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## Indigenous perspectives and experiences: Maori and the criminal justice system

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*One of the key features of colonial jurisdictions such as New Zealand, Canada and Australia, is the high levels of offending, victimisation and imprisonment amongst their indigenous populations. Another feature that all these jurisdictions share is the consensus amongst Indigenous peoples that the imposed criminal justice system is responsible in part, for the negative indigenous statistics, and inappropriate for dealing with indigenous offending. Using the Maori situation as a case study, this chapter looks at how colonial jurisdictions have responded to the 'overrepresentation problem' and indigenous criticisms of the criminal justice system.*

Colonisation is always lethal to the colonised

Oliver (1995)

### Introduction

This chapter introduces you to one of the defining features of the criminal justice system in colonial jurisdictions; namely the **overrepresentation** of indigenous peoples in offending, victimisation and imprisonment statistics. The chapter begins by highlighting the extent of Maori overrepresentation, followed by a discussion of some of the major concerns Maori have expressed about the criminal justice system in New Zealand. In particular, these include the notion of **institutional racism** and system-wide **bias** against Maori and other ethnic populations. **Indigenous Justice**, and specifically Maori approaches to and practices of justice provide the focus. The chapter ends with a critical consideration of some of the strategies and programmes the state has implemented in response to the overrepresentation problem and to indigenous challenges to the legitimacy of the criminal justice system.

## Maori engagement with and over-representation in the criminal justice system

By the beginning of the twenty-first century, Maori, the indigenous people of New Zealand, comprised 14.5 percent of the general population while New Zealand Europeans or Pakeha,<sup>1</sup> comprised 79.6 percent of the population (Statistics New Zealand (2007). Although a minority in terms of population size, Maori figure very highly across a range of negative social statistics and related outcomes. For example, Maori have high unemployment levels, lower educational attainment and poorer health outcomes, when compared to other ethnic groups in the population (Ministry of Justice, 2002b; Ministry of Social Development, 2009). Not confined to employment, health, or education however, this negative situation is also reflected in the criminal justice statistics (Tauri, 2009). In common with many other indigenous peoples in **neo-colonial** countries, Maori are also significantly overrepresented in criminal justice statistics - when measured on population size - in comparison with other ethnic groups. This holds right through the various stages of the **process of criminalisation** from police contacts, apprehension and arrest, to conviction and imprisonment. From the statistics presented below it is immediately apparent that Maori representation in crime statistics are disproportionately higher on a population basis than for other ethnic groups in New Zealand.<sup>2</sup>

In 2009, for example, the total police apprehensions were 235,684. Out of this total:

- Maori accounted for 98,893 apprehensions or 41.9 percent of the total;
- Pacific peoples accounted for 21,563 or 9.1 percent of the total; and
- Europeans accounted for 105,778 or 44.8 percent of the total (Statistics New Zealand (2010).

The latest available conviction statistics (Statistics New Zealand, 2010) tell us that in the year 2008 the total number of convictions was 95440. Out of this total:

- Maori accounted for 32,880 or 34.5 percent of the total;
- Pacific peoples accounted for 8178 or 8.5 percent of the total;
- New Zealand Europeans or Pakeha accounted for 37,332 or 39.1 percent.

Maori also accounted for 53 percent of youth prosecuted for all offences except non-imprisonable traffic offences in 2007 (Statistics New Zealand, 2010). Finally, Maori imprisonment rates are also disproportionately high. The latest updated figures from the

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<sup>1</sup> Pakeha is a Maori term in common usage referring to non-Maori people, and is used to refer to New Zealanders of European descent.

<sup>2</sup> Any discussion of the level and nature of disparities across the population needs to take into account issues related to the gathering of statistics. See chapter 2 for a discussion of the limitations in criminal justice statistics.

Department of Corrections (December 2009) tell us that out of a total of prison population of 8244 (inclusive of inmates on remand):

- Maori<sup>3</sup> accounted for 50.8 percent of all inmates;
- those identifying themselves as Pacific Peoples accounted 11.9 percent; and
- those identifying themselves as New Zealand European or Pakeha accounted for 33.5 percent of the total.

This **disproportionate** rate of Maori incarceration has been an increasing trend since the beginning of the twentieth century. Maori males comprised 10.9 percent of prisoners in 1930, increasing to 23.3 percent in 1958. Maori female prisoners increased from 4.7 percent to 47 percent of female prisoners over the same period (Hunn, 1961). In the period between 1950 and 1989, the Maori imprisonment rate increased seven-fold, this being four times the non-Maori prisoner rate of increase for the same period (Department of Statistics, 1991).

One firm conclusion that can be drawn from the above figures is that a defining feature of the criminal justice 'landscape' in New Zealand is the significant overrepresentation of Maori<sup>4</sup>. The growing numbers of Maori becoming entangled in the system during the period from 1950 to the early 1970's, was a key concern of the relatively conservative Maori leadership of the time. However, it was the rise of the contemporary Maori sovereignty movement in the early 1970s that saw the issue become fully politicised, (Poata-Smith, 1996) with a new group of young, urbanised, educated leaders forcefully criticising the way the **imposed justice system** dealt with Maori and their offending and what they described as an increasingly racist set of justice institutions biased against Maori in general and Maori offenders in particular. In turn, this criticism of, and challenge to, the legitimacy of the 'system' required a response from the state (Tauri 1996b). It is to this criticism and the State's response that we now turn.

## **Justice for all?<sup>5</sup> Institutional racism, monoculturalism and Maori critique of the criminal justice system**

At the height of the Maori cultural and political renaissance in the 1980s, Moana Jackson released his report *The Maori and the Criminal Justice System - He Whaipanga Hou: A New Perspective* (1988). The report was based on 3 years of research Jackson and others had carried out across the country, involving hui (meetings) with over 3,000 Maori where a range of criminal-justice issues were discussed. The resulting report was the first - and, so far the only - large scale study of the relationship between Maori, the criminal justice system and its key agencies. Jackson's research found that many Maori believed that the criminal justice system and its key agents (such as police and the judiciary), directly contributed to the disproportionate

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<sup>3</sup> Information on the ethnic group of inmates was obtained by a personal interview with each inmate. Inmates were given a copy of the appropriate census form and asked to identify their ethnic group(s) (Department of Corrections, 2002: 11).

<sup>4</sup> The other significant, defining feature is the male dominance of statistics for apprehensions, convictions, imprisonment, as well as criminal justice system personnel.

<sup>5</sup> Taken from Findaly, Odgers, and Yeo (1994).

numbers of Maori being arrested, appearing in court and residing in New Zealand's prisons. Jackson argued that the attitudes and practices of a significant proportion of criminal justice agents were **institutionally racist and biased**. The existence of institutional racism and bias was based on the large number of participants who described experiences of the discriminatory strategies and practices employed by police and the judiciary during their interactions with Maori individuals and communities.

Jackson wrote that through research reports and numerous government consultations, Maori have frequently stressed their concerns about inappropriate and ineffective strategies and operational practices employed by the NZ Police when interacting with their communities. One participant in Jackson's research voiced what appeared to be a common experience for Maori when they interacted with police:

*"Brutal, brutal police intimidation and violence is so common and Maori people know that racial discrimination within the police is there and that it's...awful".*

## **Police – Maori relationships**

By the mid-1990s, Police National headquarters in Wellington became concerned enough about the negative relationship the institution had with Maori that it decided to carry out research on the issue. And so in 1997, the NZ Police and Te Puni Kokiri commissioned a joint, in-depth research project that was subsequently published under the title *Challenging Perspectives: Police and Maori Attitudes Toward One Another* (2001). Although the report highlighted that there is no one unified set of Maori attitudes towards the police, there are nevertheless common perceptions and experiences of the police and their operational practices. These can be summarised as follows:

- the police as an institution is hostile to Maori and their cultural practices;
- police hold negative perceptions of Maori; and
- a significant number of Maori distrust Police;
- the often discriminatory nature of interactions between Police and Maori;
- racist and negative preconceived ideas and attitudes of Police officers toward Maori and Maori issues; and
- the institutionally racist culture of the NZ Police force.

Previous personal or whanau (family) experience with the Police was perhaps the strongest determinant of Maori attitudes towards the organisation. These experiences related to all areas of policing, from police response to crime committed against individuals, to police management of suspects (Te Puni Kokiri, 2002).

There is no specific data about the levels of satisfaction of Maori with police services, except for a general comment in a 1993 survey by the MRL Research Group that:

*“Overall Maori have a less positive view of Police than the other two groups [European and Pacific Island], having less trust and confidence in Police, seeing them as less approachable, and being less satisfied with their services”.*

## **A Monocultural Criminal Justice System and the Alienation of Maori**

A recent body of work, focusing on the cultural inappropriate application to Maori of European justice practices, has steadily grown and that supports many of Jackson’s findings from the 1988 study. For example, a 1998 joint Te Puni Kokiri and Ministry of Justice study found that Maori believed many of the responses of the criminal justice system to offending were ineffective for many offenders and victims, Maori in particular. The study found that many Maori believed by not effectively and appropriately responding to social harm (which included developing culturally appropriate programmes) criminal justice agencies **contribute to the drivers of re-offending and victimisation**. Participants in the research highlighted the following issues as drivers of the ongoing negative relationship between Maori and the criminal justice system:

- the protocol under which the court system operates is alienating for many Maori;
- the quality of legal advice to Maori is usually substandard and many Maori find it difficult to access quality legal services;
- the behaviour of lawyers, court staff, and the judiciary is often culturally inappropriate; and
- Maori offenders often receive inappropriate sentences that do not meet their cultural and rehabilitative needs, imprisonment being the prime example.

Maori have also expressed concerns with the operations of the correctional service in New Zealand (which includes the Public Prison, Community Probation and Psychological services). Many of these concerns were captured during Department of Corrections-led consultation to inform the development of its Treaty of Waitangi Strategic Plan (Department of Corrections, 2001) and joint Te Puni Kokiri-Ministry of Justice engagement with Maori providers and inmates in 2006/2007 (Te Puni Kokiri, 2007). The main criticisms expressed by Maori participants during both consultation exercises included:

- Government’s over-use of the imprisonment as opposed to non-custodial strategies for dealing with offending and re-offending;
- a lack of acknowledgement of Maori philosophies and approaches to dealing with Maori offending;
- a tendency of the Department of Corrections to incorporate tikanga within psychology-based interventions, which in turn reduces the potency of Maori approaches to rehabilitation;

- a focus on individualised programmes and interventions, at the expense of whanau, hapu and iwi involvement in the rehabilitation of Maori offenders;
- an under-representation of Maori in the Department’s workforce, particularly at the senior management level; and
- the lack of Maori involvement in the design of policy and the development of programmes.

## Maori justice versus European justice

Jackson (1988) and other Maori commentators (see Nepia, 1994; Tauri, 1998 and Webb, 1999) have argued that the drivers of Maori discontent with the formal European system stems not only from institutional racism and bias, but also because it is based almost exclusively on European justice philosophies and conflict resolution practices, thereby making it culturally inappropriate. Jackson contended that because they could not hope to attain justice in a system that ignores their cultural norms and practices, Maori should be removed from the formal system and a parallel or separate Maori justice process implemented. This system would be run by Maori and based on Maori justice philosophies and conflict resolution practices (Jackson, 1988, 1990).

## A comparison of Maori and European criminal justice processes

Since the release of Jackson’s report, the issue of a separate or parallel system for Maori has risen on a number of occasions, including at a conference held in November 2008 to celebrate the 20th anniversary of the release of He Whaipaanga Hou. The Maori challenge to the legitimacy of the formal criminal justice system is based, in part, on a dichotomy that highlights the main features of the respective approaches to dealing with offending and/or anti-social behaviour. The table below, derived from Pratt (1992: 38), provides us with some idea of the variances between the formal, state-run system, and one based on Maori approaches to dealing with social harm (see also Jackson, 1988 and Tauri and Morris, 1997):

	European	Maori
<b>Criminal Responsibility</b>	Individual	Collective
<b>Place/Location of Justice Process</b>	Private (Courtroom)	Public (Marae)
<b>Aim of System</b>	Deterrence/ retribution	Reintegration/ restore social bonds
<b>Key ‘actor’ in the system</b>	The state	The Victim

(Source: Pratt, 1992: 38)

Maori calls for a separate or parallel justice system, including those of Jackson, are based on the rights some believe were granted them through the Treaty of Waitangi that was by the Crown and iwi (tribal) leaders on 6 February, 1840. For example, Jackson contends that while the Maori version of the Treaty called for the Crown to provide for the good order and security of the country by exercising control over Europeans' living in the Far North (the basis for Article 1), they were also to recognise the special status of the *tangata whenua* (original inhabitants). This recognition, made explicit in Article 2, included an acknowledgement of the legitimacy of the institutions that formed the basis of Maori society. This included the institutions and practices designed to maintain social order. Jackson (1990:32) stated that:

*"To ensure their maintenance in a rapidly changing world, the Maori saw those laws as operating in a parallel system to that of the Crown. To Pakeha [Europeans], including crown representatives today, kawanatanga [government] corresponds to the more absolute concept of sovereignty ceded in Article 1 of the English version".<sup>6</sup>*

It is clear that despite initial colonial willingness to recognise Maori justice practices, albeit in very limited ways (see Ward, 1995: chapter 2 and Pratt, 1992), that successive New Zealand governments have rejected Maori assertions that Article 2 of the Treaty guarantees them the right to utilise their traditional institutions of social control. As a result, recognition of Maori law and conflict resolution processes have historically been controlled by the state that has done so through privileging its interpretations of the Treaty articles: "in effect, this has meant the Treaty has been used to deny Maori involvement in, and thus exclude Maori values from, the law-making process" (Jackson, 1990:33).

## **Perfunctory consultation: a lack of action**

Maori have also expressed concern at the lack of synergy between the advice and information gathered during consultation hui (meetings) and the policies and interventions developed by criminal justice agencies (Te Puni Kokiri, 2002). Maori expressed these concerns during hui held by the Department of Corrections to inform the development of its Treaty of Waitangi Strategic Plan (2001:5):

*"Consultation is often, maybe not intentionally, taken away, regurgitated, spat out, and is totally different".*

And

*"We as Maori will tell you what we want to be consulted on. We don't want the Department to decide what is significant and which initiatives require Maori input".*

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<sup>6</sup> For further discussion of the various articles of the Treaty and their respective meanings, in English and Maori, see Orange (1989).

These views match with similar comments made during Jackson’s seminal work of 1988, where he found a high level of scepticism existed amongst Maori, that consultation would lead to meaningful policy developments and changes to operational processes. Jackson (1988:115) wrote that:

*“Maori people at every hui presented views critical of the Police while accepting the likelihood that ‘nothing will be done’, indicating a level of disillusionment which has grave portents for Maori/Police relations”.*

In fact, as we will discuss below, arguably plenty has been ‘done’ by the state in response to the range of issues Maori have expressed about the criminal justice system. However, the question remains as to whether or not ‘what has been done’ has been both appropriate and effective.

## The State’s response

In the twenty two years since the release of Jackson’s 1988 report, the New Zealand Government has implemented a number of initiatives in response to the Maori ‘crime problem’ and Maori critique of the system. Overall, these responses have fallen well short of Maori expectations for a measure of jurisdictional autonomy that many believe is their right under the various terms of the Treaty signed in 1840 (as argued by Jackson, 1995 and Wickliffe, 1995). The initiatives listed in the table below were developed with one or more, of the following ‘outcomes’ in mind: To reduce Maori offending; to make the system more responsive to Maori offenders, victims and their families; and to increase the ‘positive participation’ of Maori in the criminal justice system.

**Table 1: State responses to Maori over-representation (initiatives)**

<b>Corrections</b>	<b>Police</b>	<b>Courts</b>	<b>Youth Justice</b>
Treaty of Waitangi Strategy	Maori Responsiveness Strategy	Cultural training for Judges	Family Group Conferencing
Maori (prison) Focus Units	Memorandum of Understanding with Iwi	District Court Restorative Justice	Youth rehabilitation programmes with cultural ‘add-ons’
Maori cultural programmes	Joint-Te Puni Kokiri youth gang liaison project	Maori Court Liaison Officers	South Auckland Youth Project
Maori cultural assessment tools	Iwi Liaison officers	Marae-based youth court hearings	
Maori liaison officers			



**Table 2: State responses to Maori over-representation (Strategic)**

Agency	Strategy/Framework	Year	Maori content
Ministry of Justice	Crime Reduction Strategy	2001	Minimal: no specific focus despite recognition of the issue of over-representation
Ministry of Justice	Youth Justice Strategy	2001	No specific focus on Maori issues; lack of focus on issues over 10 years
Ministry of Justice/Te Puni Kokiri	Maori Plan of Action	2007	Complete focus on Maori issues – part of Effective Interventions workstream; little agency buy-in, over-run by Drivers of Crime initiative
Ministry of Justice/NZ Police	Organised Crime Strategy	2009	Significant focus on ethnic gangs, mainly suppression and surveillance, minimal focus on socio-economic factors
Ministry of Justice	Drivers of Crime	2010	Some Maori content, largely the same focus as Effective Interventions; majority of 'Maori actions' agency-centred and not community-led

Government agencies use a range of instruments to publicise the various programmes and strategies they develop in response to crime, including research reports, annual reports, strategic plans, media releases and Ministerial speeches, official policy launches and the like. They will also from time-to-time make claims about the effectiveness of these initiatives and in particular, their attempts to make the system more responsive to Maori. However, overall the criminal justice agencies can provide little empirical evidence that the policy activity listed above, has had any demonstrable effect on Maori rates of offending, reoffending and imprisonment. Nor, it seems, have they satisfied Maori concerns with the way criminal justice agencies engage with them and their communities (Nga Kaiwhakamarama I Nga Ture. 1998; Te Puni Kokiri, 2002).

There are a number of factors that can help explain why these programmes have had little effect on the relationship between Maori and the criminal system, including (Tauri, 2009; Te Puni Kokiri, 2002):

- The agencies consultation practices are such that Maori have minimal opportunity to effectively input into the design of policies or interventions.
- Government agencies rely too much on non-indigenous theorising and research on criminality to develop policies and programmes targeted at Maori/Indigenous offending.
- There is a lack of resourcing for research and development of 'home-grown' solutions, which results in agencies relying heavily on importing international policies and interventions with no evidence of their applicability to the New Zealand context.
- There is often inadequate resourcing of programmes targeted at Maori.

- There is a general reluctance on the part of the Government and its agencies to look at the wider historical, social, economic, political and systemic causes of Indigenous offending (Te Puni Kokiri, 2002).

## Explaining State Responses to the Maori Problem

How do we explain Governments' response to both the Maori over-representation problem and Maori concerns with the operations of the criminal justice system? To begin, we need to discuss the **development of contemporary government 'Maori policy'**. This will be followed by an analysis of two strategies under which most of the responses highlighted above can be categorised and explained. The strategies are the *indigenisation* of the justice system, and ii) the *co-option* of Maori cultural concepts and practices by criminal justice agencies. Lastly, the concept of *orientalism* will be introduced to help explain a growing phenomena; namely of the use of indigenous justice practices and philosophies by the restorative justice industry to support the export of many of its products, in particular family and community group conferencing, across a range of jurisdictions.

## The Development of Contemporary Government 'Maori Policy'

In the late 1970s and early 1980s, partly in response to increasing Maori activism and challenges to the legitimacy of the State, successive New Zealand governments introduced a range of policies aimed at demonstrating the 'bicultural' nature of the state, and its ability to purposefully respond to Maori concerns with social, economic and criminal justice-related issues. According to Tauri (1998), programmes and policies introduced in support of the biculturalisation project included:

- departments developed specialist Maori advisor roles (which had little or no direct input into the development of policy, but were focused on engaging in Maori 'cultural practice' on behalf of the institution);
- the establishment by agencies of cultural advisory, Maori perspective or 'Partnership Response' units;
- the adoption by departments of a Maori name (which was then displayed on buildings and official documentation and letterhead),
- the organisation of in-house **cultural sensitivity** training sessions and marae<sup>7</sup> sleep-overs, and
- Treaty of Waitangi awareness seminars.

Jeff Sissons, a New Zealand Anthropologist, has described these sorts of programmes as a conscious attempt by the State to project a bicultural image upon what is essentially a Eurocentric policy industry. In effect, what this process did was rationalise Maori tradition and cultural practice; a process that saw Maori culture selectively broken down and utilised in departmental practice with the explicit intent of enabling government agencies to signify their

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<sup>7</sup> The marae is a meeting house where Maori meet for important hui (meetings), and to partake in tangi (funerals) and other important gatherings.

commitment to biculturalism and, thereby, to Maoridom (see Sissons, 1990: 15-16 and Tauri, 2009a).

The biculturalisation process Sisson's describes can be broken down into two inter-related strategies: **Indigenisation** and **Co-Option**. Both strategies have been prominent in Government responses to the indigenous overrepresentation problem and criticisms of the system in all four neo-colonial jurisdictions of New Zealand, Australia, Canada and the USA. These strategies will form the focus of the next part of the chapter.

## The indigenisation strategy

One of the key responses to Indigenous critiques of imposed justice systems has been the *Indigenisation Strategy*. Indigenisation can best be described as a process through which attempts are made to increase the number of indigenous peoples directly contributing to the running of the criminal justice system (as opposed to their significant contribution as 'clients' of the system via their rates of offending, victimisation and imprisonment). A sub-set of the Indigenisation strategy is the co-option of components of indigenous culture, but this will be dealt with separately below as a distinct category of itself.

Numerous examples of the indigenisation process exist in neo-colonial jurisdictions. In Canada and the US, examples include Court, Police and Corrections officer and Government agency personnel recruitment drives. The rationale behind the Indigenisation strategy is that increasing the number of Maori/indigenous people working in the criminal justice system, coupled with cultural sensitivity and awareness programmes for non-indigenous employees, will enhance the agency's responsiveness to the needs and cultural practices of indigenous peoples. The goal of the indigenisation strategy is to alter the ethnic make-up of the criminal justice workforce by increasing the number of indigenous people working in the system. However, indigenisation is explicitly not designed to provide Indigenes or other ethnic minorities with a significant measure of jurisdictional autonomy, or empower them to heavily influence the development of policy and interventions or decisions about resource allocation (Tauri, 1998; Tauri, 2009b).

In the New Zealand context, the Police and Corrections services have both had periodic recruitment drives aimed at increasing the number of Maori working in these areas. Similarly, the Department for Courts has developed the position of Court Liaison Officer, who's function it is to provide advice and support for Maori and their families having to deal with Court appearances (whether they are there to answer charges, or as witnesses or victims).

## Critiquing indigenisation

The critique of the indigenisation strategy can be broken into three broad categories, the first of which concerns the **token nature** of the indigenisation process. A number of commentators on the Canadian context (most notably Griffiths, 1988; Havemann, 1988; Harding, 1991; Landau, 1996; and McNamara, 1992) argue that indigenisation serves as an inexpensive and politically expedient strategy that allows the Government to be seen to be 'doing something' about the indigenous crime problem, without significantly altering State control of the justice portfolio. Secondly, linked to this area of concern is the charge that indigenisation is based not on the empowerment of indigenous peoples, but instead on co-opting their justice philosophies and practices within forums that are controlled by the State (see below). A third concern is that indigenisation continues the colonial process by furthering the judicial disempowerment of indigenous peoples. Finkler (1990), for example, argues that the Canadian indigenisation program of the 1980s did not adequately answer First-Nation calls for a significant measure of jurisdictional autonomy, or the much broader political issue of self-determination. Instead, indigenisation furthered the State's control of Indigenous' use of culturally appropriate justice mechanisms. Lastly, while indigenisation may have been well-intended, there is little evidence that increasing the number of indigenous peoples working in criminal justice agencies of itself, results in a reduction in rates of indigenous offending, or greatly improves relationships with indigenous communities (Tauri, 2004).

## The co-option strategy

The Indigenisation approach is often backed by the parallel strategy of **co-option**. The co-option strategy involves a process of pre-selecting and utilising elements of indigenous cultures in policy and intervention design in order to i) make the system more culturally appropriate, and ii) make generic programmes and services more likely to 'work' for indigenes (meaning the reduction of offending, re-offending and victimisation).

The process of selecting and **co-opting** the symbols and cultural practices of Maori by the New Zealand state is an important element in contemporary Government's response to the problems arising from Maori over-representation and Maori political activism. The process is also an integral part of government processes in other neo-colonial jurisdictions (see McNamara, 1995 and Palys, 1993 for discussion of similar processes in Canada). Pearson (1988) writes that co-option is a common strategy employed by modern neo-colonial states when faced with an indigenous challenge to its legitimacy. Applying the work of Mann, Pearson argues that while modern capitalist states such as New Zealand have strong political and social infrastructures they are, in contrast, **despotically weak**. This means that modern liberal democracies rely heavily on the strategies of co-option, ideological persuasion and the devolution of limited authority to minorities (such as Maori) to maintain **hegemony**<sup>8</sup> (ideological and political control), as opposed to using coercive measures.

By the early 1980's the use of the strategy of co-option State institutional practice had become a key aspect the Government's Maori policy. Poata-Smith (1997:176) describes the situation as follows:

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<sup>8</sup> For further discussion of this term, refer to the work of Gramsci, 1971, Carnoy, 1984 and Simon, 1986.

*“the fourth Labour Government (1984-1990) attempted to appease the rising level of Maori protest in two major ways. The first involved extending the jurisdiction of the Waitangi Tribunal retrospectively to 1840 and the second involved adopting the policy of ‘biculturalism’, which was based on the **selective incorporation of Maori cultural symbolism within the institutions of the state**” (emphasis added).*

The use of the strategy of co-option in support of biculturalising government practice is pronounced in the criminal justice sector. Programmes and policies highlighted in Table 1 above, that fall in this category include the Department of Correction’s *‘tikanga’* and *‘responsivity’* programmes, the Department for Courts *District Court Restorative Justice Pilot Projects*, and the youth justice systems *Family Group Conferencing* forum. A feature of all three programmes is the fact that they are based on Western theories, concepts and practices designed for dealing with offending behaviour. They are distinguishable from other programmes because elements of indigenous (Maori) cultural philosophy and practice are ‘added-on’ in order to make them more responsive to the needs of indigenous offenders, victims and their communities (Tauri, 1999).

As with the greater majority of State designed programmes, the fundamental basis for the programmes is not Maori culture, philosophy or theory (Webb, 2004). However, Government literature on each programme focuses significantly on the supposed Maori cultural elements, in order to highlight the responsiveness of both the programme and the agency, to Maori (Tauri, 1998, Te Puni Kokiri, 2002).

## **Family group conferencing: a case study in cooption**

It is in the area of juvenile justice that the most elaborate and well-known (internationally speaking) example of co-option has occurred. In 1989 the New Zealand Government introduced the **family group conferencing** through the Children, Young Persons, and Their Families Act. The development of the 1989 Act was influenced by Maori concerns for the prevalence of institutionally racist and culturally inappropriate practices within the New Zealand criminal justice system. It was also influenced by the Government’s need to be seen to be ‘doing something constructive’ in the face of a perceived rise in juvenile offending, particularly amongst Maori youth (Tauri, 1998).

The family group conferencing process was introduced to overcome many of the problems associated with the welfare-dominated system of juvenile justice in New Zealand<sup>9</sup>, and constructively deal with child and youth offending (Hassell, 1996; Henwood, 1997). The family group conferencing process was designed with an eye to addressing the disproportionate number of Maori youth being processed through the system, by enhancing the ‘cultural

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<sup>9</sup> The ‘welfare approach’ considered offending to be caused by remedial family or individual dysfunction. Young people were considered to be a symptom of such dysfunction. Decisions concerning a young person’s offending behaviour and future were made by professionals who (largely) had no previous relationship with the young person. The ‘response’ to the offending was proportionate to the perceived cause of the offending, rather than the nature of the offending itself.

appropriateness' of the youth justice system. Becroft (2002) argues that two specific components were included to promote participation by young Maori offenders and increase the likelihood of positive outcomes:

- the inclusion of whanau, hapu and iwi in repairing the harm caused by offending behaviour; and
- the opportunity to have the conference in chosen, familiar surroundings, including the marae.

Advocates of the family group conferencing forum make a number of claims about the relationship between the conferencing format, Maori justice practices, and the role the forum has played in satisfying Maori concerns with the criminal justice system. For example, it is often claimed that:

- because the conferencing process and Maori justice practice have **restorative elements**, the conferencing process therefore provides Maori with a culturally appropriate avenue for addressing their justice needs (Olsen, Maxwell and Morris, 1995); and
- the conferencing process is an example of the system's ability to culturally sensitise itself, and empowers Maori to deal with their youth offenders in culturally appropriate ways (Maxwell and Morris, 1993).

However, when we compare the claims made above with the results of what little empirical research that has been completed to date, a different picture is formed. Instead of a culturally sensitive, empowering forum for Maori, we see a clear example of the co-optive strategy in practice.

Empirical research on New Zealand family group conference forum fails to confirm that it empowers the indigenous population, particularly in relation to two key areas of concern for Maori; firstly, the **cultural appropriateness** of the conferencing forum; and secondly, **deprofessionalisation** and the **exclusion of Maori cultural expertise**.

## **Cultural appropriateness of New Zealand conferencing**

In terms of the 'cultural appropriateness' of the forum, research by Maxwell and Morris (1993) found that the majority of Maori family group conferences were dealt with in Department of Social Welfare offices or facilities; with only five percent held on marae (Maori meeting house or area). More recent research shows that the situation has not substantially changed in the last ten years (Maxwell, Kingi, Robertson, Morris and Cunningham, 2004).

This situation exists despite the continued importance of marae to contemporary Maori communities, and regardless of continued criticisms of the precedence given to 'Government dominated sites' when dealing with Maori offending (see Nga Kaiwhakamarama I Nga Ture

(1998) and Tauri, 1998). This limited use of culturally appropriate sites continues, despite arguments by advocates of family group conferencing that one of the main aims of the 1989 Act is to encourage cultural sensitivity within juvenile justice practice (see Olsen et al, 1995).

## **Deprofessionalisation and the exclusion of Maori cultural expertise**

One of the main criticisms levelled by Maori at current justice practices is the authority given to those defined as justice experts within the European system; namely lawyers, social workers, and police officers (see Jackson, 1988 and Tauri and Morris, 1997). According to Jackson (1990), the empowerment of European justice experts in comparison to Maori further perpetuates the situation whereby Maori justice practices and philosophies are under-utilised and maligned in comparison to European knowledge and expertise. Research by Maxwell and Morris (1993) showed that justice professionals (namely police officers and social workers) were present at the greater majority of conferences. Social workers were present at sixty-two percent of all family group conferences included in the study, despite the fact that the legislation severely restricts their right to attend.

An evaluation of the family group conferencing process completed in 2004 (Maxwell et al, 2004) underlines the continued dominance of justice professionals, particularly by the police, although the number of conferences attended by social workers had dropped significantly (to 15 percent). Importantly, it is clear that Maori expertise and 'knowledge' continues to be undervalued, perhaps even undermined. The authors write that "details of particular (Maori) elders' involvement in facilitation were not usually available for the retrospective cases [that made up the study] but that all the [conference] coordinators who took part in this study reported that they did not normally delegate this role to anyone else although some reported asking elders to perform a mihi (greeting) or a karakia (prayer)" (Maxwell et al, 2004: 82). It would appear then, that Maori knowledge and expertise on dealing with anti-social behaviour continues to be of secondary importance to the need to fulfil the types of tasks that underline the 'cultural responsiveness' of the system.

## **Critiquing co-option**

Given these problems associated with cultural inappropriateness and the disempowerment of Maori cultural experts, we can state that the forum does not satisfy a number of Maori concerns with the criminal justice system. However, it does represent the successful co-option of Maori cultural practice, while at the same time ensuring the continued dominance of the youth justice sector by government agents (Tauri, 2004).

For some Maori, initiatives that fall into the co-option category, including family group conferencing, are inadequate for addressing the problem of Maori over-representation. Maori criticisms centre on two arguments. The first is that the initiatives represent a piece-meal approach to the recognition of the validity of Maori justice practice and are formulated on the continuing assumption that the present system of criminal justice, whilst flawed, is 'the best we have'. Therefore, it requires only minor tinkering for it to become *culturally appropriate* for Maori (Tauri, 1998). The second is that the recent trend for allowing Maori limited authority to deal

with the offending of their own, represents a continuation of the historical strategy of co-opting Maori justice for the purpose of legitimising the imposed criminal justice system, and has little to do with empowerment or self-determination (Jackson, 1995; Tauri, 1996b). Jackson (1995:34) summarises Maori criticisms when he argues that:

*“[j]ustice for Maori does not mean the attempted grafting of Maori processes upon a system that retains the authority to determine the extent, applicability, and validity of the processes. No matter how well intentioned and sincere such efforts, it is respectfully suggested that they will merely maintain the co-option and redefinition of Maori values and authority which underpins so much of the colonial will to control. A ‘cultural justice system’ controlled by the Crown is another colonising artefact” (emphasis added).*

Overall, our discussion on the strategies employed by Government in response to Maori overrepresentation and criticism of the system, shows that its response was largely focused on enhancing responsiveness to Maori, while at the same time ensuring that this response *did not*, in any way, impact on the State’s domination of the system itself (Tauri, 1999). Charlotte Williams, in her book *The Too Hard Basket* (2001) goes further and argues that:

*“responding to the problems of Maori offending and victimisation, in spite of growing awareness of the problem was never a priority of government”.*

She goes on to point out that (2001:137):

*“The evolution of criminal justice policy and operations over the 1980s and 1990s included a broader shift that allowed more scope for less punitive, more preventative and socially based measures and varied approaches with wider community involvement”.*

In fact such varied community involvement has been encouraged and facilitated by government where the community has been exhorted to take more responsibility for and a greater self-reliant attitude towards, the resolution of their own problems. Over the last twenty years in New Zealand the Government has, at least in relation to the majority community, convinced them to take a more active role in their own governance. However, when it comes to Maori, Williams (2001:137) argues that this shift in policy:

*“did not amount to the systematic consideration, let alone incorporation, of Maori concerns in either the design or delivery of criminal justice that the size of the problem might have been thought to warrant and which Maori themselves have made a number of proposals about”.*



## Contemporary approaches

Since Williams made the above statement, there has been a considerable amount of strategic activity across New Zealand's criminal justice sector. A lot of this activity was summarised in tables 1 and 2, including the *Effective Interventions* workstream (2006-07), which involved the *Programme of Action for Maori* (PoAfM), and most recently, the *Drivers of Crime Strategy* (2009/10 and ongoing). The motivations for these high level, inter-agency projects were issues that are common to contemporary, neo-colonial jurisdictions, namely a) the lack of impact from past and current policies on rates of offending and imprisonment, b) increasing fiscal crises resulting from exponential rise in prison musters, c) repetitive crises of legitimation with general public arising from a and b; and d) continuing high levels of indigenous over-representation and Maori critique of the functions of the criminal justice sector (Tauri, 2009b). The strategies and the PoAfM contain references to Maori over-representation and a range of activities that agencies claim are designed to respond to this issue. However, overall the greater majority of initiatives fall under the co-option strategy (for example, Corrections drive to increase funding for its 'blended' tikanga programmes under Effective Interventions), while others provide the impression of 'activity', but are designed to ensure that the status quo remains.

The PoAfM provides a recent example of the latter. Created through joint effort between the Ministry of Justice and Te Puni Kokiri and signed off by Cabinet in 2007, it contained a range of initiatives including:

- an engagement process with Maori providers and offenders to gauge their views and experiences of the criminal justice system;
- selection of a suite of initiatives (originally six and later expanded to up to twelve) focused on Maori offending that would receive cross-agency funding and then be evaluated to demonstrate the effectiveness of 'Maori approaches';
- assessment of the effectiveness of the criminal justice sectors spend on Maori; and
- an inter-agency fund for supporting practical Maori initiatives.

While the PoAfM was a joint effort between the Ministry of Justice and Te Puni Kokiri, in reality it was sidelined from the beginning by the lead agency in collaboration with other justice sector agencies. Altogether the PoAfM contained up to twelve inter-related projects, including the four outlined above. Only a handful were completed, including the engagement process (although the final report has still be officially released and is now three years overdue) and the selection and funding of a select group of 'by Maori, for Maori' initiatives. Those that were completed were carried out by Te Puni Kokiri, the junior partner. The majority of the significant tasks sat with the Ministry of Justice and apart from a research project on the subject of 'bias', were never fully started, let alone completed. From the beginning it was clear to Te Puni Kokiri officials that the Ministry was reluctant to carry out any activities that would require critical scrutiny of the criminal justice sector. For this reason the critical review of the sectors spend on Maori was never completed and the development of a funding mechanism specific to Maori initiatives failed to progress past low level discussions with sector agencies (Tauri, 2010).

Why the reluctance of the Ministry of Justice (specifically) and the wider justice sector, to respond seriously to the issue of Maori over-representation and Maori critique of their activities? There are a number of explanations we can draw on, but the following are most likely:

- An historical lack of capability within the criminal justice sector to develop Maori policy.
- An over-zealous commitment to Eurocentric theories on the causes of, and responses to, crime, such as the Psychology of Criminal Conduct (Department of Corrections) and Crime Prevention through Environmental Design (Ministry of Justice), which in turn block officials' ability to look at alternative, indigenous theories and approaches.
- The sectors historical reluctance to allow internal (by other government agencies) and especially external scrutiny of the effectiveness of its initiatives or the resources it spends on 'fighting crime'.
- A paternalistic attitude to Maori organisations and Maori communities in particular, and the community sector overall (see Tauri, 2009b and 2010).

All of the above factors gel together to make it extremely difficult for indigenous outsiders to influence change in the system. This situation is particularly puzzling given the recent popularity of certain aspects of indigenous theories and practices with non-indigenous practitioners and government agencies across a range of international jurisdictions.

## Globalising Indigenous Justice

*"It is... important that traditional decision-making processes are not repackaged by white professionals and presented to families as an innovative new practice, only serving to reinforce experiences of colonial superiority". Jackson (1998)*

One of the significant developments in crime control policy in the past decade has been the **growth of restorative justice** within western jurisdictions, and in the popularity of restorative interventions such as New Zealand's family group conferencing forum. One of the defining features of this growing **globalisation** of restorative justice has been the popularity of FGC-style initiatives in the neo-colonial jurisdictions of Canada, the United States and Australia. The exportation of the family group conferencing forum to these jurisdictions has been heavily influenced by the arguments and representations from advocates of family group conferencing that were discussed earlier. Namely, that family group conferencing provides a forum that empowers Maori (an indigenous people) and enhances the ability of the criminal justice system to **culturally sensitise** itself and effectively utilise indigenous justice philosophies and practices (see Olsen et al, 1995; Maxwell and Morris, 1993 and LaPrairie, 1995).

In response to these arguments we have countered that the family group conferencing forum represents the co-option of Maori cultural practices into New Zealand's youth justice system. The forum signifies the continued willingness of the State to disempower Maori by employing their

justice processes while denying them a significant measure of jurisdictional autonomy. What is now of concern to some Maori (see Tauri, 2004 and 2009) is that Maori justice practices are now being used to disempower other indigenous peoples. This situation is particularly prevalent in Canada.

In 1997 Gloria Lee, a member of the Cree First Nation in Canada, published an article titled *The Newest Old Gem: Family Group Conferencing*. In this paper, Lee expressed strong concerns for the fact that the imported family group conferencing forum was being forced upon Canadian First Nations at the expense of their own justice mechanisms and practices. Lee (1997:1) argued that "...First Nation communities are vigorously encouraged to adopt and implement the Maori process and to make alterations to fit the specific community needs, customs and traditions of people who will make use of the new process". Lee's statement of concern is both powerful and, as the fullness of time has shown, accurate. It has been thirteen years since the publication of that article and many Canadian First Nations are struggling to gain support for the implementation of their own interventions and systems while having to implement a culturally alien process (Victor, 2007). Having faced a sustained period of colonisation, during which every effort was made to destroy their systems of justice, indigenes are now facing a new threat in the form of the increasing globalisation of crime control products (see Jones and Newburn, 2002 and Karstedt, 2002) and in particular, the exportation of the family group conferencing forum from New Zealand and Australia to the North American continent (Tauri, 2009b).

So, how has the family group conferencing forum become so popular in other neo-colonial jurisdictions? The work of Harry Blagg (1997), or more accurately, his use of Edward Said's concept of **Orientalism** may help explain the current situation.

## **Orientalism and the disempowerment of indigenes**

In 1997 Blagg wrote that he was struck by the degree to which the literature on family group conferencing, particularly the way in which Maori justice was represented, approximated what Edward Said referred to as *orientalism*, or *orientalist discourses*. Blagg describes orientalist discourses as powerful acts of representation that permit Western/European cultures to define, understand and consume other cultures. It does so by enabling colonising societies to homogenise a range of disparate cultures by emphasising or overemphasising similarities in cultural practice. Orientalist discourses represent one of the ways European hegemony was secured over indigenous peoples, not just by terror and repression alone but by the formation of systems of knowledge which essentialises indigenous cultures and represented them within a series of stereotypes; for example, exotic, savage, timeless, lazy and uncivilised, to name but a few.

The essentialising nature of orientalism strips indigenous cultures/groups of their particular histories, and therefore, of their 'essential differences' in terms of belief systems, values and cultural practice. The successful exporting of family group conferencing in recent times from New Zealand to other colonial jurisdictions, has been made possible by the orientalist discourse that proponents of the conferencing forum have used (Tauri, 2004). The discourses established by New Zealand, Australian and Canadian appropriations of Maori justice, in the form of family group conferencing, equate to orientalism in the following ways:

- It imposes a westernised interpretation of Maori justice practice, denuding the process of its history, context and internal structures of meaning and ‘representing’ it as simply a regional, albeit exotic, variation on a universal theme (i.e. one model of a restorative justice ceremony).
- As previously argued, the family group conferencing process represents the appropriation of elements of Maori justice that are palatable to the formal system. The appropriation of elements of Maori cultural practice has been erroneously presented to overseas jurisdictions, as underlining the ability of the system to respectfully ‘accommodate’ indigenous practices and empower Maori.
- Proponents of conferencing forum base their arguments that it is suitable for all/any indigenous peoples on the orientalist assumption that “because the conferencing format reflects aspects of one indigenous culture, then it is somehow readily transportable to other indigenous cultures” (Blagg, 1997:487).

The orientalist approach to the development and disbursement of justice programmes is based on a tendency to assume that because these ‘other’ cultures are similar to Maori, such as Aboriginal and Canadian First Nations and manifest similar mechanisms for ensuring adherence to accepted standards of behaviour; family group conferencing is therefore an acceptable forum for any and all Indigenous peoples. The underlying Orientalist assumption is as follows:

*Family group conferencing is based on Maori culture and Maori are an indigenous people; Australian Aboriginal and Canadian First Nations are indigenous, therefore the forum must be appropriate for all Indigenous.*

It is this statement and its underlying orientalist assumptions about indigenous peoples that highlight the concerns expressed by commentators like Gloria Lee. What we are seeing now are Canadian First Nations and other indigenous peoples fighting for recognition of their own cultural philosophies and practices in the face of the expanding globalisation of the restorative justice industry, and the popularity of its so-called ‘indigenous-inspired’ family and community group conferencing forums. The irony of the current situation is not lost on indigenous peoples: we recognise that the practices of Maori are being co-opted, and knowingly or unknowingly, used to disempower other First Nations across a number of jurisdictions (Lee, 1998; Tauri, 2004).

## REVIEW QUESTIONS

- Does New Zealand have a monocultural system of justice and in what other ways might the CJS play a role in the over-representation of Maori in the crime statistics?
- How do Maori approaches to ‘justice’ differ from the formal justice system?
- How will globalisation of FGCs impact indigenous peoples in Canada, Australia and USA?

## REVIEW EXERCISE

Do you think a separate system of justice should be established for processing Maori offending? If so, how would such a process operate? Identify some of the issues it would contend with.

## FURTHER READING

Bradley, T, Tauri, J and Walters, R (2006) 'Demythologising Youth Justice in Aotearoa/New Zealand', in Muncie, J and Goldson, B (eds.) *Contemporary Youth Justice*, Sage, London.

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Tauri, J (1999) Empowering Maori or Biculturalising the State? Explaining Recent Innovations in New Zealand's Criminal Justice System, *The Australian, New Zealand Journal of Criminology*, Winter.

Tauri J (2009) An Indigenous Commentary on the Standardisation of Restorative Justice, *Indigenous Policy Journal* (December - online).