

## Chapter 12

# Maori and the criminal justice system in New Zealand

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What do you call a Maori in a suit?

The Defendant

### 12.1 Introduction

Jokes like the one above probably represent the most common stereotype of a criminal offender in New Zealand, and unfortunately, like most clichés, it contains a grain of truth. Popular culture perpetuates this in films such as *Once Were Warriors*,<sup>2</sup> where the character of Jake Heke (“Jake the Muss”) has become synonymous with a modern disenfranchised urban Maori — a heavily tattooed, hard-drinking, violent man.

For many Maori, however, the image of Jake the Muss has other nuances — a man with no connection to whakapapa, whenua, or whanaungatanga — the aspects of tikanga Maori that provide a framework of social protection and moral guidance to actions. The fictional Jake is the end-product of nearly 200 years of dispossession and alienation as a result of the colonising process that undermined traditional Maori epistemologies and methods of dealing with harm within the community. How then did this process occur? What were the principles of tikanga Maori that were displaced? How does the contemporary criminal justice system deal with the Jakes in our communities? In this chapter we review the relationship between Maori and the criminal justice system of New Zealand.

Statistical profiles of offending in New Zealand in modern times reflect a trend of serious habitual offending by Maori, vastly disproportionate to our current 15 per cent

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<sup>2</sup> *Once Were Warriors* is an adaptation of Alan Duff’s novel of the same name: A Duff *Once Were Warriors* Auckland, Tandem, 1990.

of the population.<sup>3</sup> Maori are 3.3 times more likely to be apprehended for a criminal offence than non-Maori.<sup>4</sup> Ministry of Justice figures for 1999 report a prosecution rate for young Maori people aged ten-16 years at 76.2 per 1000 population, compared with 16.95 per 1000 population for non-Maori.<sup>5</sup> Maori adults were 3.8 times more likely to be prosecuted than non-Maori and 3.9 times more likely to be convicted of an offence.<sup>6</sup> Nine times as many Maori than non-Maori are remanded in custody awaiting trial.<sup>7</sup> Of all the cases that resulted in conviction in 2005 where the ethnic identity of the offender was known, 43 per cent involved Maori.<sup>8</sup>

As well as disparities at the front end in the over-policing, charging and conviction of Maori, there are differences in the outcomes imposed on Maori in the criminal justice system. Seven times as many Maori as non-Maori are given a custodial sentence upon conviction.<sup>9</sup> Maori are far less likely to be granted leave for home detention, or to receive a fiscal penalty.<sup>10</sup> The average number of male prison inmates in 2005 was 5369, 51 per cent of whom identified as Maori.

The overrepresentation of Maori is even more marked in female inmate numbers, where 58 per cent of the average 329 inmates in 2005 were Maori. In 2004, 36 per cent of Maori males, and 32 per cent of Maori females in prison were aged less than 25 years, compared with 31 per cent and 28 per cent for pakeha males and females respectively.

In relation to young people, the youth justice scheme in New Zealand was overhauled in 1989, with a new emphasis on keeping young offenders (those aged ten-17 years) out of institutions. Despite these changes, in 2004, 54 per cent of the 6269 young people prosecuted for offending were Maori.<sup>11</sup>

Maori are overrepresented as victims as well as offenders. In 2000, Maori males were the victims of 85 per cent more crime than pakeha males, and were 50 per cent more likely than them to have experienced acts or threats of violence. Maori females

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<sup>3</sup> See chapter 3 of this book. For a full discussion of recent statistics concerning Maori in the criminal justice system see P Doone *Hei Whakarurutanga Mo Te Ao* Wellington, Crime Prevention Unit, 2000.

<sup>4</sup> P Doone *Hei Whakarurutanga Mo Te Ao* Wellington, Crime Prevention Unit, 2000, ch 4.

<sup>5</sup> Ministry of Women's Affairs *Maori Women: Mapping Inequalities and Pointing Ways Forward*, Wellington, Ministry of Women's Affairs, 2001, p 116, Table F4.

<sup>6</sup> Ministry of Women's Affairs *Maori Women: Mapping Inequalities and Pointing Ways Forward*, Wellington, Ministry of Women's Affairs, 2001, p 117.

<sup>7</sup> M Burton, "The Effective Interventions Initiatives and the High Number of Maori in the Criminal Justice System", Ngakia Kia Puawai, New Zealand Police Management Development Conference, 28 November 2006: [www.labour.org.nz/MarkBurton/speeches\\_and\\_releases/policecollege281106/index.html](http://www.labour.org.nz/MarkBurton/speeches_and_releases/policecollege281106/index.html) (last accessed 17 August 2007).

<sup>8</sup> Ministry of Justice, *Conviction and Sentencing of Offenders in New Zealand: 1996-2005* Wellington, Ministry of Justice, 2006, Executive Summary.

<sup>9</sup> M Burton, "The Effective Interventions Initiatives and the High Number of Maori in the Criminal Justice System", Ngakia Kia Puawai, New Zealand Police Management Development Conference, 28 November 2006: [www.labour.org.nz/MarkBurton/speeches\\_and\\_releases/policecollege281106/index.html](http://www.labour.org.nz/MarkBurton/speeches_and_releases/policecollege281106/index.html) (last accessed 17 August 2007).

<sup>10</sup> Department of Corrections *Census of Prison Inmates 2003* Wellington, Department of Corrections, 2004, para 12.2.

<sup>11</sup> Ministry of Justice, *Conviction and Sentencing of Offenders in New Zealand: 1996-2005* Wellington, Ministry of Justice, 2006, Table 7.11a.

were the victims of twice as many crimes as pakeha females, and were twice as likely to have experienced acts or threats of violence from a partner.<sup>12</sup>

Research has established that ethnicity alone is not a significant factor in predicting sentence, so that the disparities between Maori and non-Maori in sentencing must be accounted for by variances such as the type and seriousness of offence and previous convictions.<sup>13</sup> Further, fines and fiscal penalties are less likely to be imposed upon people who are unemployed or financially unstable, which includes a large number of Maori. Research, such as this, points to causal factors other than ethnicity to explain disparities in process and outcome for Maori coming into contact with the criminal justice system, but these explanations are limited. In this chapter we consider the theory that colonisation has, in fact, directly shaped the socioeconomic position of Maori to such an extent that offending produced by poverty and other related demographics, and the sentences that such offending attracts, *are* connected to ethnic identity. In other words, what is happening to Maori within the justice system is not just happening to them because of class, and because of the seriousness and prevalence of their offending, at a deeper level it is happening to them because they are Maori.

One of the major barriers to progress in solving the “Maori crime problem” is the failure of successive government departments, social agencies, Judges, police, and other actors, to directly highlight and address the fact that a disproportionate amount of offenders are Maori. Often the focus of the law, policy, media and research involving criminal justice is factors such as poverty, alcohol or drug addictions, solo parenting, lack of education or employment, and physical and mental health issues. By not addressing Maori ethnic and cultural identity directly we do not get to the root of these social issues for many offenders, which is the intergenerational effect of the trauma of surviving colonisation. Further, an approach focusing on poverty and other social dysfunctions “depoliticises” the problem in that it presents offending as though it is the collective outcome of individual failings — the sum of many individuals lack of personal success in accumulating enough money for financial survival, living healthy lives or holding their marriages and families together.<sup>14</sup>

Maori scholars such as Moana Jackson, and Eddie and Mason Durie, posit that access to and participation in a secure and healthy Maori cultural identity is central to addressing the crisis posed by Maori caught in a vicious cycle of poverty and harm.<sup>15</sup> Such poverty is often of the economic kind, but may also encompass poverty of the mind, heart, spirit, and soul. A secure and healthy identity is one where people can access knowledge of their language, and cultural norms and practices, which are, in turn, valued, promoted and enforced in our larger society and legal system.

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<sup>12</sup> A Morris and J Reilly *The 2001 New Zealand National Survey of Crime Victims* Wellington, Ministry of Justice, 2003, ch 2.5.

<sup>13</sup> H Deane, “The Effect of Gender and Ethnicity on Sentencing” (March 1995) 3 *Criminology Aotearoa/New Zealand* 11-12. This study involved an analysis of the sentencing of offenders in two different courts for three types of offences to examine the extent to which gender and ethnicity affected sentencing decisions.

<sup>14</sup> P Williams *The Alchemy of Race and Rights* Cambridge, Massachusetts and London, Harvard University Press, 1991.

<sup>15</sup> M Jackson *He Whaipanga Hou: Maori and the Criminal Justice System: A New Perspective* Wellington, Ministry of Justice, 1988; E Durie, “Custom Law” paper presented to the New Zealand Society for Legal and Social Philosophy, Wellington, 1994; M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005.

Criminal justice research often presents Maori as a composite statistical analysis — people suffering according to a variety of negative indicators such as socioeconomic deprivation and over-criminalisation. This is not, however, *who* Maori are, and *what* makes a person Maori.<sup>16</sup> Accordingly, this chapter begins by providing an overview of traditional Maori belief systems and fundamental principles of customary law and processes. These principles and processes are compared with the legal system, imposed as a result of colonisation by pakeha in the nineteenth century, in order to demonstrate the alien nature of the system within which Maori must operate today. The process of colonisation is then linked with some of the demographics of the Maori population which have been argued to produce the over-criminalisation of that population today. Two particular issues illustrate this: the poor nature of police/Maori relations and the lack of Maori representation on juries. We will then explore the intersection of race and gender in the experiences of Maori women within the criminal justice system, and conclude by reviewing some contemporary developments that aim to improve the experience of Maori in the criminal justice system, arguing that some of the best of these ironically occur within the corrections context.

It should be noted that where tikanga Maori is discussed in this chapter, it is within the very narrow confines of the criminal justice context. Tikanga Maori is, in fact, a much broader system of custom, law, and normative prescriptions and it is not defined with reference to a Western legal framework or ways of thinking. This necessarily means that tikanga concepts are only analysed here in a limited fashion, and even then, they must be manipulated to some extent to fit Western ideologies, doctrines, and practices relating to crime and offending.

## **12.2 Maori tikanga and the criminal justice system**

### **12.2.1 Maori tikanga and epistemologies**

Maori are the tangata whenua of Aotearoa.<sup>17</sup> According to our own oral traditions, we had been present in Aotearoa for at least 1000 years prior to European contact, and lived with our own laws and legal processes in a kinship-based society. The term “Maori” as a collective noun for ourselves means “normal”, and came into use after European contact to distinguish the peoples of Aotearoa from the later arrivals, who we called “pakeha”.<sup>18</sup> Prior to pakeha contact, there was no real concept of Maori as a national people; day-to-day life was conducted at the level of extended family or whanau, while legal and political affairs were dealt with at subtribe or tribal level — hapu or iwi.

Despite there being no homogenous Maori identity prior to pakeha contact, and the fact that the histories, languages and tikanga varied for the many iwi and hapu

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<sup>16</sup> See, for example, the discussion in M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005, ch 2.

<sup>17</sup> Aotearoa is the Maori name for New Zealand, meaning “the land of the long white cloud”, as this was how it appeared to our ancestors first arriving from the Pacific.

<sup>18</sup> R Walker *Ka Whawhai Tonu Matou* 2nd ed, Auckland, Penguin Books, 2004, p 94.

throughout the land, there were similarities in the principles by which our people lived. These principles illustrate tikanga in this chapter.

The structural framework of Maori society is based on whakapapa, or genealogical connection — from our primordial parents Papatuanuku (Earth Mother) and Ranginui (Sky Father) and their descendants, down to human beings. Whakapapa links human beings to the natural and spiritual worlds, so that people are related to all aspects of the environment. These connections were strengthened by the principle of whanaungatanga, or familial obligations. People therefore had to act in ways that strengthened and maintained relationships, whether they be with other human beings or with the natural world. A cosmology based on a whanau classificatory system provides a template in which connectedness and interdependence is both necessary and healthy in relation to development. Personal identification starts with membership of larger groupings and individuality is secondary to the collective dynamic.

The key dynamic in tikanga is to maintain equilibrium between all parts of the human and non-human world. This is achieved through the principle of utu, meaning balance or reciprocity. If things were out of balance, then redress for utu was sought.

With regard to humans, the concept of balance may be represented by the metaphorical model of the four-sided house — the whare tapa wha, with each wall of the house representing an aspect of wellness. These “walls” are te taha tinana, te taha wairua, te taha hinengaro, and te taha ngakau, representing wellness of the physical self, spiritual self, the healthy mind/heart/intellect/conscience and educational wellbeing.<sup>19</sup> When all of these cornerstones are present, the individual, the whanau and community exist as healthy, functioning units. An imbalance in one or more of these aspects of the person requires community intervention to restore the wairua or spiritual aspect of the individual and reintegrate them into the collective group.

Social and legal control within tikanga Maori is primarily achieved through the complementary principles of tapu and noa. The status of tapu means that a person, place or thing is dedicated for a particular purpose, and is off limits unless certain protocols are followed. This status can be permanent, as with an urupa or graveyard, or it can be temporary, as with a seasonal fishing ground. In relation to people, there is an inherent tapu that attaches to all human beings, by virtue of our descent from the atua, thus confirming the status of whakapapa as a primary organising principle in tikanga Maori.<sup>20</sup> The complementary status of noa means that a person, place or thing is profane in the sense that it is not off limits, or is “safe” to use or access. When applied in a legal context, tapu and noa then designate what is lawful or not. For example, a person with relevant authority may place a resource under a temporary state of tapu in order for that resource to replenish itself. Once that goal is achieved, certain rituals may be performed to allow for the use of that resource, within predetermined limits.

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<sup>19</sup> Mason Durie devised this schema to support the Rapuora Research Project undertaken by the Maori Women’s Welfare League in 1983. The model was devised specifically to relate health status to concepts of tikanga, but it is also useful with regard to identity, healthy development and, for our purposes, imbalance that manifests itself in criminal offending. See M Durie *Whaiora* Auckland, Oxford University Press, 1994, p 70.

<sup>20</sup> See M Shirres *He Tangata* Auckland, Accent Publications, 1997, pp 34-37.

Use of the resource during the time of the tapu status is an offence or hara, which could attract both human and spiritual consequences and penalty.<sup>21</sup>

Associated with both descent and life achievements is the concept of mana. Mana is a fluid concept representing a person's reputation, charisma and influence. A person's mana reflect both their birthright and their personal achievements. Mana atua refers to the status, reputation or prestige of a person by virtue of their whakapapa or birthright; so a person from a high-born or chiefly family line will have significant mana atua. Mana tangata also reflects the deeds and actions or inactions of a person, regardless of whakapapa.<sup>22</sup> Good deeds will enhance a person's mana and that of their associated familial groups, while immoral and unlawful actions will have a negative influence on the mana of the person and those groups. This dynamic of mana applies equally to men and women.<sup>23</sup>

As Maori identify with geographically specific tribal areas, mana whenua is akin to an indigenous concept of citizenship.<sup>24</sup> So in addition to mana deriving from genealogical ties and achievements, there is also prestige attached to the responsibility of belonging to land and resources in a particular location. All activities or omissions that occur within any given location reflect, either positively or negatively, upon the mana of the local people. This then is one of the aims of Maori society — to increase individual and collective mana by ensuring that principles of tikanga are abided by in various contexts.

Unlike the common law system, there is no distinction in tikanga between civil and criminal law, or between crime and moral wrongfulness. Tikanga prescribes many activities as wrong, and subject to punishment, such as offending against personal tapu, by way of assault or bodily harm, and for offending relating to property and resources.<sup>25</sup> Hara that are mentioned in oral and historical accounts include: kohuru (murder), suicide, roromi (infanticide), abortion, rape, ngau whiore (incest), puremu (adultery), domestic violence, kanga (swearing), and theft.<sup>26</sup>

The basic "formula" for offending is that there has been a breach of tapu through commission of a hara, which has affected mana, and this calls for utu. In other words, the status of a person or thing has been compromised. This breach has affected the reputation, prestige, charisma of the individual or people concerned, and requires rectification.

<sup>21</sup> For a more in-depth discussion of tapu and noa, see M Marsden, "God, Man and Universe" in M Marsden *The Woven Universe* Wellington, The Estate of Rev. Maori Marsden, 2003; H Mead *Tikanga Maori* Wellington, Huia Publications, 2003, chs 4, 5; M Shirres *He Tangata* Auckland, Accent Publications, 1997.

<sup>22</sup> H Mead *Tikanga Maori* Wellington, Huia Publications, 2003, p 39.

<sup>23</sup> A Mahuika, "Leadership: Inherited and Achieved" in M King (ed) *Te Ao Hurihuri* Auckland, Reed Publishing, 1992, pp 42-63.

<sup>24</sup> See C Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* Auckland, Oxford University Press, 1991, p 61.

<sup>25</sup> For a discussion on different hara and how they were dealt with, see R Joseph, "Maori Customary Laws and Institutions" a paper prepared for Te Matahauriki Research Institute, University of Waikato, August 1999: <http://lianz.waikato.ac.nz/PAPERS/Rob/Custom%20Law.pdf>. (last accessed 17 August 2007).

<sup>26</sup> R Joseph, "Maori Customary Laws and Institutions" a paper prepared for Te Matahauriki Research Institute, University of Waikato, August 1999: <http://lianz.waikato.ac.nz/PAPERS/Rob/Custom%20Law.pdf>. (last accessed 17 August 2007).

The dynamic is the same whether the offending is against a person or property. For example, rape is a breach of the tapu of a woman. Her personal mana and the mana of her family and tribe are affected by this action.<sup>27</sup> Recompense is required to restore her wellbeing and repair the relationships damaged by the offending. Similarly, taking shellfish out of season breaches the temporary tapu placed on that resource until harvest time. As this action will compromise the harvest, the mana of the owners is affected, because their ability to provide for themselves and others is diminished. Again, action is required to restore the resource and repair the relationships harmed by the unlawful taking.<sup>28</sup>

Tikanga does not require the establishment of fault in order to impose liability, because every action or inaction is deemed to be within someone's sphere of mana or responsibility. If an offence occurred within your sphere of mana you were deemed responsible for that offence, irrespective of your state of knowledge. Varying degrees of knowledge, malice, or foresight in the commission of offending are, however, acknowledged in the imposition of penalty, so that unintentional action or negligence is generally less harshly dealt with than deliberate behaviour. Unlike pakeha criminal law there is also the additional factor of the mana of the parties to consider, as well as the hara itself. Thus, offending against a person of high mana is more serious than offending against a person of lesser status. Similarly, the mana of the offender is considered in the process of rebalance or achievement of utu.

The aim of dispute resolution therefore was to restore balance, and the mana of the parties involved. This was easier where parties were from the same whanau or hapu, as inter-hapu or inter-iwi disputes were more likely to escalate and could lead to warfare in a legal system that did not have state machinery to enforce resolution or settlement. Where it was possible to bring parties to a dispute together, rangatira and kaumatua played significant roles in giving structure and providing leadership to the process. For example, they could introduce the nature of the conflict and outline the relationship of the parties to each other — thus illustrating that relatedness requires demonstrating whanaungatanga. The process of dispute resolution generally took place on the marae, a forum that represents both the body of an ancestor, and the world in balance. It is also a repository of knowledge and whakapapa. This gives mana to the process and ensures that ancestral precedents are followed, as portrayed in the whakairo and art in the building.<sup>29</sup> The use of Maori language as the medium of discussion also gives mana to the process and fits with the traditional protocols to be followed in a marae context.

Maori concepts of time and space are such that time is a continuum, as opposed to the Western linear fashion. This has several impacts on dispute resolution. First, there is no limit on the time and space allowed for the resolution of disputes. This is encapsulated in the phrase “ma te wa”, meaning that things will work out in good time. The process of dispute resolution can take days, weeks, or not be resolved at all at a

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<sup>27</sup> R Pere “To Us the Dreamers are Important” in S Cox (ed) *Public and Private Worlds* Wellington, Allen & Unwin, 1987, p 57.

<sup>28</sup> For a lengthy discussion on the dynamics and process of dispute resolution in traditional Maori society, see N Tomas and K Quince, “Maori Disputes and their Resolution” in P Spiller (ed) *Dispute Resolution in New Zealand* Auckland, Oxford University Press, 1998, ch 8.

<sup>29</sup> C Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* Auckland, Oxford University Press, 1991, pp 71-74.

particular meeting. It is considered better to take time and space to fashion a consensus-based solution or series of solutions for the long-term, which are more likely to be adhered to, than to rush the process, only to have an inevitable breakdown within a short time. If all parties have had an opportunity to be heard and have input into decisions about responsibility and punishment, these decisions should be respected and upheld. Secondly, the idea that our ancestors and descendants are always with us supports the concept of inter-generational collective responsibility for disputes, both as offenders and victims. Therefore, if current disputants are unable or unwilling to resolve their dispute, the dispute remains active until dealt with in the future.

The collective nature of Maori society meant that the whanau, hapu, or iwi of the actors were also affected by the offending, as an imbalance in an individual affected that person's ability to contribute to the collective. Thus, the diminution of mana of a female victim in consequence of offending against her detrimentally affected her ability to fulfil her roles as mother, spouse, carer, food provider, nurturer. Similarly, the loss of mana of a male victim meant the community loss of a warrior, father, spouse, community worker and protector. In a relatively small tribally based society, this imbalance could potentially lead to increased conflict or threaten the economic survival of the group. Because the consequences of criminal offending had significant impact upon the relevant community or communities, in tikanga Maori it was a collective group that was identified as the victim and a collective group that was deemed responsible as the offender. For example, an insult by a person from one hapu directed at a person from another hapu, is viewed as an offence by the first hapu as offender, against the second hapu, as victim. This aspect of collective responsibility is advantageous when compared with individual culpability, as payment or performance of a penalty may be more likely when spread among a group, with access to more resources than an individual.

A collective group might agree to the settlement of a dispute by the passing of property, or by the performance of a service to the victim group. Neither of these outcomes would necessarily require the individual responsible for the offending to own the property concerned or to take part in the service agreed upon. There were consequences for the individual responsible for the commission of hara, with whakama or shame being the primary personal repercussion. The fact that punishment for offending would be met by a person's whanau, hapu, or iwi, was a powerful deterrent to breaching tapu, and shame was a natural and appropriate response to that eventuality.

A Maori system of punishment is largely forward-looking — aimed at repairing relationships, while accounting for past wrongs. In a worldview predicated upon a norm of balance and harmony, reparation was of far greater import than punishment. In such a system, the process of facilitating reparation, and mediating a settlement is as important as the outcome itself. The inclusion of the victim in this process is imperative in order to forge a binding and durable outcome. This is not to say that tikanga relating to justice was necessarily a soft option. The appropriate utu or payment for any given hara could include death, loss of group treasures or resources, and at the very least, involved public shame and humiliation. The emphasis on the future, however, prioritises a desire to reintegrate offenders into communities, heal victims, and maintain a balance between the acknowledgment of past behaviour and moving on.

Tikanga Maori is a system that is followed and enforced from the ground up — there is no state machinery, no lawyers, no Courts, no formal burdens of proof or laws of

evidence. It is law based on principle, enforced by the community, under threat of sanction. The system is best summed up by Moana Jackson:<sup>30</sup>

The rights of individuals, or the hurts they may suffer when their rights were abused, were indivisible from the welfare of the whanau, the hapu, the iwi. Each had reciprocal obligations found in a shared genealogy, and a set of behavioural precedents established by common tipuna. They were based too on the specific belief that all people had an inherent tapu that must not be abused, and on the general perception that society could only function if all things, physical and spiritual, were held in balance.

### 12.2.2 Colonisation, the imposition of the common law and the undermining of tikanga

The colonisation of Aotearoa by the British heralded the change from what Maori call *Te Ao Kohatu* — the Old World, to *Te Ao Hurihuri* — the Changing World. This process has had a devastating impact on the Maori way of life, including beliefs and laws and the ways of dealing with offending.

The signing of the Treaty of Waitangi between Maori and the Crown in 1840 allowed for the permanent settlement of pakeha in New Zealand, while guaranteeing Maori undisturbed control over various resources and treasures.<sup>31</sup> The initial priority for the colonisers was the acquisition of land and resources, which was achieved by way of negotiation, crooked dealings, warfare, and confiscation. Once the land was acquired, it was imperative for the new government to bring Maori under the legal control of the new colony.<sup>32</sup>

The common law legal system imposed many concepts that were foreign to Maori — including its materialistic focus, notions of atomised individual (as opposed to collective) responsibility for wrongs done, separate civil and criminal jurisdictions, the notion that people were not responsible for harm that was unintended, the alienation of the victim from the justice process, the idea that the state was the injured party in the dispute, the separation of the formal criminal process from the community, and the lack of a focus on reparation. To Maori, the system seemed formal, inflexible and oriented towards retributive justice, which was damaging to the individual actors and their communities. It also provided for penalty options not known to Maori, such as imprisonment.

Tikanga Maori was generally ignored by the colonial legal system, although early attempts were made to appoint Maori magistrates to oversee the administration of justice in Maori communities, and for the recognition of utu as a penalty for criminal offending, as a concession to Maori who at that time significantly outnumbered pakeha

<sup>30</sup> M Jackson, “Criminality and the Exclusion of Maori” in N Cameron (ed) *Essays on Criminal Law in New Zealand: Towards Reform* Wellington, Victoria University Press, 1990, p 32.

<sup>31</sup> For a translation of the Maori and English texts of the Te Tiriti o Waitangi /Treaty of Waitangi, see I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives* Auckland, Oxford University Press, 1989, Appendix 316.

<sup>32</sup> For a general history of this period see J Belich *Making Peoples: A History of the New Zealanders to 1900* Auckland, Allen Lane Penguin, 1996. For a legal history of the early period of land dealings see D V Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* Auckland, Huia Publishers, 1999.

settlers.<sup>33</sup> Similarly, in the twentieth century, central government delegated power to Marae Committees and Maori Councils to deal with minor Maori offending in Maori communities.<sup>34</sup> These initiatives could be viewed as token attempts at a pluralistic legal system, although in reality they seem to be a response to the fact that most Maori lived in communities beyond the reach or care of the machinery of the state. Other than these token attempts at recognition of tikanga, it has been actively suppressed and adjudged to have the status of native folklore.<sup>35</sup>

While Maori remained largely rurally based in the latter decades of the nineteenth century, the traditional Maori legal system operated for them much as it had since time immemorial, so that in New Zealand we had a kind of “accidental pluralism”.<sup>36</sup> As Maori became more urbanised in the latter half of the twentieth century, and thereby came into more frequent contact with pakeha people and communities, the long arm of the colonial legal system began to be comprehensively extended to Maori.

At the same time there was a breakdown of the traditional Maori legal system, partly due to the laws, policies and land confiscations that alienated whanau and hapu from their economic base. A shift to individualised land tenure meant that there was less respect for traditional leadership and it became difficult to support collective familial structures. These problems were compounded by mass urban migration after the 1939-1945 War, so that while 75 per cent of Maori lived in rural areas in 1945, this had reduced to 18 per cent by 1991.<sup>37</sup> Moving to urban centres and engaging in a more “pakeha” lifestyle further weakened Maori ties to tribal lands, support networks, and systems of social organisation.

Despite Crown assurances in the Treaty of Waitangi, within a century of its signing Maori society had suffered incalculable damage. To Maori the most harmful breach was that of the guarantee of Article Two — the promise of tino rangatiratanga or sovereignty over Maori affairs, people and assets. It is this assurance that Maori turn to in calls for reform in the modern era.

## 12.3 Explanations for Maori overrepresentation as offenders

### 12.3.1 General risk factors and the link to colonisation

One outcome of the historical circumstances described above is the socioeconomic disadvantage Maori experience. The Native Schooling system that operated for a

<sup>33</sup> A Ward *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Second edition, Auckland, Auckland University Press, 1995, p 66.

<sup>34</sup> R Walker *Ka Whawhai Tonu Matou* 2nd ed, Auckland, Penguin Books, 2004, pp 203-209.

<sup>35</sup> A Mikaere, “The Treaty of Waitangi and Recognition of Tikanga Maori” in M Belgrave, M Kawharu and D V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* Auckland, Oxford University Press, 2005, ch 18.

<sup>36</sup> Dr Lindsay Robertson of the Faculty of Law at the University of Oklahoma uses this term to describe the analogous nineteenth century situation in the US, where tribal Indian law prevailed in areas where white settlers had no formal government and/or law enforcement.

<sup>37</sup> R Walker *Ka Whawhai Tonu Matou* 2nd ed, Auckland, Penguin Books, 2004, p 197.

century after its establishment in 1867, aimed to assist Maori to assimilate into the pakeha world, by providing boys with training for the rural agricultural sector, and training girls as domestic workers and housewives.<sup>38</sup> In addition, the Native schools demanded what historian Ranginui Walker refers to as “cultural surrender, or at the very least suppression of one’s language and identity”, through the banning of te reo Maori, and the promotion of pakeha ways and values.<sup>39</sup> Restricting students to manual training rather than academic endeavours produced generations of Maori 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 Maori were largely employed. Although Native Schools were abolished in 1967, their legacy continues to influence and impact upon contemporary Maori educational achievement and aspirations.<sup>40</sup>

Maori continue to feature on the negative side of the ledger in almost all indicators involving health, wealth, education, and employment in New Zealand compared with other demographic groups.<sup>41</sup> Low Maori participation in certain functions of society, such as the economy, education, and lawmaking, reinforces marginalisation, and maintains barriers in terms of access to justice. Maori passivity in these spheres may be the result of insecure cultural identities and a lack of control over resources. One of the key difficulties for young, often second or third generation urban Maori, is the ability to participate in a Maori identity. All of these dynamics combine to fuel and maintain a circular pattern of disadvantage.

In an international context, it is universally accepted, and supported by empirical evidence that there is a strong correlation between poverty and criminal offending. In the developed world, crime tends to be committed by poor people. In New Zealand, for example, in the 1970s, criminologist A J Nixon contended that “Maori lads break the law because they belong to the social group where law-breaking occurs, and that skin colour has very little to do with the matter.”<sup>42</sup>

The growth of critical criminology in the 1970s and 1980s, expanded deprivation theories to posit that crime is not simply the result of poverty and other disadvantages but of the subtle and complex interaction of a number of social processes, including the politics of lawmaking and law enforcement, as well as politics of race, ethnicity,

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<sup>38</sup> Native Schools Act 1867.

<sup>39</sup> R Walker *Ka Whawhai Tonu Matou* 2nd ed, Auckland, Penguin Books, 2004, p 147.

<sup>40</sup> For a history of Native Schools, see J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* Auckland, Auckland University Press, 2001.

<sup>41</sup> There are of course issues with collating and analysing statistics relating to the recording of ethnic identity that are beyond the scope of this chapter. Key concerns include whether ethnic identity is self-reported, and what criteria are used to define each category. Possible over-reporting occurs where prioritising in cases of multiple identification means that a person is recorded in one category rather than another (that is, all Maori/pakeha persons are recorded as Maori). Data is also often collected in gender and ethnic categories as separate entities, but not both. For a fuller discussion see T Kukutai *The Dynamics of Ethnicity Reporting: Maori in New Zealand* Wellington, Te Puni Kokiri, 2003.

<sup>42</sup> Joint Methodist-Presbyterian Public Questions Committee, *New Zealand Today – Criminal Violence — The Church and Violence — Our Problem?* 1976: <http://www.casi.org.nz/publications/violnce.html> (last accessed 17 August 2007).

gender and culture.<sup>43</sup> In other words, certain groups were over-criminalised, not just because they committed more crimes, but because they were subject to over-surveillance. In addition, they did not have influence in the framing or enforcing of laws, with the result that the legal system did not take account of their norms or values, and instead promoted and protected the interests of those in the dominant power structures.

In New Zealand, empirical evidence tends to suggest that Maori offending can be linked to both economic disadvantage, as well as the ongoing effects of the colonial process. Maori psychiatrist Mason Durie refers to the complex interaction between historical identity factors and socioeconomic profiles and offending. He states that: “While incarceration is the most visible form of imprisonment, an equally pernicious type of imprisonment is to be found in lifestyles from which there is no escape.”<sup>44</sup> Durie identifies loss of access to Te Ao Maori, through loss of land, language and tikanga as the historical processes that have framed modern Maori identity.<sup>45</sup> The effects of these factors are then compounded by the lifestyle risk factors associated with offending and imprisonment, including alcohol and gambling addictions, drug use, domestic violence and abuse.<sup>46</sup>

A report on Maori offending by former Police Commissioner Peter Doone in 2000 came to similar conclusions, and listed other factors that may contribute to subsequent criminal behaviour:

- Having few social ties, or antisocial peers;
- Family breakdown;
- Poor self-management, aggressiveness, poor school attendance and performance;
- Unemployment, or low-skilled and low-income jobs;
- Demonstrating antisocial and violent attitudes;
- Living in overcrowded housing, and/or intransient, poor neighbourhoods; and
- Disconnection from cultural institutions such as whanau, hapu and iwi.

Maori are overrepresented on every score for these phenomena and, once combined, they may partially explain the statistical gulf between Maori and non-Maori in criminal justice data in New Zealand.<sup>47</sup>

Maori also have a high dependency on the state and its agencies involved in housing, health and law enforcement, because of their socioeconomic positioning. Increased contact with social or governmental agencies may, in turn, result in over-policing and increased surveillance of such communities.

Numerous commentators have also asserted psychological links between colonisation and contemporary endemic offending. The theory is that the current cycle

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<sup>43</sup> See, for example, I Taylor, P Walton and J Young *The New Criminology* London, Routledge and Kegan Paul, 1973.

<sup>44</sup> M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005, p 62.

<sup>45</sup> M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005, ch 4.

<sup>46</sup> M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005, p 65.

<sup>47</sup> M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005, pp 65-66.

of offending is a manifestation of the spiritual and psychological damage perpetuated upon Maori by assimilationist policies, the loss of land and resources, and the trauma of surviving experiences of violence and illness that decimated entire generations. Connected theories look to the breakdown of Maori social norms as a result of colonisation, with associated social disintegration. In support of such theories, Maori criminologist and lawyer Moana Jackson talks of colonisation as an “attack on the Maori soul”,<sup>48</sup> while Maori politician Tariana Turia refers to the aftermath as “Post Colonial Traumatic Stress Disorder” and a kind of “holocaust”.<sup>49</sup> Turia’s holocaust claims caused an uproar in the media for some time, although one commentator provided an interesting analysis of the statement, asserting that what occurred in New Zealand might be termed a “vertical holocaust”, meaning that colonisation blocked the cultural transmission of laws, language and ideologies.<sup>50</sup>

Correspondingly, critics have also claimed direct and indirect racism in the formation and application of laws and legal processes, whereby Maori are underrepresented as police, legislators, Judges, lawyers and jurors and consequently lack any input into the norms and processes of the system.<sup>51</sup> There is a clear sense among many Maori that the law and its mechanisms are not owned or shaped by Maori — it is merely a blunt pakeha tool of coercion against Maori.<sup>52</sup> Maori dissatisfaction with the criminal justice system is evident at many levels, including distrust of the police, judiciary and other law enforcement agents. If Maori neither respect nor obey the law, then this might also contribute to a cycle whereby government agencies also do not respond positively to Maori.

Of course, none of these theories provides a total answer to the conundrum of Maori over-criminalisation, although each offers something to the full picture.

### 12.3.2 Maori and the police

Historically, the relationship between Maori and the police has been fraught. Many Maori would claim that their communities are over-policed, and that they are subject to unwarranted harassment. At different times in New Zealand history, certain incidents between Maori and the police have become flashpoints which highlight these longstanding tensions — from the crushing of perceived rebellion by the early Maori

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<sup>48</sup> M Durie *Nga Kahui Pou: Launching Maori Futures* Wellington, Huia Publishers, 2003, p 62.

<sup>49</sup> Speech by Hon Tariana Turia to the New Zealand Psychological Society Conference 2000, 29 August 2000, Waikato University, Hamilton: <http://www.bennion.co.nz/mlr/2000/aug.html> (last accessed 17 August 2007)

<sup>50</sup> M Goldsmith, “Maori Assertions of Indigeneity, Post-Colonial Traumatic Stress Disorder, and Holocaust Denial” in E Kolig and H Muckler (eds) *Politics of Indigeneity in the South Pacific* New Brunswick, Transaction Publishers, 2002, p 90.

<sup>51</sup> This is analogous to the French criminologist Emile Durkheim’s theory of “anomie” discussed in E Durkheim *Rules of the Sociological Method* Translation by S Solvay and J Mueller, Glencoe, Free Press, 1950. Durkheim’s theory is that crime is a result of normlessness — where rapid change and destabilisation result in disrespect for law and a rise in crime. Of course, for colonised peoples, the imposition of a new alien system of law and norms must also be considered.

<sup>52</sup> P Doone *Hei Whakarurutanga Mo Te Ao* Wellington, Crime Prevention Unit, 2000, ch 4.

prophets Te Kooti, Te Whiti, and Rua Kenana, to the heavy-handed police treatment of young Maori activists in the 1970s and 1980s. The emergence of mass television coverage meant that images of the 600 police surrounding Bastion Point on 25 May 1978 to end the 506-day occupation of the site by Ngati Whatua and their supporters, are an iconic image of recent New Zealand history. Animosity between Maori and the police also escalated after the Haka Party incident in 1979 in which the Maori student group He Taua took direct action in order to stop the long-standing practice of engineering students denigrating the haka during university capping week. During the subsequent trials of the He Taua members for assault, there were accusations of police brutality during the arrest and detention of the protestors, which were not directly refuted by police officers giving testimony in Court. These tensions spilled over into the early 1980s, during the Springbok Tour of 1981, and also at Waitangi Day celebrations, where it became the norm for police to assemble in riot gear, armed with long batons, in preparation for Maori protesters, who were often preemptively arrested and detained.<sup>53</sup>

While these high profile events demonstrating strained Maori/police relations were not so frequently visible in the 1990s, attitudes of mutual distrust remained. Research conducted in 1998 in conjunction with the police and Te Puni Kokiri assessed both Maori perceptions of the police and police perceptions of Maori.<sup>54</sup> The Maori research participants were unanimous in their perception that “the police institution is a racist institution that perpetuates strong anti-Maori attitudes”.<sup>55</sup> Participants related numerous examples as evidence, including being stopped and questioned on the pretext of criminal offending, verbal racist abuse, physical abuse during arrest, and disrespect for tikanga Maori.<sup>56</sup> Variables that were identified as relevant in influencing police behaviour included: police perceptions about a person’s ethnicity, physical appearance, gender, class, associates, and whanau name. Many respondents thought that police often provoked Maori into verbally and/or physically retaliating to justify arrests. The result of these perceptions is that some people stated a strong attitude of distrust towards the police, such that they would be hesitant in going to them for assistance, or in providing assistance to police if asked. These were generalised attitudes, prevailing across all ages, income levels, educational levels, gender and geographical locations.

Unfortunately the parallel research on police perceptions of Maori often matched some of the negative attitudes perceived in the Maori study. For example, at least two-thirds of the 737 police respondents reported hearing colleagues use racist language about Maori. Many reported a greater tendency to suspect Maori of an offence, or to

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<sup>53</sup> See R Walker *Ka Whawhai Tonu Matou* 2nd ed, Auckland, Penguin Books, 2004, ch 11, for an overview on the origins and developments of the modern Maori protest movement.

<sup>54</sup> P Te Whaiti and Dr M Roguski *Maori Perceptions of the Police* Wellington, He Parakeke, 1998, G Maxwell and C Smith *Police Perceptions of Maori* Victoria University of Wellington, Institute of Criminology, 1998.

<sup>55</sup> P Te Whaiti and Dr M Roguski *Maori Perceptions of the Police* Wellington, He Parakeke, 1998, Summary and Recommendations.

<sup>56</sup> P Te Whaiti and Dr M Roguski *Maori Perceptions of the Police* Wellington, He Parakeke, 1998, Summary and Recommendations.

stop and query Maori driving “flash” cars. Overall, the data suggested that about 25 per cent of police have negative attitudes towards Maori.<sup>57</sup>

Two years after the publication of those parallel studies, the issue of Maori/police relations became national news once more, following the fatal shooting of Steven Wallace in April 2000.<sup>58</sup> In the aftermath, Moana Jackson wrote a paper analysing the Wallace investigation from a Maori perspective.<sup>59</sup> Jackson particularly criticises the investigation for its failure to contextualise the event, given the history of Crown oppression in Taranaki and also the background of general Maori/police relations, which he says saw police culture view Maori “not just as criminals, but as enemies of the State”.<sup>60</sup> Jackson asserts that there is a clear correlation between the historical actions of police towards Maori, and the contemporary distrust between them, as shaped by that background.

Several initiatives have been established to address issues involving Maori and the police, including the convening since 2000 of an annual conference, “Ngakia Kia Puawai”, which addresses issues of police responsiveness to Maori. Strategies at ground level have included the employment of Police Iwi Liaison Officers in communities, active recruitment of Maori into the police and training in Maori culture and protocol for all frontline staff.

### 12.3.3 Maori and juries

Similar Maori dissatisfaction is evident in relation to the jury process. Maori participation in the jury system has always been low, the reasons for which are varied, and include both legal and logistical barriers. Historically, Maori were excluded from sitting on juries for trials of non-Maori defendants, until 1962.<sup>61</sup> Maori were, however, able to sit as jurors for Maori defendants, although few defendants availed themselves of this provision.<sup>62</sup>

In the contemporary context, Moana Jackson claims that jury composition in New Zealand is flawed due to the monocultural bias produced by the method of jury selection.<sup>63</sup> Several Maori defendants have unsuccessfully challenged Court jurisdiction on this basis.<sup>64</sup> In *R v Pairama*,<sup>65</sup> for example, the applicant unsuccessfully

<sup>57</sup> G Maxwell and C Smith *Police Perceptions of Maori* Victoria University of Wellington, Institute of Criminology, 1998, Summary and Recommendations. Note that of the 737 police respondents, 8 per cent of the sample identified as Maori.

<sup>58</sup> Steven Wallace, a young Maori man, was shot by police in Waitara in April 2000.

<sup>59</sup> M Jackson *Steven Wallace: An Analysis of the Police Report*, unpublished paper, August 2000: <http://www.converge.org.nz/pma/smoana.htm> (last accessed 17 August 2007)..

<sup>60</sup> M Jackson *Steven Wallace: An Analysis of the Police Report*, unpublished paper, August 2000: <http://www.converge.org.nz/pma/smoana.htm> (last accessed 17 August 2007), Part Three.

<sup>61</sup> Juries Act 1908, s 3.

<sup>62</sup> Juries Act 1908, s 4.

<sup>63</sup> M Jackson *He Whaipaanga Hou: Maori and the Criminal Justice System: A New Perspective* Wellington, Ministry of Justice, 1988

<sup>64</sup> See, for example, the cases of *R v Pairama* (High Court, Hamilton, T21/95, 20 December 1995, Penlington J) and *R v Cornelius* (Court of Appeal, CA 405/93, 12 November 1993, Cook P, Casey J and Hardie Boys J).

argued, inter alia, for a jury of six Maori and six Pakeha, based upon the partnership relationship negotiated in the Treaty of Waitangi.

The present law governing jury selection is the Juries Act 1981, which provides that potential jurors must be over 18 years of age, registered on the electoral roll, live within 30 km of the Court, and have no disqualifying convictions.<sup>66</sup> Many Maori do not meet these criteria, as our population is young, more likely to live in rural areas than non-Maori, and more likely to have criminal convictions which prevent them from serving.<sup>67</sup> In addition, people summoned for jury service are able to request that they be excused, and Maori women often cite lack of transport and/or childcare as barriers to jury service.<sup>68</sup>

The discretionary mechanisms of jury selection also militate against Maori. Peremptory challenges allow both the Crown and defence counsel to dismiss jurors without cause. Research has shown that prosecutors often view Maori as anti-police and anti-Crown, while being empathetic to defendants, particularly Maori ones. An empirical analysis of challenges demonstrated that Crown counsel was twice as likely to challenge Maori as non-Maori in the High Court, and three times as likely in the District Court, so that nearly every second Maori was challenged in the District Court.<sup>69</sup>

The result of the current situation is that for Maori defendants, juries are not representative of their communities, nor their values. Thus, the fact that many Maori are tried before juries with no Maori representation makes a mockery of the theory that the jury trial process allows for a person to be judged by their peers. A more radical interpretation of the desire for a trial by one's peers would require a jury comprised entirely of Maori — thereby ironically revisiting aspects of New Zealand's pre-1962 jury regime.

## 12.4 Gender and the position of Maori women

The analysis so far in this chapter has been along ethnic lines, to highlight the disparities between Maori and non-Maori in the criminal justice system. However, an additional gendered analysis demonstrates that there is a gulf between Maori men and Maori women in offending and incarceration patterns. Maori women are more overrepresented than Maori men in apprehensions, convictions and imprisonments,

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<sup>65</sup> *R v Pairama* (High Court, Hamilton, T21/95, 20 December 1995) in which Justice Penlington claimed he had no jurisdiction to make such an order. Pairama also made a request to represent his son, as a non-legally qualified person, which he claimed to be in accordance with tikanga Maori. It was held that there was no statutory right derived from the Treaty of Waitangi or the 1835 Declaration of Independence, but that such a request could be considered within the recognised exception given for a "McKenzie friend".

<sup>66</sup> Juries Act 1981 ss 6, 7, 8.

<sup>67</sup> See S Dunstan, J Paulin, and K Atkinson *Trial By Peers? The Composition of New Zealand Juries*, Wellington, Department of Justice, 1995.

<sup>68</sup> Law Commission, *Justice: The Experiences of Maori Women*, Report 53, Wellington, Law Commission, 1999, pp 32-34.

<sup>69</sup> S Dunstan, J Paulin, and K Atkinson *Trial By Peers? The Composition of New Zealand Juries*, Wellington, Department of Justice, 1995.

although still numerically less. The difference between the contemporary positions of Maori men and women is a result of their different experiences of colonisation.

Prior to European contact, Maori women had legal standing that was superior to that of their pakeha counterparts. A Maori woman had separate legal personality, and could own and devise real and personal property at will, guided by appropriate tikanga practice. She retained her own name and family connections upon marriage, which could be dissolved without prejudice to her reputation, future marriage prospects, or assets. The colonial legal system reduced the status of Maori women, so that like pakeha women, she had no legal personality or property rights divisible from those of her father or husband.<sup>70</sup>

The erosion of traditional ways of life saw the nuclear family supplant the whanau as the core social unit, so that where previously childrearing and other domestic tasks were performed by the extended family, Maori women were now often isolated in, and largely confined to, individual households, bearing the main responsibility for these tasks. These new ways meant that the prior constraints on actions that derived from a more open collective lifestyle were no longer operative. The distinction between a public political sphere and a private domestic one was foreign to pre-urban Maori, where privacy was a little valued commodity. This arguably lessened any likelihood of domestic abuse, which is virtually absent in historical accounts. As Stephanie Milroy has noted, "In pre-colonial Maori society a man's house was not his castle. The community intervened to prevent and punish violence against one's partner in a very straightforward way."<sup>71</sup>

The adoption of pakeha values, the process of modernisation, and the effects of Native Schooling, all contributed to the high rate of socioeconomic disadvantage suffered by Maori. Maori women, however, tend to fare even worse than Maori men in social indicators, in that they have lower incomes, less education, poorer health and are more likely to have the sole charge of dependent children. For example, the data in the 2001 census showed a deficit of \$1600 in the median income of Maori women compared with non-Maori women, but a gap of \$6800 between Maori women and Maori men.<sup>72</sup> As discussed earlier, poor socioeconomic status may affect rates of offending, rates of victimisation, and access to justice.

In addition to being over-criminalised, recent research has also concluded that young Maori women are more likely to be victims of crime than any other demographic in New Zealand. Other identified risk factors for victimisation include being a student, beneficiary, solo parent, unemployed and living in rented property. Maori, and particularly Maori women, are overrepresented in each of these indices.<sup>73</sup> Young Maori women are also the group most likely to be repeat victims of violence.<sup>74</sup> Often the

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<sup>70</sup> A Mikaere "Collective Rights and Gender Issues: A Maori Woman's Perspective" in N Tomas (ed) *Collective Human Rights of Pacific Peoples* University of Auckland, International Research Unit for Maori and Indigenous Education, 1998, p 79.

<sup>71</sup> S Milroy, "Domestic Violence: Legal Representations of Maori Women" unpublished paper, 1994, p 12.

<sup>72</sup> Statistics New Zealand, *Census of Population and Dwellings 2001* Wellington, Department of Statistics, 2001.

<sup>73</sup> A Morris and J Reilly *The 2001 New Zealand National Survey of Crime Victims* Wellington, Ministry of Justice, 2003, ch 2.5.

<sup>74</sup> A Morris and J Reilly *The 2001 New Zealand National Survey of Crime Victims* Wellington, Ministry of Justice, 2003.

offender will be that woman's partner or other persons known to them, so that violence is commonly domestic and confined within the woman's community. Much of the violence perpetuated upon Maori women is at the hands of Maori men.<sup>75</sup>

Some of the initiatives in criminal justice that aim to address Maori offending manifest gender bias in their delivery. For example, the Maori Focus Units in prisons, described below, are only available for male offenders, and there are no plans to open any for female offenders in the foreseeable future.

The failure to take gender into account in criminal justice has other effects. For example, risk assessment in the penal system places a high value on the offences committed when considering security classification and eligibility for programming and privileges. One of the factors differentiating many Maori female offenders from their male counterparts, is that some of them are imprisoned with little or no criminal record prior to the relevant offence, which is often homicide. The situation of a Maori female could be that of a long-term victim of domestic abuse who has finally killed her abuser, a fact situation which turns the victim/offender paradigm on its head. Her status as an offender is prioritised, however, so that programming to deal with her trauma as a victim of abuse is not prioritised, if considered at all.

An intersectional analysis would demonstrate that Maori women fare worse than both "Maori" and "women" as separate categories, in that their ethnic identity causes their gender to be read in a certain way. This is likely to be evident in their treatment by police, Judges and jurors. If there are cultural expectations and stereotypes of Maori and gender expectations and stereotypes of women, Maori women are not likely to meet either.

## 12.5 Reform efforts

### 12.5.1 Contemporary responses

The negative statistical profiles of Maori offending, burgeoning prison populations, a dissatisfied general public, as well as the Maori renaissance and protest movements, have all contributed to a perceived need for reform to the various arms of the criminal justice system implicated in the over-criminalisation of Maori. The 1970s and 1980s were a period of intense social and economic debate and change, resulting in numerous committees and reports. Some of these reports have been translated into programmes, legislation or policy aimed at remedying the mischief of Maori over-criminalisation. Several strategies have been employed, including reforms aimed specifically at Maori, or indirectly benefiting Maori, along with the cooption of Maori principles and processes for all offenders.

Examples of programmes aimed directly at Maori include the numerous justice sector agencies which have developed Treaty of Waitangi policy statements, Maori advisory boards, cultural training programmes for staff, and other initiatives aimed at providing more efficient and effective service delivery to Maori.

There have also been statutory reforms that benefit Maori — whether by coincidence or design. Some reforms coincidentally parallel concepts in tikanga

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<sup>75</sup> A Morris and J Reilly *The 2001 New Zealand National Survey of Crime Victims* Wellington, Ministry of Justice, 2003, ch 5.

Maori, such as the general movement towards restorative justice, along with sentencing principles that encourage reparation, and the recognition of the interests of victims.<sup>76</sup> For example, the Victims of Offences Act 2002 encourages victims and offenders to meet, in accordance with principles of restorative justice and the tikanga concept which requires that disputes be resolved *kanohi ki te kanohi* — face-to-face. Such a reform has the unintended side effect of being more Maori-friendly than previous systems. Conversely, some changes designed and intended to benefit Maori have been translated into provisions that are non-Maori specific — such as s 27 of the Sentencing Act 2002.<sup>77</sup> This provision allows an offender appearing for sentence to call a witness to address issues involving their ethnic or cultural background that may have impacted upon the commission of the offence. Research by the Ministry of Justice, however, indicates a low level of awareness of the applicability of the provision to Maori offenders, uncertainty as to its scope and application, and a resulting low rate of utilisation.<sup>78</sup>

Examples of “coopted processes” include the Family Group Conference (FGC) and the recognition of Marae Justice/Restorative Justice programming. Dissatisfaction with the operation of New Zealand’s child welfare and youth justice systems led to the convening of a Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare, which released its report, *Puao Te Ata Tu — Daybreak*, in 1988.<sup>79</sup> This report criticised the lack of Maori involvement in these processes and the lack of support for family-centred decision making. The government’s response was the Children, Young Persons, and Their Families Act 1989. This Act, and the regime it heralded, aimed to be inclusive of differing cultural family dynamics — such as the perceived Maori emphasis on extended whanau. The cornerstone of the new system is the FGC, which emphasises collective decision making, along with supporting and maintaining the family unit where possible. Therefore, families are encouraged to make plans for the future care and protection of their young people, with appropriate support and resourcing from state agencies working alongside them. In the justice context, the FGC aims to divert young offenders from Courts and custody, while still promoting accountability, rehabilitation and reintegration.

Marae justice initiatives mirror some aspects of the statutorily empowered processes of the early twentieth century.<sup>80</sup> Such processes reemerged in the 1970s, with urban marae managing less serious offenders as an alternative to formal Court processes. In the 1990s, a government backed pilot project included a marae justice programme as an adjunct to the District Court process at Waitakere in Auckland. This programme, Te Whanau Awhina, operates at Hoani Waititi Marae, and uses a community panel to deal with selected offenders. Suitable candidates are identified by facilitators in the District Courts, who obtain consent from the offender and the Crown to have the matter diverted to the community panel. The case is then deferred in order for the community panel process to take place, and for agreements to be made if possible. If the Crown

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<sup>76</sup> Sentencing Act 2002 s 7.

<sup>77</sup> This replaced s 16 of the Criminal Justice Act 1985.

<sup>78</sup> A Chetwin, T Waldegrave and K Simonsen *Speaking About Cultural background at Sentencing* Wellington, Ministry of Justice, 2000, pp 51-58.

<sup>79</sup> Department of Social Welfare *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* Wellington, Department of Social Welfare, 1988.

<sup>80</sup> These processes included the provision for Marae Komiti, discussed above.

agrees on the plan of action, then the offender may be discharged and no further action taken.

There has been voracious criticism by some Maori concerning the promotion of marae justice and family group conferencing as “Maori processes”. Criticisms are generally centred on two issues: first, the derivation and authenticity of these processes; and secondly, their subservient place in the legal system. In relation to the first criticism, Maori scholar Moana Jackson asserts that many of the purportedly “Maori” aspects of marae justice and conferencing are actually Crown-imposed values and processes, stemming from the laws that enacted Maori Councils and Marae Komiti. Jackson maintains that the modern adoption of these phenomena as customary traditions sourced in tikanga Maori is part of the process of colonising the Maori mind, and that culturally sensitive ways of dealing with Maori offenders are all part of the colonising ethic.<sup>81</sup>

Fellow Maori criminologist, Juan Tauri, is similarly sceptical, utilising a Marxist/Gramscian analysis to assert that such reforms are little more than window-dressing. He says that: “By allowing Maori restricted ... autonomy, the state is seen to be responding to Maori social, economic and justice concerns while at the same time striving to contain their hegemonic potential through passive revolutionary activity.”<sup>82</sup>

Maori psychiatrist, Mason Durie, has also commented on the political context in which such reforms usually occur:<sup>83</sup>

While Maori-specific provisions have sometimes surfaced from sudden and urgent concerns, more often they have emerged from environments shaped by different political ideologies with contrasting attitudes towards the place of indigenous peoples in modern societies. Moreover, far from being based entirely on principles of justice and righteousness, there have also been elements of pragmatism and political posturing; a balancing of indigenous expectations and opinions against majority demands for a society where being aboriginal is seen as a distraction from progress.

This “browning” of the legal system defuses without meeting Maori demands for recognition of Te Tiriti o Waitangi and, more specifically, for Maori legal autonomy as guaranteed by Article Two, under which Maori retain “tino rangatiratanga” over our natural resources and other taonga. As Maori scholar, John Rangihau, commented, such initiatives are akin to “placing a carving above the door while the inside remains the same.”<sup>84</sup>

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<sup>81</sup> M Jackson, “Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?” in Judge F W M McElrea (ed) *Rethinking Criminal Justice Vol 1: Justice in the Community* Auckland, Legal Research Foundation, 1995, p 34.

<sup>82</sup> J Tauri, “Indigenous Justice or Popular Justice?” in P Spoonley, D Pearson and C Macpherson (eds) *Nga Patai — Racism and Ethnic Relations in Aotearoa/New Zealand* Palmerston North, Dunmore Press, 1996, 202, p 207.

<sup>83</sup> M Durie *Nga Tai Matatu: Tides of Maori Endurance* Melbourne, Oxford University Press, 2005, p 188.

<sup>84</sup> Submission to M Jackson Steven Wallace: *An Analysis of the Police Report*, unpublished paper, August 2000: <http://www.converge.org.nz/pma/smoana.htm> (last accessed 17 August 2007), p 3.

Nearly 20 years ago, Moana Jackson's seminal report<sup>85</sup> on Maori in the criminal justice system led the demand for a separate justice system for Maori, with jurisdiction and authority over the people. None of the reforms to date have come close to achieving this aspiration. It is clear that conferencing and Court-sanctioned restorative justice processes are not reconstructions of indigenous models of justice. At best, they are attempts to forge a culturally appropriate modern criminal justice system, for which many Maori agree there is a place.

Aside from the philosophical and Treaty-based objections to the cooption process, there are also concerns about the cultural disconnect between the theory and reality of these practices. Initiatives such as the FGC and marae justice programmes are predicated upon the offender coming from a functional whanau group, with whom the offender identifies, and who will take responsibility for them. There is also an assumption of knowledge of, and respect for, tikanga Maori and marae kawa on the part of the offender. These things are just not part of the lives and experiences of many modern Maori, who come from single parent families, with no relationship with Te Ao Maori or te reo and tikanga. Further, for such people to only experience the marae and tikanga Maori within a criminal justice context, denigrates the mana of those institutions. The marae should be seen as an integral part of a holistic community dynamic — not as an isolated venue for the dispensation of justice.

There is some empirical evidence of a gap between the intent and the practice of the law. For example, there are very few FGC's conducted upon marae, and only one-half of Maori children and young people who participate in the process are placed in the care of their whanau, hapu, or iwi networks.<sup>86</sup> Further, despite a commendable 38 per cent of offenders never reappearing after an FGC, 12 per cent of young people have six-12 subsequent appearances, whilst another 11 per cent have 12 or more, and the majority of these are Maori.<sup>87</sup> A study conducted of the reconviction rates of FGC participants determined that the most significant predictors of reoffending included being Maori, and not having whanau or family present at the conference.<sup>88</sup>

### 12.5.2 Maori and corrections policy

At the far end of the criminal justice spectrum, there has also been change in the corrections system, which deals with offenders at the post-conviction stage. The overall aim of the Department of Corrections is to reduce offending, and one of the

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<sup>85</sup> M Jackson *He Whaipanga Hou: Maori and the Criminal Justice System: A New Perspective* Wellington, Ministry of Justice, 1988.

<sup>86</sup> S Pakura, "The FGC 14 Year Journey: Celebrating Successes, Learning the Lessons, Embracing the Challenges", paper presented at the IIRP's Sixth International Conference on Conferencing, Circles and other Restorative Practices, 3-5 March 2005. Paper accessed at [http://www.familypower.org/library/au05\\_pakura.html](http://www.familypower.org/library/au05_pakura.html) (last accessed 17 August 2007), p 3.

<sup>87</sup> S Pakura, "The FGC 14 Year Journey: Celebrating Successes, Learning the Lessons, Embracing the Challenges", paper presented at the IIRP's Sixth International Conference on Conferencing, Circles and other Restorative Practices, 3-5 March 2005. Paper accessed at [http://www.familypower.org/library/au05\\_pakura.html](http://www.familypower.org/library/au05_pakura.html) (last accessed 17 August 2007).

<sup>88</sup> A Morris and G Maxwell, "Restorative Justice in New Zealand: Family Group Conferences as a Case Study" (1998) 1 *Western Criminology Review* 10.

key objectives of the past decade has been to reduce Maori offending in particular.<sup>89</sup> Until recently, most of the involvement Maori have had in the Corrections system has been as providers of tikanga Maori programmes to inmates, and in the provision of cultural advice and support in some institutions.

The Department of Corrections underwent a major overhaul in 1999 when it followed its counterparts in many other jurisdictions in adopting the Integrated Offender Management (IOMS) system of prisoner administration. The cornerstone of this system is the recognition and management of an offender's risk of reoffending. This requires ongoing assessment of risk, and the provision of interventions in the form of programmes, that are targeted to meet an individual offender's needs.

As part of this overhaul, Corrections policy has more clearly aimed to involve Maori in the development and operation of the IOMS system, as well as new correctional facilities.<sup>90</sup> A significant new initiative has been the development of the world's first culturally specific assessment tool for inmates — the Framework for the Reduction of Maori Offending (FreMO).<sup>91</sup> FreMO aims to integrate tikanga Maori with Western science to contribute to the development of effective policies and interventions for Maori inmates. It isolates several aspects of tikanga Maori and assesses individual inmates against these; for example, to determine whether he or she has issues with their identity as Maori, and whether they have positive whanau/familial connections. The tool can then recommend targeted interventions aimed at strengthening these cultural aspects with a long-term view to reducing recidivism. The new range of targeted interventions has included the provision of new kaupapa Maori programming, where inmates are able to access and participate in aspects of Te Ao Maori: te reo language programmes, general education in tikanga, and Maori arts such as carving and weaving.

A further development has been the introduction of Maori Focus Units at five of New Zealand's 19 prisons in the past decade. These residential units operate on a kaupapa Maori philosophy, with intensive Maori programming in te reo and tikanga Maori. Evaluative research has commented favourably on the units, which have since been exported for Aboriginal offenders in Australia.<sup>92</sup>

Other initiatives available to mainstream inmates (meaning those not housed in Maori Focus Units) include Maori therapeutic programmes integrating tikanga Maori with cognitive behavioural therapy and the bicultural therapy model provided by the Psychological Service. Recent research suggests that the majority of Maori inmates at high risk of reoffending support the inclusion of tikanga Maori in Corrections programme options, largely due to their self-reported lack of knowledge of tikanga and te reo.<sup>93</sup>

<sup>89</sup> Department of Corrections, *Annual Report 2005-2006*, Wellington, Department of Corrections, 2006, p 11.

<sup>90</sup> For an overview of Corrections policy in relation to Maori, see <http://www.corrections.govt.nz/public/pdf/annualreports/ar2005-part3-sust-devxappendix.pdf> (last accessed 17 August 2007), p 182.

<sup>91</sup> See <http://www.corrections.govt.nz/public/pdf/publications/fremo.pdf> (last accessed 17 August 2007).

<sup>92</sup> Ministry of Justice *Ministerial Review of Targeted Policies and Programmes: Department of Corrections Maori Focus Units* Wellington, Ministry of Justice, 2005.

<sup>93</sup> Dr N J Wilson *New Zealand High Risk Offenders: Who are they and what are the Issues in their Management and Treatment?* Wellington, Department of Corrections,

In relation to new facilities, Corrections has entered into relationships with various iwi who are tangata whenua of the areas surrounding the new sites. An example of this is the Memorandum of Partnership signed between Corrections and Ngati Rangi with respect to the Northland Region Corrections Facility, which opened in March 2005. These partnerships intend to give some local input into the ongoing operation of the facilities through provision of employment at the facility, the operation of programmes by locals and ongoing cultural support and advice.

Other policies aimed at assisting Maori in Corrections include the provision of Whanau Liaison Workers to mediate between inmates, their whanau and the prison system; for example, over issues of visitation and release for bereavement. Related policies enable visitation access by kaumatua for inmates, and staff training in Maori cultural awareness. Overall, the focus of Corrections is on including Maori in their operations, both as a commitment to them as Treaty partners, but also, as noted above, with aspirations to address Maori offending and imprisonment rates.

It is both significant and ironic that much of the real movement for change in the criminal justice system in New Zealand is occurring within the Corrections system, given that it is necessarily the “ambulance at the bottom of the cliff” in terms of solving any macro level problems associated with crime such as poverty and poor socioeconomic status. One explanation for this phenomenon might be the fact that, to some extent, the prison system is “private” in the sense that it operates largely under the radar for the majority of the population. This gives it some leeway to develop and trial new methods, with less public scrutiny than other arms of the criminal justice system. The operation of the police and Courts, for example, are subject to both the detailed scrutiny of the media and grandstanding by politicians wanting to appear tough on crime. The problem is again an intersectional one — the public do not like criminals, and they also do not broadly support “special measures” for Maori generally.<sup>94</sup> Measures to assist Maori offenders are therefore particularly unpopular, and Maori offenders are doubly vilified in a climate that David Brown has referred to earlier in this book as one of “popular punitiveness”.<sup>95</sup> This is short-sighted; people need to consider the bigger picture. Interventions and assistance that may result in fewer Maori offenders and less offending is something that all New Zealanders should be concerned about. If programmes targeting Maori result in safer communities and healthier citizens, then we all stand to benefit.

## 12.6 Conclusion

As the broad overview in this chapter has illustrated, there are many and varied aspects to the problems faced by Maori in the criminal justice system of New Zealand. The past 20 years have seen significant developments in the time, money and resources

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Psychological Service, July 2004: <http://www.corrections.govt.nz/public/pdf/research/highriskoffenders/high-risk-offenders.pdf> (last accessed 17 August 2007), p 6.

<sup>94</sup> See chapter 14 of this book, in relation to the role of the media in constructing and amplifying public concerns about crime and social construction, and dictating the creation of policy on crime and criminal justice.

<sup>95</sup> See chapter 2 of this book, for a discussion of the uncivil politics of law and order and the volatile and emotional media and political debates that feed off the anti-elites agenda and attitudes of popular punitiveness.

expended by government through its various agencies to “fix the Maori problem”. While some of these initiatives have yielded positive results, there needs to be better coordination of the targeted programmes and interventions across all relevant sectors, to provide a more holistic approach to the provision of culturally appropriate services for Maori in criminal justice. Further, despite some positive evaluations of government strategies, ultimately the solution to dealing with Maori offending must come from Maori, and be sourced in matauranga and tikanga Maori. For Maori, the past is in front of us — as lessons for mistakes made, and also as guidance towards a healthy future. This concept is encapsulated in the whakatauki:

Me titiro me anga ki whakamua  
(Look to our history as we move forward)

The wairua of te iwi Maori can only be uplifted by resorting to strategies and philosophies grounded specifically in the Maori psyche. The key is to make the connection to men, women and children who are disconnected from a Maori identity, or who are unable to participate in that identity for practical reasons, such as economic disadvantage. People must have a vested interest in a society in order to seek to uphold its institutions, and currently many Maori people do not have that stake.

This is also the pathway taken by our fictional Jake Heke, in *What Becomes of the Broken Hearted?*,<sup>96</sup> the sequel to *Once Were Warriors*. Jake’s search for redemption is ultimately a journey seeking that framework of tikanga Maori — with a strong emphasis on whanaungatanga.

If the past 200 years have proven anything, it is that, despite assimilationist policies, intermarriage, and cooperation between Maori and pakeha, the bottom line is that Maori still want to exist as Maori. We do not want to be Pakeha, and the assertion of our identity in our own land should be recognised and provided for.

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<sup>96</sup> *What Becomes of the Broken Hearted?* 1999, South Pacific Pictures, directed by Ian Mune.

**GLOSSARY OF MAORI TERMS**

|                     |  |
|---------------------|--|
| Aotearoa            | New Zealand                                    |
| Atua                | Gods   |
| Haka                | Maori ritual dance                             |
| Hapu                | Sub-tribe                                      |
| Hara                | Offence, crime                                 |
| Iwi                 | Tribe  |
| Kanga               | Swearing                                       |
| Kanohi ki te kanohi | Face to face                                   |
| Kaumatua            | Elder  |
| Kohuru              | Murder   |
| Ma te wa            | Give it time                                   |
| Mana                | Influence, prestige, reputation                |
| Mana atua           | Mana from the gods — inherited                 |
| Mana tangata        | Mana derived from human activity               |
| Mana whenua         | Mana derived from association with land        |
| Marae               | Meeting house                                  |
| Marae kawa          | Meeting house protocols                        |
| Matauranga          | Maori knowledge, philosophy                    |
| Ngau whiore         | Incest   |
| Noa                 | Unrestricted, safe, profane                    |
| Pakeha              | White New Zealander of British descent         |
| Papatuanuku         | Earth Mother                                   |
| Puremu              | Adultery                                       |
| Rangatira           | Chief  |
| Ranginui            | Sky father                                     |
| Roromi              | Infanticide                                    |
| Tangata whenua      | Indigenous people, local citizens              |
| Tapu                | Restricted, set aside, dedicated for a purpose |
| Te Ao Hurihuri      | The changing world                             |
| Te Ao Kohatu        | The old world – literally the stone world      |
| Te Ao Maori         | The Maori world                                |
| Te iwi Maori        | The Maori people                               |
| Te Reo Maori        | Maori language                                 |
| Te taha hinengaro   | The mind, or intellectual aspect               |
| Te taha Tinana      | The physical aspect                            |
| Te taha wairua      | The spiritual aspect                           |
| Te taha ngakau      | The heart aspect                               |
| Tikanga             | Law, correct and proper practices              |
| Tino rangatiratanga | Absolute authority and power                   |
| Urupa               | Burial ground                                  |
| Utu                 | Payment, recompense                            |
| Wairua              | Spirit   |
| Whakairo            | Carving  |
| Whakama             | Shame, embarrassment                           |
| Whakapapa           | Genealogy                                      |
| Whakatauki          | Proverb  |

**12.6**

Criminal Justice in New Zealand

Whanau  
Whanaungatanga  
Whare tapa wha  
Whenua

Extended family  
Familial obligations, kinship  
Four walled house  
Land