

DOMESTIC VIOLENCE AND WOMEN: CAN A THERAPEUTIC JURISPRUDENCE APPROACH ASSIST?

ARTICLE

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INTRODUCTION

OVER REPRESENTATION OF INDIGENOUS PEOPLES¹ IN PRISONS IS ENDEMIC. In Fiji, out of a total prison population of 1,279, 984 prisoners were indigenous Fijians (nearly 80%) and 222 were Indians (17%).² While working with the formal institutions of the Government of Fiji, a cross sectoral program formed in 2003 identified the need to establish policies to reduce the over representation of indigenous Fijians in conflict with the criminal justice system.³

In other jurisdictions, the statistics for the imprisonment of indigenous women is even more alarming. In Australia the indigenous population comprises 2.2% of the Australian population.⁴ Yet, the imprisonment rate of adults is approximately fifteen (15) times that of other Australian adults and approximately 25% of women in prison are Aboriginal or Torres Strait Islander.⁵

In Canada, the overrepresentation of Aboriginal people in Canadian prisons and jails is common knowledge, but it is less well known that the overrepresentation is growing at a greater rate for women than for men. Among federally sentenced women prisoners (those serving two (2) years or more) over 30% are aboriginal. Yet, aboriginal people comprise only 4% of the Canadian population.⁶

The first part of this paper will outline the measures currently in place in New Zealand to address domestic violence problems and suggest that the answer

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1 *Indigenous peoples* is a term commonly used to describe an ethnic group inhabiting a geographic region with which they have an early historical connection.

2 See RATU FILIMONE RALOGAIVAU, PROBLEM SOLVING COURTS OF THE FIJI ISLANDS: BLENDING TRADITIONAL APPROACHES TO DISPUTE RESOLUTION IN FIJI WITH RULE OF LAW – THE BEST OF BOTH WORLDS 5 (2007), <http://www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Ratu%20Filimone.pdf>.

3 *Id.* at 4.

4 AUSTRALIAN HUMAN RIGHTS COMMISSION, A STATISTICAL OVERVIEW OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN AUSTRALIA (2006), http://www.hreoc.gov.au/social_justice/statistics/index.html.

5 *Id.*

6 Margaret Marin, Exec. Dir., The Elizabeth Fry Soc’y of Man., Can., A Canadian Perspective on Addressing the Overrepresentation of Indigenous Women and Girls in the Canadian Criminal Justice System 7, <http://www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Marin.pdf> (last visited Mar. 2, 2009).

may lie in a return to a system of indigenous law.⁷ The second part will focus on the doctrine of therapeutic jurisprudence and whether it will provide a vehicle to implement an indigenous legal system. The final part will propose a model to highlight why a return to an indigenous legal system, or *tikanga* Maori, through the vehicle of therapeutic jurisprudence, is the answer to reduce the alarming rates of domestic violence in New Zealand for Maori.

I. NEW ZEALAND

A. Problematic Statistics

Maori are today disproportionately represented in New Zealand prisons.⁸ Although there are subsisting methodological difficulties⁹ associated with the gathering of statistics, such as who should be classified as a “Maori” and how the statistics must be interpreted, it must be acknowledged these statistics¹⁰ suggest 50% of the New Zealand prison population¹¹ is Maori. It has been said that the high rate of imprisonment in New Zealand is attributable to an almost US-like level of incarceration for Maori.¹² This suggests that the incarceration rate for Maori is similar to that of minority groups in the US. Pratt remarks that: “50 percent of the prison population are indigenous Maori, even though they make up only 15 per cent of the population – in 1950 they constituted 18 percent of the prison population. The Maori rate of imprisonment is 350 per 100,000 of the population; that for Europeans is 100 per 100,000.”¹³

Furthermore, Maori have a higher offending rate and recidivism rate than non-Maori.¹⁴ In 2000, the Maori comprised 42% of all convictions, 46% of con-

⁷ *Indigenous* is defined as native to a particular region or country; *indigenous law* refers to that system of law developed by and relating to indigenous people. BUTTERWORTHS LAW DICTIONARY 143 (Lexis Nexis 6th ed., 2005). Terms such as *customary law* and *aboriginal law* may also be used. To Maori this system of law is *tikanga*.

⁸ See N.Z. DEP'T CORR., OVER REPRESENTATION OF MAORI IN THE CRIMINAL JUSTICE SYSTEM: AN EXPLORATORY REPORT 6 (Sept. 2007), http://www.corrections.govt.nz/_data/assets/pdf_file/0004/285286/Over-representation-of-Maori-in-the-criminal-justice-system.pdf.

⁹ For a discussion on problems including self-identification or justice system identification see Juan Marcellus Tauri, *Indigenous Justice or Popular Justice Issues in the Development of a Maori Criminal Justice System*, in NGA PATAI: RACISM AND ETHNIC RELATIONS IN AOTEAROA/NEW ZEALAND 214 (P. Spoonley et al. eds., 1996).

¹⁰ B. BAYBROOK & R. O'NEILL, N.Z. DEP'T J., A CENSUS OF PRISON INMATES (Wellington, N.Z., 1988).

¹¹ See DEP'T CORR., *supra* note 8.

¹² Simon Collins, *Locked into Days of Idleness*, WKEND HERALD, Feb. 25, 2005, at B6.

¹³ John Pratt, *The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment*, 46 BRIT. J. CRIMINOLOGY 542 (2006).

¹⁴ Julie Te Urikore Lux, *Kia Mauritau*, in PRIVATE SECTOR AND COMMUNITY INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM: PROCEEDINGS OF A CONFERENCE HELD 30 NOV –2 DEC. 1992, WELLINGTON, N.Z.

victions for violence and 56% of proved cases in the Youth Court.¹⁵ More troubling perhaps, are the statistics from the Department of Corrections¹⁶ which forecast that Maori offending rates will not only remain high, but will continue to surpass non-Maori offending rates. While the percentage of Caucasian apprehended offenders has decreased slightly from 50.33% in 1996 to 45.15% in 2005, the percentage of Maoris increased from 39.6% in 1996 to 42.45% in 2005.¹⁷

The apprehension rates for Maori women surpass those of Caucasian women. For example, Maori women comprised 44.4% of female apprehensions in 1996 and 45.83% in 2005, while the apprehension rates for Maori men (43.24%) do not surpass those of Caucasian men.¹⁸ Also, in 2005, 50.52% of Maori women were prosecuted, compared to 40.1% Caucasian.¹⁹ This trend continues with 11% of custodial sentences. Of those, 58% were Maori women and 36% were New Zealand European.²⁰ Of the remanded inmate population, 53.9% of men and 58.9% of women were Maori.²¹

B. Recognition of Tikanga Maori/Customary/Indigenous Law in New Zealand

The recognition of indigenous law, *tikanga* Maori within the justice system varies from the recognition of Maori customs and values²² to the rejection of claims based on lack of jurisdiction.²³ Within the criminal justice system, the recognition of *tikanga Maori* is limited by its incorporation into programs offered by the Corrections Department.²⁴

(Austl. Inst. Criminology, 1994), available at <http://www.aic.gov.au/publications/proceedings/23/Lux.pdf>.

¹⁵ N.Z. MINISTRY J., BRIEFING TO INCOMING MINISTERS 15 (2002), <http://www.justice.govt.nz/pubs/reports/2002/post-election-brief-2002/post-election-brief.pdf>.

¹⁶ *Id.*

¹⁷ See Statistics N.Z., N.Z. Recorded Crime Tables, <http://www.stats.govt.nz/products-and-services/table-builder/crime-tables/default.html> (last visited Mar. 2, 2009).

¹⁸ NATALIYA SOBOLEVA & JIN CHONG, N.Z. MINISTRY J., CONVICTION AND SENTENCING OF OFFENDERS IN NEW ZEALAND: 1996 TO 2005 (2006), <http://www.justice.govt.nz/pubs/reports/2006/conviction-sentencing-1996-2005/report.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Ngati Hokopu Ki Hokowhitu v. Whakatane District Council*, July MAORI L. REV. 2 (2003).

²³ *R v. Toia*, CRI 2005-005-000027, Williams J., HC Whangerei, Aug. 9 2006.

²⁴ For example, *Te Whanau Awhina*. See also FIONA CRAM ET AL., N.Z. MINISTRY J., EVALUATION OF PROGRAMMES FOR MĀORI ADULT PROTECTED PERSONS UNDER THE DOMESTIC VIOLENCE ACT 1995, 119-25 (June 2002), <http://www.justice.govt.nz/pubs/reports/2002/maori-domestic-violence/maori-domestic-violence.pdf>.

The Department of Corrections has recently evaluated two (2) programs.²⁵ The first programme is *Te Whare Ruruhou o Meri*, which offers a Whanau Reconciliation Support Service. This programme is based on the recognition that many women want to return to their partners.²⁶ The programme provided by the Department of Corrections is required to support women during a reconciliation period, while providing them with the best possible opportunity to be free from violence.²⁷ The second, *Tu Tama Wahine o Taranaki*, provides a group program for Maori respondents.

The Domestic Violence (Programmes) Regulations of 1996²⁸ specify that Maori values and concepts are to be taken into account. Three (3) key principles evident in these programs were: the use of *te reo* (the Maori language), *kaupapa driven* (the use of Maori culture) and the healing of both individuals and the Maori collectively. This incorporation of *tikanga* Maori led to a favorable review.²⁹

The mainstream programs that incorporate *tikanga* for Maori offenders show a higher success rate than those programs that do not incorporate *tikanga*.³⁰ While such initiatives may be applauded, these programs are the exception to what is generally available for Maori women. Mainstream programs offered by providers³¹ lack this content and left unchecked often contribute to the disproportionate offending rates of indigenous peoples, particularly for women evidenced by the Ministry of Justice statistics. The Human Rights Commission also suggest that many of these programs that are focused on individual victims and offenders, rather than on broader relationships, are inadequate to satisfy the ambitions of those who seek the introduction or extension of programs based on *tikanga* Maori.³² In seeking appropriate programs or systems, the Human Rights Commission suggests legislative backing.³³

C. Specialist Courts in New Zealand

Despite the statistics that indicate indigenous people are disproportionately represented in the criminal justice system, unlike Australia, New Zealand has not

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Domestic Violence (Programmes) Regulations 1996, Regs. 27-28, 1996 S.R. No. 174 (N.Z.).

²⁹ See CRAM, *supra* note 24, at 69-118.

³⁰ *Id.*

³¹ Such as *Preventing Violence in the Home*.

³² Submission of the N.Z. Hum. Rts. Comm'n on: Victims' Rights Bill to the Justice and Electoral Select Committee 9 (Sept. 11, 2006), www.hrc.co.nz/hrc_new/hrc/cms/files/documents/11-Sep-2006_10-26-37_Inquiry_into_the_place_OF_victims_in_the_Criminal_Justice_System__2_.doc.

³³ *Id.*

yet developed or proposed an Indigenous Court to address this issue. Apart from Domestic Violence Courts, the Drug Court in Christchurch and the Youth Courts are the only specialized courts in New Zealand with respect to criminal offending.

The underlying philosophy of the drug court system is therapeutic jurisprudence.³⁴ This approach recognizes that the Court's processes and, in particular, the role of the judge, can be used to facilitate treatment processes. Reports indicate the rate of offending while attending the Youth Drug Court was lower.³⁵ The key feature was consistency through the presence of the same Judge on a regular basis.³⁶ Recently, a pilot court was introduced in Auckland to deal with Family Violence.

D. Family/Domestic Violence Courts

The repetitive nature of offending in a family violence context suggests that conventional sentencing practices have been ineffective deterrents. Judge Mather³⁷ noted that while recidivism is a feature of criminal offending patterns generally, it is particularly concerning when one (1) victim (usually a partner or former partner) is the object of repeated offenses by a number of different partners. According to Judge Mather, it were these concerns, as well as the high failure rate for family violence prosecutions due to the refusal or unwillingness of complainants to give evidence, that led to a new approach and establishment of a pilot Family Violence Court in 2001 at Waitakere.³⁸

In 2004 Judge Johnson called for a new, effective, workable model for processing family violence cases in the criminal court and was influential in establishing the Waitakere Court.³⁹ Any new system according to Judge Johnson should provide immediacy of response, safety for victims, accountability for guilty defendants, consistency and coordination of information sharing and community involvement.⁴⁰ There should also be a therapeutic sentencing regime, properly balanced by traditional sentences, such as incarceration, and

³⁴ SUE CARSWELL, N.Z. MINISTRY J., PROCESS EVALUATION OF THE CHRISTCHURCH YOUTH DRUG COURT 23-27 (2004), <http://www.justice.govt.nz/pubs/reports/2004/process-evaluation-chch-youth-drug-court-pilot/process-evaluation-yth-drug-crt-pilot.pdf>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ David Mather, J., Dist. Ct. N.Z., The Waitakere Family Violence Court: A more focused approach (Oct. 22, 2005), <http://www.justice.govt.nz/courts/speech-Judge-D-Mather-22-10-05.html>.

³⁸ *Id.*

³⁹ Russell Johnson, C.J., Dist. Ct. N.Z., The Evolution of Family Violence Criminal Courts in New Zealand (Nov. 8, 2005), <http://www.police.govt.nz/events/2005/ngakia-kia-puawai/johnson-on-evolution-of-family-violence-courts-in-nz.pdf>.

⁴⁰ *Id.*

should be culturally workable.⁴¹ Two (2) family violence courts have been established. The first in Waitakere in 2001 and the second in Manukau in 2005. A new Auckland Family Violence Court also began operating in March 2007.

The attention paid to details such as venue, rostering and the communication and reflective processes between all the stakeholders (Judges, Defense Bar, Duty Solicitors, Family Law, Probation, Victim Advisors, Preventing Violence in the Home, Prosecution, Legal Aid Services and Court Staff) contributed to the initial success of the Family Violence Courts.⁴² As in Canada, this continual sharing and communication between the stakeholders is viewed as key to the ongoing success.⁴³

While many aspects of the new Family Violence Courts are working well, there are, however, fundamental problems that would seriously impede long-term success. Among these are⁴⁴ programs aimed at stopping violence, as research has found that these offer no guarantee of success. It is clear that most family violence happens under the radar of the criminal justice system. The widespread use of Section 106 of the Sentencing Act 2002, discharge without conviction⁴⁵, is of concern as it provides very little in the way of offender accountability. In addition it has been shown that it does not leave an accurate record of offenders and offenses, which is needed in order to make appropriate decisions about future policy.⁴⁶

Finally, there appears to be an emphasis on the role of the Judge. First, their proactive nature in monitoring and encouraging feedback from the stakeholders to ensure workability of the Family Violence Court is key.⁴⁷ Secondly, offenders consistently hearing messages from judges that they must take responsibility for their abusive behavior and that crimes of violence towards family members are unacceptable is also important.⁴⁸ Without firm sentencing directives there is no guarantee that all Judges who sit in the Family Violence Court will adopt these same practices.

⁴¹ *Id.*

⁴² Lex de Jong, J., N.Z. Family Ct., Address at the Family Violence Court Forum at Auckland District Law Seminar (Apr. 9, 2008).

⁴³ *Id.*

⁴⁴ DEBORAH MACKENZIE & HOLLY CARRINGTON, PREVENTING VIOLENCE IN THE HOME, MONITORING REPORT FOR THE AUCKLAND FAMILY VIOLENCE COURT: THE FIRST THREE MONTHS- 27 MARCH 2007 – 30 JUNE 2007 (Nov. 2007), http://www.preventingviolence.org.nz/files/resourcesmodule/@random43ea7de766f2a/1210023895_Monitoring_report_for_the_Auckland_Family_Violence_Court_.pdf.

⁴⁵ Lex de Jong, *supra* note 42.

⁴⁶ MACKENZIE & CARRINGTON, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

E. *New Zealand Conclusion*

According to Judge Lex de Jong, Family Violence Courts are here to stay and over the ensuing years the numbers will increase.⁴⁹ Cooperation between the stakeholder groups in monitoring the process and consistency from the Judiciary are keys to the success of the Family/Domestic Violence Courts. I suggest that the shortcomings identified, such as offender accountability, reliance on stopping violence programs and decisions relating to future offending, can be met through the implementation of a *tikanga* based approach. Notwithstanding this success, attributed largely to the role of the Judge, the ability to sustain this consistency, due to resources, can be problematic.⁵⁰ I suggest that the use of a traditional forum and *tikanga* practices can alleviate this concern.

I propose that the ingredients of current initiatives from the comparative jurisdictions that have shown success be identified and developed further. I suggest that the re-implementation of traditional practices, such as circle sentencing, should be extended and that a return to *tikanga* Maori will be pivotal to the reduction of the disproportionate offending and imprisonment rates of Maoris in New Zealand. I propose that the shortcomings of the current Domestic Violence Court in New Zealand and Indigenous Sentencing Courts in Australia can be met through the implementation of therapeutic jurisprudence as a vehicle for *tikanga* Maori.

II. THERAPEUTIC JURISPRUDENCE AND TIKANGA MAORI

A. *What is Therapeutic Jurisprudence?*

Therapeutic jurisprudence developed out of the mental health system.⁵¹ American Professors Bruce Winick and David Wexler, both mental health law academics, are pioneers of this movement.⁵² During their practice within the American health system, they conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players including lawyers, judges and the offender.⁵³ This impact could be both therapeutic or anti therapeutic. Hence, a system that is designed to help people recover or achieve mental health often backfires and has the opposite effect. For instance a decision to release an offender on parole will often have the opposite effect particularly if the program is not suitable for the offender.

⁴⁹ Lex de Jong, *supra* note 42.

⁵⁰ *Id.*

⁵¹ JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 3-6 (David Wexler & Bruce Winick eds., 1996).

⁵² *Id.*

⁵³ *Id.*

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences.⁵⁴ Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced. Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way so long as other values such as justice can be fully respected.⁵⁵ It does not trump other considerations or override important societal values such as due process or freedom of speech and press.⁵⁶ Therefore therapeutic jurisprudence is the study of therapeutic and non therapeutic consequences of the law.

Therapeutic jurisprudence is thus described as the study of the role of law as a therapeutic agent.⁵⁷ One author offers the following definition, capturing the essence of therapeutic jurisprudence: “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well being of the people it affects.”⁵⁸

In this sense therapeutic jurisprudence is more a descriptive and instrumental tool than an analytical theory.⁵⁹ It focuses on the law’s impact on emotional life and psychological well being.⁶⁰ Therapeutic jurisprudence can be thought of as a lens through which regulations and laws may be viewed, as well as the roles and behaviour of legal actors: the legislators, lawyers, judges, and administrators.⁶¹ It is through this lens or window that an indigenous legal system such as *tikanga* Maori can be implemented.

B. Disadvantages and Criticisms

One of the early criticisms of therapeutic jurisprudence was that it was paternalistic, perhaps a confusion brought about by its name, which may have suggested a return to a therapeutic state.⁶² The state legal system is paternalistic; so, if the implementation of a therapeutic jurisprudential approach is successful in

54 *Id.*

55 *Id.*

56 William G. Schma, *Judging for the New Millennium*, 34 CT. REV. 4 (2000).

57 Authur G. Christean, *Therapeutic Jurisprudence: Embracing a Tainted Ideal*, FOCUS ON UTAH (Jan. 2002), available at <http://psychrights.org/Articles/TherapeuticJurisprudenceTaintedIdeal.htm>.

58 Christopher Slobogin, *Therapeutic Jurisprudence: Five dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193, 196 (1995).

59 Warren Brookbanks, *Therapeutic jurisprudence: Implications for judging*, __ N.Z. L. J. 463 (2003).

60 Wexler & Winick, *supra* note 51.

61 *Id.*

62 DENNIS P. STOLLE ET AL., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 8 (2000).

reducing Maori offending rates and those relating to domestic violence then, in my opinion, the positive outcome would justify the paternalistic means.

In a recent article⁶³, Judge Arthur Christean has outlined a number of criticisms that are also echoed by David Wexler.⁶⁴ These criticisms involve the use of therapeutic jurisprudence within a specialist court setting. They include the belief that therapeutic jurisprudence puts a tremendous strain on resources and judicial collegiality because of the “one court, one judge” concept common to specialised courts.

In New Zealand there is a trend towards a proliferation of specialised courts.⁶⁵ A specialist judge creates consistency of response.⁶⁶ This is pivotal to the success of the Family Violence Court, where the judge is proactive in monitoring, and the success of the Court hinges on consistency from the bench. In a recent evaluation of the Waitakere Family Violence Court, Morgan found that consistency of approach among the judiciary is very important. “If we have visiting judges we do whatever we can to make sure they don’t go into the Family Violence Court”.⁶⁷

While this may seem to exacerbate the strain on resources, in my opinion, the importance of specialist courts and the long-term benefits outweigh this cost.

Christean⁶⁸ further adds that therapeutic jurisprudence works against the goal of unified courts in the direction of a proliferation of specialised courts that operate on the basis of a different judicial philosophy from those of other courts within the same district. However, proponents of problem solving courts have been adamant about not allowing critics to pick apart these new initiatives by comparing them to an idealized vision of justice that does not exist in real life.⁶⁹

There is also the concern that therapeutic jurisprudence compromises the separation of powers by asking the courts to fashion solutions to social problems rather than leaving that to the legislature. Christean⁷⁰ states that the line between the judicial and executive branch becomes blurred when courts become service providers intent on achieving specific outcomes. The judge thus becomes part of a treatment team and assumes the responsibility of overseeing

63 Christean, *supra* note 57.

64 Wexler & Winick, *supra* note 51.

65 For example Family Court, Youth Court, Environment Court, Maori Land Court, and Domestic Violence Court.

66 Lex de Jong, *supra* note 42.

67 MANDY MORGAN ET AL., AN EVALUATION OF THE WAITAKERE FAMILY VIOLENCE COURT PROTOCOLS 45 (2007), http://psychology.massey.ac.nz/pdf/Family-Court-Protocols_Apr2007.pdf.

68 Christean, *supra* note 57.

69 Wexler & Winick, *supra* note 51, at 82.

70 Christean, *supra* note 57.

programs sponsored by the team so he or she exercises an executive and a judicial function.

This occurs in New Zealand within the youth justice sector as well as in family court jurisdiction. In the Family Violence Court the effectiveness of programs are discussed regularly between the stakeholders. Judges, in effect, make policy by taking advantage of the discretion traditionally afforded to them over sentencing to craft more meaningful sanctions⁷¹ or to direct program changes.

There is merit in maintaining clear boundaries with respect to the doctrine of parliamentary sovereignty and separation of powers. However, in a therapeutic problem solving court, it could result in the undermining of the relational element that is necessary between the judge and the offender. By stating clear boundaries and defining roles at the outset this problem may be overcome and the judge's position of respect maintained. Also, therapeutic jurisprudence does not trump long-standing notions of due process or the rule of law. Yet, to work strictly within the current Westminster system a compromise has to be made.

Christean⁷² claims that therapeutic jurisprudence compromises the objectivity and impartiality of judges, and the collaborative process requires the judge to act as part of the therapeutic team. Acting as part of a clinical team the judge cannot avoid unethical *ex parte* communications that have been traditionally deemed a serious ethical breach for judges, but such communications form a regular part of the therapeutic process.⁷³ When the judge becomes the central focus of the entire effort as the enforcer of the treatment team decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided.⁷⁴ To the defendant the barriers become less clear and the judge is perceived to be one of them. On the other hand, this can also be seen to be an effort by the judge to deal more effectively and humanely with the people who come before the court.

Christean also argues that the new model substitutes a judge's subjective judgment for time honored due process checks. This eliminates a vital check on the abuse of government power. Christean⁷⁵ is concerned that judges cannot effectively act as impartial and detached judicial officers to hear and rule on the competing claims of adversaries. Particularly, when they simultaneously function as advocates and defenders of the programs and procedures under challenge. Beneficial intent, not legal soundness, is seen to be the benchmark of the effectiveness of treatment regimes that are imposed.⁷⁶

71 *Id.*

72 Christean, *supra* note 57.

73 Wexler & Winick, *supra* note 51.

74 Christean, *supra* note 57.

75 *Id.*

76 *Id.*

Finally, therapeutic jurisprudence is said to abandon the role of equal justice under the law, in that programs are necessarily limited to those offenders who qualify rather than all defendants who would like to participate.⁷⁷ This implies that some defendants will be treated differently from others, depending on whether they are deemed worthy candidates for available program openings. Christean⁷⁸ suggests that difficult or resistant candidates should be screened out in favour of presenting a public face to a program that may be attractive to the media and an endorsement of the program's success. However, there would be no reason why the jurisdiction could not be widened to include all offenders after the program becomes successful.

I acknowledge the validity of these criticisms and therapeutic jurisprudence advocates are currently addressing them.⁷⁹ Nonetheless, one should not lose sight of the aim and must bear in mind that the law does not exist in a vacuum and is ever changing. If therapeutic jurisprudence has the desired healing effect this would result in less offending. The flow on from this will be a lighter case load and a lessening strain on resources and arguably one justification against these criticisms.

If this is the case, I propose that, from a policy perspective therapeutic jurisprudence can be mainstreamed. This rationalization is not new. The mainstreaming of Restorative Justice⁸⁰ into the Sentencing Act 2002 Court is required to take into account offer, agreement and response to make amends.⁸¹ Also, the Canadian Criminal Code⁸² takes into consideration sanctions other than imprisonment, which are reasonable to the particular circumstances of Aboriginal offenders.

While there has been enthusiastic support for therapeutic jurisprudence, a common response is that therapeutic jurisprudence is a rebranding of previous models or a soft approach to crime.⁸³ In a scathing critique Hoffman criticizes therapeutic jurisprudence as possessing a 'New Age pedigree' and for being both anti-intellectual and wholly ineffective.⁸⁴

These criticisms should not reduce the possibility that therapeutic jurisprudence may assist in the reduction of Maori offending rate. The commonalities

77 *Id.*

78 *Id.*

79 *Id.*

80 See John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244 (2002). Restorative Justice defined as "a process where all stakeholders involved in an injustice have an opportunity to discuss its effect on people and to decide what is to be done to attempt to heal those hurts." *Id.* at 246.

81 Sentencing Act 2002, § 10, 2002 S.N.Z. No. 9.

82 Canada Criminal Code, R.S.C., C-49, §§ 717-742 (1985).

83 Morris B. Hoffman, *Therapeutic Jurisprudence, Neorehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002).

84 *Id.*

between the philosophy behind therapeutic jurisprudence and the Maori World View will show that therapeutic jurisprudence should not be dismissed as an irrelevant.

C. *Advantages and Suitability*

From a practical point of view, a significant advantage of therapeutic jurisprudence is that can co-exist with the current legal system. This factor supports the political arguments against a separate system for Maori. Additionally, therapeutic jurisprudence simultaneously allows for the incorporation of *tikanga* Maori. The inclusion of *tikanga* can occur, *prima facie*, at all levels of the criminal justice process. I apply this intention to my proposed model.

Collectivity is a central tenet to Maori⁸⁵ and therapeutic jurisprudence is asserted as being a relationally based method.⁸⁶ The Maori World View, like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness and the notion of *whanaungatanga* or relatedness. This principle based approach, different from a rule based approach, is consistent with Maori *tikanga*. So, from a conceptual point of view, therapeutic jurisprudence represents a movement away from the heavily rule based approach of legal processes to a more collective, relational and principle based approach.

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Maori conceptual framework is at odds with the existing mono cultural system in New Zealand. Some central Maori issues, such as reciprocity, have no equal in the State system. So we see the different approaches and administration of justice between the Maori and State systems. For instance for Maori balance is the ultimate goal and responsibility must be taken irrespective of guilt.⁸⁷ For non Maori, under the Westminster system in New Zealand, the offender is innocent until proven guilty and responsibility is not a requirement. Critics⁸⁸ widely voice their concern that the current system does not allow Maori to administer justice to Maori.

Therapeutic jurisprudence, like *tikanga* Maori, is a forward looking doctrine. The Criminal Justice system in comparison looks back, punishing the past actions and focusing on the penalty. *Tikanga* Maori like therapeutic jurisprudence is not primarily penalty orientated. It looks for the “right way” or the *tika* way, ultimately resulting in a healing for the participants.

⁸⁵ JOHN PATTERSON, *EXPLORING MAORI VALUES* 135 (1992).

⁸⁶ Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J. MED. & L. 328 (2001).

⁸⁷ Khylee Quince, *Maori and the Criminal Justice System in New Zealand*, in *CRIMINAL JUSTICE IN NEW ZEALAND* (W. Brookbanks & J. Tolmie eds., 2007).

⁸⁸ Audio tape: Interview by Linda Clark with Annette Sykes, Radio N.Z. Nat'l Prog. Morning Rep. (July 18, 2003) (on file with author).

Two (2) important issues can be drawn from this. The first is that the commonalities between therapeutic jurisprudence and *tikanga* Maori allow them to work in tandem. This also provides a window to introduce *tikanga* programs that focus on indigenous law as a basis to understand why the crime or *hara* should not be committed. Acknowledging the effect of colonisation on the role of women is instrumental to understand the true “*hara*” or “crime” that underlies domestic violence.

The second issue is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well being of communities, thereby allowing Maori to look after Maori. The challenge will be the production, implementation and practicality of therapeutic jurisprudence in a suitable Court forum.

With respect to the criticisms of therapeutic jurisprudence from a *tikanga* perspective, the facilitator in a dispute is usually a *rangatira* or *tohunga*.⁸⁹ The set of principles attached to resolving disputes is supported by other principles that provide the guidelines for actions amongst individuals and groups throughout Maori society. When incorporated into a system of dispute resolution, the principles provide endless flexibility as to choice of action. For this reason, Maori society is often described as “principle based” as opposed to “rule based.” There is less emphasis on the rule but more emphasis on the principle. For example, within a *tikanga* Maori perspective the principle of a healing outcome would move towards outweighing the rule based notion of *ex parte* communications.

The central *tikanga* tenets, of collectivity and equality, dispel the idea that the defendant perceives the judge as his equal providing objective and impartial criticism. Therapeutic jurisprudence, like *tikanga* Maori, is a relational ethic. In a submission, on the Victims Rights Bill to the Justice and Electoral Select Committee, the Human Rights Commission considered that a therapeutic jurisprudence model was appropriate and could be addressed through progressive amendments to the judicial system.⁹⁰

The programs in place for Maori offenders (such as *Te Whanau Awhina*) may be stemming the tide but are not solving the problem.⁹¹ Over the generations, Maori have moved away, physically and spiritually, from their *turangawaewae* (place to stand), which has alienated many urban Maori from their culture. As a result, some Maori perceive a *Marae* setting for the *Te Awhina Whanau* program as alien as a courtroom, which might produce an anti therapeutic effect. This supports the need to consider an alternative system to address the disproportionate Maori offending rate.

89 *Tohunga* defined as expert.

90 Submission, *supra* note 32.

91 See statistics in text, *supra* Part I.A.

Therapeutic jurisprudence thinking has encouraged people to think creatively about how to bring promising developments into the legal system. Using the tools of the social sciences to promote psychological and physical well being opens the door to *tikanga* Maori. In doing so, therapeutic jurisprudence may be able to offer a vehicle to ultimately decrease Maori offending rates.

III. WHAT IS TIKANGA MAORI— AN INDIGENOUS LEGAL SYSTEM?⁹²

The legal system for Maori originates from *Te Ao Maori*, the Maori world view. *Te Ao Maori* encompasses cosmology and the creation stories that determine their relationship to each other, the environment and the spiritual world. This establishes our social charter for our understanding and behaviour in the same sense as legal precedent. *Tikanga*⁹³ is developed through these stories and ancestral precedents; it is the practice that gives effect to *kaupapa*⁹⁴, which means “first principles”. Together they set the parameters within which the concepts are given effect; *tikanga* is the law giving effect to basic principles or ground rule. Within this system key concepts, such as *mana*⁹⁵ and *tapu*⁹⁶, act as regulators.

A. Disputes

The two (2) overarching concepts of *tikanga* Maori affecting law and legal processes, *mana* and *tapu*, are the relevant foundational principles for dispute resolution.⁹⁷ Disputes such as an assault, rape or killing involves a breach of personal *tapu* or sacredness, whereas eloping, cheating on spouse, insults to your reputation or groups of people are insults to *mana* or integrity.⁹⁸ Collective dis-

⁹² As a Maori scholar lecturing, writing and researching within the area of Maori Jurisprudence, my personal knowledge, observations and experience serve as the primary sources for my interpretation of Maori terms and customs contained in this article.

⁹³ *Tika* means correct, true, just, while *nga* is a nominal suffix for plural. So *tikanga* means the collection of correct practices, a normative system meaning it tells us what is considered normal and right.

⁹⁴ *Kaupapa* derives from *kau*’ which means to appear for the first time or be disclosed, while *papa* is a reference to the Earth or *Papatuanuku*. So together *kaupapa* means ground rules or first principles.

⁹⁵ *Mana* defined as integrity, charisma.

⁹⁶ *Tapu* defined as sacred.

⁹⁷ Khylee Quince, *Maori Disputes and their Resolution*, in DISPUTE RESOLUTION IN NEW ZEALAND 256 (P. Spiller ed., 2nd ed. 2007).

⁹⁸ *Id.*

putes arose when outsiders challenged the *mana* of a group.⁹⁹ This was seen, for example, when one tribe took resources from another tribe's area.¹⁰⁰

This was a challenge to the *mana* of the area, a challenge to *their mana whenua*,¹⁰¹ a trespass. These disputes could be criminally, politically or territorially based.¹⁰²

In disputes, it was the breach of human integrity and authority that was considered important, the intention to offend was not essential.¹⁰³ The spiritual violation of the individual and the ensuing damage to the *mana* and *tapu* of the group were major reasons for disputes amongst individuals and groups.¹⁰⁴ The collective nature of disputes could result in inter *hapu* or inter tribe battles¹⁰⁵ and matters would continue to deteriorate until a *rangatira* (chief, noble) intervened.

A major criticism of the Westminster criminal system is that it does not recognise collective structures.¹⁰⁶ Instead, it provides a forum in which a series of individual rights are enforceable against other individuals thereby creating strangers of close relatives. Some Maori today, who find Marae Justice¹⁰⁷ alien, prefer to use the Westminster legal system.¹⁰⁸ The reasons for this include anonymity, privacy and an unwillingness to take responsibility for their actions. In addition, the effects of colonization and urbanisation on past generations have effectively alienated many urban Maori from *tikanga* values,¹⁰⁹ particularly women. This preference, for a cultural forum, I suggest, could be accommodated for in a specialized Court model that is underpinned by the doctrine of therapeutic jurisprudence.

99 *Id.*

100 *Id.*

101 *Mana whenua* defined as trusteeship of land.

102 Quince, *supra* note 97.

103 *Id.*

104 *Id.*

105 From my history at Aotea: the taking of a pet pig from a *rangatira's* daughter led to an inter *hapu* war.

106 Unlike the criminal system it is noted that corporate law does recognize collective structures.

107 Marae Justice is a cultural forum to address instances of Maori offending.

108 For some urban Maori who do not desire to affiliate to an *iwi* group, it is generally not unusual that they find a Marae forum alien and prefer to use the general court system.

109 My generation has effectively become detached from *tikanga* values. The onus is upon the individual to choose to learn their *tikanga* as opposed to *tikanga* being a part of everyday life. Alienation from *tikanga* values has been a slow process that has evolved since colonization.

B. Facilitator

The mediation of any dispute is usually carried out by a *rangatira*¹¹⁰ or chief as an advocate, and the responsibility¹¹¹ lies with the group. Most facilitators or *rangatira* were born into the role¹¹² and are trained for this position from an early age. They act on behalf of their people in public forums, entered into binding agreements with other *hapu* and their leadership largely went unchallenged.¹¹³

In demonstrating her *mana* and strengthening the cohesiveness of the group, the *rangatira* demonstrated three (3) principles of *whanaungatanga* (relatedness).¹¹⁴ The first was *aroha* (love), an emotional response instigated by kindness to others.¹¹⁵ The second was *atawhai* (support), the obligation to protect the well being of their people.¹¹⁶ The third was *manaaki* (blessing), the ability to look after those temporarily in your care.¹¹⁷ A parallel exists here between the *rangatira* and a judge in therapeutic jurisprudence forum. However, in the *Pakeha* criminal system, principles such as *aroha* and *atawhai* as a basis for dispute resolution were replaced by strict rules of common law and statutory law.

*Through employing these principles (love, support and blessing) the rangatira was able to settle disputes. The ultimate aim of the rangatira was always to maintain the integrity of the whakapapa line, to keep strong the obligations of whanaungatanga or relatedness amongst the individuals of the group, and to uphold and extend the mana of the group.*¹¹⁸ In this way, the well being and balance of the group is restored to enable the successful functioning of the community. This is analogous to the healing approach inherent in the doctrine of therapeutic jurisprudence.

C. Forum

The importance of the Marae (cultural forum) encounter as a forum should not be underestimated since it represented the body of ancestors and a balanced

¹¹⁰ *Rangatira* is defined as chief, noble.

¹¹¹ Responsibility for the offending and reparation if appropriate.

¹¹² Instances can arise where a *rangatira* can be appointed by their people. For example, when a *hapu* loses a *rangatira*.

¹¹³ Quince, *supra* note 97.

¹¹⁴ This information is based on my personal knowledge.

¹¹⁵ *Id.*, see also Quince, *supra* note 97.

¹¹⁶ See Quince, *supra* note 97.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

world.¹¹⁹ It was a place where mana could be restored and wairua (spirit) healed.¹²⁰ The Marae protocol, like court protocol, has an agreed framework

The whole point of a Marae encounter was to dispel tapu and bind people together; the notion of pae heretangata.¹²¹ So, dispute resolutions and Marae encounters have a metaphorical weaving exercise dispelling tapu of visitors/disputants in uniting for a common purpose.¹²²

D. Process

The repeated offenses of an individual indicated an imbalance of their *tinana* (body), *wairua* (spirit), and *mauri* (life force). This resulted in the inability to establish a state of *ora* or balance and in turn created an imbalance within the community.¹²³ The process of dispute resolution aimed to identify the causes of the dispute or reasons for offending in order to uncover and address the source of the problem.¹²⁴ This moves the focus away from the individual to an analysis of cause and effect, to help determine the wider causes of offending.

The principle of *kotahitanga* (inclusiveness) in participation and accountability underpin any process of Maori dispute resolution.¹²⁵ All parties to a dispute must be represented and given the opportunity to be heard. In contrast to the present criminal justice system, it is not essential that the individual is present as it is the collective that is the defendant and it is the collective that is the plaintiff. But the individual would suffer a loss of *mana* if they did not attend.¹²⁶

If the wrongdoing is not admitted by the group or offender, was passed to the living relations by *whanaungatanga* because of the obligations between each other, an intergenerational relationship.¹²⁷ The offender was encouraged to accept responsibility and in doing so to reestablish *mana* among the group. The group then decided what actions were required by the offender to establish *utu* (balance) with the victim and their community. The dispute process was one of

119 ALEX FRAME & PAUL MEREDITH, TE MATAHAUARIKI INSTITUTE, UNIVERSITY OF WAIKATO, TE MATAPUNENGA: A COMPENDIUM OF REFERENCES TO CONCEPTS AND INSTITUTIONS OF MAORI CUSTOMARY LAW 18 (Oct. 2002), <http://lianz.waikato.ac.nz/PAPERS/paul/Waitangi%20Tribunal.pdf>.

120 *Id.*

121 Quince, *supra* note 97.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

pono or just and *tika* or right.¹²⁸ In the dispelling of *tapu* between people, food is shared to show acceptance.¹²⁹

Going through the process, was seen as cathartic or therapeutic. For Maori, procedural justice was just as important as the result. There was no distinction between the procedural or substantive justice. Maori place much value on the process as distinct from the outcome. The process is seen as an inherent good, because it empowers the parties and the community to take responsibility for the future. Allowing time and resources for a proper airing of the grievance is, of itself a large part of the healing process.¹³⁰ In practical contemporary terms, this can be demonstrated in the Waitangi Tribunal Claims¹³¹ where the cathartic nature of airing the grievance is an essential part of the process, ensuring that healing can occur. This fundamental element is also a tenet central to therapeutic jurisprudence.

E. Punishment

For *Pakeha*, the concept of punishment is not always necessary. For instance the Court can impose a penalty such as discharge without conviction.¹³² But for Maori a form of *utu*, or reciprocity to restore the balance, is always necessary. It is suggested that the criticisms of section 106 discharges for domestic violence offenders that include little by way of offender accountability can be met with the adoption of *tikanga*. This is primarily because reciprocity and balance is always required.

Although both punishment and *utu* involve a deliberate response to an offence and aim to achieve retribution, they differ in important aspects. Ethically speaking, punishment can be foregone, but *utu* cannot; punishment should be unpleasant enough to deter, but *utu* may be entirely friendly and welcome; punishment should be confined to offenders who have been proven guilty of intentional offences, but *utu* may be exacted from individuals who have done no wrong.¹³³ This different conceptual thinking cannot be accommodated in the

128 *Id.*

129 *Id.*

130 *Id.*

131 Waitangi Tribunal was established to hear Maori grievances and claims for breaches of the Treaty of Waitangi. During these hearings Maori *aired their grievances*. Based on these hearings the Waitangi Tribunal recommended (non binding recommendations) to the Crown appropriate redress which usually included an apology from the Crown to Maori for the breaches. See Muriwhenua Waitangi Tribunal Claim Wai 45, <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/45/A881C742-3AFC-4892-B192-18AE8DAEE9Bo.pdf> (last visited Mar. 2, 2009), particularly submissions given on July 7, 1993. See also Edward T. Durie & Gordon S. Orr, *The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence*, 14 N.Z.U. L. REV. 62 (1990).

132 See Sentencing Act 2002, § 106, 2002 S.N.Z. No. 9; Criminal Justice Act 1985, § 19, 1985 S.N.Z. No. 120.

133 PATTERSON, *supra* note 85.

existing criminal justice system, but can be adopted in a therapeutic jurisprudential forum.

In assessing what *murū* (to absolve from sin) was to be paid, factors such as precedents, the status of the parties, what could be afforded, and was appropriate for the type of offending were considered. The penalty agreed reflected a “collective” concern. *Muru* like *hara* (wrong doing) was intergenerational and taking the penalty also increased the group’s *mana*.

The primary aim in the breach of *hara*, as in Dispute Resolution is to restore the balance - *whakahoki mauri* - to restore the individual *mauri*, to restore both the *mana* of the offender and victim, so that they can be continue to be part of a functioning community, a healing approach.¹³⁴ The group as a collective has an interest to maintain their *mauri*. The *utu* was an ongoing process of restoring the balance. This is a holistic healing approach. Therapeutic jurisprudence also adopts the approach of healing.¹³⁵

F. Overall aim

The overall aim of dispute resolution remains the restoration of *mana* through *utu*, to achieve a balance of all considerations and to achieve a consensus; it is not an adversarial process. When there has been a dispute that has affected the spirit and *mauri*, the question is how to bring it back into balance. Regardless of what level or who is involved the same fundamental principle is involved, the principle of *whakahoki mauri* or restoring the balance. Apparent here is the parallel notion of “healing” with therapeutic jurisprudence.¹³⁶

G. Women

According to Ani Mikaere the roles of men and women in traditional Maori society can be understood only in the context of the Maori World View, which acknowledged the natural order of the universe, the interrelationship or *whanaungatanga* of all living things to one another, and the overarching principle of balance.¹³⁷ Both men and women were essential parts in the collective whole, both formed part of the *whakapapa* that linked Maori people back to the beginning of the world, and women in particular played a key role in linking the past with the present and future.¹³⁸ The survival of the whole was dependent on eve-

¹³⁴ Quince, *supra* note 97, and personal knowledge.

¹³⁵ REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David Wexler ed., 2008).

¹³⁶ Wexler & Winick, *supra* note 51.

¹³⁷ Ani Mikaere, *Collective Rights and Gender Issues: A Maori Women’s Perspective*, in COLLECTIVE HUMAN RIGHTS OF PACIFIC PEOPLES 84 (N. Tomas ed., 2004).

¹³⁸ *Id.*

ryone; they were all a part of the collective; it was a collective responsibility to see that their respective roles were valued and protected.¹³⁹

The gender neutral aspect of Maori language indicates the absence of any gender hierarchy. The importance of women is also symbolized by language and concepts expressed through proverbs. Rose Pere has written on the association of positive concepts with females pointing to the description of women as *whare tangata* (the house of humanity), the use of the word *whenua* to mean both land and afterbirth and the use of the word *hapu* as meaning both pregnant and large kinship.¹⁴⁰

Instances of abuse against women and children were regarded as *whanau* (family) concepts and action would be taken against the perpetrator. 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 straight forward way."¹⁴¹

Women could retain various roles however, as child rearing was a collective responsibility with grandmothers, aunts and other females being responsible for all children in the *whanau*. This sharing of work meant that mothers could still develop expertise in other areas and perform leadership roles. Women had the role of keeping the affairs of the communal group in order and to pass on the customs of the ancestors within the *whanau*. The role of Maori women as nurturers and organisers valued within their *whanau*, *hapu* and *iwi* was challenged by the European view of men as heads of the family.

The role of women of rank as leaders was challenged by the European view of the subordinate role of women to men. Women as leaders, the lines of descent and birthright could be traced through either men or women and were often traced through women where she was of a higher rank than her husband.

Maori women as individuals could own and use rights over land and resources.¹⁴² Those rights could be passed to her by either parent and remained her property upon marriage. They were not the common property of the marriage or of her husband. She could then pass those rights on to any or all of her children.

Colonization of Aotearoa (New Zealand) changed the order of things, the British had culturally specific views on the role and status of women which did not fit with tikanga Maori. After the arrival of the Pakeha (non Maori), Maori women continued to play a significant role in Maori society. Heni Pore of Te Arawa fought against the British in the 1860s in support of the Kingitanga, and

139 PATTERSON, *supra* note 85.

140 Rose Pere, *To Us the Dreams are Important*, in *PUBLIC AND PRIVATE WORLDS: WOMEN IN CONTEMPORARY NEW ZEALAND* 84 (S. Cox ed., 1987).

141 Stephanie Milroy, *Domestic Violence: Legal Representation of Maori Women* 12 (1994) (unpublished paper, on file with author).

142 Mikaere, *supra* note 137.

also at the Battle of Gate Pa in 1864.¹⁴³ Maori women continued to be acknowledged as landowners, as negotiators and religious leaders. However, the introduction of disease, a new economy, land alienation and Christianity saw Maori women's role change.

With respect to land ownership legislation introduced in 1873 (Native Land Act 1873) required that husbands be a party to any deed executed by Maori women.¹⁴⁴ Husbands could dispose of land interests as they wished. Pakeha officials insisted on the use of husband's surnames for Maori women.¹⁴⁵ Pakeha writers rewrote many of the Maori stories and myths they heard from Maori to marginalize the role played by women in them. The practice of customary marriage was gradually eliminated in law. The recognition of only legal marriage in accordance with English law contributed to the breakdown of the *whanau* and *hapu* unit, as the legal relationship of marriage places the husband and wife relationship above all others, including those that the woman has with her parents and siblings.

The relationship of women with the land was challenged by the Common Law concept of individual land ownership and the role of men as property owners. In comparison the Maori female presence is a constant in Maori traditional beliefs about the origins of human kind, the transfer of knowledge and wisdom, and the restoration of balance.

H. Tikanga Maori and Domestic Violence

When colonial law and culture was introduced to New Zealand, the status of Maori women was reduced to that of their European counterparts.¹⁴⁶ Women had no legal personality, could not enter into contracts and could not be sued or own property. Her legitimate sphere of activity was within the home, which was deemed beyond the reach of the law. Within that private sphere, men were able to discipline their spouses and children so the laws of personal *tapu* and privacy disintegrated.

This imbalance has not yet been addressed. As well as that, many within Maori culture have adopted discriminatory attitudes towards women as a result of colonial views and stereotypes. I suggest that the implementation of *tikanga* through the vehicle of therapeutic jurisprudence is pivotal to achieving this balance in both the individual and the community.

¹⁴³ *Id.*

¹⁴⁴ For a full description of the effect of this legislation, see DAVID V. WILLIAMS, *TE KOOTI TANGO WHENUA: THE NATIVE LAND COURTS 1864 – 1909* (1999).

¹⁴⁵ Mikaere, *supra* note 137.

¹⁴⁶ *Id.*

I. Tikanga Maori – Conclusion

Ani Mikaere¹⁴⁷ views *tikanga* as the first law of New Zealand, a law that served the needs of Maori before the arrival of the colonists. The disproportionate offending rates of indigenous peoples have been attributed to the effect of colonization and oppressive government policies. I suggest that a return to an indigenous legal system, such as *tikanga*, is instrumental to address this problem.

IV. CAN THERAPEUTIC JURISPRUDENCE AS A VEHICLE FOR AN INDIGENOUS LEGAL SYSTEM, SUCH AS TIKANGA MAORI, BE EFFECTIVE FOR A DOMESTIC VIOLENCE COURT? A PROPOSED MODEL

In New Zealand, ten (10) children are killed every year in domestic violence; one (1) woman is killed every five (5) weeks by a partner or ex partner and Women's Refuge assisted 20,000 women and children last year.¹⁴⁸ With regard to victimization:¹⁴⁹

- Maori women are over-represented among victims of domestic violence and are more likely to experience repeated victimization from a partner.

- A higher proportion of Maori women, in comparison to non-Maori women, apply for protection orders under the Domestic Violence Act 1995.

- Maori women and children are heavy users of women's refuge services. There is some evidence that Maori women do not access other services for victims at the rate that might be expected.

With regard to offending:¹⁵⁰

- Both female and male Maori youth are far more likely to be apprehended and prosecuted than their non-Maori counterparts.

- Maori women are five (5) times more likely to be prosecuted for an offense than non-Maori women, and Maori men are over three (3) times more likely to be prosecuted than non-Maori men.

- Although far fewer Maori women than Maori men offend, there are some indications that Maori women are becoming increasingly involved in offending.

¹⁴⁷ Ani Mikaere, *The Treaty of Waitangi and Recognition of Tikanga Maori*, in WAITANGI REVISITED: PERSPECTIVES ON THE TREATY OF WAITANGI 330 (M. Belgrave et al. eds., 2005).

¹⁴⁸ N.Z. Police, Protection Orders & the Domestic Violence Act [1995], <http://www.police.govt.nz/safety/home.domesticviolence.html> (last visited Mar. 2, 2009).

¹⁴⁹ N.Z. MINISTRY WOMEN'S AFF., MAORI WOMEN: MAPPING INEQUALITIES AND POINTING WAYS FORWARD (Sept. 2001), <http://www.mwa.govt.nz/news-and-pubs/publications/az-publications/maori/maorimap.pdf>.

¹⁵⁰ *Id.*

- Maori women make up over 60% of total numbers of sentenced women imprisoned, a higher percentage than Maori men compared to non-Maori men (around 50%).

The factors threatening the establishment and sustainability of families, *whanau* and communities are:¹⁵¹

- The high incidence of domestic violence experienced by Maori women.
- The disproportionately high representation of Maori women who offend.
- The significant and rising over-representation of young Maori women in the criminal justice system.
- The impact of the offenses of male partners on Maori women.
- The impact of Maori offending on children.
- High rates of Maori re-incidence.

Domestic Violence is a different crime, partly because the lives of the perpetrator and the victim are usually intertwined. A domestic violence court would move cases in front of a judge more quickly. Importantly, as Rivera notes: “it would keep the victim working with the same judge and prosecutor; that means the victim doesn’t have to repeat the story of abuse over and over, sometimes to the point of giving up.”¹⁵²

A. *Domestic Violence*

This paper proposes to extend the application of therapeutic jurisprudence to implement *tikanga* Maori within a specialized Court setting, such as the Domestic Violence Court, in order to alleviate the alarming rates of domestic violence in New Zealand. The use of this system is not a novel idea. Both South Australian and Western Australian Domestic (Family) Violence Courts are inter-agency and community initiatives aimed at reducing the incidences of violence in families by integrating treatment into the court process. Unlike criminal courts, the Domestic Violence Court seeks not only to punish and rehabilitate the batterer, but also to provide support and services to the victim.

The current trial process for domestic violence has an anti-therapeutic effect on victims. The “crime against the state” perspective on prosecution disempowers victims and closes any avenue to seek balance for both the victim and the defendant.

The Domestic Violence Courts operating in New Zealand are problem solving courts and generally focus on the underlying chronic behaviours of criminal

¹⁵¹ *Id.*

¹⁵² Ray Rivera, *Our View: Boise Needs New Method to Stop Domestic Violence*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 58 (B. Winick & D. Wexler eds., 2003).

defendants.¹⁵³ It is acknowledged that victim support agencies are attached to the Court. However, in my opinion, these agencies operate quite separately and distinctly from the judicial process. Based on the input of a team of experts from the community, a judge orders the defendant to comply with an individualized plan, such as anger management, and then the judge (with the assistance of the community team) exercises intensive supervision over the defendant to ensure compliance with the terms of the plan.¹⁵⁴

B. Model

The model I propose is comprised of two (2) general components. First, the Domestic Violence Court should be “retuned” to incorporate the doctrine of therapeutic jurisprudence. Secondly, this doctrine then supports the implementation of *tikanga* in a similar way to that of circle sentencing in Canada or Indigenous Sentencing Courts in Australia. However, I suggest an extension and application of *tikanga* to the whole criminal process. Ultimately, legislative recognition¹⁵⁵ will provide certainty to this process.

This restructuring would include training of lawyers and the judiciary to better understand the effects of domestic violence and battered women’s syndrome from an indigenous perspective. The result of which would include a broader understanding of the causes of crime and its relationship with colonization.

From a practical point of view, this model will utilize the relevant systems and frameworks already in place, such as the existing court forums, existing Marae, Maori Committees and existing legislative provisions such as the Community Development Act 1962.

Ideally, the judges would be Maori; however, it is acknowledged that there is a shortage of Maori judges. Considering the education and continued training of judges in the fields of *tikanga*, *te reo* and *marae* protocol, it is possible that non-Maori judges could fill the roles. But, they would need to be well versed. In the alternative, *kaumatua* or a panel of *kaumatua* could assist a non-Maori judge in an advisory capacity.¹⁵⁶ This is not novel; although not often exercised, the Resource Management Act 1991 provides for a similar option.¹⁵⁷ This option would allay current concerns regarding the consistency of judges in a Domestic Vi-

¹⁵³ Lex de Jong, *supra* note 42.

¹⁵⁴ Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts into the Mainstream: A Report Card from the CCJ-COSCA Problem-Solving Courts Committee*, 39 CT. REV. 4 (2002).

¹⁵⁵ Legislative recognition of indigenous practice is not new. See Magistrates’ Court (Koori Court) Act 2002, 2002 VICT. REPR. STAT. No. 27.

¹⁵⁶ *Te Ture Whenua Maori Land Act 1993*, § 62, 1993 S.N.Z. No. 4, states: “Additional members with knowledge and experience in tikanga Maori.”

¹⁵⁷ Resource Management Act 1991, § 252, 1991 S.N.Z. No. 69; see also *Te Ture Whenua Maori Land Act 1993*, § 269 (3), 1993 S.N.Z. No. 4, on consideration of *tikanga* values.

olence Court and address the problem of increased workloads identified in the Australian Domestic Violence Courts.

C. Procedure – Tikanga Maori Component

The jurisdiction should be open to all offenders. One of the criticisms to the Domestic Violence Court is its limitation to summary offences and its inability to deal with indictable offences. While this concern may be warranted there are practical difficulties of dealing with hardened criminals alongside first offenders. In the initial stages the jurisdiction could be confined to summary offenses with the anticipation that after the success of this model has been proven, the jurisdiction be widened to include indictable offences. This method would solve the limitation in jurisdiction identified by the Australian Domestic Violence Courts. At this time, there is a need to address provisions for security of the offender and community.

This model and accompanying procedure is totally integrated. Its application takes effect at the beginning of the criminal procedure, upon arrest of the offender. The arresting Officer would inquire whether the offender identifies himself or herself as Maori and advise them of the process. If the offender does not identify as Maori, irrespective of appearance indicators, then that person would fall within the general criminal justice process or, in this instance, the Domestic Violence Court.

If the offender identifies as Maori, it would be mandatory that a Maori representative or warden is called in and that the offender joins the program.¹⁵⁸ This is similar to the arrest of a juvenile. It is helpful but not vital that the representative be legal. This representative would become responsible for the offender until their Court appearance.

If the offender is clearly non-Maori, but identifies as being Maori, this should not inhibit the offender from partaking in the process, primarily because it is principle based. If successful, there should be no reason why this model should not be extended to non-Maori. However, as the statistics indicate it is Maori offending and Maori victim rates that are of concern and as such Maori offenders should be the target.

The offender would be assessed within the local Marae forum, allowing for *whanau* involvement. Initially the offender would have no choice of which *Marae*. This is similar to the Maori Focus Units in prisons where upon sentencing the offender has no choice but is allocated to an area where his protocol or *kawa* may or may not apply. In Auckland, New Zealand, there are several “pan” iwi Marae that cater for Maori from all different iwi.¹⁵⁹ These *Marae* are also usually urban based. Envisaged as a first port of call, a “pan” iwi *Marae* would be used.

¹⁵⁸ See Marcellus Tauri, *supra* note 8, at 204 (for discussion of powers for mandatory involvement to compel *whanau* to attend, etc., and employ Maori justice practices).

¹⁵⁹ For example, in Auckland Hoani, *Waititi Marae* in West Auckland.

The offender can then be transferred to a tribal or *iwi* specific *Marae* if requested and if funding resources allow.

As with the Indigenous Courts, both parties would sit at eye level (*kanohi ki te kanohi*). The use of existing indigenous forum such as a *Marae*, addresses those concerns associated with unsuitable locations identified by the siting of *Koori* Courts. The arresting warden would assist to ensure that the offender does not feel uncomfortable by implementing relational values such as *whaka-papa* to alleviate any feeling of alienation to the process.

After the initial formalities have been completed, an appropriate program would be specified for the offender, thus taking on board the success from *Te Whanau Awhina* Programs and utilizing existing Youth Programs.¹⁶⁰ At this point, it is pivotal that the offender understands, from a *tikanga* perspective, the nature of his crime. It is also important that the offender takes responsibility, faces his victim, recognizes the need for *utu* and balance and acknowledges the role of women prior to colonization. The composition and underlying *tikanga*, or cultural perspective, of these programs will assist to address the safety needs of the victim and the future well being of the offender. Stewart identified these shortcomings in the Australian system.¹⁶¹

For this model to be successful this stage requires legislative promulgation, similar to the legislative provisions acknowledged by the *Koori* Court Act. Promulgation would provide appropriate recognition and give a clear direction to the Court to follow the recommendations given.

The current “stopping violence” programs used by the Domestic Violence Court can also be undertaken in conjunction with the appropriate *Marae* programme above. The difference, however, is that the participation of the offender would be monitored. If as research suggests programs show no guarantees of success¹⁶² this will be identified by the monitored participation.

One of the purposes of *tikanga* based programs is for the offender to take responsibility for his actions. Judges in domestic violence cases often give this directive which shows a commonality between the mainstream procedure and *tikanga*.

The process demonstrates direct intervention and administration of *tikanga* Maori, along with the notion of Maori looking after Maori. This option would overcome the criticisms of indigenous sentencing. The Indigenous courts are not seen as adopting indigenous customary laws, but rather using Australian

¹⁶⁰ *He Tete Kura Mana Tangata* Programme for Maori violent offenders based at *Nga Whare Waa-tea Marae* in Mangere Auckland. See *Promising results from programme for Maori violent offenders*, 2001 (3) JUDGES' UPDATE 2, http://www.corrections.govt.nz/_data/assets/pdf_file/0004/271057/2001issue3.pdf.

¹⁶¹ JULIE STEWART, SPECIALIST DOMESTIC/FAMILY VIOLENCE COURTS WITHIN THE AUSTRALIAN CONTEXT 4 (2005), http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_10.pdf.

¹⁶² *Id.*

criminal laws and procedures when sentencing Indigenous people, while allowing indigenous elders or respected people to participate in the process.

Alternatively, at this point there is room for the adoption of Moana Jackson's concept of a *marae* based model of diversion.¹⁶³ Maori committees established under legislation such as The Maori Social and Economic Advancement Act 1945 and its replacement, the Maori Welfare Act 1962, could easily be reconstituted as community or *marae* based committees. These committees would then have the right to hear all charges under the Maori Community Development Act 1977. Instead of processing them under the Domestic Violence Act 1995 or the Summary Offences Act, when accused for other offenses, the offender would enter into a Marae based program. Participating in this program allows the offender to avoid the conventional question of guilt, which is unfamiliar for the Maori.

The philosophy behind this "First Intervention Step" or "Pre Plea" is two-folded. First, it allows involvement of *whanau* and implementation of *tikanga* Maori. This moves towards satisfying the call for the administration of justice to Maori by Maori. Secondly, the philosophy recognizes that defendants often come before the court with a background that increases the risk of offending. For instances of domestic violence it is often the victim who is also at risk and there is a need to ensure her safety. Such defendants, if left without treatment, may well find themselves back before a court charged with further offenses committed while on bail. Early treatment or intervention may prevent this situation from occurring and reduce the "on bail offenses" rate.¹⁶⁴ This may also eliminate the jurisprudence and case law on breaches to bail conditions.¹⁶⁵

Ideally, admission to this first intervention stage would be contingent to the offender's predisposed risk of offending. Also, it would be preferable that the system acknowledges the problem, commits to its resolution and participates in the Marae or other suitable program.

Upon the offender's court appearance, the Judge would call for a Report from the Maori representative (similar to a probation report). The Judge taking into account the findings of the Report would then assess the effectiveness of the Program and, if he is satisfied, the offender could be returned to the community and discharged without conviction.¹⁶⁶ Proposed legislation would provide clear directions for the Judge.

¹⁶³ Diversion is a scheme that allows for some offenders who have been charged to be dealt with in an *out of Court* way. If the offender completes agreed conditions, the Prosecutor can seek to have the charge withdrawn and a conviction will not be recorded.

¹⁶⁴ BARB LASH, N.Z. MINISTRY J., TRENDS IN THE USE OF BAIL AND OFFENDING WHILE ON BAIL 1990 – 1999 (Jan. 2003), <http://www.justice.govt.nz/pubs/reports/2003/bail-1990-1999/bail.pdf>. This report indicates that 21% of people offended while on bail.

¹⁶⁵ See *S v. Police*, [1992] N.Z.F.L.R. 150 (H.C.); *Kerisiano Aeau v. The Police*, [2007] N.Z.H.C. 887.

¹⁶⁶ Sentencing Act 2002, § 106, 2002 S.N.Z. No. 9; Criminal Justice Act 1985, § 19, 1985 S.N.Z. No. 120.

D. Domestic Violence Court– Therapeutic Jurisprudence

It is acknowledged that there will be offenders who will not complete satisfactorily the program for various reasons, which may include the Marae forum being alien to the offender. These offenders, together with those who chose not to participate in the *tikanga* Maori component, would then be subject to a Domestic Violence Court that is underpinned by the doctrine of therapeutic jurisprudence.

Although that particular program formulated within the Marae forum may not have worked, the Judge still has the option to incorporate other programs or social sciences to assist in further treating the offender. Unlike the Youth Court where the Judge does not tend to depart from the Family Group Conference Report, the discretion would be broader here for various reasons one being there is still another step before the General Court process would come into effect and secondly the offender would not always be a youth.

For instance, the Judge could adopt a preventive approach, if he believes that the offender's adverse behavior has led to the offense. For example, as a result of various reports on the offender, the judge may confine the offender to home detention on the days he is more likely to offend. Alternatively, the judge may impose a court protection order for domestic violence cases.

The Judge could also incorporate *tikanga* Maori. For instance:

- *Kanohi ki te kanohi* encounter,
- Maintaining the importance of reciprocity between the offender and victim,
- Adhering to the principles used by *rangatira* such as *aroha*, *atawhai* and *manaaki*.

By considering the notion of *utu*, the Judge could also incorporate the offender's wider family in assisting the offender complete the program. It must be understood that *utu* may be differentiated from those who have done no wrong and that *utu* is essentially a mechanism for restoring lost *mana*, a "healing" tool.

The proposed system would give the Judge with a more active role in the process of promoting rehabilitation and crime prevention, similar to the Probation or Re-Entry. The aim is to facilitate offenders' participation in a program, to maintain their dignity and to promote their trust.

Upon entry into the program, the offender would sign a behavioral contract¹⁶⁷ agreeing to comply with the program's agenda. The offender could also be encouraged to participate in the development of the program. So, this program could be tailored to suit the problems or offenses relevant to the participant and could be specific, such as an Anger Management Course. Part of the

¹⁶⁷ See David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"*, 38 CT. REV. 18 (2001); see also David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 131 (2000).

program would include regular court appearances for review, as progress is made.

Participants would be actively involved in the process and provide input into the program for changes. The Judge would interact with the offender, expressing interest in his life and commending any progress. This endeavor would establish the “*tika*” or correct approach.

Once the participant completes the program successfully, he will be awarded a “graduation certificate.” This philosophy is based on the ethic of care and the central tenet of therapeutic jurisprudence: a “relationally-based” construction. The ethic of care recognizes and is capable of offering such an alternative approach to legal problem solving, which is more overtly relational and deliberately less adversarial.¹⁶⁸

There may be cases in which the offender shows no progress in the program. In such instances the program, would be terminated and the offender would be subject to the general court’s jurisdiction.

Similar processes have been implemented already within the existing system. Judge Cooper,¹⁶⁹ taking an innovative approach to sentencing, attempted to break the cycle of offending by allowing the intervention of the Probation Officer. A series of victim-offender *hui* were held, a community program. As a result, the two protagonists have shaken hands and “healed” any rift.

A similar model in operation in Geraldton, Western Australia, has integrated therapeutic jurisprudence into their sentencing regime and has already shown promising results.¹⁷⁰ This system is comparable to the drug Courts and uses therapeutic jurisprudence to import holistic concepts such as transcendental meditation. This concept is based on the premise that stress related problems may be alleviated on the levels of mind, body and behavior. Transcendental meditation also intends to promote overall growth in life and remove the underlying causes of substance abuse and offending.¹⁷¹

Introducing a mix of *tikanga* Maori values and problem solving skills or other more mainstreamed legal practices is not a new concept. This combination of methods conforms to the long term plan to integrate problem solving courts into established judicial systems.¹⁷² Judge Joe Williams,¹⁷³ the Chief Judge of the Mao-

¹⁶⁸ Wexler & Winick, *supra* note 51.

¹⁶⁹ Sentencing Act 2002, § 106, 2002 S.N.Z. No. 9; Criminal Justice Act 1985, § 19, 1985 S.N.Z. No. 120.

¹⁷⁰ Michael S. King, *Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush*, 26 CRIM. L. J. 260 (2002); see also Michael S. King & Steve Ford, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime*, 1 MURDOCH U. ELAW J. [SPECIAL SERIES] 9 (2006), <https://elaw.murdoch.edu.au/v1/issues/special/exploring.pdf>.

¹⁷¹ King, *supra* note 170, at 267.

¹⁷² Sentencing Act 2002, § 106, 2002 S.N.Z. No. 9; Criminal Justice Act 1985, § 19, 1985 S.N.Z. No. 120.

ri Land Court, proposed a model which would incorporate principles from equity and public law mixed with *tikanga* values. The changes envisaged also included a name modification and a *Waitangi* Tribunal like forum, incorporating a Community or People's Court notion. Maintaining the integrity of a *tikanga* approach within the current Criminal Justice Process addresses the criticism leveled at Koori Courts claiming that the Court is European justice under the guise of indigenous Courts.¹⁷⁴

To undertake an analysis of the practicalities in terms of Government resourcing for such a model is beyond the scope of this paper, except to note that it is a problem recognized by the Government, which is continually engage in criminal law reform¹⁷⁵ and have allocated resources¹⁷⁶ to reduce the Maori offending rate. If this system is trailed and shown to be effective, then the end result should go towards outweighing the resourcing hurdle. To put this into perspective, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCC&R), had an annual budget of fifty six (56) million for the 2005-2006 period. The current jurisdiction identifies fifty three (53) people that have been placed under an IDCC&R order with other 314 people identified but not under an order.¹⁷⁷ So, a large amount of funding has been allocated for relatively few people. If the same budget is applied to the implementation of a proposed model, it would benefit more people both directly and indirectly.

CONCLUSION

The primary aim of this paper was to examine why the offending rates for Maori and Maori women remain high and to suggest ways in which these rates could be reduced. After an analysis of comparative jurisdictions and the judicial process for indigenous peoples this paper proposes a model that may offer an answer.

Some elements of the existing system have shown to be mono cultural and in opposition to *tikanga*: judge's inaccessibility, the alien court process, and the lack of concern or relationship with the offender after their court appearance. The criminal justice system lacks any appreciation or analysis of the broader role colonization has played in contributing to the high offending rates. The persistence of these elements has resulted in anti therapeutic results.

Therapeutic jurisprudence as a vehicle allows:

¹⁷³ Joe Williams, C.J., Maori Land Ct., Address at Forum 1 of the University of Auckland Law School (July 24, 2003).

¹⁷⁴ STEWART, *supra* note 161.

¹⁷⁵ See *Major project to simplify criminal procedure*, LAW TALK, May 5, 2008, at 1.

¹⁷⁶ Such as the *Tahua Kaihoatu* Fund that is administered by *Te Puni Kokiri*. Also to fund programmes that have a *tikanga* component, e.g. *Te Whare Ruruhau* or *Meri* and *Tu Tama Wahine*.

¹⁷⁷ For further details, see Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 "IDCC & R Act", <http://www.moh.govt.nz/idccr> (last visited Mar. 3, 2009).

- Maori to take responsibility,
- formal recognition of the validity and applicability of *tikanga* Maori,
- a fully integrated bicultural approach,
- involvement of Maori throughout the whole process,
- Maori to administer justice,
- the community to make decisions a system predicated upon *tikanga*

Maori as well as Maori people.

The most important commonalities between *tikanga* Maori and therapeutic jurisprudence are the recognition of collective responsibility or communitarianism and the healing process. Therapeutic jurisprudence allows for Maori offending to be addressed in a Maori way. The goal for both therapeutic jurisprudence and *tikanga* Maori is *whakahoki mauri* or restoring the balance through healing. This end enables the offender to successfully participate in the community.

The model incorporates the doctrine of therapeutic jurisprudence within a court setting. Therapeutic jurisprudence offers a vehicle to incorporate a separate indigenous legal system, *tikanga*, which would be legislated to provide certainty.

This recognized social problem challenges both our politicians and judges to embrace and implement legal systems that have shown success but lie outside the Westminster structure. In my opinion, the adoption of *tikanga* Maori and a therapeutic jurisprudential approach within a New Zealand court setting can effectively open a pathway for *tikanga* Maori to walk together with *te ture Pakeha*, in order to turn around the disproportionate offending rates of Maori. Even if this proposal introduces any challenges, this is a first step in the right direction to create a new criminal justice system that incorporates the values of all the members of our society.

GLOSSARY OF MAORI TERMS

- *ahora*: love
- *Aotearoa*: New Zealand
- *atawhai*: support
- *hapu*: pregnant; large kinship
- *hara*: crime; wrong doing
- *kaupapa*: Maori culture “first principles”
- *manaaki*: blessing
- *manu*: integrity; charisma
- *mana whenau*: trusteeship of land
- *Marae*: cultural forum
- *mauri*: life force
- *murū*: to absolve from sin
- *rangatira*: chief; noble
- *tapu*: sacred
- *te reo*: use of Maori language
- *tika*: correct; true; just; right
- *tikanga maori*: an indigenous legal system
- *tinana*: body
- *tohunga*: expert
- *turangawaewae*: place to stand
- *utu*: balance; reciprocity
- *wairua*: spirit
- *whakahoki mauri*: restoring balance
- *whakapapa*: lineage

- *ora*: balance
- *pae heretangata*: bind people together
- *Pakeha*: non-Maori
- *pono*: just
- *whanau*: family
- *whanaungatanga*: relatedness; interrelationship
- *whare tangata*: the house of humanity
- *whenua*: land; afterbirth