

Opening Address of Chief Judge Jan-Marie Doogue

Youth Court Judges' Triennial Conference

Auckland, 22–24 July 2019

Introduction

E ngā mana, e ngā waka, e ngā reo,

Ki ngā tini karanga nō ngā hau e whā.

To our distinguished guests from the four winds

Tēnā koutou, tēnā koutou, tēnā koutou katoa.

I greet you once, I greet you twice, I greet you thrice.

Ki ngā aitua maha huri noa, e moe koutou, haere atu ra.

To those who have recently departed, rest easily – farewell.

Takaparawhau te riri, Takaparawhau te aroha, Takaparawhau te āio - e tu whakaiti mātou, a, i rongo matou i tōu tangi auē o nehe, a ka rongo mātou i tōu aroha o nāianeī.

To Takaparawhau,¹ the site of great anger, Takaparawhau the site of compassion, Takaparawhau the site of peace and calm, we heard your cries of pain in the past, and now we feel your love for all in the present.

¹ Takaparawhau is the original name of Bastion Point.

E te Tumutumuwhenua, e tu whakarae ana hei poutiriao i nga waiwhetū o te Waitemata, tenei au ka mihi.

To the carved house, Tumutumuwhenua that stands proudly as a guardian of the glistening waters of the Waitemata, I greet you.

E Ngāti Whātua, te mana whenua, te mana tangata, tēnā koutou.

To Ngāti Whātua, the guardians of land, the guardians of the people, I greet you.

Kua tatū mai nga Kaiwhakawā maha o ngā Kōti Taiohi, ngā Kōti Rangatahi me ngā Kōti Pasifika o te motu ki runga a koutou.

The numerous judges of the Youth Court, Rangatahi Courts and Pasifika Courts have arrived here amongst you today.

Kua tae mai te Kaiwhakawā Matua o ngā Kōti katoa o te motu, me kī ko Dame Helen Winkelmann ki te tautoko i te kaupapa, no reira ka mihi hoki au ki a ia.

Likewise, the Chief Justice of all courts, Dame Helen Winkelmann has come today to support this Conference, and I acknowledge her.

No reira, ki a tātou katoa, tēnā koutou, tēnā koutou, tēnā koutou katoa.

So again, to one and all, welcome.

I wish to acknowledge this whareniui, Tumutumuwhenua, the heart of Ngāti Whātua Ōrākei. I also wish to acknowledge and thank the people of Ngāti

Whātua Ōrākei, on whose land we assemble today. And finally, I want to thank Judge John Walker for asking me to speak today.

It is somewhat of a coincidence that we are gathered in this wharenuī, which was completed in 1989. That is, of course, a very important year for youth justice with the enactment of the Oranga Tamariki Act 1989.

Thirty years ago, New Zealand decided that children and young people were not akin to adults when it came to matters of criminal justice; that a wholesale adoption of the adult criminal justice system was not appropriate in that context; and that the imposition of traditional criminal penalties on young people could in fact be detrimental to their development as contributing members of society.

This took much courage and is something I will return to shortly.

Some 15 years earlier however, Henare Toka, an expert carver of Ngāti Whātua Ōrākei was chosen to lead the carving of a new wharenuī to sit atop Takaparawhā — Bastion Point.

Unfortunately, Henare Toka passed away not too long after. Denis Conway, a student of Henare Toka and an Australian, agreed to continue the project.

As you can imagine, this did not please everyone. The project was not being led by people with a connection to this land and the wider iwi voiced its concerns.

This, too, took courage.

A major recommendation of the Waitangi Tribunal was that Ngāti Whātua Ōrākei manage and lead the project itself.

Ultimately, the ownership and control of the marae was vested in the Ngāti Whātua Ōrākei Trust Board, and this wharenuī was finished in 1989.

So, our presence here today symbolises the interweaving of two acts of courage.

This is what I would like to speak to you about today. Courage. In particular, judicial courage and our judicial oath.

Courage and the Judicial Oath

Justice François Kunc, a judge of the Supreme Court of New South Wales, recently gave a lecture titled “Courage as a Legal Virtue”.

Justice Kunc made a point to speak of virtues as opposed to values. In his view, our public discourse has been swamped by a focus on values which are, using his words, “protean things”.² He gave an example to explain what he meant.

An organisation may say its values are “service, strength and efficiency”. What exactly is this organisation? Well, it could describe a bank as much as an invading army.

But virtues are different. Unlike values, virtues are “behaviours that are measured by the extent to which they are good, beautiful and objectively true.”³

One such virtue that Justice Kunc advocates for is courage. He identifies four key features of legal courage.⁴

First, an unwavering commitment to the rule of law.

Second, that the public good must always be put ahead of self-interest, whatever the cost.

Third, a knowledge not only of the law, but the moral and policy principles underlying it and the history of how it came to be where it is today. This involves respecting, but not being bound by tradition.

² François Kunc, Judge of the Supreme Court of New South Wales “Courage as a Legal Virtue” (Inaugural Andrew Rogers Lecture in Private Law and Legal Practice, School of Law and Justice of Southern Cross University, Lismore, 2 May 2019) at 4.

³ At 4.

⁴ At 19.

Finally, a readiness to call out injustice and engage in civic debate.

Justice Kunc’s views about legal courage are of particular relevance to our judiciary at this time.

At her swearing-in earlier this year, the Chief Justice commented on the judicial oath, saying it is “something [judges] hold fast to” as they strive to do right to all manner of people according to the laws and usages of New Zealand, without fear or favour, sympathy or ill will.⁵

But she also noted how short it is — 26 words to be precise. Yet, these 26 words “manage to describe the basic concepts of the rule of law, outline a judicial method, prescribe a code of judicial conduct and demand of judges that they show courage.”⁶

By courage, she meant acting boldly; trailblazing with judicial initiatives that aim to truly do justice. And also being awake and sensitive to the underlying causes of offending that we so often see in our courts.

The Judicial Oath, Courage and the Youth Court

So how does the judicial oath and legal courage apply specifically to the Youth Court?

Well, the Youth Court is perhaps the spiritual home of the judicial oath.

Youth Court judges have exhibited courage since the Court’s inception in 1989.

I want to illustrate this with reference to the first Principal Youth Court Judge, Judge Mick Brown.

Judge Brown, who was of Ngāti Kahu, Te Aupōuri, Te Rarawa, and Ngāpuhi descent, was appointed a District Court judge in 1980. He sat in Waitakere

⁵ Helen Winkelmann, Chief Justice of New Zealand “Speech of The Rt Hon Dame Helen Winkelmann at her swearing in as Chief Justice of New Zealand” (14 March 2019) at 3.

⁶ At 3.

District Court for nine years and during this time he was involved in trialling what would become a ground-breaking way of delivering youth justice.

Aware of the discontent in the Māori community with how young offenders were being dealt with in the criminal justice system, Judge Brown employed a family conferencing system, sending young offenders and their families to Hoani Waititi Marae in West Auckland.

It was natural, then, that his court was used as a pilot site for a proposed new system of youth justice incorporating family group conferences.

Judge Brown saw things differently to many judges before him. He was an avid reader of Alexis de Tocqueville who wrote about political science and sociology in the 19th century, and who is best known for his work *Democracy in America*.

In that text, de Tocqueville makes an observation which I have no doubt would have caught Judge Brown's eye. Speaking about when exactly a person's virtues and vices form, de Tocqueville said:⁷

Step back in time; look closely at the child in the very arms of his mother; see the external world reflected for the first time in the yet unclear mirror of his understanding; study the first examples which strike his eyes; listen to the first words which arouse with him the slumbering power of thought; watch the first struggles which he has to undergo; only then will you comprehend the source of the prejudices, the habits, and the passions which are to rule his life. The entire man, so to speak, comes fully formed in the wrappings of his cradle.

As a society, we are finally understanding that offending has a myriad of underlying causes. De Tocqueville wrote of this in the 1800s; Judge Brown understood it well before many of his peers.

⁷ Alexis de Tocqueville *Democracy in America* (Saunders and Otley, London, 1840).

Judge Brown's way of doing things in the 1980s showed immense courage. He epitomised all four features of legal courage which I mentioned earlier.

It is no wonder Judge Brown was appointed the first Principal Youth Court Judge in 1989, a few months before the introduction of what is today the Oranga Tamariki Act 1989.

Before this Act came into force, Judge Brown toured the country presenting on the radical new legislation. In his introductory comments, he explained he was but one of the leaders of a journey into a new way of providing youth justice, saying:⁸

Let me suggest one possible way to approach this legislation. It may require what the poets have described as 'a willing suspension of disbelief.' It may require, too, flexibility of mind and a willingness to entertain the unconventional, the innovative. To allow in Doctor Johnson's words (when referring to second marriages) 'optimism to triumph over experience'.

Judge Brown was a trailblazer who used his knowledge and privileged position to do right by all young people who appeared before him.

He embodied both our judicial oath and judicial courage.

It is with this leadership that the Youth Court entered a new era in 1989.

And the Court continues to lead the way and foster healthy public debate about many facets of the criminal justice system.

Breathing Life into Judge Brown's Vision

I mention Judge Brown's example for a reason.

Your conference comes at an interesting time for the Youth Court.

⁸ Geoff Adlam "Judge Michael John Albert (Mick) Brown CNZM, 1937 – 2015" (April 2015) New Zealand Law Society <www.lawsociety.org.nz>.

Three weeks ago, the most significant legislative changes since the inception of the Youth Court, Judge Brown's appointment as Principal Youth Court Judge, and the completion of this wharenuī, came into force.

Because of these changes, low-level offending by 17-year-olds now falls under the Youth Court's jurisdiction.

In addition, Youth Court judges must take a holistic approach to all decision-making, putting a young person's well-being at the centre.

As Youth Court judges, you must also encourage young people to participate in proceedings and to give them reasonable opportunity to freely express views and be provided with appropriate support.

And finally, the legislation makes a greater commitment to Te Tiriti o Waitangi. This includes, amongst other things, recognition of mana tamaiti, tikanga Māori, whakapapa and whanaungatanga.

You will be hearing a lot about these changes, and other pertinent issues over the next few days.

A good portion of today's discussions will focus on the concepts, purposes and principles of the Oranga Tamariki Act 1989, and the implications for judges.

Tomorrow, presentations will be given on enhancing participation of young people and their whānau, enabling young people to contribute to a safe, healthy and inclusive society, and offending by young females.

You will also hear about the work of the Dingle Foundation and its attempts to prevent 'copy-cat' behaviour among siblings of youth offenders. And tomorrow's programme will conclude with a panel discussion involving people with lived experience in youth justice and care and protection.

The final day will focus on neurodisabilities and Foetal Alcohol Spectrum Disorder, their identification and management.

This is an extremely broad programme which should be immensely thought-provoking. So, I don't intend to pre-empt discussions by detailing the content of these sessions.

But I do want to briefly reflect on Judge Brown's vision, particularly in light of the legislative changes I have mentioned.

A feature of legal courage is understanding the development of the law. Well, a vast majority of the young people who appear before you carry with them a long list of disadvantage.

The Oranga Tamariki Act has evolved to recognise this.

The Act has always given Youth Court judges broad powers to find an appropriate solution. This is no different following the changes that have come into effect.

Arguably, you now have more power than ever before to be courageous in your decision-making.

In the District Court, defendants may appear before one judge on one day, and before another the next. Our workload CAPs may theoretically give us sufficient time to deal with a defendant, but I am almost certain I would struggle to find a judge who would not want to have more time.

In the Youth Court, you have the benefit of having more time to engage with the young people who appear before you. You also have the support and expertise of various agencies to assist you.

But above all, there is judicial consistency in the Youth Court that is lacking in the adult court. You are better able to form a rapport with the young people in your courtroom; to learn about their histories, their goals and their aspirations.

For many young people in the Youth Court, the judge is the only constant in their life.

It is no wonder then that many young people will refer to you as “my judge”: “My judge said I’m doing a good job...”; “My judge is so annoying...”; “My judge told me I have to go to a programme...”. Even where you have no choice but to impose a section 311 residence order, the young person will likely still respect you when they hear why you had to do it. Importantly, they know they will be seeing you — “their judge” — again.

This puts you in a truly unique position.

As the Chief Justice has said before, it is this “diligent, skilled and humane service we give to society that is the true source of the courts’ authority.”⁹

Your work, your judging, your problem-solving and your solution-focused approach are examples of you fulfilling your judicial oath and “doing right by all manner of people.”

The Youth Court is a place where young people may end up by chance, but where they can also be equipped to emerge with greater purpose.

These young people are “whole persons” as the Oranga Tamariki Act now recognises.¹⁰ And they are young persons who need your assistance, perhaps more than they ever will again in their lives.

As Youth Court judges, you are in a privileged position. You can help them.

Of course, the law, especially since 1 July, requires you to take into account a wide range of factors in coming to your decisions.

These include denouncing the conduct which has brought a young person to court, and considering the interests of both the public (including public safety) and any victim.¹¹

⁹ Helen Winkelmann, above n 5, at 2.

¹⁰ Oranga Tamariki Act 1989, s 5(1)(b)(vi).

¹¹ Section 4A.

But these must be balanced against the young person's well-being and best interests, which must be paramount considerations.

In any case, these seemingly competing factors are not mutually exclusive.

It is entirely possible to denounce a young person's offending and work with the resources you have to steer them away from that behaviour. This is exactly the "holistic approach" the legislation requires.

All of this, both from a judicial and policy perspective, is of particular relevance to Māori.

The new section 7AA of the Oranga Tamariki Act imposes on the Chief Executive of Oranga Tamariki a duty to recognise and provide a practical commitment to the principles of te Tiriti o Waitangi.

This includes ensuring the department's policies and practices, which impact on the well-being of young persons, have the objective of reducing disparities by setting measurable outcomes for Māori.

Section 7AA also imposes a duty to ensure these policies and practices have regard to mana tamaiti and the whakapapa of Māori children and young persons, as well as the whanaungatanga responsibilities of their whānau, hapū and iwi.

And above all, the Chief Executive is now required to report to the public each year on the measures taken in respect of these duties, and the impact of those measures on Māori children and young persons.

The addition of these duties is monumental.

Legislative acknowledgement of the disadvantage felt by Māori, of which Judge Brown was so acutely aware over 35 years ago, is finally here.

In this way, we know that Judge Brown's vision for a fair youth justice system is achievable.

We shouldn't forget, however, that we have already started down the road of realising this vision. The Rangatahi Courts are prime examples of this.

In fact, the Rangatahi Courts resemble in many ways Judge Brown's own initiatives at Hoani Waititi Marae in Waitakere all those years ago. The legislative amendments to the Oranga Tamariki Act will get us closer to realising that vision.

Conclusion

It is now your role, as Youth Court judges, to do everything within your power to get us there.

It is up to you to be courageous and continue the kōrero.

There is one more vital element to assist you.

John Walker describes the Youth Court as a place of great hope.

Hope is a powerful motivator; a life force. But it is the prospect of success that keeps hope alive.

The Youth Court has many success stories among the rangatahi and tamariki who have entered it in circumstances of seeming hopelessness.

The Court provides a special kind of leadership and direction to help our young people lift themselves up; to draw on their own personal courage; and to engage loved ones and communities in the journey to restore their lives and fulfil their potential.

In Aotearoa New Zealand we are fortunate these efforts are mandated by enlightened and progressive governing legislation, and that as judges we have the individual autonomy to innovate and build consensus within its provisions.

Courage, hope and enlightenment. These are powerful forces. Especially when backed with the force of the law.

I trust you to harness them wisely and I hope they guide you as you explore — through this conference — fresh ideas and experiences which will help deliver justice for young New Zealanders.

Nō reira, tēnā koutou, tēnā koutou, tēnā tatou katoa.