



# **INDIGENOUS COURTS: A CROSS JURISDICTIONAL PERSPECTIVE**

A PANEL DISCUSSION WITH JUSTICE CHAMBERLAIN,  
MAGISTRATE PREVITERA AND JUDGE DAVIS.  
MODERATED BY PROF. CUNLIFFE.



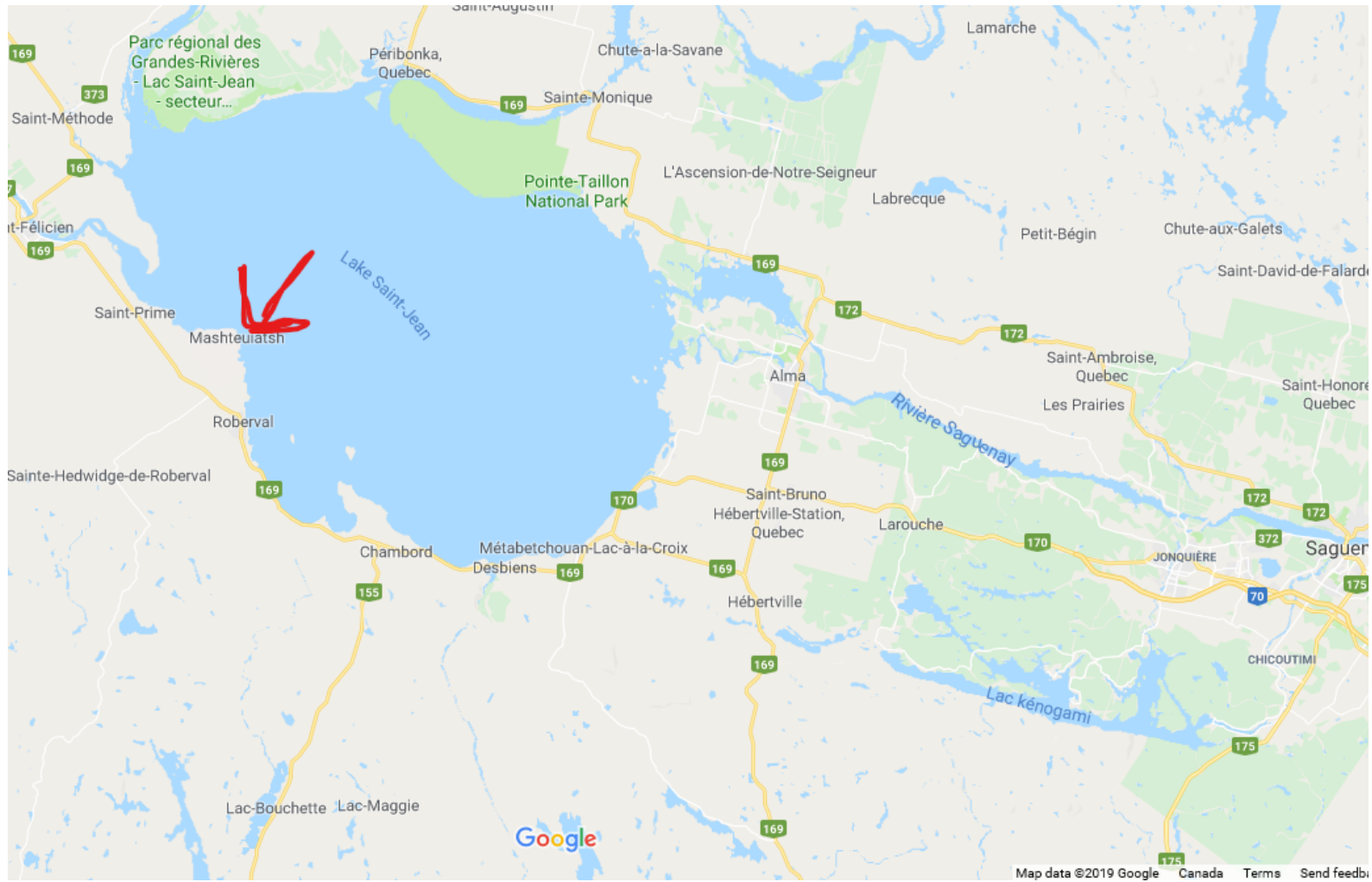
# OUTLINE

- Introduction
- Gladue Court – Toronto (Justice Chamberlain)
- Murri Court – Australia (Magistrate Previtiera)
- Maori Court – New Zealand (Judge Davis)
- Q&A

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the left and right sides of the slide, framing the central white area where the text is placed.

# Indigenous Courts: The Toronto Experience

André Chamberlain





## *The Scoop*

Kent Monkman

2018

Acrylic on canvas

84" x 126"

Image courtesy of the artist



# Fort George Residential School





My mother

Probably late 1962





*Male Figures  
Resisting  
Incarceration*

Kent Monkman  
2019

Acrylic on canvas  
60" x 38"

Image courtesy of the artist



# *Three Women in a Courtyard*

Kent Monkman  
2018

Acrylic on canvas  
60" x 38"

Image courtesy of the  
artist



My mother



# Indigenous Courts: The Toronto Experience



History



Arts and Gifts



Food



Ceremony



Approach



# Art and Tributes (Old City Hall)



Our First - from the Okanee Family

Indigenous  
Courts:  
The Toronto  
Experience



At Metro  
North  
(1000 Finch)





▶ Wayne's Story

▶ Max's Story





# MURRI COURT BRISBANE

(For Aboriginal and Torres Strait Islanders – ATSI)

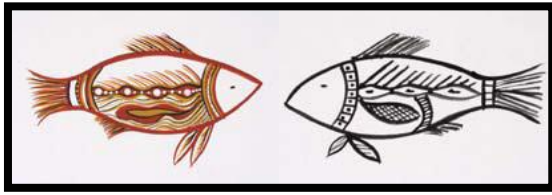
ISRCL Webinar 28<sup>th</sup> May 2020



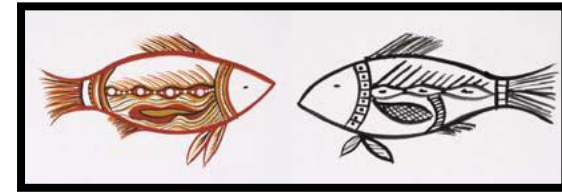
# The Uniqueness of ATSI people

- Socio-economic disadvantage from Colonisation/Dispossession;
- Intergenerational trauma from discriminatory laws/policies (Removal of children, Stolen Generations);
- Over-policing of offenders/under servicing of victims;
- Poor Physical/Mental Health;
- Alcohol/drug misuse, poverty, unemployment, poor/no education, isolation, homeless;
- Loss of land/country/connection with family/culture/ATSI laws/lores;
- Suppression of language and rituals;
- Language barriers, forced child removals (Stolen Generations), high rates of incarceration;
- Loss of identity.

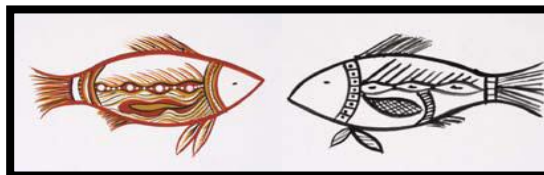




## Statistics



- Although ATSI people comprise 3% of the Australian population, they comprise 31% of the prison population;
- ATSI women constitute 34% of the female prison population (higher than both the rate of non-ATSI women, non-ATSI men and ATSI men);
- ATSI people are 12.5 times more likely to be in prison than non-ATSI people;
- ATSI women are 21.2 times more likely to be imprisoned than non-ATSI women;
- ATSI men are 14 times more likely to be imprisoned than non-ATSI men.





## Key Factors for the Emergence of Murri Courts

Despite millions of dollars spent on 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCADIC) in 1991:

- Continued High Rates of incarceration of ATSI people (female incarceration rates have increased 148% since 1991);
- High Rates of failures to appear;
- High Rates of reoffending;
- High Rates of breaches of bail conditions and courts orders.





## Goals of the Murri Courts

- For government and ATSI communities/organisations to work together to improve justice outcomes for ATSI people;
- A recognition of the need for a more culturally appropriate process for ATSI people;
- To encourage participants and provide pathways for them to reconnect with family, community, culture;
- To provide culturally appropriate rehabilitation and support services easily accessible to ATSI people;
- To thereby reduce the incarceration rates of ATSI people.



# Eligibility Criteria

Offences must fall within the jurisdiction of the Magistrates Court;

Participant must :

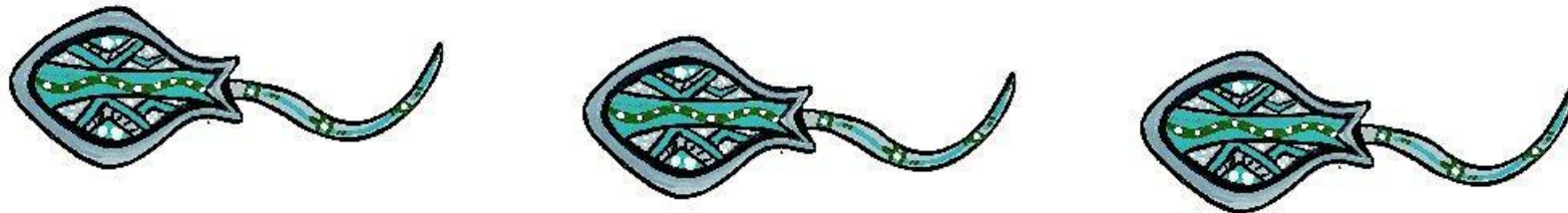
- plead guilty;
- be willing to engage with the Elders and provide information as requested by the Elders;
- be willing to participate in programs/services that will assist the defendant in changing his/her behaviour;
- be willing to follow all lawful directions of the Community Justice Group (CJG) Coordinator (The Elders comprise the CJG).



# Processes upon referral to Murri Court

## Cultural reports (based loosely upon the “Gladue” concept)

- First contact by the participant with the Elders (a male and a female);
- Culturally and gender-specifically appropriate;
- Participation by, the participant/support persons in a more comfortable and dignified setting;
- Elders are able to assess the participant’s suitability, cultural and personal circumstances; contributing factors to offending;
- Elders identify disabilities/treatment and support services; willingness of offenders to engage in/meet the demands of the Murri Court, and change;
- Elders formulate a support plan/make recommendations to the Murri Court Magistrate about those matters to support bail conditions.





## Processes upon referral (Cont'd)

### Health Checks

- Ascertain a defendant's ability to attend and participate;

### Yarning Circles

- Provide opportunities to form closer relationships with the Elders, participate in culturally appropriate activities, build trust and confidence, enable Elders to provide support and advice, ensure compliance with bail conditions and orders;
- Enable the CJG Coordinator to gauge a participant's progress;
- Remove the need for a participant to report to police.

### Mental Health/Intellectual/Cognitive Assessments

- Participants are assessed to determine their level of likely participation in the Court, to assist the Court/Elders in formulating appropriate conditions and to enable those eligible to receive support under the National Disability Insurance Scheme.





# Processes upon referral (Cont'd)

## On-site service providers each Court day

- Male and female counsellors; alcohol and drugs/Social Security/housing/mental health referral officers; NDIS assessor.

## Other Assistance

- Applications for payment plans/work development orders for unpaid fines;
- Opportunities for vocational training/employment/rehabilitation services/suicide prevention/esteem/budgeting/domestic violence programs;
- Referrals to Personal and Family Histories department (to find their MOB)
- Referrals to LINK –UP to be re-united with their MOB;
- Brokerage money/assistance provided to obtain birth certificates/medical cards, driver licences/phones/travel cards; and to open bank accounts;
- Assistance with applications to obtain disability services.



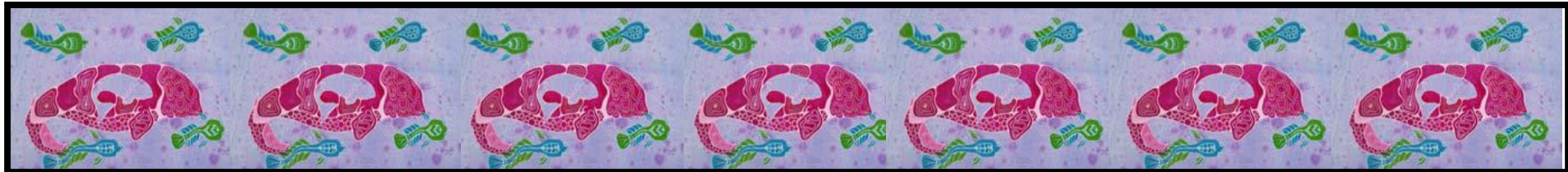
# Court Procedures

## Pre-Court

- Participants will attend the on-site housing/alcohol and drug/counselling/social security officer officers and their lawyer before Court starts;
- Pre-Court, the Coordinator of the CJG provides all parties/Elder with the cultural report/progress report for each participant;
- Pre-Court, the Elders and the Coordinator of the CJG meet with the Magistrate in chambers to discuss any matters listed for sentence.

## In Court

- The team (Magistrate, Elders, Police, Corrections, Defence, Coordinator of CJG) sit around a table in a court room with culturally appropriate artefacts, paintings and flags;
- The Magistrate does not robe;
- The Elders (one male, one female) sit on either side of the Magistrate;
- The Elders will provide a Welcome or Acknowledgement to Country and tell either their own story or that of an ATSI person significant in their life.



# Court Procedures (cont'd)

## First Appearance

- The Elders/Magistrate discuss the cultural and other reports, and the Elders' recommend in the cultural report with the Participant;
- The participant is placed on bail conditions appropriate to the assessments of them in the ts.

## Future Appearances

- Participants will appear for reviews approximately once every 4 weeks over a period between and 12 months depending on their progress;
- The Team is provided with progress reports before each review and the Elders and Magistrate speak to each participant at each review;
- Further information is gathered; bail conditions may be varied;
- Participants may be excluded from the Murri Court if they don't appear or don't comply;
- Participants are sentenced when it is recommended by the CJG (if they have met all requirements).





# Sentencing in the Murri Court

- Governed by the Penalties and Sentences Act 1992 (Qld) S.9;
- S. 9 (2) (p) provides that; *if the offender is ATSI, the Court can take into account any submissions by the CJG as to;*
  - (i) *the offender's relationship to his/her community;*
  - (ii) *any cultural considerations;*
  - (iii) *any considerations relating to programs/services established for the offender in which the CJG participates.*
- Aboriginality per se is not a mitigating factor;
- No equivalent of S. 718.2 Canada Criminal Code.

# Sentencing (cont'd)

## **Relevant Case Law**

*Neal v. The Queen* (1982) 149 CLR 305.

*R v. Fernando* (1992) 76 A Crim R 58.

*The Queen v. Fuller-Cust* (2002) 6 VR 496.

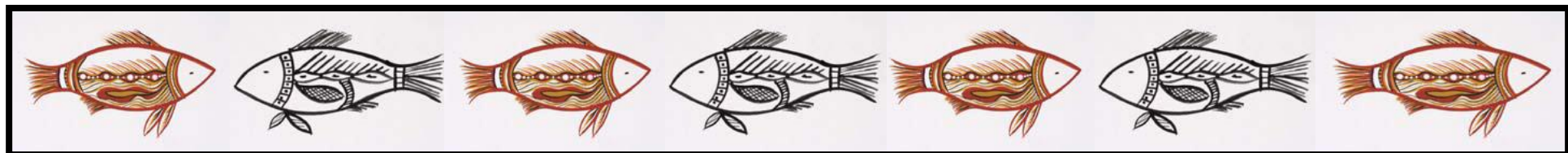
***Bugmy v The Queen* (2013) 249 CLR 571.**

***Munda v. Western Australia* (2013) 302 ALR 207.**

*AH v. Western Australia* (2014) WASCA 228.

*LCM v. The State of Western Australia* (2016) WASCA 164.

*Churnside v. The State of Western Australia* (2016) WASCA 146.





## Recommended Reading

**Carolyn Holdom; QUT Law Review, Volume 15, Issue 2, pp 50-71;**

*Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation during the Sentencing Process*

DOI: 10.5204/qutlr.v15i2.647

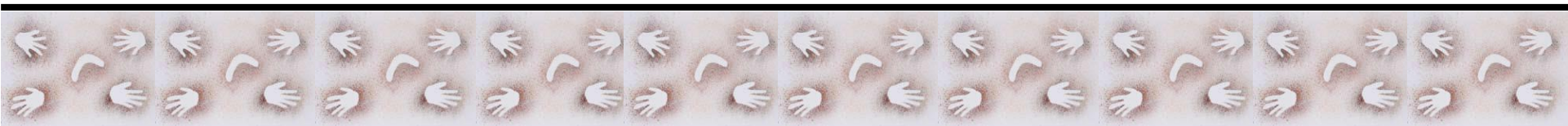
**Anthony et al PSR 2017 26 JJA 121.**

*Individualised Justice through Indigenous Community Reports in Sentencing*

**Anthony Crawford AILR 172**

*Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality*

[http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AUIndigLawRw/2014/6.html?context=1;query=crawford%20and%20thalia%20;mask\\_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AUIndigLawRw/2014/6.html?context=1;query=crawford%20and%20thalia%20;mask_path=)





# Te Kōti Matariki

ŌNA NGOI  
ŌNA NGOIKORE

Presentation by Judge Greg Davis, Matariki Court of New Zealand

# Hei Tīmatanga

He mea hanga tōku whare	When my sacred house was created
Ko Papatuānuku te paparahi	Our mother, the Earth, was its floor
Ko ngā maunga ngā pou pou	The mountains its pillars; and
Ko Ranginui e titiro iho nei te tuanui	The sky, our father, its ceiling
Manaia titiro ki Tūtāmoe	Manaia, the mountain looks toward Tūtāmoe
Tūtāmoe titiro ki Maunganui	Tūtāmoe looks toward Maunganui
Maunganui titiro ki Pūhanga-tohora	Maunganui looks toward Pūhanga-tohora
Pūhanga-tohora titiro ki Te Ramaroa	Pūhanga-tohora looks toward Te Ramaroa
E Whakakurupae ake ra i te Hauāuru	The mountain range that stands in the west
Te Ramaroa titiro ki Whīria	Te Ramaroa looks toward Whīria
Te Paiaka o te riri, te kawa o Rāhiri	The source of strife for the offspring of Rāhiri
Whīria titiro ki Panguru, ki Papata	Whīria looks to Panguru and Papata
Ki te rākau e tū papata ki te tai Hauāuru	To the windswept trees of the west coast
Panguru, Papata titiro ki Maungataniwha	Panguru and Papata look toward Maungataniwha
Maungataniwha titiro ki Tokerau	Maungataniwha looks toward Tokerau
Tokerau titiro ki Rākaumangamanga	Tokerau looks toward Rākaumangamanga
Rākaumangamanga titiro ki Manaia	Rākaumangamanga looks toward Manaia
E tu kohatu mai ra i te akau	That stands steadfast on the coastal shore
Ehara ōku maunga i te maunga nekeneke	My mountains do not move
He maunga tū tonu	They remain steadfast
Tū te Ao, tū te Po	Standing day and night
Ko te Whare Tapu o Ngāpuhi tēnei	This is the ancestral house of Ngāpuhi





# Hei Tīmatanga

Ka mimiti te puna i Hokianga

Ka tōtō te puna i Taumārere

Ka mimiti te puna i Taumārere

Ka tōtō te puna i Hokianga

When the tide ebbs in Hokianga

It flows in Taumārere

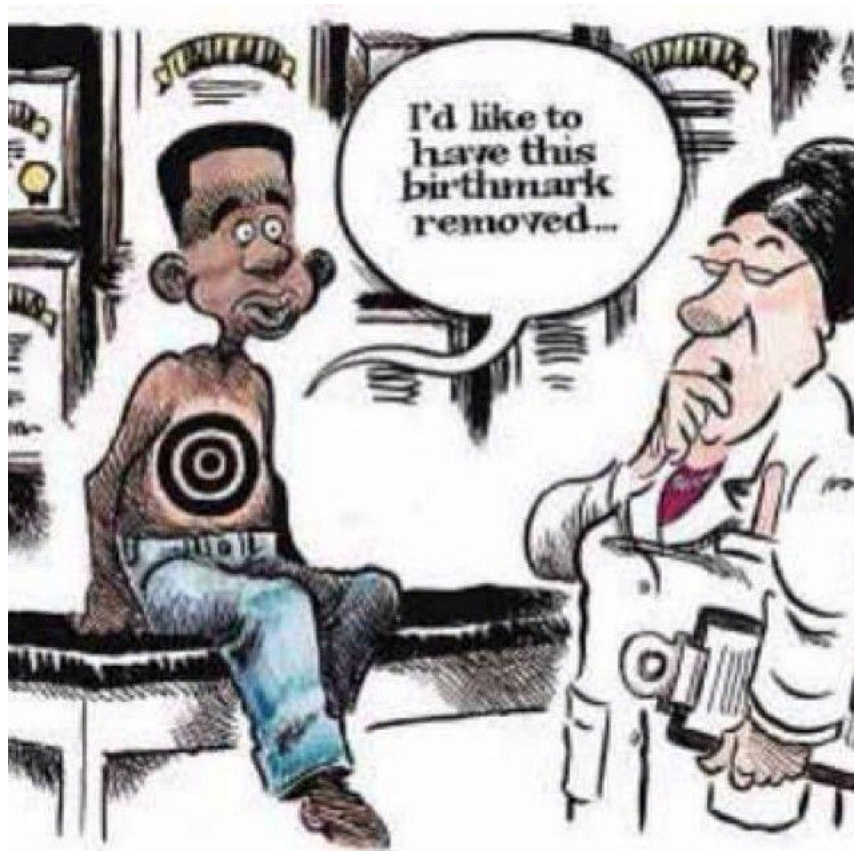
And when the tide ebbs in Taumārere

It flows in Hokianga

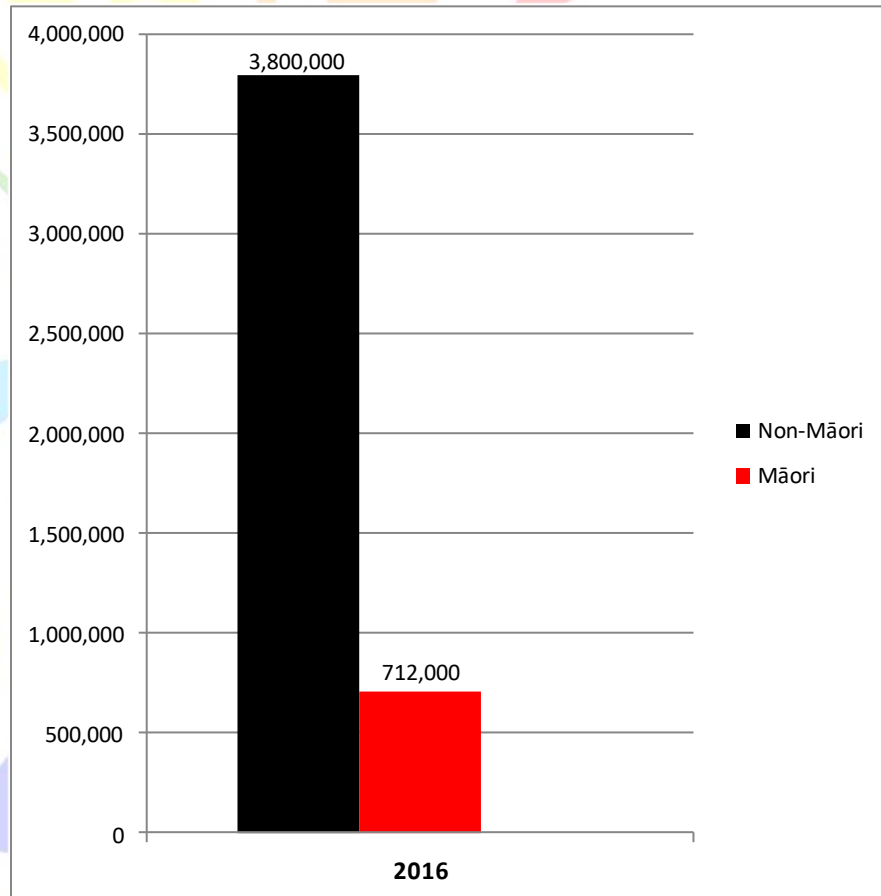
# Duty Solicitor

- Three Houses Down
- <https://www.youtube.com/watch?v=Es4WIO-9H9Y>
- Used with the permission of WTK Puriri (Composer)

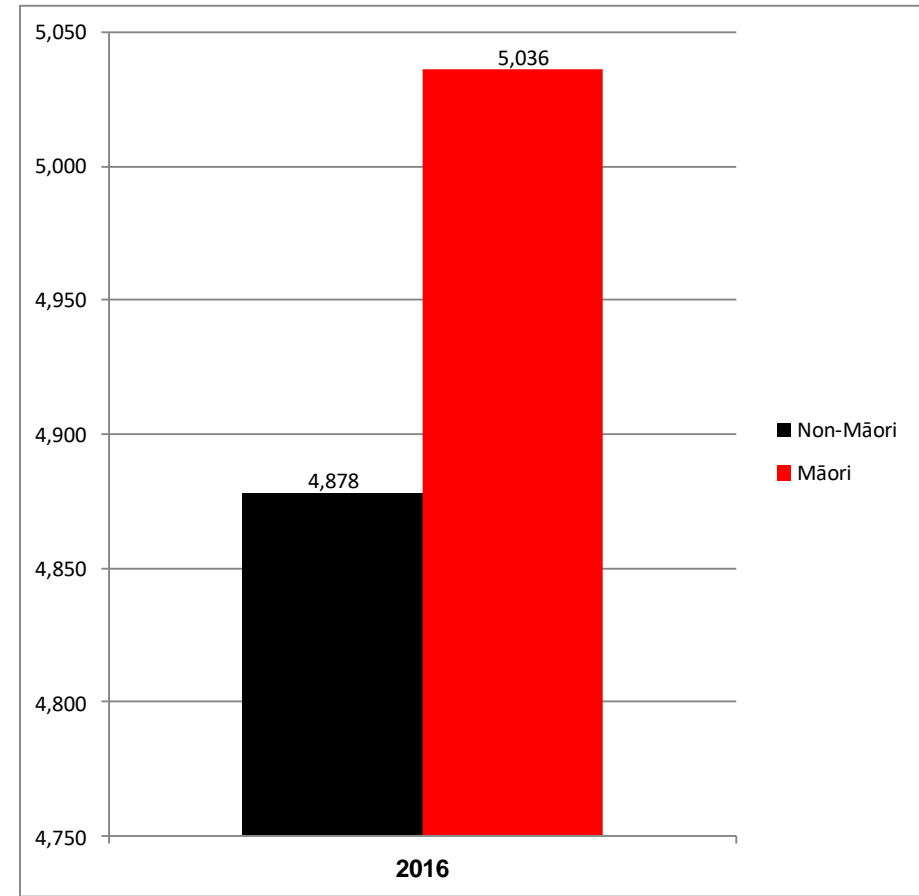
# The Sentencing Act 2002 – A quick summary



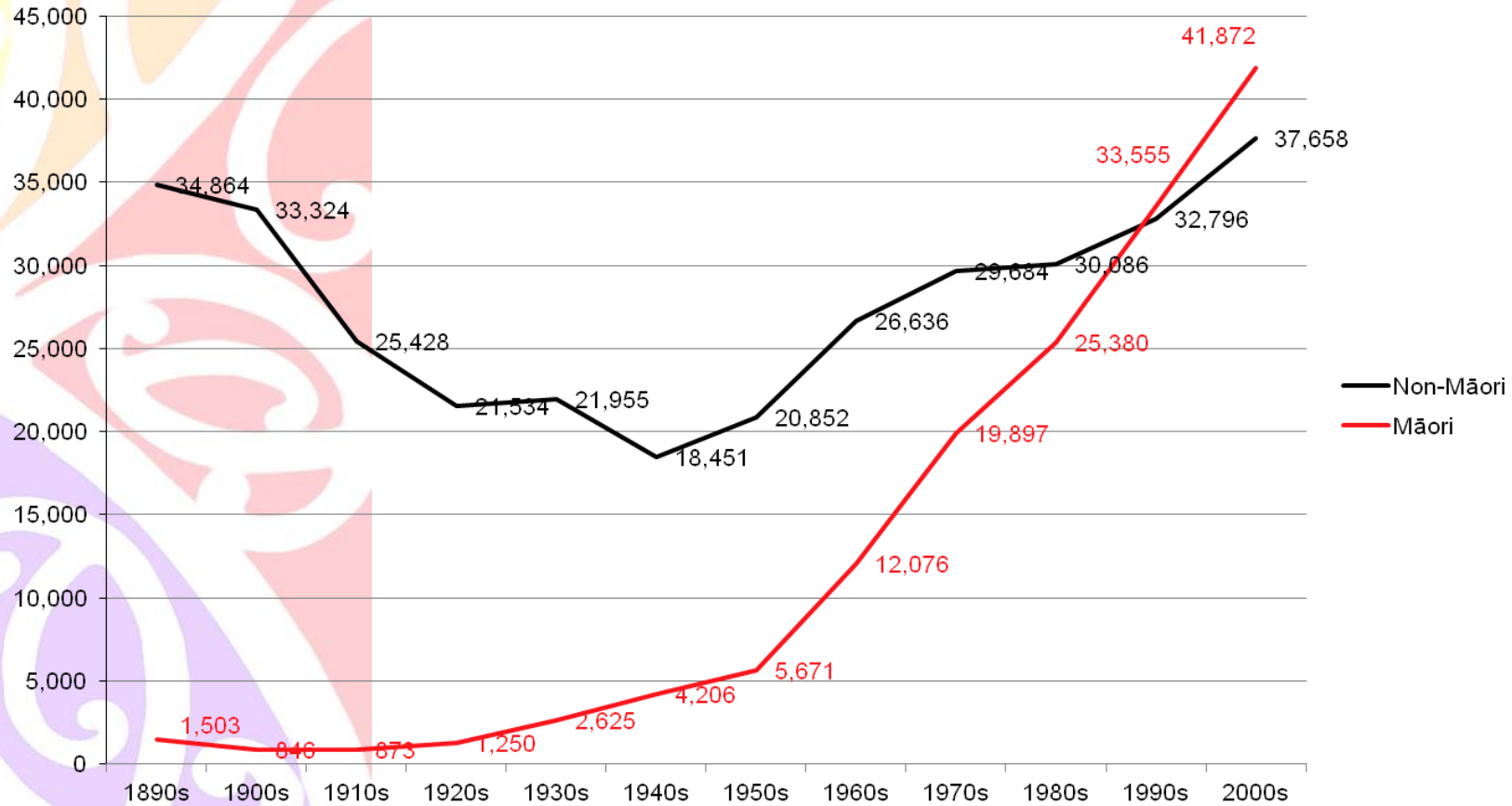
## Total New Zealand Population (4.6m)



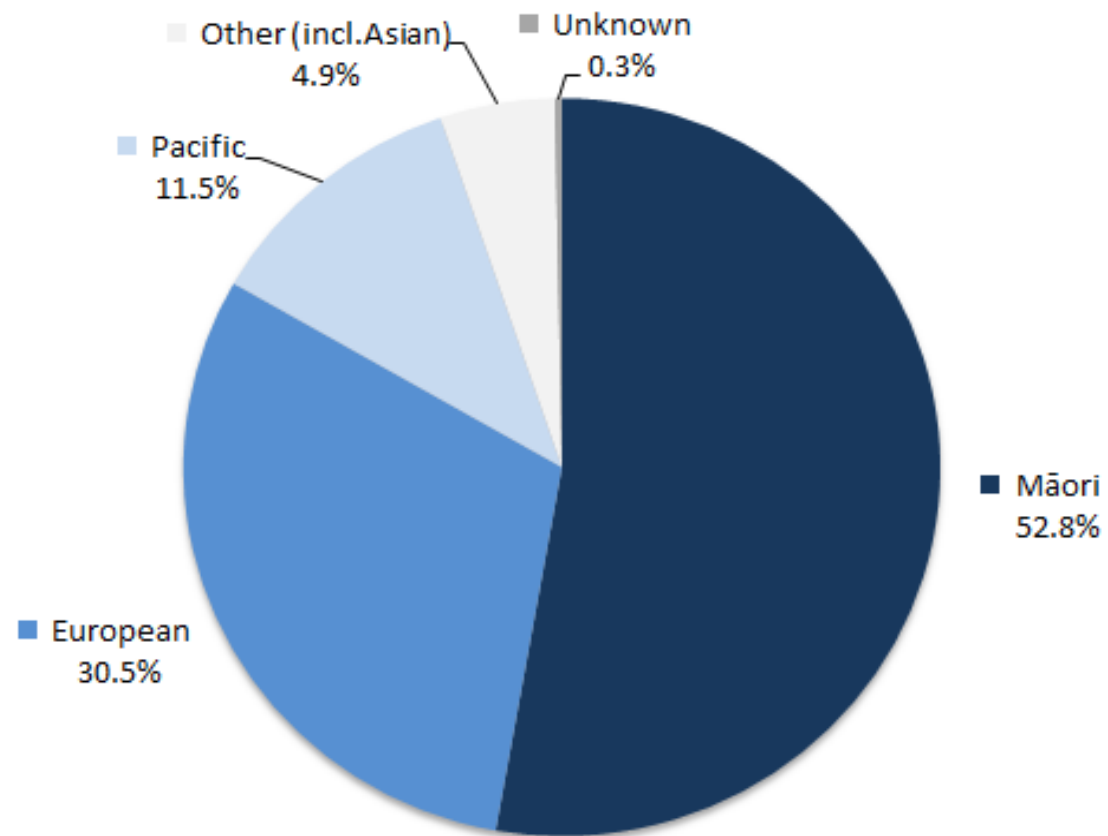
## Total Prison Population (9,914)



# Offenders sentenced to imprisonment in NZ



# Prison population by ethnicity



Source: [https://www.corrections.govt.nz/resources/research\\_and\\_statistics/quarterly\\_prison\\_statistics/prison\\_stats\\_march\\_2020](https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2020)

# Section 27 Sentencing Act 2002

- **Offender may request Court to hear person on personal, family, whānau , community, and cultural background of offender**
- (1) If an offender appears before a court for sentencing, **the offender may request** the court to hear any person or persons called by the offender to speak on –
  - (a) the **personal, family, whānau , community, and cultural background** of the offender
  - (b) the **way in which that background may have related** to the commission of the offence

# Section 27 continued...

(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, whānau , or community **and the victim or victims** of the offence

(d) **how support** from the family, whānau, or community may be available to help **prevent further offending** by the offender

(e) how the offender's background, or family, whānau or community support **may be relevant in respect of possible sentences**



# Principles of Sentencing Act 2002

- **Principles of sentencing or otherwise dealing with offenders**
- **8(i) must take into account the offender's personal, family, whānau , community, and cultural background** in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose

# Effect of ss8 and 27 Sentencing Act 2002

- Section 27 allows the presiding Judge to:
  - Consider what weight is to be given to the background circumstances in passing sentence in light of the gravity of the offending and other matters in ss7-9 of the Sentencing Act
  - Factors such as deprivation and poverty, violence, alcohol and drug use, homelessness, hopelessness, land loss, colonisation and unemployment become relevant at sentencing
  - Onus to sheet home the link between historic and present-day trauma and offending
  - Requires Judges, lawyers (including prosecutors) to understand indigenous history

# A thought

- Engagement with an offender means engagement with all aspects of an offender's make up
- An offender cannot be looked at in isolation from their *taha tinana*, *taha wairua*, *taha hinengaro* and *taha whānau*
- Engagement means out of Court engagement and in Court engagement
- Generations of “systemic mistrust” needs to be overcome

# A further thought

- Court rooms need to be reconfigured to allow whānau into the Courtroom
- Greater information is required about offenders and their particular circumstances
- Offender specific rehabilitation plans required that look at all the aspects of *taha tinana*, *taha wairua*, *taha hinengaro* and *taha whānau*

# Yet Another thought

- Māori have a long and unpleasant history of engagement with the "system". They have a longer history of engagement with whānau. Te Mana o Ngāpuhi Kowhāo Rau are seen as whānau by offenders
- Engagement of providers and whānau independent of the "system" and the "state" are critical to long term rehabilitation and reducing recidivism

# A final thought

- If Revelation 21:21 described streets being paved in gold, for Māori, the pathway to imprisonment is paved in stories of deprivation and poverty, violence, alcohol and drug use, homelessness, hopelessness, land loss, colonisation and unemployment. For most Māori that will not be no great revelation!
- Effects of colonisation are no coincidence

# An after thought

- An offender is a person long before they are an offender
- Understanding the cultural context of an offender will require considerable education for lawyers, prosecutors and judges alike
- For these matters to have weight, Judges and others must be on Board



# QUESTIONS