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**A Theoretical Analysis of Iwi Justice Panels. Where Does the
Authority for These Panels Come from?**

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PENOLOGY**



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Abstract

This paper addresses the new and innovative Iwi Justice Panels. They are an alternative to the court system based on a marae. They are a long awaited response to the Puao-te-ata-tu or the 'Daybreak' report in 1988 which outlined Maori offending. Over 50% of arrests and imprisonments are Maori and these rates have not changed since the report. Therefore, a new response was required and has been a success. However, the policy is not legislated and questions are asked as to whether it should be or not.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,505 words.

Subjects and Topics

*Sentencing, or
Iwi Justice Panels.*

I Introduction

In 2014 the Ministry of Justice introduced three Iwi Justice Panels nationally (these are in Gisborne, South Auckland and Hutt Valley), with the intention of unclogging the court system, reducing the costs to the country, reducing the Maori footprint in the court system and getting a handle on recidivism.¹ It is an initiative to reduce offending and is a response to the Puaoteata-tu or the ‘Daybreak’ report in 1988, which outlined concerns of Maori offending, calling for a more sensitive approach.² New Zealand’s Criminal Justice system has been the subject of Maori criticism since 1970, with such a high Maori offending rate. With the Police Commissioner, Mike Bush, admitting to unconscious bias within the police force, new innovative approaches were considered. One of the ways to combat this unconscious bias was the Policing Excellence Program. The Iwi Justice Panels come under this program. They are a joint initiative between the policies and communities. This paper will look at what these panels are, the criticisms the panels have received, where the authority and the police discretion for these panels come from and whether they should be legislated.

II What is an Iwi Justice Panel?

An Iwi Justice Panel is an alternative to the court system. It is intended to be offered where police perceive that it would be more beneficial, to both the offender and the community, to take this course of action as opposed to directing them through the court system. The panel is made up of at least one police officer and prominent members of the community such as members of the church, social workers, sports coaches and so on. There is also a navigator, chair, and Kaumatua (Maori elder).³ The panel is situated in a marae which contains waka and Maori carvings. Te Rira Puketapu, Kaumatua on the Hutt Valley Panel and descendant of Parihaka leaders te Whiti and Tohu, and his wife Potiki, are truly pillars of their community. Their marriage of 54 years has produced more than 25 grandchildren. They are therefore very interconnected within the Lower Hutt community. The tikanga principles of Atiawa, Te Rira Puketapu says, are followed during the panel hearings “just like house rules are followed by

¹ Minister of justice to the justice and electoral committee *Ministry of Justice Annual Review 2013/14 Responses to the standard questions* (20 February 2015) at 3.

² Ministerial Advisory Committee *Puaoteata-tu (day break)* (September 1988).

³ James Greenland “Justice Panels Innovative way to achieve justice” *Law talk 881* (New Zealand, 12 February 2016) at 14.

guests in a strangers home”.⁴ The navigator directs the hearings to ensure a successful outcome is reached. This is where the offender has been able to open up about their problems, express accountability and remorse, is motivated to maintain good behaviour and a penalty or legal sanction is agreed on by panellists and the offender. Julie Wilson, who navigates the Hutt Valley Panel, says that the hearings can become really emotional. She steers the waka towards restoration and helps to guide the ship that carries an offender on their journey to betterment and community reparation.

An offender (and their family or supporters if they have chosen to bring them) are welcomed into the marae with a mihi, an explanation of the process and a karakia (a Maori prayer). The offender and supporters sit down with the panelists and talk through why they committed the offence. Many offenders are suffering from trauma or issues they cannot cope with. If the offender can turn this around and work to resolve these problems or difficulties they are having, the likelihood of reoffending drops significantly. Iwi Liaison Police Officer Asher Hauwaho was the police officer on a panel when a young solo mother of two had stolen meat from the supermarket. The panel discovered she was only receiving \$5.00 a week from Work and Income. She had felt desperate and needed to feed her children. There had been an error in the Work and Income system which meant she was missing out on the living costs she was entitled to. With the help of the panellists, this was corrected. She began receiving the amount she was entitled to, and has not offended since.⁵ Hata Wilson, Manager for Whanau Ora and Chair of the Waiwhetu Panel, says:⁶

It’s an opportunity to help out in terms of channeling our people away from the system and putting them into a more positive space in terms of dealing with not only the offence they committed but also their lives, to work a better plan around their lives. Keep it as simple as that.

The police officer issues a sanction that is appropriate for the crime, but may not necessarily fit the crime. For example, if the offender committed the offence due to a drug addiction, its better they receive help to recover from the drug addiction, than be charged with a hefty fine or prison sentence.⁷ The sanction must be proportionate to the offence. Police officers are

⁴ Greenland, above n 3, at 16.

⁵ Interview with Asher Hauwaho Iwi Liaison Officer (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

⁶ Interview with Hata Wilson Manager for Whanau Ora and Chair of the Waiwhetu Panel (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

⁷ Interview with Asher Hauwaho Iwi Liaison Officer (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

encouraged to consider referring offenders to an Iwi Justice Panel for low levels of crime. Iwi justice panels are available to those of any ethnicity. There is a set of police guidelines officers must consult for this referral process. The offender must be an adult, admit the offence and the offence must carry a maximum of six months' imprisonment or less. An offender may decide they do not want any involvement in the panel and the officer will then refer them to an alternative process such as the court system. However, if an offender accepts this referral, it is the first step in showing that they are willing and wanting to help themselves.

The New Zealand police culture has been undergoing a paradigm shift. Since about 2010 a series of common sense initiatives have been introduced under the Policing Excellence programme. Deputy Chief Executive Maori Superintendent Wally Haumaha states that this is “the largest strategically significant and operationally relevant change programme undertaken by NZ Police”.⁸ It focuses on alternative resolutions and prevention, “to develop better alternatives to hold offenders to account for less serious offending without having to use the courts”. It is useful, as long as the intention of the offender is the restoration of the offending. Iwi Justice Panels are outside of the traditional court processes, without the stigma and associated consequences of a criminal conviction, incorporating the tikanga principles which were used to resolve dispute before colonisation and such an impersonal Eurocentric justice system.

Julie Wilson, Hutt Valley Navigator, says that judges actually really appreciate the panels, as it takes pressure off the courts. Judges may be able to liaise with the panel to get an idea of what is actually going on within the community. This allows judges to get an idea on what an appropriate sentence for the offender would be.⁹ It is a significant change to the conventional justice system which may appear hazardous or risky, but the conventional system has not been successful. Reoffending rates just continue to increase. It is time for a change and this change outweighs any of the negatives that may be presented.

III Criticisms

⁸ Greenland, above n 3, at 12.

⁹ Interview with Julie Wilson Navigator for Waiwhetu Panel (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

Iwi Justice Panels, and other Maori based policies, have faced many criticisms. A portion of Maori criticize the source and authenticity of these processes, and their “subordinate place in the legal system”.¹⁰ At the other end of the spectrum it is argued that Maori policies create two standards of justice, are racist and “soft” on Maori offenders.

A True Maori policies?

The Iwi Justice Panels are for every New Zealander, not just Maori, although they are based on traditional Maori principles. They are very different to the conventional criminal justice system, which has become Eurocentric and impersonal, preventing those involved to have their say. The traditional Maori legal order was value-based rather than rules based and therefore very flexible. A breach of the legal order would be resolved in an iwi meeting during which the voices of all parties could be heard and consensus decisions would be arrived at with the purpose of restoring the social order. Maori chiefs had discretion in how the wrong-doer was to remedy their wrongful act.¹¹ For Maori the marae as a forum is important because it represents “the body of ancestors and... a world in balance... a place where mana [can] be restored and wairua held”¹²

However, Maori Scholar Moana Jackson argues that the “Maori” aspects of such policies are actually Crown imposed values and processes, and therefore not “true” portrayals of the Maori culture. Also that the modern adoption of these phenomena as customary traditions sourced in Maori is part of the process of colonizing the Maori mind and that culturally sensitive ways of dealing with Maori offenders are all part of the colonizing ethic.¹³

The Iwi Justice Panels are not Crown leading, they are led by the community and local iwi, portraying a partnership model. Hata Wilson says that there is success in this partnership model:¹⁴

¹⁰ M Jackson, “Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?” in judge F W M McElera (ed) *Rethinking Criminal Justice Vol 1: Justice in the Community* (Legal Research Foundation, Auckland, 1995) 30 at 34.

¹¹ Ministry of justice “A Maori View of Sentencing” *Sentencing policy and guidance* (New Zealand, 1997) at 10.2.

¹² Valmaine Toki “Are Domestic Violence Courts working for indigenous peoples?” (2009) 35 CLB 259 at 276.

¹³ M Jackson, “Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?” in judge F W M McElera (ed) *Rethinking Criminal Justice Vol 1: Justice in the Community* (Legal Research Foundation, Auckland, 1995) 30 at 34.

¹⁴ At 6.

Coming into a traditional environment, looking at the waka and having an explanation of what it is, listening to the Maori prayer and philosophy are all part of our success pieces.

For Maori communities, the development of the justice system is part of the important process of reclaiming authority over the systems for dealing with social harm. Re-establishing control of our community-centered justice processes is important, given these same processes were destroyed during the initial phases of colonization.¹⁵ The development of justice programmes based on tikanga theories and practice is very much part of re-empowerment, through reasserting the importance, vitality and significance of indigenous communities taking responsibility for caring for their own.¹⁶

Moana Jackson speculates that the redefinition and incorporation of basic Maori legal and philosophical concepts in the law is part of the continuing story of colonization. Its implementation by government, its acceptance by judicial institutions, and its presentation as an enlightened recognition of Maori rights are merely further blows in that dreadful attack to which colonization subjects the indigenous soul.¹⁷ Jackson also argues for a separate justice system for Maori with jurisdiction and authority over the people.¹⁸ Both indigenous and non-indigenous practitioners and theorists argue, that this type of restorative justice is about empowering communities.¹⁹ Its implementation and regulation by government is necessary to ensure a fair and equal process. This does not reassert the power of the community to the government. Notwithstanding Jackson's argument, the Iwi Justice Panels are in fact, reconstructions of the indigenous models of justice. They are an integration of the traditional Maori processes into the mainstream criminal justice system. We cannot split as a country into different justice systems. In doing this, it is important and necessary to preserve and respect the indigenous beliefs and practices.

Maori Scholar John Rangihau states that policies such as this are similar to "placing a carving above a door while the inside remains the same".²⁰ John Rangihau is failing to recognize that

¹⁵ Valmaine Toki "Are Domestic Violence Courts working for indigenous peoples?" (2009) 35 CLB 259 at 276.

¹⁶ Valmaine Toki "Are Domestic Violence Courts working for indigenous peoples?" (2009) 35 CLB 259 at 270.

¹⁷ Moana Jackson "Justice and Political Power: Reasserting Maori Legal process" in Kayleean M. Hazlehurst (ed) *Legal pluralism and the colonial legacy: Indigenous experiences of justice in Canada, Australia and New Zealand* (Avebury, Aldershot, 1995) 235 at 254.

¹⁸ M Jackson *He Whaipanga Hou: Maori and the Criminal Justice System: A New Perspective* (Ministry of Justice, Wellington, 1988) at 31.

¹⁹ Valmaine Toki "Are Domestic Violence Courts working for indigenous peoples?" (2009) 35 CLB 259 at 281.

²⁰ Moana Jackson "Steven Wallace: An Analysis of the Police Report" (August 2000) Converge <<http://www.converge.org.nz/pma/smoana.htm>>.

these panels have created an opportunity to have a different perspective and another option for justice and sentencing, in a contemporary Maori space. The panel model is around how Maori view offending and restoring balance between relationships and the rights and wrongs along the way. Maori psychiatrist, Mason Durie, argues that:²¹

While Maori-specific provisions have sometimes surfaced from sudden and urgent concerns, more often they have emerged from environments shaped by different political ideologies with contrasting attitudes towards the place of indigenous peoples in modern societies. Moreover, far from being based entirely on principles of justice and righteousness, there have also been elements of pragmatism and political posturing: a balancing of indigenous expectations and opinions against majority demands for a society where being aboriginals seen as a distraction from progress.

The experience of Maori in the past concerning policy development in the criminal justice sector has concerned disempowerment. This is summarised by John Braithwaite who states that:²²

[A]ccreditation for mediators that raises the spectre of a Western accreditation agency telling an Aboriginal elder that a centuries-old restorative practice does not comply with the accreditation standards is a profound worry.

What Braithwaite succinctly describes is a situation many Maori justice theorists and practitioners have experienced in their dealings with government agencies. Given the actions and behaviour during the colonisation process, it is understandable as to why Maori are skeptical of the governments involvement in policies such as the Iwi Justice Panels. The government has failed, since the 19th and 20th centuries, to incorporate tikanga Maori into the system, which has created mistrust in the government down through all Maori generations. The Iwi Justice Panels are an alternative, innovative, process to find a way forward, to restore Maori autonomy in managing Maori affairs. However, it must be recognized that no law or policy can possibly satisfy 100% of the population. There will always be the extremists or those with radical views at one end of the spectrum, who will always be dubious and cynical. Neville Baker, former Waiwhetu Hutt Valley Panel Chair, says the Justice Panel is a good

²¹ M Durie "Nga Tai Matatu: Tides of Maori Endurance Melbourne" *Oxford University Press* (United Kingdom, 2005) at 188.

²² Juan Marcellus Tauri "An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada" (2009) 13 IPJ 9 at 12.

example of iwi working with government agencies to deliver better outcomes and a positive change.²³

What we see is a recidivist situation that has been going on for one hundred years. Iwi need to focus on the things that make life good, invest in education and training – no more prisons. Change will eventually come to pass, from being seen as a people who need to be incarcerated to a healthier Maori New Zealander.

To find a way forward it is necessary to restore Maori autonomy in managing Maori affairs. The Iwi Justice Panels represent just this, an alternative process, reflecting tikanga Maori. Western justice places great value on ideals like equality and consistency that value the individual, but inherently misses opportunities to engage effectively with communities, particularly Maori communities that traditionally have placed greater significance on family and social connections than the individual.²⁴ These new innovative Iwi Justice Panels aim to provide for Maori needs and values, they are an alternative to the traditional criminal justice process that reflect tikanga, despite the cynical remarks.

Neville Baker also considers the Iwi Justice Justice Panel to be a long awaited response to the then Ministry of Social Development's Puaote-ata-tu or daybreak Report, which identified systemic causes of Maori socio-economic deprivation. Nearly 30 years ago that report recommended a new approach to engaging with Maori who had ended up "in the system" and were unmotivated to break the cycle of hardship and poor decision making that had led them there.²⁵ The report noted that; proper engagement would require utilisation of people in the community who understood families and whakapapa and the benefits of talking to people in their own environment.²⁶ It is unbelievable that the government has taken this long to take action on this report. Having had this information in its possession, it is the fault of those in the government and government departments who failed to take any action, who are responsible for such high Maori offending and reoffending rates. The Eurocentric system was failing the Maori community; the Maori community was not failing the system. The system contained numerous policy projects which had been developed without sufficient

²³ Putanga "Kokiri: Restorative Justice Panel" *Community Law Wellington and Hutt Valley Newsletter* (New Zealand, 2014) at 2.

²⁴ Greenland, above n 3, at 17.

²⁵ Greenland, above n3, at 15.

²⁶ Ministerial Advisory Committee *Puaote-ata-tu (day break)* (September 1988).

Maori consultation. Not to mention that most of these policies were imported from North America or Britain, whose values were of significant difference to tikanga Maori. Tikanga Maori was clipped into these policies, in an effort to compensate for the lack of cultural consultation.²⁷ Nonetheless, in spite of all of this, official policies and solutions have and are being developed and put into action. Te Rira Puketapu, Kaumatua on the Hutt Valley Panel, says that the Iwi Justice marae, and the establishment of a justice panel that is outside of the formal and intuitionist and western justice system, fulfils the prophecy of Parihaka leaders Te Whiti and Tohu, who he says foresaw the eventual flourishing of Maori under the combined values of Christ and tikanga Maori.²⁸

B Should there be Standards to Regulate the use of Tikanga on the Panel?

Tikanga has developed over time, within different iwi and hapu. Tikanga provides conceptual and philosophical beliefs specific to Maori residing in a particular rohe, and sometimes to those living outside the tribal area. There are basic similarities across iwi in relation to the tikanga that underpins the dealings with social harm, but each iwi, and even hapu have established various different practices and protocols such as; jurisprudence, responses to specific types of social harm and social harm processes on a marae. Consequently there was concern with tikanga being appropriately applied when dealing with the actions that have torn the social fabric within communities.²⁹ Due to such distinctively different protocols, Maori providers have had to tailor their programs and their tikanga to fit standard design requirements. Juan Tauri, a Maori criminologist, makes a controversial statement:³⁰

By allowing Maori restricted... autonomy, the state is seen to be responding to Maori social, economic and justice concerns while at the same time striving to contain their hegemonic potential through passive revolutionary activity.

Hata Wilson, chairman of the Hutt Valley Iwi Justice Panel, said that the panel took a blended approach at the start, trying to mold cultural elements together with the procedural elements, but they didn't match. The panel had to look for aspects in both processes that were

²⁷ Valmaine Toki "Are Domestic Violence Courts working for indigenous peoples?" (2009) 35 CLB 259 at 276.

²⁸ Greenland, above n 3, at 15.

²⁹ M Jackson, "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?" in judge F W M McElera (ed) *Rethinking Criminal Justice Vol 1: Justice in the Community* (Legal Research Foundation, Auckland, 1995) 30 at 36.

³⁰ J Tauri "Indigenous Justice or Popular Justice?" in P Spoonley, D Pearson and C Macpherson (ed) *Nga Patai – Racism and Ethic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996) 202 at 207.

complimentary or not dissimilar to each other to be able to find a solution that works. It is important to understand the significant differences between the traditional Maori system and the Eurocentric system. The two systems actually do have some similarities in terms of sentencing. Restoring harmony in the Maori community is that of restoring a disrupted balance in a Eurocentric system, as is restitution. The western dispute resolution also addresses the reasons for the offending to resolve the underlying reason for the problem. Maori view offending in a way that is also similar to the restorative justice concepts, the objective being to restore balance between relationships and the rights and wrongs along the way, as well as having the opportunity to talk trauma in the family space. These similarities have been adapted successfully into the Iwi Justice space. Having to mold together two different systems does not delegate more power or control to the government than it does to Maori and the community, it is simply necessary to adhere to regulations or there will be a significant absence of a check and balance system to ensure equal and fair treatment within the system. It is also essential that it is of high quality. Accordingly, it is imperative that there are standards, rules and regulations. It is not so much the rules by which the panel operates that should be of interest, it is who sits on them and what they have to say.³¹

C Racist, Two Standards of Justice, Soft?

The general media in New Zealand has portrayed these Iwi Justice Panels, and other recent policies, in a negative light, implying racism, two standards of justice and being soft on Maori crime. A One News article called them “race-based”, creating means for blogger Whale Oil to post and spark public backlash.³² Comments such as “I think ill buy myself some tanning lotion and save myself a conviction” and “maybe it would simplify things if police just instructed their officers not to stop Maori for anything full stop” and “what happened to one law for all” were made.³³

1 Racist?

Firstly, Iwi Justice Panels are for all New Zealanders, although they were implemented with the intention of reducing Maori crime (Maori account for over 50 per cent of prison inmates

³¹ Greenland, above n 3, at 18.

³² One News “Police told not to ticket unlicensed Maori drivers in South Auckland” *One News* (New Zealand, 16 June 2015).

³³ Cameron Slater “Race-based fines (or not)... Apartheid by any other name” *Whale Oil* (New Zealand, 17 June 2015).

in New Zealand³⁴), they are available to any ethnicity. They are called Iwi Justice Panels as they are in a traditional Maori forum. As Asher Hauwaho says “if it can work for Maori it can work for anyone so therefore we take them all”.³⁵ Half of the offenders who attend these panels are non-Maori members of the community.

2 *Two standards of justice?*

It must be recognised that the Iwi Justice Panels do not provide for two standards of justice. Yes, they are in a traditional Maori forum, but they are available to any offender referred by police. Police have particular guidelines they must follow. Critics may see this as a “special measure just for Maori”³⁶ but it is not. The Justice sector is looking at Maori crime because for too long now the Maori offending rates have been disproportionately high in comparison to pakeha. A high percentage of Maori spend their whole lives going in and out of prison, and this cycle runs down through the generations.³⁷ The Ministry of justice noted a huge level of community support for the panels saying once people enter the court system it becomes harder to address the causes of their offending. Police are also in support of the panels.³⁸

3 *Soft?*

Iwi Justice Panels are not soft on Maori offenders. Rather, they hold people to account. While keeping them out of the court system, they are able to receive the support they need to avoid future criminal behavior.³⁹ Many Maori who attend the panel are actually alienated from their culture, thus when they are in a cultural space they feel confronted and accountable to the community. With the local knowledge and local connections the panel have, there are very few degrees of separation.⁴⁰ Hon Amy Adams MP explains that:⁴¹

³⁴ Justice O’Reilly *A review of Police and iwi/Maori relationships: working together to reduce offending and victimization among Maori Justice* (New Zealand Police, October 2014) at i.

³⁵ At 5.

³⁶ At 10.

³⁷ Interview with Asher Hauwaho Iwi Liaison Officer (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

³⁸ Nicholas Jones “Marae justice panels get strong backing” *NZ Herald* (New Zealand, 30 March 2016).

³⁹ At 22.

⁴⁰ At 5.

⁴¹ At 22.

Sending someone off to jail for their first shoplifting offence might make society feel good, but if that then sets them on a lifetime path of crime, then I don't think society has won out of the deal... Having sat through these panels, they are not a soft option.... The offender certainly has to pay a price.

IV Authority

Iwi Justice Panels are completely policy based. They are not in statute nor do they have any judicial supervision. The law is supposed to be certain and the public should have easy access to it. Such an innovative policy creates flexibility, moving away from the conventional justice system. Police officers in these panels are given the discretion and power to sentence and decide the offender's penalty. The question must be asked; is this outside their scope of authority? Should this policy be legislated to be legitimate?

A Innovation versus Conventional Justice

The rule of law cannot exist without a transparent legal system. The law must be freely and easily accessible to all, have a strong enforcement structure and an independent judiciary to protect citizens against the arbitrary use of power by the state, individuals, or any other organisation. The regulatory system should be predictable to provide certainty to regulated entities, and be consistent with other policies.⁴² Therefore, a perception of authority is central to the effective functioning of the legal system and the courts in New Zealand. However, Iwi Justice Panels have not arisen this way. This policy-implementing justice is different to the procedural idea of justice in traditional western jurisprudence. Its lack of authority can create questions of legitimacy and transparency. The authority of a judge is derived from sovereign power, that is regulatory or legislated, yet Iwi Justice Panels do not have this legal standard.

There are concerns that the due process, as well as equality and proportionality, could all be lost, and that the justice system will have a lesser degree of control over its citizens and communities. However, in an iwi justice model, priority is given to the community, enhancing its responsibility for social control while building its capacity to achieve this and other outcomes relevant to the quality of community life. Whereas, the conventional criminal justice system generally assigns responsibility and punishment for criminal acts rather than

⁴² New Zealand Treasury *The Best Practice Regulation Model: Principles and Assessments* (July 2012) at 9.

looking into reintegration of the offender, why the offender committed the crime, does the offender need help and so forth.

Conventional criminal justice is based on an ethic of individualism and individual culpability at both the conviction and sentencing stage. It has a priority of legal rights and focuses primarily on the symbolic and expressive functions of punishment. It signifies that the government has a limited role in the care of its citizens. Offenders do not participate in the justice process. A general lack of understanding on the part of lawyers and offenders has resulted in many eligible offenders not participating. The contemporary judicial process is grounded in a set of procedural practices that attempt to protect the rights of the accused. Whereas, the panels are an innovative development and shift in the legal process, involving restorative principles, challenging the traditional criminal justice practices and concepts that draw boundaries between the role of the state and of communities in the justice process. Chris Bishop MP, when asked whether he thinks the Iwi Justice Panels are better than the court system, said there is real potential:⁴³

The aim of the panels is to steer offenders away from the traditional criminal justice system; which has traditionally failed these sort of offenders. Iwi Justice Panels hold offenders accountable and it allows the use of tools and sentencing that is far more likely to mean they don't reoffend.

Since the initiation of the Iwi Justice Panel in Hutt Valley, there have been some significant changes to justice in the area. Trends are positive with volumes of recorded crime coming down, reduced numbers of cases progressing through the system and efficient management of cases through the criminal court.⁴⁴ The question is one of discretion and innovation versus transparency, certainty, statutory authority and conventional justice.

The innovation and discretion within the Iwi Justice Panels appears to be working, it is effective and is unclogging the court system. The escalating costs could only be prevented by agencies working together in partnership with communities to examine new forms of justice and reconstruct their resources for crime-prevention and social control. A new innovative

⁴³ Interview with Chris Bishop MP (Sarah Croxford, Iwi Justice Panels, 3 May 2016).

⁴⁴ Ministry of Justice Valley *Hutt Valley Justice Sector Innovation Project* (Ministry of Justice, 2016) at 5.

approach was fundamental if offending rates were to drop and the court system was to unclog. A senior officer in a review of police and Maori/iwi relationships said:⁴⁵

I've been around, and locked up the grandfathers then the sons and now the grandsons. Enforcement always has its place; some will always have to go to jail. But to make real gains we have to look at how to change lives.

A space needs to be developed where the police can hear the voices of offenders with respect, as having equal political standing to challenge law enforcement in the policymaking process. As Asher explains, it's great that police have the chance to be seen in uniform in a different environment, where offenders and their supporters feel respected and listened to. It is trying to break the cycle of negativity and hatred towards police officers. This attitude tends to be sent down through generations, particularly within the Maori community due to such high offending rates, as a child's grandfather and father have been arrested by police officers. It is important that these relationships between the police and the community are restored to enable a partnership where everyone can work together towards a safer and more prosperous community.

As more and more programmes based around these restorative justice principles begin to develop and community demand for these processes grow, the government undertakes a policy-focused process of legitimation. To ensure consistency, monthly reports are prepared by the police to monitor panel referrals and to identify opportunities for system enhancements and adjustments, Mrs Wilson Tuala-Fata says.⁴⁶ The key is that people within the community are doing it themselves, they are getting organised themselves and not getting forced by the government to organise them. This can be seen by comparing a court attendance; where offenders have a scheduled time, do not have a choice or a say, and half of the time do not bother showing up due to lack of respect of the process, with an Iwi Justice Panel session where offenders are given the choice of accepting the referral, are thankful to be avoiding the court process and turn up holding themselves account for their actions. This partnership model is different; it is not Crown leading. It is community leading and consequently strengthens the community.

⁴⁵ Justice O'Reilly *A review of Police and iwi/Maori relationships: working together to reduce offending and victimization among Maori Justice* (New Zealand Police, October 2014) at 30.

⁴⁶ Greenland, above n 3, at 17.

1 Statute or policy?

It is necessary to look into where the authority for these panels comes from, as essentially these panels are given similar power to that of a court room, in being able to determine the penalty or legal sanction an offender must face. The question is; should the authority for these panels be legislated?

(a) Reasons why the Iwi Justice Panel should be in statute

The rule of law is the most fundamental constitutional principle in New Zealand law and incorporates a number of subsidiary principles. The full scope of the rule of law is the subject of debate but the core principles are clear. These are; the law must be clear, accessible and apply to everybody. The law cannot be certain if it is not in statute, nor is it accessible or as predictable as it could be. Legislation encourages greater consistency, democracy, and due process. It sets out standards, procedures and principles that must be followed, where as policies are not legally binding. But actually, standards, procedures and principles can sufficiently be followed and operate without being legislated.

The rule of law has been recognized to be of utmost importance, as Lord Denning MR emphasized in 1968, “the rule of law must prevail”.⁴⁷ He also stated that it would be improper for central government to lay down policy directives in the absence of legislative authority, and that the Commissioner of the metropolitan Police was “answerable to the law and to the law alone”.⁴⁸

Members of Parliament are democratically elected to make laws and they should therefore have the opportunities to put forward the views of his or her constituents. Its absence in statute is undemocratic. It lacks publicity and is therefore generally unknown to the wider public. However, avoiding publicity and coverage to the general wider public actually seems to work in favour of these panels. As referred to above, those who lack sufficient knowledge

⁴⁷ R v Metropolitan Police Commissioner, Ex Parte Blackburn (1968) 1 All E R 763, 769 at 138.

⁴⁸ R v Metropolitan Police Commissioner, Ex Parte Blackburn (1968) 1 All E R 763, 769 149.

regarding this policy, broadcast the policy to be racist, or soft, intentionally cause public backlash and create a negative attitude towards these panels.⁴⁹

The Legislation Design and Advisory Committee Guidelines are consistent with the traditional proposition that the greater the infringement on human rights and freedoms, the greater the democratic character of the decision infringing the rights should be.⁵⁰ Rule 10.1.3 states that provisions which affect fundamental human rights and freedoms should always be included in primary legislation.⁵¹ The Iwi Justice Panel have the power to determine the legal sanction the offender must face, but these offences are only pre-charge and low level.

Is it not proper procedural justice if it is not contained in statute? The power and authority of the Iwi Justice Panels may certainly seem more legitimate if enshrined in our statute law and its absence may undermine authority. Even though there are positives to shifting away from the traditional justice system, the traditional tools of statutory construction might prove to be necessary to prevent generally consequences of policies, such as allowing for a quick and easily abolition, for example if the funding stream is cut off.

Passing legislation has a long and thorough scrutiny process. It is a formal institutional process and would provide for adequate justification of the authority and powers maintained by the panels. There is concern that; the safeguards and protections legislation brings may erode, there will be a decrease in the punitiveness of the criminal process and that alternatives to court practice may prevent equal treatment of all offenders.⁵² The application of the Iwi Justice Panel policy also has a lot of discretion, that in particular concerns police discretion. It is imperative that this discretion is adequately managed and overlooked. However, to achieve this, legislation may not be crucial. There are many rules and checks on the system that work to prevent any misuse of power or authority. This will also be discussed further below regarding policing powers. Legislation certainly provides for concepts such as the rule of law and democracy, but is it essential for this policy to be legislated? There are also advantages to remaining purely policy based, absent from statute.

⁴⁹ Interview with Hata Wilson Manager for Whanau Ora and Chair of the Waiwhetu Panel (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

⁵⁰ Legislation Design and Advisory Committee Guidelines 2012.

⁵¹ Rule 10.1.3 Legislation Design and Advisory Committee Guidelines 2012.

⁵² Greenland, above n 3, at 15.

(b) Reasons why the Iwi Justice Panels should not be in statute

The significant advantage of non-legislated policies, is the allowance for rapid change and flexibility. It permits quick responses to new developments, extensions and/or changes that might be required. Since the Iwi Justice Panels are such a new policy, it is important that such responses are possible. Our society is always changing and if something is not working, it must be quickly and efficiently changed to make it work. The statute process is long and fails to respond to issues requiring immediate assistance. Parliament does have the power to go under urgency but this is only for matters of utmost importance, such as national security.

Non-legislated policies are flexible, which great for innovation. This flexibility allows for the adaptation to social changes over time. Committing to a policy in statute loses this flexibility to be able to respond to unforeseen contingencies. There is the flexibility to carry out justice in all situations, as well as allowing for the examination of each individual circumstance, as each offender is different.

Legislation would bring consistency, but there are other methods that can provide for this. Police guidelines are already existent, as well as panel being required to report on each case. However, I suggest further guidelines, rules and procedures are implemented. These do not, and in my opinion should not, be legislated, but they would deliver a higher level of consistency, clarity and certainty, as well as accessibility if they are made available to the general public. Passing legislation through parliament is a long and limited process, as is changing it. The bill has to go through many readings and stages in the house which can take many months, and this is not appropriate when the law may need to change promptly. It can also be dominated by a political agenda of government. The Iwi Justice Panels remaining absent in statute therefore saves parliament time. There is also the issue of members of parliament not wanting to introduce controversial legislation. Members of parliament have a lot of pressure on them to keep their voters happy. If the general public does not understand a policy such as the Iwi Justice Panels, and argue criticisms such as those stated above (that it is racist, soft, not true Maori) members of parliament may lose their supporters as well as sparking further backlash within members of the public. It is no longer tenable for the functions of a legal system to be all knotted into a common core of fundamental rights of a political, democratic or constitutional character. Our justice system is changing from the conventional traditional process, allowing for innovation and modernity.

The superior courts of New Zealand have always exercised full jurisdiction in both common law and equity. Despite this there were no legislative equivalents of Britain's Supreme Court of Judicature Act⁵³ until 1881. In the 1840/50s a set of Supreme Court rules had been devised by Chief Justice Martine and Justice Henry Chapman, designed for simplicity and accessibility of procedure, without the functions and technical forms of the English courts and with the aim of fusing law and equity procedures.⁵⁴ Then in 1881 a subcommittee of the Law Procedure Commission drafted a new set of procedural rules. The subcommittee noted that one of the aims of the new code of procedure was to ensure that "the laws of the colony shall be administered as a whole, irrespective of any division into law and equity".⁵⁵ Section 16 Judicature Act 1908 states that the court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.⁵⁶ The power and authority of the New Zealand Supreme Court in the 1840/50s is similar to that of the Iwi Justice Panels, where there are simple guidelines to follow, but an absence of statutory authority. As policies such as the Iwi Justice Panels develop and grow, there may need to be further consideration as to whether the laws and policies should be administered as a whole. But for now flexibility is desired and essential if offending rates are truly to successfully decline. As author James Greenland states, "it is not so much the rules by which the panel operate, as who sits on them and what they have to say".⁵⁷

It is a matter of discretion, innovation, and flexibility versus certainty, transparency, and conventional justice. In terms of the Iwi Justice Panels, innovation and flexibility that derives from non-legislated policies outweighs the benefits and advantages of statute law. The panels are still new and fresh to our system. If they successfully continue and develop, further down line, maybe in ten or twenty years, legislation may be more suited than it is currently, to the panels.

B Police Discretion

⁵³ Supreme Court of Judicature Act 1873.

⁵⁴ Valmaine Toki "Are Domestic Violence Courts working for indigenous peoples?" (2009) 35 CLB 259 at 201.

⁵⁵ At 202.

⁵⁶ At 204.

⁵⁷ Greenland, above n 3, at 19.

There are strict guidelines the police are to follow, but how can the public be sure that these are actually being followed without any bias, or subjective opinion. Asher Hauwaho explains that every officer is held accountable under the spot light. When an officer arrests or charges an offender they are required to file their name and their police identification, as well as a second officers name and identification who has approved it.⁵⁸

During the panel the police officer determines an appropriate sentence for the offender. Part of the relationship building between the police and iwi was to look at what penalties may be imposed by a court, what is appropriate and proportionate, and how the Iwi Justice Panels should impose penalties. Asher Hauwaho explains that the police officer issues a sanction that is appropriate for the crime, but may not necessarily fit the crime. For example, if the offender committed the offence due to a drug addiction, its better they receive help to recover from the drug addiction, than be charged with a hefty fine or prison sentence.⁵⁹

Nevertheless, shouldn't the courts be the only authority making final decisions on sentencing? Asher Hauwaho states that from a police perspective, more complex problems can be dealt with during the panel.⁶⁰ This is expanding policing beyond the standard practices. The job of a police officer is to enforce the law, not to determine which laws apply to which person. Should police have such discretionary power? In the Iwi Justice Panel, police appear to be stepping outside of their role. However, the panel operate in a pre-charge low level offence range and are mindful around guidelines, and prefer to impose agreements after input from the offenders. The panel serves to compliment the court system, not to overtake it. The panel have some experience and confidence in this space, as well as some being certified in the restorative justice space. Yet, this is still slightly outside of the scope of police power. Is it appropriate for the police to have such power, are they considering all of the circumstances? In 2015 Police Commissioner Mike Bush made a public statement admitting that there is unconscious bias against Maori in the police force.⁶¹ More than 50% of prosecutions are Maori, and he says that "this data shows that there is a disparity in the way we apply some of our discretion". It is an international issue, such as in America where there is unconscious bias against African Americans. Since this unconscious bias has been

⁵⁸ At 5.

⁵⁹ At 5.

⁶⁰ At 5.

⁶¹ Alison Harley "Commissioner: Police addressing bias in Maori relations" (Podcast, 28 November 2015) Newshub <www.newshub.co.nz>.

recognised, the police force has been working with the Executive in an effort to filter out this bias and to change the dynamic to get closer to that equality that should already be existent. This has brought in programmes such as Policing Excellence, which the Iwi Justice Panels come under. This recognition by the police force and steps being taken actually display a high sense of competency and accountability regarding such authority and discretion. Police have both been willing and capable of engaging respectfully with Maori since this recognition. There has been a significant change in attitude and engagement by the police and government.

However, there needs to be a clear and transparent source of authority providing this discretionary power to the police. Iwi Liaison Police officer Asher Hauwaho explains that there is good network coverage, and to ensure consistency, monthly reports are prepared by the police to monitor the panel referrals and to identify opportunities for system enhancements and adjustments.⁶² The panels are able to follow up with the offender in the future to see whether their problem has been resolved. There are the requisite checks and balances on this system. Philip Pettit argues that the police are given enormous powers and are exposed to huge temptations to abuse those powers, and their use of the powers is subject only to very imperfect controls.⁶³ The powers in question include the power to charge or not to charge. Criminal procedure has for a long time been obsessed with solving the problem of police discretion. In the Criminal Justice area, the main way in which discretion can be confined is by drafting techniques in connection with the legislation of substantive criminal law. Although, as discussed above, legislation may not be necessary at this moment. Discretion can be confined with other adequate checks and balances, such as the guidelines and reporting already in place. It may be beneficial if further rules and regulations are put in place.

V *Personal Experience*

During my research for this paper, I was invited to sit on the Panel during a session. I was really impressed by not only the process the panel went through, but the attitude of the offender. The offender had turned up the day prior to the hearing to check how long it would

⁶² At 5.

⁶³ M Durie "Nga Tai Matatu: Tides of Maori Endurance Melbourne" *Oxford University Press* (United Kingdom, 2005) at 188.

take him to travel there the next morning and that he had the right place. The panel went through problems such as anger issues the offender may be suffering from, as well as what the offender would do in the future if the situation presents itself again. The Iwi Liaison Officer of the Hutt Valley Police ordered the offender attend weekly meetings with a church minister (providing for interconnectedness within the community) as well as a good behavior watch for three months.

VI Should this Policy Remain?

Since the Iwi Justice Panels have been established, relationships between iwi and the Crown have moved from transitional to proactive. The objectives of the panel, being the unclogging of the court system, reducing the costs to the country, reducing the Maori footprint in the court system and getting a handle on recidivism, are being achieved. The Iwi Justice Panel in Lower Hutt has dealt with over 180 cases since its launch in 2014. The Ministry of Justice has said that:⁶⁴

Since the initiation of the Iwi Justice Panel in Hutt Valley, there have been some significant changes to justice in the Hutt Valley. We have built strong relationships at the management level and these are enabling us to work smarter by working together to deliver joined up justice services for the Hutt Valley.

Trends are generally positive, with volumes of recorded crime coming down, a reduced numbers of cases progressing through the system and an efficient management of cases through the criminal court. There has been a 6.8% drop in the number of adults receiving sentences from 1 January to 31 December 2015.⁶⁵ Greenland, author of the New Zealand Law Magazine, has expressed that progress has also been made through the Policing Excellence program. “The police have made greater use of pre-charge warnings and alternative mechanisms (such as the community and Iwi Justice Panels) to ensure minor offending is more appropriately dealt with”.⁶⁶

⁶⁴ Ministry of Justice *Valley Hutt Valley Justice Sector Innovation Project* (Ministry of Justice, 2016) at 6.

⁶⁵ Ministry of Justice *Valley Hutt Valley Justice Sector Innovation Project* (Ministry of Justice, 2016) at 8.

⁶⁶ James Greenland “Justice Panels Innovative way to achieve justice” *Law talk 881* (New Zealand, 12 February 2016) at 20.

In 2012 the pilot Community Justice Panel (CJP) in Christchurch was introduced. It is very similar to the Iwi Justice Panels, the only difference being that the CJP does not include tikanga nor is it on a marae. However, it does revolve around the same objectives and restorative justice principles. The New Zealand Police evaluation of the CJP concluded that the alternative resolution pathway has potential to reduce prosecutions of low level offences/offenders “and therefore reduce the burden on courts and the justice system for less serious offences”.⁶⁷ The report also found that the panel had achieved reasonable offender compliance, demonstrated strong community involvement, reduced re-offending rates of those who went through the process and perhaps most importantly provided the opportunity to address offenders’ underlying behaviour and to support victims restoration.⁶⁸

VII Conclusion

Iwi Justice Panels are an innovative way to hold offenders to account in a manner that reflects the culture of New Zealand society. It addresses the causes of low level offending to work towards breaking the cycle of repeat offending and unclogging the court system. Significantly it offers a partnership between iwi and the Crown to assist in reducing the Maori crime rate. It has been a long wait since the ‘daybreak’ report for such innovative programmes, such as the launch of Policing Excellence. It provides for flexibility in the criminal justice sector, as well as the chance for an integration of tikanga and methods Maori dealt with offending pre-colonisation. Police Commissioner Mike Bush recognising unconscious bias within the system is a huge step towards equality and change. Reports and trends in crime are all positive and Maori are beginning to feel respect towards the system.

⁶⁷ Greenland, above n 3, at 16.

⁶⁸ Greenland, above n 3, at 17.

BIBLIOGRAPHY*PRIMARY SOURCES**A New Zealand*

Judicature Act 1908.

Legislation Design and Advisory Committee Guidelines 2012.

Policing Act 2008.

Supreme Court Act 2003.

B United Kingdom

Supreme Court of Judicature Act 1873.

R v Metropolitan Police Commissioner, Ex Parte Blackburn (1968) 1 All E R 763, 769.

*SECONDARY SOURCES**A New Zealand*

Alison Harley “Commissioner: Police addressing bias in Maori relations” (Podcast, 28 November 2015) Newshub <www.newshub.co.nz>

Cameron Slater “Race-based fines (or not)... Apartheid by any other name” *Whale Oil* (New Zealand, 17 June 2015).

Interview with Asher Hauwaho Iwi Liaison Officer (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

Interview with Chris Bishop MP (Sarah Croxford, Iwi Justice Panels, 3 May 2016).

Interview with Hata Wilson Manager for Whanau Ora and Chair of the Waiwhetu Panel (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

Interview with Julie Wilson Navigator for Waiwhetu Panel (Sarah Croxford, Iwi Justice Panels, 15 April 2016).

J Tauri “Indigenous Justice or Popular Justice?” in P Spoonley, D Pearson and C Macpherson (ed) *Nga Patai – Racism and Ethic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996) 202 at 207.

James Greenland “Justice Panels Innovative way to achieve justice” *Law talk 881* (New Zealand, 12 February 2016) at 14.

Juan Marcellus Tauri “An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada” (2009) 13 IPJ 9.

Justice O’Reilly *A review of Police and iwi/Maori relationships: working together to reduce offending and victimization among Maori Justice* (New Zealand Police, October 2014) at 30.

M Jackson, “Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?” in judge F W M McElera (ed) *Rethinking Criminal Justice Vol 1: Justice in the Community* (Legal Research Foundation, Auckland, 1995) 30.

M Jackson *He Whaipanga Hou: Maori and the Criminal Justice System: A New Perspective* (Ministry of Justice, Wellington, 1988).

M Jackson “Justice and Political Power: Reasserting Maori Legal process” in Kayleen M.Hazlehurst (ed) *Legal pluralism and the colonial legacy: Indigenous experiences of justice in Canada, Australia and New Zealand* (Avebury, Aldershot, 1995) 235.

M Jackson “Steven Wallace: An Analysis of the Police Report” (August 2000) Converge <<http://www.converge.org.nz/pma/smoana.htm>>.

Ministerial Advisory Committee *Puao-te-ata-tu (day break)* (September 1988).

Ministry of justice “A Maori View of Sentencing” *Sentencing policy and guidance* (New Zealand, 1997).

Minister of justice to the justice and electoral committee *Ministry of Justice Annual Review 2013/14 Responses to the standard questions* (20 February 2015) at 3.

Ministry of Justice Valley *Hutt Valley Justice Sector Innovation Project* (Ministry of Justice, 2016).

New Zealand Treasury *The Best Practice Regulation Model: Principles and Assessments* (July 2012).

Nicholas Jones “Marae justice panels get strong backing” *NZ Herald* (New Zealand, 30 March 2016).

One News “Police told not to ticket unlicensed Maori drivers in South Auckland” *One News* (New Zealand, 16 June 2015).

Putanga “Kokiri: Restorative Justice Panel” *Community Law Wellington and Hutt Valley Newsletter* (New Zealand, 2014).

Rethinking Criminal Justice Vol 1: Justice in the Community (Legal Research Foundation, Auckland, 1995) 30.

Valmaine Toki “Are Domestic Violence Courts working for indigenous peoples?” (2009) 35 CLB 259.

B United Kingdom

M Durie “Nga Tai Matatu: Tides of Maori Endurance Melbourne” *Oxford University Press* (United Kingdom, 2005).