A FAIR GO AT ACCESS TO JUSTICE

Dame Lowell Goddard QC

Expert commentary

TE TAPEKE
FAIR FUTURES
IN AOTEAROA

ROYAL SOCIETY TE APĀRANGI

TE TAPEKE FAIR FUTURES

Royal Society Te Apārangi has convened a multidisciplinary panel of leading experts* to examine issues of equality, equity, and fairness in Aotearoa.

The panel's name, **Te Tapeke**, comes from 'ka tapeke katoa te iwi'† and conveys valuing and including all people. This expert commentary expresses the view of the author.

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* royalsociety.org.nz/fair-futures

† Joshua 4:11–13. 'Including all people, without exception'.

[1] Jackson M. Brief of Evidence. Royal Commission of Inquiry into Abuse in Care. Contextual Hearing; 29 October 2019–8 November 2019, para 60.

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History shows that every society realises very early on that it cannot survive in a lawless state. They therefore establish ways of ensuring social cohesion and harmony by developing a philosophy or jurisprudence of law as well as a discrete legal system to give effect to it. Both are shaped by the land, history, and values of the people concerned – the idea and ideals of law are unique cultural creations.[1]

Dr Moana Jackson

The relationship between law and justice in contemporary Aotearoa New Zealand is eloquently reflected in the above observation that 'the idea and ideals of law are unique cultural creations'. In Aoteoroa New Zealand, our system of criminal justice might be seen as an evolving amalgam of three different cultural influences. One influence is the impartial and adversarial nature of the codified criminal law. Another is the framework of human-rights law developed over time by the global community, with much of it incorporated into our domestic law. There is also an increasing recognition of the social drivers of crime and of the need for transformative change, using a more restorative, integrated, and community-based approach.

This new approach seeks to acknowledge and implement the partnership principle of Te Tiriti o Waitangi The Treaty of Waitangi and extend it across the entire criminal justice spectrum in a holistic manner that will work to ensure a more socially cohesive and harmonious society.

These major influences and developing philosophies are shaping our evolving justice landscape, and informing our discussions about the quality of justice in contemporary Aotearoa New Zealand, and how it might be more even-handedly accessed by all in society, regardless of ethnicity, culture, means, or social position.

FAIRNESS AND ACCESS TO JUSTICE

Historically, the guarantee of access to justice under the common law[2] derives from principles that have their origins as early as 1215 when the Magna Carta was signed by King John at Runnymede, in Britain. The Magna Carta guaranteed rights to due legal process, protection from illegal imprisonment, and swift justice. This was an important historical step on the path to a more fair and just society under British law.

The criminal law was first introduced into Aoteoroa New Zealand in common law form in 1840, when Aotearoa New Zealand became a British colony. It was codified in 1893 and forms the core of our criminal justice system. Its strength is in the framework of legal certainty it provides in proscribing acts and omissions deemed to fall below the minimum standard required for the security of individuals and the survival of the social group as a whole.

However, the introduction of this Anglo-European justice system in the mid-19th century effectively swept away the existing, and very different, system of social order and traditional approaches to addressing social transgressions.[3] The effect on Māori of this alternative legal system, along with other elements of colonisation, was profound and would cause extensive harm that continues to this day.

In his 2019 evidence to the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission of Inquiry into Abuse in Care), Dr Moana Jackson referred to updating research he is conducting on the relationship between Māori and the criminal justice system, and to a comparative analysis he has carried out into the incarceration rates of indigenous people in Australia, the United States, and Canada. This analysis demonstrates 'clear symmetries between the injustice of colonisation and the injustice of disproportionate indigenous incarceration which were system-based rather than offender-specific.' In Dr Jackson's expert opinion, '[C]olonisation is an inherently abusive process.' He noted that currently, Māori men make up 52 percent of the prison population in Aotearoa New Zealand, as they did in the late 1980s, while Māori women now make up nearly 64 percent of the female prison population, compared to less than half that figure on average in the 1980s – a statistic Dr Jackson justifiably described as 'especially shameful'.[4]

[2] 'Common Law refers to the body of law that has been developed by judges over centuries, and which can be further developed by the courts or Parliament.' https://www.courtsofnz.govt.nz/about-the-judiciary/overview/

[3] See 'A Fair Go for Māori' by A Erueti, Te Tapeke Fair Futures, Royal Society Te Apārangi: https://www.royalsociety.org.nz/major-issues-and-projects/fair-futures/a-fair-go-for-maori/

[4] Jackson M. Brief of Evidence, para 18.

The situation of an increasingly revolving door of criminalisation and recriminalisation, particularly for Māori, has led to numerous calls for transformative change by Dr Jackson and other authoritative voices over several decades, and with increasing urgency. Most recently, the major investigative report by Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group,[5] and the report by The Workshop and JustSpeak,[6] have provided in-depth research and guidance into the limited deterrent effect of imprisonment, and of punishment generally, as a means of addressing the drivers of crime and effecting reform. Among many of the critical factors examined in these reports are: the effect of racism and discrimination in the justice system in compounding the systemic and structural drivers of crime; the deleterious effect on victims and offenders of an unwieldy justice system with lengthy delays; the feelings of depersonalisation and exclusion engendered in victims and offenders by the nature of the justice process; the absence of meaningful atonement; the dearth of effective rehabilitative processes; and many more negative perceptions and outcomes – all of which work against the public interest and harm those who offend, those who are harmed by offending, and society as a whole. All of these factors signal a demand for more workable and transformative alternatives to a single punishment model that has failed to address cause and effect.

The principle of partnership underpinning te Tiriti, and the concepts of tikanga and whanaungatanga, allow for a more holistic and restorative approach, founded on the wellbeing of the social group and on reciprocity through community-based solutions. These principles are finding increasing traction in the dispensing of justice through leadership initiatives taken by the judiciary working in partnership with Māori, and which are now being implemented throughout the District Courts. These initiatives come in answer to decades of calls for just solutions and a more enlightened approach as to how justice might more fairly be accessed and the social balance more effectively restored.

The quest for a more fair and accessible justice model that addresses the drivers of crime and succeeds in reducing offending and victimisation is the major challenge across the justice landscape. The need to recognise vulnerability and inequality and respond accordingly; to ensure transgressors are appropriately held to account; to guard against conscious or unconscious bias; to be restorative, reintegrative, and preventive; and to focus on resolutions that are effective in the long term – is the approach to ensuring we build a more socially cohesive and harmonious society.

[5] Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group. *He Waka Roimata: Transforming Our Criminal Justice System.* 9 June 2019.

[6] Berentson-Shaw J, Elliot M. *Expert and Public Narratives on Crime in New Zealand: Gaps and Opportunities to Communicate Reform.* The Workshop and JustSpeak; 2019.

TE AO MĀRAMA: TRANSFORMATIVE CHANGE IN THE DISTRICT COURT

The District Court's response to calls for transformative change is Te Ao Mārama – the concept of an enlightened world in which all people can come to Court to seek justice and be seen, heard, understood, and meaningfully participate in the proceedings that relate to them. This was the clear message given by Chief District Court Judge Heemi Taumaunu in his Norris Ward McKinnon Lecture of 2020, in which he explained his vision for the future direction of justice in his Court.[7]

His underlying message was '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. This is most pronounced in the criminal justice system.'[8]

It is a given, that justice cannot be 'accessed' in the true meaning of the word through a mere formulaic proceeding in which participants feel irrelevant and of which they have little or no understanding. To participate in such a process is not transformative, nor can it be just. To be *heard* in the fullest sense of the word is the most critical aspect of open justice. As Chief Judge Taumaunu observed, failure to achieve this will be felt most acutely in the District Court, as it is the portal through which all enter the criminal justice system and where the vast majority of cases are processed.

Te Ao Mārama, as outlined by Chief Judge Taumaunu, seeks to build on the principle of the founding partnership of te Tiriti, and to extend this principle to an all-inclusive vision of 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.'[9]

The goal of Te Ao Mārama is to bring transformative change across the whole of the District Court through solution-focused judging and outcomes, achieved by focusing on the underlying drivers of offending, such as addiction, mental or physical health issues, homelessness, whānau imprisonment, unemployment, cultural dislocation, or past trauma, and by applying a solution that is tailored accordingly. To give one example of an underlying driver of offending, a 2017 *Justice Sector* study explored the extent of recorded traumatic brain injury (TBI) prior to interaction with the justice system and found that between 34 percent and 46 percent of people interacting with the system in 2015 had a recorded TBI.[10]

[7] Chief District Court Judge Heemi Taumaunu. Mai te pō ki te ao mārama – the transition from night to the enlightened world: Calls for transformative change and the District Court response. Norris Ward McKinnon Annual Lecture. Waikato University: 2020; 11 November 2020, pp 7–11.

[8] Ibid, pp 8–9.

[9] Chief District Court Judge Heemi Taumaunu. Mai te pō ki te ao mārama, p 6.

Fairness through specialist courts and solution-focused judging

This tailored approach of focusing on cause and solution has already been, and continues to be, successfully trialled in a number of specialist courts within the District Court. These specialist courts had their genesis in the 1980s in Waitākere, when a difficult case was resolved communally following an initiative taken by the late Judge Mick Brown and Sir Pita Sharples. This led to the Whānau Awhina Diversion programme, which continues today, and later to the establishment of the Youth Court.[11] The principles and approach of that Court have provided the basis for the solution-focused judging now being used in the many specialist courts that have followed. These specialist courts include the:

- Family Violence Courts
- Youth Drug Court in Christchurch
- Rangatahi Courts held on marae to support young Māori offenders and their whānau to engage in the youth justice system
- Matariki Court in Kaikohe, which focuses on culturally appropriate rehabilitation programmes
- Pasifika Courts in Auckland, held in churches and community centres
- New Beginnings Court in Auckland, established in response to the prevalence of offenders' homelessness, mental impairment, and drug dependency
- Alcohol and Other Drug Treatment Court, a joint pilot initiative between the government and the judiciary, which is to be made permanent, and with further courts to be established
- Sexual Violence Pilot Court in Whangārei and Auckland
- Intervention Court in Gisborne, focusing on family violence
- Criminal Procedure (Mentally Impaired Persons) Court
- Young Adult List Court in Porirua.

While the above is not a complete list of all specialist District Courts, all have the common goal of streamlining and tailoring access to justice, based on well-informed decisions consistently made on better information, with better-informed participants, and better-understood processes. Other key components include the endeavour to ensure the same judge is assigned to a case and is thus able to follow it through to a conclusion; and another is to involve essential community and social services in the process.

[10] Horspool N, Crawford L, Rutherford L. Traumatic Brain Injury and the Criminal Justice System. in *Justice Sector: Crime and Justice Insights*. New Zealand Police Ngā Pirihimana o Aotearoa, Ministry of Justice Tāhū o te Ture, and Department of Corrections Ara Poutama Aotearoa; December 2017, p 1.

[11] Chief District Court Judge Heemi Taumaunu. Mai te pō ki te ao mārama, pp 15–16.

Two of these specialist courts I single out for particular mention: the Criminal Procedure (Mentally Impaired Persons) Court and the Young Adult List Court.

The Criminal Procedure (Mentally Impaired Persons) Court was developed in response to the needs of particularly vulnerable participants, for instance, defendants suffering from mental health conditions, who (as a group) are highly represented in the courts. This specialist court, which started in March 2020, is designed to reduce processing time and avoid unnecessary psychiatric reporting and numerous adjournments.

The Young Adult List Court in Porirua focuses on 18 to 25-year-olds from the ordinary criminal list in the District Court. The creation of a special list for this cohort avoids their abrupt transition from the Youth Court into the adult Court. The impetus for this initiative derived from the considerable volume of evidence suggesting that the brain continues to develop up until people are in their mid-20s. It also recognises the significant number of young people appearing in the Youth Court who suffer from disabilities, such as foetal alcohol spectrum disorder or TBI.

Youth Court experience has also taught that the interests of children and young people are best served by keeping them and their whānau away from the courts. This has led to an increasing search for alternative options to custody, and significantly reduced numbers of children and young people in custody as a result.

Ultimately, Chief Judge Taumaunu's aim is to mainstream the best practices learned in the specialist courts and to comprehensively integrate these across the entire District Court, thus building the Te Ao Mārama model of enlightened and inclusive justice. The specialist courts will also continue to be supported and, where appropriate, developed and extended.

This enlightened Te Ao Mārama approach and its all-inclusive vision for the District Court provides a model for how the differing strands of cultural influence that make up our justice system in Aotearoa New Zealand might coalesce in a more humane, equitable, and socially effective manner, by focusing on solutions that address cause and effect in an integrated, restorative, and rehabilitative manner. In turn, the moves to reduce inhumane incidences of marginalisation, avoid unnecessary criminalisation, and address root causes, including institutional biases, will be of benefit to society as a whole.

THE RIGHT TO ACCESS OPEN JUSTICE WITHOUT UNDUE DELAY: COVID-19 AND THE CHRISTCHURCH MOSQUE ATTACKS

There are many other challenges facing the justice sector, which have required, or are requiring, urgent response, such as the delivery of timely justice in a Covid-19 environment and the frank acknowledgment of historical and ongoing failures to protect the most vulnerable in state care and other closed environments.

The global pandemic and the courts' response

The advent of the Covid-19 pandemic[12] placed unprecedented pressure on already stretched legal and judicial resources in Aotearoa New Zealand, and impacted severely on the ability of the courts to deliver justice in a timely way. The legal maxim 'justice delayed is justice denied' is particularly acutely felt in the criminal justice arena, where the right to a fair and public hearing by an independent and impartial court, as well as the right to be tried without undue delay, are guaranteed under Article 25(a) and (b) of Aotearoa New Zealand's Bill of Rights Act.

The courts, which are an essential service, invariably operate at or above maximum capacity, and were doing so before the pandemic. The national state of emergency, which presented in March 2020 with little warning, required a huge logistical rethink as to how already heavy caseloads might be managed, with continual revision required as new challenges arose. The Chief Justice advised at an early stage that at alert level 4 only priority hearings could proceed, defined as those affecting an individual's liberty, personal safety, or wellbeing, and those for which resolution was time critical. Jury trials had to be suspended because of the need to summon jurors well in advance of trial dates and the inability to predict movements between alert levels.

Throughout this difficult and protracted period, the courts made arrangements to ensure access to open and timely justice, with paramount consideration given to the liberty of the individual, the rights of the child in society, public safety, and the importance of preserving the peace. As each new alert level was announced, the courts issued updated directives, making clear to all what the arrangements for ensuring access to justice were.

An integral human rights issue for the criminal courts during lockdowns has been the threat to open justice, in terms of the right of a person

[12] The section was written prior to the emergence of the Delta variant in New Zealand and the consequential effect of the current pandemic situation on the workload of the courts.

in custody to be physically brought before the District Court for a hearing at the earliest opportunity. The use of audio-visual links (AVL) – which have for some time been facilitating appearances in many courts where difficult circumstances arise or where physical in-court appearances are unnecessary – increased during lockdown, and ensured the wheels of open justice kept turning to the fullest extent possible. Participation by counsel was conducted remotely by AVL or telephone, where possible. Accredited news media were permitted continued access to report on court proceedings, which ensured the flow of information so integral to open and transparent justice.

The speed with which standard legal processes were revised or new measures introduced demonstrates the capacity of the legal system to move swiftly, effectively, and in a coordinated way. The institutional resilience and willingness within the profession to adapt and modify traditional modes of practice is a timely reminder of what can be achieved when all parts of the justice system work together in pursuit of the common goal of fair and open justice.

The sentencing for the Christchurch mosque attacks

The sensitive and high-profile sentencing on 24 August 2020 of the perpetrator of the Christchurch mosque attacks is an outstanding recent example of how both open and solution-focused justice can and should ideally operate. The perpetrator was charged with the murder of 51 people and the attempted murder of 40 others, while they attended masjidain, and with an act of terrorism.

The manner in which this difficult sentencing exercise was conducted illustrates the fair impartiality and certainty of the criminal law when it sensitively and seamlessly coalesces with the observance of humanitarian principles and a restorative community process.

The preparation and lead-up to the sentencing was meticulous in its detail and timeliness. Steps were taken to ensure that the interests of justice for all were openly observed, that relevant information was provided in a timely and sensitive manner, and that directions were clearly given and understood.

The massacre was carried out on 15 March 2019 and the perpetrator appeared in the District Court the following day, 16 March 2019. Eight further hearings were held in the High Court before guilty pleas were entered on 26 March 2020, the first day of Covid-19 level 4 restrictions.

From an early stage of proceedings, the Chief Justice engaged with the Secretary for Justice to request that all steps be taken to ensure the Court's processes would be culturally appropriate and trauma-informed.[13] Throughout, her Office provided significant support for the conduct and management of proceedings, including in relation to communications, approaches to cultural matters, and security advice.

The Judge, Justice Cameron Mander, issued a number of minutes in the lead-up to the sentencing, in which he advised on all matters relevant to the conduct of the sentencing. The minutes covered the implications of Covid-19 for the sentencing date; the perpetrator's election to dispense with counsel and represent himself; how court documents could be accessed; the conditions of media coverage and remote accessing; and arrangements for the sentencing on 24 August 2020 under Covid-19 alert level 2. The exercise involved a huge collaborative effort across the justice sector and multiple agencies.

The sentencing took place over four days, during which 683 survivors, family members, and support people attended the hearing, which was live-streamed to overflow courtrooms and to 402 other survivors, family members, and support people elsewhere in Aotearoa New Zealand and overseas.

Onsite and remote interpreter services were provided in eight languages, and an operational support group oversaw the design and delivery of a range of victim-support services. Some 35 media representatives from 22 organisations attended in person, and a further 31 media representatives attended remotely.

The meticulous care with which the Court and the justice system approached this complex and major sentencing, in ensuring that all necessary processes were conducted sensitively and appropriately in order to meet the needs of those experiencing extreme trauma, and that open justice was able to be observed on an unprecedented scale, is an outstanding example of solution-focused justice in operation.

[13] The Court processes were appropriate and Court personnel were briefed in relation to trauma and cultural sensitivity.

FAIR ACCESS TO JUSTICE IN CLOSED ENVIRONMENTS

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.

Nelson Mandela

The settings in which access to justice is, or should be, a vital component are many and varied and not confined to the classic forum of the criminal courts or the custodial setting of prisons. The incorporation of international human rights law into much of our domestic law has undoubtedly expanded and strengthened the protections afforded to those in the criminal justice sector and in the numerous settings in which persons are deprived of their liberty.[14] However, the critical factor in all situations is not simply what the law or guidance is, but the extent to which access to justice is being realised in practice and without discrimination.

Oversight of closed environments

In contrast to the criminal justice system, where access to timely justice in the courts is openly played out, there are graphic examples of a lack of access to justice in many closed environments and a concerning lack of visibility overlaying this. Recent examples concern the longstanding and serious abuse of children, young persons, and vulnerable adults, particularly those from Māori and Pasifika communities, in both state and faith-based institutions, a matter currently under examination by the Royal Commission of Inquiry into Abuse in Care;[15] allegations of serious shortcomings in the treatment of women prisoners in the custody of Department of Corrections Ara Poutama Aotearoa; and (until recently) a lack of independent oversight or visibility of those in aged-care facilities regulated by the state.

The humane treatment of persons in care or custody is one of the most fundamental rules in the international legal order. Aotearoa New Zealand is party to the United Nations (UN) Convention against Torture, and in 1989 enacted the Crimes of Torture Act to honour its obligations under that Convention. In 2007, the Act was further amended to give effect to the Optional Protocol

[14] Consider, for example, the United Nations International Covenant on Civil and Political Rights (ICCPR), articles 6–8 (physical integrity: the right to life and the freedom from torture); articles 9–11 (liberty and security of the person: freedom from arbitrary arrest and detention and the right of *habeas corpus*); and articles 14–15 (procedural fairness: due process, a fair and impartial trial, the presumption of innocence, and recognition as a person before the law).

[15] See 'A Fair Go for Māori' by A Erueti, Te Tapeke Fair Futures, Royal Society Te Apārangi: https://www.royalsociety.org.nz/major-issues-and-projects/fair-futures/a-fair-go-for-maori/

[16] OPCAT, article 4(1).

to the Convention against Torture (OPCAT). The OPCAT provides for a system of domestic and international monitoring and reporting on a variety of detention situations, the aim of which is to prevent ill-treatment and improve detention conditions.

A place of detention is any place 'where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.[16] Deprivation of liberty has been further explained as containing 'an objective element of a person's physical confinement and a subjective element of lack of free consent.'[17] This is a situation that may be found in a number of settings and was recently interpreted to include aged-care facilities as 'situation[s] in which the State either exercises, or might be expected to exercise a regulatory function'.[18]

In addition to the Convention against Torture and OPCAT, Aotearoa New Zealand is party to a range of other subject-specific UN human-rights treaties, including the Convention on the Rights of the Child and two of its three Optional Protocols; the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol.[19] In addition to being bound by these treaties, Aotearoa New Zealand is obliged to report regularly to the UN on its implementation efforts, which provides international transparency and accountability on core human-rights issues.[20]

The Royal Commission of Inquiry into Abuse in Care

Against this comprehensive backdrop of international and national human rights commitments, and contrary to the guiding partnership principle of te Tiriti, the extent to which access to justice has been realised in practice, and without discrimination in Aotearoa New Zealand, has been called into question by the exposure of longstanding and serious abuse of children, particularly Māori and Pasifika children, in both state and faith-based institutions.

In 2018, the Government established the Royal Commission of Inquiry into Abuse in Care. The decision to establish this Inquiry followed previous reviews (namely, the Confidential Listening and

[17] Krisper S. Article 4: Obligation to Allow Preventive Visits to All Places of Detention. in Nowak M, Birk M, Monina G (eds.) *The United Nations Convention against Torture and its Optional Protocol: A Commentary* (2nd ed). Oxford: Oxford University Press; 2019, p 744.

[18] Subcommittee on Prevention of Torture. *Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc CAT/C/57/4, Annex, para 3; see also Stephanie Krisper, previous footnote, n 12, p 746.

[19] Details of Aotearoa New Zealand's ratification of human rights treaties are recorded in the United Nations treaty collection database: https://treaties.un.org

[20] A list of the key international human rights instruments and their monitoring bodies is available on the United Nations website: www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx

Assistance Service and the Confidential Forum), a public awareness campaign, and recommendations for an inquiry by human rights treaty bodies. The Inquiry is the largest of its kind in Aotearoa New Zealand's history, with a substantial mandate to examine the treatment of children, young persons, and vulnerable adults in various care settings. The Inquiry's terms of reference expressly reaffirm international law and international human rights law and confirm that the Inquiry will be underpinned by te Tiriti.[21] It has a wide mandate to examine what happened in care and why, the factors that led to abuse, and its impact (including intergenerational impacts and the interface between experiences in care and later exposure to the criminal justice system), and what may be required to prevent and respond to abuse in the future. The acknowledgement of failures to protect the vulnerable, and a detailed examination of the impact of abuse, are critical first steps in addressing complex issues of equality and fairness in Aotearoa New Zealand.

I referred earlier to Dr Jackson's evidence at the Inquiry's contextual hearing in 2019, that Māori men make up 52 percent of the prison population, as they did in the late 1980s, while Māori women now make up nearly 64 percent of the female prison population, compared to less than half that figure on average in the 1980s.

This evidence bears repeating for what it represents, which is an ongoing failure of the criminal justice system to deliver even-handed and fair justice. Dr Jackson's recent research is continuing his examination into the relationship between Māori and the criminal justice system. Of 6,000 Māori interviewed, 600 have been, or are, in prison. Of this 600, over half had been placed in state or faith-based care and over half were abused in that care. Dr Jackson describes this abuse as 'part of their almost inevitable progression into prison.'[22] He said, 'Reckoning with colonisation and acknowledging the constitutional implications of that reckoning will help better develop policies to care for children and vulnerable people.'[23]

As noted in the report by The Workshop and JustSpeak,[6] and in many other writings, experts are clear on the role of colonisation and racism in our criminal justice system. This also bears repeating. The deleterious impact on Māori of dispossession of their land and resources, loss of connection to whakapapa, social ostracism, the introduction of Western ideas and practices, including on the raising of children, the introduction of a justice and penal system with a very different response to harmful behaviour, and other factors, have all had profound implications for Māori and have resulted in longstanding and extensive harm.

[21] Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018. The terms of reference were updated by an Amendment Order in 2021.

[22] Jackson M. Brief of Evidence. Royal Commission of Inquiry into Abuse in Care. Contextual Hearing; 29 October 2019–8 November 2019; paras 18–20.

[23] Jackson M. Brief of Evidence, para 30.

[24] Chief District Court Judge Heemi Taumaunu. Mai te pō ki te ao mārama, n 6, p 8.

Part of the colonisation experience was the urban drift between the 1950s and 1970s, occasioned by the removal of a viable economic base and a traditional way of life for Māori but without alternative support structures being put in place. It was during this time that the Māori prison population (relative to all prisoners) doubled.[24] Dr Jackson's seminal report *He Whaipaanga Hou – A New Perspective* in 1988,[25] which investigated the criminal justice system's apparent bias against Māori, was expressly acknowledged by Chief Judge Taumaunu in his Norris Ward McKinnon Lecture.[7]

Dr Oliver Sutherland, who also gave evidence before the Inquiry, highlighted issues of bias against Māori boys from police and prosecutors in the 1970s and 80s, as well as the over-representation of Māori children in social welfare custody and penal institutions.[26] He described how in 1970, '[A]ny Māori child before the court was more than twice as likely to be sent to a penal institution … as a non-Māori child, while the latter was more likely to be fined or simply admonished and discharged.'[27] These and similar justice sector statistics he described as 'profoundly disturbing'.[28]

While there are now good systems of legal representation generally available across the justice system, they are reportedly still not effectively penetrating all closed environments, and the contemporary treatment of children and young people in custody remains in serious question.

The Inquiry will present its report on redress in late 2021, with its final report on all investigations due in mid-2023. The Royal Commission presents an opportunity to turn a corner in our shared history. It is providing a forum for people to be heard, their experiences acknowledged, to receive support, and for the system to make necessary changes to prevent future abuse and provide fair and even-handed access to justice. Its messages must be heard.

OTHER INVESTIGATIONS AND REVIEWS

The Inquiry is not alone in its work examining state care and related access-to-justice issues. The Waitangi Tribunal recently undertook an urgent inquiry (WAI 2915) into Oranga Tamariki Ministry for Children policies and practices in relation to children taken into care, with a particular focus on 2015 to the present day, and presented its findings in April 2021.[29] The Tribunal is also undertaking a wide range of kaupapa inquiries, many of which engage with access-to-justice issues.[30] The issue of children being taken

[25] Department of Justice. Study Series 18. November 1988.

[26] Sutherland, O. Brief of Evidence. Royal Commission of Inquiry into Abuse in Care. Contextual Hearing; 29 October 2019–8 November 2019; paras 5–7 and 17–18.

[27] Ibid., para 22. [28] Ibid., para 31.

[29] Waitangi Tribunal. *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (WAI 2915; 2021).

[30] Waitangi Tribunal. *2021 Kaupapa Inquiry Programme – Appendix*. Available from: https://waitangitribunal.govt.nz/inquiries/kaupapa-inquiries/

into state care, and the experience of children and their families of the state care system, has also been the subject of a practice review by Oranga Tamariki Ministry for Children (November 2019), the Office of the Children's Commissioner (June 2020 and November 2020), the Office of the Ombudsman (August 2020), and the Whānau Ora Commissioning Agency (February 2020).[31]

The findings in these reviews warrant careful consideration. The Office of the Children's Commissioner, for example, found substantial and persistent inequities for Māori in the care and protection system. Assessments and removals of babies are happening earlier, with greater urgency to uplift Māori babies. State custody experiences are intergenerational in nearly half of all cases.[32] The Office identified a number of areas for change, each directed towards the humane treatment of mothers and their children, professional social work practice, and improving organisational culture.

[31] A full list of recent external investigations and reviews is available on the Oranga Tamariki website: https://www.orangatamariki.govt.nz/about-us/reviews-and-inquiries/

[32] Office of the Children's Commissioner. *Te Kuku O Te Manawa (Report One of Two)*. June 2020; p 40.

CONCLUDING REMARKS

Access to justice is a fundamental human right and its measure lies in how effectively and fairly it is able to be accessed by all in society. It is unfortunately clear that people who are the most vulnerable and at risk in our society have not always been accorded the equality and empathy that true justice requires. Giving impetus to a community-based approach that recognises the social drivers of crime and the need for transformative change, that acknowledges and implements the partnership principle of te Tiriti and focuses on resolutions that are effective in the long term, will do much to ensure that we rapidly move towards achieving a more socially cohesive and harmonious outcome for society in Aotearoa New Zealand.

We have a rich legal framework in which to continue developing our jurisprudence in the effort towards a more fair and equitable society. Our legal history is replete with examples of efforts to create such a society, beginning with Magna Carta in 1215, to the growth of international human-rights law in the mid-20th century, and domestic instruments such as our own Bill of Rights Act in 1990. Overlaying this rich framework, the partnership principle of te Tiriti is the fundamental cornerstone in assessing how fair and even-handedly access to justice is being applied in Aotearoa New Zealand.

The quest to achieve a fair and more equitable society, through a range of access-to-justice measures, is a process of continual evolution and refinement. In the field of human rights and criminal justice, Aotearoa New Zealand seems now to be embarking upon a more enlightened chapter of its constitutional history – a chapter that has given rise (or is giving rise) to a unique philosophy or jurisprudence shaped by our land, history, and common values. These values include mana and human dignity, protection of the vulnerable, partnership, and a shared future. Looking ahead, the realisation of fair access to justice in Aotearoa New Zealand (in practice as much as theory) will require honest introspection, innovation, and collective action.

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