

Panel Discussion 3: Indigenous special proceedings and legal aid

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Aid*

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Questions

1. What challenges do Indigenous peoples face in access to justice and litigation procedures? What are the reasons for these challenges?
2. What measures has the government proposed to solve these challenges?
3. Does state law recognise the legal effect of Indigenous peoples' customary and legal traditions?
4. Are there non-governmental organisations that are involved in solving judicial difficulties?

New Zealand's legal history



- The first inhabitants of Aotearoa/New Zealand were Māori on the two main islands and Moriori on Rēkohu. Māori regulated their behaviour by tikanga Māori and Moriori by tikane Moriori.
- From the late 1700s Europeans began to arrive.
- 1835 - He Whakaputanga o Niu Tirenī | Declaration of Independence signed.
- 1840 - Te Tiriti o Waitangi signed.
- At this time, large numbers of Pākehā (English colonists) began to arrive. Their arrival along with introduced diseases and military power overtook Māori society and tikanga Māori, the English then claimed sovereignty and established their legal system.
- The question of the source of English sovereignty remains a live issue.

New Zealand's constitutional arrangements

- New Zealand is a constitutional monarchy with a parliamentary system of government.
- The head of state is King Charles. The King is represented by the Governor-General.
- There are three branches of government, the legislative branch, the courts and the executive.
- New Zealand does not have a written constitution, there are many sources and documents including the Constitution Act 1986, British law, the NZ Bill of Rights Act, te Tiriti o Waitangi, conventions, the Cabinet Manual and relevant court decisions.
- Parliament is the supreme law-making body, and legislation is the highest form of law.
- The sources of law include legislation, common law, international law and tikanga Māori.



1. What challenges do Indigenous peoples face in access to justice and litigation procedures? What are the reasons for these challenges?

- Time and cost.
- Legal Services Act 2011 - the purpose of the Act is to provide legal services to people of insufficient means.
- Legal Aid is available for some court matters but it is dependent on the income of the applicant.
- Financial threshold for a single person is \$28,444 p.a. (568,808.57 TWD).
- Minimum wage is \$40,566.97 p.a. after tax (810,807.57 TWD).



2. What measures has the government proposed to solve these challenges?

Section 27 of the Sentencing Act 2002, states that the offender may request court to hear person on personal, family, whanau, community, and cultural background of offender

The purpose of such reports is to providing the sentencing judge with information on the personal background and cultural factors of the offender.

Reports detail the lived experience of the offender and whether such experiences may have had a role in the offending. The report can outline any restorative justice processes that have occurred, and their outcome and it can outline what support the whānau (family) of the offender can provide to prevent reoffending.

Solicitor-General v Heta [2019] 2 NZLR 241, an appeal against a 30% discount on sentencing given to Ms Heta because of her personal and cultural circumstances as set out in her section 27 report.

Justice Whata noted the impact of colonisation on Māori and Māori society and the fact that Māori are disproportionately represented in the criminal justice system. It is important to note that Māori make up 52% of the prison population but only 17.3% of the general population.

Earlier this year, the government abolished government funding for section 27 reports. Māori offenders received legal aid funding for these reports more than any other ethnicity. This will have a disproportionate impact on Māori.

3. Does state law recognise the legal effect of Indigenous people's customary and legal traditions?

- **Legislation** - there are references to tikanga Māori in legislation however, there is no uniform approach.
- **Case law** - the recent decision of the Supreme Court addresses this question, *Ellis*.
 - Pros -
 - provides direction and guidance to the lower courts,
 - ushered in a new approach and greater legal recognition of tikanga Māori.
 - Cons -
 - The approach doesn't address the ongoing legal issue of sovereignty,
 - The courts alone will determine how the common law will interact with tikanga Māori,
 - There is no support to revitalise tikanga Māori and there is limited opportunity for Māori to determine how they would like state law to engage with tikanga Māori.
 - Tikanga Māori applies to non-Māori as well.



4. Are there non-governmental organisations that are involved in solving Indigenous peoples' legal issues?

Yes, but it is very limited

- There is one community law Centre, the Ngai Tahu Māori Law Centre which provides free legal services for Māori land matters.
- There are five law Schools in New Zealand who may provide legal support through clinical programmes.

