

# **An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada**

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## **Abstract**

The dramatic increase in restorative justice activity in western jurisdictions since the early 1990s has driven state officials, supported by some theorists and practitioners, to standardise the design and delivery of restorative justice programmes. The purpose of this paper is to provide a critical indigenous examination of various rationale proffered in support of the standardisation process that is occurring in the neo-colonial jurisdictions of Canada and New Zealand. The paper ends with a call for Maori justice practitioners to develop their own standard for enhancing the delivery of restorative justice initiatives to Maori offenders, victims, families and communities.

**Key Words:** *First nations, Maori, policy industry, restorative justice, standardisation.*

## **Introduction**

The development and implementation of restorative justice policies and initiatives has increased dramatically in western jurisdictions, including New Zealand and Canada, since the early 1990s (Jantzi, 2001). This rise in activity has instigated a drive by state officials, supported by some practitioners, to standardise the design and delivery of restorative justice initiatives (Cormier, 2002; Ministry of Justice, 2007; Roach, 2000).

The paper begins by looking at the (re)discovery of restorative justice in New Zealand and Canada. <sup>1</sup>This is followed by a critical examination of various rationale presented in support of the state-driven standardisation process that recently occurred in Canada, and is currently underway in New Zealand. The final section focuses on strategies that Maori practitioners and First Nations may consider for responding to the state's standardisation programme. The call is made for Maori practitioners to develop their own standards, or *tika* (doing what is right) for enhancing the delivery of restorative justice initiatives to Maori offenders, victims, *whanau* (extended family) and communities.

## **The (re)discovery of restorative justice in neo-colonial jurisdictions**

Justice systems around the world, particularly western jurisdictions, have recently (re)discovered restorative justice and are rapidly turning to it as a key component of the states response to criminal behaviour and victimisation (Braithwaite,

1996; Zehr, 2000). The reasons for this (re)discovery are complex, but can be linked to the following broad factors:

### **Rising costs of the penal system**

Arguably, the most compelling factor behind the contemporary state's increasing interest in restorative justice is the utilitarian need to reduce the fiscal costs of the rising number of court hearings and prison musters that impacted western jurisdictions throughout the 1970s and into the 1990s (Barlow et al, 2005; Zimring, 2001). The increase in costs prompted many jurisdictions to look at procedural innovations, such as family group conferencing, sentencing circles and community alternatives to incarceration such as electronic monitoring, to alleviate the growing fiscal burden.

### **Responding to the ideological challenge of the restorative justice industry**

While dealing with the rising costs of an expanding penal system, western governments found themselves confronted by a rapidly growing, vocal, restorative justice industry, one that challenged the perceived punitiveness of the formal system of justice (Braithwaite, 1996). By the early to mid 1990s, in true Gramscian style, the state began to respond the counter-hegemonic potentiality of the restorative justice movement by implementing major policy programmes aimed at integrating restorative justice into formal justice processes (Tauri, 1998).

### **Responding to Indigenous activism and over-representation**

In both New Zealand and Canada, the (re)discovery of restorative justice and its increasing use, was fuelled by

concerns for the increasing overrepresentation of indigenous peoples in the criminal justice system, and the ideologically driven need to respond to their criticisms of the operations of the system, and with crime control policy generally. In the New Zealand context, as with all other neo-colonial jurisdictions, the statistical profile of Maori engagement with the criminal justice system makes for bleak reading: Although only 14.5 percent of the total population at the last census (Statistics New Zealand 2007), Maori make up to 50 percent of the prison population (around 4,000 of the total of prison population of around 8,000 at the time of writing). In 2005 Maori made up 45 percent of offenders serving community-based sentences, and in 2007 Maori made up between 40-45 percent of all police apprehensions (Bull, 2009).

In an historical context this picture of over-representation has been a 'fact of life' for Maori since the mid 1970s. The period during which the rate of Maori over-representation in the courts and prison also saw the rise of the Maori cultural renaissance (see Walker, 1990) and the 'radicalisation' of Maori political activity (see Poata-Smith, 1996). The radicalisation movement fuelled a sustained critical scrutiny of the operations of the criminal justice system in particular, along with the wider social policy sector more generally. This critique saw its zenith with the release in 1988 of Moana Jackson's report *He Whaipanga Hou: Maori and the Criminal Justice System*. While the need for brevity omits lengthy discussion of the range of findings and recommendations of the report, one theme was constant throughout: that the individualistic, state-centred, punitive nature of the Pakeha (European) justice system was a significant driver of Maori over-representation. It was proposed that one way to alter this situation was to develop parallel or

separate justice processes based on Maori philosophies and practices.

There was, of course, little chance of the state agreeing to extend to Maori the privilege of significant jurisdictional autonomy advocated by Jackson and the participants in his study (see Tauri, 1996). However, the rise of the restorative justice movement in the late 1980s and early 1990s provided the state with an avenue through which to be seen to make meaningful responses to Maori concerns. The (arguably) restorative bases of many historical and contemporary indigenous responses to incidents of social harm became the focus of restorative-style innovations in both jurisdictions. In New Zealand, the state's response centred on the transformation of the youth justice system. This transformation was operationalised through family group conferencing, a process that many of its exponents believe is based on traditional Māori cultural philosophy and practice (Consedine, 1999; Maxwell and Morris, 2000). In Canada, the spread of restorative justice steadily increased from the mid-1990s (Roach, 2000), culminating in recently enacted legislation to entice provincial jurisdictions to implement restorative processes for youth offenders and their victims (Wilson et al, 2002). It appears that restorative justice became a fashionable theoretical and policy vehicle for responding to the overrepresentation problem and indigenous activism (Tauri, 1998). Arguably, restorative justice became a significant tool for advancing the perception that the state-centred justice system was culturally sensitive and responsive to the needs of Indigenous (Tauri, 2004).

The contemporary recognition of indigenous justice processes in both countries is characterised by a process of

*indigenisation*. During the initial stages of indigenisation, the state acknowledges that indigenous communities may benefit from having traditional ways of dealing crime returned to them via the state-centred jurisdiction. So it was in New Zealand in 1984, when the Department of Social Welfare published a report calling for a culturally appropriate way to deal with Maori youth offenders, later operationalised with the passing of the Children, Young Persons and their Families Act 1989 (Maxwell and Morris, 1992). Through indigenisation the state system begins to adopt, for its own use and control, 'traditional' justice approaches it once prohibited or restricted. Thus, the state *incorporates* indigenous approaches to social harm within the framework of a state-dominated process (Tauri, 2004).

The (re)discovery of restorative, communitarian responses to criminal behaviour by neo-colonial states appears ironic to some indigenous commentators (Palys and Victor, 2005 and Tauri, 2004). After all, one of the key platforms of the introduction of restorative justice policies and initiatives is their comparability to traditional indigenous justice practice. The irony arises from the current situation developing in the neo-colonial jurisdictions of Canada, New Zealand and Australia, where the contemporary use of supposedly indigenous justice philosophies and practices is being driven by, or at the behest of, the very system that sought the eradication of these social control mechanisms throughout the colonisation process (Blagg, 1997; Cunneen, 1998 and Tauri, 1999). By all appearances, the states (re)discovery and utilisation of restorative justice signals that we are working in a similar policy environment to that observed during the initial stages of colonisation, where the state recognised the value of indigenous justice practices for enhancing formal responses to crime.

However, the state's largesse in this matter is generally restricted to indigenous philosophies and practices deemed culturally and jurisdictionally palatable (Tauri, 2004).

## **Standardising restorative justice practice**

As more and more restorative justice programmes begin to develop and community demand for these processes grow, the state undertakes a policy-focused process of legitimation. First, requests from communities and practitioners for policy and financial support for their restorative justice processes are received by state officials. Second, state officials (those working in the system, such as court workers, probation officers, etc) demand that clarity and certainty about the place and function of restorative justice be provided (see Probation Officers Association of Ontario Inc, 2000). And third, the state provides policy direction and financial support, which in turn creates mechanisms for enveloping community-driven practice within the rubric of the formal justice system (Roach, 2002; Tie, 2002).

The policy process established in New Zealand takes the form of top-down managerialism, which applies the techniques of business accounting and ethics to the policy development process (Enteman, 1993). The central focus of this policy process is on fiscal responsibility, accountability and measurable outcomes (Dillow, 2007; Easton, 1997). Top-down managerialism as a policy technique does not have a positive history in criminal justice, particularly where indigenous peoples are concerned. The reasons for this are many, but broadly speaking it can be explained by the fact that indigenous

justice is a component of a bottom-up social movement (*tino rangatiratanga* (sovereignty)) for which a key philosophical fundamental requires Maori (meaning *hapu* (sub-tribe), *iwi* (tribe) and urban authorities) to exercise power accountably (Tauri, 1999). In contrast, managerialist (restorative) justice is by definition a state-centred, top-down process, designed to ensure state control of programme design, delivery and funding.

It is within this managerialist, state-focused context that the process of the standardisation of restorative justice is occurring in many western jurisdictions. The federal government in Canada has developed a set of guidelines for restorative justice programmes based on the model guidelines developed by the United Nations but tailored to address Canadian concerns (Cormier, 2002). Central government in New Zealand is in the process of developing a range of tools that ensure the standardisation of programme design and delivery, training and accreditation (Ministry of Justice, 2003).

From a governmental perspective, the state-centred process of standardisation described above is an understandable response to the rise of communitarian restorative justice. After all, restorative practitioners are demanding access to state resources and tax payers' money. In the New Zealand context funding and policy support is provided by the Department for Courts (now subsumed within the Ministry of Justice) and the Ministry of Justice's Crime Prevention Unit. In Canada, requests have been routinely made to federal, provincial and territorial governments (Rudin, 2003). The more frequent these demands are made, the more the state is compelled to develop proscriptive policy frameworks that enable officials to make



‘standard’ policy and funding decisions that ensure fiscal accountability.

## **Rationale for supporting standardisation**

One of the key ideological and supposed practice-based rationales of these proscriptive policy frameworks is the *equality principle*. The principle of equality, meaning equality in programme delivery (everyone gets treated the same), funding and expectations (like is compared to like), can be described as a fundamental meta-narrative<sup>ii</sup> of the criminal justice policy context in both New Zealand and Canada.

Equality with respect to programme delivery focuses primarily on the types of cases that are appropriate for restorative justice programmes. In this case, the equality concern is that the criminal justice system should treat everyone the same. After all, according to government rhetoric justice in New Zealand and Canada does not, or should not, differ from one place to the next, given that only one set of criminal code exists for each country. In the state’s view it would not be fair or equitable if a person charged with an offence in one region can avoid criminal liability by having their case diverted to a restorative justice process that was not available in other parts of the country. This potential outcome would be further exacerbated if restorative processes were open to dealing with serious offences. As such, standardisation considered by state officials as essential for ensuring that restorative justice programme are not dealing with crimes that are deemed beyond their capacity and capability (ibid). It is an important process for ensuring that restorative justice practice does not cause political problems for

government officials and Cabinet Ministers at some point in the future (e.g., serious offending by an offender previously dealt with via a community restorative justice programme) (Tauri, 2008).

In the Canadian context, standardisation is considered to be beneficial because it leads to enhanced bureaucratic efficiency through increased comparability of programme design and delivery. Theoretically, standardisation makes it easier to assess providers' ability to meet specific goals and targets in comparison with other programmes (Cormier, 2002). In turn, comparability in design and service delivery enables officials to measure the impact of initiatives across a range of geographic locations. There is no reason to presume that the motivations of government officials in New Zealand are any different to that of Canada.

A more recent rationale for standardisation was to address the policy need to situate restorative justice models within the formal system. Work was required to define restorative justice, to identify what constituted a restorative justice programme (and therefore, what did not) and clarify how these approaches differ from other formal components of the criminal justice system. Each of the rationale will be critically examined below.

### **Critiquing the equality principle**

The first rationale – that everyone should be treated the same by the system – suffer from two interrelated weaknesses. The first is that it compares an idealised version of the justice system with the reality of the operation of restorative justice *in the community*.<sup>iii</sup> As Rudin argues (2003), a better comparison would be with the *actual reality of justice* as it is practiced on

the ground, in different social contexts, rather than to a state-centred idealisation of how justice is performed.

On this basis, the equality principle collapses from the outset. Despite the fact criminal law is the same across Canada there is no uniformity in sentencing practice. Both across and within provinces there are discrepancies in the way offences are handled. Especially when comparing neighbouring districts. Rudin (2003) also contends that crime tends to be treated with longer prison sentences in smaller communities than in larger metropolitan areas and cities.

Given the absence of provincial jurisdictions in New Zealand, there is theoretically less likely to be a similar degree of difference in judicial practice. Unfortunately, the historical lack of independent, critical research on the operations of the criminal justice system in New Zealand makes it difficult to talk about differences in sentencing patterns from one court to the next, and from one region to another. However, there is significant anecdotal evidence of variations in police and judicial response to different categories of offence and type of offender, in particular Māori and non-Māori offenders and victims and between street crime and corporate crime and white collar offences. All this puts the lie to the claim that, in a practical sense, there is equality of treatment of offenders, at all times and for all cases, in either jurisdiction.

The second problem with this principle is that it advocates a model of justice that is at odds with a key goal of all concerned with social harm, namely achieving quality, meaningful outcomes, such as reducing reoffending, victimisation and restoring communal harmony. The idea that equality is achieved by making sure everyone experiences a similar process and receives the same sentence for similar offences, is

an argument for *formal* equality – equality of process (ibid). I submit that an alternative indigenous position would be to advocate for treating people differently in order to achieve the same result - social justice.

If the result we wish to achieve through the formal justice process is to deter offenders from committing crime and keeping communities safe, then we must recognise that there are many ways to accomplish this goal. This argument has received partial recognition in New Zealand with the inclusion of restorative justice provisions in the Sentencing Act 2002, in particular the principle whereby a Court must, when sentencing an offender ‘take into account any outcomes of restorative justice processes in the case’ (Ministry of Justice, 2002). Similarly, the Supreme Court of Canada has explicitly recommended that courts adopt a more restorative and thus a more individualised approach to sentencing (Rudin, 2003).

### **Problems with the bureaucratic process of defining restorative justice**

The bureaucratic process of standardisation has the potential to create difficulties for Indigenous wanting to continue to design and deliver services to their own people. By standardising programme design, delivery and restricting the types of offences restorative justice initiatives can process, local creativity and the formulation of responses to social harm wedded to localised contexts, can be stifled (Tauri, 2004).

From a communitarian perspective, restorative justice processes develop in response to the needs of communities, and result from the collaborative efforts of individuals and whanau and hapu (Rudin, 2003; Tauri, 1999). This is true of indigenous responses as it is for any community of concern. These creative

and innovative responses then influence other communities wanting to construct justice processes that empower their communities. Ironically, this growth then spurs the bureaucratised process of standardisation, thus prohibiting the very factors that made the programmes innovative and community-centred in the first place. It can be argued that this situation signals an extension of the historical contest of power, authority and survival between the coloniser and the colonised which has played itself out in numerous ways in the neo-colonial histories of New Zealand and Canada.

The continual centralising of power through bureaucratic projects like the standardisation of restorative justice creates specific problems for indigenous peoples, including constricting their ability to meaningfully respond to issues in ways they consider appropriate (Tauri, 1999). A significant issue with the Canadian standardised guidelines is that they were heavily modelled on those developed by the United Nations, which favour one particular model of restorative justice – victim-offender reconciliation (Cormier, 2002). For victim-offender programmes, the guidelines have some utility, but equating restorative justice with victim-offender reconciliation ignores the range of community-centred restorative justice programmes, in particularly indigenous responses (Rudin, 2003).

The issue of defining restorative justice might appear largely semantic – who cares what the programme or preferred approach is called as long as it is delivering results? The difficulty with this position lies with the limited definition of restorative justice that forms the basis of bureaucratic standardised processes. There is a great danger that programmes that do not fit the proscribed, ‘standard’ model

will find it difficult to obtain state support. Furthermore, even if existing programmes are exempt from a newly constructed standardised model, and continue to receive support, this development might well make it difficult for new programmes to grow if they do not conform to a constricted definition of restorative justice to continue. Compounding these issues for Māori is that past examples of standardisation and general policy development in the justice sector highlights the criminal justice sectors reliance on imported theories and interventions, upon which *tikanga* (customs and traditions) is added in order to make the programme culturally appropriate (Tauri, 1999). And, lastly, there is the issue of the truly independent providers and programmes: not seeking state assistance is no guarantee of their continued existence. In all likelihood they will find their operations restricted because of the codified, legislated ideal of restorative justice developed by the policy industry.

### **The political economy of the state's standardisation process**

For indigenous communities, the development of justice programmes is part of the important process of reclaiming authority over the management of the systems for dealing with social harm. Re-establishing control of our community-centred justice processes is important, given these same processes were explicitly targeted for eradication during the initial phases of colonisation (Ward, 1995). The development of justice programmes based on indigenous theories and practice, such as *tikanga*, is very much part of indigenous re-empowerment, through reasserting the importance, vitality and significance of indigenous communities taking responsibility for caring for their own (Tauri, 2004).

If, as both indigenous and non-indigenous practitioners and theorists argue, restorative justice is about empowering communities (see Lilles, 2002; White, 2003), then surely re-imposing the state to set standards of restorative justice shifts power back to the state (Rudin, 2003)? Given the part played by the state in both jurisdictions in the process of colonisation, it is eminently reasonable for Indigenes to be wary of the state's insertion of itself into the restorative realm (Tauri, 2004).

The processes utilised by government officials to develop criminal justice policy, especially for Maori, evidences the need for Indigenes to be cautious in supporting state-sponsored standardisation of restorative justice policy. The past 20 years is littered with numerous examples of policy projects informed by inadequate and unethical consultation. Maori views on policy and initiatives are often sought long after they have been designed or implemented. Furthermore, policies and initiatives are often imported wholesale from North America or Great Britain with tikanga simply clipped on the end to make them culturally appropriate (Tauri, 2008).

Indigenous experience of policy development and standard setting in the criminal justice sector highlights the dangers for Indigenes in the state-dominated process of standardisation of restorative justice that is gathering pace in neo-colonial jurisdictions. These experiences, of indigenisation, incorporation and disempowerment are effectively summarised in the following quote from John Braithwaite (Professor of Law, Australian National University; cited in Rudin: 2003:6) who states that:

*[a]ccreditation for mediators that raises the spectre of a Western accreditation agency telling an Aboriginal elder that a centuries-old*

*restorative practice does not comply with the accreditation standards is a profound worry.*

What Braithwaite succinctly describes is a situation many Maori justice theorists and practitioners have experienced in their dealings with government agencies.

The situation described by Braithwaite is but one potential effect of the standardisation process. Another we must contend with is the impact the process may have (and in some instances, is having) on the specific practices of various Maori providers and iwi. Each iwi and hapu has developed over time the tikanga that provides the conceptual, philosophical and practice of programme design and delivery particular to Maori residing in a particular rohe, and sometimes to those living outside the tribal area. Surface similarities exist across iwi in relation to the tikanga that underpins our dealings with social harm, but nevertheless each iwi, and even hapu will have established distinctive practices, with differences apparent in jurisprudence, protocols for running 'social harm processes' on marae, and responses to specific types of social harm. To date there is little empirical research on the intricacies of iwi/provider specific practice. However, there has been a number of 'general studies' that highlight differences between iwi Maori approaches to dealing with social harm, and those of the formal justice system, and even to mainstream (European) restorative responses (see Jackson, 1988; Tauri and Morris, 1998).

The concern for the current process of state-sponsored standardisation of restorative justice is based on almost three decades experience of this process being one of the foundational techniques for the development of crime control policy. Our experience of this approach to policy making instructs us that standardisation of restorative justice will



invariably mean our processes being codified within Eurocentric frameworks, with 'room' made available for 'acceptable cultural practices' (see Tauri, 1998). Standardisation will ensure that Maori providers will be forced to tailor their programmes (their tikanga) to fit 'standard design requirements' enshrined in contracts for service delivery. The standardisation process in New Zealand is of further concern to Maori practitioners because it envelopes the accreditation process. In 2006 the Restorative Justice Centre was established at AUT University in Auckland. The Centre derived significant financial, advisory and policy support from the Ministry of Justice. The intention was to develop formalised, 'best practice-based', training and accreditation in restorative practice. What is evident thus far is that the close relationship between the Centre and the Ministry has resulted in the focus of course design being wedded to the Ministry-driven standardisation process. Maori practitioners have expressed concern directly to the author at the apparent lack of Maori input into the design of the accreditation process, and well they might be as the future of their programme funding may depend on them and their colleagues securing certification that does not recognise their processes of dealing with social harm.

## **What can we do?**

Having critiqued the state-centred process of standardisation, I now want to pose a contradiction – standards are not all bad! As indigenous practitioners, theorists and researchers we should all be concerned with the quality of programme design and delivery. After all, there is such a thing as poor practice, which can be just as damaging as no practice. Surely, we are all concerned with ensuring that tikanga is appropriately applied

when dealing with the actions that have torn the social fabric of our communities? One limitation of the state-centred process is its use of the terms ‘standard’ and ‘standardisation’, both of which imply there is *one way of doing things*. It may be more helpful and accurate for us to use the term *tika* in its broadest sense, meaning ‘doing what is right’. As Maori we know that there are many ways of doing ‘it’ right, as hapu and iwi determine *their* own tikanga.

If our programmes are based on tikanga, as they should be, then by their very nature they are based on standards defined by historical practice, underpinned by theories that explain the causes of social harm and how best to respond to those types of behaviours (see Jackson, 1990). The important difference is that they are *our* standards, practices and theories. One way of ensuring the survival of our practice is for Maori practitioners to develop their own standards or tika for guiding restorative justice practice in our communities.

It must be acknowledged that the majority of Māori practitioners cannot ignore the state’s standardisation process, as many are reliant on government funding to survive. Engagement with officials and the policies and legislation they generate, is unavoidable. However, engagement can take place in a variety of ways. For example, we might choose to engage on the state’s terms, according to bureaucratic timeframes and processes. This form of engagement will invariably follow a top-down approach where Māori are asked to assist in identifying a few culturally relevant principles, etc, that are tagged to the end of pre-conceived Eurocentric frameworks (Tauri, 2004).

An alternative process would be for Maori to develop their own tika on restorative justice practice, separate from the state’s

standardisation process. A full set of Maori designed standards would 1) underline the authority of tikanga as the basis for Maori practices for responding to social harm, 2) ensure/encourage discussion and debate of *all* relevant issues related to standardisation, as opposed to a small number of ‘cultural elements’ and 3) provide the basis for meaningful dialogue between the Treaty partners. This will focus attention on finding ways of empowering Maori to deliver appropriate services to their own, and (hopefully) move state officials away from the historic tendency to view Maori as passive recipients of state services. However, for this process to have meaning, state officials will have to be both willing and capable of engaging respectfully with Maori. In my experience, this will require a significant change in attitude and engagement methodology on the part of state officials.

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<sup>i</sup> Activities in New Zealand and Canada are highlighted to emphasise the fact that standardisation is not confined to one jurisdiction, and that the issues faced by Maori are being experienced by other indigenes. The commentary is informed by PhD-related research comparing state responses to indigenous justice in New Zealand and Canada.

<sup>ii</sup> Bull (2009) cautions that relying solely on crime-related statistics can provide a distorted or partial view of Maori over-representation. Our tendency to focus on numbers often lead us to focus on individuals and the population group they represent, while ignoring the roles played by known criminogenic factors on individual or collective behaviour. For example, Bull (ibid: 1-2) asks that “rather than compare the proportion of Maori apprehensions to the proportion of Maori in the general population, for example, we should examine whether the proportion of Maori who are young, male, unmarried, unemployed, uneducated, in substandard housing, is reflected in the apprehension statistics. Rates of recorded offending, and hence imprisonment, are well known to depend on a range of social development factors (Braithwaite, 1989), rather than raw population proportions”. My use of the term meta-narrative differs slightly from that of



Lyotard (1984), who used it to describe ‘grand narratives’ or total philosophies of history which provide the ethical and political prescriptions for society. I use the term here in a more grounded, institutionalised manner, to refer to totalising or overarching ideological frameworks through which the criminal justice sector attempts to legitimise its operations. In relation to the arguments made in this paper, the equality principle is a key meta-narrative for the continued legitimisation of the system; the idea that the criminal justice system is fair, balanced, unbiased and operates to protect the legal rights of all participants.

<sup>iii</sup> Literature and research on the biased operations of western jurisdictions is plentiful, including numerous studies focused on ethnic minorities. The exception is New Zealand, which has a poor history of research on bias in the criminal justice system (Tauri, 2008)