PRINCIPAL YOUTH COURT JUDGE
OF AOTEAROA NEW ZEALAND

"Barriers to engagement: enabling full participation in the justice system for young people"

A paper delivered by Judge John Walker,

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Justice for Young People Conference

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E ngā mana, e ngā reo,

E ngā rangatira, e kui mā, e koro mā

Tēnā koutou katoa.

All authorities, all voices, all nobles and elders, greetings to you all

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I acknowledge the Kaurna people, the traditional owners and custodians of the land on which we meet. I pay my respects to their elders, past and present, and bring greetings from Aotearoa New Zealand.

Thank you for the invitation to speak with you today. New Zealand and Australia have many similarities. We are close as nations, and I see it as important that we foster opportunities to learn from each other and fashion the most effective solutions.

What I have to say comes from my experiences of the Youth Court. In New Zealand our Youth Court is a division of the District Court , an amalgam of your Magistrates Court and County Court in terms of jurisdiction. The Youth Court deals with youth offending. Our Family Court deals with Care and Protection, and Care of Children in a quite separate jurisdiction. So I speak from a Youth Justice perspective although I cannot do so without talking about what generally underlies offending - a childhood of deprivation and challenge.

These challenges are complex and inter-related. Across the Youth Court population there are concerningly high rates of neurodisabilities, and I am talking FASD, traumatic brain injury, dyslexia, autism spectrum disorder. There is exposure to family violence, dislocation from schooling and a history of trauma.

We know that many of these challenges disproportionately impact our indigenous Māori population. In turn, this results in disproportionate rates of youth offending with 66% of those appearing in the New Zealand Youth Court are Māori (14% of the population).

So what does this mean? This is the crux of my presentation today: that in order to confront the challenges we see in the Youth Court, we must first understand and respond to the barriers to engagement. We must be innovative, and forward thinking in our development of judicial processes, including those which are culturally-appropriate. We must consider all of the ways that we, as youth justice professionals, can ensure that the process about this child, *involves and engages* the child. Only then can we expect positive change.

Participation

At one level, this is simply about participation. Children in conflict with the law must be enabled to participate in the court process which is about them.

Our Youth Court and our Family Court are governed by a statutory provision that requires this level of participation.

Section 11 Oranga Tamariki Act 1989

11 Child's or young person's participation and views

(2) In proceedings or a process to which this section applies,—

a) the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate for their age and level of maturity unless, in the view of a person specified in subsection (3), that participation is not appropriate, having regard to the matters to be heard or considered; and

b) the child or young person must be given reasonable opportunities to freely express their views on matters affecting them; and

c) if a child or young person has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support must be provided to assist them to express their views and to be understood; and

d) any views that the child or young person expresses (either directly or through a representative) must be taken into account.

From 01 July 2019 this provision will be further strengthened. It also reflects international conventions to the same effect, for example the Beijing Rules where Rule 14(2) provides that proceedings are to be carried out in "an atmosphere of understanding" which allows for participation.

Much can be done to try to give effect to these principles, making courtrooms less formal, having judges sit at the same level as the child or young person, encouraging youth-appropriate language, having the court closed to the public, having family close and supporting the

young person in the court room, consistency of judge so relationships can be fostered and conversation enhanced.

However, there are very often fundamental issues which stand in the way of participation which need to be recognised and accommodated. One is recognising the challenges a young person may well have experienced prior to offending. A history of family violence is one example. We know that our family violence statistics are deeply concerning. Approximately 80% of child and youth offenders under the age of 17 will have grown up with family violence at home.[1] Whether they were a direct victim of this, receiving beatings and experiencing physical trauma, or witnessing it indirectly, their brain development will have been affected. Even the effects on the unborn child of a mother exposed to violence or threat of violence – the flooding of the developing brain with cortisol released by the mother, has a serious effect on brain development.

Anxiety, fear, depression, PTSD; these effects will play out in other aspects of their lives and will affect their ability to engage in the court process. As a Scottish commentator has so correctly said if you raise a child in a warzone, you will end up with a warrior.

[1] Ian Lambie, "It's never too early, never too late: youth offending in New Zealand", at para 47.

Having an acquired brain injury will also dramatically increase a person's chances of coming into conflict with the justice system, and we also know that once connected they are more likely to remain trapped within it, continuing to reoffend. This is because the criminal justice system demands compliance with rules, instructions and processes that people with an acquired brain injury have difficulty following.

The effects of neuro-disability, particularly FASD and communication disorders, dyslexia, intellectual disability, mental illness, AOD addiction, in addition to these, result in a major challenge to engagement and often they are co-existing. And we know that indigenous populations tend to experience disproportionately many of those interacting risk factors.

"Nobody made the connection:
The prevalence of neuro-disability in young people who offend"

Report of the Children's Commissioner, England, October 2012

Neuro-developmental disorder	Young people in general population	Young people in custody
Learning disabilities	2-4%	23-32%
Dyslexia	10%	43-57%
Communication disorders	5-7%	60-90%
Attention deficit hyperactive disorder	1.7-9%	12%
Autistic spectrum disorder	0.6-1.2%	15%
Traumatic brain injury	24-31.6%	65.1-72.1%
Epilepsy	0.45-1%	0.7-0.8%
Fetal alcohol syndrome	0.1-5%	10.9-11.7%

Nathan Hughes and others *Nobody made the connection; the prevalence of neuro-disability in young people who offend* (Office of the Children's Commissioner for England, October 2012).

Fundamentally, my point is this: this cocktail of disabilities reduces the young person's ability to participate. We all know how the language in court can be a mystery for those who come to court. Fully functioning adults find it a strange place with strange language.

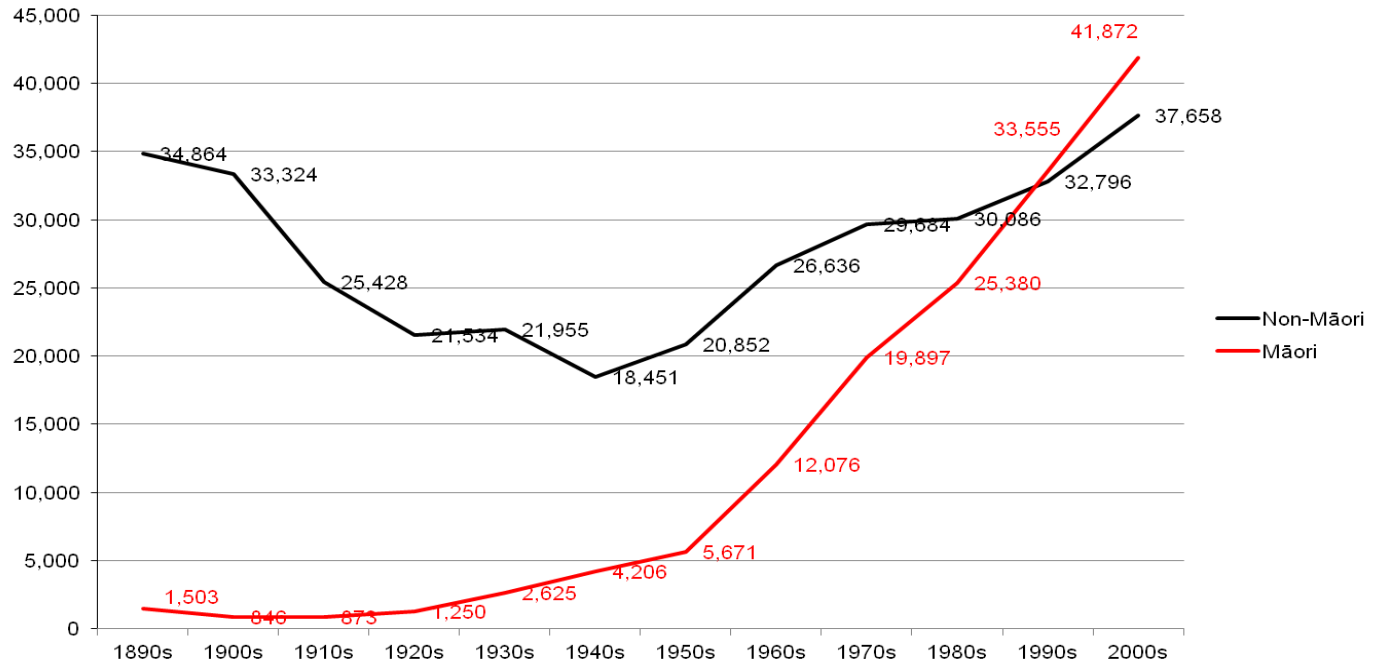
Our court process on the first appearance will give a young person, who dropped out of formal education at an early age, who may have disengaged from school because of dyslexia, a bail form to sign. Almost 50% of young people who appear in the Youth Court are dislocated from formal schooling. Yet the process expects them to understand the legal jargon, "reside", not "associate", not "offer violence", "not consume illicit drugs". And we use words like "remand". So we must recognise these factors which inihibit full

engagement. It is an unfortunate reality that they are prevalent within the Youth Court cohort.

Cultural disconnection

These barriers affect the majority of young people in the Youth Court. Often however, also at play for the young person and their whānau, is the impact of cultural disconnection.

As I have noted, 66% of those appearing in the Youth Court are Māori (14% of the population). The effects of colonisation, the destruction of family supports and the dilution of community life centred on the support of marae (traditional home of an iwi or tribe) by movement of Māori to the cities in search of work, has cast many young Māori adrift, without a sense of identity, knowing their place in the world. This loss of identity has become inter -generational.



This graph illustrates the trends of Māori imprisonment over each decade since 1890:

The escalating trend since the mid-1950s is deeply concerning, and there are complex reasons for this.[2] The 1950s coincided with the urbanisation of Māori, and subsequent loss of connection to Māori society. This escalating trend constitutes a major problem for Māori, but equally as importantly, for the whole nation. We know, that as a community in New Zealand, it is the responsibility of all of us to do what we can to ameliorate historic injustices.

And while the overall numbers in the Youth Court have continued to trend down, the numbers of young Māori have decreased at a much

[2] Ian Lambie, "Using evidence to build a better justice system: The challenge of rising prison costs", (Office of the Prime Minister's Chief Science Advisor, March 2018) at 19.

lower rate. This concern initiated a conversation, what more can we do for our rangatahi Māori? How can we connect with them to ensure they receive the help and guidance that they need?

The result, 10 years ago, was the establishment of the first Te Kōti Rangatahi, or 'Rangatahi Court'.

I would like to play a short video which explains what Ngā Kōti Rangatahi are all about.

Video link:

https://www.youtube.com/watch?v=0RWe2dY8Cgw&feature=youtu.be

An important point from the video that I wish to touch on, is the importance of community engagement. It is a hallmark of the Rangatahi Court movement that the drive must come from **within** the community itself. The Youth Court does not impose Ngā Kōti Rangatahi on the communities, but works with iwi to find the best solutions.

A Judge once asked me how they could go about implementing some of these processes in their own country. My response will always be: to ask. To seek input and discussion and partnership with the community itself. The best solutions will come out of engaging with

communities, not those which are dreamt up in an office.

Fortunately, in Gisborne in 2008, it was evident that there was strong local iwi support for the Youth Court to sit at Te Poho-o-Rawiri marae. Extensive discussions were held to determine how te reo Māori, tīkanga Māori, and marae kawa (ritualistic ceremony on the marae), could be incorporated in an appropriate manner with the criminal legal processes applicable to young people appearing in the Youth Court. No one marae is the same, and these discussions enabled processes to be developed in a way that was appropriate, specifically for Te Poho-o-Rāwiri marae.

You will also see from the video that Rangatahi Courts do not represent a separate justice system. The Youth Court changes its venue to sit on the marae and that happens where the charge is admitted and family group conference plan (FGC is a compulsory stage in all proceedings) is being monitored by the court.

It is a culturally adapted process. Not only do the young people feel more connected and see the court process as relevant to them, likewise their family (whānau) feel more able to engage.

We now have 15 Rangatahi Courts and two Pasifika Courts.

Effect on recidivism

In 2012, a qualitative evaluation of the Rangatahi Courts concluded that there were positive early outcomes: for rangatahi, for whānau and for marae communities. There were high levels of attendance, rangatahi spoke of feeling welcome and respected, understanding the court process, perceiving the monitoring process as legitimate, and having positive relationships with youth justice professionals and the marae community. The study also found that young people who take part in the Rangatahi Court process are 15 percent less likely to reoffend.

In New Zealand, we are now turning to give consideration of how Rangatahi Court processes could be adopted for the benefit of the adult population. Research undertaken to assess the viability of this concluded that Ngā Kōti Rangatahi "have proven that criminal courts in New Zealand can successfully apply a bi-cultural process to the criminal justice system, one that enhances engagement with young people and their families, with an increased level of respect for the legitimacy of the justice system".[3]

[3] Dr Valmaine Toki, "Measuring the success of Te Kooti Rangatahi and Te Kooti Matariki: If recidivism rates are a 'blunt instrument' – can the use of tikanga as common law heal our communities intrinsically reducing offending – and should the jurisdiction be extended?" (University of Waikato, 2018).

It is important to note that each young person who comes before a Rangatahi Court will have a Lay Advocate, as well as their lawyer. The role has been implemented to convey cultural matters and bring the family into the process. The Lay Advocate is a person (not a lawyer) of standing in the culture of the Young Person who can bring to the court the cultural background and advocate for the family (in Māori, "whānau"), and bring in wider family to assist. This role is provided for in the Oranga Tamariki Act, which was passed in 1989, but lay dormant for many years before we started to realise and give effect to its potential. It is utilised by young people in the Rangatahi Courts, but also by those appearing in standard Youth Courts in areas where there is no access to a Rangatahi Court. They similarly provide to the Court the benefit of understanding the background cultural concerns that the young person or their family has.

The use of Cultural Reports, which are provided to the court to bring to light the cultural background of the young person, is becoming increasingly common. In particular, Cultural Reports assist to understand the link to the particular offending and provide context on their background and history.

My hope is that the New Zealand Youth Court will continue to be forward-thinking and pragmatic on how we incorporate the use of te

rēo and tikanga Māori into every aspect of our court processes. I hope that we may have a Iwi liaison role in our Youth Courts to assist Young people, their whanau, social workers and Judges to make the necessary connections to provide information on interventions and options to custody for young people.

Conclusion

Regardless of what the issues are which hold a young person back, I put forward that procedural fairness is more than just going through a tickbox of processes. It is looking at the person in front of us, really looking, and asking the right questions to determine whether justice is being served. Justice is not served when a young person is confused, or are kept out of the loop, or are not acknowledged as the very centre of our youth justice system. Justice is not served when it does not recognise the role that culture has to play in a young person's paradigm. To hold a young person to account for their actions, we must ensure they are truly present at every stage of the journey.

I suggest that it is why we must ask those questions; We must look behind the offending to the complexities, the cultural background, the reasons why they have offended. Ask, not only what happened, the details of the offence, (that is the easy bit) but what is it that happened to you. We cannot hope to get an answer to this question unless there

is full engagement and it is only then that we can have any hope of redirecting their life trajectories, and reclaiming these young lives for the benefit of all.