Access to justice for children and young people in Aotearoa New Zealand

Working paper No. 3 - Tamariki and Rangatahi Māori

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Introduction

Context

This working paper forms part of an overall research project exploring the extent to which children and young people are able to access to justice in Aotearoa New Zealand. The findings of the research study are presented in three parts:

Part One contains my analysis of data from key informant interviews with adults with expertise in the justice system and/or working with particular groups of children and young people, as well as from a survey of children and young people aged 14 to 24.

Part Two discusses the meaning of access to justice and other related concepts such as legal empowerment as well as the specific meaning of access to justice for children and child-friendly justice. It then discusses the justice problems experienced by children and young people generally, as well as common barriers to accessing justice. The analysis in this report is based on my review of the research and literature in New Zealand and overseas as well as analysis of information obtained from the government and Crown entities.

This report is supported by a series of ten working papers discussing the justice problems and barriers to accessing justice experienced by particular groups of children and young people and is broken up into a series of reports relating to groups identified as likely to experience differing justice problems or barriers to access. These working papers are:

1. Children and young people in care or with care experience;
2. Disabled and neurodiverse children and young people;
3. Tamariki and rangatahi Māori;
4. Pacific children and young people;
5. Rainbow and takatāpui children and young people;
6. Girls and young women;
7. Boys and young men;
8. Poverty and socio-economic disadvantage;
9. Trauma; and
10. Intersectionality.

Part Three explores possible solutions or ways to close the justice gap for children and young people in Aotearoa New Zealand. This part of the study is also supported by a series of working papers in relation to possible solutions. At the time of writing these working papers consider the following topics with additional working papers likely to follow:

11. Strategic litigation;
12. Legal service delivery, non-lawyer services, and integrated services;
13. Data, evidence and measuring change;
14. Technology;
15. Training for professionals;
16. Legal education and continuing professional development for lawyers and judges; and
17. Law-related education for children and young people.

These reports and working papers are available at: https://www.cypaccesstojusticenz.com/

Positionality

I acknowledge my positionality as a pākēha lawyer and researcher which gives rise to questions as to the appropriateness of me writing about the issues for Māori. I chose to write this working paper despite my own questions in this regard because it is impossible to discuss the justice problems and barriers for children and young people in Aotearoa New Zealand without specifically addressing the experiences of tamariki and rangatahi Māori given the breadth and extent of injustices they have experienced both historically and today. Where possible I have focused on research and literature by tangata Māori, particularly in relation to questions of interpretation, but any errors or misinterpretations are of course my own.

Executive Summary

This working paper discusses the justice problems and barriers to accessing justice experienced by tamariki and rangatahi Māori followed by some possible solutions raised in the research and literature from Aotearoa New Zealand and overseas. It draws from the research and literature in relation to tamariki and rangatahi Māori, as well as the experiences of tangata Māori more generally and the experiences of other indigenous peoples in settler colonial countries. Each of the three sections in this report are briefly summarised below.

Justice problems

Education system. Schools stand-down, suspend and exclude tamariki and rangatahi Māori at a greater rate than any other ethnic group.[1] However, it is important to recognise that disciplinary statistics reflect school's response to behaviour not the behaviour itself.[2] This means that in addition to legal issues in relation to disciplinary action, these statistics may also represent wider justice issues such as systemic bias or discrimination. Tamariki and rangatahi Māori are also overrepresented in those referred to special educational services,[3] and more likely to report experiencing bullying and discrimination in school.[4]

Victimisation. The New Zealand Crime and Victims survey shows that Māori are victimised at a disproportionate rate.[5] The Ministry of Justice argue that this over-representation appears to reflect the higher proportions of young Māori and higher proportions of Māori in high deprivation areas.[6] However, data also shows that Māori are more likely to experience victimisation in areas with relatively small Māori communities which suggests other causes.[7]

Involvement in the care & protection system. Tamariki and rangatahi Māori are more likely to come to the attention of care & protection services and then more likely to move through each

[1] Ministry of Education. (2022). *Stand-downs, suspensions exclusions and expulsions from school* at 4.
[2] Bourke, R., Butler, P. & O'Neill, J. (2021). *Children With Additional Needs*. Massey University at 4, 34.
[3] Ibid at 13.
[4] Morton, S.M.B., Walker, C.G., Gerritsen, S., Smith, A., Cha, J., Atatoa Carr, P., Chen, R., Exeter, D.J., Fa'alili-Fidow, J., Fenaughty, J., Grant, C. Kim, H., Kingi, T., Lai, H., Langridge, F., Marks, E.J., Meissel, K., Napier, C., Paine, S., Peterson, E.R., Pilai, A., Reese, E., Underwood, L., Waldie, K.E, & Wall, C. (2020). *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now We Are Eight*. Growing Up in New Zealand at 126; Webber, A. & McGregor, A. (2019). *He Whakaaro: What do we know about discrimination in schools?* Ministry of Education at 1.
[5] Ministry of Justice. (2021). *Māori victimisation in Aotearoa New Zealand Cycle 1 and 2 (March 2018 – September 2019)* at 2. See also Fanslow, J., Hashemi, L., Gulliver, P., & McIntosh, T. (2021). Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study. *Child Abuse & Neglect,* 117, 105067 at 6-7.
[6] Ministry of Justice, *Māori victimisation in Aotearoa New Zealand Cycle 1 and 2 (March 2018 – September 2019)* at 24.
[7] Ibid at 50.

stage of the system as compared with children and young people of other ethnicities.[8] Although there is some debate about the causes of this overrepresentation,[9] Keddell and Cleaver's thesis that disparities in child protection system contact are caused by a combination of heightened needs and biases in the systems that respond to them with both need and bias being related to "patterns of racism, colonisation, and class inequity through history" is particularly persuasive.[10] Arguably this thesis would apply equally well to other areas of over-representation including in disciplinary statistics, victimisation, and criminal justice system involvement.

Involvement in criminal justice system. Tamariki and rangatahi Māori also continue to be overrepresented in the justice system,[11] with an amplifier effect operating at each stage of the criminal justice process which increases the likelihood that Māori will progress further into the criminal justice system and be dealt with more severely.[12] Research and literature in relation to other settler colonial countries such as Australia and Canada show similar patterns of over-representation.[13]

Other legal needs. General legal needs research gives a partial picture in relation to Māori experience of other legal needs including findings that Māori are more likely to have experienced impactful legal problems and more likely to have experienced multiple legal problems.[14] This pattern is also reflected in other settler colonial countries such as Australia and Canada where there has been more in-depth research. For example, LAW Survey found that indigenous Australians face elevated legal need in areas of crime, government, health and rights as well as increased prevalence of multiple legal problems.[15] The Indigenous Legal Needs Project also identified a high degree of complexity within Indigenous legal need including the inter-connection between legal problems and non-legal issues associated with disadvantage which can make it harder to resolve legal issues once they occur.[16]

Barriers to access

Attitudinal barriers. The primary attitudinal barrier is racism. Racism can be a legal or justice problem in its own right (e.g. racial discrimination in health or employment), increase the likelihood of experiencing legal issues (e.g. racially mediated perceptions of risk and

[8] Oranga Tamariki—Ministry for Children. (2020). *Factors Associated with Disparities Experienced by Tamariki Māori in the Care and Protection System* at 7.
[9] For example see Oranga Tamariki—Ministry for Children, *Factors Associated with Disparities Experienced by Tamariki Māori in the Care and Protection System* at 6; Cook, L.W. (2020). *A Statistical Window for the Justice System: Putting a Spotlight on the Scale of State Custody across Generations of Māori*. Victoria University of Wellington, Institute for Governance and Policy Studies at 15.
[10] Joint brief of evidence of Emily Keddell and Kerri Cleaver (Wai 2915, #A90) at [14]-[16].
[11] Ministry of Justice. (2023). *Youth Justice Indicators Summary Report* at 5-6.
[12] Toki, V. (2018). *Indigenous Courts, Self-Determination and Criminal* Justice (1st ed.). Routledge at 19.
[13] Commission for Children and Young People. (2021). *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system* at 21; Truth and Reconciliation Commission of Canada. (2015). *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada* at 177-178.
[14] Ignite Research, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* at 33 & 36.
[15] Coumarelos, C., Macourt, D., People, J., McDonald, H.M., Wei, Z., Iriana, I., & Ramsey, S. (2012). *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of New South Wales at 178.
[16] Allison, F., Cunneen, C. & Schwartz, M. (2017). The Civil and Family Law Needs of Indigenous People Forty Years after Sackville: The Findings of the Indigenous Legal Needs Project" in A. Durbach, B. Edgeworth & V. Sentas. (Eds.), *Law and Poverty: 40 years after the Commission of Inquiry into Poverty,* Federation Press (pp.231-248) at 244-245. See also Savage, L. & McDonald, L. (2022*). Experiences of serious problems or disputes in the Canadian provinces, 2021*. Statistics Canada at 7.

culpability),[17] as well as a barrier to accessing justice in relation to other justice problems (e.g. prejudicial attitudes by lawyers or other justice system actors).[18]

Experiences of racism and other negative experiences of contact with the justice system or those in authority can lead to a lack of trust in the system and system actors.[19] A series of surveys have found that Māori have significantly lower levels of high trust and confidence in the Police and were significantly less likely than the NZ average to agree that Police are professional when conducting their duties.[20] Research in other settler colonial countries has also found that indigenous peoples are less likely to trust the police due to a combination of historical experiences, e.g. colonisation and assimilation practices, as well as contemporary experiences such as over-policing and deaths in custody.[21]

Structural / systemic barriers. Racism can also operate at a systemic level in the form of institutional racism. The monocultural legal and policy settings operate as a barrier to accessing justice in a range of ways including legal definitions that are based on Western, individualistic ways of seeing the world and legal systems and processes that have largely been transplanted from England and conflict with te ao Māori.[22] Although there are some tools and methods that are said to be culturally appropriate, such as the family group conference,[23] many express concerns that they are just a co-option of Māori culture,[24] with Māori participants in one research study reporting that the FGC process is culturally inappropriate and disempowering[25] and the

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[17] Waitangi Tribunal. (2021). *He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry*. Legislation Direct at 104; Stanley, E. & Mihaere, R. (2019). The problems and promise of international rights in the challenge to Māori imprisonment. *International Journal for Crime, Justice and Social Democracy,* 8(1), 1-17 at 121-122.

[18] Monteith, K., Quinn, E., Dennis, A., Joseph-Salisbury, R., Kane, E., Addo F. & McGourlay, C. (2022). *Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)*. University of Manchester at 6.

[19] See Office of the Children's Commissioner. (2021). *What Makes a Good Life for Tamariki and Rangatahi Māori?* at 3; Latimer, C.L., Le Grice, J., Hamley, L., Greaves, L., Gillon, A., Groot, S., Manchi, M., Renfrew, L. & Clark, T.C. (2021). 'Why would you give your children to something you don't trust?': Rangatahi health and social services and the pursuit of tino rangatiratanga, *Kōtuitui: New Zealand Journal of Social Sciences Online*. 17(3), 298-312 at 303.

[20] Daniels-Shpall, A. (2019). *Strategies for (re)building community trust: A review of practices in the New Zealand Police*. Fullbright New Zealand at 5-6; Gravitas Research and Strategy Ltd Research. (2020). *Citizens' Satisfaction Survey – Full Report for 2019/20 Fiscal Year Research Report*. New Zealand Police at 12; Evidence Based Policing Centre, *New Zealand Crime and Victims Survey: Police Module Results* at 11-12.

[21] Curran, L. & Taylor-Barnett, P. (2018). *Overcoming the Invisible Hurdles to Justice for Young People*. Hume Riverina Community Legal Service at 100; Cesaroni, C., Grol, C., & Fredericks, K. (2019). Overrepresentation of Indigenous youth in Canada's Criminal Justice System: Perspectives of Indigenous young people. *Australian & New Zealand Journal of Criminology*, *52*(1), 111–128 at 115.

[22] Waitangi Tribunal, *Hepā Harakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 108; Smith, C., Tinirau, R., Rattray-Te Mana, H. Tawaroa, M., Moewaka Barnes, H., Cormack, D. & Fitzgerald, E. (2021). *Whaka Tika: A Survey of Maori experiences of racism*. Te Atawhai o Te Ao Charitable Trust at 11.

[23] Consedine, J. (1995). *Restorative justice: Healing the effects of crime*. Ploughshare Publishing; Olsen, T., Maxwell, G., & Morris, A. (1995). Māori and youth justice in New Zealand. In K. Hazlehurst (Ed.), *Popular justice and community regeneration: Pathways to indigenous reform* (pp. 45–66). Praeger.

[24] Tauri, J. (1998). Family group conferences: A case study of the indigenisation of New Zealand's justice system. *Current Issues in Criminal Justice*, 10(2), 168–182; Love, C. (2000). Family group conferencing: Cultural origins, sharing and appropriation—A Māori reflection. In G. Burford & J. Hudson (Eds.), *Family group conferencing: New directions in child and family practice* (pp. 15–30). Walter de Gruyter Inc.; Tauri, J. (2014). An indigenous, critical commentary on the globalisation of restorative justice. *British Journal of Community Justice*, 12(2), 35–55.

[25] Moyle, P. & Tauri, J.M. (2016). Māori, Family Group Conferencing and the Mystifications of Restorative Justice. *Victims & Offenders,* 11(1), 87-106 at 96.

Waitangi Tribunal making specific findings that deficiencies in the FGC process meant that whānau, hapū, and iwi were not able to meaningfully participate.[26]

Professionals' lack of cultural competence can also operate as a barrier to accessing justice. For example, a key finding in research relating to Māori whānau experiences of family group conferences was that mainstream non-Māori social workers generally did not know how to engage with them and given the nature of the FGC process, a failure to engage effectively can have a significant impact on its outcome.[27] In a recent report, the Independent Children's Monitor also described how a lack of cultural competence can affect the outcome of investigation of reports of concern.[28] Cross cultural communication challenges can also lead to misinterpretations in both investigations and court processes.[29]

Practical barriers. A key practical barrier is the lack of data in some key areas including the Oranga Tamariki system with both the Waitangi Tribunal and the Independent Children's Monitor raising concerns about the quality and availability of Oranga Tamariki data.[30]

Possible solutions

The section of this report on possible solutions begins by discussing the research and literature in relation to Māori including culturally appropriate services and kaupapa Māori services, tailored processes within a Western justice system, changes to the courtroom environment and the incorporation of tikanga, by Māori for Māori approaches, separate processes and systems, and the need to look outside the justice system for solutions. I then discusses possible solutions identified in other jurisdictions by and for other indigenous peoples including culturally appropriate and delivered services, specific courts, and the provision for intersecting needs.

Other possible solutions include cultural awareness or cultural competence training although concerns arise in relation to some forms of training and the risk that it can perpetuate racial stereotypes or be insufficient to create the needed change. I also discuss education and training of lawyers starting with the inclusion of tikanga in the law school curriculum as well as ongoing professional development for those already in practice. Legal education for non-lawyers also has the potential to better enable other professionals and community members to support children and young people in contact with the justice system. The section concludes with a discussion in relation to the need for increased diversity in the legal profession.

This discussion of possible solutions is not a complete analysis, nor an attempt to identify all possible ways to resolve the access to justice challenges experienced by tamariki and rangatahi

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[26] Waitangi Tribunal, *Hepā Harakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 105.
[27] Moyle & Tauri, Māori, Family Group Conferencing and the Mystifications of Restorative Justice at 95; Tauri, J. (2022) What exactly are you restoring us to? A critical examination of Indigenous experiences of state-centred restorative justice. *The Howard Journal of Crime and Justice*. 61(1), 53-67 at 58.
[28] Independent Children's Monitor. (2023). *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022* at 42.
[29] Eades, D. (2012). Communication with Aboriginal Speakers of English in the Legal Process. *Australian Journal of Linguistics,* 32(4), 473-489 at 478.
[30] Independent Children's Monitor, *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021* at 9-10; Waitangi Tribunal, *He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 158.

Māori. It should be read together with working papers 11-17 which discuss possible ways of increasing access to justice for children and young people more generally.[31]

Justice problems

Te Tiriti o Waitangi and international law

Any discussion of justice issues for tamariki and rangatahi Māori must start with consideration of their rights under te Tiriti o Waitangi as well as the interplay of these rights with those under international law. A common criticism of international law is that it reflects Western practices and views and imposes "law, personal and cultural identities, and epistemologies acceptable within the Eurocentric realm" including a pervasive culture of individualism in contrast to the collectivist models associated with non-Western societies.[32] However, recognition of the cultural bias inherent in both the drafting and content of international human rights treaties, such as the UNCRC, and the resulting challenges in implementation have led to suggestions that the goal should be to make it work in different contexts for different communities including by giving western concepts and ideas new local meanings.[33]

Many in Aotearoa New Zealand have taken this approach and sought to find ways to read international human rights law and te Tiriti together in a way that emphasises their commonalities rather than their differences. For example, Dr Claire Achmad argues that the CRC and te Tiriti are complementary frameworks that both provide protection for children and their families in New Zealand, for the following reasons:[34]

- both documents place whanau centrally and acknowledge the concept of children thriving best as part of a collective;
- both documents take a holistic view of the person and the essential nature of connections to the wider collective;
- the concept of identity in the CRC relates to the concept of whakapapa in Te Ao Māori; and
- both documents emphasise the importance of culture and language.

Her analysis was cited with approval by Youth Court Judge Fitzgerald.[35] His Honour Judge Davis also made a similar point in a recent Youth Court case of *New Zealand Police v JH:*[36]

> *[Te Tiriti], the [Oranga Tamariki] Act and [the CRC] are not identical in their terms, but in my view nor are they in conflict. What is clear is that each document sets minimum standards of conduct and benchmarks minimum standards that every young person is entitled to. These rights are not something that are optional, or something that may be aspired to as best practice by police, Oranga Tamariki, or*

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[31] Working papers 11-17 discuss Strategic litigation; Legal service delivery, non-lawyer services, and integrated services; Data, evidence and measuring change; Technology; Training for professionals; Legal education and continuing professional development for lawyers and judges; and Law-related education for children and young people.

[32] Faulkner, E. A., & Nyamutata, C. (2020). The Decolonisation of Children's Rights and the Colonial Contours of the Convention on the Rights of the Child, *The International Journal of Children's Rights*, 28(1), 66-88 at 72.

[33] Cleland, A. (2013). Children's and young people's participation in legal proceedings in Aotearoa New Zealand: Significant challenges lie ahead. *New Zealand Law Review,* (3), 483-504 at 500-501.

[34] Achmad, C. (2019). *Children, Families and the State* (School of Government Seminar 3). Victoria University of Wellington.

[35] Fitzgerald, A. (2021) *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People* (unpublished paper) at 12-13.

[36] [2020] NZYC 396 at [49].

> *Judges for that matter – they are mandatory provisions, rights and protections afforded to every young person.*

Other authors have also developed models or ways of approaching these intersecting instruments and the relative priority given to each. King et al. developed Oranga Mokopuna as an alternative rights-based approach "that foregrounds whānau, whakapapa, tikanga Māori, He Wakaputanga and te Tiriti, while incorporating international human rights conventions such as the UNCRC and, specifically, the UNDRIP".[37] King et al. utilise the fan-shaped harakeke plant to represent Oranga Mokopuna and the interrelationships between the different sources of rights and elements of the model. They explain that the goal of the Oranga Mokopuna model is to:[38]

> *[R]e-centre decolonised tikanga Māori and local rights instruments in discussions of rights-based approaches, with international human rights instruments such as the UNCRC, and specifically, the UNDRIP, developing and supporting inherent tāngata whenua rights, rather than being seen as the basis for those rights.*

Charters et al. from Te Puna Rangahau o te Wai Ariki Aotearoa New Zealand Centre for Indigenous Peoples and the Law took a similar approach in their thematic report for the UN Committee on the Rights of the Child emphasising the unique rights and protections of tamariki Māori as tangata whenua in accordance with Te Ao Māori and tikanga Māori, pursuant to te Tiriti o Waitangi, and under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[39] They argue that Te Ao Māori, tikanga Māori, and te Tiriti should be the first point of reference when considering the rights and interests of tamariki Māori with international instruments including UNDRIP and the UNCRC then being drawn on to further strengthen and develop the rights of tamariki Māori.[40]

Luke Fitzmaurice also considered the interplay between these different instruments, their commonalities, and their differences in his PhD thesis on decolonising the child protection system.[41] Like the others cited, he acknowledges the areas of commonality between the Oranga Tamariki Act 1989, UNCRC, the UNDRIP and te Tiriti/the Treaty noting that each recognise the importance of wellbeing, cultural identity and participation.[42] However, he goes on to argue that "each places a different emphasis on one or two at the possible cost of the others".[43] For example, in the UNCRC the best interests principle (Art 3) and the right to participation (Art 12) are framed as essential, and implicitly more important than the right to cultural identity, whereas collective rights to self-determination and cultural identity are more prominent in UNDRIP and te Tiriti.[44] As he notes, the fact that each framework mentions the same objectives does not mean that they are weighted in the same way in each.[45]

Fitzmaurice also critiques the Oranga Mokopuna model in his thesis arguing that while it may "be of value for convincing those who are wedded to the importance of rights frameworks that

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[37] King, P., Cormack, D. & Kōpua, M. (2018). A tāngata whenua rights-based approach to health and wellbeing. *MAI Journal*. 7(2), 186-202 at 197.
[38] Ibid at 198.
[39] Charters, C., Te Aho, F., & Mason, C. (2022). *The Rights of Tamariki Māori in Aotearoa New Zealand*. Te Puna Rangahau o te Wai Ariki - Aotearoa New Zealand Centre for Indigenous Peoples and the Law at 2.
[40] Ibid at 3.
[41] Fitzmaurice, L.S. (2022). *Te Rito o Te Harakeke: Decolonising Child Protection and Children's Participation* [Doctoral Thesis, University of Otago].
[42] Ibid at 68.
[43] Ibid at 69.
[44] Ibid at 69-70.
[45] Ibid at 70.

Indigenous values must come first when seeking to uphold the rights of Indigenous children", it remains a rights-based model that is at risk of perpetuating the problems it is designed to solve.[46] He argues for a "bias towards indigeneity" meaning that "when selecting the tools with which they seek to advance the interests of Indigenous children, advocates would choose whichever tool is most likely to advance the goal of Indigenous self-determination".[47] While this approach may have value in the specific context where an advocate for an indigenous child is considering how to frame an argument, it is not entirely clear what it would mean, if anything, for decision-makers who may be responding to such advocacy. Those decision makers will be left with the need to consider and reconcile all competing arguments, including any based on international law, and if advocates do not suggest a way to do so that process seems unlikely to result in the outcome sought by advocates.

Colonisation and breaches of te Tiriti o Waitangi

The Human Rights Commission described some of the impacts of colonisation on Māori in its report in relation to violence and abuse of tāngata whaikaha Māori:[48]

> *Colonisation created a devastating pattern that led to a loss of political power, cultural understanding and autonomy for Māori that continues today. The arrival of Pākehā settlers resulted in the systematic dispossession of Māori from their land. Colonial structures and policies created significant disparities between Māori and Pākehā, with Māori being forced to abandon their traditional ways of living in favour of colonial practices. This led to processes and institutions that remain systemically biased. The impacts of colonisation must be acknowledged as a historic, intergenerational and contemporary political determinant of health.67*

The Waitangi Tribunal report on its inquiry into Oranga Tamariki describes the impact of colonisation on Māori and other indigenous peoples around the world:[49]

> *Many issues associated with colonisation (including disease, land loss, cultural marginalisation, and the Crown's policies of assimilation, urbanisation, and economic restructuring) have had far-reaching negative implications for Māori and their interactions with the State. Indeed, the impacts of colonial inequity are increasingly well-documented, and parallels can be drawn with indigenous populations around the world. We note, for example, the alarming statistics set out in 'incarceration table 1' of the statistical appendix at section II.3.2.3.194 It sets out the percentages of indigenous children in State custody, of indigenous incarcerated youth, and of indigenous incarcerated adults – not only here but also in Australia, Canada, and three states in the United States. In every metric of this table, indigenous populations are disproportionately represented. Clearly, the ramifications of colonisation are profound, and much remains to be done to right the persistent inequities that stem from our shared colonial pasts.*

Gavey et al. also link Māori women and children's experience of whānau and sexual violence with colonisation arguing that "myriad forms of colonial violence severely disrupted Māori social

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[46] Ibid at 181.
[47] Ibid at 183.
[48] New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2021) *Whakamahia te tūkino kore ināianei, ā muri ake nei: Acting now for a violence and abuse free future* at 14. The New Zealand Human Rights Commission explores the impact of colonisation in more detail in New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2023) *Maranga Mai! The dynamics and impacts of white supremacy, racism, and colonisation upon tangata whenua in Aotearoa New Zealand*.
[49] Waitangi Tribunal, *He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 95.

structures and undermined tikanga" and paved the way for the introduction of Western models of gender which endorsed men's dominance over women and children.[50]

The Waitangi Tribunal is currently in the early stages of Te Rau o te Tika: the Justice System Inquiry which will take place in three parts:[51]

- Whakatika ki Runga – a mini-inquiry that commenced in July 2022 about the funding of claimant participation in Waitangi Tribunal processes, including legal aid.
- Te Tūāpapa o te Tika – a process involving people as Pou Tikanga, or authorities on tikanga, in order to gain insights about the tikanga of justice that need to guide the Inquiry process.
- Te Tāhū o te Tika – the balance of the Inquiry. The Tribunal intends to look at criminal justice first then turn to civil justice, including civil litigation and civil legal aid, followed by the Family Court, Environment Court and Māori Land Court.

Although the focus of Te Rau o te Tika is not on children and young people specifically, its findings and recommendations will no doubt be of considerable relevance to any discussions in relation to access to justice for tamariki and rangatahi Māori.

Issues in the education system including school discipline

Ministry of Education data shows that schools stand-down, suspend, and exclude Māori students at a greater rate than any other ethnic group.[52] However, it is important to note that prevalence data on stand downs, suspensions and exclusions record the school's response to presenting behaviour rather than the behaviour itself, and schools' responses to similar presenting behaviours vary widely.[53] In 2021: [54]

- The stand-down rate for Māori students in 2021 was 44.7 per 1,000 students as compared to a rate of 24.1 per 1,000 students for European/Pākehā students;
- The suspension rate for Māori students in 2020 was 6.1 per 1,000 students as compared to a rate of 2.5 per 1,000 students for European/Pākehā students; and
- Of the suspended Māori students, the exclusion rate was 2.2 per 1,000 students; and the expulsion rate was 2.3 per 1,000 students as compared to an exclusion rate of 0.8 and an expulsion rate of 0.5 per 1,000 students for European/Pākehā students.

Bourke et al describe the overrepresentation of Māori in disciplinary statistics as a "sentinel indicator of a system that does not meet the language, culture and identity needs of significant and growing proportions of the school population".[55] They also point to the overrepresentation of Māori learners in those referred to special education behaviour services as suggesting either structural racism or that the system does not "enable Māori students to live and learn as Māori", leading to "disproportionately high numbers of Māori being labelled with 'behaviour problems'."[56]

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[50] Gavey, N., Calder-Dawe, O., Taylor, K., Le Grice, J., Thorburn, B., Manuela, S., Dudley, M., Panditharatne, S., Ross, R., & Carr, A. (2021). *Shifting the Line: Boys talk on gender, sexism and online ethics*. Te Kura Mātai Hinengaro - School of Psychology, Te Whare Wānanga o Tāmaki Makaurau - The University of Auckland at 7.

[51] Wai 3060, 2.5.007(c) Appendix 3: The structure of the inquiry and relevant translations of the memorandum-directions, 19 Apr 22

[52] Ministry of Education (2022) *Stand-downs, suspensions exclusions and expulsions from school* at 4.

[53] Bourke, Butler, & O'Neill, *Children With Additional Needs* at 4, 34.

[54] Ministry of Education *Stand-downs, suspensions exclusions and expulsions from school* at 4.

[55] Bourke, Butler, & O'Neill, *Children With Additional Needs* at 5.

[56] Ibid at 13. Research in the United Kingdom exploring similar disparities experienced by Black Carribean youth identified two alternative explanations, the first being inappropriate interpretation of ethnic and cultural differences and teacher racism, and the second that ethnic minority students are at greater risk due to socio-economic disparities: Strand, S. & Lindorff, A. (2018). *Ethnic disproportionality in the*

Bourke et al. also identify other problems underlying the data including the impacts of colonisation; low teacher expectations; distrust of mainstream education system; and many whānau not wanting to access services because tamariki and rangatahi will be labelled for life.[57] They argue that the data has not improved for Māori over last thirty years and will not unless these underlying causes are addressed.

Gordon also points to normalised expectations of failure and argues that "ethnic bias in the schooling system might be seen to arise from two potential causes: the production and dissemination of knowledge in the school, and the exercise of authority within the system".[58] In terms of the latter, Ministry of Education data shows that only 41% of school boards have proportional Māori representation on the school board with this rate increasing by only 1% since 2013.[59]

Data also shows that tamariki and rangatahi Māori experience are more likely to experience bullying and discrimination. For example, the Growing Up in New Zealand study found that a larger proportion of Pacific (15%, n=76) and Māori (9%, n=106) students reported bullying compared with Asian (8%, n=42) and European (5%, n=84) children.[60] Recent research commissioned by the Ministry of Education in relation to discrimination in schools also found that "Māori, Samoan and other Pacific students are far more likely to report discrimination on the basis of their ethnicity from adults than from their peers, with unfair teacher behaviour the most frequently reported issue."[61]

It is also noteworthy that tamariki in Kaupapa Māori (Indigenous education) achieve at higher levels.[62] A 2021 report by the Education Review Office found that:[63]

> *Ultimately, Te Kōhanga Reo, Kura Kaupapa Māori and Ngā Kura ā Iwi [Indigenous education institutions] provide models of excellence for Māori education, and offer exemplars for supporting Māori learners to enjoy and achieve education success as Māori, in Māori-medium settings.*

Other settler colonial societies see similar issues with the over-representation of indigenous children and young people in disciplinary statistics. For example, a 2021 Inquiry by the Victorian Commission for Children and Young People into overrepresentation of Aboriginal children and young people in the youth justice system found:[64]

> *Aboriginal children and young people have lower rates of school attendance, are more likely to be suspended or expelled from school, and have lower levels of*

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identification of Special Educational Needs (SEN) in England: Extent, causes and consequences. University of Oxford at 19.

[57] Bourke, Butler, & O'Neill, *Children With Additional Needs* at 53.

[58] Gordon, L. (2015). Teaching the 'Poor' a Lesson: Beyond Punitive Discipline in Schools. *New Zealand Journal of Educational Studies*, 50(2), 211-222 at 217. See also Flavell, W. (2022). *Kia tū pakari ngā māhuri: Amplifying the voices of rangatahi Māori in the criminal justice system and their educational experiences*. [Masters Thesis, Auckland University of Technology] at 17-22 which discuses the impact of low teacher expectations of tamariki and rangatahi Māori, deficit theorising, and racism.

[59] Education Counts. (2021). *Māori parent representation on school boards*. Ministry of Education at 2.

[60] Morton et al., *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now We Are Eight* at 126.

[61] Webber & McGregor, *He Whakaaro: What do we know about discrimination in schools?* at 1.

[62] New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2022). *New Zealand's 6th Periodic Review under the UN Convention on the Rights of the Child: Submission of the New Zealand Human Rights Commission to the Committee on the Rights of the Child* at 21.

[63] Education Review Office - Te Tari Arotake Mātauranga. (2021). *Te Kura Huanui: The treasures of successful pathways* at 12.

[64] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system* at 31.

educational attainment than non-Aboriginal students. They also experience unacceptable rates of racialised bullying, which contributes to their disengagement from education. Each of these factors increases the risk of contact with, and entrenchment in, the youth justice system.

O'Brien also discusses research demonstrating that many indigenous Australian children believe that they are constantly singled out by teachers and that they have experienced some form of racism or discrimination during their schooling lives with this discrimination coming from administrative staff, principals, teachers and other children and having an overwhelming effect on a child's well-being and self-esteem.[65]

Victimisation

The New Zealand Crime and Victims survey shows that Māori are victimised at a disproportionate rate with over one third of Māori adults (38%) being victimised in a 12-month period as compared to the New Zealand average of 30%.[66] The Ministry of Justice argue that when the various risk factors for victimisation are taken into account, including being younger,[67] the higher overall rates of victimisation observed for Māori largely appear to reflect the higher proportions of young Māori and higher proportions of Māori in high deprivation areas.[68]

Another important finding which suggests a different, or at least more complex, explanation for the higher rates of victimisation was that Māori living in most parts of the North Island were less likely to experience personal offences and violent interpersonal offences than Māori living in Wellington or the South Island.[69] A key difference between these regions is that the relative proportion of Māori is almost three times higher in the wider North Island than in Wellington or the South Island suggesting that Māori are safer in regions with relatively larger Māori communities.[70] Similar patterns have also been found in research on the effects of ethnic density on Māori health outcomes.[71] These patterns are also consistent over time which suggests that little has been achieved and they will continue unless significant changes are made.[72]

Fanslow et al.'s population based study using data from the 2019 Family Violence Survey produced prevalence estimates of measured ACE types by socio-demographic characteristics.[73] Fanslow et al. also found that experience of ACEs was not evenly distributed with Māori reporting a greater prevalence of all types of ACEs as shown in the table below.

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[65] O'Brien, G. (2021). Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia. *Social Sciences*, 10(2), 68 at 6.
[66] Ministry of Justice. (2021). *Māori victimisation in Aotearoa New Zealand Cycle 1 and 2 (March 2018 – September 2019)*. New Zealand Crime and Victims Survey Topical Reports at 2.
[67] "Controlling for the influence of other demographic and socioeconomic factors in our modelling analyses, age consistently remained a strong indicator of victimisation across all offence types, but especially with regard to personal offences and violent interpersonal offences. That is, controlling for other factors, being aged 15–29 was the strongest predictor for experiencing a personal or violent interpersonal offence for Māori." Ministry of Justice, *Māori victimisation in Aotearoa New Zealand Cycle 1 and 2 (March 2018 – September 2019)* at 28.
[68] Ministry of Justice, *Māori victimisation in Aotearoa New Zealand Cycle 1 and 2 (March 2018 – September 2019)* at 24.
[69] Ibid at 50.
[70] Ibid.
[71] Ibid.
[72] Ibid at 49-50
[73] Fanslow et al., Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study.

Table 1 Prevalence of Adverse Childhood Experiences[74]

Ethnicity	Emotional abuse	Physical abuse	Sexual abuse	Witnessing IPV	Emotional abuse	Physical abuse
European	27.1%	16%	16.7%	12.8%	19.2%	20.7%
Māori	52.1%	31.3%	31.3%	33.3%	36.8%	23.6%
Pacific	33.5%	24.7%	21.1%	24.2%	21.7%	12%
Asian	19.9%	13.3%	14.2%	12%	9.4%	8.8%
MELAA	30.2%	20.9%	26.8%	27.9%	16.7%	25.6%

Involvement in the care & protection system

The Oranga Tamariki Evidence Centre's analysis of the data shows that tamariki Māori are more likely to come to the attention of care & protection services and then more likely to move through each stage of the system as compared with other ethnicities:[75]

- First report of concern:
  - Tamariki and rangatahi Māori are 3.45 times more likely to be involved for the first time before allowing for socioeconomic and demographic characteristics; and
  - Tamariki and rangatahi Māori are 1.22 times more likely to be involved for the first time after allowing for socioeconomic and demographic characteristics.
- First referral to assessment / investigation:
  - Tamariki and rangatahi Māori are 1.10 times more likely to be involved for the first time before allowing for socioeconomic and demographic characteristics; and
  - Tamariki and rangatahi Māori are 1.03 times more likely to be involved for the first time after allowing for socioeconomic and demographic characteristics.
- First Family Group Conference (FGC) or Family Whānau Agreement (FWA):
  - Tamariki and rangatahi Māori are 1.34 times more likely to be involved for the first time before allowing for socioeconomic and demographic characteristics; and
  - Tamariki and rangatahi Māori are 1.06 times more likely to be involved for the first time after allowing for socioeconomic and demographic characteristics.
- First placement:
  - Tamariki and rangatahi Māori are 1.01 times more likely to be involved for the first time before allowing for socioeconomic and demographic characteristics; and
  - Tamariki and rangatahi Māori are 0.99 times more likely to be involved for the first time after allowing for socioeconomic and demographic characteristics.

The UN Committee on the Rights of the Child raised concerns about this over-representation of tamariki and rangatahi Māori in its Concluding Observations on New Zealand issued in February

[74] Ibid at 6-7.
[75] Oranga Tamariki—Ministry for Children, *Factors Associated with Disparities Experienced by Tamariki Māori in the Care and Protection System* at 7.

2023 particularly highlighting the "high number of infants removed into State custody, and incidents of harm disproportionately experienced by these children".[76]

As with victimisation rates, the Oranga Tamariki Evidence Centre argue that a significant proportion of this ethnic disparity appears to be associated with the socioeconomic and parent/child characteristics.[77] However, they also acknowledge that further work is required to determine the extent to which systemic ethnicity biases affect these socio-economic factors "for example, identifying where operational practice may be applying 'excess' weight within other socioeconomic factors that may also reflect ethnic disparity, such as parental Corrections involvement".[78]

Academics and researchers have cast some doubt on Oranga Tamariki explanations of this disproportionality. For example, former chief statistician Len Cook used a study of aggregate statistics over time to question assumptions about the connection between socio-economic indicators and over-representation noting that:[79]

> *The highest rate of Māori children in the custody of the state, for the 15-20 years up to 1988, was also a high point in Māori employment. The lowest number and share of Māori children in the custody of the state occurred when the economic position of whanau children in the custody of the state was at its lowest.*

In Emily Keddell and Kerri Cleaver's brief of evidence for the Waitangi Tribunal Inquiry into Oranga Tamariki, they argue that disparities in child protection system contact are caused by a combination of heightened needs amongst some populations, and biases in the systems that respond to them with both need and bias being related to "patterns of racism, colonisation, and class inequity through history".[80] Focussing solely on need as a contributing factor to system involvement is problematic because it can lead those involved in the child welfare system "to believe that the causes of disproportionality occur largely outside their systems, and as a result, racial disproportionality is to be expected and no action is needed to address it".[81] Moreover, as United States academic Alan Dettlaff argues, we also need to acknowledge the connection between racism and disproportionate need:[82]

> *Although research clearly documents the relationship between poverty and maltreatment, poverty and 'disproportionate need' are the result of centuries of racism and structural disadvantage that have created the conditions of risk that contribute to maltreatment in Black families. These issues of disproportionate need are then compounded by the oversurveillance and over-reporting of Black families to child welfare systems, which begins their involvement in a system that exacerbates these inequities through racial biases in decision making that disproportionately impact Black children.*

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[76] United Nations Committee on the Rights of the Child, *Concluding observations on the sixth periodic report of New Zealand* at 8.
[77] Oranga Tamariki—Ministry for Children, *Factors Associated with Disparities Experienced by Tamariki Māori in the Care and Protection System* at 6.
[78] Ibid at 6.
[79] Cook, L. W. (2020). *A Statistical Window for the Justice System: Putting a Spotlight on the Scale of State Custody across Generations of Māori*. Victoria University of Wellington, Institute for Governance and Policy Studies at 15.
[80] Joint brief of evidence of Emily Keddell and Kerri Cleaver (Wai 2915, #A90) at [14]-[16].
[81] Ibid.
[82] Dettlaff, A.J., Weber, K., Pendleton, M., Boyd, R., Bettencourt, B. & Burton, L. (2020). It is not a broken system, it is a system that needs to be broken: the upEND movement to abolish the child welfare system, *Journal of Public Child Welfare*, 14(5), 500-517 at 507.

Keddell and Cleaver go on to explain the effect of instrumental biases and direct biases.[83] Instrumental biases are third party or proxy factors that increase disparities and include:[84]

- Exposure bias – more Māori, especially those living in deprived areas, are exposed to people with heightened notification responsibilities such as police, health or social services;
- Visibility bias – where people are targeted because they are a visible minority;
- Surveillance bias – heightened surveillance of Māori in general and some whanau in particular i.e. whanau with multiple system contacts often generate an increased perception of risk;
- Recorded case contacts – emphasising recorded case history over current, in-depth assessments will exacerbate bias because more Māori have intergenerational histories of system contact.
- Intimate partner violence – Māori are more likely to be victims of intimate partner violence and may be more likely to have Police callouts which lead to automatic notification of Oranga Tamariki. Keddell and Cleaver suggest this is a good example of the interrelationship of need and bias.

Direct biases are biases that affect the decisions of individual decision makers. A good example of this is Keddell & Hyslop's study of perceptions of risk which compared social workers' responses to Māori and non-Māori families using an otherwise identical fact situation.[85] The participants were asked to rate their perceptions of the children's risk and state what decisions they would make. The quantitative findings showed family ethnicity had a moderate effect on perceptions of risk, safety, and decisions with the Māori family being perceived as higher risk than the Pākehā family and more decisions being made about them.[86] Keddell & Hyslop also discuss how these biases may be formed such as practitioners' exposure to the overrepresentation of Māori children in the system, and media coverage in relation to tamariki Māori who have died of maltreatment, which can skew practitioners' assumptions about base rates and future likelihood of harm leading to 'illusory correlation' bias, and confirmation bias.[87] Another risk is that where these biases are present in data used for predictive risk analysis which then compounds the existing bias by inflating later risk assessments.[88] In other words, taking individual social workers out of the assessment process doesn't actually eliminate biases if they are hardwired into the data used for the assessment.

The recognition of the need to take practical steps to address these disparities led to the introduction of section 7AA of the Oranga Tamariki Act[89] which imposes duties on the chief executive of Oranga Tamariki under s7AA to give practical effect to te Tiriti o Waitangi including by ensuring that the policies and practices of Oranga Tamariki that impact on the well-being of young people have the objective of reducing disparities by setting measurable outcomes for Māori young people.[90] However, in the Waitangi Tribunal's recent report on its inquiry into Oranga Tamariki the Tribunal found that s7AA, which requires only a 'practical commitment', is

[83] Joint brief of evidence of Emily Keddell and Kerri Cleaver (Wai 2915, #A90) at [18].
[84] Ibid at [19]-[23].
[85] Keddell, E. & Hyslop, I. (2019). Ethnic inequalities in child welfare: The role of practitioner risk perceptions. *Child & Family Social Work*, 24(4), 409-420.
[86] Ibid at 417-418.
[87] Ibid at 418.
[88] Ibid.
[89] Oranga Tamariki Act 1989, s7AA.
[90] New Zealand Police/Oranga Tamariki v LV [2020] NZYC 117 at [69(a)]

not strong enough to ensure that the Crown complies with its Tiriti / Treaty obligations.[91] They concluded:[92]

> *Most significantly, however, it is our conclusion that any attempts to broadly reform the philosophy and operations of Oranga Tamariki – within existing parameters – will not succeed. While ameliorative measures may succeed in reducing disparity in certain areas for periods of time, we consider that unless the core precepts of the care and protection system are realigned, with power and responsibility returned to Māori, disparity will be a persistent feature of the system – as it has been prior to and since the release of Puao-te-Ata-tu.*

Indigenous children in other jurisdictions are also overrepresented in child protection system involvement. For example, in Australia, Aboriginal and Torres Strait Islander children were 6.5 times more likely than non-Indigenous children to be the subject of substantiated reports of harm/risk of harm,[93] and 11 times more likely to be placed in out of home care.[94] The Australian Institute for Family Studies identifies similar underlying causes of this over-representation as those in Aotearoa New Zealand:[95]

> *The reasons for this are complex and are connected to past policies and the legacy of colonisation. Poverty, assimilation policies, intergenerational trauma and discrimination and forced child removals have all contributed to the over-representation of Aboriginal and Torres Strait Islander children in care, as has a lack of understanding of the cultural differences in child-rearing practices and family structure (Human Rights and Equal Opportunity Commission [HREOC], 1997; SNAICC, 2016a; Titterton, 2017).*

Writing in the United States, Beardall and Edwards argue "[t]he enduring effects of the settler-state's targeted control of non-white families cannot be understated" with recent data indicating that about 15% of indigenous children will enter foster care at some point before their 18th birthday as compared with only 5% of white children. [96] They identify two primary causes - land dispossession and the destabilization of indigenous families and tribes.[97] They also point to the need to address underlying economic and social inequities that drive referrals into the system,[98] and post-investigation decision making by child welfare agencies who "are more likely to substantiate maltreatment of Native children once investigated, and more likely to separate them from their family conditional on initial contact".[99]

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[91] Waitangi Tribunal, *He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* at 153.
[92] Ibid at 154.
[93] Australian Institute of Family Studies. (2020). *Child protection and Aboriginal and Torres Strait Islander children*. Commonwealth of Australia at 2. This data relates to the year from 1 July 2017 to 30 June 2018.
[94] Ibid at 8. This data relates to the year from 1 July 2017 to 30 June 2018.
[95] Ibid at 1.
[96] Beardall, T. R., & Edwards, F. (2021). Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare. *Columbia Journal of Race and Law*, *11*(3), 533–574 at 536.
[97] Ibid.
[98] Ibid at 560.
[99] Ibid at 559.

Involvement in criminal justice system

Tamariki and rangatahi Māori also continue to be overrepresented in the justice system. For example, in 2021/22:[100]

- The offending rate for tamariki Māori was 171 per 10,000 children, compared with 66 per 10,000 for the total population rate;
- The offending rate for rangatahi Māori was 502 per 10,000 young people, compared with 224 per 10,000 for the total population rate;
- 29% of rangatahi Māori who offended appeared in the Youth Court compared with 24% of total young people who offended; and
- 4% of rangatahi Māori who appeared in the Youth Court were remanded in custody compared with 29% of total young people who appeared in the Youth Court.

Of concern, the overrepresentation of younger children is particularly stark with tamariki Māori accounting for 79% of the 953 arrests of children aged 10 to 13 in 2020/21 (compared to 27% of the total New Zealand population) and 87% of arrests involving children aged 10 or 11.[101]

In her research on indigenous courts Valmaine Toki describes an 'amplifier' effect at each of the different stages of criminal justice process which increases the likelihood that Māori will progress further into the criminal justice system and be dealt with more severely:[102]

> *Māori are more likely to be apprehended, prosecuted, convicted and imprisoned than non- Māori. At each stage of the criminal justice process from apprehension right through to prosecution, trial and sentencing, a significant degree of built-in discretion exists with respect to decision-making.[68]*
>
> *Upon apprehension the police may exercise judgment about whether or not to detain an individual for questioning.[69] If an individual is apprehended, there is discretion about whether or not to arrest the person, and later, whether or not to proceed with prosecution. At the prosecution stage, the court may or may not convict the individual. Upon conviction, judges may remit the offender's sentence.*

As noted above, the Oranga Tamariki Act 1989 now imposes duties on the chief executive of Oranga Tamariki under s7AA to give practical effect to te Tiriti o Waitangi.[103] However, recent decisions of the Youth Court have found no evidence that this is happening in practice.[104]

Research and literature in relation to other settler colonial countries such as Australia and Canada show similar patterns of over-representation of indigenous peoples. For example, the Commission for Children and Young People in Victoria Australia reported that Aboriginal children and young people were 10 times more likely than non-Aboriginal children and young people to be subject to community-based supervision and 9 times more likely than non-Aboriginal children and young people to be in youth justice custody.[105] Data also shows that this over-representation occurs at each stage of the investigation process from arrest and detention to entry into youth justice custody.[106]

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[100] Ministry of Justice. (2023). *Youth Justice Indicators Summary Report* at 5-6.
[101] Spier, P. (2022). *Children arrested by Police in 2020/21*. Oranga Tamariki—Ministry for Children at 5.
[102] Toki, *Indigenous Courts, Self-Determination and Criminal Justice* at 19.
[103] New Zealand Police/Oranga Tamariki v LV [2020] NZYC 117 at [69(a)].
[104] New Zealand Police/Oranga Tamariki v LV [2020] NZYC 117 at [69]-[70]; New Zealand Police v JV [2021] NZYC 248 at [55]-[62].
[105] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system* at 21.
[106] Ibid.

Similarly, the Truth and Reconciliation Commission of Canada described the youth justice system as failing Aboriginal families with Aboriginal girls making up 49% and Aboriginal boys 36% of those admitted to custody.[107] The Commission link this overrepresentation to "[t]he great vulnerability and disadvantage experienced by so many Aboriginal youth" including "high rates of addictions, fetal alcohol disorder, mental health issues, family violence, incarceration of parents, and the intrusion of child-welfare authorities."[108]

Other justice problems

Legal needs surveys and research in Aotearoa New Zealand provides some limited data on the legal needs of Māori. The first legal needs study in Aotearoa found that Māori and benefit recipients were more likely to report legal problems of most types and were more likely to have unmet legal needs.[109] The 2006 national survey of unmet legal needs and access to services found that Māori were overrepresented as users of legal aid lawyers[110] and were more likely to seek help for their legal problems.[111] The 2018 survey of legal needs among low income New Zealanders found that 55% of Māori are likely to have experienced an impactful problem in the past two years[112] as compared to 36% of all respondents.[113] Māori were also more likely to have experienced 5 or more legal problems in the last year – 27% as compared to 9% of all respondents.[114] A similar pattern was also identified in the general population with 49% of Māori likely to have experienced an impactful problem in the past two years[115] as compared to 35% of all respondents.[116] Again, Māori were also more likely to have experienced 5 or more legal problems in the last year – 12% as compared to 6% of all respondents.[117]

In Australia, the Indigenous Legal Needs Project which took place from 2011 to 2015 was the first large-scale study specifically focused on Indigenous legal need and access to justice in non-criminal areas of law in Australia.[118] It identified seven priority areas of need "housing (tenancy), discrimination, credit and debt and associated consumer law, social security, child protection and wills and estates" the majority of which overlap with those areas identified as being problematic for the poor.[119] Other points of interest in the findings of this project are:

- A large portion of indigenous priority need arises in the context of interaction with the government which arguably makes it unjust for the government to fail to resource legal services relating to these issues; [120]

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[107] Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada* at 177.
[108] Ibid at 178.
[109] Toy-Cronin, B., & Stewart, K. (2022). *Expressed legal need in Aotearoa: From Problems to Solutions*. Civil Justice Centre, University of Otago at 5. I requested a copy of this report from the Ministry of Justice but my request was refused on the basis that the document does not exist or could not be found. See Letter from Ministry of Justice to Jennifer Braithwaite dated 28 April 2021.
[110] Ignite Research. (2006). *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services*. Legal Services Agency at 56.
[111] Ignite Research, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* at 75.
[112] Colmar Brunton. (2018). *Legal needs among low income New Zealanders.* Ministry of Justice at 33.
[113] Ibid at 27.
[114] Ibid at 36.
[115] Ibid at 4.
[116] Ibid at 3.
[117] Ibid at 43.
[118] Allison et al., "The Civil and Family Law Needs of Indigenous People Forty Years after Sackville: The Findings of the Indigenous Legal Needs Project" at 234.
[119] Ibid at 235. The exceptions being wills and estates and racial discrimination.
[120] Ibid at 240-241.

- While the focus on criminal legal aid is necessary, it can result in under-serving of need in relation to civil and family law – an equal focus is required without a reduction in criminal legal aid work;[121]
- There is a high degree of complexity within Indigenous legal need including the inter-connection between non-legal issues associated with disadvantage and access to justice issues e.g. illiteracy, disability and mental health issues, substance abuse, trauma, and poverty.[122] These problems can make it harder to resolve legal issues once they occur. [123]
- Many Indigenous people experience multiple legal issues simultaneously or 'snowballing', where one unresolved issue soon becomes two, three and so on.[124]

Another source of data is the 2008 LAW Survey which related to the population as a whole but also contained analysis of disaggregated data relating to the demographic groups that are particularly vulnerable to experiencing legal problems including indigenous Australians.[125] The LAW Survey found that indigenous Australians face elevated legal need in areas of crime, government, health and rights as well as increased prevalence of multiple legal problems.[126] The crime problems "include both offender and victim problems, and the government problems include problems related to fines and government payments."[127] The Law Council of Australia argue that government and crime problems are interconnected due to the impact of systemic bias.[128] However, the methodological approach of the LAW Survey which used a telephone landline limit its ability to access and elicit information-rich responses from Indigenous people.[129]

Legal needs research in Canada in 2021 found that Indigenous people are more likely to have experienced multiple serious problems with 29% of Indigenous people who reported experiencing a problem saying they faced three or more serious problems as compared with 23% of non-Indigenous participants. [130] This study also found that Indigenous people were more likely to report experiencing a serious problem relating to harassment in the last three years (6% compared to 3% of non-Indigenous people) with 36% of Indigenous people who had experienced a serious problem related to harassment saying that the harassment was based on their Indigenous identity.[131]

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[121] Ibid at 240-241.
[122] Ibid at 244.
[123] Ibid at 245.
[124] Allison et al., "The Civil and Family Law Needs of Indigenous People Forty Years after Sackville: The Findings of the Indigenous Legal Needs Project" at 245.
[125] Coumarelos et al., *Legal Australia-Wide Survey: legal need in Australia* at 46, 58.
[126] Ibid at 178.
[127] Ibid at at 178.
[128] Law Council of Australia. (2017). *Aboriginal and Torres Strait Islander People: Consultation Paper* at 14.
[129] Cunneen, C., Allison, F. & Schwartz, M. (2014). Access to justice for aboriginal people in the Northern Territory. *The Australian Journal of Social Issues*, 49(2), 219-240 at 221.
[130] Savage & McDonald, *Experiences of serious problems or disputes in the Canadian provinces, 2021* at 7.
[131] Ibid at 7.

Barriers

Attitudinal Barriers

Racism

Racism can be a legal or justice problem in its own right (e.g. racial discrimination in health or employment), increase the likelihood of experiencing legal issues (e.g. differential treatment by the police in stopping and searching on the street), as well as a barrier to accessing justice in relation to other justice problems (e.g. prejudicial attitudes by lawyers or other justice system actors).

One example presented to the Waitangi Tribunal in its inquiry into Oranga Tamariki is research in which a random sample of social workers had the same situation described to them with some told that the family were European, and others told that they were Māori.[132] The researchers found that when the family were described as Māori they were perceived to be more at risk than when they were described as Pākehā.[133] During the Waitangi Tribunal hearing in relation to Oranga Tamariki the Crown also made concessions in relation to structural racism in the child protection system:[134]

> *[S]tructural racism is a feature of Oranga Tamariki and its predecessors, and has resulted from various legislative policy and system settings over time. The Crown acknowledges that this has had adverse effects for tamariki Māori, whānau, hapū and iwi and has detrimentally affected the relationship between Māori and the Crown. Further, the Crown acknowledges the role that poor practice, lack of engagement and poor cultural understanding have played to create distrust throughout the Care and Protection system.*

Stanley and Mihaere discuss how a narrative of Māori deficit has developed in mainstream discourse:[135]

> *Māori are linked to 'a familiar litany of social pathologies' within media and political reporting (Slater 2012: 948)—having a 'warrior culture', being child abusers, refusing to shift from welfare dependency, being gang members (Chapman and Levy 2011; Marks 2011; Newman 2004; Newstalk ZB 2016; Sachdeva and Kerr 2016). These narratives are reflected in political speeches. Within Parliament, politicians have decreed that Māori 'need to accept their responsibility for their culture of violence'. 10 They must 'break free from the shackles of gang thuggery, to disown gangs, and to stop making excuses for them'11 and see that crime has become 'a way of life', something developed 'from the time that an offender is born or probably even before the offender is born'.12 Māori penal capture is represented as the inevitable result of 'their' pathological and socio-cultural deficits.*

Latimer et al. conducted research with Māori youth development practitioners that explored the impact of these racist and prejudicial attitudes. They reported that participants "outlined how mainstream systems perpetuate racialized representations of Māori resulting in punitive

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[132] Waitangi Tribunal, *He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 105
[133] Ibid.
[134] Waitangi Tribunal, *He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 177. Wai 2915, #3.3.34, Closing submissions on behalf of the Crown, 9 Feb 21 at 18 & Wai 2915, #3.3.17 Opening submissions on behalf of the Crown, 23 Nov 20 at 4.
[135] Stanley & Mihaere, Managing Ignorance About Māori Imprisonment at 121-122.

treatment, often excluding whānau and rangatahi from the very systems meant to support them to live fulfilling lives."[136]

Research in relation to the over-representation of indigenous youth in Canada raised similar narratives with one participant commenting "police have stereotypes in their head every single Indigenous person is a criminal or lazy or a drunk ... so I think that has a lot to do with how they treat them (youth) even if it is a minor crime they treat them like they are a huge murderer".[137] Participants also suggested that this racism impacted how Indigenous young people saw themselves.

Research in the United Kingdom in relation to judicial bias which drew from a survey of 373 legal professionals as well as existing research found that "95% of the legal-professional survey respondents said that racial bias plays some role in the processes and/or outcomes of the justice system".[138] The authors noted that "racial bias extends to preferential treatment for white defendants not just negative treatment of ethnic minority people."[139] A quote from a participant gave an example that also exemplifies how race and class can interact to advantage white defendants:[140]

> *[A] young white male defendant, a rugby player (so he was tall, big and strong), assaulted his girlfriend (including punching her in the face), and my fellow magistrates wanted to find him not guilty because he was an undergraduate in final year at a prestige university, he was only 20, it would be a stain on his career. Even though he admitted that he had punched her – he said in self defence – she was much smaller than him). On legal advice he was found not guilty, but what was evident from the discussion and comments was how much race and class played a part in how a defendant was viewed. I rarely saw anything like the same consideration for black male defendants.*

I am not aware of directly comparable research in Aotearoa New Zealand. However, social media is full of discussions about differential sentencing where white, privileged defendants are given comparatively light sentences for what seems to be quite serious crimes with questions being asked what would have happened if the defendant was Māori. The challenge with such commentary is that the publicly available information seldom represents the full picture and in-depth consideration of each specific case and its context is required to determine whether, and to what extent, any differences in the sentence are due to racism.

A related issue identified in the United Kingdom is 'adultification bias' where perceptions of a child's inherent vulnerability are not applied to some children, particularly black and mixed heritage children and young people, and they are seen as more mature and culpable for their actions than their peers.[141] Again, I am not aware of this issue being raised in research and

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[136] Latimer et al., 'Why would you give your children to something you don't trust?': Rangatahi health and social services and the pursuit of tino rangatiratanga at 302.
[137] Cesaroni et al., Overrepresentation of Indigenous youth in Canada's Criminal Justice System: Perspectives of Indigenous young people at 119-120.
[138] Monteith et al., *Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)* at 6.
[139] Ibid at 14.
[140] Ibid at 17.
[141] Bridge, M. (2021). *'I wanted to be heard': Young women in the criminal justice system at risk of violence, abuse and exploitation*. Agenda Alliance for Woman & Girls at Risk and Alliance for Youth Justice at 21; Fitzpatrick, C., Hunter, K., Shaw, J., & Staines J. (2022). *Disrupting the Routes between Care and Custody for Girls and Women*. Centre for Child & Family Justice Research at 35; Her Majesty's Inspectorate of Probation. (2021). *The experiences of black and mixed heritage boys in the youth justice system* at 21 & 62.

literature in this country but I have heard similar concerns being raised anecdotally and further research to explore this issue could be worthwhile.

Racism and other negative experiences leads to a lack of trust

When the Office of the Children's Commissioner asked tamariki Māori about feeling safe, some described how the police presence made them feel scared with a few describing their experiences of the police using physical force or turning up with a large group officers when they were alone or with a small group and how "their personal experience had led to distrust of systems and organisations that were supposed to keep them safe".[142] Latimer et al's research with youth development practitioners had similar findings describing how "opting out of mainstream services is considered the best approach to care for rangatahi, as state agencies have often caused more pain than healing".[143] Latimer et al. also described how the dominant narrative in relation to Māori disengagement from services blamed Māori for this such as by referring to 'failing to attend' or 'truanting', instead of recognising the socio-political context in which it occurred.[144]

The latest Crime & Victim's Survey included a Police Module which contained questions in relation to respondents' level of trust and confidence in the Police.[145] The survey found that people who are Māori had significantly lower levels of high trust and confidence – 59% versus 74% in the general population,[146] and were significantly less likely than the NZ average to agree that Police were professional when conducting their duties.[147] The survey also found that Māori were significantly more likely to have had contact with police noting that this was in line with the over-representation of Māori in the criminal justice system.[148] Previous reports in 2019[149] and 2020[150] also found that Māori have lower levels of trust and confidence in the police which the author of the 2019 report also linked to their over-representation in victimisation and offending statistics.[151]

In my view, reduced levels of trust and confidence are not related to prior involvement with the criminal justice system per se, but rather how people have been treated by that system either individually or collectively when they have come into contact with it. For example, Police practices in New Zealand have been in the spotlight in the last few years with reports of police photographing predominantly Māori children and young people in the street leading to an internal review by Police and a joint investigation by the Independent Police Conduct Authority and the Privacy Commissioner.[152] The Privacy Commissioner issued a compliance notice to

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[142] Office of the Children's Commissioner, *What Makes a Good Life for Tamariki and Rangatahi Māori?* at 3.
[143] Latimer et al., 'Why would you give your children to something you don't trust?': Rangatahi health and social services and the pursuit of tino rangatiratanga at 303.
[144] Ibid at 303. See also *New Zealand Police & Oranga Tamariki v SD* [2021] NZYC 360 at [99]-[100] where the Youth Court Judge describes how a young person and her mother were blamed for disengaging from a system which had treated them terribly.
[145] Evidence Based Policing Centre. (2022). *New Zealand Crime and Victims Survey: Police Module Results*. New Zealand Police.
[146] Ibid at 11-12.
[147] Ibid at 21.
[148] Ibid at 14.
[149] Daniels-Shpall, *Strategies for (re)building community trust: A review of practices in the New Zealand Police* at 5-6.
[150] Gravitas Research and Strategy Ltd Research. (2020). *Citizens' Satisfaction Survey – Full Report for 2019/20 Fiscal Year Research Report.* New Zealand Police at 12.
[151] Daniels-Shpall, *Strategies for (re)building community trust: A review of practices in the New Zealand Police* at 5-6.
[152] Cardwell, H. (2020, December 23). Children's Commissioner probing how widespread police photographing incidents are *Radio New Zealand*; Hurihanganui, T. & Cardwell, H. (2020, December 24).

Police in December 2021[153] and the joint report released in August 2022 found that aspects of Police policy and practice were inconsistent with the privacy law framework and that officers were routinely taking photographs when it was not lawful for them to do so.[154]

Police Association President Chris Cahill was characteristically bullish with media reports quoting him saying that "we totally reject it" and that it "creates a situation that's unworkable for police".[155] The response from the Police Commissioner was more measured in accepting the findings but highlighting what he saw as the challenges that they placed to Police.[156] The former Minister of Police (now Prime Minister) Chris Hipkins also said that he would support challenging the report and did not rule out a law change when speaking at the Police National Conference.[157]

In December 2022 journalist Hamish Cardwell reported that one year after the compliance notice was issued, "of the 23 recommendations from the joint inquiry, 21 remain in the earliest stage of completion - and only two have been finished."[158] Further media coverage in March 2023 revealed that the Police's own policy did not provide for taking photographs of children or young persons without consent and that internal Police advice was that that the practice of stopping and photographing young people likely breached the United Nations Convention on the Rights of the Child.[159] The Police were also reported to be seeking further advice from Crown Law.[160] The Prime Minister Chris Hipkins did however say that a law change was not "likely at the moment".[161]

Tauri and Deckhart's critical commentary of this practice, the joint investigation and the responses to it from Police leadership makes a number of strong arguments including questioning the extent to which consent in the face of police pressure can be considered voluntary and whether bringing young people into the justice system actually benefits society

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Questions raised after police officers stop youths to take their photos *Radio New Zealand*; (2020, December 24). Police photographing young Māori: IPCA, Privacy Commissioner investigating *Radio New Zealand*; Dunlop, M. (2021, January 20). Police launch internal review into policy of taking photos of young people *Radio New Zealand*; Hurihanganui, T. (2021, March 9). Police using app to photograph innocent youth: 'It's so wrong' *Radio New Zealand*; (2021, March 9). Police deny racial profiling after accounts of youths being stopped and photographed. *Radio New Zealand*.

[153] Cardwell, H. (2022, August 6). Privacy Commissioner acts over police practice of photographing people *Radio New Zealand*.

[154] Privacy Commissioner & Independent Police Conduct Authority. (2022). *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* at 7.

[155] Cook, A. (2022, September 8). Police Association wants damning report into police practices when photographing public to be thrown out. Newshub.

[156] Cardwell, Police illegally photographing youth, Māori a 'widespread practice', investigation finds.

[157] Green, K. (2022, October 12). Photography essential part of intelligence gathering, Minister of Police says *Radio New Zealand*.

[158] Cardwell, H. (2022, December 22). Slow progress on changes to police practice of photographing people. *Radio New Zealand*.

[159] Cardwell, H. (2023, March 8). Police lawyers advised photographing youth likely breached UN protections for children. *Radio New Zealand;* Cardwell, H. (2023, March 11). Law change to allow police to photograph youth not likely 'at the moment' – Hipkins. *Radio New Zealand*.

[160] Cardwell, Police lawyers advised photographing youth likely breached UN protections for children. *Radio New Zealand.*

[161] Cardwell, H. (2023, March 11). Law change to allow police to photograph youth not likely 'at the moment' – Hipkins. *Radio New Zealand.*

overall.[162] However, his arguments about the disproportionate impact of this practice are particularly compelling in this context:[163]

> *Since the practice evidently affected Māori disproportionately and would therefore continue to affect Māori disproportionately, the only way to guarantee equity in practice would be to fingerprint and photograph every New Zealand citizen and resident over the age of 12. This is what authoritarian states tend to do, and the police in such regimes have access to that data for any purpose. We have to ask whether New Zealand intends to join the ranks of authoritarian states or remain one that protects civil liberties. We also have to wonder if the majority of the New Zealand population would support such a move if the police practice affected everyone and not just Māori.*

Personally, my answer is no, the majority of the New Zealand population would not support such a practice if it affected everyone and not just Māori. Moreover, it is easy to see how tamariki and rangatahi Māori who were photographed on the street, or were simply aware of this practice and its disproportionate use on Māori, would not view the police positively as a result.

There has also been media coverage in relation to Police treatment of tamariki and rangatahi Māori in other contexts such as an incident in Christchurch in December 2022 where Police officers aimed rifles and Tasers at a car full of 12 to 16 year-olds over a toy pop gun with flashing lights one child had received as a class Secret Santa gift.[164] The children were ordered from the car then made to kneel on the ground with their hands in the air while being shouted at by armed Police.[165] The kura the children attended reported that the incident left the children traumatised but there was no follow-up with them or their whānau and the kura had to organise ongoing support and counselling for the children involved.[166] Again, whilst the Police may justify their actions based on the original report from a member of the public that a group of individuals had a gun,[167] the impact of this incident on both the tamariki and rangatahi Māori involved and all those who are aware of it is likely to be profound. As the father of one of the boys commented, both the Police response and the original report are of concern: "who could possibly have observed the innocence of a toy pop gun and perceived it to be dangerous"?[168]

Concerns in relation to police treatment of rangatahi Māori and its impact on their attitudes to the Police have also been raised in research studies. For example, six of the participants in Paula Bold-Wilson's qualitative research in relation to the quality of legal representation young Māori men receive in the New Zealand Justice system experienced difficulties with the police, and subsequently believed that the police officers' attitudes and behaviours were unjust.[169] The examples she gave included the refusal of a participant's request for medical treatment in the

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[162] Tauri, J. & Deckhart, A. (2022). Walking While Brown: A Critical Commentary on the New Zealand Police Extra-Legal Photographing and Surveillance of Rangatahi Māori. *Decolonization of Criminology and Justice,* 4(1), 69-75 at 72-73.
[163] Tauri & Deckhart, Walking While Brown: A Critical Commentary on the New Zealand Police Extra-Legal Photographing and Surveillance of Rangatahi Māori at 72-73.
[164] Tarena, E. (2022, December 17). A Māori teen with a pop gun meets the politics of fear. *Stuff*; O'Callaghan, J. (2022, December 17). Ramraid 'politics of fear could have killed my son', kura dad says. *Stuff*; O'Callaghan, J. (2023, March 8) Kura lays formal complaint over armed police response to toy gun. *Stuff.*
[165] O'Callaghan, Kura lays formal complaint over armed police response to toy gun.
[166] Ibid.
[167] Ibid.
[168] Tarena, A Māori teen with a pop gun meets the politics of fear.
[169] Bold-Wilson, P. (2018). *The injustice in justice. An examination of the quality of legal representation young Māori men receive in the criminal justice system* [Masters Thesis, Unitec Institute of Technology] at 88-89.

cells being refused by police officers, not being offered legal representation through Police Detention Legal Assistance during questioning, and delaying a participant's arrest until he turned 17 years old which meant that the police and courts could apply more severe consequences.[170]

Similar patterns are also seen in other settler colonial states such as Australia where Curran and Taylor-Barnett describe how Aboriginal young people's "suspicion of the law and those seen as a part of the legal system" are shaped by the intergenerational impact of:[171]

> *Government policies and administration, for example, the Stolen Generations, Policing, Child Protection, incarceration and deaths in custody and poor departmental practices that are played out in intergenerational trauma and also impact on the engagement of young Aboriginal mums, pregnant women and other young people experiences and perceptions collected for this research and evaluation project. It is evident that these practices from five generations back are still being lived out and have impacts on today's young people and their families.*

Writing in Canada, Cesaroni et al. also explain how "[c]olonialism has led to distrust of all government agencies, but in particular in terms of the police who participated in assimilationist policies" noting that "[i]n communities where Indigenous young people are routinely stopped, searched, and questioned, it is not surprising that these same young people are hostile toward police (Perry, 2009)."[172]

A lack of trust and confidence in the police and other authority figures can operate as a barrier to accessing justice by inhibiting reporting victimisation. It can also have a wider impact as children and young people may be reluctant to engage with services or share information about their needs resulting in them receiving less support and potentially relevant information not being taken into account in decision-making.[173]

Other barriers

Khylee Quince identifies another potential barrier or challenge using the example of intimate partner violence:[174]

> *We know that Māori men and men of colour are particularly poorly treated, if we think about the Black Lives Matter movement, by the police and justice agencies. But we also know that women of colour are the victims of their private violence. The dilemma for those women of colour is: do I prioritise my race over my gender? Do I prioritise my own and the safety of my children against the safety of my man by handing him over to the authorities where he may be harmed, or killed, or at least one of the many thousands of men of colour incarcerated? That is political intersectionality.*

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[170] Ibid at 88-89.
[171] Curran & Taylor-Barnett, *Overcoming the Invisible Hurdles to Justice for Young People* at 100.
[172] Cesaroni et al., Overrepresentation of Indigenous youth in Canada's Criminal Justice System: Perspectives of Indigenous young people at 115.
[173] Alliance for Youth Justice. (2023). *Young people in transition in the criminal justice system: Evidence review* at 33.
[174] Quince, K. (2022). "Law and gender: beyond patriarchy" symposium – Keynote speech: Sistahs in arms? Mana wāhine and feminism. *New Zealand Women's Law Journal*, 6, 9-23 at 20.

Structural and systemic barriers

Monocultural legal and policy settings

In the Waitangi Tribunal's report on its inquiry into Oranga Tamariki the Tribunal described how "monocultural legal and policy settings" operated as a barrier in combination with the impacts of colonisation.[175] The Waitangi Tribunal also made specific findings that "due to the evident deficiencies in Oranga Tamariki's family group conference process prior to 2017 – several of which the Crown has conceded – whānau, hapū, and iwi were not able to participate meaningfully in decision-making regarding their tamariki."[176]

The research and literature also shows that these monocultural legal and policy settings operate as a barrier for children and young people. For example, authors of the report of a 2021 survey of Māori experiences of racism explain:[177]

> *[L]egal definitions of racism and discrimination, which look only at an individual without looking at the impact on whānau, hapū, iwi and Māori communities, fall short of capturing the true costs of racism as an attack on rangatiratanga. They also fail to give adequate recognition to the role played by whānau as we navigate the many ways racism invades our daily lives.*

Interview participants in Action Station's research in relation to the criminal justice system which explored Māori perspectives of racism in the criminal justice system "identified that almost all parts of the current justice system (with a few exceptions such as Rangatahi Courts) are foreign, British structures that conflict with Te Ao Māori (the Māori world)."[178] Toki explains:[179]

> *[M]ainstream courts can be confusing, frustrating and demeaning to Māori litigants as mainstream courts offer an environment that many Māori consider alien. And finally, the adversarial style of the mainstream courts is inconsistent with tikanga Māori procedures such as "kanohi ki te kanohi' (face to face) "korerotia" (talking things out), whiriwhiri-a-ropu (group discussion), whaikorero (formal speech making), and "whakatatū" (agreement).*

However, although Rangatahi Courts operate differently to the mainstream Youth Court including by operating on marae and by incorporating aspects of tikanga, as Toki has argued:[180]

> *[T]he underlying principle that applies to this approach is not based on tikanga, but on the law; that is, to honour and apply the objects and principles in the Children and Young Persons Act 1989. Although this project represents an attempt to incorporate Māori tikanga within the law, it is not designed to abandon the law and start a tikanga-based court. That is beyond the jurisdiction of the Rangatahi Court.*

I would also add another limitation of ngā Kooti Rangatahi that makes it clear that the system remains a Western colonial one – the role of Te Kooti Rangatahi is restricted to monitoring a plan that had previously been agreed to at a Family Group Conference where the young person

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[175] Waitangi Tribunal, *Hepā Harakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 108.
[176] Ibid at 105.
[177] Smith et al., *Whaka Tika: A Survey of Maori experiences of racism* at 11.
[178] Action Station. (2018). *They're Our Whanau: Maori Perspectives on New Zealand's Justice System* at 12.
[179] Toki, *Indigenous Courts, Self-Determination and Criminal Justice* at 21.
[180] Toki, V. (2017). Seeking Access to Justice for Indigenous Peoples. *Yearbook of New Zealand Jurisprudence,* 15, 25-44 at 32.

has admitted the charges they are facing.[181] Toki also identifies other tensions in the rangatahi court process including the difficulty overlaying two different world views and how to deal with urban Māori who do not identify with the collective.[182] Toki also cites Matiu Dickson: "[j]udges are doing the kaumatua's job and thus taking away the last bastion of Māori ownership of the process."[183]

Research and literature in relation to the experiences of indigenous children and young people in other countries raise similar issues. For example, Doel-Mackaway's research with Aboriginal and Torres Strait Islander young people found that "all participants either expressed or agreed …that as Aboriginal children and young people, they live under two disparate systems of law, 'white-fella law and black-fella law.'"[184] Participants described how they needed to be vigilant about complying with both systems of law, whereas non-Aboriginal peoples do not generally have to order their lives in this way and that "respecting each system is complex given the inherent differences between them, particularly given non-Indigenous law is not sensitive to, nor incorporates, Aboriginal law."[185]

Cultural inappropriateness and the co-option of culture

Concerns have also been raised about the co-option of culture. For example, Family Group Conferences (FGCs), sometimes called the "jewel in the Crown" of the youth justice and child protection systems, are often referred to as indigenous inspired or culturally appropriate practice.[186] However, practice does not bear out these claims.[187] One of the key themes identified in research by Paora Moyle regarding Māori social workers, whānau (families) and community members' experiences of FGCs was the lack of cultural responsiveness and capability.[188] Moyle and Tauri report that the majority of whānau participants described FGCs as a "culturally inappropriate and disempowering" process that "undermined and even at times excluded Māori cultural expertise."[189] A second theme was the mystical origins of the family group conference forum with one research participant commenting:[190]

> *[F]amily group conferencing was never a Māori process . . . (laughing) the Pākehā took the whānau hui, colonized it and then cheekily sold it back to the native.*

Practitioners involved in Moyle's research also raised concerns that Māori names were used to make tools "more culturally marketable to Māori practitioners and participants" rather than Māori

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[181] Youth Court of New Zealand. (n.d.). *Rangatahi Courts & Pasifika Courts.* https://youthcourt.govt.nz/about-youth-court/rangatahi-courts-and-pasifika-courts/
[182] Toki, Seeking Access to Justice for Indigenous Peoples at 32.
[183] Ibid at 33.
[184] Doel-Mackaway, H. (2019). 'Ask Us ... This Is Our Country': Designing Laws and Policies with Aboriginal Children and Young People. *The International Journal of Children's Rights*, 2019(1), 31-65 at 41.
[185] Doel-Mackaway, 'Ask Us ... This Is Our Country': Designing Laws and Policies with Aboriginal Children and Young People at 41.
[186] Consedine, J. (1995). *Restorative justice: Healing the effects of crime*. Ploughshare Publishing; Olsen, T., Maxwell, G., & Morris, A. (1995). Māori and youth justice in New Zealand. In K. Hazlehurst (Ed.), *Popular justice and community regeneration: Pathways to indigenous reform* (pp. 45–66). Praeger.
[187] See Waitangi Tribunal *Hepā Harakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 105 and the discussion above.
[188] Moyle & Tauri, Māori, Family Group Conferencing and the Mystifications of Restorative Justice at 94.
[189] Ibid at 96.
[190] Ibid at 97.

culture, identity, and social practice aspects being central to the process.[191] Concerns about the co-option of Māori culture are shared by many other Māori researchers and academics.[192]

Concerns were also raised about the "ethnocentric Pākehā (European) monoculturalist foundations of youth justice and statutory social work that result in a one world view, one size fits all standardized approach to engaging with what is a socio-culturally diverse clientele" including the use of imported risk assessment tools that prevent practitioners considering impactful contextual and contemporary factors such as colonisation and ongoing systemic discrimination[193] (this issue is discussed further below). Other studies have also demonstrated that standardised testing involving standards based on a European population can be inappropriate for Māori.[194]

Treatment methods that are based on European or Pākēka population and culture may also be less suitable for Māori. Faithfull et al. discuss these issues in the context of speech-language assessments and interventions citing research which concluded that the standard tests based on Australian, British and American norms and practices were linguistically and culturally inappropriate to the detriment of tamariki Māori.[195] They also argue that the relationship between speech-language therapist and the child, whānau and community is also critical.[196] In particular, "underlying differences in values and approaches" or therapist's lack of knowledge of te reo Māori could continue to create barriers.[197]

Risk Assessments

Former chief statistician Len Cook raises concerns about how risk assessments or criteria that are ostensibly culturally neutral operate in a discriminatory or biased way. He gives the example of how the oft-relied upon risk factor of having a family member who has been involved in the criminal justice system operates to disadvantage Māori:

> *[A] much larger share of Māori adults have been through state custody compared with any other ethnic group. Because whānau Māori involve a much larger 'family*

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[191] Ibid at 95. This discussion related to the "Tuituia Framework", an assessment tool used by child care and protection services.

[192] Tauri, Family group conferences: A case study of the indigenisation of New Zealand's justice system; Love, C. (2000). Family group conferencing: Cultural origins, sharing and appropriation—A Māori reflection. In G. Burford & J. Hudson (Eds.), *Family group conferencing: New directions in child and family practice* (pp. 15–30). Walter de Gruyter Inc.; Tauri, An indigenous, critical commentary on the globalisation of restorative justice.

[193] Moyle & Tauri, Māori, Family Group Conferencing and the Mystifications of Restorative Justice at 94.

[194] Lambie, I. (2020). *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand*. Office of the Prime Minister's Chief Science Advisor at 12-13 cites research with a sample of Māori men aged 16 to 24 without head injury which "showed their scores were lower than "average" (per standardised norms) on tests that relied on formal education and westernised concepts, higher than average on visuospatial tests, and average on the rest (testing attention span and mental tracking). When Māori concepts or language were used to replace non-Māori in a revised version of a verbal memory test, they scored within the norm for their age.[26] This was also evident in research comparing the performance of groups of Māori and non-Māori, matched for age and education.[27] Testing with the WAIS-IV on a non-head-injured group of more than 200 Māori showed their levels of income and education affected scores, in line with the increasingly established understanding that familiarity with test-taking in formal school settings affects neuropsychological test results, disadvantaging those who have had negative experiences or little experience or success in western schooling. Also, the authors noted that having the research testing run by Māori for Māori led to reports of "enhanced rapport, reduced anxiety and increased motivation" for participants (p. 11).[25]"

[195] Faithfull, E., Brewer, K., & Hand, L. (2020). The Experiences of Whānau and Kaiako with Speech-Language Therapy in Kaupapa Māori Education. *MAI Journal* 9(3), 209-218 at 210.

[196] Ibid at 210-211.

[197] Ibid at 216.

> *circle', historical contact by whānau members with the state's childcare and justice systems increases the possibility that young Māori who wish to be mothers will be more likely to appear as a risk, even if the tests themselves that focus on previous contact with the justice or child protection services were designed to be administered without bias.*[198]

Joy & Beddoe use the same example to explain their concerns in relation to the use of the Adverse Childhood Events (ACE) checklist as an assessment tool and, in particular, the "concentration on incarceration as a question obscures the impact of racism in considering what might be adverse childhood experiences; and, critically, it individualises a larger societal problem".[199] The end result is "that the criminal activities of Pākehā parents are significantly less likely to be captured than those of Māori parents, thus creating 'false negatives' in addition to failing to capture the impact of institutional racism."[200]

While I agree with Joy and Beddoe's concerns, I query whether incarceration of a parent will be harmful to the child regardless of why they were incarcerated. Moreover, wrongful or unjust imprisonment may be even more harmful, particularly in the context of a child's views of the fairness of the justice system. The difference is then who or what caused the harm and what the consequences of that harm should be. Arguably, if the State has caused the problem it has a greater obligation to be the solution e.g. by providing extra support to the family / give redress to the family rather than taking the child away. Another related question is whether parents committing criminal acts leading to incarceration is harmful to the child in itself or if it is the State response that causes the harm even where there was 'justification' for it e.g. by removing a parent and any resources they provide from the home by sending someone to prison.

Cook also explains that how tools which are based on characteristics measured and modelled for Pākehā inevitably leads "to parts of the Māori population often being systematically identified and treated as outliers in most sectors".[201] In particular, these tools do not take account of differences in cohort connections with the justice system and risk "reinforcing the momentum behind the still-increasing adverse engagement of Māori with the justice system" rather than allowing us to "rethink and challenge the influence of our past on the present."[202]

Stanley and Mihaere raise similar concerns in relation to risk screening tools reliance on factors that appear to be neutral "such as education or employment status, care and protection histories, socio-economic home location, mental health problems, family members with offending histories" but are "inevitably skewed against Māori who bear the brunt of socio-economic disadvantage, structural dislocation and institutionalised discrimination."[203]

Others overseas others have also argued for the inclusion of racism in the list of adverse childhood experiences as Bernard et al. explain:[204]

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[198] Cook, L. W. (2020). Lessons from child welfare: Why accountability to ministers cannot meet the needs of public legitimacy. *Policy Quarterly,* 16(1), 26-33 at 27-28.
[199] Joy, E., & Beddoe, L. (2019). ACEs, Cultural Considerations and 'Common Sense' in Aotearoa New Zealand. *Social Policy and Society,* 18(3), 491-497 at 494.
[200] Ibid.
[201] Cook, Lessons from child welfare: Why accountability to ministers cannot meet the needs of public legitimacy at p.32.
[202] Ibid at 51
[203] Stanley & Mihaere, Managing Ignorance About Māori Imprisonment at 128.
[204] Bernard, D. L., Calhoun, C. D., Banks, D. E., Halliday, C. A., Hughes-Halbert, C., & Danielson, C. K. (2020). Making the "C-ACE" for a Culturally-Informed Adverse Childhood Experiences Framework to Understand the Pervasive Mental Health Impact of Racism on Black Youth. *Journal of Child & Adolescent Trauma*, 14(2), 233–247 at 235.

> *[S]cholars have pointed to the necessity of expanding the conceptualization of ACEs to incorporate stressful life experiences of particular relevance to historically disadvantaged and marginalized groups. In a qualitative examination of ACEs within a sample of low-income youth (71% Black), Wade et al. (2014) found that youth spoke about ACEs in ways that extended beyond the traditional conceptualization. Specifically, while some responses aligned with conventional ACEs (e.g., familial substance, physical abuse), youth also described experiences that have not been customarily discussed within ACEs literature including racial discrimination, community violence, poverty, and interactions with juvenile justice and foster care system. As such, the authors concluded that the ACEs framework should be expanded to be more representative of the unique PTEs that youth of color encounter.*

However, while there may be a strong case for racism to be incorporated into the ACE checklist, arguably the last thing we want is the experience of racism interpreted as a risk factor as this veers very closely towards victim blaming which is another injustice.

(Lack of) cultural competence

Participants in Moyle's research also raised a lack of cultural competence by non-Māori professionals involved in the FGC process with a key finding from Māori whānau experiences being that mainstream non-Māori social workers generally did not know how to engage with them.[205] Moyle's research with Māori practitioners reached a similar finding, mainstream social workers "often did not understand, value, or put into practice fundamental elements of a Māori worldview—such as whakapapa (genealogy/family connections)", yet were professionally approved as culturally competent to work with Māori.[206]

The Independent Children's Monitor's most recent report discusses the negative impact of staff who lack cultural competence:[207]

> *Staff talked about how some colleagues take whānau statements out of context, because they do not understand the differences between te reo Māori and English expressions. They told us about staff making judgements about whānau based on reading historic reports rather than meeting them, and noticing a deficit rather than taking a mana enhancing approach and "putting the whānau in the centre".*

Alison Cleland discusses the cultural norms in Māori and Pacific communities and how they can operate in the context of family group conferences:[208]

> *In tikanga Māori, the views of those with the most mana (importance and respect in the group) will be given most weight. Children's views will often be of less significance and will therefore be given less weight." There will also be expectations - particularly in respect of Pasifika family groups - that elders will be respected and that children will not contribute a great deal to the discussion, but will listen and learn from what they hear. In conferences involving Māori and Pasifika peoples, an appreciation of cultural norms in respect of communication is also necessary.*

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[205] Tauri, What exactly are you restoring us to? A critical examination of Indigenous experiences of state-centred restorative justice at 58.
[206] Moyle & Tauri, Māori, Family Group Conferencing and the Mystifications of Restorative Justice at 95.
[207] Independent Children's Monitor, *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022* at 42.
[208] Cleland, Children's and young people's participation in legal proceedings in Aotearoa New Zealand at 499.

> *Across these cultures, silence is a strong means of expression of emotion - in contrast to Western expectations regarding spoken discourse. Knowledge of where, when and "how" to speak and to participate forms an essential part of Polynesian decision-making.*

In other countries with indigenous peoples challenges around cross cultural communication are also identified as potential barriers. For example, Eades discusses how the widespread Anglo convention of interpreting silence to the detriment of the silent person, such as by implying that person has something to hide, is not shared by many Aboriginal people who often use lengthy silences without finding them either uncomfortable or remarkable.[209] He explains:[210]

> *This difference in the use and interpretation of silence can have serious implications for police, lawyers and courtroom interviews of Aboriginal people. Aboriginal silence in these settings can easily be interpreted as evasion, ignorance, confusion, insolence or even guilt.*

Eades also raises the disturbing idea (at least for those who care about justice) that a handbook written to assist lawyers to communicate more effectively with Aboriginal witnesses which described this use of silence, was used by counsel in cross examination to the detriment of Aboriginal witnesses.[211]

Although Eades is writing in Australia, and the specific cultural differences may not be relevant here in Aotearoa New Zealand, I found her work to be of considerable value by prompting self-reflection in relation to what may seem common sense (at least to Pākehā). Eades explains:[212]

> *Understanding what people mean involves more than accent, word meaning, and grammar. In intercultural communication, an important role is played by cultural assumptions about language use. Such assumptions might seem like commonsense, yet they are culturally based assumptions, not facts. And they are not shared with all sociocultural groups.*

Eades gives a number of examples of differences of in cultural communication norms. One example I found particularly interesting is the assumption that "when a person is interviewed about a personal story they have talked about in an earlier interview, inconsistency suggests problems with their reliability and/or credibility". Eades raises two issues with this assumption, the first which is of relevance to all cultures is that "sociolinguistic research on the impact of interviewer questions in legal contexts shows that they play a significant role in organising the story, deciding what parts can be told, and in what order, as well as what parts cannot be told" which means that "inconsistency can also be achieved through interactional work".[213] Secondly, Aboriginal cultural norms emphasise taking "time to get to know them; don't rush them, and don't talk all the time you are with them" and "[i]f someone asks many questions, especially in

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[209] Eades, D. (2012). Communication with Aboriginal Speakers of English in the Legal Process. *Australian Journal of Linguistics,* 32(4), 473-489 at 478.
[210] Ibid at 478.
[211] Ibid at 484 talking about the Pinkenba case, in which three young teenage Aboriginal boys were prosecution witnesses in the case against the six police officers charged with their abduction. Eades explained: "the manipulation of Aboriginal ways of using English was central to the cross-examination of the boys, particularly in relation to gratuitous concurrence, and silence. This was made overt in comments by defence counsel such as we have to take your silence as 'no' (Eades 2008: 111), and your silence probably answers [the question] (114). It was clearly impossible for the 13- and 15-year-old young teenagers to provide a metalinguistic analysis in answer to such questions."
[212] Eades, D. (2015). Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations. *Precedent.* 126, 44-48 at 46.
[213] Ibid at 46.

a pressured situation, the best thing is to say 'yes' and keep them happy" which is sometimes described as 'gratuitous concurrence'.[214]

Language

Paula Bold-Wilson's qualitative research in relation to the quality of legal representation young Māori men receive in the New Zealand Justice system found that many of the participants found it difficult to understand the legal terminology used by their lawyers with one participant noting that "there were not enough Māori lawyers".[215] Bold-Wilson also found that although some participants felt confident asking for clarification, this was dependent on the relationship and trust they had with their lawyers.[216] The challenge for duty solicitors who have a triage role is that there are limited opportunities to build a strong relationship.[217]

Practical Barriers

Lack of Data

The ICM's report on the year from the year from 1 July 2020 to 30 June 2021 found that they were unable to definitively say that Oranga Tamariki are meeting all their obligations for tamariki Māori[218] noting that Oranga Tamariki could only answer five percent of the questions for all children in their care using its administrative database.[219] This included an inability to report on whether tamariki and rangatahi are informed of, and understand their rights.[220]

The Waitangi Tribunal also raised concerns about the quality and availability of data in its report on its inquiry into Oranga Tamariki:[221]

> *Mr Cook, in his expert evidence, advised the Tribunal that the government statistician publishes Principles and Protocols for Official Statistics – and that these are considered common statistical standards and practices in the public sector.205 The principles and protocols identify six critical dimensions for data quality: relevance, accuracy, timeliness, accessibility, coherence / consistency, and interpretability. Mr Cook makes clear that Oranga Tamariki's core statistics do not meet these basic requirements. He also notes: '[a]nalysis of trends by those outside Oranga Tamariki has been made more difficult by reduced access to information and the changing measurements and a departure from common statistical standards and practices'.206*

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[214] Ibid at 47.
[215] Bold-Wilson, *The injustice in justice. An examination of the quality of legal representation young Māori men receive in the criminal justice system* at 90.
[216] Ibid at 97.
[217] Ibid.
[218] Independent Children's Monitor, *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021* at 9.
[219] Ibid at 10.
[220] Ibid at 10.
[221] Waitangi Tribunal, *He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* at 158.

Possible solutions

Introduction

In this section I discuss some possible solutions or ways of addressing some of the barriers to access raised in the research and literature from Aotearoa New Zealand and overseas. It is not a complete analysis, nor an attempt to identify ways to resolve all the access to justice challenges experienced by tamariki and rangatahi Māori. It should be read together with working papers 11-17 which discuss possible ways of increasing access to justice for children and young people more generally.[222]

Tamariki and rangatahi Māori

Culturally appropriate services

Unlike in Australia where there are Aboriginal-led legal services for Aboriginal and Torres Strait Islander people in each State,[223] as well as specialist services[224] and a national representative body,[225] there is only one Māori community law centre in Aotearoa New Zealand. This centre, the Ngāi Tahu Māori Law Centre in Dunedin, provides free legal service for Māori land matters to all Ngāi Tahu people wherever they live and any Māori people living in the Ngāi Tahu rohe [area].[226] In the past there were two other Māori community law centres, Ngā Kaiwhakamārama i Ngā Ture (the Wellington Māori Legal Service) co-founded by Moana Jackson and Caron Fox[227] and Ngā Ture Kaitiaki o te Rohe o Waikato ki Tamaki in Manukau, South Auckland. Moana Jackson's seminal report, *The Māori and the Criminal Justice System: A New Perspective: He Whaipaanga Hou Part Two,* discussed the call for Māori legal services:[228]

> *Of the many positive changes sought by Māori people in the course of this research, the need for an independent tribally linked legal resource centre and the provision of Māori legal services were two of the most frequently raised, both as developments which could revitalise and adapt traditional legal and spiritual values, and as bases from which the Māori could more effectively shape and use the laws which govern his life. There is a thus clear call for the idea of the commission and the service to be accepted and further studied. Their particular relevance as sources of Māori*

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[222] Working papers 11-17 discuss Strategic litigation; Legal service delivery, non-lawyer services, and integrated services; Data, evidence and measuring change; Technology; Training for professionals; Legal education and continuing professional development for lawyers and judges; and Law-related education for children and young people.

[223] Aboriginal Legal Service NSW / ACT Ltd. (n.d.). *Our history*. https://www.alsnswact.org.au/history; Aboriginal Legal Service of Western Australia Limited. (n.d.). *About.* https://www.als.org.au/about/our-history/; Victorian Aboriginal Legal Service. (n.d.). *Welcome to VALS*. https://www.vals.org.au/; The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd. (n.d.). *ATSILS*. https://atsils.org.au/; Tasmanian Aboriginal Legal Service. (n.d.). *Home.* https://tals.net.au/; Aboriginal Legal Rights Movement. (n.d.). *Home.* https://www.alrm.org.au/; and North Australian Aboriginal Justice Agency. (n.d.). *About us.* http://www.naaja.org.au/naaja/.

[224] Aboriginal Family Legal Service WA. (n.d.). *About.* https://www.afls.org.au/about/; First Nations Women's Legal Services Qld Inc. (n.d.). *Home.* https://www.atsiwlsnq.org.au/; Wirringa Baiya Aboriginal Women's Legal Service. (n.d.). *Home.* https://www.wirringabaiya.org.au/; Family Violence Legal Service Aboriginal Corporation (n.d.) *Home.* https://www.fvlsac.org.au/.

[225] National Aboriginal and Torres Strait Islander Legal Services. (n.d.). About. https://www.natsils.org.au/about/.

[226] Ngāi Tahu Māori Law Centre. (n.d.). *Mihi.* https://www.ngaitahulaw.org.nz/.

[227] La Hatte, D. (2022, March 31) Māori rights advocate dies. *Te Ao Māori News*. https://www.teaomaori.news/maori-rights-advocate-dies

[228] Jackson, M. (1988). *The Maori and the Criminal Justice System: A New Perspective: He Whaipaanga Hou Part Two*. Department of Justice at 221.

> *research into the strategies needed to deal with criminal offending, and their ability to provide appropriate legal support for Māori offenders makes that suggestion appear particularly urgent.*

Although both these Māori community law centres were closed, a number of community law centres have kaupapa Māori services or teams. For example, Waitematā Community Law Centre in West Auckland has a Kaupapa Māori Team[229] and Wellington and Hutt Valley Community Law operate Pou Whirinaki, a regional community legal service for Māori, by Māori.[230] Establishing kaupapa Māori teams nationwide in each community law centre has been a long-standing priority of the community law movement and the Community Law national body, Community Law Centres Aotearoa.[231] Their proposal was supported by Te Uepū Hāpai i te Ora / the Safe and Effective Justice Advisory Group who recommended that the Government "[i]nvest in Kaupapa Māori Legal Units within each Community Law Centre, to support access to justice in Māori communities".[232] However, funding has not yet been obtained.

More broadly, there are also issues in relation to the appointment of lawyers to represent tamariki and rangatahi Māori as Lawyers for the Child and Youth Advocates as discussed above. The relevant guidance does include a requirement to consider culture, but anecdotal evidence suggests that there are not enough Māori Lawyers for the Child and Youth Advocates. If so, it may be appropriate to put in place mechanisms to encourage and support Māori lawyers working in this area.

Tailored processes within a western justice system

As set out above, despite family group conferences being touted as culturally responsive, they have subject to significant criticism.[233] Ngā Kooti Rangatahi tend to be viewed much more positively although this model and its limitations are also subject to critique.[234]

Boulton et al.'s research in relation to Māori whānau experiences of Family Court care and protection proceedings also found that there was a mixed response from participants to the idea of holding Family Court care and protection proceedings on marae:[235]

> *Over half (59%) of participants thought that holding Oranga Tamariki court proceedings on a marae would be a good or positive thing. Some thought it might put whānau more at ease and/or that they themselves would feel safer….Thirty-eight per cent of whānau thought that holding care and protection proceedings on a marae would not be a good thing. They felt that it would make no difference to the outcomes for whānau.*

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229 Waitematā Community Law Centre. (n.d.). *Kaupapa Māori Legal Services*. http://www.waitematalaw.org.nz/kaupapa-maori-legal-services.html.

230 Community Law Wellington and Hutt Valley. (n.d.). *Pou Whirinaki – Services to Māori.* https://www.wclc.org.nz/our-services/pou-whirinaki/.

231 Community Law Centres Aotearoa. (2019, July 24) Community Law Ready To Implement Kaupapa Maori Plan [press release]. *Scoop*. https://www.scoop.co.nz/stories/PO1907/S00294/community-law-ready-to-implement-kaupapa-maori-plan.htm.

232 Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group. (2019). *Ināia Tonu Nei – Hui Māori Report.* Ministry of Justice at 28.

233 See **Monocultural legal and policy settings** and **Cultural inappropriateness and the co-option of culture** above.

234 See **Monocultural legal and policy settings** and **Cultural inappropriateness and the co-option of culture** above.

235 Boulton, A., Wikaira, M., Cvitanovic, L., Williams Blyth, T. (2020). *Te Taniwha I Te Ao Ture-ā-Whānau: Whānau Experience of Care and Protection in the Family Court*. Whakauae Research for Māori Health and Development; Whāia Legal; Te Kōpū Education at 18.

One participant described this suggestion as "just another way to diminish our whakapapa and connection to that forum".[236]

Changes to courtroom environment and the incorporation of tikanga

Boulton et al. found much more support for practical steps to make the court more accessible such as having "care and protection proceedings on a Saturday, with less emphasis on a formal process, and an enhanced opportunity for discussion and increased ability for whānau to attend. Almost all participants (97%) thought that this would be a good thing."[237] Boulton et al. recommended three options for change with the first focussing on "changing the behaviour of the judiciary and professionals involved in the justice system": [238]

> *Every court date is an opportunity to engage with whānau, hapu and iwi to support change. Whānau, hapū and iwi must be respected at all points of engagement, and culturally appropriate models of engagement must be understood and enacted by the judiciary. It must be agreed that the attainment of a sound knowledge of tikanga and te reo Māori is non-negotiable for professionals working in the Family Court. Furthermore, respecting mana, whakapapa and whanaungatanga, together with acts of kindness and inclusion towards whānau, are behaviours that should be a common standard for all that work in the Family Court.*

The Te Ao Marama model developed by Chief District Court Judge Heemi Taumanu also envisages similar changes to the way courts operate including through the incorporation of tikanga:[239]

> *Court design should increasingly become a joint endeavour with iwi and local communities. …Under the Te Ao Mārama model I expect that the infusion of tikanga and te reo will be explored with local iwi in each court location. A one size fits all approach will not be appropriate. …I expect that bilingual and where appropriate, multi-lingual, greetings by all court staff and most particularly from the time that first contact is made by security staff at the front entrance will be a natural and appropriate development under the new model.*
>
> *Mainstream court sessions commencing with karakia and mihi whakatau is another useful discussion point. Some judicial officers may wish to commence the court sitting, following the current practice of bilingual announcements, by reciting their pepeha and extending a brief welcome with a mihi.*
>
> *Within the physical space itself, courtrooms could be reimagined as a community and participant centred space that reflects tikanga.*

By Māori, for Māori approaches

A consistent recommendation in recent reviews and inquiries is the need to recognise tino rangatiratanga and for by Māori, for Māori approaches. For example, the final report of the Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group's second recommendation "By Māori, for Māori" provided:[240]

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[236] Ibid.
[237] Ibid at 19.
[238] Ibid at 20.
[239] Taumanu, H. (2020). *Norris Ward McKinnon Annual Lecture 2020*. Ministry of Justice at 32.
[240] Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group. (2019). *Turuki Turuki:Transforming our criminal justice system : the second report of Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group*. Ministry of Justice

That the Government:

– establish a Mana Ōrite (equal power) governance model under which Māori and Crown agencies share in justice sector decision-making, as recommended by Ināia Tonu Nei;[20]

– transfer power and resources to Māori communities so they can design and develop Māori-led responses to offending, and to tamariki and whānau wellbeing;

– make tikanga Māori and te ao Māori values central to the operation of the justice system.

The Chief Victim's Advisor to Government also recommended a by Māori, for Māori approach:[241]

Māori have long said that services and systems that are designed by Māori work best for Māori. To achieve better services for Māori means being more committed about our obligations under Te Tiriti o Waitangi. The justice system needs to recognise and incorporate Te Ao Māori models of healing and tikanga principles. The system must affirm tino rangatiratanga, and the Crown must deliberately partner with iwi, hapū, whānau and Māori communities to design and deliver kaupapa Māori responses to crime that have a clear focus on whānau and whakapapa. Māori systems and services are likely to benefit both Māori and non- Māori, alike.

The Waitangi Tribunal made similar recommendations for shared power with reform led and directed by Māori in its report on the Oranga Tamariki inquiry:[242]

Our primary and overarching recommendation, however, concerns the process by which a Treaty-consistent transformation may be achieved. We focus on this because, of all the factors that underpin the disparities we examine, none is more enduring and pernicious than the effects of alienation and disconnection from culture. The primary cause of this disconnection is decades of Crown resistance and hostility to the guarantee to Māori of the right to cultural continuity – embodied in the article 2 guarantee of tino rangatiratanga over kāinga. Poverty and disparities in health, education, and the criminal justice system are all linked to this, and compound the prejudice. It is clear to us that Māori must lead and direct the transformation now required. This is because the essential long-term solution lies in strengthening and restoring whanaungatanga. While the Crown has a significant ongoing role, this is not something that it can or should lead. Our primary recommendation therefore focuses on the formation of a 'Māori Transition Authority' that can lay the foundations, and then guide and implement the change.

The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions also made recommendations that the Crown should work in partnership with Māori to establish a new redress scheme for survivors of abuse in State care:[243]

We consider it essential the Crown works in partnership with Māori when designing and operating the puretumu torowhānui system because of its te Tiriti obligations, because Māori are disproportionately affected by abuse in care, because Māori should be able to exercise tino rangatiratanga over a kaupapa that is central to their

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[241] Chief Victims Advisor to Government. (2019). *Te Tangi o te Manawanui: Recommendations for Reform*. Ministry of Justice at 34.
[242] Waitangi Tribunal. (2021). He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry. Legislation Direct at 178.
[243] Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions. (2021). *He Purapura Ora, he Māra Tipu From Redress to Puretumu Torowhānui*.

> *communities, and because tikanga Māori principles are sound ideas on which to base a system uniquely designed for survivors in Aotearoa New Zealand.*

However, as Fitzmaurice has said in the context of the Oranga Tamariki system, while there seems to be a clear consensus that change should be by Māori, for Māori it is less clear exactly what this means:[244]

> *Improving outcomes for Māori children and whānau requires doing things in a Māori way, but there is disagreement as to exactly what this should look like. Within child welfare, some Māori advocate for biculturalism and partnership with the Crown, while others insist that Māori self-determination is the essential starting point if the legacy of colonisation is to be overcome. Perhaps, for some, it is a question of whether or not wholesale system reform is realistic, rather than whether it is ideal.*

Separate systems and processes

Some argue that much more is required than making a western colonial system more culturally appropriate by incorporating Māori concepts or processes and that sharing power does not go far enough. These arguments have been made for over thirty years by leading Māori scholars such as Moana Jackson, Juan Tauri, and Annette Sykes. For example, in his 1988 report *He Whaipaanga Hou* Moana Jackson described the bias and prejudice experienced by young Māori in the criminal justice system and wider society which makes it necessary to take a different viewpoint, and "move away from both the imposition of Pākehā-defined models of change and the grafting of 'culturally appropriate' panacea onto existing monocultural structures".[245] He argued:[246]

> *[T]he effectiveness of any change ultimately depends upon the perspective from which it is proposed. If the change accepts the basic rightness of the existing process for both Māori and Pakeha, then it may not be effective because it will not alter the philosophical base nor the authority which underpins the system. If however the change arises from a process which asserts that a specifically Māori approach has a basic rightness for Māori, just as a Pakeha model is inherently right for the Pakeha, then the changes will be meaningful because they address questions of authority and philosophical appropriateness.*
>
> *The latter process is based on a concept of equality which maintains that the institutions and procedures of the Māori are as valid and worthwhile as those of the Pakeha. It is developed from an understanding of rangatiratanga and the rights of tangata whenua which maintain that Māori people should have the authority to care for and monitor the behaviour of their young. It is tied to the weave of Treaty partnership which maintains the framework for that equality and rangatiratanga. It is the context in which the development of a parallel Māori method of dealing with offenders can be considered.*

Before Moana Jackson passed away in 2022, he was leading a project to update this research, including tracking down and interviewing original interviewees, and comparative international

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[244] Fitzmaurice, L. (2020). Whānau, Tikanga and Tino Rangatiratanga: What is at stake in the debate over the Ministry for Children? *MAI Journal*. 9(2), 166-172 at 170.
[245] Jackson, *The Maori and the Criminal Justice System: A New Perspective: He Whaipaanga Hou Part Two* at 260.
[246] Ibid at 261.

research about other settler states.[247] I am not aware whether this project will be completed by other researchers, but if so, it would be of considerable value to the debate on these issues.

Annette Sykes has also made similar arguments in recent years including in the Nin Thomas Memorial Lecture in 2020 where she argued:[248]

> *We have to be talking about constitutional change. The vision for a decolonised Aotearoa in Matike Mai is not about a hybridised justice system, where the question is whether or not Māori values will be recognised within a colonial paradigm. It is about having a tikanga system of justice based on our values that work for our people.*

Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group also made recommendations for constitutional change in *Ināia Tonu Nei – Hui Māori Report* including for "constitutional reform to take place to entrench Te Tiriti o Waitangi" and for "[j]ustice and social sectors to establish a Mana Ōrite model of partnership that puts in place Māori at all levels of decision-making".[249] However, there has been fairly limited progress in implementing these and any other recommendations of Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group,[250] although a further hui Māori is planned for early 2023.[251]

The Waitangi Tribunal is currently in the early stages of Te Rau o te Tika: the Justice System Inquiry which will take place in three parts:[252]

- Whakatika ki Runga – a mini-inquiry that commenced in July 2022 about the funding of claimant participation in Waitangi Tribunal processes, including legal aid.
- Te Tūāpapa o te Tika – a process involving people as Pou Tikanga, or authorities on tikanga, in order to gain insights about the tikanga of justice that need to guide the Inquiry process.
- Te Tāhū o te Tika – the balance of the Inquiry. The Tribunal intends to look at criminal justice first then turn to civil justice, including civil litigation and civil legal aid, followed by the Family Court, Environment Court and Māori Land Court.

Although the focus of Te Rau o te Tika is not on children and young people specifically, its findings and recommendations will no doubt be of considerable relevance to any discussions in relation to access to justice for tamariki and rangatahi Māori.

Looking outside the justice system

It is also necessary to look outside the justice system as the Waitangi Tribunal noted in its report on the Oranga Tamariki inquiry:[253]

> *Change to genuinely move towards Treaty-consistent outcomes will also require a sustained focus on addressing what Associate Professor Keddell describes as the*

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[247] Michael and Susan Borrin Foundation. (n.d.). *He Whaipaanga Hou – A New Approach 2018*. https://www.borrinfoundation.nz/he-whaipaanga-hou-a-new-approach-2018/#:~:text=He%20Whaipaanga%20Hou%20%E2%80%93%20A%20New%20Perspective%20was%20a%20ground%2Dbreaking,have%20shaped%20New%20Zealand%20society.

[248] Sykes, A. (2020). *The myth of Tikanga in the Pākehā Law: Nin Thomas Memorial Lecture 2020* at 20.

[249] Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group, *Ināia Tonu Nei – Hui Māori Report* at 25.

[250] Ināia Tonu Nei. (2022). *Work Programme report: 1 Poutu-te-rangi 2022 to 30 Pipiri 2022*.

[251] Ināia Tonu Nei. (2022). *Future Hui Maori.* https://www.inaiatonunei.nz/future-hui-mori

[252] Wai 3060, 2.5.007(c) Appendix 3: The structure of the inquiry and relevant translations of the memorandum-directions, 19 Apr 22

[253] Waitangi Tribunal, He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry at 179-180.

> *'intersecting inequalities' that cause Māori to come into contact with the 'system' in vastly disproportionate numbers. These factors include poverty, alienation, transience, income and housing insecurity, health and education disparities, involvement with the criminal justice system, and drug and alcohol dependency.59 Addressing these issues will require a bold and comprehensive all-of-government approach. Piecemeal reform of Oranga Tamariki, no matter how well designed, will ultimately fail another generation of children (Māori and non-Māori), if the same factors placing inhumane stress on families continue unabated.*

Much the same points could be made about the other intersecting systems in which justice issues are discussed and in terms of wider issues of justice.

Other indigenous peoples and minority cultures

Access to justice research in other settler-colonial countries has also considered the need for culturally appropriate services and systems for indigenous peoples. For example, the Law Council of Australia recommended both increasing funding for Aboriginal and Torres Strait Islander community controlled organisations to provide legal services, and increased funding and support for other legal assistance services to provide "culturally safe, informed and accessible services".[254] As with specialist service in other contexts, the Law Council of Australia found that "while specialist services were often best able to provide culturally responsive, informed services, mainstream services who frequently engaged with particular client groups also needed to do so."[255]

Culturally appropriate and culturally delivered services

The VLA guide sets out what lawyers need to understand to provide comprehensive, culturally safe legal representation to Aboriginal children including Aboriginal people's cultural rights; the positive impact for children arising from a strong connection with culture; the historical and current impact of government child protection policies on Aboriginal children and families; and the legal requirements in the Act relating to child protection decisions about Aboriginal children.[256]

Change the Record argue that Aboriginal and Torres Strait Islander people know best what will work for their people giving examples of some of the innovative strategies that First Nations women are using to tackle violence including the Kullarri Patrol in Broome which is often used as an alternative to police and intervenes, deescalates and prevents family violence and a multi-agency hub in Fitzroy which brings together crisis support and accommodation with legal assistance and counselling.[257]

Tailoring services to particular groups can mean more than ensuring services are culturally appropriate. For example, the Law Council of Australia concluded that services for Aboriginal and Torres Strait Islander people should be designed to address the legal capabilities of this client group e.g. providing services face to face rather than via telephone or online makes it

[254] Law Council of Australia. (2018). *Recommendations and Group Priorities* at 5.
[255] Law Council of Australia. (2018). *The Justice Project: Final Report Part 2 Legal Services* at 39.
[256] Victoria Legal Aid. (2019). *Representing children in child protection proceedings: A guide for direct instructions and best interests lawyers* at 30. The guide also discusses the role of Aboriginal Community Controlled Organisations (ACCOs) and the Aboriginal Child Specialist Advice and Support Service (ACSASS).
[257] Change the Record. (2021). *Pathways to Safety: The case for a dedicated First Nations Women's National Safety Plan - written by Aboriginal and Torres Strait Islander women, for Aboriginal and Torres Strait Islander women* at 18.

easier for practitioners to check clients' understanding.[258] Another example is that Aboriginal and Torres Strait Islander people commonly have a lack of trust in the Australian justice system due to historic marginalisation.[259] This lack of trust in authority is not an aspect of culture per se, rather it reflects the common experiences of people who are members of this culture. However, culturally appropriate services could still be part of the solution as they may assist in developing trust.

Cultural appropriateness is also relevant in other contexts such as risk assessment and rehabilitation as the Commission for Children and Young People conclude:[260]

> *Youth Justice should validate its risk assessment tools for use with Aboriginal children and young people and ensure that all Aboriginal children and young people have access to culturally safe youth offending programs in custody, preferably delivered by Aboriginal organisations.*

The Law Council of Australia also cite submissions from stakeholders that the principles of self-determination and culture were "fundamental to delivering culturally competent services" including "recognising the centrality of community strength in justice solutions, being guided by community-controlled organisations and recognising the value of codesigning local responses".[261]

Case Study – Balit Ngulu

Balit Ngulu is a specialist legal service for Aboriginal children and young people operated by the Victorian Aboriginal Legal Service.[262] Balit Ngulu provides holistic support and case management for Aboriginal and Torres Strait Islander children and young people involved in the youth system.[263] Balit Ngulu provides two streams of support:[264]

- Lawyers who provide high quality legal advice, assistance and representation; and
- Youth support officers who provide culturally safe holistic support and case management.

Balit Ngulu's integrated service model is based on four principles: embed self-determination, be culturally safe, take a holistic approach, and prioritise and value youth participation.[265] Although each of these principles is an important feature of the Balit Ngulu model, in this case study I will focus on cultural safety. The 2020 evaluation of Balit Ngulu defines culturally safe services as "services which see and value the full identity, relatedness and worth of an Aboriginal and Torres Strait Islander person. They also put that recognition into practice and, by doing so, create a safe setting for people to access the support they need to thrive."[266] A summarised version of the strategies for culturally competent services in Balit Ngulu service model is set out in the table below.[267]

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[258] Law Council of Australia, *Aboriginal and Torres Strait Islander People: Consultation Paper* at 45-46.
[259] Ibid at 46.
[260] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system* at 37.
[261] Law Council of Australia. (2018). *The Justice Project: Final Report Part 2 Legal Services* at 40-41.
[262] Victorian Aboriginal Legal Service. (n.d.). *Balit Ngulu*. https://www.vals.org.au/balitngulu/
[263] Ibid.
[264] Ibid.
[265] Nous Group, *Evaluation of Balit Ngulu* at 10.
[266] Ibid at 11.
[267] Ibid at 11-12. The text in the table has also been amended from past tense to present tense. The evaluation was in past tense as the Balit Ngulu had ceased operating due to lack of funding. The service was relaunched in 2021 with new funding from the Victorian Government: Premier of Victoria. (2021).

Table 2: Balit Ngulu integrated service model

Strategies for culturally competent services	Features of Balit Ngulu's service model
Embed cultural knowledge in the structure of the service	• Involve community in identifying the services needed and how they can be delivered. • Employ staff, especially youth support officers, who are members of the community with connections and cultural knowledge as well as professional expertise. • Establish a governance Board of elders and other community members who have community recognition and relevant professional experience.
Employ specific practices and strategies	• Engage a male youth support officer and a female youth support officer so they can conduct men's business and women's business with clients. • Embed a relationship-based service culture including service continuity and clear expectations about the responsibility of workers' responsibility to gain and maintain clients' trust and deliver consistent service. • Actively prepare the young person to attend and participate in court and to be seen by the court as a whole person. • With the client's consent, liaise with family members/carers and provide support and advice when requested.
Selection, training, and actions of individual staff members	• Employ Aboriginal and Torres Strait Islander staff members with professional expertise and/or experience working with Koorie young people who understand and foster culturally-relevant ways of working. • Invite 'elders-in-residence' with justice sector experience to provide cultural support to the youth support workers and train Balit Ngulu lawyers to work with community. • Establish a Balit Ngulu service style and ethic – staff are expected to get to know their client as a whole person, beyond their legal circumstances.
Define what success looks like using measures and definitions grounded in the culture of the community being served.	Success measures included: • The support officer and lawyer know about how life is going for a child or young person, apart from their legal proceeding/outcome. • Young people are prepared for, and not too stressed or feeling sick about, the court process, what might happen, and what their voice is in it. • Members of the court are prepared to hear the young person's voice in court. • The support officer works with the child or young person to identify their long-term pathway and assist them to work towards it.

Supporting Aboriginal Children And Young People. https://www.premier.vic.gov.au/supporting-aboriginal-children-and-young-people

Specific courts

In Australia there are specialist youth courts for Aboriginal youth. Similar to Ngā Kooti Rangatahi, to be eligible to participate in the court a young person must have either indicated that they will plead guilty to the offence or had the offence proven after hearing.[268] Once a young person is accepted into the court process, sentencing is deferred for up to 12 months to develop and implement a case management plan addressing the underlying risk factors relating to their involvement in the criminal justice system.[269]

A recent evaluation of one of these, the NSW Youth Koori Court, found that young people who had been through the Youth Koori Court were less likely to be sentenced to custody in a detention centre and less likely to be re-convicted of a new offence than Aboriginal young people who went through the standard children's court.[270] The evaluators commented that the benefits of the Youth Koori Court model were that the magistrate has substantially more information about the young person and that the model was purposefully designed to meet the unique needs of Aboriginal young people coming into contact with the justice system. As a result, the Court is more able to accurately assess the needs of the young person and identify suitable intervention(s).[271] Sentencing courts for Aboriginal adults who plead guilty also operate in Queensland (Murri Courts),[272] Victoria (Koori Courts),[273] South Australia (Nunga Courts),[274] and NSW (Circle Sentencing).[275]

An Aboriginal Youth Court (AYC) also operates in Toronto[276] as well as Gladue Courts across Canada,[277] particularly in Ontario.[278] An evaluation of the AYC in 2016 found that the court met its four objectives including encouraging effective alternatives to incarceration, developed through culturally and individually appropriate processes.[279] Though not a stated objective, the evaluation also found that young people who had been through the AYC were less likely to reoffend.[280]

A Gladue Court is characterised by specific factors or goals drawing from the Criminal Code and the Supreme Court decision in *Gladue*:[281]

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[268] Ooi, E.J., & Rahman, S. (2022). *The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes*. NSW Bureau of Crime, Statistics and Research at 3. There are also a range of other criteria relating to age, Aboriginal descent and the nature of the offence.
[269] Ibid at 4.
[270] Ibid at 17.
[271] Ibid.
[272] Queensland Courts. (n.d.). *Murri Court.* https://www.courts.qld.gov.au/courts/murri-court
[273] Magistrates Court of Victoria. (n.d.). *Koori Court*. https://www.mcv.vic.gov.au/about/koori-court
[274] Courts Administration Authority of South Australia. (n.d.). *Aboriginal Programs.* https://www.courts.sa.gov.au/for-the-community/aboriginal-programs/
[275] NSW Government Communities and Justice. (n.d.). *Legal and court support for Aboriginal people and Torres Strait Islander people*. https://courts.nsw.gov.au/courts-and-tribunals/help-and-support/legal-and-court-support-for-aboriginal-people-and-torres-strait-.html
[276] Clark, S. (2016). *Evaluation of the Aboriginal Youth Court*. Toronto Aboriginal Legal Services.
[277] Department of Justice Canada. (2019). *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*. Department of Justice Canada at 31-35.
[278] Steps to Justice. (n.d.). *What is a Gladue or Indigenous Peoples Court?* https://stepstojustice.ca/questions/criminal-law/what-gladue-or-indigenous-peoples-court/
[279] Clark, *Evaluation of the Aboriginal Youth Court* at 42-46.
[280] Ibid at 41-47.
[281] Department of Justice Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* at 32; *R. v. Gladue,* 1999 CanLII 679 (SCC), [1999] 1 SCR 688.

- Directly address section 718.2(e) of the Criminal Code which provides that all available sanctions other than imprisonment should be considered, with particular attention to the circumstances of Aboriginal offenders;[282]
- Apply the Gladue principles including understanding and accounting for the offender's background and the history of marginalization, systemic discrimination, and socio-economic deprivation experienced by Indigenous peoples in Canada;
- Encourage effective restorative justice or community-based justice alternatives to incarceration for Aboriginal offenders, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans that will engage Aboriginal persons in their own rehabilitation; and
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal persons.

In order to achieve these goals Gladue Courts require information about the offender in the form of a Gladue Report prepared by a trained expert who has done a background investigation on the person.[283] Other key aspects of Gladue courts include the availability of culturally appropriate rehabilitation programmes, indigenous court workers, and committed judges and lawyers trained in Indigenous justice issues.[284]

Other models also operate in Canada including sentencing circles and specialist domestic violence and wellness courts that process mainly indigenous offenders "in a manner consistent with Gladue principles".[285] The Department of Justice Canada concludes that there is not a single model that is culturally appropriate for all indigenous people in Canada:[286]

> *"It should be noted, however, that one size does not fit all. It is important to remember that community-based approaches that involve the court, such as circle sentencing, are not appropriate in all cases. As noted earlier, Indigenous peoples in Canada represent many different cultures, each having its own views on justice. For example, while court mandated sentencing circles can work well in Ontario or Saskatchewan, they do not fit with Inuit culture. Inuit prefer smaller group approaches to restorative justice (see Crnkovich, 1995)."*

Denis-Boileau, a former Gladue lawyer, extends this point further arguing that culturally appropriateness does not mean a disregard for the uniqueness of the specific person in front of the court:[287]

> *Indigenous peoples – like all people - have different beliefs and individualities. Some were raised far from their Indigenous cultures and may be interested to connect and learn about them, while others are not. In order to make culturally appropriate and responsive decisions or suggestions to the court, it is important to respect the*

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[282] Criminal Code, s781.2(e): Purposes and Principles of Sentencing provides: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.".

[283] Department of Justice Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* at 32.

[284] Ibid at 33.

[285] Ibid at 35.

[286] Ibid.

[287] Denis-Boileau, M. (2021). The Gladue Analysis: Shedding Light on Appropriate Sentencing Procedures and Sanctions. *University of British Columbia Law Review*. 54(3) 537-628, at 610.

uniqueness and individual beliefs of each person and not impose upon them a culture which is not their own.

Intersecting needs

The National Aboriginal and Torres Strait Islander Legal Services argue that Aboriginal and Torres Strait Islander people's intersecting needs mean that they:[288]

> *[N]eed to access justice in ways that are different to other Australians. Our people have disproportionate rates of, for example, incarceration/child removal/experiences of family violence/experiences of racism, live in more remote locations with more disadvantage and complex needs and therefore need greater access to lawyers… We need culturally safe services, and holistic services that address underlying needs and trauma which are a consequence of colonisation and subsequent policies.*

Education and training

Cultural competence or cultural awareness training

In addition to the provision of specialist services, it is also commonly argued that justice system professionals should receive ongoing cultural competence training led by members of the relevant cultural community.[289] Cultural competence is part of the "skills required for the provision of equal justice to all users, irrespective of their cultural or linguistic characteristics".[290] Research and literature also raises the importance of having an understanding of racism and its institutional and structural impacts as Joseph-Salisbury explains in the context of the English education system:[291]

> *To understand racism as institutional (and structural) is to recognise the ways in which racism is woven into the fabric of society's institutions. This understanding enables teachers to see, and therefore respond to, the ways in which the education system can and does reproduce racism and racial inequalities…. Several respondents argued that the cultivation of racial literacy should be seen as an ongoing process of learning and unlearning. Rather than as a tick-box 'skill' that one might acquire and retain with little effort, teachers should understand racial literacy as a constant journey, and they should be given the time, support and resources to pursue that journey. It should be part of continued professional development within schools, and should be encouraged at all levels – including at the level of the Department for Education, local authority level and school level.*

However, it is also critical that any training is not delivered in a way that inadvertently perpetuates racism and biases. Monteith et al. give the example of the training of one of the respondents to their survey of Magistrates in the United Kingdom:[292]

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[288] Nous Group, *Evaluation of Balit Ngulu* at 13 citing National Aboriginal and Torres Strait Islander Legal Services. (2018). *Submission to the Review of the Indigenous Legal Assistance Programme*, NATSILS.
[289] For example, see: Law Council of Australia, *Recommendations and Group Priorities* at 21; Paul, S. (2021). *Tackling Racial Injustice: Children and the Youth Justice System*. JUSTICE at 57-58.
[290] Martin, W. (2017). *Access to justice in multicultural Australia* (Paper presented at the Council of Australasian Tribunals National and New South Wales Joint Conference) at 22.
[291] Joseph-Salisbury, R. (2020). *Race and Racism in English Secondary Schools*. Runnymeade Trust at 8.
[292] Monteith et al., *Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)* at 24.

> *In the first few weeks of training as a magistrate, there were compulsory visits to prisons and young offenders institutions, so while this is useful (awareness of what you were sending someone to if custodial sentence imposed), presenting (without context) a large black and mixed heritage prison population - sets the scene for black men to be seen as inherently criminal.*

Monteith et al. argue that is the lack of context to the over-representation of black and mixed heritage people in prison which is so problematic.[293] While I agree the lack of context is problematic, I question whether simply giving explanations of the context will necessarily be effective particularly where someone already holds a bias. However, this is probably a question for more detailed research.

In addition, although the research and literature discusses the importance of training and education, advocates and scholars also consistently raise concerns about the limitations of existing cultural awareness training. For example, Miller identified the following shortcomings of existing training:[294]

- It is often one-off, when ongoing training is required;
- Training is voluntary with individuals having the responsibility to identify and obtain training;
- Training about indigenous groups often fails to recognise diversity within indigenous peoples including diversity of experience between urban and rural populations; and
- Training is sometimes provided by non-indigenous people or indigenous people from other parts of the country.

Cavanagh & Marchetti also raise concerns that "cultural awareness training is often packaged in short courses or brief seminars that, in isolation, either do not sufficiently unpack the issues of colonisation and its effects in contemporary society, or do not demonstrate an individual's increase in knowledge and a change in behaviour that improves the experience of their interactions with Indigenous Peoples".[295] Another limitation of training is that it may make little difference if the surrounding systems and structures remain the same:[296]

> *[U]nless accompanied by wider changes to culture and practice, race training efforts are at best marginally effective at addressing specific problems, while distracting from much larger ones. …Even if individuals in the system respond well to training, continuing workplace norms in a racist, hierarchical and complexly discriminatory system make it hard to convert understanding into action.*

Legal education for non-lawyers

Te Korimako is an initiative which trains and educates Iwi, legal and social service providers to assist whānau who come to the attention of Oranga Tamariki to participate in the care and protection process, including within the Family Court.[297] Te Korimako have also developed a website "to look at the law and explain how the law relates to tamariki and whānau".[298] However, although the purpose of this initiative is states as to "educate and support whānau who come to

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[293] Ibid at 24.
[294] Miller, A. (2017). Neighbourhood Justice Centres and Indigenous Empowerment. *Australian Indigenous Law Review,* (20), 123-153 at 151.
[295] Cavanagh, V. & Marchetti, E. (2016). Judicial Indigenous Cross-Cultural Training: What Is Available, How Good Is It And Can It Be Improved? *Australian Indigenous Law Review,* 19(2), 45-63 at 47.
[296] Monteith et al., *Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)* at 23.
[297] Te Korimako Legal Education. (n.d.). https://www.facebook.com/tekorimakolegaleducation/
[298] Te Korimako Legal Education. (n.d.). *About us.* https://tekorimako.org/about

the attention of Oranga Tamariki and the Family Court",[299] the language used on the website is probably more suited to professionals likely reflecting its background in training. The website contains a mix of text and short videos to explain various concepts as well as a list of legal services that may be able to assist whānau. Tania Williams Blyth discussed the background to this initiative in her evidence for the Waitangi Tribunal inquiry into Oranga Tamariki.[300]

Some other private law firms also offer legal education. For example, Kahui Legal offer legal education workshops on a range of topics including Te Tiriti o Waitangi/the Treaty of Waitangi; governance; tikanga and the law; and recent legislative amendments affecting Māori (such as the Resource Management Act 2003 and the Oranga Tamariki Act 1989.[301]

Education for law students

A major new development in legal education in Aotearoa New Zealand is the New Zealand Council of Legal Education's unanimous approval of a resolution to include concepts of Te Ao Māori and tikanga in all core law degree courses.[302] It is also likely that tikanga will be added to the curriculum as a new core subject.[303] This decision followed public debate and public statements by senior members of the judiciary in relation to the need for lawyers and judges to be aware of, and comfortable with, tikanga and its place in New Zealand law.[304]

A related issue is the need for legal education to prepare students for practice as Dean of AUT Law School Khylee Quince commented in a recent interview discussing the Council of Legal Education's resolution and the Peter Ellis decision:[305]

> *A key question is whether our lawyers are fit to represent and advocate for our populations? The worst thing that could happen is that legal education and practice doesn't change while our population changes rapidly and then they can't connect to one another.*

The need for law students to understand the social context of their clients, including being culturally competent has led to some Universities in Canada incorporating cultural competence into clinical legal education. One technique is teaching students five habits required of culturally competent practitioners:[306]

1. *take note of the differences between the lawyer and the client;*
2. *map out the case, taking into account the different cultural understandings of the lawyer and the client;*
3. *brainstorm additional reasons for puzzling client behavior;*
4. *identify and solve pitfalls in lawyer-client communications to allow the lawyer to see the client's story through the client's eyes; and*
5. *examine previous failed interactions with the client and develop pro-active ways to ensure those interactions do not take place in the future.*

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[299] Te Korimako Legal Education. (n.d.). *Home.* https://tekorimako.org/
[300] *Brief of Evidence of Tania Rose Williams Blyth* (Wai 2915, #A46)
[301] Kahui Legal. (n.d.). *Legal Education Workshops*. https://www.kahuilegal.co.nz/expertise/legal-education-workshops/
[302] Clement, D. (2021). Tikanga becomes compulsory for law students. *ADLS LawNews*. 14, 1-4 at 1.
[303] Ibid.
[304] Ibid at 1-2.
[305] Barnett, J. (2021). Transforming the lawyers of tomorrow. *LawTalk*. 947, 37-41 at 41.
[306] Voyvodic, R. (2006). Lawyers Meet the Social Context: Understanding Cultural Competence. *Canadian Bar Review*, 84(3), 563-591 at 586.

Other techniques include using professional role models to demonstrate cultural competence in complex situations including through mentorships, job-shadowing, and pro bono programmes.[307] Voyvodic suggests that a first step which could "be implemented immediately is a pledge on the part of law schools and law societies to fostering the knowledge, skills and attitudes of a culturally competent practitioner among law students and lawyers in Canada today."[308]

Continuing professional development for lawyers and judicial education

NZLS CLE run workshops providing an introduction to Te Ao Māori and Te Reo Māori for the legal profession which are described as:[309]

> *[T]ailored for lawyers and is designed to enhance your ability to connect with Māori as clients, stakeholders, partners, or in another capacity. Experienced facilitators will guide you through an interactive day as you consider who, why and how to successfully engage with Māori in legal settings.*

However, while a positive initiative, these workshops are not compulsory and are only available in the main centres.

Te Kura Kaiwhakawa, the Institute of Judicial Studies provides a range of programmes on key areas including Te reo and Tikanga.[310] The Tikanga programme was designed by Justice Joe Williams and Te Kura Kaiwhakawa in 2014 and is now compulsory for all newly appointed District Court judges.[311] The Te reo programme is offered at multiple levels and attendance at a Te reo course at the appropriate level is also compulsory for all newly appointed District Court judges.[312] While this is a positive development, it is unclear whether sitting Judges are also required to complete the Tikanga and Te reo programmes.

Resources

The Victorian Aboriginal Legal Service and the Victorian Equal Opportunity & Human Rights Commission have worked together to develop resources for lawyers including:

- A legal resource to assist lawyers and advocates who represent Aboriginal Victorians in coronial inquests;[313] and
- A guide to assist lawyers and advocates who represent Aboriginal Victorians in making transfer applications to the Koori Court.[314]

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[307] Voyvodic, Lawyers Meet the Social Context: Understanding Cultural Competence at 589-590.
[308] Ibid at 589-590.
[309] NZLS CLE Limited. (2023). *Kua Ao te Ra: Introduction to te ao Maori and te reo Maori for the legal profession 2023*. https://www.lawyerseducation.co.nz/shop/Workshops2023/23MCD.html?utm_source=LawPoints+16+March+2023&utm_campaign=e0842f4adc-LawPoints_636&utm_medium=email&utm_term=0_-e0842f4adc-%5BLIST_EMAIL_ID%5D
[310] Te Kura Kaiwhakawa Institute of Judicial Studies. (2021). *Prospectus 2021*. https://www.ijs.govt.nz/prospectus/2021_Prospectus_for_Internet.pdf at 4-6.
[311] Taumanu, H. (2020). *Norris Ward McKinnon Annual Lecture 2020*. Ministry of Justice at 13.
[312] Ibid.
[313] Victorian Aboriginal Legal Service. (2021). *Resource: Investigating systemic racism. A Tanya Day inquest resource for advocates and lawyers*. Victorian Equal Opportunity & Human Rights Commission.
[314] Victorian Aboriginal Legal Service. (2021). *Resource: Making transfer applications to the Koori Court*. Victorian Equal Opportunity & Human Rights Commission. The Koori Court is a sentencing court for and Torres Strait Islanders: Magistrate's Court for Victoria. (n.d.). *Koori Court.* https://www.mcv.vic.gov.au/about/koori-court

The Youth Justice Legal Centre in the United Kingdom have also developed a set of three resources "designed to equip practitioners with knowledge and strategies for identifying and challenging racism facing Black, Brown and Racialised children and young adults in the criminal justice system":

- #1 Fighting Racial Injustice: Background, childhood, legal representation & trauma;[315]
- #2 Fighting Racial Injustice: Police station, diversion, CCE, effective participation, remand & sentence;[316] and
- #3 Fighting Racial Injustice Rap & drill.[317]

The Howard League for Penal Reform have also produced a guide to anti-racist lawyering,[318] accompanied by a list of third sector and community organisations.[319] The executive summary to the guide explains the rationale for it, and its content:[320]

> *This guide is inspired by two harsh realities that must be addressed: racial discrimination as an enduring feature of criminal justice for Black people; and legal training in England and Wales that does not equip lawyers to be antiracist. Without taking the initiative to learn about and challenge the racism inherent in our justice and social systems, criminal law practitioners can become complicit in it… Offering clear step-by-step advice and helpful case studies, the guide is designed to support lawyers to be antiracist at each phase of a client's journey through the system. Lawyers must recognise injustice, listen to clients' stories, build trust and rapport, and work to counter bias and discriminatory evidence and behaviour in court.*

Although the Youth Justice Legal Centre and Howard League for Penal Reform guides do not relate to indigenous people, they do give a sense of the sorts of resources that could be developed to support lawyers and others working to support tamariki and rangatahi Māori involved in the justice system.

Increasing diversity

The need for increased diversity in the legal profession was recognised by the Independent Review Panel in their 2023 report on regulating the legal profession leading to a series of recommendations intended to support "efforts to improve diversity and inclusion within the legal profession" including:[321]

1. The independent regulator having a new objective to encourage an "independent, strong, diverse and effective legal profession" with the expectation that the new regulator would "encourage diversity by collecting and publishing relevant data, commissioning research and highlighting areas for improvement".

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[315] Youth Justice Legal Centre. (2022). *#1 Fighting Racial Injustice: Background, childhood, legal representation & trauma*. Youth Justice Legal Centre; The Barrow Cadbury Trust.
[316] Youth Justice Legal Centre. (2022). *#2 Fighting Racial Injustice: Police station, diversion, CCE, effective participation, remand & sentence*. Youth Justice Legal Centre; The Barrow Cadbury Trust.
[317] Youth Justice Legal Centre. (2022). *#3 Fighting Racial Injustice Rap & drill*. Youth Justice Legal Centre; The Barrow Cadbury Trust.
[318] Howard League for Penal Reform. (2021). *Making Black lives matter in the criminal justice system: A guide for antiracist lawyers*.
[319] Howard League for Penal Reform. (2021). *Third-sector and community organisations*. https://howardleague.org/third-sector-and-community-organisations/
[320] Howard League for Penal Reform, *Making Black lives matter in the criminal justice system: A guide for antiracist lawyers* at 5.
[321] Independent Review Panel. (2023). *Regulating Lawyers in Aotearoa New Zealand: Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa*. New Zealand Law Society at 174.

2. More diversity in the composition of the independent regulator's board meaning it "will likely be more responsive to diversity issues".
3. A new Te Tiriti o Waitangi clause to ensure a focus on Māori in the regulator's work to support inclusion with the expectation that the regulator will "undertake effective outreach, consultation and co-design with Māori,…partner with Māori in the delivery of certain functions, and …make improvements to regulatory procedural matters."

The Independent Review Panel's recommendations are currently being subject to feedback and a response from both the Law Society and the Government is still to come.

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