Calls For Transformative Change and the District Court Response

By Chief Judge Heemi Taumaunu*

… mai te pō ki te ao mārama …
… the transition from night to the enlightened world …

I. Introduction

E aku nui, e aku rahi, e aku whakatamarahi ki te rangi, tēnā koutou katoa.

Towards the end of the 19th century, in the later years of his life, after he had experienced arrest without charge, imprisonment, armed conflict with the Crown, an official pardon and the formation of the Ringatū religion, Te Kōti-Arikirangi uttered these famous expressions:

Ko te waka hei hoehoenga mā koutou hei muri i au, ko te ture.
Mā te ture anō te ture e aki –
The canoe for you to paddle after me is the law.
Only the law can be set against the law.

He also said:[1]

Ka kuhu au ki te ture, hei matua mō te pani –
I seek refuge in the law as a parent for the oppressed.

These powerful words continue to resonate and provide a relevant historical context for the modern-day vision of the District Court. That vision is simply expressed. The District Court should

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* His Honour Judge Heemi Taumaunu was appointed Chief District Court Judge in September 2019, and leads a bench of 172 permanent judges, 39 acting warranted judges, and 18 community magistrates. Born in Gisborne, he is the first Māori to be appointed to the role and is a fluent te reo Māori speaker. His tribal affiliations are Ngāti Pōrou, Ngāti Konohi, and Ngāi Tahu.

He was appointed a District Court Judge in 2004 after practising law mainly in Gisborne and a previous career in the New Zealand Army. He studied law at Victoria University, where he was awarded the Quentin Baxter Memorial Scholarship and the Ngā Rangatahi Toa Scholarship. As a barrister, he gained experience as counsel in jury trials, as a Youth Advocate in the Youth Court and as a lawyer for child and counsel to assist in the Family Court.

Through various leadership roles in the District Court, Judge Taumaunu has encouraged a wider appreciation for the value of culturally responsive justice. He led development of the Rangatahi Courts, and his leadership was recognised internationally in 2017 when he received the Veillard-Cybulski Award.

Chief Judge Taumaunu has also served as a Judge of the Court Martial of New Zealand since 2012, and currently serves as the Deputy Judge Advocate General and Deputy Chief Judge of the Court Martial of New Zealand.

1 Judith Binney *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Bridget Williams Books, Wellington, 2016) at 337.

be a place where all people can come to seek justice, no matter what their means or ability and regardless of their culture or ethnicity, who they are or where they are from.

The title of this address touches on three related topics. The first topic concerns a Māori worldview about Te Ao Mārama that has helped to shape this vision for the District Court. The second topic touches on the multiple calls for transformative change that have been directed towards our Court. The third topic relates to the District Court response in terms of what we have done so far and what we propose to do in the future. In this regard, I intend to discuss the District Court generally and I also intend to specifically address the Hamilton District Court and the Alcohol and Other Drug Treatment (AODT) Court that is to be established there in 2021.

In doing so, I make it clear that the pathway forward is one that is intended to include all New Zealanders who are affected by the business of our Court. It is a pathway that will respect the independence of judicial officers who will continue to decide cases on their individual merits. Our ultimate intention will be to ensure to the maximum extent possible that the best available information is presented to our judges and other triers of fact to assist them to make well-informed decisions about the people who appear before them.

These remarks are framed within the applicable constitutional framework. Criminal justice policy and legislation reform in the criminal justice system are matters for the executive and the legislature. Examples that come to mind are the legislation that established the Youth Court in 1989 and in more recent times the Government funding that has been allocated for specialist services to support the AODT Court.

As Chief District Court Judge I have a statutory responsibility to ensure the orderly and efficient conduct of the business of the Court. This includes duties around rostering of judges, scheduling of work, setting standards for best practice in the District Court and to oversee and promote the professional development and education of judges. Nothing discussed in this address will necessarily require legislative change. Clearly, both the judiciary and the executive have a role to play in the important task of transforming the courts – and both branches of government have to respect the prerogatives and constitutional boundaries of the other. I look forward to working in an appropriate and careful partnership with the executive – both Ministers and officials – as this important work continues to be progressed.

II. The "Te Ao Mārama Model"

The District Court response to the calls for transformative change has been shaped by reference to the concept of Te Ao Mārama (which means "the world of light" or, for the purposes of this address "the enlightened world"). The title of this address, "Mai te pō ki te ao mārama", literally means "from the night to the world of light (the enlightened world)". This concept draws on several different Māori worldview threads including the well-known expression:

Ka pō, ka pō, ka ao, ka awatea.
Tīhei mauri ora ki te whei ao!
Tīhei mauri ora ki te ao mārama!
The first rays of dawn herald the transition from night to day.
Behold it is the living environment!
Behold it is the world of light!

The expression "… mai te pō ki te ao mārama …" is also a reference to the Māori creation myth. In the beginning of creation, Ranginui, the Sky Father and Papatuanuku, the Earth Mother, were bound together in an eternal embrace. A state of perpetual and intense darkness ("te pō") existed in the space between the two parents. The children of Ranginui and Papatuanuku lived in that space. In that state of perpetual darkness the children were unable to fulfil their potential. Tane Mahuta, the god of the forest, eventually separated his parents by pushing them apart. This created the world of light ("te ao mārama") and allowed the children to move "mai te pō ki te ao mārama", from the darkness to the enlightened world. The children then commenced their tasks creating forests, oceans, fish, animals, and people.[2]

Although the general theme of moving from "the darkness of night to the world of light (or to the enlightened world)" is a universal and easy to understand pan-cultural concept, the theme provides a relevant Māori cultural lens that can be used to consider the past, present and future development for all people and cultures of our nation, Aotearoa New Zealand, and more particularly for the purposes of this address, the future direction of the District Court of New Zealand.

When my paternal great, great, great grandfather, Rangiuia, signed the Treaty of Waitangi at Tolaga Bay in May 1840, I do not know exactly what his thoughts were at the time. On an objective assessment, the promises exchanged between the parties to the Treaty, at least on their face, created a vision of hope for the future. On one view of it, the Treaty imagined the creation of an enlightened world, te ao mārama, where Māori and Pākehā could live peacefully alongside one another and both parties could have opportunities to prosper.

When Tūta Nihoniho, one of the leading chiefs of my tribe, Ngāti Pōrou, composed his famous haka, Te Kiringutu, in the 1870s, he was furious that large tracts of Māori land were being sold to Pākehā settlers and he was concerned about the future problems this would cause for Māori people. The haka begins with the opening verse:

Pō ngā rā, i pō ngā rā
Ka tataki mai te whare o ngā ture
Ka whiria
Te Māori, ka whiria rā
Ngau nei ōnā tāke
Ngau nei ōnā reiti, āhaha
Te taea te ueue! …

A shadow (the law) has descended upon the land
This has been caused by the chattering in Parliament (the house that makes the laws)
The Māori people have been bound and tied down by the law
They have been bitten by taxes and rates
Alas, there is no escape! …

By the time my maternal great, great, great grandfather, Te Maiharoa, had reached an advanced stage in life in the mid-1870s, he had been deeply affected by two decades of Māori land grievances and perceived injustice. He was a prominent Ngāi Tahu tohunga and rangatira and lived in Arowhenua,

2 See: B Mikaere *Te Maiharoa and the Promised Land* (Heinemann Publishers, Auckland, 1988) at 69.

a village located just south of Temuka. In 1877, when he was 77 years old, Te Maiharoa led more than 100 of his followers on a migration from Arowhenua to Te Ao Mārama.

Te Ao Mārama is located in the MacKenzie Basin and is now known by the name Omarama. Te Maiharoa and his followers peacefully occupied the land and lived in accordance with Māori custom and protocol for two years. This was the version of the enlightened world that he envisaged for his people. Eventually Te Maiharoa and his followers were arrested and thrown off the land.

When my Hopkinson, Sherborne, and Ferguson ancestors travelled to this country in the 1800s they were seeking a better life for themselves and their families. They settled in the South Island and at various times married my Ngāi Tahu ancestors. They came from England and Scotland and in similar fashion were in pursuit of a more enlightened world. The search for a more enlightened world, te ao mārama, has been a consistent theme throughout successive generations, from the time of Kupe's first voyage of discovery from the mythical Hawaiki to Aotearoa New Zealand, through until the present-day arrival of immigrants from the many and diverse cultures seeking a new life in our country.

I suggest that the calls for transformative change as they relate to the District Court could be translated as a concerted call to move towards a more enlightened world, to move towards te ao mārama, not just for Māori, but for all people of all ethnicities and from all cultures who are affected by the business of our Court. This is because modern day Aotearoa New Zealand is a multi-cultural and vibrant society with two founding cultures bound together by the principle of partnership based on the Treaty of Waitangi. In modern thinking, the vision of hope that is expressed in the Treaty relationship now extends to include all Māori and non-Māori New Zealanders regardless of culture or ethnicity. Hence the all-inclusive nature of the vision for the District Court as a place where all people can come to seek justice, no matter what their means or ability and regardless of their ethnicity or culture, who they are or where they are from.

The District Court response to the calls for transformative change will be known as the "Te Ao Mārama model". Inspired by a simple idea; in essence, the Te Ao Mārama model signals a deliberate intention on the part of the District Court to move "towards a more enlightened world" for the benefit of all people of all ethnicities and cultures who are affected by the business of our Court.

This vision and move by the District Court will, of course, still mean that offenders will be held accountable and responsible, that the Sentencing Act 2002 will continue to be applied, and that principled and lawful sentences, including imprisonment, are imposed. But we hope that this occur in an environment where more well-informed decisions can be consistently made, based on better information, with better informed participants, and better understood processes.

Thus far, I have painted a backdrop for this address which is a blend of legend and the historical record. At this point I will look more specifically at history as it affects criminal justice and the District Court. This relates in particular to the repeated calls for transformative change made over the last four decades, and – by way of response to those calls —the solution-focused approach that District Court judges have developed, most notably through a series of specialist courts.[3]

These have a direct bearing on the proposed District Court response and the Te Ao Mārama model.

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3 I am indebted to the judicial clerks (Oliver Fredrickson, Stephen Woodwark, Katherine Werry and Zahra Zavahir), and to Marie McNicholas and Renee Smith who all work in my chambers for their research and assistance in preparing this paper.

III. Calls for Transformative Change

Calls for transformative change to the justice system have been passed down through successive generations. They are not a modern phenomenon, nor just another worthy contemporary cause. They come from all corners of our society and have relevance not just for the founding cultures but also all other cultures in modern Aotearoa.

The sense of hurt and unfairness driving the calls for change is deeply felt amongst Māori. In the 19th century, these calls were primarily directed towards Māori land alienation and related issues.[4] When the Treaty of Waitangi was signed in 1840, Māori owned almost all of the land in Aotearoa New Zealand. By 1892, it was little more than a third, and a quarter of that was leased to Pākehā.[5] In the space of a generation, Māori were transformed into wage labourers with no capital base. During this period, Māori were excluded from the economic opportunities of the new colonial society and witnessed the gradual overturning of mana Māori bi-settler authority.[6]

As a result of a combination of factors including armed conflict with the Crown, resulting land confiscations and the devastating effects of disease on the Māori population, by the turn of the 20th century Māori were considered to be a dying race.[7] The Māori language was banned in schools.[8] Certain tikanga practices were banned by statute.[9] Official government policies effectively promoted the assimilation of Māori people into the dominant colonial settler culture.

In the mid-20th century, the Māori population began migrating into larger urban areas. Until this time, the rate of Māori imprisonment was generally proportionate with the Māori population percentage. However, the generation of Māori who were part of the "urban drift" became a visible and conscious minority and faced further official government policies that required Māori to assimilate into the "mainstream".[10] This urban shift, and the social and economic difficulties that followed, contributed to a dramatic increase in Māori representation in the criminal justice system. Between 1950 and 1970, the number of Māori prisoners received into prisons, relative to all prisoners, doubled.[11]

As the statistics continued in this direction, the justice system became the target for calls for transformative change. Most notable were the seminal reports *Puao-te-Ata-tu*, *He Whaipaanga Hou*, and *Te Ara Hou* drafted by John Rangihau, Dr Moana Jackson, and Sir Clinton Roper

4 See: PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011); Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011); RP Boast "The Native Land Court at Cambridge: Māori Land Alienation and the Private Sector" (2017) 25 Waikato Law Review 26.

5 Ministry of Culture and Heritage "Native Land Court" (September 2020) New Zealand History <nzhistory.govt.nz>.

6 Sir Joesph Williams, Justice of the New Zealand Supreme Court "Build a Bridge and Get Over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do About It" (Sir Robin Cooke Lecture 2019, Victoria University, Wellington, 4 December 2019).

7 Jane Stafford and Mark Williams *Maoriland: Literature 1872–1914* (Victoria University Press, Wellington, 2006) at 110.

8 Waitangi Tribunal *Report of The Waitangi on The Te Reo Māori Claim* (Wai 11, 1993) at 3.2.8.

9 See: Tohunga Suppression Act 1907.

10 Richard Hill "Māori Urban Migration and the Assertion of Indigeneity in Aotearoa/New Zealand, 1945–1975" (2012) 14:2 Interventions 256 at 257.

11 Greg Newbold *The problem of prisons: corrections reform in New Zealand since 1840* (Dunmore, Wellington, 2007) at 55–56.

respectively.[12] Although these reports were released more than 30 years ago, calls for transformative changed have continued. During this period, a persistent wave of reports, papers, and articles have continued to criticise our justice system.

Surveying this material, one can immediately see common themes in the issues raised in the 1980s and those raised today, including within reports recently commissioned by the Government. In *Ināia Tonu Nei*, released in 2019, the hui members noted that the "true essence and kōrero of these reports published more than 30 years ago have not been fully understood or accepted by those in power".[13] On the whole, contemporary commentary suggests that these calls for transformative change have largely been left unanswered.[14]

The depth and breadth of the issues raised over these years is considerable, spanning across all jurisdictions of the District Court. The underlying message is that our courts are failing to understand or protect those who appear before it or who are affected by the business of the Court. In essence, defendants, whānau, and victims are leaving the current system feeling unheard and unappreciated.[15] This is most pronounced in the criminal justice system.

Criminal justice policy and legislation are matters for the executive and legislature to address. I am aware the Government has commissioned numerous important reports over time that have helped shape our understanding of the issues that need to be addressed. Many of these reports make the point that our criminal justice system over-emphasises punishment at the expense of rehabilitation.[16] They argue that for many communities, prioritising punishment over rehabilitation does not make them safer.[17] In fact, it often has the opposite effect, bringing more individuals into the formal criminal justice system which can have a lasting effect on them and their whānau.[18]

A punishment-first focus is faulted as particularly ineffective where the underlying driver of the offending is actually addiction, mental or physical health issues, homelessness, whānau

12 John Rangihau *Puao-te-Ata-tu: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Māori Advisory Committee, September 1988); Moana Jackson *The Māori and the Criminal Justice System A New Perspective: He Whaipaanga Hou* (Department of Justice, Study Series 18, November 1988); Clinton Roper *Te Ara Hou: The New Way* (Ministerial Committee of Inquiry into Prisons System, 1989).

13 Hui Māori Participants *Ināia Tonu Nei* (Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group, July 2019) at 9.

14 See: Charlotte Williams *The Too Hard Basket: Māori and Criminal Justice Since 1980* (Victoria University Press, Wellington, 2001) at 95; JustSpeak *Māori and the Criminal Justice System: A Youth Perspective* (JustSpeak, Position Paper, March 2012) at 8; Kim Workman "From a Search for Rangatiratanga to a Struggle for Survival – Criminal Justice, the State and Māori, 1985 to 2015" (2016) NZS22 Journal of New Zealand Studies 89 at 98; Waitangi Tribunal *Tu Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 97; Craig Linkhorn "He Waka Roimata – transforming our criminal justice" June 2019 Māori Law Review.

15 Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group *He Waka Roimata* (First Report, June 2019) at 37; Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group *Turuki! Turuki!* (Second Report, December 2019) at 3.

16 Clinton Roper, above n 12, at 1.63–1.65 and 2.3–2.4; Māori Hui Participants (Ināia Tonu Nei), above n 13, at 21; Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 43 and 46–49; Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 9,11, 15, 39 and 54; Te Uepū Hāpai I te Ora *Summit Playbook* (September 2018) at 13.

17 Clinton Roper, above n 12, at 2.3–2.4; Sian Elias, Chief Justice of New Zealand "Blameless Babes" (Annual Shirley Smith Address, Victoria University, Wellington, 9 July 2009) at [46], citing Shirley Smith "Crime and jail" *The Dominion* (Wellington, 2 February 1999, ed 2) at 10; Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 47.

18 Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15.

imprisonment, unemployment, cultural dislocation, or past trauma.[19] In such cases, there is often a "cocktail of disabilities" that may underpin the offending.[20] It is acknowledged that for people in these circumstances, wrap-around support services are needed to properly address the underlying causes of offending.[21] Presently, local communities, government agencies, and NGOs do this. However, these reports tell us that they are poorly coordinated with the Court (and with each other), which causes gaps in provision.[22] Defendants, victims, and whānau are left to navigate the confusing and often intimidating court process without support. As a result, they are unlikely to fully engage with the process and will often leave feeling unheard.[23]

The reports also remind us that a failure to adequately coordinate community support services prevents judges from receiving important information about the offender.[24] Most relevantly, information about the defendant's cultural and whānau background, mental and physical health, and educational history. Without this information, it makes it more difficult for judges to effectively engage with the individual defendant and their circumstances.[25]

These shortcomings are said to have contributed, at least in part, to the disproportionate over-representation of Māori in the criminal justice system. Māori are both more likely to offend and more likely to be victimised.[26] As of June 2020 there were 9,469 prisoners in Aotearoa. 4,952 of these were Māori (52.3 percent) despite Māori making up just 17 percent of the population.[27]

These reports impress on us that our current system continues the oppression from colonisation by imposing British institutions, laws, processes, and values onto Māori.[28] This created what Dr Jackson called "monocultural myopia", whereby the New Zealand legal system has adopted almost all aspects of the British system and almost entirely ignored the other founding culture of Aotearoa New Zealand.[29] As a result of this myopia, many facets of our justice system are inconsistent with te ao Māori and tikanga Māori principles.[30] This lack of recognition for tikanga Māori principles

19 Sian Elias, above n 17, at [20] and [28]; Andrew Becroft, Principal Youth Court Judge, "Playing to Win – Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Youth Justice System" (paper presented to Queensland Youth Justice Forum, Brisbane, Australia, July 2015) at 10; John Walker, Principal Youth Court Judge "When the Vulnerable offend – who fault is it?" (address given to Northern Territory Council of Social Services Conference, Darwin, 27 September 2017); Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 48.

20 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).

21 Māori Hui Participants (Ināia Tonu Nei), above n 13, at 28.

22 Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 58 and 62; Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 9 and 39–40.

23 Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 30.

24 At 40.

25 Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 30.

26 Chief Victims Advisor *Te Tangi o te Manawanui* (Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group, December 2019) at 2.

27 Department of Corrections "Prison Facts and Statistics – June 2020" <www.corrections.govt.nz>.

28 Chief Victims Advisor, above n 26, at 7; Te Uepū Hāpai I te Ora (Summit Playbook), above n 16, at 13.

29 Moana Jackson, above n 12, at 35.

30 Moana Jackson, above n 12, at 35; Chief Victims Advisor, above n 26, at 7; Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 25.

still causes many Māori to feel that the justice system is a foreign entity and have "little empathy" for it.[31]

One of the most notable ways that our system is inconsistent with tikanga Māori is the limited role that whānau and victims play in criminal proceedings.[32] Unless called as a witness or as a s 27 speaker, whānau members have no substantive role in the criminal justice process. Although victims can give evidence, provide victim impact statements and participate in restorative justice processes, their role is also relatively limited. The imported British system is penal-focused and revolves around the offender. This fails to reflect tikanga Māori principles, where both whānau and victims play a pivotal role in providing support to the person harmed and to the person who has caused the harm, and to be part of the solution.[33]

These reports also tell us that the justice system fails to support and protect victims.[34] Victims say that they feel isolated and unsupported during their own trial and are often left chasing the few support services that are available to them.[35]

The increasing delays associated with criminal trials often force victims and their whānau to put their lives on hold and retain the traumatic details of the offending until the trial. These delays, especially on the day of the trial, prevent victims from healing.[36] During the trial, many victims feel unprepared, as there is often a paucity of information about the process and what can be expected at each stage.[37]

IV. District Court Response to Date

A. Judicial Education and Other Initiatives

The District Court is well aware that it is one of the primary targets of the many calls for transformative change. In response, the Court has incrementally developed several different initiatives over the past three decades.

In 1996, former District Court Judge, Jim Rota, and the Institute of Judicial Studies ("IJS") commenced a nationwide marae visit programme designed to expose judges to the Māori world and increase cultural competency amongst the judiciary. This extremely valuable programme continues to operate annually and is now organised by Judge Louis Bidois and Judge Denise Clark in conjunction with the IJS. Attendance at the annual marae visit is now compulsory for all newly appointed District Court judges.

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31 Moana Jackson, above n 12, Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 3; Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 25.

32 Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 20.

33 Te Uepū Hāpai I te Ora (Summit Playbook), above n 16, at 21.

34 Chief Victims Advisor, above n 26, at 2–3.

35 At 3, 7, 10 and 36.

36 At 13.

37 At 13.

In 2001, the then Chief Judge of the Māori Land Court, now Justice Joe Williams, and the IJS commenced a marae-based Māori language course for judges of the Māori Land Court bench. This programme was then extended to include District Court Judges. For well over a decade, an annual marae-based Māori language course was held at Te Herenga Waka marae at Victoria University of Wellington. This course was primarily attended by District Court judges.

On 3 October 2001, Judge Denise Clark (of Ngā Puhi descent) was the first person to be sworn-in as a District Court Judge during a ceremony held on a marae. Since that time, many District Court judges of Māori descent have chosen their own marae as the venue for their swearing-in ceremonies.

In 2008, the former Chief District Court Judge, the late Russell Johnson, formed a judicial committee designed to address kaupapa Māori issues. That committee, known as the Kaupapa Māori Advisory Group, was instrumental in the design and implementation of the Rangatahi Court, the Matariki Court and other kaupapa Māori initiatives in the District Court.

In July 2012, to coincide with Māori Language Week, court announcements in both the English and Māori languages were commenced in the District Court. This development was the result of an initial proposal made by Judge Ema Aitken to the then Chief District Court Judge, now Justice Jan-Marie Doogue. The Ministry of Justice and the Kaupapa Māori Advisory Group were heavily involved in the design and implementation of this initiative.

Since 2013, all swearing-in ceremonies for District Court Judges now commence with a mihi whakatau, a formal Māori welcome. This applies regardless of whether the new judge happens to be of Māori descent and is intended to recognise the commitment of the District Court to honour the other founding culture in the spirit of partnership under the Treaty. The Kaupapa Māori Advisory Group has been instrumental in designing and arranging the processes that are followed during the mihi whakatau.

In 2014, Justice Joe Williams and the IJS designed and commenced a tikanga Māori programme for the judiciary. Attendance at the tikanga programme is now compulsory for all newly appointed District Court judges.

Since 2015, the Institute of Judicial Studies has also developed a multi-level Māori language programme that caters for judges with different levels of competence. Attendance at a level appropriate Māori language course is now compulsory for all newly appointed District Court judges.

In addition to those courses outlined above, the Institute of Judicial Studies delivers many other programmes as part of the judicial education curriculum. As can be seen, education programmes for the judiciary and judge-led initiatives outside of the courtroom have formed an important part of the overall District Court response to the calls for transformative change.

Over the past two decades, District Court judges across Aotearoa have also sought to address some of these calls for change within the existing legal framework inside the courtroom. Often these initiatives are entirely judge-led and designed in response to perceived community needs. There has been a natural development of solution-focused judging as part of this response, but there is also extensive academic and jurisprudential theory underpinning this approach. It is not a mere trend or fad. It is both evidence-based and legally sound.

B. Solution-Focused Judging

Solution-focused judging is a well-known concept both in Aotearoa New Zealand and abroad. I shall briefly traverse the origins and principles of the concept, which are reflected in the existing

judge-led initiatives currently operating within the District Court. Typically, these initiatives have not relied explicitly on academic thought. However, it is important to recognise that a solution-focused approach has, at its foundations, the weight of evidence and jurisprudence.

Courts long approached criminal law on the assumption that people make rational choices; that is to say, that people can objectively weigh the costs and benefits before choosing how to act.[38] Against this backdrop, judges are then seen as neutral arbiters, dispassionately determining the facts and applying the law.[39] Understanding the offender and their situation has rarely been part of this assessment, outside what is necessary to make decisions regarding the offence.

Therapeutic jurisprudence takes a different view. It contends that the legal process, and the actors within it, can be therapeutic or anti-therapeutic. Originally developed in the 1980s in response to concerns of mental health law, therapeutic jurisprudence is now a wider discipline that encompasses all aspects of law.[40]

Solution focused judging rests on these same principles. It is, in many ways, similar to another widely used term: problem-solving courts.[41] The difference is one of emphasis and framing. Using the term "problem-solving courts" implies that it is the court taking the lead role in resolving the participant's issues. In contrast, solution focused judging promotes participant autonomy. It seeks to empower the individual to resolve the causes of their offending behaviour but with support and guidance of the court and associated services.[42] Instead of the court's role being confined to that of decision maker, it also plays the role of facilitator.

Victims also play a central role in solution focused judging. Research shows that victims wish to have a criminal justice system where they are able to participate in their cases, they are treated respectfully and fairly, they receive more information about the processing and outcome of their cases, and they are engaged in a less formal process where their views count.[43] This is also reflected in the calls for change heard in Aotearoa. The key tenets of solution-focused judging aim to achieve these objectives for victims.

Solution-focused courts seek to address the wide-ranging needs of both victims and offenders to avoid a recurrence of the problem that brought these parties to court.[44] Victims are actively assisted to engage in the process. Features of solution focused judging, including consistent judicial personnel and toning down formalities, aim to make the courtroom a comfortable and unintimidating place where the victim feels able to participate. It is the specific aim of several

38 Richard Wiener and Eve Brank "Social Psychology and Problem-Solving Courts: Judicial Roles and Decision Making" in Richard Wiener and Leah Georges (eds) *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, New York, 2013) 1 at 5.

39 Susan Goldberg *Judging for the 21st Century: A Problem-solving Approach* (National Judicial Institute, Ottawa, 2005) at 5.

40 Bruce Winick "Problem Solving Courts: Therapeutic Jurisprudence in Practice" in Richard Wiener and Eve Brank (eds) *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, New York, 2013) 211 at 219.

41 Bruce Winick "Problem Solving Courts", above n 40.

42 Michael King *Solution-Focused Judging Bench Book* (Australian Institute of Judicial Administration Incorporated, 2009) at 3–4.

43 Heather Strang "The Victim in Criminal Justice" in Heather Strang *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, Oxford, 2002) at 1–24; Chief Victims Advisor, above n 26, at 2–3.

44 Michael King, above n 42, at 16.

problem-solving courts to provide support to victims of crime and enhance the rights and place of victims in the sentencing process.[45]

The centrality of victims in solution-focused judging is best illustrated through local examples. In the Young Adult List Court in Porirua, emphasis is placed on avoiding legal jargon and using plain language to ensure that the process is conducted in a way that all participants in the courtroom can understand. Crucially, this assists victims to engage as much as it does defendants. The focus on using language that is clear and easy to understand has the effect of enabling not only the defendant, but also victims and their support people, to effectively participate in proceedings that are affecting them.

At the Mātaatua Rangatahi Court in Whakatāne, a table is covered with a whāriki (ceremonial mat) woven by the local iwi, to represent the victim. There is a permanent place set at this table for the victim, whether or not a victim chooses to attend the court proceedings. A similar process is followed at the Pasifika courts, where colourful cloths adorn all the tables, including a special cloth designated for the table where the victim sits, should they be in attendance.

In simple terms, solution-focused judging seeks to identify the drivers of offending and then address them by facilitating the provision of services and community support required.[46] The development of solution-focused judging in Aotearoa has included a number of ambitious and successful judge-led initiatives that have been implemented by the District Court. We have come to call these initiatives "specialist courts". These initiatives are all essentially examples of solution focused judging in Aotearoa. They light the path ahead.

C. Specialist Courts in Aotearoa

To plot the history of specialist courts in the District Court, we must go back to the 1980s. The late Judge Mick Brown was a resident judge of the then Henderson District Court (now Waitakere District Court). As the story was orally relayed to me by Sir Pita Sharples, on one occasion, Judge Brown phoned Sir Pita and told him about a particularly difficult Māori man the judge had been dealing with and requested that Sir Pita work with him and the man's whānau at the Hoani Waititi marae. Sir Pita agreed to do so and with the marae's assistance they engaged in a highly emotional whānau meeting that resulted in a successful resolution of the case. Its success spoke volumes about the healing power of community involvement. This then led to the establishment of the Whānau Awhina Diversion programme that continues to operate at Waitakere District Court.

Judge Brown (who later became the first Principal Youth Court Judge), with the Government of the day, was also instrumental in the development of the empowering legislation (the Children, Young Persons and their Families Act 1989) that led to the creation of the Youth Court of New Zealand in 1989. The youth justice principles contained in that legislation were, and still are, world-leading, and have formed the basis for the solution focused judging approach for all of the specialist courts that have followed.

1. Family Violence Courts

The extent of family violence in Aotearoa has long been considered a significant social issue. In 2001, the first Family Violence Court was established at Waitakere by the late Chief District

45 See, for example: Michael S King "Judging, judicial values and judicial conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts" (2010) 19 JJA 133 at 139–140.

46 Bruce J Winick "Therapeutic Jurisprudence (and Problem Solving Courts" (2003) 30 Fordham Urb LJ 1055 at 1061.

Court Judge Russell Johnson and Judge Coral Shaw. Family Violence Courts were subsequently expanded to other locations across the country in the following years.[47]

The original purpose of establishing the Family Violence Courts was to address concerns about systemic delays in responding to the high number of family violence cases. Over time, a solution focused approach has been adopted. Through these courts, family violence cases are aggregated to a single list and heard at dedicated sessions, where appropriate services and access to programmes are on hand. It has proven to be more efficient and more effective.[48]

2. Youth Drug Court

While young people are vulnerable by virtue of age alone, the Youth Drug Court established in Christchurch in 2002 addresses the particular issues of youth offending and its links with alcohol and other drug dependency.[49] The Youth Drug Court aims to identify these issues early and monitor the young person's process through treatment. Participants in the Youth Drug Court have the same judge each time they appear, helping to foster enhanced engagement with both the Court and the process. Where potential drug dependency has been identified in a recidivist youth offender, a clinical screening tool is used, following which a decision will be made to transfer the young person to the Drug Court. A multidisciplinary and interagency team meets before the Court sits to review cases.

The Youth Drug Court was originally established by Principal Youth Court Judge John Walker. Judge Jane McMeeken now presides over the Court.

3. Rangatahi Court

Many of the District Court's solution-focused initiatives were established in response to the needs of young people, doing so in a way that brings Māori and Pasifika perspectives to the fore.

Beginning in Gisborne over a decade ago, the Rangatahi Court is held on marae to support young Māori offenders and their whānau engage in the youth justice system.[50] The Rangatahi Court is part of the overall Youth Court and is therefore overseen by Judge John Walker as Principal Youth Court Judge and also by Judge Louis Bidois, as National Liaison Judge for Rangatahi Courts.

The Rangatahi Court route offers the option for the monitoring of a Family Group Conference plan to take place in culturally familiar surroundings, with significant guidance from kaumatua and kuia, and the integration of tikanga Māori into the court process. Rangatahi (young people) gain a better sense of who they are and where they are from, and this encourages greater respect for themselves, their heritage, and for others. These specialist courts operate within the same legal framework as all our courts, but the processes are informed by tikanga and the Māori world-view.

The 16 Rangatahi Courts now in operation demonstrate how a Māori-centred process can lead to enhanced engagement with the young people who are before the Court, their whānau and also victims who may choose to attend court sittings.[51] It is an example of the community actively participating in the court for these purposes in the meeting house of the marae.

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47 Trish Knaggs, Felicity Leahy and Nataliya Soboleva *The Manukau Family Violence Court: An Evaluation of the Family Violence Court Process* (Ministry of Justice, August 2008).

48 At 64–66.

49 Sue Carswell Process *Evaluation of the Christchurch Youth Drug Court Pilot* (Ministry of Justice, November 2004).

50 Heemi Taumaunu *Te Kōti Rangatahi: Background and Operating Protocols* (1 July 2015) <www.napierlibrary.co.nz>.

51 Lisa Davies and John Whaanga *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Kaipuke Consultants Limited, December 2012).

4. Matariki Court

Shortly after the first Rangatahi Court was established, the late Chief District Court Judge Russell Johnson took steps to initiate a specialist court in Kaikohe which shares key features of the Rangatahi Court approach. This Court was formed with the intention of increasing the use of s 27 of the Sentencing Act 2002 which enables sentencing judges to be better informed about an offender's background.[52] Former District Court Judge Jim Rota was involved in extensive consultation and discussions with local iwi before the model for the Court was finalised. Judge Greg Davis is now the lead judge for the Matariki Court at Kaikohe.

The Matariki Court brings the offender's iwi, hapū and whānau to the forefront of the process. Through the s 27 provisions, a chosen cultural speaker may inform the Court about the offender's community and cultural background, as it relates to the offending and available rehabilitation support. In this way, cultural reports offer sentencing judges a fuller picture of all the circumstances affecting an offender. In order to enter the Matariki Court, an offender must plead guilty and demonstrate a commitment to addressing the drivers of their offending.

5. Pasifika Courts

Operating in a similar way, the Pasifika Courts are held in Pasifika community centres in Auckland.[53] Pasifika elders are involved in the process, alongside the presiding judge, reconnecting the young person with their cultural heritage. The Court adopts traditional cultural practices to create an environment that better reflects the needs of the young person and their community. Judge Ida Malosi has been instrumental in the establishment of the Pasifika Courts.

6. Te Kooti Timatanga Hou – New Beginnings Court

Judge Tony FitzGerald launched Te Kooti Timatanga Hou, the New Beginnings Court, in 2010. Based in Auckland, it is a solution-focused court established in response to the prevalence of homelessness, mental impairment, and drug dependency amongst offenders.[54] The Court aims to connect offenders to social and health supports to address the underlying causes of homelessness and offending, while also delivering accountability and ensuring victims' needs are met. Evaluations of the Court have indicated that the Court significantly reduces reoffending rates and prison time.[55]

7. Special Circumstances Court

Of course, the needs of many low-level offenders as seen in the New Beginnings Court are not limited to Auckland. In 2012, now-Chief High Court Judge, Justice Susan Thomas developed the Special Circumstances Court in Wellington as a result of concerns about the frequency of court appearances by repeat offenders committing low level crime.[56] This offending was often fuelled by

52 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).

53 Lagi Tuimavave "The Pasifika Youth Court: A Discussion of The Features and Whether They Can Be Transferred" (LLM, Victoria University of Wellington, 2017).

54 Alex Woodley *A Report on The Progress of Te Kooti o Timatanga Hou – The Court of New Beginnings* (Point Research, 25 September 2012).

55 At 17.

56 Lee Edney "A court with a difference: A fresh approach to supporting the homeless in Wellington" (1 May 2013) <www.salvationarmy.org,nz>.

the challenges posed or exacerbated by having no stable accommodation and often accompanied by a drug dependency and mental health problems.

The Special Circumstances Court was established with no additional funding or allocated judge time. Instead it relies on the goodwill of those involved and relationships with community agencies.

8. Te Whare Whakapiki Wairua – The Alcohol and Other Drug Treatment Court

While the majority of specialist courts have been almost exclusively judge-led, the AODT Court was established in 2012 as a joint initiative between the government and the judiciary.[57] It has received dedicated multi-agency funding. In December 2019, the government announced that the pilot was to be made permanent.[58] Additional funding to establish a new AODT Court in the Waikato was also announced, and as I have already signalled, work on that is underway. The current Labour Government's manifesto also proposes establishing a further AODT Court in the Hawke's Bay.

The AODT Court targets offenders who would otherwise be imprisoned, but whose offending is being fuelled by unresolved addiction or dependency. The candidates are those for whom previous sentences and court orders have not changed their situation, and typically they have been punished, only to offend again.

As an alternative to prison, the Court applies evidence-based best practices in case management, treatment, drug testing, monitoring and mentoring. Sentencing is deferred while participants go through a rigorous programme under judicial monitoring that may take up to two years to complete. Notably this Court has a strong tikanga Māori ethos, and features a Pou Oranga, a person with a lived experience of recovery, treatment and sound knowledge of te reo and tikanga Māori. Judge Ema Aitken and Judge Lisa Tremewan have led the development of AODT Courts in Aotearoa.

9. Sexual Violence Pilot Court

We know from calls for change that victims, as well as offenders, can be adversely affected by their experiences in our courts. In 2015, the Law Commission recommended improving the way the justice system responds to victims of sexual violence, and the District Court took heed.[59]

In late 2016 the Sexual Violence Pilot Court was introduced in Whāngārei and Auckland. Judge Duncan Harvey in Whāngārei and Judge Eddie Paul in Auckland are currently the lead judges for those two courts. The aims were to reduce pre-trial delays and to improve the experience of participants. These courts feature intensive and proactive pre-trial case management by judges, extra judicial training, judge-designed best-practice guidelines and various practical measures in an attempt to reduce further trauma for complainants and vulnerable witnesses.

An independent evaluation found the pilot's approaches had considerably reduced trial wait times and that most complainants reported the way trials were managed did not cause them to feel retraumatised by the process.[60] That pilot has since been made permanent in those two centres.

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57 Lisa Gregg and Alison Chetwin *Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot* (Ministry of Justice, 31 March 2014).

58 Cabinet Paper "Future of the Alcohol and Other Drug Treatment Court" (Office of the Minister of Justice, 21 August 2019).

59 Law Commission Te Aka Matua O Te Ture *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

60 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Ministry of Justice, June 2019).

10. Intervention Court

More recently, in 2018, family violence cases were placed at the centre of the Intervention Court in Gisborne by Judge Haamiora Raumati.[61] This Court originated from a proposal by local agencies focused on responding to family violence. Participants are required to address the underlying causes of their offending. The Court's responses are directed towards defendants accessing appropriate programmes at the earliest stage and supporting the family.

Scheduling the family violence cases together in the Court allows agencies to be aware of when they are required to be present in Court. A lead agency will provide the Court with an individualised plan and progress will be taken into account at sentencing.

11. Personal Individual Needs Court

Close to Wellington and established by Judge Barbara Morris, the Personal Individual Needs Court (PINC) was set up in Masterton in response to recidivist, low-level offending.[62] As with many specialist courts, the PINC encourages cooperation between agencies and stakeholders to arrange for required support to be provided. A lead agency will coordinate provision of the required assistance and the Court will monitor each defendant's progress.

12. Criminal Procedure (Mentally Impaired Persons) Court

It will be evident that these specialist courts have developed in response to the needs of particularly vulnerable participants. Defendants suffering under mental health issues are highly represented in the courts.[63] The CP(MIP) Court started on 18 March this year, led by Judges Pippa Sinclair and Claire Ryan, and is designed to reduce the time the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)) process takes and avoid people being unnecessarily subjected to psychiatric reports.[64]

This Court has seen early successes. The streamlined approach reduces the time the CP(MIP) process takes and the number of adjournments. Unnecessary delay is an impediment to accessing justice, and the new approach will continue to reduce that delay for some of the most vulnerable people who come before the District Court.

13. Young Adult List Court – Porirua

Principal Youth Court Judge, John Walker, has led the recent creation of a Young Adult List Court in Porirua.[65] The Young Adult List Court separates 18–25-year-olds from the ordinary criminal list. This initiative represents a first step towards a model that can be adopted across the whole of the District Court in Aotearoa.

The Young Adult List Court began in March of this year and was subsequently gifted a name by local iwi Ngāti Toa, Iti rearea kahikatea teitei ka taea. The name symbolises overcoming challenges

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61 "Violence intervention" *Gisborne Herald* (Gisborne, 11 July 2018).

62 Barbara Morris "Problem solving court: a community approach that works" *The District Court of New Zealand* (2019) <www.districtcourts.govt.nz>.

63 Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020).

64 Chief District Court Judge "Auckland District Court to streamline court processes for mentally impaired" (press release, 6 March 2020) <www.districtcourts.govt.nz>.

65 Principal Youth Court Judge "Trial of Young Adult List court officially launched in Porirua" (press release, 31 July 2020) <www.districtcourts.govt.nz>.

by applying the same determination as the little bellbird that can scale the tallest tree in the forest, the kahikatea tree (white pine).

Aotearoa has a pioneering youth justice system, which has seen the numbers of children and young people entering our courts reduce considerably over recent decades. However, the difference in approach afforded by the Youth Court ends abruptly when a young person attains the age of 18 (or 17 in some cases). There is a considerable volume of evidence to suggest that the brain continues to develop up until the mid-twenties, making this age group at increased risk of engaging in anti-social behaviour.[66] In addition, a significant number of these young people carry with them disabilities, such as foetal alcohol spectrum disorder or traumatic brain injury, that they have attained from birth or during their childhood.[67]

These features of the young adult cohort require special and continued recognition by the Court. The Young Adult List Court focuses on engaging the young person in the process and upholding procedural fairness.[68] In practice the aim is to:[69]

1. ensure that the process is conducted in a way that the participants can understand;
2. ensure that the young person is aware of what the outcome of a hearing means for them, (such as what bail conditions have been imposed); and
3. provide services at court so that the young adult can access the interventions necessary to address their offending.

The Young Adult List Court provides extra support where required to those aged 18–25 appearing before the Court, adapting the approach used in the Youth Court. Services providers are present within the courtroom. Participation of police, lawyers and other stakeholders is vital to this success.

Crucially, this list court is cost neutral. Existing resources in the Court and in the community are repurposed to provide the necessary support. An evaluation is soon to commence. It is highly likely that the approach taken in the Young Adult List Court will inform aspects of the Te Ao Mārama model.

V. The Te Ao Mārama Model — Mainstreaming Specialist Court Best Practices

I have talked about the calls for change, I have discussed the District Court's response thus far, and I have outlined what solution-focused judging means and its various manifestations. So where to now? Do we continue to support specialist courts that deal with discrete issues, dotted unevenly about the country, and representing a small percentage of the approximately 37,000 active cases that make up the criminal caseload of the District Court? Or do we take a broader, more integrated approach? My answer is that we must do both.

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66 See: Claire Bryan-Hancock and Sharon Casey "Young People and the Justice System: Consideration of Maturity in Criminal Responsibility" (2011) 18 Psychiatry, Psychology and Law 69 at 74 and Gwyneth Boswell "Young people and violence: balancing public protection with meeting needs" in Maggie Blyth, Enver Solomon and Kerry Baker (eds) *Young people and 'risk'* (The Policy Press, Bristol, 2007) 39.

67 See: Ian Lambie, above n 63.

68 Chief District Court Judge and Principal Youth Court Judge *Proposal for a trial of Young Adult List in Porirua District Court: Procedural Fairness for the Young and the Vulnerable* (District Court of New Zealand) <www.districtcourts.govt.nz>.

69 At 1.

Specialist courts have their place as centres for excellence for best practice. They will continue to be supported and, where appropriate, they will continue to be developed and extended. However, it has become increasingly clear that the way ahead is to look to build the Te Ao Mārama model on the foundation provided by specialist courts. This will allow us to integrate, comprehensively throughout the District Court, the lessons and skills specialist courts have taught us. I see it as a common-sense next step and indeed a natural extension of the work that has already been developed by the specialist courts of the District Court.

However, the Te Ao Mārama model will be unique. It will be designed in partnership with iwi and other local communities. This partnership framework will allow each court to design the model that suits their specific location. It will also seek to invite local iwi and local communities to share in the design of the model to ensure that it best reflects the needs and special characteristics of each community.

So, what are these best practices that have enabled our specialist courts to succeed?

A. Best Practices from Specialist Courts

Reflecting on these specialist courts, one can identify several important practices that amount to, or promote, best practice. These practices help enhance procedural and substantive fairness and improve access to justice. Where possible, these practices should be universally applied.

1. Infusing te reo and tikanga Māori

Te reo and tikanga Māori represent one element of best practice. The Rangatahi, Matariki, and AODT Courts infuse their processes with te reo and tikanga Māori. At a fundamental level, incorporating these aspects recognises the partnership between our two founding cultures. Allowing Māori users of the court to engage in Māori culture ensures that they are better able to engage and participate in the process, allowing them to be heard and understood more effectively. These benefits of enhanced engagement would likely extend to include, in appropriate cases, other ethnicities.

2. Improving information available to judges

Improving the detail and scope of information available is vital to ensure that judges understand each individual who is appearing before them, including their background and their particular needs. By enhancing the role of whānau, the community, and wrap-around service providers, judges in our specialist courts have access to information about addiction, mental health, financial, social, or cultural issues that the offender may face. Having access to better information that paints a fuller picture of the defendant allows the court to tailor both the process and outcomes in a way that best serves the interest of all those involved.

3. Active and involved judging

Judges across common law jurisdictions have traditionally taken a hands-off approach to their role as a "neutral umpire" in court. Solution-focused judging, however, necessarily encourages judges to take a more active role in the case, ensuring that all parties are engaged in the process.[70] International literature confirms that techniques including rephrasing an offender's statement back to them, being aware of body language, and even simply ensuring an offender is always referred

70 Christopher Salvatore, Venezia Michalsen and Caitlin Taylor "Reentry court judges: the key to the court" (2020) 59 J Offender Rehabil 198.

to by their name can lead to more engagement. Better engagement from participants then leads to more robust outcomes.[71]

4. Toning down formalities

In line with the hands-off approach, courtrooms are traditionally places of significant and sometimes solemn formality. This applies to both demeanour and court procedure. To the uninitiated, courts have a language all of their own. Proceedings may be incomprehensible to many participants, resulting in their disengagement from the process. Reducing formalities – being less stuffy, a little more human using ordinary or familiar language, and speaking like normal people do – provides an opportunity for all in the courtroom to participate in cases which affect them. This can be achieved while still retaining the mana, solemnity and purpose of the court.

5. Community involvement

Communities have the knowledge and resources that the courts draw upon to address the needs of those coming to court. Unless there is a real presence of community – a community voice and community input – courtrooms risk appearing to be mere public spaces where an elite group of professionals conduct business about the fate of disengaged and alienated third parties. One of the key aspects of our specialist courts is how they bring the community, who usually know the parties best, into the court process, to the benefit of all. There are, of course, many different ethnic communities in modern Aotearoa New Zealand that the courts serve. Improving community engagement can ensure that the voice and perspective of these communities is present and recognised in the District Court.

6. Interagency coordination

Cooperation between court stakeholders is another key component of the specialist courts' success. Having all participants from the community and various justice services and social agencies involved allows the court process to function more efficiently and effectively and improves the quality of information reaching the judicial decision-maker.

7. Focus on addressing "drivers"

The focus of nearly all specialist courts is to understand and address the causes of offending behaviour. While there may be subtle difference in focus, all specialist courts address criminal behaviour in a more holistic way, because this is what promotes and improves rehabilitation. This requires access to programmes and services tailored to the particular offender. Crucially, agencies and service providers often attend specialist courts to offer participants on-the-spot access to support and advice.

8. Consistency of personnel

Many of these specialist courts ensure that the same judge is presiding throughout the offender's time in the court system. This allows the offender to develop a positive rapport with the judge and properly engage with the process. In certain cases it is also beneficial to have a presiding judge with expertise in the particular issues before the court.

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71 Olivia Klinkum "Taking New Zealand's Specialist Criminal Courts 'To Scale' For Better Criminal Justice Outcomes" [2019] New Zealand Criminal Law Review at 19 citing Michael S King, "The therapeutic dimension of judging: the example of sentencing" (2006) 16 JJA 92 at 99.

B. The Hamilton District Court

These are many components to harmonise if we are to incorporate these approaches into the mainstream District Court – New Zealand's biggest and busiest court – where volumes are high, resources are stretched, and time is always of the essence. But the District Court currently finds itself presented with an opportunity – perhaps a once in a generation opportunity. It comes in the form of the new AODT Court in Hamilton. The government's commitment to this Court is based on the success of AODT Courts in Auckland and Waitakere, and is warmly welcomed. It will make a significant difference to the Hamilton community, which has been seeking an addiction treatment court for a long time.

The proposed roll out of this new AODT Court has provoked discussion and exploration within the judiciary about the sustainability and future direction of specialist courts generally. We have been inspired by the concept of moving the District Court towards Te Ao Mārama. And throughout, we have endeavoured to keep paramount the aim to bring to life the shared vision for the District Court as a place where all those coming to court (whether as defendants, complainants, victims, parties or whānau), can seek justice and will leave feeling they have been heard and understood.

We have determined that the next advance of the approach developed in the specialist courts will be far-reaching. Significantly, the Hamilton AODT Court model will include not only a criminal stream but will also extend to include a care and protection stream from the Family Court jurisdiction.

1. Dual AODT Streams: Criminal and Care and Protection

In Hamilton there will be an AODT stream in the criminal jurisdiction based on the current model in Auckland and Waitakere. Additionally, there will be a distinct Care and Protection AODT stream, focusing on young mothers with addictions who have or are at risk of having a child removed from their care and so have come within the sphere of the Family Court. Notably, this means the AODT Court will for the first time include participants from both the criminal and family jurisdictions – though on separate and discrete tracks.

This expansion of the AODT Court is primarily about the best interests and welfare of children, required by the paramountcy principle outlined in ss 4A and 5 of the Oranga Tamariki Act 1989 (OTA). When exercising powers under the OTA, it is essential that the child is encouraged to participate and that their views be taken into account in making decisions affecting them.[72] The child's wellbeing must also sit at the centre of decision making that affects them and their family/whānau, hapū, iwi, and community should be recognised.[73] In such cases involving care and protection, there is an additional focus on recognising and promoting mana tamaiti, the whakapapa of the child, and the relevant whanaungatanga rights and responsibilities of their family/whānau, hapū, and iwi.[74]

Before discussing the AODT Care and Protection stream, it is necessary to first canvass the legislative scheme underpinning care and protection issues. Where there are care and protection

72 Oranga Tamariki Act 1989, s 5(1)(a).

73 Section 5(1)(b).

74 Section 13.

concerns for a child,[75] which are shared by Oranga Tamariki,[76] the parties can be referred to a Family Group Conference ("FGC") which must be held prior to any care and protection order being made.[77] If the care and protection concerns cannot be remedied at the FGC, and it is still determined that the child is in need of care and protection, an application for a Care and Protection Order can be filed by Oranga Tamariki in the Family Court. If there is a high risk of harm to the child, an interim custody order may be made.[78] If the application for the Care and Protection Order is unopposed, a judge will determine whether the order should be made, and if so, the matter is adjourned for filing of plans, a report, and any orders sought are identified. If the application is opposed, either mediation can be directed where an agreement or plan may be developed to deal with the concerns,[79] or a hearing can be directed where a judge will decide if an order is appropriate.

The Care and Protection AODT stream will be a valuable new tool for the Family Court. This comes at a time when the Family Court is forging new community partnerships for retaining whānau, hapū and iwi connections and building confidence in both achieving the safe return of vulnerable babies and children to their whānau, and lessening the need to resort to separation in the first place. This is an essential step in ensuring that the Family Court is complying with the s 5 principles of the OTA, in particular, ensuring that the well-being of the child is at the centre of decision making that affects them.

It is envisioned that the Care and Protection Stream of the AODT Court should enable mothers to retain care of their children, with the wraparound support that is required to ensure this is plausible. The sad fact is that many of the children who come to the state's attention do so in the Family Court first.[80] There is more than enough evidence that children who end up in state care go on to have vastly higher incarceration rates.[81] Yet children and young people living with parents who are addicts are vulnerable to falling on to the wrong side of law, as well as harm and neglect. The expansion of the AODT Court into Care and Protection offers a two-pronged approach to this conundrum by opening a new path for early and better tailored intervention for mothers and their children.

This concept may be new to New Zealand, but it is certainly not a new international development. The first general drug court in the United States was established in 1989 in Miami-Dade County, Florida, with others following in quick succession. As part of this rapid growth, specialised drug courts emerged that target specific demographics or issues – including families. The first Family Drug Court was formed in Reno, Nevada in 1995. As of 2016, there were approximately 370 Family Drug Courts in the United States.[82] These courts were developed as a response to the high

75 Section 15.

76 Sections 14 and 17.

77 Section 70. Aside from an interim order.

78 Section 78.

79 Section 170.

80 Jan-Marie Doogue, Chief Judge of the District Court "Generations of Disadvantage: A View from the District Court Bench" (Ethel Benjamin Commemorative Address, Otago University, 15 October 2018) at 5.

81 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).

82 Florida Courts "Family Dependency Drug Courts" (30 April 2021) <www.flcourts.org>.

percentage of child abuse and neglect cases that involved substance use by a parent or guardian.[83] While each court has unique features, most share basic components: they are all entirely voluntary, most include similar requirements for graduation (such as staying substance-free for a specified period) and the majority of participants are women.[84]

These Family Drug Courts achieved greater rates of reunification, family stability, and lowering rates of substance abuse.[85] Recognising this success, Family Drug Courts based on the United States model were developed in the United Kingdom and Australia in the late 2000s. Although they are less common in these jurisdictions than in the United States, they nonetheless show similar signs of success and positive outcomes.[86] The two Family Drug Treatment Courts in Australia are both found in Victoria: the first was piloted in Broadmeadow Children's Court in 2014 and expanded to the Shepparton Children's Court in 2019.[87] Two independent evaluations of the Broadmeadow Court found that participants were more likely to achieve reunification, especially if engaged for at least six months, and less likely to have a substantiated report made to child protection in the post-court period.[88]

C. The Te Ao Mārama Model in the Hamilton District Court

In addition to the development of the AODT Court at Hamilton District Court, the Te Ao Mārama model will be established as the first of a staggered implementation across the country. The Te Ao Mārama model will herald the mainstreaming – normalising – of solution focused judging for the whole of the District Court, taking on the best practice lessons from our specialist courts, and integrating them to become business as usual. Where appropriate, responses will be aimed towards addressing the underlying causes of offending, and understanding the offender not just the offending. Each court location will have the flexibility to adapt their processes in a way that best reflects the needs and special characteristics of their community. The Te Ao Mārama model intends to co-ordinate and draw upon existing resources and will not necessarily require legislative change.

The principles of solution-focused judging in the Hamilton District Court will not be confined solely to the two AODT streams. They will be applied to all participants in the District Court criminal jurisdiction. While helping to identify potential AODT candidates who may need more intensive treatment and monitoring, the Te Ao Mārama model is also intended to produce vital information about all court participants.

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83 See, for example, Florida Courts, above n 82, where it was estimated that 60–80% of children linked to substantiated child abuse and neglect cases have at least one custodial parent with a substance use disorder.

84 Office of Juvenile Justice and Delinquency Prevention "Family Drug Courts" (November 2016) <www.ojjdp.gov>.

85 See: National Center on Substance Abuse and Child Welfare "Santa Clara County Family Wellness Court (FWC <https://ncsacw.samhsa.gov/technical/rpg-i.aspx?id=62>; Gayle Dakof, Jeri Cohen and Eliette Duarte "Increasing Family Reunification for Substance-Abusing Mothers and Their Children: Comparing Two Drug Court Interventions in Miami" (2009) 60 Juv Fam Ct J 11 at 11–23; and Gayle Dakof and others "A randomized pilot study of the Engaging Moms Program for family drug court" (2010) 38 Journal of Substance Abuse Treatment 263 at 263–274.

86 See, for example, Professor Judith Harwin and others "After FDAC: outcomes 5 years later – Final Report" (2016) accessed at <wp.lancs.ac.uk>; and "Family Drug Treatment Court" Children's Court of Victoria" (2021) <www.childrenscourt.vic.gov.au>.

87 Rhiannon Tuffield "Regional-first Family Drug Treatment Court launches in Shepparton after three-year pilot" (27 March 2019) ABC News <www.abc.net.au>.

88 "Family Drug Treatment Court", above n 86.

Therefore, it is intended that court participants, not only those in the AODT streams, will have an opportunity to access services at the Hamilton District Court to assist in addressing their underlying needs. Focus will be placed on providing effective social, emotional and physical outcomes for offenders, victims and whānau.

In order to provide the most appropriate services for offenders, judges need to fully understand the person appearing before them. This includes their background, history of trauma and their particular needs. To achieve this, it is intended that all Hamilton judges will receive more extensive information on defendants. For most people coming before our courts, there is often a wealth of information available but it may be difficult to access or is trapped within separate jurisdictional systems. The new model will aim to develop processes that will overcome the present obstacles.

Young adults who appear in the Hamilton District Court, aged 18–25, will receive the same attention as they do in the current Young Adult List pilot in Porirua by being placed in different lists for their court appearances. Targeted services will be present in the courtroom. The plain language used in the Young Adult List Court will be adopted to ensure that all participants can understand proceedings. Easy-to-understand information about the court process will also be made available.

Local communities will also be encouraged to play a bigger part in the District Court. Iwi and community representatives will be actively encouraged to engage with the Court. An important feature of the Te Ao Mārama model will explore the creation of a co-ordination role in each court that provides a connection between the community and the Court. When appropriate, this co-ordination role would ensure that plans for defendants are submitted for approval and that the plan is properly managed between the relevant service providers and community organisations. Alongside the co-ordinator, local kaumātua, kuia and respected elders of all ethnicities will be present within our courts, having an established voice within the Court. This role will be primarily to facilitate whakawhanaungatanga, develop relationships and foster links between defendants, whānau, victims, parties to proceedings and other participants, judges and staff to help ensure that all people affected by the business of our Court are heard and understood to the greatest extent possible.

It goes without saying that victims and whānau are directly affected by the justice system. It is intended that they too will have an improved ability to engage with the Court under the Te Ao Mārama model.

Tikanga and the Māori language will play a central role in the new model. To the extent appropriate, Māori cultural concepts and protocols will be incorporated at every stage of the process. This will be done with the intent that the Court reflects our multi-cultural society with two founding cultures bound together in a spirit of partnership under Te Tiriti o Waitangi. The intention to reimagine our justice system in partnership with iwi represents a deliberate and genuine effort to recognise kāwanatanga and rangatiratanga by engaging in mana-to-mana conversations about how our local courts can best serve our local communities, and at the same time, remaining inclusive of all cultures and all ethnicities.

I expect that the implementation of the Te Ao Mārama model will mean that the journey through the court space will look very different to how it looks today.

Court design should increasingly become a joint endeavour with iwi and local communities. Courthouses should be places that reflect the area and the communities they serve, including incorporation of local art and carvings. To the extent achievable, our courts will be an environment that welcomes everyone.

Under the Te Ao Mārama model I expect that the infusion of tikanga and te reo will be explored with local iwi in each court location. A one size fits all approach will not be appropriate. When

people attend the court, they must enter through the front entrance. In a Māori context this is similar to people gathering at the waharoa (the front entrance) of a marae. In most of our courts, court security staff will search people before they are permitted to enter the building. In a Māori context this is comparable to being welcomed onto a marae with a wero (challenge). Both processes are designed to test whether the visitor's intentions are peaceful.

I expect that bilingual and where appropriate, multi-lingual, greetings by all court staff and most particularly from the time that first contact is made by security staff at the front entrance will be a natural and appropriate development under the new model.

Mainstream court sessions commencing with karakia and mihi whakatau is another useful discussion point. Some judicial officers may wish to commence the court sitting, following the current practice of bilingual announcements, by reciting their pepeha and extending a brief welcome with a mihi.

Within the physical space itself, courtrooms could be reimagined as a community and participant centred space that reflects tikanga. As some do in specialist courts, judges in mainstream courts could consider sitting on the same level as participants to reduce the overtones of hierarchy. Where appropriate, whānau might be provided an opportunity to stand with defendants and victims, representing both support as well as collective responsibility. Courthouses and courtrooms could be re-imagined as central hubs, as places for service providers to be located to provide access to wrap-around services and opportunities for healing, and as places that encourage the supportive presence of whānau.

Although alterations to mainstream courtroom design and layout are important elements, Rangatahi Court sittings held on marae have proven to be extremely successful in engaging with whānau who have struggled to engage with mainstream systems. Some court participants and whānau feel most comfortable in a marae or community space where they feel they have a real opportunity to engage with the court.

The leadership of the District Court expects that the Te Ao Mārama model will assist us to explore with local iwi how the Rangatahi Court model might be appropriately extended to include adult participants who require intensive marae-based judicial monitoring of approved plans in the criminal and family jurisdictions of the District Court.

As noted previously, solution-focused judging involves the concept of empowering an offender to make the most of an opportunity extended by the Court to address underlying issues that have driven the offending behaviour. The Court acts as a facilitator, but power of choice rests with the offender and, by extension, the whānau and wider community.

Many initiatives have recognised that not all offending necessarily must, or even should, be resolved in the formal court system. The Police Diversion Scheme and the Pae Oranga (Iwi and Community Justice Panels) are examples of decision-making authority that has been devolved in appropriate cases and responsibility has been placed into the hands of police, whānau, iwi and local communities. I expect that the expansion and increase in jurisdiction of these types of initiative are also matters that can be usefully discussed when designing the Te Ao Mārama model for each court.

The successful introduction of the Te Ao Mārama model will require a cultural shift. Focus will be centred on the people who are affected by the business of the court, understanding their whakapapa, their upbringing and the circumstances that have led them into the justice system. Stakeholders in the court will need to be encouraged to understand the rationale for the move towards a collaborative, solution-focused approach. To this end, enhanced training will need be

provided for court staff, and further judicial education will need to be provided for our judges, as part of our collective obligations to uphold cultural competency expectations. Lawyers, service providers and other stakeholders will also need to be offered educational support that will help them to uphold these expectations.

The Te Ao Mārama model will assist us to refocus on the essential purpose of courts and judges, which is ultimately to serve our communities.

1. One Example: Section 27 of the Sentencing Act 2002

Our judges already have many tools available to achieve the best outcomes for those caught up in the criminal justice system. One such example is s 27 of the Sentencing Act 2002. Section 27 allows any offender to call on any person to come to court and speak about the personal, family, whānau, community, or cultural background of the offender, the way that background may have related to the commission of the offence, or how support from the whānau or community may be available to help prevent further offending. Section 27 can act as a vehicle through which the best available information is presented to a presiding judge which, in turn, enables judges to make well-informed decisions that are appropriately tailored to the individual circumstances of the offender.

The statutory intent behind s 27's predecessor, s 16 of the Criminal Justice Act 1986, was clear – it envisaged speakers from local communities and tribes addressing the court and providing community-based options as alternatives to imprisonment.[89] Unfortunately, this vision never materialised. Slowly but surely, however, it has become common for defence counsel to use s 27 to provide the court with a "cultural report", usually written by a cultural consultant, which canvases the matters outlined in s 27.

Information provided to the court through s 27 often reveals evidence of systemic deprivation. In recent years, courts have begun to award sentencing discounts to offenders where systemic deprivation had a "causative effect" on the offending. The genesis for this practice was *Solicitor-General v Heta*, where Whata J noted that evidence of systemic deprivation may inform the "actual and relative moral culpability of the offender and the capacity for rehabilitation".[90] The Court of Appeal recently endorsed this practice in *Carr v R*, stating that:[91]

> … where a cultural report provided under s 27 of the Sentencing Act contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing such matters ought to be taken into account in sentencing.

A sentencing discount on this basis will be appropriate where the information provided through s 27 "might be considered to have impaired choice and diminished moral culpability so as to establish a causative connection to the offending".[92] This is a positive development that recognises that offenders' each come from different starting points. One aspect of the Te Ao Mārama model will be to explore how the system can facilitate the ability of all people to use s 27 to bring vital information before the court.

Although cultural reports can be helpful and in some cases have a substantial impact on the final sentencing outcome, they tend to be expensive and may prove to be difficult to sustain for all

89 See: (12 June 1985) 463 NZPD 4759 (Dr Michael Cullen).

90 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [41].

91 *Carr v R* [2020] NZCA 357 at [60].

92 At [65].

who could potentially benefit from them in the long term. At some stage, a rationalisation of this resource may eventuate due to limitations in funding and capable report writers. The effect of this could be to deny the court valuable information about the defendant.[93]

Under the Te Ao Mārama model I expect that part of the discussion with local iwi and local communities will focus on how to achieve a significant increase in the use of s 27 speakers. This would involve a whānau or iwi member or member of the community who is familiar with the offender speaking directly to the court in the manner originally envisaged.

D. A Parallel Project

A parallel piece of work is currently underway which aims to improve the criminal court process more generally. A dedicated team has been established between the courts, Ministry of Justice, lawyers and other stakeholders to work through the entire criminal process. This team, with judicial oversight, is working to ensure that all appearances in the court are meaningful and, as a result, also reduce backlog.

The programme spans the criminal process from bail and administration to sentencing. Most work in each stage will focus on reducing unnecessary court events and adjournments. A distinct workstream will be dedicated to addressing our current backlog of cases.

Transforming our criminal process by improving the efficiency of the system is a significant undertaking. The timing of the commencement of the Criminal Process Improvement Programme could not have been better. It is intended that the relevant workstreams of the Improvement Programme will be implemented in Hamilton next year, in conjunction with the implementation of the Te Ao Mārama model and the twin streams of the AODT Court. The Hamilton District Court and the community it serves, stand to benefit significantly from the combination of these separate but related developments.

VI. Conclusion

We intend that the Te Ao Mārama model will become the new way of doing business for the District Court. Our long-term intention is that the Te Ao Mārama model will be rolled out across Aotearoa New Zealand from Kaitaia District Court in the far north to Invercargill District Court in the far south. Our intention is for the Te Ao Mārama model to be operational in Hamilton next year and for it to be developed across all of our courts as soon as we are able to do so. I emphasise that none of the concepts and approaches encapsulated in the Te Ao Mārama model are radical. The many components have already been trialled in various forms in specialist solution-focused courts over many years, and they have been found to be both effective and fair. And they have not required legislative change. Moreover, the model is not intended to substitute for, but should enhance, lawful and principled sentencing outcomes.

Our specialist solution-focused courts have been providing answers to questions that many people continue to ask, hoping that there is a different, perhaps easier answer. Taking the lessons learned from these courts about best practice and targeted, evidence-based responses and integrating them across the District Court, to the point they are normalised, is a considered and logical next step.

93 *Waikato SPCA v Tuaupiki* [2018] NZDC 17046 at [8].

We expect that the Te Ao Mārama model will help improve access to justice, and outcomes for everyone affected by the business of the District Court. It will help advance the shared vision for the Court. It will help build confidence in the court process and rule of law. And it will ultimately help to make our communities safer. The path ahead is clear, and well lit. We are confident that our new model will help move our District Court towards Te Ao Mārama, towards a more enlightened world.

To end this address, one of my grandfather's favourite whakataukī aptly describes the qualities required to successfully realise the vision and implement the Te Ao Mārama model:

He iti te mokoroa, kahikatea teitei ka hinga!
Even the smallest insect, the borer, can fell the tallest tree in the forest, the kahikatea.
(To achieve a great feat, what is required is time, persistence, and commitment.)

I commend this approach to all of us in our collective endeavour to make this vision a shared reality.

Ko te Kōti-ā-Rohe, he wāhi e rapu ai te manatika,
ahakoa he whai rawa, he rawa kore rānei,
ahakoa he te ahurei me tōnā iwi, ahakoa ko wai, ahakoa nō hea.
The District Court is a place where all people can come to seek justice,
no matter what their means or abilities,
regardless of their culture or ethnicity, who they are or where they are from.

Nō reira, tīhei mauri ora ki te whai ao, tīhei mauri ora ki te ao mārama. Whanō, whana, tau mai te mauri, haumī e, hui e, tāiki e!