KO NGĀ TAKE TURE MĀORI

Sentencing Indigenous Offenders

THOMAS CLARK*

I INTRODUCTION

Māori are one of the most punished populations in the world.[1] Māori offenders are severely over-represented at every stage of the criminal justice process. The causes of this over-representation are diverse, deep-rooted and debated. But without a doubt they are inextricably linked to the post-colonial Indigenous experience.[2] A number of initiatives aimed at countering the effects of colonisation have been proposed. The sentencing process is one way to address this imbalance.

In recent years, courts in Canada, Australia and New Zealand have considered whether and how to take account of an Indigenous offender's cultural background at sentencing. In this context, sentencing involves balancing the needs of offenders, the interests of victims and society, within the context of decolonisation.[3] In the landmark decision of *Ipeelee v R*, the Supreme Court of Canada held that in order to address the phenomenon of Indigenous over-representation, sentencing courts must take into account the unique systemic and background factors that have played a role in bringing Indigenous offenders before the court.[4] This approach to sentencing has been referred to as the "cultural background methodology".

In New Zealand under the Sentencing Act 2002, courts are enabled to consider various cultural factors in respect of Indigenous offenders. The particular provisions, however, are greatly under-utilised. The cultural background methodology approach of the Canadian Supreme Court in *Ipeelee v R* provides a valuable example for sentencing Indigenous offenders in New Zealand. This approach should guide New Zealand courts in giving full effect to provisions of the Sentencing Act 2002, which address the offender's cultural background.[5]

This article draws on the Canadian Supreme Court's decision, addressing the arguments of both its critics and its advocates. It then assesses

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* BA/LLB(Hons).

1 Department of Corrections Policy, Strategy and Research Group "Overrepresentation of Māori in the criminal justice system: An exploratory report" (September 2007) Department of Corrections <www.corrections.govt.nz>.

2 *Ipeelee v R* 2012 SCC 13, [2012] 1 SCR 433 at [77].

3 Elizabeth Adjin-Tettey "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19 CJWL 179.

4 Kate Warner "Equality Before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing" in Julian V Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge University Press, Cambridge, 2011) 124 at 128.

5 Sentencing Act 2002, ss 8(i) and 27.

the implications of applying the decision in Aotearoa New Zealand, a nation where socio-economic disadvantage, dispossession and cultural alienation mean that Māori are at a higher risk of falling within the criminal justice system. The article seeks to show that the cultural background methodology is entirely consistent with principles of equality and fairness. Substantive equality requires that proper attention be devoted to alternative forms of punishment in respect of an offender's blameworthiness. Proven principles and practices of Indigenous sentencing from Australia and Canada may usefully be applied under New Zealand's Sentencing Act 2002. Finally, the success of existing programmes that have incorporated Māori approaches to criminal justice provides a strong basis for New Zealand courts to take a purposive approach in interpreting the Sentencing Act 2002 and applying the cultural background methodology.

On its own, the cultural background methodology cannot be a panacea for Indigenous over-representation in the criminal justice system. This sentencing methodology is best approached in tandem with broader reform initiatives aimed at addressing the systemic causes of offending. The over-representation of Māori in New Zealand prisons may be addressed to some extent by strengthening and expanding existing sentencing options. Thus, whānau and community engagement at the sentencing stage and a whole-hearted utilisation of the Sentencing Act 2002 will deepen the cultural understanding and responsiveness of the New Zealand criminal justice system.

II THE CANADIAN APPROACH TO INDIGENOUS SENTENCING: *IPEELEE V R*

In *Ipeelee v R*, the Canadian Supreme Court issued a landmark decision on how courts must approach the sentencing of Indigenous offenders. The case follows a number of earlier decisions, including *R v Gladue*, in which the Court developed principles to address the relevance of indigeneity to the sentencing process.[6]

Background

The decision of *Ipeelee v R* concerned a 39-year-old Inuk man, Manasie Ipeelee. At just 11 years of age, Ipeelee developed a serious alcohol addiction. He soon dropped out of school and became involved with the criminal justice system. Ipeelee had spent a significant proportion of his life in custody or under some form of community supervision. His youth record contained approximately three dozen convictions, the majority of which were property-related. Manasie's designation as a "long-term offender" had arisen from a history of violent offending — including aggravated and sexual assault.

6 *R v Gladue* [1999] 1 SCR 688. See also *R v Wells* [2000] 1 SCR 207.

1 Section 718.2(e): Courts Must Pay Particular Attention to the Circumstances of Aboriginal Offenders

The case concerned Ipeelee's sentencing for the breach of his long-term supervision order. The central issue for the Court was how to determine an appropriate sentence for an Aboriginal offender under s 718.2(e) of the Canadian Criminal Code.[7] This section directs that:

> A court that imposes a sentence shall also take into consideration the following principles: ... (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

In the leading case on this provision, *R v Gladue*, the Canadian Supreme Court held that this section requires courts to adopt a different approach when sentencing Aboriginal offenders. The Court explained that the provision is a legislative recognition that the circumstances of Aboriginal people differ from the broader population. This is because many Aboriginal people are victims of systemic and direct discrimination, suffer the legacy of dislocation and are affected by poor social and economic conditions. The Court noted that the unique background and systemic factors of Aboriginal people which contribute to high rates of imprisonment include: "low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation".[8] Owing to these unique and systemic background factors, Aboriginal offenders are more adversely affected by incarceration and are less likely to be rehabilitated by it.[9] The reason for this is that imprisonment is often culturally inappropriate for Aboriginal offenders and facilitates further discrimination. This warrants differential and equalising treatment. Accordingly, the Court held that in sentencing, judges must consider:[10]

> (a) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
>
> (b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection

In *Ipeelee v R*, the Canadian Supreme Court re-evaluated s 718.2(e) and the application of the *Gladue* principles. The Court reaffirmed that the purpose of this section is "to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to

7 Criminal Code RSC 1985 c 46, s 718.2(e).
8 *R v Gladue*, above n 6, at [67].
9 At [68].
10 At [66].

sentencing".[11] To impose an appropriate sentence, s 718.2(e) requires judges to consider the unique circumstances of Aboriginal offenders. When sentencing an Aboriginal offender:[12]

> Courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

The *Gladue* principles must be applied in every case involving an Aboriginal offender. Failure to do so would result in a sentence that is inappropriate and inconsistent with the fundamental principles of sentencing, namely that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.[13]

2 No Requirement for Offender to Establish Connection Between Culture and Offending

The Court emphasised that Aboriginal defendants do not bear the onus of establishing a connection between their cultural heritage and their conflict with the criminal law.[14] As the Court of Appeal for Ontario identified in *R v Collins*:[15]

> [T]he *Gladue* approach to sentencing Aboriginal offenders is not about shifting blame or failing to take responsibility; it is recognition of the devastating impact that Canada's treatment of its Aboriginal population has wreaked on the members of that society

The Court confirmed the *Gladue* approach, further stressing that such cultural consideration does not result in a "get-out-of-jail-free" card, nor does it lead to an automatic reduction in an offender's sentence.[16] Nevertheless, in some cases, the jail term for an Indigenous offender may be less than the term imposed for a non-Indigenous offender.[17]

3 Adverse Effects of Incarceration on Indigenous Offenders

In arriving at its decision, the Supreme Court was mindful of the adverse effects of incarceration on Indigenous offenders. The Court noted the role of

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11 *Ipeelee v R*, above n 2, at [59].
12 At [59]. See also Renée Pelletier "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001) 39 Osgoode Hall LJ 469 at 474.
13 Melvyn Green "The Challenge of Gladue Courts" (2012) 89 CR (6th) 362 at 368.
14 *R v Collins* 2011 ONCA 182, (2011) 104 OR (3d) 241 at [32].
15 At [32].
16 *Ipeelee v R*, above n 2, at [71]. See also *R v Gladue*, above n 6, at [88] and [93(9)]; and *R v Wells*, above n 6, at [30].
17 *Ipeelee v R*, at [72]

systemic discrimination in Aboriginal overrepresentation. The circumstances experienced by Aboriginal Canadians are different from those of non-Aboriginal Canadians. Many suffer from the legacy of dislocation, endure direct and systemic discrimination and are significantly affected by poor socio-economic conditions. Accordingly, it is incumbent on courts to tailor the sentencing process to implement the remedial measures prescribed by s 718.2(e) and *R v Gladue.* Custodial sentences are less likely to be rehabilitative in the case of Indigenous offenders. In particular, the Court considered the prison environment is often culturally inappropriate and inherently discriminatory.[18] Separating an offender from his or her cultural group and tribal land is a uniquely harsh experience for an Indigenous prisoner.[19] There is, therefore, a principled justification for taking this impact into account, particularly for those from remote communities who have a spiritual connection with the land.[20]

Finally, the Court acknowledged that the sentencing goals espoused by the Canadian criminal justice system have contributed to Aboriginal overrepresentation in Canadian prisons. The dominant sentencing goals of deterrence, separation, denunciation and incapacitation are typically at odds with the Aboriginal understanding of sentencing, which gives priority to a restorative approach to sentencing.[21]

The Court allowed the appeal on the basis that the judge at first instance had failed to recognise the interplay of these background factors and Ipeelee's offending.

Summary

Canadian courts have implemented measures to ensure that prison sentences are imposed only as a last resort against Indigenous persons who commit criminal offences.[22] It is possible to discern a series of factors from the Canadian Indigenous sentencing jurisprudence for courts to consider in determining an appropriate sentence for an Indigenous offender. These factors include, but are not limited to:

> (a) whether, given the background and circumstances of a particular offender, a prison sentence may have an unduly harsh effect;
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> (b) the unique difficulties encountered by an Indigenous person coming from a remote, traditional community in adjusting to an urban environment;

18 *R v Gladue*, above n 6, at [68].
19 John Nicholson "The Sentencing of Aboriginal Offenders" (1999) 23 Crim LJ 85 at 88–89.
20 *R v Gladue*, above n 6, at [68].
21 At [93(7)].
22 Richard Edney "Imprisonment as a Last Resort for Indigenous Offenders: Some Lessons from Canada?" (2005) 12 ILB 23 at 23.

(c) evidence of discrimination, exclusion and disadvantage in an Indigenous offender's background and upbringing; and

(d) evidence of substance abuse, intellectual disability or mental illness and lower life expectancy.

Nonetheless, not every factor will be relevant in every case and the weight given to any particular factor will be a matter for courts to determine on a case-by-case basis.

Criticisms of the Cultural Background Methodology

Understandably, the approach of the Canadian Supreme Court in *R v Gladue* and *Ipeelee v R* has encountered strong criticism. It is necessary to understand this criticism in order to determine the legitimacy of the cultural background methodology and to address any possible deficiencies in its theoretical basis. Nevertheless, there are strong reasons of policy and principle to justify this approach to sentencing Indigenous offenders.

1 A "Race-based" Sentencing Discount?

The most common criticism of the cultural background methodology is that it offends against the principle of sentencing parity and amounts to a "race-based" discount for Indigenous offenders.[23] Professors Phillip Stenning and Julian Roberts consider that the approach unfairly distinguishes between offenders who would otherwise be in similar circumstances. They assert the principle of "one-law-for-all" requires judges to treat all offenders the same, regardless of their racial or cultural background.[24]

This argument is beset by two inherent deficiencies. First, it ignores the distinct history of Indigenous peoples worldwide, being based on the premise that the circumstances of Indigenous offenders are not, in fact, unique.[25] The weight of authority from government reports has concluded that the interface between Indigenous peoples and the criminal justice system and current levels of offending are intimately tied to the legacy of colonialism.[26]

Secondly, this position ignores the fact that sentencing is an individualised process. At sentencing, courts promote equal justice by tailoring sentences to the circumstances of the offending and the offender. As LeBel J stated in *Ipeelee v R*, for a court to ignore the unique and

23 Philip Stenning and Julian V Roberts "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask L Rev 137 at 158 and 165.

24 At 165. See also Jean-Paul Brodeur "On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts" (2002) 64 Sask L Rev 45.

25 *Ipeelee v R*, above n 2, at [76]

26 Moana Jackson *He Whaipaanga Hou: Māori and the Criminal Justice System — A New Perspective* (Ministry of Justice, Wellington, 1988); and Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, November 2009) at 13.

systemic background factors of an offender would "violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*".[27]

Furthermore, the cultural background methodology cannot be said to offend the principle of equality before the law because s 718.2(e) specifically applies to all offenders.[28] Accordingly, the background and systemic factors of a non-Aboriginal offender will also be of importance to a judge in sentencing that offender.[29]

2 In search of Substantive Equality

The principle of sentencing parity provides that courts should seek to impose a sentence "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".[30] Nevertheless, "similarity" is sometimes an elusory concept. As the Court in *Ipeelee* noted:[31]

> In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances.

It may seem intuitively fair to impose the same penalty for the same offence and this approach may be appropriate in a more harmonised and equitable society than our own. However, equality does not necessarily mean uniformity. Injustice often arises from treating unequal people equally.[32] As Professor Quigley highlights:[33]

> Uniformity hides inequity, impedes innovation and locks the system into its mind-set of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.

Within the criminal justice system, treating offenders differently can be justified for a whole host of reasons — including age, personal circumstances and therapeutic need. If acknowledging an offender's cultural background where it is relevant to his or her offending is an injustice, as Professor Warren Brookbanks states, "it is an injustice produced by the nature of the system, not the choice of individual Judges".[34]

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27 *Ipeelee v R*, above n 2, at [73] per LeBel J (emphasis in original).
28 *R v Gladue*, above n 6, at [77].
29 At [69].
30 Criminal Code, above n 7, s 718.2(b). See also Sentencing Act 2002 (NZ), s 8(e).
31 *Ipeelee v R*, above n 2, at [79]
32 Tim Quigley "Some Issues in Sentencing of Aboriginal Offenders" in Richard Gosse, James Henderson and Richard Carter (eds) *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (College of Law, University of Saskatchewan, 1994) 269 at 286.
33 At 286.
34 Warren Brookbanks "Therapeutic Jurisprudence: Implications for Judging" [2003] 11 NZLJ 463 at 467.

The notion that equality necessarily involves ensuring all offenders experience a similar process and receive the same treatment for similar offences is an argument for formal equality: equality of treatment. An alternative, Indigenous and arguably preferable position, would be to advocate for treating individuals differently in order to achieve equality of outcome.[35] The provision for restorative justice under the Sentencing Act 2002 is an example of this approach.[36]

3 Sentencing is Not an Appropriate Way to Address Over-representation

Critics have challenged the cultural sentencing methodology on the basis that the sentencing process is not the appropriate means of addressing Indigenous over-representation in the prison population.[37] This criticism is predicated on the view that the criminal justice system is not an appropriate forum in which to tackle the socio-cultural causes of offending. Stenning and Roberts describe the cultural background methodology as an "empty promise" to Indigenous peoples, because, they argue, it is unlikely to have any meaningful impact on Indigenous overrepresentation.[38] Moreover, Stenning and Roberts accuse advocates of "hijacking the sentencing process in the pursuit of other goals".[39]

On the contrary, the Court in *Ipeelee v R* considered that addressing the unique background and systemic factors of an Indigenous offender does not lie beyond the scope of the sentencing judge.[40] Judges can undertake to reduce the rate of offending in Indigenous communities by imposing sentences that effectively deter criminality and rehabilitate offenders. Indeed, judges are required to give effect to the principles of deterrence and rehabilitation in sentencing.[41] If an innovative sentence "can serve to actually assist a person in taking responsibility for his or her actions" and reduce the probability of recidivism, why should a culturally sensitive sentence be precluded "just because other people who commit the same offence go to jail?"[42]

Importantly, judges can ensure systemic factors do not lead to inadvertent discrimination in sentencing. Professor Quigley describes how systemic discrimination can occur, noting that:[43]

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria ... yet they conceal an extremely strong bias in the

35 Juan Tauri "An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada" (2009) 20 Indigenous Policy Journal 67 at 75.
36 Sentencing Act 2002, ss 8(j); 25(1)(b)–(c); 26; 27(1)(c); 32(6); 62(e); and 110(3).
37 Stenning and Roberts, above n 23, at 165.
38 At 167.
39 At 160.
40 *Ipeelee v R*, above n 2, at [65].
41 At [66]. See Sentencing Act 2002, s 7(1)(f), (h).
42 Jonathan Rudin and Kent Roach "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 Sask L Rev 3 at 20.
43 Tim Quigley, above n 32, at 275–276. Cited with approval in *Ipeelee v R*, above n 2, at [67].

> sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.

Thus, the sentencing judge has a limited yet important role to play in sentencing an Indigenous offender. According to the *Gladue* process, judges are well-positioned to "re-evaluate [sentencing] criteria to ensure that they are not contributing to ongoing systemic racial discrimination".[44] Courts must therefore exercise sentencing discretion in every case — regardless of the seriousness of the offence — to generate sentences appropriate to Indigenous offenders.

4 Culturally Appropriate Sentences may be Alienating for Offenders?

Another major criticism levelled against the cultural background methodology is that despite the best intentions of sentencing courts, imposing an apparently culturally relevant sentence may be a perfunctory, or even paternalistic, gesture.[45] Juan Tauri expresses the concern that without additional initiatives the cultural background methodology will have little impact on the circumstances of Indigenous people within the criminal justice system.[46] Tauri argues the system is inhibited from properly catering to Indigenous peoples by allowing, on the one hand, the expression of Indigenous processes, yet at the same time imposing institutional limits on their application.[47]

Renée Pelletier questions whether a contextualised and culturally considered sentence will be always appropriate for an Indigenous offender who, for social reasons, has been unable to participate in his or her culture.[48] This is a valid criticism, given the substantial number of Indigenous peoples living in urban areas, who have been dislocated from their traditional culture — particularly urban Māori in New Zealand.[49] However, the cultural background methodology does not necessarily require a judge to impose a sentence in accordance with pre-colonial Indigenous custom. The dynamic nature of Indigenous cultural practices means that over time not all cultural

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44 *Ipeelee v R*, above n 2, at [67].

45 Juan Tauri "Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Māori or Biculturalising the State? (1999) 32 Australian and New Zealand Journal of Criminology 153 at 164. See also Elena Marchetti and Kathleen Daly "Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model (2007) 29 Sydney L Rev 415.

46 At 158.

47 Juan Tauri "Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System (1998–1999) 10 CICJ 168 at 178.

48 Renée Pelletier, above n 12, at 475.

49 Manuhuia Barcham "The challenge of urban Māori: reconciling conceptions of indigeneity and social change" (1998) 39(3) Asia Pacific Viewpoint 303.

practices have remained static. Many have been subject to erosion by colonisation and assimilation. Furthermore, while not all Indigenous peoples are aware of, understand, or even chose to engage with their cultural heritage, this cultural dislocation is in itself a factor that should be considered by a sentencing judge.[50] Indigenous peoples "should not, of course, be blamed for this dissociation, nor should dissociation be interpreted as a lack of interest in their cultural heritage".[51] The notion that an offender must establish a prior connection with his or her Indigenous community before receiving unique consideration would inhibit the application of this approach to deserving people.[52] In taking account of this fact, judges arguably enhance rather than erode the sentencing process.

5 Potential for Sentencing to be Discriminatory

Even among those who support the cultural background methodology, there is a concern that this process may inadvertently work against the best interests of Indigenous women and children. The cultural background approach to sentencing has been criticised as potentially discriminatory towards Indigenous women and children. If Indigenous women are more likely to be victims of Indigenous offending, does the aim of reducing incarceration through the sentencing process undermine women's safety in their community?[53] This is a more substantive criticism which highlights the law of unintended consequences. By considering an offender's Indigeneity in mitigation, there is the attendant risk that victims in the process may feel aggrieved.[54] The need to impose a culturally-sensitive sentence to ameliorate historic injustice must be balanced against the interests of victims of Indigenous offenders — who are predominantly Indigenous women and children — as well as the safety of the community as a whole. This balance is essential to ensure that the potential benefits of contextual sentencing are not undermined by the re-victimisation of Indigenous women and children.[55]

The Canadian Supreme Court addressed this problem in *R v Gladue*. The Court considered that in cases of serious violent offending the unique circumstances of the Indigenous offender should be given lesser consideration.[56] The Court found:[57]

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50 Elizabeth Adjin-Tettey, above n 3, at 190.

51 At 190.

52 At 190.

53 Gillian Balfour "Do law reforms matter? Exploring the victimization-criminalization continuum in the sentencing of Aboriginal women in Canada" (2013) 19 IRV 85.

54 Kate Warner, above n 4, at 135. The criticism has also been levelled against the imposition of community-based sentences in such cases, sending a message that offences by Aboriginal men against Aboriginal women were less of a crime. See New South Wales Department for Women *Heroines of Fortitude: The Experiences of Women in Court of Victims of Sexual Assault, Summary Report* (1996) <www.dpc.nsw.gov.au>.

55 Elizabeth Adjin-Tettey, above n 3, at 181. See also Emma Cunliffe and Angela Cameron "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19 CJWL 1.

56 *R v Gladue*, above n 6, at [79].

57 At [79]. See also *Ipeelee v R*, above n 2, at [123] per Rothstein J (dissenting).

> ... the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

The New Zealand High Court has adopted a similar position on this issue.[58] However, it is problematic to distinguish between serious and non-serious offending when applying the cultural background methodology. As the Court held in *Ipeelee v R*, allowing an exception for serious offences would inevitably lead to inconsistency in the Indigenous sentencing jurisprudence because of "the relative ease with which a sentencing judge could deem any number of offences to be "serious".[59]

The plight of Indigenous women offenders should be of particular concern. Suffering from dual forms of discrimination, Indigenous women are marginalised both as women and as an ethnic minority.[60] Kimberlé Crenshaw describes this concept as "intersectionality".[61] Crenshaw argues that when multiple hierarchies of oppression intersect, groups such as Indigenous women are placed in a highly vulnerable position.[62] This phenomenon is manifest in the New Zealand prison population where Māori women are 10 times more likely to receive a prison sentence than European women.[63] Australian Courts too have considered this situation.[64] The unique nature of Indigenous offending has been said to involve two victims: the victim of the offence and the offender.[65]

In implementing the cultural background methodology, sentencing courts must be cognisant of possible unintended consequences. The process, which may be celebrated by an idealistic would-be reformer, may meet with an entirely different interpretation by Indigenous women and children who are, in the main, the most likely victims of Indigenous offending. Sentencing courts would do well to bear this in mind when sentencing, especially given the codification of community protection as a sentencing principle.[66]

Australian Approach to Sentencing Indigenous Offenders

Like Canada, three Australian jurisdictions have enacted sentencing legislation that specifically refers to an offender's cultural background.

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58 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

59 At [86] citing Pelletier, above n 12, at 479.

60 Emma D LaRocque "Violence in Aboriginal Communities" in *The Path to Healing: Report of the Round Table on Aboriginal Health and Social Issues* (Royal Commission on Aboriginal Peoples, Ottawa, 1994) 72 at 73.

61 Kimberlé Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241 at 1244–1245.

62 At 1246 and 1277. See also Julia Tolmie "Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Syd LR 472 at 472.

63 Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, November 2009) at 18.

64 *R v Fernando* (1992) 76 A Crim R 58 (NSWSC) at 64; *R v Daniel* [1998] 1 QdR 499 at 531; and *R v Friday* (1984) 14 A Crim R 471 at 472 per Connolly J.

65 *R v Daniel* at 530 per Fitzgerald J.

66 Sentencing Act 2002, s 7(1)(g).

Courts in the Australian Capital Territory must consider whether the offender's cultural background is relevant.[67] The Queensland legislation provides that, when sentencing an offender of Aboriginal or Torres Strait Islander origin, courts must have regard to submissions made by a representative of the community justice group in the offender's community including "any cultural considerations".[68] In the Northern Territory, a sentencing court may receive information from an Indigenous community about the offending or an aspect of Indigenous customary law.[69]

In a number of decisions, the Australian courts have considered the relevance of indigeneity to the sentencing process. In *R v Fernando*, Wood J set out the common law principles to guide courts when sentencing Indigenous offenders. These principles emphasise the relevance of alcohol abuse, the particular hardship suffered by Indigenous offenders in prison — especially those from remote communities — and the limited value of long prison sentences.[70] Nevertheless, the *Fernando* principles have been applied in subsequent cases in an inconsistent manner.[71]

In *R v Fuller-Cust*, Eames J acknowledged the link between current disadvantage and a loss of culture and dispossession.[72] His Honour considered that the offender's status as a member of the "stolen generation", which involved forcible removal by the state from the offender's parents, was essential to understanding the subjective circumstances of the offender and his offending.[73] Failure to consider these circumstances would be to sentence him as "someone other than himself".[74]

In *Bugmy v R*, the High Court of Australia reconsidered the application of *R v Fernando* and whether to adopt the cultural background methodology approach of the Canadian Supreme Court in *R v Gladue* and *Ipeelee v R*.[75] The Court did not go as far as the Supreme Court of Canada — refusing to take judicial notice of the systemic deprivation of Aboriginal Australians — but nonetheless made several comments indicating that Aboriginal Australians may require some degree of special consideration. In particular, the Court noted an offender who has been raised in a community surrounded by violence and alcohol abuse is likely to be considered less culpable than an offender whose background has not been affected in the same way.[76]

67 Crimes (Sentencing) Act 2005, s 33(m) (ACT).
68 Penalties and Sentences Act 1992, s 9(2)(p) (Qld).
69 Sentencing Act 1995, s 104A (NT).
70 *R v Fernando*, above n 64, at 62–63.
71 *R v Fuller-Cust* [2002] VSCA 168, (2002) 6 VR 496 per Eames J; *R v Wordie* [2003] VSCA 107 at [31] per Cummins AJA; and *DPP v Taylor* [2005] VSCA 222 at [14] per Nettle JA.
72 *R v Fuller-Cust*, per Eames J (dissenting).
73 At [77].
74 At [79] per Eames J.
75 *Bugmy v The Queen* [2013] HCA 37, (2013) 249 CLR 571 at [40].
76 At [40].

III APPLYING *IPEELEE V R* AND OTHER INDIGENOUS SENTENCING JURISPRUDENCE IN NEW ZEALAND

This section considers how the cultural background methodology may be utilised by New Zealand courts under the Sentencing Act 2002 when sentencing Māori offenders. When sentencing an Indigenous offender, a court may consider, first, cultural matters relating to the commission of the offence and, secondly, the cultural relevance or appropriateness of a community-based sentence.

New Zealand's Existing Framework: The Sentencing Act 2002

New Zealand's existing sentencing framework allows courts to take account of various cultural factors in respect of Indigenous offenders.[77] However, the cultural background provisions of the Sentencing Act 2002 remain unknown and under-utilised.[78] New Zealand courts have yet to develop a set of principles in relation to the unique systemic background factors of Māori offenders. It is considered that the Australian and Canadian jurisprudence should guide New Zealand courts when sentencing Māori offenders to enhance the substance and process of sentencing.[79]

1 Section 8(i): Consideration of the Offender's Personal, Family, Whanau, Community and Cultural Background

The Sentencing Act 2002 requires judges to consider an offender's social circumstances in sentencing.[80] Section 8(i) provides that a judge:

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

Section 26(2)(a) is a companion provision to s 8(i) and allows a court to consider information relevant to an offender's background through the pre-sentence report. Section 26(2)(a) provides that the pre-sentence report "may include: information regarding the personal, family, whānau, community and cultural background and social circumstances of the offender".[81]

By requiring courts to consider an offender's cultural background, s 8(i) allows counsel and judges to acknowledge the impact of historical injustice on Māori offending today. This, in turn, holds the potential to

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77 Sentencing Act 2002, ss 8(i); 26(2)(a); and s 27.

78 See Judge O'Driscoll "A powerful mitigating tool?" [2012] NZLJ 358.

79 Joanna Hess "Addressing the Overrepresentation of the Māori in New Zealand's Criminal Justice System at the Sentencing Stage: How Australia Can Provide a Model For Change" (2011) 20 Pac Rim L & Pol'y J 179 at 188.

80 Sentencing Act 2002, s 8(i) and s 26(2(a).

81 See *R v Mason*, above n 58, at [25], where Heath J invoked s 26(2)(a) to recommend a hui be convened to obtain information about the whānau and cultural background of the offender and tikanga Māori, for the purposes of preparing a pre-sentence report.

prevent systemic bias in sentencing.[82] Section 8(i) is analogous to s 718.2(e), the relevant section in *Ipeelee v R*, and was enacted with the same legislative purpose. Although s 8(i) does not refer specifically to Māori offenders, an "analogous ameliorative impulse drives behind" the provision and the section is framed using similar language.[83] Because Aboriginal Canadians and New Zealand Māori share a similar postcolonial experience, *Ipeelee v R* directly relevant to New Zealand. In *Ipeelee v R*, the Court held that s 718.2(e) "does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for [Indigenous] offenders".[84] It is considered that s 8(i) should have a similar effect. The section at least deserves greater recognition from judges and lawyers, particularly in light of *Ipeelee v R.*

In *R v Mason*, the High Court considered s 8(i) and its application to Māori offenders.[85] Heath J held that, by virtue of s 8(i), traditional Māori custom can play a meaningful role in the sentencing process provided it can be accommodated within the existing statutory system.[86] His Honour noted that the passage of the Sentencing Act 2002 has enabled courts to sentence in a manner that recognises an offender's cultural background. Importantly, his Honour considered Māori concepts such as utu can have a significant impact at sentencing.[87] Because of the mandatory language in this sentencing provision, there is a duty for all involved in the process to bring before the court information relevant to the offender's unique background and social circumstance. The Court made clear that all those involved in the criminal justice system are responsible for addressing Indigenous overrepresentation.

Nevertheless, when confronted with this issue, the Court of Appeal has taken the opposite view and refused to adopt the cultural background methodology.[88] In *Mika v R*, the Court of Appeal dismissed Fabian Mika's appeal against sentence. In the High Court, Mika had pleaded guilty to charges of manslaughter, failing to comply with a prohibition as an unlicensed driver and failing to stop offences. He was sentenced to six years' and nine months' imprisonment. On appeal, Mika argued that the High Court should have granted him a 10 per cent discount to reflect his Māori heritage and associated social disadvantages. As a result, Mika argued that the sentence imposed in the High Court was manifestly excessive.

Counsel for Mika marshalled a number of arguments concerning the relevance of his Māori heritage to sentencing. Counsel argued that an offender's Māori background may indicate unique systemic disadvantage. It may point to the need for alternative sanctions and it should prompt a court to remember that, empirically, Māori offenders tend to receive longer jail

82 JustSpeak *Māori and the Criminal Justice System: A Youth Perspective* (JustSpeak, March 2012) at 35.
83 At 35.
84 *Ipeelee v R*, above n 2, at [59].
85 *R v Mason*, above n 58.
86 At [38].
87 At [40].
88 *Mika v R* [2013] NZCA 648.

terms than non-Māori offenders. In a sixteen-paragraph judgment, the Court of Appeal gave short shrift to these arguments and rejected Mika's appeal.

First, the Court considered that the case had been pleaded in an inappropriate way and a Divisional Court of the Court of Appeal was not the right forum for a "discourse on sentencing principles and policy".[89] Nevertheless, the Court could have adjourned to call for further evidence or reconvened to constitute a Permanent Court of the Court of Appeal. The upshot, however, is that the ruling on this point leaves open the possibility that the Permanent Court of Appeal may hear these arguments in the future.

Secondly, the Court held that the Sentencing Act 2002 is a comprehensive code which precludes courts from considering an offender's ethnicity in sentencing.[90] Such a finding seems unduly narrow. While the Sentencing Act does not mention "ethnicity", s 8(i) requires a court to consider an offender's "cultural" or "whānau" background. It is difficult to see how ethnicity cannot be read into the Sentencing Act when, in recent times, courts have been willing to read in factors such as pregnancy,[91] mental health[92] and youth as relevant to sentencing.[93]

Thirdly, the Court considered that to adopt the approach advocated for by Counsel would amount to judicial over-reach.[94] The Court's finding on this point is unpersuasive. Judicial discretion is a defining characteristic of the sentencing process. It was judicial discretion that gave rise to the rule in *Hessell v R*, which provides that a court may grant a 25 per cent sentencing discount for an early guilty plea.[95] In any event, the Court did not explain where to draw the line between legitimate development of sentencing principles and illegitimate creativity.

Fourthly, the Court said that the Australian and Canadian authorities referred to by counsel were decided in very different statutory contexts and therefore were "of no assistance" in the appeal.[96] But the Court offered no explanation as to why the contexts were different. Given the commonality of Indigenous experience in Australia, Canada and New Zealand, it is unfortunate that the Court of Appeal was unwilling to engage in an analysis of *Ipeelee* and *Gladue*, which were referred to the Court by counsel.

Finally, the Court considered counsel's argument was inconsistent with the principle of sentencing parity. The Court did not take judicial notice of the broad and systemic background factors of Indigenous offenders. It is encouraging, however, that the Court acknowledged the overrepresentation of Māori in prison and stated that economic, social and cultural disadvantages "frequently contribute to offending".[97] Nevertheless, the Court did not consider that a person could be disadvantaged or at a higher risk of

89 At [7].
90 At [8].
91 *R v Aoapauu* [2012] NZHC 700.
92 *E v R* [2011] NZCA 13.
93 *Churchward v R* [2011] NZCA 531.
94 *Mika v R*, above n 88, at [9].
95 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
96 *Mika v R*, above n 88, at [13].
97 At [12].

offending simply by virtue of his or her Māori heritage. Given the complex issues this case presented, the Court's brief judgment represents a missed opportunity. As another commentator has noted, one should expect more from New Zealand's intermediate appellate court.[98] It is hoped that when approaching this issue in future, New Zealand courts adopt a more thoughtful analysis and give full effect to the cultural background provisions of the Sentencing Act 2002.[99]

2 Section 27: Offender May Request Court to Hear Personal, Family, Whānau, Community and Cultural Background

Section 27 provides that a sentencing judge must give an offender the opportunity to call a witness to speak to his or her cultural background. This provision enables a sentencing court to receive evidence or advice on cultural information relevant to the offender or the offending. The offender may request that persons be called on to speak to a variety of factors:[100]

> (a) an offender's personal whānau, community or cultural background or both;
>
> (b) the way in which the offender's background may have related to the commission of the offence;
>
> (c) any cultural processes that have previously been tried to resolve issues relating to the offence;
>
> (d) how support from the offender's whānau and community may help to prevent further offending; and
>
> (e) how the offender's background may be relevant in respect of possible sentences.

A cultural witness may also assist the court in determining an appropriate community-based sentence. This assistance may take the form of advice regarding community resources relevant to the offender's culture, which may be involved in the sentence.[101]

The predecessor to s 27 was s 16 of the Criminal Justice Act 1985. Section 16 was introduced to address the problem of Indigenous over-representation in the criminal justice system and to encourage courts to consider alternatives to imprisonment when sentencing Māori offenders.[102] As Dr Michael Cullen noted, the section was intended to meet the needs of

98 Max Harris "The High Court of Australia in Bugmy v The Queen: A Mixed Bag on the Sentencing of Indigenous Offenders" (February 2014) Māori LR 20.

99 Joseph Williams "The Harkness Henry Lecture — Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 30–31.

100 Sentencing Act 2002, s 27(1).

101 Ministry of Justice "Sentencing Policy and Guidance: A Discussion Paper – 10. A Maori View of Sentencing" (November 1997) <justice.govt.nz> at 10.4.

102 Criminal Justice Act 1985, s 16.

Māori offenders and the disproportionate number of Māori offenders in New Zealand prisons is "to the shame of us all".[103]

In *Wells v Police*, Smellie J discussed the legislative history of s 16.[104] His Honour noted a growing recognition that the court system in New Zealand, based on Anglo-Saxon traditions of the common law, is, at times, insufficiently flexible to ensure fair and appropriate treatment to all New Zealanders.[105]

Sentencing courts must be proactive in applying s 27.[106] In the few cases where it has been raised, s 27 has proven an effective provision in explaining the cultural factors that may have led to an offender's offending.[107] Given its potential to enhance the sentencing process, it is regrettable that s 27 is so rarely invoked by defence counsel and consequently by sentencing courts.[108] Nevertheless, it is considered that, as drafted, ss 8(i) and 27 provide a strong basis upon which a sentencing court may consider the unique background and systemic factors of an Indigenous offender.

Relevant Community-based Sentences or Traditional Methods of Dispute Resolution

1 Relevant Community-based Sentences

Under the Sentencing Act 2002, courts may take into account the suitability of Indigenous methods of punishment and dispute resolution and consider how these assist the sentencing process.[109] Where a court considers it appropriate, it may also impose a culturally sensitive community-based sentence.[110]

Sections 50 and 51 of the Sentencing Act 2002 hold the potential to serve as a rehabilitative alternative for Māori offenders. These sections allow a court to order a programme that implements traditional methods of dispute settlement. The definition of "programme" in s 51 expressly adopts Māori terms and concepts and contemplates a wide range of options within Māori social structures.[111] This legislative provision for community-based sentences may be seen as an acknowledgement that traditional court processes and methods of punishment are often irrelevant to Māori.[112]

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103 (12 June 1985) 463 NZPD 4759.

104 *Wells v Police* [1987] 2 NZLR 560 (HC).

105 At 570.

106 *R v Bhaskaran* CA333/02, 25 November 2002 at [13].

107 *R v Bhaskaran*, above n 124; *R v Goi* HC Wellington AP6/89, 24 April 1989; and *R v Nathan* (1989) 4 CRNZ 369 (CA).

108 Alison Chetwin, Tony Waldergrave and Kiri Simonsen "Speaking about Cultural Background at Sentencing: section 16 of the Criminal Justice Act 1985" (November 2000) New Zealand Ministry of Justice <http://www.justice.govt.nz> at 138.

109 Sentencing Act 2002, ss 50 and 51; and *R v Bhaskaran* at [13].

110 Sections 15 and 16.

111 Section 51(c) defines "programme" to include placement in the individual's Māori family or community, including among other things "an iwi, hapū, or whānau", "a marae" or "an ethnic or cultural group".

112 Ministry of Justice, above n 101, at 10.1.

Where appropriate, courts should endeavour to impose community-based sentences. In *R v Gladue*, the Court acknowledged that community-based sanctions are often relevant because such sentences coincide with Indigenous conceptions of sentencing and the needs of Indigenous peoples and communities.[113] Involving the offender's community and their values in the process will make the process more relevant and rehabilitative to the offender. Māori community-based sentences may, for example, prove to be particularly appropriate for young Māori offenders for whom traditional penalties have proven ineffective at rehabilitating the offender or deterring future offending. This will, in turn, help reduce recidivism and provide an important mechanism in reducing the disproportionate representation of Māori in the criminal justice system.[114]

In Ipeelee v R, the Court recognised the importance of alternative sentencing options to remedy historic injustice.[115] Likewise, in R v Gladue, the Court considered that s 718.2(e) provided sentencing judges with flexibility and discretion to:[116]

> ... consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

Affording local communities the opportunity to become actively involved in the sentencing and supervision of offenders introduces a wider range of alternatives into the sentencing process.[117] Methods that involve members of an offender's community, particularly respected kaumātua, are more culturally appropriate and more likely to be effective in meeting sentencing goals. Sections 50 and 51 should therefore be invoked wherever it is appropriate. Failing to consider these provisions may create an injustice for the offender, by making the sentence much more onerous than it would be for an offender of a different cultural background.[118]

2 Traditional Methods of Dispute Resolution

The views of the local community as to how to appropriately deal with the offender is particularly relevant to the sentencing process. This is particularly so where the offence occurred in the victim's or the offender's community. That the offender has undergone some form of local dispute resolution, involving some additional response under Indigenous customary law, is relevant, especially where this provides reconciliation for the local

113 *R v Gladue*, above n 6, at [74].
114 Joanna Hess, above n 79, at 188.
115 *Ipeelee v R*, above n 2, at [128].
116 *R v Gladue*, above n 6, at [81].
117 Ross Gordon Green *Justice in Aboriginal Communities: Sentencing Alternatives* (Purich Publishing, Saskatoon, 1998) at 18.
118 Geoffrey Hall (ed) *Hall's Sentencing* (online looseleaf ed, LexisNexis) at I.6.3.

community. By considering traditional disciplinary processes, courts recognise the importance of collective responsibility and the need for reconciliation in any offence against an Indigenous community.[119] However, this is not to say that Indigenous offenders, victims and communities all share a common understanding of how to sentence particular offences or offenders.[120]

The question of how a court should sentence an offender that may be, or has been, subject to some traditional punishment or response within the local community has arisen in Australia in the context of Aboriginal customary law.[121] Indigenous customary sentencing practices generally involve compensation, shaming or exile. Australian courts have tended to treat an offender's punishment under Indigenous customary law as a mitigating factor. A sentencing discount is justified on the basis of both double jeopardy and the role of traditional punishment in restoring communities and offenders.[122]

While New Zealand courts are yet to give Māori community punishment full recognition in sentencing, there has been increasing judicial accommodation of Indigenous disciplinary and restorative processes. For example, when sentencing, New Zealand courts are required to take account of an offender's "offer to make amends".[123] A court must also consider the outcomes of restorative justice processes that have occurred or are likely to occur.[124] Additionally, a judge may adjourn sentencing for significant periods to permit an offender to carry out reparation.[125] In *R v Mason*, Heath J referred to Māori customs and values deemed consistent with New Zealand's sentencing framework.[126] Similarly, in *R v Nathan*, the Court imposed a non-custodial sentence and considered that opportunity to revive the offender's Māori culture would promote a "stable and more responsible lifestyle".[127] In *R v Huata & Huata*, the District Court took account of the fact that the defendant would "suffer under the Māori criminal institution of whakamaa or shame and [would] have to carry that for the rest of her life".[128] Courts have been willing to treat a concluded hui where a full apology was offered[129] and an accepted ifoga as mitigation factors at sentencing, though they have rejected each as representing a complete societal response to the offending.[130] The cases referred to above demonstrate a willingness of courts

119 Thalia Anthony "Sentencing Indigenous Offenders" (7 March 2010), Indigenous Justice Clearinghouse <www.indigenousjustice.gov.au> at 4.

120 *R v Gladue*, above n 6, at [73].

121 *Jadurin v R* (1982) 44 ALR 424 (FCA); and *R v Minor* (1992) 105 FLR 180 (CCA, NT).

122 Anthony, above n 119, at 4.

123 Sentencing Act 2002, s 10.

124 Section 8(j).

125 Sentencing Act 2002, s 25. See also Paul Heath "'One Law for All' — Problems in Applying Māori Custom Law in a Unitary State" (2010–2011) 13-14 Yearbook of New Zealand Jurisprudence 194 at 197.

126 *R v Mason*, above n 58, at [43].

127 *R v Nathan* (1989) 4 CRNZ 369 (CA) at 372.

128 *R v Huata* DC Auckland, CRI-2003-041-005606, 30 September 2005 at [138].

129 *R v P* HC Auckland CRI-2005-063-1213, 9 August 2006.

130 *R v Maposua* CA131/04, 3 September 2004; and *R v Talatatina* (1991) 7 CRNZ 33 (CA).

to incorporate Indigenous customary practices and provide impetus for increasing Indigenous involvement in the sentencing process.

Underuse of the Cultural Background Provisions

Despite statutory and judicial recognition of the role Māori culture can play in the sentencing process, defence counsel rarely utilise the cultural background provisions of the Sentencing Act 2002.[131] A study undertaken by the Ministry of Justice indicated that among offenders, their lawyers, judges, Community Probation Service staff and community organisations, only 13.6 per cent of respondents believed that courts considered the offender's cultural background as often as they could during sentencing.[132] Only 8.4 per cent of respondents considered that the provisions were used effectively. When asked for the reasons for the underuse of these sections, 45.3 per cent of those surveyed cited lack of knowledge or information about the cultural background provisions. In short, offenders and court personnel did not know about the provisions or how they should be used.

New Zealand has attracted international criticism as a result of this lack of usage. In 2007, the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) condemned New Zealand for its inaction when undertaking revisions to the Sentencing Act 2002.[133] The Committee reiterated its concerns regarding the overrepresentation of Māori and Pacific offenders in the prison population — and more generally at every stage of the criminal justice system — recommending that New Zealand take urgent measures to address this problem.[134] In 2012, New Zealand acted on UNCERD's recommendation and the judiciary has agreed to work proactively to implement s 27 with the Kaikohe District Court.[135] While New Zealand's response shows promise, it fails to address the crucial issue of how and when courts should consider cultural factors during sentencing.

What emerges is a sense that the guiding statutory framework for New Zealand judges in sentencing Māori offenders is not fatally flawed.[136] The Sentencing Act 2002 may be viewed as helpful in some respects, since it sets out a series of culturally sensitive principles in clear and express language. Nonetheless, these statutory provisions, however well written, are rarely utilised by counsel and are not being used in a manner effective and beneficial to Māori. The question for New Zealand is how to give better effect to the Sentencing Act 2002 when sentencing Indigenous offenders. With Parliament having adequately discharged its legislative responsibility, it is now for courts and counsel to acknowledge and capitalise on the cultural

131 JustSpeak, above n 82, at 34.

132 Chetwin, Waldergrave and Simonsen, above n 108, at 51–58. This relates to the comparable cultural background provisions under the Criminal Justice Act 1985 (repealed).

133 Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination — New Zealand (15 August 2007) United Nations Human Rights — Office of the High Commissioner for Human Rights <www.ohchr.org>

134 At 21.

135 At 20.

136 Joanna Hess, above n 79, at 201.

background sentencing provisions. Without active implementation by the Bench and Bar, there is unlikely to be improvement in the overrepresentation of Indigenous offenders in Aotearoa New Zealand.

Existing Community-based Sentencing Initiatives

A number of restorative justice programmes designed to facilitate Māori input in the criminal justice system have received statutory and judicial recognition.[137] Although restorative justice processes are not unique to Māori, they are strongly aligned with Māori values of reconciliation, reciprocity and whānau involvement.[138] The basis of dispute resolution in traditional Māori society is to allow a free discussion on the marae in the presence of elders. The leader of the hapū summarises the discussion and makes a decision he or she considers appropriate for the tribe and the individual involved.[139]

In *R v Mason*, Heath J acknowledged how the existing statutory framework has provided for the expression of Māori customary practices.[140] The Māori Community Development Act 1962 permits Māori committees to impose penalties on Māori for certain conduct falling within the Summary Offences Act 1981.[141] The Victim of Offences Act 2002 also encourages victims and offenders to meet, in accordance with principles of restorative justice and the tikanga concept, which requires disputes to be resolved kanohi ki te kanohi — face-to-face.[142] Furthermore, Whare Oranga Ake units for Māori offenders in prison were opened in 2011 and have been piloted on a limited basis. These units are designed for inmates in the final stages of their sentences, providing pre-release rehabilitation initiatives.[143] Finally, s 10 of the Sentencing Act 2002 allows the Court to recognise an offender's offer to make amends and so provides a direct legislative pathway for muru or ifoga.[144]

The criminal justice system has recognised and established a number of programmes carried out on the marae. Nin Tomas emphasises the importance of the marae setting to Māori, particularly as a place of sharing and healing.[145] Family Group Conferences under the Children, Young Persons and Their Families Act 1989 can be held on marae with Māori facilitators and kaumātua. Te Kooti Rangatahi is also established under this

137 Ministry of Justice, above n 101, at 10.4.

138 John Belgrave "Restorative Justice: A Discussion Paper" (1996) Ministry of Justice <www.justice.govt.nz>.

139 Matiu Dickson "The Rangatahi Court" (2011) 19 Wai L Rev 86 at 88.

140 Paul Heath, above 125, at 204.

141 At 204.

142 Khylee Quince "Maori and the Criminal Justice System in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *The New Zealand Criminal Justice System* (LexisNexis, Wellington, 2011) at 12.5

143 Robert Webb "Culture and Crime Control in New Zealand" (paper presented to Crime, Justice and Social Democracy: An International Conference, Queensland, 26–28 September 2011) at 73.

144 Sentencing Act 2002, s 10.

145 Nin Tomas "Māori Justice: The Marae as a Forum for Justice" in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (Living Justice Press, Minnesota, 2005) 134.

legislative framework.[146] The Rangatahi Court is a youth court process in a Māori cultural setting which encourages strong cultural links and meaningful involvement of the Māori community in the process.[147] The kaupapa of the Rangatahi Court is to use the marae setting to connect the young offender to his or her identity and culture.[148] The availability of these Māori-focused restorative justice programmes and other Indigenous justice initiatives demonstrates the digestibility of Māori custom in the criminal justice system and an initial acceptance that the compromise in these circumstances is not too great.[149]

There are a number of advantages associated with making room for the expression of Māori custom in the sentencing process. First, allowing for such provision accords with Article Two of Te Tiriti o Waitangi[150] and is consistent with the Principles of the Treaty of Waitangi, in particular partnership and participation.[151] Secondly, it gives Māori ownership of a system with which Māori are more likely to identify and contributes to a genuine sense of cultural identity.[152] Because of the unfortunate reality that Māori represent a significant proportion of those involved in the criminal justice system, the case for a greater input into the sentencing process is all the more compelling.[153]

Māori cultural methods of dispute resolution also carry benefits for victims and their families, who can confront the offender in a manner which is not always allowed in a court. There is often an opportunity for the victim to have a real voice in the process. The opportunity for a victim to deliver a victim impact statement in a full and frank way can have a therapeutic effect. Furthermore, the penalties imposed in a community setting can be more creative, meaningful and appropriate. Offenders are given the opportunity to take responsibility for their actions. Criminal behaviour and the process can involve whakamā or shaming, which can be a powerful factor in sentencing and rehabilitation.

Practical Difficulties

Despite such benefits, a number of difficulties can arise in Indigenous sentencing. Community-based sentences are contingent upon the offender accepting responsibility for his or her offending; an alternative sentencing procedure cannot work without this. Nor will a community-based sentence be as effective when a victim, understandably, does not wish to be involved

146 Matiu Dickson, above n 139, at 86.
147 Human Rights Commission *A fair go for all? Addressing Structural Discrimination in Public Services* (July 2012) at 40.
148 Matiu Dickson, above n 139, at 106.
149 Paul Heath, above n 125, at 204.
150 New Zealand Law Commission *Justice: The Experiences of Māori Women* (NZLC R53, 1999) at 8.
151 At 6.
152 New Zealand Māori Council and Donna Durie Hall "Restorative Justice: A Māori Perspective" in Helen Bowen and Jim Consedine (eds) *Restorative Justice: Contemporary Themes and Practice* (Ploughshares Publications, Lyttleton, 1999) 25 at 28.
153 Paul Heath, above n 125, at 201.

in the process.[154] In *R v Mason*, Heath J further noted that where the offending is serious, there is less room for community-based sentencing initiatives to be imposed.[155] In such cases, the sentencing goals of denunciation, deterrence and accountability are aimed at providing a community response to the serious nature of offending, as opposed to reconciliation between victim and offender.

Along with these practical difficulties, there is also concern that without a framework to ensure significant Māori input or control over the form and substance of the process, Indigenous sentencing represents no more than tokenism.[156] Moana Jackson suggests that a community-based sentence which attempts to incorporate traditional Indigenous methods of dispute resolution may be just as alienating for some Indigenous offenders as the mainstream criminal justice system.[157] Jackson argues that the implementation of this type of forum in the New Zealand context "will merely maintain the co-option and redefinition of Māori values and authority which underpins so much of the colonial will to control".[158] Sadly, in New Zealand, marae and community-based sentencing procedures often mark an offender's first encounter with his or her culture. If not conducted properly, these procedures risk facilitating re-colonisation of Māori methods and processes.

A corollary to this issue is the way in which Māori tikanga risks being compromised and distorted in the process of adaption to a predominantly Anglo-Saxon court system.[159] It is important that Māori maintain mana or authority over their marae activities and tikanga, as the marae is the last "bastion" where Māori can freely and comfortably carry out the traditional practices of their ancestors.[160]

IV CONCLUSION

This article has examined the various ways in which a court may consider the unique status of an Indigenous offender in sentencing. It has advocated for a cultural background methodology, which affords consideration to the background and systemic factors of Indigenous offenders. This article does not suggest that this culturally sensitive approach to sentencing is a "cure-all" for Indigenous overrepresentation in the criminal justice system. However, it is an approach that recognises that the causes of Indigenous criminality often have deep roots, which extend far beyond the criminal justice system. Addressing Indigenous overrepresentation in the criminal

154 *R v Mason*, above n 58, at [45].

155 At [49].

156 Chris Cunneen "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 ANZJ Crim 292 at 304.

157 Moana Jackson "Justice and political power: Reasserting Māori legal processes" in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy* (Avebury, Aldershot, 1995) 234.

158 At 234.

159 At 306.

160 Matiu Dickson, above n 139, at 87. See also Eugene McLaughlin and others (eds) *Restorative Justice: Critical Issues* (Sage, London, 2003).

justice system cannot be achieved without first acknowledging and redressing the legacies of colonialism that have contributed to this phenomenon. Importantly, acknowledging the limits of the criminal law in addressing these issues creates a space in which to develop community engagement in the criminal justice process and restorative and community approaches that offer better protection for victims.[161]

The broad discretion available within the sentencing framework has been utilised in Australia and Canada where judges have adapted the procedure and substance of sentencing to involve Indigenous communities in a process previously dominated solely by lawyers and judges. The decision of the Canadian Supreme Court in *Ipeelee v R* is bold in its confrontation of Indigenous overrepresentation in the prison population and the discrimination Indigenous peoples face in the justice system. The case provides a useful platform from which to implement a similar sentencing methodology in New Zealand courts. It is hoped that lawyers and judges will increasingly take account of an offender's Indigenous status given the provision for such consideration under the Sentencing Act 2002.

This article has demonstrated that sentencing judges can take account of social and economic disadvantage and other Indigenous factors in a way consistent with fundamental principles of fairness, proportionality and equality before the law. Nevertheless, there are some difficulties associated with granting consideration for Indigenous offenders. Not all offenders will be receptive to community-based sentencing options. And it is important that victims of crime not be subject to re-victimisation by the process.

The cultural background methodology is an integral part of the broader movement to use therapeutic interventions to improve offenders' engagement with the system. It can be seen to improve rehabilitative outcomes, reduce recidivism and promote a just, peaceful and safe society.[162] Results may not be immediately apparent and policy-makers may even question the efficacy of the approach.[163] A longer-term perspective is required. Sentencing reform to address Indigneous overrepresentation in the criminal justice system is most likely to work most successfully when pursued in tandem with initiatives to improve the socio-economic conditions of Māori in New Zealand society.

161 Kate Warner, above n 4, at 135.
162 Elizabeth Adjin-Tettey, above n 3, at 181.
163 Marchetti and Daly, above n 45, at 443.

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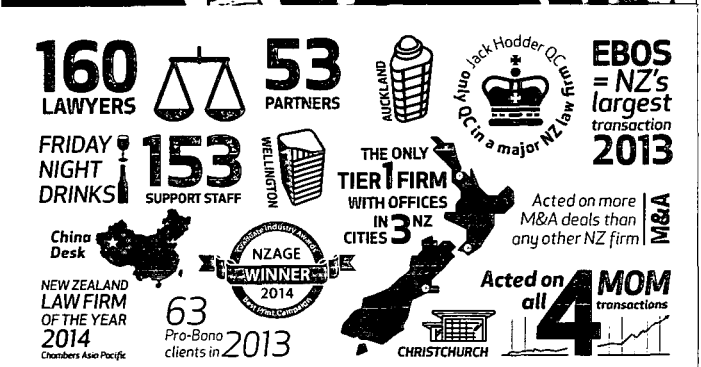

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