposed measures, making it an important consideration when assessing the practicality of reform.

1. A punitive society

Pratt writes that New Zealand has gained an international reputation as a punitive and intolerant country in regards to its punishment of offenders.269 As a heightened public voice has developed alongside what David Garland terms “the declining influence of social expertise”, contests over which political party can be ‘toughest’ on crime leads to regressive outcomes.270 This affinity for ‘penal populism’ ensures a stagnation of criminal justice initiatives for Māori in New Zealand, whereby tikanga values of community involvement, reconciliation and rehabilitation exist on the periphery of the criminal justice sector.

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267 See R v Adlam [2018] NZDC 8037, [24]-[31].
268 Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julie Tolmie and Warren Brookbanks, eds. The New Zealand Criminal Justice System (LexisNexis, Auckland: 2007). See also Bence Takacs Māori and Romani and Juvenile Justice – Approaches and Responses From Different Justice Systems (PhD, Auckland University of Technology, 2017) at 262.
2. Reframing the role of victims in this punitive context

Traditionally, victims’ interests are met by punishment. \(^{271}\) Victim support groups such as the Sensible Sentencing Trust (“SST”) have a degree of political clout in New Zealand, advocating generally for punishment and deterrence. While victim participation in rehabilitation is envisaged, it does not neatly fit within the public sentiment that the SST claims.

3. Monoculturalism

Just as Jackson proposes that the law and its processes suffers from “monoculturalism” \(^{272}\) it may be argued that New Zealand is monocultural in its conception of justice with its narrow reliance on punishment. Frameworks of sentencing adopting tikanga principles of restoring harmony and victim participation are inconsistent with the centrality of punishment in New Zealand, and therefore present political risk in their introduction.

From this perspective, much of the public’s disapproval of a “parallel system of justice” after Jackson’s He Whaipaanga Hou report and its threat to the philosophy of “one law for all” can be understood. \(^{273}\) Not only is the proposed framework manoeuvrable within this political setting, as principles of TJ sit within the existing system, and the process is open to all offenders, but it has legislative impetus. These features will be essential in ensuring political support for the regime, amongst a changing tide of criminal justice matters in New Zealand.

4. Challenging assumptions of monoculturalism

It is argued this rigid subscription to traditional conceptions of justice and punishment may be challenged by a post-modernist critique, whereby the proposed framework offers a novel challenge to prevailing commitments within the criminal

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\(^{271}\) As expressed in \(R v Adlam\), victims’ interests can be met within a problem-solving framework regardless of their ethnicity.

\(^{272}\) Jackson part 2 above n 17, at 43.

\(^{273}\) Kim Workman “From a Search for Rangatiratanga to a Struggle for Survival – Criminal Justice, the State and Māori, 1985 to 2015” (2016) NS22 Journal of New Zealand Studies 89, at 98.
justice system. Instead a process that encourages healing for both offenders and victims can be developed.274

The law both shapes the society it serves and helps to establish and maintain the place of people within it. Liberal legal ideology is limited in contemplating differences and inequalities.275 Applying this argument to health inequalities in New Zealand, Reid and Robson provide:276

Any discussion on equality and rights must be informed by acknowledging this preferential benefit accrued by Pākehā from the systems they introduced and built, and continue to refine and control.

Given the monocultural commitment to Western ideals of justice in New Zealand,277 attempting to imbue another viewpoint into the dominant criminal justice system is difficult, and a gradual process.278 This difficulty is not, however, recognised by those subscribing to the notion that the operations of the criminal law are culturally impartial.279 This impartiality, it is argued, arises from protections against bias or insensitivity.280 Jackson argues that these protections are monoculturally defined, leading to an acceptance of impartiality by the dominant culture preconceived through existing social prejudices.

New Zealand’s “legal pluralism” is arguably presented in response to this claim – that

274 Justice Richard J Goldstone of the Constitutional Court in South Africa above n 183.
278 Elena Marchetti, and Riley Downie Indigenous People and Sentencing Courts in Australia, New Zealand and Canada. In Sandra Bucerius and Michael Tonry (Eds.) The Oxford Handbook on Ethnicity, Crime and Immigration (Oxford University Press, USA, 2014) at 370.
280 Above n 279, at 257.
two systems of ‘law’ co-exist, seeking to cater for the interests of those within a multi-cultural society. Griffiths contends this framework of legal pluralism is precisely what prevents an open challenge to monoculturalism in a legal system, holding that legal pluralism is invoked to uphold notions of authority and legitimacy, to favour or promote one set of local claims over another. Under a rubric of legal pluralism, the legal system is able to assume its norms are inherently fair and valid, meaning that actions by the state and its agents are benefitted by the same token. Such a system becomes the arbiter of which Indigenous practices are “valid”.

A post-modern perspective, by contrast, proposes that one ought to refuse to give credence and deference to an established status order, in which knowledge of truth and the right to be heard are not equally distributed. Attempts to change a legal system therefore require commentators to appreciate that biases and prevailing attitudes are normalised in New Zealand, to the detriment of Māori development. Where Cheek and Gough suggest that the term ‘justice’ is a perpetual foci of speculation and debate, a mainstreaming of tikanga Māori practices can provide Māori with a foothold in the dialogue of criminal justice. Today, Indigenous perspectives are marginalised in the design of policy and development of programmes. This is further evidenced by the experience of a Māori ex-prisoner during the summit recently held in Porirua, “all those people are looking at me like I shouldn’t be here.”

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281 Williams above n 99, at 32. See also, Sally Engle Merry “Legal Pluralism” (1988) 22 Law and Society Rev 869 at 870, defining legal pluralism as “a situation in which two or more legal systems coexist in the same social field”.
285 JustSpeak above n 68, at 20.
287 A dialogue which Māori have been largely excluded from: See Pita Sharples, “Tackle Prejudice in Justice System” The New Zealand Herald (online ed, Auckland, 10 October 2011) <www.nzherald.co.nz>.
289 Comment by “Sam” <www.thespinoff.co.nz>.
It is arguable that once incorporated into mainstream court process, an Indigenous perspective may serve as the vehicle through which New Zealand’s monocultural commitment to Western ideals of justice can be challenged. By remaining on the periphery of criminal justice, it is arguable that Māori have insufficient tools to challenge the assumptions of prevailing power structures. Granting a degree of autonomy and recognising Indigenous methods can therefore provide a measured process of change. Such development need not be toward a parallel system of justice, but one in which the best of both legal systems in New Zealand are incorporated, based on co-operation and partnership as the Treaty of Waitangi envisaged. This envisages a criminal justice system emphasising empathy and relational responsibility, whereby punishment is increasingly sidelined in favour of restorative-based models emphasising reparation and participation.

Arguably, a hardened attitude towards offenders in New Zealand is waning. In 2011, Bill English recognised that current trends in the prison population are fiscally and morally unsustainable. This dissatisfaction has culminated in a nationwide conference to discuss issues with today’s system. It has been argued that this turbulent political environment debilitates rational and measured reform, where the broader bi-partisan response of the United States may provide guidance. In 2014, the U.S Attorney General gave a speech on the ‘paradigm shift’ required to combat mass incarceration. Under the ‘Coalition for Public Safety’, political advocacy groups voiced their intentions to reduce the significant fiscal and social costs of America’s ‘over incarceration’. Recent calls for a similar bi-partisan approach in measures to be

294 Bill English, Minister of Finance (speech to Families Commission 50 Key Thinkers Forum, May 11, 2011).
296 The United States Department of Justice, One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop In Federal Prison Population In More Than Three Decades (Press release, September 23 2014).
‘smart on crime’ in New Zealand\textsuperscript{297} resonate with those made within the United States.\textsuperscript{298} Bi-partisanship commitment to criminal justice reform is therefore a viable means to quell a divisive political environment. Bi-partisanship is therefore essential for introducing the marae-sentencing process proposed, and seeking to re-invest in New Zealand’s justice system to ‘wind back imprisonment’.

\textbf{D. Conclusion}

In order to maximise the potential of Te Kooti o te Ara Hou as divisional courts, both internal and external difficulties must be assessed. Given the strong rationales for funding, and emphasis on Māori autonomy, the internal assumption of a functional marae community is plausible. Externally, the political commitments and attitudes of a nation are difficult to change. However, post modernism provides a framework through which prevailing attitudes of ‘punishment’ and concerns of a ‘parallel system of justice’ can be challenged. Te Kooti o te Ara Hou remains a suitable domain for this challenge to be carried out, for it does not require a parallel system of justice. Wider legislative change and a recognition of Māori input, it is argued, allows for an Indigenous perspective to sit at the forefront of criminal justice reform in New Zealand, and thereby achieve positive change for Māori.

\textsuperscript{297} Johnston above n 111, at 3.
\textsuperscript{298} David Brown, Chris Cunneen, Melanie Schwartz, Julie Stubbs, & Courtenay Young Justice Reinvestment: Winding Back Imprisonment (Palgrave Macmillan, Australia, 2016) at 37.
Conclusion

While disproportionate rates of recidivism are tied to a raft of socio-economic factors, this paper seeks to recognise the impact of New Zealand’s monocultural processes of criminal justice. In order to reduce rates of Māori re-offending, an Indigenous framework of understanding is proposed through the implementation of Te Kooti o te Ara Hou as marae-based sentencing courts.

Taking an Indigenous approach to combat Māori disproportionality within criminal justice is mandated by a number of factors. Not only is the government’s failure to address disproportionality with a targeted approach toward Māori with Māori ownership a breach of various legal instruments including the Treaty of Waitangi, but the economic rationality of crime prevention also necessitates a targeted Māori response to such disproportionality.

In assessing the philosophical overlay between a therapeutic application of law and tikanga Māori dispute resolution processes, both highlight that the criminal justice process is uniquely placed to effect positive behavioural change. Underpinned by a solution based approach and community involvement in re-offending, these synergies allow for a streamlined application of tikanga Māori within New Zealand’s criminal jurisdiction.

Having established the case for such a sentencing framework, a range of criticisms, from legal to practical, may be levelled against its implementation. Some claim that it is inappropriate for courts to “be in the mix of solving society’s problems.” It is argued in response that specialist judges work within New Zealand’s legislative mandate in sentencing by achieving the goals of deterrence and improving public safety. Premised on the notion that the law and its processes should change to fit social issues akin to that of substantive law, it is proposed that a court-based response to Māori recidivism is a legally justifiable interpretation of the judicial role.

Various factors indicate the appropriateness of a court-based response. New Zealand’s judiciary has experience applying a holistic approach to sentencing within

299 Judith S. Kaye, former Chief Judge of New York State, as cited in Berman above n 122, at 31.
the youth jurisdiction, although legislative amendment is required to ensure the fruits of this experience can be realised. The political underpinnings of indigenous sentencing courts justify a proactive judicial response. Importantly, courts are strategically placed to effect positive behavioural change, in contrast to the ineffectiveness of prison-based rehabilitation schemes.

The novel framework proposed enhances the cultural capacity of New Zealand’s mainstream sentencing process. Establishing legislation for Te Kooti o te Ara Hou provides a much needed delineation of the courts’ functions in respect of sections 25 and 27. Taking guidance from developments within the youth context, the author proposes that this legislative evolvement is the next stage in developing a culturally effective framework of sentencing procedure.

Practical concerns, however, still exist in achieving a court-based response to recidivism within New Zealand’s socio-political landscape. The centrality of marae communities to the proposed sentencing framework requires an assessment as to its existence. Based on the involvement of marae in criminal justice, and the pan-iwi response, it is argued that such a community network exists. Whether such communities will support the proposal, however, will likely turn on issues of funding and ownership of the process. The research suggests that autonomy must be reserved for Māori initiatives in designing Te Kooti o te Ara Hou courtroom practice and the rehabilitative programmes considered within such courts. Provided the framework is effectively applied, to be assessed by a number of indicia outlined by Thomas and Quince, the road to self-determination can be realised.

The political nature of criminal justice reform cannot be overlooked as a limitation. It is a significant obstacle in achieving measured and steady reform. Based on reactions to race-based policies in the past, New Zealand’s socio-political landscape has been historically averse to a “parallel system of justice”. It is argued that a monocultural lens to justice practice is present in New Zealand, necessitating a post-modern deconstruction of attitudes towards justice. It is argued that a mainstreaming of tikanga practice provides Māori a foothold to challenge these regressive assumptions within New Zealand’s criminal justice system.
Today’s political climate recognises the need to “address the drivers of crime.” A 2016 survey found that only 12 per cent of people believe prisons successfully deter people who have been to prison from committing further crime. The time is therefore appropriate to align this country’s adult jurisdiction with its world-renowned youth counterpart. To ensure effective change, this research calls for the state to entrust and empower indigenous peoples to address an indigenous problem. Using frameworks of both criminal justice jurisdictions, it is argued that a process of sentencing can be fashioned that more closely aligns with the values of those in which it serves. Such an approach does not seek to address underlying socio-economic issues surrounding crime, but offers a collaborative landscape through which Māori and perhaps wider offenders can effect positive behavioural change in their lives. Marae-based sentencing Courts symbolise the makings of a revolutionary justice practice and are a vital step in addressing the current incarceration crisis in New Zealand.

301 Colmar Brunton Public Perceptions of crime 2016 - survey report (prepared for Ministry of Justice, November 2016) at 8.
302 New Zealand’s prison population is one of the highest among OECD countries at roughly 220 per 100,000, far beyond the averages of comparable jurisdictions such as the United Kingdom, Australia and Canada: See Department of Corrections Briefing to the Incoming Minister 2017 <www.corrections.govt.nz>, and Gluckman above n 12, at 5.
APPENDIX I

Section 27 stipulates:

If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—

(a) the personal, family, whānau, community, and cultural background of the offender:

(b) the way in which that background may have related to the commission of the offence:

(c) any processes that have been tried to resolve or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whānau, or community and the victim or victims of the offence:

(d) how support from the family, whānau, or community may be available to help prevent further offending by the offender: and

(e) how the offender's background, or family, whānau, or community support may be relevant in respect of possible sentences.

Section 25 stipulates:

Power of adjournment for inquiries as to suitable punishment

(1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:
(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:

(b) to enable a restorative justice process to occur:

(c) to enable a restorative justice agreement to be fulfilled:

(d) to enable a rehabilitation programme or course of action to be undertaken:

(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).
APPENDIX II

TE KOOTI O TE ARA HOU BILL 2018

1 Purposes

The purposes of this Act are-

(a) to establish a division of “Te Kooti o te Ara Hou” Courts as a division of the District Courts at participating marae; and

(b) to provide for the jurisdiction and procedure of the Courts with the objective of ensuring participation of the Māori community in the sentencing process of offenders and the implementation of tikanga dispute resolution processes.

2 Establishment of Te Kooti o te Ara Hou Division

(1) Te Kooti o te Ara Hou has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.

(2) Mandatory presence of a Court Kairurku (co-ordinator).

(3) Te Kooti o te Ara Hou must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the Sentencing Act 2002 and the proper consideration of the matters before the Court permit.

(4) Te Kooti o te Ara Hou must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to:

(a) the offender; and

(b) court participants;

(c) the marae upon which the hearing takes palce.

3 Functions of the court

(1) Understand the relevance of information from s 27 hearings in determining appropriate sentencing practice, such as which offenders will partake in rehabilitative programmes.

(2) To apply s 25 in a manner that is appropriate to the offenders’ cultural needs, and seeks to enhance their development using whanau, hapu or iwi networks,
including but not limited to, the creation, implementation and monitoring of marae-based rehabilitative programmes.

(3) To recognise completion of programmes in the sentencing of offenders

4 Circumstances in which Te Kooti o te Ara Hou Division may deal with certain offences

(1) Te Kooti o te Ara Hou may deal with a proceeding for an offence if:
   (a) The offence is within the jurisdiction of the District Court
   (b) The offender consents to the proceeding being dealt with by Te Kooti o te Ara Hou Division
   (c) The offender has not been convicted in the past of a serious violence offence as per s 86A of the Sentencing Act 2002.

5 Sentencing Procedure

(1) Subject to this Act, participating marae of Te Kooti o te Ara Hou may regulate their own procedure, subject to s 6.

(2) Te Kooti o te Ara Hou may inform itself in any way it thinks fit, including a report by, or a statement or submission prepared or made to it by, or evidence given to it by:
   (a) A Court Kairuruku; or
   (b) A lay-advocate; or
   (c) A rehabilitation service provider; or
   (d) A victim of the offence; or
   (e) Anyone else whom Te Kooti o te Ara Hou considers appropriate.

6 Te Kooti o te Ara Hou Steering Group

(1) A steering group will be responsible for the procedures of participating marae.

(2) Each marae holding hearings under Te Kooti o te Ara Hou procedures must elect one marae-representative.

(3) Te Kooti o te Ara Hou procedural guidelines can be enforced upon the Division if passed by a majority of marae-representatives from each marae.
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