What About the Wāhine? Can an Alternative Sentencing Practice Reduce the Rate that Māori Women Fill Our Prisons? An Argument for the Implementation of Indigenous Sentencing Courts in New Zealand

By Gregory Burt*

I. Introduction

Often described as invisible constituents[1] of the criminal justice system, women are both minority offenders and significant victims of crime. Māori, New Zealand's indigenous people, form a disproportionately large percentage of our offender population.[2] It is the intersection of ethnicity (or race) and gender that is the focus of this research which aims to analyse the factors contributing to the disproportionately high rate of custodial sentences received by Māori women, and seek a solution to these alarming statistics.

Looking specifically at the sentencing of Māori women, the paper argues that colonisation, legislative reform and judicial discretion play significant roles in the high rate of imprisonment experienced by convicted female Māori offenders. By looking to Canadian and Australian experiences, it is proposed that the implementation of indigenous sentencing courts will provide a viable solution that incorporates traditional practices to address this level of over-representation. In doing so, this sentencing alternative incorporates the principles of the Treaty of Waitangi (the Treaty) to increase the trust between the offender and a modified court system by empowering the Māori community to participate in the sentencing of their own people.

II. Part One: Māori Women and Sentencing Trends

Part One looks at criminal justice trends for the period spanning 1996 to 2005. Māori women are compared with other participants in a general sense and with specific regard to custodial sentencing.

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1 Julia Tolmie "Women and the Criminal Justice System" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 295.

2 Khylee Quince "Māori and the Criminal Justice System in New Zealand" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 333-334.

A. Sentencing Trends: 1996-2005

1. *Sentencing*

Sentencing is only one stage of the criminal justice process. However, as it provides the "portal" to incarceration, sentencing assumes a degree of importance. New Zealand has recently been recognised as the second most punitive western world nation, behind the United States.[3]

In New Zealand between 1996 and 2005 custodial sentences increased.[4] Despite an increase in convictions, the corresponding increase in the percentage of convicted cases receiving sentences of imprisonment stands out for consideration,[5] increasing from 7.4 per cent of convicted cases in 1996 to 9.6 per cent by 2005.[6] In addition, based on a decrease in the average seriousness of convicted cases attracting custodial sentences,[7] it is concluded that the courts use imprisonment in 2005 where they may not have a decade before.[8] With the number of women sent to prison increasing by 7 per cent in 2004 alone,[9] the resulting effects have produced a female sentenced prison population that has grown by 111 percent in ten years,[10] thus displaying a strong trend towards increasingly punitive sentences.

2. *Māori women*

Making up around 15 per cent of the population, Māori are disproportionately more likely than non-Māori to be represented at every stage of the justice process.[11] This paper looks specifically at sentences of imprisonment illustrating the fact that Māori in general are far more likely to receive a custodial sentence upon conviction than non-Māori[12] with commentators suggesting that the margin is as high as seven times greater.[13] Overrepresentation based on ethnicity is amplified when gender is also considered with reports stating Māori women may be ten times more likely to receive a custodial sentence than European women.[14]

Women make up slightly more than half the population yet form a much lower percentage of those subjected to the justice system when compared with men.[15] Within these offenders Māori

3 John McCrone "Filling the Prisons" (2010) Stuff.co.nz <www.stuff.co.nz/national/crime/4024049/Filling-the-prisons> New Zealand sends 199 people out of every 100,000 to jail; the United States sends 748 per 100,000. Māori figures are approximately 700 per 100,000.

4 Julia Tolmie "Crime in New Zealand Over The Last Ten Years: A Statistical Profile" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 56.

5 Ibid.

6 Natalliya Soboleva, Nina Kazakova and Jin Chong *Conviction and Sentencing of Offenders in New Zealand: 1996 to 2005* (Ministry of Justice, 2006) at 63.

7 Ibid, at 64.

8 Tolmie, above n 4, at 57.

9 Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand Since 1840* (Dunmore Publishing Ltd, Wellington, 2007) at 209.

10 Tolmie, above n 1, at 309.

11 Tolmie, above n 4, at 68. Māori women were 45.83 per cent of apprehensions in 2005. See also Quince, above n 2, at 334.

12 "Policy, Strategy and Research Group, Over-representation of Māori in the Criminal Justice System: An Exploratory Report" (prepared for the Department of Corrections, 2007) at 22.

13 See Quince, above n 2, at 334.

14 Bronwyn Morris "Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research" (prepared for the Ministry of Justice, 2009) at 18.

15 Tolmie, above n 1, at 297.

women form the most overrepresented group. When compared with general statistics for Māori, women fare worse than men.[16] Soboleva reported that whilst only 11 per cent of custodial sentences in 2004 involved female offenders, Māori women made up 58 per cent of those sent to prison compared with 36 per cent for European women.[17] Women predominantly receive convictions for property offences making up 39.84 per cent of all their convictions.[18] This has been inextricably linked to socioeconomic position in society, reflecting "the severe financial difficulties of unemployed women, especially those caring for children as solo parents".[19] Notably Māori women are over-represented in both these indices.[20]

Statistics have not always separated ethnicity and gender to enable Māori women's experiences in the criminal justice system to be evaluated as a unique entity.[21] However the above data displays trends which include: New Zealand's increasing use of custodial sentences; the over-representation of Māori in all facets of the justice process; and importantly for this analysis, that Māori women receive a disproportionately high number of custodial sentences.

The trends speak for themselves but how has this occurred? This level of over-representation has not occurred overnight[22] and, while some call it a "national disgrace,"[23] it is the factors that contribute to this poor showing that must be analysed to ascertain why Māori women receive so many custodial sentences. The starting point of this analysis is the effect of colonisation on Māori women's position in society.

III. Part Two: Colonisation and Post Treaty Law

Part Two summarises the position of Māori women prior to European contact and argues that the negative effects of colonisation and post-Treaty laws can be linked to their high rate of custodial sentencing.

A. Before Colonisation

Light can be shed on the present and also the future by looking to the past.[24] Prior to European contact and colonisation, traditional Māori beliefs assigned women a status and position that utilised human resources efficiently and was socially sophisticated with respect to equality. Māori women were key figures in nurturing and organising the whanau and hapu,[25] and played leading roles in their communities. They were the primary transmitters of specialised knowledge (from

16 Ibid, at 303.

17 Soboleva, above n 6, at 116.

18 Ibid, at 52.

19 Tolmie, above n 1, at 299.

20 Quince, above n 2, at 350.

21 Tolmie, above n 1, at 303.

22 See Moana Jackson "The Māori and the Criminal Justice System: He Whaipaanga Hou Part 2" (prepared for the Policy and Research Division, Department of Justice, 1988).

23 NZPA "Justice System Doesn't Deliver Justice for Māori – Sharples" (2010) YAHOO!extra. <http://New Zealand.news.yahoo.com/a/-/top-stories/7959810/justice-system-doesnt-deliver-justice-for-Māori-sharples/>.

24 Law Commission "Māori Custom and Values in New Zealand Law" (Study Paper 9, 2001) at 5.

25 Law Commission "Justice: The Experiences of Māori Women" (New Zealand Law Commission Report 53, 1999) at 12-13. Whanau is a group of relatives comprised of several generations. Hapu reflects an extended kin group consisting of a collection of whanau.

childbirth to weaponry)[26] with whakapapa (genealogy) providing the lineage for a higher societal ranking irrespective of gender. Māori women were particularly prominent in the areas of diplomacy and negotiation.[27] A feature of pre-European Māori society was the ability of Māori women to have ownership or "use-rights" over land and resources.[28] The onset of colonisation irreversibly changed this dynamic, meaning the status and position of Māori women would never be the same.

B. Colonisation

Colonisation altered the existence Māori had enjoyed for several centuries. All experienced the effects of this process but perhaps none were more affected by it than Māori women. The imposition of European ideologies systematically eroded the functions and value[29] they were used to providing within the whanau and hapu.

Many of the women's core roles were directly challenged by European male dominance. As colonisation attempted to assimilate Māori to European standards, the legitimacy of female influence in Māori society was undermined. Colonial views of a nuclear family headed by men, with women holding a subordinate position, marginalised the leadership, organisation, and nurturing roles held by Māori women.[30] The "colonial concept of individual land ownership and the role of men as property owners" ignored Māori women's relationship with the land.[31] Following the Treaty, the introduction of laws founded by British legislation and common law were applied with detrimental effect to Māori women.

C. After the "Treaty"

The introduction of legislative measures struck at the core of Māori society,[32] intentionally disrupting the principle of collectivism and predicating the destruction of the whanau.[33] Losing the core social unit served to isolate Māori women by decreasing the material and spiritual support they had traditionally received,[34] whilst increasing their vulnerability to victimisation.[35] In addition the application of common law reduced the status of Māori women denying them any "legal personality or property rights divisible from those of [their] father or husband."[36]

Quince suggests that the experiences of Māori women throughout colonisation resulted in a contemporary position that differs from that of Māori men.[37] The post-Treaty combination of Pakeha law and values, the increasing modernisation and urbanisation of Māori, and the breakdown of the collective social organisation contributed to socioeconomic disadvantages that were most

26 Ibid, at 14.

27 Ibid.

28 Ibid, at 15.

29 Ibid, at 15.

30 Ibid, at 11.

31 Ibid, at 15.

32 New Zealand Settlements Act 1863; Native Land Act 1865 and 1909. Required Māori to undergo legal marriage ceremonies.

33 Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Wai L Rev at 133.

34 Law Commission, above n 25, at 16.

35 Quince, above n 2, at 349. Māori women were confined to households meaning prior constraints on actions from an open and collective lifestyle no longer operated.

36 Ibid.

37 Quince, above n 2, at 349.

severely felt by Māori women.[38] When reviewing the social indicators of income, health, education and sole charge of dependent children, many of which are indicators of offending,[39] Māori women fare worse than their male counterparts.[40] It is arguable that the high rates of offending and the resultant sentences produced by colonisation driven poverty are directly connected with the ethnic and gendered identity of Māori women.[41] The consequences of this are manifested in Māori women receiving a disproportionately high number of custodial sentences.

The effects of colonisation are clearly apparent but are they the sole cause of the poor sentencing statistics? While they unequivocally contribute in a large way, other factors also play a role, most notably the legislation that governs the sentencing process which was reformed in 2002.

IV. Part Three: Sentencing Reform

Part Three argues that the 2002 sentencing reforms, along with penal populism,[42] contributed to New Zealand's increasingly punitive justice system and had a direct affect on the high number of custodial sentences received by Māori women.

A. Sentencing Reform

Following the Citizen Initiated Referendum of 1999,[43] the Government passed the Sentencing Act 2002 (the Act), along with other legislative measures.[44] At the time penal populism garnered public support which provided the consent and moral justification[45] to influence sentencing's power to punish. Characterised by political discourse[46] and the use of "moral panics"[47] by groups like the Sensible Sentencing Trust,[48] the "punitive aspects of the legislation, [not] its restraining counterforces" shaped contemporary sentencing policy[49] by encouraging judges to imprison the worst offenders.[50] This flowed on to affect offenders across the spectrum of seriousness and particularly, if not predictably, Māori women.

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38 Ibid.

39 Peter Doone "Report on Combating and Preventing Māori Crime: Hei Whakarurutanga Mo Te Ao" (Crime Prevention Unit, Department of the Prime Minister, 2000) at 11 and 21.

40 Quince, above n 2, at 349.

41 Ibid, at 335.

42 John Pratt "When Penal Populism Stops: Legitimacy, Scandal and the Power to Punish in New Zealand" (2008) 41 The Australian and New Zealand Journal of Criminology at 364. Penal populism refers to various groups spreading a law and order message of "zero tolerance" which influences government policy.

43 Ninety two per cent of participants favoured reforms imposing "minimum sentences and hard labour for all serious violent offences".

44 Parole Act 2002; Victims' Rights Act 2002.

45 Pratt, above n 42, at 365.

46 John Pratt "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment" (2006) 46 British Journal of Criminology at 557. In 2000, the Justice Minister warned judges to take note of public sentiment and expectations when sentencing.

47 John Ip "Crime, Criminal Justice, and the Media" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 401-412.

48 Pratt, above n 46, at 556.

49 Pratt, above n 42, at 372.

50 See Geoff Hall "Sentencing" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 258.

B. Effects of Reform

1. *Reforms in general*

The Act's aim of improving clarity, transparency and consistency[51] was initiated by codifying the purposes governing the imposition of a sentence.[52] Hall suggests the Act applies a retributive or "just desserts" approach to sentencing based on the principle of proportionality,[53] thereby restraining the utilitarian aspects of various sentencing options. A broad review of the Act after its first year of operation failed to discuss Māori or women as stakeholders in sentencing and stated that the Act had not intended any general change in the use of imprisonment.[54] In reality this has not been the case for Māori women and therefore begs the question "what happened?"

2. *Effect on Māori women*

The Act affected Māori women in a disadvantageous way. Tolmie states that "the relevance of gender within the criminal justice system...is often unexamined or downplayed in social importance."[55] When combined with ethnicity the issues this intersection provides seem to be amplified. The Act abolished the use of suspended sentences. Parliamentary discussions did not recognise gender (or race) despite the large number of women receiving this sentence based on its suitability for women with dependent children, and their lower risk of re-offending.[56] The net effect meant women that may have received a suspended sentence were more likely to receive a custodial one instead. Based on imprisonment trends, the likelihood is high that this negatively affected Māori women more than other groups.[57] As Māori women commit and are sentenced in relation to property offences significantly more than other types of offence, the removal of the presumption against imprisonment when sentencing for this offence[58] again increased the likelihood of Māori women receiving a custodial sentence.

The Act retained the provision allowing an offender being sentenced to call a person on their behalf to address the court regarding their cultural background, its relevance to the offending, and possible whanau or community support that was available to the offender.[59] Although designed with Māori in mind[60] indications suggest a "low level of awareness" and therefore utilisation by Māori offenders.[61] The effect this has on sentencing outcomes has not been quantified however it cannot be helpful to judges or offenders to have less than the full picture regarding the offending. Improving s 27's use by making this exchange mandatory may help reduce rates of custodial sentences for Māori women.

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51 Ibid.

52 Sentencing Act 2002, s 7.

53 Hall, above n 50, at 259. Penalties should be proportionate to the gravity of the offence.

54 Rajesh Chhana and others "The Sentencing Act 2002: Monitoring the First Year" (prepared for the Ministry of Justice, 2004) at 41-42.

55 Tolmie, above n 1, at 296.

56 Ibid.

57 See Quince, above n 2, at 350. Māori women often imprisoned based on a violent action towards an abusive partner. Suspended sentences were often considered appropriate for this type of offence.

58 Criminal Justice Act 1985, s 6.

59 The Act, above n 52, at s 27. Replacing s 16 of the Criminal Justice Act 1985.

60 Charlotte Williams "The Too-Hard Basket: Māori and Criminal Justice Since 1980" (Institute of Policy Studies, Wellington, 2001) at 44.

61 See Quince, above n 2, at 351.

In response to the overrepresentation of aboriginal people in Canadian prisons, legislators included a mandatory inquiry into the "circumstances of aboriginal offenders" when sentencing an aboriginal person.[62] Despite Supreme Court endorsement of the provision,[63] the incarceration of aboriginal women has worsened in Canada over the past ten years, highlighting the limited capacity of reforms alone to institute change where social policy and judicial discretion play a dominant hand in the application of sentencing principles.[64] Sentencing reasons in Canada showed that judges tended to contextualise female aboriginal offenders with an "intersectionalised identity" which represented their offending as being determined by ancestry, identity and personal circumstances.[65] This concurs with New Zealand commentators' suggestions that women are now treated in a similar fashion to men thus diminishing their different circumstances[66] and that an "intersectional analysis" demonstrates that the ethnic identity of Māori women causes their gender to be read by judges in a fashion that is worse than the separate categories of "Māori" or "women".[67]

Without understating the obvious influence of the 2002 reforms on the high number of custodial sentences Māori women receive, the persistent theory of a connection between these high levels and ethnic identity[68] reflects the hypothesis that Māori women receive more custodial sentences largely because they are Māori. This suggests that judicial discretion and racial bias may combine to marginalise this group during sentencing.

V. Part Four: Judicial Discretion and Racial Bias

Part Four argues that the judiciary plays a role in the disproportionately high number of custodial sentences received by Māori women based on its make-up and the amount of discretion available when sentencing, before turning to investigate the presence of racial bias in this process.

A. Judicial Discretion

It is the judiciaries' role to sentence convicted offenders in an independent and impartial manner,[69] an ability which has been questioned by some Māori scholars.[70] The widely held perception is that the Bench is still a predominantly upper class white male fraternity,[71] and despite ongoing efforts to address this fact, the perception pervades how those scrutinising the sentencing of Māori women view the use of judicial discretion.

62 Criminal Code of Canada RSC 1985, s 718.2(e).

63 *R v Gladue* [1999] 1 SCR 688 (SCC).

64 Toni Williams "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada" in Emily Grabham and others (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, New York, 2009) 79 at 88-89.

65 Ibid, at 94-95.

66 Tolmie, above n 1, at 306.

67 Quince, above n 2, at 350.

68 Ibid, at 335.

69 Peter Sankoff "Constituents in the Trial Process. The Evolution of the Common Law Criminal Trial in New Zealand" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 210.

70 Jackson, above n 22, at 113.

71 Compare Heath J "Hard Cases and Bad Law" (2008) 16 Wai L Rev at 1.

Women comprise around 18 per cent of convictions[72] with Māori women more than half that figure. Currently, approximately 30 per cent of District Court judges are female[73] with the High Court at 25 per cent.[74] Information regarding the ethnic makeup of judges is not available. On a gender basis alone, statistically there is a higher percentage of women judges than the percentage of convicted Māori women.

Sentencing allows the judge a broad degree of discretion. It involves receiving and utilising a diverse range of information from various sources, in order to prescribe an appropriate sentence under a legislative umbrella combined with appellate guidance.[75] Heath J noted "[j]udges... come from different backgrounds and have very different life experiences...[being]...the products of [their] own upbringing."[76] On this basis it is questionable how the "life experiences" of the predominant male European judge enable them to appreciate the circumstances of the high number of Māori women standing before them, considering the above mentioned limited use of s 27.

Although discretion allows sentences to be individually tailored to the nature of the offence and the circumstances of the offender,[77] the combination of the wide discretion available[78] and the small amount of guidance received by judges has been problematic.[79] Pointing to inconsistency in sentencing between judges and courts, and the lack of a Parliamentary mechanism to adjust sentencing policies, the Law Commission proposed a Sentencing Council.[80] The Labour Government legislated for the establishment of the Council[81] which would draft "sentencing guidelines" and include amongst its members an expert on "the impact of the criminal justice system on Māori and minorities".[82] Unfortunately the National Government abolished the Council[83] although the legislation has not been repealed. The failure to moderate judicial discretion with well devised guidelines reduces the likelihood of beneficial alterations occurring to policies that increasingly incarcerate Māori women. This does little to dispel one concern regarding whether wide discretion allows racial bias to permeate the process thereby detrimentally affecting Māori women.

B. Racial Bias?

For over two decades commentators have suggested that by using monocultural stereotypes[84] sentencing operates in an institutionally racist way.[85] Jackson opined that in combination with judicial

72 Soboleva, above n 6, at 52.

73 <www.courtsofnz.govt.nz/district/district/the-judges/judge-chief/district/judges.html>.

74 <www.courtsofnz.govt.nz/about/high/judges>.

75 Hall, above n 50, at 249-254.

76 Heath J, above n 71, at [9].

77 Hall, above n 50, at 254.

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

79 *Law Commission Sentencing Guidelines and Parole Reform* (Report 94, 2006) at 17-29.

80 Ibid.

81 Sentencing Council Act 2007.

82 Ibid, at Schedule 1 1(f).

83 Patrick Gower "Red Tape Will Cost Crime Victims $7.3m" *The New Zealand Herald* (New Zealand, 29 June 2009). <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10581338>.

84 Jackson, above n 22, at 108.

85 Ibid, at 113.

discretion, racial bias has contributed either "deliberately or unwittingly"[86] to Māori's (women) poor showing in sentencing statistics. The statistics, viewed in conjunction with the make-up and discretion of the judiciary, are highly suggestive that ethnicity factors provide the basis for the possibility that judges impose more severe penalties on Māori women.[87] Claims of this nature have however proved "problematic to show...in a systematic way that controls for variables such as age, criminal history, seriousness of offending, and legal representation."[88] Commentators agree on the fact that indigenous minorities are overrepresented within the criminal justice system but disagree on how the disparities occur.[89]

Compared with other jurisdictions New Zealand has a dearth of empirical analysis regarding the presence of racial bias across sentencing decisions.[90] Complex overseas studies present arguments for and against the presence of racial bias. A number record an increase in the punitive nature of sentences encountered by ethnic minority groups whilst others find a lack of evidence that racial bias is occurring when legal factors are included in the analysis.[91]

Two Australian studies illustrate the varying nature of results in different court locations. A 2007 study in New South Wales[92] found that the indigenous status of the offender had only a slight effect on the risk of imprisonment.[93] Viewed with caution, this indicated the potential for racial bias to have some influence[94] on an increased risk of imprisonment. In contrast a 2009 study in South Australia[95] found indigenous offenders less likely to be handed a custodial sentence than non-indigenous when appearing under similar circumstances.[96] Interestingly the results showed that indigenous offenders received longer imprisonment terms when sentenced[97] and offenders with a personal history of victimisation were more likely to receive a prison sentence.[98] Illustrating the difficulty in pin pointing racial bias in the sentencing of indigenous minorities, these studies highlight the need for New Zealand to engage in research of our sentencing practices with regard to Māori women (and other minorities). The methodology used must distinguish regions in New Zealand and, of importance to Māori women, look at whether previous victimisation[99] affects the likelihood of receiving a custodial sentence.

The width of the judiciary's discretion and its composition suggest the strong potential for factors based on the ethnicity and gender of convicted offenders to pervade the sentencing process and produce more severe sentences for Māori women. Without conclusively establishing the

86 Ibid.

87 Latu, above n 78, at 92. Noting the fear and insecurity of the general public towards Māori.

88 Ministry of Justice "Sentencing Policy and Guidance: A Discussion Paper" (1997) <www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-Māori-view-of-sentencing>.

89 Morris, above n 14, at 31-32.

90 Ibid, at 42.

91 Ibid, at 45.

92 Lucy Snowball and Don Weatherburn "Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?" (2007) 40(3) The Australian and New Zealand Journal of Criminology at 272.

93 Ibid, at 285.

94 Latu, above n 78, at 92.

95 Samantha Jeffries and Christine Bond "Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts" (2009) 42(1) The Australian and New Zealand Journal of Criminology at 47.

96 Ibid, at 60-64.

97 Ibid.

98 Ibid.

99 Quince, above n 2, at 350. Māori women are more likely to be victims than any other demographic in New Zealand.

incidence of racial bias, it is concluded that a combination of colonisation, legislative reform and judicial discretion combine to produce sentencing conditions that require a policy shift to address the disproportionately high number of Māori women receiving custodial sentences and the corresponding negative effects this has for Māori and society in general.

VI. Part Five: Why Not Indigenous Sentencing Courts?

Part Five argues that indigenous sentencing courts provide one solution to the sentencing problem facing Māori women with the ability to also act as a first step in resurrecting the criminal justice process for Māori through measures which introduce aspects of traditional Māori solutions to crime.

A. Māori Women and the Justice System

The justice system is a foreign place for most Māori women. A lack of recognition for the principles of the Treaty,[100] combined with systemic failures, produce barriers to accessing elements within the system that could positively affect their sentencing outcomes.[101] Based on Māori women's socio-economic disadvantage, the inability to access the information needed to make informed choices[102] reduces the effectiveness of the justice system in meeting their needs with many suggesting that the system could improve by embracing their cultural identity and providing easier access to legal and community services by Māori for Māori.[103] While some Māori community services excel in the support they provide,[104] most are underfunded. Improvement in these support services is required and must be a priority for an integrated solution.

Jackson stated that the justice system needed to "address ways in which existing operations... [could] be made more meaningfully bicultural" and needed to "consider in what ways...specifically Māori institutions might be developed to...share the authority defined by the Treaty".[105] While advocating for autonomy in the administration of justice by Māori for Māori, Jackson had reservations about the use of the marae[106] as the centre for court procedures, as without altering the nature of the process it risked the marae being associated with injustice, thereby undermining its cultural significance.[107] There have been attempts at marae based courts[108] with moderate success but some Māori scholars view these as a furtherance of the colonial ethic[109] and a "co-option" of Māori justice practices which does little to address criticisms of the justice system.[110]

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100 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

101 Law Commission, above n 25, at 27. Includes the recognition of cultural values such as te reo Māori, whakapapa and whanau.

102 Ibid, at 32-34.

103 Ibid, at 41-43.

104 For example the Hamilton Community Programme pilot with Maatua Whangai.

105 Jackson, above n 22, at 204-205.

106 Meeting house.

107 Jackson, above n 22, at 237-238.

108 Quince, above n 2, at 351-353. For example, Te Whanau Awhina in Waitakere and Rangitahi court in Hamilton (for youth).

109 Ibid. Citing Jackson "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?" (1995).

110 Juan Tauri "Family Group Conferencing and the Indigenisation of New Zealand's Justice System" (Māori and Criminal Justice Conference, Victoria University Law School, 15-17 July 1998).

The modern landscape is not without institutions that claim a strong relationship with tikanga Māori.[111] The use of conferencing[112] in youth justice has received a mixed reception and produced mixed results.[113] While some Māori believe there is a place for attempting to adapt the modern criminal justice system to be more culturally appropriate[114] very little has been done to specifically address sentencing of Māori women whose statistics call out for attention. Could a more traditionally oriented practice provide a solution for them?

B. Indigenous Sentencing Courts

1. *Why sentencing?*

Commentators allude to the fact that no simple solution exists in relation to the overrepresentation of Māori in the justice system.[115] Sentencing is but one part of a system that requires an integrated approach incorporating changes in policy, alongside Government and Māori community support. The focus on reducing custodial sentences for Māori women is two-fold. Firstly, positive changes to the way Māori women are sentenced will be socially significant[116] with lower incarceration rates improving the ability to care for the next generation. Secondly, with a complex road to improvement, the implementation of a new sentencing practice (which if successful could extend to include Māori men) could be accomplished in a short amount of time and if successful have immediate impacts on Māori society.

Both Jackson and Durie believe that addressing the cycle of poverty and harm in which Māori are often caught requires improved access to, and participation in, a healthy cultural identity.[117] Thus successfully responding to the high imprisonment rate of Māori women requires that Māori play a central role in the implementation and governance of a sentencing process that addresses structural inequalities, and provides support and monitoring to the individual.[118] In the twenty-two years since Jackson's report New Zealand has failed to address this issue in a meaningful way. It is therefore proposed that along with the re-establishment of a sentencing council and the repeal of the "three strikes" legislation,[119] that New Zealand look to Australia and implement indigenous sentencing courts similar to those already working well there.

2. *Following Australia*

New Zealand is not alone in having an indigenous population overrepresented in the criminal justice system. Both Canada and Australia experience similar problems. Drawing on "circle sentencing"[120] most Australian States have developed indigenous sentencing courts. The objective is to move away from retributive sentencing to a collaborative approach allowing community

111 Valmaine Toki "Will Therapeutic Jurisprudence Provide a Path Forward For Māori?" (2005) 13 Wai L Rev at 180. The "right way".

112 Family Group Conference for youth offenders.

113 Quince, above n 2, at 351-353.

114 Ibid, at 353.

115 Morris, above n 14, at 14.

116 Tolmie, above n 1, at 310-311.

117 Quince, above n 2, at 335.

118 Morris, above n 14, at 14.

119 Sentencing and Parole Reform Act 2010.

120 Luke McNamara "Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing" (2000) 72 Indigenous Law Bulletin.

involvement in the process.[121] The success of this process requires a committed judge,[122] combined with a community that has the capacity and willingness to participate in criminal decision-making.[123] Each State has individual differences to the court make-up with procedures set up by the parties involved.

While this type of court requires resources and takes more time, the participation of respected cultural leaders increases the perception of confidence in sentencing thus adding to the legitimacy of penalties handed down.[124] The courts work within the constraints of the criminal law, therefore statutory terms of imprisonment[125] are available and may be used. Sentencing deliberations typify a power sharing arrangement which promotes the community holding "the key to changing attitudes and providing solutions"[126] and enables the implementation of creative sentencing options based on an understanding of the offender's problems and likely solutions.[127] The process increases trust by encouraging open and honest communication between offender and judge and places greater reliance on informal modes of social control.[128] When surveyed, Aboriginal offenders cited facing their community and the realisation that respected members of the community were prepared to help, as reasons for its success.[129] This more culturally appropriate and inclusive format has empowered indigenous communities whilst reducing rates of imprisonment and recidivist offending.[130]

3. *A solution?*

It is proposed that New Zealand implement indigenous sentencing courts for Māori women. If successful this policy could be extended to other indigenous offender groups. Like Australia, offenders convicted of an eligible offence[131] would qualify for sentencing by this method thus providing a more culturally appropriate means of sentencing while resolving some of the barriers experienced by Māori. The process has the ability to empower the community and improve the self esteem of the offender via the supportive environment produced.[132] It moves away from a "rule-based approach towards a principle-based approach" consistent with tikanga.[133]

This proposal takes a positive step towards reducing the persistently high rate of imprisonment experienced by Māori women, whilst also drawing the community closer together by encouraging the sharing of responsibility for those at the margins of society, and reducing the number of young Māori separated from their mothers during periods of incarceration. This must improve their fu-

121 Ibid.

122 Ivan Potas and others "Circle Sentencing in New South Wales: A Review and Evaluation" (prepared for the Judicial Commission of New South Wales 2001) at 53-54.

123 McNamara, above n 120.

124 Potas, above n 122, at 51.

125 Elena Marchetti and Kathleen Daly "Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model" (2007) 17 Sydney Law Review at 419.

126 Potas, above n 119, at 4.

127 Ibid, at 52.

128 Marchetti, above n 125, at 421.

129 Potas, above n 119, at 53.

130 Marchetti, above n 125, at 435. Citing Koori and Nowra Court results.

131 Potas, above n 119, at 5. Excludes serious indictable offences (violence and drugs), sexual offences or domestic violence offences. See also Marchetti, above n 125.

132 Ibid.

133 Toki, above n 111, at 180.

ture prospects. The proposed system also honours the principles of the Treaty by taking steps towards answering the Māori voice for self-determination. Although not providing the absolute right to Tino rangatiratanga[134] that many call for,[135] this move makes initial strides towards social change and the enhancement of race relations. If implemented in conjunction with other forms of intervention[136] New Zealand society is likely to reduce the disproportionate number of custodial sentences received by Māori women and begin the pathway to a more bicultural nation.

VII. Conclusion

Sentencing is one step in the justice process. However it is the stage at which the convicted offender potentially loses their liberty. For women this often has significant effects not only for themselves but also their children. Proportionately, Māori women receive more custodial sentences than any other recorded group in New Zealand. This paper focuses on the reasons behind these statistics before suggesting a solution.

The disadvantaged socio-economic position of many Māori women, largely resulting from colonisation, is indicative of a propensity to offend and therefore be sentenced. The combination of reforms, which influenced Māori women's sentencing in a negative way and wide judicial discretion suggests that the intersection of ethnicity and gender factors contribute to their high rate of imprisonment. While racial bias cannot be confirmed, the lack of an affirmative response to these figures can be. Australia, experiencing similar issues, turned to indigenous sentencing courts that address Aboriginal offenders by utilising respected members of their community to participate in the sentencing process. By proposing the implementation of a similar system for Māori women it is submitted that their high rate of imprisonment can be reduced by incorporating methods which reflect more traditional Māori practices. Aside from the fiscal advantages of reducing female Māori incarceration, the corresponding benefits for the children of offenders and the potential for Māori communities to participate in the governance of their own people make indigenous sentencing courts a sound alternative. This is not a silver bullet and addressing justice figures in general will require an integrated approach however the implementation of indigenous sentencing courts will enable New Zealand to honour the principles of the Treaty and promote racial equality to a level not seen before. What about the wāhine? What about starting there!

134 Self determination.

135 Jackson, above n 22.

136 Marchetti, above n 125, at 441. Citing economic development, education, health.