BUILD A BRIDGE AND GET OVER IT: THE ROLE OF COLONIAL DISPOSSESSION IN CONTEMPORARY INDIGENOUS OFFENDING AND WHAT WE SHOULD DO ABOUT IT

Sir Joe Williams*

The following is a lightly edited version of a speech, delivered by the Honourable Justice Sir Joe Williams, for the annual Robin Cooke Lecture at Victoria University of Wellington on 4 December 2019.

> Hūtia te rito o te harakeke
> Kei hea te kōmako e kō e?
> Pluck out the young shoot of the flax bush
> And how can the bellbird sing?[1]

* Justice of the Supreme Court of New Zealand. I wish to acknowledge with gratitude the excellent research assistance provided in the preparation of this lecture by Eru Kapa-Kingi and Nopera Dennis-McCarthy. Their work was crucial in assisting me to formulate the ideas I have recorded here. I also express my gratitude to Matariki Williams and Hannah Yang who, through skilful editorial assistance, saved me from the embarrassment of my usual clumsy expression and poor grammar.

1 This is the opening two lines of a well known whakataukī, or proverbial saying, of the Aupouri iwi from the far north of the country. The rest of it is as follows:

> Whakatairangitia
> Rere ki uta, rere ki tai
> Kī mai ki au he aha te mea nui o te ao?
> Māku e kī atu
> He tangata, he tangata, he tangata
> Confused it will circle (searching for a place to land)
> Flying over land and sea to no avail
> So, if you were to ask me what is the most important thing in the world?
> I must tell you
> It is people, people, people.

I DAWN'S STORY[2]

Dawn is from a provincial East Coast town. She belongs to a criminogenic whānau; that is, many members of her whānau (including herself) have close associations with a local gang chapter. She is a big, strong young woman. At the time of the events that led to her being charged with serious violent offending, Dawn was 19.

A member of Dawn's whānau was owed a few hundred dollars. This whānau member, Dawn and other whānau visited the debtor. They stood over the debtor, beat her and demanded repayment. One of the whānau members struck the debtor on the face with an implement. The debtor suffered contusions to her face and arms, but was not permanently harmed. Although Dawn was not the principal attacker, there is no doubt she participated in the beating.

After the assailants departed, the police were called. The victim knew the assailants, and they were quickly arrested and charged. Dawn was charged as a party to injuring with intent to cause grievous bodily harm. All of them pleaded not guilty, but were eventually convicted at trial.

Sometime in the 12 months between charge and trial, however, Dawn became pregnant and subsequently gave birth to a healthy child. At the time of Dawn's sentencing, her baby was just a few months old.

The sentencing Judge's approach was spare, largely because the details in relation to the offending had already been rehearsed when he sentenced her co-offenders earlier. The sentencing notes cover the necessary ground in a level of detail consistent with current sentencing practice. After traversing the facts and adopting a starting point similar to that applied to her co-offenders, the Judge turned to Dawn's newfound situation as a young mother.

The defence argued the arrival of the baby made a difference. Dawn was now committed to turning her life around. The baby was doing well and had bonded with Dawn. But the Judge took a firm line. Having a young baby was not a sufficiently exceptional circumstance to warrant any alternative to imprisonment, or indeed any discount on the term of imprisonment. In fact, the prosecutor noted this was a plea commonly made by postnatal offenders and routinely rejected by the courts. The prosecution was right. Dawn was sentenced to three years' imprisonment.

The whakatauki speaks of the importance of kinship or whanaungatanga. The flax bush is a metaphor for this principle. The rito, or young shoot from the centre of the plant, represents the next generation, protected from the elements by the enveloping awhi rito, or parent leaves – first the female and then the male. Outside these leaves are wrapped uncle, aunt and grandparent leaves. The rito when in flower is where the kōmako, or bellbird, lands to feed and to sing. Meri Ngaroto, to whom the whakatauki is attributed, lived through the turbulent years of the Musket Wars. By her words, she reminded her people that each succeeding generation is precious and irreplaceable, just like the bellbird's song. To lose our children is, like her silent bellbird, to lose our way.

2 Dawn is not her real name. Some facts have been removed or amended to protect her identity.

I want to excavate Dawn's story in this lecture, not because it has special or distinctive elements, but because it is unremarkable. A story picked at random as everyday offending of its kind by an everyday offender of her kind. It accurately portrays the way we sentence Māori – indeed, the way we sentence all offenders.

But first let me give you a brief tour of the system.

II THE SENTENCING REGIME IN NEW ZEALAND

The Sentencing Act 2002 was intended to be a comprehensive and rather more holistic approach to the business of crime and punishment than had previously been the case. For present purposes, it is sufficient to note the enactment for the first time of guidance regarding the purposes and principles of sentencing. Sections 7, 8 and 9 have been the subject of extensive comment by appellate courts over the last 17 years and I do not intend to rehearse any of that. Rather, I will outline the broad contour of these provisions just to familiarise you with the Act's values.

A Purposes of Sentencing

Section 7 relates to the purposes of sentencing. It speaks of accountability, responsibility, denunciation, and deterrence (specific to the offender and more generally to the community).[3] It speaks also of community protection, and offender rehabilitation and reintegration.[4] It is not to be implied that any particular purpose is more important than any other.[5]

B Principles for Sentencing

Section 8 provides the principles for sentencing. Account must be taken of the gravity of the offending: the offender's culpability;[6] sentencing consistency;[7] victim impact;[8] the offender's own circumstances (including where this might make the punishment more severe);[9] the personal, family, whānau, community and cultural background of the offender;[10] and the result of restorative justice processes.[11] As a general approach, sentencing courts must impose the least restrictive outcome

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3 Sentencing Act 2002, s 7(1)(a)–(b) and (e)–(f).

4 Section 7(1)(g) and (h).

5 Section 7(2).

6 Section 8(a).

7 Section 8(e).

8 Section 8(f).

9 Section 8(h).

10 Section 8(i).

11 Section 8(j).

appropriate to the circumstances and in light of the hierarchy of possible sentencing options.[12] However, the most serious offending must receive the maximum penalty allocated to it by the relevant offence provision unless the offender's personal circumstances make that inappropriate.[13] These principles will often be in tension. Finding an appropriate balance between them is an exercise to be undertaken case by case.

C Factors for Sentencing

Section 9 does the heavy lifting in the actual day-to-day business of sentencing. It identifies aggravating and mitigating factors associated with the circumstances of the particular offending and the particular offender. Judges routinely emphasise one or more of these factors to justify their sentence selection in particular cases.

Mandatory aggravating factors include the use of violence or a weapon; home invasion; the harm inflicted; whether the offender was on bail or parole; whether the offending involved family violence, cruelty or abuse of trust; whether the offending was against a person in authority or a vulnerable person; whether the offence was a hate crime or gang-related; the level of pre-meditation; the offender's prior record; and any failure subsequently to comply with procedural requirements of the trial process.[14]

Mandatory mitigating factors include age-related offender vulnerability; guilty plea; the victim's conduct; the offender's level of involvement, diminished intellectual capacity or understanding; remorse; steps taken to shorten the proceedings; delay caused by the prosecutor; and previous good character.[15] Alcohol or drug consumption are not qualifying factors in mitigation.[16]

While the s 9 factors must be considered, they do not represent an exhaustive list. The court is free to take account of other factors not listed if satisfied they are relevant.[17]

III PERSPECTIVE

The reform of sentencing in New Zealand has been a much-ploughed field in recent times. The Government has developed a "Safe and Effective Justice" policy initiative, generally referred to as Hāpaitia te Oranga Tangata.[18] Within that, a high-level ministerial advisory committee called Te Uepū

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12 Section 8(g).

13 Section 8(c).

14 Section 9(1).

15 Section 9(2).

16 Section 9(3).

17 Section 9(4).

18 See Hāpaitia te Oranga Tangata | Safe and Effective Justice <safeandeffectivejustice.govt.nz>.

has produced two volumes of work: *He Waka Roimata*[19] and *Turuki! Turuki!*[20] Te Uepū's reports have proposed extensive reforms of the criminal justice system, which the committee considered is flawed in fundamental ways. There has also been *Te Korowai Ture ā-Whānau* in relation to the Family Court,[21] and an Oranga Tamariki review is underway. And the Department of Corrections has completed a strategy reset called Hōkai Rangi.[22] The fact that each review has chosen a title in te reo Māori is commendable, but speaks volumes about the primary subject matter of criminal justice, and child care and protection in New Zealand.

I have no wish to rehearse the findings of those inquiries or to point out where I think they may have gotten it wrong. That is beyond both my constitutional role and my expertise. If I can bring anything to the discussion, it is a particular perspective – beyond my personal perspective as a Māori.

I have had two very different judicial careers. The first was in judging in the Waitangi Tribunal and the Māori Land Court, the process of tribal – and, therefore, Māori – reconstruction. The Waitangi Tribunal, in particular, required me to fix my gaze on our colonial past. The purpose of my work in those jurisdictions was always to make a positive contribution to tribal development. In one way or another, the governing statutes required it. I cannot say I always achieved that, but I can say I always tried to.

My second judicial career is my current one. That is, I have for the last nine years worked as a judge in the mainstream courts exercising criminal jurisdiction at both trial and appellate levels. Here, my focus has been on ensuring the defendant receives a fair trial according to law and, if convicted, a just sentence. The impact of that work on the Māori community (and I include my own individual contribution to it) can only be responsibly described as destructive, even catastrophic.

IV THE NUMBERS HERE AND THERE

You might be aware of the Māori offending and incarceration statistics. They are in the news a lot. I do not want to shower you with numbers, but some basic facts are worth setting out for

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19 Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, 9 June 2019) [*He Waka Roimata*].

20 Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *Turiki! Turiki! Move together! Transforming our Criminal Justice System* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, 12 December 2019).

21 *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019).

22 See Ara Poutama Aotearoa – Department of Corrections *Hōkai Rangi: Ara Poutama Aotearoa Strategy, 2019–2024* (2019).

comparative purposes. New Zealand has a relatively high imprisonment rate at 206 per 100,000.[23] This is significantly higher than the jurisdictions with which we generally compare ourselves – Australia, England and Wales, and Canada.[24] The exception comparator is the United States of America, which imprisons at around 655 per 100,000.[25] The United States has the highest imprisonment rate in the world and may be treated as a genuine outlier.

Māori make up around 16 per cent of the general population, but 38 per cent of those charged (even in a time of diversionary "iwi panels"), 42 per cent of adults convicted, and 57 per cent of adults sentenced to prison.[26] The per capita imprisonment rate for Māori is around six and a half times that for other New Zealanders.[27] That means the Māori imprisonment rate is only slightly lower than the general imprisonment rate in the United States. Nearly 70 per cent of the approximately 6,000 children subject to care and protection orders in New Zealand are of Māori descent.[28] As I said, the thrust of these numbers is generally well known.

Perhaps it is also known that this incarceration asymmetry is repeated for indigenous people in Australia, Canada and the United States, and for African Americans in the United States. The incarceration rate for indigenous adults in Canada is nine times higher than it should be on a per capita basis.[29] In Australia, the indigenous incarceration rate is 13 times higher than the appropriate proportionate rate (2 per cent of the national population, but 27 per cent of the prison population).[30] For indigenous women in Australia, imprisonment rates are a frightening 21.2 times that for non-indigenous women.

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23 *He Waka Roimata*, above n 19, at 7. In 2017, the number had reached 2019 per 100,000, but it has since fallen: Marcus Boomen "Where New Zealand stands internationally: A comparison of offence profiles and recidivism rates" (July 2018) Department of Corrections <www.corrections.govt.nz>.

24 Australia has an imprisonment rate of 132 per 100,000, England and Wales 139, and Canada 114: *He Waka Roimata*, above n 19, at 7.

25 "International Imprisonment Rates" (July 2020) Sentencing Advisory Council of Victoria <www.sentencingcouncil.vic.gov.au>.

26 *He Waka Roimata*, above n 19, at 23.

27 Jarrod Gilbert "Maori incarceration rates are an issue for us all" *The New Zealand Herald* (online ed, Auckland, 27 April 2016). See also *Over-representation of Māori in the criminal justice system: An exploratory report* (Department of Corrections, September 2007).

28 "Quarterly Report – December 2020" Oranga Tamariki – Ministry for Children <www.orangatamariki.govt.nz>.

29 *Indigenous overrepresentation in the criminal justice system* (Department of Justice Canada Research and Statistics Division, January 2017).

30 Australian Law Reform Commission *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) at 21.

In the United States, it is difficult to find national numbers for indigenous offending and incarceration. I presume that is partly because native nations themselves exercise some criminal jurisdiction and may not contribute to national statistics, and partly because it is not clear whether these statistics are gathered uniformly. It is certainly the case that in states with relatively high Native American populations – Alaska, North and South Dakota, Montana, Arizona and New Mexico – the indigenous incarceration rates far exceed averages for those states. Interestingly, in the state of Alaska, where the indigenous proportion of the population is roughly the same as that in New Zealand, and where (like New Zealand) there is no system of separate tribal criminal jurisdiction, indigenous offending and incarceration rates are of a similar order to those for Māori in New Zealand.[31]

In 2014, African Americans comprised 34 per cent of the "correctional population" in the United states – that is, 2.3 million out of 6.8 million.[32] The African American incarceration rate is, therefore, five times the rate for white Americans.[33]

Len Cook, former Government Statistician, has an interesting take on these comparisons. He combines the sentenced and remand prisoner numbers[34] to produce an overall incarceration figure. His assessment is striking to say the least:[35]

> … there have been 1,690 per 100,000 Māori males imprisoned on average over the last five years, compared to 230 non-Māori males per 100,000. In the USA, there were 2,272 inmates per 100,000 black men in 2018, compared with 1,018 inmates per 100,000 Hispanic men and 392 inmates per 100,000 white men. Comparison with the USA shows that New Zealand Māori males are incarcerated at some ¾ the rate of black American males, and 7.3 times the rate of European males in New Zealand. The corresponding ratio of black to white prisoners in the USA is 5.8:1.

V INTERGENERATIONAL TRAUMA

What do these heavily incarcerated populations have in common, other than that they reside in English-speaking, Western countries? Why is it that they appear to repeat the same basic profile with variations in degree but not kind? According to learned texts and journal articles from psychiatrists,

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31 In 2010, the Alaskan Native population comprised 15 per cent of the overall state population, but 38 per cent of the prison population: "Racial disparities in Alaska prisons and jails" (December 2016) Prison Policy Initiative <www.prisonpolicy.org>.

32 "Criminal Justice Fact Sheet" NAACP <naacp.org>.

33 But the imprisonment rate per 100,000 for African American men is 2,336 (roughly the equivalent for indigenous Australians and more than three times the rate for Māori men!): "Criminal Justice Fact Sheet", above n 32.

34 He limits remand prisoners to those remanded in custody for three months or more: Len Cook "Missing in Action – A Statistical Window on Prisons" (paper presented to New Zealand Statistical Association UnConference, Auckland, 25 November 2020).

35 Cook, above n 34.

psychologists, sociologists and anthropologists, the common characteristic of these populations is that they are suffering from the effects of unresolved historical trauma.[36] Whether it begins with the mortality associated with first contact with Europeans, followed quickly by dispossession from place and autonomy in the case of indigenous inhabitants – or the dispossession of self and autonomy in the case of transported slave populations – physical scientists and social scientists seem to accept that historical trauma can continue long after the traumatic events themselves have abated. Why is that?

Why can't they just build a bridge and get over it?

It has been nearly 180 years since the Treaty of Waitangi, and 120 years since the close of the century in which Māori lost their estates and their autonomy – either at the end of a gun barrel or an open chequebook. Even if we accept (and the Treaty settlement process demonstrates we do) that terrible things happened to Māori in the second half of the 19th century, that time ended six generations ago. Surely the Māori community has collectively and individually had enough time to pick itself up by its bootstraps and make a decent go of it? Hasn't the system – the government, education, social welfare and the Office of Treaty Settlements – done enough? Is there really still a good reason for Māori criminality to remain such a stubbornly heavy burden on the taxpayer and the national conscience?

I want to have a go at answering these questions.

Taking my cue from Professor Paul Farmer, who tried to explain why Haiti (a country in which he practised medicine for many years) remains a victim of what he describes as "structural violence", I want to focus on the material here and now, as well as the historical, to give what I hope is an "honest account of who wins, who loses, and what weapons are used".[37] I know perfectly well that the past is

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36 The literature in this area is vast, but a useful starting point is Yael Danieli (ed) *International Handbook of Multigenerational Legacies of Trauma* (Plenum Press, New York, 1998), especially pt 6 on indigenous peoples and pt 10 on the "emerging biology of intergenerational trauma". See also Michelle M Sotero "A Conceptual Model of Historical Trauma: Implications for Public Health Practice and Research" (2006) 1(1) Journal of Health Disparities Research and Practice 93; and in respect of particular populations, see Maria Yellow Horse Brave Heart and others "Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations" (2011) 43 Journal of Psychoactive Drugs 282; Maria Yellow Horse Brave Heart "The Historical Trauma Response Among Natives and its Relationship with Substance Abuse: A Lakota Illustration" (2003) 35 Journal of Psychoactive Drugs 7; Les B Whitbeck and others "Conceptualising and measuring historical trauma among American Indian people" (2004) 33 American Journal of Community Psychology 119; William E Cross Jr "Black Psychological Functioning and the Legacy of Slavery: Myths and Realities" in Yael Danieli (ed) *International Handbook of Multigenerational Legacies of Trauma* (Plenum Press, New York, 1998) 387; Judy Atkinson *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, Melbourne, 2002); and John Reid and others *The Colonising Environment: An Aetiology of the Trauma of Settler Colonisation and Land Alienation on Ngāi Tahu Whānau* (Ngāi Tahu Research Centre, 10 May 2017).

37 Paul Farmer "An Anthropology of Structural Violence" (2004) 45 Current Anthropology 305 at 308.

untidy and occasionally chaotic,[38] and that casting the invaders as perpetual villains and the natives as irredeemable victims is to deny the complexity of lived reality both then and now. But the consistent patterns are there for all to see, whether we speak of Māori, Canadian First Nations, Indigenous Australians, Native Americans or African Americans. They are no mere coincidence.

The social science research overwhelmingly supports the proposition that trauma, if it is severe enough, can transfer intergenerationally. The debate in the field of epigenetics is now whether significant trauma – on a community-wide scale – can transfer genetically; that is, whether trauma can be biologically inherited.

So, the logical place to begin our search for answers is with a short history of the Māori transition from "lords of the land"[39] to urban poor in the space of around 70 years.

A The 19th Century

The loss of territory and the ability to be self-determining on it was hugely debilitating for many, perhaps most, iwi.[40] The worst affected were those who lost their country in war and its aftermath. But in the end, whether the land was lost in war, in early Crown purchases at 1/50th or less of its resale value, or by the individualisation mechanism of the post-war Native Land Court, the result was the same.

By the 1880s, the Māori population had fallen from the 100,000–150,000 of Cook's estimate to 40,000 – a human loss on the same scale as the land loss. This led Dr Isaac Featherston MP famously to opine that the role of the settler government was to smooth the dying pillow of the native race.[41] Once-powerful leaders of the Māori world quickly lost both legal and cultural sway over their communities. They were humiliated as leaders, and their people made landless – transformed in half a generation into wage labourers with no capital base. Those were the immediate economic consequences of the colonising process.

The psychological consequences, in addition to the emotional impact of extreme community mortality, were co-pervasive. The psychological effects of the loss of a secure frame within which to belong and thrive in a kin-based community attached to a defined territory are many: racist exclusion from the economic opportunities of the settler society that deposed that frame; the internalisation of

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38 See Niall Ferguson (ed) *Virtual History: Alternatives and Counterfactuals* (Basic Books, New York, 1999).

39 See Mark Hickford *Lords of the Land: Indigenous Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011).

40 See the Waitangi Tribunal's Rangahaua Whānui research series.

41 In 1856, he wrote: "The Maoris are dying out, and nothing can save them. Our plain duty, as good, compassionate colonists, is to smooth down their dying pillow. Then history will have nothing to reproach us with": Te Rangi Hiroa (PH Buck) "The Passing of the Maori" (1924) 55 Transactions and Proceedings of the Royal Society of New Zealand 362 at 362.

that racism to self and community; and the dawning realisation that Māori as individuals and communities could never be other than inferior in the new order.

It must be remembered that within the space of less than a lifetime, Māori communities bore witness to profound change affecting the whole of their lives: the almost complete removal of the great forests and their replacement with pasture; the draining of the vast coastal wetlands and their replacement with pasture; the construction of the urban settler beachheads in the great harbours and river basins; and the replacement of the old gathering and cultivation economy in the traditional resource complexes with the new trading economy supplying food, materials, and eventually land to the settlers. Overlaid on this was the gradual overturning of mana Māori by settler authority. The first phase occurred in the areas of early active engagement: the Tāmaki isthmus, Hawke's Bay, Wairarapa, Wellington, and the bulk of the South Island – but not forgetting the Tai Tokerau where Ngā Puhi tribes engaged early, but then rebelled. The process then continued into the rebel strongholds: the East Coast, Bay of Plenty, Taupō, Hauraki, Waikato, Taranaki, Whanganui and Horowhenua. After they fell, the last holdouts were the King Country and the Urewera, the adopted home of Te Kooti, whose autonomy was not effectively breached until the close of the 19th century.

I do not wish to give the impression that this revolution[42] was tidy or well-organised. It was neither. It occurred unevenly, and there were Māori and Pākehā on both sides. A small number of chiefs even did rather well out of colonisation, often at the expense of their communities. But the impact on Māori communities was the same.

B The 20th Century

There can be no doubt that the physical, economic and cultural effects of that part of Māori history was passed on to the first generation of 20th century Māori. The sudden rise of religious leaders such as Rua Kēnana and Tahupōtiki Wiremu Rātana attested to the extreme vulnerability of poor Māori communities in the Tai Tokerau, Kaipara, Hauraki, Tauranga, Urewera, Taranaki, Whanganui, Horowhenua, Wairarapa, Canterbury and Otago. But this time also saw the rise of the Young Māori Party: Ngata, Pomare and Buck,[43] who together with great leaders such as Te Puea signalled the rebirth (or perhaps the continuity) of Māori resilience through new rangatira-led strategies of accommodation and cooperation with the new order.

Where the colonial policy of 19th century New Zealand focused on race, the first half of the 20th century pushed Māori issues to the margins of the new settler society and its economy. For most Māori

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42 Revolution is a term I use in its technical sense: the overturning of the existing legal and social order without the expressed consent of the previous order. The Treaty of Waitangi was predicated on the retention of mana Māori – of tino rangatiratanga – and so did not provide a proper basis for that which ultimately eventuated. See generally FM Brookfield *Waitangi & Indigenous Rights: Revolution, Law & Legitimation* (2nd ed, Auckland University Press, Auckland, 2013).

43 Known in Te Ao Māori as Te Rangihīroa of Ngāti Mutunga.

communities, the land base was no longer sufficient to sustain them. Government policy in relation to Māori shifted from the native/settler binary to the class framework of the first Labour government.

By World War II, working-age Māori flooded into the cities in search of a viable replacement for the old order – buoyed by the Māori contribution to the war effort and the nation's, indeed the Empire's, gratitude to Māori for what they had sacrificed. Ngata famously described that effort as "the price of citizenship".[44] This was the Māori equivalent of the African American migration from the rural South to the urban industrial North. But make no mistake, in the United States and in New Zealand, these migrants were economic refugees from a different, failing, world. And they brought the vulnerabilities of refugees with them.

By the 1960s, around 70 per cent of the Māori community lived in the urban centres, for the most part working as unskilled or semi-skilled labourers in factories and government-owned businesses servicing the provincial hinterlands and metropolitan centres. However, this migrant generation had been born into village life which remained collective, stable, and culturally and (for the most part) linguistically Māori. The urban shift created a different kind of trauma for this generation: they lost the stability of community and culture that had provided them with at least some level of resilience despite the experiences of the 19th century. But they survived and participated in the post-war Kiwi dream. The meat- and wool-based exporting economy was booming, government regulation ensured that income inequality was modest by today's standards, and the welfare state was comprehensive and universal even for Māori, at least eventually.

That migrant generation did what they could to recreate village life in the cities, just as Pacific Island migrants would with greater success in the 1970s and 1980s. Ngāti Poneke in Wellington and the Māori Cultural Centre in Freemans Bay, Auckland, grew into urban marae in West and South Auckland, Porirua, Lower Hutt, Christchurch and so forth.

These transposed institutions helped, but they were not enough. The children of that migrant cohort would pay the price. That next generation was unique – the first urban-born Māori generation. It was unique in another important respect: it was also the largest cohort in the history of the race. The urban migration coincided with a massive upswing in the Māori birth rate. For Māori, the post-war baby boom really was a *boom*. I am told that Māori had the highest birth rate of any ethnic community in the world in the 1960s, but I have not had time to check the veracity of the proposition.

The members of this first city-born generation had no community, at least not in the old way. They were integrated into cities where they were, for the first time, a visible and self-conscious minority. Official government policy was that the Māori community should assimilate into the mainstream – into Pākehā New Zealand. Although they could retain, if they wished, benign symbols of their identity – kapa haka, tikis, hāngī food, etc – it was in the Māori interest to shed the deeper

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44 See AT Ngata *The Price of Citizenship: Ngarimu, VC* (Whitcombe & Tombs, Wellington, 1943).

traditional values and lifestyles. Māori would be able to shrug off the hangover of the 19th century if they focused on the Kiwi dream of acquiring property, personal wealth and the nuclear family – and not get distracted by the handbrake of obligation to wider whānau, hapū or iwi. Te reo and tikanga Māori were best forgotten if the city-born generation was to make headway in the new order. Many village-born Māori parents adopted the Pākehā orthodoxy, feeling they had no choice but to accept their own cultural obsolescence for the sake of their children.

The result was catastrophic: the rise of an unprecedentedly large generation of brown, urban-born, anglophone, culturally lost teenagers. The statistics tell their own story. Department of Social Welfare Boys' Homes, then borstals, and then adult prisons began to fill up with Māori. In the 1970s, when half of the Māori population was under 15, one in 14 (that is, 7 per cent) Māori boys below that age was removed from his family and placed in Social Welfare-run Boys' Homes.[45] Almost all of these boys graduated to adult prisons in due course. In fact, of the males in that first urban-born generation – my generation – 40 per cent had served a prison- or Corrections-administered sentence before they were 35. Some are still in the system.

As the inimitable Len Cook, former Government Statistician of New Zealand, keeps reminding me, each generation has its own story separate from, but connected to, what has gone before. We cannot unthinkingly extrapolate the bad experiences of the first city-born generation onto their children – the Māori millennials who now fill prisons. But the causal relationship between that first generation's experience and what happened to the generation that followed is unarguable. Simply put, my generation of prisoners had children, and those children had a significant chance of following their absent fathers into prison.

Behind these numbers is the human story of the rise of the Māori gangs – first in the poor suburbs of the cities and, by the 1990s, back in the traditional villages too; the spread of substance abuse and its supporting infrastructure; and the normalising of intimate partner and familial violence, both physical and sexual. In short, it is the story of how social and cultural fabric is broken down and replaced with noxious substitutes. It is important to remember that the breakdown was the objective of Māori policy; the noxious substitutes were an unintended but predictable consequence.

This urban-born generation – by this time adults working largely in the same labouring occupations as their parents – were also the first casualties of the economic restructuring of the mid-1980s. Without formal qualifications, they were completely exposed. The factory jobs disappeared, and the factory towns were hollowed out. The government jobs disappeared too: in the forest service, railways, post office, and more. This was the first generation to face widespread unemployment without the protection of the collectivism of the village life and without the community resources that had saved their grandparents in the Great Depression. The children of that restructured generation, the millennials – my children's generation – were thus more likely to have grown up in

45 Now known as Youth Justice facilities. See Cook, above n 34.

households with adults either in precarious employment situations or unemployed. Poverty and welfare dependency became entrenched and intergenerational, while the potentially ameliorative effect of village collectivism was no longer available. The rise of Māori nationalism in the 1980s was borne of this experience.

But it would be wrong to say it was all doom and gloom. This was also the kōhanga generation – the first to have received government-sponsored early childhood education in te reo Māori. The millennials were also the generation that, in time, would attend universities, wānanga and kura kaupapa, and witness the fruition of Treaty settlements. Ironically, the elders who staffed the kōhanga, kura and wānanga were often the factory, railway or forestry workers who had lost their jobs in the 1980s, but suddenly found their formerly redundant te reo and tikanga expertise had value after all. And by the 1980s, race (and specifically indigeneity) had pushed the old class-based approach aside to become once again the focus of government Māori policy. Assimilation and melting-pot thinking were officially dropped both as government policy and (more importantly) as Kiwi cultural orthodoxy. This was also the decade of devolution to iwi as a more positive aspect of the retreat of the state, of the Waitangi Tribunal and Treaty settlements, the Māori language revival, the renovation of the Māori Land Court, the iwi invasion of the processes of environmental regulation, and of tino rangatiratanga. And we must not forget the Springbok Tour.

It can be said that by the end of the 20th century, Māori were at a very difficult point in their history; there was much in their recent experience to regret, but this was also a time of awakening and of hope for a break from that past.

What, then, was the criminal justice system's response to this post-colonial backstory?

VI THE RESPONSE OF THE SENTENCING COURTS

It was in those reforming 1980s that s 16 of the Criminal Justice Act 1985 was enacted.[46] It required the courts to hear from those who wished to speak for the offender about their background. It was an attempt to create a pathway for the offender's community into the sentencing process by removing the usual forensic filters. Although it did not explicitly refer to Māori, -Hon Michael Cullen MP frankly admitted in the House of Representatives that the Bill was designed to address the disproportionate Māori imprisonment rate.[47] By today's standards, the numbers looked rather benign – Māori were a respectable 40 per cent of the prison muster. Section 16 lay dormant for most of the following 30 years. The only exception was the establishment of the Matariki Court in Kaikohe, at the initiative of Chief District Court Judge Russell Johnson and Judge Jim Rota in 2010. The potential was there in the statutory language to cut a new path, but the infrastructure and the resources were not.

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46 Now replaced by s 27 of the Sentencing Act 2002.

47 (23 July 1985) 464 NZPD 5841.

Over the last 30 years, the courts have struggled with the place of race and culture in sentencing – conceptually and practically. That is, they have been uncomfortable with differentiating between offenders on the basis of race as a conceptual approach to sentencing, and they have struggled to develop practical and sustainable models to incorporate culture into the sentencing process.

In 2013, the Court of Appeal heard an argument that the appellant, Mr Mika, should get a 10 per cent discount because of the social deprivation he suffered as a Māori. The Court flatly rejected the suggestion.[48] Ethnicity alone could never be a basis for a standard discount without evidence as to how that background contributed to the offending.[49] Mr Mika's counsel referred extensively to Canadian and Australian case law on the subject to support his submission, but the Court considered these authorities were irrelevant because of the different statutory contexts within which the issues were considered.[50]

One can see why an argument that Māori offenders in general should get a standard discount had no chance of success. As the Court of Appeal noted, Mr Mika should have utilised s 27 of the Sentencing Act 2002 to contextualise his argument with supporting evidence and he did not.[51] In his defence, nobody did back then.

In my experience, judicial attitudes to the materiality of culture and background to sentencing fall somewhere on a spectrum between two points: at one end are the judges who see it as their function to do all they can to alleviate systemic Māori over-representation, who believe deeply in the power of redemption, and who accept that the provision of information about culture and history is essential to sentence selection; at the other end are judges who are structurally sceptical about these issues, struggle to see how they might be relevant except in very few cases, and believe any sentencing response to a distant and traumatic past will lead to race-based undermining of the whole sentencing theory of free agency. Most judges are situated somewhere around the middle – they understand instinctively that the courts should be more responsive to indigenous circumstances and are open to doing what they can, but they are cautious about going too far and leaving the system open to being abused and manipulated by offenders. They want to better understand the linkages between history and the present, but they are worried about how making culture count in sentencing might be received by middle New Zealand. In short, judges probably replicate the same spectrum of views held by middle-class New Zealanders, though with the advantage (or disadvantage) of legal expertise.

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48 *Mika v R* [2013] NZCA 648.

49 At [9]–[15].

50 At [13].

51 At [14].

A Canada and Gladue

While the Court of Appeal in *Mika* found overseas jurisprudence in this area irrelevant, I am of the view that Canadian and Australian authorities are helpful because they address exactly the same problems, generated by the same causes, and, at least in respect of Canada, by using a similar statutory trigger.

Section 718.2(e) of the Canadian Criminal Code is the equivalent of our ss 8(i) and 27 of the Sentencing Act 2002 in relation to an offender's background. It requires Canadian sentencing courts, when selecting a sentence, to pay "particular attention to the circumstances of Aboriginal offenders". In the 1999 case of *Gladue*,[52] the Canadian Supreme Court found that it had been enacted to "ameliorate the serious problem of overrepresentation of Aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing".[53] Sentencing judges were, therefore, required to consider:[54]

> (a) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
>
> (b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.

But the Court cautioned that this was no basis for the creation of a purely race-based discount, or even necessarily more lenient sentences.[55] Rather, the key message was that because of the incarceration asymmetry, sentencing courts must take the time to learn more about indigenous offenders in order to select a truly just sentence. Unremarkable, you might have thought, but the decision was seen as controversial.

In any event, it gave rise to what became known as the *Gladue* courts: a small number of specialist sentencing courts in areas of high indigenous concentration – almost identical to the Matariki Court in Kaikohe. It also generated the requirement for a special background report when indigenous offenders were to be sentenced in all Canadian courts. They came to be known as *Gladue* reports.

Continuing controversy around the *Gladue* case led the Canadian Supreme Court to revisit these issues 12 years later in the case of *Ipeelee*.[56] The case related to the way sentencing courts should treat indigenous offenders subject to long-term supervision orders due to persistent offending. LeBel J, writing for the majority of the Court, took the opportunity to address some of the criticisms levelled

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52 *R v Gladue* [1999] 1 SCR 688.

53 At [93(3)].

54 At [93(6)].

55 At [93(9)].

56 *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433.

at *Gladue*. He noted that while indigenous over-incarceration is a systemic issue requiring a broad-based community response, sentencing judges operating as frontline workers at the retail level have a limited but important role to play in addressing this issue.[57] He suggested that sentencing courts cannot achieve the proportional response to particular offending required by the Canadian Charter of Rights and Freedoms[58] without considering applicable systemic and background factors for indigenous offenders. As culpability can only flow from voluntary conduct, those whose background significantly reduced their choices were logically less morally culpable even if their actions remained strictly voluntary. To ignore this would be to impose a sentence out of proportion to the degree of responsibility of the offender.[59] Further, selecting sentences that take into account the cultural perspectives of aboriginal communities would better achieve the objectives of sentencing for those communities.[60] Most significantly, LeBel J argued forcefully that this was not a charter for race-based sentencing.[61] He quoted academic commentary:[62]

> As Professor Carter puts it, "poverty and other incidents of social marginalisation may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's."

Furthermore, Lebel J noted that the *Gladue* approach can apply equally to non-indigenous offenders because background and systemic factors are important in all sentencing.[63]

Commentators post-*Ipeelee* have complained that the resources and infrastructure necessary to give effect to the requirements of *Gladue* are absent in many, even most, Canadian communities.[64] A particular shortcoming is the underfunding of *Gladue* report writers, which has meant the reports have been less likely to serve the purpose for which they are designed – leading, it seems, to the *Gladue* approach producing almost no change in incarceration rates.[65] Essentially, the consensus view appears to be that the *Gladue* approach is an excellent idea poorly executed.

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57 At [69].

58 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

59 *R v Ipeelee*, above n 56, at [73].

60 At [74].

61 At [76]–[77].

62 At [77], citing Mark Carter "Of Fairness and Faulkner" (2002) 65 Sask L Rev 63 at 71.

63 At [77].

64 Department of Justice Canada Research and Statistics Division *Spotlight on* Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (September 2017) at [3.1].

65 At [3.1.3.1].

Given the current controversies around s 27 reports in New Zealand, particularly what they should cover and how they are funded, we would do well to take careful note of the experience of other similarly-situated countries.

B The Heta *Case*

The six years since *Mika* have seen a particularly sharp increase in Māori imprisonment numbers.[66] It is no coincidence that over this period, sentencing judges have been more active in requesting information about the cultural and whānau backgrounds of Māori offenders. But the tipping point came with the decision of Whata J in *Heta*, in which he traversed the authorities here and in Canada and Australia and responded to the sorts of criticisms that LeBel J referred to in *Ipeelee*.[67] Whata J's decision articulated the reasons why s 27 must be made to work. And in that articulation, it produced a significant change in sentencing practice by the sheer power of its logic. As in Canada, the question now is whether the necessary resources and infrastructure will follow.

However, not all have embraced *Heta* with enthusiasm. Notes of caution have been sounded, as one might expect given the spectrum of judicial inclination on the subject. The best articulation of this more sceptical perspective may be found in the sentencing remarks of Downs J in *R v Carr*, where he responded to a cultural report tendered for the sentencing of a "part-Māori" offender for violent offending.[68] He said:[69]

> In any event, discounts in this context require care. Correlation and causation are not synonymous. Many people with disadvantaged backgrounds do not commit criminal offences let alone very serious ones like this, and many law-abiding people remain so despite difficult lives. Excessive discounts in this context risk undermining the criminal law's precepts of human agency and choice. This is not to deny the importance of upbringing or circumstance; it is to maintain perspective.

I agree with that caution. Trauma in a person's living or more distant past does not guarantee that the person will become an offender. That kind of deterministic approach is flawed in the same way algorithmic calculations of risk are flawed. For example, the fact that people of a particular background have an 80 per cent likelihood of offending does not entitle anybody to conclude that offender A was always going to offend because he has that background. More importantly, retrospective determinism dispossesses the offender of what remains of their own agency. It is in a

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66 The prison muster peaked at a record 10,820 in March 2018. For the next 18 months, the muster varied between 9,700 and just over 10,000: Collette Devlin "Prison population increases past 10,000 inmates" (24 April 2019) Stuff <www.stuff.co.nz>. As at March 2020, it had fallen to just below 10,000: "Prison facts and statistics – March 2020" Ara Poutama Aotearoa – Department of Corrections <www.corrections.govt.nz>.

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

68 *R v Carr* [2019] NZHC 2335 at [47] and following.

69 At [61].

sense dehumanising to reduce an offender to victimhood and nothing more; it is to make the offender a mere puppet of circumstance. In Māori terms, it denies their mana.

But agency does not come in a single invariable quantum. It can be unfettered or highly fettered without entirely losing its character. This is the area within which the current debate is played out.

Let me take you back to the story of the typical post-colonial first generation urban-born Māori wage labourer, whose background I sketched out earlier. His parents' typical backstory would go something like this. They moved to the city in the 1950s because they had no land and they needed work. They had no land because it was acquired from *their* parents for a sum that was insufficient to establish a viable alternative capital base. Rather, the price was sufficient only to fund daily consumption in the absence of other income. Once the proceeds were exhausted, the whānau were broke, and more likely, in debt. The low land prices were the result of the market taint of Māori land, the fragmented nature of individualised undivided interests, and the fact that Māori land was completely un-bankable – and indeed still is. The alternative of collectivisation of land holdings also faced obstacles that were usually insuperable. One such difficulty was bringing owners together to make collective decisions where they were not necessarily co-resident, and where their interests were increasingly fragmented by the post-war population boom and Māori Land Court succession rules. Corporate or trust administration did not become viable on a widespread basis until the 1970s – about a century too late.

Once again, this urban-born wage labourer belonged to the generation in which 7 per cent of boys were taken from their homes by the state before the age of 15. The current inquiry into abuse in state care speaks to the injuries said to have been suffered by so many in that generation. Most graduated to jail – around 85 per cent. Can it really be said, then, that most Māori men with that particular background had a fighting chance of leading law-abiding lives? The numbers suggest most could not. I am Māori. I have spent all my life in and around Māori communities. I reject any suggestion that Māori are more criminogenic than other races. That leaves offender background, history and systemic racism as the primary drivers of these terrible rates of incarceration. This is not to deny subjective offender agency – it is rather to understand the *reality* of it in specific circumstances. As *Gladue* and *Ipeelee* explain, the current practice of imposing an unrealistic general theory of unfettered agency produces unjustly inflated sentences.

The point is that a proper rehearsal of these histories allows sentencing judges to calibrate as best they can the degree to which free choice has been fettered by trauma, whether directly experienced or inherited, or (more likely) both. I agree that it is important to maintain perspective in assessing agency. However, without a proper command of an offender's background, there can be no perspective – only myopia.

The sentence in *R v Carr* was subsequently reduced on appeal.[70] The Court of Appeal expressed similar reservations to those I have about the High Court Judge's generalised reasoning in relation to agency and choice.[71]

C Guideline Cases and Zhang

For a generation, it has been the practice in New Zealand to facilitate sentencing consistency through guideline judgments of the Court of Appeal: *Te Rewi* in 1999 in relation to cannabis cultivation and supply;[72] *Mako* in 2000 in relation to robbery;[73] *Taueki* in 2005 in relation to serious violent offending;[74] and *AM* in 2010 in relation to sexual offending.[75] Since 2006, *Fatu* has applied to methamphetamine offending,[76] but has recently been superseded by the new guideline judgment in *Zhang*.[77] The shift in attitudes across those 20 years is instructive. Setting aside *Zhang* for the moment, none of the guideline judgments refers to systemic deprivation. The drug cases suggest personal circumstances will not be significant factors,[78] and *Taueki* acknowledges mental illness may be relevant, but says it is a double-edged sword.[79] Mental illness can make an offender more dangerous and require a longer period of incapacitation.[80]

In light of those cases, the recent methamphetamine sentencing guideline judgment of the Court of Appeal in *Zhang* represents a sea change in sentencing generally because it focuses so much on background[81] and particularly on addiction.[82]

I want to focus only on the Court's discussion of social, cultural and economic deprivation. Four of the Court's points under this heading bear repeating. First, ingrained and systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters relevant to free

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70 *Carr v R* [2020] NZCA 357.

71 See especially at [66].

72 *R v Terewi* [1999] 3 NZLR 62 (CA).

73 *R v Mako* [2000] 2 NZLR 170 (CA).

74 *R v Taueki* [2005] 3 NZLR 372 (CA).

75 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

76 *R v Fatu* [2006] 2 NZLR 72 (CA).

77 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

78 *R v Terewi*, above n 72, at [13].

79 *R v Taueki*, above n 74, at [45].

80 At [45].

81 *Zhang v R*, above n 77, at [130]–[163].

82 At [139]–[150].

choice and moral culpability where they are shown to be causally linked to the offending.[83] (As an aside, I suggest that what is meant by causation in this context will require careful thought). Secondly, experience teaches us that culturally relevant sentences can aid rehabilitation, and the courts should use the inquisitorial powers available to them under s 25 of the Sentencing Act 2002 to encourage rehabilitative outcomes.[84] Thirdly, s 27 of that Act should be the means by which relevant information gets before the court.[85] Fourthly, like the Canadian Supreme Court in *Ipeelee*, the *Zhang* Court was careful to remind us that ss 25 and 27 are available to all offenders irrespective of ethnicity.[86]

In my view, this decision is likely to provide significant guidance – not just to counsel in individual cases, but to those seeking to renovate the architecture of the sentencing process itself. It has not gone unnoticed that the Court of Appeal couched its discussion of the sentencing of Māori offenders in terms of mana and rangatiratanga, as well as land, language and culture. I see the Court's deployment of these terms as evidence of a willingness to try to reach across the divide and place itself within Te Ao Māori. The significance of this cannot be overstated. The Court was no doubt assisted by the fact that it had the foresight to seek submissions from Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) and Te Rōpū Rata o Aotearoa (the Māori Doctors' Association). Articulate Māori voices were literally in the courtroom when the matter was under consideration. To incorporate deep Māori ideas into sentencing discourse is to begin to normalise Māori ways of thinking and being. If we reach that point, Te Ao Māori ceases to be *other* for the judiciary. In this sense, *Zhang* may be seen as the early scaffolding for a bridge between sentencing courts and Te Ao Māori – the sort of bridge I want to talk about.

VII THE BRIDGE

"The system", even in in our small country, is big and diverse enough to speak to the Māori community with two mouths. From one mouth, it heralds a new day through healing the past, Treaty-based reconstruction, and a newfound partnership between iwi and the Crown. That mouth speaks (quite genuinely) with hope and optimism – and the Māori world has responded, for the most part, enthusiastically to its message. The other mouth speaks of destruction on an unprecedented industrial scale, using the powerful deterrence, denunciation and accountability rhetoric of the Sentencing Act 2002, and the words of admonishment deployed daily by its judges in sentencing. Though these dissonant voices belong to the same system, indeed the same justice sector, neither voice has the space or inclination to listen to what the other is saying. They too need a bridge – one that empowers the reconstructed communities of the post-settlement era to engage fully and productively with the forces that remove their children and incarcerate their youth, and their men and women. For a generation,

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83 At [159].

84 At [160].

85 At [161].

86 At [162].

the Crown has built bridges between itself and iwi through Treaty settlements. They are wonderful structures, but they are not connected to the place where the strong arm of the Crown most affects Māori people on a daily basis – the courts, and the criminal justice system. Even today, when a Māori child is removed from their family by an order of a Family Court judge, their community's voice is absent.

When a Māori offender is sentenced by a District or High Court judge, their community's voice is silent. Whatever the rhetorical flourishes about culture, whānau and the collective that may be found in the relevant legislation, Māori are treated in sentencing as autonomous individuals unrelated in any material way to their communities. This personal-responsibility-above-all-else approach must be seen for what it is: cultural. It is an Anglo-Protestant ethic written into the law. It is not an immutable truth applicable to all irrespective of culture. Māori culture does not deny personal responsibility. But it locates the response to wrongdoing within the offender's kin community. It places whanaungatanga alongside individual responsibility.

A couple of years ago, a new justice agency was established, called Te Arawhiti – literally, the path for crossing over, the Māori term for a bridge. Its job is to maintain active working partnerships between iwi and the Crown, and to ensure the Crown complies with its Treaty obligations. Te Arawhiti needs to build some bridge extensions – some clip-ons, perhaps – in the justice space. In fact, we need a whole new complex of bridges. A s 27 bridge between iwi and sentencing judges. A bridge for victims of Māori offending, nearly half of whom are Māori too. In fact, almost all Māori offenders are also victims, so in the context of Te Ao Māori, the binary of victim and perpetrator makes no real sense. Iwi must build bridges to their people, including their most vulnerable citizens – those engaged with Oranga Tamariki and/or the criminal justice system. And all this construction must happen quickly.

There is something deeply wrong with the way we sentence Māori offenders and provide for the welfare of Māori children said to be in need of state care and protection. Sentencing judges sentence caricatured profiles, not people. We know almost nothing about an offender's lived experience, history or community, not because the Sentencing Act 2002 excludes these matters as irrelevant – on the contrary, s 8 specifically refers to these matters – but because no resources are applied to obtaining this information. All the money is spent on finding out what the offender did, not who they are. The incarceration asymmetry is accentuated by this imbalance.

Similarly, the hapū or iwi of a child the subject of an Oranga Tamariki application will have no notice of it and, therefore, no opportunity to intervene. In fact, even an "iwi social service" approved by the Chief Executive as a child and family support service under the Oranga Tamariki Act[87] will receive no notice that a child of that iwi is at risk of removal. The right of audience, even for the few

87 Oranga Tamariki Act 1989, s 396. Approval gives the service a right to be present in court during care and protection proceedings: s 166(1)(g).

approved iwi social services, is therefore academic. The Family Court judge will almost never hear anything of the child's true Māori background and history, or of the iwi's capacity to step in.

To be fair, there is an equivalent to s 27 of the Sentencing Act 2002. Section 187 of the Oranga Tamariki Act 1989 provides that the court can request a report on the child's cultural or community background and on the resources available within the community to assist the child and their whanau. As with the experience of s 27 of the Sentencing Act, s 187 was, until recently, only rarely used. That is changing, which is a very good thing. But the infrastructure needs to be built around it for s 187 to do the work it must do. It does not yet exist.

To be frank, it is currently impossible for the community to be satisfied that the court even has the capacity to make just determinations in sentencing and care and protection matters.

But, as always, hope remains. I hope we are heading towards a time, in the not-too-distant future, where no application for removal of a Māori child is determined – and no Māori offender is sentenced – without the benefit of proper advice from that person's iwi or community as to their background and history. The story alone will sometimes be sufficient to mitigate a sentence or prevent a removal. But a requirement to inform judges about a child's or an offender's backstory is just the beginning of the value added by requiring the court to build a bridge capable of carrying the necessary information. The true power of the bridges I have in mind is that they will do more work than that. I want them to be conduits for practical options. I want bridges that provide the means by which Family Court and criminal court judges are offered more than just a backstory, important though that is. I want bridges that deliver credible alternatives to removal or incarceration, where those alternatives are created out of partnerships between iwi and community on the one hand and relevant Crown agencies on the other: agencies such as Oranga Tamariki, the Ministry of Education, the Ministry of Justice, and the Department of Corrections. And in my simple future, Te Arawhiti, with its deep connections to the Māori community, would ensure no one on either side of the bridge is blocking the traffic or slowing it down.

So, in this future Aotearoa of mine, s 27 is not just a means of obtaining information – it is a means of engaging with the resources and energy of the child's or the offender's community. And by community, I mean their relations – not just whānau, but hapū and iwi, as well. These very structures and their urban proxies like Waipareira and the Manukau Urban Māori Authority, which have now established working infrastructure through Treaty settlements or government-funded programmes, have what the state generally does not: a positive relationship with the child or offender, or at least the prospect of one, by virtue of kinship and/or social context. If the Crown can recruit that, we stand a chance of turning lives around and ending the destruction. And if, from the other side of the bridge, iwi can recruit the resources of the Crown to assist their people, iwi can be the agents of that change.

There is thus the potential to create a transformative win-win scenario: the Crown becomes more effective in solving a long-term social problem, and iwi can become what they once were: central

institutions in the lives actually lived by their people. In short, by rising to meet this difficult challenge, iwi can be the kaitiaki they profess to be.

In my view, the long-term survival of modern post-settlement iwi institutions will depend entirely on their finding modern meaningful ways to be relevant to the everyday lives of their people. If the new iwi entities cannot be relevant, they will not last beyond 2050. The experience of the old Māori Trust Boards teaches us that. But the capital sums obtained in modern settlements – three or four thousand dollars per iwi member at most – are nowhere near enough to support effective iwi interventions in sentencing and child welfare. Iwi resources must be leveraged through Crown partnerships to upgrade their capacity to touch the lives of their people in meaningful ways. There is a lot of work to do to get iwi ready to participate. As for the Crown, failure to engage is simply not an option.

You see, the only way to change the status quo is to build bridges and get over ourselves. All of us.

VIII BACK TO DAWN

How might this new world of bridged perspectives have affected Dawn's sentencing? A chance discussion about Dawn's story piqued my interest in her. I recognised her surname and knew one or two of her relations, so I made a phone call to see if and how she fitted into known tribal narratives and whānau histories, both old and new. It only took one phone call.

Dawn belongs to two East Coast iwi on her maternal and paternal sides. On one side, her ancestors lost their land in the so-called Tūranga rebellion of 1865–1869 and the subsequent work of the Poverty Bay Commission, which confiscated all of the land interests of "rebels" in the greater Poverty Bay area. The recent Crown apology in settling the claims of her Tūranga iwi demonstrates the significance of the loss of land and mana of her people, not to mention the extraordinary body count.

On her other side, she belongs to Ngāti Porou, north of Gisborne. Her whānau located themselves in Ngāti Porou territory because those were their only remaining lands. Her great-great-great-grandfather was the leader of his community, a chief of genuinely high rank. So high, in fact, that he gifted family land to the hapū to establish a new marae complex and for local sports fields – the marae and the fields are still there today. The land that remained in the family was gradually individualised, fragmented through the generations, and un-bankable. By the time of Dawn's grandparents, they still held a few acres, but they could not raise finance for development. The whānau abandoned the land, which remains unoccupied, and moved to the city in the 1980s, already dirt poor and in debt. They searched for other work, but this was the 1980s, and there was none.

Gang life beckoned the children (that is, Dawn's father and his siblings). There was, I was told, little else for them. Dawn was born in the city. She was on a Child Youth and Family Services watchlist when she was young and was removed from her home and placed with an aunt for a period of time. She was eventually returned home.

The gang community was an enormously important element in Dawn's life. It was her substitute for the village in which her grandparents had been raised.

As you know, Dawn had a baby before she was sentenced and she fought, for the sake of the baby, to turn her life around – for the first time in her life. In fact, she was so committed that she led a small local group of gang-connected women to turn their lives around too. Dawn was then a young mother in her early 20s. People in positions of leadership and authority within the iwi spoke glowingly of the changes she had made to her life since the baby's birth. She had obviously inherited her great-great-great-grandfather's mana. So Dawn was always going to be a leader. The only question was who she would lead and in what direction.

Te Rūnanga o Ngāti Porou and Te Rūnanga o Tūranganui a Kiwa run social programmes for members of their communities. They engage in court interventions, and operate addiction programmes, parenting courses, and more general support programmes for their constituent whānau. Both are upgrading their capacity as a result of Treaty settlements and the government's new approach to education and welfare partnerships with mana whenua.

What might have happened to Dawn if there was a bridge between her, these Rūnanga and the Judge when she came to be sentenced? What might have happened if the iwi had filed a s 27 report outlining the background of this whānau, Dawn's own particular history, and the special steps she had taken? What might have happened if, in this report, the Rūnanga advised the Judge it was willing to sponsor her participation in a restorative justice process with her victim, to provide her with appropriate programmes, and to vouch for her? In fact, what if the Rūnanga had advised the Judge that Dawn was a natural leader and that she had been asked by the Rūnanga to assist with its programme of reaching out to disconnected whānau in the region? And, what might have happened if someone from the Rūnanga attended the sentencing and spoke to the Rūnanga's report while firmly eyeballing the Judge?

I think Dawn would not have gone to jail at all. Her sentencing would have been adjourned to allow the programmes and restorative justice process to be satisfactorily completed, and if so she would have received a community-based sentence. And the cycle would have been broken for Dawn and for her child. This is how deeply-imbedded problems are healed. And, because Dawn is a leader, her redemption would have affected the other women in the small group with which she had been working.

As it was, Dawn's baby was (I am told) physically taken from her at Court at the conclusion of her sentencing, and their bond broken. In one swift move, Dawn's baby suffered the same trauma of separation from whanau and place that she herself had suffered as a child, that her grandparents had suffered when economic circumstances required them to leave the kāinga, and that her ancestors had suffered when their lands in Tūranga were taken. And so it was that the intergenerational trauma by this whānau since the 19th century, was transferred intact to the next generation, with every likelihood

that it will now continue beyond the middle of the 21st century. As Meri Ngaroto said 200 years ago: pluck out the young flax shoot and the bellbird cannot sing.

It is time to build a bridge and get over this.