Māori and the Criminal Justice System:
A Youth Perspective

A Position Paper prepared by JustSpeak

2012
Cover image taken on JustSpeak's Annual Planning Retreat, Ōtaki, January 2012.
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Preface

JustSpeak Background

JustSpeak represents a non-partisan network of people, based in Wellington, who contribute to the debate on criminal justice in New Zealand. As a new generation of thinkers JustSpeak is working for change in the justice system through imagination, innovation and a belief that we can achieve a just Aotearoa. JustSpeak was formed in early 2011 as the youth branch of the organisation Rethinking Crime and Punishment. It consists of between 50 and 100 people.

The group is guided by a belief that this new generation has much to offer to the national conversation on criminal justice: an imaginative outlook; a feeling of urgency; and a sense of hope, among other things. The group values an informed criminal justice debate based on evidence, experience and ongoing learning. And within its own operations, JustSpeak has a genuine commitment to inclusion and diversity.

The aims of the group are to empower people to think independently about criminal justice issues, to encourage networking and the engagement of those affected by the justice system, to foster learning from others, to develop a voice for a new generation of thinking on criminal justice, and to allow this next generation to own its rightful place at the policy table in this area. The name “JustSpeak” reflects the group’s desire to encourage people to speak out, without fear of belittlement or ignorance, as well as the goal of the group to contribute to a culture of “speak” about what is “just” in relation to crime and punishment policy.
JustSpeak is founded on the following whakatauki:

Mā te tika o te toki, o te tangere, me te tohu o te panaho, ka pai te tere o te waka i ngā momo moana katoa.

(By designing and shaping the keel of the waka to perfection, your canoe will overcome obstacles.)

The whakatauki articulates the need to design the keel of JustSpeak to perfection, so that the group can overcome obstacles, and maintain a durable voice in the criminal justice conversation. The whakatauki also points to the need for the keel of a bigger waka – the criminal justice system as a whole – to be designed carefully, so that New Zealand’s criminal justice system can provide a sustainable platform to rehabilitate and reintegrate members of society.

Members of the Steering Group at the Annual Planning Retreat, Ōtaki - January 2012.
Executive Summary

In 1988 Moana Jackson raised the profile of significant challenges facing Māori in the criminal justice system. Jackson wrote of the interconnectedness and depth of the problems (which extended across police, politicians, the public service, judges, and juries), but was also willing to suggest solutions, which included the development of a separate Māori criminal justice system. Over 20 years on, JustSpeak – a new generation of thinkers working for change in the justice system – has attempted to review the state of issues relating to Māori and the criminal justice system. That review began in a forum held on 2 November 2011, and has developed into this longer Position Paper, which builds on the discussion at that forum.

The policy context today represents a mixture of positives and negatives when compared to the world of 1988. There are promising developments (for instance, the level of commitment to the Treaty of Waitangi, and the emergence of new institutions such as the Public Defence Service and rangatahi courts). However, structural change remains far off, and many of Moana Jackson’s proposals have not even been considered, let alone implemented.

The consensus at the JustSpeak forum, from the guest speakers and the participants, was that there is still a long way to go before issues around Māori and the criminal justice system might be fully addressed. The causes of those issues stretch far beyond the justice sector, into education, health, social welfare, and social disenfranchisement generally. That should not paralyse us into a state of inaction, however. What is needed, the participants at our forum agreed, is an acceptance of the size of the challenge, along with a willingness to think imaginatively about new solutions, especially those drawing upon community initiatives and change that begins on a small scale.

Out of the forum this paper suggests four policy proposals: the showcasing of success stories around Māori and the criminal justice system; the utilisation of law as a force for good; the development of a Māori lens on policy; and the promotion of small-scale change. Further research should also focus on an interdisciplinary approach to this area, solutions-based thinking, and specifically whether aspects of the Youth Court system could be incorporated into the mainstream criminal justice system for the benefit of Māori. Such research and policy development is necessary to tackle head-on the challenges so astutely identified by Moana Jackson, and developed by others over the last 20 years.
Preliminary JustSpeak Positions on Māori and the Criminal Justice System

The following succinct statements outline JustSpeak’s positions on issues around Māori and the criminal justice system, on the basis of the points made in this paper. They are necessarily stated at a high level of generality and take ‘preliminary’ form because they precede wider consultation and feedback.

1. JustSpeak believes that Moana Jackson’s 1988 report, He Whaipaa Hou, is a useful resource in any consideration of questions relating to Māori and the criminal justice system.

2. JustSpeak proposes that attention be paid to the interconnectedness of problems surrounding Māori and the criminal justice system, the possibly endemic nature of problems in the system, and solutions that are available to these challenges.

3. JustSpeak believes that while some of Jackson’s suggestions have been implemented, many facets of his analysis have been ignored and current policies fail to grasp the depth of the challenges around Māori and the criminal justice system.

4. JustSpeak believes individuals who have offended in the past, particularly Māori, should be empowered to speak about their experiences, and their cultural experience within the criminal justice system.

5. JustSpeak supports the hosting of further forums on issues around Māori and the criminal justice system, particularly those that allow for young people’s views to be heard.

6. JustSpeak proposes that greater emphasis be placed by government and media on the showcasing of success stories and positive attitudes in the area of Māori and the criminal justice system.

7. JustSpeak recommends that lawyers, amongst others, investigate use of existing legal mechanisms that might contribute to reducing rates of Māori incarceration.

8. JustSpeak suggests that in the creation of criminal justice policy a Māori lens is always used so that criminal justice policy does not have an unintentionally disproportionate impact on Māori.

9. JustSpeak believes that consideration should be given to ways in which conversations and small-scale change can be fostered on issues of Māori and the criminal justice system.

10. JustSpeak proposes that further interdisciplinary research be conducted into Māori and the criminal justice system.

11. JustSpeak recommends that research in this area places emphasis on solutions.

12. JustSpeak directs that research be focused on the efficacy of the Youth Court model of personalised treatment of offenders.
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Part One: Introduction

The issue

How the criminal justice system deals with Māori may be the most significant issue that needs to be confronted by any group seeking to address the long-term challenges in crime and punishment in New Zealand. It is an issue that has implications for social cohesion, national identity, cultural identity, economic policy, and human rights, among other matters.

It is therefore important to recognise that a short paper such as this one cannot address all of the relevant points comprehensively. More modestly, this paper attempts to stimulate thinking on the topic, to encourage more discussion (more just speak) about solutions to the challenges that are outlined, and to suggest some actions that would go some way to achieving a just Aotearoa.

This Position Paper

JustSpeak holds monthly forums on issues in the criminal justice system. It was decided in mid-2011 that, where appropriate, efforts would be made to record in written form the contents of these forums. This decision was driven by the view that others in the community may be interested in reading and hearing a new generation of thought on the justice system, and also with an eye to bringing together Position Papers from these forums at a JustSpeak Summit on Criminal Justice. At this Summit a single declaration of JustSpeak’s position on various criminal justice issues could be released on the basis of the findings of these papers. The Position Papers would summarise the views of JustSpeak as explored in monthly meetings, and provide further research on the topics.
This paper emerges from a meeting held on Māori and the criminal justice system on Wednesday 2 November 2011. At that meeting, three guest speakers spoke about the issues surrounding this topic. This was followed by small group brainstorming about Māori and the criminal justice system around two guiding questions, and then reporting back on the group’s views as a whole. The views were written on a whiteboard, which was photographed, and small group brainstorming was recorded on large sheets of paper that were collected by the JustSpeak Steering Committee.

The analysis that follows uses these discussions as a springboard to explore bigger issues around Māori and the criminal justice system. After this introduction, the paper examines first how issues of Māori and the criminal justice system were highlighted in the 1980s, by Moana Jackson and others. In Part Three attention turns to the current place of the debate on these same issues, and whether progress has been made since the 1980s. Part Four summarises the ideas that were raised by the JustSpeak forum on Māori and the criminal justice system.

Parts Five and Six delve more deeply into the issues explored at that forum. Part Five develops some of the suggested solutions mentioned at the forum into more concrete policy proposals, and Part Six highlights further questions that need to be answered in the research literature so that policy can be more informed. The report closes with a brief conclusion, along with a bibliography.

Succinct statements of JustSpeak’s positions are set out above and throughout the paper.
Part Two: A Spotlight on Issues of Māori and the Criminal Justice System in the 1980s

In assessing how issues of Māori and the criminal justice system are currently being addressed, it is helpful to turn to some historical context. This paper does not provide a full historical account of how the colonial experience has shaped Māori outcomes in the criminal justice system. Instead, it examines in brief Moana Jackson’s 1988 report on Māori and the criminal justice system, He Whaipaanga Hou.¹ This was not the first report, nor the last, to touch on Māori over-representation in the criminal justice system. But it was the first report to provide a comprehensive overview of the challenges faced by Māori in interactions with police, prison officials, and the courts; and its content remains relevant irrespective of the work by other accomplished Māori researchers in the intervening years. This paper reviews Jackson’s report, both to encourage readers to review it and to highlight the insights thrown up by Jackson’s writing, which serve as a suitable starting point for this paper’s analysis. This review aims to track Jackson’s overall argument, and gives only a rough-and-ready guide to the nuances of his thesis.

He Whaipaanga Hou

Moana Jackson’s final report, which was released after the publication of a methodological paper outlining Jackson’s approach to research grounded in Māoritanga, begins by noting that fourteen months of consultation preceded the writing of the final report. The report does not seek to blame or condone, says Jackson, but instead to understand. Jackson observes that a Pākehā research method has in the past tried to employ overly simplistic causal explanations, for instance linking historical injustice to offending. More complex lines of causality are needed and made possible by a Māori research method; history must be

¹ Moana Jackson He Whaipaanga Hou: Māori and the Criminal Justice System – A New Perspective (Ministry of Justice, Wellington, 1988).
connected, for example, to trauma and dysfunction, which is then used to explain offending. Jackson attempts to reconstruct this more complex story.

The first section of the report offers an historical perspective. Pre-1840, the report says, Māori recognised rules as binding. Māori clearly had their own legal system; their own system of rights and duties. Concepts of muru and tapu, for example, gave rise to a legal system. Upon the arrival of Pākehā, Māori had positive expectations for European law. But violence intervened, challenging the Māori faith in Pākehā law. Despite the signing of the Treaty of Waitangi, Māori confidence in the law was further shaken by legislation such as the Māori Prisoners Act 1850, which did not allow trial for Māori before sanction. Other legislation showed promise for respect for te ao Māori, but more often than not this legislation was neglected or ignored. (A useful case study of this was the Constitution Act 1852, which allowed for “native districts” under s 71. However, these were never properly established.) Cultural harm was done, in part from the approach taken by settlers and the settler government to law.

After the wars of the 1860s much Māori land had passed into Pākehā hands through often questionable land sales and raupatu (confiscation). However, despite the consequent social dislocation and popular perceptions of their lawlessness, John Pratt and Donna Hall have noted that Māori were not disproportionately represented in crime statistics.\(^2\) It was not until after World War II, with the acceleration of urbanisation and consequent disintegration of Māori social fabric, poverty and high rates of Māori unemployment, that the Māori crime rate surpassed that of Pākehā. Explicit policies preventing building on Māori land, implementing “pepper-pot” housing, and suppressing the use of te reo Māori further disempowered Māori well into the twentieth century. This history of social and legal disenfranchisement forms the background for the writing of He Whaipaa nga Hou.

Turning then to existing problems with the criminal justice system, Jackson underscores that discretion is central to discrimination. The law is presented as culturally neutral, and discretion seems to uphold that neutral appearance, but in fact it allows institutional racism to fester. Such racism has, according to

Jackson, flared up in historical interactions with police at Parihaka and in Tūhoe lands. To make matters worse, racism – when identified – is invariably presented as an aberration. The Roper Committee had indicated that the police lack cultural understanding. Yet very little had been done since that Committee’s findings, says Jackson. The courts are also beset with flaws in their dealings with Māori. As physically unwelcoming places, they draw on Pākehā – not Māori – values. The law itself parallels certain Māori ideas, observes Jackson, but it is the application of the law (by police and by the courts) that is the problem. When the term “offensive” is applied, for example, if care is not taken, the application may take on a slanted cultural perspective. Concerns are raised by Jackson over the treatment of Māori by lawyers and juries. Further, Te reo Māori is mispronounced, reflecting disrespect for the language and the culture it represents. In addition, the Ministry of Justice can be alienating. Jackson says that monoculturalism infuses the way in which the system treats Māori.

For Māori individuals, it is almost inevitable that a sense of inferiority is internalised when they face such treatment. Self-worth is harmed. The individual frustration that emerges finds release in offending, and the societal disenfranchisement is evidenced in the disproportionate representation of Māori in rates of offending. Many Māori caught within the criminal justice system have few material resources and are themselves the victims of social injustice. To redress this problem, Jackson argues that Māori need to draw upon the wellspring of their own tradition. Spiritual strengthening may reduce cultural deprivation, and must be targeted towards urban Māori, as well. Many threads need to be drawn together to repair these tears in the social fabric.

It is important to recognise that greater cultural awareness alone will not change the incarceration rates of Māori. Further structural change to the legal system, and to law enforcement, is necessary. However, if structural change to the legal system is to occur along Jackson’s lines, tikanga Māori nevertheless must be encouraged and understood.

The Treaty relationship has often been defined by Pākehā. That must change. Genuine partnership is crucial. Māori thought after signing the Treaty that they would retain their mana, as is proven by reference to the many written records,

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such as those from the 1860 Kohimarama conference. That promise has not been kept, however. Jackson calls on society as a whole to be more empathetic, sensitive, and to face up to these historical challenges. The Pākehā community must be committed to a change of attitude – what is needed are interrelated, holistic remedies (matching the approach of te ao Māori) that give meaning to a bicultural Aotearoa New Zealand.

Examining more specific measures that might concretely reverse cultural deprivation to improve Māori performance in the criminal justice system, Jackson talks of advancing the use of te reo Māori through kura kaupapa and kōhanga reo schools, and studying tikanga further through the creation of a Centre for Cultural Research. The latter would allow the Māori community to define its cultural inheritance. Stereotypes need to be confronted, such as the view that Māori culture encourages secrecy around abuse, which perpetuates child abuse. At the same time, Māori must also take responsibility for crime and criminal justice (as all New Zealanders must). Furthermore, Māori support services need to be given greater prominence. According to Jackson, there is a lack of funding of Māori programmes and over-bureaucratisation. There should also be more Māori-run media. The regulation of alcohol and drugs and Māori health treatment (including treatment of mental health) must be given proper consideration; and wherever possible, official discretion should be minimised and adequately monitored.

In the next section of the report Jackson scrutinises more closely the legal system. Reiterating the point that Pākehā need to acknowledge monoculturalism and to accept that Māori law is relevant and adaptable, he turns to analysing how this approach would change various legal doctrines. Māori concepts are not used sufficiently in the criminal law, says Jackson, and the exclusion of Māori concepts from criminal law reflects a devaluing of Māori concepts. Incorporation of Māori terms may therefore serve a useful purpose. Caution should be exercised with laws against gangs, says Jackson, which might disproportionately affect Māori. Minor offences can also have a similarly disproportionate impact, and should for the most part be repealed. In the field of defences and sentencing, cultural defences based in Māoritanga are worthy of consideration, and increased use of reparation in sentencing may give effect to the principle of muru. To achieve some of these changes, Jackson suggests the creation of a Māori Law Commission, possibly accompanied by Māori Legal Services. This would respect the Treaty relationship (since Treaty partners have a right to contribute to laws that affect them) and might make the law more accessible.
Laws should change at the same time as institutions relating to the law are modified. Police need to acknowledge past prejudices, set up improved police complaints mechanisms, and have a permanent Māori support structure as well as additional Māori staff (who could relate more to their iwi). Police should generally not be prosecuting. In the education system, more should be done to ensure young people are aware of their rights, particularly when detained or questioned (further, rules should be modified to allow for whānau involvement in this process). Legal education should continue to change, and Māori law should be compulsory. A public defenders’ service should be set up, drawing on precedents in Australia and the United States of America, to ameliorate problems with the duty solicitors scheme. Jury rules should be revised, to allow for the possibility that Māori might be tried by an all-Māori jury (to guarantee trial by peers). Court staff should complete Māori education. There must be more Māori involved in the Law Commission.

Caution must be used when courts are hosted on marae: this may constitute a colonisation of Māori space. It is not good enough, says Jackson, for a pōwhiri and karakia to be said, and then for courts to conduct “business as usual”. Judges must be educated, and real thought should be given to allowing culture to be taken into account at sentencing. Moreover, diversionary schemes used by police must not get overly bureaucratised. Jackson proposes, imaginatively, that it be possible that cases be referred to Māori community groups. The Department of Justice does not escape Jackson’s scrutiny, either. It needs a cultural advisory group; affirmative action to secure employment of those who are expert in te ao Māori; a change in interview practices (to allow whānau support groups to speak to applicants’ qualities); a renewed commitment to biculturalism in training; and the use of secondments to iwi.

Most fundamentally, perhaps, Jackson says there may even be a need for a separate Māori system of criminal justice. People accept institutions, processes and sanctions when they have legitimacy. There is a real question, notes Jackson, around whether the current institutions, processes and sanctions have legitimacy for Māori. A separate system might resolve this legitimacy problem. Such a solution would not constitute separatism. It would constitute a commitment to equal results that are achieved through the use of different procedures. The “one law for all” model is not achieving equal results, and represents a system insensitive to difference. One side-effect of a separate system is that the general law might benefit from being informed by experiences in the Māori legal system.
The rights of Māori are not in doubt, says Jackson. Aboriginal rights exist; international law affirms these rights; and it is now widely acknowledged that the Treaty has legal standing. These factors must be translated into legal structures that Māori want, such as perhaps a Māori Law Commission, a Centre for Cultural Research, and a Māori sentencing panel. Tino rangatiratanga must be upheld, and monoculturalism needs to be rejected. Jackson closes by saying that the need for practical implementation of these ideas is a long-term project, but commitment to the validity of the overall approach is a short-term necessity.

**Enduring insights**

2. JustSpeak proposes that attention be paid to the interconnectedness of problems surrounding Māori and the criminal justice system, the possibly endemic nature of problems in the system, and solutions that are available to these challenges.

Moana Jackson’s report is comprehensive, detailed, and at times freewheeling in its diagnoses and prescriptions. Three aspects of the report stand out today, making it a useful reference point for any contemporary consideration of issues around Māori and the criminal justice system.

First, Jackson’s report raises many interesting questions about the interrelated nature of societal ills. Jackson uses the metaphor of a “weave” throughout the report, and this neatly illustrates his belief that issues of justice, healthcare, education, and history are linked. The connections Jackson draws are fascinating, and suggest that a broader vision of what is encompassed by “criminal justice” is appropriate and necessary. The connections Jackson draws should prompt hard thinking about how embedded the problems are, and how comprehensive the solutions have to be to address the more negative experiences of Māori in the criminal justice system.

Secondly, Jackson’s analysis sparks debate because of how deep his criticisms are of courts, the police, prisons, the public service, and other actors in the criminal justice system. Jackson is unapologetically blunt in his comments about the defects in attitudes and systems. This approach forces us to challenge our assumptions about the core tenets of justice. The uncompromising approach directs readers to investigate further whether the criminal justice system is as broken as Jackson suggests.
Thirdly, any reader would be struck by the breadth and depth of the solutions proposed in *He Whai paanga Hou*. Jackson’s report cannot be criticised for providing a sweeping critique and then omitting to look to solutions. Throughout he offers suggestions for how the criminal justice system might be changed to avoid the problems he identifies. Some of these suggestions relate to attitudes and values (but are not to be dismissed simply because such suggestions cannot be tied to obvious institutional solutions) – such as the claim that more Pākehā need to take responsibility for the deprivation of Māori people and the suppression of Māori culture. Others are much more concrete, such as the ideas pertaining to a Centre for Cultural Research and a Māori Law Commission. The sheer number of these suggestions enjoins us all to take this report seriously.

Jackson’s magisterial work, then, provides useful context for examining issues around Māori and the criminal justice system today. Are Jackson’s criticisms still relevant almost a quarter of a century later, in 2012? Has the New Zealand criminal justice system accommodated any of Jackson’s proposals? How would Jackson look upon the system today? Those questions are taken up in the next part.
Part Three: The Context Today

Statistical profiles of offending in New Zealand at present continue to reflect a trend of serious routine offending by Māori, vastly different to the Māori percentage of the population. Māori continue to be overrepresented at every stage of the criminal justice system. As well as disparities at the front end in the policing, charging and conviction of Māori, there continue to be differences in the outcomes imposed on Māori in the criminal justice system, with Māori accounting for over 50% of the prison population, but accounting for a substantially lower proportion of those serving home detention and community-based sentences. Māori are also overrepresented as victims. One salient example is that Māori women have a victimisation rate for sexual offending double the average for women overall. Without reciting the multiple statistics referenced in literature surrounding Māori and the criminal justice system it is sufficient to state that since Moana Jackson’s seminal report, the serious disparities and disadvantages that our criminal justice system perpetuates on Māori continue to confront New Zealand today.

Some Māori and Pakeha scholars, including Dr Pita Sharples, Sir Eddie and Sir Professor Mason Durie, have in recent times continued to advance the message echoed throughout Moana Jackson’s 1988 research: that access to and participation in a secure and healthy Māori cultural identity is central to addressing the crisis posed by Māori caught in a vicious cycle of poverty and harm. Notwithstanding this continued message by a few and the continued disproportionate outcomes for Māori in our criminal justice system, there continues to be little empirical research on these issues. As Sir Eddie Durie noted, there is “a gap in the state of criminology in New Zealand, [that gap being] the paucity of researched information in relation to Māori.” Much of the research which currently exists is scarce in its confrontation of the current systemic bias in our criminal justice system and focuses primarily on Māori needs and social disadvantage.

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4 Sir Eddie Taihakurei Durie “The Study of Maori Offending” (based upon an address to the New Zealand Parole Board Conference, Te Papa, Wellington, 23 July 2007).
As a result the actions taken regarding the kinds of changes that Jackson saw as necessary to make a profound difference have also for the most part been lacking. A lack of determination to confront the basis and causes of this disparity was evidenced in the debate preceding the recent general election, where discussion of Māori and the criminal justice system barely entered the fray. Dr Pita Sharples of the Māori Party did, however, bring this issue into the spotlight in the lead-up to the 2011 election, calling on New Zealand to have the courage to be honest and look at the systematic discrimination that the justice system perpetuates on Māori, if we want to be able to improve its fairness. He suggested in a New Zealand Herald article\(^5\) that a review of the entire justice system is required in order to confront this issue. He stated, that in reviewing the justice system, we will need to consider how it encompasses te ao Māori, tikanga Māori, and mātauranga Māori – principles and practices of Māori justice.\(^6\)

Ideas of justice and fairness shouldn’t be limited to monoculturalism but reflect the bicultural partnership our country was founded on and the many cultures that make up our diverse society … justice is a right of all citizens, regardless of race and creed. If we can all agree that the justice system needs to be fair then let us have a debate, and let us confront these issues together so we can move forward.

Dr Sharples suggested that there is a higher sense of ethics and fairness that we as a nation need to achieve. If we are to attempt to change our justice system to achieve a more just Aotearoa, we need to understand the way social and cultural dynamics such as attitudes, biases and prejudices are produced and reproduced in our justice system. We need to understand the ways in which these dynamics impact on how different parts of New Zealand society, in particular Māori, experience justice; and the way these dynamics are normalised in our society.

Although many of the very criticisms that Moana Jackson identified over 20 years ago are still clearly present, today there have been several successful justice


\(^{6}\) Ibid.
policies and reforms of late focused on Māori, many of which are precisely those suggested in *He Whaipaanga Hou*. These are discussed below.

**Positive trends**

*Statutory reform*

In the past decade there has been a general movement towards restorative justice, along with sentencing principles that encourage reparation and the recognition of victims’ interests (as in s 7 of the Sentencing Act 2002). The Victims’ Rights Act 2002, for example, encourages victims and offenders to meet, in accordance with the principles of restorative justice and the tikanga concept which requires that disputes be resolved kanohi ki te kanohi: face-to-face. Additionally, s 27 of the Sentencing Act 2002 allows an offender appearing for sentence to call a witness to address issues involving their ethnic or cultural background that may have impacted upon the commission of the offence. Such movements have been more accommodating to Māori concepts of justice.

Unfortunately, however, despite several references to restorative justice in the Sentencing Act, the concept continues to sit uncomfortably with the overriding concern for consistency in sentencing outcomes, among other considerations. In this environment, sentences which fit better with Māori principles of justice by restoring equilibrium between victim and offender and are tailor-made for the case must give way to the need for sentencing consistency.

*Māori focused sector changes*

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

*Public Defence Service*

Another suggestion of Moana Jackson’s 1988 report that has come into existence today is the creation of a Public Defence Service. The Public Defence
Service was established in the Auckland and Manukau courts in 2004 to provide publicly-funded, high-quality criminal defence services as an alternative to private lawyers funded by legal aid. After the success of the pilot, the PDS was made permanent in those courts in 2008. Promisingly, a 2009 review found Māori and Pasific Islanders appeared to experience no comparative disadvantage under the PDS.\(^7\)

It has since been expanded to many courts throughout New Zealand. A particular focus of the PDS is training and professional development. Since its commencement, the PDS has also benefited from attracting staff who reflect the diversity of the legal aid client base, including Māori, Pacific Island, and Asian lawyers and administrators. A formal independent evaluation has found that the PDS achieved cost savings with no difference in outcome for the clients as measured by overall conviction rates. It also found that the PDS maintained or improved the quality of legal services. It should be noted that comparative experiences in other jurisdictions with similar schemes underscore the fact that any such scheme must be adequately resourced.

**Māori Television**

Also in line with Moana Jackson’s suggestions for Māori-run media, and advancement of the use of te reo in order to concretely reverse cultural deprivation, has been the creation of Māori Television (TV). New Zealand’s national indigenous broadcaster, Māori TV was established as one of a number of important initiatives to promote and revitalise the Māori language and was founded under the Māori Television Service Act 2003 (Te Aratuku Whakaata Irirangi Māori). The aim of the channel is to play a major role in revitalising language and culture that is the birthright of every Māori and the heritage of every New Zealander. A key initiative undertaken in early 2008 was the launch of a second channel – named Te Reo – which broadcasts in 100 per cent Māori language during prime time. The aim is to better meet the needs of fluent Māori speakers, Māori language learners and to enable New Zealanders to have full immersion Māori language households. If this aim were achieved the consequent

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decrease in social and cultural disenfranchisement experienced by many Māori would likely have flow on effects in the criminal justice sector.

*Rangatahi courts*

A recent judicially-led initiative surrounding issues with Māori and the criminal justice system is the introduction of marae-based rangatahi courts. Their purpose is to better link Māori young offenders with their culture and the local Māori community. The rangatahi courts arose from profound concern with the disproportionate involvement of young Māori in the youth justice system (and are discussed further below).

*Family group conferences*

Since Moana Jackson’s report, New Zealand has also seen the introduction of family group conferences. These were originally used to allow social work practice to work with and not against Māori values and culture. The Children, Young Persons, and Their Families Act 1989 made such conferences a central part of practice and services where serious decisions about children are to be made. The family group conference involves the whole whānau helping to make decisions about the best way to support the family and take care of their child. It is a formal meeting in which the whānau of the child and professional practitioners closely work together to make a decision that best meet the needs of the child. The process has four main stages, which include: a meeting where professionals inform the family of the concerns they have, followed by private family time, where the family alone develop a plan that addresses the concerns that have been raised; the plan is then presented to the professionals who should support it if the concerns have been addressed and it does not put the child at risk.

*Māori focus units*

In the sphere of corrections, efforts have also been made to decrease the cultural deprivation that many Māori experience. One example of this is the creation of Māori focus units. The first Māori focus unit opened at Hawkes Bay Prison in 1997 and others have since been opened at several prisons throughout the
country. The aim of these units is to reduce an offender’s risk of re-offending by helping participants to understand and value their Māori culture and its evolution, how this culture influences themselves and their families; and learning how to apply the principles of tikanga Māori to thoughts, beliefs and actions. Research evaluating the performance of these focus units has indicated that participants gained significant knowledge and skills in tikanga Māori, leading to stronger cultural identities. For most inmates, this has resulted in a major attitude change, and a renewed commitment to rehabilitating with whānau, hapū and iwi, and lower rates of reoffending than for other prisoners.

Reducing reoffending programmes and whānau support systems

At the far end of the criminal justice system spectrum, there has also been change in the way offenders are dealt with post-conviction, particularly when prisoners complete custodial sentences. One of the key objectives of the recent past has been to reduce Māori offending through increasing connections with offenders’ Māori culture and whānau support systems. Initiatives include the Department of Corrections’ Framework for Reducing Māori Offending, and the recent Whānau Ora programme. Whānau Ora is an holistic and inclusive approach to providing services and opportunities to families across New Zealand. It empowers families as a whole, rather than focusing separately on individual family members and their problems. It requires multiple government agencies to work together with families rather than separately with individual family members. It will be available to all families in need across New Zealand.

While we reiterate the need for wider structural change, both within the criminal justice and the wider socio-economic sectors, for Māori worldviews to inform the law making process; we believe that more culturally appropriate processes are a good starting point and facilitate the education and cultural change that needs to accompany structural change.
### Ongoing deficiencies

3. *JustSpeak believes that while some of Jackson’s suggestions have been implemented, many facets of his analysis have been ignored and current policies fail to grasp the depth of the challenges around Māori and the criminal justice system.*

4. *JustSpeak believes individuals who have offended in the past, particularly Māori, should be empowered to speak about their experiences, and their cultural experience within the criminal justice system.*

Over 20 years ago, Moana Jackson’s powerful report on Māori and the criminal justice system led to the demand for a separate justice system for Māori, with jurisdiction and authority over the people. Despite the positive attempts at addressing the issues confronting Māori and the criminal justice system, none of these reforms to date have come close to achieving this aspiration. Moreover, some of the most significant suggestions in Moana Jackson’s report have continued to be ignored, such as setting up organisations fundamental to guarding Māori interests in the criminal justice system, like a Māori Law Commission, Māori Legal Services or a Centre for Cultural Research. There has also been substantial criticism by some Māori, including Moana Jackson, about some of the aforementioned policies and programmes, particularly the promotion of marae justice and family group conferences being labelled as “Māori processes”.

Criticisms are generally centred on two issues: first, the authenticity and origin of these processes; and secondly, their deferential place in the legal system. In relation to the first criticism, Moana Jackson has suggested that many of the purportedly “Māori” aspects of marae justice and conferencing are actually Crown-imposed values and processes.

As this Part of the paper has attempted to illustrate, whilst the past 20 years has seen significant developments in the time and resources expended by government through its various agencies to deal with the “issue”, there are still many and varied aspects to the problems faced by Māori in criminal justice system. Some of these developments have yielded positive results. But there needs to be better coordination of the targeted programmes and interventions across all sectors to provide a more holistic approach and a broader discussion.
And any such programmes and interventions need to be adequately and consistently resourced.

The following parts of this report will canvas the JustSpeak forum on this very topic and the policy proposals and further questions that arose from that meeting, in an attempt to offer up both food for thought on this topic from a youth perspective, and meaningful suggestions for steps ahead.
Part Four: Summary of JustSpeak Forum and Discussions

On Wednesday 2 November 2011 JustSpeak held a forum on the topic of “Māori and the Criminal Justice System”, which was to form the basis of this written report on the subject. Three guest speakers spoke: Chuck Harris, a young Māori man who has had experience with the criminal justice system; Judge Andrew Becroft, the Principal Youth Court Judge; and Justice Joseph Williams, High Court Judge. This was followed by discussion in small groups in response to the ideas sparked by the speakers. The account below is based on notes taken on the night and a written record of the entire group discussion at the conclusion of the night.

Guest speakers

Chuck Harris spoke first of the guest speakers. Chuck recently completed time in prison. He reflected on how he was treated there as a young Māori male – and what he believes are the crucial factors contributing towards rehabilitation. He talked of healthy relationships as being central in desisting from crime. Beyond those relationships, there was a need for Māori individuals to get back in touch with their culture, Chuck said, which (properly understood) does not involve
fighting or swearing. He observed that Māori programmes in prisons worked in helping him to feel a sense of rehabilitation, as did faith-based programmes, which allowed him to “grab some hope” from God as well as from his cultural background.

Judge Becroft spoke next. He noted that the statistics around Māori and the criminal justice system are well-known, and represent an indictment on our system. We need to face up to some probable causes such as our “colonialised past and apparently systemically biased present”, Judge Becroft said, and we need to acknowledge that many young people will have their views coloured by such systemic bias. Judge Becroft also distributed a paper on “Practical Ideas for Addressing Māori Youth Offending”, prepared by the Youth Justice Independent Advisory Group in 2009, in response to a request by senior government ministers. Judge Becroft went through parts of the paper.

Emphasis is placed in the paper on improving cultural connectedness for Māori young people because “connectedness” appears to build resilience and reduce risk. Such connectedness must be encouraged from an early age. There also must be further research on effective approaches for Māori youth offenders. A range of solutions is suggested in the paper: including improving school retention and career planning for young Māori women; targeting teen parents in the Youth Court; paying attention to the performance of Māori boys at school (and minimising suspensions and exclusions); extending cultural programmes in the Youth Court; giving ethnicity more importance when deciding on diversion; improving Child Youth and Family (CYF) residential practice; and considering adopting a Canadian statutory provision, which allows specific consideration of indigeneity in sentencing. Judge Becroft enjoined young people to be radical and active in their thinking on issues relating to Māori in the criminal justice system.

Justice Joseph Williams observed the common community perception that Māori are “the problem”. Justice Williams pointed out that the issue of Māori incarceration is distorting New Zealand’s incarceration rates, and preventing us from achieving Scandinavian-style imprisonment rates. The situation is getting worse and worse in line with changing demographics: it is now common for everyone in court to be Māori, except for the judge and court-related officials, and disproportionate representation is becoming part of who we are.

The issue must be resolved now, or Aotearoa is destined to be crippled by it, said Justice Williams. There is systemic bias and ignorance in our modern systems of criminal justice brought about as Māori in the 19th century lost the power to
control their own affairs. The “one law for all” model must be debated and challenged. To be sure, there is no difference culturally in what wrongs are, but there does need to be a difference in the approach to dealing with them, the punishment that is appropriate, and the attitude taken towards family responsibility. In questions and answers after Justice Williams’s speech, he underscored that the problem had become too large a problem for Māori alone to resolve. Pākeha must be committed to the problem too: passive support is not enough.

**Small group discussion**

Small groups, provided with the stimulus of these guest speakers, brainstormed the issues, focusing their discussion around two questions:

- What practical solutions exist to the problems raised?
- What can we do as young people to contribute?

Ideas developed by the groups were then discussed amongst the larger group at the end of the session.

Diverse ideas were raised by all the groups. Addressing solutions initially, several groups discussed the need to break the cycle of Māori offending – to break down the “revolving door before it’s too serious”. This could be done through greater education, rehabilitation, community identity, and understanding. One group noted the political difficulty of some of these changes, but emphasised that to achieve them, barriers need to be broken down in the community at large, so that a more preventative approach can be taken. A number of groups discussed a parallel legal system for Māori (perhaps with an opt-out, opt-in mechanism), noting though that this would require trust and understanding in the community. Other ways to integrate tikanga Māori into the
criminal justice system were also floated. A more “bottom-up approach” was needed to re-establish cultural links for offenders, said one group; another suggested building on the model of family group conferences, and referred to the closure that can be provided by the authority of a kaumātua being involved. Solutions aside from the integration of tikanga Māori into the criminal justice system were also toyed with. The treatment of younger offenders as adults was pinpointed as a move that harmed Māori in particular; it was emphasised, as well, that crime should be addressed within the community (to allow for support from family and an opportunity for a victim’s family to explain the impact of a crime, in a manner akin to family group conferencing). Another group centred their discussion of solutions around prison, the courts, and police. On prisons, it was said that a new identity or culture in the place is needed; it is becoming too familiar a place for youth. The courts are old and stale from the perspective of many, too, and the Youth Court is a much better environment that could provide a model for change, said this group. As for the police, more education is needed to ensure sensitivity to ethnicity (given that many police are male and Pākeha) and awareness of statistic

Turning to what we can do as young people, groups overlapped in their focus on the need to change and challenge perceptions, so that racism and negativity towards Māori can be combated. They also said that institutions, and especially law schools, should be encouraged to teach more about these issues. Starting small, it was agreed, could be a good thing. In a place as small as New Zealand, every conversation can make a difference, and we can achieve small amounts of change just by challenging stereotypes whenever we hear them, and avoiding a sense of fatalism whenever that arises. We are not immune from bias, and identifying our own assumptions was also thought to be important. We can further contribute by focusing on positive stories relating to Māori and the criminal justice system, since there is such an overwhelming emphasis on the negative in the media and in policy. Ultimately the groups reached a consensus that we need to take up a sense of responsibility, and see Māori issues in criminal justice as our shared problem, which we will have to act to resolve in the coming years.
Part Five: Policy Proposals arising out of Discussion

This Part builds on the ideas floated during discussions at the JustSpeak forum in an effort to gesture towards some solutions (in the form of policy proposals) to the problems around Māori and the criminal justice system. It takes several of the ideas raised and supplements these ideas with research in order to create a policy platform in response to issues concerning Māori and the criminal justice system. This Part aims to illustrate that, for all the dispiriting statistics, the challenges surrounding Māori and the criminal justice system are not intractable. It also highlights that more solutions-based thinking is needed, and it is hoped that this Part might be a catalyst in the development of solutions by encouraging a new generation of thought and prompting further contributions to the debate.

Positive showcasing of successful policy

6. JustSpeak proposes that greater emphasis be placed by government and media on the showcasing of success stories and positive attitudes in the area of Māori and the criminal justice system.

At the JustSpeak forum many expressed the view that there appears to be a focus in New Zealand by the media, politicians and general public on the failures and negative aspects of our criminal justice system. Most agreed that there are very rarely criminal justice success stories showcased in the media, particularly those surrounding Māori. The group asked: what hope is there for change in the outcomes the system generates when the stories that are constantly told are stories of failure?

Harry Tam, a policy manager at Te Puni Kōkiri who spoke at a later JustSpeak forum on gangs, has also emphasised this idea, asking: “Why should the public believe rehabilitation is possible when the stories they are confronted with every day of the week are about failure?” In his view the more we, as a nation, talk about the success stories, the more likelihood there is that the public will actually commit to the idea of rehabilitation and believe that it is possible.

It is clear that public attitudes about crime, including perceptions about Māori and crime, play a significant role in fashioning criminal justice policy. As in other jurisdictions, politicians from across the spectrum have sought political capital from adopting a tough on crime stance, and have failed to fully endorse alternative approaches, such as those offered by Jackson – which focus on the root causes of crime in our society and the rehabilitation of those who enter the system. In particular, this is due to public perceptions surrounding crime, and the political risk, such approaches require.

Current societal concern inevitably also reflects the amount and type of media coverage – particularly that given to the most violent and distressing crimes. Recent New Zealand data on televised news coverage showed that on average about 20% of the main television news stories were about crime and about half were stories that dealt with either crime or disaster. It is not only the amount, however, but also the type of coverage, that is the problem. Much of this media and political attention also tends to increase the systemic bias towards Māori in the system. One example of this is the constant reference to the high proportion of abuse against Māori children, which fails to highlight similar issues amongst Pākehā and other ethnicities.

Lord Falconer, previous Secretary for State for Justice in the United Kingdom, has stated: “... an effective penal policy is one in which the public has confidence and where communities can see that justice is being done. But it is much more than that. They must see that the system delivers real reductions in re-offending .... The public needs confidence that they are being kept safe from harm, while offenders are not only being effectively rehabilitated but their offending behaviour addressed.”

In our view a lot of the debate in criminal justice needs to be focused on how it is possible to reduce offending and rates of reoffending. As such, alternative policies and programmes offered to try and solve the issues surrounding Māori and the criminal justice system need to be better publicised. This is especially so when achievement is proven in order to educate the public about the effectiveness of such policy. JustSpeak proposes that there is an important role for the media to play in the positive showcasing of successful policy and within

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that the success stories of individuals. Such coverage would give the public the confidence and in turn politicians the mandate to pursue rehabilitation and alternative approaches to criminal justice policy. Examples of such policies include the rangatahi courts and Māori focus units, a google search of which shows little media attention.

Just as Jackson’s report raised many interesting questions about how interrelated different societal ills are, JustSpeak suggests that there is an equally strong weave between: the focus on failure and the lack of showcasing of positive stories regarding Māori and the criminal justice system, and the policies that Members of Parliament feel they can legitimately pursue. If the public, however, is exposed to more success stories, including the success of new policies which involve incorporating Māori concepts of justice into our criminal justice system, then the public will gain belief in such policies which may in turn lower the political costs for those politicians willing to pursue them. A realisation of this weave should prompt hard thinking about how embedded our focus on failure is, and how comprehensive solutions to the issues around Māori and the criminal justice system will need to be. They will have to include educating the public as to how and why these policies can work. In our view one way to do this is by bringing about a change in our culture which appears fixed on highlighting the negative stories in our criminal justice system by showcasing more positive stories.

Individuals building on this theme of positivity might consider at greater length how the showcasing of success stories could be spurred on in practice. Some ways to make this positivity more concrete include: the development of a competition for journalism students (who may later become leading journalists) on positive stories of rehabilitation; an essay competition for school students (who may grow into the leaders of tomorrow) on ways in which rehabilitation might be advanced in the New Zealand criminal justice system; or the public funding of films focused on individuals who are “desistance success stories”.

We believe JustSpeak can contribute to this goal through blogs, press releases, and select committee submissions. JustSpeak also believes that the government needs to take an active role in changing public attitudes and misconceptions. Thus, JustSpeak believes that the government should actively commit to showcasing success stories in relation to successful rehabilitation initiatives by forming partnerships with progressive media sources, such as Māori TV. However, we also believe that a corresponding change is necessary in our
political culture – both the way in which the public engage with the political, and the way in which politicians garner support from the public.

Using the law as a positive force

Policy proposals should not be directed at the media or citizens alone. Policy makers, lawyers and judges should ensure that the existing law is used properly to reverse the trends and avoid the over-incarceration of Māori. Further law reform efforts should focus on areas where the law is deficient in dealing with the disproportionate impact of the criminal justice system on Māori.

One avenue in the existing law that may prove fruitful, but is neglected, is s 27 of the Sentencing Act 2002, which enables a sentencing court to receive evidence or advice on cultural factors affecting the offending, the offender or any proposed sentence. The offender can request that persons be called to speak on: their personal, whānau, community and/or cultural background; the way in which that background may have related to the commission of the offence; any cultural processes that have previously been tried to resolve issues relating to the offence; how support from the whānau and community may help to prevent further offending; and further how their background may be relevant in respect of possible sentences. The Court of Appeal has said in relation to this provision: "Community support for rehabilitation may be very relevant to the nature and length of sentence .... Moreover a Court must be astute to recognise the valuable assistance it may obtain from another cultural, ethnic or community insight, including on matters of penal concern".¹⁰

Moana Jackson in his formative report suggested that judges must be educated and real thought should be put into allowing culture to be taken into account at sentencing. It is thus disappointing, given the fact that there is now statutory and judicial recognition of the role that Māori culture can play in the sentencing process, that the opportunity to make use of this provision is rarely taken by defence counsel. Whilst real challenges do exist for counsel and judges wishing

to bring such considerations into their court work with integrity and intelligence, both should be challenged to turn their minds to such evidence when developing the most effective sentence. Incorporating Māori principles of justice which recognise both integral reasons behind the individual’s offending and suggest meaningful proposals for their rehabilitation provides the Court with a powerful tool to engage in an effective sentencing process. JustSpeak challenges those involved in the adjudicatory and sentencing process to harness the potential of this provision.

A second legal hook for mitigating Māori overrepresentation in the criminal justice system is s 8(i) of the Sentencing Act, which notes that a court “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”. This is not a discretionary provision. It requires a sentencing court to take into account cultural background, with the reference to the need to take into account whānau suggesting that the drafters of this provision had Māori in mind. It is possible that this provision could be used by lawyers and judges as a way to prevent systemic bias in sentencing and to acknowledge the impact of historical injustices on Māori offending today.

A recent decision of the Canadian Supreme Court, Ipeelee v R 2012 SCC 13, analysed an analogous provision of the Canadian Criminal Code. Section 718(2)(e) of that Code says that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” The majority decision of the Canadian Supreme Court affirmed at [59] of the judgment that s 718(2)(e) is “a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.” It is certainly arguable that s 8(i) of our own Sentencing Act should have similar effect. Granted, it does not refer specifically to Māori offenders. But an analogous ameliorative impulse drives behind s 8(i). The provision is at least worthy of greater consideration from judges and lawyers, particularly in light of the Supreme Court of Canada’s forthright decision.

These legal hooks are but two examples. What is needed, more generally, is an attitudinal shift. While the law has historically been a tool of significant oppression for Māori in many areas, lawyers and judges committed to resolving issues around Māori and the criminal justice system must attempt to see the law
as a force for good in the fight to reduce Māori offending and disproportionate rates of Māori imprisonment. This may entail lawyers and judges taking greater responsibility for systemic problems, and considering how these may be addressed through creative argumentation in individual cases. In the absence of that sense of heightened responsibility, the very legitimacy of our criminal justice system could be at risk.

A Māori lens for policy

8. JustSpeak suggests that in the creation of criminal justice policy a Māori lens is always used so that criminal justice policy does not have an unintentionally disproportionate impact on Māori.

A third proposal, which has less of a legal tint and is designed more for the policy arena, is that all new criminal justice policy should be required to consider its impact on Māori and the Crown’s obligations under the Treaty of Waitangi. This solution responds to the problem that it appears as if, in some cases, policy has unintended consequences for Māori. An example of such unintended consequences is the recent reduction in New Zealand to the age of criminal responsibility for serious child offenders, through the Children, Young Persons and their Families (Youth Courts Jurisdiction and Orders) Act 2010.

Discussions around the age of criminal responsibility should focus on accurately reflecting the limited culpability of the young person who offends. This culpability in turn needs to reflect the developmental immaturity of the individual. However, in setting a specific age for bringing such serious offenders into the criminal justice system, those individuals who are inherently more immature due to developmental features unique to them are still expected to accept responsibility for their actions. Many of the serious child offenders that will be captured by this lower age of responsibility are likely to have an intellectual disability, learning difficulties or poor achievement due to specific factors such as Foetal Alcohol Syndrome or family/life circumstances, including disengagement with their culture, and lack of formal education. As a result, these young people are chronologically aged 12 or 13 years, but mentally are much younger than this. These unique characteristics appear most predominantly in young Māori, yet little consideration seemed to be given to the disproportionate effect such legislative change would have on Māori.
The Ministry of Justice could incorporate into its policy development processes a step that examines the possibility of such unintended consequences (based on existing policies of an analogous nature) and suggest alterations to the policy which take these consequences into account. The new approach would have to be taken on not only by policy-makers in the Ministry, but also by politicians, who would need to adopt a vigilant stance to ensure that certain policy is not disproportionately harming Māori. Further, tikanga Māori should be a key consideration in determining the nature of the impact on Māori.

This solution makes good sense, in that it would seem to be an effective way to improve policy delivery. However, it is also justifiable in terms of the obligations that lie on the government in terms of the Human Rights Act 1993 and the Treaty of Waitangi. Under s 65 of the Human Rights Act 1993, the government must not discriminate indirectly against citizens; that is, it must not act in a way that has the effect of discriminating, even if that is not the intention of legislation or executive behaviour. Guaranteeing that justice policy is screened to avoid discriminatory effects would contribute towards government fulfilling its obligations in this regard.

The Treaty also arguably requires this screening, in at least two ways. First, Article Three of the Treaty provides Māori with rights of equal citizenship. Equal citizenship may be imperilled by policy that has a differential impact on Māori which may lead to societal disenfranchisement, such as through disproportionate imprisonment. A process that allows all criminal justice policy to be viewed through a Māori lens might be a useful attempt to strive towards protection of Article Three. Sir Professor Mason Durie argues that the social inclusion that accompanies equal citizenship requires “the right to develop as Māori people, to speak the Māori language, to learn from the Māori knowledge system and to live within Māori cultural values.”\(^\text{11}\) Therefore for this obligation to be met any assessment of differential impact on Māori should account for the right of Māori to develop as Māori.

Secondly, Article Two secures for Māori te tino rangatiratanga - the unqualified exercise of chieftainship, which Sir Professor Hugh Kawharu explains would have been understood at the time of the Treaty’s signing to be absolute control in

\(^{11}\) Mason Durie, “Progress and platforms for Māori educational achievement” (Hui Taumata Matauranga Māori Education Summit, Turangi and Taupo, 23-25 February 2001).
accompany with Māori custom.\textsuperscript{12} That authority for Māori may be supported by a condition that all criminal justice policy respect tikanga in its design and implementation, and take into account its particular impact on Māori. This proposal, therefore, has a strong justification in statutory law as well as in the terms of the Treaty of Waitangi.

It would be important, of course, that this proposal not collapse into a perfunctory box-ticking exercise undertaken by Ministry officials. To avoid this, the proposal would have to be accepted wholeheartedly, and leadership from public service chief executives might be necessary to ensure that the values underlying the policy were understood and underscored. For the impact of criminal justice policy on Māori to be properly measured, there would also be a need for specialist expertise in the Ministry of Justice (and perhaps other ministries). Individuals with a background in empirical research might prove valuable, as well as those with a understanding of tikanga Māori (who might be able to evaluate the impact of policy on Māori cultural values). Increasing the te reo and tikanga Māori proficiency of our public servants is obviously a necessary step, and would bring us into line with other bicultural and bilingual nations such as Canada. If that expertise were carefully managed, this proposal might have the added benefit of giving effect to one of Moana Jackson’s recommendations in \textit{He Whaipaanga Hou}, which was to infuse Ministry of Justice (or the Department of Justice, as it was in 1988) processes with tikanga Māori.

We also think other mechanisms should be investigated. We strongly endorse Moana Jackson’s call for a Māori Law Commission. We recommend that a pilot be run in partnership with the existing Law Commission. We also suggest that in the upcoming consideration of constitutional issues, thought be given to the possibility of a mechanism (akin to s 7 of the New Zealand Bill of Rights Act 1990) requiring the tabling of legislative and policy impact statements that consider whether Māori are disproportionately affected (and thereby Treaty obligations breached) by proposed legislation.

\textsuperscript{12} I. H. Kawharu, “Treaty of Waitangi - Kawharu Translation” (2011) Waitangi Tribunal - Te Rōpū Whakamana i te Tiriti o Waitangi:

Conversations and change on a small scale

9. JustSpeak believes that consideration should be given to ways in which conversations and small-scale change can be fostered on issues of Māori and the criminal justice system.

JustSpeak’s view is that greater public education is the key that may unlock the door to a more informed debate on criminal justice in New Zealand. Citizens are not predisposed against rehabilitation and more reintegrative measures for offenders. Many New Zealanders merely oppose such measures because of the information that is available to them about crime, and their resulting perceptions of rehabilitative and reintegrative policy. It is JustSpeak’s belief that if there was better dissemination of information, members of the public might have different opinions about the need to promote rehabilitation over prison and other punitive measures, especially in relation to offenders identifying as Māori. The more difficult question is: how can such information be disseminated? “More education” is a common catch-cry. But how can it be achieved?

Part of the answer may lie in making the most of New Zealand’s smallness. In numerous countries, significant change to people’s attitudes would not be possible without a pervasive, well-funded, far-reaching education campaign. However, in New Zealand, where it is said that just three degrees of separation lie between any two people, it might be that more change is possible through small-scale activism and discussion. If that is the case, greater faith could be shown in the power of rippling conversations, as opposed to large-scale advertising. What would be needed would be a critical mass of well-informed and well-connected individuals to be committed to reaching out to their communities to explain the evidence base on rehabilitation and the efficacy of incarceration.

Formal and informal mechanisms alike could be used to start this process of small-scale change. In the lead-up to the 2011 election the New Zealand youth climate change group Generation Zero experimented with encouraging “climate conversations” around the country to raise awareness of climate change. NGOs working in the criminal justice field – like the Howard League for Penal Reform and Rethinking Crime and Punishment – could call on conversations about Māori and the criminal justice system in a similar, informal way. More formally, politicians could endorse the need for these discussions to be had. One idea would be for discussions of this kind to be invited in the week following Waitangi Day; another idea would be for Māori Language Week to be accompanied by
conversations about how Māori rates of incarceration might be reduced. Ultimately both of these proposals run the risk of painting Māori issues (around the constitution and te reo Māori) in an overly negative light. Consequently, these proposals should be coupled with our earlier suggestion that success stories around Māori and the criminal justice system be highlighted. All in all, more thinking needs to be done of this sort to consider when conversations could be formally encouraged, to use small-scale networks to initiate broader change. There is some truth in the words of the song written by Paul Kelly and the Messengers about the struggle for indigenous land rights in Australia: “From little things, big things grow.”

These policy proposals inevitably form only part of the solution to the challenges of Māori and the criminal justice system. Because JustSpeak’s expertise does not lie in the design or evaluation of interventions in the education or justice system, there has been less of a focus on these interventions, for instance, but their continued use and funding will also be a necessary part of reducing Māori offending and improving the statistics surrounding Māori and the criminal justice system. There should be additional consideration of how structural change can be achieved in the criminal justice system, as well, bearing in mind Moana Jackson’s diagnosis of the problems. The proposals outlined are, we accept, only incremental changes, which we hope can contribute to bigger, structural change. The proposals described above purport only to be fresh ideas, from the perspective of youth – and they do have the advantage of stretching out across many parts of the criminal justice system, affecting the media, policy-makers, lawyers, the judiciary, and the citizenry.
Part Six: Further Questions

This Part charts out a partial programme for future research conducted in the area of Māori and the criminal justice system. Answering all the lingering questions raised by the preceding analysis would require a well-resourced team of researchers with comprehensive access to information. This Part does not attempt that task. Instead, it uses the insights garnered from the JustSpeak forum discussions and the follow-up analysis to suggest what research is required to begin resolving issues around Māori and the criminal justice system. It is hoped that policy-makers, NGOs, and others could use these suggestions as starting points when conducting their research.

Greater interdisciplinary research

10. JustSpeak proposes that further interdisciplinary research be conducted into Māori and the criminal justice system.

At the JustSpeak forum, members were cognisant that the term "criminal justice" encompasses much more than the police, courts and corrections arms of the executive. One point that is obvious is how interrelated the different societal problems are surrounding Māori and the criminal justice. The group felt that both a broader vision and wider cross-disciplinary research are necessary and appropriate in order to create solutions to these multi-faceted issues currently facing Māori.

There is currently a gap in the all-encompassing research of the type attempted by Moana Jackson, and suggested both by Dr Sharples and the members of JustSpeak. There is also inadequate data collected on these issues, and that which is collected is not acquired or presented in a manner that makes it useful for those working across the sector. As such it is suggested that it is integral that further interdisciplinary research, and more high quality, comprehensive data collection across government departments and interest groups, particularly those in the Māori community, takes place to ensure effective policies are established rather than band-aid solutions that momentarily deal with one symptom, without dealing with the root cause. One department or group cannot tackle this issue alone. There must be a concerted effort across the board first to undertake and fund such research, but also to commit to developing integrated and holistic
solutions for the social disenfranchisement and disproportionate rates of prosecution and imprisonment of Māori.

Research across all disciplines – from the sciences to education, from law to social policy – is essential to understanding the interconnected nature of the issues Māori face today. Organisations, departments or individuals wishing to engage in interdisciplinary research might consider at greater length creating a team with representatives from different disciplines to review the entire justice system in order to confront these multiple and overlapping issues.

Most saliently, however, the group was generally of the view that despite some positive evaluations of government strategies, ultimately the solution to dealing with Māori offending must, at the very least partially, come from Māori, and be rooted in mātauranga and tikanga Māori. Therefore any interdisciplinary research must have meaningful Māori participation and must be prepared to be open to kaupapa Māori ways of performing research and Māori views and concepts of justice. A body seemingly well-placed to lead such research would be Ngā Pae o te Māramatanga, which has worked across disciplines with a commitment to a Māori research methodology.

One way in which such interdisciplinary research could be coordinated, with a focus on Māori principles of justice, is through the creation of a publicly-funded Centre for Cultural Research, as was suggested by Moana Jackson. A body such as this could direct research and funding into broad-based research into structural problems within the justice system which impact upon Māori, in order to suggest more comprehensive solutions to these problems. This may overlap with existing groups such as Ngā Pae o te Māramatanga, and careful effort would have to be made to avoid duplication or wasted resources.

More solutions-based research

11. JustSpeak recommends that research in this area places emphasis on solutions.

There also appears to be a scarcity of research into effective interventions – “what works” – for the rehabilitation of Māori offenders in the New Zealand context. Nor have we come across much specific research that is aimed at attempting to provide solutions to the structural problem of the overrepresentation of Māori in the system, including the systemic bias that currently exists.
There is a need to focus on proven effective practice and interventions. We recommend, as a key priority, that solutions-based research be conducted. Solutions-based programmes that have been accepted by other cultures should also be looked into, such as the Navajo court system in the United States (which is the largest and most established tribal legal system in the world). To this end, it is recommended that solutions-based research should encompass programmes that have a high cultural component and build on successful programmes elsewhere.

However, JustSpeak is also of the view that given this lack of research in the New Zealand context, some considered risks with the introduction of innovative and untried initiatives should be taken, which at the very least will add to our body of locally generated knowledge. This is particularly important in the context of ‘by-Māori, for-Māori” initiatives, in which Māori communities design, develop and deliver their own services. As has previously been posited throughout this report, without an attempt to achieve a positive solutions focused system we will continue to fail to deal with the disproportionate effect the system has on Māori, and the root causes and symptoms of the problem will become further entrenched.

One example of the type of solutions-based thinking that ought to be encouraged is the report by the Youth Justice Independent Advisory Group on practical solutions to Māori offending, about which Judge Becroft spoke at the JustSpeak forum. Some of the proposals in that report (for instance, those relating to minimising detentions and expulsions at schools, and monitoring police practice) could be the subject of pilot programmes. More broadly, the attitudes expressed in the report – the search for original ideas and fresh solutions – should be replicated by other NGOs, academics, policy-makers and our legislature.

How effective is the Youth Court model and can its strengths be incorporated into the mainstream criminal justice system?

12. JustSpeak directs that research be focused on the efficacy of the Youth Court model of personalised treatment of offenders.

At the JustSpeak forum on Wednesday 2 November, Justice Williams made the valuable point that there is a strange norm in the Western system of criminal justice that suggests that judges should know little about an offender in the
course of sentencing. Sentencing without drawing on much background knowledge is seen as a bastion of impartiality. However, as Justice Williams indicated, from a Māori perspective this approach to sentencing is inhumane and likely to lead to poor outcomes. It also stands in contrast to traditional Māori approaches, which often involved punishment being meted out by the offender’s own community and only once all aspects of an offender’s circumstances have been taken into account. The Youth Court model is different from the traditional model in that judges in that Court attempt in many instances to immerse themselves in a young person’s life before selecting an appropriate order.

There is a gap in the research on the effectiveness of the Youth Court model. It would be useful to answer a number of questions about this model, in order to understand the system wide impact of engaging with the personal background of offenders. Does saturating judges in personal background in the Youth Court lead to appropriate sentences that improve rehabilitation prospects? Could the more tailored, personal approach improve public confidence in the Youth Court system by acknowledging that a “one-size-fits-all” model is not effective? And can the approach enhance faith in the system on the part of those being subject to orders in the Youth Court? All these questions need empirical evidence to be answered. As part of any research, it would be necessary to review in detail the ways in which judges do consider personal background under ordinary sentencing procedure, since it would be a caricature of the system to argue that no personal background can be taken into account. (Section 8(h) of the Sentencing Act 2002 requires that a Court “take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe”.)

Any possible review of the Youth Court by the government would provide a useful opportunity to launch this research. Interviews with observers of Youth Court processes, offenders, and victims may be necessary – along with analysis of statistics on rehabilitation where a strong personalised approach has been taken. If such research is not undertaken as part of a government review, independent research might be done by thinktanks or university academics working in the field of youth justice. If evidence can be adduced that the personalised model is effective, there would be a good case for using it, especially in the treatment of Māori offenders, given the apparent consistency of this model with principles of tikanga Māori.
Part Seven: Conclusion

As noted at the outset, it cannot be expected that a position paper of this length will provide the solutions to the issues around Māori and the criminal justice system. The scope of this paper has been narrow for reasons of practicality and expertise. But it is hoped that that narrow focus has allowed for several clear points to emerge which may generate broader discussion.

First, it is useful to look to existing scholarship when addressing a topic as complex as Māori and the criminal justice system – and on this specific topic, the work of Moana Jackson cannot be overlooked. His 1988 paper, *He Whai paanga Hou*, remains a significant contribution to the debate. While we acknowledge the scholarship of others in the intervening years, many of the insights in the report remain pertinent and challenging; such as the claim that the problems around Māori and the criminal justice system are interconnected, and the suggestion that issues of racism and bias may be endemic in the structure of our police, public service, and judiciary.

Second, consultation is crucial when surveying an issue like Māori and the criminal justice system afresh, and more forums of the kind organised by JustSpeak on Wednesday 2 November would provide an outlet for such consultation. Consultation must include drawing of advice from leaders in the field of Māori and the criminal justice system, such as the Principal Youth Court Judge and Justice Williams. It should include consultation of those Māori subject to orders and sanction within the criminal justice system, as well as their communities. Young people (discussed further below) must also have a voice in this process of consultation.

Thirdly, specific solutions that arose out of the JustSpeak forum merit specific consideration. Thought should go into how more positive stories regarding Māori and the criminal justice system can be spotlighted in the media and by government: that is a solution aimed at the media. In the sphere of law, greater attention should be paid to the effective use of legal provisions (in the Sentencing Act and elsewhere) in litigation, which might help to contribute to lower rates of incarceration and more appropriate sentences for Māori; practicing lawyers and the judiciary have a part to play in all of this. There are good grounds for establishing a “Māori lens for policy” so that policy does not have unintended consequences that are harmful to Māori. Additionally, small-scale change (such as the use of local conversations) should be fostered. These solutions bring
together different types and tiers of change-makers – grassroots activists, citizens, policy-makers, lawyers, the media, and government. All of their effort will be required to ensure Aotearoa New Zealand is not crippled by the disproportionate impact of our criminal justice system upon Māori. As Justice Williams said in the JustSpeak forum, passive engagement is not sufficient.

Fourthly, academics and policy-makers ought to investigate gaps in the research. Further interdisciplinary research needs to be done. That research must, where possible, be solutions-oriented. And there is room for specific research into the Youth Court model of personalised treatment of offenders, which might assist in determining whether a more personalised approach to Māori offenders (consistent with tikanga Māori) might be appropriate in the mainstream criminal justice system.

Some of these ideas have been suggested before, by others. Certain ideas are novel. What is most self-evidently unique about what has been presented in the preceding paper is that it comes from the perspective of young people. It is written from a position of urgency (reflective our impatience with failures to address this issue) – but also a position of idealism, imagination, and hope. That overall position is summarised in the declaration at the outset of this paper which provides a bullet-pointed overview of our views.

We believe that we can get to a position in our society when we no longer have to speak of “Māori and the criminal justice system”. It will not be easy. But if we can get to that destination, we will have achieved something of value not just for lawyers and policy-makers – but for our nation as a whole. To paraphrase the closing words of He Whaipaanga Hou, this problem will take some time to address. However, what we can all do now is commit, Māori and Pākehā alike, to resolving it.

The keel of our societal waka, the backbone of our society, needs greater attention. If the keel of that waka can be crafted more carefully – with the help of all four million of us working together – we might just be able to overcome any obstacle that the future throws at us.
Bibliography


United Kingdom Ministry of Justice. *Penal Policy – A Background Paper* (London, 2007). (See in particular the foreword by Lord Falconer, then Lord Chancellor and Secretary of State for Justice.)
