

## “Te Ao Mārama – Enhancing Justice for All”

### *Two Years On: An Update on Progress in the District Court of New Zealand*

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#### I FOREWORD

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

The Norris Ward McKinnon speech “Mai te Pō ki te Ao Mārama: The Transition from Night to the Enlightened World” was given at Waikato University in November 2020.<sup>1</sup> It signalled the commencement of the “Te Ao Mārama – Enhancing Justice for All” initiative for the District Court. Te Ao Mārama model signals a deliberate move on the part of the District Court “towards a more enlightened system of justice” for the benefit of all people, ethnicities and cultures who are affected by the business of our court. It is our vision and response to the calls over many years for transformative change. I am heartened by the embrace of the kaupapa (initiative) across the justice system as we have begun to develop Te Ao Mārama in the District Court.

#### II TE AO MĀRAMA IN CONTEXT

##### **The Calls for Transformative Change**

The long-standing calls for transformative change date back to the seminal reports of the 1980s.<sup>2</sup> Subsequent reports, papers and academic articles,<sup>3</sup> have identified numerous concerns with consistent themes, including:

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- \* Chief District Court Judge Heemi Taumaunu. I want to especially acknowledge my judicial clerks, Tommy Zhang and Te Uranga Royal, for their helpful assistance in researching and preparing for this article. This article is based on the Auckland University Law Review Symposium, hosted at the University of Auckland on 4 October 2022.
- 1 Heemi Taumaunu, Chief District Court Judge of New Zealand “Mai te Pō ki Te Ao Mārama: The Transition from Night to the Enlightened World: Calls for Transformative Change and the District Court Response” (Norris Ward McKinnon Annual Lecture, University of Waikato, 11 November 2020).
  - 2 John Rangihau *Puao-te-Ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Maori Perspective Advisory Committee, September 1988); Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipanga Hou* (Department of Justice, Study Series 18, February 1987); and Clinton Roper *Te Ara Hou: The New Way* (Ministerial Committee of Inquiry into Prisons System, 1989).
  - 3 See Charlotte Williams *The Too-Hard Basket: Maori and Criminal Justice Since 1980* (Victoria University Press, Wellington, 2001); JustSpeak *Māori and the Criminal Justice System: A Youth Perspective* (Position Paper, March 2012); Kim Workman “From a Search

- many defendants, parties, victims and whānau are leaving the District Court feeling unheard, unseen and with unresolved needs;<sup>4</sup>
- our justice system prioritises punishment at the expense of rehabilitation;<sup>5</sup>
- Māori, as partner to the Treaty of Waitangi, are disproportionately over-represented in a monocultural and monolingual justice system that fails to adequately incorporate Māori culture and language;<sup>6</sup>
- the underlying causes of offending, such as addiction, mental health, homelessness, or past trauma, are often not addressed;<sup>7</sup>
- support services are often poorly coordinated with the court and with each other;<sup>8</sup> and
- the criminal justice system often fails to support and protect victims and their whanau.<sup>9</sup>

The sense of hurt and unfairness driving the calls for change is particularly felt by Māori. In the 19th century, these calls were primarily directed towards Māori land alienation and related issues.<sup>10</sup> When the Treaty of Waitangi was signed in 1840, Māori owned almost all of the land in New Zealand. By 1892, it was little more than a third, and a quarter of that was leased to Pākehā.<sup>11</sup> As a result of a combination of factors, including armed conflict with the Crown and the devastating effects of disease, by the turn of the 20th century Māori were

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for Rangatiratanga to a Struggle for Survival – Criminal Justice, the State and Māori, 1985 to 2015” (2016) 22 *Journal of New Zealand Studies* 89; and Waitangi Tribunal *Tu Mai Te Rangī: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017).

- 4 Te Uepū Hāpai i te Ora (the Safe and Effective Justice Advisory Group) *Ināia Tonu Nei* (July 2019) [*Ināia Tonu Nei*]; Te Uepū Hāpai i te Ora *He Waka Roimata: Transforming Our Criminal Justice System* (First Report, June 2019) [*He Waka Roimata*]; and Te Uepū Hāpai i te Ora *Turuki! Turuki! Move together!* (Second Report, December 2019) [*Turuki!*].
- 5 Roper, above n 2, at 1.63–1.65 and 2.3–2.4; *Ināia Tonu Nei*, n 4 at 21; *He Waka Roimata*, n 4 at 43; *Turuki!*, above n 4, at 9, 11, 15, 39 and 54; and Te Uepū Hāpai I te Ora *Summit Playbook* (September 2018) [*Summit Playbook*] at 13.
- 6 Jackson, above n 2, at 35.
- 7 *He Waka Roimata*, above n 4, at 48; Sian Elias, Chief Justice of New Zealand “Blameless Babes” (Annual Shirley Smith Address, Victoria University, Wellington, 9 July 2009); and Andrew Becroft, Principal Youth Court Judge “Playing to Win - Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Youth Justice System” (Paper presented to Queensland Youth Justice Forum, Brisbane, 15 July 2015).
- 8 *He Waka Roimata*, n 4, 58; and *Turuki!*, above n 4, 39–40.
- 9 Chief Victims Advisor to Government *Te Tangi o te Manawanui Recommendations for Reform* (The Safe and Effective Justice Advisory Group, September 2019).
- 10 See PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011); Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford 2011); and RP Boast “The Native Land Court at Cambridge, Māori Land Alienation and the Private Sector” (2017) 25 *Wai L Rev* 26.
- 11 New Zealand History “Native Land Court” (Ministry of Culture and Heritage, September 2020) <<https://nzhistory.govt.nz>>.

considered to be a dying race.<sup>12</sup> The Māori language was banned in schools.<sup>13</sup> Certain tikanga practices were banned by statute.<sup>14</sup> Official government policies effectively promoted the assimilation of Māori people into the dominant colonial settler culture.

In the mid-20th century, the Māori population began migrating into larger urban areas. Until this time, the rate of Māori imprisonment was generally proportionate with the Māori population percentage. However, the generation of Māori who were part of the “urban drift” became a visible and conscious minority and faced further official government policies that required Māori to assimilate.<sup>15</sup> This urban shift, and the social and economic difficulties that followed, contributed to a dramatic increase in Māori representation in the criminal justice system. Between 1950 and 1970, the number of Māori prisoners received into prisons, relative to all prisoners, doubled.<sup>16</sup>

As Māori prisoner statistics continued in this direction, the justice system became the target for calls for transformative change. In the late 1980s, three major reports — *Puao-te-Ata-tu*, *He Whaipanga Hou*, and *Te Ara Hou* — were released by John Rangihau, Dr Moana Jackson, and Sir Clinton Roper respectively. These reports highlighted many shortcomings within our justice system.<sup>17</sup> Since then, a steady wave of reports, papers, and academic articles have continued these calls for change.<sup>18</sup> Overall, contemporary commentary suggests that these calls for transformative change have largely been left unanswered.<sup>19</sup>

These reports and papers reflect the views and experiences of individuals around New Zealand from all backgrounds, who say that our justice system prioritises punishment at the expense of rehabilitation.<sup>20</sup> Many of the individuals interviewed reported that this does not make them feel safe. In fact, it has the opposite effect, as it brings more individuals into the formal criminal justice system which can have a lasting effect on them and their family.

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

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

13 Waitangi Tribunal *Report of The Waitangi on the Te Reo Māori Claim* (Wai 11, 1986) at 3.2.8.

14 See Tohunga Suppression Act 1907.

15 Richard S Hill “Maori Urban Migration and the Assertion of Indigeneity in Aotearoa/New Zealand 1945–1975” (2012) 14 *Interventions* 256 at 257.

16 Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand since 1840* (Dunmore Publishing, Wellington, 2007) 55–56.

17 Rangihau, above n 2; Jackson, above n 2; and Roper, above n 2.

18 See Williams, above n 3; JustSpeak, above n 3; Workman, above n 3, at 89; Waitangi Tribunal, above n 4.

19 See Williams, above n 3, at 95; JustSpeak, n 3, at 8; Workman, n 3, at 98; Waitangi Tribunal, n 3, 97; and Craig Linkhorn “He Waka Roimata – transforming our criminal justice system” (2019) June Māori LR.

20 Roper, above n 2, at 1.63–1.65 and 2.3–2.4; *Ināia Tonu Nei*, above n 4, at 21; *He Waka Roimata*, above n 4, at 43; *Turuki!*, above n 4, at 9, 11, 15, 39 and 54; and *Summit Playbook*, above n 5, at 13.

trauma.<sup>21</sup> In such cases, there is often a “cocktail of disabilities” underpinning offending.<sup>22</sup>

Further, a punishment-first focus often fails to identify and address those underlying causes of offending.<sup>23</sup> These reports tell us that support services are poorly coordinated with the court and with each other, causing gaps when providing important support services.<sup>24</sup>

These reports also tell us that the criminal justice system often fails to support and protect victims, who commonly feel isolated and unsupported during their own trial. The increasing delays associated with criminal trials also force victims and their family to put their lives on hold and retain the traumatic details of the offending.<sup>25</sup>

The depth and breadth of the issues raised over these years is considerable, spanning across all jurisdictions of the District Court. The underlying message is that our courts are perceived as failing to understand or protect all those who appear before it or who are affected by the business of the court. Essentially, some defendants, families, witnesses, complainants, victims and parties are leaving the current system feeling unheard and unappreciated.<sup>26</sup> This is most pronounced in the criminal justice system but is also relevant to the Family jurisdiction.

## Te Ao Mārama Vision for the District Court

The “Te Ao Mārama – Enhancing Justice for All” kaupapa for the District Court imagines a journey towards a more enlightened system of justice by ensuring that all people who come to the District Court can seek justice and be seen, heard, and understood and meaningfully participate in proceedings that relate to them. In that context, Te Ao Mārama kaupapa represents a judicial-led, cross-agency response to longstanding calls for transformative change to the way that justice is administered in the District Court.

## Fundamental Principles

The fundamental role of the judiciary is to uphold the rule of law. Accordingly, Te Ao Mārama kaupapa must be all-inclusive and implemented in a manner that respects and upholds fundamental principles applicable to all courts. It must operate in a manner that:

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- 21 Elias, above n 7, at [20] and [28]; Becroft, above n 7, at 10; Craig Linkhorn, Principal Youth Court Judge, “When the Vulnerable offend – whose fault is it?” (Address to Northern Territory Council of Social Services Conference, Darwin, 27 September 2017); and *He Waka Roimata*, n 4, at 48.
  - 22 John Walker and Jan-Marie Doogue “District Court responds to high Incidence of disabilities” (press release, 16 August 2018) as cited in Meghan Lawrence “‘Cocktail of Disabilities’: Judges to develop new model for youth offenders” *The New Zealand Herald* (online ed, Auckland, 16 August 2018).
  - 23 *He Waka Roimata*, above n 4, at 48; Elias, above n 7; and Becroft, above n 7.
  - 24 *He Waka Roimata*, above n 4, at 58; *Turuki!*, above n 4, at 39–40.
  - 25 Chief Victims Advisor to Government, above n 9.
  - 26 *He Waka Roimata*, above n 4, at 37; *Turuki!*, above n 4, at 3.

- is compliant with the New Zealand Bill of Rights Act 1990;
- is in accordance with applicable legislation — including for example, the Evidence Act 2006, Bail Act 2000, Sentencing Act 2002 and the Criminal Procedure Act 2011;
- respects the independence of prosecution and defence counsel in criminal cases and the parties and counsel in family and civil cases;
- provides consistency of approach for all those coming before the courts across the country; and
- does not have unintended consequences that compromise fundamental fair trial rights — such as defendants opting to plead guilty in order to access therapeutic services, thereby bypassing their right (in an illegitimate manner) to require the prosecution to prove charges at a hearing.

### **Mainstreaming Solution-Focused Judging**

In response to the many calls for transformative change, the District Court has incrementally designed and implemented a range of different initiatives over the past three decades. This has included developing successful judicially-led specialist criminal courts that are designed to meet perceived community needs.

These specialist courts are considered centres of excellence, as they embrace a number of best practices, and each adopts — in their own way — a version of solution-focused judging. Solution-focused judging uses these best practices to empower individuals in relation to the causes of their offending behaviour, with support and guidance of the court and associated services.<sup>27</sup>

Solution-focused courts seek to address the wide-ranging needs of both victims and offenders to avoid a recurrence of the problem that brought these parties to court.<sup>28</sup> Victims are actively assisted to engage in the process. Features of solution-focused judging, including consistent judicial personnel and toning down formalities, aim to make the courtroom a comfortable and unthreatening place. It is the specific aim of several problem-solving courts to provide support to victims of crime and enhance the rights and place of victims in the sentencing process.<sup>29</sup>

In the criminal jurisdiction, if a guilty plea is entered, Te Ao Mārama kaupapa aims to support a solution-focused judging approach in all mainstream

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27 For a discussion on the jurisprudential basis for solution-focused judging, see Eve M Brank and Richard L Wiener (eds) *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, New York, 2013); Michael S King *Solution-Focused Judging Bench Book* (Australian Institution of Judicial Administration Incorporated, Melbourne, 2009); Susan Goldberg *Judging for the 21st Century: A Problem-solving Approach* (National Judicial Institute, Ottawa, 2005); Bruce J Winick “Therapeutic jurisprudence and problem solving courts” (2003) 30 *Fordham Urb L J* 1055 at 1061.

28 King, above n 27, at 16.

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

courts. Judges who utilise this approach will seek to hold people accountable but at the same time identify and address the underlying causes of offending behaviour. This requires support services to be closely connected to the court. Solution-focused judging in Aotearoa New Zealand is not new and has been developed over many decades, particularly in the specialist criminal courts such as the Rangatahi, Matariki, Alcohol and Other Drug Treatment, special circumstances, family violence, and homelessness courts.

Examples of best practice lessons from specialist courts that adopt solution-focused judging practices include using plain language, toning down formalities in court, increasing community involvement, working together with community and iwi organisations, justice sector agencies, the legal profession and wider stakeholders.

It is a natural extension of the solution-focused judging approach to incorporate it in all District Court proceedings, when and where applicable and to the extent practicable. “Mainstreaming” in this context is intended as a response to the calls for transformative change and as an attempt to address the postcode justice concern that attaches to some specialist courts.

### III PROGRESS UPDATE: NOVEMBER 2020 TO NOVEMBER 2022

In the November 2020 speech it was announced that Te Ao Mārama would first be implemented in the Hamilton District Court.<sup>30</sup> Since then, the Gisborne and Kaitiāia District Courts have also been announced as court locations for Te Ao Mārama, in May 2021 and July 2022, respectively. I discuss some of the work that has been done in relation to each court below.

#### Progress of Te Ao Mārama in Hamilton

The Norris Ward McKinnon speech in 2020 referred to the establishment of an Alcohol and Other Drug Treatment (AODT) Court at the Hamilton District Court based on the AODT pilots that had been set up in Auckland and Waitākere. The Hamilton AODT Court, Te Whare Whakapiki Wairua ki Kirikiriroa, was formally established in June 2021 after being launched at Hukanui Marae. It is now providing alternative treatment pathways for offenders in Waikato whose criminal behaviour is driven by their alcohol or other drug substance use disorder.

The 2020 speech also discussed a distinct Care and Protection AODT stream, focussed “on young mothers with addictions who have or are at risk of having a child removed from their care and so have come within the sphere of the Family Court”.<sup>31</sup> This proposal has yet to be taken further.

Significant progress has been made in implementing the Young Adult List in the Hamilton District Court, with Phase One of the List being established on

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30 Taumaunu, above n 1.

31 Heemi Taumaunu “Calls for Transformative Change and the District Court Response” (2021) 29 Wai L Rev 115 at 133.

20 June 2022.<sup>32</sup> The Young Adult List introduces best practices from specialist courts such as plain language, active, solution-focused judging, alternative courtroom layouts and improved information sharing.

The Hamilton Young Adult List will be implemented in three phases. Phase two will involve the development of participant support resources such as multi-media formats and support to participants in the community, navigators to support participants through the court process, and the introduction of agencies and service providers for access to community interventions and pathways (for example, court-monitored intervention plans). The third phase will involve the screening of consenting participants for neuro-diversities to support appropriate accommodations in court to identify and address barriers to participation.

Hamilton is the third court to establish a Young Adult List, after Porirua and Gisborne. The Young Adult List is part of Te Ao Mārama vision which recognises that jurisdictional age limits do not reflect actual development.<sup>33</sup> It was a call for change to existing court processes to be more accommodating for young adults.<sup>34</sup> The scientific justification behind treating young adults differently from adults’ rests on the difference in brain architecture.<sup>35</sup> The brain, before it is fully developed at 25 years old, will exhibit underdeveloped executive functioning and assessment of risk and consequences which, in it of “itself is justification for a court process which recognises [these vulnerabilities]”.<sup>36</sup> To this end, the objectives of the Young Adult List are:<sup>37</sup>

- to have young adults fully engage and participate with the court process;
- to have young adults understand implications of particular stages of the criminal process; and
- to have young adults be given the opportunity to be referred to the right interventions.

The Young Adult List will seek to achieve these objectives by drawing on the experiences of the Youth Court. Young adults will be encouraged to participate by utilising.<sup>38</sup>

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32 The Young Adult List is a concept proposed by John Walker, the Principal Youth Court Judge, in August 2019. The concept was piloted in Porirua from March 2020 and has seen great success implementing best practice features of specialist courts.

33 Judy Paulin and others *Formative and Short-term Outcome Evaluation of the Porirua District Court Young Adult List Court Initiative Iri rearea teitei kahikatea ka taea* (Artemis Research, July 2021) at 1.

34 See, for example, King, above 29, at 139–140.

35 Elise White and Kim Dalve *Changing the Frame: Practitioner Knowledge, Perceptions, and Practice in New York City’s Young Adult Courts* (Center for Court Innovation, New York, December 2017).

36 John Walker and Jan-Marie Doogue “Proposal for a trial of Young Adult List in Porirua District Court: Procedural Fairness for the Young and the Vulnerable” at 2.

37 Paulin and others, above n 33, at 1.

38 At 1.

- a separate list to allow the court to have a dedicated young adult focus;
- use of a screening tool to screen for young adult defendants that present with characteristics that may limit their executive functioning;
- increased safe information sharing between the Youth, Family and District Courts;
- support for young adults through the court process from support services (such as from Māori, Pacific and Ethnic Services (Police Service) and Bail Support Officers (Corrections Service));
- use of plain, accessible language by court professionals in and outside of the courtroom;
- consistency of judiciary to enable young adults to build a connection with the judge;
- revised court room seating arrangements to engender defendant participation; and
- legal aid assignments allowing the continuity of legal aid service between jurisdictions.

Te Ao Mārama is complemented by the Young Adult List through, among other best practices, recognising the vulnerabilities of young adults and ensuring that they meaningfully engage with the court process in a way that makes them feel seen, heard and understood. In the words of the Principal Youth Court Judge John Walker, it is “[f]undamentally... about fairness”.<sup>39</sup>

### **Progress of Te Ao Mārama in Gisborne**

The Gisborne District Court was announced as the second Te Ao Mārama court location, in May 2021. Gisborne was deliberately chosen as the second site to implement Te Ao Mārama after Hamilton. This is because, unlike Hamilton, which is a larger metropolitan court, Gisborne provides an opportunity for a smaller, regional court to develop a Te Ao Mārama court model. Most of the District Court locations are of a similar size and scale. The Gisborne District Court has relatively strong connections with its local community, where local services and agencies are willing and available to help ensure that the underlying needs of those affected by the business of the court can be addressed. Gisborne is also no stranger to specialist courts, with the first Rangatahi Court being established there nearly 13 years ago.

Phase One of the Young Adult List was successfully launched at the Gisborne District Court earlier this year. The Young Adult List sat for the first time on 5 May 2022, after an opening ceremony attended by judges, iwi representatives and justice sector agencies. This event marks a key milestone in the implementation of Te Ao Mārama at the Gisborne District Court.

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<sup>39</sup> Walker and Doogue, above n 36, at 4.



Another related development in Gisborne includes the design and delivery of the Toitū Te Ao Mārama service, a whānau centred wrap-around support service designed to support offenders, victims and whānau through the court process.

The Toitū Te Ao Mārama service entered its testing phase on 1 July 2022, with full implementation from 17 October 2022 onwards.

### **Announcement of Te Ao Mārama in Kaitiāia**

On 13 July 2022, the third Te Ao Mārama location was publicly announced at the Kaitiāia District Court. The launch of Te Ao Mārama in Kaitiāia was held at Waimanoni Marae with iwi representatives from Te Hiku o Te Ika, Waitomo Papakāinga Development Society, local judges and other local stakeholders. Police and Corrections Minister, Hon Kelvin Davis, also attended the ceremony.

The Tuteāniwaniwa support service was established to operate at the Kaitiāia District Court in March 2022. The service offers and provides wrap around support for anyone who comes to court and needs assistance. The establishment of wrap around support services is vital because effective solution focussed judging is reliant on close connections between the courts, relevant service providers and those who come to court in need of assistance.

## **IV NEXT STEPS FOR TE AO MĀRAMA AND FINAL REMARKS**

The national implementation of Te Ao Mārama will be approached in three stages. The progress I have outlined fits within the first stage. During the second stage in 2023, other selected District Court locations will commence the development of Te Ao Mārama kaupapa. The stage two locations will include courts of similar size and scale to the Gisborne District Court. During the third stage, from 2024 onwards, the kaupapa will be developed and implemented in the remainder of the District Court locations.

When speaking to a group of Te Aute College students in the early part of last century, Sir Apirana Ngata told them: “In the vocabulary of youth, there is no such word as failure”. In other words, he challenged them to become courageous thought leaders of the future. Many of them did exactly that.

Today and in coming years, many of our current law students and young practitioners will join the profession when Te Ao Mārama kaupapa is under development in the District Court. Some of them will go on to become the future thought leaders of the profession and the judiciary. In those roles, they will continue to be guided by universal ideals and principles, particularly the need to ensure that people who come to court to seek justice are treated in a manner that is fair and just, and that courts are connected to, and are relevant within the communities they serve. This is the vision for the future of the kaupapa, Te Ao Mārama – Enhancing Justice for All.