

**THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA**

Report by - JARED SHARP - 2012 Churchill Fellow

**THE JUSTICE JAMES MUIRHEAD CHURCHILL FELLOWSHIP  
to investigate strategies for increasing the cultural integrity of court processes for  
Aboriginal young people and their families in the Northern Territory Youth Justice  
System - USA, Canada, New Zealand**

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Dated

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## Introduction

The purpose of the Justice James Muirhead Churchill Fellowship is to undertake a project to enhance the capacity of people, communities, agencies and/or governments in the Northern Territory to reduce Indigenous contact with the Justice system (policing, courts and prisons and after-care of prisoners) and/or reduce the negative impacts of that system on Indigenous lives.

Justice Muirhead worked tirelessly to improve justice outcomes for Aboriginal people. His Honour was a distinguished Supreme Court Justice from 1974 to 1985 and Administrator of the Northern Territory from 1990 to 1993. Justice Muirhead also was at the forefront of addressing the systemic issues confronting Aboriginal people in the justice system. He was the first Chair of the Royal Commission into Aboriginal Deaths in Custody and the Inaugural Director of the Australian Institute of Criminology.

My project looks at innovative approaches in Canada, the United States and New Zealand to improve the cultural relevance of the justice system for Aboriginal people. It looks at initiatives that try to make court less formal, more understandable, more culturally meaningful and ultimately better able to identify and address the reasons underpinning an Aboriginal person's offending. A central element of this is to consider initiatives that look to find bridges between Western and First Nations cultural perspectives and how a contemporary justice process can be enhanced as a result.

Twenty recommendations have been made which aim to make practical and tangible changes to reduce the negative impacts of the justice system on Indigenous people.

I wish to thank at the outset the family of the late Justice James Muirhead and the Churchill Trust for their generosity in giving me this opportunity. I particularly acknowledge Mrs Margaret Muirhead. Mrs Muirhead has demonstrated not only extraordinary generosity, but incredible vision in establishing this Fellowship. She has a deep knowledge about the subject matter of this Fellowship, and has taken an ongoing interest in the progress of my research, for which I am extremely grateful and pleased. I truly hope that my report, findings and recommendations do in some small way honour the late Justice Muirhead and the purpose for which this Fellowship was established.

This project would not have been possible without the contributions of so many people. I would like to thank my amazing CEO, Priscilla Collins and the entire Board of the North Australian Aboriginal Justice Agency for allowing me study leave to undertake this Fellowship.

I would like to express my enormous appreciation to the inspirational people I was fortunate enough to meet during my visits to Toronto, Calgary, Siksika, Saskatoon, Prince Albert, New York, New Mexico, Auckland, Rotorua and Wellington. I sincerely wish to thank all of them for so generously giving their precious time.

I would like to especially acknowledge some remarkable individuals for their support. Firstly, Jonathan Rudin for so generously sharing his knowledge (and music) and making it possible for me to meet with those instrumental in running the Gladue Court; Madam Justice Marsha Erb, who received an out-of-the-blue request from a just-arrived Aussie in Calgary and responded with the most incredible hospitality, guidance and wisdom imaginable; Ruth Thompson and Wes Fine Day, for taking me into your home and looking after me (in -40 Saskatchewan winter) like a son, toque and all; Judge Gerry Morin for sharing so much of your expertise and insights into running a bi-cultural court, and for being willing to have me tag along on your circuit court to Pelican Narrows; Principal Youth Court Judge Andrew Becroft, Emily Bruce and Steven Bishop, for being so accommodating in facilitating and supporting the New Zealand part of my itinerary; Judge Heemi Taumaunu for your inspiring words, writings and leadership in driving the Rangatahi Court; and Judge Louis Bidois, for being so flexible and generous with your experience and knowledge.

Most importantly, I would like to thank my wonderful wife, Amy. I will forever be grateful to you for allowing me to take off on this opportunity of a lifetime, while you flew solo with our three adorable (but very young) kids, Sadie, Ari and Zephaniah. Without your unwavering support, this Fellowship would never have been possible.

## Executive Summary

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### Description

Our justice system is not meeting the needs of Aboriginal people. We have a system of imposed justice, where Aboriginal people feel little sense of ownership or engagement. Decisions are made *about* Aboriginal people, not together with them. Aboriginal defendants are not engaged in court processes. They often don't understand technical language used in court, or have a shared understanding of Western legal concepts they are subjected to.

In other ways, our processes do not create a culturally supportive environment for Aboriginal people. Courts seldom have detailed cultural information about an Aboriginal defendant when making life-changing decisions such as whether to sentence an Aboriginal person to prison or refuse them bail. Aboriginal restorative justice practices like mediation that promote healing, restore relationships and repair harm done, are rarely part of how our justice system resolves a matter, with the consequence that relationships and underlying issues are left unaddressed.

The aim of this project is to see what we can learn from promising initiatives in Canada, the United States and New Zealand. I was able to observe attempts in each of these jurisdictions to improve justice processes and outcomes for Aboriginal people. It is argued that it has only been when these jurisdictions have acknowledged systemic bias in how the justice system deals with Aboriginal people that Aboriginal-specific justice initiatives have been able to grow.

### Highlights

- Meeting with Jonathan Rudin and seeing the expertise the Aboriginal Legal Service of Toronto brings to writing Gladue Reports
- Meeting with the inspirational Madam Justice Marsha Erb, who was central to establishing the Tsuu T'ina Peacemaker Court
- Learning so much from Judge Gerry Morin and seeing the Cree Court in Saskatchewan
- Seeing New York's trailblazing Youth Courts in action
- Meeting with Judges Andrew Becroft, Heemi Taumaunu and Louis Bidois and seeing the extraordinary Rangatahi Courts and the Pasifika Youth Court in action.

### Lessons

We can improve justice processes and outcomes for Aboriginal people. But to do this, we need to understand that it is the system that must change. We need to see that in a modern legal system, it is possible for two cultures, and two approaches to justice, to coexist. We need to develop culturally-strengthening initiatives that reconnect an offender with their cultural identity and bring in Elders, family and a defendant's community to help them address the issues underpinning their offending. If we create the space for two cultures to co-exist, this will lead to improved procedural justice for Aboriginal people and strengthen the legitimacy of the justice system as a whole.

Twenty recommendations are made. They encompass:

- (a) Making our justice system more culturally responsive, where culture is seen as a foundation for engaging Aboriginal people and detailed cultural information is provided to courts so they can make informed sentencing and bail decisions
- (b) Procedural Fairness, so that people understand and have a say in decisions made in court about them
- (c) specialist processes like Rangatahi and Pasifika Youth Courts that include a defendant's family, the victim, and Elders and use cultural reconnection as a key strategy to get an Aboriginal young person back on the right track
- (d) the importance of Aboriginal judges, who can more effectively communicate and engage Aboriginal defendants in the court process

### Dissemination

- Board of Directors and Staff, North Australian Aboriginal Justice Agency; legal profession
- NT judiciary; NT Attorney-General; Commonwealth Attorney-General's Department; NT Department of Correctional Services
- Australasian Youth Justice Conference; NT Children and Youth Justice Coalition
- Journal articles, media interviews, other conferences



28 -31 January	New York, New York	<p><i>Staten Island Youth Justice Center</i></p> <ul style="list-style-type: none"> <li>- Arnold Adams, Programs Coordinator</li> <li>- Beth Broderick, Program Director</li> <li>- Jacklyn Romanoff, Coordinator Youth Court</li> <li>- Observe Youth Court</li> </ul> <p><i>Brownsville Community Justice Center</i></p> <ul style="list-style-type: none"> <li>- James Brodick, Program Director</li> <li>- Viviana Gordon, Coordinator of Operations</li> </ul> <p><i>Red Hook Community Justice Center</i></p> <ul style="list-style-type: none"> <li>- Jessica Kay, Clinical Director</li> <li>- Judge Alex Calabrese</li> <li>- Erika Sasson and Coleta Walker, Peacemaking Program</li> <li>- Sabrina Carter, Coordinator Youth Court</li> <li>- Observe Youth Court</li> </ul> <p><i>Manhattan Integrated Domestic Violence Court</i></p> <ul style="list-style-type: none"> <li>- Judge Tandra Dawson</li> <li>- Anna Ulrich, Court Enhancement Coordinator</li> </ul> <p><i>Adolescent Diversion Program, Brooklyn</i></p> <ul style="list-style-type: none"> <li>- Jessica Kay, Clinical Director</li> <li>- Julian Adler, Program Director</li> </ul>
1-2 February 2013	Shiprock, New Mexico	<p><i>Peacemaking Program of the Navajo Nation</i></p> <ul style="list-style-type: none"> <li>- Gloria Benally, Peacemaking Program Coordinator</li> <li>- Stanley Nez, Traditional Program Specialist, Ship Rock</li> </ul>
6 February – 18 February	<p>Auckland, New Zealand</p> <p>Wellington, New Zealand</p> <p>Tauranga, New Zealand</p> <p>Rotorua, New Zealand</p> <p>Auckland, New Zealand</p> <p>Wellington, New Zealand</p>	<p><i>Orakei Rangatahi Court</i></p> <ul style="list-style-type: none"> <li>- Judge Hemi Taumaunu</li> <li>- George Ngatai, Lay Advocate</li> </ul> <p>Principal Youth Court Judge Andrew Becroft Emily Bruce, Research Counsel to Judge Becroft</p> <p>Tauranga Youth Court</p> <ul style="list-style-type: none"> <li>- Judge Louis Bidois</li> </ul> <p>Rotorua Rangatahi Court</p> <ul style="list-style-type: none"> <li>- Judge Louis Bidois</li> </ul> <p>Pasifika Youth Court</p> <ul style="list-style-type: none"> <li>- Judge Frances Eivers</li> </ul> <p>New Zealand Police</p> <ul style="list-style-type: none"> <li>- Inspector Kevin Kneebone, NZ Police</li> </ul> <p>Ministry of Justice</p> <ul style="list-style-type: none"> <li>- Anna Wilson-Farrell, Principal Advisor Children, Youth and Family Services</li> <li>- Chris Polaschek, General Manager Youth Justice Support</li> <li>- Peter McIntosh, Senior Advisor Youth Justice Support</li> </ul>

## Background

The Northern Territory's incarceration rate is 5 times the national average<sup>1</sup> and is increasing faster than that of any other state or territory: in the ten years from 2002 to 2012, the NT imprisonment rate rose a staggering 72% (from 480 prisoners per 100,000 adult population to 826 prisoners per 100,000 adult population).<sup>2</sup> Just in the twelve months to December 2012, the Northern Territory recorded a 9% proportional increase in imprisonment rate, the largest in Australia.<sup>3</sup>

It was reported that as at December 2012, the NT had 1452 people in full time custody.<sup>4</sup> This figure is now well above 1500. With a new 1000 prison to be opened in 2014, it is projected that it will be more than 100 beds short when it opens its doors. On current trends, the NT will need another 1000 bed prison by 2016.

The scandal in the Northern Territory is not just that we are locking up so many people; it is that we are locking up so many Aboriginal people. Over 30% of the Northern Territory's population is comprised of Aboriginal people. Yet of the 1452 people in custody in December 2012, only 239 were non-Aboriginal. Aboriginal people comprise close to 85% of the jail population. Of the 64,000 Aboriginal people in the NT, 1213 are in prison.<sup>5</sup>

Aboriginal incarceration rates are even worse for young people. On 31 January 2013, there were 65 juvenile detainees held across three NT detention centres in the Northern Territory. 62 (96%) identified as Aboriginal or Torres Strait Islander.<sup>6</sup>

The over-representation of Aboriginal people in the justice system is symptomatic of a broader problem. The justice system is failing Aboriginal people. Report after report has shown this. In 1991, the final report of the Royal Commission into Aboriginal Deaths in Custody<sup>7</sup> made 339 recommendations to address the systemic factors that were contributing to Aboriginal deaths in custody.<sup>8</sup>

Twenty years later, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs tabled the report of its inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system, *Doing Time - Time For Doing: Indigenous youth in the criminal justice system*.<sup>9</sup> The report notes that:

(m)any of the issues addressed in the report of this Committee reflect the core underlying factors that the Royal Commission identified as explaining the disproportionate number of Indigenous people in custody, including poor relations with police, alcohol and substance abuse, poor education, unemployment, inadequate housing and entrenched poverty.<sup>10</sup>

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<sup>1</sup> Australia's national incarceration rate is 169 per 100,000 adult population. The NT rate is currently 843 per 100,000. See: Australian Bureau of Statistics, *Corrective Services Australia, December Quarter 2012*: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2December%20Quarter%202012?opendocument&tabname=Summary&prodno=4512.0&issue=December%20Quarter%202012&num=&view=>

<sup>2</sup> Australian Bureau of Statistics, *Prisoners in Australia – 2012*. See:

<http://www.abs.gov.au/ausstats/abs@.nsf/Products/138443A6EDB15748CA257B3C000DCA24?opendocument>

<sup>3</sup> Australian Bureau of Statistics, *Corrective Services Australia, December Quarter 2012*. See:

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2December%20Quarter%202012?opendocument&tabname=Summary&prodno=4512.0&issue=December%20Quarter%202012&num=&view=>

<sup>4</sup> Australian Bureau of Statistics, *Corrective Services Australia, December Quarter 2012*, above.

<sup>5</sup> Australian Bureau of Statistics, *Regional Statistics, Northern Territory March 2011*. See:

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1362.7Feature%20Article1Mar%202011?opendocument#Aboriginal>

<sup>6</sup> These statistics were cited by Margaret Anderson, Executive Director of the Youth Justice Division, NT Department of Correctional Services at a forum on youth boot camps (22 February 2013).

<sup>7</sup> I note that Justice James Muirhead, in whose name this Fellowship was established, was the Chair of the Royal Commission into Aboriginal Deaths in Custody from 1987-89 and worked tirelessly to improve outcomes for Aboriginal people in the criminal justice system.

<sup>8</sup> Commonwealth, *Royal Commission into Aboriginal Deaths in Custody Final Report* (1991),

[www.austlii.edu.au/au/other/IndigLRes/rciadic/](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/) accessed 1 March 2013. See, for example recommendations 234-245.

<sup>9</sup> Commonwealth of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report, *Doing Time - Time For Doing: Indigenous youth in the criminal justice system* (2011),

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=atsia/sentencing/report.htm#chapters](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm#chapters) accessed 2 March 2013.

<sup>10</sup> *Ibid*, page 2.

It concludes that our current situation “is a national disgrace and recognises that all governments, including the Commonwealth, states and territories, have failed to adequately address this problem. The Committee strongly urges all governments and jurisdictions to be rigorous in implementing the recommendations contained in this report.”<sup>11</sup>

Sadly, at the time of writing it appears that of *Time for Doing’s* 40 recommendations, few if any look like being implemented.

### Procedural Justice in the NT Context

An observer of a Northern Territory court proceedings would likely first notice that the only Aboriginal person in court is sitting in the dock. They might observe that person with their head down, with limited actual input into what is being discussed, almost as if they are not even there.

A key focus of this Fellowship is Procedural Justice. This concept refers to the extent to which court proceedings are understandable and comprehensible to court participants and the extent to which participants have a meaningful role in contributing to court decisions that affect them.

The Royal Commission into Aboriginal Deaths in Custody, among other findings, found that court processes are culturally insensitive, intimidating and alienating for many Aboriginal people.<sup>12</sup> Many Aboriginal people find attending court a mystifying, terrifying ordeal. It is not uncommon for Aboriginal defendants who might have instructed their lawyer that they wish to plead not guilty to say the word ‘guilty’ when they enter court because they assume this to be the response expected of them. Or for Aboriginal defendants to agree to particular sentencing and bail conditions which are actually unworkable and which they might not understand, simply to have their court matter concluded.<sup>13</sup>

Compounding this, most Aboriginal people find the mainstream legal system completely foreign. Fundamental legal concepts such as “guilty” and “not guilty”, “bail”, “evidence” are poorly understood. Our system also does not take into account different conceptual notions that many Aboriginal people have.

In 2007, the authors of the ‘Little Children are Sacred’ report<sup>14</sup> noted that Aboriginal people struggle to understand the ‘mainstream’ world and law.<sup>15</sup> Many Aboriginal people live their lives according to traditional customary law and have minimal or no understanding of the conceptual framework of the non-Aboriginal legal system. The ‘Little Children’ report noted these perspectives:

*The Yolngu have a law to which every member of that society has assented to. The colonial system is something that is coming at them externally and something that they have never assented to. There is still to this day a very strong resistance to this external law*<sup>16</sup>

*Australian law has knocked us out*<sup>17</sup>

*The traditional fences have broken down and we need to repair them.*<sup>18</sup>

We also fail to take into account that many Aboriginal people, especially those from remote communities, speak English as a second, third or fourth language.<sup>19</sup> Many young people speak almost no English at all. Even where Aboriginal people do speak some English, the language used in court is often complex legal English which many people do not fully understand.

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<sup>11</sup> Ibid.

<sup>12</sup> Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, Final Report* (1991), vol 3, ch 22.4

<sup>13</sup> In relation to miscommunication in the criminal justice process, see for example Michael Cooke, *Anglo/Aboriginal Communication in the Criminal Justice Process: A Collective Responsibility* (2009) 19 JJA 26.

<sup>14</sup> Pat Anderson & Rex Wild, Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, “Ampe Akelyernemane Meke Mekarle” (“Little Children are Sacred Report”), (2007).

<sup>15</sup> Ibid, p.177.

<sup>16</sup> Ibid, p.175.

<sup>17</sup> Ibid, p.176.

<sup>18</sup> Ibid.

<sup>19</sup> An Australian Indigenous language was spoken at home by 59% of Indigenous respondents to the 2006 Census. Australian Bureau of Statistics *Population Characteristics, Aboriginal and Torres Strait Islander Australians, Northern Territory, 2006* Released 27 March 2008 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/MF/4713.7.55.001> (viewed 24 April 2009)



In 1997, Justice Dean Mildren wrote the seminal piece, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System'. His Honour noted<sup>20</sup>:

While most Aboriginals in the Northern Territory are able to speak some English, few are completely fluent in the language even today, and the vast majority are illiterate. Even those who speak English are liable to be misunderstood.

These language, conceptual and communication issues are exacerbated by access to legal services and the model of justice in the NT. Fly-in, fly-out bush courts service regional and remote areas of the NT. Lawyers usually arrive a day before court, but clients are often not seen before the day of court. Most court sittings in remote communities have enormous court lists, and despite the best efforts of extremely hard-working lawyers and magistrates, there is simply inadequate time available for each client's matter to be fully and properly dealt with.

In summary, the current situation in the NT is that our court system propels Aboriginal people through a process that most do not fully understand, and few feel they have a meaningful voice in. This Fellowship will consider some international initiatives that address Procedural Justice to improve justice outcomes for Aboriginal people.

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<sup>20</sup> Justice Dean Mildren, *Redressing the imbalance against Aboriginals in the criminal justice system* (1997) Criminal Law Journal, Vol. 21, no. 1, p 8.

## Preliminary comments

In undertaking this Fellowship, I have had the privilege of observing a range of justice initiatives in Canada, the United States and New Zealand. The bulk of these initiatives have been specifically designed by Aboriginal people, to improve the cultural relevance of court proceedings for Aboriginal people.

This Fellowship is about seeing what we can learn from countries such as New Zealand, Canada and (even) the United States. However, as a non-Aboriginal lawyer it is not my place to speak for Aboriginal people in the Northern Territory. The views I offer are my personal perspectives based on my own observations.

I am also mindful of three other crucial considerations. First, the post-colonial context in which our justice system operates. Judge Melvyn Green recently observed of the Canadian justice system:

To the degree that law is an instrument of colonialism (and it is), Canadians of Aboriginal descent remain as subject to its influence now as they were when European settlers and mercantile interests first invaded these shores and asserted their dominance some four to five hundred years ago. Indeed, to characterize Aboriginal Canadians as merely "marginalized" is more than charitable to those who occupy the centre of the page. Aboriginal Canadians have relatively little economic or political power. They have been alienated from their land, culture and history through physical and legal coercion, misguided paternalism and discriminatory laws. And they inhabit a legal regime about which they were never consulted and in which they have had no significant input.<sup>21</sup>

Second, the growing body of academia warning of the 'Indigenization' of the criminal justice system.<sup>22</sup> Efforts to change the justice system to be more culturally responsive to Aboriginal people cannot be superficial. They must change the organisational or structural inequality of the justice system that Aboriginal people have experienced, and continue to experience.

Third, we cannot for one moment think that we can simply 'cut and paste' a justice model from overseas and expect it to work in the Northern Territory. I am acutely mindful of the "risks of 'cherry picking' or 'butterfly collecting' (Crawford, 2002) policies without considering the cultural and societal context."<sup>23</sup>

This report seeks to encourage a dialogue that will lead to locally designed initiatives that will alleviate some of the negative impacts of the criminal justice system on Aboriginal people. The recommendations in this report ought not be controversial. If implemented, they will lead to practical changes in the operation of the justice system that will make it more culturally meaningful, relevant and effective for Aboriginal people.

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<sup>21</sup> Justice Melvyn Green, *The Challenge of Gladue Courts* (2012), Criminal Reports (Articles), 6th Series at 1.

<sup>22</sup> See, for example Juan Marcellus Tauri, 'Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand' in Wanda McCaslin (ed), *Justice as Healing* (2005) Living Justice Press who considers that "the state's bicultural experiment to date has largely concentrated on these types of 'cultural sensitivity' exercises but made no substantive organizational accommodation".

<sup>23</sup> Nessa Lynch, *Playing Catch-up? Recent reform of New Zealand's youth justice system*, Criminology and Criminal Justice (9 January 2012), at 13.

## Description of Key Initiatives

This section of the Report describes initiatives that observed in the six weeks of my Fellowship. Initiatives have been grouped into the countries and chronological order in which they were observed.

### 1. Canada (January 2013)

My visit to Canada started in Toronto, to see the Gladue (Aboriginal Persons) Court. Before describing the Court, it is important to give some background to its establishment, which in turn highlights the reasons I was visiting it.

#### Section 718.2(e)

In 1996, section 718.2(e) was inserted into the Canadian Criminal Code. Section 718.2(e) was an extraordinary enactment. It specifically sought to address the grossly disproportionate incarceration rates affecting Canada's First Nations peoples. The section requires sentencing judges to:

consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders (emphasis added)

It is striking that the Northern Territory, with Aboriginal incarceration rates that make Canada's pale in comparison, seems light years from this sort of legislative recognition to analogous systemic failures.

#### R v Gladue

Section 718.2(e) was first considered by the Supreme Court of Canada in the context of Aboriginal defendants in the ground-breaking case of *R v Gladue*.<sup>24</sup> This case acknowledges that courts have failed in the way they have dealt with Aboriginal people and it sets up a new way of dealing with Aboriginal people.

In *Gladue*, Jamie Gladue was sentenced to three years jail for manslaughter. She appealed her sentence to the Supreme Court of Canada on the basis that the sentencing court had wrongly decided that s 718.2(e) did not apply to her. Although Aboriginal, the court considered that she was an 'off-reserve' Aboriginal person and that s 718.2(e) was not directed to her.

The Canadian Supreme Court rejected this. They held that the Canadian criminal justice system has a deeply entrenched systemic bias which has led to Aboriginal people receiving longer jail sentences and being more often refused bail than non-Aboriginal Canadians. They also pointed out that although only one part of a broader picture, the judiciary has a key role to play:<sup>25</sup>

The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.<sup>26</sup>

They also made it expressly clear that new approaches to sentencing Aboriginal defendants needed to be found:

<sup>24</sup> *R. v Gladue* [1999] 1 S.C.R.688, 133 C.C.C.(3d) 385, 23 C.R (5<sup>th</sup>) 197

<sup>25</sup> Several cases since *Gladue* have upheld these principles, most recently *R v Ipeelee* [2012] 1 S.C.R. 433. Ipeelee was subject to a long term supervision order with a condition not to consume alcohol after having served a 6 year sentence. Police charged him with breaching the condition. He was sentenced to 3 years imprisonment, and appealed the length of sentence. The Supreme Court of Canada held that the sentencing Court gave only attenuated consideration to Ipeelee's circumstances as an Aboriginal person and that an "application of the Gladue principles is required in every case involving an Aboriginal offender." His sentence was reduced from 3 years to 1 year imprisonment.

<sup>26</sup> *R. v Gladue* at [65]

traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community ... most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e).<sup>27</sup>

This was not to say that in some cases, conduct will be so serious that only a term of imprisonment is appropriate. But the Court identified that too often for Aboriginal people, there is a lack of non-custodial options available, an institutionalized unwillingness to exhaust all non-custodial options before imprisonment is imposed, and a lack of community-based sanctions that meet Aboriginal needs and concepts of sentencing:

Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented.<sup>28</sup>

The Supreme Court of Canada reiterated its support for *Gladue* with the 2012 decision of *R v. Ipeelee* [2012] 1 S.C.R. 433.

### 1.1 Gladue (Aboriginal Persons) Court – Toronto, Canada

The Gladue (Aboriginal Persons) Court ('Gladue Court') started in 2001. It was the result of the considerable efforts by a small, dedicated group of experts<sup>29</sup> frustrated by a lack of action following *Gladue*, and who were determined to see the landmark decision implemented in their locality.

The Gladue Court at Old City Hall was the first in Ontario (and Canada). There are now three other Gladue Courts in the city (not counting the Aboriginal Youth Court) and Gladue Courts in two other cities in Ontario. There are plans for three more to open in the next year or so.

The Court brings a new and innovative approach to dealing with Aboriginal people. Judge Brent Knazan, one of founding judges of the Gladue Court, described the court as fundamentally being about a different process, not necessarily a different result.<sup>30</sup> This process takes into account that many Aboriginal people "perceive that judges have not listened to them in the past"<sup>31</sup>, and seeks to respect First Nations cultures and create a culturally safe court environment.

When I visited the Court, I noticed that as well as the Canadian Coat of Arms, there were Aboriginal objects clearly of significance on prominent display. An Eagle Feather and Sweet Grass were in a large frame at the front of the Court.<sup>32</sup> Noting that "the very presence of the bible can be painful to persons because of the history of church-run residential schools",<sup>33</sup> Aboriginal witnesses have the option of using an eagle feather as an alternative to a sworn oath or affirmation.

It was also noticeable that Judges ran the court in a different way. There was less formality and more direct interaction between Judge and defendant. There was also more allowance given to family of defendants to participate in proceedings.

The court deals with charges of all levels of seriousness. *Gladue* can be taken into account in determining the length of a sentence, or it can lead to a non-custodial sentence being imposed instead of a term of imprisonment.

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<sup>27</sup> *R. v Gladue* at [70]

<sup>28</sup> *R. v Gladue* at [74]

<sup>29</sup> Led by Justice Patrick Shepherd, Professor Kent Roach and Jonathan Rudin of the Aboriginal Legal Service of Toronto (ALST)

<sup>30</sup> Interview on 11 January 2013.

<sup>31</sup> Judge Brent Knazan, *Time for Justice: One Approach to R v Gladue* (2009) 54 CLQ 431

<sup>32</sup> This is the only Gladue Court where such objects are on display. This was given to the Court by the family of Eugene Okanee, an Aboriginal man who was Duty Counsel for the court and died suddenly a few years ago.

<sup>33</sup> Judge Brent Knazan, *Paying Particular Attention to the Circumstances of Aboriginal Offenders: An Evolving Concept*, National Conference on Aboriginal Criminal Justice Post-Gladue 19 April 2008 at 7.

When I observed the Gladue Court in action, I saw one Judge explicitly mention that *Gladue* required courts to address the over-representation of Aboriginal people, and that that was a material factor to her Honour's consideration of bail in that case. This ties in with post-*Gladue* Canadian jurisprudence that where a court cannot be assured that Gladue factors were taken into account in relation to a matter appearing on a defendant's criminal record, that conviction will have decreased relevance at a bail hearing. This is because that matter on a defendant's criminal record was registered "under a criminal justice system that has failed all members of the group to which the convicted person belongs."<sup>34</sup>

Also, post-*Gladue* jurisprudence has found that in Ontario at least, the Gladue principles apply beyond the sentencing process, and whenever the liberty of an Aboriginal person is at stake (*United States v Leonard*, 2012 ONCA 622).

Jonathan Rudin notes how the Supreme Court in *Gladue* identified a 'crisis'<sup>35</sup> of Aboriginal overrepresentation in the Canadian justice system, and that in so doing, "the court was locating the problem in the justice system itself. It was not the fact that Aboriginal people were committing crimes that was the crisis; rather it was the response to that offending behavior that was problematic."<sup>36</sup>

This is revolutionary stuff – it goes to the fact that Gladue is a case "unlike any other"<sup>37</sup> and calls for courts to apply a fundamentally different approach to what they have always done.

Some in Canada have asked, 'Why should Aboriginal people be singled out for special treatment? What about other disadvantaged groups who might also face disproportionate levels of incarceration?' Judge Brent Knazan has this answer:

Of course, complex tragedies occur in all communities, but the violence and trauma that some Aboriginal offenders experienced when young must be one of the reasons that the Supreme Court of Canada concluded and emphasized *those circumstances are unique*.<sup>38</sup>

From an Australian perspective, although we have no judicial authority equivalent to *Gladue*, the lesson for us may well be this; if we are serious about addressing the causes of Aboriginal over-incarceration, we need to acknowledge that systemic and background factors affecting Aboriginal people are unique. Unless and until our justice system recognises this, we cannot have faith in decisions made by a justice system that has failed, and is failing, Aboriginal people.

## Gladue Reports

Gladue Reports are central to the operation of the court. They are expert, information rich reports written by Aboriginal people about an Aboriginal defendant's cultural background. Reports are typically ordered at a point where a defendant has pleaded guilty to a serious charge for which imprisonment is likely. The court then asks a local agency<sup>39</sup> and the report is provided within 4-6 weeks, prior to the defendant being sentenced.

Gladue Reports arose from an acknowledgement that too frequently courts sentence Aboriginal defendants in an information vacuum. Judge Knazan makes the point that "(p)aying attention to the circumstances of Aboriginal offenders necessitates knowing what those circumstances are."<sup>40</sup> Gladue Reports are designed to give a Judge a full picture of the person they are dealing with. They are distinct from pre-sentence reports (PSRs), written by staff at the Ministry of Correctional Services. A Gladue Report may be presented alongside a PSR, but their focus and content is distinct.

<sup>34</sup> Judge Brent Knazan, above n 18 at 440.

<sup>35</sup> *R. v Gladue*, at 64.

<sup>36</sup> Jonathan Rudin, *Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs* (2009) 54 CLQ 447 at 448.

<sup>37</sup> Judge Brent Knazan, above n 18 at 432.

<sup>38</sup> Judge Brent Knazan, above n 18 at 439.

<sup>39</sup> in Toronto this is the Aboriginal Legal Service of Toronto (ALST)

<sup>40</sup> Judge Brent Knazan, above n 18 at 433.

Gladue Reports are impartial and not aligned to either defence or prosecution. Their purpose is to give the court more information, which the court can consider and weigh as it sees fit. Judges I spoke to emphasizes the enormous benefit of the reports to determining an appropriate sentence. The Reports are factual rather than opinion-based, and although they do make some recommendations (with a focus on cultural reconnection and healing), they do not advocate for a particular outcome.

I was fortunate to meet with Jonathan Rudin, Program Director of the ALST and several of their Gladue Writers.<sup>41</sup> I was struck by the calibre of the ALST's Gladue Writers. The ALST is a non-government organization, although it does receive government funding. They set best-practice standard in terms of writing reports about Aboriginal defendants. Most Gladue Writers have law degrees and their writing clearly showed their high level skillset.

The reports I saw were not only detailed (usually between 20-40 pages) but rigorously referenced and academic in nature. Reports also include set pieces about significant events that affected a defendant and their family (for example, the impact of residential schools on an individual or their family). They also include statistical and background information about issues such as FASD or suicide in Aboriginal communities and explore how cultural reconnection and healing can be approached in a particular case. They provide this level of information because they do not presume that judges invariably know about systemic matters, let alone how those issues might have affected an individual to be sentenced.

The ALST also only employs Aboriginal people as Gladue Writers. They see it as crucial that a report about Aboriginality should be written by a person with that lived experience. Justice Knazan supports this view. His Honour notes how an Aboriginal writer will have "a natural and deeper sense of the devastating that over-incarceration has had on Canada's Aboriginal peoples"<sup>42</sup>. Judge Knazan also makes the point that the circumstances in a case are sometimes so appalling and multi-faceted, that to put this in writing is so "textured and require(s) time to absorb and explain, as can best be done by an Aboriginal person."<sup>43</sup>

Gladue Reports are an important innovation to sentencing Aboriginal defendants. They ensure that the full background and circumstances of an Aboriginal defendant are before the court, which is crucial because it enables the court to comply with *Gladue* and make better informed sentencing and bail decisions.

There are, however not an end in themselves. They do not resolve other issues, such as the process that should be used for sentencing Aboriginal defendants. Some have observed that Gladue Reports (and the Gladue Court generally) have not changed what is still a Western, colonial model of criminal justice<sup>44</sup>. Whilst valid and needing response, this does not detract from the fact that they a significant improvement in relation the sentencing of Aboriginal defendants.

### Aboriginal Youth Court

I also had the opportunity to observe a new Aboriginal Youth Court in Toronto. The Aboriginal Youth Court commenced in mid 2012. Modelled on the Gladue Court, the Aboriginal Youth Court seeks to ensure that Aboriginal young people also have Aboriginality taken into account in sentencing and bail proceedings.

The differences between this court and an ordinary Youth Court was considerable. Judge Marion Cohen was acutely aware of the Aboriginality of each defendant she was dealing with. Her Honour's approach was informed by her awareness of how in mainstream courts, judges and

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<sup>41</sup> Interestingly, my visit coincided with a visit from a delegation from the Yukon territories who had traveled to Toronto for the same purpose as me - to see how things were being done in Toronto. The ALST is clearly setting the pace nationally in terms of Gladue Reports.

<sup>42</sup> Judge Brent Knazan, above n 18 at 438.

<sup>43</sup> Judge Brent Knazan, above n 18 at 439.

<sup>44</sup> Judge Melvyn Green has written of the need to make further innovations to the Gladue Court, to make it more restorative and more jointly managed by Aboriginal people and more in line with Aboriginal conceptions of restorative justice - see Judge Melvyn Green, above n 12.

lawyers were sometimes entirely unaware of a young person's Aboriginality. This would mean that an Aboriginal young person would be treated as any other young person, with their specific needs being overlooked and no consideration of Gladue principles in bail and sentencing.

Judge Cohen described how an education process is needed, not only for judges, but also for Justices of the Peace, lawyers, and other court officials to ensure that they comply with *Gladue*. All those participating in the Aboriginal Youth Court must undertake a detailed training program run by ALST. This comprehensive approach speaks strongly against those who would argue that mainstream courts can take *Gladue* into account within and simply as part of their day-to-day work.

A key emphasis of the Aboriginal Youth Court is reconnecting Aboriginal young people to their culture. The court works closely with the ALST, and deploys the resources of the Aboriginal community to help a young person deal with their issues. An ALST court worker sat with counsel at the bar table, advising the court about the most appropriate intervention to assist each young person. There was also an ALST youth mental health worker, who was present in court and ready to assist a young person connect with specialist services.

Whilst in its early days and with a formal evaluation just beginning, it is possible to see the Aboriginal Youth Court making a real difference in the lives of the young people it is dealing with. I was struck by one case, Sasha (not her real name) who presented with a range of complex issues: alcohol misuse, mental health issues, numerous charges, limited family supports. She refused to be interviewed for a Gladue report because she didn't want to go into details of her past.

The preparedness of the Aboriginal court workers to be flexible to find alternatives to meet her needs was striking. Probation would have just turned their back. Judge Cohen adjourned matters for Sasha to attend a Community Council conference, where a panel of Aboriginal elders and service providers will meet with Sasha to see how best to address her needs. This to me signified a court willing to innovate, to try something different to better meet the needs of the Aboriginal young people who in times past would have just fallen between the cracks.

## 1.2. Tsuu T'ina Peacemaker Court<sup>45</sup>

The Tsuu T'ina Nation are Dene people who originate in the Northwest Territories of Canada and who migrated south along with the Navajo and Apache peoples. Their lands are southwest of Calgary, Alberta on the city limits and comprise three townships and 69,000 acres.

The Tsuu T'ina Peacemaker Court is a unique innovation in Canadian justice – it represents a partnership between a First Nations people and the Federal and Alberta governments to set up an Aboriginal justice system. It is a tangible manifestation of the Supreme Court's call in *Gladue* for Aboriginal restorative justice approaches to sentencing.

The Court was inaugurated in October 1999 and the first two peacemakers and the judge were sworn in at that time. The court opened in 2000 as a provincial court which sits on the Tsuu T'ina Lands. The Court is an "enhanced" provincial court in that it incorporates some features not found in provincial courts and also supplements this with the peacemaker program. Peacemakers are trained in both traditional and modern practices in problem solving. Importantly, Peacemakers also have a community harmony role outside of specific offending before the court.

The Court deals with offences committed on Tsuu T'ina lands. The Tsuu T'ina opted against setting up another Criminal Code and court, because they concluded that the problem was not so much the type of conduct that attracts criminal sanction, but "how the conduct is handled which requires the major work and this is why the focus is on restorative practices such as peacemaking."<sup>46</sup>

### The Tsuu T'ina court model

Nearly twenty years ago, the Tsuu T'ina Nation perceived that "the incoming Europeans discarded in a wholesale fashion First Nations' concepts of justice" and that there was a prevailing 'white justice' system "which was 'partial and unfair' with little attention paid to the First Nations perspective."<sup>47</sup> It is sad to note that while I was in Canada, the Idle No More movement was undertaking a series of protests highlighting that Aboriginal and Treaty rights are still not being respected on the ground, especially in relation to land rights, economic resources and self-determination.

The Tsuu T'ina Nation saw "courts and judges (as) tools of oppression."<sup>48</sup> Not only was the justice system failing to accommodate their world view, but it was inadvertently or otherwise, having a harmful rather than helpful effect on their lives.

The Tsuu T'ina sought to change the paradigm affecting many Aboriginal people now living in two worlds. Whilst the 'clock cannot be turned back completely', things can be done differently. The report which recommended the establishment of the court noted that:

for meaningful change to occur in the status quo world of Euro-Canadian justice, they must insist on taking responsibility for and becoming empowered to deal with justice issues in their own way, that is, based on their own value system.<sup>49</sup>

The relevance of these considerations for Aboriginal people in the Northern Territory could not be more apparent.

The Tsuu T'ina Nation undertook extensive research to find an alternative court model that could combine their traditional and modern conceptions of justice. I was fortunate during my Fellowship

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<sup>45</sup> As well as observing the Tsuu T'ina Peacemaker Court, I was fortunate to have also observed the Siksika Peacemaker Court and to have met with Siksika and Navajo peacemakers during my Churchill Fellowship. There are some significant differences between those peacemaking models and the Tsuu T'ina model here described. I have focused here on the Tsuu T'ina model to present one coherent example of peacemaking.

<sup>46</sup> Madam Justice Marsha Erb, email correspondence, 23 April 2013.

<sup>47</sup> Karen Kryczka MLA (Chair, Review Team), *A New Direction, Report of the Review Team Established to Study the Tsuu T'ina Nation Proposal for a First Nation Court* (September 1998) at p 8.

<sup>48</sup> *Ibid* at p 9.

<sup>49</sup> *Ibid* at p 8.



to meet with Justice Marsha Erb of the Alberta Court of Queen's Bench. Her Honour worked for 7 years as General Counsel for the Tsuu T'ina Nation and was instrumental in helping the Tsuu T'ina Nation develop the Peacemaker Court.

They knew that a peacemaking role had worked in times past and could work again. They consulted with Elders and looked to other models (such as Navajo peacemaking processes<sup>50</sup>) to find better ways of dealing with conflict. Elders explained the traditional approach of peacemaking - those in conflict had to be healed and relationships between victims and offenders restored. This relatively straightforward example<sup>51</sup> illustrates peacemaking in practice:

A younger woman assaulted an older woman. The two had been friends. The assault had ended the friendship. In the peacemaking circle, the younger woman apologized to the older woman, saying "I'm sorry I hit you but what you said to me at the time really hurt me." In this case, apologies went both ways and their friendship was restored.

One of the unique features of the model developed by the Tsuu T'ina is that the Office of the Peacemaker is integrated within the Court and has a status equivalent to that of the Prosecutor (see Annexure 1). Other key aspects of the model include that the court sits on the Tsuu T'ina lands, has Aboriginal court personnel (these include an Aboriginal judge, prosecutor, court clerks, courtworker, and probation officer), uses traditional ceremonies, improved communication (not using legal jargon, using interpreters) and has a primary focus on healing and restorative justice.

### Observations of court

I observed the Tsuu T'ina Peacemaker Court sitting in central Calgary due to renovations taking place at the Tsuu T'ina courthouse. The court in Calgary was nevertheless arranged in a circle with the judge sitting at the same level as others present. The court had First Nations symbols and artwork on prominent display. The Court usually starts with a smudge, where sweetgrass is burnt as a prayer for guidance.<sup>52</sup> Incorporating these traditions means "Tsuu T'ina will see the Court as their court, their system of justice, and their wish for peace and order in their community."<sup>53</sup>

As well as court layout and incorporation of ceremony and tradition, there are two other key aspects to the Tsuu T'ina model. The first is the role of the Judge in safeguarding the process. It had been recommended in the Final Report of the Review Team Established to Study the Tsuu T'ina Nation Proposal for a First Nation Court that "a highly qualified member of the First Nations Bar who ordinarily qualifies for the Bench and who has demonstrated an ability to bridge the cultural divide between the Euro-Canadian legal system and the First Nations community."<sup>54</sup>

This recommendation was adopted, and the current Tsuu T'ina Court Judge, Eugene Creighton is a Blackfoot Aboriginal man. Judge Creighton is currently the only First Nations judge in Alberta and the benefits of an Aboriginal judge dealing with matters involving Aboriginal defendants was undeniable. This was firstly as regards to having a shared cultural background. In one matter, his Honour spoke to a defendant who breached Tsuu T'ina cultural protocols and without speaking of it, canvassed how the defendant could face banishment for his wrongdoing. A non-Aboriginal judge would likely have been entirely oblivious to this subtext to the matter.

In another matter, I observed the difference in communication that is possible with an Aboriginal judge. Judge Creighton spoke at length with a defendant convicted of high range drink driving (his reading was 0.19). His Honour asked the defendant detailed information about his family, health and background. The defendant spoke about his battle with alcohol, and how as he was getting older, he was seeing things differently and becoming more conscious of spirituality. There was also discussion about the defendant's liver damage: 'Alcohol is a strong spirit for me to break'. Judge Creighton responded how cirrhosis of the liver is a big problem amongst *our* people, how *he* had had family die from cirrhosis and the impact of drink driving on *our* families. The matter

<sup>50</sup> Navajo are part of same Athapaskan linguistic group as the Dene people.

<sup>51</sup> Extracted from an article by Judge Tony Mandamin, Ellery Starlight and Monica Onespot, 'Peacemaking and the Tsuu T'ina Court' in *Justice as Healing*, Native Law Centre Vol. 8, No. 1 (Spring 2003)

<sup>52</sup> When I observed the Tsuu T'ina Peacemaker Court it was sitting at the Calgary Court house and not on the Tsuu T'ina reserve due to renovations taking place. Although the courtroom in Calgary had aspects as here described, I didn't observe processes such as smudging.

<sup>53</sup> Judge Tony Mandamin, Ellery Starlight and Monica Onespot, above n 36.

<sup>54</sup> See Karen Kryczka MLA (Chair, Review Team), above n 32, p 27

concluded on a very positive message of support, with Judge Creighton expressing his hope for the defendant to get back on the right track.

It is difficult to conceive this type of exchange happening in a mainstream court context with a non-Aboriginal judge. Judge Creighton's lived experience with the harmful impact of alcohol clearly gave him the ability to understand the defendant's issues and respond more effectively to them. I was left with a strong sense of why the Tsuu T'ina leaders insisted on having an Aboriginal judge with a shared cultural background and lived experience to deal effectively and fairly with their people.

The second other key aspect of the Tsuu T'ina Peacemaker Court model is Peacemaking. A Peacemaker Coordinator sits across from the Crown prosecutor and their role is considered to have the same status as the prosecutor. On the day I visited, I saw at least five matters involving peacemaking. It was clear that the role is regularly utilized and highly valued.

Matters are referred for peacemaking from the general court list, usually with the Crown prosecutor's consent. The prosecutor I observed was a strong proponent of peacemaking and actively sought to refer matters for peacemaking<sup>55</sup>. The court also has the power to refer a matter for peacemaking notwithstanding a prosecutor's opposition.

If a case is referred to peacemaking, the Peacemaker Coordinator will first assess whether it is suitable for peacemaking. Elders set the requirement that any offence other than homicide or sexual assaults could be referred. Peacemaking may only take place, however if the victim agrees to participate.

The first step upon referral is for the Coordinator to speak to the victim and make a decision as to whether peacemaking is appropriate. If it is, they will assign the matter to two of their panel of peacemakers. Peacemakers are recruited on the basis of having high community standing, and they will be selected in a particular matter based on whether they will be seen as fair by both sides.

Peacemakers then gather the participants to a peacemaking circle. As well as the parties, this will include an Elder and possibly service providers (eg. an alcohol counsellor), depending on the case in question.

Peacemaking generally starts with a prayer and smudging and is followed by four 'rounds' when the Peacemaker goes around the circle, giving each person the opportunity to speak. The first time around, people speak about what happened. The next time, the focus is how they were affected by what happened. The third time is what they think should be done. And in the fourth round, they speak about what is agreed. This could be community work, an apology, restitution, or attending some form of counselling.

The final part of the process is that the Coordinator reports back to the court the outcome of the circle. If it is a less serious charge, the prosecutor may dismiss it. If more serious, the judge will take the outcome of the circle into account in arriving at the appropriate penalty.

## Conclusion

Tsuu T'ina Peacemaking is a unique, restorative justice response by the Tsuu T'ina Nation to find a better way of dealing with conflict consistent with their world view and traditions. The Tsuu T'ina Nation's decision whether the court should sit within the current justice system, or outside it as a separate, free-standing court highlights the logistical questions that need to be considered in developing initiatives such as this. Ultimately, each Aboriginal Nation must answer questions like those for themselves. In the case of the Tsuu T'ina, they decided that the best option for them was as part of Alberta's provincial court system, "to weave First Nations traditional concepts into an existing justice environment"<sup>56</sup>. It is a testament to their willingness to forgive and move

<sup>55</sup> He described the peacemaking court to me as "awesome". Again, his lived experience as an Aboriginal man was central to his role in the court.

<sup>56</sup> Karen Kryczka MLA (Chair, Review Team), above n 32, p 10.

forward that they were willing to undertake this extraordinary task.

The Tsuu T'ina Peacemaker Court stands as a powerful response to the challenge set by the Supreme Court of Canada in *Gladue*, to find restorative justice approaches that are meaningful and legitimate for Aboriginal people. As Judge Mel Green observes:

At bottom, honouring principles of restorative justice in the adjudicative process requires the inclusion of First Nations and Inuit peoples in the creation and practice of models of criminal justice that are grounded in and legitimated by customary law and tradition... this necessitates community-infused approaches that invite community and offender — and, where possible, victim — to participate in a process of acknowledging responsibility for criminal conduct and fashioning a culturally meaningful response.<sup>57</sup>

A particularly exciting aspect of the Tsuu T'ina Peacemaker Court is that it was designed and implemented by a First Nation peoples, on their terms. There are obvious lessons for Aboriginal people in the NT, many of whom live in communities where traditional restorative justice processes continue to be practiced.

If we are committed to take action to address the systemic failures of how our justice system negatively impacts Aboriginal people and to make it more relevant and meaningful for them, we must foster restorative justice processes that are geared to restoring relationships and community harmony. And if that involves supporting and empowering Aboriginal communities to turn their restorative justice vision into a reality, as well as significant changes like Aboriginal judges and magistrates overseeing bi-cultural court process, it is a vision we must embrace.

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<sup>57</sup> Judge Melvyn Green, above, n 12 at p10.

### 1.3. The Cree Court

The final part of my Canadian travels was to Saskatchewan, primarily to observe the Cree Court. As much as I knew that I would be travelling to a full-blown Canadian winter, there was no amount of preparation that could ready a Darwinite for the extremes of 40 below.

Upon arrival in Saskatoon, I met and had the pleasure of staying with Ruth Thompson and Wes Fine Day. As Director of the Program of Legal Studies for Native People, Ruth oversees an eight-week course run by the University of Saskatchewan's Native Law Centre.<sup>58</sup> The course provides Aboriginal students from across Canada with an opportunity to study first-year Property Law before beginning law school. The program provides an alternative means for Aboriginal students to be accepted to law school and seeks to increase the number of Aboriginal people in the legal profession. The importance of this program became increasingly apparent in my time in Saskatchewan.

I travelled from Saskatoon to Prince Albert in northern Saskatchewan. The Cree Court is a circuit court that is serviced by the Prince Albert Provincial Court, and travels to several locations in north-eastern Saskatchewan including Pelican Narrows, Sandy Bay, Whitefish First Nation and Ahtahkakoop First Nation.

I travelled to observe the Cree Court in remote Canada because of parallels (but for the climate) with remote NT. Despite some of the similarities between the Canadian and Australian criminal justice systems and the way they impacted Aboriginal people in the remote north included:

- a) language and communication barriers where English is usually a second language;
- b) understanding of Western justice concepts; and
- c) the relevance of a mainstream justice system to Aboriginal people's everyday lives.

#### Establishment and Features of Cree Court

A Cree Court was first proposed in 1996 by Judge Claude Fafard. Its purpose was to provide court services to Cree-speaking people in northern Saskatchewan in a culturally sensitive manner. This included being able to communicate with people attending court in Cree, encouraging community leaders to participate in the justice system, acknowledging the value of Cree culture and language and incorporating traditional values into sentencing, and making the court more relevant as a local institution in remote Cree communities.

The Court was formally established in 2001 and Judge Gerald Morin appointed as the inaugural Cree Court judge. Twelve years later, he remains in that role. Judge Morin is a passionate advocate for the Cree Court and has driven the Court's development.

The main features of the court that differentiate it from an ordinary circuit court are that it has an Aboriginal judge, it functions in Cree as well as English, and it has Aboriginal court staff, Aboriginal defence lawyers and until recently, an Aboriginal prosecutor.

My overriding impression of the Cree Court was that it was bi-cultural justice in action. The Court substantially changed the dynamic of an ordinary circuit court in four ways:

#### 1. Perceptions of Fairness

Judge Morin considers the use of Cree in addition to English as vital to the court's legitimacy in northern Saskatchewan and a key step in changing community perceptions about the justice system. It tells Aboriginal people that their language is valued. If people can understand and meaningfully participate in court proceedings, it is so much more likely that the court will be seen as fair.

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<sup>58</sup> I am deeply indebted to Fiona Hussin for suggesting I visit Saskatchewan and the Cree Court, and for putting me in touch with Ruth Thompson and Wes Fine Day.

In a real and tangible way, the presence of a Cree speaking, Aboriginal judge meant that people could feel confident that issues unique to Cree people would be understood and taken into account. Some examples where I observed this take place were:

- a self-representing grandfather in a child protection matter, who was clearly overawed being in court. By being able to speak in Cree with Judge Morin, a culturally safe process was possible;
- Judge Morin questioning the lack of evidence to support the removal of children in a child protection matter. His lived experience meant that he understands more than others the legacy of residential schools and tearing families apart.
- Judge Morin encouraging Legal Aid to grant aid to a Cree speaking lawyer so that the client could feel comfortable and effectively communicate with their lawyer.

A key finding from American research considering perceptions of fairness is that “procedural justice is the key normative judgment influencing the impact of experience on legitimacy.”<sup>59</sup> Moreover, where people perceive the law to be legitimate they are more likely to obey it:

People obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect.<sup>60</sup>

There are important implications from the Cree Court as regards procedural fairness. This is not just in for the mainstream criminal justice system in Canada, but also for our own. If we want to improve compliance with court orders, the first step is to increase people’s sense of legitimacy in the justice process.

## 2. Understanding

Linked to perceptions of fairness is that the use of Cree means that people are better able to understand what takes place in court. The court alternated between English and Cree as and when a defendant or other court user needed it. Again, the judge was at the centre of this interchanging between languages. In one case, when the charges were read in English, the defendant clearly did not understand them. Judge Morin read the charges again in Cree, and the defendant was able to properly respond. In another example, the community-based mediation court worker responded in Cree to a question put to him in English. He was clearly more confident communicating in Cree, and less certain that he would be able to accurately convey his message in English.

Both examples highlight the importance of having a bi-lingual judge in the remote community context. Without Judge Morin’s interventions in the first case, there would have been significant risk of miscommunication and gratuitous concurrence<sup>61</sup>. In the second case, the mediation worker was able to better express himself using Cree because knew that the judge was able to speak in Cree.

Judge Morin put particular importance on speaking in Cree when he would give reasons for sentence. This was not only so that a defendant would be clear about the reasons he or she had been sentenced to imprisonment or some other order, but also for the benefit of members of the public present, to understand the various factors considered in sentence. Because the Court staff were also Cree speaking, they were also able to explain the order in Cree at the point of the defendant entering into it.

A final point concerns the professional worker preferring to speak in Cree so that he could fully express himself. The question must be asked about other, non-professional community members and the futility of our usual approach of conducting court proceedings even in remote communities in English.

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<sup>59</sup> Tom Tyler, *Why People Obey the Law*, Yale University Press 1990, at 162.

<sup>60</sup> *Ibid* at 178.

<sup>61</sup> where a person may agree with a person in authority because they think that’s the reaction expected of them rather than because they understand and agree with what is being said to them.

### 3. Lived Experience of Aboriginal Judges and Lawyers

A key feature of the Cree Court is the importance of having Aboriginal judges and lawyers. The Cree Court requires judges and lawyers to be attune to the unique needs and cultural background of Cree people. In this regard, there is no substitute for the lived experience that Aboriginal judges and lawyers bring to their respective roles.

The irony is that for some Aboriginal lawyers, Aboriginality was previously a barrier that had to 'overcome'. Professional opportunities have been missed and advancements delayed. But the Cree Court is now turning this on its head, and prizing Aboriginality as essential to successfully doing your job.

Judge Morin is a case in point. He is from the village of Cumberland House and is a member of the Peter Ballantyne Cree Nation in Northern Saskatchewan. Cree culture and language are clearly at the centre of his identity and sense of self. Yet he is also a man who walks in both worlds. Prior to his appointment to the Provincial Court, he practiced as a criminal lawyer in Prince Albert for nearly 15 years and before that was a probation officer. He was made Queens Counsel in 1999, and was the first Aboriginal lawyer in Saskatchewan to take silk. It is impossible not to see the skill set that he brings to his role as a judge.

It is also significant that the Cree Court is creating career pathways for Aboriginal lawyers. Aspiring lawyers can see role models in important and senior positions. Glass ceilings are being broken. The crown prosecutor who commenced with the court was recently appointed a judge. Other lawyers will hopefully follow.

There is now the exciting possibility that Aboriginality will be an advantage for the career prospects of Aboriginal lawyers. And not in the sense of any positive discrimination – the advantage it brings is entirely merit-based, and stems from the recognition that in a bi-cultural justice system, you need to have lawyers and judges who can work across both worlds.

There is a gain a lesson for the Northern Territory. With 30% of our population Aboriginal and the majority of our court users being Aboriginal, it is time for us to recognise that we need Aboriginal judges and magistrates who bring a skillset similar to Judge Morin to work across both the Aboriginal and non-Aboriginal domains.

### 4. The Violence of Poverty

I was struck during my visit to Pelican Narrows with how much the lives of the people resembled those of Aboriginal people in Top End Aboriginal communities. Poverty was obvious. Children (and adults) were skinny and underfed. Houses were tired, overcrowded. Unemployment seemed high, services poor and a sense of despair widespread.

Judge Morin spoke about the 'violence of poverty.' This refers to the flow-on effects when people do not have ready access to food, shelter and access to essential services and live in precarious living environments. The end result is often emotional, psychological and physical violence:

people living in extreme poverty are forced to lead lives where their dignity and rights are seldom respected – they often feel that they are not recognized nor treated as human beings with equal rights. The irony is that society often perceive people living in poverty as the source of violence and as a threat to society, rather than as the victims of violence and crime<sup>62</sup>

What is striking is that notwithstanding what we ought to know about the links between poverty and violence, responses to offending in remote Canada (just as in remote Australia) are hamstrung by a lack of programs and resources to deal with the poverty people face. There is little doubt that the Cree Court could be so much more effective if it had these sorts of programs and support services at its disposal.

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<sup>62</sup> Overcoming Extreme Poverty website: <http://overcomingpoverty.org/article/presentation-of-international-theme-for-october-17-2012> (last viewed 2 April 2013). In 1992, the United Nations declared October 17 as "World Day for Overcoming Extreme Poverty".

## 2. New York (January – February 2013)

I travelled from Canada to New York to visit the Center for Court Innovation. The Center is a not-for-profit organisation integrated with the New York court system. It is the judiciary's independent research and development arm and their mechanism for testing innovative approaches to improve the functioning of the justice system.

The Center runs a range of demonstration projects including community courts, youth courts, domestic violence courts, mental health courts, and the re-entry of ex-offenders from prison back into the community. I travelled to New York to see some of these in action.

I was also interested in learning about the Center's approach to justice system innovation – how they look at how best to address complex criminal justice issues like domestic violence, youth crime, and the way minority groups are treated in mainstream justice processes and set up creative, new approaches to address them.

### 2.1 Innovation

The Center is a world leader in justice system innovation. They have had many successes, but what is equally impressive is their approach to failure. They acknowledge up-front that failures are to be expected, not because of corruption or incompetence, but because “change is exceedingly difficult to achieve ... within an institution as sprawling and complex as the criminal justice system.”<sup>63</sup> They place great emphasis in understanding reasons for failure; was it because a concept was poorly conceived? Or that a project was badly implemented? Or because a project was not well managed, or failed to meet on-the-ground needs?

This aspect of the Center's work resonates from a Northern Territory perspective. Too often, we try something new on a 'pilot' basis and discard it because we conclude that it has not worked.<sup>64</sup> We need to fundamentally change our approach and acknowledge the complexity of the criminal justice system issues we are dealing with. Even in the case of 'unsuccessful' projects, we need to maintain a long-term focus to the problem sought to be addressed, and see whether there might be lessons that can be drawn to make our next effort more successful.

### 2.2 Demonstration Projects

I observed demonstration projects operated by the Center for Court Innovation in three diverse parts of New York City; Staten Island, Brownsville and Red Hook. I will here profile two projects which illustrate the Center's approach to procedural justice, and another which shows what is possible when it comes to innovative justice approaches for young people.

#### 2.2.1 Procedural Justice

Procedural justice focuses on how comprehensible and understandable court proceedings are from the point of view of defendants, victims and witnesses. It also looks at whether participants feel they have a meaningful voice in the justice proceedings that concern them.

Proponents of procedural justice point to research that suggests that where defendants perceive a justice process as fair, they are more likely to comply with court orders and follow the law in the future. Greg Berman and Emily Gold from the Center for Court Innovation put it in these terms:

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<sup>63</sup> Greg Berman and Aubrey Fox, 'Why Good Programs Go Bad. Learning from Failure' (2011) *Criminal Justice* Summer, p 46.

<sup>64</sup> The Substance Misuse Assessment and Referral for Treatment (SMART) Court is a recent NT example of this. A change of Government saw a decision that after only 18 months of the court's operation that it should be disbanded because it was not effective. There was no consideration of commissioning an evaluation of the SMART Court before taking this decision or how, if the Government did consider the court was not working effectively, it could be re-designed to be more effective.



how litigants regard the justice system is tied more to the perceived fairness of the process than to the perceived fairness of the outcome. In other words, even litigants who “lose” their cases rate the system favourably if they feel that the outcome is arrived at fairly.<sup>65</sup>

### Procedural Justice and the role of the Judge

Berman and Gold refer to a recent study in relation to drug courts, which showed that drug courts were an effective and preferable process to mainstream court. The study found that Drug Court participants were less likely to be using drugs 18 months after starting the program.

They also found that the “strongest predictor of reduced future criminality was a defendant’s attitude towards the judge.”<sup>66</sup> This finding clearly points to the importance of the relationship between the defendant and the judge or magistrate. Where a judge is able to communicate effectively and engage with the defendant, not only will a defendant perceive that they have been treated fairly, but they will be more likely to comply with outcomes that they have had a voice in co-constructing with the court.

As a way of building on this study, the Center for Court Innovation is partnering with the National Judicial College to look at how to enhance procedural justice in the criminal court context. Two of their recommendations are using plain English and engaging defendants in dialogue.

### Demonstration Projects

I observed two demonstration projects focussing on procedural justice:

#### (i) Red Hook

The Red Hook Community Justice Center was established in 2000 after the shooting of a local school principal galvanized the community to take action. The Center operates out of a refurbished catholic school and the focal point is the Red Hook Community Court. To visit the center, two things are striking. First, that procedural fairness is practiced inside the courtroom. The court hears cases that would ordinarily go to three different courts— Criminal Court, Housing Court and Family Court. The Community Justice Center brings all of these cases into one courtroom with one judge to provide a coordinated approach to dealing with people’s problems. Judge Calabrese has been the sole judge since the court commenced in 2000. His Honour describes how:

We treat people with respect when they walk in the front door. That is our philosophy throughout the entire building: we work with people and helping them address their issues.”<sup>67</sup>

The second aspect extraordinary aspect is how as a multi-jurisdictional, problem-solving Community Justice Center, Red Hook provides a one-stop-shop that is able to deal with the variety of issues a person might face. This includes alcohol and drug treatment, job training, education, medical examinations and mental health counseling. People in the community can access these via court referral, or they can simply drop in. The model is now a basis for justice innovation nationally and internationally. I also visited the Brownsville Community Justice Center, located in one of the most dangerous, high crime precincts in New York. The staff setting up the Brownsville Center previously worked at Red Hook, and are working in close collaboration with the local community to set up a homegrown version of Red Hook that will meet local needs.<sup>68</sup>

#### (ii) Manhattan Integrated Domestic Violence Court

<sup>65</sup> Greg Berman and Emily Gold, ‘Procedural Justice From the Bench. How Judges can Improve the Effectiveness of Criminal Courts’, *Judges Journal* Vol. 51 No. 2, at 20

<sup>66</sup> *Ibid*, at 20.

<sup>67</sup> Maura O’Connor, ‘A Different Sort of Court’, *The New York World*, 8 October 2012. See:

<http://www.thenewyorkworld.com/2012/10/08/a-different-sort-of-court/>

<sup>68</sup> One of the projects operating at Brownsville is Justice Community. This is a 6 month project which provides young people with an opportunity to ‘step off the fast track that leads to incarceration, unemployment, and poverty.’ Most of the Justice Community clients are gang affiliated. Many gang members cannot see where they will be in five years time – most assume they’ll be dead or in jail. Simply participating in a project like this is a success but also brings its own unique challenges, such as developing relationships of trust with clients to unearth the issues they face. The project includes job readiness, educational attainment and civic engagement components, and intensive case management.



The Manhattan Integrated Domestic Violence Court was an initiative to see if the needs of litigants who would otherwise be before the criminal and family courts could be better met by appearing before a single, Integrated Domestic Violence Court. I had the opportunity of observing the Manhattan Integrated Domestic Violence Court and meeting Judge Tandra Dawson. Judge Dawson was extremely impressive in her interactions with court participants. She spoke in a caring, patient manner and went to great lengths to ensure participants understood and were part of the process that involved them.

The model of the Manhattan Integrated Domestic Violence Court is to simultaneously deal with criminal charges of a domestic violence nature and related family law matters. Research shows that a frequent reason for conflict between litigants is uncertain contact arrangements with their children. If those can be clarified, a trigger for domestic violence is removed.

Matters are heard only where a defendant faces a misdemeanour level Domestic Violence - related charge, and the prosecution agree to it being dealt with in the Integrated Domestic Violence Court. The prosecution have a dedicated Domestic Violence unit. Misdemeanours include not only minor matters, and matters I saw included some relatively serious assaults.

Judge Dawson sat with a specialist clinician, and where a defendant was pleading guilty, the clinician designed an appropriate treatment plan for that defendant. This might include a domestic violence counselling program, substance abuse, or therapy. Judge Dawson told me after court that 90% of defendants coming before her court complete the treatment and counselling they are ordered to do. This is clearly strong vindication of a justice model that prioritises the practical needs of court participants and operates in a procedurally fair way.

## Conclusion

In the Northern Territory, we need formal research to consider questions of procedural justice in our criminal justice system. But if there is one finding we should take on board immediately, it is that if we want to see improvements not just in perceptions of fairness but also in compliance with court orders by Aboriginal people in the NT, we need to prioritise the importance of procedural fairness in the criminal justice system.

If we are to increase procedural justice, we need appropriately skilled judges and magistrates who can safeguard procedural justice, and who are themselves expert at communicating and engaging with Aboriginal court participants.

### **2.2.2 Youth Courts**

Youth Courts are an extraordinary innovation. They are a diversionary process from ordinary court where a defendant consents to a panel of their peers (Youth Court Members) deciding how they can pay back the community and receive the help they need to avoid further involvement in the justice system. Youth Courts only hear low-level offences such as shoplifting, trespass, fare evasion. A defendant must have indicated that they are pleading guilty to the charge. It should also be noted that it is entirely voluntary for a young person to be dealt with by their peers. They can choose to be sentenced in the ordinary court.<sup>69</sup>

The Center for Court Innovation launched its first Youth Court in 1998 and today operates over 80 in New York alone. I had the opportunity of seeing the Staten Island and Red Hook Youth Courts in action.

Before court, defendants are met by a Youth Court member allocated as their Youth Advocate. When court commences those present take an oath to keep what happens in the court confidential, and agree that if a Member discloses information they will be banned and not able to observe in future.

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<sup>69</sup> They also hear cases referred by schools principals such as a young person regularly truanting or involved in a school-based fight.

The Community Advocate (representing the community) gives an Opening, outlining the agreed facts. The Youth Advocate then gives a response, similar to a plea in mitigation. The respondent is then asked to sit next to the judge. It is at this point that the truly innovative part of proceedings occurs. The foreperson starts by telling the defendant, 'We are only here to help you, not to judge you.' The twelve members of the jury then ask the defendant a series of questions about what happened and why, whether they have insight into harm caused to themselves, their peers, community, or victim; their future goals; whether they are a leader or follower; whether they have apologised; been punished elsewhere; whether their friends are a positive or negative influence; their conflict resolution skills; any family issues; and how they are going at school.

In one matter where a young person admitted to stealing and trespass with two co-accused's the questions included:

- *How were you approached by police? (tackled to floor)*
- *What was that experience like? (not good)*
- *Is there anyone else you should apologise to? (my mother)*
- *How was your relationship with your mum before the offence? (good)*
- *Do you see yourself as role model?*
- *What are your goals for future? Are you aware that this offence could effect your future goals?*
- *Do you know how offence affects the community?*
- *How are your grades at school?*
- *Are you a leader or follower?*
- *How do you respond to conflict?*
- *If you could go back to the day of the offence, what would you do differently? (not take it)*
- *Did you three talk about the offence? Whose idea was it? Were you the only one caught?*

The manner in which questions were asked, and their depth and variety, that was the most extraordinary aspect of the Youth Court. Questions were asked (and answered) that could never be asked by adults in ordinary court. Judge Calabrese states:

What we have found is that young people are more effective in delivering these kinds of messages to their peers than adults. I've seen a lot of Youth Court sessions and I know that an adult could talk to the respondents for two weeks straight and not get the same results as one Youth Court session. Most important, an effective intervention at a young age may save a kid from coming before me in Criminal Court when he or she is older and their problems have grown bigger.<sup>70</sup>

After the jury completed its questions (which might last 15 to 20 minutes), they retire to consider the appropriate disposition. This might be community work (a learning experience and not just picking up rubbish), essay(s), decision-making session, goal-setting session, conflict resolution, or referral to one of the Center's in-house social workers. They decide dispositions by consensus voting - they go through each possible option, and see who supports each option. After the jury return, they announce their decision. The defendant then meets with a staff member to work out the next steps.

## Conclusion

Youth Courts use positive peer pressure to help young people who have committed minor offences to see the impacts of their actions on the community, the victim and themselves. The focus is entirely rehabilitative, turning something negative into something positive. It was interesting to hear in Staten Island that notwithstanding that there is nothing to compel defendants to complete the tasks given to them, their compliance rates were 94%!

Youth Courts offer a more effective way of communicating with young people, and set a challenge for those appearing as defendants to become the person they want to be. One interaction that resonated with me was a female defendant who was asked if she was a role model, and said she wasn't. The question came back from the juror, 'Why not?'

Another aspect of Youth Courts is that they train teenagers with an interest in a career in the justice sector to serve as jurors, judges and lawyers. Young people who want to be Youth Court

<sup>70</sup> Judge Alex Calabrese, 'Research', Center for Court Innovation website: <http://www.courtinnovation.org/research/alex-calabrese-judge-red-hook-community-justice-center>

Members apply via a competitive selection process. They are trained over two months before sitting in the court and are paid a small stipend for the time they volunteer each fortnight.

The Court also teaches young people the ability to ask questions in a gentle, non-judgmental way and to empathise with young people who are sometimes from very different backgrounds to their own, and who they might otherwise have never had direct contact.

The Center for Court Innovation has developed a comprehensive manual to assist those interested in establishing a Youth Court. This typifies the Center's approach to facilitating positive change in the justice system, anywhere in the world.

### 3. New Zealand (February 2013)

I travelled to New Zealand to see innovation justice initiatives set up to address the needs of Māori and Pacific Islander (Pasifika) youth. New Zealand's criminal justice system has some striking similarities to our own as regards the grossly disproportionate representation of Māori at all stages of the justice system. One example is the proportion of Maori apprehended and sent to prison. Although only 12.5% of the general population, Māori constitute 50% of all persons in prison."<sup>71</sup>

Whilst New Zealand's adult criminal justice system has been condemned for its punitive focus<sup>72</sup>, its young justice system has been lauded as one of the best in the world.<sup>73</sup> I was interested to see this in action, including adaptations of their mainstream model designed to meet the particular needs of Māori and Pasifika youth.

#### 3.1 The New Zealand Youth Justice system

The *Children, Young Persons and Their Families Act* 1989 ushered in a "new paradigm of re-integration, restorativeness, diversion and family empowerment."<sup>74</sup> The object of the Act is to promote the well-being of children, young persons and their whānau (families). The Act brought in a diversionary regime, which seeks to divert children and young people<sup>75</sup> as possible from the youth justice system. It is based on the premise that if rehabilitation is the fundamental goal of the Act, court proceedings are counter-productive to this aim.

Section 208 of the Act sets in place the foundations of the 'new paradigm.' Criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter; strengthening the family, whānau, hapu, iwi, and family group of the child or young person concerned; sanctions imposed should be the least restrictive possible, and the most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapu, and family group; and measures for dealing with offending should be to address the causes underlying the child's or young person's offending.<sup>76</sup>

Principal Youth Court Judge Andrew Becroft notes that:

Eighty per cent of the young offenders in New Zealand are not charged, they are dealt with by police diversion in the community. They do not come to court, which is the worst place for them. There is no country in the world that matches that rate, and it works best. It's just good, firm, community-based creative intervention led by police and the community.<sup>77</sup>

Police play a crucial role. This is particularly as regards the decision to prosecute a child or young person, or pursue alternative means of dealing with the matter.<sup>78</sup> To their great credit, New Zealand Police do not see the justice system as the best way to deal with a young person's underlying issues. Rather, they embrace an evidence-based approach that "approaches that work outside the formal Youth Court system appear most effective."<sup>79</sup>

<sup>71</sup> Department of Corrections, *Overrepresentation of Maori in the Criminal Justice System: An Explanatory Report* (September 2007), p. 6.

<sup>72</sup> See, for example Nessa Lynch, 'Playing Catch Up? Recent Reform of New Zealand's Youth Justice System', *Criminology and Criminal Justice* (9 January 2012)

<sup>73</sup> It is important to note that there are some odious aspects of the New Zealand youth justice regime – for example, 17 year olds are considered adults and dealt with in adult court.

<sup>74</sup> Morris and Maxwell, cited in Nessa Lynch, 'Playing Catch Up? Recent Reform of New Zealand's Youth Justice System', *Criminology and Criminal Justice* (9 January 2012) at 1.

<sup>75</sup> 'Child' is defined as a 10-13 year old, and 'young person' as aged 14-16. 17-year olds are dealt with in the adult jurisdiction.

<sup>76</sup> It is interesting to observe that the key principles in s. 4 of the Northern Territory's *Youth Justice Act* are not altogether dissimilar to those expressed in s. 208. Whether they are implemented in practice is quite another issue.

<sup>77</sup> Simon Collins, 'Getting Tough Not the Answer Says Head of Youth Court', *New Zealand Herald* 18 February 2012. See: [http://www.nzherald.co.nz/crime/news/article.cfm?c\\_id=30&objectid=10786296](http://www.nzherald.co.nz/crime/news/article.cfm?c_id=30&objectid=10786296)

<sup>78</sup> Section 208(a) of the Act establishes the guiding principle that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.

<sup>79</sup> Kaye McLaren, *Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action* (2011) Police Youth Services Group, New Zealand Police, at 6.

New Zealand Police have a specialised Police Youth Aid section who deal exclusively with young offenders and youth at risk of offending. Part of this role is to work with young people and their families, to build relationships with young people and support them to address any issues they face. They also oversee youth prosecutions and ensure that only appropriate matters are brought to court. This expert approach to youth justice has led to Police using warnings and diversionary programs as alternatives to criminal prosecution in the vast majority of the cases of young offenders they deal with, even those who have been in trouble before.

New Zealand's youth justice statistics speak for themselves. In the last decade, whereas comparable numbers for adults have increased, the numbers of young people apprehended, charged and appearing in the Youth Court have decreased, the numbers of young people in detention have decreased, and at the same time, youth crime rates have also decreased<sup>80</sup>.

When I met with Acting Inspector Kevin Kneebone, Prevention Manager Youth & Community, New Zealand Police he contrasted New Zealand's youth and adult justice as a way of highlighting the expert, youth-specific justice approach New Zealand is taking. He posed the question in the context of a young person just turned 17, who in New Zealand is then dealt with in the adult courts: 'If it was your kid, how would you like them to be treated?'

### 3.2 Family Group Conferencing

New Zealand's Family Group Conferencing (FGC) model was introduced as the key element of the *Children, Young Persons and Their Families Act* reforms in 1989. FGC's "form the basis of decision-making in the Youth Court."<sup>81</sup> They developed in response to Maori pressure for a new approach to dealing with *rangatahi* (Maori young people). FGC's are a blended Maori/Western model of conferencing. They bring together those involved in life of a young person (especially their whānau), the victim and members of the community to put together a plan that will foster individual and whānau accountability, repair harm and prevent re-offending. They are in no way a soft option – whereas in court a young person can rely on counsel to speak on their behalf, conferences are emotionally confronting, and a young person must speak directly to the issues raised.

FGC's are a restorative justice process, designed to restore harmony between the defendant and the victim(s) of their offending, and address harm done. The idea is that by the end of a conference, attendees will have formulated "a plan about how best to deal with the offending."<sup>82</sup>

Parties attending an FGC include the young person, the victim, their families as well as professionals (such as police and service providers) as appropriate to the particular case. Where victims choose to attend, they can participate face-to-face, or from a separate room. One of the goals of FGC's is for young people to see how their actions affect real people and victim participation is crucial to this. Participating in an FGC can also help a victim to bring closure to a traumatic incident.

FGC's operate on the premise that if the development of the young person is the goal of the Act, the best way to achieve this is in a less formal, conference setting. But it is also essential that FGC's take place in a safe and secure environment. The presence of police at FGC's ensures that all parties feel they are in a safe environment.

As noted above, one of the great strengths of the New Zealand model is that 80% of young people are diverted from the youth justice system. In these cases, Police give warnings or run their alternative action programmes. Of the remaining matters that are not diverted, most are referred to an FGC in one of two ways: when Police have an intention to charge a young person or by the Court, if a young person is arrested and brought to court.

<sup>80</sup> See Principal Youth Court Judge Andrew Becroft, *Child and Youth Offending: Introductory Notes*. His Honour stresses, however the increased violent offence apprehensions for 14-16 year olds over the last decade, which is of significant concern.

<sup>81</sup> Youth Court of New Zealand, *The Youth Court and Youth Justice in New Zealand* (July 2012), at 3.

<sup>82</sup> Gabrielle Maxwell & Allison Morris, *Youth justice in New Zealand: A restorative model* (2000) *Restorative Justice Online*: <http://www.restorativejustice.org/10fulltext/maxwellandmorris>

## The FGC Process

For a conference to arrive at a Plan, it needs to be agreed by consensus of all present. It also needs to follow these steps:

1. does the young person admit the offence?;
2. discussion among those at the conference about the nature of the offence, the effects of the offence on the victims, the reasons for the offending;
3. deciding the outcome.

### (a) Admitting the Offence

The young person must indicate prior to an FGC that they are willing to take responsibility for their alleged actions. For a court-referred FGC, the young person must advise the court that they 'do not deny' the charge before it can be referred. At the FGC the young person will be required to accept responsibility for the offending behavior.

They are not required to explicitly plead guilty because matters could be raised at the FGC which might be disputed by the young person and which mean the matter needs to be referred back to the Youth Court for a contested hearing. Principal Youth Court Judge Becroft also notes that the "not denied" mechanism removes a potential blockage of matters being referred to an FGC:

the formal Court process assists restorative justice processes, because, if the Youth Court insisted upon the making of a guilty or not guilty plea, this would inhibit prompt access to the FGC process.<sup>83</sup>

As a side point, it is interesting to compare the analogous practice in the Northern Territory, where Police will not refer a matter for diversion unless a young person undertakes a formal record of interview making full admissions to the charge. Where lawyers cannot be sure whether police will or won't exercise their discretion to refer a matter for diversion, it creates an expectation that lawyers will advise their clients to relinquish their right to silence without any assurance that admissions will not be used should formal charges be pursued.

### (b) Discussion

The victim (or if they are not present, the police on their behalf) describes the impact of the offence on them. This leads to a broader discussion of the offence, what led to it, as well as to the harm and impacts as a result of the offending. This is the part of the process that is typically emotionally tough for all concerned, especially the young person.

Following this, other participants leave the room and the young person and their family consider possible proposals as to how the young person and their family can repair any harm done, and how issues that led to the offending can be addressed.

### (c) Outcome

A spokesperson for the young person calls the other participants back into the room. The group then has the opportunity to discuss the proposals. Other possibilities might also be discussed. When the group reaches consensus, the details are formally recorded as a Plan, and the conference concluded. I was advised by Child, Youth and Family that in around 80% of cases, a Plan is agreed at an FGC.

Plans need to be achievable, understandable, and uncomplicated. A good Coordinator will ask a young person to describe in their own words their understanding of what the Plan is asking them to do. A Plan should have sufficient detail to enable the terms to be put into effect. For example, if a young person is being asked to do community work, the Plan needs to address where and when

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<sup>83</sup> Principal Youth Court Judge Andrew Becroft, *Restorative Justice in the Youth Court* (19 September 2007) Speech to the LEADR 9th International Conference on Alternative Dispute Resolution, Wellington, New Zealand. See: <http://www.justice.govt.nz/courts/youth/publications-and-media/speeches/restorative-justice-in-the-youth-court>

the community work is to be completed and practical details like how the young person will get there.

### Changed role of the Youth Court

What is extraordinary to an Australian outsider is the structural change that has been achieved in New Zealand. Whilst FGC's are an autonomous process, the Court retains overall control, the presumption that courts are best equipped to decide how to address a young person's offending behaviour is displaced. Of course, there are certain matters where courts are still the decision-maker – such as if a FGC cannot agree on an outcome, or where an FGC thinks a matter too serious for it to deal with.

But for the vast majority of matters, what is revolutionary about the New Zealand model is the acknowledgement by the legislature, the judiciary and the New Zealand community that FGC's are a better way to encourage young people to take responsibility for their behaviour and to deal with the issues underpinning their offending.

Once an FGC plan has been recorded, it is presented to the Youth Court. The presiding judge will consider the proposed terms, and if acceptable, the plan will become binding. The Court may reject the plan or refer it back to the FGC if not satisfied with any of the terms proposed. A Judge can also resolve specific issues that were not able to be resolved at a conference.

The benefits for this model are twofold – first, it allows the conference participants to craft individualised outcomes that will address harm done to victims and the community, and the causes of a young person's offending outside the imposing courtroom environment. Second, conferences allow complex matters to be discussed in-depth, and in a timeframe that busy youth courts simply cannot devote to each particular case.

### FGC's and cultural adaptation

The Act allows for culturally flexible approaches to FGC's to account for the particular cultural background of the young person. The Act specifies that the "procedure to be followed" at an FGC can take account of the wishes of the family or whānau as far as practicable and as consistent with the Act.<sup>84</sup> This allows an FGC to be conducted using whatever procedure will be most effective for the young person.

Recognising that venue can play a pivotal role in the cultural integrity of an FGC process, a conference can take place wherever a young person and their family think most appropriate, so long as this is agreeable to the victim. FGC's can, for example be held on Marae (Maori meeting houses) or in a young person's home.

Under the Act, the Coordinator does not necessarily have to be the same person as the facilitator of the FGC. The Coordinator can select an appropriate person according to the cultural background of the young person to be the facilitator.

A strength of the FGC model is the breadth and creativity that can be given to plans. There is no limit on the terms that can be included in an FGC plan which means that they can be tailored to the particular needs of the parties. I was able to view de-identified examples of FGC plans. These showed innovative conditions including a young person creating and giving to the victim an artwork, and a young person paying back the victim by helping his Koro (Grandmother) with firewood and doing a paper run in exchange for his family making formal reparation.

The flexibility of the FGC process also enables the Coordinator to 'depart from the script' as and when needed. I was told of one example of a Coordinator who couldn't get hold of Maori young person's family to make arrangements for the FGC. He spoke to the head of the Marae Committee, who then convened a meeting of all those who had an interest in the well-being of the young person. Ninety people turned up! They discussed what ought to be included in the Plan. The Coordinator convened the FGC for the following week, and the FGC adopted the Marae

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<sup>84</sup> See s21 of the Act



Committee's proposals. This shows the potential for the Act to be used innovatively, and in a way that involves the young person's community and gives them ownership over the issues being determined.

Under the Act, FGC's are required to be held within a short timeframe. For example, young people in custody must have an FGC convened within 7 days, and held within 14 days.<sup>85</sup> It is crucial for all young people that matters be resolved within a timeframe appropriate with their sense of time and development. It was impressive to observe court proceedings where FGC's were requested, and to hear that they would be convened within 14 days. Over 7000 FGC's are convened each year<sup>86</sup>, and it is pleasing to see the extent to which a justice system similar to our own can build FGC's into their everyday practice.

## Conclusion

FGC's have now been operating as the 'lynchpin' of the youth justice system for over 20 years and continue to be seen as a better way of dealing with the underlying causes of a young person's offending and of restoring harm that victims have suffered. They encourage involvement of a young person's whānau, focus attention in a young person's needs, and provide a more informal and open forum where a young person can put things right. I was told that victims attend approximately one quarter of FGC's convened. Whilst this number might sound small, it should be contrasted with the negligible involvement of victims in mainstream court proceedings.

Evaluations of FGC's<sup>87</sup> have also concluded that they are having a significant role in reducing youth reoffending. One third of young people who went through an FGC had not re-offended within two years. A further third had only re-offended in a minor way.

This is not to say that the FGC process works flawlessly all the time. Some consider that FGC's are too frequently held in offices and not at marae. Although there are situations where an office setting is most appropriate (for example, where a victim expresses this as a condition of their attendance), there are obvious limitations to the effectiveness of an FGC held in an office. It can stymie the power of venue to draw in whānau and community.

Others note that Plans are at times formulaic, lacking creativity, and not sufficiently adapted to the circumstances of a particular case. The oversight function of the court to challenge stale-appearing FGC Plans highlights the strength of the New Zealand system. It is also a reminder of the need for culturally appropriate practices like utilising facilitators from a shared background to the young person to tailor Plans to the needs of Maori youth, and holding FGC's on Marae.

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<sup>85</sup> See s249(3) and (6).

<sup>86</sup> See Child, Youth and Family website: <http://www.cyf.govt.nz/about-us/who-we-are-what-we-do/family-group-conferences.html#YouthJusticeFamilyGroupConferences2>

<sup>87</sup> Youth Court of New Zealand, *The Youth Court and Youth Justice in New Zealand* (July 2012), at 4.



### 3.3 Rangatahi Courts

Rangatahi Courts commenced in 2008, with the first sitting at Gisbourne. As at 31 January 2013, there are 10 Rangatahi Courts, with strong demand for more.

Rangatahi Courts were introduced following community and judicial concerns that the conventional Youth Court process was not meeting the culturally specific needs of Māori young people. Rangatahi Courts seek to address the over-representation of Māori young people in the justice system; despite making up approximately 22% of the 14-16 year old population, Māori young people account for 65% of Supervision with Residence sentences<sup>88</sup>, the highest sentencing disposition open to the Youth Court short of a transfer to the District Court.

A Rangatahi Court is not a separate court for Māori youth. It is a sitting of the Youth Court, and very much part of the New Zealand Youth Court. The purpose of a Rangatahi Court is to monitor a young person's completion of their FGC Plan, which also happens for young people in the main Youth Court. All young people are able to have their case heard in the Rangatahi Court (it is not limited to Māori young people) and the same law is applied as in the main Youth Court.

Matters are referred to Rangatahi Court from an FGC. If an FGC (including the victim) think it appropriate, they can recommend to the Youth Court to refer the matter to the Rangatahi Court, where the monitoring of the FGC takes place on Marae, at the Rangatahi Court. The Youth Court Judge makes the final decision as to whether the matter is referred to the Rangatahi Court or dealt with in the Youth Court.

Unlike ordinary Youth Court sittings, Rangatahi Courts aim through an emphasis on Māori tikanga (process and custom) to support young people back onto the right track by emphasising pride in culture and self, and by building a young person's linkages within the Māori community.

Judge Heemi Taumaunu<sup>89</sup> along with Principal Youth Court Judge Becroft and several of New Zealand's other Youth Court judges had seen the Victorian Koori Court model in operation. Their Honours were impressed with what they saw and looked to implement a similar model in New Zealand to address Maori-specific needs.

The Rangatahi Court model adopted some of the Koori Court processes, but also brought in a number of innovations, including holding Rangatahi Courts at a Marae, a place of enormous cultural significance to Māori. Other innovations included that the court incorporate Māori language and cultural protocols into the court process. Judge Taumaunu explained their rationale:

This is not tokenism and should not be underestimated. This represents the first time that a criminal court in New Zealand has actively and systematically incorporated Maori language and protocols.<sup>90</sup>

Principal Youth Court Judge Becroft also highlights how important this is. With intercontinental echoes of the Canadian Supreme Court in *Gladue*, his Honour states that 'systemic bias cannot be excluded'<sup>91</sup> in the New Zealand youth justice system. His Honour speaks of the justice system needing to lead the way:

I hope that moving the Youth Court hearings to a marae is a clear and unequivocal signal that judges care about the disproportionate representation for Māori and want to develop with a new vision for delivering youth justice.<sup>92</sup>

#### Addressing Cultural Dislocation

A key motivation in setting up the court was to address the dislocation of many young Maori from their culture. The Court brings in a range of cultural supports, led by Kaumātua and kuia (Elders),

<sup>88</sup> Supervision with residence statistics for the year 2012 calculated from Statistics New Zealand, 'Child and Youth Prosecution Tables' 'Multiple Offence Type Youth Court Order': <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7364>.

<sup>89</sup> now the National Rangatahi Courts Liaison Judge

<sup>90</sup> Judge Heemi Taumaunu, *Rangatahi Courts in New Zealand* (June 2012) The Rangatahi Courts Newsletter, Issue 1 at p4.

<sup>91</sup> Principal Youth Court Judge Andrew Becroft, above n 73 at p6.

<sup>92</sup> Ibid.

to help young people find their sense of self. Judge Taumaunu notes:

It is a tragedy that most Māori youth who appear before the Youth Court have no knowledge of their own Māori language and have no idea of who they are and where they come from.<sup>93</sup>

In Rangatahi Court proceedings, the young person plays an active role. They are expected to learn a *mihi*, a traditional greeting in Maori and deliver their *mihi* at the outset of proceedings.

The *mihi* is an introduction to Elders of who they are - what tribe they are from, where their country is. This is a big challenge for many Māori youth, especially those who do not speak Māori, and they receive support to research and if necessary, write their *mihi* out (usually from a Lay Advocate). The *mihi* is the beginning point for a young person accepting the challenge to find out who they are, and where they have come from, to take control of their future.

### Observations of Rangatahi Court

I attended two sittings of Rangatahi Court, the first at Orakei with Judge Taumaunu and the second at Rotorua with Judge Bidois.

#### (i) Orakei Rangatahi Court

Prior to court commencing, the manuhiri (visitors, including the professionals, as well as the young people and their whānau) gathered until the pōwhiri (formal welcome) began.

From inside the Marae, a female Elder sung a formal welcome for the manuhiri to approach the Marae. It was impossible not to be struck by the beauty of the Marae and the feeling of being part of something deeply religious and powerful.

We stood outside the entrance and waited for the next stage of the pōwhiri, which was to be called on to enter the Marae. We took our shoes off and entered. Inside were the tangata whenua ("People of the land"). We sat down, facing the elders. The young person was front and centre.

The Elders welcomed the manuhiri with a speech in Maori. Judge Taumaunu, on behalf of the manuhiri gave a speech in response, also in Maori. His Honour later told me he referred to a speech the night before (Waitangi Day) by the Minister of Maori Affairs calling on Māori people to be proud of their culture. Judge Taumaunu described the Rangatahi Court as giving expression to this pride.

After that, a male Elder gave a whaikorero/mihi (formal speech) and a waiata (song) was sung in support of the whaikorero/mihi. The manuhiri were then invited to greet Tangata Whenua by exchanging hongi (pressing noses).

The court was then set up in the Marae, with tables in a square formation. Judge Taumaunu sat across from the young person, with the Elders on either side. To the judge's right was the youth advocate and to his left were the court clerk, the prosecutor and the Department social worker.

The young person sat with her father to her left, and her lay advocate to her right. The Lay Advocate is a crucial part of the New Zealand youth justice system. Their role is to "appear in support" of the young person and "ensure that the court is made aware of all cultural matters that are relevant to the proceedings", and to "represent the interests of the child or young person's whānau hapu and iwi"<sup>94</sup> ... to the extent that those interests are not otherwise represented in the proceedings."<sup>95</sup> Lay advocates liaise with the young person, their whānau and the Marae. They establish the young person's whakapapa (genealogy), fundamental to the young person's identity, and present a report to the Court on how those links can be strengthened and expanded.

Lay Advocates have not been frequently utilised in the Youth Court. It is fascinating to observe a resurgence now taking place in New Zealand. The Lay Advocates I met were leaders in their

<sup>93</sup> Judge Heemi Taumaunu, above n 74 at p2.

<sup>94</sup> These can be referred to as family, sub-tribe and tribe

<sup>95</sup> Children, Young Persons and Their Families Act 1989, s327

communities and clearly worked very hard to engage young people and their whānau. It was not unusual to hear of them making multiple home visits.

The heavy utilisation of Lay Advocates in the Rangatahi Court is having a flow-on effect. It is leading to their resurgence in the mainstream Youth Court. This speaks strongly of the capacity for Rangatahi Courts, as part of New Zealand's Youth Court structure, to drive system-wide change.

When court proceedings formally commenced, the Elders gave a short mihi (speech) and the rangatahi was asked to do a mihi in response. This was very powerful to watch. The young person spoke quietly but directly to the Elders and Judge Taumaunu in Māori, introducing herself, her father and explaining her tribal name and heritage. This was plainly a difficult task for her, but she accomplished it admirably.

Others present were then asked to introduce themselves. This included me; although an observer, it was important for everyone to explain their role. Two Māori liaison police were also present, sitting in the back row. When they spoke, they said they were here to support the young person, and explained how they knew her through a youth group.

The Youth Advocate and Lay Advocate gave an overview of the young person's progress towards achieving the FGC plan. They addressed counselling arrangements, community work and her attendance at school. Judge Taumaunu spoke with the young person, her father, and social worker about her progress. His Honour made the point that everyone was here to support her, to help her achieve her goals. His Honour referred to the Orakei Marae where we were, and spoke about how beautiful it was, how it is her Marae, and how she is part of this. His Honour asked the young person about her aspirations for the future, and asked her to have a response for the next court.

Judge Taumaunu then explained that matters would be further adjourned for her to complete the tasks in the FGC Plan. The Elders gave a short speech of encouragement, and after farewell greetings, proceedings concluded. It was apparent that emphasis was placed on matters finishing on an uplifting basis – the farewell greetings and words of encouragement certainly achieved that.

#### (ii) Te Arawa (Rotorua) Rangatahi Court

I observed the Te Arawa (Rotorua) Rangatahi Court with Judge Louis Bidois. Judge Bidois is born and raised in the Rotorua region, clearly respected across Māori and non-Māori worlds. The process was similar to that described in relation to Orakei Rangatahi Court and was also an incredibly powerful and uplifting experience.

Prior to court commencing, and after the pōwhiri, there was a morning tea for all present. This is a usual part of the Rangatahi Court process, and allows all present including the Elders, the Judge and the young persons to informally mingle and break down a young person's sense of intimidation of attending court. Judge Taumaunu has written on this: "According to a Māori cultural viewpoint, the participants in the powhiri have entered a state of tapu (a state of spiritual restriction) and must be made noa (free from tapu) at the conclusion of the powhiri. Food and drink is used to remove tapu, and all participants in the powhiri share morning tea at the conclusion of the powhiri."<sup>96</sup>

During the court proceedings, three Elders sat with Judge Bidois. All were knowledgeable, and committed to encouraging and supporting their Māori young people to get back on the right track. In one case, an Elder told a young person about his grandfather, who had fought heroically in World War 2.

In another case, an Elder was able to tell the young person about his father's side of his family. The young person had spoken in his mihis about his mother's side, but not his father's. The Elder personally knew the young person's family, and offered to sit down and discuss it with him in

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<sup>96</sup> Judge Heemi Taumaunu "Rangatahi Courts of Aotearoa/New Zealand - An Update" (New Zealand Law Society Continuing Legal Education Criminal Law Symposium, 22 February 2013, p 70)

more detail. As with Orakei, the young person's mihi was the starting point for the Elders connecting with them and expanding their family and cultural awareness.

### Evaluation of Rangatahi Courts

The New Zealand Ministry of Justice contracted consultants to prepare a qualitative interim evaluation of the Rangatahi Courts. The report, 'Evaluation of the Early Outcomes of Nga Kooti Rangatahi' was released in December 2012. It considered the venue and processes of the Rangatahi Court, and whether it contributes to a strength-based approach and improved self-identity and cultural identity amongst young people participating. It was not looking at longer term recidivism.

The Report provides a strong endorsement of Rangatahi Courts and made several important findings about why the Rangatahi Court model was effective:

- a) the venue of the Marae plays a crucial role. It engenders respect from the young person and their whānau and effects how they engage with the court. People feel welcome, at home, and it means that underlying issues can be addressed. The authors quote the grandmother of a young person who describes:

Ahua - matakū, wiriwiri. Going into the unknown. [The rangatahi is fearful trembling going to the marae]. But in the Youth Court the mask goes on [the rangatahi] and the barriers go up straight away.<sup>97</sup>

- b) Aligned to this is the language used. One aunty of a young person commented:

Yes it was different language [in Youth Court]. They start throwing all the words around...Pursuant of Act....Section. It is quite intimidating. You can see it in [the rangatahi's] body language. Here I think [the judge] puts it in a way that we can understand, how he breaks it down, so he puts whānau at ease.<sup>98</sup>

- c) the Elders have a central position. All stakeholders universally acknowledged the supportive, encouraging role Elders play;
- d) Lay advocates had an important impact in supporting rangatahi and whānau. Their independent reports about cultural information were strengthened by the trust of the family, which meant they were able to elicit the 'real story' from the inside. One mother of a young person observed:

He [the lay advocate] has been great support from the beginning since we met. Maybe because we have not had other support. He focused on the consequences and making sure he got to finish [off his plan]. That he had to finish. That is what we focused on.<sup>99</sup>

- e) the collective commitment of participating agencies to the process. They noted the increased discussion and collaboration between agencies, with the Judge driving a process that requires coordinated, intensive work with the youth and their family;
- f) the increased community involvement in court process. They quoted one source who said:  
One of the powerful outcomes has been the mobilising of a part of the Māori community to support youth on the wrong side of the law. When we actually launch a new court it's really powerful because you've got the wider Māori community iwi and hapū at the launch. That's a visible marker of the Māori community taking responsibility for the offending.
- g) Increased community respect for the law. The authors quoted a Judge who saw an "enhanced respect for the law within our communities." The judge went on to say:

What better way to do it than to take these courts into the community and to empower the community, to show that the law's human and to let people gain a real sense of what the

<sup>97</sup> Kaipuke Consultants, *Evaluation of the Early Outcomes of Nga Kooti Rangatahi* (17 December 2012) Submitted to the Ministry of Justice, p62.

<sup>98</sup> Ibid, p45.

<sup>99</sup> Ibid, p47.

law is about. To familiarise our people with all the various officers involved, Police officers, social workers. It goes a lot wider than just Rangatahi Courts because that filters into a lot of other areas where there's discontent with the law.<sup>100</sup>

With respect to increased community respect for the law, Judge Taumaunu<sup>101</sup> made the point that there is no reason why two cultures cannot be promoted through the legal system.

This point has particular significance in Australia (and the Northern Territory in particular) where s16AA of the Commonwealth Crimes Act 1914<sup>102</sup> prevents a Northern Territory court from taking into account any form of customary law or cultural practice as a reason for:

- a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- b) aggravating the seriousness of the criminal behaviour to which the offence relates.

The constraints on the consideration of Customary Law and cultural practice in bail and sentencing has substantially eroded the confidence of many Aboriginal people in the Northern Territory in their justice system. Many view the legal system as being discriminatory to Aboriginal people and unfair.<sup>103</sup>

There has arguably never been a more important time for us to grasp for the full import of the reconciliatory benefit identified by Judge Taumaunu. Rangatahi Courts show that in a modern legal system, it is possible for two cultures, and two approaches to justice, to coexist. And they show that where this can happen, these two approaches actually serve to strengthen each other and create a much fairer justice system for all.

### The 'Rangatahi Movement'

Principal Youth Court Judge has described a "Rangatahi Movement"<sup>104</sup> now taking hold in New Zealand. This movement is founded on the genuine efforts of the New Zealand Youth Court to address systemic bias as it affects Māori people. As well as the leadership of Principal Youth Court Judge Becroft, this has only been possible because of the involvement and leadership of Māori Judges such as Judge Taumaunu. Maori Judges set the path to holding court sittings on Marae, involving Elders, speaking in Maori, emphasising Māori culture and reasserting the role of Lay Advocates.

Rangatahi Courts demonstrate how the judiciary want to develop a new vision for delivering justice. The exciting part is that their vision appears to be widely shared<sup>105</sup>. As noted, the number of locations where Rangatahi Court sit has grown significantly, and the Youth Court is receiving requests from locations throughout New Zealand wanting to establish Rangatahi Courts. What is holding back the establishment of more Rangatahi Courts is a lack of Māori judges.

Judiciary-led change has prompted a snowball effect in relation to Rangatahi Courts. Māori judges were critical to their development, and now that they are operating and being embraced in the community, it is the lack of Māori judges that is holding back their further growth. This is currently leading to calls for more Māori judges to be appointed.<sup>106</sup>

What is most significant here is that Rangatahi Courts are driving change by exposing broader, system-wide deficiencies such as the under-representation of Māori judges, as well as in other

<sup>100</sup> Ibid, p51.

<sup>101</sup> In a personal conversation with the author

<sup>102</sup> See: [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca191482/s16aa.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s16aa.html) This provision was inserted in 2012 but has been in operation in the Northern Territory since 2007 as part of the Northern Territory Emergency Response legislation.

<sup>103</sup> Its unfair impact was highlighted by Justice Southwood of the NT Supreme Court in *R v Wunungmurra* [2009] NTSC 24 at para 24 where his Honour considered the previous incarnation of this provision (s 91 of the Northern Territory *National Emergency Response Act* 2007) to preclude a sentencing court "from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts"

<sup>104</sup> Principal Youth Court Judge Andrew Becroft, above n 73 at p.5.

<sup>105</sup> Not all – see for example, Matiu Dickson, *The Rangatahi Court* Waikato Law Review (2011) Vol 19 Issue 2 at 86

<sup>106</sup> See, for example 'Not Enough Maori Judges Could Stifle Maori Youth Courts', Radio New Zealand National Morning Report on Wednesday 30 January 2013. Audio of this story can be accessed at:

<http://www.radionz.co.nz/national/programmes/morningreport/audio/2544950/not-enough-maori-judges-could-stifle-maori-youth-courts>

areas such as the under-utilisation of the Lay Advocates in mainstream Youth Court proceedings.<sup>107</sup>

The success of Rangatahi Courts highlights the urgent need in the Northern Territory to redress the under-representation of Aboriginal people in the judiciary. Despite making up approximately 30% of the population, there are no Aboriginal judges or Magistrates. Worse still, we have *never* had Aboriginal judges and magistrates in the Northern Territory.

This must change. The evolution of Rangatahi Courts shows that if we want to improve the justice system to better meet the needs of Aboriginal people, judiciary-led change has an important part to play. In that regard, Aboriginal Judges are vital to establishing equivalent processes to Rangatahi Courts to better meet the needs of Aboriginal people.

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<sup>107</sup> When I was at Tauranga, for example Judge Bidois was involved in appointing four lay advocates to service the Youth Court in that area.

### 3.4 Pasifika Youth Court

The Pasifika Youth Court was an initiative driven by the Pacific Islander communities in New Zealand following the introduction of Rangatahi Courts. As with a Rangatahi Court, the role of the Pasifika Youth Court is to monitor a young person's performance of their FGC plan in a culturally strengthening environment. The court commenced in June 2010 in Mangere and at Avondale in September 2011 under the stewardship of Judge Ida Malosi.

I was fortunate to visit the Avondale Pasifika Youth Court in Auckland. Although Judge Malosi was on leave at the time of my visit, Judge Frances Eivers was presiding and the Pasifika Youth Court process under her Honour's control was extremely impressive to observe.

There were many similarities with the Rangatahi Court, but also many differences. The fundamental difference stems from the fact that the Pasifika Youth Court caters for young people from a large number and variety of Pacific Islander nations. These include Fiji, Tonga, Samoa, Vanuatu, Kiribati, and Tuvalu. This had implications for the set up of the court, the Elders selected and processes followed. All needed to be flexible enough to cater to the often significant cultural differences between Pasifika nations.

#### Process

The process itself was relatively similar to the Rangatahi Court. The young person and their family were called in to take their seats. The young person introduced themselves and their family, Lay Advocate, Youth Advocate, and social worker(s). An Elder then gave a welcome speech, which included that they were here to support the young person and their family. They then led a prayer, which was sometimes in English, sometimes in a Pasifika language.

Judge Eivers gave an overview of the status of the matter, and the Youth Advocate would update how things had been progressing. The prosecutor and Department representative could provide a response and there was discussion between the professionals of any issues arising. Judge Eivers then discussed directly with the young person how they are going, any issues they were having, and then advised them of the next steps. An Elder then spoke to the young person and led a prayer to close proceedings.

#### Case Examples

##### 1. Katy<sup>108</sup>

Katy is Samoan and committed several burglaries. She was subject to concurrent care and protection proceedings and attended with a lawyer for each matter, as well as numerous family members.

Katy had been attending the Pasifika Youth Court for many months, and had formally completed her FGC Plan. Her Youth Advocate, Lay Advocate and social worker commended her excellent progress. Her grandfather spoke at length in Samoan, expressing his gratitude to the court. Katy's family presented several gifts to the court; garlands of chocolates and lollies, a magnificent kava bowl and other items, and food for morning tea.

Judge Eivers spoke to Katy, conveying how pleased she was with her efforts. Her Honour asked Katy to sign the Tapa (mat) in the middle of the court, which all young people who graduate from the Pasifika Youth Court sign and date. Judge Eivers spoke about how it takes the whole community to make this lengthy process work.

After Katy signed the Tapa, an Elder said to her, 'In your heart, what do you want to say?' Katy replied, 'I'm proud of myself and my family. Thank you for believing in me.' The Elder replied that he hoped God is with her in the future, and to be wise.

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<sup>108</sup> Not her real name. The names of all young people referred to have been altered to protect their anonymity.

Katy then placed necklaces of chocolates and lollies around the neck of Judge Eivers, the Elders and all others present in court. Proceedings ended with an Elder singing a Samoan song on his guitar. Katy and her family hugged Judge Eivers and all of the Elders, and moving around the circle, then left.

It was unquestionably the most powerful youth justice proceedings I have had the privilege to observe or be part of.

## 2. Tony

Tony is 16 and is Tongan. Both of his parents were present, as well as his mentor and social worker. Judge Eivers spoke with Tony about his sporting endeavours, the community work he has completed, getting a driver's licence, and how he's just prepared his resume. Her Honour also spoke about alcohol (which had clearly been a factor in his offending) and how a brain does not fully develop until a person is 25. Tony's social workers spoke about how it had been a delight to watch him grow, and to hear him develop insights into his behaviour. Tony's father spoke humbly, yet powerfully about how this was such a beautiful place, thanking everyone for their support.

Judge Eivers noted that Tony had now completed his Plan, and dealt with the matter by way of a Discharge. Tony signed the Tapa (mat) and an Elder spoke encouraging words - although court was now over, to keep thinking about what he has achieved and what he still needs to do. As Tony's father was Maori, the Elder offered to Tony's father to lead the closing prayer, which he did.

Tony's father commented that he was now able to take his son home. This was again an extraordinary moment to observe. It showed just how valuable it is to bring a young person's family into the centre of court proceedings.

## 3. Calvin

Calvin is Samoan and attended court with his mother. His Youth Advocate and Lay Advocate explained that a lengthy report had been prepared, showing Calvin's good progress with his mentor, as well as helping his mother at home to care for his 5 month old brother.

The prosecutor said he was happy with how Calvin was going insofar as resisting peer influence and not offending. But he spoke irritably that an organisation that was supposed to have arranged specialist support for Calvin (who has Spectrum Disorder) had still not engaged despite numerous requests being made. The prosecutor called for a meeting of the court professionals before the next court date to revisit Calvin's Plan. He concluded by saying that in these circumstances, he would withdraw the charges when Calvin completed his Plan.

An Elder then gave Calvin a strong talk about how he had just recently gone home to Samoa after a cyclone, and had seen examples of enormous resilience and how people were already bouncing back. He urged Calvin to do the same, to not dwell on the past but rebuild his life for the future.

This matter was noteworthy for highlighting how the prosecutor's role also shifts in the Pasifika Youth Court. He also was concerned to ensure that Calvin received the specialist assistance he needed and that his rehabilitative needs outweighed any requirements for punishment.

## The Pasifika Movement

Principal Youth Court Judge Becroft's reference to a 'Rangatahi movement' surely extends to a 'Pasifika movement' as well. The court is a credit to all involved, especially the leadership of Principal Youth Court Judge Becroft and Judge Malosi and the Elders who make it possible. Three features stand out as underpinning its success:



### (a) Community Support and Support of Stakeholders

The Avondale Pasifika Youth Court sat in a beautifully adorned, church community hall. It was a venue of cultural and religious significance for the Pasifika community in Avondale. From when I arrived before court to the time that court commenced, adornments transformed a dull community into a colourful and vibrant court. This epitomized the enormous Pasifika community support for this court.

High attendance by community members, as well as the families of the young people before the court also showed widespread support for the court. Most youths attended with either immediate or extended family. Attendance by family was significantly higher than in conventional Youth Courts I have observed.

Also, on the day I visited the court, there were close to 20 young people dealt with. The large number of referrals also suggests widespread support from the community, the police, and the judiciary.

### (b) Role of Elders

The twelve Elders in attendance represented a variety of Pasifika nations. In each case, two Elders came forward to sit with Judge Eivers, depending on the particular nation of the young person and their family. An Elder would also sit with the young person and their family. It is worth noting that the twelve Elders attend court for a full day, twice a fortnight. This is no small duty, and quite properly, they are remunerated for their service.

As with the Rangatahi Court, a roundtable approach was used. Judge Eivers was not sitting up on high, but at the same level as the Elders, the prosecutor, the Youth Advocate, Lay Advocate and the young person and their family. This format meant more voices were heard than in a conventional Youth Court. Language used was a combination of English and first language. English was used for young people who didn't speak their first language. Where a Pacific language was used, there were times where this was interpreted for Judge Eivers.

The Elders made a point of explaining that they were here to support and help the young person. For example, one Elder spoke to a young person about how "once our mind is stretched by an idea, it won't go back to its original dimensions." The Elder explained to the young person that he is starting to be wise, and to be able to distinguish between right and wrong. He emphasized how we all make mistakes, but we also need to learn from them. They were setting the young person a challenge to step up to.

The Elders spoke with kindness, humility and love to all young people before the court. They typically picked up a theme relevant to that case and addressed the young person as if they were their son or daughter. The discourse was designed to stimulate and motivate. Their very presence radiated warmth and seemed to be an expression of the Pasifika community's rallying around a young person in trouble.

### (c) Response of young people

The Pasifika process is all about building young people up. Judge Eivers and the Elders conversed with the young people in a way that reinforced their positives and encouraged them to keep persevering. The young people were making enormous progress in dealing with the often enormous issues they face. They were given tasks and supported to achieve them. There were instances where a young person might have taken a little too long to complete community work, but I did not see any who failed to do the tasks set. Significantly, most achieved their tasks within good time.

There were also some amazing cases: one young person had completed *more* community work hours than required because they were enjoying the work and saw value in it. Another young person brought two paintings with him to court. One showed a church, and the other a police car.

The Pasifika Youth Court has powerful lessons for the Northern Territory's youth justice system. It is shameful that in the Northern Territory, we currently incarcerate over 60 young people. The total detention capacity in New Zealand is just over double that number. We need to respond to youth offending from a rehabilitative rather than a punitive perspective. The examples above illustrate how young people will more often than not, embrace and flourish in a nurturing, supportive and culturally-strengthening environment. It shows the tragedy that for so many young people, this is exactly what they have been craving but never before been offered.

## Conclusion

Twenty-two years ago, the Royal Commission into Aboriginal Deaths in Custody recommended<sup>109</sup>

That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

This recommendation is a call to action. Aboriginal people are systemically disadvantaged by our justice system. In theory, the justice system applies neutral laws and policies to all in an equal manner. But discrimination occurs not only when laws overtly disadvantage a particular group, but also where laws and policies *have the effect* by their requirements or practices of disadvantaging a particular group.

The over-representation of Aboriginal people in our prisons is one clear marker that something is very wrong in our justice system. It has been noted that Aboriginal people comprise 33% of the population, yet make up close to 85% of the prison population and 98% of our juvenile detention population. Other indicators also show that our court system is failing to meet the needs of Aboriginal people.

Our courts operate using complex language that many Aboriginal people do not understand. For many people, they have such limited input into courtroom decisions that affect them that they may as well not even be there. We recoil from, rather than embrace culturally-strengthening practices that can reinforce a defendant's cultural identity and bring them from an offending to a law-abiding path. And participation by an Aboriginal defendant's family or Elders is the exception rather than the norm.

These observations are nothing new. Commonwealth, State and Territory Governments have too frequently not heard the message of the Royal Commission and subsequent reports and failed to embrace strategies to reconnect an Aboriginal defendant with their culture, family and community as the foundation from which they can address the causes of their offending.

To their greater shame, Governments have left in place practices, policies and legislative provisions that have disastrous impacts on Aboriginal people and actively pursued populist law and order policies (such as mandatory sentencing and zero tolerance policing) that have little or no evidentiary basis, and that disproportionately lead to the criminalization and incarceration of Aboriginal people.<sup>110</sup>

This happens because we have refused to grasp the key message of the Royal Commission - our justice system is failing to meet the unique needs of Aboriginal people.

In Canada, acknowledgement of systemic discrimination against Aboriginal people in the justice system has been fundamental to forging new approaches to addressing Aboriginal over-incarceration. The report that recommended the Tsuu T'ina Peacemaker Court put it in this way: "Aboriginal over-representation in the criminal justice system ... will continue to deteriorate unless specific innovative initiatives are implemented that address such over-representation and the underlying causes."<sup>111</sup>

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<sup>109</sup> Recommendation 62

<sup>110</sup> Consider as a case study the expansion of police in remote Aboriginal communities since the Northern Territory Emergency Response began in 2007. The rate of driving criminalization has increased by 250%, mostly in relation to driving unlicensed, uninsured and unregistered.<sup>110</sup> Policing practice of one type of law that is having a systemic, criminalising impact on Aboriginal people. Allard (*Understanding and Preventing Indigenous Offending*, (December 2010) Indigenous Justice Clearinghouse, Brief 9 at 6) notes that the "high rate of over-representation for public order offences suggests that changes to legislation, police and court practices may be necessary to avoid a disproportionate impact on Indigenous people.

<sup>111</sup> Karen Kryczka MLA (Chair, Review Team), above n 32, at i.

In New Zealand, the courts are leading the way in demonstrating how two cultures can co-exist in our legal system to create fairer and more meaningful court processes, and work together to bring young people back on track. Māori Judges have been vital to establishing processes to better meet the needs of Māori young people. Aboriginal judges and magistrates are equally needed in the Northern Territory to help develop similar processes.

Just as in New Zealand, many Aboriginal young people have not had the benefit of nurturing, culturally-strengthening processes to deal with their offending. It is crucial that we establish initiatives that are part of the court process, but that involve Elders and mobilise family and a young person's community to help deal with their issues and bring them back to the right path.

Judge Heemi Taumaunu of the Rangatahi Court in New Zealand composed a Waiata (Song)<sup>112</sup> for the Court which includes these lyrics:

*Ko te anga whakamua nei  
Kia whakahoki tātou e  
Ki te Reo me ōna Tikanga  
Kia mohio mai  
Ko wai? No whea?  
A tātou rangatahi e*

*The vision for the future  
Is for us to return  
To our Māori language, its customs and protocols  
So that our Māori youth will know  
Who they are, and where they are from*

*E whai nei matou  
I te ara tutuki pai  
Aratika  
Mō ngā tamariki  
Mokopuna e raru nei  
Kia ora ai*

*We are seeking  
The pathway to achieve success  
The right path  
For our children  
And grandchildren who are in trouble (with the law)  
To secure their well-being (for the future)*

There has never been a more important time for us to heed Judge Taumaunu's words. Rangatahi and Pasifika Courts show that in a modern legal system, it is possible for two cultures, and two approaches to justice, to co-exist.

Moreover, the message of Rangatahi and Pasifika Courts is that where this can happen, these two approaches actually serve to strengthen each other and create a justice system that can achieve the outcomes we all want it to achieve.

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<sup>112</sup> Full lyrics are reproduced at Annexure 2

## Five Themes

I had the privilege of observing innovative approaches being taken in Canada, the United States and New Zealand to improve the cultural relevance of the justice system for Aboriginal people.

In this section, I present key themes that have emerged from my research. This is followed by recommendations which flow from these themes and which could see improvements for Aboriginal people in their interactions with Northern Territory the justice system.

Key themes that have emerged from my research include:

1. **Systemic Bias** – to achieve improved justice outcomes for Aboriginal people, we need to do two things: first, identify policies, practices and laws that disproportionately have an adverse impact on Aboriginal people. And second, we must admit the need to encourage and develop Aboriginal-specific approaches to address this. The Supreme Court of Canada has demonstrated that the type of courage and leadership that we so badly need in the Northern Territory.
2. **Cultural Foundation** – a justice system inclusive of the needs of Aboriginal people must start from a foundation of respect for Aboriginal cultural practices. As Judge Taumaunu says, there is no reason why two cultures cannot co-exist and both be promoted through our justice system. We need to acknowledge the cultural disempowerment brought by the Northern Territory Emergency Response (and in particular the provisions that severely curtail consideration of customary law and cultural practice), and take steps to define how and where cultural consideration can be taken into account.
3. **Specialist Aboriginal Approaches** – Specialist Aboriginal approaches are not separate justice processes for Aboriginal people, but a justice system being responsive to the unique needs of Aboriginal people. As shown with New Zealand’s Rangatahi Courts, Aboriginal justice approaches do not pit Western and Aboriginal notions of justice against each other, but serve to strengthen and enhance the authority of each. Specialist Aboriginal approaches are also essential to identify policies and practices in the mainstream justice system that negatively impact Aboriginal people, as well as encouraging policies and practices to better meet the needs of Aboriginal people (for example, the increased use of Lay Advocates in New Zealand Youth Courts is now occurring because the Rangatahi Courts reinvigorated this important role, and exposed their under-use in mainstream proceedings).
4. **Procedural Fairness** – Court proceedings are not comprehensible, understandable and meaningful for so many Aboriginal people. The evidence shows that where defendants feel part of decisions made about them and perceive a justice process as fair, they are more likely to comply with court orders. The Cree Court is an example of a new model of courtroom communication, designed to ensure that Aboriginal people are active participants in decisions made about them.
5. **Innovation and Experimentation** – We need to commit to finding creative new and innovative responses to deal with complex justice system issues. The New York Center for Court Innovation has a proven track record of developing ‘thoughtful innovation and well-crafted and well-evaluated alternatives to incarceration.’<sup>113</sup> As New York Mayor Bloomberg said on the Center’s 15<sup>th</sup> Anniversary, ‘By giving judges more options, more carrots and more sticks, the Center gives defendants a better chance to turn their lives around and stay out of trouble’.<sup>114</sup> The Center for Court Innovation demonstrates how we must embrace and invest in innovation and experimentation if we want to see better justice outcomes for Aboriginal people.
6. **Specialist Youth Approaches** – We need approaches to youth justice which recognise the unique needs of young people. The New Zealand youth justice system is a world’s best

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<sup>113</sup> New York’s Chief Justice Jonathan Lippman quoted in ‘Center for Court Innovation Celebrates 15 Years of Justice Reform’. See: <http://www.courtinnovation.org/15th-anniversary>

<sup>114</sup> New York Mayor Michael Bloomberg quoted in ‘Center for Court Innovation Celebrates 15 Years of Justice Reform’. See: <http://www.courtinnovation.org/15th-anniversary>

practice model of ensuring that young people are dealt with in a way that promotes their rehabilitation, and assists them to take responsibility for offending behavior. New York's Youth Courts are an example of an unconventional youth-specific approach that uses positive peer pressure to assist young people receive the help they need to avoid further involvement in the justice system and pay back the community.

## Recommendations

### SYSTEMIC BIAS

#### Systemic Bias

1

Just as the Supreme Court of Canada did in *R v Gladue*, systemic bias in the operation of the Northern Territory justice system must be acknowledged. This includes but is not limited to decisions surrounding bail and sentencing of Aboriginal people.

### CULTURAL FOUNDATION

#### Cultural Foundation

2

Meaningful initiatives to address the over-representation of Aboriginal people in the criminal justice system must start from a foundation that respects and values the role of Aboriginal culture at all stages of justice proceedings.

3

The Northern Territory Emergency Response restricted the application of Customary Law and cultural practice in bail and sentencing matters. It has also created untold damage to the trust and confidence Aboriginal people feel in the legal system by insulting and demeaning the standing and relevance of their culture. The key lesson from Canada and New Zealand is that there is nothing controversial about valuing the role of Aboriginal cultural practice in the justice system. The Northern Territory urgently needs to safeguard and reassert the rightful role of Customary Law and cultural practice within our justice system. We are failing to see the potential roles for Elders and community leaders and uses of Aboriginal restorative justice practices to enhance a shared imperative of community safety and respect for law and order.

4

The Northern Territory has never invested in justice approaches that take a strength-based approach to Customary Law and cultural practice to assist individuals in trouble with the law and repair community harmony. If we are serious about improving justice processes and outcomes for Aboriginal people, the time to do this is now.

5

Aboriginal people must be empowered to take responsibility for dealing with justice issues according to their own value systems. We must commit to a genuine dialogue with Aboriginal Elders and community leaders in the Northern Territory to see whether restorative practices such as mediation and peacemaking offer a better way of handling criminal conduct. Where communities express a willingness to put restorative practices into effect, they must be supported and resourced to do this.

### SPECIALIST ABORIGINAL APPROACHES

#### Specialist Aboriginal Approaches

6

We urgently need Aboriginal judges and magistrates in the Northern Territory. This is not to call for positive discrimination. In the unique Northern Territory justice system, high level cross cultural communication skills and the ability to work across two worlds are essential criteria for judicial appointment. With Aboriginal people comprising the overwhelming majority of court users, we need Judicial officers whose lived experience enables them to work across both worlds and who can identify and drive community-owned initiatives to better meet the needs of Aboriginal people. We need to identify Aboriginal lawyers who are appointable now, and support up-and-coming Aboriginal lawyers to move towards appointment.

7	The Northern Territory legislature should introduce a provision similar to s. 718.2(e) of the Canadian Criminal Code to make it explicit that courts must consider the cultural background of Aboriginal people when considering a term of imprisonment or when the liberty of an Aboriginal person is at stake, and impose alternatives to incarceration wherever possible. We need legislative provisions and specific mechanisms of providing this information to courts, to ensure that an Aboriginal person's cultural background is properly taken into account.
8	Reports modeled on Canadian Gladue Reports should be introduced. These provide the courts with detailed, independent information about an Aboriginal person's cultural background and systemic factors in their case. These reports must be written by experts with lived experience.
9	Consideration should be given to the introduction of Lay Advocates in the NT youth justice system. Lay Advocates ensure that the court is made aware of all cultural matters that are relevant and that a young person's family and kinship group is actively represented in court proceedings.
10	Bi-cultural Courts that can function in Aboriginal language(s) and English have a vital role in ensuring a fair justice system for Aboriginal people. They ensure Aboriginality is fully considered and enable culturally strengthening approaches to be used to address the dislocation of many Aboriginal people from their culture. The Cree Court model should be considered for implementation in the Northern Territory, especially large bush court communities.
11	The Northern Territory should immediately seek to develop local approaches to Rangatahi Courts and the Pasifika Youth Court. These models demonstrate that culturally significant court processes can address the dislocation of many Māori and Pasifika young people from their culture, and make court process more meaningful and less alienating for Maori people. Northern Territory approaches must be developed according to the cultural
12	Aboriginal-specific mediation and peacemaking models should be resourced and given the opportunity to intersect with the justice system. The Tsuu T'ina Peacemaker Court is an example of how the justice system can accommodate traditional restorative justice processes like peacemaking. Northern Territory approaches must be developed according to the cultural

## PROCEDURAL FAIRNESS

### Procedural Fairness

13	Procedural Justice is urgently needed in the Northern Territory. Aboriginal defendants are currently subjected to a grossly unfair court process that they do not understand or have a meaningful role in. Enormous bush court lists, complex court language and foreign court processes mean that our court proceedings are incomprehensible, poorly understood and lacking in meaning for many Aboriginal people. If we want to see improved justice outcomes for Aboriginal people, Aboriginal defendants must be active participants in decisions made about them.
14	Judicial officers should receive specific training in relation to effective courtroom communication with Aboriginal people, including appropriate language and strategies to engage Aboriginal participants.



## INNOVATION AND EXPERIMENTATION

### Innovation and Experimentation

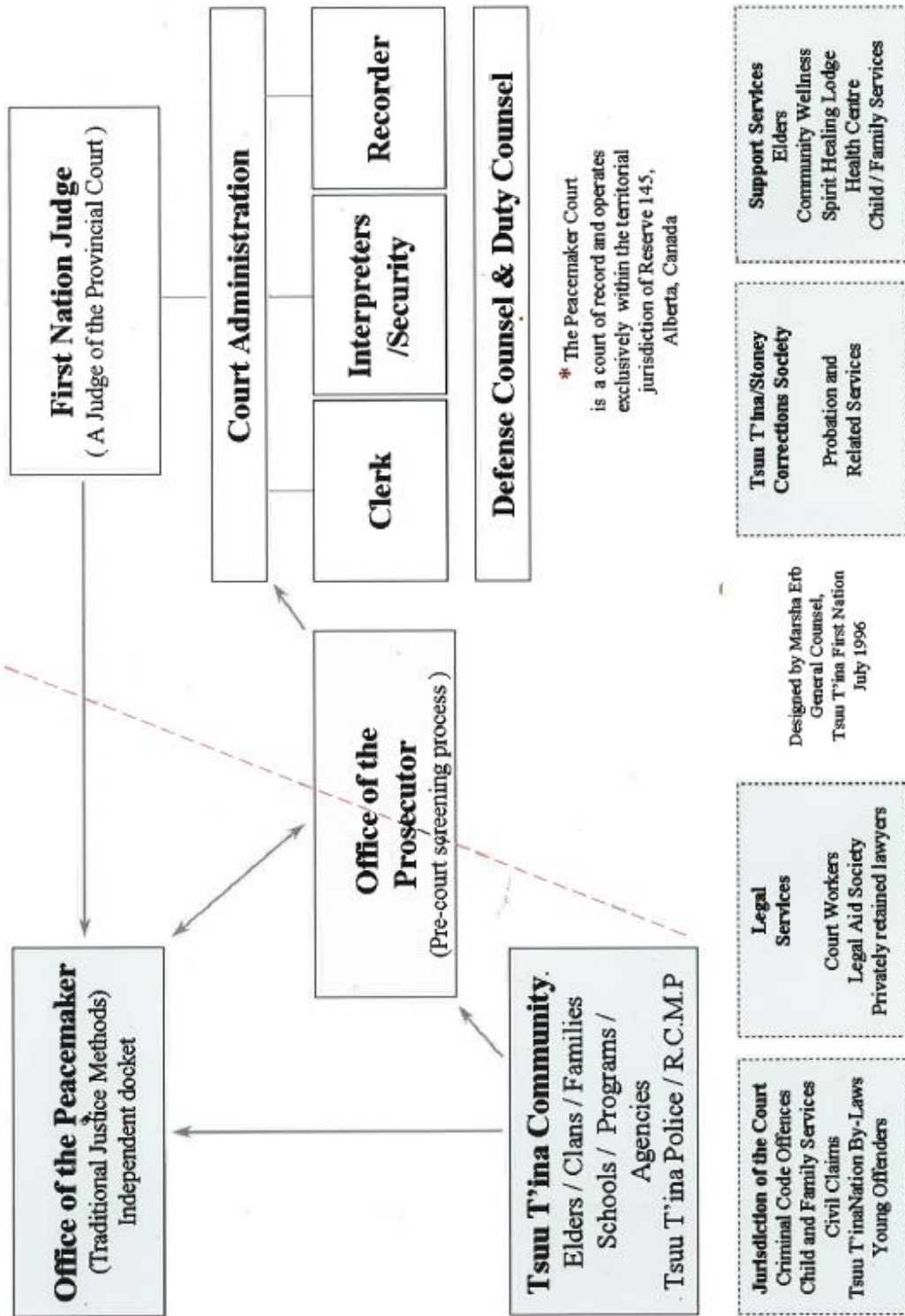
15	We must commit to innovation and experimentation in the Northern Territory criminal justice system. The status quo is not working. Punitive justice approaches have seen more people incarcerated but have not made the community safer. With a young and growing Aboriginal population, we must as a matter of urgency invest in fresh, evidence-based ideas. New initiatives must be rigorously evaluated to learn from their success or failure.
16	The Northern Territory Government should establish a Sentencing Advisory Council. Although we are only a small jurisdiction, we need to de-politicise law and order and invest in developing innovative, evidence-based and culturally relevant sentencing initiatives.
17	Judicial officers have a crucial role in driving justice-system innovation. We must safeguard judicial discretion in sentencing and remove constraints on judicial discretion. We must empower Judicial officers and resource them appropriately to develop locally relevant innovations on delivering justice, including non-custodial sentencing options, courtroom configuration, holding court outside of court buildings, involving Aboriginal Elders and other individuals and agencies in courtroom decision-making.

## SPECIALIST YOUTH APPROACHES

### Specialist Youth Approaches

18	The Northern Territory should re-design its youth justice system based on New Zealand's diversion and Family Group Conferencing model. The New Zealand model is an evidence-based approach which has brought reductions in youth apprehensions and offending in the last decade, and better outcomes for children and young people.
19	Northern Territory Police should implement a specialist approach to dealing with young people based on the New Zealand Youth Aid model. This approach prioritises diverting young people from the formal justice system wherever possible, and working with young people and their families to address offending behavior.
20	New York's Youth Courts are innovative, inexpensive and effective. The Northern Territory should trial a Youth Courts project as part of a range of new and innovation youth justice reforms.

# Tsuu T'ina First Nation Peacemaker Court\*



## Annexure 2

# TE KOOTI RANGATAHI

### Karakia

E te Atua  
E te Ariki  
Tukua mai te kaha te maramatanga  
Ki te hapai  
Te Kooti Rangatahi

### Blessing

Our God  
Our Lord  
Give us your strength and enlightenment  
And uplift  
Our Rangatahi Court

### Whakatauki

Ko te whakatauki e korero nei  
Ka pu te ruha  
Ka hao te rangatahi

### Proverb

The well known saying goes  
The old worn out net is cast aside  
The new net goes fishing

### Waiata

Tēnei matou  
Te whakatipuranga  
O tēnei ao  
Te nui o  
Ngā rangatahi Māori  
E raru nei

### Song

Here we are  
This generation  
Living in today's world  
(Alas) the great number  
Of our Māori youth  
Who are in trouble (with the law)

Ko te anga whakamua nei  
Kia whakahoki tātou e  
Ki te Reo me ōna Tikanga  
Kia mohio mai  
Ko wai? No whea?  
A tātou rangatahi e

The vision for the future  
Is for us to return  
To our Māori language, its customs and protocols  
So that our Māori youth will know  
Who they are, and where they are from

E whai nei matou  
I te ara tutuki pai  
Aratika  
Mō ngā tamariki  
Mokopuna e raru nei  
Kia ora ai

We are seeking  
The pathway to achieve success  
The right path  
For our children  
And grandchildren who are in trouble (with the law)  
To secure their well-being (for the future)

Ko te anga whakamua nei  
Kia whakahoki tātou e  
Ki te Reo me ōna Tikanga  
Kia mohio mai  
Ko wai? No whea?  
A tātou rangatahi e

The vision for the future  
Is for us to return  
To our Māori language, its customs and protocols  
So that our Māori youth will know  
Who they are, and where they are from

Te Kooti Rangatahi  
(E) whakahoki nga taiohi  
Ki te marae  
Ka pu te ruha  
Ka hao te rangatahi  
Te kaupapa

The Rangatahi Court  
Returns the young person  
To the marae  
On the basis that  
The old worn out net is cast aside  
And the new net goes fishing

Ko te anga whakamua nei  
Kia whakahoki tātou e  
Ki te Reo me ōna Tikanga  
Kia mohio mai  
Ko wai? No whea?  
A tātou rangatahi e

The vision for the future  
Is for us to return  
To our Māori language, its customs and protocols  
So that our Māori youth will know  
Who they are, and where they are from

Kia mohio mai  
Ko wai? No whea?  
A tātou rangatahi e

So that our Māori youth will know  
Who they are, and where they are from

**Whakamutunga**

Tuturu whakamaua kia tina  
Tina! Hui e, Taiki e!

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**Conclusion**

Make it secure, make it tangible!  
Join together and be united!

Composed by: Judge Heemi Taumaunu

Collaborators: Music and Lyrics:

Anaru Grant  
Wayne Panapa  
Ngarue (Kim) Ratapu  
Judge Lisa Tremewan  
David Parker  
Judge Philip Recordon  
Riri (Liz) Motu  
Jake Kake  
Harley Hoani  
Karaitiana Taumaunu  
Wiremu (Hone) Elliott  
Matutaera Ihaka

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