Are Parole Boards Working?
or
Is It Time for an Indigenous Re Entry Court?

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I INTRODUCTION

Statistics indicate that the current criminal justice system, including parole, is not working for Maori[1] and every second offender that appears before the New Zealand Parole Board [NZPB] will be Maori. Jurisdictions, such as Canada, have established a specialized indigenous forum to act as an advisory group to address cultural issues that inform Canada's National Parole Board. However, in achieving the purpose of the Parole Act, there is no clear direction within the policies of the NZPB on how the obligation of the Treaty of Waitangi[2] impacts on the decision making process of the NZPB. Similarly, there are no policy guidelines for cultural consideration. This raises concerns for Maori, both procedural and substantive, in terms of how culture is considered in the decision making by the NZPB.

Disenchantment with the NZPB has led to calls to overhaul the New Zealand parole system[3] to exclude parole for some offenders.[4] Continuing offending whilst on parole has encouraged the public to perceive parole as the soft option with calls for tougher sentencing as the answer.

Parole Boards like the NZPB have long been the jurisdiction of the Executive. A shift back to the Judiciary in the form of a Re Entry Court will provide transparency and accountability both to the offender and society. Specialist Courts such as Re Entry Courts are underpinned by therapeutic jurisprudence. Therapeutic jurisprudence shares commonalities with tikanga Maori, an indigenous legal system.

Against this background of public disenchantment and disproportionate statistics the first part of this paper will traverse the current parole system in New Zealand, highlight some

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[1] See B Morrison, N Soboleva and J Chong "Conviction and Sentencing Offenders in New Zealand: 1997 – 2006" Ministry of Justice April 2008 p 118.

[2] See discussion in M Durie *"Nga Tai Matatu – Tides of Maori Endurance"* (Oxford University Press, Australia, 2005) p 146 for discussion on increasing government consciousness of Treaty obligations.

[3] "Parole system under scrutiny" One News/Newstalk ZB Sunday January 7, 2007. Available also <http://tvnz.co.nz/content/953573> last accessed 10 December 2010. "Need to abolish parole highlighted" December 6, 2008. Available also <http://tvnz.co.nz/national-news/need-abolish-parole-highlighted-2360814> last accessed 10 December 2010.

[4] "National demands parole overhaul" Newstalk ZB Sunday 7, 2007. Available also <http://tvnz.co.content/953313> last accessed 14 December 2010. See also "Burton considers parole changes" One News/Newstalk ZB Monday January 29, 2007. Available also <http://tvnz.co.nz/content/972253> last accessed 14 December 2010.

problems and analyse comparable jurisdictions such as the Canadian parole system. To address these problems the second part of this paper suggests a Re entry Court.

Indigenous Re Entry Courts originate from indigenous legal codes. In conclusion, to address the lack of procedural and substantive cultural consideration, the final part identifies the similarities between therapeutic jurisprudence and tikanga Maori and suggests that an Indigenous Reentry Court as a possible vehicle that may provide a way forward.

II PART A

i. Background

Maori are today disproportionately represented in New Zealand prisons.[5] Although there are subsisting methodological difficulties[6] associated with gathering of statistics, such as; the classification of how a "Maori" is determined, who is a "Maori," the circumstances under which the statistics were gathered, the interpretation of the statistics; it must be acknowledged these statistics[7] suggest 50 per cent of the New Zealand prison population[8] is Maori. It has been said that the high rate of imprisonment in New Zealand is attributable to an almost US-like level of incarceration for Maori.[9] Pratt remarks that:[10]

> 50 percent of the prison population are indigenous Maori, even though they make up only 15 per cent of the population – in 1950 they constituted 18 per cent of the prison population. The Maori rate of imprisonment is 350 per 100,000 of the population; that for Europeans is 100 per 100,000.

In 2006, these statistics remain the same with just over 50 percent of all cases resulting in a custodial sentence being Maori.[11] Maori also have a higher offending rate and recidivism rate than non-Maori.[12] In 2000, Maori comprised 42 per cent of all convictions, 46 per cent of convictions for violence and 56 per cent of proved cases in the

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[5] See B Morrison, N Soboleva and J Chong "Conviction and Sentencing Offenders in New Zealand: 1997 – 2006" Ministry of Justice April 2008 p 118, See also M Rich *"Census of Prison Inmates 1999"* (Department of Corrections SAS Policy Development, Wellington, December, 2000), 43. Available also <http://www.corrections.govt.nz >.

[6] See for discussion on problems including self identification or justice system identification J M Tauri *"Indigenous Justice or Popular Justice Issues in the Development of a Maori Criminal Justice System."* in P Spoonley, D Pearson and C McPherson (eds) *"Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand"* (Palmerston North, Dunmore Press, 1996), 214.

[7] Morrison et al above n 2. See also B Baybrook and R O'Neill *"A Census of Prison Inmates"* (Justice Department, Wellington, New Zealand, 1988). See also Rich above n 5.

[8] Rich, ibid, identifies 54 per cent inmates as Maori. See also Department of Corrections *"About Us, Facts and Statistics, Prison Statistics"* (2003), which identifies 50 per cent of male inmates as Maori available.<http://www.corrections.govt.nz >. See also Morrison et al above n 1.

[9] S Collins *"Locked into Days of Idleness"* Weekend Herald 2 5 February 2005 p B6.

[10] J Pratt *"The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment"* (2006) 46 (4) British Journal of Criminology, 541 at 542.

[11] B Morrison, N Soboleva and J Chong "Conviction and Sentencing Offenders in New Zealand: 1997 – 2006" Ministry of Justice April 2008 p 118.

[12] J Lux "Kia Mauritau" published in D Biles and J Vernon (ed), *"Private Sector and Community Involvement in the Criminal Justice System: proceedings of a conference held 30 November 1992, Wellington, New Zealand"* (Canberra, Australian Institute of Criminology, 1994) ISSN 1034-5086, available <http://www.aic.gov.au>

Youth Court.[13] More troubling perhaps, are the statistics from the Department of Corrections[14] that forecast Maori offending rates will not only remain high but will continue to surpass non-Maori offending rates. Whilst the percentage of Caucasian apprehended offenders has decreased slightly from 50.33 per cent in 1996 to 45.15 per cent in 2005 the percentage of Maori increased from 39.6 per cent in 1996 to 42.45 per cent in 2005.[15]

Although the Annual NZPB Reports do not provide an ethnic breakdown, if Maori comprise 50 percent of custodial sentences then it is reasonable to assume that, in the minimum, at least, half of the offenders that come before the Parole Board will be Maori. The Treaty of Waitangi guaranteed to Maori the full, exclusive and undisturbed possession of their lands, estates and other treasures. This has been taken to include the Crown's obligation to maintain Maori health and social standards including the NZPB policy on release. Despite these statistics there is no clear direction within the policies of the NZPB on how the obligation of the Treaty of Waitangi impacts on the decision making process of the NZPB. Similarly, there are no policy guidelines for cultural consideration.

ii. Parole Board

New Zealand's first parole legislation was introduced by the Crimes Amendment Act 1910 but only for indefinite sentences. The Statute Law Amendment Act 1917 provided that inmates serving finite sentences of two years or more could be released on probation after serving half their sentence. This was extended to all finite sentences, by the Crimes Amendment Act 1920, offering eligibility after the longer of either six months or half their sentence served. The Criminal Justice Act 1985 provided for a structure that included a Parole Board and 17 District Prison Boards. Section 108 of the Parole Act 2002 establishes the New Zealand Parole Board, an independent statutory body, replacing the former fragmented system. Despite this raft of legislation there is no referral to Maori issues or the Crown's Treaty obligations to Maori.

iii. Parole - Today

Parole[16] is the discretionary release of offenders by the NZPB from prison to serve the remainder their sentences in the community under conditions laid down by law.[17] The NZPB is currently comprised of 20 Judges, 17 non judicial members and chaired by Judge David Carruthers.

The NZPB operates in panels of at least three members, with each parole hearing requiring the participation of a convenor and two non judicial representatives. Panel decisions are by a majority.

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[13] Refer Ministerial Briefings 2002, *Justice, Maori and Pacific crime and victimisation*, 2.3.6, (2002) available www.beehive.govt.nz.

[14] Ibid.

[15] See <http://www.stats.govt.nz/products-and-services/table-builder/crime-tables/default.htm> accessed 23 January 2008.

[16] The purpose of the Parole Act in section 3 is to reform the law relating to the release from detention of offenders serving sentences of imprisonment.

[17] Hall G 'Sentencing' in Brookbanks and Tolmie (ed) *"Criminal Justice in New Zealand"* (Lexis Nexis, Welington, 2007) p 274.

The paramount consideration for the NZPB is ensuring the safety of the community.[18] Irrespective of how heinous the crime or traumatized the victim,[19] if the offender is no longer a risk, the NZPB must not deny parole. Factors of general deterrence or a community desire for retribution are irrelevant.[20]

Other principles that must guide the Board's decision are;[21]

> Offenders must not be detained any longer, or be subject to release conditions or detention conditions that are more onerous, or last longer than is consistent with the safety of the community (sections 7, 8, 35)22
> Offenders must be provided with information about, and be advised of, how they may participate in decision making that directly concerns them
> Decisions must be made on the basis of all relevant information that is available to the Board at the time (sections 13AA – 13AE) and
> The rights of the victims must be upheld, and victims' submissions and any restorative justice outcomes must be given weight.

Parole hearings increased from 3971 in 2006/07 to 4261 in 2007/08, an increase of 7.3 percent.[23] Of those heard 29.4 per cent were approved, similar to the previous year of 28.3 per cent approval.

Upon release a parolee is required to report to a probation officer who then has the responsibility to monitor progress and adherence to the conditions including residential restrictions.[24] This is related to, but different to, the legislative amendment that requires an offender to come back before the Board for a Compliance Hearing for the Board to monitor the offender's progress in complying with their conditions of release.[25] The NZPB Annual Report does not contain the statistics on parole breaches. However during 2007/08 there were 272 recall[26] applications for offenders on parole. Of these 188 or 69.1 per cent were approved.[27]

The amendments to the Parole Act[28] now require offenders to serve a greater proportion of their sentence before being eligible for parole. For instance, offenders serving long term sentences are now required to serve two thirds of their sentence or 12 months, whichever is longer, before becoming eligible for parole. This doubles the threshold currently required.

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[18] Section 7 (1) Parole Act 2002.

[19] See *Smither v The New Zealand Parole Board* [2008] NZAR 368 per Hansen J HC Christchurch para [15] – to give the victim primacy is to effectively give them the power of veto.

[20] *A v The New Zealand Parole Board* [2008] NZAR 703 per Simon France J HC Wellington para 43. See also *Reid & Anor v New Zealand Parole Board* (2006) 22 CRNZ 743 at Judgment of the Court para A.

[21] Hall above n 19, p 276.

[22] See also *Reid v New Zealand Parole Board* (2006) 22 CRNZ 743.

[23] Parole Board Annual Report 2007/08 p 16. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

[24] Sections 14 – 16, 29 -29B of the Parole Act 2002. See also discussion in Hall G 'Sentencing' in J Tolmie and W Brookbanks "Criminal Justice in New Zealand" (Lexis Nexis, Wellington, 2007) p 274 – 275.

[25] See Section 29A and 29B Parole Act 2002 – Board may monitor compliance with conditions.

[26] Under sections 59 – 61 Parole Act 2002, the Department of Corrections may apply to the Board to have an offender recalled to continue serving a sentence in prison.

[27] NZPB Annual Report 2007/08 p 28. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

[28] See Section 48 Parole Act 2002 "Non Parole periods".

iv. Parole Board and Maori

Maori are over represented within the criminal justice system. Yet, the recognition of indigenous law/tikanga Maori within the justice system varies from recognition of Maori customs and values[29] to rejecting claims based on lack of jurisdiction.[30] Within the criminal justice system this is further limited to incorporation into programmes by the Corrections Department.[31]

The current policy framework of the NZPB acknowledges that the Treaty of Waitangi gives rise to certain rights and obligations.[32] This policy framework indicates that the NZPB will always operate in a way that is sensitive to iwi and hapu, whanau and Maori communities. The NZPB will also ensure that Maori cultural concepts, values and practices will be respected and safeguarded.

However, there is no clear direction within the policy documents to determine how this is to be achieved and, if it has not been achieved, if any redress may be available. By default it is assumed that this obligation lies with the decision maker to satisfy. There is no specific allocation of Maori representation at the decision making stage despite the disproportionate statistics for Maori.

The functions of the NZPB contained within the Parole Act[33] require the development of policies on how to discharge these functions. The NZPB is currently reviewing all its policies. As part of an effort to improve the decision making process the NZPB engaged Professor Jim Ogloff to develop a straight forward, comprehensive and user friendly evidence based methodology for structured decision making on New Zealand conditions and reflecting New Zealand concerns.[34] It is unclear whether this methodology will provide for cultural considerations on decision making.

v. Parole - Canada

The National Parole Board is a Canadian government agency that operates under the auspices of Public Safety Canada. Created in 1959 under the Parole Act, the Board primarily deals with the Corrections and Conditional Release Act, Criminal Records Act and the Criminal Code of Canada.

It is an independent administrative tribunal that has the exclusive authority under the Corrections and Conditional Release Act to grant, deny, cancel, terminate or revoke day parole and full parole.[35] The Corrections and Conditional Release Act and Regulations is the prescriptive legislative framework which guides NPB policies, operations, training and parole decision making. The National Parole Board is also

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[29] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* Maori Law Review July 2003 p 2 – 8.

[30] *R v Toia* CRI 2005 005 000027 Williams J HC Whangerei 9 August 2006.

[31] For example Te Whanau Awhina. See also domestic violence programmes at <http://www.justice.govt.nz/pubs/reports/2002/maori-domestic-violence/chapter-4.html>

[32] NZPB *"Framework policy covering the development of the Board's Policies"* Policy 1, Introduction – however all policies are now under review.

[33] Section 109 of the Parole Act 2002.

[34] Personal communication.

[35] In addition, the Board is also responsible for making decisions to grant, deny and revoke pardons under the Criminal Records Act and the Criminal Code of Canada.

guided in its mandate by the Letters Patent, and the Privacy and Access to Information Acts.

The National Parole Board in Canada makes parole decisions for all federal offenders and for provincial offenders in provinces that do not have their own parole board. It is part of the criminal justice system and works with key partners to develop and support an effective criminal system that is focused on a common objective of protecting the community and promoting respect for the law.

Each hearing panel is comprised of two Board members who consider a range of issues. These include the offence, criminal history, social problems, psychiatric reports, performance on earlier release, opinions from judges, Elders, or other professionals, information from victims and other information that would indicate whether the release would present an undue risk to the community. Positive changes are also examined including behaviour and benefits from any programme while incarcerated and the offender's personal plan for living within the community upon release.

Although parole board members engage in continuous training and learning to promote cultural awareness, First Nations, Inuit and Metis offenders have access to Elder and Community assisted Hearings. These hearing are designed to provide a culturally sensitive process for Aboriginal offenders and may incorporate traditions such as "a cleansing smudge", opening the room to a circle and conducting traditional teachings in preparation for a hearing. The Elders act as an Advisor to the Board during deliberation stage of the hearing.[36]

vi. Parole – Comparison Canada and New Zealand

Neither Parole Boards are immune from the criticism of parolees committing further offences whilst on parole.[37] The National Parole Board of Canada defends its record, noting that between April 1994 and March 2006, 70 per cent of 14,792 offenders who had a full parole supervision period, completed their sentence successfully.[38] A little over 17 per cent had their parole revoked for breach of conditions while almost 13 per cent had their parole revoked as a result of committing a new offence. In the same period, the Board granted 32,236 day parole releases. Nearly 82 per cent were completed successfully. Revocations for breach of conditions amounted to slightly less than 13 per cent while 5.8 per cent were revoked for committing new offences. In New Zealand legislative amendments that require offenders to serve a larger proportion of their sentence before becoming eligible for parole and the power to monitor release on parole are viewed as steps to reducing offending while on parole.[39]

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[36] National Parole Board "From confinement to Community: The National Parole Board and Aboriginal Offenders". Available also <http://www.npb-cnlc.gc.ca/infocntr/fctc-eng.shtml> last accessed 16 March 2010.

[37] "Family wonders how killer got multiple paroles" CTV ca News Staff, 21 December 2003. Available also <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1071888288460_67297488/?hub=TopStories> last accessed 16 March 2010. See also "'Balaclava Rapist' broke parole conditions" CTV ca News Staff, 18 January 2005. Available also <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1106017647438_28?s_name=&no_ads> last accessed 16 March 2010.

[38] "Reports and Publications – Parole Decision Making Myths and Realities". Available also <http://www.npb-cnlc.gc.ca/infocntr/myths_reality-eng.shtml> last accessed 16 March 2010.

[39] See Parole Act 2002 Sections 29B – "Board may monitor compliance with conditions" and 48 – "Non-parole periods"

Although the similarities between the NPB and the NZPB are primarily due to the fact that the NZPB model has been designed on the Canadian parole system there are some major differences.

The ability for kaumatua (Maori elders) to participate during deliberations is not available for New Zealand offenders despite the high proportion of Maori offenders appearing before the Parole Board. New Zealand does not employ half way houses to allow for a "better test of freedom in the community" in a safe way.[40]

According to Judge Carruthers:[41]

> managed release on parole was at least twice as successful in preventing re offending as automatic release at the end of sentence.

Also quite significantly, unlike New Zealand, in Canada all parole hearings are open to the public.[42]

Does the Parole Board have a Treaty Obligation to Maori?

The two different texts of the Treaty of Waitangi have caused much debate.[43] Nevertheless, it is commonly accepted that Article 2 confirms and guarantees to Maori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other treasures. Although this may seem to be restricted to forests and fisheries, in 1988 the Royal Commission on Social Policy concluded that the Treaty's relevance is wide and has implications for health and social policies.[44] This extension of the Crown's obligation to Maori to maintain health and social standards would include the NZPB policy on release. Consistent with this the Maori text, which contained the most signatories and which at law is to be preferred, protects "taonga", a more inclusive term referring to all things treasured, both tangible and intangible.

The Principles of the Treaty of Waitangi

Initially viewed as a simple nullity,[45] the orthodox view, on the legal effect of the Treaty of Waitangi, is that unless it has been adopted or implemented by statute, it is not part of our domestic law and creates no rights enforceable in Court. It is the "Principles of the

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[40] D Carruthers *"Chairpersons Report"* New Zealand Parole Board Annual Report 2007/08, p 5. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

[41] "Halfway houses could make communities safer" NZPA 5 December 2008. Available also <http://www.3news.co.nz/News/Prison/Halfway-houses-could-make-communities-safer/tabid/423/articleID/83067/cat/357/Default.aspx> last accessed 16 March 2010.

[42] A Spierling *"Manager's Report – The Year in Review"* New Zealand Parole Board Annual Report 2007/08 p 9. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

[43] See for example discussion M Solomon "The Wai 262 Claim" in M Belgrave, M Kawharu and D Williams (ed) *"Waitangi Revisited"* (Oxford University Press, Australia, 2005) pp 216 - 217

[44] Royal Commission on Social Policy (1988) *The April Report Vol II: Future Directions*, Royal Commission on Social Policy, Wellington p 27 – 80.

[45] *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ.

Treaty" that are referred to in legislation[46] and policy documents[47] rather than the text of the Treaty itself.

When appropriate, legislation and policy requires decision makers to take into account the Principles of the Treaty.[48] For instance, when assessing an application for resource consent the decision maker is required by the Resource Management Act 1991[49] to take into consideration the Principles of the Treaty.[50] Also the Ministry of Health strategies in Moving Forward: the National Mental Health Plan for More and Better Services identified the Treaty of Waitangi as its fourth principle to satisfy.[51] It would follow that, when necessary, the NZPB, as a decision maker, should take into account, as one of the considerations on whether or not to grant an application for release, the Principles of the Treaty.

What is *Tikanga* Maori – An Indigenous Legal System?

The legal system for Maori originates from *Te Ao Maori*, the Maori world view. *Te Ao Maori* encompasses cosmology and the creation stories that determine their relationship to each other, the environment and the spiritual world. This establishes the Maori social charter for our understanding and behaviour in the same sense as legal precedent. *Tikanga*[52] is developed through these stories and ancestral precedents[53]; it is the practice that gives effect to *kaupapa*[54], which means "first principles". Together they set the parameters within which the concepts are given effect; *tikanga* is the law giving effect to basic principles or ground rule. Within this system key concepts, such as *mana* (charisma) and *tapu* (sacred), act as regulators.

The overall aim of tikanga Maori remains the restoration of *mana* through utu, to achieve balance, a balance of all considerations and to achieve a consensus;[55] it is not an adversarial process. When there has been a dispute that has affected the spirit and *mauri*, the question is how to bring it back into balance. Regardless of what level or who is involved the same fundamental principle is involved, the principle of *whakahoki mauri* or restoring the balance. Apparent here is the parallel notion of "healing" with therapeutic jurisprudence.[56]

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[46] For example Section 4 Conservation Act; Section 9 State Owned Enterprises Act.

[47] For example see the policy for the Office for Disability Issues where the Treaty underpins the development of their Strategy and is consistent with the relevant principles of the Treaty. Available at <http://www.odi.govt.nz/publications/nzds/discussion-document/tow.html>

[48] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, (CA).

[49] Section 8 Resource Management Act 1991.

[50] For general discussion see M Durie "Nga Tai Matatu" (Oxford University Press, Victoria, 2005) pp 197 – 204.

[51] M Durie "Mauri Ora, The Dynamics of Maori Health" (Oxford University Press, Victoria, 2005) p 258 – 259.

[52] "Tika" means correct, true, just, while "nga" is a nominal suffix for plural. So "tikanga" means the collection of correct practices, a normative system meaning it tells us what is considered normal and right.

[53] See Mikaere A 'The Treaty of Waitangi and Recognition of Tikanga Maori' in M Belgrave, M Kawharu and D Williams *"Waitangi Revisited Perspectives on the Treaty of Waitangi"* (Oxford University Press, Victoria, 2005) pp 331 - 332.

[54] Kaupapa derives from kau' which means to appear for the first time or be disclosed, while papa is a reference to the Earth or Papatuanuku, So together kaupapa means ground rules or first principles.

[55] See J Paterson *"Exploring Maori Values"* (Thomson Dunmore Press, Australia, 2005) ppl 16 – 135.

[56] D. Wexler and B. Winick (ed) *"Judging Law in a Therapeutic Key Therapeutic Jurisprudence and the Courts"* (Carolina Academic Press 1996).

Current Policy of the NZPB

The primary purpose of the NZPB is to assess whether an offender poses an undue risk to the safety of the community.[57] There is no clear direction within the policies of the NZPB on how the Treaty of Waitangi impacts on the decision making process of the NZPB to achieve this purpose. There is also no clear direction on how the decision maker, in satisfying the purpose of the Parole Act, must to take into account the principles of the Treaty of Waitangi. It is clear, however, that the NZPB must adequately accommodate Maori cultural concepts, values and practices within its general process, including hearings.

Whether it is the text of the Treaty or the Principles of the Treaty the NZPB, as a decision maker, is required to articulate these obligations within their policy. The current policy is unclear as to how this may be achieved.

Parole - Conclusion

If the NZPB adopted a framework for considering specific cultural factors that may offer a structured way in which the board may consider culture, in its deliberations, this may help address the lack of cultural consideration in the decision making process. Although there would be no input at the decision making table, such a framework may offer inmates an opportunity to identify and participate in programmes and interventions that may both make a difference in reducing the chance of recidivism as well as be seen as positive by the board during its decision making. However, this has not occurred.

Parole Boards like the NZPB have long been the jurisdiction of the Executive, most recently under the Department of Corrections. The increase in offending whilst on parole has decreased public confidence in the ability, process and policies adopted by the NZPB and Department of Corrections. The public perceiving parole as the soft option with calls for tougher sentencing as an answer.[58] To address these concerns legislative amendments have been implemented.[59] The effectiveness of these amendments are yet to be gauged.

Despite the statistics indicating half of the offenders appearing before the NZPB will be Maori, there is still no clear direction on how the obligations under the Treaty of Waitangi impact on decision making and no policy guidelines for cultural consideration.

A shift from the Executive to the Judiciary in the form of a Re Entry Court will provide transparency and accountability both to the offender and society. A shift to an Indigenous Re Entry Court that is based on tikanga Maori will provide cultural consideration and fulfill the obligations under the Treaty of Waitangi.

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[57] Section 7, Parole Act 2002.

[58] G Mc Vicar "Pathetic legislation blamed for violent attack" 26 May 2004 Sensible Sentencing Trust Available also <http://www.safe-nz.org.nz/Press/2004pathetic.htm> last accessed 20 March 2009.

[59] However, further amendments to include the "three strikes" have drawn criticism for breach of human rights. See "Foreign Officials concerned at tough sentencing plan" 20 March 2009. Available also < http://www.3news.co.nz/Foreign-Affairs-officials-concerned-at-tough-sentencing-plan/tabid/209/articleID/96268/cat/525/Default.aspx> last accessed 20 March 2009.

III PART B – RE ENTRY COURTS

Re Entry Courts are designed to assist offenders released from prison. These Courts aim to ease offenders through a judicially supervised conditional release process back into society. They are a specialist court with a purpose to help reduce recidivism and improve public safety.

Specialist Courts such as Re Entry Courts are underpinned by therapeutic jurisprudence. Therapeutic jurisprudence shares commonalities with tikanga Maori, an indigenous legal system. Indigenous Re Entry Courts originate from appropriate indigenous legal codes.

Re entry Courts and Therapeutic Jurisprudence

Ideally a re entry court would employ the following therapeutic jurisprudential principles:[60]

> Relationship ethic - the judge client relationship can spark motivation[61] to, for example, adhere to conditions of parole;
> Problem solving skills - Courts can engage offenders in relapse prevention planning and the development of problem solving skills,[62] for example by contributing to the conditions of parole programme;
> Risk management - Courts can manage risk and, at the same time, promote rehabilitation[63] to reduce rates of recidivism;
> Compliance - Courts can enhance offender compliance with conditions of release[64]; and
> Abstaining from crime - Courts can help build on offender strengths and how they can reward and help maintain offender desistance from crime.[65]

Therapeutic Jurisprudence - What is it?

Therapeutic jurisprudence developed out of the mental health system. American Professors Bruce Winick and David Wexler, both mental health law academics are pioneers of this movement. During their practice within the American health system, they conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players including lawyers, judges and the offender. This impact could be both therapeutic or anti therapeutic. Hence, a system that is designed to help people recover or achieve mental health often backfires and has the opposite effect. For instance a decision to release an offender on parole will often have the opposite effect particularly if the program is not suitable for the offender.

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[60] D Wexler *"Spain's JVP (Juez de Vigilancia Penitenciaria) Legal Structure as a potential model for a re entry court"* Contemporary Issues in Law [2003/2004] 1, 2.
[61] B Winick and D Wexler (ed) "Judging in a Therapeutic Key – Therapeutic Jurisprudence and the Courts" (Carolina Academic Press, North Carolina, 2003), 181.
[62] Ibid, 189.
[63] Ibid, 201.
[64] Ibid, 213.
[65] Ibid, 249, 255.

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced. Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way so long as other values such as justice can be fully respected.[66] It does not trump other considerations or override important societal values such as due process or freedom of speech and press.[67] Therefore therapeutic jurisprudence is the study of therapeutic and non therapeutic consequences of the law.

Therapeutic jurisprudence is thus described as the "study of the role of law as a therapeutic agent".[68] One author offers the following definition, capturing the essence of therapeutic jurisprudence:

> the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well being of the people it affects.[69]

In this sense therapeutic jurisprudence is more a descriptive and instrumental tool than an analytical theory.[70] It focuses on the law's impact on emotional life and psychological well being.[71] Therapeutic jurisprudence can be thought of as a lens through which regulations and laws may be viewed, as well as the roles and behaviour of legal actors: the legislators, lawyers, judges, and administrators.[72] It is through this lens or window that an indigenous legal system and indigenous principles such as *tikanga* Maori can be implemented.

In a recent article[73], Judge Arthur Christean has outlined a number of criticisms that are also echoed by David Wexler.[74] These include issues of due process and constitutional infringements. I acknowledge the validity of these criticisms and therapeutic jurisprudence advocates are currently addressing them.[75] Nonetheless, one should not lose sight of the aim and must bear in mind that the law does not exist in a vacuum and is ever changing. If therapeutic jurisprudence has the desired healing effect this would result in less offending. The flow on from this will be a lighter case load and a lessening strain on resources and arguably one justification against these criticisms.

While there has been enthusiastic support for therapeutic jurisprudence, a common response is that therapeutic jurisprudence is a rebranding of previous models or a soft approach to crime. In a scathing critique Hoffman criticizes therapeutic

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[66] Wexler and Winick above note 61.
[67] W. Schma *"Judging for the New Millenium"* Spring 2000 Special Issue Overview Court Review.
[68] Wexler and Winick above note 61.
[69] C. Slobogin, *Therapeutic Jurisprudence: Five dilemmas to Ponder,* Psychol., Pol and Law 193, 196 (1995).
[70] W. Brookbanks W. *"Therapeutic jurisprudence: Implications for judging"* Paper delivered at the District Court Judge's Triennial Conference, Rotorua, 1 April 2003.
[71] Wexler and Winick above n 61.
[72] Brookbanks above n 74.
[73] A.G. Christean *"Therapeutic Jurisprudence: Embracing a Tainted Ideal"* (January 2002), *available at* <http://www.sutherlandinstitute.org>.
[74] Wexler and Winick above n 61, p 80.
[75] Wexler and Winick ibid.

jurisprudence as possessing a 'New Age pedigree' and for being both anti-intellectual and wholly ineffective.[76]

These criticisms should not reduce the possibility that therapeutic jurisprudence may assist in successful re integration of Maori into society and reduce recidivism rates. The commonalities between the philosophy behind therapeutic jurisprudence and the Maori World View demonstrate that therapeutic jurisprudence should not be dismissed as an irrelevant.

From a practical point of view, a significant advantage of therapeutic jurisprudence is that it co-exists with the current legal system. This factor supports the political arguments against a separate system for Maori. Additionally, therapeutic jurisprudence simultaneously allows for the incorporation of *tikanga* Maori. The inclusion of *tikanga* can occur, prima facie, at all levels of the criminal justice process including parole via a Re Entry Court.

Collectivity is a central tenet to Maori and therapeutic jurisprudence is asserted as being a relationally based method.[77] The Maori World View, like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness and the notion of *whanaungatanga* or relatedness[78]. This principle based approach, different from a rule based approach, is consistent with Maori *tikanga*. So, from a conceptual point of view, therapeutic jurisprudence represents a movement away from the heavily rule based approach of legal processes to a more collective, relational and principle based approach.[79]

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Maori conceptual framework is at odds with the existing mono cultural system in New Zealand. Some central Maori issues, such as reciprocity[80] and taking responsibility have no equal in the State system. So we see the different approaches and administration of justice between the Maori and State systems. For instance for Maori balance is the ultimate goal and responsibility must be taken irrespective of guilt. For non Maori, under the Westminster system in New Zealand, the offender is innocent until proven guilty and responsibility is not a requirement. Critics[81] widely voice their concern that the current system does not allow Maori to administer justice to Maori.

Therapeutic jurisprudence, like *tikanga* Maori, is a forward looking doctrine. The Criminal Justice system in comparison looks back, punishing the past actions and focusing on the penalty. *Tikanga* Maori like therapeutic jurisprudence is not primarily penalty orientated. It looks for the "right way" or the *tika* way, ultimately resulting in a healing for the participants.

Two important issues can be drawn from this. The first is that the commonalities between therapeutic jurisprudence and *tikanga* Maori allow them to work in tandem. This provides a window to introduce *tikanga* within the Parole hearing process as well as the conditions for parole, including the need to take responsibility for the conditions as a

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[76] Morris B. Hoffman *Therapeutic Jurisprudence, Neorehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous* Fordham Urb. L.J., 2063 (2002).
[77] Warren Brookbanks *Therapeutic Jurisprudence: Conceiving an Ethical Framework* 8 J. MED. & L.328 – 341 (2001).
[78] See also H Mead *"Tikanga Maori – Living by Maori Values"* (Huia Publishers, Wellington, 2003) pp 28 -29.
[79] For discussion on "collective responsibility" see Paterson above n 58, pp 136 – 154.
[80] For discussion see Mead above n 78, p 27.
[81] Audio tape: Radio New Zealand National Programme Morning Report Interview by Linda Clark with Annette Sykes (July 18, 2003).

collective rather than an individual. The focus is on indigenous law as a basis to reach a balance, a balance within the individual and a balance within the community.
The second issue is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well being of communities, thereby allowing Maori to look after Maori.[82] The challenge will be the production, implementation and practicality of therapeutic jurisprudence in a suitable Court forum.

Maori society is often described as "principle based" as opposed to "rule based." There is less emphasis on the rule but more emphasis on the principle. The central *tikanga* tenets, of collectivity and equality, dispel the idea that the defendant perceives the judge as his equal providing objective and impartial criticism. Therapeutic jurisprudence, like *tikanga* Maori, is a relational ethic.

Therapeutic jurisprudence thinking has encouraged people to think creatively about how to bring promising developments into the legal system. Using the tools of the social sciences to promote psychological and physical well being opens the door to *tikanga* Maori. In doing so, therapeutic jurisprudence may be able to offer a vehicle to ultimately decrease Maori recidivism and re offending rates.

The incorporation of therapeutic jurisprudence principles and processes would allow the NZPB to develop and maintain a relationship ethic with the offender. From an offender's perspective it will encourage the offender to recognise when they are at risk and how they propose to counter this through a proposed programme. Therapeutic jurisprudence will also assist the understanding, recognition and importance of the collective structures, such as the whanau, within the NZPB process.

Re Entry Courts - Background

Re Entry Courts are modeled from the same principle that underpins Drug Courts. Hon Richard Gebelein has stated:[83]

> ...drug courts have succeeded because, unlike previous failed rehabilitative efforts, the drug court movement has been able to provide a narrative of what is causing the criminal behaviour of the drug court clients and what they need to get better.

For Maruna and LeBel the critical question from the point of Re Entry Courts becomes[84], *is there a similar narrative for how and why reentry should work?*

Re entry Courts are designed to assist offenders released from prison to a form of judicially supervised parole to effect a successful integration into the community.[85] They are specialized courts that help reduce recidivism and improve public safety through the

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[82] Ibid.
[83] S Maruna and T LeBel *"Welcome Home? Examining the 'Reentry Court' Concept from a Strengths based perspective"* Western Criminology Review 4 (2) 91 – 107 (2003), 92.
[84] Ibid.
[85] Saunders T ' Re Entry Court' in B J Winick and D Wexler (ed) *"Judging in a Therapeutic Key"* (Carolina Academic Press, North Carolina, 2003) p 67

use of judicial oversight. The responsibilities generally assigned to re entry courts include;[86]

> *Review offenders' reentry progress and problems*
> - Order offenders to participate in various treatment and reintegration programs
> - Use drug and alcohol testing and other checks to monitor compliance
> - Apply graduated sanctions to offenders who do not comply with treatment requirements and
> - Provide modest incentive rewards for sustained clean drug tests and other positive behaviour.

The judiciary conventionally has no role past sentencing where responsibility for the offender ends and, in New Zealand, the Executive in the form of the Department of Corrections takes responsibility. Despite more prisoners being incarcerated and serving longer sentences before becoming eligible for parole[87] the availability of treatment programmes in prisons is questionable and program participation among prisoners has been declining over the past decade.[88]

Countries like the USA, have shown that Re Entry Courts can assist released offenders to deal with a variety of problems that, if left unresolved, could significantly interfere with their successful reintegration into the community.[89] The long term benefits of successful re entry into the community are seen to outweigh the costs associated with establishing and operating a Re Entry Court.

The goal of Re Entry Courts is to reduce recidivism[90] and the costs of incarceration and community disrepair, building a safer community in the process. The supervision of offenders on parole has been poor.[91] These factors have given rise to a new form of jurisprudence and approach to court management in which judges actively become involved in supervising the transition of the offender.

This is not novel. Specialised courts such as the Drug Court and Domestic Violence Courts operate in this fashion. A key component in this type of court is that the court holds the judicial authority to which offenders respond positively.[92] In addition, frequent appearances before the court with the offer of assistance, coupled with the knowledge of predictable and prudent consequences for failure, assist the offender in the reentry process.

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[86] "Office of Justice JD Programs, Model Programs Guide" Available also <http://www.dsgonline.com/mpg_non_flash/reentry_court.html> last accessed 14 March 2010.

[87] Parole Act amendments now require the offenders to serve a greater proportion of their sentence before being eligible for parole. For instance, offenders serving long term sentences are now required to serve two thirds of their sentence or 12 months, whichever is longer, before becoming eligible for parole. This doubles the threshold currently required.

[88] J Lynch and W Sabol, *"Prisoner reentry in perspective."* Crime Policy Report. Vol. 3. (2001). Washington, DC: The Urban Institute.

[89] See for example discussion by Judge Terry Sanders on the Harlem Reentry Court in Wexler and Winick above n 89, pp 67 – 72.

[90] This is consistent with New Zealand. See *Reid v Parole Board* (CA 247/05, 29 June 2006) where the Court of Appeal held that the Parole Board's sole focus should be the recidivism risk of the individual offender.

[91] See "Report finds failure in parole management" February 17, 2009. Available also <http://tvnz.co.nz/national-news/report-finds-parole-failings-2491225> Last accessed 14 March 2010. .

[92] OJJDP Model Programs Guide "Re Entry Court". Available also <http://www.dsgonline.com/mpg_non_flash/reentry_court.htm> last accessed 23 March 2010.

A reentry court can take various forms. A "case defined" court provides for the judge to retain jurisdiction over a case during the entire life of the sentence.[93] A "stand alone" court allows the court to maintain exclusive jurisdiction of reentry cases.[94] Another type involves parole boards working with the judiciary to develop quasi courts through the use of an administrative law judge. This is similar to the situation in New Zealand where the Parole Board consists of members of the Judiciary as well as community members to consider offenders for parole. All forms offer a unified and comprehensive approach to managing offenders from court to incarceration and back into the community, exploring a new approach to improving offender reintegration into the community.

The goal is to establish a seamless system of offender accountability and support services throughout the reentry process. Important core elements of a reentry court include the assessment of offender needs and planning for release, active judicial oversight of offenders during the period of supervised release including the use of graduated and parsimonious sanctions for violation of release conditions; broad array of supportive services with community involvement and positive judicial reinforcement of successful completion of reentry court goals.[95]

Procedure – an example

In February 2000, the Office of Justice Programs in the USA launched a Re entry Court initiative to explore a new approach to improving offender reintegration into the community. One of the Delaware Superior Court reentry pilots is the New Castle County reentry court program where case managers work with offenders while they are in custody to create reentry court plans. The probation officer works closely with the community police officers to enhance offender monitoring.

This reentry court incorporates three tiers of supervision.

(a) Phase I – participants meet weekly with the judge and probation officer
(b) Phase II – they meet biweekly for three months and if necessary with more status conferences with the probation officer
(c) Phase III – monthly status conferences are held at 30 day intervals

Case managers act as a service broker and report directly to the reentry judge about appropriate services and treatment for participating offenders.

The Re Entry Courts are situated in the heart of the community, close to where parolees live, receive services and work. This provides convenience and a familiar setting for the parolees. The time post release has been identified as a critical time for parolees, providing a quick and smooth transition is vital.

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[93] OJJP ibid.
[94] OJJP Ibid.
[95] "Delaware State Courts – Re Entry Courts". Available also <http//courts.delaware.gov/Courts/Superior%20Court/?reentry.htm> last accessed 14 March 2010.

Current (Indigenous) Re Entry Models

Juez de Vigilancia Penitenciaria - JVP

The JVP law was created to provide judicial watchfulness over prisoner rights and liberties and is given oversight authority to monitor the prisoner's progress through an active treatment programme, with the prisoner's active participation in the planning and execution of such programme.[96] David Wexler proposes that the legal structure of Spain's JVP[97] could be used as the foundation for a reentry court. The JVP may impose relevant conditions on release such as prohibiting contact with the victim, participations in particular programmes and periodic appearances before the JVP.[98]
The role of the JVP begins upon incarceration, conditional release is not automatic once an offender serves a certain portion of the sentence, nor does release lie in the unfettered discretion of the JVP. Conditional release authority resides in a single judge rather than a multi member board.

In contrast, the role of the NZPB begins not upon incarceration but when the offender applies for release. Although legislative amendments provide for the NZPB to monitor and recall, if necessary, forming a relationship of sorts between the offender and the panel, hearings are before a panel not a single judge. This reduces the benefits that a powerful motivating one on one relationship with the offender produces.[99]
Although this is somewhat underdeveloped according to David Wexler:[100]

> the enviable JVP legal structure deserves to be studied seriously by those in the United States and in other Anglo American legal systems contemplating reform of the reentry process.

Tohono O'odham Nation

The Tohono O'odham Nation has a Law and Order Code and retains jurisdiction over many criminal offences. The re entry of these offenders is community concern. This Law and Order Code[101] allow a tribal court to "parole" offenders after successfully serving a portion (typically one half) of the imposed sentence.[102] Upon parole application a tribal judge would typically grant or deny parole. Recently the Tohono O'odham judiciary has been contemplating using the (tribal) Law and Order Code parole provision as a legal

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[96] Wexler above n 60, 3.
[97] See Art 76, Organic Law of Spain 1/1979.
[98] Wexler above n 60, 3.
[99] For instance the success of drug treatment courts has been attributed to this one on one relationship.
[100] Wexler above n 60, 7.
[101] Tohono O'odham Law and Order Code 1.15 (5) (1994) "a person convicted of an offence and sentenced to jail may be paroled after he or she has served at least half of the particular sentence with good behaviour.
[102] Winick B J and Wexler D 'Practice Settings and Clinical Opportunities' in D Wexler (ed) *"Rehabilitating Lawyers Principles of Therapeutic Jurisprudence for Criminal Law Practice"* (Carolina Academic Press, North Carolina, 2008) p 313.

cornerstone to facilitate and create a Re Entry Court where the judges would play an active role.[103]

There are obvious issues that flow from such a proposition. These include which kind of cases a re entry court may best begin with, the nature of a judicial parole hearing, the type of preparation an offender should engage in, the kind of parole conditions that may be imposed, the role of the community and the follow up process between the offender and the judge.[104]

Reentry Courts – Conclusion

According to Retired Judge Peggy Hora:[105]

> In the US one in everyone 31 citizens is under community corrections supervision. This makes it difficult for Parole/probation officers to do a good job. Recidivism rates are 70 percent within three years for offenders with alcohol or other drug problems and Reentry courts do work.

Petersilia[106] has recently recognized, whether or not an offender has had a problem with substance abuse, a prisoner about to be released into the community could certainly benefit from a carefully planned, gradual re-integration into society, and there is a powerful argument that an additional type of problem solving court could be a general re entry court. This is not a novel idea.[107]

To stem the reoffending rates suggestions of managed release, half way houses, longer non parole periods, and the ability to monitor and require offenders on parole to attend a hearing have all been implemented. Nonetheless there is still no recognition of cultural considerations within the decision making process for Maori offenders despite the fact that half of the offenders before the New Zealand Parole Board will be Maori.

A movement from the Executive to the Judiciary will promote transparency and accountability. Re Entry Courts are underpinned by therapeutic jurisprudence. The commonalities between therapeutic jurisprudence and tikanga Maori provide a window for tikanga Maori within the Parole system.

IV PART C: AN INDIGENOUS RE ENTRY COURT FOR MAORI?

Indigenous Reentry Courts are based on indigenous legal systems.
Half of all offenders before the NZPB will be Maori. The question now becomes - *Will an Indigenous Reentry Court for Maori underpinned by tikanga Maori assist Maori to re enter the community successfully and reduce recidivism?*

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[103] Ibid, 314.
[104] See Wexler and Winick ibid pp 313 – 316 for discussion.
[105] Personal communication email 20 March 2009.
[106] J Petersilia, *When Prisoners come Home* (Oxford University Press, New York, 2003), 204.
[107] See S Maruna and T Lebel *"Welcome Home? Examining the "Reentry Court" Concept from a Strengths based perspective"* Western Criminology Review 4 (2) 91-107 (2003). See also J Travis *"But they all come back: Rethinking Prisoner Reentry"* US Dept of Justice, National Institute of Justice, Washington.

Proposed Model

Upon incarceration a kaumatua/judge co ordinates, monitors and motivates the offender's progress in the correctional facility. This will include requiring the offender to participate in various tikanga programmes within the correctional facility such as the Maori Focus Units[108] to concentrate on identified areas of rehabilitation like drug treatment. Like the JVP programme through periodic review hearings the kaumatua/judge can, from the beginning, help instill in the offender a vision of eventual release,[109] a healing process.

Ideally this model would involve all offending but in the early stages limited to less serious offenders. The kaumatua/judge would be different to the sentencing judge who may be viewed by the offender in a negative light, whereas the monitoring judge would be perceived to "care" or maintain an ethic of "care" about the prisoner's rights.

Upon entry into the programme the offender would sign a behavioural contract[110] agreeing to comply with the programme agenda. The offender could also be encouraged to participate to develop the programme and the ability to set release conditions. The release conditions would require the taking of responsibility as a collective (whanau). Like the JVP, this ability to set release conditions allows for the possibility of dialogue between the court and offender, and allows for conditional release to be conceptualized more as a bilateral behavioural contract than as a unilateral judicial fiat; such a conceptualization is likely to promote an offender's sense of fairness and participation, and should enhance the offender's compliance with the release conditions.

So, this programme could be tailormade to suit the problem or offence relevant to the offender, and could be specific to include tikanga programmes within the correctional institute that focus on anger management.

The offender's genuine involvement in correctional programmes will have a bearing on the prisoner's progress through the levels and on the prospect of eventual release.[111]

The kaumatua/judge would take a more active role with the offender by using the court processes aimed at promoting the rehabilitation or crime prevention process. These processes will seek to facilitate an offender's participation in a programme, to maintain the dignity of the offender and to promote the offender's trust.

Part of the programme would include regular court appearances for review that decline as progress is made. Participants would be actively involved in the process and could provide input into the programme for changes. The judge would interact with the offender expressing interest in their life and praising any progress that has been made. This is an endeavour to establish the 'tika' or correct approach.

This philosophy is based on the ethic of care and the central tenet of therapeutic jurisprudence, of it being a 'relational-based' construct. The ethic of care recognizes, and is capable of offering, such an alternative approach to legal problem-solving which is more overtly relational and deliberately less adversarial.

A similar model in operation in Geraldton in Western Australia has integrated therapeutic jurisprudence into its sentencing regime and has already shown promising

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[108] See Maori Focus Units. Available also <http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/maori-focus-units.html> last accessed 20 March 2010.

[109] Wexler above n 60, 4.

[110] See also D B Wexler 'Robes and Rehabilitation: How Judges can Help Offenders Make Good' (2001). Available also <www.law.arizona.edu/depts/upr-intj/robes.pdf> last accessed 23 March 2010.

[111] Wexler above n 60, 6.

results.[112] This is comparable to the drug courts that uses therapeutic jurisprudence to import holistic concepts such as transcendental meditation.

If parole is granted and the conditions are breached, a similar process of deferred revocation as suggested by David Wexler could be adopted.[113] This envisages a clinic approach where the burden lies on the offender to defer revocation of parole based on a rehabilitative plan that the offender, with support and help of the collective (whanau), would be responsible for. Assistance for hearing preparation would be provided for by a clinic composing of possibly law students where advocacy would be enhanced by a therapeutic spin.[114]

Conclusion

Half of all offenders before the New Zealand Parole Board are Maori. Comparative jurisdictions such as Canada have implemented an "Elder Assisted Hearing" to advise the Board during deliberations. There is no direction within the Parole Act to take into consideration the principles of the Treaty during decision making, nor is there any policy articulation of cultural considerations for Maori within this process. This raises procedural and substantive concerns for Maori.

Arguably the public disenchantment with offending while on parole is a result of the lack of transparency and a fault within the decision making process of the New Zealand Parole Board. The current review of all policies by the New Zealand Parole Board are perhaps a reflection of this.

In seeking a solution for these issues this paper has suggested a shift back to the Judiciary in the form of a Re Entry Court. There are commonalities between therapeutic jurisprudence, which underpins Re Entry Courts, and tikanga Maori. This paper concludes with the recommendation of an Indigenous Re Entry Court as a possible way forward. It is recognized that there are pitfalls ahead however other jurisdictions with similar ethnic offending rates have adopted elements of re entry that have started off as pilot programmes are now successfully implemented state wide. According to David Wexler:[115]

> Do you recall the discussion in the book chapter regarding juvenile deferred parole revocation? It was then a pilot program in one small area but it is now a statewide program throughout Arizona.

Although New Zealand is not Arizona, the principles that underpin this initiative, therapeutic jurisprudence, has important commonalities with tikanga Maori and this could be a pathway forward for Maori.

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[112] M King, 'Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush' 26 Criminal L J 260. (2002).

[113] D Wexler and B Winick *"Rehabilitating Lawyers Principles of Therapeutic Jurisprudence for Criminal Law Practice"* (Carolina Academic Press, North Carolina, 2008) p 312.

[114] Ibid.

[115] Personal Email Communication 22 March 2009.