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EDITOR’S INTRODUCTION

The *Yearbook of New Zealand Jurisprudence* is an annual collection of papers contributed by participants in the Staff Seminar Series of the University of Waikato School of Law and is published in conjunction with the Centre for New Zealand Jurisprudence. The School of Law was founded in 1991 to provide a professional legal education, develop a bicultural approach to legal education and to teach law in the contexts in which it is made and applied. The *Yearbook of New Zealand Jurisprudence* aims to stimulate and contribute to the development of New Zealand jurisprudence by publishing articles, essays and other forms of analysis and comment which directly address or are relevant to New Zealand jurisprudence. The articles contained in this issue are from both permanent and visiting scholars. The areas of law covered by these articles are diverse, however each addresses the achievement of “justice” in different contexts.

Paul Havemann examines peace building between Indigenous peoples, the dominant settler polities and the Crown within a reconciliatory justice paradigm and surveys some recent steps towards building peace with Indigenous peoples in Australia, Canada and Aotearoa/New Zealand.

Marianne Nielsen brings further important insights from the Canadian perspective. She examines the work of the Aboriginal Youth Justice Committees in Alberta, Canada in the context of Aboriginal young people’s experiences with the Canadian criminal justice system. These Committees operate within a restorative justice paradigm but without some of the constraints that tend to impede the development of other restorative justice programmes.

Can compensation provide justice for the wrongs of the past? This is the theme of Craig Coxhead’s consideration of compensation for wrongful conviction in New Zealand, using as a case study the effect of current policy on the whanau (family) of the Whakatohea Chief, Mokomoko, who was executed in 1866 for the murder of a New Zealand Missionary and later pardoned.

Although he rejects affirmative action as a means of remedying past discrimination, Ken Mackinnon argues that law schools have a special obligation to consider the justness of university admissions. He uses the debate in the US as a basis for advocating a goal-based policy of affirmative action in New Zealand law schools.

Brenda Midson’s article is also comparative, looking at how US and New Zealand case law has dealt with the issue of corroboration of recovered memories in criminal trials. She suggests that greater flexibility in assessing the admissibility of evidence will better ensure that justice is done in individual cases.
The Editorial Committee is grateful to the referees to whom these articles were sent for their time and thoughtful contributions. They have done more than could be justly expected of them, while the administrative and secretarial support of Raewyn McGregor has been outstanding. Our thanks.

Jacquelin Mackinnon

Editor

Yearbook of New Zealand Jurisprudence
Reconciliatory Justice for Indigenous Peoples in the Anglo-Commonwealth?¹

BY PAUL HAVEMANN*

Introduction

The substance of this article is based on a presentation which contributed to a dialogue on Indigenous peoples' rights hosted by the Commonwealth Human Rights Initiative at the Institute of Commonwealth Studies, University of London, in July 1999.¹

Unlikely as it may seem, London was a most fitting place for such a dialogue: it was there, more than 160 years ago, that perhaps the first official recognition and concern about the genocidal impact of colonisation on Indigenous peoples of the Empire was stated, in the 1837 report of the British House of Commons Select Committee on Aborigines. The Select Committee’s recommended solution was a benignly meant amalgamation of the races, i.e. assimilation, but the consequences for Indigenous peoples in what we now call the Anglo-Commonwealth have been universally horrendous. Events since 1837 show the need for eternal vigilance over the actions of the powerful even where their best intentions are expressed. The human rights of Indigenous peoples the world over have been more often honoured in the breach than in their realisation – and this is true of the Indigenous peoples in the liberal democracies of the Anglo-Commonwealth.²

Some steps are now being taken towards building peace between Indigenous peoples, the dominant settler polities and the Crown. Conceptually, peace building is a complex transformative process for eliminating the sources of high and low-intensity conflict and promoting healing and trust.³ I call this process 'doing reconciliatory justice'. This paper surveys examples of developments in the quest

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¹ I gratefully acknowledge the Institute of Commonwealth Studies, University of London for the collegiality, space and amenities enjoyed as Visiting Fellow (July–October 1999).


for reconciliatory justice and critiques them in terms of their contribution towards building peace. Peace building requires communication, consultation and cooperation between the parties and a sustained commitment to a sustainable future coexistence.  

Globally, non-discriminatory observance of human rights is now the basic test against which the promises of the powerful (e.g. the nation state) to honour their commitments to respect the rights of the powerless (e.g. Indigenous peoples) can be measured. It is my view that the Commonwealth is a most appropriate supra-national body through which the capacity of member states to recognise, respect and fulfil their human rights obligations can be enhanced.

The new millennium needs to be the age of supra-national cooperation as it is most certainly the age of unprecedented global competition. Justice based on and grounded in human rights remains as important and as threatened as ever. The gap between the powerful (e.g. the nation state and the transnational corporations, or TNCs) and the powerless is set to continue to widen dramatically. Entrenched economic and political interests sustain and accelerate divisions, globally and locally. The digital divide suffices to illustrate this point. The UN Development Program’s annual Human Development Report (1998) predicted that by 2001 an estimated 700 million people would have access to the Internet but that nearly all of these people would be in the OECD countries where half the GDP is knowledge based. Indigenous peoples are likely to find themselves in the category of ‘have nots’ when it comes to access and any growth in the GDP of the state in which they find themselves, unless major steps are taken to promote their inclusion in the network society on their terms. The UNDP 2000 report for the year 2000 explicitly links the enforcement of human rights with human development for the 21st century.

**Reconciliatory Justice**

Building peace based on reconciliatory justice for Indigenous peoples requires a paradigm shift away from archaic, Westphalian, state-centred and hierarchised power-brokering to relational processes premised on ‘horizontalised’ politics. A

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central theme of this paper is the need for states to start, or in some cases persist with, honouring their obligation to engage in building peace with the first peoples to inhabit their territories by doing reconciliatory justice. For Indigenous citizens this means enforcing their human rights as peoples and as individuals. Reconciliatory justice for Indigenous peoples involves social inclusion of Indigenous peoples in political participation and prosperity, on terms defined by Indigenous peoples themselves. John Paul Lederach proposes a conceptual framework based on four quadrants for understanding and empowering the process of building peace through reconciliation: 7

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Reconciliation has many facets and sustained dialogue is essential to it. The focus needs to be an holistic approach focused on rehabilitating or 'habilitating' de novo the relationship between peoples. The concept of reconciliatory justice in this framework based on truth, mercy, justice and peace is a positive alternative to retributive justice. Fortunately for those who co-exist with Indigenous peoples, reconciliatory justice is the idea of justice to which most Indigenous peoples subscribe. It is merciful and involves recognition that 'we are all here to stay' for good or ill. Reconciliatory justice is predicated on an holistic approach to truth and restoration involving all parties in forward-looking problem-solving: the continuing coexistence of the harmed and the perpetrator of the harm is assumed, though with an altered balance of power.

In contrast, retributive justice involves punishment by death, incarceration away from society, banishment from society or the infliction of pain, with no commitment to reconciliation or towards the ongoing, face-to-face coexistence of the perpetrator and the harmed. Retributive justice is backward-looking and does not transcend

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the stage of blaming, i.e. truth seeking and telling, in order to justify punishment; yet it lies at the core of the liberal legal ideology and enlightenment rationality which inform liberal democratic nation building. Perhaps this explains the hesitancy and tortoise-like pace with which settler societies have embarked upon reconciliation and restoration.

Essentially, truth requires acknowledgement in the form of an apology to Indigenous peoples by majority communities and the nation state for past genocidal and ethnocidal harms; justice and peace will come from the recognition, protection and fulfilment of individual and group human rights of Indigenous peoples, including restoration to Indigenous peoples of their lands, autonomy and culture. Vitally, the onus of proving title to lands – belonging to the land and identity with land – must shift from Indigenous peoples to settlers and nation builders, who have masqueraded as the unchallenged titleholders and definers of what is right for far too long. Apology signifies that one of the first barriers to justice and healing and building peace, namely denial, is being overcome.

This paper will not attempt to address mercy. Mercy is the prerogative of those who have been wronged. From my observation of the Anglo-Commonwealth, Indigenous peoples have invariably come to the negotiating tables, invariably shown acceptance and forgiveness, and invariably provided support for the dominant polity to learn and understand about them and about what they have done. The basis of merciful interventions appears to be willingness to take an inter-generational perspective, to plan for the well-being of the seventh generation by envisaging a common, connected, peaceful future in which affinity and difference are sustainably reconciled.

Lederach astutely analyses the interdependent paradoxes inherent in the process of reconciliation that must be managed in building peace. His analysis encapsulates the challenge involved in managing the dynamic tensions within the truth – mercy – justice – peace quadrants. These tensions generate polarisations either creating a crippling impasse or synergies forming the basis of a new relationship. South Africa’s Truth and Reconciliation Commission is an example of positive synergy. The current Australian Government’s repeated denial of truth reflected in its refusal to say ‘sorry’ illustrates a crippling impasse.

Lederach reminds us that truth in the peace-building encounter between perpetrator and victim involves open expression of the pain caused by the one to the other in the past and a commitment to search for an interdependent future. Where truth is

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to be sought and mercy shown, there is exposure and shaming of the perpetrator as well as the letting go of grievance in favour of the interdependent future by the victim. Justice is done through redress, and peace is made through a mutual commitment to envisaging a common, connected future.9

Settler nation building: genocide, liberalism10 and denial

The Commonwealth now represents the progeny of British Empire. We who live in the Commonwealth claim to be a ‘family of peoples’ in the North and South, with shared yet divergent histories and experiences of Empire, colonisation, decolonisation and globalisation, attempting to unite for the common good. Rhetorical, and sometimes actual, commitment to ideas about the value of liberal democracy is a shared legacy. This is the foundation upon which the commitment to human rights for everyone is established. Almost all Commonwealth states have ratified the major international human rights instruments of the post-World War 2 era; most are governed by political–legal institutions that are variations on the Westminster model; most aim to promote representative democracy and constitutionalism in some form; and most also operate legal systems based on the common law and promoting the ideal of the Rule of Law.

All states, whether they be the United Kingdom itself, the old settler dominions or the decolonised states of the ‘new’ Commonwealth, share another characteristic in common: they are modern states (states of the modern age spanning the last three centuries). They are products of recent processes of nation building in which a monopoly on sovereignty has been imposed over territory that is culturally diverse, i.e. home to multiple distinct historical state-free sovereign communities. The process of imposing this singular statist sovereignty in the name of ‘nation building’ has been a project almost invariably aimed to create an idealised and organic unity between ‘the nation’ and ‘the people’ where no such organic unity exists.

A pernicious design flaw in this process of nation building has been that the basic idea of ‘the people’ from whom the nation is supposedly forged generally fails to accommodate ‘others’ who do not fit into the mould of the dominant

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majority. The ideology of majoritarianism, which is sometimes legitimated through the democratic process, pervades modern nations. Majoritarianism, whether manifested in liberal democracies or in more authoritarian systems of governance, has legitimated consistent discrimination against the ‘others’ with awful and dehumanising consequences. In liberal democracies a dual system has obtained, combining democracy for the majority and authoritarianism for the ‘others’ – except under apartheid in South Africa, of course, where the pattern was reversed.

To enhance the ‘purity’ of ‘the people’ and suppress diversity, the sovereign state, in the name of the majority, has deployed its monopoly of force and law-making power to legitimate a host of ‘cleansing’ processes. The form of harm perpetrated on Indigenous peoples ranges from murderous cleansing, i.e. genocide, to insidious processes of ethnocide involving the destruction and/or removal of ‘alien’ cultures by means of induced and coerced assimilation, immigration and emigration conducted over many generations. Indigenous peoples represent the classic ‘other’ and have been the targets of discriminatory cleansings to eliminate or assimilate them in all parts of the Commonwealth.

Processes of peace building universally take place against the backdrop of a culture of denial of harm, for instance to Indigenous peoples. The culture of denial is shaped by greed, ignorance and the ideologies of superiority derived from science and religion that have served to de-legitimate and invalidate the rightful claims of the ‘other’ to enjoy their human rights to all dimensions of their individual and collective identity. This culture of denial divides settler from Indigenous communities throughout the Anglo-Commonwealth and is manifested in cycles of hostility often creating deep distrust. Denial is sustained by intense negative stereotyping. The culture of denial is dehumanising for denier and denied. For the latter, their personhood is denied, the harms they have suffered are negated, their legal rights ignored and their lands deemed the land of no one, terra nullius such as in Australia (from 1788 to 1992). As for the deniers they must live a lie, and refuse to honour one of the basic tenets of their humanity, to do unto others as they would have others do unto them.

A classic illustration of the symptoms of denial emerges from the public debate over the preamble for a possible patriated Australian republican constitution. The former Chief Justice of Australia, Sir Harry Gibbs, is reported to have said ‘One can only conjecture, for example, what effect might be given in legal proceedings

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to the presumption that Aboriginal peoples were the original occupiers or custodians of Australia.\textsuperscript{12}

Challenging the settler nation builders’ culture of denial relies on disclosure and exposure of harm set against universally ratified human rights norms. Denial is the deeply pathological ideological\textsuperscript{13} resource endlessly drawn upon in the nation state to evade guilt and responsibility for harms against Indigenous peoples, to stall reconciliation and restoration, and to perpetuate discrimination. A key element of building peace is truth seeking. To achieve anything against the powerful, the powerless need to embarrass them by naming, blaming, shaming and re-educating them. This in turn relies on human rights standards that can aid in defining harms and framing obligations and rights which human rights workers can use to advocate against breaches. Human rights provide the benchmark against which lapses of standards can be measured and claims publicised. Thus local and global public naming, shaming and blaming in terms of violations of human rights becomes the fulcrum by which to lever change to enforce human rights duties. Hence the obvious need for supra-national bodies like the Commonwealth to focus the spotlight of human rights standards on places where violations persist and to enhance the capacity of states to meet their human rights obligations. Such a process never ends: mercy, or forgiveness, is achievable only when peace building is predicated on truth. To demand that we forget the past and move on is to run the risk that the culture of denial will reassert itself and allow history to repeat itself. Building peace, however, cannot begin unless there is a commitment to vision a future together.

I readily acknowledge that universalising ‘rights talk’ is associated with the liberal democratic project, but it needs to be recognised that rights imply correlative obligations on all, including the powerful.\textsuperscript{14} Hence the language of duties ought to be just as well understood by those for whom rights talk sounds too individualistic, e.g. those nations in Africa and the ‘Asias’ where duties within collectivities are a better-understood way of depicting relationships. So whether the discourse of rights or the discourse of duties seems more appropriate, the state is inescapably obligated to honour responsibilities to ‘others’ such as Indigenous People who are also citizens yet have, more often than not, been trampled over in the haste to nation build according to the blueprint of the majority.


\textsuperscript{13} See Cohen, S, \textit{States of Denial: Knowing about Atrocities and Suffering} (Cam bridge: Polity, 2000).

Surely no healthy nation can be built on the foundations of denial of genocidal harms to members of the polity? Truth is thus an essential building block for healthy nation building where cultural diversity is accepted and ‘purity’ seen for the dangerous mirage that it is. Each of the settler dominions has a history of fabricating nationhood in the image of a British imperial civilisation; each has a history of profound intolerance of diversity; each is bedevilled with a culture of denial; each has for the most part excluded Indigenous peoples from political participation and prosperity through discriminatory practices over many generations. It is worth repeating that these practices traverse the full gamut of ethnocidal and genocidal harms from outright war to murderous cleansing, and from coerced and voluntary immigration and emigration to coerced and voluntary assimilation. None of these societies has yet come to terms with the peace-building task of crafting a differentiated yet first-class form of citizenship for all, in a poly-ethnic nation in which the political and legal institutions empower Indigenous peoples to practice such citizenship. Nevertheless, there is some real as well as much gestural evidence that steps have begun to be taken towards building peace with Indigenous peoples through reconciliatory justice.

Towards Reconciliatory Justice: Australia, Canada and New Zealand/Aotearoa?

Applying Lederach’s conceptual framework for building peace to the conflict between Indigenous peoples and the dominant settler polity and the Crown: truth involves truth telling about the harms, and acknowledgement and apology for those harms; justice involves reparation for harm in financial terms (while recognising that ethnocidal and genocidal harms are really incompensible), restoration of Indigenous peoples’ land, and power to determine its use; and peace involves redesign of state political – legal institutions, and a process to empower Indigenous peoples to participate in their own governance and the government of the state as well as to accommodate new, hybrid, self and community identities.

Following is a brief and selective survey of recent steps towards building peace with the Indigenous peoples of the Anglo-Commonwealth.

**Australia**

The foundation of the Australian settler state’s legitimacy was the convenient legal fiction that the continent was *terra nullius* to be acquired by occupation and to be ruled without any presumption that the rights, laws and lands of the original owners and occupiers merited recognition by the common law or the Constitution of 1901. This dehumanising fiction defined the relationship between settlers and Aboriginal and Torres Strait Islander peoples from 1788 to 1992, when
Reconciliatory Justice for Indigenous Peoples

the landmark (in Australian legal terms) *Mabo (2)* decision of the High Court put the *terra nullius* doctrine to rest by acknowledging the possibility of doctrine recognising a pre-existing form of native title as a form of proprietary interest. This native title predates occupation and does not flow from the radical title of the Crown.

The onus of proof of such native title falls heavily on the shoulders of Aboriginal communities, diverting them and precious resources away from community empowerment and rebuilding into litigation. The courts and tribunals before which Aboriginal peoples have had to plead their cases have, by and large, erred on the literal and strict interpretations of elaborate tests required to establish ‘title’ in the eyes of the settler Crown. It seems likely that few of those harmed by genocide can satisfy the requirements of the test by virtue of the very nature of the two centuries of harm they have endured, notably dispossession and assimilation. Reconciliation and restoration seem like a pipedream as long as Indigenous people must justify their claims to belong to the country through demeaning, socially degrading courtroom ceremonies while the settlers are presumed in law to have a legitimate title and while the dominant ideology of ‘the nation’ reproduces personal, official and cultural denial of history and contemporary events and processes.

Below are illustrations of the mixed and modest patchwork of processes and events one could associate with the process of reconciliation and restoration in Australia.

**Truth?**

In 1975, the Senate passed a resolution acknowledging the Aboriginal and Torres Strait Islander peoples as having had original possession of the continent.

In 1981, the Senate *Two Hundred Years Later* report recommended a treaty and statement of reconciliation with Aboriginal and Torres Strait Islander peoples, to be known as the *Makarrata*.


16 In 1975 the International Court of Justice determined that the *terra nullius* doctrine was inapplicable as a mode of territorial acquisition in relation to any territory where there were Indigenous inhabitants: see *the Western Sahara (Advisory Opinion)* (1975) ICJ Reports 12.

17 See Federal Court Justice Olney’s comments on the Yorta Yorta People: ‘the tide of history has undoubtedly washed away any traditional rights that indigenous people may have had...’ *Yorta Yorta v Victoria, NSW and Ors*, Federal Court, 18/12/98, paragraph 126. This sort of judgement on living peoples has been likened to passing the death sentence on the juridical person so as to finalise the genocide.
The 1987 report of the Royal Commission on Aboriginal Deaths in Custody revealed the systemic discrimination against Aboriginal and Torres Strait Islander peoples in the criminal justice system, and linked this harm to ethnocide and genocide. The process of naming and blaming has led to no prosecutions but to many unfulfilled promises for criminal justice system reform.

In 1991, the Council for Aboriginal Reconciliation was set up with a ten-year mandate to achieve reconciliation.

The 1992 Mabo (2) and Ors v Queensland decision of the High Court of Australia included acknowledgment that Australia was not terra nullius and had indeed been occupied by the ancestors of Australia’s citizens of Aboriginal and Torres Strait Islander ancestry.

In 1993 Prime Minister Keating’s Redfern speech acknowledged the failure of White Australia to confront the history of atrocities committed against Aboriginal peoples.

The 1997 Human Rights Commission’s Bringing Them Home report revealed the scale of the systematic separation of generations of Aboriginal and Torres Strait Islander peoples’ children from their families for the explicit purpose of coerced assimilation. These people become known as the ‘stolen generations’.

It is notable that in response to this report Prime Minister Howard refused to make official apology for the record of state-sponsored forced assimilation amounting to ethnocide.

Justice?

From 1976 to the 1990s the States and Territories passed so-called land rights legislation. The Crown conceded control over limited sections of territory to Aboriginal peoples under various forms of legal arrangement, though nowhere acknowledging it is theirs as of right due to their pre-1788 status as the original occupiers.

In 1985 Uluru (Ayers Rock) was handed back to the original owners in a joint-venture National Park.

In 1993 the Federal Government established a fund to assist Aboriginal and Torres Strait Islander peoples unable to establish native title under the Native Title Act 1993 (estimated to be 90% of Aboriginal and Torres Strait Islander peoples) with funds to buy land.
In 1993 the Native Title Act gave statutory recognition to the native title recognised in Mabo (2). The Act contained stringent tests for peoples to qualify as titleholders and established a system of state and national native title tribunals to make findings on title claims.

Peace?

In 1967 the Referendum on the Constitution allowed an amendment giving the federal Commonwealth Government conjoint power over Aboriginal and Torres Strait Islander affairs and empowering and obligating the Commonwealth Government to honour international human rights laws in national law.

In 1989 the Aboriginal and Torres Strait Islander Commission replaced the Department of Aboriginal Affairs (operative since the 1970s) and this Commission of Aboriginal and Torres Strait Islander leaders was mandated to manage Aboriginal affairs. However, the Opposition had forced the Government to drop a clause which recognised Aboriginal peoples as ‘original owners and occupiers’ from the preamble of the enabling legislation creating the Commission.

In 1999 the culture of denial was actively lived out in debate about the proposed republican Constitution’s preamble: the proposal to include reference to Aboriginal and Torres Strait Islander peoples as ‘original occupiers and custodians’ threatened to jeopardise any reference to their existence at all.

Canada

Canada’s Indigenous peoples – the First Nations, the Metis Nation and the Inuit – have enjoyed recognition of their presence and rights to their land supposedly since the Royal Proclamation of 1763 through numerous pre-Confederation (1867) treaties, 12 post-Confederation treaties and a host of ‘modern’ treaties under the Federal Government’s Comprehensive Claims policy after 1973 and the Inherent Right to Self-Government policy after 1996. The Royal Commission on Aboriginal Peoples concluded nonetheless that the legacy of ethnocidal practices of dispossession, coerced and voluntary migration and assimilation still required radical steps towards restoration and reconciliation. Denial was most obviously manifest in the Trudeau Federal Government’s notorious 1969 White Paper: it contained the proposal to abolish the special status of Indians under the Treaties and Indian Acts and thereby, at a stroke, make them like other Canadians – equal

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18 See former Australian Prime Minister Gough Whitlam’s 2nd Vincent Lingiari Memorial Lecture at Northern Territory University entitled ‘Dragging the chain 1897 – 1997’ for a very relevant, critical overview of denial in Australian constitution-making, past and present.
citizens under the law, without reconciliation or restoration in any form. The Alberta Chiefs branded this the ‘citizens minus’ approach and called for a ‘citizens plus’ approach.\textsuperscript{19}

As it has on the Indigenous peoples of Australia, the onus of proving title to their lands and the legitimacy of self-government of their nations has fallen heavily on First Nations, Metis and Inuit peoples of Canada. Costly and demeaning processes of proving themselves and their claims have diverted them from community empowerment and rebuilding. Recent developments of Federal Government policy, notably the \textit{Gathering Strength} policy and \textit{Statement of Reconciliation} (1998) made in the wake of the findings of the Royal Commission on Aboriginal Peoples (1996), reflect a significant watershed in the relationship. Some still suggest, however, that Government policy is more about the extinguishment of claims than about the start of a new partnership between peoples.

**Truth?**

In the 1973 case of \textit{Calder v Attorney General of British Columbia}\textsuperscript{20} the Supreme Court of Canada acknowledged that Indigenous peoples may have native title which is independent of the grant of the Crown derived from their occupation of lands since time immemorial. This signalled the need to consider land claims seriously and led to the Comprehensive Claims policy.

In 1996 the Royal Commission on Aboriginal Peoples identified the magnitude of great wrongs done to Aboriginal peoples and made firm, active and clear acknowledgment of these. It recommended the abandonment of a simplistic ‘equality’ approach which denied Aboriginal Peoples’ status as unique political entities whose place in Canada is unlike that of any other people.

In the 1997 case of \textit{Delgamuukw v British Columbia}\textsuperscript{21} the Supreme Court of Canada castigated the court below for its failure to take aboriginal history seriously in adjudicating on the legitimacy of claims.

The 1998 policy statement \textit{Gathering Strength – Canada’s Aboriginal Action Plan} included a statement on reconciliation and an explicit apology for the Federal government’s role in the ethnocidal residential school system.

\textsuperscript{20} \textit{Calder v Attorney General of British Columbia} (1973) SCR 313.
\textsuperscript{21} \textit{Delgamuukw v British Columbia} (1997) 3 SCR 1010.
Justice?

In 1975 the Comprehensive Claims policy allowed for monetary reparation to accompany land settlements.

In 1991 the Special Claims Commission was established.

In 1998 the Gathering Strength plan included a commitment of NZ$350 million explicitly for community healing programmes.

Peace?

In 1975 the Comprehensive Claims policy formed the basis for a substantial number of land settlements: twelve major settlements that included restoration of some or all of the lands claimed and self-government were concluded by 1998. These include significant settlements of territory and agreements on self-government such as the James Bay Cree of Northern Quebec agreement, the Nisga’a agreement, agreements covering almost all the Yukon Territory, and the consequent creation of the Inuit’s self-governing Nunavut Territory in 1999.

In 1982 the Constitution Act embodied a new constitution for Canada ('repatriated' from Westminster) which provided for recognition of Royal Proclamation and treaty rights (section 25), recognition and affirmation of existing aboriginal rights (section 35) and inclusion of Aboriginal leaders in subsequent discussion of constitutional amendments (section 37) in as much as these affected Aboriginal peoples directly.

The Supreme Court of Canada has played the significant role in defining 'Aboriginal rights' under section 35—though one must remember that this arises from protracted adversarial litigation pitting impoverished First Nations against the Crown. Aboriginal people carry the onus of justifying their claims. Initially, the Court offered broad and generous canons of interpretation of settler law in Guerin (1984) and Sparrow (1990); but later, more and more rigorous requirements, as in Van der Peet (1996) have started to come into play. 22

Attempts to amend the Constitution in the 1990s to ‘constitutionalise’ the Aboriginal right to self-government were supported in principle by governments at the Charlottetown constitutional amendment conference but ultimately got nowhere following defeat in a national referendum. There was opposition to the concept of

self-government at the provincial government level and the majority of Canadians opposed the implications of implementing this idea, which amounts to a third tier of government. Possibly, hostility to change on the part of the majority was prompted more immediately by Quebec's concurrent claim to be a 'distinct society'. 23 Quebec's bid for quasi sovereignty was aimed at giving the province a status superior to other provinces in the Canadian Confederation. So that First Nations' legitimate claims would not get lost in constitutional and intergovernmental wrangling, the Federal executive enunciated recognition of the inherent right to self-government as an Aboriginal right.


In 1993 the British Columbia Treaty Commission was set up. Between 1993 and 1999 it considered over 50 separate claims by First Nations to territory and self-government.


In 1998 the Federal Gathering Strength action plan, as mentioned before, included NZ$350 million towards community-based health and healing, to be allocated by Indigenous People.

**New Zealand/Aotearoa**

The British House of Commons Select Committee on Aborigines had reported in 1837. Its proceedings had brought to the attention of British humanitarians the widespread atrocities that seemed to be a concomitant dimension of colonisation. This had the effect of encouraging a treaty-based approach to the settlement of New Zealand. The British Crown obtained a Declaration of Independence in 1835 for a substantial group of Maori chiefs to signify that they were sovereign peoples with whom a treaty could be concluded. In 1840 the Treaty of Waitangi was duly concluded.

The Treaty aims to avert the 'evil consequences which must result from the absence of necessary Laws and Institutions alike to the native population and Her subjects'. The first article is highly contested. The British clearly intended it

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to give them substantial governmental power and probably sovereignty. Maori assumed it empowered the Crown to govern British people, not Maori. The third article, in relation to Maori, ‘extends royal protection and imparts to them all the Rights and Privileges of British subjects’. The second article guarantees to Maori full, exclusive and undisturbed possession of the lands and estates, forests, fisheries and other properties they individually and collectively own. To protect Maori from dishonest dealings the Crown identified itself as having a right of pre-emption over land Maori planned to sell.\(^2\)

The differences between Treaty rhetoric and the reality are stark. Maori have never enjoyed any measure of self-determination since 1840, though they were assigned four parliamentary seats in 1867. Most land is not in Maori hands any longer. Much of it passed to settlers by dubious deals and unlawful confiscations constituting breaches of the Treaty partnership and the Crown’s obligations – as, for instance, in the notorious New Zealand Settlements Act 1863. This process was made a whole lot easier by the relegation of the Treaty to the status of ‘a simple nullity’ by Chief Justice Prendergast in 1877 in the case of Wi Parata v the Bishop of Wellington.\(^3\) The Chief Justice determined that no binding pact could be concluded with mere ‘barbarians and savages’. This convenient deconstruction of the Treaty as a statement of constitutional–legal obligations effectively persisted until the mid-1970s – that is, for a century!

Maori resistance and the shaming of the conscience of the majority led to the creation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975. The Tribunal is a standing inquiry empowered to make findings and recommendations on Treaty breaches (though not orders per se) and to recommend principles for honouring the Treaty. Since Judge (now Justice) Durie was appointed to the Chair of the Tribunal in 1982 it has played a very significant part in truth finding and telling. A detailed history of Treaty breaches has emerged from the reports of the Tribunal. These reports\(^4\) are scholarly documents addressing legal, cultural and historical matters with equal facility and rigour. Half the members of the Tribunal are Maori. The proceedings of the Tribunal allow Maori claimants to present their claim in Maori on their home marae, and the Tribunal enables them to collect historical data. Historians and other experts for both sides may be cross-examined but the process is not a degradation ceremony premised on the assumption that Maori must justify their existence. Maori land, as a category of land separate from

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\(^3\) Wi Parata v the Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC).

\(^4\) To conduct a free web search by keyword, to browse or read the entire text, see the database of the Waitangi Tribunal <http://www.knowledge-basket.co.nz/waitangi>.
general land and held collectively by Maori has always been a feature of New Zealand law; separate land legislation (the latest version being Te Ture Whenua Maori Act 1993) has been enacted and a Maori Land Court has existed since the 1860s.

Doing justice and building peace are up to the Crown, which has followed Tribunal recommendations about truth in some but not every instance. One of the major settlements, the Tainui Raupatu settlement concluded in 1995, was negotiated directly with the Crown outside the Tribunal process but probably benefitted from the climate of negotiation engendered by the Tribunal process and findings.

Truth in terms of acknowledgment and apology by the Crown is settlement-specific, though one can infer apology and acknowledgment of the dishonouring of the Treaty from the creation of the Tribunal under the Treaty of Waitangi Act 1975. This Act signified that the political and legal culture of denial articulated in Wi Parata in 1877 was over, at least in official discourse.

Building peace in terms of the redesign of state political – legal institutions and process has not been particularly evident in recent decades, though the devolving of Maori policy matters to the Ministry of Maori Development under a Maori cabinet minister and the increase in the number of Maori seats from four to five represent modest and gradual reforms. Ideas for a Maori upper house of review have foundered. Since 1987 Maori has been one of the official languages of New Zealand and, officially, since the late 1980s fidelity to Treaty principles should inform all aspects of governance in New Zealand.27

The Waikato Raupatu Claims Settlement model

I conclude this essay by describing the microcosm of a peace-building process found in the Waikato Raupatu Claims Settlement Act 1995. The Act is the culmination of a process which began in 1865 when the Crown purported to lawfully confiscate the lands of 33 hapu (sub-tribes) of the Waikato Tainui iwi (tribes) whose lands stretch from the southern edge of the Waikato plain northward to South Auckland. This land is estimated to have a current market value of NZ$12 billion. Queen Elizabeth II assented to the Act in person, signifying the personal

dimension of the Crown’s apology. The pretext for the 1863 – 5 confiscation (raupatu) was retaliation for Waikato Tainui’s alleged rebellion against the Crown during the Land Wars in the region. There was no such rebellion.

Waikato Tainui sought reconciliation and restoration very much in terms of reconciling the paradoxes in Lederach’s conceptual framework. Waikato Tainui iwi’s negotiating principles were: restoration of land for land – *i riro whenua atu, me hoki whenua mai* – and reparation in money as acknowledgment by the Crown of their crime – *ko to moni hei utu mo te hara*.

The fact that for Tainui the post-settlement process has been highly politicised and litigious should not detract from the model the Tainui Raupatu settlement represents. It seems to me that managing the contradictions between tradition and modernity in the context of governance of the iwi was never going to be easy. The steps taken to get to a platform of process for building peace are as follows:

**Truth?**

The 1995 Act is the outcome of a long process of truth seeking and telling in which Waikato Tainui have long been exonerated of the charge of rebellion and the basis of the confiscation is acknowledged to have been false. This process of truth seeking and telling encompasses, for instance, the (Sim) Royal Commission of 1926, the Waikato – Maniapoto Maori Claims Settlement Act 1946, the Manukau report of the Waitangi Tribunal in 1985, and the judgment of the New Zealand Court of Appeal in the *CoalCorp* case in 1989.

The preamble of the 1995 Act explicitly acknowledges the history of efforts by Waikato Tainui to get justice. It records the steps in detail and the part the Crown has played in a litany of unsatisfactory outcomes, from petitions in the 1860s onwards.

Section 4 sets out the apology given by the Crown in Maori and English and includes the two principles regarding money and land set out above. The apology is unreserved, and acknowledges the breach of the Treaty, the wrongfulness of the confiscation, the fact that Tainui were never rebels, and that Waikato Tainui have indeed contributed positively to the work of the Crown.

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28 Robert Joseph, of Tainui, a PhD candidate in law, must be acknowledged for invaluable help with materials and collegial discussion in preparing this section.

29 See for details the Tainui web site: <http://www.tainui.corp.co.nz>.

The apology concludes with the Crown expressing its intent to begin a process of healing and a new age of cooperation with Waikato Tainui and the movement which has sustained their struggle for justice since the 1850s, the Kingitanga.

**Justice?**

The 1995 Act returns 39,000 acres of Crown land and includes an undertaking by the Crown to purchase a further 90,000 acres to make up for the acreage confiscated. In fact, a total of 1,200,000 acres were confiscated. The settlement does not restore to Waikato Tainui their river, the Waikato, which is the largest in New Zealand and flows through their country; nor have interests in sub-surface minerals been restored. Redress in financial terms amounts to NZ$170 million plus interest on the principal sum of the settlement.

**Peace?**

The Deed of Settlement vests the lands in the first Maori King, the late Pootatau Te Wherowhero. No individual can succeed to these lands: a new title has been created as a tribal title; the land vests in three trustees and can be alienated by them only with the agreement of 75% of the beneficiaries, who number more than 12,000 people. Te Wherowhero title land cannot be alienated in the process of obtaining resource consent under the Resource Management Act 1991, nor do the Maori Land Court or the Waitangi Tribunal retain jurisdiction over matters dealt with under the settlement.

The statutory Trust Board was to be abolished and Waikato Tainui were to agree collectively on a mode of governance for their management of their assets and lands post-settlement. A new body (Kohanganui) drawing on three representatives from each of the 33 marae of Waikato Tainui will constitute a decision-making body for the management of the settlement.

**Conclusion**

Building peace requires the redesign of processes and institutions of governance to represent a plural society of peoples, not just 'the people'. New models of governance and differentiated citizenship are required to manage the tensions between affinity and difference in the context of partnership-based coexistence.

Reconciliatory justice implies restoring the balance between powerful and

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powerless so that the burdens and benefits of nation building by colonisation are radically redistributed. A gestural closing of the accounts is not enough. Indigenous peoples have borne the burden of social exclusion and genocide while the dominant majorities have achieved relative prosperity. The criterion for the redistribution of benefits to Indigenous peoples should be fulfilment of all their human rights (social, civil, political, economic, developmental and cultural). Such rights are both the means whereby self determination is achieved and constitutive of self determination. Only self determination based on these foundations can be relational not confrontational. The universality and indivisibility of all human rights for all peoples requires a horizontalised politics that holds difference and affinities in balance as the basis for coexistence and cooperation. Peace building must be based on partnership for the future grounded in truth, justice and mercy.
Alberta Aboriginal Youth Justice Committees And Restorative Justice Issues

BY MARIANNE NIELSEN*

Introduction

The Aboriginal Youth Justice Committees located in Alberta, Canada are restorative justice programmes that provide services to First Nations young people in trouble with the law. The Committees play one of two roles: either they are community-based sentencing advisory bodies to youth justice court, or they offer Alternative Measures to young people referred to them by the police. A very few Committees do both. In Indigenous communities, the Committees are overwhelmingly sentencing advisory bodies, therefore the Committees discussed in this paper are of this kind.

In this article, the Aboriginal Youth Justice Committees are analyzed in terms of issues that have been associated with non-Aboriginal restorative justice programmes, but first, background is provided on the experiences of First Nations young people with the Canadian criminal justice system; and then the history of the programme is briefly described. In addition to documents from government, organizations and newspapers, this article is based on the content of interviews with Youth Justice Committee members, criminal justice system members such as judges, police officers, and courtworkers and Aboriginal community members in nineteen Alberta communities. Wherever possible, the actual words of the respondents are used.

Background on First Nations Juveniles and the Canadian Criminal Justice System

About 58% of the Canadian Aboriginal population is under the age of 25, compared to about 38% of the non-Aboriginal population (LaPrairie, 1992:286). There are 46 First Nations in Alberta with many different languages and cultures. In 1996, 46% of the Alberta First Nations population was aged 20 years or younger compared to 29% of the overall population (Alberta, 2000).

Under the Youth Criminal Justice Act 2000, the young offender system in Canada deals with youths between the ages of 12 and 17 inclusive. Children under the age

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of 12 are considered incapable of criminal wrongdoing and are dealt with by the provincial social welfare legislation and departments (Yates and Yates, 1993). Not surprisingly, Aboriginal young people are over-represented in juvenile courts, especially in the Western provinces. In Alberta’s circuit courts, for example, about 36% of those appearing in court were Aboriginal. In urban Edmonton Alberta courtrooms in the 1980s, they represented about 14% of those appearing (Bala and Corrado, 1985); this proportion steadily increased into the 1990s (Cawsey, 1991a). The crimes Aboriginal young offenders commit are very similar to those committed by non-Aboriginal young offenders, that is, property offences such as shoplifting, break and enter, and theft. Their committal rates, however, are much higher (LaPrairie and Griffiths, 1982). According to Jackson (1989:216), ‘prison has become for young native men, the promise of a just society which high school and college represent for the rest of us.’

LaPrairie (1990) suggests that there are three overlapping explanations for why Aboriginal people are over-represented in the Canadian criminal justice system: they commit more offences than non-Aboriginals, they commit offences that are more easily detectable, and they receive differential treatment from the criminal justice system. The explanations for Aboriginal young (and adult) offenders committing more offences, and more detectable offences, are complex and associated with the processes of colonization (Frideres, 1993; Hamilton and Sinclair, 1991; Griffiths and Verdun-Jones, 1994; Cawsey, 1991a). First Nations peoples in Canada, like Indigenous peoples in most colonized regions of the world (Burger, 1987), have been marginalized economically, legally, politically and socially. They suffer from: economic dependency, social inequality, assimilative state policies, lack of political self-government, cultural conflict with the dominant society, and individual and institutionalized discrimination. Cultural oppression is another factor. Assimilationist state policies forbid the practice of cultural ceremonies and made the exercise of most Aboriginal social institutions extremely difficult. In the current day, the mass media, especially television, must be added to the list of cultural processes having a negative impact on Aboriginal social institutions (Ross, 1992). In combination, these processes have led to: poverty, high unemployment rates, low educational achievement rates, high mortality rates, high rates of alcohol and drug abuse, high suicide rates, high rates of family violence and, as discussed above, high crime rates. According to the Government of Alberta (2000: 7), ‘over 30% of Aboriginal people have disabilities that limit their physical, mental and emotional well-being and their ability to participate in economic activities.’ Most of the Aboriginal young offenders in Alberta’s and Canada’s young offender centres come from dysfunctional families, have limited employment opportunities, grew up in foster homes, lack a sense of their Aboriginal identity, were subjected to negative peer and family pressures, engage in alcohol and drug abuse, became involved with the criminal justice system at an earlier age than non-Native youth,
ran away from remote communities to urban areas, and do not really understand
the criminal justice system or the complexities of non-Aboriginal society (see
LaPrairie, 1995; LaPrairie and Griffiths, 1982, Cawsey, 1991a). Some also have
different expectations, rooted in Aboriginal cultures, about what the justice process
should do (see Dumont, 1993).

The third explanation for over-representation, differential treatment by the criminal
justice system, focuses on a number of factors external and internal to the criminal
justice system. External factors might include the amount of reporting by the
community to the police, and community acceptance of responsibility for dealing
with crime (Griffiths and Verdun-Jones, 1994). Factors internal to the system revolve
around decision-making by criminal justice system members at important points
in the process. Reports by such important government-mandated groups as the
Manitoba Justice Inquiry, the Marshall Inquiry, the Cawsey Commission and the
Royal Commission on Aboriginal Peoples have documented discrimination by
the Canadian criminal justice system against Aboriginal people. For example, the
Marshall Inquiry, in its investigation of the wrongful incarceration of Donald
Marshall, Jr., a young Micmac Indian, concluded that:

The criminal justice system failed Donald Marshall, Jr. at virtually every turn
from his arrest and wrongful conviction for murder in 1971 up to, and even
beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure
is compounded by evidence that this miscarriage of justice could-and should-
have been prevented, or at least corrected quickly, if those involved in the system
had carried out their duties in a professional and/or competent manner. That they
did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native
(Hickman et al, 1989:1).

Differential treatment has occurred not only on an individual basis, but is an
institutionalized part of the operation of the criminal justice system. Aboriginal
adult and young offenders face special disadvantages in dealing with the criminal
justice system, including: language barriers; lack of knowledge of the non-
Aboriginal criminal justice terminology, ideology, and procedures; unavailability
of legal counsel; lack of informal community-based justice mechanisms (e.g.
diversion programmes); lack of detention facilities separate from adults or in their
home community; lack of alcohol and solvent abuse treatment programmes; lack
of youth emergency shelters; lack of culturally-appropriate programmes in
correctional facilities; and lack of cultural understanding and sensitivity by non-
Aboriginal justice system members.

A review of the somewhat contradictory sentencing literature suggests that
Aboriginal offenders are more likely to be incarcerated than non-Aboriginal
offenders, but for shorter periods of time (LaPrairie, 1990). As well, adult Aboriginal
offenders are less likely than white offenders to get bail, to have access to defense counsel, to get probation, to be able to pay fines (and therefore must serve time in lieu), to have access to culturally relevant correctional programmes, to be released on parole, and to have access to after care services (Law Reform Commission, 1991). Aboriginal young offenders are less likely to be diverted from court and are less likely to be admitted to Alternative Measures programmes (Frideres, 1993). All things being equal, Aboriginal youth are more likely to be sentenced to custody and to spend longer times in custody for the same offences than non-Aboriginal youth (Cawsey, 1991a; Griffiths and Verdun-Jones, 1994). On the other hand, research on Aboriginal and non-Aboriginal juvenile dispositions in Manitoba found that legal factors, such as the number of criminal offences and prior record, had a more important role than extra-legal factors such as age, sex and race, in determining sentences (Kueneman et al, 1992). This reiterates the results of an earlier 1982 study (LaPrairie and Griffiths, 1982). In general, discovering the patterns of over-representation among Aboriginal young offenders is seriously hindered by lack of research (Griffiths and Verdun-Jones, 1994; Minore, 1992).

Despite these documented systemic problems in dealing with Aboriginal adult and young offenders, there are few Aboriginal peoples working in the criminal justice system (Frideres, 1993; Hamilton and Sinclair, 1991). Cawsey (1991b) found in Alberta, that between 1.7 and 1.8 % of all police were Aboriginal, 3.5% of correctional personnel were Aboriginal, and about 1% of Crown Prosecutors were Aboriginal. According to the Law Reform Commission of Canada (1991:5):

"From the Aboriginal perspective, the criminal justice system is an alien one, imposed by the dominant white society. Wherever they turn or are shuttled throughout the system, Aboriginal offenders, victims or witnesses encounter a sea of white faces. Not surprisingly, they regard the system as deeply insensitive to their traditions and values. Many view it as unremittingly racist."

Because of the lack of Aboriginal personnel working within the criminal justice system, the federal and provincial governments have initiated a number of programmes to deal more effectively with Aboriginal offenders. These programmes include Native Awareness (cultural diversity) training for non-Aboriginal personnel, affirmative action to hire more Aboriginal personnel, and funding a number of First Nations-operated criminal justice initiatives that are adjuncts to the main system, such as Native courtworker programmes, justice of the peace programmes, and community-based correctional programmes. An alternative to adjunct programmes, and the alternative favored over-whelmingly by First Nations communities, is Aboriginal-controlled justice services. The development of self-determined Aboriginal justice programmes has also been supported by many government-appointed task forces and commissions (see Cawsey, 1991b for an
Alberta, like many Canadian provinces and territories, has many adjunct, 'indigenized' services as well as self-determined services. Indigenized services are controlled by the non-Aboriginal government by means of funding contracts, audits and other bureaucratic mechanisms, even though the services are operated and usually designed by Aboriginal peoples (Havemann, et al, 1985). Many of the programmes are hindered in their attempts to incorporate traditionally-based Aboriginal processes and values by the need to, for example, fulfill bureaucratically-based operating standards and policies.

In Alberta, the number of young offender-oriented initiatives is increasing rapidly. First Nations communities are developing new programmes for youth ranging from child welfare to criminal justice. Native courtworkers from Native Counselling Services of Alberta (NCSA) provide information and support services in youth courts throughout the province (as well as in criminal and family courts). NCSA also operates Elders' visitation programmes to young offender (and adult) correctional facilities, and young offender custody homes. Specifically for young offenders, First Nations and other urban-based Indigenous organizations offer group homes, open custody facilities, probation supervision programmes, and crime prevention programmes based in recreational and cultural activities (Griffiths and Verdun-Jones, 1994).

Despite these services, First Nations communities still see Aboriginal young offenders as:

the primary victims of the system-cut adrift by it and removed from the community's support as well as from its spiritual and cultural tradition. Elders recount experiences of children taken from their communities at an early age who later emerge, hardened from the court and the correctional process and ultimately beyond the reach of even imaginative initiatives designed to promote rehabilitation. (Law Reform Commission, 1991: 6).

In an effort to keep Aboriginal young people in the community, Aboriginal communities designed and established the Youth Justice Committees.

Youth Justice Committees

Youth Justice Committees are in the vanguard of attempts to shift the young offenders system away from retributive justice and towards restorative justice. The first Committee was established in 1990 in Fort Chipewyan, a remote Aboriginal community, when local Elders expressed their frustration with young people being sent out of the community after committing offences. The judge suggested that
the young offender legislation of the time might allow them to operate as a community sentencing advisory body. The idea of the Committees spread to non-Aboriginal communities so that by June 2000, the number of Committees in the province had increased to 83 (six of which were not active). Of the 77 active organizations, 20 were primarily Aboriginal-operated. The provincial government Department of Justice ‘designates’ new Committees that meet certain criteria set by the government (such as having a written constitution). Some Committees operate without this official support.

An ever-changing number of volunteers provides services in each community. Each community has a Committee of anywhere from 6 to 30 volunteers that form smaller groups known as ‘sentencing panels’ or ‘sentencing circles’ to hear cases recommended to them by the court. The term ‘sentencing circle’ as used by the Committees, is different from the term previously used in court and in the literature. Previous sentencing circles included all members of the court party (judge, prosecutor, police, attorney) as well as parents, victims, and other interested community members. With the Committees, the sentencing circle excludes members of the court party, unless the circle asks a police officer or probation officer, for example, to attend to provide information. The victim may or may not be there; parents or guardians have to be there. The Committees are comprised of respected community members who represent the ethnic make-up of the community so that, for example, in Aboriginal communities where there are Status and non-Status Indians (as defined by law), and Metis (individuals of mixed Aboriginal and European descent), all three groups will be represented on the Committee. Similarly in a community that is mixed Aboriginal and non-Aboriginal, there are representatives of both groups on the Committee. An important criterion for membership is caring about and wanting to help the young people in the community. Aboriginal Elders are represented on the Committees although other community leaders predominate. The Committees primarily serve young offenders, although some assist adults, and in some communities the Committees occasionally bypass the courts (with the blessings of the court and the police) to deal directly with disputes. More details on the structure and operation of the Committees are presented in the next section.

The Restorative Justice Paradigm and Youth Justice Committees

The primary goal of restorative justice programmes is to bring justice back into the community using a process that respects ‘the feelings and humanity of both the victim and the offender’ (Van Ness and Strong, 1997: 25). This means the empowerment of victims, the community and offenders (McCold, 1996: 97). The current criminal justice system operates on a retributive model that focuses on
upholding the authority of the state, deterring offenders, and punishing wrongdoing. Repairing the harm done to the victim and the community has become nearly irrelevant (Van Ness and Strong, 1997: 10).

The restorative model is based on a number of principles that vary greatly from the retributive, deterrent, protective principles of the adversarial system. Principles include that: the victims need to regain control of their lives, overcome a feeling of powerlessness and receive vindication; the community needs to restore its order, its members’ confidence in their safety, and reassert common community values; offenders need to have ‘contributing’ injuries (such as alcohol or child sexual abuse) and injuries resulting from the crime healed (Van Ness, 1996: 23-4). In addition, victims and offenders need personal involvement in the process so that the offenders know who they owe restoration to and the victim can be re-empowered so that, for example, their fear of crime is reduced. (Hudson and Galaway, 1996).

The restorative justice model (McCold, 1997) can be summarized in three propositions: (1) crime is primarily a conflict between individuals (not between an individual and the state) resulting in injuries to victims, communities and offenders; (2) the aim of the criminal justice process should be to reconcile parties while repairing the injuries caused; and (3) the process should facilitate active participation by victims, offenders and their communities instead of being dominated by the state (Van Ness, 1996: 23). The goal of restorative justice is that, ‘the community seeks to restore peace between victims and offenders, and to reintegrate them fully into itself; the goals for victims can expressed as healing and for offenders as rehabilitation.’ (Van Ness, 1996: 28). In general, the establishing of blame for past behaviour is less important than problem-solving for the future (Kennedy and Sacco, 1998: 206).

Victim-offender reconciliation programmes (VORPs), mediation and perhaps arbitration are the most common types of restorative justice programmes in North American non-Aboriginal societies. In these programmes trained mediators work to empower participants, promote dialogue between victims and offenders, and encourage mutual problem-solving (Van Ness, 1996: 24).

The Youth Justice Committees were originally established under the Young Offenders Act of 1985. Under Section 69 of the Young Offenders Act, the Committees could assist, unpaid, ‘in any aspect of the administration of this Act or in any programmes or services for young offenders’. According to Alberta Justice guidelines, the functions of the Committees could include: operating as an alternative to the formal court process by making referrals to alternative measures; getting the views of victims of the offence; providing community support to offenders; providing recommendations on sentencing alternatives to youth court
judges where requested; providing opportunities for young offenders to take part in community service and fine option programmes; arranging for victim/offender reconciliation; providing community supervision of young offenders; ensuring community resources for young offenders are used; and enhancing community awareness of youth crime. The Committees were continued under Section 164.4 of the Youth Criminal Justice Act of 2000. This Act gives more emphasis to the provision of Alternative Measures programmes than sentencing advisory bodies but still allows for them ‘to assist in any aspect of the administration of this Act or in any programmes or services for young persons’ (Section 18.1), specifically ‘to give advice on...sentences...and reintegration plans’ (Section 19.2). The Young Offenders Act 1985 and the Youth Criminal Justice Act 2000 both fit into a ‘retributive justice’ paradigm (Bazemore, 1996).

The Youth Justice Committees, on the other hand, despite their sanction by legislation and connections to the courts, clearly fit within a restorative justice paradigm. Their primary goals include: increasing community involvement in criminal justice administration; increasing community harmony by assisting offenders to ‘heal’; ‘healing’ the community; healing the victim; and decreasing recidivism. A criminal justice system member explained:

[They put] peer pressure on the individuals living in the community...the judge sits down and says ‘You’ll do this’. [then] gets on a plane and flies out of the community, and he’s not there anymore; but when you deal with a group of Elders or [a] sentencing group, the next morning [the offender] gets up and walks down the street, the chances are good he’s going to see somebody that sat on that committee... that is a much better sense of deterrence, or peer pressure, or even justice, because it lives with them a lot longer. (Interview with author, 1994)

Because each community has its unique combination of people and concerns, the structure and operation of the groups vary widely. Each community decides who the Committee members are, how they are selected, how they carry out their duties, and what offenders are eligible. For example, some Committees will accept only first time offenders, whereas others will take only second or repeat offenders because they do not want to infringe on local Alternative Measures programmes. Some groups will consider only minor offences; others will accept indictable (felony) offences, even serious ones, depending on the circumstances of the offence. None of the Committees will deal with murder, manslaughter or serious sexual offences, although several have dealt with family violence and relatively minor sexual assault cases. Some will hear family court and child welfare matters. Several groups accepted adult offenders despite their lack of jurisdiction to do so. Alberta Justice is aware of this, but as a senior official said, ‘how much do you
want to interfere with the good work that is happening?" Taking into consideration the eligibility criteria set by the local Committee, each case is assessed on its own merits, with the judge, or in some communities, the prosecutor, making the final decision as to which offenders are eligible. Some Committees will refuse to hear a case if a parent, guardian or other family member does not attend the hearing. The sentencing advisory Committees are being encouraged by Alberta Justice also to expand into 'family conferencing' in which the victim must be present, and Alternative Measures programmes. There is some resistance by many Committees to this expansion because of the heavy increase in workload it would entail.

The Committee becomes part of the court process after the offender has been found guilty and a determination has been made by the judge that the offender might benefit from meeting with a sentencing panel. The hearing is held in private, and confidentiality for all parties is observed. Input is requested from the police, probation services, parents, and perhaps the school, the victim, and potential treatment agencies. The offender is asked to give his or her version of the events. The attendance of the victim is encouraged though not mandatory.

A description of one of the hearings observed by the author illustrates the procedures and ideology of the panels (keeping in mind that there is great variance among committees):

The hearing started with a prayer and was carried out in Cree, the first language of all present except the police officer who read out a police report on the matter and remained for the rest of the hearing. Information from probation services was read out by a courtworker, who also took notes. The panel members, who obviously knew the offender and his family, commented on efforts of other family members to remain sober, the important economic role the young man played in the family, his past misbehaviours, told him that they and other community members cared about him or he wouldn't be at the hearing, lectured him about his disrespect for older community members whom his driving frightened, and joked with him about a number of things including his possible sentence ('You will spend one year living with an old lady! Just kidding.'). His respect for the panel members was easy to see throughout the hearing. He was asked about his feelings about the recommended sentence and if he agreed with it. At the end of the hearing, each panel member gave the offender a hug at which point it was obvious that the young man was moved.

The sentencing options open to the Committees are broad within the limits set by the legislation and the power of the judge's veto. They include such 'traditional' sentences as probation, fines, restitution orders, community service orders and open and closed custody; however, sentencing panels have proved somewhat more innovative than this in the sentences they recommend. For example, sentences
have included: using community service orders or probation conditions to make offenders cut firewood or hunt for an Elder, mow grass for a local church, help a trapper build a cabin, give talks at the school about their experiences as a drunk driver and in treatment, and help prepare a feast for a traditional ceremony. Young offenders were not sentenced to take active part in spiritual ceremonies, but they might be sentenced to help in the preparations for the ceremonies, so that, if they became curious they would have the opportunity to take part. Sentencing panels or circles do not recommend incarceration except in cases where they must recommend open custody incarceration so that the offender can receive help in an alcohol treatment or other institution. Several respondents commented that the sentences of the circles tended to be more severe than the court might make in a similar case. This usually happens when the circle members think that the offender may benefit from a longer time period of supervision or treatment, and is only done with the agreement of the offender and all other participants. If the panel or circle feels that incarceration (not for purposes of treatment) is the best alternative for the offender, they will refer the case back to court and let the judge decide the period of incarceration. It should be noted that judges have only ignored the recommendations of a Committee on two occasions, and both times the judge’s decision was over-ruled and the Committee’s recommendations were up-held by a higher court.

The purpose of these sentence recommendations is not only that offender should ‘pay back’ the community but also that the offender be exposed to people and processes that might help him or her ‘heal’. One Committee member reported that the Committee would really like to recommend that more young offenders to be counselled by Elders but there were too few Elders in that community willing or able to take on this volunteer task. As an alternative, some Committee members become actively involved in the offender’s sentence by, for example, providing supervision or counselling. Sentences are negotiated in that the offender, his or her family, the victim, and all other participants must agree that it is fair. If they do not, it is discussed until a new sentence is arrived at that all find equitable and appropriate.

Suggestions are also made to family members and victims about changes that they could make in their own lives so that they provide a better support for the offender. This frequently means going to alcohol treatment. The panel or circle often orders the offender to return to report on his or her progress, or they may check up informally on the offender.

This description clearly suggests that the Youth Justice Committees do not fit into a retribution paradigm, despite their association with the Provincial Courts. On the other hand, they are not exactly ‘mediation’ programmes, either. They try
to restore harmony between individuals, and between the individual and the community, but their primary purpose is to assist the court. They are restorative, however, because of the their emphasis on healing the offender through taking responsibility, treatment, and repairing damages to the victim and/or community. As well, they do not focus only on the offender; the healing of the community and the victim are also addressed.

**Youth Justice Committees as Restorative Justice: ten potential issues**

While there are many issues that arise in any discussion of restorative justice, only ten will be discussed here. Previous research has found these to be of particular interest in discussing Indigenous-operated restorative programmes (see Nielsen, 1999; Meyer, 1998). These are: the relationship between the retributive and the restorative justice systems, victim perceptions of justice, offender perceptions of justice, due process, community perceptions of justice, antagonism from criminal justice personnel, lack of programme resources, programme effectiveness in reducing incarceration and recidivism, mediator skills, and expanding clientele to include organizations, repeat offenders, and violent offenders.

Hudson and Galaway (1996: 11) raise the issue of the relationship between the two models of justice. They ask if the restorative justice system should be separate from or part of the criminal justice system and canvass arguments on both sides. The Youth Committees are part of the criminal justice system, by legislation and by function; however, it is interesting that many Aboriginal respondents, when interviewed, felt that the Committees could replace the criminal justice system for most young people. Before the new Act with its emphasis on Alternative Measures became law, some Committees operated at the pre-court diversion level. These Committees by-passed the court; some still do by working directly with the parents of truant children, for example. This was the course that some respondents from the police and other criminal justice organizations envisioned as the most desirable for Youth Justice Committees. Reasons given for preferring this process were that it saved the criminal justice system money by bypassing the court system, it saved the offender stress, and most importantly, it placed more responsibility in the hands of the community. This feeling among criminal justice members may have been one of the factors encouraging the inclusion of Alternative Measures in the Young Offenders Act. It gives more control to the criminal justice system. Legally, the Committees cannot operate separately from the criminal justice system; however, a few of them do and there was support for this before the new Act. Whether this support still remains, needs further investigation.
The second issue is victim perceptions of justice. The question is asked whether or not the victims feel that they are voluntarily participating in restorative justice programmes. Umbreit (1994) found that a small percentage of victims in his sample felt that they had been coerced into participating and thereby felt re-victimized. Wright (1996: 229) suggests that the victim knowing that the offender may otherwise be prosecuted or go to prison leads to feelings of pressure. Griffiths and Hamilton (1996: 187) point out that Aboriginal women and female adolescents are particularly vulnerable to pressure. Power structures within First Nations communities may also compromise the fair operation of restorative justice programmes for certain community members (Griffiths and Hamilton, 1996: 188).

Ashworth (1993) suggests that restorative justice programmes do not provide clear criteria for consistent settlements to the victim or to the community. It might be difficult for victims to get what they consider to be a just reparation since some offenders may not have the resources to make full reparation. Along the same line, he argues that there are few criteria for measuring harm done to the community and what would be fair reparations to it. Research by Umbreit (1994) found confirmation of one of these issues and introduced another. First, he found that some victims felt that the punishment given the offender was inadequate. Second, some victims were concerned that mediation lacked the authority to enforce completion of mediation agreements.

In theory, there should be voluntary participation of the victims and perhaps their family in the Youth Justice Committee hearings. The victim has a chance to express his or her feelings in a controlled environment. Since consensus by all participants on the sentencing recommendations is necessary before the procedure is over, the victim should be able to get whatever reparations he or she thinks is equitable. However, because victims do not have to attend the hearings, as their participation is completely voluntary, their absence means that they have to depend on the Committee members to represent their interests. In actuality very few victims attend the hearings. Some may submit a letter to the Committee or communicate their feelings through the probation officer's report, if there is one. Often the Committee members try to represent these feelings on behalf of the individual victim and especially of the community, to the offender. It is to the credit of the Committees that their sentencing recommendations often include victim-oriented tasks such as writing or personally apologizing to the victim, working for the victim to make up the cost of damaged goods or to replace goods, or performing some other task for the victim. Many of the sentences also contain provisions for the offender to pay back the community by performing community services of various kinds like painting bleachers, shoveling snow or gathering firewood for Elders, or assisting in the preparation of a ceremony.
Victim perception, therefore, is not a major issue, although the low number of victims who attend the panel despite being invited to do so, is. This may reflect victim discomfort with the process, a factor that needs to be looked at. Another issue is whether or not that the Committees can enforce their recommendations. Unless the Committee's recommendations are incorporated into the terms of probation, they are not enforceable, and new charges cannot be laid if the offender refuses to comply with non-probation enforced suggestions (this is not the case in Alternative Measures where refusal to comply results in the laying of charges). Suggestions made to the victim or family members are also not enforceable. This is one of the reasons for the emphasis on consensus about the sentencing recommendations. The issues here then, are not victim perception, but lack of victim attendance and non-enforceability of some recommendations.

Offender perceptions of justice are a third issue. Offenders may feel that pleading guilty (if necessary) and diversion from the system into a restorative justice programme will offer them a better chance, even though they might have had a valid defense against the charges (Wright, 1996: 229). Wright (1996) and Ashworth (1993) both point out that some victims may be more vindictive than others and make greater demands. Similarly, victims may discriminate on economic grounds, leading to inequity (Harland, 1996: 511). Umbreit (1994:105) reports that a small number of offenders felt that the punishment they received was too severe or out of proportion to the offence. At the opposite end of the spectrum, some victims of a serious offence may be satisfied with a symbolic form of reparation such as an apology. This is an issue of proportionality, the achievement of which is one of the aims of the criminal justice system though not central to restorative justice. Hudson and Galaway (1996: 13) point out that this question is really the result of confusing the retributive and the restorative models, since in the restorative model, 'fairness is not uniformity but satisfaction.' This response applies equally well to Youth Justice Committees. The objectives of Committees are healing the offender and restoring the relationship between offender, victim and community. The offender is asked about his or her response to the recommendations of the Committee. In most cases, they voluntarily agree with the terms. If offenders cannot live with the arrangement, they can ask that their case go back to court. This is not, therefore, a major issue with the Youth Justice Committees.

Due process has been raised as a related issue. Ashworth (1993) suggests that there is a conflict between the victim's right to participate and the procedural rights of the offender in some kinds of restorative justice. He suggests that the victim might have undue influence, especially on the court process. This is particularly a concern in serious crimes. Due process is not really relevant to the Youth Justice Committees. The offender has the right to refuse participation and must agree to whatever plan is developed. If, for whatever reason, the offender is
not satisfied with the hearing process, he or she can ask that their case be moved back to the courts where they will have the protection of due process.

Community perceptions of justice is an issue because currently there is a political climate of 'get tough' on offenders. Restorative justice programmes may be seen as 'soft' by those with this kind of agenda (Harland, 1996: 510). On the other hand, research by McElrea, (1994) indicates (in New Zealand research) that on the whole, victims are not as vindictive as may be imagined and that most of them want to help 'straighten out' the offender, especially if the offender is young. Research done in the late 1980s and early 1990s found public support for reparation, restitution and community service programmes as long as the victim agreed to participate. Even so, these programmes were not seen as suitable for violent or repeat offenders (Lee, 1996: 339-40).

Griffiths and Hamilton (1996: 188) suggest that not all Aboriginal communities in Canada may want to deal with serious offenders. Some communities practiced banishment for serious offences, repeat offenders, or in cases where the individual refused to abide by community-imposed sanctions. These communities may think of the Euro-based criminal justice system as the modern equivalent of removing the offender from the community.

Community support for the Youth Justice Committees seems quite high considering their rapid spread in both Aboriginal and non-Aboriginal communities. Victims that attend Youth Justice Committees are there because they want to help the offender. Also, as mentioned earlier, some Committee recommendations are actually tougher than those that might have been made by the court alone. The purpose of these longer sentences is to give the young offender more time and help in healing.

The next issue is antagonism from criminal justice personnel towards Youth Justice Committees. According to Marshall (1995), this arises mainly from the attempts of criminal justice personnel to use the new programmes to fill their own organizational needs. They sometimes impose restrictions that interfere in the operation of the restorative programme. Because the criminal justice system is more offender-oriented than victim-oriented, the restrictions most often adversely affect the interests of the victims. This is a highly relevant issue for the Youth Justice Committees. Research indicates that on the whole, there is a great deal of support for the Committees, however they did experience some resistance when they first started. Resistance existed particularly among 'some lawyers' who, respondents thought, might feel they were losing business since lawyers were not necessary to the operation of the Youth Justice Committee initiative and were, in fact, not allowed into the hearings. Some judges also were opposed to any kind of judicial advisory body. (Interviews with the author, 1994) A senior police respondent
suggested that while many prosecutors, defense counsel and police didn't actively oppose the Committees, they were also not ready to support them:

Some believe in it...but the rest are sitting back on the fence...some are participating because management has said you will participate...I personally don’t believe that we will have firm believers totally in the programme for a long period of time. In fact, there will be a lot of credence put to any time that they fail, by the so-called nonbelievers. (Interview with the author, 1994)

The above concerns seem to be related to a confusion by criminal justice personnel about the difference between restorative and retributive goals and procedures, and to the acculturation of criminal justice personnel into Euro-based values about justice as retributive and its mechanisms. Because of the importance of good relationships between the Committees and other members of the criminal justice system, this antagonism or resistance was and still could be a very important issue for the Youth Justice Committees.

Lack of resources such as funding, expertise, and political will is also an issue for restorative justice. McElrea (1994) expresses the fear that restorative justice programmes may be adopted as a means of reducing the costs of courts and prisons without recognizing that communities need financial resources to properly operate these new programmes (see also Harland, 1996: 512). A related issue is the lack of human resources in the community. Griffiths and Hamilton (1996) raise the issue of the ‘healthiness’ of community members, leaders and others who play key roles in restorative programmes in Canadian Aboriginal communities. Because of the tragic impacts of colonialism, many Indigenous communities have social problems, such as widespread alcoholism, family violence and child abuse. Community members who act as mediators (or Committee members) will have to deal with their own personal issues before they can help others. A final resource needed by these programmes is political will (Harland, 1996: 515), which the current climate suggests is in short supply. Lack of resources is an important issue for the Youth Justice Committees. Committee members, by law, cannot be paid, although they are allowed to raise money for training, attending conferences, recognition ceremonies, administrative work, mileage expenses for Elders and so on, through community activities such as car washes and casino nights. Local Probation offices may provide some office supplies. The Committees can apply for small grants from Alberta Justice, Alberta Child Welfare, and private foundations. Some also get anonymous donations. On the other hand, there is a great deal of political will and few problems with finding stable, capable community members to act as Committee members.

The effectiveness of these programmes in reducing incarceration and recidivism
is another issue. Umbreit (1995) raises the issue that while restorative programme staff often tout these kinds of programmes as an alternative to prison, there is little evidence that these programmes decrease incarceration. Some research has found that mediation has contributed to reducing the length of sentences and changing the locale of the sentence served from prison to local jail. There is also some question of whether or not these programmes decrease recidivism. Umbreit (1994:117), for example, found a 'marginal but non-significant impact of the mediation process' among juveniles. He suggests that the mediation process may be over-shadowed by the contrasting influences of a dysfunctional family and criminal friends. However, in the Euro-based society there is, as Harland (1996: 511) states:

...the perception that it is not the business of the criminal justice system to try to right the underlying social and cultural wrongs that maintain and encourage the existence of stable and visible class of criminals is both deeply ingrained and a convenient excuse for its abject failure to reduce crime.

Restorative justice programmes may try to respond to the underlying causes of the crime and the needs of the parties involved, but they still suffer some restraints because of the wide-spread nature of narrow, retributive attitudes, and because true 'healing' of all parties is not a broadly accepted objective.

So far no evaluations have been done on the Youth Justice Committees. Anecdotal evidence suggests that their recidivism rate is low. None of the communities kept formal statistics of the results of the Committees, but one of the oldest committees reported that 8 of the 43 offenders they had dealt with in their first year of operation had reoffended, most of these after court and while waiting to see the sentencing panel or circle for the first time. Two of the inactive Committees mentioned earlier, are now inactive because the crime rate dropped so low in their communities. In several other communities, the Committees now have very few cases after initial busy periods. In Ft. Chipewyan, Northern Alberta, for example, the court used to meet twice a month for two days with full dockets. Now, they have court once a month with only three or four cases.

Mediator attitude and competence were a concern to small numbers of both victims and offenders (Umbreit, 1994). When mediators were unable to control the proceedings, it left either the victim or offender feeling re-victimized or victimized. Hudson and Galaway (1996, 3) warn that empowering the community will likely mean that the processes of restorative justice will have to be 'deprofessionalized', that is placed in the hands of non-professional community members, because 'by their very nature, professions remove power from others and concentrate it in their own alleged area of expertise.' This is not an issue for Youth Justice
Committees. The Committees in and of themselves are a form of community empowerment. The community brings its presence into the process through the Committees, as well as learning more about the criminal justice system through serving on a Committee or through some Committees’ community education activities. ‘Professionalism’ is an irrelevant concept. Members are chosen for their ability to care about young people and their knowledge of community resources and issues. If Committee members cannot act appropriately at a hearing, they are not asked to serve again. Information about the criminal justice system is available to them though the police, probation officers or Aboriginal courtworkers, if the Committee needs it.

Expanding clientele to include repeat and violent offenders can be an issue in restorative justice not only because of public resistance to ‘going easy’ on these offenders but because these kinds of cases need more time to prepare and work through (Marshall, 1995). While questions of the suitability of serious cases such as rape and aggravated assault have been raised, there is also evidence that as long as the victim is willing to participate, victim-offender mediation may be successful (McElrea, 1994). Very little research has been done on expanding restorative justice programmes to include organizations. The issue raised previously about resources to support programmes is also a concern here. It should be pointed out that there is also an opposite concern about ‘widening the net’ of social control to include offenders who, for example, might have had their charges dismissed (Hudson and Galaway, 1996: 12). This issue boils down to a question of which offences should be dealt with by restorative justice and which by the retributive system. For Youth Justice Committees, this is not really an issue. Widening the net is not likely since the young offender has already been found guilty of an offence and is in the process of being sentenced. Repeat offenders can be sent to a Committee if the court wishes and any offence can be dealt with, as long as the Committee is willing. Most Committees are not willing to take a case that requires incarceration. Some Committees will handle violent offenders if incarceration is not the only option available, and if the Committee thinks it is in the best interests of the community.

Conclusion

In summary, the Alberta Youth Justice Committees share two important experiences with other restorative justice programmes. These are antagonism from criminal justice personnel and lack of resources. The experiences of Youth Justice Committees and other restorative programmes overlap to some degree in relation to victim perception of the process and getting the victim to attend, and effectiveness in reducing incarceration and recidivism. However, since the Committees have not yet been evaluated their effectiveness cannot be established.
Issues that are more or less irrelevant to the Youth Justice Committees are: separation between the Committees and the criminal justice system, although the sovereignty aspirations of Aboriginal communities may eventually play a role in pushing for greater separation between the state system and an Aboriginal youth justice system; offender perceptions of the programme; due process; community perception of the programme; mediator attitude and competence; and expanding clientele.

The two shared issues of antagonism from criminal justice personnel and lack of resources may be a meeting ground for the Committees and other restorative programmes. The Committees have already overcome much of the antagonism they faced. They developed a variety of strategies specific to their own communities such as meeting with specific resistant personnel, using other local organizations to help them, recruiting certain kinds of community members, and emphasizing their role as 'assisting' the court. These strategies can be shared, and Committees can also learn from other restorative programmes. There has been a great deal of discussion about holding a regional Committee conference, but the expense of doing so has been an obstacle. Alberta Justice and some Committee members have made presentations to national conferences.

Lack of resources is an equally serious issue. This not only affects the efficient operation of the Committees and other restorative justice programmes but also means poorer services to their clients when, for example, treatment programmes are not available for referrals, or Elders cannot afford to take part in the programme because of costs. The Youth Justice Committees have legal restraints on them not faced by many other restorative justice programmes. They would have a lot to gain by sharing information with other organizations that have come up with innovative strategies for obtaining resources. There is little doubt that restorative justice programmes could benefit from sharing information with each other. It can only make them stronger.

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**Bibliography**

Alberta Aboriginal Affairs


Alberta, Government of


Ashworth, A

Bala, N and Corrado, R

Bazemore, G

Burger, J

Cawsey Commission
Task Force on the Impact of the Criminal Justice System on the Indian and Metis Peoples of Alberta

Dumont, J

Frideres, J S

Galway, B and Hudson, J (eds)

Griffiths, C T and Hamilton, R

Griffiths, C T and Verdun-Jones, S N

Hamilton, A C and Sinclair, C M

Harland, A

Havemann, P, Couse, K, Foster, L and Matonovich, R
*Law and Order for Canada’s Indigenous People* (Regina, SA: Prairie Justice Research, University of Regina, 1985).

Hickman T A, Poitras, L A, and Evans G T

Hudson, J and Galaway B
Jackson, M

Kennedy, L W and Sacco V F

Kueneman, R, Linden, R, and Kosmick, R

LaPrairie, Carol
*Seen But Not Heard: Native People in the Inner City* (Ottawa: Department of Justice Canada, 1995).

LaPrairie, C P and Griffiths, C T

Law Reform Commission of Canada.

Lee, A

Marshall, T F

McCold, P

McElrea, His Honour Judge F WM.

Meyer, Jon'a

Minore, J B
Nielsen, M O


Ross, R

Umbreit, M S.


Van Ness, D W

Van Ness, D and Strong, Karen Heetderks

Wright, Martin


Yates, R A and Yates, R W
Canada’s Legal Environment (Scarborough, ON: Prentice-Hall, 1993).
Bring Them Justice

BY CRAIG COXHEAD*

Compensating the wrongly convicted – the Mokomoko case

(Tangohia mai te taura kaki kia
waiata au i tuku Waiata)
(Take the rope from my neck that I may
sing my song)

Kaore te takiri e tute nei te moenga
Kei te hori te tangata tenei au kei te
rawake
He pono te ki kei te awhi au i
te moenga
Koia ra te tangata mate.

(Take the rope from my neck that I may
sing my song)

Violent shaking will not rouse my sleep
They treat me like a common thief
It is true that I embrace eternal sleep
For that is the lot of a man condemned
to die.

Shielded from the harsh light
With narrow eyes I reflect on the
retribution taken at Hamukere
Remember how I was taken on board
ship (chained)
The memory of it burns me with shame

Me tiki ki tawhiti hei homai
te mekameka
Ko te rerenga o te ra ko te Kawana kei
Oropi
Mana e ki mai me tau au ke te tauari
Hei tutaki e mo te kuaha o te pouaka.

Bring me justice from distant lands to
break my shackles
Where the sun sets is a government in
Europe
It is for them to say that I must hang
They shut me in my coffin box

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Ngati Makino, Ngati Pikiao, Ngati Awa and Ngati Maru. Craig is a lecturer at the
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The title is an adaptation from the words of the waiata (song) composed by Mokomoko
while he stood on the scaffold just before he was hanged. The title seeks justice for
the Mokomoko Whanau (Family) and can be seen as a plea from Mokomoko him­
self asking the Government to “Bring them (my Whanau) Justice”. I am indebted to
Tuiringa Mokomoko for giving me access to material for this article.

Composed and sung by Mokomoko as he stood on the scaffold awaiting execution.
This waiata is still sung today.
Within the last five years the issue of "compensating the wrongly convicted" has had much publicity especially in light of changing Government policy, a planned review of the current policy, a Law Commission (Commission) report and a number of cases.

While there are cases, which have attracted much public, and Government attention there is one claim which goes unheard. It is the case of a person who was not only wrongly convicted but also executed. He was given a posthumous pardon in 1992. His whanau still seek compensation for his wrongful execution. This is the case of Mokomoko.

The purpose of this article is to assess the Mokomoko whanau's claim for compensation in light of the Government's current policies for compensating the wrongly convicted. Within this article I shall firstly outline the Mokomoko story and how the Mokomoko whanau are now pursuing the issue of compensation for

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3 This article adopts the phrase adopted by the Law Commission report *Compensating the Wrongly Convicted* Report 49, September 1998.
4 Discussion of the 1997 Interim policy and 1998 Government policy can be found at pages 55 and 58.
5 The current guidelines were implemented on a "trial basis for a period of three years, after which the Minister of Justice shall review their operation and recommend to Cabinet any alterations that may be considered desirable", Cabinet Strategy Committee papers STR (98) M 39/6, with the current criteria being reviewed before December 2001, “Dougherty seeks anonymity” Bay of Plenty Times, 12 July 2001.
6 In particular the cases of David Brian Dougherty and “Mr M”. Mr Dougherty was granted $868,728 in compensation in July 2001. The compensation included $168,728 for pecuniary losses – for lost income, legal costs – and $700,000 for loss of liberty, loss of reputation, loss or interruption of family and other personal relationships, and mental and emotional harm. Mr M was wrongly convicted of sexual abuse and spent 14 months in prison before being released. Both cases involved claims for compensation with “M” being paid $570,000. For further discussion of MR M see Chisholm, D “Compensation ends seven years in Hell” *Sunday Star Times*, 3 September 2000, C4, Chisholm, D “Landmark payout for years in hell” *Sunday Star Times*, 3 September 2000 1, “Compensating For A Wrongly Convicted Individual” *New Zealand Government Press Release*, 3 September 2000.
7 In particular at the time of writing this article David Dougherty had just been paid compensation for the 38 months he spent in jail for a rape he did not commit. For further discussion of the Dougherty matter see Chisholm, D “Dougherty: Praise the Lord, it’s over” *Sunday Star Times*, July 15, 2001 A3, A8, and Rudman, B “Abysmal treatment for man jailed wrongly” *New Zealand Herald*, September 7 1999, A13.
the wrongful conviction and execution of their tipuna.\(^8\) I will then consider the Government’s past and present policy on compensating those who have been wrongly convicted. I will conclude with an assessment as to whether the current policy for compensating the wrongly convicted assists the Mokomoko whanau in their pursuit for justice.

**Mokomoko**

Mokomoko was a Whakatohea Chief who was tried and found guilty for the murder of the Missionary Carl Sylvius Volkner. On 4 April 1866 he was executed along with three others, Heremita Kuhupaea, Hakaraia te Rahui and Penetito.

Mokomoko lived in the mid 1800s in the Whakatohea area.\(^9\) He was a successful farmer and trader who over years had, along with many other Whakatohea people, formed good relations with settlers moving into the eastern Bay of Plenty.\(^10\) Mokomoko was described as:

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\(^8\) Refers to ancestor.

\(^9\) The Whakatohea people are located in Eastern Bay of Plenty region broadly in the Opotiki Ohiwa area. Their tribal rohe was described before the Native Land Claims Commission in 1920 as: "Commencing at Pakihi, at the mouth of the river along the sea coast to the mouth of the Waiatora stream to the mouth of the Ohwiha stream to Te Horo (a hill) and thence turning inland southward to Puhikoko (a hill) by straight line to Pukemoremore (a hill) then to Mapouriki (a hill) at one time a fighting pa. Then descending to Waimana stream, Mapouri being on the bank; following the Waimana stream towards its source at Tautautahi (a hill) along the banks to the mouth of the Parau stream; then following Parau stream to Tangata-e-wha (a hill) on the Kaharoa (an old settlement); ... from Kaharoa to Pa-Harakeke, a ridge leading towards Maunganopohatu to Maungatapere (a hill) descending into the Motu river, down Motu river to Kaitaura falls, a swing bridge at present stands there, to Peketutu (this is a rock in the Motu river that was an old crossing); leaving the river and up a ridge to Whakararonga (a hill); following along tops of hills till it reaches Tipi o Houmea (a peak descends towards Mokomoko (another hill) down till it crosses Takaputahi stream to Ngautepokotangata (a mountain) following a ridge to Kamakama (mountain, a resting place); along the ridge to Oroi (a trig station) then turning seawards to Te Rangi on the sea coast. (This was once an anchor on a canoe of Hauraki [?] Nukutere) It is a stone visible on the sea coast a low tides); then along the sea coast to the mouth of Opape stream, to Awahou stream to Tirohanga formerly a pa, and back to Pakihi."

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...a closely tattooed man, intelligent, able to read and write and with knowledge of the scriptures. He was baptised as an Anglican on May 1866 — the day before he was executed. He was a Chief who had the responsibility to protect the Whakatohea people when the army came in 1865 and would have led the resistance. He was an experienced fighting man, a leader and a warrior.11

Howe noted Charles Barker’s, a CMS missionary, description of Mokomoko when Barker was chaplain at the Stockade in Auckland, now Mount Eden prison, where Mokomoko was held:

Mokomoko is a middle-aged man and intelligent. Can read and write and knows a good deal of Scripture Truth. Acknowledges his apostasy but not his guilt of murder.12

Mokomoko along with many Whakatohea people supported the missionary work of Vollner. This support was reflected in the establishment of a new church in 1864.13 While it can be said that there were good relations between Vollner and the Whakatohea people a number of events occurred between 1864 and 1865 which affected this relationship: the killing of the Whakatohea Chief, Te Aporotanga; the involvement of Whakatohea in the Waikato wars which Vollner opposed. Further, a Roman Catholic Priest, Father Gravel, had earned a great deal of respect from the Whakatohea people culminating in a number of Whakatohea people being baptised Catholic. Vollner complained to the Governor about Father Gravel, which eventuated in Father Gravel being sent to Australia.14 Increased tension in the relationship was due to Whakatohea being aware that Vollner was supplying information to the Governor about their involvement in the wars. A further event was when a large Pai Marire party lead by Kereopa15 was in the Whakatohea rohe to introduce the people to Pai Marie as well as, it is

11 Were, K Mokomoko – Our Tipuna (Research Report, unpublished) 3.
12 Howe, E Bring me Justice (Auckland: Anglican Provincial Bicultural Education Unit, 1991) 18.
14 Ibid.
15 Kereopa was of Ngati Rangiwewehi and was influential in the hanging of Vollner.
claimed, for the specific purpose to execute Volkner.\textsuperscript{16} It is within this context that events lead to the hanging of Volkner on 2 March 1865.

It is important to recognise that the hanging of Volkner is seen as the commencement of the confiscation of Whakatohea lands. Following the hanging of Volkner Sir George Grey, Governor at the time, issued a proclamation on 2 September 1865 for the arrest of the murderers of Volkner. The killing of Volkner gave the Government reason to invade the area and confiscate some 173,000 acres of land, or as Howe wrote:

Following the death of Volkner, British troops were despatched to Opotiki under the leadership of Major McDonnell. Settler attitude is graphically shown in Grey's "Proclamation of peace," which in reality was a threat to confiscate land, and the ready use of martial law.\textsuperscript{17}

Following the dispatch of troops into the Opotiki area four men were arrested for the murder of Volkner. They were Mokomoko, Heremita Kuhupaea, Hakaraia te Rahui, Paora Taia and Penetito. These people were condemned at a court martial, and taken to the Stockade in Auckland, where on March 1866 at a civil trial, all except Paora were found guilty, convicted and given the death sentence, and executed on May 17 1866.\textsuperscript{18}

Following Mokomoko's execution he was buried at the Stockade and in 1988, after initially being refused by Government, his whanau obtained approval to exhume\textsuperscript{19} his body from Mount Eden and return him to Waiaua.\textsuperscript{20}

\textsuperscript{16} For further discussion of surrounding events leading to the hanging of Volkner see, Were, K Mokomoko – Our Tipuna (Research Report, unpublished), Mikaere, B Exploratory Report to the Waitangi Tribunal being an Historical account of confiscation of land in the Opotiki District (Wellington: Waitangi Tribunal, 1991) and Howe, E Bring me Justice (Auckland: Anglican Provincial Bicultural Education Unit, 1991).

\textsuperscript{17} Howe, E Bring me Justice, (Auckland: Anglican Provincial Bicultural Education Unit, 1991) 17.

\textsuperscript{18} Ibid, 18.


\textsuperscript{20} For further discussion of the struggle the Mokomoko whanau faced in seeking to exhume their tipuna from Mount Eden see, “The Death of Mokomoko” Te Iwi o Aotearoa, February 1990, 30: 6, and Ratima, T W Mokomoko – the untold story <http://www.hrc.co.nz/tirohianov/stories/mokomoko.html>
Acquittal or Pardon?

Having returned their tipuna to Waiaua the Mokomoko whanau sought statutory recognition of Mokomoko’s innocence. Whakatohea oral tradition is that Mokomoko was innocent. Evidence and conduct of the trial show that Mokomoko was innocent.

It is not the purpose of this paper to traverse the reasons in support of providing evidence that Mokomoko was innocent, however details of reasons are outlined in a letter of Professor Richard Boast to the Rt. Hon GWR Palmer dated 17 July 1990 and reproduced in full in Howe, E Bring me Justice. Some of the reasons, in summary, to support Mokomoko’s innocence are that:

- Procedures at Trial were unjust;
- One solicitor acted for all four accused;
- There was only a one day hearing;
- No evidence was called on behalf of defence;
- Accused did not give evidence until at sentencing as to why they should not be hanged;
- There was only brief cross examination;
- Crown’s case was inconsistent;
- Crown witness, Rev. Thomas Samuel Grace, stated nothing regarding Mokomoko;
- Another Crown witness, Wiremu Te Paki, stated Mokomoko was not to be seen when the hanging of Volkner took place;
- George Graham had written a letter to the Colonial Secretary stating Mokomoko was not present at the execution and he trusted that Mokomoko’s life would be spared;
- Another Crown witness, Wepiha, an enemy of Mokomoko and also instrumental in the murder gave evidence against

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21 A place on the east coast of the north island of New Zealand.
22 Howe, E Bring me Justice (Auckland: Anglican Provincial Bicultural Education Unit, 1991) 19.
23 Ibid, 23.
Mokomoko, which was not fully tested under cross-examination; and

Heremita and Hakaraia acknowledged that they had played a part in the execution of Volkner and agreed with Mokomoko’s accounts of events and the fact that he played no part in the execution.

Most poignant is the fact that Mokomoko had protested his innocence till his death.24 Howe quoting from the letter of Professor Richard Boast noted:

And shortly before his death Mokomoko said: “Hei konei ra, pakeha ma, tenei ahau e mate hara kore! Kahore i tika taku matenga!” (Farewell, you pakeha, I die without a crime! It is not right that I should die!)25

In seeking to clear the name of their tipuna the Mokomoko whanau originally sought an acquittal.26 Why an acquittal? An acquittal pronounces a person innocent. A pardon on the other hand may not necessarily denote innocence.27

While I do not intend to comment at length about the law of pardons a brief narration I think is necessary to understand why the family originally sought an acquittal and not a pardon.

The effect of a pardon is provided for in section 407 of the Crimes Act 1961, which simply states that a person granted a pardon “shall be deemed never to have committed that offence”. The section quite clearly does not provide that a

26 Letter from Professor Richard Boast to the Mokomoko whanau, C/- Ruby Nikora, 14 August 1990 states “I have written to the Secretary for Justice to say that the family’s attitude is clear: an acquittal is what is wanted.”
person granted a pardon is considered innocent.\textsuperscript{28} In his article on the prerogative of pardon Hodge was not totally convinced that a pardon denoted innocence and concluded that:

Finally, it must be said that the form of recent New Zealand pardons is equivocal. To decree for example that “there is real doubt ... [that a case] was proved beyond reasonable doubt” is equivocation squared, two quasi-negatives, not making a positive. Given, the dual source and purpose of the pardon power: add the mystery of the deeming clause, multiply by the double use of the word doubt, and the result is confusion compounded.\textsuperscript{29}

The effect of a pardon was made somewhat clearer in Re Royal Commission on Thomas case,\textsuperscript{30} where the Court of Appeal, while not embarking on a full discussion of the law of pardons, concluded the effect of a pardon is that it wipes out the criminality of the acts not the acts themselves, giving a complete discharge from criminal liability but no necessary inference as to factual innocence. The Court stopped short of stating that a pardon equates to innocence, but did emphasise that effect of section 407 is that:

[w]here a convicted person has been granted a free pardon in New Zealand, it can no longer be said that the pardon may imply that the Executive accepts that he committed the offence but is forgiving him.\textsuperscript{31}

The Australian case of \textit{R v Cosgrove}\textsuperscript{32} held that a pardon is not the equivalent of an acquittal and “contains no notion that the [person] to whom the pardon is extended never did in fact commit the crime”.

Given the Mokomoko whanau’s clear attitude towards the innocence of their tipuna a pardon would be inadequate as its statutory phraseology, could be seen as an act of clemency towards a guilty person and would not recognise Mokomoko as being innocent.


\textsuperscript{29} Hodge, W C, “The Prerogative of Pardon” in NZLJ, 1980, 163.

\textsuperscript{30} [1982] 1 NZLR 270.

\textsuperscript{31} Re: Royal Commission on Thomas Case [1982] 1 NZLR 252.

\textsuperscript{32} [1948] TAS S.R. 99.
After years of lobbying the Government for an acquittal and being refused, in June 1992 the Mokomoko whanau were informed that the Governor General would be granting a pardon to Mokomoko.

In reading the pardon granted to Mokomoko the statutory phraseology adopted by the Crown makes no reference or inference towards Mokomoko being innocent. The pardon reads that Mokomoko was convicted along with three others who have been granted full pardons by virtue of s 11 of the Te Runanganui o Ngati Awa Act 1988 and it is therefore just and expedient that a pardon should be granted to Mokomoko. The essential parts of the Mokomoko pardon read as follows:

And whereas section 11 of the Te Runanga o Ngati Awa Act 1988 restores the character, mana and reputation of the persons of Ngati Awa descent who were arrested, tried and labeled as rebels in or about 1865 and grants to them a full pardon in respect of all matters arising out of the land wars of 1865:

And whereas it appears that one of the incidents of section 11 of the Runanga o Ngati Awa Act 1988 is to pardon the three persons convicted with Mokomoko of the murder of Carl Sylvius Volkner:

And whereas it appears to me just and expedient that a pardon should also be granted to Mokomoko:

Now therefore I, Catherine Anne Tizard, Governor-General of New Zealand, acting upon the advice of the Minister of Justice, do hereby in the name and on behalf of Her Majesty, grant to the said Mokomoko a free pardon in respect of the said crime.

Mokomoko’s pardon therefore reads that he was given a pardon because three others were pardoned rather than because he was innocent. This is in spite of the evidence, which surely suggests that Mokomoko was innocent.

Having secured a pardon the next obvious step was to consider compensation. The Mokomoko whanau have made a number of attempts through lobbying Ministers, amending their Waitangi Tribunal claim as well as exploring other legal avenues in order to secure compensation. What then are the chances of the Mokomoko whanau obtaining compensation under the Government’s current cri-

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33 An initial approach for an acquittal was made on 17 July 1990.
34 Waitangi Tribunal Claim Wai 203.
teria for compensating the wrongly convicted?

**Compensation For The Wrongly Convicted**

Prior to 1997, New Zealand like many other countries lacked any clear formal processes for evaluating compensation for persons wrongly convicted and imprisoned. Compensation was, in the very limited number of cases where the Crown made payments, on an ex gratia basis. Ex gratia payments had been made by the Crown where persons had been pardoned or whose conviction had been quashed following a referral under section 406 of the Crimes Act 1961.

In terms of pardons there are very few statistics. Since 1995 when the Ministry of Justice was established, records show there have been in excess of 22 applications assessed and only four pardons have been granted. In terms of who has been paid compensation by the Crown due to wrongful conviction there is less statistical information available. The Ministry of Justice advised of three incidents in New Zealand’s history. The first incident was in a 1905 case where an Act of Parliament acquitted Mr. Meikle of sheep stealing after a Commission of Inquiry. Mr Meikle was paid £500 in full and final settlement of all claims. In 1938 the case of R v Griqual involved a man who was sentenced to 12 months imprisonment for indecent assault and acquitted at a retrial and paid £200 for loss of earnings and £300 for Solicitor costs. The third incident the Ministry of Justice referred to involved Arthur Allan Thomas. Thomas was granted a pardon and in 1980 paid $1,087,603.35 (inclusive of costs) in compensation. Other cases of payments for wrongful conviction are the recent cases of David Dougherty who was paid $868,728.00 and Mr M who was paid $570,000.00.

In November 1997 the Government of New Zealand adopted an interim policy for compensation or ex gratia payments for persons wrongly convicted and im-

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35 The Law Commission in their report *Compensating the Wrongly Convicted*, Report 49, 1998 noted at page 22 that “... There are therefore no binding legal rules for assessing compensation ...”

36 An ex gratia payment is one which is made without there being any legal obligation to do so.


38 Letter from Deputy Secretary of Ministry of Justice to Minister of Justice, 8 February 2000.

39 The Meikle Acquittal Act 1908

40 Refer to footnote 6 for further details of David Dougherty and Mr M.
prisoned. The adoption of an interim policy pending the release of the Commission’s report and assessing of policy was due to a number of factors.

Firstly New Zealand’s policy of paying compensation on an ex gratia basis to those who have been wrongly convicted and imprisoned had been criticised.

The current practice in New Zealand and many other countries of only making ex gratia payments where a pardon has been granted or a conviction quashed has been widely criticised.

Secondly, the fact that a specific Law Commission report dealing with compensating the wrongly convicted was an indication in itself that issues and concerns needed to be addressed.

Thirdly there was much public concern regarding New Zealand’s policy of paying compensation on an ex gratia basis to those who have been wrongly convicted and imprisoned. This public concern was heightened with the prominence of the David Brian Dougherty matter. Dougherty was convicted in the High Court at Auckland on 21 May 1993 of one charge of abduction and one charge of sexual violation by rape. He was sentenced to seven years and nine months imprisonment. Dougherty’s appeal against conviction was dismissed by the Court of Appeal in 1994, but then in 1996 the Minister of Justice recommended to the Governor General that an application by Dougherty for the exercise of the Royal prerogative of mercy under section 406 of the Crimes Act 1961 be granted after Dougherty’s counsel produced three independent expert reports on DNA profiling. The matter was referred back to the Court of Appeal who quashed Dougherty’s conviction and ordered a re-trial. On 17 April 1997 at a re-trial Dougherty was found not guilty. Dougherty then sought compensation that was granted in July 2001. This case brought the issue of compensation for the wrongly convicted to the public and Government attention.

Fourthly, the New Zealand Government, of the time, recognised New Zealand trailed other countries in terms of policy in this area. There have been moves, in Australia, to look at this issue with the Law Reform Commission in Western Australia publishing a working paper entitled Compensation for persons detained in custody who are ultimately acquitted or pardoned which followed from rec-

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41 The interim criteria contained in Cabinet Strategy Committee minutes STR (98) 307 dated 30/11/98, entitled “Compensation or Ex Gratia Payments for Persons Wrongly Convicted & Imprisoned” is discussed in detail at page 55.


ommendations coming out of the Aboriginal Justice Advisory Committee. Since 1988 England has partially replaced the practice of making ex gratia payments with a statutory scheme. All applications for compensation following an alleged miscarriage of justice are considered under two schemes being section 133 of the Criminal Justice Act 1988 and the ex gratia scheme. Further, in Canada Federal-Provincial Guidelines on Compensating for Wrongly Convicted and Imprisoned Persons have been adopted by the Canadian Justice Minister. These guidelines provide for compensation to be granted "to those persons who did not commit the crime for which they were convicted". A number of other countries provide compensation to defendants who have been wrongly imprisoned with some going as far as having provision for those wrongly remanded in custody pending trial.

A fifth factor that has provided some impetus for the New Zealand Government to adopt criteria for compensating the wrongly convicted is at an international level. Article 14(6) of the International Covenant on Civil and Political Rights obliges parties to the Covenant to provide compensation to persons where

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44 For further discussion of these recommendations see Lofgren, "Kelvin Condren considered by the AJAC" (1994) 3 Aboriginal Law Bulletin No 66, 10.
45 Section 133 of the Criminal Justice Act 1988 requires that compensation be paid when a conviction has been reversed in certain circumstances, or a person has been pardoned, on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.
46 The ex gratia scheme under which compensation can be paid to people who have spent time in custody following a wrongful conviction or charge that is the result of some serious default by a non-judicial body or where facts emerge at trial or appeal that completely exonerate the accused person.
49 Rosenn, KS, "Compensating the Innocent Accused" (1976) Ohio State Law Journal 705, noted countries having procedures for compensating the innocent victims of erroneous criminal accusations included, Sweden, Norway, Denmark, France, Italy, West Germany, Switzerland and Japan.
50 For example Germany has provision for compensating those held in custody awaiting trial. For further discussion on compensation for detention see Shelbourn, C "Compensation for Detention" [1978] Crim.L.R. 22.
51 This article states: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."
there has been a miscarriage of justice. While New Zealand ratified the Covenant in 1978 a reservation to Article 14(6) reserved the right to New Zealand to continue to make ex gratia payments to persons who suffer as a result of a miscarriage of justice. In 1993 the International Human Rights Committee reported that ex gratia payments, the only provision in New Zealand for granting compensation to the wrongly convicted, did not meet the requirements that a person be compensated according to law. In 1989 New Zealand was asked whether it intended to maintain the reservation and some amount of moral pressure was applied for New Zealand to enact a compensation scheme.

The above factors have led successive New Zealand Governments to address the issue of compensations for the wrongly convicted transpiring in the request for the Commission to undergo research and culminating in changes to Government policy.

**Interim Criteria**

In November 1997 Cabinet agreed to a set of interim criteria for evaluating claims for compensation or ex gratia payments in respect of persons who are wrongly convicted of criminal offences pending consideration of proposals from the Commission for the establishment of a general compensation regime.

The interim criteria provided that those eligible for compensation or an ex gratia payment were limited to those who received a free pardon under section 407 of the Crimes Act 1961 or whose cases were referred to the Court of Appeal under section 406 of the Crimes Act resulting in either:

(a) the quashing of the relevant conviction with no order for re-trial; or

(b) the quashing of the relevant conviction followed by an acquittal at trial.

The criteria also required claimants to prove that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice and that they

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52 The reservation reads, "New Zealand reserves the right not to apply Article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice."


54 Cabinet Strategy Committee minutes, STR (98) M 39/6 dated 2/12/98 entitled "Compensation or Ex Gratia Payments for Persons Wrongly Convicted & Imprisoned".
were innocent on the balance of probabilities. The person also had to be alive at the time an application for compensation was made.55

The interim criteria were limited in who was eligible for compensation. The interim criteria did not and was never intended to cover innocent people who have been arrested, detained in custody, and released without charge or held in custody, charged, only for the charge to be withdrawn before their first court appearance. Neither was it intended to cover situations where a person was denied bail and remanded in custody, but acquitted at trial or convicted and imprisoned, but acquitted on appeal.56

**Law Commission Report**

While an interim policy was in place the Commission undertook extensive research into the issue of compensating the wrongly convicted which concluded with its report released in September 1998.

The Commission’s primary focus was to determine eligibility for compensation. Following on from establishing criteria for eligibility the Commission then proposed how the quantum of compensation was to be determined.57

In making its considerations for eligibility the Commission canvassed four options and concluded that the scheme for compensating should be limited to exceptional cases where:

(i) it is clearly established that the claimant is innocent;

(ii) the criminal justice system has failed to discharge the claimant at or before verdict; and

(iii) the conviction has resulted in imprisonment.58

The Commission was innovative in that it recommended a scheme that would confer “a right to have compensation assessed.”59 No such right previously ex-

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55 Cabinet Strategy Committee minutes, STR (98) 307 dated 30/11/98 entitled “Compensation or Ex Gratia Payments for Persons Wrongly Convicted & Imprisoned”.
57 This article focuses on the eligibility requirements for those seeking compensation not the assessment of quantum of compensation for those wrongly convicted.
59 Ibid, 27.
isted, or currently exists, in New Zealand as compensation assessments are at the discretion of the Crown. This new approach was justified on a number of grounds. Firstly, it was proposed that by conferring a right to compensation it would indicate that the state was seriously concerned about convicting and imprisoning the innocent. It would also show that the state placed value in peoples' liberty and freedom. Further the public would find confidence in a justice system where there was a right to compensation when the system acknowledged a wrong. In seeking to increase public confidence in the criminal justice system it was recommended that an independent tribunal be set up to assess claims and quantum of payments. The Commission also proposed that the conferring of a right to have compensation assessed would ensure clarity and certainty through the inclusion of guidelines for the exercise of the prerogative of mercy or a new section in the Crimes Act 1961. The proposed section 407A of the Crimes Act 1961 would state who had a right to have compensation assessed and would read:

(1) A person who

(a) has been convicted of a criminal offence and acquitted on appeal (including a reference under section 406 of this Act) or pardoned of that offence or had the conviction quashed without an order for a retrial; and

(b) has served all or part of a term of imprisonment imposed in respect of that offence

may apply to the Compensation Tribunal for an assessment of compensation for losses resulting from being convicted and imprisoned in respect of that offence.

(2) The Compensation Tribunal shall assess compensation only if satisfied beyond reasonable doubt that the person was innocent of the offence charged.

The Commission's criteria extended that of the interim criteria to also include those who had their convictions reversed during normal appeal processes and a retrial was not ordered. The rationale was that a person acquitted on appeal

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60 The 1997 Interim Policy and subsequent policy adopted in 1998 provide that a person must first qualify for compensation upon which they can then make application to the Minister of Justice to have the quantum of compensation assessed.


62 Ibid, 32.

63 Refer to page 55 above.
suffers hardship if convicted and imprisoned while awaiting the outcome of that appeal. In contrast to the interim criteria, the Commission did not require that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. While conferring eligibility on a wider group the Commission required an eligible person to prove innocence to a higher standard than that incorporated in the interim criteria.\(^\text{64}\)

The Commission scheme also required that a person apply, within six months of being granted a pardon or a conviction being quashed, to the Compensation Tribunal. The Commission also sought to retain the Crown’s prerogative power to consider applications outside of the scheme. This would allow the Crown flexibility to consider worthy and exceptional claims where the person did not meet the proposed criteria.

**1998 Government Policy**

The Government’s key objectives for compensating persons who are wrongly convicted are to make good losses incurred when a person had been wrongly deprived of liberty, vindicate innocent defendants and to enhance public confidence in the justice system.\(^\text{65}\) With these objectives in mind, following the Commission report the Government adopted a mixture of the interim policy, set in 1997, and the Commission’s recommendations. On 2 December 1998 Cabinet agreed to replace the interim criteria for eligibility for compensation or ex gratia payments with the following criteria (1998 criteria):

1. The category of claimants who shall be eligible to receive compensation or ex gratia payment in respect of being wrongly convicted of offences (qualifying persons) is limited to those who:

   (a) Have served all or part of a sentence of imprisonment; and have either

   (i) had their conviction quashed on appeal, without order of retrial, in the High Court (summary convictions) or Court of Appeal (including references under section 406 of the Crimes Act 1961); or

   (ii) Have received a free pardon under section 407 of the Crimes Act 1961; and

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\(^{65}\) Cabinet Strategy Committee minutes, STR (98) M 39/6 dated 2/12/98 entitled “Compensation or Ex Gratia Payments for Persons Wrongly Convicted & Imprisoned”.
(b) Are alive at the time of the application.

2. A qualifying person may apply to the Minister of Justice for compensation or ex gratia payment and the Minister shall refer those cases meriting further assessment to a Queen's Counsel appointed by the Minister for that purpose.

3. The Queen's Counsel shall report to the Minister of Justice, certifying whether he or she is satisfied that the claimant is innocent beyond reasonable doubt.\(^66\)

If the Queen's Counsel is satisfied they will proceed to recommend an appropriate amount of compensation/ex gratia payment, taking into account a number of factors.\(^67\)

At the Cabinet meeting on 2 December 1998 it was also agreed inter alia that the Crown would reserve the right, in extraordinary circumstances, to consider claims falling outside the criteria specified on their individual merits where this is in the interest of justice.\(^68\) Furthermore, the new guidelines were implemented on a trial basis for a period of three years.\(^69\)

Under the 1998 criteria the range of potential eligible applicants was extended to include individuals who have had their convictions quashed on appeal to the High Court. While the range of potential applicants was extended, Mokomoko is from the outset ineligible for consideration as claimants must be alive at the time of application.

Rather than follow the Law Commission's recommendation of the establishment of an Independent Compensation Tribunal a Queen's Counsel is given the task of deciding the innocence of the applicant and the quantum of compensation.

\(^{66}\) Ibid, Annex B.

\(^{67}\) These factors include: the conduct of the person leading to prosecution and conviction; whether the prosecution acted in good faith in bringing and continuing the case; whether the investigation was conducted in a reasonable and proper manner; the seriousness of the offence alleged; the severity of the sentence passed; and the nature and extent of the loss resulting from the conviction and sentence. Cabinet Strategy Committee paper STR (98) M 39/6 Annex B. These factors were in large taken from the case of \(R\ vs\ Margaritis\) (unreported, Christchurch Registry T 66/88, 14 July 1989), which dealt with section 5 of the Costs in Criminal Cases Act 1967.

\(^{68}\) Cabinet Strategy Committee minutes, STR (98) M 39/6 dated 2/12/98 entitled "Compensation or Ex Gratia Payments for Persons Wrongly Convicted & Imprisoned".

\(^{69}\) Ibid.
tion. The establishment of an independent Tribunal was difficult to justify given the few eligible cases that would be considered. By giving a Queen's Counsel the task of assessing applications, independence of the executive branch of Government was still achieved with the objective of enhancing public confidence.

Following the Commission's approach rather than retaining the approach of the interim criteria, the 1998 criteria did not require that a new or newly discovered fact show conclusively that there has been a miscarriage of justice.

**Beyond Reasonable Doubt**

A major difference between the interim policy and that adopted in 1998 relates to Cabinet's adoption of the Commission's proviso of applicants being required to prove they are innocent beyond reasonable doubt. This issue attracted considerable criticism. In the Government's press release of 10 December 1998 the then Minister of Justice Rt Hon D.A.M. Graham stated:

> The new regime is designed to shift the focus onto the innocence of the claimant, eliminating the chance that compensation is paid to guilty people who have their conviction reversed on a technicality.

He went on to state that the test of innocence is a tough test but he believed that it was essential in order to preserve the integrity of the justice system. It is understandable that there is a need for safeguards to ensure people who are acquitted on technicalities or procedural grounds do not profit from their imprisonment. There is also a need to ensure that only the truly innocent are compensated. However, to require applicants to prove their innocence beyond reasonable doubt will make it near impossible for any applicant to succeed under this scheme.

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71 Draft Memorandum for Cabinet Strategy Committee dated 16/11/98 entitled "Compensation or Ex Gratia Payments for Persons Wrongly Convicted & Imprisoned".
72 See discussion below regarding concerns raise by the New Zealand Law Society, Ministry of Justice and Justice and Law Reform Committee.
75 Eligible applicants are being asked to prove that there is no reasonable possibility at all that they could have committed the crime. Given that the prosecution saw fit to charge them there must be some reasonable if only slight possibility that they might have committed the crime. One would assume that the prosecution would have some evidence to bring a charge.
While under the 1998 criteria the range of potential eligible applicants was extended from those who were eligible under the interim policy, the potential claimants are still very much limited to those who have been through appeals processes with no order for re-trial or have received a pardon. Eligible claimants are not those who are acquitted at first instance. Rather those eligible must have been acquitted on appeal to the High Court or Court of Appeal. Therefore they would have had their case before New Zealand's higher courts, on at least two sometimes three occasions. Further, the Court of Appeal can still dismiss an appeal if the grounds of appeal are decided in favour of the appellant and where there has been no substantial miscarriage of justice. The New Zealand Law Society were of the view that given limited eligibility, appeal requirements and the Court of Appeal powers in terms of section 385 of the Crimes Act 1961 the Court in themselves would act as a filter for claims where a person may be guilty but acquitted on a technical or procedural ground.

There will be few cases that will qualify to be considered for compensation. Of those limited number eligible to be considered not all will be able to prove innocence beyond reasonable doubt. There are practical difficulties in requiring a

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76 The case of David Dougherty went before the Courts four times. On 21 May 1993 Mr Dougherty was convicted in the High Court at Auckland. On 2 November 1994 the Court of Appeal dismissed Mr Dougherty's appeal against conviction. On 19 August 1996 the Court of Appeal quashed Mr Dougherty's convictions and ordered a new trial. On 17 April 1997 Mr Dougherty was acquitted at the High Court in Auckland.

77 Section 385(1) of the Crimes Act 1961 states: (1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion: (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or (c) That on any ground there was a miscarriage of justice; or (d) That the trial was a nullity and in any other case shall dismiss the appeal: Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

claimant to prove innocence\textsuperscript{79} let alone requiring that innocence to be proven to a standard beyond reasonable doubt. The Ministry of Justice estimated that between 1993 and 1997 "no more than seven cases a year would qualify for consideration."\textsuperscript{80}

A major difficulty the Mokomoko whanau would face if they were eligible under the 1998 criteria is proving their tipuna was innocent beyond reasonable doubt. There is obvious difficulty with evidence given the trial was in 1866. While much evidence indicates Mokomoko’s innocence\textsuperscript{81} it is unclear whether a Queen’s Counsel would assess the current evidence as proving innocence beyond reasonable doubt. The Ministry of Justice appears to be of the opinion that:

There is no satisfactory basis on which we could now conclude that a jury was not entitled to return a guilty verdict in respect of Mokomoko.\textsuperscript{82}

In submissions to the Justice and Law Reform Select Committee, Judith Ablett-Kerr QC noted the harshness of the standard required in stating:

Having failed to protect those individuals from the trauma of conviction, loss of good name, loss of everything that goes with being wrongfully convicted, and not the least loss of liberty, the present system says that we will not compensate you for what is the system’s error unless you can prove beyond reasonable doubt that you are innocent. To get compensation for what, for some, is an extreme trauma which is likely to affect them for the rest of their lives, requires the victim of the wrongful conviction to assume that high burden of proof beyond reasonable doubt.\textsuperscript{83}

\textsuperscript{79} The Law Commission \textit{Compensating the Wrongly Convicted}, Report 49, 1998 at page 40 noted that: “We acknowledge that there are practical difficulties with requiring a claimant to prove innocence, including that it may often be impossible (or too costly) to do so. An enquiry into innocence might be tantamount to a retrial long after memories are dimmed, if indeed witnesses are still alive and otherwise available. It may very well not be feasible to reconstruct the events.”


\textsuperscript{81} Refer to page 48.

\textsuperscript{82} Letter from Secretary of Justice to the Minister of Justice regarding “Mokomoko – Application for Posthumous Pardon”, 11 December 1990.

\textsuperscript{83} Submissions to the Justice and Law Reform Select Committee on \textit{Compensation for Wrongful Conviction}, 17 February 1999, 2.
It is interesting that the Ministry of Justice, the Justice and Law Reform Committee and the New Zealand Law Society were all of the view that the standard adopted by Cabinet in 1998 is unreasonable. The Ministry of Justice recognised the difficulty claimants will have in proving their innocence.

We have determined that the number of claims that would be received under the proposed scheme is likely to be small and consider it likely that even fewer will meet the test of proving innocence beyond reasonable doubt.  

The majority view of the Justice and Law Reform Committee was that:

Most of us consider that the threshold for compensation recommended by the Commission, and adopted by the Government, that claimants must prove their innocence beyond reasonable doubt, is unreasonably high. We consider that very few, if any, persons who have been wrongly convicted and imprisoned, will be able to meet this standard, which is virtually impossible to attain in our criminal justice system.

The Justice and Law Reform Committee went as far as to recommend to Government that they consider lowering the threshold test to the “standard of being required to prove innocence on the balance of probabilities.”

The Law Society noted:

...it is not necessary or desirable in the interest of justice to set a wrongfully convicted person another test at “an impossible high standard” to gain some compensation for the failure of the system.

Even with the above concerns raised the Cabinet of the time still followed the recommendation of the Commission of having the standard of proof at beyond reasonable doubt. The Government did note that they would re-examine the thresh-

84 Letter from Secretary for Justice to Minister of Justice & Associate Minister of Justice regarding compensation for persons wrongfully convicted and imprisoned, 17 September 1998.
86 Ibid, 7.
87 Ibid, 4.
old test when all aspects of the process were reviewed. So why did the Commission recommended such a standard? The Commission were of the view that only the "truly innocent" should receive compensation. The Commission recognised that if the scheme was dealing with only applicants who were innocent then the standard would be balance of probabilities but the scheme would also deal with those who are not innocent and have secured an acquittal.

There were also administrative and resource concerns. The Commission saw that wider criteria for eligibility to be considered for compensation could "threaten finality and certainty in criminal procedure and lead to destabilisation of the administration of justice".

Further justification for the higher standard of proof was due to the removal of the requirement for a new fact or a miscarriage of justice. With a shift to a focus on the innocence of the applicant it was necessary to increase the standard of proof required.

A higher standard of proof is considered consistent with the article 14(6) of the International Covenant on Civil and Political Rights, which requires facts to "show conclusively" that there had been a miscarriage of justice. A standard of reasonable doubt, in the Commission's view, equated with "show conclusively".

This sees a shift in focus to the innocence of the applicant rather than whether there has been a miscarriage of justice. In terms of Mokomoko's situation it has

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89 The term is taken from a phrase used by Justice Baragwanath in notes from Justice and Law Reform Committee meeting, February 1999.

90 The Law Commission Compensating the Wrongly Convicted, Report 49, 1998, 41 and Justice Baragwanath in notes from Justice and Law Reform Committee meeting, February 1999, noted a number of situations in which a person may obtain an acquittal where they may not necessarily be innocent. He stated, "The other is the citizen who is not but managed to secure acquittal, perhaps on technical or procedural grounds or because of deficiencies in the presentation of the prosecution case, or perhaps a summing up that is misunderstood, or even because of perjury or threats to witnesses."


92 Discussed above at page 54

93 Notes from Justice and Law Reform Committee meeting, February 1999, 2.
been noted above that there are obvious difficulties in proving innocence beyond reasonable doubt. What is more easily assessed is the miscarriage of justice of the situation. The record of the Mokomoko trial when read in totality and with knowledge of the context of the time establishes that there was a miscarriage of justice. Even when disregarding the fact that the evidence strongly indicated that Mokomoko was innocent, a number of factors support the contention that there had been a miscarriage of justice. These factors include unjust procedures at trial; one solicitor acting for all four accused; a one day hearing; no evidence being called on behalf of the defence; the accused not giving evidence until sentencing (as to why he should not be hanged); the very brief cross examination; and the inconsistency of the Crown’s case.94 Tuiringa Mokomoko when writing on behalf of the Mokomoko Whanau to the Rt. Hon Douglas Graham, Minister of Justice at the time, made the point clear when stating:  

It is our submission that a unique set of circumstances conspired against Mokomoko, involved him in a trial from which there was no chance of true justice and which resulted in him being hanged for a crime he did not commit.95

The Commission recognised that the new requirement for standard of proof is higher but were of the view that it was better that an innocent person who cannot prove their case beyond a reasonable doubt not recover compensation rather than someone who is guilty receive compensation. The Commission stated:

The law cannot achieve a perfect, but only a practical result. In the present context we prefer a result that protects the efficient operation of the system, even at a cost to some innocent claimants.96

This is a difficult view to accept when considering that it is the failures of the legal system that puts innocent persons in prison and deprives them of liberty. The Commission’s view is that when the legal system is inefficient and imprisons innocent persons it is best that the system then operate efficiently even at the costs of failing to compensate a worthy applicant. A situation could therefore emerge where efficient compensation operation of the system fails to compensate for inefficiency of that same system. The Commission’s assessment was that it was better that innocent people receive no compensation rather than guilty people receive compensation. This is somewhat of a reverse of the old saying that it is

94 Refer to page 48.
better that a guilty person go free than an innocent person be imprisoned.

Not only is the standard high but there is also uncertainty as to what is required to be proved. In most criminal cases the burden is on the prosecution to prove all elements of an offence and also, in most cases, negate the existence of a defence. The current scheme is unclear as to what the applicant will need to prove. No criteria, mechanism or procedure is given as to what the applicant must prove to satisfy the burden. By simply shifting the burden in criminal matters one could presume that the applicant is required to prove beyond reasonable doubt that they did not commit any of the elements of an offence. Further there is no provision of criteria by which the applicant shall be judged. The policy simply states that a qualifying application will be referred to a Queen's Counsel who must be satisfied that the claimant is innocent beyond reasonable doubt.

Besides the high threshold standard to meet, many applicants will simply not be able to afford to fund an application. The costs in defending a case are high as would be the cost in putting a case together to prove your innocence beyond reasonable doubt.

The issue of the standard of proof will be one matter given serious consideration when the scheme is reviewed especially given the present Minister of Justice's early indications that he sees the standard of proof being too high and indications from the Ministry of Justice that it is intended that changes be made to the threshold for innocence within the context of the review.

The 1998 criteria has a number of hurdles that applicants must get through. Some of those hurdles are set too high and it is therefore questionable as to the fairness of such criteria. The previous Government was well aware of this fact when adopt-

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97 Judith Albert Kerr QC submissions to Justice and Law Reform Select Committee - 17 February 1999, 3.
99 "Dougherty seeks anonymity" Bay of Plenty Times, 12 July 2001 states: Justice Minister Phil Goff said the criteria, set by the previous government in 1988, under which compensation cases were decided would be reviewed by December this year.
100 Chisholm, D "Compensation ends seven years in Hell" Sunday Star Times, 3 September 2000, C4, where it was stated that Justice Minister Phil Goff: ...believes the threshold for proving innocence beyond reasonable doubt is too high, and payments should be made when the innocence is proven on the balance of probabilities.
101 and also Letter from Secretary for Justice to writer, 2 July 2001 where it was stated: The Minister of Justice continues to believe that the threshold of 'innocence beyond reasonable doubt' is too high.
102 Letter from Secretary for Justice to writer, 2 July 2001.
ing a scheme where few if any applicants will be successful.

**Returning to Mokomoko**

So do the 1998 criteria in relation to compensating the wrongly convicted assist the Mokomoko whanau? No.

It has already been commented that at the outset Mokomoko is ineligible for consideration as claimants must be alive at the time of application.

Even if Mokomoko was alive to make an application it appears that the compensation scheme excludes claims where a person has received a free pardon that is subject to a Treaty of Waitangi Claim. In a Cabinet paper relating to compensation for the wrongly convicted it states:

> As a point of clarification, it is not intended that this paper extend to statutory or free pardons that are the subject of Treaty of Waitangi claim settlements. In this regard, it is noted that claims have been made to the Crown by the descendants of persons who have received free and statutory pardons in respect of historical grievances.\(^{102}\)

While there does not appear to be an official government policy excluding those who may be entitled to compensation for wrongful conviction if they have a Waitangi Tribunal claim lodged, the situation has been recognised as a possibility and disregarded.

As noted above a major difficulty the Mokomoko whanau face under the 1998 criteria is proving their tipuna was innocent beyond reasonable doubt.\(^{103}\)

Further exclusion of the Mokomoko case relates to the assessment of losses. Even if eligible and successful in obtaining consideration the Mokomoko whanau’s losses are excluded under the 1998 criteria. It is interesting that the current 1998 criteria specifically excludes the exact types of losses sought by the Mokomoko Whanau. Currently there is a Waitangi Tribunal claim\(^{104}\) lodged whereby Mokomoko’s whanau seek compensation for emotional harm, stigmatisation and loss of reputation as a result of Mokomoko’s conviction and execution. While recognising that a family may suffer emotional harm, stigmatisation and loss of

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\(^{102}\) Cabinet paper entitled *David Brian Dougherty – Claim for an ex gratia payment*, undated.

\(^{103}\) Refer to page 62.

\(^{104}\) Wai 203.
reputation as a result of a wrongful conviction and imprisonment the Commission were of the opinion that these specific types of losses were too remote to be covered by a compensation scheme.

The claimant’s family may also have suffered emotional harm, stigmatisation and loss of reputation as a result of the claimant’s conviction. However, the response to our discussion paper confirms our preliminary view that such losses are too remote to be covered by a compensation scheme.\(^\text{105}\)

The only apparent avenue within the compensation scheme available to the Mokomoko whanau to gain justice rests with the Crown’s reserved right, in extraordinary circumstances, to consider claims falling outside the criteria specified on their individual merits where it is in the interest of justice. This will be but one further challenge the Mokomoko whanau have to endure. The Office of Treaty Settlements has already warned the Government about the significant precedent that could be set upon granting compensation to Mokomoko when it wrote:

> We consider that compensation specifically related to the execution of Chief Mokomoko might create a significant precedent for claims where other Maori involved in the wars were executed. It might also be argued to create a precedent where Maori were killed in general in the wars: some 50 Whakatohea were killed during the Crown’s invasion of their territory last century, for example.\(^\text{106}\)

What failed to be considered is that compensation to Mokomoko should be seen in relation to those wrongly convicted and wrongly executed. Mokomoko’s case is distinguishable to those who may seek compensation for execution in war. Mokomoko was tried, albeit in an unsatisfactory manner, and wrongly convicted for the murder of Volkner. He was not a prisoner of war, not convicted of a crime during war and not convicted of being a rebel in war. His case stands as one seeking compensation for wrongful conviction.

It is difficult to know whether the Crown would view the Mokomoko circumstances as extraordinary. Factors relating to the Mokomoko case appear to make this case very extraordinary. Factors such as: Mokomoko was wrongly convicted; he was wrongly executed; he was granted a pardon which in itself is somewhat extraordinary especially given the limited number of pardons granted in New


Zealand. If found to be extraordinary circumstances the Crown can give consideration to the Mokomoko case. The final requirement would be that to grant compensation would be in the interest of justice. If justice equates to making good losses when a person has been wrongly convicted, deprived of their liberty and executed, then this is a case where it is in the interest of justice to make good the losses suffered. The Mokomoko case is clearly a situation requiring justice to be done. It is for the Crown to see that in the interest of justice some compensation for wrongful conviction and execution is made. Obviously no compensation will be adequate for the loss of life, but some compensation could bring some justice to the Mokomoko whanau.

Last century, Mokomoko called to distant lands for justice but to no avail. Today, his descendants press on with his call for justice. These calls are not to distant lands but to the government of this land. Mokomoko’s pardon symbolises a loosening of his shackles. Compensation to the Mokomoko whanau will help to lift the shackles not only from their tipuna in his death, but also from generations of whanau who have suffered stigmatisation. Compensation will bring closure to the Mokomoko call for justice.

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107 Refer to page 52.
108 Refer to footnote 2.
The ‘Best Qualified’ – for What? The place of affirmative action in a mission-focused New Zealand law school admissions policy

BY KEN MACKINNON*

Introduction

Each year there are a significantly greater number of applications to the five New Zealand Law Schools than can be accommodated in the LLB programmes within those schools. It follows that the schools must select some applicants and reject others. This rationing of places is done at the beginning of the LLB degree programme, at the end of the first year, or both. Without the intense public debate that would accompany such a practice in the United States, all five of the New Zealand law schools have adopted some variation of affirmative action policy with respect to selecting applicants for admission.

The concern of this paper is whether and to what extent race or ethnicity can be a legitimate factor in admitting students to law school. By considering the American debate on (race-based) affirmative action in the light of recent developments in California, and looking at the New Zealand context, I want to suggest that, while some justifications for affirmative action such as those based on reparations are not defensible, there is a valid place for measures which have an affirmative action effect in law school admissions processes in New Zealand. What is argued for is

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1 The development of my thinking in this area has benefited greatly from feedback on papers presented at the 1999 meeting of ANZELA and at a Waikato Law School staff seminar in 2000. My thanks to those involved.

2 In addition to those who study for the LLB degree and the LLB with Honours, there are a number of students who undertake double or ‘conjoint degree’ programmes. For present purposes they are treated together.

3 The paper draws on the academic literature, statutes and case law of New Zealand and of the United States, on interviews conducted in selected Californian law schools, the handbooks and prospectuses of the New Zealand Law Faculties and Law Schools, and on my experience as Admissions Committee convenor at the University of Waikato, New Zealand over nine years. Interviews were carried out during 1999 at Boalt Hall Law School (UC Berkeley), Stanford University Law School, Hastings College of Law, Golden Gate University Law School, McGeorge School of Law (University of the Pacific), and UCLA Law School. Three of these are public institutions and three are private. Both administrators and faculty were interviewed. Literature was also obtained from Lincoln School of Law, Sacramento (a private night school) and information provided by other higher education institutions (such as two CSU campuses and several Community Colleges) in California is also drawn on.
not 'hard' affirmative action, in that no one would be admitted solely 'because of their race' and no one would be excluded because of their race. The focus is on selecting students who can contribute to the school's educational and social goals (nowadays termed the 'mission' of the school), but the paper goes beyond that to consider the attracting of particular sorts of student through active recruitment and support for them while at law school. Attracting, selecting and supporting the students whose qualities and characteristics match with the achieving of these goals will, indirectly, cause a greater presence of 'minority' students in the law schools and in the occupations and professions they join on graduation. While some of the arguments set out below may have wider application (for example in employment policies), this paper does not pretend to provide either a theory or a model of affirmative action in general.

Although personal factors influenced strongly the choice of law schools as a focus for this study, they are a particularly appropriate focus for discussion of affirmative action for a number of reasons.

The first is that several of the key American cases on affirmative action and racial discrimination relate to law schools.4 No doubt one of the reasons for this is that admission to law school is highly selective and the number of qualified applicants far exceeds the places available. Consequently difficult choices have to be made in determining who is to gain entry.

But the frequency of law schools as defendants may have as much to do with the nature of what they teach. Many of the concepts used in discussing affirmative action are the concerns of jurisprudence and law. Law and law schools are, therefore, more than contingently connected to the 'justness' of society. They have a special responsibility for subjecting both the substantive and procedural issues raised to rigorous analysis and criticism, and for proposing alternative models.

Equally, applicants who aspire to be law students are likely to have an existing interest in 'justice', 'rights', and 'compensation', and in the way that law relates to these – and, perhaps they simply have a litigious predisposition! Sensitised to

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4 Sweatt v Painter 339 US 629 (1950); DeFunis v Odegaard 416 US 312 (1974); Hopwood v Texas 78 F 3d 932 (5th Cir 1996); Grutter v Bollinger No. 97-75928 (E.D. Mich.) (currently on appeal).
these concepts, a ‘minority’ applicant to law school who believes the admissions policy is ‘unjustly’ excluding minorities will be more than averagely inclined to challenge it; if a ‘majority’ applicant believes his or her ‘right’ to a place is trampled by a preference for minorities, then he or she too will challenge.

Finally, law schools are avenues not merely to legal knowledge, but also to power and to the means of changing society. This happens directly through legal action in the courts but also indirectly through the disproportionate influence (informal as much as formal) that the legal profession has on the legislature, government and policy-makers. Thus entry to law school is particularly important for minorities as a means of access to positions of power in society.

As a result, the American law journals are replete with symposia proceedings, analyses and critiques, case-notes and ‘Special Issues’ on affirmative action, which prove a useful starting point for considering affirmative action in New Zealand.

However the histories and contexts of the American and New Zealand systems of legal education are sufficiently divergent that not only can the practices of one system not be immediately transferred intact to the other, but a comparison forces participants in each system to re-evaluate their own practices and assumptions.

One important difference between law schools in America and those in New Zealand is that whereas law is an undergraduate programme in New Zealand (in which respect it mirrors Australia and the UK), it is a graduate programme in the US. This makes an enormous difference in terms of the nature of the pool of eligible applicants and the level of discretion available to admissions officers. If holding a BA degree or equivalent is a prerequisite for entry to an American law school, only that percentage of the population who have graduated in higher education (and therefore only those who can afford – in terms of time, etc., as well as finances – a very lengthy period in higher education) can achieve a legal education and the rewards which generally follow. This assertion has to be tempered however by the existence, in California, but not nationwide, of law schools which are not accredited by the American Bar Association or the Association of American Law Schools. A

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5 Hence, for example, Martin Trow’s criticism of affirmative action that it merely transfers privilege from one elite to another: Trow M, ‘Comments on Bowen and Bok’s The Shape of the River’ (1999) 135 Public Interest 64.
private law school such as Lincoln Law School, which is accredited by the Californian Bar but not the ABA, does grant admission in certain circumstances to applicants who have not completed an undergraduate degree. It is to provide cheap access to legal education for working people in Sacramento. Nevertheless, because of its unique nature, it would be misleading to use Lincoln as a comparator for the New Zealand law schools.

What the graduate nature of legal studies in the US does also mean is that there is a stronger presumption that graduates will be entering the profession; in contrast the LLB degrees in New Zealand have—or can have—wider aims (with a higher proportion of the students enrolled in them treating them as a general degree).

It is ironic, therefore, that whereas in New Zealand only a holder of an LLB degree can obtain entry to the legal profession, in a few remaining states of the US, it is possible to gain entry by passing the state Bar examinations without first having obtained a law degree. Nevertheless the holding of a JD degree and the status of the university which conferred it effectively determine entry into and success in the higher echelons of the profession.

As yet there are no private law schools in New Zealand, whereas four of the seven visited in California are. Nevertheless, even if there were private providers in New Zealand, the main pieces of legislation affecting affirmative action, the Education Act 1989, and the Human Rights Act 1993, apply to both private and public sectors. In California, in contrast, Proposition 209, which outlawed the use of affirmative action in respect of race and certain other attributes, covers public institutions only. The consequence—that there are some respected universities (eg Stanford University) which are able to practise affirmative action and others (such as UC Berkeley) which cannot—has a distorting effect on the admission figures and practices of each group.

In view of the importance placed on the mission of law schools in the discussion that follows, it is worth noting the variation in purposes of the Californian law schools, particularly the private ones. For example, Stanford University emphasises

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6 ‘A limited number of students who do not meet the requirements of a Regular Student may be considered for admission as Special Students at Lincoln Law School based on their maturity, life experience, intellectual ability and aptitude for law study,’ Lincoln Law School, 1999-2000 Catalog (Sacramento: Lincoln Law School, 1999) at p 9.

7 It has no full time staff, no day time classes, and no research capacity, for example.
research and a broad, liberal curriculum while Golden Gate University focuses on commercial law electives and Lincoln University has a minimalist professional training mission. At least thus far, New Zealand law schools have not sought to differentiate themselves to the same extent.

A further obvious difference between the two systems – that the US is federal while New Zealand is not – does not directly affect the debate except in so far as the US Constitution entrenches certain rights and, consequently, the technicalities of Constitutional interpretation often dominate the discussion in the US rather than the merits of the substantive issues. On the other hand, the Treaty of Waitangi in New Zealand, entered into in 1840 by the British Crown and certain of the indigenous Maori people of Aotearoa-New Zealand, is beginning to be seen as setting parameters for, and giving direction to, governmental actions.

Perhaps, however, the import for present purposes of the Treaty is that ethnic relations are considered generally in New Zealand to be bicultural rather than multicultural. Maori have a special status as the indigenous people, tangata whenua, as against all other ethnic groups collectively. That may give rise to a bicultural version of affirmative action rather than the more usual multicultural version. United States affirmative action programmes tend to identify particular ethnic and racial groups for special treatment. Having said that, occasional references can be found in the US literature which attribute a unique status to African-Americans/black Americans as former slaves, while similar claims can be made for specific native American tribes, and, in California, vis a vis the Chicanos whose part of Mexico was appropriated by the US as the spoils of war.

Despite the differences between California and New Zealand, the issues raised over affirmative action in the American setting are not alien in New Zealand, and it is informative to evaluate the much more extensive American literature. However, any actual affirmative action policy will be ‘context-specific’.

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8 These are usually African-Americans, Hispanic-Americans, Native Americans, and, sometimes, Asian-Americans.


Affirmative action

The term ‘affirmative action’ dates back to the 1960s and came to prominence through a number of executive orders issued by President Lyndon Johnson between 1965 and 1967, requiring those who contracted with government to go beyond merely not discriminating by taking positive (affirmative) action to assist minorities in employment decisions. In educational settings, affirmative action occurs where special consideration is given—usually in admission decisions—to an (otherwise qualified) individual on the grounds that the individual is a member of a disadvantaged or minority group.

There is a vast US literature on race-based affirmative action in education, much of arising from the 1978 Supreme Court case of Regents of the University of California v Bakke in which Allan Bakke (a white student who failed to gain a place in medical school, though minority applicants who were less qualified academically did gain places set aside for them) successfully argued that the quota system favouring minority applicants which the University of California Medical School at Davis used was unconstitutional.

Since Bakke, higher education institutions have continued to employ affirmative action, but more indirectly (sometimes, covertly). They have done so by taking race into consideration among other factors, when allocating places. But in the past couple of years, even these policies have been challenged and in some cases outlawed. In California, the huge multi-campus University of California changed its admission policies in 1995 (with effect in graduate schools including Law in 1996, and then throughout the remainder of the University in 1997) so as to eschew racial considerations. Shortly afterwards, in a referendum vote on ‘Proposition 209’, the people of California outlawed the use of ‘race, sex, color,

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12 Not defined in American law, affirmative action has been described as ‘a public or private program designed to equalize hiring and admissions opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment’: Duncan ML, ‘The Future of Affirmative Action: A Jurisprudential/Legal Critique’ (1982) 17 Harv CR-CL LR 503. Oppenheimer lists a variety of forms of affirmative action: Oppenheimer DB, ‘Understanding Affirmative Action’ (1996) 23(4) Hastings Constit LQ 926. The qualifier ‘otherwise qualified’ is used to indicate that applicants who may be granted special consideration already meet certain minimum criteria of academic ability (such that they are thought capable of coping with the demands of the course and are likely to benefit from it).

ethnicity or national origin' as admissions criteria in public institutions. In Texas the Court declared racial affirmative action – however indirect – to be unconstitutional. Justifications put forward for affirmative action seem to be reducible to three groups: those looking to correct or compensate for past disadvantage; those concerned with distributing current burdens and benefits 'justly'; and those more teleological arguments which are concerned with achieving certain educational, social or ideological goals in the future.

'Corrective Justice'

The first group of justifications is premised on conceptions of 'corrective', 'retributive' or 'restorative' justice.

(A) Competition perfecting

Heslep suggests starting with a minimalist form of corrective justice. He distinguishes between 'indicator' standards (grades, scores, etc) and 'substantive' standards' (the skills, knowledge and character habits which the grades are supposed to reflect). While normally there is considered to be a sufficient correlation between the two, in some cases further information becoming available may necessitate a 'correction' to the indicator standard. For example, the applicant may have been ill during preparation for secondary school exams, the school lost its specialist teacher in one of the subjects during the academic year, or some other factor may mean that the 'indicator' grades are not a true reflection of the applicant's ability or potential. Although this process is compensating (in the sense of 'making allowances') for disadvantage, it is not properly viewed as affirmative action, since it applies to any individual who has a specific case for special consideration and not only to members of a 'preferred group'. It is termed 'competition perfecting'. It is open to an applicant to argue that he or she has been disadvantaged because of race but, if so, evidence of that disadvantage must be shown in relation to that individual and the admissions committee need to be confident that but for the disadvantage, the applicant would have 'made the grade'.

14 Hopwood v Texas 78 F 3d 932 (5th Cir 1996).
16 Sindler, supra note 11, at p 13.
(B) Reparation

A much stronger form requires that members of groups that have been disadvantaged by historic discrimination be compensated by receiving preferential treatment in admissions decisions. While that idea may seem fair, it is almost impossible to implement fairly in practice. The first issue is determining which disadvantaged groups are to be selected as recipients of reparation. Historically, disadvantage, discrimination and deprivation have not been restricted to particular racial groups (although they may have experienced a disproportionate amount).

The second difficulty is that, at the level of admissions to university, it is individuals who gain and lose, but neither the gainer nor the loser has necessarily been involved in the discriminatory wrongdoing. Just as it is unclear why Allan Bakke or any other specific applicant should bear the cost of compensation which is owed, if at all, by all those who are in a dominant position in society, so it may also be that the particular minority group individual who gains a place through this process has not personally been significantly disadvantaged (though his or her grandparents, say, may have been). While it may be conceded that all members of minority racial groups – even those individuals who appear to be successful in the modern society – have experienced some sort of discrimination or stereotyping, it is not always clear that it warrants this form of compensation. Nor is it clear that it is the role of a university to correct the wrongs of the past (except possibly where it has been that institution which has discriminated).

Similarly, there are clearly individuals and groups within the ‘majority’ who have not gained any advantages, but who, rather, might be thought to be in need of special assistance themselves if they are to overcome the social and economic disadvantages that they are experiencing. Unfortunately, it is often these disadvantaged individuals who, by missing out on places in higher education, are likely to bear the cost of compensating the minority for the racial disadvantages they have experienced. For an approach that bases itself on justice, it is ironic that affirmative action as corrective or compensatory seems doomed to operate unfairly: this approach to affirmative action ‘will always entail some mismatch between wrongdoers and cost-bearers, and between beneficiaries and victims’.17 I do not believe, therefore, that a reparations argument is sufficient to justify affirmative action. Indeed it is the failure of this argument to convince which has brought about the backlash against affirmative action in the United States and is just as likely to happen in New Zealand. Perhaps a fairer way to provide reparation

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through the education system would be for society as a whole to increase the places or funding for disadvantaged individuals in general, by means of progressive taxation.

In New Zealand, there are other mechanisms for compensating Maori for the wrongs of the past. Recent years have witnessed multi-million dollar compensation packages for tribal groups whose lands were confiscated by governmental agencies. The Waitangi Tribunal was set up as a grievance procedure for these purposes and the Government has additionally negotiated major settlements with Ngai Tahu in the South Island and with Tainui around the Waikato Region. With some of the settlement funds, Tainui have established a number of scholarships and educational foundations. The need for compensation can, I believe, be met more fairly and effectively by these types of arrangement than would be achieved through affirmative action.

**Distributive Justice**

A second grouping of justifications focuses on the appropriate allocation of current burdens and benefits.

Past discrimination has a ... role to play in this model, but compensation for past wrongs is not the main concern ... Rather, distributive justice focuses on present inequality; the past is relevant as an explanation of current inequalities ... but is not directly part of the justification.\(^{18}\)

It is widely accepted that public benefits (such as places in higher education) should be distributed according to one of the standard criteria of justice – rights, needs or merits.\(^{19}\) The first of these, rights, has been picked up as group rights by Ronald Fiscus.\(^{20}\) The second, distribution on the basis of needs, does have a role in higher education when financial and educational support for individual students is allocated, but that is separate from the question of justifying the admission of an applicant.\(^{21}\) The third criterion, merit or deservingness, is the one that has been traditionally used to allocate places in university.

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\(^{21}\) Cfs 31 of the Human Rights Act 1993, which permits otherwise discriminatory actions if they are designed to assist persons or groups who 'need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community'. However, further analysis reveals this to be a form of goal-based justification rather than a free-standing needs based one.
(A) Rights and Proportionality

While it may well make sense to argue that an applicant who meets the current stated criteria for admission to a university or law school has, thereby, an entitlement or 'right' to that place, a more extensive assertion by an individual of some sort of natural or human right to a place in higher education cannot be sustained – not, at any rate, as an enforceable right against a particular institution: the most that can be granted is that each has an equal right to compete for a place on one's merits. Fiscus develops a rights argument on a different plane. He assumes that African-Americans as a group have a right to the resources, burdens and benefits of society proportionate to their population. He invites us to accept that in a society that had been always free of race discrimination, the proportion of higher education students who were African-American would be the same as the proportion of African-American in the country's population. Therefore, if the number of African-American students is less than the proportion would dictate, a white student occupying a place that should properly be an African-American place is not entitled to that place. He (or she) suffers no loss if that place is reallocated to a 'less qualified' African-American student. Indeed the white student who gets a place that would, under proportionality, be an African-American one is benefiting unjustly from past racism. The solution is to set aside the appropriate proportion of places for the minority applicants.

Of course neither Fiscus' assumption that all races are academically equal and would therefore have a proportionate number of university places in a just society nor his assumption that all disciplines are inherently equally attractive to all races, are universally accepted. Indeed, in New Zealand, there is a growing demand among Maori for the resources to set up their own culturally appropriate institutions in health provision, social services, and education. There are now at least three Wananga recognised by the Government and having a status equivalent to that of a university, and Te Wananga o Raukawa confers a Bachelor of Maori Laws and Philosophy degree. But in any event, there are, at the practical level, a number of difficulties with Fiscus' approach. While he restricts its use to race, the logic of the approach suggests it should be applied to all minorities, leading to a logistical nightmare of trying identifying their respective proportions and applying them in a matrix. There is also a problem of which is the appropriate baseline for the proportions (local, national, the high school leaver cohort, etc).

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23 Fiscus' arguments, which he rightly describes as based on distributive rather than retributive justice, are closer to the principles of unjust enrichment than to the doctrines of tort law.
A further issue has arisen in recent years which puts into question Fiscus' approach: particularly in California, Asian-Americans are 'over-represented in the university admission figure by factors of between 4 and 14'. Fiscus' argument that over-represented whites are there because they are effectively taking advantage of historic discrimination against other groups and that they consequently have no moral claim to the places can hardly apply to Asian-Americans who (a) are a tiny minority and (b) probably have been themselves the victims of historical discrimination rather than its perpetrators. It does not seem fair to restrict their entry numbers to higher education to correspond to their percentage of the overall population.

There is little support in the US for Fiscus' 'hard' affirmative action approach. Quite apart from the ruling in Bakke that it is unconstitutional, it is thought to fail both fairness and effectiveness tests. Despite Fiscus' assertion that a white applicant who is denied a place has no claim to that place, he does not deny that it is only because of that applicant's colour that he or she loses out. The applicant has not been treated fairly as an individual but discriminatorily as a cipher. Although Fiscus' immediate aim of proportionality is achieved merely by allocating places proportionately, there is a danger that the longer-term effect may be as likely to exacerbate racial discrimination as to alleviate it. The reasons for this are potential labelling (by themselves as much as by others) of the 'preferred' applicants as 'second-rate', and the possibility of 'white backlash'.

It has been individual academic merit which universities in modern times have claimed to use as their chief admissions criterion (though other factors are taken into account either openly or covertly). Affirmative action may seem to fly in the face of allocating places according to merit, but this need not be the case.
In fact, measures or evaluations of merit are commonly used in two senses. One sense is to look at past performance and to recognise that people who have achieved (or got close to) a pre-determined goal or standard are meritorious as a result of having applied the appropriate skills, personal qualities or abilities effectively. Merit in this sense may deserve reward. In a second sense, we determine people (eg candidates for a job or applicants for a university place) to be meritorious because they have the attributes necessary for doing an activity which is still to be done. Being identified as meritorious in the first sense does not necessarily mean a person is meritorious in the second sense, unless the possession of the qualities needed for the future activity is what is evidenced by the past achievement.

Allocating places at law school falls into the second category. Being selected for a place at law school is not primarily a reward, not primarily backward looking, but rather a forward looking granting of an opportunity to those who are considered to be 'best qualified' or most able to make something of that opportunity. The focus is on the potential of the applicant. An admissions committee allocating law school places on merit is expected to treat merit as a purposive or 'functional notion'.

There is a temptation for admissions committees to equate the two senses of merit identified above, and to use evidence of past merit in the form of academic records and grades as (perhaps the only) evidence of (or at least predictors of) future performance. Admission on the basis of past academic record has the advantage for admissions committees that it is a relatively simple procedure of applying set (quantitative) criteria to specific cases and yet carries an aura of objectivity. But it rests on a number of assumptions. It is assumed that merit can be quantified, that it can be standardised, and that past grades are sound predictors of future merit.

Certainly it is possible to devise tests which measure and rank skills, ability and knowledge, and to rank candidates according to the degree to which these are demonstrated in the results of these tests. What is less clear is whether these tests have wider significance beyond their own results and whether past grades are invariably accurate indicators of the generic skills and capacities that are needed for legal study or legal practice.

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Past grades may not always reflect academic ability. Test results can reflect inappropriate skills—such as rote-learning of material which is forgotten within a short period following the test, or the acquisition of exam technique. Similarly a law student in New Zealand who has gained entry on the basis of an A Bursary score may have done so by taking mainly scientific and mathematical subjects. This is no guarantee of his or her nascent ability to interpret statutes, write opinions, ascertain facts from clients, negotiate a settlement of a dispute, or argue in court.

Secondly, even if prior grades are accepted as accurate proxies for academic merit, the bald figures of the academic record are not necessarily fair. A student's genuine ability in a subject is not always reflected in the grade obtained. The opportunities to perform well in secondary school exams vary from one school to another. For example, a rural school may be unable—perhaps because of lack of resources; perhaps because of lack of student demand—to teach a particular language. Pupils wishing to take that subject, and having to do so by correspondence, may be thought to be at a disadvantage as compared with others at a well-resourced school which provides teaching and support in that subject on site. Pupils in disadvantaged areas may have little access to books or computer resources. Similarly, certain schools put considerable more effort into coaching their pupils in techniques of national exam success than others.

While the extensive American research on predictors of university success is not conclusive, it does raise sufficient doubt about the accuracy and utility of past grades and standardised tests that it would be inadvisable to rely exclusively on them as predictors of ability to succeed at law school. Surveying recent work in the area of past academic performance and standard tests, Sturm and Guinier report research findings showing such measures to be poor indicators of university performance. In particular they under-predict the achievements of minorities.

They conclude:

These tests, which are used to predict future performance based on existing capacity or ability, do not correlate with future performance for most applicants, at least not as a method of ranking those 'most qualified'. These tests and informal criteria making up our 'meritocracy' tell us more about past opportunity than about future accomplishments on the job or in the classroom.

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30 This is a wider problem than the exceptional case which can be dealt with through 'competition perfecting' (see text accompanying footnotes 15, 16 above). Rather what is of concern here is systemic unfairness.


32 Ibid at 957.
In a major and much cited study, Wightman, following the 1990-1 cohorts of law applicants to 173 US law schools through their degrees, found that the correlation between test scores (in the national Law School Admission Test) and law course grades declines after first year law and that the entry scores are poor predictors of eventual graduation. She nevertheless believes that there is sufficient positive relationship between undergraduate grades combined with standardised tests and law school outcomes as to justify the retention of these records and tests as one, but only one, element in the admissions process. Similarly Duncan and Wojciechowiski-Kibble report in relation to the UK (where the vast majority of law students have come directly from secondary school) that

[although A-levels are poor predictors of ultimate performance on Law Degree courses, they do correlate positively, particularly in respect of young students. There is thus some justification for their use by admissions tutors in respect of school-leavers, although little for the importance which is attached to them. Their failings as predictors are more serious in respect of mature students.]

The literature in both America and Britain points to concerns that are particularly relevant to this paper’s focus on affirmative action for ethnic minorities. Underperformance by some groups in the standard measures seems to be due not simply to lack of opportunity but also to the narrow cultural base of the performance measures. In a heterogeneous society, standardised tests may be more attuned to the way of thinking of one group and less attuned to other groups and cultures whose relative disadvantage in this respect may be reflected in lower scores, despite their having an equivalent natural ability. While an early study found that ‘standardized’ tests such as the Scholastic Aptitude Test (SAT) may be a sound predictor of grades in college, its authors came to the conclusion that a major

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33 Wightman L, ‘The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions’ (1997) 72 NYU LR 1 at 35 (though she does point out that ‘[a]cademic difficulty is not the only reason that some students failed to graduate from law school’, financial considerations being a major factor). These findings replicate the conclusions of a smaller, focused study at Pennsylvania Law School: Guinier L et al, ‘Becoming Gentlemen: Women’s Experiences at One Ivy League Law School’ (1994) 143 U Pa LR 1.


factor was that college grading and college life were just as oriented to a narrow western culture as the tests.\textsuperscript{36} The contention that standard tests have an inherent bias favouring the dominant culture has been firmly reinforced by further work in the 1980s and 1990s.\textsuperscript{37}

It appears, then, that, for a number of reasons, the traditional measures of academic merit can operate as a self-fulfilling prophecy for members of a particular category of people – those whose characteristics have been used to shape the tests or examinations. However, others, such as minority group members or mature students, who are effectively eliminated by exclusive use of such criteria, could in fact achieve success in law school if given the chance. In failing (in a technical sense) the non-standard student, standardised testing fails (in a wider sense) to do what is required of it, the identifying of potential ability. Alan Freeman puts it at its strongest:

Every one of us who has internalized meritocratic norms is complicit in the subtle reproduction of relations of domination through the ‘neutral machinery’ of ‘equality of opportunity’.\textsuperscript{38}

Furthermore, despite the link between a strong academic record and success in university examinations, it may be that neither is an accurate indicator of ability, competence or potential as a legally educated person in the workforce and community.

All legal educators know that the quantitative measures can predict performance on law school examinations only on a crude level. ... To state categorically, therefore, that the higher the combined LSAT and college grade average is, the ‘better qualified’ the applicant necessarily is, even for law school ‘success’, is clearly unwarranted, for this factor deals with rough probabilities and not certainties in individual cases. To equate law school success with success in practice is also a dangerous proposition, for law school education, as it now exists, is best geared to training in the analytical and research skills required of practitioners. It does not train effectively in the skills of advocacy, counselling,


drafting, negotiation, client relations, fact investigation and preparation which are also of prime importance in practice. ... The quantitative predictors, in view of the range of skills needed by a practitioner, are simply not good enough to be the sole basis for admission to law school.39

The dissonance between what is learned at law school and the needs of the profession may not be as great in the modern New Zealand law school as Griswold suggests. Nevertheless it is clear that the desired graduate attributes are unlikely to be apparent in the academic records of many high school leavers. The Bursary scores they have are not closely tied to the skills and attributes of the modern lawyer.

What can be concluded, however, is that while the use of past grades is a convenient way to select law students, it may exclude potentially strong performers and may include some students with limited aptitude. Expanding the admissions criteria beyond the use of past grades should not be seen as derogating from an ideal, as making exceptions. For any institution, choosing fairly, 'on the merits', means selecting applicants by criteria that are appropriate to the purposes of the organisation. For colleges and universities, using broader criteria than grades is a more effective and appropriate method for choosing academically qualified applicants who not only give promise of doing well academically, but who also can enlarge the understanding of other students and contribute after graduation to their professions and communities.40

In general, the benefits in time and administrative resources accrued from mechanizing the admission process are lost when the consequences of overreliance on test scores and grades are evaluated. From a measurement perspective, relying exclusively, or even primarily, on test scores and grades calls upon the test to do far more than it was designed to do. From an educational perspective, it far too narrowly defines the goals and mission of an institution of higher learning. And from a diversity perspective, overreliance on test scores, with or without additional consideration of grades, results in predictable and measurable discrimination.41

It is worth noting in passing that the practice of universities in the US has long abandoned fidelity to a policy of purely academic meritocracy. As one American college president put it,

39 Griswold E, 'Some Observations upon the DeFunis Case' (1975) 75 Col LR 512 at 515
41 Wightman L, supra note 34 at 98-9.
The issue before us is not whether admissions should be based solely on grades and tests. No responsible institution, no matter how large the applicant group, would invoke exclusively quantitative measures in this sensitive area.42

Admissions committees go beyond the past academic records and test scores of applicants. For example, the Boalt Hall Law School policy document reads:

Yet numbers alone are not dispositive. The Law School considers other factors as well for all applicants. For example, substantial consideration is given to letters of recommendation, graduate training, special academic distinction or honors, difficulty of the academic program successfully completed, work experience, and significant achievement in nonacademic activities or public service.43

The Texas statute passed in response to the Hopwood case disallows ethnicity as a factor in admissions but permits seventeen others, including:

(1) academic background; (2) socioeconomic background; (4) bilingual proficiency; (7) extracurricular obligations, including employment, child-raising, or other similar factors; (9) whether the applicant resided in a rural, suburban, urban, or central city area; (11) performance on standardized tests in comparison to students from similar socioeconomic backgrounds.44

What may be more surprising is the statistic that more white students gain entry to Harvard College through special admissions programmes as ‘legacies’ – that is, as the children of alumni – than do the total number of African-American, Hispanic, and Native American students taken together, including those admitted through the regular admissions programme and those admitted through the special admissions programmes for the disadvantaged.45

43 Faculty Policy Governing Admission to Boalt Hall, adopted April 22, 1996.
45 Lamb JD, ‘The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale’ (1993) 26 Colum JL & Soc Probs 461 at 504. See also Fetter J, Questions and Admissions: Reflections on 100,000 Admissions Decisions at Stanford (Stanford: Stanford UP, 1995) chs 4, 6, where the admission of less-qualified athletics scholarship holders and children of alumni is treated as an accepted aspect of admissions, and where the role of wealthy donors is acknowledged. In New Zealand, the Human Rights Commission has ruled that Hamilton Girls High School was in breach of the Human Rights Act in giving enrolment priority to the daughters and grand-daughters of former pupils: New Zealand Herald, Monday 19 March 2001, A7.
While both educational research and the practice of universities suggests that the role of academic records and tests should be severely restricted, the rhetoric of the debate about affirmative action stills puts a high premium on merit. Unable to rely on the traditional quantitative measure of merit, and afraid of being seen to down-play merit by bringing in additional values (far less abandoning it, as Freeman advocates) some liberal educationalists offer a redefinition of ‘merit’ in such a way that it no longer excludes minorities but rather acts as a justification for affirmative action:

Above all, merit must be defined in light of what educational institutions are trying to accomplish. In our view, race is relevant in determining which candidates ‘merit’ admission because taking account of race helps institutions achieve three objectives central to their mission – identifying individuals of high potential, permitting students to benefit educationally from diversity on campus, and addressing long-term societal needs.46

What Bowen and Bok (both former Presidents of Ivy League universities) appear to be attempting here is to provide three justifications for treating race as a criterion of merit. They want to retain academic ability (which may have been concealed in previous testing) within ‘merit’. Yet simultaneously they desire to broaden the idea in two seemingly distinct ways: firstly, by considering applicants as meritorious in so far as they bring various qualities to the learning environment; and secondly, by ascribing merit to someone who contributes to goals beyond the university. However, what are presented as three justifications are, in practice, intertwined aspects of the same argument.

In identifying academic merit, it is necessary to employ evidence that may be less quantifiable than prior grades. Each applicant must be considered as an individual, focusing on future potential rather than the past record. Once the tyranny of the academic record is broken, it makes sense to include non-academic factors in an evaluation of an applicant’s potential. Of importance are generic skills and personal qualities, evidence of which may be revealed in work experience or even in ‘life experience’. Thus an applicant who has overcome a severe physical disability to get within the pool of eligible applicants, or one who is returning after leaving formal education early for family reasons, may have the determination to succeed where the high grade school-leaver falters and drops out after first year. Implicit in this broader conception of merit is that these skills and qualities are valued because of the potential they reveal. But ‘potential’ is not self-referential. It is impossible to identify without asking about its purpose(s). Therefore an admissions committee must be clear as to why these particular attributes are important and for what purpose.

46 Bowen WG and Bok D, supra note 34 at p 278.
If a law school is to use nonacademic (or academic) information in its admissions process, it should develop an articulated rationale for doing so. ... a school should define its institutional goals or missions and then determine the qualities that admitted students should possess for the school to achieve those objectives.\(^{47}\)

It is doubtful that race in itself can be relevant here, without further justification: despite the significant statistical correlation between race and educational disadvantage, belonging to a minority group is not evidence of a particular individual’s hidden potential. The most that can be said is that an applicant’s membership of a minority race should prompt the admissions committee to be especially vigilant for a discrepancy between past performance and potential, and for other indicia of potential. Bowen and Bok’s first rationale for redefining merit to include race— that it reveals potential— must fail, if only because it is incomplete. In contrast, their second justification for treating race as an aspect of merit has more widespread support: admitting minority students to law school does increase educational diversity.

**Educational and Social Goals**

**(A) Diversity**

Obtaining the educational benefits that flow from a racially diverse student body was a justification for affirmative action that gained the approval of Mr Justice Powell in the *Bakke* case and is the most widely stated rationale for affirmative action among Californian law schools. Because higher education is concerned with ‘the robust exchange of ideas’, the legitimate aims of the university will be best served by having a heterogeneous population, and achieving this may be a consideration in the admissions process.\(^{48}\) Students educated in diverse classrooms learn to think in deeper and more complex ways, and are better prepared to become active participants in a pluralistic, democratic society.\(^{49}\)

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\(^{48}\) Elizabeth Anderson points out the importance to research of ‘knowledge claims’ being exposed to the fullest range of criticisms and perspectives, and from that argues for universities to recruit diverse staff and students. (Anderson E, ‘The Democratic University: the Role of Justice in the Production of Knowledge’ in Paul EF et al, *The Just Society* (Cambridge: CUP, 1995). However ideas can be evaluated and challenged from outside the institution in which they originate, and the student body is not usually the first source of critique. This part of the paper thus confines itself to value of diversity in the teaching-learning nexus.
Many studies have confirmed the educational value of diversity. In addition to formal teaching processes, students can learn through observing and listening to both the brighter and weaker of their fellow students, and from the different perspectives and experiences of others. They acquire new information and also re-evaluate their own assumptions. As a consequence, Neil Rudenstine, President of Harvard University claimed that a diverse student body is as much an educational resource as a university's academic staff, library and laboratories. Certainly if the purpose of education is merely to transmit received doctrine, the presence or absence of classroom diversity may not be important. However knowledge is not static and uncontestable: new knowledge that emerges must be tested and challenged. Tertiary students are expected to acquire more than settled wisdom: they develop skills, both intellectual and practical, they learn to evaluate knowledge claims, to reinterpret, to apply knowledge to new situations. It is generally accepted that these processes are assisted by having different perspectives and experiences presented to them.

Students learn not only from books and teachers but also from each other, and in a milieu where all think alike, no challenge and no new ideas readily emerge.

But if diversity is valued for the variety of experiences and perspectives that are shared, the question must be asked whether some differences should be valued more highly than others, and if so, for what reason. Some affirmative action policies in the US and in New Zealand have listed certain groups or categories of person whose difference has to be taken into account, while remaining silent about other groups. Valuing educational diversity 'for its own sake', or at least as providing a more stimulating educational milieu, suggests that these policies should be extended so that there is diversity of, say, religious and political beliefs, socio-economic class, geographic origins, and so on. Indeed George Sher argues that limiting affirmative action to certain groups reveals the diversity rationale as a

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49 Gurin P, ‘Expert Report’ in University of Michigan, *The Compelling Need for Diversity in Higher Education* (Ann Arbor: University of Michigan, 1999) at p 2. Gurin, a Professor of Psychology, is reporting empirical research findings, later relied on in the University of Michigan’s submissions in *Grutter v Bollinger*. 

50 Ibid. See also Astin A, ‘Diversity and Multiculturalism on the Campus: How Are Students Affected?’ (1993) 25 Change 44.


52 Following the *Hopwood* decision, the presidents of 62 major research universities signed a statement affirming the importance of diversity to the learning process, and defending race-conscious admissions policies. see Liu G, supra note 17 at 411.

merely a façade for a reparation scheme at the expense of current majority group members.\textsuperscript{54}

Pursuing the logic of educational diversity-for-its-own-sake reveals a further weakness. If it is difference that constitutes the value that a particular applicant brings to the educational process, the ‘difference value’ of each individual would seem to diminish as others with the same characteristic are admitted. A ‘solution’ would appear to be to limit the numbers of each group so that representatives of more diverse groups can be admitted. But diversity in this form can lead to tokenism whereby one or two representatives of each characteristic are admitted. This in turn gives rise to moral concerns about using people in such a way, just as with the use of individual white applicants to compensate for societal discrimination. There is, too, a danger of stereotyping, of assuming that there is a single ‘black view’ or a unified women’s perspective.\textsuperscript{55} The heterogeneity within minority groups needs to be taken cognisance of, along with the many similarities between members of minority and majority groups.

The issue then becomes one of determining how far diversity is to be pursued, in terms of which minorities are to be selected, and whether in particular ratios, and why. The results can become arbitrary as certain characteristics are chosen while others are not, unless there is an ulterior rationale for selecting particular characteristics – ie, unless a social goal is being served. If the argument is simply that the world into which the law graduate will be entering is a diverse one and the graduate should be acclimatised at law school to operate in such an environment, then the school should not limit the special consideration it gives in admissions decisions to only certain categories of ‘difference’. Rather, an applicant should be able to make a case (‘even if only in a blank space on the admissions form’) for special consideration on the grounds of any ‘unanticipated traits that are relevant to the goal of educational diversity’ which he or she displays.\textsuperscript{56} The rationale is one that supports richness of diversity and not any particular pattern of diversity.

\textsuperscript{54} Sher G, ‘Diversity’ (1999) 28 Philos & Pub Affairs 85. That this allegation is unfounded (in any event in respect of some policies) should become clear in the next section of this paper.


\textsuperscript{56} Blasi V, ‘Bakke as Precedent: Does Mr Justice Powell have a Theory?’ (1979) 67 Calif LR 21 at 49, 50.
It is quite a different argument from that advocating proportionality of representation.\textsuperscript{57}

Even if one agrees that some of the favoured minority students are less qualified in the academic sense than those who could have been admitted had only the test grades been taken into account, the very presence of minority students at the university is important. If university education is understood not only in a narrow professional sense but also as a means of learning about one's own society and as a practical study in community life, diversity in the student body becomes an important condition of the quality of education.\textsuperscript{58}

The case for accepting diversity as enhancing education is a strong one. Education itself occupies a special position in social policy because of its transformative nature – it is a process which changes people and creates opportunity. While knowledge is a good in itself, it is also a means to other goals. Affirmative action in university admissions is sometimes proposed as a way of opening up opportunities for the achievement of such goals. However, perhaps because Powell J’s opinion in \textit{Bakke} rejected affirmative action for the purpose of increasing minority graduates in society as a whole, discussion among American legal academics of affirmative action’s social goals is less developed than that concerning diversity in the classroom. The argument for diversity used by Powell in \textit{Bakke} – and the reference point for almost all subsequent debate on the issue – was premised, ironically, on a narrow conception of a uniform function for the university.

The Bakke Court and the national debate that has swirled about the case have not seen the whole problem. The Court, therefore, accepted ‘comparative merit’ as the principal criterion for admission to state professional schools, and ‘educational diversity’ as the principal reason for deviating from that criterion. Attention to the long-term interests of the individual applicant and to the larger concerns of the society would have refocused issues and broadened the Court’s perspective. Such attention in the future would lead to more rational state policies that affect access to the professions and to admissions policies that promote and support those policies.\textsuperscript{59}


\textsuperscript{58} Sadurski W, ‘The Morality of Preferential Treatment (the Competing Jurisprudential and Moral Arguments)’ (1983-4) 14 Melb ULR 572 at 581.

\textsuperscript{59} Henkin L, ‘What of the Right to Practice a Profession?’ (1979) 67 Calif LR 131 at 140. Henkin advocates that states should set the goals and ‘admissions policies for professional schools should be tailored, articulated, and carefully administered to achieve these goals’.
That different universities might have different missions was not discussed. While educational diversity is a valid rationale for widening admissions criteria, it is only half the answer. Neither merit nor diversity as criteria for distributing law school places can be understood without reference to the 'societal goals' not only of education but of each particular law school: ‘The objective of the selection process is a function of the ‘mission’ of the particular Law School.’

(B) Mission

While, historically, the purposes of universities have varied markedly, with vocational training being emphasised in some periods and locations, the transmission of general culture being the focus in others, and the creation of knowledge through research occupying attention in yet others, a relatively homogenised conception of the modern western university is becoming dominant. The modern university is increasingly seen in Clark Kerr’s famous phrase as ‘a multiversity’. Thus a higher education institution today is likely to have a plurality of functions. Talcott Parsons grouped these loosely into four: production of specialist knowledge through research and the training of the next generation of researchers, education of generalists (liberal education), contributing to the intellectual life of society at large, and training for ‘applied professions’. All of these are also legitimate functions of law schools, though the emphasis in each school will vary. Twining explores a number of models for law schools and then, for the purposes of discussing the future of English legal education, singles out three possibilities: ‘a professional [ie vocational] school, an undergraduate liberal arts department, and a multi-functional institution concerned with the study of all aspects of law at a variety of levels’. Each of these conceptions (and no doubt some others) could be found in thinking about legal education within New Zealand. Consequently, as these models are adapted for putting into practical

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60 Thus assertions such as ‘Affirmative action is the means, and the end is diversity’ (Perloff R & Bryant F, ‘Identifying and Measuring Diversity’s Payoffs’ (2000) 6 Psychology, Public Policy and Law 101 at 104) are misleading. For an attack on treating diversity as the end point of affirmative action, see Sher G, supra note 54.

61 see Bowen and Bok, supra note 34.


effect in particular institutions, significant variations in functions and focus are bound to emerge, each law school having distinctive ‘profile’. These differences become reflected in the aims, content and methodologies of the teaching programmes of the schools, even where there may be a core syllabus, as in the New Zealand LLB degrees.

There is no suggestion here that every law school has to have the same social goals – quite the reverse. The community will be best served by having graduates with different specialist skills and knowledge, different emphases and perspectives. Each higher education institution will have its own features, its own emphasis – with, needless to say, education as a core. Just as each university identifies its own specific mission, so do the schools and faculties within it. The mission defines its purposes and focus and differentiates it from other schools. A sense of the variation possible among law schools can be gained from a survey of ABA accredited law schools in the United States, carried out by Gordon Butler in 1999. While Cornell focuses on producing ‘well-rounded lawyers’, Northern Illinois places greater emphasis on ‘developing practical competence’, the University of Dayton law school has a religious mission, St Thomas University school of law has a special commitment to ‘South Florida’s Hispanic and Black communities’ and

The mission of Northwestern University School of Law is to lead in advancing the understanding of the law and legal institutions, for furthering justice under the rule of law, and in preparing students for productive leadership, professional success and personal fulfilment in a complex and changing world.

These goals and missions (and the resultant admissions policies) should not be thought of as arbitrary. Although identified by the institution itself, the mission is

67 The terminology of university profiles, in currency for some time in Australia, has been adopted in New Zealand by the Tertiary Education Advisory Commission: see Shaping a Shared Vision (Wellington: TEAC, 2000). However differentiation between law schools is as much a practical necessity in a more competitive education market.

68 An interesting example of an institution with a particular focus is the National University of Ireland at Galway, which has, by statute, a special commitment to the Gaeltacht. Its employment policies give preference to Irish speakers who are invited to demonstrate their proficiency through a university administered test.


70 Ibid at 243.
responsive to the various stakeholder groups that have an interest in its activities, and in particular its students and their prospective employers.  

The concept of stakeholders appeared in the literature of management theory as long ago as the 1960s, was seen to have particular explicatory application in relation to public and third sector organisations, and has gained renewed popularity through the Stakeholder Capitalism rhetoric of Mr Tony Blair's 'New' Labour Party in Britain. Freeman and Reed provide a useful broad working definition of a stakeholder:

Any identifiable group or individual who can affect the achievement of an organization's objectives or who is affected by the achievement of an organization's objectives. (Public interest groups, protest groups, government agencies, trade associations, competitors, unions, as well as employees, customer segments, shareowners and others are stakeholders, in this sense.)

Inevitably, the degrees of power and influence (which may be economic, voting or political) exerted on the organisation by each of these stakeholders will be unequal, and factors outside the control of the organisation may alter the relative power of the various stakeholders. However what the organisation can do within limits, beyond any empirical stakeholder analysis which is undertaken, is adopt a more normative approach in determining both the manner in which and the extent to which each stakeholder interest should be taken into account. In some cases, participation in the governance of the organisation will be necessary; in others, the simple provision of information will be appropriate: in yet others (eg competitors), the need is to be responsive to, rather than owing any responsibility to, their stakeholding interests.

Applying this stakeholder analysis to the provision of legal education in New Zealand, staff and students are joined as stakeholders by such diverse interests as employers including – but not restricted to – law firms, the New Zealand Law Society, the judiciary, taxpayers acting through Government Departments and Ministries, the public as consumers of legal services, the Maori community,

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73 Gray R et al, Accounting and Accountability: changes and challenges in corporate social and environmental reporting (London and New York: Prentice Hall, 1997).
publishers and suppliers of teaching resources, others within the universities, other law schools, the Association of University Staff, and so on. Overlaid on that are further sub-groups which might, for example, categorise students or customers of legal services according to gender or ethnicity. Each law school will have slightly different stakeholder groups and will respond differently to them.

The graduate attributes desired by these stakeholders will affect what it is that the law school is trying to achieve in its LLB programme and in turn the admissions committee will select its students in a purposive way. Thus if a law school has a commitment to service a minority community, in the way that St Thomas University law school does in Florida, there are qualities (perhaps linguistic ability rather than racial or ethnic affiliation itself) which will be looked for in applicants to that school, but which may be less important in, or absent from, the criteria used for entry to another law school. A corollary of the differentiation among law school missions is the variation in admissions criteria:

An admissions committee is free to set nonacademic qualifications within three principled bounds. Each nonacademic qualification must be (1) publicly defensible, (2) related to the purposes to which the university is publicly dedicated, and (3) related to associational purposes that are themselves consistent with the academic purposes that define a university as such. These three criteria leave ample room for different universities to count different characteristics as qualifications (and to weigh the same characteristics differently), depending on their particular associational purposes.74

It is likely that the New Zealand law schools would all choose Twining's multifunctional role for themselves. Although all will have some students taking the degree without any intention of entering the profession, preparation for the legal profession will be a central concern of the school. The knowledge, skills and values that the profession determines, through the Council of Legal Education, as essential will outline one of the 'graduate profiles' that the schools will be seeking to achieve. Of course, 'the profession' itself is changing and restructuring. Even if a law school is simply to serve the profession, what was wanted by way of graduate attributes in the late Twentieth Century is not necessarily the same as those attributes important for the Twenty-first. Thus the Task Force on Lawyer Competency of the American Bar Association recommended that

[i]n admitting students, law schools should consider a full range of the qualities and skills important to professional competence. Those law schools that admit students almost exclusively on the basis of a relatively mechanical index of Law

School Admissions Test score and undergraduate grade point average should give
greater weight to such factors as writing ability, ability in oral communication,
work habits, interpersonal skills, dependability, and conscientiousness.\textsuperscript{75}

A parallel can be made with the medical profession. Traditionally, admission to
medical schools has been on the basis of (extremely high) scores or grades in
previous academic work; but recently there has been a move to consider other
factors such as the applicant’s ability to communicate with others (primarily
patients).\textsuperscript{76} It is not only the profession and employers who have a role in identifying
the attributes of a good doctor or a good lawyer. And just the medical profession
is serving a variety of patients, so too the legal profession is operating in a
society where a range of groups and communities place different demands on
their legal advisers. Minority groups in our society need to be given the opportunity
to be represented by persons they believe understand and relate to them – with
whom they can communicate on all levels, affective as well as cognitive.\textsuperscript{77} It is
entirely appropriate for a law school to make a special commitment to particular
potential client bases for their graduates.\textsuperscript{78} An obvious example in New Zealand
is the many land claims coming before courts and tribunals where only someone
with a deep (insider’s) understanding of Maori traditions could hope to represent
iwi appellants adequately. Similarly a solicitor who can empathise with a distressed
client may be more efficient at fact-finding during a client interview and at seeing
practicable solutions, than the more academically inclined. Sadurski, among others,
has pointed out that various ‘unquantifiable and apparently non-academic
qualities’ are looked for in ‘successful’ graduating students, and he notes with
approval Greenawalt’s observation that

‘A [law] school might well, for example, admit a student it thought had great
potential for political leadership, though believing he might perform less well as
a lawyer than some rejected applicant.’\textsuperscript{79}

\textsuperscript{75} ABA, \textit{Report and Recommendations of the Task Force on Lawyer Competency: the
Role of the Law Schools} (ABA, 1979), cited in Dawson G, supra note 47 at 395.
\textsuperscript{76} Eccleston R, ‘Out for a Dux’ \textit{The Australian Magazine} 27-28 March 1999, p 22,
carrying the subtitle ‘Believing it takes more than top marks to make a good doctor,
some universities are using other methods to diagnose candidates’ suitability’.
\textsuperscript{77} Griswold, supra note 39 at p 518.
\textsuperscript{78} There can be little doubt that a significant reason why the University of Waikato was
chosen as the location of New Zealand’s fifth law school was its commitment to
(Wellington: Council of Legal Education, 1989). As part of its mission that commit­
ment must influence what characteristics it takes into consideration in selection its
students.
\textsuperscript{79} Sadurski W, supra note 58 at 580 quoting Greenawalt K, ‘The Unresolved Problems
of Reverse Discrimination’ (1979) 67 Calif LR 87 at 124.
But, even in a law school focused on the legal profession, the best law graduates will be broadly educated, socially aware and reflective. In any event, it is not self-evident why only the most able academically should deserve to benefit from legal education. On that principle, only Olympic-standard swimmers should have the use of the university pool and someone who merely desires a little healthy exercise should be excluded. It is unnecessary to show that excluded minority applicants would be the very best lawyers before it can safely be asserted that the low participation and success rates of minorities in higher education represent a serious loss of educational potential for individuals and for wider society (quite apart from any issues about discrimination).

It is no longer, if it ever was, an appropriate function of law schools merely to reproduce a professional elite. In the mass higher education system of the twenty-first century, the mission of law schools must be sufficiently broad to satisfy the interests of various stakeholding groups, including public, private and voluntary sector employers, the government, potential clients, and the students themselves, each seeking a particular combination of graduate attributes. Especially in those common law countries where law is an undergraduate education, and where a significant proportion of law graduates do not enter the profession, there is a high degree of consensus that the LLB should take the form of a liberal education involving more than the learning of legal rules, doctrine and skills. 80

The response of each law school, weighing up the needs and expectations of its own stakeholders and societal goals in the form of a more or less articulated and unique mission, will legitimately shape not simply what is taught but the sorts of applicants it should be admitting and the attributes of its graduates. Recognising the intertwining of all these elements, Maria Tzannes calls for what she calls proactive admissions policies, which will not simply react to market demand but will – as part of a law school mission – help shape legal practice and shape society. She points out that admitting students to law school is not simply about getting the numbers right:

An Admissions Policy is exactly that, an Admissions Policy, not merely a procedure. As a policy, decisions must be made based on values, judgement, equity, access and the 'mission' of the Law School.81

It should not be a surprise, then, if one law school rejects a particular individual who would easily gain entry to another since such decisions are influenced by the law schools' divergent social aims. Merit is neither self-defining nor self-revealing; it is an ever-changing concept that is historically, socially, and institutionally contingent – and often contested. It is impossible to define merit without asking what kinds of institutions we want to have and for what purposes.82

Without employing the fashionable language of mission statements or stakeholder interests, this approach was well-summarised by Hathaway in 1984:

I believe that faculties should adopt explicit goal-oriented admissions policies. ... Ideally, value-oriented admissions criteria should result from soul searching by a law faculty to define its particular role in meeting perceived social and legal needs. ... While undoubtedly the policy here advocated is highly subjective, its strength lies in both its candor and its imposition of social accountability on law schools. Gone is the guise of objectivity that masked the use of criteria of questionable predictive worth and equity. Rather, this goal-oriented admissions policy requires a law school to struggle to define its objectives, enunciate them, hold its goals up to the scrutiny of the bar and the public, and realize them by creating opportunities for legal studies for individuals able to carry them out. As professional schools, law faculties bestow more than knowledge or diplomas on their graduates; to a very real extent law schools determine the composition of a group that plays an important and privileged role in society. As such, it is high time that law schools substitute social accountability for pretended objectivity as the cornerstone of the admissions process.83

Nevertheless, despite the case against over-reliance on grades, despite the arguments for going beyond diversity for its own sake, an advocate of using a mission-based admissions policy must counter a traditional objection to goal-

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81 Tzannes M, supra note 62.
82 Raskin JB, 'Affirmative Action and Racial Reaction' (1995) 38(3) Howard LJ 521 at 551. See also Blackstone WT, 'Reverse Discrimination and Compensatory Justice' (1975) 3 Soc Theory and Prac 265, reproduced in Blackstone and Heslep, supra note 15. For example, high LSAT scores have been found to have a negative relationship with subsequent community leadership and community service, which might be thought of in some quarters as 'meritorious' activities: Lempert R et al, 'The River Runs through the Law School' (2000) 25 J of L and Soc Inquiry 468.
based theories – that they should not be endorsed if they trample over putative individual rights.

**Persistent concerns**

(\textbf{A}) \textit{‘Innocent victims’}

By far the strongest argument that opponents of affirmative action have offered is that affirmative action harms or discriminates against individual members of a majority grouping who would have had a place (or a job) if it were not for the affirmative action. Furthermore these individuals are being penalised for past societal discrimination which they as individuals did not perpetrate. They are the innocent victims of affirmative action. This is a strong objection. If a person misses out on a place or loses his or her job for no other reason than that he or she was not a member of the preferred minority, it is difficult to avoid the conclusion that he or she has been unfairly discriminated against. But such cases must be rare and can be avoided. Instead, the merits of each applicant should be looked at and minority status is only one among the considerations. An applicant who is not admitted because his or her aggregate of attributes is not as great as those of another should not be seen as having their rights over-ridden either by less meritorious candidates or by social goals. It is worth repeating that no one has a pre-existing right to a place: any ‘entitlement’ must arise out of the application of the criteria to the individual cases that present themselves to the admissions committee. The mission of the school will shape what these criteria are. An individual who might have been admitted under another criterion (such as past academic record) has no grievance if the school applies consistently a different set of criteria which does not suit the applicant as much. He or she is not an ‘innocent victim’ – not because he or she is guilty, but because he or she is not a victim.

(\textbf{B}) \textit{‘Positive discrimination’ as positive harm}

There is a school of thought that holds that affirmative action has only benefited that small proportion of minority groups who are already performing well in the majority culture and would succeed even in an environment free of affirmative action.\footnote{See, for example, \textit{Firefighters Local Union No 1784 v Stotts} 104 S Ct 2576 (1984) and \textit{Wygant v Jackson Board of Education} 476 US 267 (1986) where there were ‘affirmative action’ policies of selecting longer-serving white employees for redundancy rather than recently hired black employees.} This view is reinforced by analysis of the effects of banning affirmative action.
action at the University of California. Although there is no dispute over the fact that minority numbers at Berkeley have dropped (especially in the Law School\textsuperscript{86}), there has been an almost corresponding increase at campuses such as Irvine and Riverside. This is known as ‘the cascading effect’. Trow argues that therefore there has been no significant loss to minority students by abandoning affirmative action (at least not as significant as the damaging effects of affirmative action). Cohen reports that retention figures (the ‘drop-out rate’ being twice as high for Black Americans as Whites in undergraduate degrees) show that minority students have not prospered when admitted to the higher status institutions, so they may be better off at the lower levels.\textsuperscript{87} This thesis misses a number of points.

The first is that there are minority students who do drop off at the bottom of the cascade: thus the total of minority students benefiting from higher education or legal education is less. Secondly, the lower retention rates may be the result of faults (lack of support, or even discrimination) in the institutions, rather than the result of students not coping with a standard of work that is too high. In any event, the racial difference in retention rates almost disappears in law schools where the dropout rates are consistently lower.\textsuperscript{88} In order to have gained admission in the first place, students need to have been very committed. What is of most concern however is that cascading (and also the reliance of ‘historically black’ institutions, such as Howard Law School) may lead to ‘ghettoisation’ and race-based stratification of society, taking America back to a state of affairs which predates even the now discarded doctrine of ‘separate but equal’. It begs the question of why Riverside is good enough for minorities but not for whites and ignores the status of education as a ‘positional good’. Major law firms in New York, for example, often recruit almost exclusively from a narrow range of leading law schools: failure to get into one of these elite schools may well effectively exclude a student from consideration by these firms.\textsuperscript{89}

A related objection is that affirmative action exacerbates racial divisions, leads to the beneficiaries of it being labelled (even by themselves) as second-rate and causes a backlash.\textsuperscript{90} While this may be true in some ‘tokenistic’ forms of affirmative

\textsuperscript{86} Between the Fall 1996 intake and the Fall 1997 intake, the admissions figures for African-Americans dropped from 20 to 1, for Hispanics from 26 to 14, and for Native Americans from 4 to 0: Weng GK, ‘How Stella got her Character’ (1998) 13 Berkeley Women’s LJ 19 at 20.


\textsuperscript{88} See Wightman, supra note 33; Bowen and Bok, supra note 34. See also text accompanying note 103.

\textsuperscript{89} Bowen WG and Bok D, supra note 34 at p 100.

\textsuperscript{90} Sowell T, supra note 27 at p 113.
action, such as quotas where race is the sole consideration, there is no evidence that it applies where race is only one among several factors used to enable the admission of well-qualified minority applicants. It is a criticism that only holds good where different criteria are being used in the same competition for places. It is doubtless true that only a relatively privileged few within any community will have an opportunity to even apply for law school and that therefore affirmative action will not do much for the most disadvantaged among, say, marginalised urban Maori. Neither broader goal-based admissions criteria nor targeted scholarships will instantly produce total equality of opportunity. However that is not a reason for refusing to take steps in the right direction. This much is acknowledged by one of the leading opponents of affirmative action in Australia:

...since those who benefit from a preferential hiring program are likely to come from the top of the minority or female distribution, a preferential hiring program based on compensatory justice can be criticized for favouring those who are least in need of preferences and have been least disadvantaged by past social discrimination. This criticism, however, is not valid with regard to forward-looking arguments. The recruitment and selection of the least disadvantaged minority members and women is consistent with arguments that seek to justify a preferential hiring program on the ground that it will result in greater overall social utility. In fact, if the legitimacy of preferential hiring lies in maximizing the average or collective welfare, then the absence of a tight fit between past societal discrimination and present disadvantage becomes irrelevant.91

### Appropriate affirmative action

Thus while it has not been possible to explore all the subtleties of the arguments, the foregoing discussion suggests that some affirmative action is legitimate; some is not. The key is to view education, not as a grievance settling mechanism, but as a forward-looking purposive activity. When selecting students, it is appropriate to consider what a student will bring to that activity and what that individual and the community will gain from his or her participation. This argument does not, however, confer legitimacy on whatever affirmative action policy a university happens to favour. Rather

> an institution must demonstrate that its race-conscious admissions policy is part of a larger strategy to reap the educational benefits of diversity, and that the strategy, whatever its content, is carefully designed, internally consistent, and guided by educational objectives.92

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92 Liu G, supra note 17 at 440.
While it is essential that the goals of a law school be firmly educational in a broad
sense, these educational objectives are not simply the production of academically
able graduates, but, rather, will look beyond the graduation ceremony to the ever­
changing expectations of the institution's stakeholders. The pluralistic type of
law school that now exists in New Zealand needs to be sensitive to the various
stakeholders without being 'captured' by any one particular view, interest or
ideology. The school must identify and justify its particular mission and have an
admissions policy that is designed to help achieve that mission. However the
admissions decision itself is only a part of an integrated strategy, one that pays
attention to those students with the selected attributes before and after the
admissions decision too. As the American experience shows, affirmative action
may have as important a role in assisting a law school to achieve its mission
through pre-admission and post-admission activities as at the moment when one
applicant is selected over another.

**Pre-admission**

A factor in the California system which can assist in the achievement of diversity
goals is the well articulated transfer system from community colleges through to
degree awarding institutions. Thus a student without strong SAT scores or a
mature student returning to study can gradually work up through the system
taking credit with him or her. Unfortunately research indicates that the transfer
system does not operate as effectively as it might. It appears that having reached
community college, most minorities do not progress on to degree-awarding four
year institutions – despite the course credit opportunities.

The expansion of community colleges was seen as a way of addressing the needs
of nontraditional students without compromising the standards of four-year
institutions. Critics have argued that this two-tier system allowed the four-year
colleges to evade the responsibility of recruiting minorities, relegating it to the
two-year colleges. The objective of recruiting from the two-year to four-year
colleges was, to a large extent, never realized. 93

The pattern is repeated at the end of the undergraduate degree in terms of transfer
to law school. In each of the six law schools where interviews were conducted, the
percentages of African-Americans and of Hispanics are below their percentage
representation in the Californian population, the only exception being Stanford in
relation to African-Americans.

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The transfer system is backed up by targeted recruitment activities known as 'outreach programs' at each level of the higher education system. It is possible to view recruitment targeted at particular minorities as affirmative action. This is especially so if it is developed into a bridging programme in which minorities are given assistance to bring their skills up to the standard needed for admission. While these involve expenditure on a minority, they do not directly harm others. But even these efforts can be open to challenge:

Until recently, outreach and counseling programs were not viewed as controversial. In California, however, [the legislative change produced by Proposition 209] has been read as eliminating outreach and counseling plans where they target participants based on race, sex or ethnicity. 94

Nevertheless these activities are widespread. In 1997-8, the UCLA School of Law began developing its outreach programme so as to make it more effective but also less open to criticism. The School has sought and obtained private sponsorship for what is rather grandly called a Law Fellows Outreach Program. It is targeted at undergraduates from socio-economically and educationally disadvantaged backgrounds. It is designed both to encourage them to enter law school and also to 'increase the competitiveness of disadvantaged Fellows for admission to the law school'. Saturday seminars are held at the law school to familiarise students with legal concepts, materials and skills. Law student mentors are appointed to keep in touch with the Fellows and preparation classes for the LSAT are conducted. Indeed, much greater contact (including personal visits by students and alumni) is maintained with intending applicants in the Californian universities generally than in New Zealand. While New Zealand people might be more likely to view these 'hard sell' activities as intrusive, there seem to be no such qualms about targeted recruiting (for example visits by Maori law students and graduates to Maori boarding schools). Additionally there are 'bridging programmes' for non-school-leaving potential students, including ones focused on Maori and aimed at increasing study skills within a context of substantive subjects. There is scope for a greater articulation between courses in polytechnics and the LLB programmes in universities. Similarly students could be required to take foundational courses in subjects where they are weak, simultaneously with their first year law subjects.

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94 Oppenheimer DB, supra note 12 at 932. cf Finke, writing in 1989: ‘Although a discussion of legality of support programs is beyond the scope of this article, I do not believe that the programs I describe raise any serious legal questions.’ Finke C, ‘Affirmative Action in Law School Academic Support Programs’ (1989) 39 JLE 55 at 56 fn 6. See also Adams M, ‘The Last Wave of Affirmative Action’ (1998) Wisc LR 1395, who points out (at p 1403) that these ‘non-preferential forms of affirmative action are ... inclusive, pro-competitive, and consistent with the equal protection principles embodied in the constitution’.
Admission

There are two main approaches to affirmative action at the point of admissions decisions. One possibility is to use a quota system whereby places are set aside for particular minority groups. This allows an institution to achieve diversity and preferred proportions of the student population in a straightforward, explicit and speedy way. An immediate objection is that this has the effect of positively excluding non-minority students from specific places, which may then be taken up by ‘less-qualified’ minority students. The non-minority student’s right to compete for the place is sacrificed simply because he or she is not of the preferred race or gender. Particularly since race cannot normally be changed, the result is perceived as unfair to the rejected applicant, operating as a form of racial discrimination and serving to emphasise the very differences it is trying to overcome in the long run. As such, it can create resentment and a backlash among the previously dominant group.

Additionally, it can be ineffective if the now-preferred group label themselves as second rate in so far as they are in the school only because of a quota or preferential treatment and not on their merits. Such labelling may, consciously or not, be endorsed by the institution.\footnote{This is neatly illustrated by the criteria for entry to one of the New Zealand Law Faculties: ‘The 425 places for 810.101 The Legal System for Part I will be allocated as follows:
\textbf{General admission quota:} 331 places, to be filled by the best-qualified applicants. \textbf{Maori quota:} Up to 49 places … etc.’ University of Auckland, \textit{Faculty of Law Student Handbook 1997} (Auckland: University of Auckland, 1997) at p 63. Clearly it follows that those in the Maori or other quotas cannot be ‘the best qualified’. This phraseology is no longer used in the current handbook.} Similarly others, including prospective employers, may label them as second rate and ‘discount’ their achievements, preferring to employ those who have made their achievements ‘through their own efforts’. Indeed African-American Thomas Sowell objects that affirmative action undermines the value of every achievement of minorities:

\textit{[I]t creates the impression that the hard-won achievements of these groups are conferred benefits.}\footnote{Sowell T, supra note 27 at p 129.}

There are therefore both moral and practical objections to affirmative action by means of quotas. Since the \textit{Bakke} case, quotas have been unconstitutional in the
United States. However they are employed in a majority of the New Zealand law schools, primarily for Maori, but some for mature students, and so on.

An alternative approach to affirmative action in the admissions process is similar to medical triage. All applicants are considered together. It is usual for a committee to be established to consider applicants so that, for example, attributes of an applicant not weighted as highly by one member can be picked up by another. Committees usually comprise both academic and administrative staff, but at several US law schools there is also student representation on selection committees. Those who would not succeed in the course are declined. Those applicants whose academic ability is of such a high level that there could be no doubt that they will excel academically at law studies are admitted. There remain those in a middle group who could get through the degree, perhaps with some effort and some assistance, but who are more numerous than the remaining places available in the school.\footnote{It may be that the high academic grade students are not separated from the "possibles" and all are rated together using the multiple criteria.}

Now the committee must look for additional reasons to select some of them but not others. The "extra" that one applicant has over another (who in terms of academic qualifications may be an equal) need not be academic, but could instead be to do with experience, attitude, contribution to the school’s diversity.

When the Committee on admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on the farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.\footnote{Archibald Cox, \textit{Amicus Curiae Brief on behalf of Harvard College}, for \textit{DeFunis v Odegaard} 416 US 312 (1974), reprinted in Gross, supra note 27, at p 184.}

Conceivably this could be a fairly formal points-based system, or more subjective and impressionistic. It is worth noting that it is possible for an applicant declined first time to go away and gain better grades or more experience, giving them a second chance in a way that a racial quota system could not. For the person is declined, not because he is white, but because compared with the other applicants, he at present has less to offer. I believe therefore that while a quota system is
unjust (and therefore particularly inappropriate for a law school), the same charges cannot be laid against this ‘Harvard model’ of affirmative action.\textsuperscript{99} Between 1978, when \textit{Bakke} was decided, and 1996, when the Regents prohibited its use, a version of this was the method used in the University of California law schools. It continues to be used in the private Californian law schools and in at least one New Zealand law school.

What is now being considered in the Californian public sector is the use of proxy characteristics for race. While it is not possible to equate racial minority status and socio-economic deprivation in either California or New Zealand, there is a high correlation. A law school which can assist low income applicants is therefore likely to be assisting a disproportionate number of racial minority members. For this reason several Californian law schools are looking to socio-economic status as a (very rough) proxy for racial classification. This is then backed up by generous scholarships and funding arrangements. But again this is to oversimplify the obstacles to access for economically deprived minority students. They, especially if they are a little older, may have significant family responsibilities; they may need to be earning and the effective opportunity costs of attending university may be higher than for the white middle-class high school leaver. Therefore, I think it is significant in terms of accessibility that Stanford and the three UC law schools do not admit students on a part-time basis, though this is done at Golden Gate, and McGeorge, while all students at Lincoln are part-time.

In March 1999, a new approach to admitting minority students at the undergraduate level was adopted at the University of California. Previously the top 12\% of Californian school-leavers were able to gain a place at the University. A high proportion of these came from a narrow band of more elite schools. The new approach is trying to attract a similar total percentage but one that is distributed differently. Now the top 4\% of every high school is entitled to a place. It is hoped to thereby attract students from schools that traditionally had no one or only a few in the overall top 12\%. Since many of these schools are predominantly Hispanic, African-American or poor, it is hoped that such students will gain access to UC in unprecedented numbers. In practice, location is being used as a proxy for race in an attempt to maintain classroom diversity.

In varying degrees the New Zealand law schools employ affirmative action in admissions. The majority use quotas; Waikato uses the Harvard method. The latter appears to be particularly successful in raising the percentage of Maori law students, but that may be more a result of the post-admissions environment.

\textsuperscript{99} The recent passing of Proposition 209 in California which outlaws ALL racial, ethnic and gender affirmative action is thus to be regretted.
It may be wondered whether selecting students according to the attributes and qualities that are desirable for the overall mission is affirmative action at all. Once it is realised however that affirmative action need not be about making exceptions to existing practices and standards, but about achieving change in such a way that disadvantage is removed, then the rethinking of admissions criteria in the way that has been suggested is, in fact, an immensely effective form of affirmative action.

**Beyond admission**

It is a mistake to concentrate exclusively on recruitment, admissions procedures and numbers. Just as important is what happens after the student has been admitted. If the institution truly wishes to achieve a social goal, then the minority applicant students need to succeed at university. There is little to be gained in admitting students who then fail and are thrown out at the end of their first year. The important issue becomes how to ensure that the minority students succeed. One possibility is to make allowances for them in the grading of assessments. Such an approach would be consistent with the reparations and with the proportionality justifications of affirmative action, but not with the merit or social goals justifications. There are at least a couple of reasons why it is not acceptable, particularly in a law school. Firstly the law school is attesting to the world at large that its graduates have met a certain standard and are competent to convey property, defend clients and set up corporations. In New Zealand, this is reinforced by the external assessment of examination scripts by fellow academics in other law schools. It would be a fraud on the public to slip through students who fall below that standard. It would also undermine the social goal being sought: for the minority students - all the minority students – would be labeled as inferior, the very outcome that the policy is trying to counter. Thirdly, it would be unfair on the other students who earn their high marks. Finally it would, I believe, show the institution up as having failed as an educator.

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100 As Dean Rusk, former US Secretary of State put it: ‘I must confess that I feel affirmative action is most appropriate at the door marked ‘entrance’. I have some concern about how far we can go at the door marked ‘exit’ in our education system. I don’t believe that I would want a surgeon to take out my kidney with boxing gloves because my surgeon was a woman or a Chicano.’ Rusk D, ‘Preferential Treatment: Some Reflections’ in Blackstone and Heslep, supra note 15.

101 Justice Douglas made this point in *DeFunis v Odegaard* 416 US 312 (1974): ‘A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or browns cannot make it on their individual merit.’ Quoted in Sindler, supra note 11 at p 270.
However, having admitted diverse students to law school for sound goal-based reasons, academics need to alter their pedagogy and assessment. If it is being claimed that society needs lawyers and law graduates with a variety of skills and not just traditional ‘book learning’, then the content of courses and the way they are taught and assessed needs to be suited to these learning objectives. This is not to be seen as ‘dumbing down’ but reorienting all aspects of the degree to realise the qualities that are sought in the graduate.

...a teacher may not realize that affirmative action challenges not only the measures of intellectual ability, but the very conception of it. If that challenge is correct, pedagogic strategies that were effective before affirmative action, given a distribution of intellectual ability traditionally conceived, may no longer be effective with classes that are indeed ‘equally’ able, because the institution’s understanding of ability has changed but the teacher’s has not. ... Our pedagogy therefore ought to demand no less of our students than it used to. At the same time however, it may have to become demanding in a different way, because what we understand as intellectual ability ought to have changed.\(^{102}\)

Instead, what is needed is to make the institution a welcoming and supportive place for minorities, one which ensures that the maximum benefit be derived from the transformative process which is education. This can be done in the curriculum, in the administrative systems, in facilities which are provided and in academic support systems. It is important to have minority staff, both academic and administrative, and a minority Students Association with its own room, and scholarships for minority students. It might be argued that minorities then receive disproportionate attention and resources and that this is a form of discrimination. To an extent this is true, but on the other hand the institution and staff are committed to educating all its students and this will inevitably involve spending more time and effort with some rather than others. And in the end, all the students gain from the enriched learning environment that results. It may well be that post-admission support (and the resulting increased attractiveness of the institution for prospective minority students) is as effective as admissions quotas in bringing about the goals of affirmative action. The American literature on retention suggests that retention rates can be noticeably improved by such factors as offering a pluralistic curriculum, creating a critical mass of minority students, identifying role models, academic support programmes, and social activities which permit the

students to meet with staff outside classroom teaching encounters.\textsuperscript{103} There is a variety of approaches in the Californian law schools.

In addition to the ‘Law Fellows Outreach Program’ which prepares students for legal study (and which has the effect of a continued strengthening of skills), UCLA Law School has developed a number of support programmes, some for minority students to ‘reduce the alienation they may experience at a mostly white professional school’; others for (any) students who are falling behind in their grades.\textsuperscript{104} Golden Gate University Law School runs a tutorial support system which is initially targeted at minority first year students but which ‘converts’ at the end of the first semester into a support system for all students ‘at risk’. Approaches elsewhere can be quite different: neither Stanford nor Boalt Hall (Berkeley) Law Schools provide formal academic support (in the belief that students who succeed in getting in are all sufficiently academically skilled that these are unnecessary). However at Stanford, great emphasis is placed on social support for minority students, each ethnic grouping having support persons. Additionally diversity issues are discussed in semi-formal settings within the residences. Cultural events are organised often involving the ethnic communities from the area around the University. At Berkeley, administrative staff are employed to develop cultural awareness and sensitivity among teaching staff. For example, the traditional teaching method in American law schools, the interrogatory ‘Socratic method’ would be particularly intimidating to Muslim women. Despite these efforts, they all appear to adopt a monocultural or assimilist approach in that student aspirations and the criteria of their success are assumed to be within a majority white paradigm. The possibility of trying to empower students within their minority culture (for example, by conducting law classes in a minority language) was, in interviews, only mentioned at McGeorge Law School.\textsuperscript{105}

A feature of a couple of the Californian law schools – and one which was particularly emphasised at Stanford – is the existence of funds not simply to support needy students while at university, but also to have a goal-based social effect. Where a graduating student enters low-paying public interest employment, the law school will assist that student with loan repayments and the loan may even be ‘forgiven’ in some of the schemes. The aim is to encourage students to move into ‘a non-

\textsuperscript{103} Astone and Nunez-Womack, supra note 93 at pp 64 - 79.

\textsuperscript{104} Knaplund K and Sander R, ‘The Art and Science of Academic Support’ (1995) 45(2) JLE 157, in which the effectiveness of the various programmes has been rigorously assessed.

\textsuperscript{105} The only visible minority language literature was found at community colleges. The inference drawn is that minority language (such as Spanish) is an obstacle to be overcome rather than a gift to be celebrated.
profit organization or governmental agency which renders representation to persons who could not otherwise obtain such services'. This appears a much better approach to social goals than the assumption which was invoked in the Bakke case to justify affirmative action at the admissions stage, namely, that only minority group doctors would service minority communities and should gain entry to medical school for that reason.

In New Zealand too, there is growing awareness that the successful achievement of affirmative action goals is as much dependent on post-entry practices as on the admissions policy. In 1999, for the first time, the percentage of Maori students at Waikato Law School (27%) exceeded the percentage in the regional population. Since there are no quota places, unlike at Auckland and Victoria University of Wellington for instance, and race is only considered as one consideration among many in the admissions process, this achievement must be attributed to other factors. The answer lies in the public perception of Waikato Law School as particularly welcoming to and supportive of Maori students. This perception has a good deal of truth to it and has led to Waikato becoming the law school of first choice for many academically able Maori students. There are Maori support tutors; there are significant numbers of Maori staff; there is a Maori Law Students Association; there is a policy enabling the writing of assignments in Maori; there are Maori concepts discussed in the courses; and now there is a self-perpetuating critical mass of Maori students. Thus in Waikato’s case, issues of recruitment and admissions are secondary: well qualified Maori students choosing to come to Waikato obviate many of the difficulties which other law schools encounter in recruiting and in admissions policy.

Clearly, improving educational opportunities for ethnic and racial minorities must become more than an objective of the admissions office. It must become an institutional priority.

The legal framework in New Zealand

The legal position in New Zealand is similar to the pre-Bakke days in California. There is no doubt that the Education Act 1989, s 224(6) authorises affirmative action (including, possibly, quotas):

106 McGeorge School of Law Catalogue 1998-99 at p 91.
107 Astone and Nunez-Womack, supra note 92 at p 99.
Where —

(a) The maximum number of persons who may be enrolled at an institution in a particular course in a particular year is determined by the Council of the institution under subsection (5) of this section; and

(b) The number of eligible persons who apply for enrolment in that course in that year exceeds the maximum number so determined —

the Council may, in the selection of the students to be enrolled, give preference to eligible persons who are included in a class of persons that is under-represented among the students undertaking the course.

What does that section mean? The term 'under-represented' is a relative or comparative term. The class must be under represented as against some standard. But no guidance is provided as to what that standard is. It is unlikely simply to mean 'in a minority'. A plausible interpretation (harkening back to Fiscus' approach) is that a class is under-represented if the proportion of its members is less than its proportion in the local or possibly national population. This fits with one of the duties imposed on the councils of higher education institutions by s 181 of the statute: to encourage the greatest possible participation by the communities served by the institution with particular emphasis on those in the communities who are under-represented among the student body. An alternative is that a class is under-represented if there are insufficient numbers to produce and sustain diversity in the classroom. 108 Yet again, under-represented could be interpreted as insufficient for the achievement of a mission objective, or a goal of social equity within the professions or trades being served by the qualification. In other words, this appears to be a general enabling section granting a wide discretion to higher education providers. The statute provides little here except an assurance that a university may use criteria that are not exclusively academic in selecting students for a course with limited places. It seems compatible with the distributive and the goal-based, but (possibly) not the compensatory, approaches to affirmative action. The qualifier 'eligible' presupposes the achievement by the applicant of a minimum academic threshold before he or she can be considered under the subsection, but otherwise quotas and the Harvard method of selection are permissible.

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108 The reference to 'sustain' is to acknowledge the psychological need of an individual minority member for the support of similar colleagues in a setting in order to avoid isolation.
But it does not follow that it is safe for an institution to admit, for example, only women to an engineering course to counter past discrimination, or resident Chinese to an education course because there is a need for more Asian teachers in a specific location. There is other legislation which deals with the equal treatment of minorities—the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. The former lists as unlawful various grounds of discrimination, such as race, gender, age, marital status, etc. Section 38 relates specifically to qualification-conferring bodies, s 40(a) to training bodies, and s 57 to educational establishments. Section 57 reads

It shall be unlawful for an educational establishment ... or any person concerned in the management of an educational establishment or in teaching at an educational establishment,—

(a) To refuse or fail to admit a person as a pupil or student; or

(b) To admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or

(c) To deny or restrict access to any benefits or services provided by the establishment; or

(d) To exclude a person as a pupil or a student or subject him or her to any other detriment,—

by reason of any of the prohibited grounds of discrimination.

But a specific exception is granted

S 73. Measures to ensure equality—

(1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute such a breach if—

(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and

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(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.\textsuperscript{110}

These sections have been considered by the Complaints Review Tribunal in a case concerning Nelson Polytechnic\textsuperscript{111} and by the Race Relations Conciliator’s office in relation to Wanganui Polytechnic\textsuperscript{112}.

The first arose out of restrictions on admission to a Fishing Cadet course at Nelson Polytechnic. The Polytechnic reserved four out of fourteen places in the course for Maori and New Zealand resident Pacific Islanders, when it was first offered, and all fourteen in the second offering. This then is a classic example of a quota excluding applicants from consideration for a fixed number of places on the sole ground that they are not members of a targeted minority group. The Polytechnic was held in breach of the Act. Section 73 did not protect it because anyone relying on s 73 needs to make out a case for its use, and the Polytechnic simply failed to produce any evidence that it applied. (Indeed no appearance was made on behalf of the Polytechnic.)

It is not so clear that the use of the 'Harvard method' would be in breach of s 57, since selection is based on an aggregation of factors including race, but it probably does fall foul of the law by virtue of s 65 which prohibits indirect discrimination.\textsuperscript{113} Thus higher education institutions using either method will need to show that it is justified under s 73:

This means that education providers … must have a reason for adopting affirmative action programmes rather than apply them because they seem like a good idea.\textsuperscript{114}

But the Tribunal has left open the choice of which justifications for affirmative action (eg, corrective or goal-based) may be employed under this section. Interestingly, a further provision, s 19 of the New Zealand Bill of Rights Act 1990, has slightly different wording:

\textsuperscript{110} For discussion of this section, see Joychild F, ‘Affirmative Action – ‘Measures to Ensure Equality’ (1996) 1 HR Law & Practice 218.

\textsuperscript{111} Amalal Fishing Co Ltd v Nelson Polytechnic [1996] NZAR 97.

\textsuperscript{112} Osborne and Jakobsen v Wanganui Polytechnic (Unrpt, Race Relations Conciliator A3, 3 September 1998).

\textsuperscript{113} See Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218.

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

That would allow affirmative action policies to assist only those who have been disadvantaged, and brings up many of the difficulties with the compensatory justice approach to affirmative action. One way around this is to assume that s 19(1) incorporates the Human Rights Act s 73 exception.\textsuperscript{115} This would make s 19(2) of the New Zealand Bill of Rights Act 1990 effectively redundant since a higher education institution could rely on s 73 of the Human Rights Act 1993.

The Wanganui Polytechnic case relates not to admission but to post-admission affirmative action. Complaints by students enrolled in a Certificate in Social Services alleging both racial harassment and racial discrimination were upheld. Only the latter issue is relevant here. The relevant complaints were that a remedial study skills workshop was available only to Maori students; that in separate weekly support sessions, non-Maori received less attention than Maori; that assessment procedures differed between Maori and non-Maori. As in the Nelson Polytechnic case, the Polytechnic here did not invoke s 73, so the case does not advance the law on affirmative action very much. What is of concern, however, is the following extract from the Conciliator's decision,

\textit{The Polytechnic did not at any time invoke the section 73 defence and the Complaints Division noted that the respondent could possibly rely on section 73 if the courses were restricted to Maori. Section 73 cannot be used to justify preferential treatment to members of a disadvantaged group simply because they belong to that group, if the programme is also offered to other students who are not members of the targeted group, but who need the same level of assistance.}

It may be that these sentences are merely an awkward paraphrase of a more complex interpretation of section 73, but on the face of it, it severely curtails

\textsuperscript{115} Northern Regional Health Authority v Human Rights Commission (supra note 112) lends support to this approach.
The perverseness of this interpretation is revealed if it is applied to the admissions process (rather than post-admission support). It appears to permit a separate LLB programme for Maori students, for example. Yet, it rejects affirmative action preference for, say, Maori applicants to an existing law school, because there are other applicants who would also need affirmative action if their applications were to succeed. Similarly, it may prohibit targeted recruitment (or 'outreach programs'). It may prohibit the hiring of a Maori support person unless all other groups have equivalent support persons. It suggests that it is permissible to have a separate course for Maori but not an additional revision session for them in a 'mainstream' course. It also forecloses a debate that has yet to be concluded in this country over whether there should remain a special place for Maori as tangata whenua in New Zealand society, and if so, whether that would be in a bicultural or a multicultural framework.

There is some dissonance between the enabling sections of the Education Act and the more restrictive provisions of the human rights legislation. There may also be a dissonance between the human rights legislation and the practices of the universities and polytechnics, and between the human rights legislation and the approach to affirmative action advocated in this paper. This tension reflects the relative paucity of debate about affirmative action in New Zealand as compared to the United States. It would be surprising if, as looks to be increasingly the case in the US, affirmative action were rejected in New Zealand. Affirmative action policies are widespread within New Zealand higher education institutions. But the two cases discussed above leave the status of these policies unresolved. Legal academics are well placed to — and have a special responsibility to — initiate a long overdue debate about affirmative action in New Zealand higher education, one that is informed by the various rationales for and objections to affirmative action; and the different forms in which it can operate.

Conclusion

The experience of affirmative action in California and New Zealand law schools leads to the conclusion that the appropriateness and success of any given affirmative action policy depends on the justification that is being offered, the process of implementation and the circumstances of the law school which implements it. Not all affirmative action policies are good; not all of them are bad.

116 Little reassurance can be gained from the Conciliator's Press Release of 3 September 1998: 'While the positive discrimination provisions entitle a provider to target a particular group who are demonstrably disadvantaged, it [sic] does not entitle a provider to offer courses on less favourable terms to different ethnic groups with similar needs in the same course.'
However, where the legitimate educational and social goals of a particular institution call for it, the recognition in an admissions policy of a diversity of attributes and skills may well have an affirmative action effect. There is no injustice in actively seeking out, allocating places to, or allocating resources to, those applicants who, when evaluated individually, display the combination of qualities that can best effect those goals. They are the most deserving; they are the best.
Corroborating Recovered Memories

BY BRENDA MIDSON*

1. Introduction

The debate on recovered memories reached its peak in 1995.¹ Six years on, with an emerging consensus from the psychological community, it is timely to reflect on how (or whether) the New Zealand legal system is adapting to the task of determining sexual abuse cases based on recovered memories.

It is impossible to encapsulate, in a paper of this length, the many facets of the recovered memory debate. The subject matter raises many different psychological and legal issues that are beyond the scope of this paper. The position of the writer in attempting to resolve some of the legal issues is based upon the following summary.

The reports of several professional organisations² in this area urge caution in dealing with recovered memories and accept that it is possible for false memories to be implanted (unwittingly or otherwise). However, the consensus of these organisations is that it is also possible for some people who were sexually abused as children, to have a period of amnesia for that abuse and for those memories to be triggered at some later point. To date, there is no evidence suggesting that recovered memories are any less reliable than continuous memories. While these views are not universally held, the writer endorses them in order to place parameters around the following discussion, and this position appears to represent the "middle ground" which seems a sensible way to approach the issue. As Lindsay points out:

There is no reason to doubt that ["memory work") techniques can enable people to recover accurate but long-forgotten memories of childhood traumas. Unfortunately...there are many reasons to believe that these same techniques

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² For example, the American Psychological Association, British Psychological Society, and the New Zealand Psychological Society.
can also enable nonabused clients to develop compelling but illusory memories and firmly held but false beliefs about C[illhood] S[exual] A[buse].

However, despite the existence of a middle ground approach, the New Zealand legal system is likely to be reluctant to deal with recovered memory cases, due to past controversy surrounding the issue. Yet the principle of access to justice demands that all complainants of sexual assault should have the opportunity to have their claims heard. A development in some United States jurisdictions has been to require some form of "independently verifiable objective evidence" before courts will consider suspending limitation statutes in "repressed memory" cases. This paper will thus consider how the types of corroboration accepted by United States courts can assist the fact-finder in the context of New Zealand criminal trials.

Firstly this paper will discuss dissociative amnesia as a possible mechanism for causing the phenomenon of recovered memory. Secondly, the writer will review New Zealand recovered memory cases in order to appraise the current approach of the courts to this issue. Thirdly, the United States case of Moriarty v Garden Sanctuary Church of God will be assessed for its treatment of the corroboration requirement. Fourthly, the writer will consider how the different types of corroboration identified in Moriarty might assist the fact-finder in New Zealand criminal trials. Finally, the writer concludes that New Zealand courts must negotiate their way around the extreme views associated with this issue, and adopt an approach that ensures justice in each individual case.

2. Dissociative Amnesia

Dissociative amnesia is identified in the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) as a clinical diagnosis that may be responsible for causing amnesia for traumatic events. The amnesia is reversible.

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4 The term used in Moriarty v Garden Sanctuary Church of God 334 S.C. 150; 511 S.E.2d 699; 1999 S.C. App. LEXIS 9.


6 Supra at n 4.
The essential feature of Dissociative Amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness.⁷

The American False Memory Syndrome Foundation⁸ argues that the identification of dissociative amnesia in DSM – IV does not mean that "repression" is a real phenomenon.⁹ The Foundation’s arguments include the fact that the DSM – IV itself notes that there is considerable controversy surrounding the recovered memory phenomenon, and that dissociative amnesia cannot be distinguished from malingering. The Foundation also points out that the DSM – IV was developed by committee, rather than from scientific evidence. It is the writer’s contention that these arguments lack credibility. Firstly, dissociative amnesia and repression are two distinct concepts and the existence of one does not "prove" or "disprove" the existence of the other. Secondly, while many declaimers of recovered memory theory show a distrust of clinical data, on the basis that it is subjective and anecdotal (not validated by scientific research), recovered memory theory is impossible to prove by scientific research because, as Wylie points out, traumatic events cannot be staged with human subjects to prove the impact of trauma on memory.¹⁰ Thirdly, while DSM – IV does state that there are no methods for distinguishing dissociative amnesia from malingering, they also add that individuals with dissociative amnesia often score high on standard measures of hypnotisability and dissociative capacity. They further state that malingering is more common in individuals who present with elaborate symptoms in contexts that are indicative of secondary gain (although true amnesia might also occur with such stressors).¹¹

There are several mechanisms that may be responsible for the phenomenon whereby individuals are unable to remember incidents of childhood sexual abuse. However using dissociative amnesia as an explanatory model provides a framework for the legal system to adopt in adjudicating individual cases.

⁸ The False Memory Syndrome Foundation is an advocacy group formed in 1992 in Philadelphia by an accused father, Peter Freyd, and his wife, Pamela.
¹⁰ Wylie, “Trauma and Memory” (1993) Family Therapy Networker 42.
¹¹ DSM-IV, supra at n 7 at 479-481.
3. New Zealand Case Law

Prior to 1995, the most flexible judicial approach to the recovered memory issue was demonstrated in *R v R*,\(^{12}\) where the court admitted expert evidence on a range of topics including the concepts of repression, dissociation and "false memory syndrome". The expert's testimony was admitted because it was relevant to the central issue of the credibility and reliability of the complainants' evidence.

A search of New Zealand case law since 1995 reveals that a small number of cases dealing with "recovered memory" have arisen in the courts. However, there are difficulties in drawing any useful comparison between these cases because each case deals with different legal issues, and courts (amongst others) use the psychological terminology inconsistently.

For example, what are often classified as cases of "recovered memory" are not. They tend to be cases where complainants\(^{13}\) have always remembered the abuse, but not appreciated the effects such abuse has had on their life, or alternatively chosen not to think about the abuse for a long period of time. To classify these as cases of "recovered memory" does complainants a disservice as there is a tendency by the courts to see evidence based on a recovered memory as unreliable.

For instance, in *R v Hughes*\(^ {14}\) counsel for the accused had argued in a pre-trial hearing that the evidence of one complainant should be ruled inadmissible as "inherently unreliable",\(^ {15}\) because it was alleged to have been based on a recovered memory. In this case, however, the Judge was satisfied that this was not a case involving recovered memory.\(^ {16}\) This result raises the question of what would have been the outcome if it were found to be an instance of recovered memory. Would counsel for the accused have been successful in having the relevant evidence deemed inadmissible, and if so, on what grounds?

\(^{12}\) (1994) I I CRNZ 402.

\(^{13}\) Research suggests that females form the majority of sexually abused children whereas males form the majority of sexual abuse perpetrators. Therefore, throughout this paper, complainants will be referred to as "she" and perpetrators/accused will be referred to as "he". The writer acknowledges that these are generalisations, however has adopted these pronouns for the sake of simplicity. See Watkins & Bentovin, "The Sexual Abuse of Male Children and Adolescents" (1992) 3 Journal of Child Psychology and Psychiatry 1, 239; Martin et al, *Otago Women's Health Survey : Results* (1991) 1.

\(^{14}\) Unreported CA 470/96 28 May 1997 Eichelbaum CJ, Blanchard & Robertson JJ.

\(^{15}\) Ibid, 3.

\(^{16}\) Ibid, 4.
Similarly, in *D v R*[^17] the court commented as follows:

There is no evidence to show that at the time of charging the applicant there was concern known to the police about the retrieved memory syndrome... Armed with the experience gained in this case, the police may have greater future ability to assess the validity of the evidence founded on allegedly retrieved memory.[^18]

These comments suggest that allegations of recovered memory provide circumstances that warrant special investigation techniques in order to determine the veracity of a complainant’s story before the matter goes to trial.

In *H v B*,[^19] counsel for both parties agreed that the case was not one of “repressed” or “recovered” memory.[^20] This is despite the fact that the plaintiff deposed that the shock of dealing with her son’s sexual abuse “jogged my memory about what had happened to me as a child.”[^21]

In *R v Campbell*,[^22] Campbell was convicted with the murder of a man whom the appellant perceived as having made homosexual advances to him. The appellant had been sexually abused by another man (V) as a child. The defence sought to have the appellant’s murder conviction reduced to manslaughter, on the basis of provocation. According to the defence, when the deceased had put his hand on the appellant’s thigh and smiled at him, the appellant had a flashback of V, lost control and struck the deceased with a poker, punched him, and struck him with an axe. The appellant gave evidence at trial that the resemblance of the deceased to V was so great, that at the time he thought he was striking V.

Dr. Edwards, expert for the defence, testified that when someone had “suppressed” the memory of abuse they could later manifest themselves in their consciousness under situations of stress, when a trigger caused a recollection of past events to resurface.

Dr. Edwards also testified that “repression of the intense feelings of anger, rage and humiliation, would result in the subject having less ability than the average person to control his anger.”[^23]

[^18]: Ibid, 370.
[^19]: Unreported, High Court, Wellington, CP 7/97 4 September 1998, Gendall J.
[^20]: Ibid, 17.
[^22]: (1996) 14 CRNZ 117.
[^23]: Ibid, 121.
It is not clear from the facts of this case whether there was a point in time when the appellant did not remember the abuse, and whether this is a case of recovered memory or not. However, the case is helpful in that it is clear that the expert evidence was admissible to support the appellant’s contention of loss of self-control. What can be drawn from this case, then, is that the court was prepared to accept that disturbed memory functioning is a possible outcome of sexual abuse.

In summary, the approach of New Zealand courts to the issue of recovered memory has been generally inconsistent. Felicity Goodyear-Smith, founding President of Casualties of Sexual Abuse Allegations, believes it unlikely that police would now bring charges where the complainant’s testimony is based on recovered memories. The writer suspects this is an accurate assessment, based upon the controversy such memories engender. If so, complainants who have had amnesia for abusive episodes will effectively be denied the use of the legal system and serious questions must be raised about access to justice. The writer believes that it is not an option for the legal system to simply put recovered memory cases in the “too hard” basket and leave them there until further research provides more insights.

4. Corroborating Recovered Memory Claims in Criminal Trials: Using Moriarty

In New Zealand, because of the Accident Compensation Insurance regime, there are limited circumstances in which a complainant of sexual abuse may bring a civil action for damages. Thus the recovered memory issue has arisen more often in the context of criminal trials.

However, New Zealand criminal courts can gather some assistance from U.S. civil cases. The decision in Moriarty is just one example of U.S. courts requiring some form of corroborating evidence before accepting “memory repression” as a ground for suspending limitation statutes. In that case, the majority opinion held that the “objectively verified evidence” requirement may be satisfied by, for example:

1. An admission by the abuser.
2. A criminal conviction (for use in a civil case).

24 COSA is a New Zealand advocacy group established to support those falsely accused of sexual assault.
3. A documented medical history of childhood sexual abuse.
4. Contemporaneous records or written statements of the abuser.
5. Photographs or recordings of the abuse.
6. An objective eyewitness's account.
7. Evidence the abuser had sexually abused others.
8. Proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred.  

Howell CJ dissented on the last type of evidence identified by the majority. He noted that this particular type of evidence is simply the definition of circumstantial evidence. It was his view that only direct evidence can satisfy the requirement of "objectively verifiable corroboration". With respect, the writer disagrees with Howell CJ's interpretation of the phrase "objectively verifiable corroboration". In the context of the case, this phrase suggests that what is required is corroboration of a type external to the complainant's testimony. If this analysis is correct, the writer respectfully submits that circumstantial evidence (or evidence from which an inference may be drawn), while not direct, may still be objectively verifiable (verified from a source external to the complainant).

There has been much discussion elsewhere on what corroboration actually means. Jackson identifies apparently conflicting approaches. It has been said that corroboration has no special meaning, and simply means evidence that confirms, supports or strengthens other evidence. Another definition is that corroborative evidence must be independent testimony that connects, or tends to connect, the accused with the crime. This latter definition emerged from the case of R v Baskerville and is referred to as the Baskerville test.

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In

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26 It must be remembered that Moriarty v Garden Sanctuary Church of God was a civil suit and hence not subject to the criminal standard of proof.
29 R v Baskerville [1916] 2 KB 658.
other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.\(^{30}\)

Jackson concludes that there are two senses in which the word “corroboration” is used. It can be used in the ordinary sense of evidence that “fits in” with other statements. Alternatively, it can be used in the sense of a legal doctrine that requires a jury to look for independent evidence in support of a complainant’s testimony that implicates the accused. Jackson refers to the latter definition as “legal corroboration” as opposed to corroboration in the ordinary sense.\(^{31}\) Despite this distinction, the writer suggests that in recovered memory cases, any form of supporting evidence is unusual, thus an adherence to strict rules regarding what is, or is not, capable of being legally corroborative, should be abandoned. This is supported by the United Kingdom case of \textit{R v Hills}:

Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the accused committed the crime.\(^{32}\)

In New Zealand, the common law corroboration rules have been abrogated by statute, meaning that corroboration is not required by law, or practice, for a conviction to be sustained. However, in sexual offence cases it may still be difficult to obtain convictions. This is particularly so in historical cases where any evidence that may have existed has long since disappeared. Even in cases that are prosecuted soon after the alleged events there is often no corroborative evidence. However, the decision in \textit{Moriarty} provides some assistance in respect of areas where corroboration may be found. When viewed as a whole, such corroboration may provide compelling evidence of the truth, or otherwise, of the allegations. This is not to suggest that corroboration rules should be reinstated in recovered memory cases, requiring corroborative evidence to sustain a conviction, but rather that such evidence \textit{can} be available and of assistance to the courts.

**Admissions by the Abuser**

While there may be a lack of evidence generally in sexual abuse cases, the accused is almost always aware of whether he committed the crime with which he is charged.\(^{33}\) Thus, any admissions made by the accused should be admissible, and

\(^{30}\) Ibid, 667 per Lord Reading CJ.

\(^{31}\) Jackson, (1988), supra at note 27.


\(^{33}\) Department of Justice “Adverse Inferences from Silence” (1989) 22 U Mich JL Ref 1005.
usually are unless excluded on the grounds of involuntariness or unfairness. This applies to admissions by conduct also. Because an accused’s behaviour and demeanour when first questioned can provide clues as to his guilt or innocence, the writer suggests that videotaping of accused in initial interviews be adopted as a standard practice in sexual assault cases.

Because of the absence of corroborative evidence in most sexual abuse cases, the writer also submits that in such cases if an accused failed to give an explanation to the police when asked, refused to give evidence in his defence in court, or lied either to the police or in cross-examination, these factors should all be available as corroborative evidence, under the classification of “admissions by the abuser”. In proposing such reforms it is necessary to strike a balance between the interests of society in having sexual abuse perpetrators convicted, and the rights of the accused not to be wrongfully convicted. However, it should be noted that it is already permissible for juries to consider an accused’s conduct as part of the evidence against him. For example, the fact that an accused unexpectedly left town the day after the offence, or fled from a crime scene, or concealed, destroyed or fabricated evidence is usually admissible as evidence against him.

Failure to Answer Questions or Give Evidence

In 1994 the British Parliament adopted Prime Minister John Major’s proposal to significantly curtail the right to silence, by allowing judges and juries to draw adverse inferences when a suspect remains silent. These provisions followed a

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34 For a fuller discussion on failure to give evidence and lies by the accused, see Midson, B. “Determining the Truth in Recovered Memory Cases”, supra at n 1 at 158-166.

35 It is important to note the rights protected under the “Search, Arrest and Detention” provisions of the New Zealand Bill of Rights Act 1990, and in particular the rights afforded to persons arrested, detained or charged (ss 23, 24), and the right to be secure against unreasonable search and seizure (s 21). However, these rights are subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (s 5).

36 O’Reilly, GW. “England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice” (1994) 85 J Crim L 402. Sections 34-37 of the Criminal Justice and Public Order Act 1994 allow inferences to be drawn from the silence of the accused where he fails to mention facts relevant to his defence when questioned or charged (the ambush defence); refuses to account for suspicious marks, objects or substances or his presence at the scene of a crime; and fails to give evidence at his trial. Section 38(3) of the Act provides that no person shall be convicted solely on the basis of an inference founded on the defendant’s silence: Enright “Right to Silence (1995) 145 NLJ 6690, 495.
similar enactment in Northern Ireland in 1988, namely the Criminal Evidence (NI) Order 1988. Although the Order was justified on the basis of dealing with terrorist suspects and persons suspected of holding money from parliamentary activity, it actually applies to all criminal suspects in Northern Ireland.38

In some Australian states the trial judge cannot comment upon an accused’s decision to remain silent. In other states only the prosecution may not comment upon such silence. However, in these states the judge must not make comments that invite the jury to infer guilt directly from silence.39

In the United States, adverse comment on the defendant’s failure to testify is prohibited under Griffin v California40 and under Carter v Kentucky41 the jury must be instructed not to draw any inferences from a defendant’s silence at trial.42 Conversely, French law provides multiple opportunities for questioning of the defendant, and freely permits adverse inferences from silence.43

In New Zealand, the Court of Appeal in Trompert v Police44 held that silence can be the deciding factor in arriving at a conclusion of guilt beyond reasonable doubt.45 However in R v Drain46 the Court of Appeal stated that silence is not independent evidence of guilt and may only be used to strengthen existing evidence. In R v Gunthorp47 the Court of Appeal reiterated that failure to testify

38 Jackson, J.D. “Curtailing the Right of Silence: Lessons from Northern Ireland” (1991) Crim LR 404. Articles 3-6 of the Order allow inferences to be drawn where the defendant relies on the ambush defence; fails to testify at trial; fails to account for the presence of objects, substances or marks; or fails to account for his presence. All of the articles permit the court, on the basis of any inferences drawn from silence, to treat such silence as capable of amounting to corroboration of any evidence (in relation to which the silence is material) given against the accused. However, article 2(2) provides that no person shall be convicted of a criminal offence solely on inferences drawn from silence.


42 Department of Justice, supra at n 33.

43 Ibid.

44 Trompert v Police (1984) 1 CRNZ 324.

45 It should also be noted that pursuant to s 24 of the New Zealand Bill of Rights Act 1990, a person charged with an offence has the right not to be compelled to be a witness or to confess guilt, and s 23 provides that persons arrested or detained shall have the right to refrain from making any statement and to be informed of that right.

46 R v Drain, Court of Appeal. 11 October 1994 (CA 249/94). Eichelbaum CJ, Casey & Thorp JJ.

can be enough to take a prima facie case to the point of proof beyond reasonable doubt. However, the Court denied that this amounted to drawing an inference from the accused’s silence. So, while the jury must not use a failure to testify as a fact from which they might infer an accused’s guilt, they may:

[D]raw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so.49

Therefore, judges have not been permitted to invite the jury to conclude that failure to testify is itself an indication of guilt. However, they have been permitted to instruct the jury that, where the accused does not testify it means that there is no evidence from the accused to undermine, contradict, or explain the evidence put forward by the prosecution.50 These are seemingly contradictory propositions. As Mahoney points out, it is difficult to understand the distinction between drawing an inference of guilt from silence, and a finding that silence strengthens the evidence against the accused which may lead to a finding of guilt beyond reasonable doubt.51 It is submitted that the distinction should be abolished in sexual offence prosecutions. As mentioned earlier, the distinction has been abolished altogether in other jurisdictions, where a full inference of guilt may be based on an accused’s silence or failure to testify.

A frequently made argument against curtailing the right of silence is that alternative explanations may be drawn from someone’s silence when arrested, or failure to testify.52 Silence may be consistent with confusion, loyalty, or fear of a co-accused.53 The suspect may have a well-founded fear that the answers will not be treated in confidence; or be reluctant to admit to having done something that was discrediting or embarrassing but not illegal.54 However, as Robertson points out, all circumstantial evidence is capable of alternative explanations. Furthermore, the accused will have the opportunity at trial to explain the reasons for his silence.55

It is submitted that the arguments for the right to silence are outweighed by the justifications for curtailing it. In particular, there are certain offences, such as

50 O’Reilly, supra at n 37.
51 Mahoney (1994), supra at n 48.
53 Enright, supra at n 37.
55 Robertson, supra at n 52.
sexual abuse, in which it is almost impossible to obtain a conviction without a confession or the ability to draw adverse inferences from an accused’s silence.\textsuperscript{56}

In New Zealand inroads have already been made into the right to silence. For example, in paternity proceedings, a court is entitled to draw any such inferences as appear proper in the circumstances from a refusal to give a blood test, subject to the right of the individual to explain their reasons for refusal.\textsuperscript{57}

As Spencer points out:

\begin{quote}
If it is politically possible to knock one dent in the right of silence when the interests of justice require it, it is possible to knock another.\textsuperscript{58} [Emphasis added].
\end{quote}

The writer submits that because of the lasting negative psychological outcomes associated with child sexual abuse, and the likelihood of sexual abuse perpetrators reoffending,\textsuperscript{59} sexual abuse of children is a serious offence for which perpetrators must be convicted. This is so regardless of whether or not the alleged offences are historical, or whether or not the charges are based on recovered memories. In order to ensure that perpetrators are convicted, traditional principles such as the right to silence may have to be revisited.

Lies

In some circumstances, lies told by an accused can corroborate the evidence against him. In \textit{R v Collings},\textsuperscript{60} McCarthy P said:

\begin{quote}
Before instructing a jury that they may treat a lie (if such they find it to be) as corroborating either the commission of the crime or the identity of the criminal, a Judge must hold that it can reasonably be regarded as more than merely consistent with either the truth or untruth of [the complainant’s] testimony.\textsuperscript{61}
\end{quote}

\begin{thebibliography}{99}
\bibitem{56} Ibid.
\bibitem{57} Family Proceedings Act 1980, s 57(2).
\bibitem{60} [1976] 2 NZLR 104.
\bibitem{61} Ibid, 117.
\end{thebibliography}
The Court of Appeal later emphasised in *R v Toia* \(^\text{62}\) that the circumstances in which lies by an accused add to the Crown's case are rare and in *R v Samuels* \(^\text{63}\) it was held that lies must not be used too readily by the prosecution as part of a chain of proof of the accused's guilt. In most cases lies have a bearing only on the credibility of the accused. However, Mahoney points out that while the New Zealand Court of Appeal has consistently stated that the situations in which an accused's lie can prove guilt are rare, the test formulated in *R v Collings* \(^\text{64}\) for allowing a lie to amount to corroboration does not actually set too stringent a test. \(^\text{65}\)

In sexual abuse cases, if it can be established that the accused has told a lie, and that this was motivated by an awareness that the truth is inconsistent with his innocence, then his lie should be taken as an implied admission of guilt, and therefore constitute corroborative evidence against him.

**Criminal Convictions**

The court in *Moriarty* was concerned with the use of a criminal conviction for the abuse at issue, as corroboration of the complainant's testimony in a civil claim. Cases where such a conviction exists are rare. However, the writer suggests that criminal convictions of the accused in other matters may be useful in making a determination in recovered memory cases. The evidence that the accused behaved in a similar way on occasions other than that being considered by the courts is generally excluded. This is an extension of the fundamental principle in western legal systems that an accused's criminal record may not be used in evidence against him, nor can evidence be used that shows that he has a tendency to commit crimes. However, evidence of prior convictions is admissible in certain circumstances as similar fact evidence (to be discussed later) and also as a factor affecting the accused's credibility.

In terms of prior convictions and an accused's credibility, section 5(4)(b) of New Zealand's Evidence Act 1908 provides that the accused may be cross-examined like any other witness, on matters not necessarily arising out of his or her examination-in-chief. However, the Court may limit cross-examination as to previous convictions or to the accused's credit "as it thinks proper". Despite this open-ended discretion, the Court of Appeal in *R v Clark* \(^\text{66}\) made it clear that, in general, the discretion should be exercised in accordance with the limits prescribed by

\(^{62}\) [1982] 1 NZLR 555.  
\(^{63}\) *R v Samuels* [1985] 1 NZLR 350.  
\(^{64}\) *R v Collings*, supra at n 60.  
\(^{65}\) Mahoney (1995), supra at n 49.  
\(^{66}\) [1953] NZLR 823.
s 1(f) Criminal Evidence Act 1898 (UK). In following the English provisions, NZ courts have held that the "shield" can be thrown away by the accused if he or she gives evidence or calls witnesses to testify to his or her good character; or attacks the character of prosecution witnesses.

However, even if the accused "throws away the shield", there is a question surrounding what types of conviction the accused may be questioned on. In R v Shrimpton Alderson B said a rape conviction would have nothing to do with the accused's character for honesty. However, in R v Winfield the accused was charged with indecent assault. A character witness who testified as to the accused's "good behaviour with ladies" was cross-examined about the accused's prior conviction for an offence involving dishonesty. Humphreys J approved the cross-examination saying:

There is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half.

This decision has been criticised, but the New Zealand Court of Appeal in R v Johnston did not overturn a trial judge's decision to allow cross-examination as to a conviction for dishonesty in a trial for indecent assault. However, a more recent English case, Selvey v DPP, did not allow cross-examination on convictions unrelated to the offences charged. New Zealand courts have not overturned Johnston, although R v Anderson adopts the Selvey approach to the extent that any previous convictions must have some "real probative value".

The writer suggests that courts should allow a wider range of convictions to go to the issue of credibility. While a conviction for dishonesty may not be strictly relevant to an indecent assault charge, it might rebut a defence argument of the "blameless life" of the accused. In R v Accused (CA 311/88) the accused was charged with indecent assault on his daughter. The prosecution was granted leave to cross-examine on his previous convictions for indecent assault. The accused appealed against his conviction on the ground that such leave should not have been granted. The Court of Appeal said that the trial Judge had not erred in allowing the cross-examination. The accused had set out to establish his own

67 (1851) 2 Den 319.
68 (1939) 27 Cr App R 139.
69 [1956] NZLR 516.
72 Ibid, at 677 per Elias CJ.
73 [1989] 3 NZLR 21
good character and himself as a benevolent family man, and had also suggested that the complainant was a liar and a thief, thereby impugning her character. While in this case, the accused’s prior conviction was for a related offence, even if it had been for dishonesty, it would have rebutted his good character and may also have shed a new light on his assessment of his daughter’s credibility.

**Documented History of Abuse**

It is most unusual in historical sexual abuse cases, recovered memory or otherwise, to find a documented history of the abuse. It seems plausible to suggest, in relation to at least some recovered memory cases, that if help was sought at the time, and the abuse acknowledged by a third party, that the events might not have been banished from consciousness. While any documented history of the abuse would certainly fall into the category of corroborative evidence, by virtue of the scarcity of such evidence, courts are unlikely to be assisted by this type of evidence.

**Contemporaneous Records of Abuser & Photographs or Recordings**

These two categories of evidence are unlikely to yield much in the way of corroboration of recovered memories. It is improbable that abusers record details of abuse. However, as a matter of course, warrants should be issued for the seizure of diaries, journals, and other documentation that may contain contemporaneous records. In relation to photographs or recordings, it is possible that an abuser has collected photographs or recordings of the abuse for pornography purposes. In addition, if the accused is in possession of child pornography generally, this evidence could potentially be admissible as similar fact evidence.

**Objective Eyewitness Accounts**

‘Objective’ eyewitness accounts of the abuse may be difficult to obtain, but third parties may have evidence of behaviours exhibited by the child at the time. Suspicious activity on the part of the accused that might not necessarily amount to child abuse as such should also be admissible, for example persistent attempts to be alone with a child. In terms of ‘objectivity’ surely evidence from anyone other than the accused and the complainant should meet this requirement. Any issues such as collusion should go to the weight of the evidence rather than its admissibility.
Objective ‘earwitness’ accounts should also be admissible. The rule against hearsay poses particular problems in sexual abuse cases because of the paucity of any other corroborative evidence. However, some common law and statutory exceptions to the hearsay rule where sexual offences are involved have been developed in response to the problems of young children testifying in court. Children are easily confused by cross-examination; they are often reluctant witnesses; and they sometimes recant, disclaiming prior testimony in order to protect the accused who is often a relative or friend, or from fear of reprisals.

The recent complaint exception provides that the fact that the victim of a sexual assault complained of it immediately afterwards is admissible in evidence as an exception to the rule against hearsay. However, it is admitted only as evidence of the consistency of the complainant’s account, and not to prove the truth of the contents of the statement.

One justification for the hearsay exceptions is that of reliability. The statement made closest in time to the alleged events is usually the most reliable. Accordingly, any statements that may have been made by the complainant at or around the time of the alleged events would provide the court with an account that is not distorted by any post-event factors bearing on the complainant. The reliability of such evidence would, of course, depend on the memory and credibility of the testifying witness.

The following hypothetical situation demonstrates how hearsay statements can be utilised in recovered memory cases. A child complains to a friend that her father has been committing indecent acts upon her. In the intervening years the complainant has no memory of either the alleged abuse or the complaint. Upon first recovering her memory of the abuse, the person to whom she complained spontaneously reveals that an early complaint was made, and the memories recovered are consistent with the early complaint. This pre-amnesia complaint could corroborate a complaint made after memory recovery. If the details of the two complaints were consistent, it would suggest that the offences did, in fact, occur. There is no opportunity for the complainant to manufacture a “memory” to

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Notes

77 See Midson, B. “Determining the Truth in Recovered Memory Cases” supra at n 1, at 147.
comply with the early complaint. This is not a radical proposal considering that reliability is one justification for admitting hearsay evidence. The early complaint is likely to provide the most accurate account of what actually happened.

In many instances of recovered memories the first disclosure will be made many years after the alleged events. While courts currently are unlikely to admit such complaints under the recent complaint exception, they may provide the most reliable account of what the complainant remembers as happening. Evidence of these complaints should be admissible, as they record what the complainant remembers before the possibility that later events distort her memory.

While hearsay statements may also be admitted under the res gestae or excited utterances exception, the requirement of spontaneity precludes many statements that might otherwise be reliable. In Washington, the legislature has enacted a statutory exception to the rule against hearsay, which permits the courts to look at indicia of reliability other than that of spontaneity. That is, out of court disclosures can be admissible if "the time, content, and circumstances of the statement provide sufficient indicia of reliability". In New Zealand, the Law Commission's proposed Evidence Code contains a similar provision relating to the admissibility of hearsay evidence in criminal proceedings. Section 19 of the proposed Code provides that hearsay is admissible if "the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable". If this provision is enacted as proposed, New Zealand courts could be guided in its interpretation by the U.S. courts. In Washington, in applying the statutory exception, courts have held that the following factors can be taken into account as indicia of reliability: the age of the child; their physical or mental condition; the exact circumstances of the alleged event; the language used by the child; the child's family, school and peer relationships; and the reliability of the testifying witness. In recovered memory cases, these factors could be taken into account in admitting evidence of early complaints, as well as in determining the weight or reliability of the early complaint. Evidence of an early complaint can be probative of the fact that the abuse occurred, given the unlikelihood of a complainant persisting with a false complaint over an exceptionally long period of time.

Generally, because of the huge difficulties in proving allegations of sexual abuse, any statements that may have been made to friends, siblings or other family

80 Yun, supra at n 78.
members should be admissible to prove the truth of the statement made. Such statements could also counter the defence that the allegations are recent fabrications or that therapists have implanted the memories. In admitting the complaint for these purposes, it should be irrelevant whether or not the complaint was made within a reasonable time, or elicited by leading questions.

Evidence Abuser had Abused Others

Evidence that an accused had abused others falls into what is referred to in New Zealand as "similar fact evidence". Evidence of similar conduct in the past is admissible if there is an identifiable pattern of behaviour, and the evidence is more probative than prejudicial.81

There are compelling reasons for admitting similar fact evidence in child sexual abuse cases:

Only a person who has the lust for sex with children is likely to abuse a child sexually, this lust is unusual and the fact that the defendant has it makes it much more likely that he did indeed commit the offence.82

Similarly, Spencer suggests that evidence of paedophilia ought generally to be admitted:

In the very nature of things, evidence of paedophilia in paedophile cases tells us something much more important than evidence of previous dishonesty in a trial for theft or of previous violence in a trial for common assault, and this should justify its being admitted.83

As Munday points out, people who sexually abuse children tend to display set behaviour patterns, and their case histories can prove most informative.84 Literature on sexual offending suggests that an addiction model successfully captures many aspects of sexually deviant behaviour. Sexual aggression can be highly repetitive, it is a reliable way to alter and enhance mood, it is shrouded in secrecy and denial, it involves thinking errors that justify the behaviour, it can be compulsive and driven, and subject to frequent relapse.85

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82 Spencer (1987), supra at note 58.
83 Ibid.
84 Munday, "Sexual Abuse and the Similar Fact Rule" (1992) 51 CLJ 1, 41.
85 Salter, supra at n 59, at 40-41.
In recovered memory cases, as in sexual abuse cases generally, evidence of past convictions for sexual offences against children should be admissible. Further, if the accused can be shown in some other way to have sexual inclinations towards children, this evidence should be admissible. This evidence could be established by psychological assessments of the accused, although such assessments are not foolproof. Before using such assessments in criminal proceedings certain levels of reliability would need to be ensured.

Similar fact evidence is not necessarily limited to evidence of prior convictions. An accused may have been acquitted several times resulting from a lack of corroboration, or charges may have been withdrawn for other reasons. In *R v Pinkerton* the Court of Appeal held that evidence related to a charge which was withdrawn by the prosecution following the accused's compliance with the Police Diversion Scheme, could still be relied upon by the prosecution as similar fact evidence when prosecuting another charge against the accused.

If evidence of past indecencies with children is not admitted, the facts of the case often appear in a false light. In recovered memory cases where allegations are made against the father, the accused may attempt to paint a picture of an ideal family life and perfect parenthood. Evidence that the accused has a history of indecencies with children would at least undermine the credibility of his account.

The obvious argument against admitting such evidence is that it is highly prejudicial to the accused. Spencer argues that the solution to this problem is to give the courts a discretionary power to reject any such evidence in inherently weak cases. It would seem that this is already the case at least in relation to sexual abuse cases. A further protection would be provided for the accused if courts were unable to convict solely on the basis of similar fact evidence. While in *R v McIntosh* the Court of Appeal stated that a conviction may be obtained on the basis of similar fact evidence alone, the Court was more constrained in the later case of *R v F*:

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86 Spencer (1987), supra at note 58.
89 Spencer (1987), supra at note 58.
90 Ibid.
91 *R v McIntosh* (1991) 8 CRNZ 514.
92 *R v F*, Court of Appeal. 28 March 1995 (CA 227/94). Cooke P, Casey & Heron JJ.
It is difficult to imagine that there could ever be a case where similar fact evidence of itself could conclusively prove the accused's guilt of the alleged crime for which he or she is being tried...similarities may [only] add to the likelihood that the accused committed the crime now charged, thus combining with the more direct evidence to establish the case beyond reasonable doubt. 91

This would seem to be the more reasonable approach to adopt in relation to similar fact evidence. While similar fact evidence might be highly probative, it would be dangerous to convict solely on this basis. Courts must also have regard to any collusion or contamination issues that may arise in cases where the similar fact evidence relates to complainants who have been in contact with one another.

In summary, each of the types of evidence described above may be unreliable when standing alone, and there may be explanations for the evidence other than the guilt of the accused. However, the evidence can make a convincing whole when added together, if the chance of all being wrong is negligibly small. 94 Such evidence should therefore be capable of amounting to corroboration in criminal recovered memory trials. While it might be argued that these types of evidence provide only circumstantial evidence against the accused, there is no rule in New Zealand that a conviction cannot be sustained on circumstantial evidence alone. 95 In addition to the types of evidence outlined above, a consideration of other factors may also direct the court towards a reliable outcome in terms of the truth or otherwise of the complainant's allegations.

5. Other Considerations

A fundamental argument raised against admitting recovered memory evidence in court is based upon the belief that it is impossible to distinguish a false memory from an accurate one. It is said that a complainant's firmly held belief in her memory (albeit allegedly false) makes her unshakeable in cross-examination. It is the writer's contention, however, that witnesses in any case who might be mistaken as to their recollection may still prove as unshakeable, given their firmly held belief in the accuracy of their memory. In any event, it has not been proven that recovered memories are prima facie less reliable than continuous ones.

In practical terms, in every case courts must look at the reliability of the complainant's testimony. Thus, there may be factors (not necessarily limited to the issue of recovered memory), which detract from the overall credibility of the

93 Ibid at 7 per Cooke P.
94 Williams, supra at note 87.
95 See R v Horry [1952] NZLR 111.
complainant's evidence. The competency of a complainant to give evidence may be challenged on a number of grounds, including age or mental capacity. What may also be relevant in recovered memory cases is an assessment of the suggestibility, or otherwise, of the complainant. Is the complainant susceptible to influence (intentional or otherwise)? Are drug and alcohol abuse involved? Does she suffer from any recognised medical disorders that might impair her ability to perceive reality? 96

What the court must also assess in recovered memory cases is the credibility of the memory itself. That is, is the substance of the allegation credible? The presence of bizarre aspects to the allegations does not necessarily detract from their overall truth, however such characteristics may be suggestive of a false memory.

Another issue that should be addressed is whether the amnesia is full or partial. If recovered memories are, as alleged, less reliable than 'normal' memories, are the recovered memories consistent with the ones for which there was no amnesia? A further consideration might be how the complainant herself classifies her memories of abuse. Was it always remembered, never remembered, or never thought about? The way a complainant classifies her memory might not be in the way a clinician, researcher or lawyer would classify it, which leads to problems for the legal system in determining an appropriate legal response. This dilemma lends support to the conclusion that the focus in these cases should be on the substance and credibility of the allegations, and the presence or absence of corroborative evidence, rather than the aetiology of the allegations.

The timing of the recall is another significant factor in assessing the reliability of the memory. If the defence suggests that the memory is the result of therapist implantation, obviously memories recovered prior to therapy are not 'tainted' by any degree of suggestion from a therapist. Similarly, if the stimulus for recall is something other than therapy, such as spontaneous recall or some other significant trauma, the memories are less likely to have been manufactured. Other factors to consider are the use of hypnosis and so-called 'truth serums'. Given the risks associated with these methods of memory retrieval in terms of inadvertent provision of false information, memories that are recovered without recourse to such techniques should be considered more reliable.

The credibility of the accused should also be considered in light of any behavioural traits that may throw their reliability into doubt, and also that might be consistent

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96 Vella, S. "Recovered Traumatic Memory in Historical Childhood Sexual Abuse Cases: Credibility on Trial" 32 U.B.C.L. Rev 91. LEXIS 124.
with child sexual abuse. From a summary of comparative studies on child sex offenders, the most common characteristics exhibited by child sex offenders were a past history of sexual abuse as a child, low self-esteem and limited social skills. As research continues to develop in this area, it may be possible to identify a range of characteristics, which are so common to child sex offenders, that such a profile would be of real assistance in determining the validity of complaints in these cases.

Likewise, although there is dispute as to whether a particular range of characteristics can be said to identify sexual abuse victims, the presence of one or more factors such as eating disorders, self-abusive behaviour, intimacy difficulties, for example, may contribute to a determination that sexual abuse has occurred. Such a conclusion may more readily be drawn where there is no other reasonable explanation for the behaviour.

Finally, there may be other evidence that confirms or contradicts the testimony in the case when assessed as a whole. An example might be evidence showing the accused did not have the opportunity to sexually assault the complainant at the times alleged. While inconsistencies in times and places do not necessarily mean the central events alleged are untrue, in cases where precise times and places are facts in issue, the lack of opportunity in those times and places will tend to absolve (partially or completely) the accused of any wrongdoing. Say, for example, a daughter alleges her father abused her during a period when she was four years old, in the garden shed of the house in which they were living at the time. However, evidence shows that her father was estranged from her mother at the pertinent time, living in another part of the country, with no access, and did not at any point in time live in the house with them. Clearly, the complainant was incorrect either in the fact that her father abused her, or in the fact of where the abuse took place. Of course, she may have been abused by her father (either at an earlier or later time) and/or abused by someone else in the garden shed. But if her allegations are based solely on this particular time, place and perpetrator, the prosecution will be hard pressed to convince the judge or jury that the allegations are true.

6. Conclusion

It is timely to move on from the debate over whether it is possible to recover accurate memories of sexual abuse. To refuse to accept the possibility is to deny a number of complainants redress to legal remedies. The writer contends that it is

98 Vella, supra at n 96.
within the capabilities of the criminal justice system to make a determination in any case as to the truth of the complainant's allegations, based upon corroborating evidence. While traditional forms of corroboration may be lacking (for example, physical evidence and eyewitness observations), other forms of evidence such as confessions, admissions and other behaviours of the accused, prior convictions and similar fact evidence, and hearsay evidence can be of assistance. Such evidence may be unreliable when standing alone, but when viewed as a whole, can be compelling evidence that the complainant's memories are reliable. In order to facilitate a judgment, and justice in individual cases, wider scope must be given to those involved in the collection of evidence, and greater flexibility must be adopted in assessing the admissibility of such evidence.