Washington International Law Journal

Volume 20 | Number 1

1-1-2011

Addressing the Overrepresentation of the Maori in New Zealand's Criminal Justice System at the Sentencing Stage: How Australia Can Provide a Model for Change

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ADDRESSING THE OVERREPRESENTATION OF THE MAORI IN NEW ZEALAND'S CRIMINAL JUSTICE SYSTEM AT THE SENTENCING STAGE: HOW AUSTRALIA CAN PROVIDE A MODEL FOR CHANGE

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Abstract: New Zealand's 2002 Sentencing Act provides several ways a sentencing court may take an offender's cultural or ethnic background into account. Given the disproportionate rate of recidivism among New Zealand's indigenous Maori offenders and international and domestic concerns regarding this problem, the Act's provisions offer one method for addressing and mitigating this issue. However, these sentencing provisions remain largely unknown or underused. This comment argues that in order to tackle these concerns, left unaddressed by the current Sentencing Act, New Zealand should restructure its sentencing provisions to follow the legislative model that is developing in Australian states, particularly the model in Victoria, which has specifically created indigenous sentencing courts as a separate division of their local court system. In fact, New Zealand should go one step further than the current Australian legislation establishing an independent indigenous court system by requiring judges (or magistrates) to allow Maori offenders to be sentenced in an indigenous sentencing court whenever they so request. New Zealand would benefit from adoption of a specific legislative framework implementing aspects of the indigenous sentencing courts found in Australia. In doing so, New Zealand would address criticism surrounding treatment of Maori offenders within New Zealand's criminal justice system and the underuse of the current sentencing provisions that allow judges to consider an offender's cultural background.

I. INTRODUCTION

"The sentence imposed on a Maori offender is so often perceived to be the final systemic act in a series of culturally-insensitive or biased steps."[1] — Moana Jackson, Maori activist and author.

Moana Jackson's sentiment is understandable given the relationship of the Maori to New Zealand's criminal justice system. The Maori, indigenous to New Zealand, are grossly overrepresented[2] within the nation's criminal justice system that is based on the practices of the British Colonizers rather

[†] The author would like to thank Professor Robert Anderson of the University of Washington for his invaluable guidance, and editor Megan Winder for her constant support and thoughtful advice. The author is very grateful to both.

[1] New Zealand Ministry of Justice, Speaking About Cultural Background at Sentencing, Section 1.3, http://www.justice.govt.nz/publications/global-publications/s/speaking-about-cultural-background-at-sentencing/introduction#1.3 (last visited Jan. 18, 2010).

[2] New Zealand Department of Corrections, Overrepresentation of the Maori in the Criminal Justice System, Section 1.0, http://www.corrections.govt.nz/research/over-representation-of-maori-in-the-criminal-justice-system/1.0-introduction/1.html (last visited Jan. 18, 2010).

than on traditional Maori values.[3] Facing criticism and calls for some measures of reform, New Zealand has adopted legislation that allows for sentencing courts to take into account an offender's cultural background. However, this legislation has remained underused, and thus has yet to remedy Maori overrepresentation within the system.

This comment argues that in order for New Zealand to improve its relationship with the Maori, it must take steps to incorporate the Maori community, and its values, into the sentencing process. The current provisions of the 2002 Sentencing Act provide means for accomplishing this goal, yet the provisions are not used effectively. To make the Act's provisions effective, New Zealand should adopt a legislative framework modeled after the indigenous sentencing courts in Australia. This would require establishing a separate division where the special indigenous sentencing provisions can be applied. Like the Maori, Australia's Aboriginal population is overrepresented within the criminal justice system, particularly in terms of incarceration rates.[4] However, courts in Australian states have, to varying degrees and based on varying legislation, begun to create separate courts designed to respond to the unique circumstances of indigenous offenders' backgrounds.[5] These courts' developments provide a model that New Zealand should emulate in order to raise the profile of its own special legislative provisions for sentencing Maori offenders, thus increasing Maori participation in the process.[6] This is particularly important if New Zealand wishes to change the perception among Maori that sentencing is just a final step in an already biased process.[7]

The success of the sentencing courts in Australia provides a strong incentive for New Zealand to establish similar mechanisms ensuring its legislative text, which demands the consideration of an offender's cultural background, becomes relevant to both the offender and the court system. New Zealand, while acknowledging concerns, should adopt the model in the

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[3] For a discussion of traditional Maori notions of justice, *see* New Zealand Ministry of Justice, Sentencing Policy and Guidance — A Discussion Paper, Section 10.0, http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing/?searchterm=indigenous%20sentencing (last visited Oct. 23, 2010).

[4] Adam Morton, *Courts a Revolution in Aboriginal Justice*, AUSTRALIAN ASSOCIATED PRESS, July 11, 2003 (Aboriginal offenders are 15 times more likely to be jailed than non-Aboriginal offenders).

[5] Elena Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 SYDNEY L. REV. 415, 416 (2007) (providing a detailed table of each of these courts and the accompanying legislation).

[6] Sentencing Act of 2002, § 8(i), § 26, § 27, § 51 (N.Z.).

[7] New Zealand Ministry of Justice, Speaking About Cultural Background at Sentencing, Section 1.3, http://www.justice.govt.nz/publications/global-publications/s/speaking-about-cultural-background-at-sentencing/introduction#1.3 (last visited Jan. 18, 2010).

Australian state of Victoria to create a specific court division where the provisions already in place in New Zealand's Sentencing Act can earn more attention, use, and, ultimately, be more effective.

Part II of this comment describes the current status of the Maori within the criminal justice system, the potential causes for the Maori's overrepresentation within the system, and New Zealand's current Sentencing Act[8] in order to argue that, while it includes well-drafted provisions in regards to indigenous offenders, it has not provided adequate relief for this group. Part III examines the evolution of indigenous sentencing courts in Australia, particularly the formally legislated Koori Court Division in Victoria. Part IV argues that this framework for a separate division of indigenous sentencing courts should be established in New Zealand. Within a separate legislative framework, and with some minor revisions, the current provisions can be used effectively to address the needs and concerns of Maori offenders.

II. NEW ZEALAND HAS NOT EFFECTIVELY ADDRESSED THE OVERREPRESENTATION OF THE MAORI WITHIN ITS CRIMINAL JUSTICE SYSTEM

New Zealand has struggled with the overrepresentation of its indigenous population within the nation's criminal justice system, especially in prisons and corrections programs.[9] The Maori, New Zealand's largest indigenous group,[10] constitute just under fifteen percent of the country's total population,[11] yet make up 42% of police apprehensions[12] and 50% of the prison population.[13] Furthermore, 63% of Maori offenders are reconvicted,[14] compared with only 51% of European offenders.[15] Facing international

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[8] Sentencing Act of 2002, § 8(i), § 26, § 27, § 51 (N.Z.).

[9] New Zealand Department of Corrections, Overrepresentation of the Maori in the Criminal Justice System, Section 1.0, http://www.corrections.govt.nz/research/over-representation-of-maori-in-the-criminal-justice-system/1.0-introduction/1.html (last visited Jan. 18, 2010).

[10] Waitangi Tribunal, The Offender Assessment Report for Claim, http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1024/8237665E-0C72-48DD-8F2A-6981F363FF29.pdf (last visited Oct. 23, 2010).

[11] New Zealand Department of Corrections, Overrepresentation of the Maori in the Criminal Justice System, Section 1.0, http://www.corrections.govt.nz/research/over-representation-of-maori-in-the-criminal-justice-system/1.0-introduction/1.html (last visited Jan. 18, 2010).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] "European Offenders" is used to refer to offenders who have European heritage. *See* Waitangi Tribunal, The Offender Assessment Report for Claim, Section 2.2.1, http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1024/8237665E-0C72-48DD-8F2A-6981F363FF29.pdf (last visited Oct. 23, 2010).

criticism and calls for reform, New Zealand has acknowledged the problem[16] and has begun to discuss its causes as well as possibilities for redress.[17]

By its text, the 2002 Sentencing Act appears to improve upon the language of the 1985 Sentencing Act,[18] which merely granted a sentencing court broad discretion to consider an offender's background during sentencing and did little to ease Maori overrepresentation.[19] The 2002 Sentencing Act is more specific. It provides the court guidelines on how and when to consider an offender's background.[20] It also provides more rehabilitative alternatives.[21] Yet despite well-designed legislative language, the new provisions in the 2002 Act have been under-utilized.[22] To date the provisions have had negligible impact on repairing the relationship between the Maori and the criminal justice system.[23]

New Zealand has framed the issue of overrepresentation of the Maori in the criminal justice system in terms of the Maori's "social and economic marginalization," rather than as of evidence of racial bias.[24] Taking this view, Maori overrepresentation is a symptom of broader social problems and a history of colonization, rather than an isolated issue that can be resolved by a single reform or measure.[25] However, criminal sentencing is one area where there may be means of relief—it could mitigate, if not resolve, the effect of the economic and social circumstances of the Maori.

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[16] Ben Fawkes, *Courts 'Ignoring Ethnic Factors'; UN Urges Cultural Sentencing for Maori*, THE DOMINION POST, Aug. 20, 2007.

[17] New Zealand Committee on the Elimination of Racial Discrimination, Request for Further Information on Recommendations 14, 19, 20 and 23, http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/10-Oct-2008_13-33-37_CERD_report_NZ_Govt.DOC (last visited Oct. 23, 2010). *See also* New Zealand Ministry of Justice, Speaking About Cultural Background at Sentencing, Table 6.18, http://www.justice.govt.nz/publications/global-publications/s/speaking-about-cultural-background-at-sentencing/survey (last visited Oct. 23, 2010).

[18] *See* New Zealand Ministry of Justice, Speaking About Cultural Background at Sentencing, Section 1.1, http://www.justice.govt.nz/publications/global-publications/s/speaking-about-cultural-background-at-sentencing/introduction#4 (last visited Mar. 31, 2010).

[19] Sentencing Act of 1985 § 16 (N.Z).

[20] Sentencing Act of 2002, § 8(i), § 26(2), § 27, § 51 (N.Z.).

[21] Sentencing Act of 2002, § 8(i), § 26, § 27, § 51 (2002) (N.Z).

[22] *See* New Zealand Ministry of Justice, Speaking About Cultural Background at Sentencing, Table 6.18, http://www.justice.govt.nz/publications/global-publications/s/speaking-about-cultural-background-at-sentencing/survey (last visited Oct. 23, 2010).

[23] *See id*.

[24] New Zealand Ministry of Justice, Sentencing Policy and Guidance — A Discussion Paper, Section 10.0, http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing#10.1 (last visited Oct. 23, 2010).

[25] *Id*.

A. New Zealand's Current Approach to Sentencing Does Not Reduce the Overrepresentation of Maori's in Prison

In terms of sentencing, one explanation for the Maori's disproportionate presentation in prison is that the system works against Maori because they are less suitable for community-based or financial sanctions.[26] Because of Maori's economic marginalization[27], individuals are less able to pay financial sanctions, and Maori communities may be less competent to "provide and sustain community based-programmes or other alternatives to imprisonment."[28] Moreover, while New Zealand courts most often impose a monetary penalty as a sentence,[29] Maori offenders receive this penalty less frequently than Europeans or other minority groups.[30] Instead, Maori offenders receive prison time, most likely due to consideration of their ability to pay.[31] As a result of their overall social and economic marginalization, Maori individuals and communities are less able to offer alternatives to prison that might reduce the number of Maori having to serve time in prison.[32]

However, New Zealand has begun to recognize the need to address the role of the criminal justice system, including the role of sentencing, in assuaging sentiments of bias and exclusion.[33] In its discussion paper on sentencing, New Zealand's Ministry of Justice, hesitantly acknowledged the relationship between Maori marginalization and their treatment by the criminal justice system. It stated, "Even though the criminal justice system is not the vehicle for major social and economic restructuring, there is still the possibility that institutional changes within the various stages of the system, including sentencing, could reduce the impact of social and economic disparities between groups."[34] It further stated that "[a]t the sentencing stage, this could involve the development, with Maori communities, of viable alternatives to imprisonment and the other available

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[26] New Zealand Department of Corrections, Overrepresentation of the Maori in the Criminal Justice System, Section 2.3, http://www.corrections.govt.nz/research/over-representation-of-maori-in-the-criminal-justice-system/1.0-introduction/1.html (last visited Jan. 18, 2010).

[27] *See* Simon Chapple, *Maori Socio-Economic Disparity*, MINISTRY OF SOCIAL POLICY, September 2000, http://www.publicaccessnewzealand.com/files/chapple_maori_disparity.pdf.

[28] *See* New Zealand Ministry of Justice, *supra* note 24.

[29] *See* New Zealand Department of Corrections, *supra* note 26.

[30] *Id*.

[31] *Id*.

[32] *See* New Zealand Ministry of Justice, *supra* note 24.

[33] *See* New Zealand Department of Corrections, *supra* note 26.

[34] *See* New Zealand Ministry of Justice, *supra* note 24.

sentences and orders, which would be particularly appropriate to Maori offenders.[35]

From these statements, the Ministry of Justice appears to have begun recognizing its potential role in reducing bias within the criminal justice system. With this, it realistically acknowledges its limitations,[36] yet appears willing to work with the Maori communities in order to address sentencing disparity. This effort represents a significant first step.[37]

B. New Zealand's Current Sentencing Act Does Not Adequately Address the Sentencing Needs of the Maori Population

Revisions to the 2002 Sentencing Act were designed to allow New Zealand courts to consider the cultural and social circumstances of the offender in a constructive way.[38] There are several provisions in the Act that allow offenders to have their backgrounds taken into account in sentencing and the development of post-conviction rehabilitative programs.[39] Unfortunately, despite the language of the Sentencing Act, these provisions remain underused.[40] As a result, New Zealand faces international and domestic criticism that changes to the text of the Act are inadequate.[41]

1. The 2002 Sentencing Act Provides Opportunities for Culturally Sensitive Sentencing

In 2002, New Zealand amended its Sentencing Act allowing for sentencing that is more sensitive to Maori concerns.[42] The Act includes consideration for Maori offenders. For example, Section 8(i) requires a magistrate to consider an offenders' background;[43] Section 26(2)(a) provides that a pre-sentence report may include information on the offender's cultural background and social circumstances;[44] Section 27 allows an offender to call witnesses who can speak to his or her background;[45] and, Sections 50 and 51, together allow for placement of the offender with his family or extended

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35 *Id.*
36 *Id.*
37 *Id.*
38 Sentencing Act of 2002, § 8(i), § 26(2)(a), § 27, § 51 (N.Z.).
39 *Id.*
40 *See* New Zealand Ministry of Justice, *supra* note 22.
41 *See infra* Part II.C.
42 Sentencing Act of 2002, (N.Z.).
43 Sentencing Act of 2002, § 8(i) (N.Z.).
44 Sentencing Act of 2002, § 26(2)(a) (N.Z.).
45 Sentencing Act of 2002, § 27 (N.Z.).

cultural or ethnic community.[46] Taken together, the provisions of the Act appear comprehensive and well designed for allowing judges and magistrates to accommodate Maori values and backgrounds within a criminal justice system that evolved from British penology.[47]

a. Section 8(i), with Section 26(2)(a), Place an Obligation on a Sentencing Judge to Consider an Offender's Social Circumstances

The 2002 Sentencing Act lists "principles" that a sentencing judge or magistrate must take into account when imposing a sentence.[48] For example, a court must consider the "gravity of the offending"[49] and the effect of the offense on the victim.[50] Among these principles, Section 8(i) requires that a judge, "*must* take into account the offender's personal, family, whanau [extended family], community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose."[51]

Section 26(2)(a) complements Section 8(i), allowing information relevant to an offender's background to be included in the offender's pre-sentence report. The pre-sentence report "may include: information regarding the personal, family, whanau [immediate family], community, and cultural background, and social circumstances of the offender."[52] Together, Section 26(2)(a) and Section 8(i) create the impetus to consider an offender's background and a means through which that information can be brought to the courts' attention.

b. Section 27 of the Sentencing Act Requires that a Judge Allow an Offender to Call a Witness to Speak to His or Her Cultural Background

Section 27 of the Sentencing Act mandates that an offender appearing before a court for a sentencing hearing may request that the court hear any person (or persons) called by the offender to speak to the cultural

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[46] Sentencing Act of 2002, § 50-51 (N.Z.).

[47] The British and other European criminal systems revolve around the notion of individual blame-worthiness and court-based prosecution and sentencing, with imprisonment being the primary sanction. *See* New Zealand Ministry of Justice, Sentencing Policy and Guidance — A Discussion Paper, Section 10.3, http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing#10.3 (last visited Jan. 18, 2010).

[48] Sentencing Act of 2002, § 8 (N.Z.).

[49] Sentencing Act of 2002, § 8(a) (N.Z.).

[50] Sentencing Act of 2002, § 8(f) (N.Z.).

[51] Sentencing Act of 2002, § 8(i) (N.Z.) (emphasis added).

[52] Sentencing Act of 2002, § 26(2)(a) (N.Z.).

background of the offender.[53] Section 27(1) and its subsections provide that the offender may call anyone to speak on:

> (a) the personal, family, whanau [immediate family], 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 [immediate family], or community and the victim or victims of the offence:
> (d) how support from the family, whanau [immediate family], or community may be available to help prevent further offending by the offender:
> (e) how the offender's background, or family, whanau [immediate family], or community support may be relevant in respect of possible sentences.[54]

These provisions are each important in that they allow a sentencing court to consider an offender's family, community, and cultural background. At the same time, these provisions also direct the witness' testimony to speak on how the offender's background is relevant to the commission of the offense.[55]

While provision (a) broadly defines who can speak, inviting involvement from the offender's family and community, provisions (b) through (e) play a narrowing role.[56] Provision (b) directs the witness to discuss the link between the offender's history and the crime, thereby immediately addressing the issue of relevancy.[57] Provision (c) invites community involvement and provides for alternative resolution methods.[58] Provisions (d) and (e) are constructed with a similar purpose to provision (c), yet are more rehabilitative and forward-looking, as they allow representatives to speak to ways that their family or community may be able to prevent recidivism and support the offender.[59]

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[53] Sentencing Act of 2002, § 26(2)(a) (N.Z.).
[54] Sentencing Act of 2002, § 27(1) (N.Z.).
[55] *See* Julian V. Roberts, *Sentencing Reform in New Zealand: An Analysis of the Sentencing Act of 2002*, 36 AUSTL. & N.Z. J. CRIMINOLOGY 249 (2003), also *available at* 2003 WLNR 17659296.
[56] Sentencing Act of 2002, § 27(1)(b)-(e) (N.Z.).
[57] *See* Roberts, *supra* note 55.
[58] Sentencing Act of 2002, § 27(1)(c) (N.Z.).
[59] Sentencing Act of 2002, § 27(1)(d)-(e) (N.Z.).

Most noteworthy, however, is that the provisions of Section 27 are not purely discretionary.[60] The court *must* hear a person or persons called by the offender under this Section, "unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate."[61] That is, the court may decide to deny the offender's request, but if it does, it must provide reasons for doing so.[62]

Even if the offender does not request the presence of a person to speak to his or her background, the court "may suggest to the offender that it may be of assistance to the court to hear a person or persons on [the matters specified in subsection 27(1), listed above]."[63] Overall, Section 27 of the Sentencing Act appears to provide the offender, and the court, with a means to ensure that the unique background of a Maori is at least heard at the sentencing stage.

c. Sections 50 and 51 of The Sentencing Act Provide Valuable Sentencing Alternatives

While other parts of the Sentencing Act focus on the Maori individual's background, Sections 50 and 51 focus on the Maori community and its potential to serve as a rehabilitative alternative for offenders.[64] While Section 50 provides the court with the option of applying "special condition or conditions" as part of a court imposed "programme."[65] Section 51(c) defines "programme" to include placement in the individual's Maori family or community.[66] The text of Section 51(c) is inclusive and allows the court to place the offender:

> In the care of any appropriate person, persons, or agency, approved by the chief executive of the Department of Corrections, such as, without limitation,
>
> (i) an iwi [extended kinship group or tribe], hapu [kinship group, clan, or tribe or subtribe], or whanau [extended family];
>
> (ii) a marae [traditional public forum, including the building complex];

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60 Sentencing Act of 2002, § 27(2) (N.Z.).
61 Sentencing Act of 2002, § 27(2) (N.Z.).
62 Sentencing Act of 2002, § 27(3) (N.Z.).
63 Sentencing Act of 2002, § 27(5) (N.Z.).
64 Sentencing Act of 2002, § 50-51 (N.Z.).
65 Sentencing Act of 2002, § 50 (N.Z.).
66 Sentencing Act of 2002, § 50-51 (N.Z.).

> (iii) an ethnic or cultural group;
> (iv) a religious group, such as a church or religious order;
> (v) members or particular members of any of the above.[67]

This provision provides an important mechanism for incorporating the Maori community in the sentencing and rehabilitative process. By providing an alternative to prison and financial sanctions, it could be a valuable tool for addressing the disproportionate number of Maori in the criminal justice system. Moreover, by providing a rehabilitative environment that is specific to the offender, such an alternative is more likely to be relevant to Maori offenders and ultimately reduce the rates of recidivism and imprisonment of Maori citizens.

Taken together, the text of the 2002 Sentencing Act is well designed to address the specific concerns of an indigenous offender facing a sentencing court. Not only does the Act require that a sentencing judge consider the unique background of a Maori offender, but it also provides what should be an effective means for bringing evidence of that background into court.[68] The Act also invites the offender's family and/or community to be involved with the offender's punishment and rehabilitation providing an alternative to prison, thus providing a mechanism that could reduce the disproportionate number of Maori in prison.[69] Involvement of the offender's community, and the incorporation of the community's values into the process, will make the process more relevant and rehabilitory to the offender, thus reducing recidivism and the overrepresentation of the Maori in the criminal justice system.

2. The Sentencing Act, at Least Textually, Addresses an Offender's Cultural Background

The extent to which an offender's "cultural background" should be relevant when sentencing is fuel for an ongoing debate among scholars, particularly those in Commonwealth countries with large indigenous populations, such as New Zealand, Australia, and Canada.[70] One of scholars' largest concerns is that allowing consideration of one's "cultural

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[67] Sentencing Act of 2002, § 51(c)(i)-(v) (N.Z.).
[68] Sentencing Act of 2002, § 26(2)(a), § 27(1)-(2) (N.Z.).
[69] Sentencing Act of 2002, § 51 (N.Z.).
[70] *See* Roberts, *supra* note 55 (citing J. Rudin & K. Roach, *Broken Promises: A Response to Stenning and Roberts' Empty Promises*, 65 SASKATCHEWAN L. REV. 3-34 (2002)).

background" would simply provide an "Aboriginal discount,"[71] or an automatically reduced sentenced based on the offender's race or ethnicity.[72] Despite scholars' concerns, the text in each provision that allows for consideration of an offender's cultural background[73] is well designed to address these concerns and criticisms.

The language of Section 8(i) avoids the appearance of creating an "Aboriginal discount," by stating that an offender's cultural background is only a relevant consideration "when the purpose [of sentencing] is rehabilitative in nature."[74] An offender's cultural background should not necessarily be considered a mitigating factor.[75] Pursuant to the language of Section 8(i), an offender's cultural background should be taken into account when considering the offender's "rehabilitative disposition" and constructing a "programme" that will aid in his or her "rehabilitation and reintegration."[76] In this way, the language of Section 8(i) cleverly allows for consideration of Maori principles in creating a rehabilitative plan for offenders, yet it avoids criticism that offenders are treated differently based on their cultural backgrounds.

Section 27 also avoids the appearance of providing a categorical discount by asking that the person called to speak address the "way in which [the offender's] background may have related to the commission of the offense," thereby seeking a direct link between the offender's background and the offense, rather than an unqualified consideration.[77] The language also clarifies two points. First, it is clear that the court *must* allow the offender to call a witness or provide a good reason for denying a request.[78] Second, it provides that the offender is formally allowed to call multiple witnesses.[79]

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[71] *Id*.

[72] *Id*. The Canadian Criminal Code has been criticized for creating a so-called "Aboriginal discount"; it states that judges should pay "particular attention to the circumstances of Aboriginal offenders." (Criminal Code of Canada, R.S.C., c. 32, § 718.2(e) (2005). In particular, this provision came under criticism in Canada after the Supreme Court of Canada considered an defendant's Aboriginal status a mitigating factor in sentencing her for killing her common law husband.

[73] Sentencing Act of 2002, § 8(i), § 26(2)(a), § 27, § 51 (N.Z.).

[74] Sentencing Act of 2002, § 8(i) (N.Z.); *see also* Roberts, *supra* note 55, (arguing that Section 8(i) does not allow one's cultural background to become a purely mitigating factor at sentencing).

[75] *See* Roberts, *supra* note 55.

[76] *Id*.

[77] *Id*.

[78] Sentencing Act of 2002, § 27(2) (N.Z.).

[79] Sentencing Act of 2002, § 27(1) (N.Z.); *see also* Roberts, *supra* note 55 (comparing the 1985 and 2002 Sentencing Acts).

C. The Underuse of these Provisions and the Need to Resolve this Problem, is Evidenced by Domestic and International Criticism

The 2002 Sentencing Act appears to make legitimate attempts to introduce Maori principles to the court at the sentencing stage, or at least allow for alternative punishments that are more appropriate for Maori offenders.[80] However, subsequent history demonstrates that the provisions have remained largely unused or have been used ineffectively. Accordingly, offenders' backgrounds and potential alternative punishments often remaining unconsidered. The result has drawn domestic and international attention.

1. New Zealand Has Collected Evidence of How and Why Indigenous Sentencing Provisions are Underused

Within New Zealand, concerns about bias within the criminal justice system prompted the Ministry of Justice to undertake a study of indigenous sentencing practices in 2000.[81] The study found that among the lawyers, judges, Community Probation Service staff, and community organizations responding, only 13.6% of respondents believed that courts considered the offenders' cultural background as often as it could during sentencing.[82] Further, only 8.4% believed that the provisions were used effectively.[83] When asked for the reasons for underuse and ineffective use, 45.3% cited lack of knowledge or information about the cultural background provision (that is, the offenders and court personnel did not know about the provisions or how they should be used); 28.8% blamed resistance to use from the courts or criminal justice system in general; and nearly 20% saw the administrative or court process issues as the reason for underuse.[84]

Neither the revisions nor government awareness efforts, including distribution of pamphlets to offenders about their options, appear to have been effective.[85] New Zealand's government has remained largely silent on the issue, at least until 2007 when the United Nations published a report criticizing New Zealand's race relations.[86]

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[80] *See supra* Part II.C.2.

[81] *See* New Zealand Ministry of Justice, *supra* note 22.

[82] *Id.*

[83] *Id.* at Table 6.22.

[84] *Id.* at Table 6.19.

[85] *Id.* at Section 6.1.

[86] U.N. Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted By States Parties Under Article 9 Of The Convention, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand*, U.N. Doc. CERD/C/NZL/CO/17 (Aug. 15, 2007),

When the 2007 report by the United Nation Committee on the Elimination of Racial Discrimination ("UNCERD") publicly criticized New Zealand for the overrepresentation of Maori within the country's criminal justice system, it focused attention on the inaction of the government regarding its revisions to the 2002 Sentencing Act.[87] The report also provided an opportunity for Maori activists to speak up and draw attention to a problem that has consistently affected the Maori population.

2. The United Nation's Report Demonstrates the Ineffectiveness of the 2002 Sentencing Act in its Application

In its report, the UNCERD pointed out that New Zealand had not followed up on its revisions of the 2002 Sentencing Act to ensure their effectiveness.[88] The report succinctly states that "[t]he Committee regrets that the State party has not assessed the extent to which Section 27 of the 2002 Sentencing Act, providing for the courts to hear submissions relating to the offender's community and cultural background, has been implemented and with what results."[89]

After acknowledging New Zealand's lack of follow-up on its promising revisions to the 2002 Sentencing Act, the Committee criticized the overrepresentation of the Maori in New Zealand's prisons.[90] The UNCERD recommended that the sentences for Maori criminals be "assessed against their 'ethnic and cultural backgrounds.'"[91] The report noted that only 14% of criminals were aware that they were entitled to have their cultural background considered,[92] and that criminals blamed "resistance" among court officials for the underuse.[93] In response, the New Zealand Deputy Prime Minister Michael Cullen said that the report put the government "on notice" to improve relations.[94] Accordingly, New Zealand submitted a

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available at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/10-Oct-2008_13-36-31_CERD_Concluding_Observations_NZ.doc.

87 *Id.*

88 *Id.*

89 *Id.*

90 The Committee's concluding observations state, "The Committee reiterates its concern regarding the over-representation of Maori and Pacific people in the prison population and more generally at every stage of the criminal justice system." The report continues, "The Committee recommends that the State party enhance its efforts to address this problem, which should be considered as a matter of high priority." *See Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand*, *supra* note 86 at ¶ 21.

91 *See* Fawkes, *supra* note 16.

92 *Id.*

93 *Id.*

94 *Id.*

lengthy response to the U.N. Committee's report.[95] However, the response failed to address the issue of how and when courts should consider cultural factors during sentencing.[96]

3. New Zealand has also Faced Domestic Criticism for its Inability to Effectively Address Sentencing Concerns

The publication of the U.N. report provided the Maori community with an opportunity to speak out about its relationship with the criminal justice system.[97] Maori Party co-leader Pita Sharples expressed agreement with the report, stating that the Maori are "often the victims of 'cultural ignorance' within the criminal justice system."[98] When asked how he would like to see New Zealand's criminal justice system recognize the Maori, he responded that he would like to see "restorative justice and family group conferences used more widely in sentencing because they are a more culturally appropriate approach to criminal justice for the Maori."[99]

Others have expressed concern with New Zealand's criminal justice system, specifically concerning its sentencing system.[100] In 2004, Tom Hemopo, a Maori individual, brought a claim to the Waitangi Tribunal[101] alleging that the criteria[102] used by the Department of Corrections to

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[95] *See* New Zealand Committee on the Elimination of Racial Discrimination, *supra* note 17.

[96] *Id*.

[97] Maori Party, Report to the United Nations Committee on the Elimination of Racial Discrimination: Shadow Report, *Response to the 2006 Advance Report of the New Zealand Government* (May 2007), *available at* http://www2.ohchr.org/english/bodies/cerd/docs/ngos/maoriparty.doc (last visited Jan. 23, 2009) (the Maori party was able to submit its own shadow report to the UNCERD; and the Treaty Tribes Coalition (an NGO representing twelve New Zealand tribes) issued a response to New Zealand's official response); Treaty Tribes Coalition, *NGO Report Submitted by the Treaty Tribes Coalition in Response to Information Supplied by the Government of New Zealand on the Implementation of the Concluding Observations of the Committee on the Elimination of Racial Discrimination* (Feb. 2007), *available at* http://www.converge.org.nz/pma/cerd71-ttcfo.pdf (last visited Jan. 23, 2009).

[98] *See* Fawkes, *supra* note 16.

[99] *Id*.

[100] Waitangi Tribunal, The Offender Assessment Report for Claim, http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1024/8237665E-0C72-48DD-8F2A-6981F363FF29.pdf (last visited Oct. 23, 2010).

[101] Waitangi Tribunal, Waitangi Tribunal Introduction, http://www.waitangi-tribunal.govt.nz/about/intro.asp (last visited Oct. 25, 2010) (the Waitangi Tribunal is a permanent commission that hears claims brought by Maori relating to acts or omissions of New Zealand's Government ("The Crown") that violate the obligations assumed under the Treaty of Waitangi).

[102] "Criteria" here refers to the risk assessment methods used by the New Zealand Department of Corrections to determine an offender's risk of reoffending. The claim revolved around "RoC*RoI" (shorthand for risk of reconviction/risk of imprisonment), which is a statistical model that uses an offender's criminal history and demographics to assess the risk of reoffending, and "MaCRN" (Maori Culture Related Needs) a physiologically based assessment designed to identify the causative factors, such as drugs or alcohol, that should be targeted to reduce the risk of reoffending. *See* Department of Corrections, What is a RoC*RoI?, http://www.corrections.govt.nz/policy-and-legislation/cpps-operations-

determine the type and length of sentences disadvantaged indigenous offenders and were the result of prejudice.[103] The Tribunal found that the criteria did not necessarily represent prejudice,[104] yet it noted that the Department of Corrections had stopped including a variable for an offender's ethnicity in its risk assessment once the claim was filed.[105] Despite a finding that the criteria used to evaluate an offender's risk of recidivism neither resulted in nor resulted from prejudice, the Tribunal found that the government breached its promise[106] to work with the Maori as partners for developing and implementing these tools.[107] Although this claim concerned the role of the Department of Corrections in recommending sentences for offenders, and not the role of judges, it demonstrates a level of distrust and discontent with the sentencing process. Prejudice appears to permeate the process.

Given this overview of the status of the relationship between New Zealand's criminal justice system and the Maori, particularly in terms of sentencing, two things become clear. First, New Zealand's legislation guiding sentencing of indigenous offenders is not fatally flawed. In fact, the language of the 2002 Sentencing Act is quite thoughtful because it sets out culturally sensitive principles in language one would expect to support those principles. Second, these provisions, however well-written, are being underused, or at best, they are not being used in a manner that is effective and satisfactory to the Maori. The question for New Zealand is how to put this legislation to work so that it can do what it was apparently written to do. Neighboring Australia provides an answer.

III. NEW ZEALAND SHOULD LOOK TO THE AUSTRALIAN MODELS TO DETERMINE HOW TO EFFECTIVELY IMPLEMENT INDIGENOUS SENTENCING COURTS

Like New Zealand, Australia has grappled with how to address the overrepresentation of its indigenous Aboriginal population within the criminal justice system.[108] Generally, Australian states have broad

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manual/volume-1/i.-reports-general/roc_rol/2.html (last visited Jan. 23, 2009); *see also* Waitangi Tribunal Claim, *supra* note 100.

[103] *See* Waitangi Tribunal, *supra* note 100, at 1.

[104] *Id*. at 16.

[105] *Id*. at 15.

[106] *Id*. at 16, 150. The Treaty of Waitangi promises equal treatment for Maori. One of the principles of the treaty is to provide Maori with opportunities to provide input in government decisions.

[107] *See id*. at 16.

[108] Elena Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 SYDNEY L. REV. 415, 419 (2007).

sentencing provisions that allow magistrates to take an offender's background into account at sentencing.[109] However, over the last ten years, these magistrates have begun to interpret these provisions broadly in order to create specific indigenous sentencing courts or "Circle Sentencing Courts."[110] In most Australian states, legislation has followed to catch-up to, and codify, these ad hoc courts.[111] One state in particular, Victoria, has passed legislation that formally recognizes and establishes its indigenous sentencing courts, the Koori Courts, as a specific division of the Magistrates Court.[112] Even though these indigenous sentencing courts were established spontaneously in Australia, followed by formal legislation, they can serve as a model for New Zealand.

A. The Evolution of the Australian Indigenous Sentencing Courts Began With Individual Magistrates Broadly Interpreting Sentencing Provisions

The first indigenous sentencing court in Australia began with one Magistrate, Chris Vass, in Port Adelaide, South Australia in 1999.[113] His idea was to create a model that allowed for Aboriginal community involvement while addressing the overrepresentation of Aboriginals within the criminal justice system.[114] These courts, called "Nunga Courts,"[115] were also designed to build trust between the Aboriginal and European Australian communities.[116] As Magistrate Vass put it, "[T]he consensus among Aboriginal people was that they weren't being heard in courts, that it was a club for white fellas, which it probably is. [Now] they tell me they trust it and understand."[117] The concerns articulated by Magistrate Vass echo

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[109] *Id*. at 416.

[110] Some examples of indigenous sentencing courts in Australia include the Koori Courts in Victoria, Murri Courts in Queensland, Ngambra Courts in the Australian Capitol Territory, and the Community Courts in the Northern Territory. Tasmania is the only Australian state without some form of indigenous sentencing court. *Id*. at 416-17.

[111] Crimes Sentencing Act of 2005, § 33(1)(m) (Austl. Cap. Terr.); Queensland Penalties and Sentencing Act of 1992, § 9(2) (Queensl. Pub. Acts); Criminal Law (Sentencing) Act, § 9C(2)(a)-(e) (S. Austl.) (2008); Magistrates' Court (Koori Court) Act of 2002. (Vict.); New South Wales Criminal Procedure Regulation 2005, Schedule 4: Circle Sentencing intervention program , cl. 19 (N.S.W. Acts).

[112] Magistrates' Court (Koori Court) Act of 2002 (Vict.).

[113] Elena Marchetti & Kathleen Daly, *Indigenouse Courts and Justice Practices in Australia*, AUSTRALIA INSTITUTE OF CRIMINOLOGY, May 2004, at 2, *available at* http://www.aic.gov.au/documents/0/8/3/%7B08326CEA-3B11-4759-A25B-02C1764BCB8A%7Dtandi277.pdf.

[114] *Id*.

[115] "Nunga" was the name chosen for the court by the Aboriginal group near Pt. Adelaide. Tomaino J, Aboriginal (Nunga) Courts, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 2, 14, *available at* ttp://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf.

[116] *See* Morton, *supra* note 4.

[117] *Id*.

sentiments in New Zealand, and the model for indigenous sentencing courts that evolved in response to these problems can be instructive for New Zealand.

Since the Nunga Courts were first developed by Vass, the model has spread to other Australian states.[118] The Nunga Courts have also been recognized in a formal amendment to South Australia's 1988 Criminal Law (Sentencing) Act.[119] Similarly, other states have formally recognized the forms of indigenous sentencing courts created by individual magistrates, following South Australia's lead, in their own states.[120]

B. The Australian Model Operates in a Way that Fosters Constructive Community Involvement

The Australian model provides for Aboriginal community involvement in sentencing. While indigenous sentencing courts vary somewhat between Australian states and regions, the basic concepts guiding their operation are similar throughout the country.[121] The proceedings take place during special sessions[122] of the Magistrate Court where indigenous "Elders" or "Respected Persons" who know the offender participate in the sentencing.[123] The courts use Australian criminal laws and procedures rather than indigenous customary law.[124] However, they may take into account cultural considerations and an apology given according to Aboriginal tradition.[125]

In most indigenous courts, the only eligibility requirement is that the offender is an Aboriginal who has been found guilty and has consented to submit to the indigenous sentencing court for punishment.[126] The offender comes to court with a family member, friend, or partner, along with an Elder

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[118] For example, the Koori Courts in Victoria, Murri Courts in Queensland, Ngambra Courts in the Australian Capitol Territory, and the Community Courts in the Northern Territory all came after Vass' Nunga Model. Tasmania is the only Australian state without some form of Indigenous Sentencing Court. *See* Marchetti & Daly, *supra* note 108, at 416.

[119] *See* Criminal Law (Sentencing) Act, § 9C (S. Austl.) (2008).

[120] Magistrates' Court (Koori Court) Act of 2002. (Vict.); New South Wales Criminal Procedure Regulation 2005, Schedule 4: Circle Sentencing intervention program, cl. 19 (N.S.W. Acts).

[121] *See* Marchetti & Daly, *supra* note 108, at 421.

[122] For example, some states might set aside separate days on which the court will sentence Aboriginal offenders. Magistrates Court, Aboriginal Court Days, http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html (last visited Feb. 2, 2009).

[123] *See* Marchetti & Daly, *supra* note 108, at 421.

[124] *Id*. at 421.

[125] *Id*.

[126] *Id*. Queensland Government: Department of Justice and Attorney-General, The Murri Court, http://www.justice.qld.gov.au/__data/assets/pdf_file/0004/18697/Murri_Court.pdf (last visited Mar. 29, 2010).

or Respected Person from his or her community.[127] All participants sit at eye-level with the magistrate at a table (or in chairs arranged in a circle) in order to foster a sense of inclusion and community.[128] Alternatively, some areas have adopted a "Circle Court" model which is very similar, but involves an approach that "tak[es] a sentencing court to the local community." In this model, the magistrate sits in a circle with members of the community, which can include Elders, the victim, the victim's family, the offender and the offender's family.[129]

The aim of having an Elder join in the sentencing process is that, ideally, the Elder will have a positive impact on the offender by helping the offender "understand that they have 'committed an offense not only against the white law but also against the values of the [Indigenous] community.'"[130] The principle of including a representative from the offender's community, particularly one related to or familiar with, the offender may be replicated in New Zealand to serve a similar purpose.[131]

Aside from including Elders in the sentencing process, the Australian system also calls on local community justice groups to help inform the process.[132] These groups are responsible for gathering information about the offender, including his or her background, and ultimately submitting written or oral reports on the offender and possible treatment options.[133] In effect, the community justice groups are responsible for keeping the participants, including the Elder and the magistrate, informed of the offender's circumstances.[134]

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[127] *See* Marchetti & Daly, *supra* note 108, at 421.

[128] *Id.*

[129] Andrew Cannon, *South Australia: Nunga Court II- Aboriginal Sentencing Conferences*, CENTER FOR JUSTICE AND RECONCILIATION, 2007, http://www.restorativejustice.org/10fulltext/cannonandrew/view (last visited Mar. 29, 2009).

[130] *See* Marchetti & Daly, *supra* note 108, at 436 (quoting MARK HARRIS, "A SENTENCING CONVERSATION": EVALUATION OF THE KOORI COURTS: PILOT PROGRAM: OCTOBER 2002 — OCTOBER 2004 79 (Victoria Dept. of Justice 2006). The Elder can play different roles in his or her involvement with the court. Perhaps more importantly, as part of his sentence, an Aboriginal offender may be required to have weekly, or follow-up meetings with the Elder, who in turn advises the magistrate and plays a guardian role. At the same time, the Elder can also play a "shaming role." That is, the Elder can "help impart a positive and constructive notion of shame," coming from an indigenous source, rather than from an "embarrassing…fearful, or non-meaningful experience before a foreign and distant legal authority.

[131] *See* New Zealand Ministry of Justice, Sentencing Policy and Guidance — A Discussion Paper, Section 10.4, http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-maori-view-of-sentencing/?searchterm=indigenous%20sentencing (last visited Oct. 23, 2010).

[132] *See* The Murri Court, *supra* note 126.

[133] *Id.*

[134] *Id.*

C. Australian Indigenous Sentencing Courts are Supported by Legislation, Increasing Legitimacy and Consistency

In most Australian states,[135] the legislative framework supporting indigenous sentencing courts was initially weak.[136] However, in some states, legislation has, to varying extents, codified existing informal judicial practices.[137] All states initially relied on general sentencing provisions as the legislative basis for separate courts, while others have since amended their sentencing legislation to provide for specific procedures.[138] Victoria has gone the furthest by creating a separate legislative framework for its Koori Courts.[139]

1. South Australia and New South Wales' Codification of Indigenous Sentencing Courts Through Amendments Has Been Successful

In a few Australian states, where indigenous sentencing courts began based on general sentencing provisions,[140] the state legislatures have since amended their sentencing legislation to codify these types of specialized courts. In South Australia for example, the 2008 Legislature amended its 1988 Criminal Law (Sentencing) Act to include an entire section detailing the procedure for sentencing Aboriginal defendants.[141] In passing the amendment, the legislature acknowledged that its purpose was to "provide statutory backing" to a practice that was already in operation.[142] The Sentencing Act now provides that the court "may, with the defendant's consent, and with the assistance of an Aboriginal Justice officer . . . convene

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[135] Every Australian state except Tasmania has some form of indigenous sentencing court. *See* Marchetti & Daly, *supra* note 108, at 416-17.

[136] The Queensland Murri Courts, the Northern Territory's Community Courts, Western Australia's Aboriginal Sentencing Courts, and the Australian Capitol territory's Ngambra Courts all rely on general sentencing provisions of each state's sentencing act that place an obligation on the court to take into account any cultural considerations or community submissions when sentencing Aboriginal offenders. Crimes Sentencing Act of 2005, § 33(1)(m) (Austl. Cap. Terr.); Queensland Penalties and Sentencing Act of 1992, § 9(2) (Queensl. Pub. Acts); Sentencing Act of 2005, § 5(2)(e) (N. Terr.); Sentencing Act of 1995, § 6 (W. Austl.).

[137] Magistrates' Court (Koori Court) Act of 2002 (Vict.); Criminal Law (Sentencing) Act, § 9C(1)(a) (2008) (S. Austl.); New South Wales Criminal Procedure Regulation 2005, Schedule 4: Circle Sentencing intervention program, cl. 19 (N.S.W. Acts).

[138] Magistrates' Court (Koori Court) Act of 2002 (Vict.); Criminal Law (Sentencing) Act, § 9C(1)(a) (2008) (S. Austl.); New South Wales Criminal Procedure Regulation 2005, Schedule 4: Circle Sentencing intervention program, cl. 19 (N.S.W. Acts).

[139] Magistrates' Court (Koori Court) Act of 2002 (Vict.).

[140] *See supra* note 136.

[141] Criminal Law (Sentencing) Act, § 9C "Sentencing of Aboriginal Defendants" (2008) (S. Austl.).

[142] Parliament of South Australia, House of Assembly Transcript, Floor Debate, Dec. 1, 2003, 1005, 1018.

a sentencing conference."[143] South Australia also allows for someone to speak on the defendant's behalf, like in New Zealand; however, the language is not mandatory, unlike in New Zealand.

New South Wales also amended its sentencing legislation in 2005 to include provisions spelling out how the circle sentencing in the region should be handled, in the "Circle Sentencing Intervention Program."[144] The legislature supported the program whole-heartedly. One member rhetorically asked:

> Has the Government's Aboriginal pilot Circle Sentencing Program reduced the Aboriginal recidivism rate by 30 to 40 per cent in areas such as Dubbo and Nowra that have adopted this program? Does the Government acknowledge that these results are a significant success in the management of socio-cultural challenges facing the Aboriginal community throughout New South Wales? Does the Government have plans to further extend the Circle Sentencing Program to other areas?[145]

Although New Zealand should go a step further than amendments and adopt legislation similar to the Victorian legislation that created the Koori Courts, New South Wales and South Australia demonstrate the effectiveness of the end result. That is, the success in the two states demonstrates that this model can be successful, even if it would need to be based on specific legislation in order to come to fruition in New Zealand.

2. The Creation of a Separate Division for Indigenous Sentencing Courts Through Formal Legislation in Victoria Is Most Instructive for New Zealand

The most progressive step in implementing culturally sensitive sentencing was taken by the state of Victoria which created an entirely separate legislative framework for its Koori Courts[146] in the Koori Court Acts.[147] The Koori Courts began, like the courts in Port Adelaide, based on

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[143] Criminal Law (Sentencing) Act, § 9C(1)(a) (2008) (S. Austl.).

[144] New South Wales Criminal Procedure Regulation 2005, Schedule 4: Circle Sentencing intervention program, cl. 19 (N.S.W. Acts).

[145] Parliament of New South Wales, Legislative Council Transcript, Oct. 12, 2005, 18370.

[146] Magistrates' Court (Koori Court) Act of 2002 (Vict.).

[147] The Magistrates' Court (Koori Court) Act of 2002, amended the Magistrates' Court Act of 1989; later, the County Court Act of 1958 (Vict.) was amended by the County Court Amendment (Koori Court) Act 2008 (Vict.), so the current County and Magistrate Courts have parallel Koori Court Acts with nearly identical provisions.

magistrates exercising their discretion under general sentencing provisions allowing consideration of cultural factors.[148] However, the 2002 Koori Court Act established a Koori Court Division of the Magistrates' Court, providing the jurisdiction and procedure for that division.[149] In doing so, the Victorian legislature acknowledged, "[t]his is important and groundbreaking legislation, and in particular it enshrines the process of diversion within the legislative framework which has been operating through our court system for a significant time."[150] So far, Victoria is the only state to formalize indigenous sentencing courts as a special division.[151]

The creation of a separate framework and division to support and codify its existing Koori Courts enjoyed bipartisan support[152] as a means to address the overrepresentation of Kooris in prison.[153] Given this support, the Koori Courts also benefit from an extra level of legitimacy, which ideally attracts participants and increases trust in the system. The specific legislation has also increased the level of involvement of Elders by allowing judges to operate with more latitude when departing from mainstream practices.[154] As a result of this specific legislative framework providing for sentencing that considers the cultural background of offenders, a magistrate is less likely to feel like he or she is departing from the norm. Rather, a magistrate can feel confident that he or she is following a valid and accepted procedure allowing greater participation by the Aboriginal Elder.[155]

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[148] Magistrate Court Act of 1989 (Vict.).

[149] Magistrates' Court (Koori Court) Act of 2002, § 1(a)-(b) (Vict.).

[150] Parliament of Victoria, House of Assembly Transcript, Criminal Justice Legislation (Miscellaneous Amendments) Bill: Second Reading, June, 5, 2002, 2223, 2227, *available at* http://tex.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=19243&activity=Second+Reading&title=CRIMINAL+JUSTICE+LEGISLATION+%28MISCELLANEOUS+AMENDMENTS%29+BILL&date1=5&date2=June&date3=2002&query=true%0a%09and+%28+data+contains+'Koori'+%29%0a%09and+%28+hdate.hdate_3+=+2002+%29%0a.

[151] *See supra* Part III.A.

[152] Parliament of Victoria, House of Assembly Transcript, Sentencing (Further Amendment) Bill: Second Reading, Oct. 16, 2002, Mr. Wynne Speaking, 706, 714, *available a*t http://tex.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=20481&activity=Second+Reading&title=SENTENCING+%28FURTHER+AMENDMENT%29+BILL&date1=16&date2=October&date3=2002&query=true%0a%09and+%28+data+contains+'Koori'+%29%0a%09and+%28+hdate.hdate_3+=+2002+%29%0a.

[153] Parliament of Victoria, House of Assembly Transcript, Justice: Government Initiatives, Sept. 12, 2002, 172, 172, *available at* http://tex.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=20198&activity=Questions+without+Notice&title=Justice:+government+initiatives&date1=12&date2=September&date3=2002&query=true%0a%09and+%28+data+contains+'Koori'+%29%0a%09and+%28+hdate.hdate_3+=+2002+%29%0a.

[154] *See* Marchetti & Daly, *supra* note 108, at 431.

[155] *Id.*

D. Australian Courts Have Been Successful and Generally Well-Received, Thereby Providing Lessons for New Zealand

The results and reception of the special indigenous sentencing courts have been mostly positive in Australia. For one, the willingness of states to amend their Sentencing Acts to account for these courts demonstrates appreciation for the role they can play.[156] For example, when New South Wales was debating an amendment that would recognize its Nunga Courts, Member Chapman noted the positive response to this program, particularly in terms of increasing court attendance by indigenous offenders.[157] While studies on the effects of indigenous sentencing remain few and far between, a 2004 report from the Australian Institute of Criminology showed a reduction in Aboriginal offenders.[158] The availability of indigenous sentencing courts has also increased the rate of Aboriginal appearances in court,[159] decreasing the number of arrests for non-appearance.[160]

After a 2008 study in New South Wales found that there had been no reduction in imprisonment rates for Aboriginal offenders,[161] the indigenous sentencing courts received some limited negative press.[162] However, a closer examination of the facts demonstrates that while rates of imprisonment were not decreasing, the number of indigenous offenders actually decreased.[163] The New South Wales Bureau of Crime and Statistics found that the phenomenon captured in the 2008 study can be explained by stricter sentencing and harsher punishments,[164] with a quarter of the increase being attributable to remandees (those denied or refusing bail), and 75% of the increase attributable to sentenced offenders.[165] At the same time, the

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[156] *See supra* Part III.C.

[157] Parliament of South Australia, House of Assembly Transcript, Floor Debate, Dec. 1, 2003, 1005, 1019.

[158] *Indigenous Courts Cut Prison Numbers*, Australian Broadcasting Company. Aug. 15, 2004.

[159] Elena Marchetti & Kathleen Daly, *Indigenous Courts and Justice Practices in Australia*, AUSTRALIAN INSTITUTE OF CRIMINOLOGY, May 2004, *available at* http://www.aic.gov.au/documents/0/8/3/{08326CEA-3B11-4759-A25B-02C1764BCB8A}tandi277.pdf.

[160] *Id*.

[161] Jacqueline Fitzgerald, *Why are Imprisonment Rates Rising?*, NEW SOUTH WALES BUREAU OF CRIME AND STATISTICS AND RESEARCH, Aug. 2009, http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/bb41.pdf/$file/bb41.pdf.

[162] *Id*.

[163] *Id*.

[164] *Id*.

[165] *Id*. "The increase in the number of remandees appears to be due to a greater proportion of Indigenous defendants being refused bail and an increase in the time spent on remand. Similarly, the number of sentenced Indigenous prisoners has increased because more Indigenous offenders are receiving a prison sentence." *Id*.

number of indigenous offenders actually decreased from 21,156 offenders in 2001 to 19,601 in 2007.[166]

IV. NEW ZEALAND SHOULD RESTRUCTURE ITS SENTENCING PROVISIONS, FOLLOWING THE LEGISLATIVE MODEL DEVELOPED IN AUSTRALIAN STATES, TO INCLUDE INDIGENOUS SENTENCING COURTS

New Zealand's current sentencing provisions are not fatally flawed;[167] the problem is that these provisions are underused.[168] In order to address this problem, Australia provides a model for how to create a forum in which these provisions can be used to sentence Maori offenders. In terms of creating this model in New Zealand, Victoria's method of codifying a separate division of the court should be adopted by New Zealand. New Zealand would benefit from the forum—such a division would provide for Maori offenders and the Maori community. Further, creating such a sentencing court on strong legislative foundations would strengthen the legitimacy of a special division of the court and ensure that sentencing provisions regarding offender's cultural background are used consistently and effectively.

A. New Zealand Should Follow the Victorian State Model to Establish a Separate Court Division in Which the Current Sentencing Provisions are Applied

The language of New Zealand's Sentencing Act provides a constructive and well-designed process for considering an offender's cultural background,[169] yet it lacks enforcement mechanisms to ensure that it is actually put to use. Many elements of the current Sentencing Act are positive: it calls on the Maori community to be included in the procedure,[170] and it allows those communities to serve as alternative rehabilitative "programmes,"[171] thus potentially reducing the disproportionate number of Maori in prisons. The problem, however, is that these provisions are underutilized.[172] In this respect, the indigenous sentencing courts of Australia, particularly the Koori Courts in the state of Victoria, provide a solution.

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[166] *Id.*
[167] *See supra* Part II.C.3.
[168] *See supra* Part II.D.
[169] Sentencing Act of 2002, § 8(i) (N.Z.).
[170] Sentencing Act of 2002, § 27 (N.Z.).
[171] Sentencing Act of 2002, § 51(c) (N.Z.).
[172] *See supra* Part II.C.

Although the Koori Courts were initially established based on general provisions, such as one already existing in New Zealand, the legislative framework that now supports the Australian courts could support the creation of similar courts, or court sessions, in New Zealand. Ideally, New Zealand would create a framework similar to the Victorian model, making the provisions provided for in Sections 8(i), 27, and 51(c) stand separately as part of procedures for a special division, or sitting, of the Sentencing Courts.

1. New Zealand Would Benefit from Legislation Creating a Separate Division for Indigenous Sentencing

The Koori Courts provide a model for how New Zealand can implement the provisions of its current Sentencing Act relating to indigenous offenders. Providing legislation to support a separate division of courts would provide a jurisdictional and procedural framework to support the application of these provisions. It also provides an opportunity to grant judges some degree of flexibility within a set of specific rules for how indigenous sentencing might work.

New Zealand should adopt a procedural and jurisdictional framework that is similar to the Koori Court model, providing basic guidelines for indigenous sentencing. The Koori Court Act provides procedures for appeal from or to the Koori Courts;[173] an important mechanism for protecting offenders' interests. New Zealand could benefit from these simple procedural mechanisms. Clarifying definitions would help advocates and remove discretion from judges who might be unsure of, or even opposed to, the indigenous sentencing provisions. Adding basic procedural and jurisdictional requirements would clarify how and when a Maori offender may invoke these provisions, making the process more accessible, and hopefully more effective.

New Zealand would also benefit from adopting some of the substantive elements of the Koori Court Act. The Koori Court Act is well designed given the purpose of the Courts.[174] The legislation balances the decision to codify the courts with the benefits that comes from flexibility to be informal. With the aim of continuing to provide that flexibility, the Acts stipulates that, "[t]he Koori Court Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act . . . permit."[175] Moreover, the legislation provides

[173] Magistrates' Court Act 1989, § 4D (Vict.); County Court Act § 4D-E (Vict.).
[174] Magistrates' Court (Koori Court) Act of 2002 (Vict.).
[175] Magistrates' Court Act of 2002, § 4D(4) (Vict.); County Court Act, § 4A(5) (2008) (Vict.).

the newly created Division with judicial independence, providing that, "the Koori Court Division may regulate its own procedure" subject to the rules and regulation provided in the Act.[176]

This addresses some of the concerns that codification would inhibit the flexibility of the court and its ability to adapt best practices given changing circumstances: the procedure remains relatively general, but the legislation provides a forum for the practice, increasing the indigenous courts' profile and legitimacy. New Zealand would benefit from some degree of this type of flexibility within a legislated forum. The implementation of a separate division where indigenous sentencing provisions may be applied would likely require some modifications along the way. Furthermore, it would be wise to provide a judge with the opportunity to adapt the process to his or her circumstances.

Making the courts more accessible to the Aboriginal community and building trust is also addressed in both Koori Court Amendments.[177] The stated objective of the Koori Courts is to "ensur[e] greater participation of the Aboriginal community in the sentencing process."[178] If the aim is to increase Aboriginal participation, the courts should make every effort possible to ensure that the proceedings are comprehensible and accessible to the community.

New Zealand's Sentencing Act currently has no such stated objective, although the provisions allowing for testimony speaking to one's cultural background[179] and for the placement programs within the offender's Maori community[180] hint towards that at least one purpose could be to increase indigenous participation. Given the overrepresentation of Maori within the criminal justice system and the Maori expressions of frustration with the system,[181] it is prudent for New Zealand to aim towards a similar objective as Australia and attempt to incorporate Maori communities into the sentencing process. Currently, the underuse of New Zealand's sentencing provisions and the expressions of concern from both the Maori and the

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[176] Magistrates' Court Act of 2002, § 4D(6) (Vict.); County Court Act, § 4A(6) (2008) (Vict.).

[177] The Magistrates' Court (Koori Court) Act of 2002, amended the Magistrates' Court Act of 1989; the County Court Amendment (Koori Court) Act 2008 amends the County Court Act of 1958 with nearly identical language.

[178] Magistrates' Court (Koori Court) Amendment 2002, § 1(b) (Vict.); County Court Amendment (Koori Court) Act 2008, § 1(b) (Vict.). This language is in the "purpose" sections of the Amendments but does not appear in the actual legislation.

[179] Sentencing Act of 2002, § 27 (N.Z).

[180] Sentencing Act of 2002, § 51 (N.Z).

[181] *See* Marchetti & Daly, supra note 153, at 5 (citing Juan Tauri, Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturising the State?, 32 AUSTL. & N.Z. J. CRIMINOLOGY 153-67 (1999)).

United Nations suggest that New Zealand's criminal justice system would benefit from such explicit direction.

2. The Language of New Zealand's 2002 Sentencing Act Should Be Amended to Adopt a Formal Framework Similar to the Koori Court Model

The current indigenous sentencing provisions remain underused despite the mandatory language of New Zealand's Sentencing Act.[182] The mandatory language of the current Sentencing Act should remain to avoid granting too much discretion to judges. On the other hand, the Amendments establishing the Koori Courts contain no mandatory language.[183] Language requiring a Koori Court to hear a case may seem redundant. Where there is a special division of courts to hear Aboriginal cases, it is a foregone conclusion that special sentencing provisions are applied.[184] Analogously, creating a separate division of indigenous sentencing courts in New Zealand would increase the application of indigenous sentencing provisions without the need for mandatory language. Yet given the history of under-use in New Zealand, procedures that work in the Koori Courts may leave too much discretion to New Zealand judges.

The same level of judicial discretion in imposing indigenous sentencing is not appropriate for New Zealand. Although this may create tension with the need for flexibility discussed above, this would be eased by allowing discretion within specific procedural requirements. For example, the language of New Zealand's statute *requires* a judge to respect an offender's request to have a representative speak to his or her cultural background.[185] Such a strong mandate should remain, given New Zealand's history of underuse of the provision, as it ensures that the objectives of any reform efforts cannot be thwarted by individual judges who may misuse their discretion. At the same time, the judge is not unreasonably bound by the provision if there is good cause to deny such a request. In this way, New Zealand appears to strike a good balance in imposing a reasonable burden on the magistrate to allow an offender to call someone to speak to his or her cultural background.

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[182] *See supra* Part II.D.

[183] Magistrates' Court (Koori Court) Amendment 2002, § 1(b) (Vict.); County Court Amendment (Koori Court) Act 2008, § 1(b) (Vict.).

[184] Sentencing Act of 2002, § 27 (N.Z).

[185] Sentencing Act of 2002, § 27(2) (N.Z).

a. In Order to Increase the Use of Indigenous Sentencing Provisions, New Zealand Should Revise Section 27(5) to Require a Court to Advise Offenders of Their Right to Call a Witness to Speak

The language of Section 27(5)[186] of the 2002 Sentencing Act allows the court to "suggest to an offender, that it would be of assistance to the court to hear [a witness]."[187] The permissive language of the provision does little to shift the burden from the offender to the court in bringing up the relevance of his or her background.[188] Although it may not be the court's traditional responsibility to help an offender put on a defense, if New Zealand seeks to raise awareness of this provision, and ensure its use, it should amend the language of Section 27(5) to make it mandatory for the court to inform the offender that he may call a person or persons to speak on his behalf and that he is entitled to be have such witnesses be heard.[189] Under these revisions, the court would bear the burden of ensuring that offenders are aware of their entitlement and hopefully increase the consideration of an offender's cultural background.

b. Application of Section 51 of the Sentencing Act Would Benefit From Guidelines that Provide Clear Direction for the Sentencing Court

The question of discretion in Section 51, providing for alternative placement options,[190] is trickier. Unlike the Koori Court, or any other indigenous sentencing court, New Zealand explicitly provides that the sentencing court may place an offender in the care of "any appropriate person or persons, including, his or her iwi [extended kinship group or tribe], hapu [kinship group, clan, or tribe or subtribe], or whanau [extended family], etc . . ."[191] This provision is important given New Zealand's restriction that an offender's background be considered only for rehabilitative purposes.[192] Yet requiring that a court *must* apply any of these alternative options would unnecessarily bind the court, and lead to an unreasonable outcome, given that alternative sentences are unlikely to be appropriate in every case.

A better solution would be to provide guidelines or perhaps follow the model in Section 27 and require the magistrate to include his or her reasons for imposing the sentence chosen. Ultimately, while the sentence itself must

[186] Sentencing Act of 2002, § 27(5) (N.Z).
[187] Sentencing Act of 2002, § 27(5) (N.Z).
[188] Sentencing Act of 2002, § 27(5) (N.Z).
[189] Sentencing Act of 2002, § 27(2) (N.Z).
[190] Sentencing Act of 2002, § 51(c) (N.Z).
[191] Sentencing Act of 2002, § 51 (N.Z).
[192] Sentencing Act of 2002, § 8(i) (N.Z).

remain discretionary, a revised sentencing statute should provide direction for courts to consider alternative placements while allowing for flexibility given the unique circumstances of each offender.

B. New Zealand Should Take Policy Considerations Acknowledging Criticisms of Australia's and Its Own Sentencing Processes into Account when Developing an Effective Indigenous Sentencing Model

Before moving forward, there are some criticisms of the indigenous sentencing processes that should be noted and kept in mind when addressing an effective model for New Zealand. The courts must avoid becoming paternalistic, but at the same time, they must also take precaution to avoid the appearance of providing special treatment to indigenous groups. Courts must also balance the benefits of formality and consistency with the advantages that come with flexibility. Yet despite these concerns, adopting the Australian model, particularly the one developed in Victoria, is worthwhile.

First, one of the criticisms surrounding the process is that it is paternalistic, or a purely token gesture.[193] In his essay, Juan Tauri expresses concern that sentencing taking an offender's background into account does little to effect an actual change in the condition of indigenous people within the criminal justice system.[194] Instead, he argues that it is an empty gesture and perhaps a dangerous one because it could lead to different treatments for criminals based on race, or "biculturisation."[195] The concern over varying sentencing standards is not exclusive to Australia and New Zealand—others have argued adamantly for equal treatment among criminals.[196]

Similarly, concerns in Australia include fears that the punishments imposed by indigenous sentencing courts are too lenient.[197] If a court considering an offender's cultural background continues to impose lighter or more lenient punishment, it risks creating the perception that one's ethnicity, hardship, or race is a mitigating factor. In New Zealand as well, there was public outcry when a judge who considered a Maori defendant's background, sentenced the defendant to three years in prison for

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[193] *See* Marchetti & Daly, supra note 108, at 5 (citing Juan Tauri, Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturising the State?, 32 AUSTL. & N.Z. J. CRIMINOLOGY (1999)).

[194] *Id.*

[195] *Id.*

[196] *See* Roberts, *supra* note 55.

[197] *See* Marchetti & Daly, *supra* note 108, at 421.

manslaughter in the death of the child he was babysitting.[198] It was perceived as both unfair and as an aberrational application of law.[199] If New Zealand wishes to effectively allow their courts to consider an offender's background, it must ensure that the process is applied consistently and in a manner in which one's background broadens the court's possibilities for rehabilitation rather than as a mitigating factor. New Zealand's current legislation already addresses these concerns by requiring an offender's background be considered only for rehabilitative purposes and further requires a direct link between the offender's background and the commission of the offense.[200] However, the inconsistent application of the provisions applying to Maori offenders remains a hurdle. By increasing the legitimacy and profile of courts that apply these provisions, New Zealand can expect the indigenous sentencing provisions to become more consistent and less controversial.

As the process of Aboriginal sentencing has evolved in Australia's states, some magistrates have expressed concern that the increasing codification and formalization of the practice has made the process less flexible.[201] Flexibility allows the courts to evolve as the magistrates learned what worked and what did not. Though recognition through legislation may increase legitimacy, there are magistrates who worry that legislation may "make the process too 'state led' or compromise the experimental qualities of court."[202] Addressing these concerns means New Zealand must find a delicate balance between ensuring consistency and allowing for growth. In the end, a legislative mechanism that effectively puts New Zealand's existing legislation to work may not be able to satisfy everyone's demands, but as it begins to function effectively, it will address the varied concerns while prioritizing them.

Despite these concerns though, there remain reasons why Australia's model is worthwhile for New Zealand to adopt. One study found the indigenous sentencing process increased trust between "white justice" and members of the indigenous community.[203] It is not hard to see why: the process encourages communication between the magistrate and the offender in a less formal, or at least less European, environment. It also places a

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[198] *Cutting to the Chase*, NATIONAL BUSINESS REVIEW (NEW ZEALAND), Dec. 12, 2003 at 20; *Family Tells of Remorse*, THE EVENING STANDARD (New Zealand), Oct. 30, 2003 at 3 (information on offender's family testifying at sentencing).

[199] *See id*.

[200] Sentencing Act of 2002, § 8(i) (N.Z).

[201] *See* Marchetti & Daly, *supra* note 108, at 431.

[202] *Id*.

[203] *Id*. at 422.

greater reliance on indigenous knowledge while "respect[ing the] modes of social control in and outside of the courtroom.[204] That is, at the same time the input of the Elder or community representative helps ensure that the ultimate penalty is appropriate and well-suited to the offender's circumstance. Furthermore, the representative helps to build trust and prevent the offender from feeling like he or she is being subjected to a completely foreign law or system of justice. Moreover, some have suggested that one of the long-term collateral effects of the process will be to strengthen and rebuild indigenous communities[205] while re-establishing the authority of Elders within those communities.[206] As one Magistrate put it, "the Circle Court doesn't end in the courtroom, but continues with the encouragement of the circle members . . . with the strengthened informal social control may come a more peaceful community."[207] Therefore, one would hope that the sentencing process in New Zealand, as in Australia, would not only help relations between "white justice" and the indigenous community but also strengthen relations within indigenous communities themselves.

V. CONCLUSION

Ultimately, the slow but steady progress resulting from Australian innovations to indigenous sentencing processes can provide direction for New Zealand. Like Australia, New Zealand faces the challenge of how to address the overrepresentation of its indigenous population in its criminal justice system. Given the domestic and international criticism of the Maori's condition in relation to the criminal justice system, change is necessary. Reforms to the sentencing process alone cannot be expected to cure the broader problems facing the indigenous populations in Australia and New Zealand, but that is no reason to avoid any small step available to make the process more open and accessible. New Zealand has drafted thoughtful legislation in its current Sentencing Act, but the indigenous sentencing Provisions are useless if they are not implemented by the courts and those offenders in the criminal system. The key to resurrecting these provisions and making sure they become effective lies in adopting a legislative framework in which they can flourish.

The creation of a special division of local courts in New Zealand to

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[204] *Id.*
[205] *See* Marchetti & Daly, *supra* note 159, at 5 (citing interview with Dick, D).
[206] *See* Marchetti & Daly, *supra* note 108, at 422.
[207] *See* Marchetti & Daly, *supra* note 159, at 5 (citing interview with Dick, D).

sentence indigenous offenders would mitigate the problems of underutilization of provisions intended to allow courts to consider an offender's background. By establishing a special division of courts, New Zealand would immediately raise the profile of such provisions by creating a forum for their use and compel magistrates, lawyers, and offenders to put the existing provisions to work. Following the Victorian Koori Court model would also legitimize the courts and in turn, as the provisions are used more and more, the use of these provisions would become more effective. Finally, revising the statute to require the sentencing courts to consider alternative placements for indigenous offenders would strengthen the relationship between the criminal justice system and the Maori communities, while addressing the overrepresentation of Maori offenders in prison. In the end, one would hope that these steps would ensure future Maori do not feel that sentences are merely the "final systemic act in a series of culturally-insensitive or biased steps."[208]

[208] New Zealand Ministry of Justice, Speaking About Cultural Background at Sentencing, Section 1.2, http://www.justice.govt.nz/publications/global-publications/s/speaking-about-cultural-background-at-sentencing/introduction#1.2 (last visited Jan. 18, 2010).