

Māori Language Act — What Does it Mean?

Ihipera Peters

Associate — Wackrow Williams and
Davies Limited Contents

Te Kani Williams

Partner — Wackrow Williams &
Davies Limited

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This paper provides an overview of the Te Ture mō Te Reo Māori 2016 (Māori Language Act 2016) and in particular its application to the practice of law. This brief paper cannot possibly cover the intricacies of when it is appropriate to use Te Reo Māori in all legal proceedings because it is entirely dependent on the context and circumstances of each case.

This paper also does not cover the lengthy history of when Te Reo Māori has been used (or refused) in courts however we do highlight a few key events by way of background to elucidate examples of when Te Reo Māori can be successfully used in legal proceedings. Essentially it boils down to an assessment of the appropriateness which will depend on the circumstances of where the proceeding takes place, who is involved and the competency of the speaker, the audience and/or interpreter.

We note for the reader that this paper is based on our perspective as we have used, or observed others use, Te Reo Māori in the Courts and Tribunals and although tikanga (customary practices) also go hand in hand with the way in which Te Reo Māori is used, the details of cultural etiquette and tikanga will be addressed by other panel members. It is therefore based on what we have observed to be the practical application of Te Reo.

1. A Brief History

- 1.1 In Aoteroa, Māori was the predominant language spoken in the early 1800s. Some suggest that there were and are dialectal differences in Te Reo Māori. Our recently appointed Māori Court of Appeal Justice Joe Williams was one who maintained that view. Others, are of the view that the differences are not dialectal, but are in fact the distinctive Te Reo Māori of those peoples, with its own whakapapa (geneology), its own beginnings and development.
- 1.2 Whatever the position, those who came to settle in Aoteroa, quickly saw the benefit of being able to converse in Te Reo Māori particularly when opportunities for trade and land acquisition arose.
- 1.3 However, with the increase in arrival of European settlers, use of Te Reo Māori became more and more infrequent. The development and design of policies and legislation with the express purpose of assimilating Māori into being British subjects drove Te Reo Māori into near distinction. This policy is accurately reflected in the following article:²⁶

“Most Pākehā did not understand that the Māori language was an essential expression and envelope of Māori culture, important for Māori in maintaining their pride and identity as a people. Speaking Māori was now

²⁶ New Zealand History “History of the Māori language” <http://nzhistory.net.nz/culture/maori-language-week/history-of-the-maori-language>.

officially discouraged, and many Māori themselves questioned its relevance in a Pākehā-dominated world where the most important goal seemed to be to get ahead as an individual.

The Māori language was suppressed in schools, either formally or informally, to ensure that Māori youngsters assimilated with the wider community. Some older Māori still recall being punished for speaking their language”.

- 1.4 However in the 1970’s, emphasis by Māori of the importance of Te Reo Māori and of the ability Māori to express themselves in their own language began to have some prominence.
- 1.5 In *Mihaka v Police*²⁷ creditably the Court of Appeal agreed that use of Te Reo Māori was a matter of national importance but held that as the common law stood, Mr Mihaka was required to speak English. The Court also indicated that it was a matter for the legislature to resolve and not the Courts. This was the genesis for change.²⁸

2. Background to the New Māori Language Act

- 2.1 From 2006 to 2013 there was a 4.8% decrease in the number of people who could hold an everyday conversation in Māori, according to census data.²⁹
- 2.2 As a result of the declining numbers of Te Reo Māori speakers, the Māori Party introduced the Māori Language Bill in around 2015 to promote the use of Te Reo Māori and to provide leadership and strategy for the language.
- 2.3 The Māori Language Act 2016 (“the Act”) is a bilingual Act which came into force on 30 March 2017.³⁰
- 2.4 It replaced its predecessor the Māori Language Act 1987 which was the first legislative recognition of Te Reo Māori as an official language of Aotearoa and established a right to use Te Reo Māori in Court proceedings. The preamble to the 1987 Act stated that it was:

“An Act to declare the Māori language to be an official language of New Zealand, to confer the right to speak Māori in certain legal proceedings, and to establish Te Taura Whiri i te Reo Māori and define its functions and powers”.

- 2.5 The 1987 Act then lists in Schedules 1 and 2, those Courts and Tribunals in which Māori may be spoken including the Supreme Court. In our firms experience, most of those Courts in recent

²⁷ *Mihaka v Police* [1980] 1 NZLR 453.

²⁸ Outlined later from paragraph 3.4.

²⁹ http://archive.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-progress-indicators/home/social/speakers-of-te-reo-māori.aspx.

³⁰ Te Ture mō Te Reo Māori 2016 / Māori Language Act 2016 (“the Act”), s 2.

times have been more pro-active in utilising Te Reo Māori in their processes. However, with respect, more can and should be done.

- 2.6 Uniquely, the 2016 legislation expressly provides that the Māori version of the Act takes precedence over the English version in the event of any conflict.³¹

3. History of Use of Te Reo Māori in the Courts

- 3.1 While it is now commonplace to hear Te Reo Māori being used in the Māori Land Court and Waitangi Tribunal proceedings, it is also becoming more common in other court jurisdictions.
- 3.2 For example the Ministry of Justice has made efforts in recent years to encourage the daily use of te reo in High Court and District Court proceedings including announcing the Judge in Te Reo Māori, “Kia rite mō te Kaiwhakawā o te Kuini, e tū koa” (“Silence, all stand for His/Her Honour the Queen’s Judge”).
- 3.3 While this is a positive move forward in revitalising our indigenous language in the legal context, the use of Te Reo Māori in New Zealand courts has not always been welcome. The *Mihaka* case is but one example.
- 3.4 Importantly, in our view, we highlight some of the key milestones illustrating the development of the use of Te Reo Māori in Courts or Tribunals:
- 3.4.1 In April 1986 the Waitangi Tribunal released its *Report on the Te Reo Māori Claim*. This was the first official legal empowerment of Te Reo Māori in the courts and had a significant impact on the political and legal landscape at the time. The Te Reo Māori Tribunal found that although the judgment in *Mihaka* was legally correct at the time, it was inconsistent with Aotearoa/New Zealand’s bi-cultural foundation³² and inconsistent with the principles of the Treaty.³³
- 3.4.2 The Tribunal went on to state that Te Reo Māori is a taonga (treasure) that the Crown (government) was obliged to protect under the Treaty of Waitangi. More particularly, the Tribunal found that the guarantee in the Treaty requires affirmative action to

31 See s 12(2) of the Act.

32 *Report of the Waitangi Tribunal on The Te Reo Māori Claim (Wai 11)*, Waitangi Tribunal, Wellington, April 1986 at p45. Available from https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68482156/Report%20on%20the%20Te%20Reo%20Māori%20Claim%20W.pdf.

33 Ibid at p23.

protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place.³⁴

3.4.3 In its report the Tribunal made five recommendations to the government to remedy its breaches of the Treaty in relation to Te Reo Māori,³⁵ including that Te Reo Māori be declared an official language of New Zealand and a statutory body be established to “supervise and foster the use of the Māori language”.³⁶

3.4.4 The government of the day acted on those recommendations by enacting the Māori Language Act 1987 on the basis which is set out earlier.

3.4.5 The High Court in *Green v Te Rōpu Whakamana i te Tiriti o Waitangi (Waitangi Tribunal)* [2014] NZHC 723 (which was decided under the previous 1987 Act) was a Judicial Review case. The High Court confirmed the current legal position that any persons listed in the Act may speak Māori in any legal proceedings, whether or not they are able to understand or communicate in English.³⁷

4. What does the 2016 Act say?

Purpose of the Act

4.1 Section 3(2) outlines the purpose of the Act which is to –

- a) affirm the status of the Māori language as:
 - i. the indigenous language of New Zealand;
 - ii. a taonga of iwi and Māori;
 - iii. a language valued by the nation;
 - iv. an official language of New Zealand; and

b) to provide means to support and revitalise the Māori language.

4.2 The Act therefore continues to recognise Te Reo Māori as an official language of Aotearoa.

4.3 It affirms Te Reo Māori as a taonga (treasure) that must be protected and promoted by the Crown, as guaranteed under Article 2 of Te Tiriti o Waitangi.

4.4 It highlights iwi and Māori as official kaitiaki (guardians) of Te Reo Māori.³⁸

³⁴ Ibid at p1, 21-23.

³⁵ Ibid at p51.

³⁶ Ibid at pp47-48.

³⁷ *Green v Te Rōpu Whakamana i te Tiriti o Waitangi (Waitangi Tribunal)* [2014] NZHC 723 at [11]-[12].

³⁸ Section 8(2)(c) of the Act.

- 4.5 It sets up a new independent Māori language entity called Te Mātāwai to help the government develop Māori language strategies to increase fluency and the number of Te Reo speakers.³⁹ For the purposes of this paper, we do not cover the structure or functions of Te Mātāwai or the way it is intended to assist in achieving the purpose of the Act as the focus here is on the use of Te Reo Māori in legal proceedings.

5. How Does the 2016 Act Apply to the Practice of Law?

Right to Speak Māori

- 5.1 Section 7(1) of the 2016 Act affirms the right for any person to speak Māori in legal proceedings, regardless of whether they can speak English or any other language. It also sets practical limits on and rules around the use of Māori in proceedings.
- 5.2 For instance section 7(2) states that the right to speak Māori does not entitle an individual to insist on being answered in Māori.
- 5.3 Section 7(3) places responsibility on the court's presiding officer to ensure a competent interpreter is available.
- 5.4 There are various reasons why clients, legal counsel or court members may want to speak Māori during legal proceedings. For example, a witness may be better able to express themselves in Māori rather than in English, the subject of discussion may concern Māori concepts which are better addressed in Te Reo Māori or the place in which the hearing is set requires Te Reo Māori to be spoken as a matter of tikanga (custom).
- 5.5 While the right to speak Māori in courts is clear in law, it is important to realise that this right is not only reserved for those who are fluent or native speakers. A brief introduction of yourself in Te Reo Māori or the use of (and correct pronunciation of) Māori words in submissions is very important and can mean the world to Māori clients.

6. Relevant Court Procedural Rules Governing the Use of Te Reo Māori

- 6.1 You may have Māori clients who wish to give evidence in Māori or you may wish to present submissions yourself in Māori as legal counsel.

39 See Part 3 (sections 17-36) of the Act.

- 6.2 A party wishing to speak Māori should notify the presiding officer of the court in advance to enable them to make appropriate arrangements for a competent interpreter.
- 6.3 Different Courts and Tribunals have their own procedural rules that must be complied with by those wishing to speak Māori.

District Courts

- 6.4 In the District Courts, District Court rule 1.15(2) states that any person wishing to speak Māori in a proceeding or at the hearing of an interlocutory application (or if the person is a witness, the party intending to call that witness) must “file and serve on every other party to the proceeding a notice of his or her intention to speak Māori”.
- 6.5 That notice must be in a prescribed form (Form 4 of Schedule 2 of the District Court Rules) and pursuant to DCR 1.15(3) must state that the person intends to speak Māori at either:
- a) all conferences and hearings; or
 - b) all conferences and hearings held after a specified conference or hearing; or
 - c) a specified conference or hearing.
- 6.6 DCR 1.15(5) states the notice must be filed “not less than 10 working days” before the first conference or hearing at which the person intends to speak Māori.
- 6.7 However, increasingly, Counsel (who speak Māori) may first make an appearance, by greeting the Judicial Officer and Co-Counsel first in Māori before making his or her formal appearance in English. We see no real need for formal notices to be filed for that to occur, or for that practice, if engaged in, to be changed. In our view it should be encouraged.

High Court

- 6.8 The High Court Rules are similar. Rule 1.11(3) differs slightly in that notice must be given not less than 10 working days before any case management conference and/or hearing at which the person intends to speak Māori.
- 6.9 There is a different prescribed form for the Notice that must be given in the High Court, Form G12 (found in Schedule 1 of the High Court Rules).
- 6.10 Again, in our experience, more and more counsel are electing to introduce themselves first in Māori.

- 6.11 Judicial Officers should not, in our view feel uncomfortable with the process. One hopes they will encourage it.

Right to Speak Māori Not Defeated if there is a Failure to Inform Court

- 6.12 Both the Court rules (DCR 1.17 and HCR 1.13) state that the failure to give notice does not prevent a person speaking Māori in a proceeding. However, the court may adjourn a conference or hearing to arrange an interpreter if an individual demands to speak Māori without having provided notice and/or the court may treat the failure to comply as a relevant consideration in an award of costs.

Translation of Documents into Te Reo Māori

- 6.13 A person who is served with a court document in English may be entitled to receive a translation of that document into Te Reo Māori provided certain conditions are met (see DCR 1.16 and HCR 1.12).

7. Māori Legal Jurisdictions

Māori Land Court

- 7.1 The conduct of a hearing of the Māori Land Court is determined by the judge hearing the case and he or she may apply any rules of marae kawa (protocols) as considered appropriate.
- 7.2 In practice that means that nearly all Court hearings commence and conclude with a karakia (prayer) and mihi whakatau (greetings).
- 7.3 Many cases heard in the Māori Land Court involve complex issues of law and fact concerning Māori land or General Land owned by Māori. While Te Reo Māori is often used in the Court, on some occasions cases may also involve tikanga or customary concepts.

Waitangi Tribunal

- 7.4 The Waitangi Tribunal is similar to the Māori Land Court in that all Tribunal hearings commence with a mihi whakatau (greetings) or pōhiri (formal welcome ceremony) and begins and ends with a karakia (prayer).
- 7.5 Unlike the Māori Land Court, the Waitangi Tribunal is a commission of inquiry established under the Treaty of Waitangi Act 1975 and therefore it has a wider discretion in the way it runs its processes.

- 7.6 Most, but not all, Tribunal hearings are held on Marae in the relevant region of the Inquiry concerned. As these hearings are not typically held in a Courthouse, it means that the tikanga (custom) and kawa (etiquette) is often determined by the hosting Marae and incorporated into the way the Tribunal conducts its inquiry. In those instances, it is important to find out beforehand what the appropriate protocols are for the local Marae.
- 7.7 It is common to hear Te Reo Māori spoken in Waitangi Tribunal hearings by the Tribunal panel members, legal counsel, witnesses or the hau kāinga (local people of the Marae). Indeed, clause 6(2) of Schedule 2 of the Treaty of Waitangi Act 1975 provides that witnesses may give their evidence in Te Reo Māori.
- 7.8 A Te Reo Māori interpreter often travels with the Tribunal members and staff to provide simultaneous translations from Māori into English, however counsel are expected to indicate to the Tribunal if it is anticipated that Te Reo Māori speakers will address the Tribunal so that appropriate arrangements can be made at the venue.
- 7.9 An interesting case where the right to speak Māori was challenged in the Waitangi Tribunal was during a hearing in the Te Rohe Pōtae (The King Country) District Inquiry in 2012 where the late Judge Ambler refused to allow one of the legal counsel to cross-examine two non-Māori expert witnesses in Te Reo Māori.
- 7.10 An application for judicial review was filed with the High Court and resulted in the High Court decision mentioned above, *Green v Te Rōpu Whakamana i te Tiriti o Waitangi*.⁴⁰ The application was partially successful because, as I have said previously, the High Court confirmed that the current legal position (albeit determined under the 1987 Act at that time) is that any persons listed in the Act may speak Māori in any legal proceedings, whether or not they are able to understand or communicate in English. Justice MacKenzie went on to say “*it is not a requirement that the person cross-examined is able to understand te reo Māori*”.⁴¹ Therefore the High Court confirmed that Mr Hope was entitled to cross-examine the two non-Māori expert witnesses in te reo Māori.
- 7.11 However in the end Justice MacKenzie did not overturn Judge Ambler’s decision not to allow counsel to cross-examine in te reo and declined to grant a remedy to Mr Hope or his client because of the circumstances of the proceeding. Those circumstances included time

40 [2014] NZHC 723.

41 Ibid at [12].

constraints faced by the Tribunal during the hearing and the need for the Tribunal to regulate its own procedures and proceedings in its unique context.

7.12 Relevant to Justice MacKenzie’s decision was his observation that *“the ability of counsel to cross-examine witnesses before the Tribunal is not unfettered.”*⁴² Judge Ambler had issued a direction that counsel must seek leave to cross-examine and provide time estimates three weeks prior to the hearing. Mr Hope never sought leave to cross-examine the two witnesses. Therefore on the face of it, it would have been open to Judge Ambler to refuse leave to cross-examine despite the law being clear that Judge Ambler could not require that questions be asked in English.

7.13 Following the release of the High Court judgment Judge Ambler issued a direction saying:⁴³

“Notwithstanding the High Court’s refusal to grant a remedy, I am not aware of any rule of law that prevents me from providing an appropriate remedy if it is procedurally possible. Indeed, given that the underlying premise of my earlier ruling was wrong, I feel it my duty to remedy the situation. And rather serendipitously, the judgment has been released just in time for hearing week 12 when Dr Robinson will be presenting once again.

In my view it is appropriate for Mr Hope to have an opportunity to ask his questions of Dr Robinson in te reo Māori in relation to her joint report with Dr Christoffel at hearing week 12.”

7.14 This was a significant move by Judge Ambler to acknowledge the partially successful aspect of the High Court judgment and to grant a remedy, of his own volition in the Waitangi Tribunal.

7.15 We should add that Judge Ambler did make it clear in his initial direction that he had no issue with cross-examination in Te Reo Māori of a witness who was proficient in the language (provided the person asking the questions is competent in the language) as that would, in those circumstances, be appropriate and beneficial in assisting the Tribunal because the witness would be more comfortable with the questioning and more likely to give a thorough and considered response.

8. Final remarks on using Te Reo Māori in courts

8.1 As the Te Reo Māori Tribunal reported:⁴⁴

42 Ibid at [20].

43 Wai 898 #2.6.63, Memorandum-Directions of Judge Ambler concerning matters arising out of Hearing Week 11 and other matters dated 14 April 2014.

44 *Report of the Waitangi Tribunal on The Te Reo Māori Claim (Wai 11)*, Waitangi Tribunal, Wellington, April 1986 at p47.

“to recognise Māori officially is one thing, to enable its use widely is another thing altogether. There must be more than just the right to use it in the Courts. There must also be the right to use it with any department or any local body if official recognition is to be real recognition, and not mere tokenism.”

- 8.2 To avoid “mere tokenism” in navigating your way through the use of Te Reo Māori in legal practice, we leave you with some things to think about when considering whether it is appropriate or beneficial to use Te Reo Māori in legal proceedings. Ask yourself these questions:
- a) Is the person who intends to speak Māori proficient in the language to deliver the intended message?
 - b) Will it assist or enhance the Courts/Tribunals understanding of the evidence?
 - c) What practical implications will speaking Te Reo Māori have on the proceedings? (e.g. timing/delays, logistics, availability of a competent interpreter, who will be responsible for the translation)
 - d) Are those practical implications detrimental or beneficial to your case or your client?
- 8.3 The writers have been fortunate enough to have acted for many Māori claimants in the Waitangi Tribunal, and Māori Land Court since 1997 to the present day. Many of those hearings have had people presenting their evidence in Māori. Perhaps none more so than in Te Urewera, where nearly every week the predominant language spoken was Te Reo Māori, Te Reo o Ngai Tuhoē.
- 8.4 What has been evident is that when given the opportunity, Māori express themselves far more comfortably, far more eloquently in Māori than they do in English. Their ability to express themselves in Māori enables them to provide shape to their words, to give their expression a wairua (spirit) that is not possible when expressed in English.
- 8.5 Counsel should be encouraged to speak Māori in legal forums being careful to ensure that they do so, not to promote themselves, but to advance the position of their clients who they ultimately have obligations to.

Section 27 of the Sentencing Act 2002 and the District Courts of New Zealand

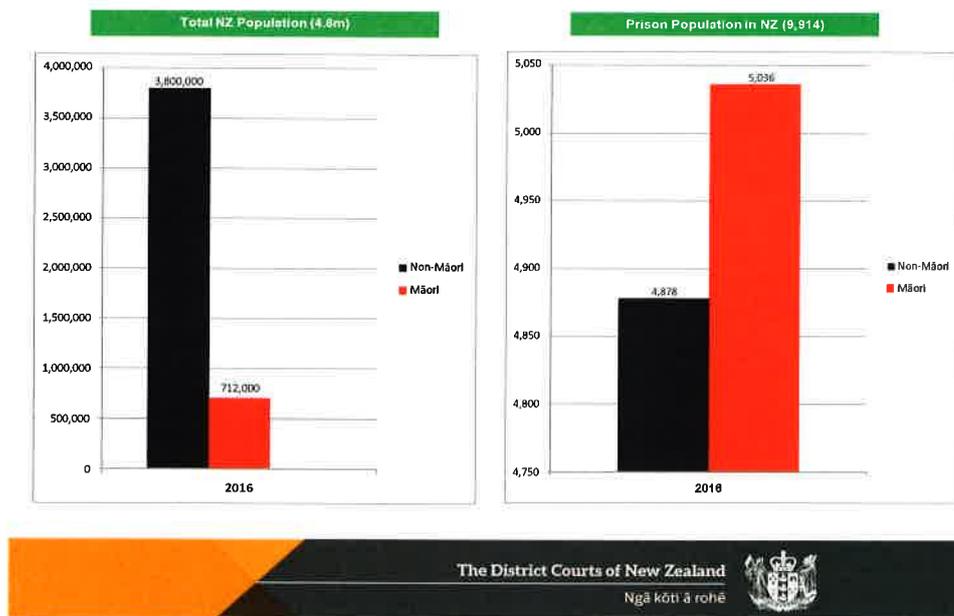
His Honour Judge Taumaunu

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Māori Disproportionate Over-Representation

- 38 All sentencing in New Zealand is conducted in accordance with the Sentencing Act 2002 (the Sentencing Act). Sentences of imprisonment are able to be imposed in both the District Court and the High Court of New Zealand. The District Court deals with the vast majority of criminal cases in New Zealand, and accordingly, it imposes the vast majority of prison sentences that are handed down. In 2016, Māori comprised 15.8% of the total population of New Zealand. As at 31 December 2016, the total prison population was 9,914 and Māori comprised 50.8% of that total prison population.

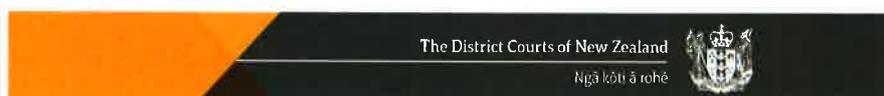
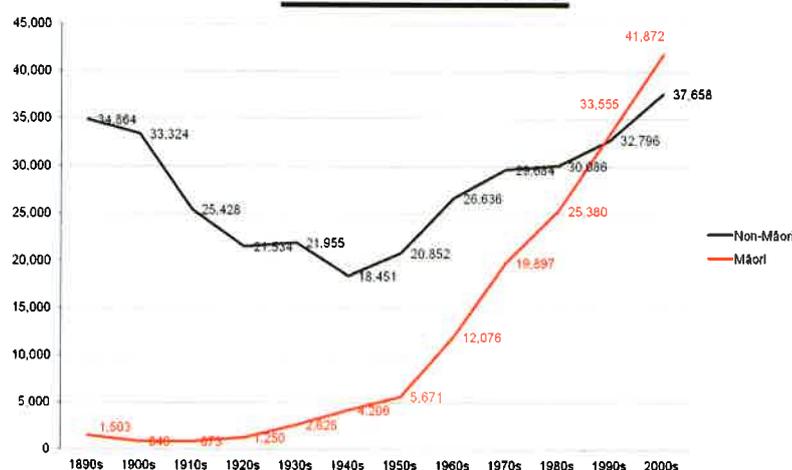


- 39 In order to understand these statistics it is necessary to briefly consider historical issues that concern Māori in New Zealand. Although the causes of Māori offending is a topic that is hotly debated by legal academics, social scientists, and historians, it appears obvious that the present day over-representation of Māori in New Zealand prisons is directly linked to the cumulative effects of colonisation and the historical assimilation policies adopted by 19th and 20th century Governments in New Zealand. The focus of this paper is on s27 of the Sentencing Act 2002. Accordingly, a detailed examination of the causes of Māori over-representation in New Zealand prisons is unable to be addressed in the detail that it merits, however it is important to highlight some of the major contributors to the present situation. When the Treaty of Waitangi was signed in 1840, there was an existing system of law in New Zealand, namely “tikanga Māori”. This system of law, that had regulated Māori society for many centuries prior to the arrival of the first European settlers, was replaced by the British

common law system. This enabled Māori titles to land to be individualised by the Native Land Court resulting in the large scale alienation of Māori land by European settlers. This land had been owned collectively by whānau, hapū and iwi. The situation was exacerbated by the large-scale confiscation of Māori land following the New Zealand wars in the 19th century.

- 40 In the 20th century the Māori language was actively suppressed in accordance with an official policy of assimilation. School children were forbidden to speak Māori. This policy was in force between 1900 and 1950. This policy sent a strong message to successive generations of Māori people, "...there is no value in the Māori language, and likewise, there is no value in Māori culture." The Māori language and Māori culture are dependent on each other.
- 41 Notwithstanding the loss of land, prohibition on language and breakdown of culture, Māori imprisonment rates were roughly proportionate to the total Māori population throughout the first half of the 20th century. They then rose steeply from the 1950's onwards. This coincided with the large scale movement of Māori people from their rural villages, to the cities, a phenomenon known historically as the "urban drift". Māori moved en-masse to the cities in search of employment, and in doing so, they left behind the traditional leadership structures of their villages, and also left behind what little remained of their language and culture.
- 42 The table below graphically illustrates the trend of Māori imprisonment rates.

Offenders Sentenced to Imprisonment In New Zealand



Section 16 of the Criminal Justice Act 1985

- 43 Successive New Zealand Governments have been aware of the issues concerning Māori over-representation in New Zealand prisons for more than 3 decades. The fourth Labour Government of New Zealand addressed the issue in 1985 by enacting section 16 of the Criminal Justice Act 1985 (the CJA). The parliamentary debates on the Criminal Justice Act are helpful. When the 1985 report¹ on the Criminal Justice Bill (No. 2) was tabled in Parliament Dr Michael Cullen noted that:

...the Select Committee made a conscious attempt to recognise in particular the importance of trying to meet the needs of Maori offenders and more particularly young Maori offenders who form such a disproportionately large element within the prison population and the population coming before the Courts, to the shame of us all.²

- 44 To reduce the level of Maori offending it was thought that such offenders would show a greater level of respect if they were dealt with in the community by their elders, their tribes, and within the marae (traditional tribal meeting places) system than if they were inside penal institutions.³
- 45 The then Minister of Justice noted that:

The purpose of the new provision is to secure the co-operation of ethnic minorities that at present experience high rates of imprisonment in seeking ways of finding alternatives to imprisonment. Clause 14A has been framed to apply generally to persons of all races to avoid any argument that it favours some racial groups at the expense of others.⁴

- 46 His Honour Justice Gendall in *Nishikata v Police*⁵ commented on s 16 as follows:

The section is discussed by Smellie J in *Wells v Police* [1987] 2 NZLR 560 and, as His Honour remarked, the section was introduced largely because of the disproportionately high rate of imprisonment of Maori and to assist in addressing the problem of the use or availability of alternatives to imprisonment for Maori offenders. The intent was that the Court should receive information to recognise Maori cultural patterns and alternative programmes for discipline and reformation of Maori offenders. However it is equally clear that the provision does encompass all ethnic minorities and the section was deliberately framed to apply generally to persons of all races

1 Report of the Statutes Revision Committee (1985) on the Criminal Justice Bill (No. 2).

2 (12 June 1985) 463 NZPD 4759 (Dr Cullen).

3 (12 June 1985) 463 NZPD 4761 (Dr Cullen).

4 *Then Minister of Justice, Hon Geoffrey Palmer* (12 June 1985) 463 NZPD 4759

5 *Nishikata v Police* (Wellington HC, AP 126-8/99, 22 July 1999, Gendall J) at 7.

or ethnic origin so as to avoid any suggestion it favoured some racial groups at the expense of others. As Smellie J commented at p570:

There is, today, a growing (and some would say long overdue) recognition that the Court system in this country based as it is on the Anglo-Saxon traditions of common law is not always flexible enough to ensure fair and appropriate treatment for all New Zealanders.

...

- 47 Gendall J then stated that consideration of an offender’s cultural or ethnic influences under s 16 of the CJA (now s 27 of the Sentencing Act) involves two aspects:
- a) Whether these influences explain the commission of the offence; and
 - b) The relevance to the sentencing process of the availability of traditional punishment or dispute resolution within a local or particular cultural community.
- 48 Unfortunately, despite best intentions, as can be seen from the chart at paragraph 1 above, the issue of Māori over-representation in New Zealand prisons has not yet been successfully corrected by the enactment and operation of s16 of the CJA 1985 or its successor, s 27 of the Sentencing Act .

Section 27 of the Sentencing Act –

- 49 Section 16 of the CJA 1985 was repealed and replaced by s 27 of the Sentencing Act. The ambit of s 27, and its predecessor s 16, has been broadly drafted. Although the terms of s 27 may apply specifically to Maori offenders the section has general application to all offenders.
- 50 Section 27 enables sentencing courts to hear from persons who may speak about the personal, family, whanau, community and cultural background information relevant to the offender, and the way in which that background may have related to the commission of the offence⁶.
- 51 Section 27 provides as follows:

Section 27 — Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender

- 2) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—

⁶ Sentencing Act 2002, s 27(1)(a) and (b).

- a) the personal, family, whanau, community, and cultural background of the offender:
 - b) the way in which that background may have related to the commission of the offence:
 - c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:
 - d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:
 - e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.
- 3) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.
 - 4) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.
 - 5) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.
 - 6) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

52 When imposing a sentence with a partly or wholly rehabilitative purpose it is appropriate for a court to consider s 27 together with the statutory principles in s 8 of the Sentencing Act. In particular a court must, under s 8(i) of the Sentencing Act, take into account an offender's personal, family, whanau, community and cultural background. Section 8 provides:

Section 8 — Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court— ..

- i. must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and ...

- 53 A speaker who addresses the court pursuant to s 27 may propose, amongst other things, processes to resolve issues relating to the offending, community based support that may be available to help prevent further offending, and how that support may be relevant to possible sentences.
- 54 If the court accepts a proposal, the court has the ability to adjourn sentencing pursuant to s 25 to enable, amongst other things, a restorative justice process agreement to be completed, and a proposed rehabilitation programme or course of action to be undertaken. Section 25 provides:

Section 25— Power of adjournment for inquiries as to suitable punishment

- 1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:
 - a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:
 - b) to enable a restorative justice process to [occur, or to be completed]:
 - c) to enable a restorative justice agreement to be fulfilled:
 - d) to enable a rehabilitation programme or course of action to be undertaken:
 - da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:
 - e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).
- 2) If proceedings are adjourned under this section or under [section 10(4) or 24A], a Judge or Justice or Community Magistrate having jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was heard) may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates.

Section 27 — Representations to the Court

- 55 A sentencing court may gain valuable insight from cultural, ethnic and community representations concerning the offender, although it will be left to the court to decide in each case, whether these representations will be relevant to the nature and length of possible

sentences. The Court of Appeal has previously said in *R v Bhaskaran*⁷ that information on community support systems to assist with an offender's post-imprisonment rehabilitation is capable of mitigating a sentence influenced by considerations of personal deterrence and rehabilitation.

- 56 Despite there being no established procedure for the application of s 27 counsel play an important role in the sentencing process in bringing to the court's attention personal information about the offender that the court would not normally receive.⁸
- 57 The offender has a presumptive right pursuant to s 27 for representations to be made to a court on relevant matters set out in that section but its provisions are often overlooked in the sentencing process. Yet, once utilised by a court, s 27 can become a powerful tool in gaining some understanding of the offender's personal and cultural background.
- 58 The offender may therefore call members of his or her personal and wider community to make submissions on such matters to the sentencing court, and it is mandatory for the court to hear these persons called by the offender unless the court gives reasons for declining to hear from such persons.⁹ If no request is made to the court to hear any speakers then the court "may" suggest that the offender call persons to speak in relation to s 27(1) matters - it is a discretion not a duty.¹⁰
- 59 A speaker's representations need not be given on oath since s 27 merely specifies that the person "speak on" the offender's background and the way in which that background may have related to the commission of the offence.¹¹ Thus strict adherence to the rules of evidence and procedure in respect of such speakers is not a requirement despite counsel having the sole right of audience before a court. Nevertheless lawyers and Judges must be prepared to see this right of audience qualified "when Parliament considers that is necessary for the common good of society."¹²

7 *R v Bhaskaran* (CA 333/02, 25 November 2002) at [13].

8 Judge Stephen O'Driscoll "A Powerful Mitigating Tool?" [2012] NZLJ 358.

9 Section 27(2) and (3) of the Sentencing Act 2002.

10 Section 27(5) of the Sentencing Act 2002.

11 Section 27(1) of the Sentencing Act 2002.

12 *Wells v Police* [1987] 2 NZLR 560 (HC) at 570 per Smellie J.

Section 27 — Direct Causal Nexus Between Cultural Background and Offending

60 In New Zealand it has been recognised that s 27(1)(b) cultural factors may mitigate culpability in certain circumstances.¹³ The legal position in New Zealand is similar to that of Australia and Canada. If a direct causal nexus is established between the cultural background of the offender and his or her offending, then those cultural background factors are able to be taken into account when assessing culpability and appropriate sentence.¹⁴ An example of the type of cultural background that may establish a direct causal nexus with the offending could be an assault with a traditional weapon committed by one of the hosts in accordance with Māori protocol in response to a traditional challenge by one of the visitors as part of the formal welcome ceremony at a marae. Whether a causal nexus is able to be established as a result of the offender's alienation from his or her cultural background, customs and values is not entirely clear and is a likely area for further appellate guidance. In more serious offending the purposes of sentencing, such as denunciation, deterrence and accountability, will be emphasised and they may preclude a finding of a causal connection.¹⁵

Section 27 — Indirect Connection Between Cultural Background and Offending

61 The current legal position in New Zealand is that a sentencing court cannot take into account (to any extent) an indirect connection between the cultural background of an offender and his or her offending when assessing culpability and sentence. An example of the type of cultural background that may establish an indirect connection with the offending could be the present day social disadvantage experienced by an offender caused by the historical effects of colonisation and assimilation policies.

62 The Court of Appeal observed in *Mika v R*¹⁶ that if Parliament intended an offender to receive a sentencing discount solely on account of his or her ethnicity then such an intention would have been made clear either in the Sentencing Act or a subsequent statutory instrument. Furthermore, a judicial evaluation of an offender's culpability is an essential element of the sentencing process that does not require proof that ethnicity was causally linked to the

13 *RS v R* [2014] NZCA 484

14 *RS v R* [2014] NZCA 484, *Bugmy v R* [2013] HCA 37, *Munda v Western Australia* [2013] HCA 38, *Churnside v The State of Western Australia* [2016] WASCA 146

15 *R v Fane* [2015] NZCA 561 (CA) at [45]–[46] and *RS v R* [2014] NZCA] 484 at [18].

16 *Mika v R* [2013] NZCA 648 at [9]–[10].

particular offending. Nevertheless the Court noted that s 27 is available to an offender to call persons to speak on the offender's heritage and cultural background.

- 63 Whilst s 27(1)(b) and (d) recognise respectively that cultural factors may mitigate culpability in very specific circumstances, or may be relevant to the appropriate type of rehabilitative sentence, a particular ethnicity or cultural background can never be a ground in itself for a discount on sentence.¹⁷ As Gendall J said in the *Nishikata* case, (dealing with 3 offenders who were of Japanese ethnicity), the sentencing principles apply to all persons regardless of their ethnic or racial group yet the court must take into account and apply mitigating factors which are directly relevant to the individual offender.¹⁸ His Honour then observed that:¹⁹

Equality before the law is fundamental to the administration of justice but, in line with s16 [Criminal Justice Act 1985] and decided authorities, the penalty must reflect matters of mitigation arising from an offender's background and which recognises the structure and operation of the society within which he lives and in particular the degree to which the cultural or ethnic heritage predominates, in any problems of a cross cultural nature.

- 64 The courts in Canada and Australia can take into account, subject to certain considerations, an indirect connection between the cultural background of an offender and his or her offending when assessing culpability and sentence. There does appear to be scope for further development of the New Zealand position on this issue. In the case of *Rakuraku*,²⁰ Justice Williams held that "the impact of R's mitigating, personal and historical factors" ought nonetheless to be discernible". R's minimum period of imprisonment was reduced by 12 months. In that case, the High Court sat as a first instance sentencing court. The Court heard from a speaker called by the defendant pursuant to s 27 who addressed the Court in detail on the historical factors that were relevant to the defendant. It is worth noting that in the Court of Appeal case of *Mika v R*,²¹ no s 27 speaker was called by the defendant to address the Court about historical and cultural background issues at first instance, and accordingly, there was no evidential foundation established in that case.

17 *RS v R* [2014] NZCA 484 at [18].

18 *Nishikata v Police* (Wellington HC, AP 126-8/99, 22 July 1999, Gendall J) at 7.

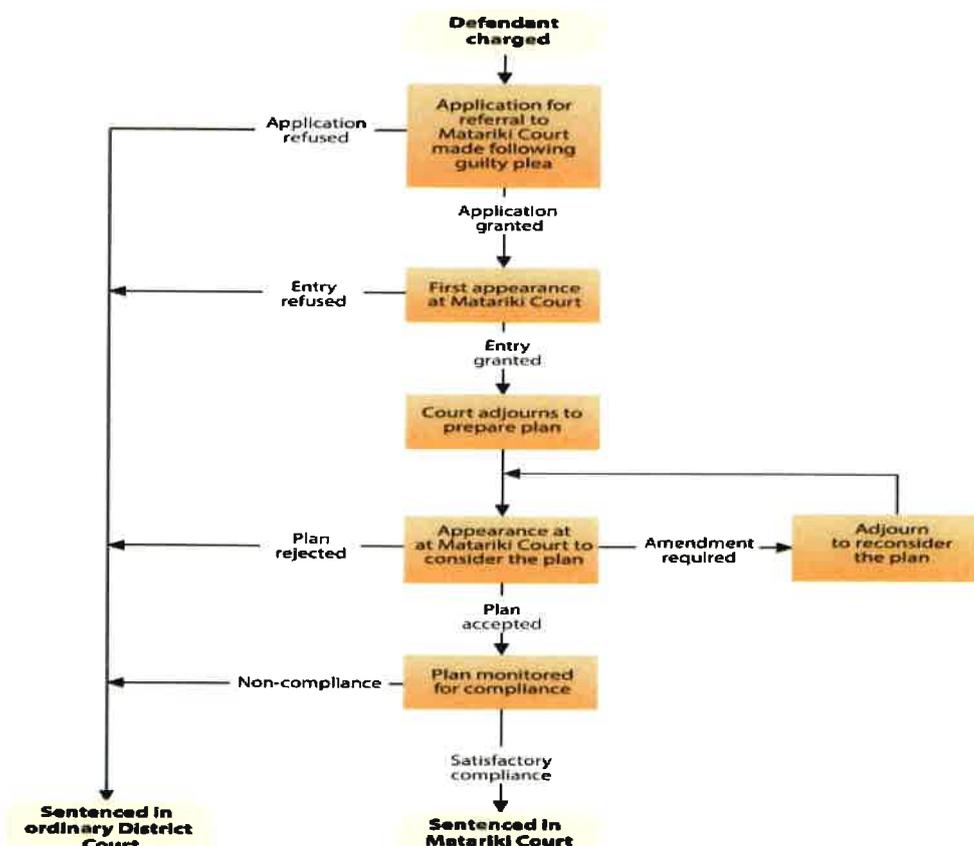
19 At 8.

20 *R v Rakuraku* [2014] NZHC 3270, Williams J.

21 *Mika v R* [2013] NZCA 648 at [9] – [10].

Section 27 — The Matariki Court Model in New Zealand

- 65 The Matariki Court was established in the Kaikohe District Court in 2010. Kaikohe is located in the Far North of the North Island of New Zealand. The Matariki Court is designed to increase the utilisation of s 27.
- 66 The Matariki Court (“the Matariki Court”) is a post guilty plea, monitoring and sentencing court. The Court applies the principles and purposes set out in ss 7 and 8 of the Sentencing Act. Although all offenders, regardless of race, ethnicity or gender are eligible for entry, the Court is primarily designed to target and deal with Māori offenders. After a guilty plea has been entered and prior to imposing sentence, the Court provides an opportunity for an offender’s rehabilitative needs to be assessed, a plan to be formulated and approved, and time allocated for the offender to enter into and complete appropriate rehabilitation programs prior to sentencing pursuant to s 25 of the Sentencing Act 2002. The process is set out in the chart below:



- 67 At sentencing in the Matariki Court, amongst other things, the Court hears from people called by the offender, on the personal, family, whānau (extended family), community, and cultural background of the offender, pursuant to s 27 of the Sentencing Act 2002. The Court

encourages the involvement of the offender, and his or her whānau (extended family), hapū (sub-tribe), and iwi (tribe), in the development, and implementation of his or her offender specific rehabilitation plan. The Court promotes the participation of victims and their whānau (extended family) in restorative justice processes, formulation of reparation plans, and participation in Court hearings. The successful completion of an offender specific rehabilitation plan is taken into account by the Court at sentencing as a factor that may tend to mitigate the final sentence pursuant to ss 9 & 10 of the Sentencing Act.

- 68 The key strength of the Matariki Court at Kaikohe District Court is the dedicated community based organisation, He Kōwhao Rau, and the excellent service they provide to the court in terms of assessments and preparation of rehabilitation plans, monitoring reports, and completion reports, as well as the facilitation of, and actual delivery of services in the community. This would appear to be a key area for the development of partnerships between iwi, Government organisations, and the District Court.
- 69 No exhaustive qualitative or quantitative evaluations have yet been undertaken in respect of the Matariki Court based at Kaikohe District Court. However in 2015, the New Zealand Ministry of Justice reported that²²:

Over the 15 months leading to November 2015, only two of the 31 referrals to the (Matariki) Court were imprisoned, and the majority of offenders have completed or are completing intervention plans and are in training or employment. Five have had their sentences reduced to home detention.

Section 27 – Community/Iwi Based Rehabilitation Plans as Alternatives to Imprisonment

- 70 A s 27 speaker who addresses the cultural background of a defendant is likely to be of useful assistance to a sentencing court. However, the practical benefit of a s 27 submission will be significantly enhanced if not only the defendant’s cultural background is addressed but also a community or iwi based rehabilitation programme is presented as an alternative to imprisonment for the court to consider at sentencing.
- 71 As Justice Smellie noted in *Wells v Police*, the benefit of being in the care of an offender’s own people under a community-based sentence is that it enables the offender to re-establish social relationships with their families and form a common connection to their culture thereby having a greater prospect of rehabilitation.²³

²² New Zealand Ministry of Justice Internal online article – JET, 2015.

²³ *Wells v Police* [1987] 2 NZLR 560 (HC) at 574 per Smellie J.

- 72 It is worth noting that community based restorative justice and rehabilitation plans presented as alternatives to imprisonment pursuant to s 27, would only be able to be approved on a principled basis if the sentencing court accepts that the appropriate sentence of imprisonment would fall within the threshold for consideration of Home Detention (2 years imprisonment or less). This would require calculation of the appropriate starting point for the offending, an uplift for aggravating personal factors and discounts for personal mitigating factors. Sentencing considerations would necessarily include a discount for pleading guilty and successfully completing the proposed community or iwi based Restorative Justice plan and/or Rehabilitation plan.
- 73 The ambit of s 27 has been drafted in a sufficiently wide sense to encompass all ethnicities.²⁴ Thus offenders need not be Maori for the provisions of s27 to be applied in the manner outlined. In *R v Bhaskaran* representatives from a Maori trust board were able to speak to the court on the health and social services provided by the trust board's programme and the availability of a personalised programme that not only benefited the Malaysian offender but also his whanau.²⁵

24 See *Nishikata v Police* (Wellington HC, AP 126-8/99, 22 July 1999, Gendall J) where the appellants were of Japanese descent.

25 In *R v Bhaskaran* (CA 333/02, 25 November 2002) at [6] the Malaysian offender was supported in Court by representatives of the Whakatohea Trust Board.

TE REO MĀORI I TE AO TURE / THE MĀORI LANGUAGE IN THE LAW

A quick guide to simple every day Māori words and phrases we can use within the law environment

RERENGA KÖRERO MŌ TE TARI/ OFFICE PHRASES

- **Atamārie!** (Good Morning)
- **Tēnā koe/Kia ora** (Hello - formal and informal)
- **E pēhea ana koe?** (How are you?)
- **E pai ana ahau** (I am well)
- **E pukumahi ana ahau** (I am very busy)
- **E haere ana koe ki hea?** (Where are you going?)
- **E haere ana ahau ki te Kooiti** (I am going to Court)
- **Āwhea tō tātou hui?** (What time is our meeting?)
- **Ā te 10 karaka, ki te tari o te Karauna** (At 10 o'clock at the Crowns office)
- **He pene tāu?** (Do you have a pen?)
- **Āe, he pene tāku** (Yes, I have a pen)
- **Kāore āku pene** (I don't have a pen)

KUPU ĀWHINA MŌ TE KOOTI / HELPFUL COURT PHRASES



Tēnā koe e te Kaiwhakawā, ko (name) tōku ingoa. Nō te tari o (firm name) ahau. Ko au te roia mō (clients name). (Greetings Your Honour, Counsels name is..... from the firm of..... and I appear on behalf of.....).



Āe, E hiahia ana ahau ki te tuku pātai ki tēnei kaiwhakawā. (Yes, I want to cross examine this witness).



Kua pau katoa āku pātai i tēnei wā. (I have no further questions).



Kei a koe te mana e te Kaiwhakawā. (As Your Honour pleases).

KIWAHA / SAYINGS

E mea ana koe! (You bet!)
Kai tawhiti! (Awesome)
Hoki atu, hoki atu, ko taua āhua anō (Time and time again, it's the same ol story)
Tē aro i a rātou (They just don't have a clue)
Pai tū, pai hinga (We'll see how things unfold)

NGĀ KUPU TURE/ LAW TERMS

Court = Kooiti

Tribunal =
Taraipūnara

Submissions =
Tāpaetanga

Judge =
Kaiwhakawā

Lawyer =
Rōia

Opening
Address =
Kōrero
Whakataka

Closing
Address =
Kōrero
Whakakapi

Advice =
Kōrero
tohutohu

Contract =
Kirimana

Policy =
Kaupapa
Here

Strategy =
Rautaki

Criminal Law
= Ture Taihara

Client = Kiritaki

Article =
Atikara

Principles =
Mātāpono

Evidence =
Kōrero
Tāunaki

Charge(s) =
Hāmene

Crown =
Karauna