A CONSIDERATION OF THE PLACE OF PŌWHIRI IN THE STATE SECTOR

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INTRODUCTION

This paper is about the difficulties that arise when the customary practices of one culture are transported into and evaluated by another. It considers the controversial place of *pōwhiri* in the state sector. *Pōwhiri* are formal Māori welcoming ceremonies or traditional rituals of encounter that are performed by *tangata whenua* (local people or hosts) to welcome *manuhiri* (visitors) into a space. They are conducted according to *tikanga* (Māori custom) and take place in a number of different contexts. Māori events such as meetings, *tangi* (funerals) and celebrations that are held on the *marae*[1] will usually have a formal *pōwhiri*.[2] Additionally, it is also now common practice for *pōwhiri* to be performed at non-Māori events and in non-Māori environments.

All *pōwhiri* follow a basic process, with slight variations depending on the particular occasion and the *iwi* (tribe) involved. The first step is generally the *karanga* or the calling of visitors onto the *marae*. This is an essential part of the *pōwhiri* and is done exclusively by women. Once the *karanga* is finished, women are then generally expected to take a seat behind selected men who perform *whaikōrero*, a particular type of formal speech. Although only men are usually permitted to perform *whaikōrero*, there are other considerations such as oratory skills and one's *mana* (status or prestige) that are also relevant in determining the selection of a speaker. The rationale behind only males delivering *whaikōrero* is rooted in *tikanga* and the Māori paradigm. The primary justification is the protection of women as *whare tangata* (child bearers). Traditionally, being seated behind men was to protect women from the threat of physical harm. Although this physical danger is no longer present, a spiritual danger is still considered to exist as the space between the *tangata whenua* and *manuhiri* is *tapu* (sacred). The *pōwhiri* process is designed to remove this *tapu*. Once *whaikōrero* have been completed, there will then usually be a *hongi* (pressing of noses) and the reason for the gathering can then commence.

Periodically, the practice of *pōwhiri* has been the subject of controversy in relation to the gender-differentiated roles evident in the custom. In particular, the relegation of women to seating behind men, and the general prohibition on women delivering *whaikōrero* have proven contentious. Although there is lively debate on this issue within Māori society,[3] this paper will discuss the incorporation of *pōwhiri* into the formal functions or ceremonies of the State. This incorporation provides a particularly interesting site of examination as the State not only has a unique role and relationship with Māori based on their status as indigenous

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[1] This is translated as 'ceremonial courtyard' and is the sacred open meeting area, often situated in front of Māori communal meeting houses.

[2] Note that Māori have a number of different welcoming ceremonies depending on context. For informal occasions when there are generally no *manuhiri* (visitors) they may just perform a *mihimihi* (a Māori speech of greeting). For formal occasions where new people are entering onto the *marae*, there will usually be a *pōwhiri*.

[3] For example, a woman who pushed the boundaries and has sparked controversy and debate is the late Whaea McClutchie, who was a female speaker from Ngati Porou. She was famous for upsetting men that staunchly defended gender-based roles. When they came onto her *marae*, she would deliver *whaikōrero*.

peoples and the *Treaty of Waitangi*, but it is also bound by certain constitutional and statutory obligations of non-discrimination.

The controversy over the gender-based role differentiation in *pōwhiri* made national headlines in New Zealand in 2005 and 2006.[4] One of the primary catalysts for this attention was a confrontation that occurred in December 2004 involving Sandra Bullock, a *Pākeha*[5] parole officer, and her employer, the Department of Corrections. The incident involved a *pōwhiri* that was performed at a graduation ceremony conducted by the Department. Ms Bullock took exception to the expectation that she was to be seated behind the men (including some offenders) as per Māori *tikanga.* She therefore contravened the custom and sat in the front row and refused to move, even when asked to do so by her colleagues. Ms Bullock was later issued with an oral warning by her employer for her behaviour and told her contract required that she not comment on the incident publicly. Ms Bullock did not comply with this instruction and as a result lost her job. Ms Bullock subsequently lodged a claim with the Human Rights Review Tribunal (HRRT) of New Zealand that was heard in November 2007.[6] Although she was ultimately unsuccessful in being awarded damages, the Tribunal concluded that Ms Bullock was subjected to detrimental treatment by reason of her sex in both the expectation that she would not be a speaker and the expectation that she was to sit behind the men.[7]

There have been a number of other incidents in New Zealand that have proved controversial. In April 2006 Helen Clark, the then-Prime Minister, declared that women will be able to sit in the front row during *pōwhiri* run by state agencies or institutions. This edict however prompted mixed responses from Māori. This ranged from the outrage reflected in Dr Pita Sharples' response for Māori to boycott these 'bastardized' versions of *pōwhiri*[8], to support from Māori Labour MP Dover Samuels who asserted that local *kawa* (protocol) does not apply in government buildings and that Māori *tikanga* must be adaptable to modern circumstances.[9] In May 2006 the issue hit headlines again as Judith Collins (MP) and two of her National colleagues were rebuked by a Māori *kaumatua* (elder) at a *pōwhiri* at a Child, Youth and Family Services (CYFS) centre for sitting in the front row, despite a CYFS policy permitting women to do so.[10]

The ramifications of the precedent set by the HRRT in the *Bullock* case are technically extensive. The findings were that the incorporation of traditional *pōwhiri* into the events or affairs of a State agency is discriminatory against women employees. The implication of this finding is that traditional *pōwhiri* either need to change or should be removed from this public sphere. It is a fascinating yet extremely difficult issue that involves competing rights and ideologies, conflicting cultural values and world-views, and an extremely complex statutory framework of rights. Given this complexity, the aim of this paper is a modest one, simply to canvas and highlight some of the layers of difficulty that exist and to offer a few thoughts.

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[4] See *Bullock v The Department of Corrections* [2008] NZHRRT 4.
[5] This term is used to indicate a white New Zealander of European descent.
[6] The HRRT Tribunal hears cases about breaches of the *New Zealand Human Rights Act 1993.*
[7] *Bullock v The Department of Corrections* [2008] NZHRRT 4, 90.
[8] Ruth Berry, 'Boycott Pōwhiri Says Sharples' *New Zealand Herald* 25 May 2006 http://www.nzherald.co.nz /nz/news/article.cfm?c_id=1&objectid=10383434 (Accessed 23 December 2012).
[9] Waatea News Update, 'Samuels Reflects Pōwhiri' 25 May 2006 http://waatea.blogspot.co.nz/2006/05/ samuels-rejects-pōwhiri-formalism.html (Accessed 23 December 2012).
[10] See Judith Collins, 'Comment on Post-Pōwhiri Walk-Out' (Press Release, 7 May 2006) http://www.scoop.co.nz/stories/PA0605/S00159.htm (Accessed 23 December 2012).

Firstly, I want to frame the issue in regards to the two competing rights involved in this case; that is, sex equality and claims for cultural recognition or equality. I then turn to consider how this debate is mediated by the New Zealand legal framework. Given my conclusion that this framework is extremely limiting, I will subsequently move to discuss the ways in which Māori can proceed.

FRAMING THE DEBATE: SEX EQUALITY VS CULTURAL EQUALITY

The *Bullock* case and the role of traditional *pōwhiri* in the State sector highlight an uneasy tension between different rights and associated ideologies. On one hand you have individual rights such as sex equality or non-discrimination on the basis of their sex. These rights are purportedly universally applicable and inalienable. Contrarily, however, there is the call for cultural equality and the collective right of groups to have their culture respected and accommodated. A supporting conceptual justification for this latter claim is cultural relativism. This concept challenges the validity of universal human rights standards as culturally constructed and a guise for ethnocentrism, imperialism, racism and cultural superiority. This cultural relativist stance would see Māori not only argue for the recognition of *pōwhiri* but also see the *Bullock* case as another attack on their culture and attempted colonization and Westernization of their norms. This combination of factors results in competing rights (individual sex equality vs group cultural recognition) that are accompanied by two different ideologies of human rights (universalism vs cultural relativism). From a personal perspective, being both female and Māori, this discussion is extremely thought-provoking as the preservation of *tikanga* Māori and women's equality are both significant and important.

To contextualize the debate, it is clear that the conflict between these two opposing positions is not unique to New Zealand and is applicable to many countries around the world. A polarizing example is the cultural practice of female genital mutilation or female circumcision. This practice, usually performed without consent or anaesthesia on girls between the ages of seven and ten, is widespread and practiced in many parts of Africa and the Middle East. This custom, believed to ensure virginity as it reduces a women's libido, is a potent example of where the right of the group to practice their culture conflicts quite clearly with the individual human rights of women. Other examples from around the world include forced marriage,[11] cultural defences such as a reduced sentence for honour killings,[12] and the exoneration of rapists who offer to marry their victims.[13] All of these cases demonstrate a clear conflict between the recognition or accommodation of the custom or cultural practice and the civil and purportedly universal rights of women. Although these cases are more extreme than the *pōwhiri*, they highlight the conflict that liberal societies can face when addressing the question of how far they can accommodate cultural groups whose norms mandate gender differentiated roles that disadvantage women.

Within the context of New Zealand it is initially important to note that there is disagreement as to whether the practice of *pōwhiri* is discriminatory or even contravenes the notion of sex

[11] This is different from arranged marriages (which are quite common) where both parties consent to assistance from someone else (such as their parents). Forced marriage is practiced in a number of Asian countries, in the Middle East and Africa. It will often involve a significant age difference and the girl will usually be in a subordinate power relationship with her husband.

[12] For example, in Jordan men receive reduced sentences for murdering female family members if they are deemed to have brought dishonour to their family (e.g. in cases of adultery).

[13] This law existed in Peru until 1991 where in the case of gang rape men could be exonerated if one of the men offered to marry the victim. This is based on the cultural belief that a raped woman is a used item and marriage solves the situation.

equality (this will be discussed later). It is clear, however, that this high-level normative contest has been instrumental in informing the positions that have emerged on the *pōwhiri* debates. Ms Bullock, for example, advocates for the prioritising of sex equality and universal individual rights in her statement:

> What are you going to do? Bring back slavery, utu and cannibalism and say: 'Well, these are all cultural things so we've got to go along with it'? It's just stupidity to me, to say that some cultural matter is going to take precedence over a basic human right.[14]

Conversely, Professor Gary Raumati Hook adopts a cultural relativist position in his characterisation of the *Bullock* decision as an 'attack on Māori cultural practices'.[15] He argues that Māori should not be pushed into a place of compromise by a system that places little value on Māori traditions other than for their entertainment value.[16] Dr Pita Sharples also aligns with a cultural relativist view. He comments that if a Māori practice is going to be adopted, the custom cannot be changed.[17] It should be an all-or-nothing approach where if the government cannot respect the *kawa* (etiquette) of the *tangata whenua* (people of the land), Māori 'must boycott it or even refuse to let it happen'.[18] Dr Sharples defends the idea that Māori should have autonomy over their own culture and should not have to assimilate and conform to an external imposition based on a different value system.

Framing the *pōwhiri* in cultural relativism vs universalism terms is helpful from an explanatory perspective to understand some of the underlying conceptual arguments that are being made. However, the question is whether categorising the issue in terms of these competing paradigms serves the purpose of reaching a resolution. I would suggest that arguing at this abstract level has limited utility as there are basically two irreconcilable rights and ideologies. Both carry strong justifications. For example, one could flesh out an argument that women's rights should take precedence, as cultural claims for group rights can subordinate women as they operate on a patriarchal basis that gives men the power to define the culture.[19] Equally, one could emphasis toleration and that cultural minorities should be able to retain their traditional customs in societies that do not share their values.[20] Claire Charters in her article *Universalism and Cultural Relativism in the Context of Indigenous Women's Rights*, contends that the universalist-versus-cultural relativist debate does not assist

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[14] 'Sacked Pōwhiri Rebel Seeks $116,000 Payout' *Dominion Post* 2 November 2012 http://www.stuff.co.nz/dominion-post/archive/national-news/17772/Sacked-pōwhiri-rebel-seeks-116-000-payout (Accessed 23 December 2012).

[15] See G. Raumati Hook, '*Bullock versus the Department of Corrections*: Did the Human Rights Review Tribunal get it wrong?' (2009) 2 *Mai Review* 3 http://review.mai.ac.nz/index.php/MR/article/viewFile/167/240 (Accessed 23 December 2012).

[16] Ibid.

[17] See Berry, above n 8.

[18] Ibid.

[19] For example, see Susan Okin in her seminal piece, 'Is Multiculturalism Bad for Women?' in J Cohen, M Howard and M Nussbaum (eds), *Is Multiculturalism Bad for Women* (1999) 9–24, who argued that collective rights in the name of preserving cultural diversity should not overshadow the discriminatory nature of gender roles in many traditional minority cultures. She basically selected women's rights as deserving of priority on the basis that cultural claims for group rights can seek to oppress women and operation upon a patriarchal basis that subordinates women and gives men the power to define 'traditional' culture.

[20] Chandran Kukathas, in response to Susan Okin, makes an argument that cultural minorities should be able to retain their customs in societies that do not share their values. See Chandran Kukathas, 'Is Feminism Bad for Multiculturalism' (2001) *Public Affairs Quarterly* 15, 2, 83–98. His argument is based on toleration.

decision-making as it polemicizes the issue, leaving little room for a middle ground.[21] Further, she argues that at this level, the debate becomes politicized and subverted by State interest. I concur that arguing solely at this high level is not particularly helpful. However, simply understanding these competing rights and ideologies assists us when we zone in on the New Zealand context and examine how our legal and constitutional arrangements mediate this debate and reflect or prioritize these positions.

PLAYING THE BATTLE OUT IN THE NEW ZEALAND LEGAL FRAMEWORK

Pōwhiri in the Public Realm

Reflecting a culturalist stance, a question that arises for Māori is: why are our cultural practices being judged by the external standards of another culture at all? One of the reasons is that in this instance we are not looking at cultural practices performed within the private sphere on the *marae*, but those *pōwhiri* that occur in the public arena. Subsequently, it is subject to critique under the New Zealand rights framework that adopts a non-discrimination regime that subjects certain situations to equality based protections.

This distinction between the public and private sector emerges from classical liberal philosophy. It advocates that the state can regulate the public and political sphere, but the private sphere of the family and home should be immune from legal regulation. This division has been strongly criticized.[22] However, although significant work has been done to break down this dichotomy, it is a distinction that in many ways is still reflected in the New Zealand human rights framework. In respect of the freedoms and rights in the *Bill of Rights Act 1990* (*BoRA 1990*) only those entities that have a public function (including the legislative, executive and judiciary) have powers or duties.[23] The *Human Rights Act 1993* (*HRA 1993*) does subject the private sphere to prohibitions on discrimination, but only in limited prescribed circumstances, such as in employment (s 22) and access to public places and vehicles (s 42).

A demonstrative example is the gender-specific roles evident in the Roman Catholic Church. Although the prohibition on the ordination of women as priests is clearly gender discrimination, because churches and religion are considered to be a private entity they are not justiciable under the *BoRA 1990* because they are not a 'public' body. Further, even though churches are employers and caught by the *HRA 1993*, there are specific exceptions that have been made to allow this practice.[24] The same applies to *pōwhiri* when they occur privately on the *marae*. Māori customs in this realm are not subject to legislative regulation and do not have to conform to non-discrimination ideals. However, once *pōwhiri* have been trans-located into the public governmental (or employment) realm, a different set of considerations arise. The context changes and the discussion therefore centres on the State and its relationship and obligations in respect of both women and Māori.

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[21] Claire Charters, 'Universalism and Cultural Relativism in the Context of Indigenous Women's Rights' in P Morris and H Greatex (eds), *Human Rights Research* (2003) http://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-1/Charters.pdf (Accessed 23 December 2012).

[22] For example, see Susan B Boyn, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (1997).

[23] See s 3 of the *Bill of Rights Act 1990*.

[24] For example, s 28 of the *Human Rights Act 1993* provides an exception to the prohibited grounds of discrimination in relation to employment for the purposes of religion.

There is rich discussion to be had around how the State *should* balance its obligations in regards to women and Māori. For example, one could make an argument that the State as a democratically representative and secular[25] body should only incorporate Māori culture to the extent that it does not infringe on basic fundamental rights such as sex equality. A contrary argument, however, can be made that even if the *pōwhiri* was held to be discriminatory on the basis of sex, that Māori have a unique relationship with the State and New Zealand that calls for an exception to be made. Māori signed the *Treaty of Waitangi* that created a partnership between Māori and the Crown/State. The Treaty (under article 2) guaranteed that the Māori relationship with their *taonga* (treasures) would be recognised and provided for. Māori would certainly consider their traditional cultural practices to be *taonga*. Further, Māori as the indigenous peoples of New Zealand have been subjected to a history of systematic assimilation, colonisation and dispossession of their land. They are attempting to recover and strengthen their cultural traditions post-colonisation. Arguably, if New Zealand wants to go forward as a bicultural country that respects the heritage and special place of Māori, accommodation should be made to meaningfully recognise and incorporate Māori cultural practices into ceremonies of the State. This is the nature of the dynamic discussion that should be engaged in the process of trying to strike an appropriate balance in this matter.

This issue, however, is a political hot potato that, for politicians, is easier to avoid. It involves competing rights, different values and race relations. The default position of lack of active debate and discussion at the legislative level, however, is that when an issue arises, as in the *Bullock* case, it reverts to the current legislative framework for resolution. This paper will therefore analyse how the legal framework deals with this issue. In particular it will highlight its limitations as a space in which merit based arguments for each side can be weighed.[26]

Is the *Pōwhiri* discriminatory?

Under the human rights framework in New Zealand, discrimination based on sex is prohibited under both the overlapping *BoRA 1990* and the *HRA 1993*.[27] Under the *BoRA 1990* there is a general prohibition on discrimination by public authorities. Under the *HRA 1993*, discrimination is prohibited in employment matters. This is relevant because the State as an employer falls under the *HRA 1993* and therefore has to meet the same non-discrimination standards as private sector employers. The State is thus caught by both provisions—non-discrimination both generally and as an employer.

The question posed is: what constitutes sex discrimination? 'Discrimination' is not defined in the rights regime. This is significant because people and cultures have different paradigms of equality and meanings vary. In finding that the *pōwhiri* and its gender-based role differentiation amounts to sex discrimination, the HRRT justification was that it is 'obvious'

[25] Note that although New Zealand is purportedly a secular state, where there is no state religion and where matters of religion and belief are 'deemed to be a matter for the private, rather than public, sphere' (Human Rights Commission, 'Chapter 9: The Right to Freedom of Religion and Belief' in *Human Rights in New Zealand Today* http://www.hrc.co.nz/report/summary/summary09.html (Accessed 23 December 2012)), it needs to be recognised that there are exceptions to this. For example, Easter and Christmas are public holidays, and Christian prayers are often a part of public ceremonial occasions.

[26] See Dean Knight in his working paper 'Pōwhiri and Human Rights: A Contest of Values?' (Address to Markings: sites of analysis, discipline, interrogation, 24th Annual Law and Society Association of Australia and New Zealand Conference, University of Melbourne Law School, Melbourne Australia 2007) http://www.vuw.ac.nz/staff/dean_knight/Knight_Pōwhiri_Notes.pdf (Accessed 23 December 2012). Knight undertakes a similar doctrinal analysis of the human rights framework and its limitations in dealing with the issue of *pōwhiri* in the State sector.

[27] See s 19 of the *Bill of Rights Act 1990* and Part 2 of the *Human Rights Act 1993*.

that an expectation that women cannot speak at a function and that women are more limited than men in choosing where they sit involves a detriment, as women have fewer choices and opportunities than men do.[28] The Tribunal therefore adopted a position that discrimination is a distinction that leads to disadvantage. However, as Dean Knight states, 'there is a credible argument which suggests that, when viewed through a different lens, claims about differential treatment in the *pōwhiri* fall away'.[29] There are some Māori that would take the position that based on a more collectivist approach that views the *pōwhiri* in its entirety, the process is not necessarily unequal or discriminatory towards women. This is a more substantive equality position.

Women play a vital role in the *pōwhiri* process. They alone will perform the *karanga*, which is the first voice heard. This role is to lead people on and prepare the way, and can be used to address similar issues as the *whaikōrero*.[30] Women also are valued for their behind-the-scenes role, often providing information to the male speakers, preparing food and, on the rare occasion, some women have even been known to terminate *whaikōrero* if they are too long or offensive by simply standing up and singing. Further, the *pōwhiri* is only the formal welcoming ceremony. Once it is completed, the restrictions are lifted and the subsequent event can commence. The *pōwhiri* does therefore provide a forum by which women's voices can be heard. A substantive equality argument can therefore be made based on the emphasis that Māori place on the collective as opposed to the individual and looking at the allocation of responsibilities in the wider ritual. Although not all Māori would accept this view, there is an argument that considering the overall enterprise, each role is equally valued for its contribution to the process. Therefore based on this cultural conception of equality, the practice may not constitute discrimination on the basis of sex.

With regards to how this contest fits within the legal arena, because there is no definition of discrimination, there is technically scope for differing conceptions of equality to be adopted or accommodated. However, the HRRT in the *Bullock* case did not engage at all with the different interpretations or with the wider ritual. Ultimately, these issues are heard in Western courts in a framework of equality that promotes and protects individual rights. Therefore from a sceptical perspective, in this space, an argument based on collectivism and viewing the practice in its wider context is likely to struggle to gain traction.

Limitations of our rights framework

If the *pōwhiri* is held to constitute sex discrimination, the next issue is whether there are any competing rights or avenues by which Māori can advance their claim that traditional *pōwhiri* should be permitted to be practiced nonetheless. Section 20 of the *BoRA 1990* provides a general obligation not to interfere with minority cultures. However, this is framed in negative terms. For example, the State should not prevent or deny Māori from conducting *pōwhiri* on their *marae* as this would interfere with their culture. This provision, however, does not require the State to actively incorporate *pōwhiri* into its own functions or ceremonies. Therefore, when there is the assertion that *pōwhiri* are sexually discriminatory in the State sphere, Māori cannot claim a s 20 competing right to culture to defend the practice and assert

[28] *Bullock v The Department of Corrections* [2008] NZHRRT 4, 89.
[29] Knight, above n 26.
[30] For example, in both the *karanga* and the *whaikōrero*, the person will usually pay acknowledgements to the dead, the other side and will address the purpose of the event. In *whaikōrero* of course there is more time and scope to deliver an extensive speech, as the *karanga* is constrained by the amount of time it takes to walk on to the *marae*. Also, usually only one woman will *karanga* from both the *tangata whenua* (hosts) and *manuhiri* (guests), whereas with *whaikōrero* there are usually multiple men that will make these formal speeches.

that positive recognition by the State should occur. The *HRA 1993* is different than the *BoRA 1990* in that it does not have a competing rights structure. It simply prohibits discrimination in certain situations.

Because there are no explicit competing rights recognised within the statutory framework that can be weighed against the prohibitions on non-discrimination, the only option to defend the *pōwhiri* is to attempt to squeeze it into the non-discrimination *exceptions.* See Dean Knight's working paper *Pōwhiri and Human Rights: A Contest of Values* for a more thorough examination of the legal scaffolding.[31] Basically, in the case of the *BoRA 1990* general prohibition on discrimination, there is a 'justified limitation' exception.[32] This allows for rights and freedoms to be reasonably limited provided the limitation can be demonstrably justified in a free and democratic society. If a general complaint were brought under the *BoRA 1990* against a governmental policy to adopt traditional *pōwhiri* on the basis of sex discrimination, then arguments around the *Treaty* and the unique place of Māori in New Zealand could be made. This justified limitation, of course, is not a positive direction for State departments to adopt Māori welcomes in the first instance; it is merely a defence if they decide to do so.

Although there is some scope under the *BoRA 1990* for Māori to claim an exception to the non-discrimination clause, if sex discrimination is alleged in an employment context, cultural recognition claims basically have no legal toehold. Because the State is an employer, it falls under the private *HRA 1993* regime. These provisions only provide very narrow exceptions to direct discrimination, for example, for the purposes of religion (s 28). The *pōwhiri* simply does not fall under any of these exceptions. Therefore, in situations where a female employee makes a claim against the State (as evidenced in the *Bullock* case), *tikanga* or cultural recognition claims are not engaged.

Māori claims for the positive recognition of their cultural practice in the state sphere therefore face a number of barriers within the current legal framework. It is only under specific circumstances, namely when there is a general *BoRA 1990* complaint against a State department that has incorporated traditional *pōwhiri* into their ceremonies, when Māori arguments can even be aired and debated. As Knight recognises, the importance and richness of this debate—the meeting of *Pākeha* law and *tikanga* Māori—deserves greater space for ventilation.[33] The current legal framework eschews the political and social debate necessary to grapple with this issue.[34]

WHERE TO GO FROM HERE?

Given the limitations inherent in the current legal framework, a more robust debate on the merits of each side needs to occur outside the law. If, however, there is no impetus for this discussion, Māori still have some options and are not completely bound by legal condemnation of custom or State prescription of what their custom must look like. Māori can:

1. Agree to change the traditional *pōwhiri* when it is performed in the state sector to accommodate equal gender roles;
2. Refuse to change the *pōwhiri* and be excluded from the public sphere altogether; or

[31] Knight, above n 26.
[32] See s 5 of the *Bill of Rights Act 1990*.
[33] Knight, above n 26.
[34] Ibid.

3. Refuse to change, but still participate in the state welcoming ceremonies in some capacity without calling it a traditional Māori cultural construct or practice.

There are a number of considerations that need to be weighed in deciding how to react. The first is recognition that *tikanga* has the capacity to evolve and change according to context. An example of this is the increasing integration of Māori grieving practices and *tikanga* into funerals involving bicultural families.[35] For change to occur, however, it needs to be driven and consented to by those that have *mana whenua* (the group that has power deriving from their association with the land). For example, in regards to *pōwhiri* on the *marae*, there have been some *iwi* (such as Ngāti Porou) where women in limited circumstances have been permitted to perform *whaikōrero*. Although there are other *iwi* (such as Te Arawa) that staunchly oppose this, change is possible.

Other considerations in deciding how to proceed, include the potential desire and benefits of being able to claim that Māori customs cohere with international human rights, as well as the empowerment of women who could acquire the skill and the *mana* (prestige) of delivering *whaikōrero*. Also due consideration is the further alienation and division that could be created between Māori and the State if Māori chose to disengage completely. Further, there is the cultural relativist concern that changing the culture to conform to external norms and values is really just another watering-down of *tikanga* and an alternative way of colonising indigenous custom and the indigenous soul. Ultimately, in deciding the appropriate course of action, it will be important for Māori to maintain their cultural integrity and for any change to accord with the fundamental values underlying *tikanga.*

The way the policy around *pōwhiri* developed in the Department of Corrections is an interesting case in point. In response to the *Bullock* controversy, the Department of Corrections sought an appropriate balance between non-discrimination and respecting Māori culture by changing its policy on *pōwhiri.*[36] The initial policy, released in December 2005, was to abandon the use of *pōwhiri* except in exceptional circumstances and instead to adopt the less formal *mihi whakatau*.[37] The Corrections Department stated that the key features of the *mihi whakatau* were that men and women were to have the same roles, and language other than *te reo Māori* would be permitted if required.[38] This policy, however, was met with offence and the contention that the *mihi whakatau* was not an appropriate replacement for traditional *pōwhiri*.[39] Māori therefore rejected this externally forced change and redefinition of their cultural practices. Therefore, in mid-November 2007 the department changed its policy again. *Pōwhiri* were to permitted in exceptional circumstances; however, the reference to *mihi whakatau* was removed and it was recognised that for a large number of occasions a simple Departmental welcome would be appropriate with an emphasis or encouragement to

[35] For example, when my *Pākeha* grandmother passed away the way that her funeral and death were handled was a fusion of both Māori and *Pākeha* elements. We did not have her lying at a *marae* nor did we have the formal *pōwhiri* processes. However, we did have her body lying in the family home (as opposed to the funeral parlour) and she had someone by her side until she was buried. The context was such that a full *tangi* (Māori funeral) was inappropriate, but because she had Māori grandchildren and in-laws, this fusion of Māori elements was appropriate.

[36] Note that the details of the Department policies in regards to *pōwhiri* are not easily accessible. The following details are obtained from a discussion in *Bullock v The Department of Corrections* [2008] NZHRRT 4, 65–69.

[37] *Mihi whakatau* (like the *pōwhiri*) vary depending on the particular protocols of the *tangata whenua*. However, in general it is less formal and will not usually have the *karanga* (or call). However, the ceremony will usually proceed in the same way as a traditional *pōwhiri*. There are some *mihi whakatau* where women are still not expected to speak.

[38] *Bullock v The Department of Corrections* [2008] NZHRRT 4, 65–69.

[39] Ibid.

use *te reo Māori*. This move away from forcing a Māori construct such as the *mihi whakatau* to conform to an external demand for formal equality between sexes was likely an attempt to avoid accusations of cultural hijacking.

The final state of the Department of Corrections policy reflects one of the possible avenues by which Māori can maintain their cultural integrity by not succumbing to forced change or external redefinition of their customs, whilst still not being entirely excluded from the state sphere. Whether this is a satisfactory compromise, however, is debatable. It is up to Māori to decide which route they want to pursue after undertaking a balancing exercise. What should be emphasized, however, is that even though the Māori choice and claim to cultural recognition of *pōwhiri* in the state sphere is greatly limited by the current legal rights framework, they should not be bullied into changing their cultural traditions. Māori still have the option to choose how they react to these limitations whether that is changing the *pōwhiri* in response to concerns of sex discrimination (in a State context or even more broadly on the *marae*) or refusing to do so.

CONCLUDING REMARKS

This paper highlights some of the multiple layers of difficulty that arise when the customary practices of one culture are transported into another context. A clash of norms and ideologies can occur. In the case of *pōwhiri* and their incorporation into State ceremonies, there is a conflict between cultural recognition of Māori customs and Western ideas around non-discrimination on the basis of sex. This paper argues that a more robust debate and national conversation needs to occur around the place of *pōwhiri* in the public sphere that weighs both sides in a New Zealand context. The current legal framework greatly limits this debate as the justifications and arguments supporting the recognition of traditional *pōwhiri* in the State sector are not given adequate consideration or space to be aired as individual sex equality rights are clearly prioritized.[40] This default position is unsatisfactory. Although Māori have choices in how they respond to claims of discrimination and a movement towards excluding traditional *pōwhiri* from the public arena, New Zealand needs to start an active conversation on how we want our two cultures to come together and share a similar space.

[40] This conclusion supports the work that Dean Knight has done on this issue. See Knight, above n 26.