# *"Am I part of this? Is this really anything to do with me?*

# *Fostering engagement and procedural fairness in the youth justice system"*

A paper delivered by Judge John Walker,

Principal Youth Court Judge for New Zealand to the

Children's Court of Victoria Conference

Melbourne, Australia

Thursday 11 October 2018

_____

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

_____

I acknowledge the Wurundjeri 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 . We are close as nations, we have much in common, and we in New Zealand learn much from the way you do things here. We also share many of the same problems, and can bring our common experiences and wisdo to assist in fashioning solutions.

I want to share some of our experiences in the area of Youth Justice.

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.

The theme of this conference - the voice of the child, interpreted in a Youth Justice context, I suggest means hearing the voice of the child

in court proceedings brought against the child. It is, at its most basic about procedural fairness.

Procedural fairness requires the engagement of a person in the process which directly impacts on them. Engagement requires an understanding of what is happening and an ability to participate in the decision-making process.

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.

This provision 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, encouraging child appropriate language, having the court closed to the public, having family close and supporting the child in the court room, consistency of judge so relationships can be fostered and conversation enhanced.

Accountability, instilling a sense of responsibility, promoting safety of the community, are not compromised by recognition of the needs of a young person. Properly engaging with the young person, creating a

process that happens with them as well as to them, is likely to enhance outcomes. Fundamentally, it is about fairness.

However, there are very often fundamental issues which stand in the way of participation which need to be recognised and accommodated. The effects of neurodisability, particularly FASD and communication disorders, dyslexia, intellectual disability, mental illness, AOD addiction, acquired brain injury, the effects of childhood trauma including exposure to family violence, the trauma still recent and the effects still raw, dislocation from culture with no sense of identity or belonging. Each of these is a major challenge to engagement but often they are co-existing.

Even without these challenges the child's brain is undeveloped.

Where these challenges are not recognised and accommodated proceedings are perceived as happening to the child rather than with the child. Such proceedings are procedurally unfair and I would argue that such proceedings have little chance of delivering an effective intervention. Young people have an acute awareness of unfairness.

None of this picture will be new to any of you. I want to share with you some of the procedures we have adopted in the Youth Court to try to confront these issues.

The underlying causes of offending are often multi faceted and so a multi disciplinary team approach is required to fashion interventions. The information held by agencies that have touched the lives of these young offenders has to be harvested from the information silos. A team approach in the court room helps with this. This information starts to build a picture of what may get in the way of proper engagement.

A Youth Court in Action

The new Christchurch Youth Court

We are seeing a very large number of children with neuro disability as I am sure you are. The prevalence rates for those children in conflict with the law are significantly greater than in the general child population.

"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).

These disabilities reduce the ability to participate. Communication disorders, simply not having the language to express feelings, not being able to absorb information conveyed in a conventional way, will mean engagement, participation in the hearing cannot happen without assistance. We have instituted the role of Communication Assistants - specialised Speech and language therapists, who advise the court on how proceedings need to be adapted to the level of functioning of the child. Sometimes concepts need to be conveyed in pictorial fashion.

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.

How much more difficult it is for a child with cognitive deficits.

We are confronting the challenge of those young people whose development has been seriously compromised by exposure to family violence. This impacts on their cognitive ability as well as predisposing them to violent behaviour themselves.

Family violence has been described as a "scourge of New Zealand society" by the New Zealand Court of Appeal.[1] We know that our family violence statistics are deeply concerning. In the space of one year, there were 119,000 family violence investigations by NZ Police. There is a family violence call out to Police every 4.5 minutes. In 80% of the call outs a child is present in the home. It needs to be remembered that the estimate is that only 20% of family violence is ever reported.

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. Constant fear is not a good

[1] *Solicitor General v Hutchison* [2018] NZCA 162, per Kos, French and Miller JJ at [27].

predicator of positive outcomes for these young people. We have generations of people negatively impacted by the effects of family violence.

Approximately 80% of child and youth offenders under the age of 17 will have grown up with family violence at home.[2] The effects of raised in a climate of violence, either as subjects to violence, or of witnessing or hearing such violence, are severe: physically, emotionally and developmentally. Anxiety, fear, depression, PTSD; these effects will play out in other aspects of their lives and affect them in the long term and will affect their ability to engage in the court process.

The learned behaviour, the normalisation of violence as a means of handling issues or challenges, is deeply problematic. As a Scottish commentator has so correctly said if you raise a child in a warzone, you will end up with a warrior.

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.

For many, a history of childhood sexual abuse will result in them self-medicating, turning to alcohol and other drugs to numb the pain, with

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

the risk of further cognitive impairment. This vulnerability further increases the risk of gang involvement, and offending behaviour.

We now know that an acquired brain injury can cause a person to experience a range of cognitive impairments and emotional and socially challenging behaviours, including poor memory and concentration, reduced ability to plan and problem solve, lack of consequential decision-making, difficulty absorbing additional information, heightened emotions and reduced capacity to regulate these. They are also much more susceptible to depression, irritability, impulsivity, disinhibition and aggression. We know that having an acquired brain injury will 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. In part, this is because the criminal justice system demands compliance with rules, instructions and processes that people with an acquired brain injury have difficulty following. This links directly in with what I have been talking about in regard to procedural fairness.

The latest figures in New Zealand are that almost 35% of all those appearing in the criminal court have a traumatic brain injury, this is likely to be an under estimate and does not take into account acquired

brain injury (as a result of something other than trauma – solvents, drug use). Our court processes need to recognise this fact.

These are all part of the cocktail of disabilities that impact on the ability to engage in court processes.

*Education*

The factors that I have mentioned do not stand-alone. A young person who suffers from any of these cognitive challenges, or grows up in a climate of violence, will usually struggle to remain in school. This is particularly when their behaviour is such that the schools would prefer they were not there. Without proper supports in place, most will become disengaged from education at an early stage. Their parents too may have been dislocated from education. Almost 50% of young people in New Zealand Youth Court are not enrolled, have been excluded, suspended or are simply not attending school.

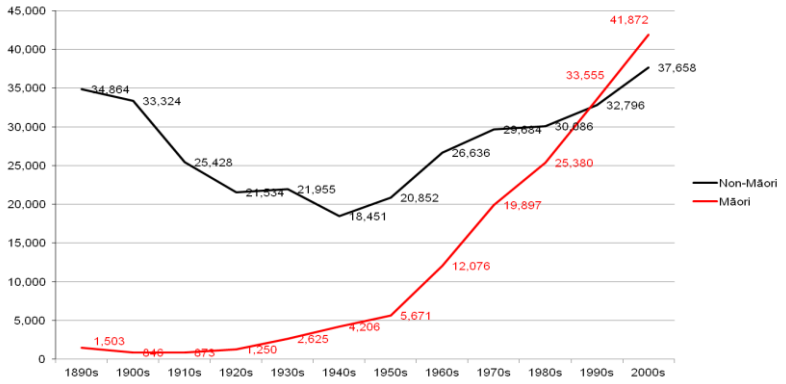
Our court process on the first appearance will give a young person, who dropped out of formal education at an early age, who may have disengaged from school because of dyslexia, a bail form to sign. The process expects them to understand the legal jargon, "reside", not "associate", not "offer violence", "not consume illicit drugs". And we use words like "remand".

The effect of neurodisability, such as FASD (Fetal Alcohol Spectrum Disorder) can so easily be missed by the untrained eye, and I encourage you to seek out information about the hidden nature of these disabilities.

Cultural disconnection is another barrier to engagement. A young person relying on family support to navigate through a court process, will get little help from a family that feels alienated from the process.

66% of those appearing in the Youth Court are Maori (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 maori to the cities in search of work, has cast many young maori adrift, without a sense of identity, knowing their place in the world. This loss of identity has become inter -generational. They do not see the court as relevant to them and this disconnection impacts on engagement.

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.[3] 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 continue to trend down, the numbers of young Māori have decreased at a much lower rate. This initiated a conversation, what more can we do for our young people? How can we connect with them to ensure they receive the help and guidance that they need?

[3] 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.

And as a result the establishment, 10 years ago, of Ngā Kōti Rangatahi, or 'Rangatahi Courts'. 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 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 (whanau) feel more able to engage.

The delivery of intervention programmes are more likely to be effective if the young person has a sense of where they fit in the world. Judge Heemi Taumaunu, who first developed the concept 10 years ago has spoken of how important it is that our young Māori have a sense of "purpose in the future, to know where they have come from and who they are". We now have 15 such courts and two Pasifika Courts.

[The link to the Rangatahi Court video is https://www.youtube.com/watch?v=0RWe2dY8Cgw&feature=youtu.be ]


Te Koti Rangatahi in action

For the first time, a New Zealand court exercising criminal jurisdiction, applied the same law in the usual manner, but also incorporated te reo Māori, and tikanga Māori, held the sitting of the court at a marae, and observed marae kawa as part of the process of the court.

As anyone who sits in on the court session will notice, it is not a separate court but the Youth Court sitting at a different place. It is an alternative setting in which to monitor the FGC plan, bringing the enhancement of cultural identity to that plan. The young person will learn where he or she comes from, their ancestors and their tribe. They will learn the marae protocol and become connected with their culture. There will be the delivery of interventions.

Research was undertaken in 2018 to assess viability of Rangatahi Court processes being adopted for the benefit of the adult population. It was noted 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".[4]

A challenge for these courts is the development of accompanying interventions that will support the work being done by the Court – for the cultural intervention, and sense of community, cannot be provided by just a couple of court appearances. For the 15 Rangatahi Courts, we are very strongly focussed on the establishment of resources to support the work of the Court – such as tikanga wananga – a meeting over several days, in which the young person is fully immersed in Māori culture at a marae.

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

[4] 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).

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 is an increasingly common way of bringing cultural background before the court and explaining the link to the particular offending.

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.

**AVL**

I see this procedural fairness as meaning that we should not be defaulting to the use of audio-visual links ("AVL") for young people, except where it specifically enhances the process. The barriers to engagement are substantial enough without disembodiment of the process and participants. In certain circumstances, such as

geographical remoteness, there are clear incentives to enabling access to justice in this way. However, in a majority of courts, and in a majority of cases, the risk remains that it becomes widespread purely due to economics and interests of agencies, and in New Zealand I have been urging Youth Court Judges to proceed with caution.

*'VOYCE' Project or Voices of Children and Young People – Oranga Tamariki*

The final aspect I wish to discuss in regard to ensuring procedural fairness, is a programme that Oranga Tamariki, our Ministry for Children has pioneered. It is called 'VOYCE – Whakarongo Mai", or Voices of the Young and Care Experienced – Listen to Me. It is a reference group of children and young people who have been in the system, who help to guide policy development. It commenced 1 April this year, and is an independent connection and advocacy service for care-experienced children and young people. It ties in with the idea that we have been discussing: what good is a system that does not involve the very people it is set up to engage?

Why would you not turn up the volume of the voice of the child?

## Conclusion

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 they are confused, or are kept out of the loop, or are not acknowledged as the very centre of our youth justice system. To hold a young person to account for their actions, we must ensure they are truly present at every stage of the journey. We know the statistics, the serious and challenging barriers they have been subjected to in their young lives. We know that the likelihood that they have a neuro-disability or traumatic brain injury are considerably higher than in the non-offending population. This may not always be visible, and in fact will usually not be.

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 we have any hope of redirecting their life trajectories, and reclaiming these young lives for the benefit of all.