22nd Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address

Generations of Disadvantage: A View from the District Court Bench

Judge Jan-Marie Doogue, Chief District Court Judge for New Zealand*

Dunedin, 15 October 2018

Introduction

E ngā mana, e ngā waka, e ngā reo.

Tēnā koutou, tēnā koutou, tēnā koutou katoa.

It is my privilege and pleasure to give the annual Ethel Benjamin Commemorative Address.

Māori have a proverb, a whakataukī, that encapsulates the career of Ethel Benjamin:[1]

Ka kuhu au ki te ture, hei matua mo te pani

I seek refuge in the law, for it is a parent to the oppressed

Ethel Benjamin took refuge in the law, to help the disadvantaged. It was telling that in her graduation speech in 1897, which she gave on behalf of all graduands — the first time a woman had given this speech[2] — that Ethel chose to quote English novelist and feminist Sara Grand, saying:[3]

---

* I am indebted to my Judge's Clerk, Milan Djurich, for his invaluable assistance in the preparation of this address.

1 This whakataukī originates from Te Kooti Arikirangi Te Turuki of Ngati Maru, a hapū of Rongowhakaata from Poverty Bay in the Gisborne region. In 1865, Te Kooti was arrested on suspicion of being a spy and was imprisoned without being tried. He had his land confiscated without proof of unlawfulness. His people were executed by Government forces without charge or trial. In essence, Te Kooti was a man who had no reason to seek hope or see light in the law. Yet he did. He saw value in the law for it treats all people fairly, regardless of who they are.

2 Janet November *In the Footsteps of Ethel Benjamin: New Zealand's First Woman Lawyer* (Victoria University Press, Wellington, 2009) at 58.

3 Sara Grand (1854–1943) wrote about the 'New Woman': the concept of the woman who wanted to work and learn for herself and who questioned marriage and the unequal position of women at the time.

> It is the rebels who extend the boundary of right, little by little narrowing the confines of wrong, and crowding it out of existence.

Two years later, in 1899, Ethel effectively started putting this into practice. She became an honorary solicitor for the Society for the Protection of Women and Children. She took on a number of female clients, attempting to ensure justice was done for those who had no voice. Her caseload included spousal abuse, separation, divorce and adoption — all areas of the law in which women of that time were disadvantaged.[4] Sadly, many still are.

In 2018, I feel confident that a rebel like Ethel Benjamin would have been fighting to end all forms of disadvantage. And it is disadvantage that I want to talk about today. I want to speak about disadvantage from a unique perspective; that of the Chief Judge of the District Court, New Zealand's largest court. I want to speak about the disadvantage District Court Judges see day-in, day-out, and how Judges consider, deal with and respond to it, albeit in the limited way that they can.

What do I mean by "disadvantage"? It is the circumstances that set people up to make bad choices, and once they have taken a wrong turn, restrict their ability to change direction. Those circumstances range from material, cultural and spiritual poverty to mental impairment and illness, substance abuse and addiction, and exposure to sexual and family violence. Disadvantage is commonly a multi-headed hydra where many or even all of these factors are at play.

I hope to convey two key messages. The first is that the role of our courts, particularly the District Court, has evolved beyond the traditional decision-making or adjudicatory role. Our courts are having to engage in social justice more than ever before, and they are joining in the search for solutions to many of society's malaises. As a society, we need to accept this and

4 Carol Brown "Ethel Rebecca Benjamin" (1993) Te Ara <www.teara.govt.nz>.

embrace the reality that holding people to account requires a more sophisticated approach than finding wrong, attributing blame and imposing punishment. As Judges, we have a valuable contribution to make in breaking or disrupting the trajectory of disadvantage, and in restoring people's lives. To deliver justice effectively, there needs to be a more holistic view of what justice looks like (at least in my Court).

The second message I hope to convey is that in spite of our Court's efforts, in many instances, intervention once a case reaches court is too late. A comprehensive, multi-faceted response is needed, and early on. As the saying goes, an ounce of prevention is worth a pound of cure.

Of course, I am unable to offer you all the solutions today. That is beyond what any one Judge could do. What I intend to do is share with you my and my colleagues' perspectives, and hope that they fan the fair winds of change and inform the kōrero that needs to be had.

The ultimate decisions on how we can make society better are for others. But we will continue to use the law to assist disadvantaged individuals in whatever jurisdiction of the District Court. In the criminal courts, this may be the defendant, complainant, victim, or witness. In the Family Court, this may be a child and his or her family who require assistance through state intervention or the regulation of family breakdown; people suffering from mental illness; or vulnerable elderly suffering economic or familial oppression.

The People's Court

The District Court has one of the widest jurisdictions of any court of first instance in the world. Everyone entering the criminal justice system will have their first appearance in the District Court or, depending on their age, in its youth division, the Youth Court. Likewise, all litigated

family disputes are first heard in the District Court's family division, the Family Court.[5] In respect of civil cases, the District Court has jurisdiction to hear a wide range of civil claims up to a value of $350,000. District Court Judges deal with around 200,000 matters each year, and issue 40,000 judgments.[6] The District Court is usually a person's first and last point of contact with the court system.

I do not mention these statistics to promote the District Court. Rather, to give an insight into the kind of cases District Court Judges see daily. The District Court deals with everyone, from the unborn to the elderly. It deals with cases that touch on almost every aspect of New Zealanders' lives. It is very much the people's court.

I truly believe that there are few people as in touch with the painful realities faced by those coming to the courts as District Court Judges.[7] Every day they hear from and speak to victims of crime and broken families; from people suffering addiction and mental illness; and from defendants and victims alike who are the products of the vicious cycles of sexual and family violence. District Court Judges see what Justice Whata referred to in a recent judgment as the "multiplicity of overlapping factors, including deprivation, trauma, youth, drug and alcohol abuse, and mental health issues."[8]

No single agency or department is placed to fully appreciate this; to disentangle the web of disadvantage. No single agency or department truly gets a holistic view of the disadvantaged person. In many respects, as District Court Judges, we do. We have a cradle-to-grave view of society's illnesses.

---

5 Only Judges holding a family warrant can preside over cases in the Family Court: Family Court Act 1980, s 5.

6 See District Court of New Zealand "Annual Report 2017" The District Court of New Zealand <www.districtcourts.govt.nz>.

7 For similar sentiments see Thomas Bathurst, Chief Justice of New South Wales "Community Participation in Criminal Justice" (Opening of Law Term Dinner Address, Law Society of New South Wales, Sydney, 30 January 2012) at 6–7.

8 *Solicitor-General v Heta* [2018] NZHC 2453 at [63].

We see all the dots. It was inevitable that we would eventually start to join them.

So, what insights do we have that could contribute to making our society a better, fairer and more decent place?

People often look to the Youth Court to see the seeds of adult crime. In fact, the starting point is often the Family Court. We see a cycle of alienation, hardship, disempowerment and tragedy in the Family Court that progresses through to the Youth Court, and ultimately into the adult criminal jurisdiction. In this sense, District Court Judges see a full life cycle of some of New Zealand's offenders. It is disturbing to observe, and the outcomes are too often frighteningly predictable. The Judges of the District Court have a joyless ringside seat.

The Effects of State Care

It is the Family Court where disadvantage often presents first.

In the Family Court, care and protection proceedings under the Oranga Tamariki Act 1989 account for 15% of cases, while family violence cases that involve applications for protection orders make up 13% of the work. Although family violence proceedings make up a relatively small proportion of overall business, family violence pervades almost every area of the Court's work. Therefore, a significant portion of the Family Court's work relates to societal breakdown at the most basic, human level. And it is frequently exacerbated by disadvantage.

Where the Family Court considers a child or young person is in the need of care or protection, a declaration is made[9] and the child or young person can be placed in appropriate care, most commonly in the care of the Chief Executive of Oranga Tamariki.[10]

At the end of May this year, there were a record 6,300 children or young people in the Chief Executive's care.[11] The figures tell us that our most vulnerable children and young people are being put into state care faster than ever before.

A significant portion of these children and young people, who need a sense of stability and normalcy more than anything else, do not receive it. Between 2013 and 2017, 40% of children and young people in state care had at least three caregivers.[12] This is in spite of research that suggests a secure placement, coupled with a continuous and quality relationship with a foster parent, can avert the onset of criminal behaviour.[13]

Predicted criminal behaviour amongst those in state care also paints a grim picture. These children and young people are 15 times more likely than their peers to have a subsequent record with the Department of Corrections.[14] In fact, half of young people with a past care and protection event, and more than a quarter with a past care and protection notification, are predicted to offend in the next 15 years.[15] These young people make up only 3.6% of the population but are predicted to commit 12% of all offences in that timeframe.[16] It is little

---

9 Oranga Tamariki Act 1989, s 67(1).

10 Section 101(1). The court may also place the child or young person in the care of an iwi or cultural social service, the director of a child and family support service, or any other person the Court considers appropriate.

11 Children's Commissioner *Meiea Te Tūruapō – Fulfilling the Vision* (Office of the Children's Commissioner, October 2018) at 35.

12 Brittany Keogh "Forty per cent of children in state care moved between three-plus caregivers in five years" *New Zealand Herald* (online ed, Auckland, 10 June 2018).

13 Jennifer Yang, Evan C McCuish and Raymond R Corrado "Foster care beyond placement: Offending outcomes in emerging adulthood" (2017) 53 JCL 46 at 47.

14 Carolyn Henwood and others *Rangatahi Māori and Youth Justice: Oranga Rangatahi* (The Law Foundation, September 2018) at 25, citing Ian Lambie *Youth justice secure residences: A report on the international evidence to guide best practice and service delivery* (Ministry of Social Development, May 2016).

15 Sector Group *Justice Sector Population Report* (Ministry of Justice, 2018) at 40 and 52.

16 At 13.

wonder that 17% of all prisoners and 13% of all people serving a community-based sentence had a care and protection event by the time they were 17.[17] It is even worse for young offenders in prison. More than four out of five prisoners under the age of 20 have been in state care.[18] And the resulting negative impacts are disproportionately felt by Māori who make up two-thirds of children and young people in state care.[19]

These statistics show that the state care system, at least historically, has failed those it was designed to protect. The dissolution of Child, Youth and Family and the establishment of Oranga Tamariki acknowledged this. Nevertheless, Family Court Judges see desperate and dangerous care-and-protection cases every day. They are often left with no choice but to place children and young people into the custody of the Chief Executive of Oranga Tamariki.

Yet, offending patterns amongst children and young people with a history of state care appear to be chronic and persistent into adulthood.[20]

It is said that most criminals are made, not born. Many of the children who first come to the state's attention do so in the Family Court. Children who are brought up in the most disturbing circumstances become the potential offenders of tomorrow. The sad fact is that some are effectively in the Family Court even before they are born.

Putting the Cart before the Horse?

Historically, there has been a greater emphasis on 'fixing' our criminal justice system than any other part of the justice system. While this should undoubtedly form part of our society's

17 At 32.
18 Henwood and others, above n 14, at 82.
19 Children's Commissioner, above n 11, at 35.
20 Peter Gluckman and Ian Lambie *It's never too early, it's never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, June 2018) at 17.

response to disadvantage, I would argue that it should *not* take centre stage. The brutal reality is that by the time someone appears in our criminal courts, weighed down and damaged by years of disadvantage and hardship, there is only so much that our Judges can do.

That is not to say there is no hope, because there is. It is only to say that by that stage, the road to recovery and rehabilitation is considerably more arduous. Accordingly, we need to be focusing our resources on the genesis of the problems; targeting disadvantage at its source before its effects become entrenched. In our justice system, that change should start in the Family Court, particularly where it interacts with the state care system.

It is clear from the statistics that the most pressing need for action relates to Māori children and young people in care and protection proceedings, or in state care. The origins of the Oranga Tamariki Act lie in a 1988 report by the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare titled *Pūao-Te-Ata-Tū* ("daybreak"). The Committee recommended that Māori values, culture and beliefs be incorporated into future welfare policies, and regard be given to the desirability of Māori children remaining within their whānau, hapū and iwi.[21] Commenting on the disadvantage faced by Māori, the Committee noted, rather boldly for that time:[22]

> There is no doubt that the young people who come to the attention of the Police and the Department of Social Welfare invariably bring with them histories of substandard housing, health deficiencies, abysmal education records, and an inability to break out of the ranks of the unemployed. It is no exaggeration to say, as we do in our report that in many ways the picture we have received is one of crisis proportions. To redress the imbalances will require concerted action from all agencies involved — central and local government, the business community, Māoridom and the community at large. We make recommendations for a

[21] Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare *Pūao-Te-Ata-Tū* (Department of Social Welfare, September 1988) at 9–11.

[22] At 8.

> comprehensive approach accordingly. Our problems of cultural imperialism, deprivation and alienation mean that we cannot afford to wait longer. The problem is with us here and now.

That report resulted in enactment of what is today known as the Oranga Tamariki Act.[23] Thirty years on from the Advisory Committee's report, we still see chronic disadvantage amongst Māori. Coincidentally, we are also on the brink of upcoming legislative reform.

From next July, the Oranga Tamariki Act will include the tikanga Māori concepts of mana tamaiti, whakapapa and whanaungatanga.[24] It will establish as principles the need to consider these concepts at the heart of any decision made in respect of a child or young person, as well as the need to take a holistic approach in any decision-making.[25] And it will impose duties on the Chief Executive in respect of Te Tiriti o Waitangi. This includes ensuring that the policies, practices and services of the department have regard to these concepts and the whanaungatanga responsibilities of the child or young person's whānau, hapū, and iwi.[26] The Act will augment the role that a child or young person's whānau, hapū, and iwi have to play in their care and protection.

In light of this, it is crucial that all our Judges are culturally competent. This includes the ability to understand the key tikanga Māori concepts that will come into force next year, as well as ongoing education on tikanga and te reo Māori. Our Judges will need to be able to both understand the disadvantage that those children and young persons who come into the Court have faced, as well as recognise how their whānau, hapū, and iwi can be part of the solution.

---

23 The Oranga Tamariki Act 1989 was initially enacted as the Children, Young Persons, and Their Families Act 1989. This name was changed on 14 July 2017 and the Act can now be referred to as either the Children's and Young People's Well-being Act 1989 or the Oranga Tamariki Act 1989.

24 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 7.

25 Section 11.

26 Section 14.

In order to draw from the mana of a child or young person's whānau, hapū, and iwi, the Family Court will need to make greater use of cultural reports[27] and lay advocates,[28] both of which assist in providing Judges with pertinent information, and inform the most suitable solution.

Additionally, ensuring whānau and social worker engagement at Family Group Conferences[29] and Mediation Conferences[30] will help the Court to craft a plan that is in the best interests of the child or young person.

Utilising iwi capabilities, where available, may equally provide alternatives to traditional state care. This of course will depend on iwi resources. However greater iwi involvement in the justice system is to be encouraged.

It is heartening that the Children's Commissioner, earlier this month, released a report discussing the upcoming changes to the Oranga Tamariki Act, with a particular focus on the Chief Executive's obligations.[31] The Commissioner advocated for a kaupapa Māori approach to state care, arguing that the upcoming law reform will bring with it the opportunity to partner with hapū and iwi to transform the outcomes of tamariki Māori and whānau.[32] I agree entirely. Given the over-representation of Māori in the state care system, it is time to acknowledge that we need to address the issue in a different way; with hapū and iwi taking the lead.

These changes to the law will also require Family Court Judges to rethink the way some things are done in the Court. For example, Judges will have to reflect on the appropriateness of permanent custody orders, as opposed to interim custody orders with periodic review. In fact,

27 Oranga Tamariki Act 1989, s 187.
28 Section 163.
29 Section 137.
30 Section 170.
31 Children's Commissioner, above n 11.
32 At 35.

Judges will need to give thought to whether or not care options, other than those involving whānau, hapū and iwi, comply with the amended principles of the Act.

Finally, there is a case for changing the way in which care and protection matters are considered by Family Court Judges. Currently, some reviews are done in Chambers, on the papers. It is rare for Judges to have family and whānau in the courtroom. This is because the final decision comes after the mandatory Family Group Conference where all parties are present. However, if we are to stay true to the Act's expanded principles, it may be that care and protection reviews simply need to be done kanohi ki te kanohi — face to face. This would give whānau, hapū or iwi a greater opportunity to be heard; something which carries immense cultural and moral value.

What is clear to Family Court Judges is that state care can have disastrous implications on a child or young person's development, and can greatly increase the risk of future offending.

The Criminal Courts

State care is not the only marker for entry into the criminal justice system.

In the criminal courts, our Youth and District Court Judges see a plethora of disadvantage every day including poverty, homelessness, family and sexual violence, family gang affiliations, addiction, and mental health issues. Those appearing in our criminal courts are frequently presenting with a complex range of issues underlying their offending.

Turning first to family violence, a recent review of around 16,000 young offenders in New Zealand found that 80% of offenders under the age of 17 had experienced violence at home.[33]

33 Gluckman and Lambie, above n 20, at 18.

In fact in 2016/17, nearly nine out of ten offenders aged 14 to 16 had had one or more prior care and protection reports made to Oranga Tamariki.[34]

In 80% of Police call-outs to family violence incidents, a child is present in the home. Tens of thousands of children in New Zealand are growing up in a climate of violence. And violence in one generation is positively correlated to violence in the next: 77% of all adults in the criminal justice system have been victims of family violence;[35] and almost half of all prisoners have experienced family violence as a child.[36] In our criminal courts, it is clear that violence breeds violence; it sets up those who are abused to become future abusers.

Equally as prevalent is substance abuse and addiction. A staggering two-thirds of young people in youth justice residences meet the criteria for a substance abuse disorder.[37] Even more are reported to be heavy drinkers.[38] These figures are worse for Māori who, on average, start using alcohol and drugs from an earlier age.[39]

Substance abuse is a major driver of crime. It is estimated that nine out of ten prisoners have a substance abuse disorder.[40] Like violence, substance abuse and addiction are a common marker of disadvantage in cases before our Judges.

Then there are mental health issues. Between 50% and 75% of youth involved in the justice system meet diagnostic criteria for at least one mental health disorder.[41] Those in youth justice

---

34 Ministry of Justice *Youth Justice Indicators Summary Report* (April 2018) at 16.

35 Peter Gluckman and 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 15.

36 At 17.

37 Children's Commissioner, above n 11, at 18, citing Sean McArdle and Ian Lambie *The needs profile of youth in secure facilities using the MAYSI-2* (University of Auckland, Auckland, 2015).

38 Gluckman and Lambie, above n 20, at 23 (79%) citing Jill Bowman "Lessons from research into youth desistance" (April 2015) Department of Corrections <www.corrections.govt.nz>.

39 K McClintock and others *Māori Rangatahi and Addictions: Review of Key Issues* (Te Rau Matatini, 2015) at 5.

40 Roger Brooking "Substance abuse affects 90% of prison inmates. Why are they being fobbed off with unqualified addiction counsellors?" (16 February 2017) The Spinoff <www.thespinoff.co.nz>; see also Gluckman and Lambie, above n 35, at 16.

41 Gluckman and Lambie, above n 20, at 18.

residences are 10 times more likely to have a mental health disorder than youth generally.[42] As a recent study concluded — rather chillingly — in New Zealand youth-justice residences, "some form of psychological need was the rule rather than the exception."[43]

The pattern repeats in the adult jurisdiction. More than a third of offenders have a mental illness,[44] while nine out of ten prisoners have a diagnosable lifetime mental illness disorder.[45] This is more than twice the rate measured in the general population.[46]

Meanwhile, science is teaching us more about other forms of mental impairment underlying offending. Our criminal courts are increasingly faced with offenders who have what Principal Youth Court Judge John Walker has called a "cocktail of disabilities",[47] that is, neurodisabilities. This form of disadvantage is not always obvious and the conditions are often referred to as 'hidden disabilities'.[48]

Neurodisabilities include intellectual disabilities, learning disabilities, communication difficulties, ADHD, autism, traumatic brain injury,[49] epilepsy and foetal alcohol spectrum

---

42 At 18, citing Emily Hurren, Anna Stewart and Susan Dennison "Transitions and turning points revisited: A replication to explore child maltreatment and youth offending links within and across Australian cohorts" (2017) 65 Child Abuse and Neglect 24.

43 Sean McArdle and Ian Lambie "Screening for mental health needs of New Zealand Youth in secure care facilities using the MAYSI-2" (2018) 28 Criminal Behaviour and Mental Health 239 at 246.

44 Mike Wesley-Smith "Mental illness in NZ: Court 'last point before total despair'" (22 April 2017) Newshub <www.newshub.co.nz>.

45 Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Department of Corrections, June 2016) at 8–9.

46 At 8–9.

47 Meghan Lawrence "'Cocktail of disabilities': Judges to develop new model for youth offenders" *New Zealand Herald* (online ed, Auckland, 16 August 2018), citing a press release by the Chief District Court Judge and Principal Youth Court Judge: see Jan-Marie Doogue and John Walker "District Court responds to high incidence of disabilities" (press release, 16 August 2018).

48 Centre for Innovative Justice and Jesuit Social Services *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (RMIT University, September 2017) at 9.

49 Accident Compensation Corporation (ACC) defines a TBI as "an alteration in brain function, or other evidence of brain pathology, caused by an external force that disrupts the function of the brain" which could be "caused by a blow, shake or jolt to the head or body or a penetrating injury": see ACC *Traumatic Brain Injury Strategy and Action Plan (2017–2021)* (September 2017) at 1.

disorder.[50] Although research on neurodisability is not new, it has not yet been developed at a local level.[51]

In 2012, the Children's Commissioner for England reported that neurodisabilities were over-represented in the youth offender population.[52] For instance, youth offenders in the UK are ten times more likely to have a learning disability than young people generally; 60 to 90% of them have a communication disorder; and around 11% have foetal alcohol spectrum disorder.

The prevalence of neurodisabilities is equally high amongst adult offenders: 95% of female prisoners, and almost half of all prisoners have a traumatic brain injury, and as many as 70% of prisoners have significant literacy problems, a strong marker of future criminal offending.[53]

The high prevalence of traumatic brain injury and foetal alcohol spectrum disorder is of particular concern to Judges. They can cause a person to experience a range of cognitive impairments and socially challenging behaviours, including poor memory and concentration, reduced ability to plan and problem solve, lack of consequential decision-making and a reduced capacity to regulate emotions.

Consider then the defendant who repeatedly does what they are told not to do, such as breach bail conditions or a protection order, and does not understand the implications of their actions. The defendant who appears sullen and non-cooperative, because they feel — and indeed are — dislocated from the process happening around them. These neurodisabilities will negatively impact on their fate in the criminal justice system which is, after all, a system that demands compliance with rules and processes.

---

50 Nessa Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (Dyslexia Foundation, May 2016) at 5.

51 In 2016, the former Principal Youth Court Judge Andrew Becroft went so far as to state that neurodisabilities have been "largely invisible" in the Youth Court for the last 25 years, and their prevalence and implications for the youth justice sector were only now just beginning to be understood: see Lynch, above n 50, at 8.

52 Nathan Hughes and others *Nobody made the connection: The prevalence of neurodisability in young people who offend* (Office of the Children's Commissioner, October 2012) at 23.

53 Gluckman and Lambie, above n 35, at 16.

Particularly worrying is the fact that the disadvantage I have spoken of disproportionately affects Māori. In 2016, Māori accounted for two-thirds of young people appearing in the Youth Court.[54] When the prison muster reached a record high of 10,645 earlier this year,[55] half of those inmates identified as Māori, despite Māori comprising only 15% of the general population.[56] This figure is around 60% in respect of female prisoners. Overall, Māori are six times more likely to be imprisoned than non-Māori.[57]

And consider this. The female prison population, generally, has been increasing at almost three times the rate for men in the last five years.[58] It is estimated the vast majority of our female prisoners are mothers.[59] Therefore, most New Zealand children who have a mother in prison are Māori. And we know that a child with a parent in prison is 10 times more likely to end up in prison themselves.[60] The dots are lining up.

Māori also disproportionately feature throughout the criminal justice system, not only in prisons.[61] Recent data shows Māori account for 42% of all criminal proceedings,[62] and 41% of convictions.[63] The statistics are paralleled by the high number of Māori as victims of crime.[64] The Māori reoffending rate is also disproportionately high. The current reimprisonment rate

---

54 John Walker, Principal Youth Court Judge "When the Vulnerable Offend — Whose Fault is it?" (Address to the Northern Territory Council of Social Services Conference, Darwin, 27 September 2017) at 4.

55 Department of Corrections "Prison facts and statistics – March 2018" (31 March 2018) Department of Corrections <www.corrections.govt.nz>. This was a rate of 219 prisoners per 100,000 citizens based on the prison population of 10,645 and an estimated population of 4,871,300 (provided by Stats NZ). Both of these figures were published on 31 March 2018.

56 Department of Corrections, above n 55.

57 See 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) at 4; and Jarrod Gilbert "Māori incarceration rates are an issue for us all" *New Zealand Herald* (online ed, Auckland, 27 April 2016).

58 "Why are more New Zealand women going to jail?" (26 February 2018) Stuff <www.stuff.co.nz>.

59 Social Policy Evaluation and Research Unit *Improving outcomes for children with a parent in prison* (June 2015) at 2.

60 Gluckman and Lambie, above n 20, at 8.

61 Eleanor Brittain and Keith Tuffin "Ko tēhea te ara tika? A discourse analysis of Māori experience in the criminal justice system" (2017) 46(2) New Zealand Journal of Psychology 99 at 99.

62 New Zealand Police "Proceedings (offender demographics)" (29 June 2018) New Zealand Police <www.police.govt.nz>.

63 Ministry of Justice "Data Tables" (1 July 2018) Ministry of Justice <www.justice.govt.nz>.

64 At 100.

for Māori, within 12 months of release, is 37%, compared to 25% for non-Māori.[65] Within two years of release, the reimprisonment rate gets worse for Māori while the disparity with non-Māori continues.[66] As the Waitangi Tribunal noted in a recent report, "whatever measures were presented, the rates for Māori were invariably worse."[67]

For most New Zealanders, having any contact with the criminal justice system is rare. Sadly, for some communities and families, it is a normal part of life.

These figures speak to a long history of inter-generational disadvantage suffered by Māori. It has been 15 years since the late historian Michael King wrote of the cycle of disadvantage, exacerbated by urbanisation of Māori in the 1950s. Māori as a group were younger, less skilled, and paid considerably less than Pākehā. King observed:[68]

> All these factors combined to make Māori more vulnerable as a group than Pākehā when wool prices fell a decade later and ended full employment. They created a cycle of circumstance that was self-reinforcing and difficult to break: lower standards of educational attainment led to lower-income jobs or unemployment, which led to lower standards of housing and health, which led to higher rates of crime, which led back to lower educational attainment, and so on.

Today, I believe there is a growing acknowledgement of the shameful story behind the statistics; of the toll colonisation has taken on Māori. The figures I spoke of are finally focusing minds. A consensus appears to be building on finding alternative approaches to prisons, famously described as "a moral and fiscal failure".[69] The recently-convened Criminal Justice Summit is an example of this more progressive, collaborative thinking.

---

65 Department of Corrections *Briefing to the Incoming Minister* (October 2017) at 17.

66 Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 8.

67 At 8.

68 Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 476–477.

69 "Prisons: 'moral and fiscal failure?'" *Otago Daily Times* (online ed, Dunedin, 24 May 2011).

As Judges who see the cycle of disadvantage on a daily basis, applying the law and dispensing justice can be a disenchanting exercise in déjà vu. Time for a reset is long, long overdue.

Responding to the Disadvantage

It is no surprise then that the most pressing need to address disadvantage in our criminal courts relates to Māori over-representation in the criminal justice system. As in the Family Court, this places an obligation on our Judges to be culturally competent. In the criminal jurisdiction, this also requires Judges to be receptive to the relevance of cultural information about the defendant presented in pre-sentence reports.[70] And where it has not been presented already, counsel need to be more aware of s 27 of the Sentencing Act 2002 and the option of calling a cultural speaker to address the Court on behalf of the defendant about relevant cultural considerations at sentencing.

Cultural information may be relevant in two ways: it may mitigate the defendant's culpability; or it may impact on the relevance of a sentence. Cultural information also assists in "dimensionalising" the defendant.[71] It gives the Court necessary information to piece together a greater sense of who the defendant is, and particularly whether that person's conflict with the law is driven by systemic disadvantage.

Additionally, at the time of sentencing, judicial cultural competence may extend to acknowledging the suitability of Māori solutions to Māori offending. For example, when

70 Sentencing Act 2002, s 26(2)(a).
71 This is a term coined by Justice Joe Williams.

imposing a sentence of supervision or intensive supervision, a Court may also impose special conditions related to attending certain types of programme.[72] A programme includes placement in the care of any appropriate person or agency approved by the Chief Executive of Corrections, including whānau, hapū, iwi or marae.[73]

This rehabilitative sentencing option seeks to place the offender into a community environment with positive influences. It also acknowledges the strength and resourcefulness of te taha Māori (the Māori identity). Of course, such an option relies on adequate hapū and iwi resources and capability. Given the over-representation of Māori in our criminal courtrooms, it is imperative that the District Court works with hapū and iwi however it can, to assist in increasing the community's capacity to provide supplementary alternative sentencing options.

Another of our criminal courts' priorities is the treatment of young adult offenders between the ages of 18 and approximately 25. The Youth Court has already evolved into a solution-focused court, with five different Government agencies represented in the courtroom in most of our larger courts.[74] Solution-focused courts provide a non-adversarial, co-ordinated and multi-disciplinary response to offending. This approach has proven to be effective for mitigating the risk of reoffending.

However, when a person turns 17, they enter the District Court where this wrap-around approach does not exist.[75] They are treated like fully competent adults and are expected to understand the court process. Yet these young people continue to carry the disabilities they may have had since childhood, together with those they may have gathered along the way.

---

72 Sentencing Act 2002, ss 50 and 54G.
73 Sections 51 and 54H.
74 These are the Ministry of Justice New Zealand, the New Zealand Police, Oranga Tamariki, the Ministry of Health and the Ministry of Education.
75 For the Youth Court's jurisdiction, see s 272 of the Oranga Tamariki Act 1989.

Disabilities that do not have an expiry date; that do not simply disappear when a person turns 17.

Research shows that young people — up to their mid-twenties — have demonstrably different brain architecture than adults.[76] Adolescents are more impulsive, short-sighted, responsive to immediate rewards and less likely to consider long-term consequences. While basic intellectual abilities reach adult levels around the age of 16, this is long before the process of psycho-social maturation is complete.[77] This occurs around the age of 25 — later for some people — and may be delayed by alcohol and other drugs, mental illness, neurodisabilities and other trauma.

Cognitive and emotional underdevelopment significantly impacts on young adult crime. In 2017, one-third of all people convicted were aged 17-24.[78] This group accounts for around 17% of the prison population,[79] and up to 40% of all criminal justice apprehensions.[80] Although research shows that at least one-third of young people aged 14-18 will engage in some form of serious criminal behaviour, at least half will "age out" of this behaviour by the time they are 23.[81] However, imprisonment significantly limits a young person's ability to do this naturally.[82]

If we are to truly seek to stamp out recidivism amongst young adult offenders, we must first acknowledge that their actions and decisions may be mitigated by their lack of maturity. Sanctioning them like fully mature adults could have life-long consequences that do more harm

---

76 Elise White and Kim Dalve *Changing the Frame: Practitioner Knowledge, Perceptions, and Practice in New York City's Young Adult Courts* (Center for Court Innovation, December 2017) at 2; see generally Kathryn Monahan, Laurence Steinberg and Alex R Piquero "Juvenile Justice Policy and Practice: A Developmental Perspective" (2015) 44(1) Crime and Justice 577.

77 Laurence Steinberg "A Social Neuroscience Perspective on Adolescent Risk-Taking" (2008) 28(1) Developmental Review 78 at 93.

78 Ministry of Justice "Adult Conviction and Sentencing Statistics" (30 June 2017) Ministry of Justice <www.justice.govt.nz>.

79 Department of Corrections "Prison facts and statistics – March 2018" (31 March 2018) Department of Corrections <www.corrections.govt.nz>.

80 Gluckman and Lambie, above n 20, at 11.

81 Ian Lambie and Isabel Randell "The impact of incarceration on juvenile offenders" (2013) 33(3) Clinical Psychology Review 448 at 451; see also Department of Corrections *Briefing to the Incoming Minister* (October 2017) at 7.

82 Lambie and Randell, above n 81, at 451.

than good — to them and our communities. The evidence around this needs to be reflected in court procedures.

Procedural fairness leads to defendants having: a better understanding of court processes; opportunities to express their voice; a sense that decisions are made by impartial arbiters; and a feeling that regardless of the outcome, they have been shown respect.[83] Adopting an approach that is more cautious and treats all people as though they could be vulnerable in their interaction with the criminal justice system is likely to benefit everyone.

This "universal vulnerability" approach can be as simple as using plain language, open-ended questions, and asking people to repeat back information in their own words. This approach zeroes in on what is important in the interaction; whether the communication is effective, understood and, therefore, fair.

An approach that better deals with disadvantage also requires giving District Court Judges the same range of tools available to the Youth Court when dealing with young adults. Numerous overseas jurisdictions are already doing this.[84]

If our Judges can make a difference in the life-course trajectories of this group through the sort of wrap-around services we see in the Youth Court, and by using appropriate processes already available to us, there is every chance fewer will go on to become recidivist offenders.

In an ideal world, all courts such as ours would provide wrap-around services and shift from solely decision-making to include solution-finding. This is precisely what our specialist courts do. Courts like the Matariki and Rangatahi Courts address the underlying causes of Māori

---

83 Jo Thomas, Claire Ey and Ben Estep *A fairer way: Procedural fairness for young adults at court* (Centre for Justice Innovation, April 2018) at 7.

84 See generally Sibella Matthews, Vincent Schiraldi & Lael Chester "Youth Justice in Europe: Experience of Germany, the Netherlands, and Croatia in Providing Developmentally Appropriate Responses to Emerging Adults in the Criminal Justice System" (2018) Justice Evaluation Journal 1; and also The Council of State Governments Justice Center *Reducing Recidivism and Improving Other Outcomes for Young Adults in the Juvenile and Adult Criminal Justice Systems* (2015).

offending; Pasifika Courts do the same in respect of Pasifika offenders; the Alcohol and Other Drug Treatment Court aims to address offenders' substance abuse and addiction issues driving offending; and in the Special Circumstances Court and the Court of New Beginnings, offenders are provided with services to address their homelessness. Imagine if these courts did not exist in isolation, but rather their holistic, solution-focused approach were integrated across all of our courts.

Of course, to be holistic, we also have to be truly mindful and responsive to the needs of victims. We have been told for a long time that the criminal justice system ignores, disrespects and even retraumatises victims; that it treats them merely as evidence. Legally-trained people have no difficulty understanding that court processes are designed to impartially consider and test evidence in proceedings brought by the state on behalf of the community. The criminal justice system does not callously set out to side-line victims, but unfortunately, that is how it often feels to victims. We are beginning to better appreciate how the system's processes are good for testing evidence and protecting fair trial rights, but struggle to accommodate the needs of victims.

My response to this is that in the District Court we are striving to be more mindful of victims, without compromising the integrity of our impartial system and the presumption of innocence. If handled carefully, the two need not be mutually exclusive. For instance, the Sexual Violence Pilot Court is demonstrating how judicially-led improved case management and best trial practice can make court processes gentler on everyone involved. However, recognising the underlying causes of offending and the central part played by entrenched disadvantage, and adapting our processes accordingly, holds the promise of the real prize for victims and indeed for all New Zealanders.

Back to the Beginning

This takes me back to the beginning — to the Family Court and those families in crisis; those children and young people at risk of harm. We all stand to lose when state intervention in those families merely leads the vulnerable to offend. Or as a veteran court reporter recently described it:[85]

> It's one thing to hear about the effects of abuse and neglect on a child. It's another to see it manifested in a sad, angry, and lost human being standing before you.

To underscore my point, of the 17–19-year-olds in custody, 83% have been in state care.[86] In the vast majority of cases, those children and young people were placed into state care not because of their own behaviour, but because of fears for their safety. Their subsequent offending is not necessarily innate. Rather, these figures imply that the system designed to protect these children and young people in the short run, is doing the opposite in the long run.

Given these depressingly familiar patterns, more investment in the Family Court's care and protection work is warranted. The Ministerial Advisory Committee's words I spoke of earlier apply as much today as they did in 1988. Family Court Judges see the deprivation and disadvantage leading up to, and resulting from, state care. We do not want to be here in another 30 years, staring at the consequences of another generation of disadvantage — yet more sad, angry, and lost human beings.

Our primary focus needs to be on the feeders of the criminal justice system, where the effects of disadvantage begin to take hold.

If the District Court and its Judges are to effectively engage in social justice, we cannot do it alone. It will require resources to be allocated strategically across whole of Government to

---

85 Marty Sharpe "It's not the justice system that's broken, it's the people" (3 September 2018) Stuff <www.stuff.co.nz>.

86 Henwood and others, above n 14, at 82.

ensure they have a greater impact on the people who come to court. There is an opportunity to drastically improve outcomes for these people if we invest in early, more effective intervention. Given the cyclical nature of disadvantage, this has potential to affect generational change; to decrease the risk of the 'the system' producing and reproducing future offenders.

I am the first to admit that it would require a Rolls Royce funding model to completely transform our justice system. During my time as Chief Judge, I have tried to stretch our judicial resource to places it unfortunately cannot reach. Remedying that is beyond my control but in the District Court, where we get a clear view of the precarious landscape that is the justice system, the corrosive, long-lasting and cyclical influence of disadvantage is now irrefutable.

The District Court's response which I have outlined today tries to go some way in addressing disadvantage. Cultural competence amongst our Judges; constructively adapting to the upcoming amendments to our care and protection legislation; making greater use of cultural information in respect of children and young people as well as at sentencing; making greater use of whānau, hapū and iwi alternatives to state care and imprisonment as well as solution-focused principles when dealing with young adult offenders; and having a better appreciation of neurodisabilities are all part of this response.

Conclusion

People who appear in the District Court are often in crisis. Their families are in crisis; the victims of their offending are in crisis; and their loved ones are in crisis. They should be able to look to the Court for understanding, empathy and insight. For the Court to make life-changing decisions about these people, it should be first attempting to cut through the isolation, hostility and alienation; it should recognise disadvantage and try to understand its influence on those who offend.

The court system needs processes that offer hope to people who may well be at their lowest points; hope that things which have gone so disastrously wrong will start to come right, no matter how long and arduous the journey toward restoration and rehabilitation.

In the District Court, Judges are uniquely placed to witness the life cycle of family and social breakdown. We cannot genuinely uphold the role of wise adjudicator and decision-maker without having processes that address the growing evidence of the underlying causes of offending. We especially cannot close our eyes and ears merely because it would be inconvenient to justice system timelines and targets.

The District Court may have a unique long-range vantage point, but we do not pretend we can address this challenge alone. The repeating cycles of disadvantage evident in the District Court may be simultaneously showing up right across New Zealand society in different settings: in our schools, hospitals, workplaces, and welfare agencies. All parts of our communities that intersect with the lives of those spiralling toward conflict with the law have opportunities to intervene. What our specialist courts have demonstrated is that when these groups work together to find solutions and alternatives to traditional responses, then reform and rehabilitation become more than a forlorn hope.

Of course, none of this diminishes our paramount role as Judges to interpret and apply the law impartially. Knowledge is the soundest foundation on which to make decisions, and the holistic approach I have outlined enriches that knowledge. It breathes humanity and vibrancy into the written law. By transforming our court processes to better account for the many complex needs of the diverse people of Aotearoa, we honour the pursuit of justice and all those we serve in the people's court that is the District Court of New Zealand.

And we honour the memory of Ethel Benjamin.

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