

“BRINGING THE DEFENDANT BACK INTO THE ROOM”

Rt Hon Dame Helen Winkelmann*

I. INTRODUCTION

Kei ngā tini hoe o te waka o te ture
Tēnā koutou, tēnā koutou,
Tēnā tatou katoa.

I am always very pleased to attend this conference. I plan to use best endeavours to keep coming every year because there are few opportunities for me as Chief Justice to talk ‘shop’ with the Criminal Bar. One of the greatest challenges for anyone working in a leadership role within our justice system is to gain an oversight of how the system operates as a whole. But gaining such an oversight is necessary to ensure any changes we make are for the better. In a system as complex as the criminal justice system, even small pressures or incentives in one part can have unexpected and even dramatic consequences in another.

In my opening words I acknowledged the importance of the work of the defence bar in driving the vessel that is our criminal justice system, referring to you as the many oars of the waka of the law. I value not only the work that you do, but the very particular insights that you bring. I have come here today to hear them, if not in this session, then in the coffee and lunch breaks today or in the weeks that follow.

Today I am going to speak about the place the defendant has in criminal justice. The defendant is the whole reason for the existence of our criminal justice system, yet when we gather together to talk about the work of the law we tend to focus on evidence and black letter law, rather than the person whose actions set the whole process in motion. Just who the defendant is, must, you would think, tell us something about how that system should be designed and operate to achieve its goal of providing for the interests of victims, and its goals of accountability, rehabilitation and crime prevention.

Neither the procedural nor substantive aspects of the criminal law are immutable. In 2019 change is afoot with more promised or signalled. This change is affecting how we, the judiciary and the profession, deal with defendants — how we talk to them, think about them, and most importantly, how we deal with their custodial status. Some of the change is legislation driven, but whatever the formal system we operate within, the duties of the bench and the bar remain the same. It is our collective duty to work to ensure a fair and just process for those who come to the courts. It is how we behave, as critical players in criminal justice, that does the most to shape whether those goals of a fair and just process are achieved.

* Chief Justice of New Zealand; this article is based on a keynote presentation given at the Annual Conference of the Criminal Bar Association of New Zealand, 3–4 August 2019, held at the University of Auckland.

II. THE DEFENDANT COHORT

We have far better information about the defendant cohort than was available to previous generations. We know about their ethnic make-up, their background and health status. We have a growing body of statistical information about defendants, and those in our prisons. This is increasing our understanding of who our offenders are, and what is needed to rehabilitate them into society. It is particularly timely therefore for us to think and speak about the defendant.

Information gathered about the defendant population tells us:

- 62 per cent of people in prison had been diagnosed with a mental health or substance use disorder in the 12 months prior to August 2016.¹
- Approximately 68 per cent of those remanded in custody have mental health or addiction problems.²
- People involved in the criminal justice system have higher rates of traumatic brain injury than the general population. In New Zealand, research on prison intake over six months' — of more than 1,000 male offenders — revealed that almost two-thirds (63.8 per cent) had suffered a traumatic brain injury and a third (32.5 per cent) had had more than one.³
- Other cognitive disabilities are also prevalent such as fetal alcohol syndrome,⁴ autism⁵ and attention deficit disorder.⁶ There are also high rates of illiteracy.⁷
- 52 per cent of women and 22 per cent of men in prison have a lifetime diagnosis of post-traumatic stress disorder.⁸

We also know that Māori are grossly overrepresented in every negative step in our criminal justice system. Over the last century (since 1918), the percentage of the prison population who identify as Māori has grown from less than five per cent to over 50 per cent.⁹ Māori men make up over half of the male prison population, while Māori women make up 63 per cent of the female prison population.¹⁰

¹ Te Uepū Hāpai I te Ora – Safe and Effective Justice Advisory Group *He Waka Roimata* (9 June 2019) at 65.

² At 66.

³ Mitchell, Theadom and Preeze "Prevalence of Traumatic Brain Injury in a Male Adult Prison Populations and Its Association with the Offence Type" (2017) 48(3–4) *Neuroepidemiology* 164.

⁴ See Gibbs and Sherwood "Putting fetal alcohol spectrum disorder (FASD) on the map in New Zealand: A review of health, social, political, justice and cultural developments" (2017) 24(6) *Psychiatry, Psychology and Law* 825; Flannigan and others "Fetal alcohol spectrum disorder and the criminal justice system: a systematic literature review" (2018) 57 *International Journal of Law & Psychiatry* 42; and Ministry of Health *Taking Action on Fetal Alcohol Spectrum Disorder (FASD): A discussion document* (2015).

⁵ See Robertson and McGillivray "Autism behind bars: a review of the research literature and discussion of key issues" (2015) 26(6) *The Journal of Forensic Psychiatry & Psychology* 719; and Billstedt and others "Neurodevelopmental disorders in young violent offenders: overlap and background characteristics" (2017) 252 *Psychiatry Research* 234.

⁶ See Knecht and others "Attention-deficit hyperactivity disorder (ADHD), substance use disorders, and criminality: a difficult problem with complex solutions" (2015) 27(2) *International Journal of Adolescent Medicine and Health* 163; and Cunial and Kebbell "Police perceptions of ADHD in youth interviewees" (2017) 23(5) *Psychology, Crime & Law* 509.

⁷ Te Uepū Hāpai I te Ora, above n 1, at 54.

⁸ At 66.

⁹ At 23.

¹⁰ At 23.

Perhaps the most confronting figure is that one in five Māori males have been imprisoned by age 35, although there are some regions that carry that burden more heavily than others.¹¹ These figures are still more confronting when the inter-generational effects of imprisonment are understood.

This picture is not complete for our purposes, without mentioning the 2018 statistic that within two years of release from prisoners, 61 per cent of people are reconvicted and 43 per cent are imprisoned.¹²

We know that prison adds to, rather than lessens, the drivers to offend. Yet we have very high rates of imprisonment. In an article published in this month's New Zealand Law Journal Dr Ian Lambie cites research showing that even a brief time in custody harms an individual and increases the risk of offending.¹³ Time in prison leads to job loss, residential instability, loss of social support and exacerbation of mental health and substance abuse problems. It also connects the defendant to offender networks.¹⁴

Unfortunately, the remand population in New Zealand is growing, having more than doubled since 2000. In March 2019, 35 per cent of all currently incarcerated people were held on remand. This equates to 3,500 people on remand.¹⁵

We also must consider, as a society, the inter-generational impact of imprisonment. In 2015, Corrections reported that there were 23,000 children in New Zealand with either a mother or father in prison.¹⁶ Estimates of the impact of imprisonment on the likelihood that a child will end up in prison vary. Corrections estimate is that a child with a parent in prison is seven times more likely to end up in prison.¹⁷ Other estimates are higher.

The overall picture created by this information is that our defendant and prison populations have underlying health and social issues that are contributing to their offending. Prison is not a successful strategy for rehabilitation; it damages defendants' social support and exacerbates underlying pathologies connected to their offending. It creates inter-generational harm. A lot of information has been collected, but there is much more to learn. We are just starting down this path.

These statistics tell us about the characteristics of a population. But it is information which is of no value unless we apply it in designing how all the parts of the criminal justice system interact with the individual defendant. Because it is on the individual defendant that the system operates.

¹¹ At 22.

¹² At 51.

¹³ Ian Lambie and Olivia Hyland "The Opportunity of a Lifetime" [2019] NZLJ 220.

¹⁴ At 220.

¹⁵ Department of Corrections *Prison facts and statistics — March 2019* (2019) Department of Corrections <www.corrections.govt.nz>, as cited in Lambie and Hyland, above n 13, at 220.

¹⁶ Department of Corrections *Creating Lasting Change: Strategy 2011–2015 Year Three* (2015) at 11.

¹⁷ At 11.

III. THERAPEUTIC COURTS AND THE NEED FOR INTERVENTION

The courts have taken this information and begun to work out a response, through a series of innovations. Over the last ten years therapeutic courts have been developed which target the cause of offending. It is through the leadership of Youth Court judges that the Rangatahi Courts were developed. These courts enable sentences to be monitored on a marae and in accordance with tikanga. Young people are held to account for their actions at the same time as they are reconnected to community and to whānau. Other therapeutic courts have been developed, again by judges: The Pasifika Court, Youth and Adult Drug and Alcohol Courts, and the New Beginnings and Special Circumstances Courts for the homeless. In the Far North, the Matariki court, established by Chief Judge Russell Johnson and Judge Greg Davis, brings whānau and hapū knowledge and support to bear in charting a course to rehabilitation for adult offenders. In Porirua, the District Court uses a Red Hook model, where defendants have access to wrap around community and government agency derived services to address their social and health needs.

Apart from the Rangatahi Courts these therapeutic courts all run, to a greater or lesser extent, as pilot courts. This creates its own concerns about equality of access to justice. As Chief Justice I hope to work with the judges of the District Court, with the Ministry of Justice, the profession and the community to bring the best ideas and practices of these specialist therapeutic courts into the mainstream.

The essential character of these courts is that they treat appearance at court as an opportunity for intervention in the life of the defendant, which can create a bridge away from offending. Therapeutic courts connect the defendant with support structures that can bring their offending to an end. They employ processes which involve the community and, if they choose, the victim. This is an approach to justice which has the potential to do more than rehabilitate the offender. It has the potential to address the harm caused to the victim and the community by the offending.

Therapeutic courts are based on the premise of early intervention. They engage with defendants and see them as individuals and not as part of a statistical cohort. They proceed on the principle that the best way to reduce our prison population is to identify the underlying physical, mental health or social issues and address these issues before the offending becomes so serious that there is no alternative to prison. Very few offenders sent to prison do not already have a fair number of previous convictions. What this tells us is that there have been opportunities missed in the past to try and address the causes of offending.

The Criminal Procedure Act 2011's processes and timeframes mean that the first couple of appearances in court are vital. These appearances are when mental health/fitness issues, and alcohol and drug dependency issues, can be identified. The first appearance in particular is a critical time to address impediments to bail. It is an opportunity to identify homelessness and illiteracy, conditions that many defendants try to keep hidden but which make bail difficult to achieve.

The very possibility of intervention depends upon the defendant being present in the courthouse. It is at the courthouse that counsel can talk to their client, engage with

them and make key assessments as to underlying issues that need addressing. It is only at the courthouse where the insights gained can be tested with the family who attend in support, who may bring different and valuable perspectives.

I referred earlier to the article by Dr Ian Lambie in the New Zealand Law Journal. Dr Lambie calls the first appearance of a defendant the opportunity of a lifetime.¹⁸ I would extend this beyond the first appearance to the first two or three appearances; to that point at which the defendant is represented by assigned counsel or counsel of choice. This is a point in time at which the defendant has self-identified, through his or her offending, as someone in need of intervention. The court house is the place at which this intervention can occur, with the opportunity to work with family, community and government agencies.

This is what the courts are attempting through the various pilot courts, but there is a need for this level of intervention to occur as a matter of course. Dr Lambie argues for the development of pre-trial services agencies, like those operating in other jurisdictions, whose very purpose is the identification of disability, mental health and housing issues for defendants and the structuring of interventions to address them.¹⁹

IV. THE USE OF AVL IN CRIMINAL COURTS

There is a little more wit to the title of my presentation today, bringing the defendant back into the room, than providing a hook for a talk about characteristics of the defendant as a population group, or about the steps that courts are taking to respond to that information. I chose the title, advisedly, because of developments occurring in criminal justice that have centred on the use of AVL in trial courts. Because the use of AVL is literally and physically keeping the defendant from the courtroom, and from the meeting room with counsel.

Cost and efficiency is an ever-present concern in the provision of public services, and rightly so. Any system of justice must operate to provide justice in a timely manner. It must also use public money to best effect. In recent times the drive toward efficiency and cost saving has begun to reshape how the courts operate. That is not objectionable if the outcomes for justice are good. But the use of AVL in criminal proceedings focuses upon reducing movements of those who are in custody from prison cells to courtrooms, and this has the effect of reducing the opportunities for face-to-face interactions with the defendant. Increasingly the defendant is not physically present in the courtroom when significant issues affecting his or her future journey through the system are debated and decided.

To provide some background to the use of AVL, s 8 of the Courts (Remote Participation) Act 2010 provides that AVL must be used for the appearance of a defendant in a criminal procedural matter if it is available and the participant is in custody. The defendant will appear in this way unless a judicial officer or a registrar determines that the use of AVL is contrary to the interests of justice.²⁰ This is a

¹⁸ Lambie and Hyland, above n 13.

¹⁹ Lambie and Hyland, above n 13.

²⁰ Section 8(1A)(b).

statutory presumption in favour of the use of AVL in a criminal procedural matter if the defendant is in custody.

The Act defines criminal procedural matter very broadly, as “any matter, in a criminal proceeding, in respect of which no evidence is to be called”.²¹ It uses the word procedural in a sense that does not fit with the way that word is normally used in the law. It captures within it hearings that may resolve fundamental issues affecting the defendant, such as his or her custodial status.

I support the use of AVL in both civil and criminal justice. Its use may be appropriate to bring the defendant into the room for a truly procedural hearing, where issues such as timetabling are concerned. The ability of a prisoner to watch by AVL the hearing of their appeal is a valuable improvement to access to justice. AVL can also operate well where it is the judge who is brought into the courtroom by AVL, for example, to give a sentencing indication in an area where a judge is not scheduled to visit for some time. Sometimes it is necessary to use AVL where the defendant is in too agitated a state to be safely moved. The use of AVL undoubtedly brings considerable benefit to the justice system.

However, the current inter-agency approach is that first appearances fall within the definition of criminal procedural matters for the purposes of that Act. In the Bay of Plenty defendants appear by AVL for their first appearance from a police hub. In Christchurch they are beamed onto a screen in the courthouse, from the cells of the next-door police station. In Auckland there is now a long running ‘pilot’ for first appearances with the possibility of that pilot being expanded following Ministry of Justice evaluation. In all of these places the defendant appears by AVL for the first, and any subsequent appearances unless the police or Corrections decide otherwise, or counsel raise an issue as to the suitability of the medium. A judge will only be asked to approve the use of AVL if the appearance involves evidence or sentencing. It is still somewhat opaque to me what screening processes are used by police to ensure that those with mental health or cognitive disabilities do not participate in hearings through AVL, or indeed whether such characteristics are thought to rule out its use.

Certainly the Auckland pilot excludes some from its scope; the young, those for whom English is a second language and those it is suspected have mental health issues. I also understand that defended bail hearings are not dealt with by AVL.

On its website the Ministry of Justice describes a dramatic increase in the use of AVL in Court. It reports that in the year ending June 2017 more than 18,200 remand Court appearances were held by AVL, compared to just over 12,000 in the previous year.²² I do not have the figures about what percentage of those appearances are first appearances.

While, as I have said, AVL has its place in criminal justice, there are important considerations to be borne in mind before acceding to its use. Under s 23 of the New Zealand Bill of Rights Act 1990, every person has a right to be brought before the

²¹ Section 3.

²² Ministry of Justice “Increasing use of AVL in courts” (2019) <www.justice.govt.nz>.

court as soon as possible following arrest.²³ This codifies the long standing constitutional principle that acts as a protection for the liberty of the subject. It conceptualises a delivery up of the detained person from the coercive control of the executive to the separate branch of government, the judiciary. Once in the courthouse, the court will check to be satisfied of the legality of the detention and the wellbeing of the defendant. But in the AVL universe, all that is delivered up is the image of the top part of the torso of the defendant. The defendant remains inside the prison, moving only from their cell to a room with a camera.

I make three points regarding the use of AVL. My first point — that the use of AVL at first appearance runs counter to other developments in criminal justice — I have described. It takes away the opportunity of a lifetime, to steal Ian Lambie’s phrase, to use early appearances to intervene in the defendant’s life and create a bridge away from offending. It reduces the opportunity and scope for these critical interventions. It reduces the ability of counsel or the judge to identify issues for the defendant that should be addressed, bearing upon rehabilitation opportunities or even critical fitness to plead issues.

Communication that takes place though a screen is different to face to face communication. It is artificial. Gestures, tone, posture and body language may be off screen. Behaviours may be altered. It is more difficult for a judge, and counsel, to pick up non-linguistic pointers that the defendant is not understanding the process or that they are in some way unwell. The judge and counsel do not have the opportunity to observe the walk to the dock, or the way in which the defendant stands or moves.

The second point relates to the defendant’s participation in the hearing. We conduct oral hearings to serve several purposes. An oral hearing leads to better decision making in a matter of complexity. It does this by ensuring that those affected by the decision have an opportunity to contribute information and argument relevant to the decisions to be made. Such a hearing also avoids the sense of injustice which the person who is the subject of the decision will otherwise feel if they are excluded.²⁴ Either purpose is only served if there is true participation by the defendant in the hearing. I would define participation as involving an ability to see what is going on, understand it fully, and to contribute to the hearing. We have to question if attendance by AVL at hearings involving matters of importance does amount to participation for these purposes.

The use of AVL is naturally limiting of the defendant’s ability to communicate and to follow proceedings. If the defendant is to gain any true perception of what is going on in the courtroom, they will need to view proceedings through a screen which shows several images, an image of counsel, the judge and the public gallery in which their family sit. Following proceedings in that way would be difficult for the most cognitively intact of us, sitting comfortably in an armchair at home. When we assess just how effective participation in this way is for defendants, we must add to the picture what we know about the defendant population’s high rates of cognitive impairment and mental health issues.

²³ Subsection (3).

²⁴ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 at [72].

The use of AVL also creates obstacles for communication with counsel. I ask you to use your imagination. You are to be allowed to participate by AVL in a hearing where important decisions are to be made about you. You know that your image will appear in that courtroom, but you have no idea how you appear. You have no true spatial sense of the room, or how big your image is, how loud your voice. And there is no way for you to have an easy side bar conversation with counsel. A defendant present in the dock can easily communicate to their counsel that they have something to contribute to the discussion or that they need to give further instructions on an issue. But a defendant who is unsure of how they are physically manifested in the courtroom may hesitate to make that signal.

The third point I make relates to the impact of AVL on the neutrality of proceedings and the appearance of justice. These proceedings concern the defendant but he or she is the person not physically in the room where all the other participants are gathered. The absence of the defendant from the courtroom impacts others who come to court to see justice done. A court which is distributed across two or more sites and consists in part of screens seems impersonal and remote.

In making these remarks it is important to acknowledge that the Courts (Remote Participation) Act is not the only force at work which is tending to keep the defendant out of the room. Counsel tell us that defendants are choosing not to attend court in person because of a concern that if they do so, they will lose their cell. Such are the pressures in our prison system that if a prisoner attends court, their belongings are packed up and they have no certainty as to which cell they will return to at the end of their court day. Another consideration also is the reluctance of many defendants to make the trip to court in the extremely constrained space available for each prisoner within the eponymous CAN van.

There are other pressures of equal significance which also should be listed. There are pressures that prevent lawyers meeting with defendants and pressures which encourage lawyers to engage with their clients through AVL. It is right to acknowledge that in some respects, AVL facilitates engagement with counsel. An AVL session is, after all, superior to a phone call. But AVL is not suitable for briefing complex matters.

Judges are told of counsels' difficulty in gaining access to clients who are in custody, on remand or as serving prisoners. Defence counsel tell us of travelling to see clients only to be told that they are not available to meet because of a lock-down situation. Defence counsel also tell us that legal aid will not pay, or at least pay adequately, for trips to distant prisons to meet a client in person, when there is AVL available.

There is also cause for concern that the use of AVL by counsel is becoming normalised to the extent that it is seen as a complete substitute for face to face interaction. I have been told of cases in which defendants have been represented all the way through to disposition (sentence) without ever having met their defence counsel in person – all interactions having been through audio-visual link.

These are important developments. They call for debate and careful reflection. We should be debating what the removal of the defendant from the room means for our

system of justice. And what it tells us about that system. There is also a need for deeper reflection as to what is a truly efficient and cost-effective way to run a criminal justice system. Is it to adopt a process which may or may not reduce the individual transaction cost of taking a prisoner to court, but by doing so increase the overall cost to the system when a critical opportunity to intervene in the life of the defendant is lost?

What is clear to me is that the judiciary, and the profession, are not passive participants in all of this. How we use and present the new knowledge we have about the drivers of offending, how we respond to efficiency and cost saving measures, how we respond to the incentives that the system provides, all change the system, even if that change is incremental. I would like the profession to take part in discussions regarding the future shape of the system of criminal justice that we want. I think we can imagine and plan for a system which both accommodates the pressure for cost saving and efficiency and prioritises the imperative to rehabilitate the offender. If we do that we stand a better chance of reducing the burden on victims of the harm done by offending and a better chance of breaking the inter-generational cycle of offending. If we don't discuss the future, and try to shape it, it will still arrive. It just might not be in a shape we like.

Kia ora tātou.