TANIWHA IN THE ROOM: ERADICATING DISPARITIES FOR MĀORI IN CRIMINAL JUSTICE - IS THE LEGAL SYSTEM UP FOR THE CHALLENGE?

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Abstract

This article will evaluate the effectiveness of the New Zealand legal system in eradicating disparities for Māori in criminal justice. It will survey the paradigms and contextual factors that underlie the disparities for Māori in the justice system and incorporate this into a critical analysis of the New Zealand legal system. It will canvass arguments for and against legal system effectiveness, enquiring into both direct and indirect mechanisms, both action and inaction. It will ultimately deconstruct New Zealand's legal system so as to illustrate pathways to eradicate inequities for Māori in the justice system.

> Whāia te iti kahurangi ki te tūohu koe me he maunga teitei
> Seek the treasure you value most dearly; if you bow your head,
> let it be to a lofty mountain

I. Introduction

Between 20 and 22 August 2018, the current Labour Coalition Government started a conversation with key stakeholders about the future of our criminal justice system.[1] The over-representation of Māori in the criminal

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1 Te Uepū Hāpai i te Ora - The Safe and Effective Justice Advisory Group "Summit Programme" (20 August 2018) Safe and Effective Justice <safeandeffectivejustice.govt.nz>.

justice system is not without its dead bodies. It is estimated that at any one time at least 10,000 Māori children are likely to have a parent in prison.[2] Sir Peter Gluckman, Chief Science Advisor to the New Zealand Prime Minister, noted that "[i]f Māori had the same proportion of their population in prison as non-Māori, then the prison population would be 44 per cent smaller".[3]

Evaluating the effectiveness of the New Zealand legal system in eradicating disparities for Māori in the criminal justice system is ostensibly a mammoth task. Admittedly, this inquiry has challenges and limitations. The main challenge is the availability of the most recent data. Even though there are current articles on this topic, they often cite older primary data sets. This challenge is heightened by government departments which — deliberately or otherwise — fail to conduct research on Māori disparities. A case in point is the Department of Corrections, who stated in response to my Official Information Act request that it has not yet commissioned research into the over-representation of Māori in the criminal justice system from the year 2014 to the present day.[4] Thus, research put forward by the Department of Corrections is entirely dependent on data put out by the Department of Statistics and the Ministry of Justice. Sir Peter Gluckman also laments that, compared to overseas jurisdictions, New Zealand has a lack of current research on the issue of ethnic bias in the criminal justice system.[5] The question of whether this is self-serving obfuscation of information and data that mask institutional failure is one worth pondering.

The lived experience of Māori is complex. This includes being stereotyped and over-represented in negative socio-economic statistics. Complexity also lies in how the debate about Māori criminal justice is framed. This article seeks, not just to describe the disparities for Māori, but to also show how the debate about Māori criminal justice creates a self-perpetuating cycle. The constitutional debate and constitutional bargaining are skewed towards a narrow, Pākehā-centric vision, one that disenfranchises Māori from the promises of the Treaty, and one that often dilutes policy responses in fear of a political backlash from Pākehā, particularly from groups such as Hobson's Pledge, led by Don Brash. The vitriol created by such groups, which lament so-called "special rights" for Māori, in effect becomes a barrier to ameliorating the intergenerational effects of devastating colonial atrocities and injustice against our indigenous people. The present legal system epitomises Cass Sunstein's notion of "incompletely theorised agreements".[6] This means, due to

2 Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at x.

3 Peter Gluckman *Using Evidence to Build a Better Justice System: The Challenge of Rising Prison Costs* (Office of the Prime Minister's Chief Science Advisor, March 2018) at 19.

4 Department of Corrections "Response to Official Information Act 1982 Request by the Author" (19 July 2018) C99781 (Obtained under Official Information Act 1982 Request to the Department of Corrections).

5 Gluckman, above n 3, at 19.

6 Cass Sunstein "Incompletely Theorized Agreements" (1995) 108(7) Harv L Rev 1733.

the political tussles involved in achieving consensus on a matter such as Māori over-representation in the criminal justice system, a solution that somehow appeases both sides while still resolving the matter, notwithstanding theoretical weakness at the edges. The notion of "incompletely theorised agreements"[7] is particularly applicable to relevant provisions in the Sentencing Act and the implementation of Rangatahi Courts. The current state of affairs is the result of constitutional bargaining. It is characterised by its own imperfection. This article calls for an unyielding leadership that will honour the promises of the Treaty of Waitangi and embolden the Crown to actively take steps to address Māori disparity and, moreover, that the legal system should be right behind these efforts.

The thesis of this article is that over-representation of Māori in the criminal justice system is a polycentric policy issue.[8] That is, one with many different, interrelated causes, akin to an issue like climate change. Professor Lon Fuller would characterise such a phenomenon as a "spider web".[9] This polycentricity is neither well understood by policymakers, nor by the public. This leads to a vicious cycle. Partly, there is a notion that policy responses are incompletely theorised, so as to please both sides of the debate and not upset Pākehā, who may perceive the response as special treatment for Māori. In order to see real change in line with the duties of the Treaty of Waitangi, I argue that the response must be fully theorised to encompass the polycentricity of the problem, and this will include the process of decolonisation. Any backlash from Pākehā is a small price to pay to create a better future for New Zealand children and, in turn, to create a fairer society. Most research into the over-representation of Māori in the criminal justice system misses the complexity of this as a wicked policy problem. I argue that this complexity lies in what has caused the over-representation, historically and legally speaking, as well as what continues to perpetuate it, and what needs to change in order to fully address the over-representation. Like the many tentacles of a taniwha, we must attack all the prongs in order to address this issue.

II. The Context of Māori Disparities In Criminal Justice

The statistics about Māori over-representation in the New Zealand criminal justice form an inextricable part of the polycentricity of the issue. It is not just about Māori incarceration and reoffending statistics, but also figures about Māori socio-economic deprivation, which is jarring, especially in comparison to Pākehā and other non-Māori. This socio-economic deprivation is not merely a result of "poor choices" by Māori, but rather from the inter-generational effects of colonisation and racism.

7 At 1733.

8 See Elizabeth Fisher, Bettina Lange and Eloise Scotford *Environmental Laws: Text, Cases, and Materials* (Oxford University Press, Oxford, 2013) at 24.

9 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 395.

A "The Proof is in the Pudding" - A Summary of Statistics

Data in 2007 showed that Māori were four to five times more likely to be apprehended, prosecuted and convicted than non-Māori.[10] Māori are also three times more likely to be apprehended for drug offences and seven times more likely to be apprehended for offences against justice.[11] Recent sentencing statistics from the Ministry of Justice show that the percentage of prosecutions of youth who are Māori increased from 49 per cent in 2008 to 64 per cent in 2017.[12] In the same period, the number of youth prosecuted who are European decreased by 76 per cent.[13] Equally, with regard to adult conviction statistics, the percentage of adults convicted who are Māori increased from 36 per cent in 2008 to 42 per cent in 2017.[14] The immediate reason for this is that the number of adults who are convicted who are European fell by 40 per cent between 2008 and 2017, while the number of adults who are convicted who are Māori only fell by 21 per cent over the same period.[15] Something is leading the justice system to be more effective for Europeans than Māori. Although the numbers of both Māori and Europeans convicted are falling, the numbers for Māori are falling at a lesser rate. Why is that? No research has been done recently (that is, since 2017) to explain why. I assume the Ministry of Justice is sitting on these statistics, hoping it will magically resolve itself. It will not. It must be addressed.

Another key study is the Christchurch Health and Development Study (CHDS), a longitudinal study involving 1265 children, from birth to 21 years.[16] This study found that young Māori aged 17 to 21 had annual rates of conviction for property/violent offending that were 5.9 times higher than the rates for non-Māori and rates of conviction for all offences that were 4.1 times higher than non-Māori.[17] In terms of some of the most robust quantitative research on Māori offending and issues of ethnic bias, a salient piece of research is that presented in the MSc Dissertation in Psychology, of Bridget L Jones.[18] This study updates the CHDS. This new study followed 995 participants

10 Kim Workman "Māori Over-representation in the Criminal Justice System - Does Structural Discrimination Have Anything to Do with it?" (8 November 2011) Rethinking Crime and Punishment <www.rethinking.org.nz> at 12.

11 At 13.

12 Ministry of Justice "Trends in Youth Prosecutions" (17 August 2018) Safe and Effective Justice <safeandeffectivejustice.govt.nz>.

13 Ministry of Justice, above n 12.

14 Ministry of Justice "Convictions and Sentencing Statistics" (17 August 2018) Safe and Effective Justice <safeandeffectivejustice.govt.nz>.

15 Ministry of Justice, above n 14.

16 David Fergusson, John Horwood and Nicola Swain-Campbell "Ethnicity and criminal convictions: results of a 21-year longitudinal study" (2003) 36(3) ANZJ Crim 354 at 361–362.

17 At 354.

18 Bridgette L Jones "Offending Outcomes for Māori and Non-Māori, an Investigation of Ethnic Bias in the Criminal Justice System: Evidence from a New Zealand Birth Cohort" (MSc in Psychology Dissertation, University of Canterbury, 2016).

from the original 1265 cohort of the CHDS study, and followed them from adolescence to 35 years of age.[19] This study highlighted that:[20]

> These results show that even after accounting for the disadvantageous social, family and individual risk factors, Māori still had rates of official charges and convictions that were 1.8 times higher than non-Māori, and rates of self-reported arrests and convictions that were 1.7 to 1.8 times higher than non-Māori.

Māori also have clear disparities in sentencing. Māori are seven-and-a-half times more likely to be given a custodial sentence, and 11 times more likely to be remanded in custody awaiting trial.[21] According to a report by the Department of Corrections, "… of all persons sentenced Māori typically received this sentence [monetary penalty] less frequently than did Europeans or other sections of the total population".[22] Also, it is found that from 2004 to 2005, 39 per cent of Pākehā were granted leave to apply for home detention at the point of sentencing, while only 29.1 per cent of Māori were granted leave to apply.[23] Equally, 19.3 per cent of Pākehā were granted home detention at a Parole Board hearing, compared with 10.7 per cent of Māori.[24]

It is important to note that Māori disparities in criminal justice exist in a context where New Zealand has one of the highest imprisonment rates in the Organisation for Economic Co-operation and Development (OECD).[25] In 1985, Māori formed 45.5 per cent of the total prison population and, in 2017, Māori constitute 50.7 per cent of the total prison population.[26] This shows that Māori disparity in criminal justice is a longstanding problem and initiatives aimed at addressing it seem not to have made a dent in the statistical trajectory. These statistics are not automatic proof of the thesis of this article, but no doubt raise questions about government action and inaction.

19 At 2.
20 At 75.
21 Workman, above n 10, at 13.
22 Department of Corrections *Over-Representation of Maori in the Criminal Justice System: An Exploratory Report* (September 2007) at 21.
23 At 24.
24 At 24.
25 ET Durie "The Study of Māori Offending" (New Zealand Parole Board Conference, Wellington, 2007).
26 Department of Corrections, above n 4.

B. The Statistics in Context

Colonisation turned New Zealand imperial pink (traditional colour for imperial British territories on maps).[27] From a Māori worldview, this process is seen as the shift from Te Ao Kohatu (the Old World) to Te Ao Hurihuri (the Changing World).[28] The effect of colonisation on Māori and other indigenous people around the world has been insidious and has imbued an everlasting legacy of skewed power relations.[29] In effect, colonisation called into question the humanity of indigenous peoples, and the task of defining the humanity of indigenous people was solely that of the coloniser.[30]

One of the key arms of the colonial engine in Aotearoa was the education system. It became a forum to dissuade Māori youth from developing a strong cultural identity through the banning of Te Reo and custom in schools.[31] It also marginalised Māori rangatahi in accessing quality education. Khylee Quince characterises the indictment of the Native Schooling system on Māori thus:[32]

> Restricting students to manual training rather than academic endeavours produced generations of Māori who were reliant upon unskilled jobs, and who did not seek tertiary education or the skilled professions that come with further study. Any recession or downturn in the economy usually hit the sectors in which Māori were largely employed.

Historians argue that it was not until the major rural-urban shift in the 1960s and 1970s that the full effect of colonisation was realised and Māori disparities in criminal justice became disproportionate.[33]

The Māori renaissance captured the revolutionary spirit of the late 1970s. A key focus of this movement was to reclaim Māori culture and worldviews. It was focused on reclaiming Māori rights to land, the reinvigoration of Te Reo, kapa haka and whakapapa links. It galvanised Māoridom to ask from

27 See James Belich *Making Peoples: A History of New Zealanders to 1900* (Allen Lane, Penguin, Auckland, 1996).

28 Khylee Quince "Maori and the criminal justice system" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Lexis Nexis NZ Ltd, Wellington, 2007) 333 at 341.

29 See Annette Sykes "Te Tiriti o Waitangi: A Vision of Respect of Civilisations and Cultures" in Colin James *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2000).

30 See LT Smith *Decolonizing methodologies: research and indigenous peoples* (University of Otago Press, Dunedin, 1999).

31 At 343.

32 At 343.

33 Donna Durie Hall and New Zealand Māori Council "Restorative Justice: A Māori Perspective" in Helen Bowen and Jim Consedine (eds) *Restorative Justice: Contemporary themes and Practice* (Ploughshares Publishers, Lyttelton, 1999) at 27.

the Crown what Professor Hugh Kawharu terms the "quid pro quo" of the Treaty of Waitangi.[34] An icon in this movement was Dame Whina Cooper, who along with Te Ropu Matakite, led the Māori land march in 1975.[35]

It is argued that the concept of social determinants of health is useful in shaping a waka to traverse the journey to equitable outcomes for Māori. The social determinant of health is a term that comes from the field of modern public health to characterise factors that either detract or positively influence health and wellbeing in population groups.[36]

It is important to understand that Māori justice disparities do not exist in a vacuum. Māori also experience disparities in income, education, unemployment, housing and at a neighbourhood deprivation level. The following will examine the aforementioned disparities. A key determinant of health and wellbeing is education. In 2005, 49 per cent of Māori secondary school students left school without an NCEA qualification, compared to 22 per cent of non-Māori.[37] With respect to unemployment, in 2007 Māori unemployment rates were three times higher than that of Pākehā.[38] With respect to income, average weekly income from all sources for Māori was $471 for the June 2005 quarter, compared with $637 for Pākehā.[39] With respect to housing, in 2001, 31.7 per cent of Māori owned or partly owned their home.[40] This compared with 59.7 per cent of Pākehā who owned or partly owned their home. Māori are more likely to live in rental accommodation.[41] A further determinant is neighbourhood level deprivation. The proportion of Māori living in the most deprived areas is significantly higher than non-Māori, with over half of the Māori population represented in the most deprived areas.[42]

It is important to understand that criminal justice issues interrelate with a variety of sectors. If the policy focus is solely on the criminal justice systems and areas such as health and education are ignored, it is unlikely to lead to the goal of eradicating disparities in criminal justice for Māori.

It is important to understand that New Zealand's criminal law system exists in the wider context of consistent racism against Māori. Racism did not stop in the post-colonial era; it is a continuing process. This racism is societal,

34 IH Kawharu "Foreward" in Michael Belgrave, Merata Kawharu and David Williams *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) at v.

35 Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) at 146.

36 See generally Philippa Howden-Chapman "Unequal Socio-economic Determinants, Unequal Health" in Kevin Dew and Peter Davis (eds) *Health and Society in Aotearoa New Zealand* (2nd ed, Oxford University Press, Melbourne, 2005).

37 Bridget Robson, Donna Cormack and Fiona Cram "Social and Economic Indicators" in Bridget Robson and Ricci Harris *Hauora: Māori Standards of Health IV: A Study of the Years 2000-2005* (Te Ropu Rangahau Hauora a Eru Pomare, Wellington, 2007) 21 at 22.

38 At 23.

39 At 23.

40 At 26.

41 At 26.

42 At 26.

interpersonal, institutional and internalised. A key driver of societal racism against Māori is the media. Researchers at the Whariki Research Centre comment:[43] "From the earliest contact, Māori were depicted negatively by European observers as uncivilised, savage, violent, ignorant and indolent." In the modern media context, especially in discourse about crime, it is observed that Māori are marked as the:[44]

> … "undifferentiated Other" in ways that create fear and alienation in the intended audience … Another major is to render Pākehā crime and violence, which are not ethnically marked, invisible, masking the relativities and diverting attention from the systematic impacts of repression and marginalisation of Māori by both state and society in general.

The issue of cultural bias appears to be a continuing motif in the justice system as has been extensively explored in Moana Jackson's seminal report, *He Whaipaanga Hou*.[45] Notwithstanding the views of the those who argue that equality before the law is the reality, Critical Race Theorists would argue that notions of equality before the law can only address the most blatant forms of racism,[46] while the more subtle racism in the criminal justice system remains at bay.[47] This means that racism continues to form a pivotal part of any discussion about Māori disparities.It is important to understand that Māori disparity sits alongside "Pākehā Privilege". The term Pākehā Privilege is the culturally specific term for white privilege in the New Zealand context. Pākehā Privilege is akin to racism in that it operates at societal, institutional, interpersonal and internalised levels.[48] Pākehā Privilege is arguably the natural corollary of colonisation. The Whariki Research Group finds that:[49]

> Disparity discourses can be inverted to describe how Pākehā as a group continue to show higher rates of positive outcomes in education, employment, income, and health. Pākehā are underrepresented in negative data across most domains including poverty and hardship,

43 Angela Moewaka-Barnes and others "Anti-Maori Themes in Journalism - toward alternative practice" (2012) 18(2) Pacific Journalism Review 195 at 195–196

44 At 206.

45 See generally Moana Jackson *The Maori and the Criminal Justice System; A New Perspective: He Whaipaanga Hou (Part 2)* (Ministry of Justice, November 1988).

46 JF Pyle "Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism" (1999) 40(3) BCL Rev 787 at 788.

47 At 790.

48 Helen Moewaka-Barnes, Belinda Borell and Tim McCreanor "Theorising the structural dynamics of ethnic privilege in Aotearoa: Unpacking 'this breeze at my back'" (2014) 7(1) International Journal of Critical Indigenous Studies 1 at 7.

49 At 10.

> housing, contact with the justice system, and self-reported discrimination.

The Whariki Research group explores the concept of "Pākehā as a norm" in the media. It is argued that:[50]

> Although Pākehā are rarely named as a group they are routinely constructed as natural, the nation, the ordinary, the community, against which all other ethnic groupings are viewed and measured. As a result there is a dearth of overt reference to Pākehā in the media. Instead there are a series of cues that indicate who is being spoken of, particularly through the use of pronouns - us, we, our - to denote Pākehā, while Māori are marked with you, yours and the causal distancing to the third person plural - they, them, their.

Notwithstanding these insights about the interplay between Pākehā Privilege and Māori disparities, often the government initiatives focus on the "Māori crime problem", while ignoring Pākehā privilege altogether. Also. there is a value judgement inherent in such an approach that Māori are solely to blame for their situation.

C. Perspectives on Māori offending

Historically, the problem of "Māori crime" has been conceptualised in many ways. Whether it is the retort that Māori were poor at assimilating to Pākehā culture, the "generation gap", the devastating effects of the rural-urban shift, early life disadvantage, and mono-cultural bias at all levels of society.[51]

Simone Bull argues that Māori "over-representation" is the wrong paradigm.[52] She suggests this approach ignores known criminological factors.[53] Alternatively, the focus should be on examining "… whether the proportion of Māori who are young, male, unmarried, unemployed, uneducated in substandard housing, is reflected in apprehension statistics".[54]

The issue of Māori over-representation in the arms of the criminal justice system needs to be seen as part of the wider "wicked problem of Indigenous

50 Angela Moewaka-Barnes, above n 43, at 197.

51 Dannette Marie "Māori and Criminal Offending: A Critical Appraisal" (2010) 43(2) ANZJ Crim 282 at 282.

52 Simone Bull "Changing the broken record: New theory and data on Māori offending" in Gabrielle Maxwell (ed) *Addressing the Causes of Offending - What is the Evidence?* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2009) 193 at 194.

53 At 194.

54 At 194

over-representation".[55] A part of this wickedness is the way that we enquire or research into this problem. In their 2016 book, *Indigenous Criminology*, Chris Cunneen and Juan Tauri enquire into how orthodox criminology fails to fully account for colonisation in discussions about indigenous over-representation.[56] In fact, they characterise it as "one of the significant epistemological and methodological blind spots of the discipline"[57] and call for an "Indigenous emancipatory methodology".[58] However, this is not a new idea, and part of the polycentricity of Māori disparity is that such calls have been ignored.

III. Analysis

A. Role of the Treaty of Waitangi

The Treaty of Waitangi Act 1975 and the Waitangi Tribunal are arguably both among the strongest bulwarks of protection of Māori interests in the New Zealand legal system. Sir Robin Cooke in *The Lands Case*[59] attested to the notion that the Treaty was a "living instrument" and that the "spirit" and "principles" of the Treaty should be given effect in the law.[60] The principles of the Treaty are active protection, partnership and participation.[61]It involves a fiduciary relationship in good faith and trust towards one another.[62] However, in the realm of addressing the over-representation of Māori in the criminal justice system, these bulwarks had seldom been utilised. This changed on 31 August 2015, when Tom Hemopo, a longstanding probation officer, filed claim WAI 2540 with the Waitangi Tribunal.[63] This claim was filed, not just on behalf of Mr Hemopo, but also his iwi: Ngāti Maniapoto, Rongomaiwahine, and Ngāti Kahungunu.[64] The claim had one overall aim and several supporting aims. The overall aim is to suggest "… the Crown had failed to make a long-term commitment to bring the number of Māori serving sentences in line with the Māori population generally".[65] In particular, Mr Hemopo, cites the Department of Corrections as culpable for failing to "… reduce the high rate of Māori reoffending proportionate with non-

55 Chris Cunneen and Juan Tauri *Indigenous Criminology* (Policy Press, Bristol, 2016) at 9.
56 At 10–11.
57 At 10.
58 At 29.
59 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641(CA) [The Lands Case] at 663–667.
60 At 663–667.
61 At 663–667.
62 At 663–667.
63 Waitangi Tribunal, above n 2, at 1.
64 At 1.
65 At 1.

Māori".[66] The ancillary aims mirror some of the polycentric notions of Māori disparity in criminal justice. The ancillary aims are twofold. First, that the Department of Corrections "… allowed its Māori Strategic Plan 2008–2013 to lapse without replacement, and had not consulted Māori in making this decision". [67] Second, that the Department of Corrections had "…failed to provide measurement of its performance in reducing Māori reoffending".[68]

The ruling and reasoning in the WAI 2540 claim is pertinent to the discussion in this article. The ultimate conclusion of the Waitangi Tribunal after an extensive hearing process is that "… the Crown, through the Department of Corrections, is not prioritising the reduction of Māori reoffending".[69] This is because the Tribunal deems that the Department of Corrections "… has no specific plan or strategy to reduce Māori reoffending, no specific target to reduce Māori reoffending, and no specific budget to meet this end".[70] The Waitangi Tribunal has found that the Crown breached two key Treaty principles: one of active protection and the other of Equity.[71] In its reasoning, the Tribunal affirmed the approach of the tribunal in the *Napier Hospital Report*[72] and utilised an expansive notion of active protection, one that extended beyond strict duties of the Crown, to that which encompasses "… the promotion of Māori wellbeing".[73]

The Waitangi Tribunal in WAI 2540 made six key recommendations to the Crown. These were, first, to strengthen the influence of the Department of Corrections Māori Advisory Board, second, to create a Māori specific strategy, third, to commit to measurable targets to reduce Māori reoffending rates, fourth, to create a separate budget to reduce Māori reoffending rates, fifth, to provide the required training for staff to understand traditional Māori and role of the Treaty of Waitangi in the work of the Department of Corrections, and sixth, to "… amend the Corrections Act 2004 to state the Crown`s relevant Treaty obligations to Māori".[74]

In relation to programmes run by the Department of Corrections to address Māori reoffending rates, the Tribunal commented that their limited placements and strict criteria meant that they alone are unable to change the trajectory of Māori in the justice system.[75] In relation to the universalist approach of the Department Corrections (as opposed to taking a Māori specific strategy), the Tribunal comments:

66 At 1.
67 At 1.
68 At 1.
69 At x.
70 At x.
71 At x–xi.
72 See Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001).
73 Waitangi Tribunal, above n 2, at 22.
74 At xi.
75 At 61.

> The Department seems to have wanted it both ways. It accepted it must reduce Māori reoffending to achieve its targets, but it also said that setting Māori targets would not be meaningful as too much is beyond its control.

However, it is not all "doom and gloom". In this instance, the Tribunal has deemed that the Crown has not breached the principle of partnership, because the Department of Corrections is "… currently making good faith attempts to engage with iwi and hapū".[76] Equally, there has now been a government-wide recognition of the Māori disparities in criminal justice. Admittedly, this recognition has not been perfect and possibly the same recognition may not be shared by the wider public. This policy standpoint is the culmination of several reports including: *Ministerial Inquiry into Violence*, *Roper Report*, *Daybreak Report*, *He Whaipaanga Hou* and Peter Doone's *Report on Combating and Preventing Māori Crime*.[77] The United Nations Human Rights Committee supports the notion that:[78]

> The New Zealand Government acknowledges that Māori are significantly over-represented in the New Zealand criminal justice system … It is also aware that, in addition to central government intervention and leadership, local government and community groups have crucial roles in preventing crime …

After the Waitangi Tribunal Claim, the Department of Corrections came out in March 2017 with a brand-new strategy to address disproportionately high Māori re-offending rates. This strategy can be described as inter-sectorial, because it involves a coordinated response by police, the Ministry of Justice and the Department of Corrections.[79] A unique part of this strategy is that it implements cultural competency frameworks for all staff.[80] This is a positive development. The budget for this new strategy is $10 million.[81] Although this is promising and better than nothing, given the polycentric nature of the Māori disparity in the criminal justice system, the question becomes whether the budget is sufficient. If one compares this budget to the cost of housing the inmates, this budget could be seen as minuscule. The question of what is the optimum budget to address Māori disparity has not yet been

76 At xi.

77 See Charlotte Williams *The Too hard Basket: Maori and Criminal Justice since 1980* (Institute of Policy Studies, Wellington, 2001) at 31–45.

78 Human Rights Committee *Consideration of Reports submitted by State Parties under article 40 of the Convention: New Zealand* CCPR/C/NZL/CO/5 (11 April 2011) at 2.

79 Department of Corrections *Change Lives Shape Futures- Reducing Re-Offending Among Māori* (Department of Corrections, March 2017) at 3.

80 Department of Corrections, above n 79, at12.

81 At 3.

fully studied or answered. It could be an apt topic for further research. The Department of Corrections has also formed a partnership with Māori groups. A noteworthy example is the accord between the Department of Corrections and Kingitanga.[82] It builds on mutual interests and involves means to share resources and information.

Although this decision by the Waitangi Tribunal provides important recognition of the disparity of Māori in criminal justice and makes tangible recommendations to the government, there are still obvious limitations. The aforementioned Waitangi Tribunal's recommendations on the Crown are not binding.[83] Although, by convention, these recommendations are followed, or an attempt is made to follow the recommendations, there are some recommendations that are not followed. An example of one recommendation that is yet to be followed is the amendment of the Corrections Act to reflect Treaty rights. The Crown's recognition of disparities for Māori in justice and the beginning of a more holistic criminal law policy approach, represents a significant step forward for our system. However, "sharpening the axe" of the government`s modus operandi is needed to fully and effectively eradicate disparities for Māori. Such a path must include the incorporation of the broader social and economic disparities in a plan to address justice disparities. Otherwise, a continued piecemeal approach to addressing the problems will only result in those disparities continuing into the future.

B. Legal Framework with regard to Sentencing and Māori Disparity

The Sentencing Act 2002 contains several provisions that are to a great extent aligned with the goal of eradicating disparities for Māori.[84] According to Joanna Hess:[85]

> By its text, the 2002 Sentencing Act appears to improve upon the language of the 1985 Sentencing Act, which merely granted a sentencing court broad discretion to consider an offender`s background during sentencing and did little to ease Māori over-representation. The 2002 Sentencing Act is more specific. It provides the court with guidelines on how and when to consider an offender's background. It also provides more rehabilitative alternatives.

82 Department of Corrections *Accord between the Kingitanga and the Department Corrections* (Department of Corrections, March 2017) at 5–6.

83 See Waitangi Tribunal *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (Waitangi Tribunal, May 2012) at 10.

84 Joanna Hess "Addressing the Overrepresentation of Māori in New Zealand`s Criminal Justice System at the Sentencing Stage: How Australia can Provide a Model for Change" (2011) 20(1) Pac Rim L & Poly J 179 at 182.

85 At 182.

The key sections are s 8(i), s 26(2)(a), s 27(1), s 50 and s 51. According to s 8(i) of the Sentencing Act, the Court:

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

According to Professor Geoffrey Hall this provision provides the possibility to recognise that:[86]

> … the descent into crime was a secondary consequence of desperation produced by human weakness rather than primary choice … This may demonstrate that the offender is less deserving of punishment that the primary facts might suggest, but equally that rehabilitation may be a long and difficult process.

It is arguably a slight shift from the free agent theory of criminal responsibility to one that is more holistic and particularly pertinent in the context of disparities for Māori in criminal justice.[87] For example, with regard to Class B drugs (specifically amphetamines)[88] and Class C drugs (specifically cannabis),[89] the Court of Appeal has recognised that non-custodial sentences may be justifiable in special circumstances, especially where the commercial element is absent and the quantities are small, and where the sentences are devised to break the cycle of addiction.[90]

According to s 26(2)(a) of the Sentencing Act:

> (2) A pre-sentence report may include —
> (a) information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender

Section 26(2) works in conjunction with s 8(i) allowing relevant information about cultural background to be brought to the fore.

Smelie J in *Wells v Police*[91] reiterated that s 16 of the Criminal Justice Act (the predecessor to s 27 of the Sentencing Act) was introduced largely to address the high rate of imprisonment of Māori and to assist in addressing the problem of the use of, or the availability of, alternatives to imprisonment for

86 Geoffrey Hall *Sentencing Reforms in Context (*Lexis Nexis NZ Ltd, Wellington, 2007) at 98.
87 See *R v Talataina* (1991) 7 CRNZ 33 (CA) at [36].
88 *R v Wallace* [1999] 3 NZLR 159 (CA).
89 *R v Terewi* [1999] 3 NZLR 62 (CA).
90 *R v Taylor* [1990] 1 NZLR 385(CA).
91 *Wells v Police* [1987] 2 NZLR 560 (HC) at [570].

the Māori offender.[92] The provision was envisaged to cover iwi, hapū, whanau and mātua whāngai.[93]

The key advantage of s 27 is that it enables people to speak from the body of the court without the requirement that they take the oath or make an affirmation and enter the witness box.[94] It helpfully avoids cross-examination and gives an opportunity to voice the cultural background of the offender.[95] Also, the provision is not purely discretionary. The court *must* hear the person called unless there is a special reason that makes doing so inappropriate.[96] Also, the court may suggest the use of this provision even if not specifically requested by the offender.[97] In *R v Bhaskaran*, the Court of Appeal noted that:[98]

> Community support rehabilitation may be very relevant to the nature and length of sentence … Moreover a Court must be astute to recognise the valuable assistance it may obtain from another cultural, ethnic or community insight, including on matters of penal concern.

Finally, it is important to consider the role of ss 50 and 51 of the Sentencing Act. Section 50 allows the option of applying "special conditions" as a part of a court-imposed "programme", which could include a programme with rehabilitative purpose (s50(c)). Section 51(c) specifically allows for the placement of the offender:

> In the care of any appropriate person, persons, or agency, approved by the chief executive of the Department of Corrections, such as, without limitation, —
> (i) an iwi, hapū, or whanau:
> (ii) a marae:
> (iii) an ethnic or cultural group:
> (iv) a religious group, such as a church or religious order:
> (v) members or particular members of any of the above.

Despite the promise that is evident in these provisions, it could alternatively be argued that these provisions are tokenism and biculturalisation with no

92 At [570].
93 Hall, above n 86, at 221.
94 *Wells v Police*, above n 91, at [570].
95 Sam Jeffs "Māori Overrepresentation and the Sentencing Act: The Role of Cultural Background" (19 September 2013) New Zealand Human Rights Blog <www.nzhumanrightsblog.com>.
96 Sentencing Act 2002, s 27(2).
97 Section 27(5).
98 *R v Bhaskaran* CA 333/02, 2 November 2002 at [13].

substantive effect on the disparity between Māori and Pākehā.[99] It could be said that these provisions are "perfunctory tick-boxing exercises".[100] The data on the utility of this provision suggesting low use lends weight to this notion.[101] Furthermore, Joanna Hess suggests "the permissive nature" (using the word "may") of the language of s 27(2) means that burden is more weighted to the offender to utilise, even if they are not aware of it.[102]

In *R v Rakuraku*,[103] sentencing judge, Williams J, considered the cultural impact report (as per s 27 of the Sentencing Act) provided by the sister of the defendant, Steven Tiwini Rakuraku, who is charged with the murder of Johnny Wright.[104] Williams J notes of the sister's cultural impact report,[105] that this report is "a cultural cry from the heart".[106] Consequently, Williams J reduced Mr Rakuraku's minimum period of imprisonment by one year to reflect this deprivation.[107]

However, not all cases have reasoning that recognises the polycentricity of Māori over-representation of the criminal justice system. Some judicial reasoning unwittingly evades it. For example, the Court of Appeal in *Keil v R* admonished that:[108]

> Our sentencing regime cannot be seen to condone a particular group's use of violent force to exact physical retribution. Similarly, cultural norms cannot excuse that conduct for some groups but not for others. While those norms may help to explain, they can never justify offending of such severity as occurred here.

In *Keil v R*, one of the defendants, Mr Paul, argued that the discount provided for his personal background (including the cultural report) of 20 per cent was not sufficient, and he sought a higher sentencing discount.[109] However, Harrison J concluded that:[110]

99 Juan Tauri and Allison Morris "Re-forming Justice: The Potential of Māori Processes" (1997) 30 ANZJ Crim 149 at 161.

100 JustSpeak "Māori and the Criminal Justice System: A Youth Perspective" (March 2012) JustSpeak <www.justspeak.org.nz> at 38.

101 See Alison Chetwin, Tony Waldegrave and Kiri Simonsen *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (Ministry of Justice, November 2000).

102 Hess, above n 84, at 205.

103 *R v Rakuraku* [2014] NZHC 3270.

104 At [29]–[37].

105 At [32].

106 At [31].

107 At [60].

108 *Keil v R* [2017] NZCA 563 at [58].

109 At [50].

110 At [59].

> We are satisfied that the Judge gave appropriate weight to Mr Paul's s 27 report within the overall scheme of the Sentencing Act. His acceptance of the report's relevant content was reflected in the generous discount of 20 per cent allowed against an appropriate starting point. We are not satisfied that the end sentence imposed was manifestly excessive or wrong in principle.

Equally, a recent High Court decision has come to light suggesting a sea change in judicial approach. In *Solicitor-General v Heta*,[111] the High Court considered whether it was just that Ms Heta is given a 30 per cent discount for her personal background, which encompassed the post-colonial reality of being Māori in Aotearoa.[112] The Solicitor-General argued that despite the realities of colonisation and the Parliamentary intention underlying s 27, the Court of Appeal's decision in *Keil v R* precluded a discount of 30 per cent for matters addressed in the s 27 sentencing report.[113] The s 27 report, in this case, was prepared by the formidable and prominent Māori legal academic, Khylee Quince.[114] The report explored Ms Heta's whanau background, links to Māori cultural factors and prospects for rehabilitation.[115] Mr Lillico for the Solicitor-General, submitted that a discount of 10 per cent, at most, was available for deprivation-based factors.[116] In addressing this issue, Whata J first sought to characterise s 27 of the Sentencing Act:[117]

> Section 27 was preceded by s 16 of the Criminal Justice Act 1985. Section 16 was a conscious attempt to recognise the importance of trying to meet the needs of Māori offenders, and in particularly young Māori offenders, who formed such a disproportionately large element within the prison population. That disproportionality, or asymmetry, has persisted.

Whata J goes on to cite the Waitangi Tribunal claim on Māori re-offending and the statistics about Māori over-representation.[118] Whata J notes how s 27 is not specific to Māori. According to Whata J:[119]

> Section 27 however does not enunciate a "Māori" specific response to this asymmetry. Rather, s 27 enables

111 *Solicitor-General v Heta* [2018] NZHC 2453 [*Heta*].
112 At [2].
113 At [2].
114 At [13].
115 At [14]–[18].
116 At [29].
117 At [35].
118 At [35].
119 At [37].

> background information about offenders, including Māori, to be presented to a sentencing Judge.

Whata J went on to elaborate on what is termed "systemic Māori deprivation".[120] Importantly, Whata J goes on to discuss the effect of the lack of specific reference to Māori disparity in the Sentencing Act and a specific legislative impetus to address it. Based on Whata J's reasoning, the current legal framework can be utilised to address Māori disparity in the criminal justice system. According to Whata J:[121]

> There is no express requirement to have regard to systemic Māori deprivation in sentencing. However, the Court when fixing sentence may consider "any aggravating or mitigating factor the court thinks fits." Section 27 then mandates consideration of the full social and cultural matrix of the offender and the offending. There is no obvious reason why this should exclude evidence of systemic Māori deprivation and how (if at all) this may have contributed to the offending.

In *Heta*, Whata J distinguished the approach of the Court of Appeal in *Mika*. In *Mika*, despite the Court of Appeal acknowledging systemic deprivation faced by Māori to some extent, it ultimately concluded that "… it does not logically follow that a person is more likely to be at a disadvantage and to simply offend by virtue of his or her Māori heritage."[122] Whata J articulates a nuanced position, namely that:[123]

> [T]he Court in Mika was responding to a submission seeking a fixed 10 per cent discount based "on Māori heritage and thus social disadvantage". The Court was rejecting the idea that ethnicity per se triggered a discount. It was not saying that the presence of systemic deprivation was presumptively irrelevant to the sentencing exercise.

Equally, in relation to *Keil*, Whata J found that the approach of Court of Appeal in Keil was limited to the facts in *Keil* and there was no indication that the court was laying down any presumptive rule about "discounts for personal factors".[124] Ultimately Whata J dismisses the Solicitor-General's appeal of the sentencing discount on the basis that *Keil* does not preclude a

120 At [40].
121 At [41].
122 *Mika v R* at [12].
123 *Heta*, above n 111, at [42].
124 At [57].

30 per cent discount based on a s 27 report and, in any case, the sentence was not manifestly inadequate.[125]

The absence of the "Māori disparity concern" in the criminal law is a telling indicator of the ineffectiveness of the legal system with regard to eradicating disparities for Māori in criminal justice. This has been echoed by Whata J in *R v Heta*.[126] It is also linked to the lack of Māori input into the criminal law generally and the wider context of popular punitiveness which forms the landscape of the New Zealand criminal law.[127] The phrase "Māori disparity concern" is an umbrella term for any kind of legislative signal with a commitment to eradicating disparities for Māori or a provision that refers to protections given to Māori under the Treaty. Despite several decades of policy discourse on justice disparities for Māori, there is no mention of any commitment to reducing disparities in the Crimes Act, Sentencing Act, Police Act, or the Parole Act.

It is of paramount importance to have specific reference to Māori disparity in the law. Firstly, it provides one of the most important and powerful opportunities for the state to offer an official apology to Māori for injustices committed against them by the imposed legal system and provides a pathway for cultural healing.[128] It also gives an opportunity for case law to be developed as to a legitimate role of sentencing and the wider justice system in reducing disparities for Māori. It also enables greater priority to be given to racial parity in sentencing, when faced with wide discretion and a variety of competing concerns.[129] The overall institutional response of the legal system is likely to be enhanced. A salient example of the problems associated with not having such a specific legislative commitment is seen with respect to the *Mika* case. In this case, the defendant Mika argued unsuccessfully in the Court of Appeal for a sentencing discount of 10 per cent (from the otherwise appropriate starting point) to account for the socio-economic disadvantages of being Māori.[130] Harrison J found that:[131]

> The Sentencing Act 2002 is a comprehensive code of the sentencing purposes and principles and the provisions of general application which Parliament requires courts to follow when sentencing offenders. In particular, s 8

125 At [68]–[69].

126 At [41].

127 David Brown "Recurring themes in contemporary criminal justice developments and debates" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Lexis Nexis NZ Ltd, Wellington, 2007) 7 at 24.

128 See generally Ani Mikaere "Three (million) Strikes and Still Not Out: The Crown as the Ultimate Recidivist" ('Māori Criminal Justice Colloquium' Te Ao Tara Aitu ki Te Ara Matua - From the World of Calamity to the Path of Clarity, Napier, November 2008).

129 See generally Grant Hammond "Sentencing: Intuitive Synthesis or Structured Discretion?" [2007] NZ Law Review 211.

130 *Mika v R* [2013] NZCA 648 (CA) [*Mika*] at [2].

131 At [8].

> prescribes 10 mandatory principles for which a court must take into account when dealing with an offender. Ethnicity is not included … Furthermore … s 9(2)… also omits any reference to ethnicity.

The notion that the Sentencing Act is a comprehensive code and if ethnicity is not specifically included it should not be considered to conflict with Joanna Hess's argument that the Sentencing Act is well designed and is able to tackle the challenges related to Māori disparity. Arguably, the Court in *Mika* is taking a very formalistic approach, given that section 8(i) of Sentencing Act requires a court to consider the offender's "cultural" or "whanau" background. Also, section 9(2) allows the courts to consider any other factor not specifically mentioned in the Sentencing Act and, given that the Court has earlier considered factors such as pregnancy (*R v Aoapauu*),[132] mental health (*E v R*)[133] and youth (*Churchward v R*),[134] therefore, the Court is not recognising the full potential of the Act. Arguably, factors such as ethnicity are inherently more politically contentious and possibly judges wish to avoid allegations of judicial activism.[135]

Conversely, the *Mika* case illustrates the importance of a legislative market signal that centralises the Māori disparity concern. Specific "Māori disparity concern" provision will make it unequivocal and reduce the "leaky funnel effect" in sentencing for Māori and Pacific offenders arguably associated with judges' discretion.[136] In *Mika*, the Court of Appeal distinguished relevant Australian and Canadian authorities, suggesting these are based on "… very different statutory contexts."[137] The lack of mention of Māori disparity concern in either the Sentencing Act or Crimes Act is the cornerstone of legal system ineffectiveness. In contrast, the Canadian equivalent of the Māori disparity concern is associated much more with positive jurisprudence that empowers indigenous peoples in the justice system. It is instructive to note section 718(2) (e) of the Canadian Criminal Code. The Canadian Criminal Code gives an unequivocal and salutary instruction to judges, namely that "… all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

132 *R v Aoapauu* [2012] NZHC 700 (HC).

133 *E v R* [2011] NZCA 13 (CA).

134 *Churchward v R* [2011] NZCA 531(CA).

135 Max Harris "Criminal law, sentencing and ethnicity – *Mika v R* – sensible or superficial?" (2014) *January* Māori LR 1 at 3.

136 Alex Latu and Albany Lucas "Discretion in the New Zealand Criminal Justice System: The Position of Māori and Pacific Islanders" (2008) 12(1) JSPL 84 at 90.

137 *Mika*, above n 131, at [12]. See also *R v Fernando* (1992) 76 ACR 58 (NSWSC), *R v Gladue* [1999] 1 SCR 688; and *R v Ipeelee* [2012] 1 SCR 433.

The majority decision of the Canadian Supreme Court in *R v Ipeelee* finds that section 718(2)(e) is:[138]

> … a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

According to LeBel J in *Ipeelee*, the role of sentencing law in eradicating disparities for aboriginal offenders:[139]

> Certainly, sentencing will not be the sole – or even the primary – means of addressing Aboriginal over-representation in penal institutions. But that does not detract from a judge`s fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim.

According to Charlotte Williams, further factors such as "limited vision" and "ambivalence" on the part of the Crown further account for the lack of the Māori disparity concern in the criminal law. Williams characterises approach thus far as consisting of "… piecemeal legislative or operational projects".[140]The notion of ambivalence is pivotal to the characterisation of the legal system approach to the Māori disparity thus far. Williams summarises this conflict thus:[141]

> The inherent conflict between Māori ambition to exercise some responsibility for their own people on the one hand and departmental and political reservations about sharing power on the other was obscured for a time by lack of defined objectives.

Given the pervasive history of institutional bias against Māori, it would be a significant step forward if a legislative imperative was inserted into at least the Crimes Act and the Sentencing Act with regard to achieving more equitable outcomes for Māori. Without such a provision, it would constitute a significant structural defect. A legislative imperative may elaborate further on indirect legal initiatives such as Rangatahi Courts and lead to a more long-term vision. Such a provision would also heighten the status of the Māori disparity concern in a complex and contentious process such as sentencing.

138 *R v Ipeelee*, above n 137, at [59]
139 At [69].
140 Charlotte Williams, above n 77, at 62.
141 At 63.

The absence of any measures to address racism in a criminal justice context, with respect to the actions of police officers, prosecutors, parole boards and judges, is a denial of the polycentric nature of Māori disparity. Such a provision to tackle racism could be strictly defined to targeted differential treatment based on race when all legitimate variables such as prior offending history is accounted for. Such provision could be incorporated into to the Police Act, the Parole Act, the Crimes Act and the Sentencing Act. According to Kim Workman from *Rethinking Crime and Punishment*, there is governmental resistance to the idea of systemic bias and personal racism in the justice system.[142] However, as research has found, it is a real phenomenon in the New Zealand justice system and it needs to be addressed.[143] Notwithstanding the historical pain associated with Aotearoa's legal system in terms of the treatment of Māori, it is important to realise that the current Sentencing Act is designed (at least at a theoretical level) to tackle the disparities. However, it is a matter of placing effective structural supports such as the education of judges and lawyers to fulfil its legitimate role in sentencing law.

C. The Effectiveness of the Partial Incorporation of Māori Culture and Tikanga into the Legal System

Several pieces of legislation and criminal policy approaches have incorporated Māori culture and tikanga. These arguably provide an alternative pathway to greater effectiveness in eradicating Māori disparities within our legal system. The two main areas are in terms of restorative justice and Rangatahi Courts.

1. Restorative Justice

With respect to restorative justice, the watershed came when the *Puao-Te-Ata-Tu* [*Daybreak Report*] was released in 1988. It was the culmination of the strained relationship between the Department of Social Welfare and Māori families, and it called for a more culturally responsive system.[144]

In response to the *Daybreak Report*, the Child, Young Persons and Their Families Act 1989 (CYPF Act) was introduced. Section 7(2)(c)(ii) of the CYPF Act required that any policy implemented needed to consider Māori values and culture. This led to the introduction of Family Group Conference (FGC) as an "… expression of Māori processes".[145] Proponents of FGC argue that:[146]

142 Workman, above n 10, at 6.

143 Fergusson, above n 16, at 360.

144 Williams, above n 77, at 47–48.

145 Helen Bowen, James Boyack and Janet Calder-Watson "Recent Developments within Restorative Justice in Aotearoa/New Zealand" (11 September 2011) Restorative Justice Trust <www.restorativejustice.org.nz> at 4. See also Children, Young Persons and Their Families Act 1989, ss 208(c)–(g), 246, 260 and 284(f).

146 At 4.

> The FGC is a formalised version of the whanau meeting used in tikanga, because it emphasises collective decision making, recognises the interconnectedness of the individual with the wider community, and regards input from all affected parties as essential to finding appropriate solutions.

With respect to adult offending, notions of restorative justice are seen in the Sentencing Act, the Parole Act and the Victims' Rights Act. Before these legislative pronouncements of restorative justice, the key judicial pronouncement on its importance was seen in the Court of Appeal decision in *R v Clotworthy*,[147] where restorative aspects "… can have a significant impact on the length of the term of imprisonment the court is directed to impose".

The current Sentencing Act is strongly imbued with notions of restorative justice. According to s 7 of the Sentencing Act, key purposes of sentencing, *inter alia*, include the offender taking responsibility and providing acknowledgement for the harm done,[148] taking account of the interests of victims,[149] reparation[150] and rehabilitation.[151] According to s 9(2)(f), any remorse shown by the offender is taken as a mitigating factor in sentencing. This is consistent with the restorative justice paradigm.[152] According to s 8(j) of the Sentencing Act, the Court: "*must* take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case".

Finally, and most importantly, s 10 of the Sentencing Act delivers the most extensive affirmation of restorative justice principles. Section 10 is extensive and requires that the Court "…must take into account offer, agreement, response, or measure to make amends". In combination with ss 7, 8 and 9, s 10 represents restorative justice as a "… mainstream, mandatory consideration for the court".

Further, s (2)(d) of the Parole Act 2002 ensures outcomes of restorative justice remain relatively important in a matrix of competing concerns. Likewise, s 9(1) of the Victims´ Rights Act 2002 places the onus on officials to encourage a meeting between offender and victim to resolve the issues.

These more culturally connected approaches to criminal justice are making a difference to outcomes. With respect to FGC:[153]

> … between 1989 and 1990 there was a 71 per cent reduction of young offenders appearing in Youth Court

147 *R v Clotworthy* (1998) 15 CRNZ 651 (CA) at [661].
148 Section 7(b).
149 Section 7(c).
150 Section 7(d).
151 Section 7(h).
152 Section 9(2)(f).
153 Bowen, above n 145, at 5.

> as a result of the FGC being as used as an alternative to court appearances.

With respect to adult offending, a Ministry of Justice report looking at offenders who participated in 12 of the 26 government-funded restorative justice programmes, showed that in 2009 there was 20 per cent reduction in reconviction rates for offenders that participated.[154]

Equally, with respect to FGC, the issue of connection or prior involvement becomes crucial. Otherwise, it loses its effectiveness. Cleland and Quince note that family group conferences "… often involve parties who have neither a pre-existing relationship, nor any expectations in respect of future relationships".[155] Also, the involvement of Crown officials is foreign to the authentic Indigenous custom that this process is supposed to be based on.[156] In effect, processes such Rangatahi Courts and FGC represent a "browning" of the Pākehā legal system".[157] However, the issue of polycentricity of the Māori disparity in the criminal justice system is not fully addressed. The focus of processes such FGC and Rangatahi Courts, are still very much based on an individualistic paradigm, albeit with some elements of collectivism.[158] Yet the original Indigenous equivalent of these processes was premised on fully-fledged notions of collectivism and collective responsibility.

An example of these "colonising effects" are seen with respect to FGC. Despite being heralded as a culturally sensitive approach, the implementation of these has unearthed colonising effects, namely with regard to FGC being held primarily in Department of Social Welfare facilities as opposed to marae and also with regard to the alienation of Māori cultural expertise in the implementation of FGC.[159]

Juan Tauri laments about what he terms the "grand mythologizing of restorative justice"[160] and the "commodification of Indigenous Life-Worlds".[161] This goes to the heart of the matter. A key aspect of fully understanding the polycentricity of Māori disparity in the criminal justice system is forgoing superficial solutions to more substantive, long-term solutions that work in unison with the principles of the Treaty of Waitangi. To this effect, Juan Tauri offers a common fallacy among advocates of restorative justice. This is that it conflates "Māori requests for a 'traditional forum' … with Māori

154 Ministry of Justice *Reoffending Analysis for Restorative Justice Cases: 2008 and 2009 – A Summary* (June, 2011) at 2.

155 Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis NZ Limited, Wellington, 2014) at 174.

156 At 174.

157 Andrew Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27 NZULR 715 at 740.

158 Cleland and Quince, above n 155 at 174.

159 Tauri and Morris, above n 100, at 159.

160 Juan Tauri "An Indigenous Commentary on the Globalisation of Restorative Justice" (2014) 12(2) British Journal of Community Justice 35 at 42.

161 At 39.

justice philosophies being foundational to the formulation of the forum itself".[162] For true effectiveness, the legal system must work with Māori and make Māori values foundational to any future path to eradicating disparities.

a. Rangatahi Courts

Equally, the Rangatahi Courts' initiative represents a direct co-option of Māori culture and tikanga to a New Zealand Pākehā-dominated legal system. It is important to understand the legislative foundations of this initiative. According to section 4(4) of the District Court Act 1947 "…a Judge may hold or direct the holding of a particular sitting of a Court at any place he deems convenient". Judge Heemi Taumaunu, writing extra judicially, finds that:[163]

> The power [under section 4(4)] must be exercised specifically in respect of every sitting. The Rangatahi Court is therefore a judicial initiative and involves an exercise of judicial discretion to hold a young person's successive hearings on a marae. The discretion is exercised on a case by case basis.

These, both restorative justice and the Rangatahi Courts initiative, are practical incarnations of a legal system, historically dominated by European ideals, attempting to be more culturally responsive to Māori. It is an important symbolic step forward, at the very least.

With respect to the Rangatahi Courts initiative there is no quantitative data on its effectiveness as yet. However, there is a very extensive qualitative evaluation of the views of rangatahi, whānau, judges, youth justice professionals and marae representatives on the effectiveness of the programme. This evaluation confirms the strengths-based approach taken in the scheme is having positive results in affirming cultural identity and building greater self-esteem in the participating youth.[164]

Alison Cleland and Khlyee Quince explore the notion of "cultural appropriateness"[165] in their 2014 book, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*. Cleland and Quince conceptualise cultural appropriateness on two levels. The first is the "organisational and procedural" level.[166] The second is a social level.[167] The first level is about getting the

162 At 44.

163 Heemi Taumaunu "Rangatahi Courts of New Zealand: Kua Takoto te Manuka, Au Tu Ake Ra!" in VMH Tawhai and Katarina Gray-Sharp *"Always Speaking" The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) 245 at 252.

164 See Kaipuke Ltd *Evaluation of the Early Outcomes of Nga Kooti Rangatahi* [A Report Commissioned by the Ministry of Justice] (Kaipuke Ltd, December 2012).

165 Cleland and Quince, above n 156, at 167.

166 At 167.

167 At 167.

cultural protocol correct, such as who speaks on marae and when.[168] The second level is about the social environment created by the cultural protocol, namely whether it creates "… an environment where participants are familiar and comfortable?".[169] With regard to Rangatahi Courts, Cleland and Quince note that:[170]

> While this is in one sense, a positive move, it should be done with care–particularly for young persons with little to no prior connection to or involvement with marae.

David Green describes the Rangatahi Courts initiative as an "… example of pragmatic incorporation of the Māori perspective".[171] The word pragmatic is important. Why pragmatic? Why does one have to be pragmatic when incorporating the Māori perspective into the legal system? Herein lies the problem. The law does not sufficiently allow for the Māori perspective partly because Māori are under-represented as decision-makers in the legal system (although slow progress is being made). However, New Zealand's DIY mentality is such that, well-intentioned judges and policymakers do not resign themselves to the capricious nature of fate. They act. From their action, the Ngā Kooti Rangatahi initiative was born. Although Rangatahi Courts are now very much streamlined, they arose not out of a robust legal framework, but out of a "quirk"[172] of the District Courts Act 1947. According to s 4(4) of the District Courts Act 1947:

> Notwithstanding anything in the foregoing provisions of this section a Judge may hold or direct the holding of a particular sitting of a court at any place he deems convenient

Despite these positive results, approaches such as restorative justice and Rangatahi Courts alone will not be enough to reduce the disparities for Māori significantly. Tauri asserts that such a "piecemeal approach" to indigenous justice will not work.[173] Juan Tauri supports the notion that:[174]

> … indigenisation serves as an inexpensive and politically expedient strategy that allows government to be seen to be "doing something" about the indigenous crime

168 At 167.
169 At 167.
170 At 169.
171 David Green "Interweaving the Status and Minority Rights of Māori Within Criminal Justice" (2015) 21 Auckland U L Rev 15 at 20.
172 At 20.
173 Tauri and Morris, above n 100, at 160.
174 At 161.

> problem, without seriously affecting state control of the justice arena.

A key argument against the effectiveness of the New Zealand legal system in eradicating disparities for Māori relate to the "colonising effects" of the co-option of Māori culture into the justice sector. Colonisation can be defined as the phenomenon where the humanity of the colonised is determined and defined by the coloniser in a context where there are stark power imbalances between the two.[175]

Matiu Dickson illustrates a further example of colonising effects with respect to the Rangatahi Court. Dickson argues that for marae justice to be effective it must remain true to the socio-cultural context from which it was derived.[176] Dickson outlines the spiritual significance of the marae complex:

> The activities outside the house [marae] are the realm of the atua Tumatauenga [god of war] and require strict adherence to tikanga practice, whereas the inside of the house is the realm of Rongo, the atua of peace [god of peace]. Thus, the inside of the house is the bosom of the ancestor, so that activities there are protected by that ancestor, and tikanga may be adapted to suit various occasions. The tahuhu, or ridgepole, and the heke, or rafters, represent the backbone and ribs of the ancestor.

When offenders are brought to marae to which they have no whakapapa links, the effectiveness of the initiative is called into question.[177] Dickson describes incidences of graffiti on the marae as akin to an assault on the ancestors given that the marae symbolises the body of the ancestor of the people of a particular rohe.[178] He further notes that the judges in the Rangatahi Courts do not necessarily have personal whakapapa connection with the respective marae.[179] The importance of whakapapa links is evident in the whakataukī, he kākano ahau i ruia mai i Rangiātea (I am a seed spread and sown from the marae at Rangiātea) which refers to the ancestral marae of Māori at Rangiātea in Hawaiki, the Māori homeland.[180]

Given the polarised nature of New Zealand politics about Māori and criminal justice, the triumphs of initiatives that seek to incorporate the Māori worldview into the justice system need to be acknowledged. Equally, the legal system must be mindful of the colonial history of our legal system and the power imbalances tied to this. Decolonisation would enable co-opted

175 See Smith, above n 30.
176 Matiu Dickson "The Rangatahi Court" (2011) 19(2) Wai L Rev 86 at 89.
177 At 90.
178 At 93.
179 At 89.
180 At 91.

processes to gain greater effectiveness tied to authenticity. Decolonisation may ultimately mean, as Juan Tauri argues, to cut the Gordian knot and enable self-determination for Māori in the justice sector.

More extensive research on the effectiveness of co-opted processes with respect to eradicating disparities is needed. Given such incorporation of tikanga Māori is a relatively new process it will naturally not be ideal and it is a continual learning process. Also, the co-option needs to be meaningful and it is not an end in itself. The co-option needs to be seen as part of the wider whole.

IV. Conclusion

History often repeats itself. Yet, we as a country — Aotearoa, The Land of the Long White Cloud — have a persistent problem. It is not a problem devoid of history and sociological context. Colonisation, racism and government inertia have all played a part in making the overrepresentation of Māori in the criminal justice system a polycentric policy problem. It is argued that the current civil discourse about disparities for Māori creates a self-fulfilling prophecy. New Zealand has not learnt its lessons from the past. This is not only referring to its colonial past, but also to the last 30 years, particularly in terms of heeding inter-governmental and intra-governmental calls to address the root causes of Māori disparity.

Untangling Māori disparities in criminal justice unearths the political tensions of our nation's past, present and future. Our criminal law system is based on venerable ideals that are not realised for Māori. However, there are scholars and public officials committed to honest and sincere change. Continuing in the manner of the status quo will thwart the legitimacy of our legal system and disable it from fulfilling the promises of the Treaty of Waitangi. The factors that countenance claims of legal system effectiveness in eradicating disparities for Māori in criminal justice lies on the extensive and detailed legal frameworks such as the Sentencing Act. Unfortunately, there are inadequate structural supports such as education. Fundamentally, the design of this framework does not centralise the Māori disparity concern and it does not strengthen the effectiveness of the framework to address pertinent interrelated issues such as institutional racism. This could be further tied to the exclusion of Māori from the formation and control of the criminal law; and thus, alienate Māori perspectives on offending and wellbeing. The current system owes much to the incompletely theorised, incremental tradition. However, an incompletely theorised future is a future bound for doom. Having a specific legislative impetus against racism and for the eradication of Māori disparities will enable the gap between *dejure* and *defacto* to be bridged.

On the one hand, New Zealand`s legal system has made strident efforts to incorporate Māori culture into areas such as restorative justice and marae

justice. On the other hand, such inclusion of Māori culture is fraught with normative and operational challenges, such as further colonisation, disrespect to traditional Māori culture and ineffectiveness for participants. Redemption for Aotearoa's colonial past may come through the offering of an official apology and granting a structured provision for self-determination criminal justice. Plainly, the legal system is not wholly responsible for education, employment and health, however, the vision to eradicate disparities for Māori should envisage these and also address areas such as sentencing, policing, prosecution and parole. The co-operation of the legislature, the executive government and the judiciary are needed to structurally support a reconciliation process with regard to injustice for Māori and provide a path for cultural healing. It does not necessarily mean more 'biculturalism', it is about reflective practice, partnership and inclusion.

The unifying theme of the Treaty was that of he iwi tahi tātou – we are one people.[181] Notwithstanding ambitions of the Treaty partners at the time, the modern context conveys a different story. The notion of equality under the law does exist in New Zealand, at least in theory. However, with respect to the operation of the criminal justice systems, outcomes are far from equal. In fact, equality is almost non-existent. Thirty years after indigenous rights scholar Moana Jackson's seminal report on Māori and the criminal justice system, *He Whaipaanga Hou,* Māori are still over-represented at every level of the criminal justice system, be it police prosecution, conviction, severe sentencing and incarceration rates.[182] Equally, Māori are under-represented in home detention, community sentences and police diversion programmes.[183] These disparities are chronic and consistent over time, arguably exacerbated by Neo-Liberal reforms of the 1980s and zig-zagging government policy on the issue.[184] Even though a variety of researchers and government policy officials have traversed the issue of Māori disparities in criminal justice, the mainstream system has shied away from directly tackling issues of racism and racial disparities in criminal justice through legal instruments such as the Crimes Act and the Sentencing Act. These issues are increasingly important because the cultural milieu in Aoteraoa have embedded negative stereotypes about Māori in the media.[185]

The past must be worked through. The past cannot be forgotten or undone. The actions of the ancestors of modern-day Pākehā have an enduring legacy on Māori outcomes in criminal justice. Pākehā must come to terms with Aotearoa's colonial past and stop resisting attempts to atone for the sins of the past. The disparities for Māori are as much about Pākehā as they are about Māori. Pākehā must work with Māori, alongside tauiwi, to fulfil the

181 Orange, above n 35, at 34.

182 See Peter Doone *Report on Combating and Preventing Māori Crime* (Ministry of Justice, September 2000).

183 Workman, above n 10, at 20–23.

184 Williams, above n 77, at 1.

185 Moewaka-Barnes and others, above n 43, at 195.

promises of the Treaty of Waitangi. This is not about letting Māori commit crime without consequences. There will always be a place for consequences. But consequences without a guiding purpose will not remove the taniwha from the room.