

KIA KAHA, KIA TOA, KIA MANAWANUI E *Mihi Bassett and the Auckland Women's Prison*[†]

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“Kia kaha, kia toa, kia manawanui e” were the last words his Honour Judge McNaughton spoke to Mihi Bassett on the day of her sentencing, for arson she committed in prison. It was an encouragement to Mihi to “be strong, be brave, and be steadfast” on her journey through the corrections system, and to hold on to the vision of a fresh start outside of it. In the context of this article, it is also an encouragement to those working within the criminal justice system, and for all New Zealanders, to nurture an overarching vision for structural change, and for a more just, fair and equitable Aotearoa New Zealand.

I INTRODUCTION

In March 2021, Mihi Bassett appeared for sentencing on a charge of arson in the Manukau District Court. Mihi had been serving a ten-year prison sentence at the Auckland Region Women's Corrections Facility (ARWCF),¹ when she and two fellow inmates set a fire in protest of their mistreatment within the prison. What the prosecution did not realise when it proceeded with the charges was that it would be putting the Department of Corrections' own behaviour on trial. Mihi and her peers gave evidence of their treatment

[†] The New Zealand Women's Law Journal undertakes a double-blind review process. For this article, although it has been double peer reviewed, only one of the peer reviewers was anonymous. This decision was made in recognition of the importance of the kaupapa and ensuring that the reviewers had the correct knowledge and expertise. Additionally, in the interests of whanaungatanga and ensuring the review process was mana enhancing, the second reviewer in this instance is not only a highly-regarded Māori academic, but is also a tuakana for one of the authors whose insight and support through the writing process was invaluable.

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¹ The terms “wāhine” and “women” are used throughout this article to refer respectively to Māori individuals and to all individuals who are inmates at “female” designated prison institutions; however, the authors acknowledge that not all individuals incarcerated at such facilities may identify as wāhine or women.

inside prison; behaviour that the sentencing judge labelled “degrading” and “inhumane”.²

The Judge’s damning findings, coupled with Radio New Zealand’s (RNZ) active reporting, drew significant public attention to Mihi Bassett’s case. This prompted a Special Investigation by Corrections’ Inspectorate office, and an announcement from the Minister of Corrections, Kelvin Davis (the Minister), that the Department would undergo an overhaul as to the way it treats and manages women in prison. He said such changes were necessary because it was “inappropriate for women in prison to be treated as if their needs were the same as male prisoners”.³ Since that time, Corrections has launched its updated Women’s Strategy, which has refreshed its approach to how it works with women in its care.

This article highlights the importance of Mihi Bassett’s story coming to light. Her case gives rise to important questions about the way we treat some of the “most vulnerable and disadvantaged citizens” in our society—wāhine Māori.⁴ While the Minister and the Department’s response to her case was positive, in that the proposed changes were, and are, necessary, they must also be understood in the historical and contemporary context of the New Zealand corrections system. The history of patchwork and ad hoc reforms, coupled with little change over time, demonstrates why the proposed changes are merely a continuation of the past 181 years.

This article begins with Mihi’s story, set out in Part II in more detail. It canvasses her background that led to her incarceration; the facts of her life in prison; what caused her and the other women to set a fire outside their cells; and the criminal charges against her in the District Court. In order to analyse Mihi’s story in its entirety, Part III canvasses the development of the corrections system in Aotearoa New Zealand. It discusses the substitution of Māori approaches to justice with the British criminal justice system; and the current picture for Māori and for women, and in particular for Māori women, inside the corrections system today. Part IV discusses the use of segregation and pepper spray in New Zealand prisons (especially ARWCF) and the disproportionate and increasing use of both against Māori women. Part V outlines the official response to Mihi Bassett’s case, from the Minister,

² *R v Bassett* [2020] NZDC 24454 at [92].

³ Radio New Zealand “Corrections Minister orders urgent overhaul, review of women’s prisons” (22 March 2021) <www.rnz.co.nz>.

⁴ *R v Bassett*, above n 2, at [20].

Department of Corrections and the Office of the Chief Inspectorate; and Part VI analyses that response.

In particular, Part VI describes two camps of critique to the Minister and the Department’s response to Mihi’s case. The first camp argues that the corrections system, and the wider criminal justice system that it sits within, requires transformative, structural change—the long term vision for which the Department and the Minister currently lack. On the other hand, the second camp argues that the Minister’s directions and Corrections’ actions in the short to medium term are positive steps to improving the care of Māori women, but they could go much further and implement a “Mana Wāhine” approach. A Mana Wāhine approach is one that is grounded in Kaupapa Māori, and places wāhine Māori, and the mana and primary concerns of wāhine Māori, at its centre. The framework for these two camps is informed by an informal whakaaro and kōrero, among Māori working with and within the law, that there must be progressive change within current systems, as well as an overarching vision for structural change. Ultimately, this article explains why legislation, policies and practices relating to wāhine in the criminal justice and corrections systems need to be informed by Mana Wāhine theory, in order to better recognise and address the complex needs and realities of wāhine in New Zealand prisons today.

II MIHI BASSETT’S CASE

Mihi Bassett’s story has been part of a catalyst for wider change at ARWCF and in all women’s prisons. This Part sets out her story in more detail: her background that led to her being incarcerated at ARWCF; the facts of her life in prison; and what caused her and the other women to set a fire outside their cells—the push and pull cycles of violence that swirled between prisoners and staff at ARWCF. It also outlines the court proceedings, where Mihi was allowed the opportunity to tell her side of the story in court, and was ultimately sentenced by Judge McNaughton. It was through Mihi’s courage and the efforts of her lawyer, the Judge and a journalist, that her story was also brought to light in the New Zealand public.

A Background

Mihi Isibella Bassett is a young wāhine Māori of Tūhoe descent. She grew up in Ōpōtiki in the Eastern Bay of Plenty, with hard-working parents, and in

a gang environment.⁵ As a young teenager, she suffered through the loss of two close members of her whānau, and gradually became involved in minor offending. At age 16, she appeared in the Ōpōtiki Youth Court for unlawfully entering a building. She committed three burglaries by her 17th birthday. Around that time, in 2010, Mihi was raped by a gang member at a party.⁶ She now suffers Post Traumatic Stress Disorder (PTSD) as a result. A psychiatrist's report described other significant trauma in her past, including physical and emotional abuse, exposure to violence, and drug and alcohol abuse.⁷

In October 2016, at about 23 years old, Mihi was convicted in the Whangārei District Court of aggravated burglary, kidnapping, wounding, and injuring with intent to cause grievous bodily harm. She was sentenced to ten years' imprisonment and sent to ARWCF.⁸ Mihi committed other offences during her time in prison, including assault and three incidents of arson, resulting in another year being added to her original sentence.⁹ As a result of this and other disruptive behaviour, Mihi has been classified as a maximum-security prisoner, which is for women with "extremely disruptive behaviour", for the majority of her sentence.

Despite all of that, offender notes obtained from Corrections have shown another side to Mihi.¹⁰ There were notes describing her as smiling, positive, cheerful and settled, and of her discussing her whakapapa and links to her marae and Maungapōhatu, the sacred mountain of Tūhoe. Mihi's psychiatrist noted that "Ms Bassett is a young woman with significant potential...determined to have a fresh start".¹¹

B Facts of the offending

Maximum security prisoners at ARWCF are held in the "Prison Management Unit".¹² Inside, "C Wing", with 16 beds, is known by the prisoners as "maxi", and the more prohibitive "D Wing", with 6 beds, is known as "the pound".¹³

5 Guyon Espiner "Gassed in their cells, 'begging' for food at Auckland Women's Prison" Radio New Zealand (24 November 2020) <www.rnz.co.nz>.

6 *R v Bassett*, above n 2, at [110].

7 At [110].

8 At [6].

9 At [7]; *Police v Bassett* DC Manukau CRI-092-012895, 28 August 2020 at [6]–[7].

10 Guyon Espiner "Prison guards threaten pepper-spray moments after suicide attempt" Radio New Zealand (4 March 2021) <www.rnz.co.nz>.

11 Espiner (24 November 2020), above n 5.

12 *R v Bassett*, above n 2, at [8].

13 Espiner (24 November 2020), above n 5; *R v Bassett*, above n 2, at [8].

The conditions in D Wing have been described as “spartan”, with very few in-cell facilities.¹⁴

At various points in time, Mihi was joined in C Wing by her partner Karma Cripps, her cousin Paris Reed, and her friend Tarina McClutchie. During their stay, the women felt their basic needs were not being met. They acted out in protest, for example by setting off the shower sprinklers in their prison cells. Given the sprinklers can cause flooding, Corrections staff would request the women to relocate “peacefully” from their cell.¹⁵ If they refused, staff would undertake a “cell extraction”. This involved hoses pumping “Cell Buster” pepper-spray gas under the cell door from a fire extinguisher-like canister, allowing up to six officers in full body armour to enter and forcibly remove the woman once she was incapacitated.¹⁶ The women experienced “an intense burning sensation” and “struggled to breathe”, sometimes forcing them to place their heads in the toilet bowl to get air.¹⁷ Mihi suffered four such cell extractions during her time in the Prison Management Unit.¹⁸

On 14 October 2019, Mihi, Paris and Tarina were in their respective cells inside C Wing. They were “fishing”; that is, tying blankets and clothing together to create a line to attach items to, and moving items from cell to cell.¹⁹ Using that fishing technique, in what was described as “a spontaneous act of protest”,²⁰ Mihi started a fire from inside her cell and lit part of the fishing line. Paris pulled the line toward her cell and used the fire to set clothing, bedding and documents alight. Then Tarina pulled on the line, moving the fire into the middle of the foyer. A fire alarm sounded and Corrections staff responded quickly; in less than two minutes the fire was extinguished. The floor was damaged—at an estimated cost of repair of around \$20,000—but no person was physically injured.²¹

A few days after the arson, Mihi and Paris were sent to D Wing (the pound) with no explanation for the transfer.²² Paris thought she was going for a “time out”, and Mihi thought she would be there for 14 days and then returned

¹⁴ *R v Bassett*, above n 2, at [11].

¹⁵ At [90].

¹⁶ At [24]–[27] and [90].

¹⁷ At [26].

¹⁸ At [86].

¹⁹ At [3]–[4].

²⁰ At [14].

²¹ At [3].

²² At [13]–[14].

to maxi.²³ About two weeks later, Karma and Tarina followed.²⁴ Mihi and Paris were eventually told their transfer was a management decision taken by the Prison Director, and that they were to remain there until further notice.²⁵ The women's complaints about being held in the pound without justification, and about their minimum entitlements being withheld, went unanswered.²⁶

Inside the pound and diagnosed with PTSD, Mihi's mental health deteriorated. A psychiatrist report provided to the court observed that Mihi's experience inside D Wing seemed to have compounded her past trauma and led to a major depressive disorder.²⁷ "I just felt like dying," Mihi said in court. "I was just waking up, dark, going to sleep, dark, waking up crying, going to sleep crying, it was just, nah, it was pretty hard out."²⁸ She voiced suicidal thoughts to the manager, the officer and other staff.²⁹ "Like they were asking me, 'How are you?' and I was like, 'Bro, I just wanna die'"³⁰ In January 2020, about three months into her stint, Mihi attempted suicide in her cell. She was resuscitated and sent back the next day. Corrections ultimately held Mihi in the pound for four months. RNZ obtained a copy of her management plan, and reported that it showed the prison planned to hold her there "indefinitely".³¹

C Sentence indication

Criminal proceedings were brought against Mihi, Paris and Tarina in the Manukau District Court, on charges of arson. Mihi sought a sentence indication, which the sentencing judge, his Honour Judge McNaughton, gave on 28 August 2020.³² The Judge indicated a starting point of 18 months' imprisonment.³³ This took into account the considerable amount of damage to the floor, given the cost to repair it, but also that there was no real danger to any person. His Honour indicated he would uplift the sentence to 20 months for Mihi's previous arson convictions, and allow a full 25 per cent discount if

23 At [14].

24 At [13]. Karma had volunteered to move to D Wing so she could be closer to Mihi and the other women.

25 At [14].

26 At [16]–[18], [60] and [107].

27 At [110].

28 Espiner (24 November 2020), above n 5. Also see *R v Bassett*, above n 2, at [30].

29 *R v Bassett*, above n 2, at [98].

30 Espiner (24 November 2020), above n 5. See *R v Bassett*, above n 2, at [33].

31 Espiner (4 March 2021), above n 10.

32 See *Police v Bassett*, above n 9. Sentence indications are governed by Part 3, Subpart 4 of the Criminal Procedure Act 2011.

33 *Police v Bassett*, above n 9, at [24].

she accepted the indication and pleaded guilty.³⁴ This would result in an end sentence of 15 months' imprisonment.

What set Mihi's case apart was that her lawyer argued that Mihi's mistreatment at ARWCF should be taken into account as personal mitigating factors. Judge McNaughton was prepared to accept that, given the conditions in which Mihi was serving her sentence, "what motivated this arson was a protest rather than any intention to cause massive property damage or injure other inmates or staff".³⁵ However, in order to determine whether her treatment warranted a further discount, or a concurrent (as opposed to a cumulative) sentence, his Honour invited further evidence about the treatment at the prison.³⁶ The Department of Corrections would have the opportunity to offer evidence in reply before any findings were made.³⁷

D Disputed facts hearings

Mihi accepted the sentence indication and pleaded guilty to arson. Disputed facts hearings were held on 4 September and 20 November 2020.³⁸ Mihi, Paris and Karma gave evidence.³⁹ Judge McNaughton said the women's evidence was "powerful and compelling" and entirely consistent; "I have no reason to doubt their evidence."⁴⁰

Although Corrections had "ample notice" of the allegations at the first hearing, it chose not to answer them in any substantive way at the second.⁴¹ The only witness from Corrections was Alison Fowlie, the newly appointed Deputy Prison Director at ARWCF. However, Ms Fowlie was not in her role when the events took place (she was seconded to the role in March 2020)⁴² and so could only speak to how the prison was supposed to work, rather than what actually happened.⁴³ None of the prison staff who were actually involved

34 At [25]–[26].

35 At [24].

36 At [27].

37 At [28].

38 At [17].

39 At [18].

40 *R v Bassett*, above n 2, at [53].

41 *R v Bassett* [2021] NZDC 5067 at [18]. The Police Prosecution Service had transferred the charges to the Crown Solicitor at the disputed facts hearing stage on the basis that the matter had become complex.

42 *R v Bassett*, above n 2, at [6].

43 At [37].

were called and, as a result, the women’s evidence about their treatment was not disputed.⁴⁴

On 4 February 2020, Judge McNaughton issued his reserved decision. The Judge’s findings, among other things, included unlawful cell confinement, which in Mihi’s case was four months; cell extractions by means of pepper spray and excessive use of force; failure to provide minimum requirements under the Corrections Act 2004 and its regulations; and failure to monitor “what was in [Mihi’s] case an obvious suicide risk”.⁴⁵ Judge McNaughton said it was “difficult to see all of these examples of the mistreatment of prisoners as anything other than a concerted effort to break their spirit and defeat their resistance”.⁴⁶

Having reached his findings on the disputed facts, Judge McNaughton invited further submissions regarding the extent to which Mihi’s treatment should mitigate her penalty, and whether any sentence imposed should be cumulative or concurrent.⁴⁷

E Sentence

Judge McNaughton sentenced Mihi on 22 March 2021. In light of his findings of fact, and after hearing from Mihi’s lawyer and the Crown, Judge McNaughton was persuaded that a cumulative sentence would be “disproportionately severe”,⁴⁸ and that:

Given the length of your cell confinement without lawful justification, given the severe psychological impact leading up to your attempt at suicide, and all the other instances of mistreatment, in short you have suffered enough.⁴⁹

His Honour therefore imposed the 15-month sentence of imprisonment as indicated, but concurrent with Mihi’s existing sentences. As a result, she did not receive any additional prison time from her new conviction.

44 At [53].

45 *R v Bassett* [2021], above n 41, at [19].

46 *R v Bassett*, above n 2, at [95].

47 At [111].

48 At [28]. Concurrent sentences are governed by section 8H of the Sentencing Act 2002.

49 At [29].

Before handing down the sentence, Judge McNaughton spoke to the pain and *mamae*⁵⁰ of the prison environment becoming a place of further punishment and abuse for the *wāhine*, and what that means at a societal level:⁵¹

The measure of a civilised society is how it treats its most vulnerable and disadvantaged citizens, and we judges know from experience that Māori women prisoners are amongst our most vulnerable and disadvantaged and damaged citizens, particularly those women who have grown up in a gang environment as you and Karma did.

...

So to learn that the serious physical and psychological abuse is occurring in a women's prison is profoundly disturbing, and that it is happening, or that it was happening, here in our own backyard in Manukau just a few minutes' drive from this court is especially disturbing for a judge who sits here.

After handing down the sentence, his Honour continued to address Mihi directly:⁵²

... Mihi, what I would like to say to you now at the end is how impressed I was by your evidence, not just you but all three of you. ... There was a dignity and a strength of character coming through from all of you. You are resilient. You are a survivor. ... So despite everything that has happened to you in prison and despite everything that has happened to you in your life before that, and despite the crimes you have committed, underneath all of that there is a good person. ... You deserve a better life than this. ... He mihi nui ki a koe. Kia kaha, kia toa, kia manawanui e.

Paris and Tarina were sentenced prior to Mihi, and without the benefit of a disputed facts hearing to determine mitigation. Paris was sentenced by Judge Patel to 17 months' imprisonment, to be served cumulatively on her original

50 “Mamae” is a culturally-specific concept to describe hurt or pain in Māori culture. The word can be used to describe physical, mental, spiritual and emotional injury or trauma. Mamae can be an individual, or a shared or collective, experience (for example, in ritualistic grieving). Mamae can also be felt temporarily (for example, a bump to the elbow) or on an ongoing basis (for example, intergenerational trauma).

51 *R v Bassett*, above n 2, at [20] and [22].

52 At [31]–[35].

sentence.⁵³ Tarina was sentenced by Judge Johns to six months' imprisonment, also to be served cumulatively on her original sentence.⁵⁴

The Crown's case against Mihi Bassett ended with her sentencing on 22 March 2021, but the ripple effects continue. RNZ's active reporting and Judge McNaughton's findings of fact drew significant public attention to the case from justice and prison advocates and academics. Responses were pressured from the Department of Corrections and its Minister, and the Office of the Chief Inspectorate was prompted to conduct a Special Investigation into the women's care.

While writing this article, the Chief Inspector released the final findings of her Special Investigation, and Corrections launched its updated Women's Strategy for the management of women in its care. Although that strategy was not updated in response to Mihi's case, it was surely drafted with Corrections' "lessons learned" from her case in mind.

III THE NEW ZEALAND CORRECTIONS SYSTEM

Mihi and the other women's mistreatment at ARWCF did not take place in a vacuum. Before we can fully analyse the response to her case, we must understand the historical and contemporary context of the New Zealand prison environment that informed it. This Part explores the implementation of the British criminal justice and corrections systems in Aotearoa, and the substitution of traditional Māori approaches to justice. It then outlines the framework of the current New Zealand corrections system, and the current picture for Māori and women in the system today. In particular, this Part begins to hone in on the place of Māori women living in a system that was not designed to account for them or their distinct and complex needs in contemporary Aotearoa, and set the scene for a proposed Mana Wāhine approach for wāhine in Corrections' care.

A A clash of cultures: traditional approaches to justice

Prisons, and the concept of imprisonment, have been part of Aotearoa's approach to justice for a relatively short period of time—only 181 years. Moana Jackson has explained that, prior to first contact, Māori had an established

⁵³ *Police v Reed* DC Manukau CRI-2019-092-012895, 19 June 2020, cited in *Police v Bassett*, above n 9, at [8]–[11]; and *R v Bassett*, above n 2, at [6]–[9].

⁵⁴ *Police v McClutchie* DC Manukau CRI-2019-092-012895, 7 October 2020, cited in *Police v Bassett*, above n 9, at [12]; and *R v Bassett*, above n 2, at [10].

system for identifying wrongdoing and repairing harm.⁵⁵ The ultimate aim was to restore whakapapa, in its broadest sense of an interrelationship between peoples, and between people and their environment. Guided by the principles and values of tikanga Māori, reconciliation was the logical conclusion of the process, as was rehabilitation for a person who had committed harm. But as for the concept of incarceration, “the idea of confining a wrongdoer in something like a prison would have been culturally incomprehensible”.⁵⁶

When the British first arrived in Aotearoa, incarceration had only been part of their law for a comparatively short time too. Prisons had not long before originated in urban Britain as “poorhouses” or “houses of correction”: working institutions designed to teach people a skill, usually in the form of hard labour.⁵⁷ Places of confinement for people accused or found guilty of crime initially existed only to house them before they were subjected to their ultimate punishments: transportation to penal colonies or execution; such places were not for incarceration as a punishment per se.⁵⁸ In the longer term, however, transportation became increasingly expensive and the death penalty was failing to deter offenders.⁵⁹ Imprisonment thus grew in popularity and utilisation as a punishment, and by the early nineteenth century had become the logical conclusion of the criminal justice process.⁶⁰

When the British settlers introduced their cultural values and systems to Aotearoa, they brought with them the “punitive will to contain and reprimand those who caused harm to people or property”.⁶¹ They regarded their European concepts as universal constructs, and dismissed established Māori systems as inferior.⁶² Naturally, this colonising mindset applied to concepts of justice, and the British “corrections” system, complete with the British common law

55 Moana Jackson “Why did Māori never have prisons?” (JustSpeak New Zealand Lecture Series, Wellington Girls’ College, 17 November 2017); and Moana Jackson “Moana Jackson: Prison should never be the only answer” E-Tangata (14 October 2017) <www.e-tangata.co.nz>.

56 Jackson (14 October 2017), above n 55.

57 Leonard A Roberts “Bridewell: The World’s First Attempt at Prisoner Rehabilitation Through Education” (1984) 35 *Journal of Correctional Education* 83 at 83.

58 David Wilson *Pain and Retribution: A Short History of British Prisons 1066 to the Present* (Reaktion Books, London, 2014) at 13.

59 Tim Hitchcock, Robert Shoemaker, Sharon Howard and Jamie McLaughlin et al “Background—Houses of Correction” *London Lives 1690 to 1800* (24 April 2012) <<https://www.londonlives.org/static/Punishment.jsp#Imprisonment>>; Wilson, above n 58, at 76.

60 Wilson, above n 58, at 13.

61 Jackson (14 October 2017), above n 55.

62 Moana Jackson “Moana Jackson: How about a politics that imagines the impossible?” E-Tangata (23 September 2017) <www.e-tangata.co.nz>.

and structure of prison institutions, were introduced and quickly established throughout New Zealand.

New Zealand's first prisons were built in 1840, only weeks after the signing of Te Tiriti o Waitangi and the Treaty of Waitangi.⁶³ By 1878, there were 30 small prisons throughout the country—all underfunded and under-resourced.⁶⁴ Prisoners were crammed together regardless of their age, crimes or gender. Following Victorian penal philosophy, it was thought that harsh conditions would act as a deterrent to future offending. Prison was seldom regarded as a way to rehabilitate offenders back into society.⁶⁵

B Framework of the current New Zealand corrections system

Today, the New Zealand corrections system is administered by the Department of Corrections. The Department was founded in 1995,⁶⁶ and its role and functions defined and clarified under the Corrections Act 2004 (Act) and in the Corrections Regulations 2005 (Regulations).

The Act also established the modern Office of the Inspectorate, which is led by the Chief Inspector. The Office is independent of prison management and plays an integral role in our modern prison system as a dedicated office for complaints resolution, investigation and assurance. It regularly inspects each New Zealand prison, on both notified and non-notified bases, and reports each prison's performance based on a set of standards informed by the Act, the Regulations, and best practice prison management.

C New Zealand women in the corrections system

There are three women's prisons operating in New Zealand today: Arohata Women's Prison, in Tawa, Wellington (Arohata); the Christchurch Women's Prison (CWP); and ARWCF, in Wiri, Manukau, where Mihi Bassett was held at the time of her offending. ARWCF is the only women's prison to hold maximum security prisoners.⁶⁷ As at 24 May 2021, there were 111 women at

63 Peter Clayworth "Early prisons, 1840–1879" Te Ara — the Encyclopaedia of New Zealand (20 June 2012) <www.TeAra.govt.nz>.

64 Clayworth, above n 63.

65 See, for example, the comments of Inspector of Prisons, Colonel Arthur Hume about women prisoners being long past "all possibility of reform" in 1897, cited in Department of Corrections *Change Lives Shape Futures: Wabine – E rere ana ki te pai hou: Women's Strategy 2017–2021* (June 2017) [*Women's Strategy*] at 3.

66 Pursuant to the Department of Justice (Restructuring) Act 1995.

67 Office of the Chief Inspectorate *Auckland Region Women's Corrections Facility Announced Inspection June 2020* (January 2021) at [150]–[153]. ARWCF was not purpose-built to hold maximum security women, as this classification was only introduced for women in 2009. Only 2 per cent of women are

Arohata Prison, 340 at ARWCF, and 88 at CWP (539 women in prison in total).⁶⁸ Men comprised roughly 93.6 per cent of the total prison population (7,896) and women comprised 6.4 per cent.

Throughout the 19th century, women made up a small percentage of the prison population. Jared Davidson’s research suggests that women were not catered for in an “overwhelmingly male-dominated and male-designed prison system”.⁶⁹ In contemporary times, however, and in recognition of the increasing women’s prison population, Corrections seeks to operate according to its specific strategy for women in prison. *Wahine – E rere ana ki te Pae Hou: Women’s Strategy 2017–2021 (Women’s Strategy 2017)* was the version of this strategy in place at the time of Mihi’s offending and District Court case.⁷⁰ In light of the Māori name of the strategy, meaning “Women – Rising above a new horizon”, one might be forgiven for thinking that the *Women’s Strategy 2017* may have been informed by Mana Wāhine theory, or was specifically directed toward the care of Māori women, or had been drafted on the basis of a Kaupapa Māori framework. Neither of those were the case. The *Women’s Strategy 2017* was fundamentally a monocultural strategy for all women, with a Māori name, and with three small isolated pockets directed toward wāhine Māori (which are discussed further below).

At the time of its launch, the *Women’s Strategy 2017* sought to implement a new approach for women prisoners over five years that would help curb recidivism and reduce offending generally by 25 per cent.⁷¹ Then-Chief Executive of Corrections, Ray Smith explained the basis of the new strategy:⁷²

The increase of women offenders demands attention and a fresh approach... Our corrections system has largely been built around the needs of male offenders, but research has shown that women respond differently to treatment and management. Our women’s strategy redresses that imbalance, based on international best practice and our own research into what works

classified as maximum security, and 6 per cent of women are classified as high security (*R v Bassett*, above n 2, at [7]).

68 Letter from Rachel Leota (Department of Corrections) to Mariah Hori Te Pa regarding Official Information Act 1982 request (15 June 2021) (Obtained under the Official Information Act 1982 Request to Department of Corrections) [OIA Request].

69 Jared Davidson “Making women’s prisons more gender conscious won’t solve anything much” *The Spinoff* 24 March 2021 <www.thespinoff.co.nz>.

70 *Women’s Strategy*, above n 65.

71 At 7.

72 At 3.

best. It recognises that women have different needs to men and sets out a new approach for Corrections that will give women the treatment, encouragement, counselling, skills and support they need to shape better futures for themselves, their children and families...

The *Women's Strategy 2017* recognised that women in prison required a “gender-responsive approach” based on the root causes of women’s offending and what works to reduce women’s re-offending—both of which research had shown were distinct from those of men.⁷³ Women prisoners were more likely than men prisoners to have experienced mental health disorders, PTSD, and alcohol and other drug dependence disorders, and 68 per cent of women in prison had been victims of family violence. Generally, women’s offending was often driven by these marginalised experiences and problems, and women committed less serious crimes than men overall.⁷⁴ Therefore, rehabilitation and reintegration processes designed around how men offend were inappropriate for women. In order to address these differences, the *Women's Strategy 2017* placed a “women-specific lens” over Corrections’ overall goal to reduce re-offending.

The strategy noted at the outset that “over half” of the women in prison identified as Māori.⁷⁵ It explained that in addition to the high prevalence of PTSD among women in prison generally, Māori women also suffered historical and intergenerational trauma;⁷⁶ that 70 per cent of Māori women in prison had literacy and numeracy levels lower than NCEA level 1 (compared to 60 per cent for all women in prison);⁷⁷ and that Corrections needed to be “culturally responsive to meet women’s needs”.⁷⁸ The strategy then set out three isolated initiatives specifically for the benefit of Māori women.⁷⁹ There did not appear to be any clear strategy toward the implementation of the initiatives, and it was not clear if or how the initiatives would work in conjunction, or whether they were designed as part of an overarching plan at all. As a result, the *Women's Strategy 2017* left the reader wondering whether Corrections had thought about

73 At 6.

74 At 4–5.

75 At 3 and 11.

76 At 5.

77 Tertiary Education Commission *Literacy and Numeracy Adult Assessment Tool* (2017) cited in *Women's Strategy*, above n 65, at 13.

78 At 11.

79 At 11, 16 and 20. Note this paragraph of this article represents all 14 instances of the word “Māori” being used throughout the *Women's Strategy*. The word “wāhine” is not used in the strategy other than in the title.

the fact that if Māori women were overrepresented in prison, an effective, targeted approach toward their care and rehabilitation would significantly impact its overall goal to reduce re-offending; about its place in the systematic oppression of Māori women; or conversely about its unique opportunity to empower and whakamana⁸⁰ the Māori women in its care, at all.

While writing this article, Corrections launched its updated *Women's Strategy for 2021–2025 (Women's Strategy 2021)*.⁸¹ The latest version of the strategy seeks to build on the foundations of the *Women's Strategy 2017*, and further refresh Corrections' approach to working with women in its care.⁸² In the authors' view, the *Women's Strategy 2021* improves significantly on the promises of the *Women's Strategy 2017* to be “culturally responsive” to (Māori) women's needs. This is discussed further below in Parts V and VI.

D Māori in the corrections system

Throughout the 19th century and into the early 1900s, Māori were also a negligible percentage of the prison population.⁸³ From the 1950s onwards, however, the total prison population increased rapidly alongside the increasing crime rate and incarceration of Māori men. This occurred in correlation with the rapid urbanisation of rural Māori to cities and town centres. By the mid-1970s, the percentage of Māori in prison was sitting at just under 40 per cent and surged through the 1980s, peaking at nearly 60 per cent in the late 1990s.⁸⁴ As at 30 September 2021, the prison population was 8,034 people, and Māori comprised 52.5 per cent of that total.⁸⁵

The demographics of our Māori prisoners and our women prisoners have changed dramatically in a lifetime. Reflecting on his thirty years of research, Moana Jackson noted that the percentage of Māori women in prison had risen from less than 1 per cent to over 64 per cent in 2017.⁸⁶ As at October 2021, Māori women comprised 66 per cent of the total women's prison population.⁸⁷ This makes Māori women, per capita, the most imprisoned indigenous women

80 To “whakamana” a person is to recognise, uphold and uplift the mana of that person.

81 Department of Corrections *Wāhine – E rere ana ki te pai hou: Women's Strategy 2021–2025* (October 2021) [*Women's Strategy 2021*].

82 At 6.

83 Peter Clayworth “Prisons – Māori imprisonment” *Te Ara – the Encyclopedia of New Zealand* (2012) <www.TeAra.govt.nz>.

84 Clayworth, above n 83.

85 Department of Corrections “Prison facts and statistics – September 2021” <www.corrections.govt.nz>.

86 Jackson (17 November 2017), above n 55.

87 *Women's Strategy 2021*, above n 81, at 7.

in the world.⁸⁸ By way of comparison, Māori men comprise about 52 per cent of the men's prison population.⁸⁹

Corrections launched “*Hōkai Rangi: Ara Poutama Aotearoa Strategy 2019–2024*” in 2019 (*Hōkai Rangi*). *Hōkai Rangi* outlines the long-term plan for working with Māori in the corrections system, and reducing their disproportionate recidivism rates⁹⁰ (and has since also been described as the Department's overarching strategy toward all people in its care).⁹¹ The strategy identifies that the corrections system prioritises risk management at the expense of kaupapa Māori and tikanga Māori.⁹² Other Māori-specific systemic issues include the denial of any whānau-orientated response, and that institutionalised Māori struggle to reintegrate into society.⁹³ It identified that all of these factors contribute to Māori prisoners' poor quality of rehabilitation and high rates of recidivism.

Drawing from these key concerns, *Hōkai Rangi* created six key strategic areas, each with a set of short-term and long-term actions. Among other things, *Hōkai Rangi* pledged to uphold the mana of all those in Corrections' care, promised to incorporate a te ao Māori worldview, and recognised that Corrections was “a key system player in achieving positive intergenerational outcomes for Māori”.⁹⁴

Hōkai Rangi constitutes important context for this article, given the disproportionate representation of Māori women in New Zealand prisons. It broadly states that wāhine Māori have “specialised needs” which need to be addressed within Corrections,⁹⁵ and that one of its 37 actions is to commission research looking at how Corrections would achieve that.⁹⁶ In addition to this broad commitment to undertake further research, *Hōkai Rangi* outlined three initiatives that would directly impact the management of wāhine prisoners.⁹⁷

88 Aaron Smale “Rough justice: Māori and the criminal justice system” Radio New Zealand <www.shorthand.radionz.co.nz>.

89 Department of Corrections *Hōkai Rangi: Ara Poutama Aotearoa Strategy 2019–2024* (2019) [*Hokai Rangi*] at 8.

90 At 4.

91 *Women's Strategy 2021*, above n 81, at 3 and 4 (per Minister Davis and Chief Executive Jeremy Lightfoot, in their respective forewords to the *Women's Strategy 2021*).

92 At 11.

93 *Hōkai Rangi*, above n 89, at 11.

94 At 18.

95 At 20.

96 At 21.

97 At 31, 33 and 34.

Like the *Women's Strategy 2017*, there did not appear to be any clear strategy toward the implementation of the three initiatives for wāhine, and it was not clear if or how the initiatives would work in conjunction, or in line with the *Women's Strategy 2017*, or whether they were designed as part of an overarching plan at all.

Given *Hōkai Rangī* was published in 2017 after the *Women's Strategy 2017*, it is questionable why it did not adopt a more “intersectional” approach to the management of wāhine Māori, for example in the way that the *Women's Strategy 2017* placed a “women-specific” lens over Corrections’ goals and priorities. If not to create a more aspirational approach specifically for wāhine Māori that was informed by Mana Wāhine theory, *Hōkai Rangī* should have better articulated how its mahi would interweave with, support, or supplement the proposals set out in the *Women's Strategy 2017* for Māori women. Encouragingly, the *Women's Strategy 2021* does articulate how it will align with the aims and aspirations of *Hōkai Rangī* as the Department’s overarching strategy.⁹⁸

Although the *Women's Strategy 2021* was not created in response to Mihi Bassett’s case (the 2017 strategy was already due to be refreshed in 2021), its content will be further discussed in Parts V and VI of this article, alongside the response and actions of the Department and its Minister. In particular, Part VI explains why legislation, policies and practices relating to wāhine in the corrections system need to be informed by Mana Wāhine theory, and the extent to which the *Women's Strategy 2021* does or does not incorporate a Mana Wāhine approach already. Prior to that analysis, this next Part further considers how wāhine Māori are treated differently in prison to non-Māori women, to the extent that a specific strategy for wāhine Māori is justified at all.

IV TREATMENT OF WĀHINE IN NEW ZEALAND PRISONS

Judge McNaughton found that ARWCF broke its own rules by sending Mihi to the pound and keeping her there without proper authorisation, and in the prison’s use of “Cell Buster” pepper spray against her four times. This oppressive use of segregation and pepper spray were arguably two of the most perturbing features of Mihi’s case—but this treatment was not particular to Mihi, and nor did it happen in isolation. Statistics obtained from Corrections show that the number of directed segregation orders and the use of pepper

⁹⁸ See, for example, *Women's Strategy 2021*, above n 81, at 3, 17 and 20.

spray have both increased rapidly in the last five years.⁹⁹ This Part outlines the disproportionate and increasing use of both against Māori women, especially at ARWCF. It then situates these statistics within the broader findings of the Office of the Inspectorate from its notified inspection of ARWCF in June 2020, in particular in respect of discipline and management of prisoner behaviour.

A Segregation

Corrections can hold prisoners in “segregation” for a number of prescribed reasons—mostly for health and safety. Prisoners can be held in segregation on a “directed” or “voluntary” basis.¹⁰⁰ Segregation is different to “cell confinement”, which is used for discipline, because, according to Corrections: ¹⁰¹

“[t]he option to place people on directed segregation is a preventative measure to a known or potential risk. Being placed on directed segregation does not serve as a punishment. Rather, it is to ensure the safety of themselves and others”.

Of the three women’s prisons, ARWCF has consistently imposed the greatest number of directed segregation orders over the last five financial years.¹⁰² This is likely attributable to ARWCF being the only women’s prison to hold maximum security prisoners. Reviewing the number of directed segregation orders at the women’s prisons at the beginning and end of the last five financial years, broken down into ethnicity, shows that:¹⁰³

- i) of the 70 orders at ARWCF in the 2016/17 financial year:
 - a) 62 per cent were for Māori women (44);
 - b) 26 per cent were for European women (18);
 - c) 9 per cent were for Pacific women (6); and
 - d) this compares to six orders (54 per cent) for Māori women at

⁹⁹ OIA Request, above n 68.

¹⁰⁰ OIA Request, above n 68. For voluntary segregation, prisoners can request to be placed in segregation for the purpose of protective custody if they fear for their own safety, or if it is deemed to be in their best interests. Such prisoners are accommodated in units with other people on voluntary segregation, who they can associate with, and they can withdraw from the units at any time.

¹⁰¹ OIA Request, above n 68, at 5; see also Prison Operations Manual, M.07.01-02.

¹⁰² OIA Request, above n 68, at 6.

¹⁰³ OIA Request, above n 68, at 6. The terminology for ethnicities is Corrections’ own.

Arohata (out of 11 total), and 22 orders (68 per cent) for Māori women at CWP (out of 32 total) in the same year; and

- ii) of the 142 orders at ARWCF in the 2020/21 financial year to 24 May 2021:
 - a) 82 per cent were for Māori women (117);
 - b) 12 per cent were for Pacific women (17);
 - c) 4 per cent were for European women (6); and
 - d) this compares to 31 orders (56 per cent) for Māori women at Arohata (out of 55), and 31 orders (49 per cent) for Māori women at CWP (out of 63) in the same year.

The comparison shows that the number of orders against Māori women has been increasing over the last five years at ARWCF disproportionate to the other two women's prisons: while the total number of orders has doubled at ARWCF, the proportion of those orders against Māori women has nearly tripled.¹⁰⁴ At Arohata, the proportion of orders against Māori women was relatively stable, and at CWP it decreased.

The disproportion exists not just between the prisons but between women inside ARWCF. As at 21 May 2021, Māori women comprised approximately 66 per cent of the prison population but were subject to 82 per cent of directed segregation orders.¹⁰⁵ By comparison, European women comprised 21 per cent of the prison population at ARWCF but were subject to 4 per cent of directed segregation orders; and Pacific women comprised 6 per cent of the population but were subject to 12 per cent of directed segregation orders.¹⁰⁶

B Pepper spray

Pepper spray was first authorised for use as a non-lethal weapon under the Regulations in 2010. At that time, however, the Regulations restricted when pepper spray could be issued to Corrections officers to wear on their hip for ordinary use. Perhaps due to pepper spray not being immediately available, it was not used in any women's prisons in the 2016 and 2017 calendar years.¹⁰⁷

¹⁰⁴ The number of directed segregation orders at ARWCF against Pasifika women has also more than doubled, while the number for Pākehā women has more than halved; OIA Request, above n 68.

¹⁰⁵ OIA Request, above n 68.

¹⁰⁶ OIA Request, above n 68.

¹⁰⁷ OIA Request, above n 68.

From July 2017, as a result of a policy shift and accompanying amendments to the Regulations,¹⁰⁸ all officers around the country started carrying pepper spray on their hip.¹⁰⁹ The Corrections Association (the union that represents front-line prison staff) told RNZ that this policy shift was due to increased threats to prison guards' welfare.¹¹⁰ Consequently, from 2018 all three women's prisons began to use ordinary pepper spray, and from that year onwards its use increased exponentially, especially at ARWCF.¹¹¹

With the normalisation of ordinary pepper spray, the use of "Cell Buster" (the brand of pepper spray that was sprayed under the women's prison cell doors) increased with it. Cell Buster was first authorised as a delivery method in 2012,¹¹² but was first used (in a men's prison) in 2016. It is only used in planned response incidents, and requires the Prison Director's approval. From 2016 to today, it has only been used 27 times across all New Zealand prisons (including the 15 men's prisons and the three women's prisons). Seven of those incidents were at ARWCF.¹¹³

The number of pepper spray incidents at ARWCF by year peaked in 2019. In that year it was used in 33 incidents: 27 in "individual carry" incidents, and six in "planned use" incidents (meaning the Cell Buster extractions). To put this in context of all women's prisons, this compares with three "individual carry pepper spray" incidents at Arohata and one at CWP, and no "planned use" incidents at those prisons, in the same year. In 2020 there were only two "planned use" incidents: one at ARWCF and one at CWP. In that year, ARWCF's "individual carry" incidents decreased to 12, and in the year to 21 May 2021 this figure further decreased to three.

Corrections was unable to provide information pertaining to pepper spray use against women prisoners broken down by ethnicity, as this information is not centrally recorded.¹¹⁴ The exact extent to which pepper spray is used

108 From "Restrictions on carrying pepper spray" (reg 123A, Corrections Regulations 2005 (reprint as at 21 October 2015)) to "Issue of pepper spray" (new reg 123B, Corrections Regulations 2005 (reprint as at 28 April 2020)).

109 Tom Kitchin, "Pepper spray use rises in prisons around the country, Corrections figures show" Radio New Zealand (7 September 2020) <www.rnz.co.nz>.

110 Kitchin, above n 109.

111 OIA Request, above n 68.

112 Letter from Rachel Leota (Department of Corrections) to redacted regarding C129626 Summary of cell buster pepper spray delivery system events (12 April 2021) (Obtained under the Official Information Act 1982 Request to Department of Corrections) [Letter C129626].

113 Appendix One C129626 to Letter C129626, above n 112.

114 OIA Request, above n 68. Corrections explained that in order to provide this information, staff would

against Māori versus non-Māori women is therefore unknown. However, it is noted that Judge McNaughton found that Cell Buster was used against Mihi four times,¹¹⁵ Karma has alleged it was used against her three times,¹¹⁶ and the planned use of pepper spray was only carried out at ARWCF seven times in the last five years (in 2019 and 2020).¹¹⁷ In a summary of the 27 times that Cell Buster has been used in all New Zealand prisons, five of them mention sprinklers being set off in the prisoner's cell,¹¹⁸ which matches the circumstances in which Mihi said she and the other women were pepper sprayed with Cell Buster at ARWCF.¹¹⁹ Even without clear statistics then, it appears that Cell Buster may have been disproportionately used against Māori women in prison.

Karma and Mihi have brought an application for judicial review, alleging that Cell Buster was not validly authorised under the Regulations, and that even if it was, its use is in breach of the New Zealand Bill of Rights Act 1990.¹²⁰ Specifically, they claim its use breaches s 9, the right not to be subjected to torture or cruel treatment, and s 23(5), the right of detained person to be treated with humanity and with respect for their inherent dignity.¹²¹ On 23 December 2020, in a decision declining interim relief pending resolution of the substantive claim, Ellis J said there might be “some real concerns” about the Regulations,¹²² and warned Corrections that “[i]t is to be hoped that the resultant uncertainty might be regarded as a relevant consideration in any future decision about whether to deploy the Cell Buster”.¹²³

C Office of the Inspectorate's notified inspection of ARWCF

The Office of the Inspectorate regularly reviews the compliance of New Zealand prisons with the legislative and regulatory requirements canvassed

be required to manually review a large number of files to complete a verification check, and a manual review of each individual's profile to determine how their ethnicity was recorded at the time of the incident.

115 *R v Bassett*, above n 2, at [86].

116 Claire Eastham-Farrelly “Cell Buster’ pepper spray okay for now, but Corrections put on notice” Stuff (23 December 2020) <www.stuff.co.nz>.

117 There were no planned uses of pepper spray at ARWCF in 2016–2018 or 2021; OIA Request, above n 68.

118 Appendix One C129626, above n 113.

119 *R v Bassett*, above n 2, at [90]; Espiner (24 November 2020), above n 5.

120 *Cripps v Attorney General* [2020] NZHC 3523. See also Guyon Espiner “Prisoner sues to stop pepper spray bombs that ‘make grown men cry’” Radio New Zealand (10 December 2020) <www.rnz.co.nz>.

121 Claire Eastham-Farrelly “Corrections signals pepper spray review on eve of prisoner’s court case” Stuff (17 March 2021) <www.stuff.co.nz>.

122 *Cripps v Attorney General*, above n 120, cited in *R v Bassett*, above n 2, at [86].

123 Eastham-Farrelly (23 December 2020), above n 116.

above. In June 2020, the Office conducted a notified inspection at ARWCF, and it released a report of its findings in January 2021 (2020 Report).¹²⁴

At the time of the inspection, the Prison Management Unit was accommodating ten women: five classified as maximum security, who had recently become subject to directed segregation orders for the purpose of maintaining safety and good order;¹²⁵ and five other women who were subject to directed segregation orders for their own protection.¹²⁶ Just prior to the inspection, a Visiting Justice had reviewed the length of time two of the women had been held on directed segregation (which was for more than three months). The Visiting Justice returned at least three-monthly for further reviews. The remaining women had been held in segregation for less time, and the Regional Commissioner's Office was maintaining oversight of their management and approving their directed segregation status. In short, the Office found that the Act and its Regulations in respect of directed segregation were being appropriately followed.

In addition, the Office found that “[e]ach maximum security prisoner had an up-to-date, tailored management plan”,¹²⁷ and that the plans for these women were “particularly good”. Staff told the Office that work had recently been undertaken to improve the standard of record-keeping and the management of women in the unit.

The Office did not conduct any inquiry or make any findings in respect of the use of pepper spray, but it did make findings in relation to “discipline”. It found that “the administration of the misconduct process was not working effectively at the site”,¹²⁸ and that in the high security and remand units, some custodial staff “did not communicate effectively with wāhine nor actively manage what we identified were demanding and confrontational prisoner behaviours”.¹²⁹ For the period September 2019 to February 2020, ARWCF staff had filed 496 misconduct charges.¹³⁰ Of these, 60 per cent were later withdrawn and 10 per cent cancelled. Custodial staff were aware of and “somewhat frustrated” by the high levels of withdrawn or cancelled misconduct charges,

124 Office of the Chief Inspectorate, above n 67.

125 Under the Corrections Act 2004, s 58(1).

126 Section 59(1).

127 Office of the Chief Inspectorate, above n 67, at 58.

128 Finding 57 at 8.

129 Office of the Chief Inspectorate, above n 67, Finding 58 at 8 and at [210].

130 At [205].

and felt the prosecutors only prioritised the more serious charges.¹³¹ On the other side, prosecution staff told the Office that at times it felt like staff were laying misconduct charges rather than actively managing women’s behaviour.¹³²

Relevantly, in early 2020, Corrections conducted its own Operational Review into lockdown hours at ARWCF. The Operational Review found that the prison may have developed a culture over the years whereby “many staff take a ‘punitive’ approach to their work, rather than a ‘humanising’ approach”.¹³³ For example, staff addressed women by their surnames rather than first names; applied use of force rather than first attempting to resolve issues with “more appropriate tactical communications”; and the Custodial and Health teams not always working together or in the best interests of the women. The Operational Review recorded that the “humanising aspect of *Hōkai Rangi*, which is also due to be rolled-out on site, will further assist the re-set and go some way to changing the “punitive” culture which currently exists in pockets” at ARWCF.¹³⁴

V THE WAKE OF MIHI BASSETT’S CASE

So far, this article has canvassed the facts of Mihi Bassett’s case and the wider context in which it sits. This included the historical and contemporary context of our prisons; the place of wāhine Māori in our prison system; and the increasing use of segregation and pepper spray against women in prison, and in particular Māori women at ARWCF where a “punitive culture” existed in pockets. Those factors are integral components to the story of Mihi’s life in prison. This Part now returns to that story: to the preliminary findings of the Chief Inspector’s Special Investigation; the Minister and Department of Corrections’ response in the immediate aftermath of Mihi’s case; and the events since, including Corrections’ launch of the *Women’s Strategy 2021* and the release of the Chief Inspector’s final Special Investigation report.

A *Preliminary findings of the Chief Inspector*

After the significant interest in Mihi Bassett’s case, the Chief Inspector conducted a Special Investigation into ARWCF’s management of Mihi, Karma

¹³¹ At [209].

¹³² At [208].

¹³³ Department of Corrections *Operational Review: Focus on various areas of custodial practice across Auckland Region Women’s Correctional Facility (ARWCF) over a four-month period (January–April 2020)* (25 May 2020) [Operational Review] at [12].

¹³⁴ At [12].

and Tarina in the Prison Management Unit. On 17 March 2021, the Chief Inspector released a preliminary indication of her investigation findings and recommendations to the Minister (preliminary findings).¹³⁵ The preliminary findings “confirm[ed] the criticisms” that Judge McNaughton made of ARWCF in the District Court, although the Chief Inspector indicated she was focussed on the factual position and did not intend to make findings or comments about the cruelty or inhumanity of the management regime.¹³⁶

The Chief Inspector found that the three women were initially managed according to the Prison Operations Manual and the Regulations, but that management of the women gradually departed from some of these requirements from April 2019.¹³⁷ This culminated in a regime that was highly restrictive and contrary to minimum entitlements. Overall, the Chief Inspector considered that unit staff lacked proper oversight and guidance, and noted: “[t]heir behaviour appears to be reactive rather than strategic: dealing with issues locally and informally instead of ensuring that procedure was followed.”¹³⁸

The preliminary findings canvassed four broad themes that essentially reflected those canvassed by Judge McNaughton. First, the women were being housed in confinement cells for reasons not directly connected to disciplinary matters.¹³⁹ Prisoners were effectively kept segregated without following the process for directed segregation.¹⁴⁰

Second, use of force became “frequently necessary”, but was not being reviewed as required by policy.¹⁴¹ The Chief Inspector found that staff generally used force only as a last resort, and, contrary to Judge McNaughton’s findings, “there was no evidence of any deliberate cruelty from staff, or efforts to break the spirits of wāhine”.¹⁴²

Third, staff began dealing with issues more informally than was appropriate.¹⁴³ For instance, prisoner complaints were not being elevated, even where serious (for example, a complaint from Karma that a staff member had

¹³⁵ Office of the Inspectorate *Special Investigation into the management of three prisoners at Auckland Region Women’s Corrections Facility: Preliminary indication of investigation findings and recommendations* (17 March 2021) [Preliminary Findings] at 2.

¹³⁶ At 5–6.

¹³⁷ At 7–8.

¹³⁸ At 17.

¹³⁹ At [8.1]

¹⁴⁰ At [11]

¹⁴¹ At [8.2]

¹⁴² At [16].

¹⁴³ At [8.3].

choked her).¹⁴⁴ As another example, misconduct charges were not routinely filed. This meant an absence of proper consideration and appropriate remedial steps,¹⁴⁵ whereas initiating the proper disciplinary process may well have made clear that the women were already effectively under disciplinary confinement.¹⁴⁶

Fourth, while prison management plans were in place, some elements were inappropriate or unnecessary, and the plans seemed to be rolled over without consideration.¹⁴⁷ This is despite the plans being signed off by the Residential Manager and Deputy Prison Director, and discussed at multidisciplinary team meetings.¹⁴⁸ Although a number of unit staff were clear that they did not like the plans or consider them appropriate, they lacked the confidence to challenge them.¹⁴⁹

Importantly, the Office found that the management plans were “based on maximum security male prisoners”. They required, for example, that:¹⁵⁰

- i) At least three staff were required to unlock a cell. “Corrections officers would often arrive in large numbers, which tended to escalate prisoner behaviour.”
- ii) Prisoners stand at the back of the cell before the door is opened. “This may be unnecessary for women, and appears in this case to have exacerbated tensions.”

Prisoners needed to follow precise instructions when food was delivered, including to kneel on the floor before the cell was opened. The management plans stated that not following instructions should be taken as a refusal to eat, so if the women did not comply then food would often be withheld and not re-offered. In addition, the plans were being implemented in a way that “went beyond reasonable management”.¹⁵¹ In one video, staff had withheld food from Karma because she was sitting at the opposite end of the cell but refused to kneel when instructed.

The Chief Inspector indicated her likely recommendations to Corrections

¹⁴⁴ At [8.3] and [25.1].

¹⁴⁵ At [8.3]. Also see [27].

¹⁴⁶ At [28].

¹⁴⁷ At [21]–[23].

¹⁴⁸ At [22].

¹⁴⁹ At [22]–[23].

¹⁵⁰ At [21.1]–[21.3].

¹⁵¹ At [21.3].

would be to address the findings and confirm that no prisoners are subject to a similar management regime throughout the prison network, and review the use of management plans across the prison network generally;¹⁵² consider the staffing, management and oversight of ARWCF in order to provide assurance that no other systemic issues persist;¹⁵³ and review the use of the maximum security classification for women.¹⁵⁴ As to this last recommendation, the Chief Inspector questioned whether the maximum security classification for women, which was only introduced in 2009, was appropriate for women at all given the low numbers at any one time to allow socialisation.¹⁵⁵

B Response of the Minister and Department of Corrections

It is clear from the Minister's response to Mihi Bassett's case that the Chief Inspector's preliminary findings hold significant sway. On 22 March 2021, the day that Mihi was sentenced, a media release on the Parliament website announced that Minister Davis had received the preliminary findings.¹⁵⁶ He was quoted as saying that the "failings highlighted in the Chief Inspector's report are unacceptable. The lack of oversight and leadership has had a major impact on prisoners... I want and expect better from Corrections..."

Significantly, the Chief Inspector's observation that the women's management plans were "based on maximum security male prisoners" appeared to have struck a chord with the Minister. Addressing reporters in Parliament, Minister Davis made various comments about the treatment of women prisoners versus men prisoners, including that "[i]t's inappropriate for women in prison to be treated as if their needs were the same as male prisoners", and that:¹⁵⁷

"It is important that the management of women is appropriate to women. And the system has basically been designed around managing men, and I just don't think in this day and age – and it has probably never been appropriate that women and their needs have been treated as if they are men."

152 At [31.1] and [31.4].

153 At [31.2].

154 At [31.3].

155 At [31.3].

156 Hon Kelvin Davis "Minister directs Corrections to overhaul processes and management of women in prison" Beehive (22 March 2021) <www.beehive.govt.nz>.

157 *Radio New Zealand*, above n 3.

The Minister set out his expectations for Corrections in a letter to the Chief Executive, to immediately improve processes and overhaul the management of women in prison, “to ensure prisoners are treated in a way that fulfils the aims of... *Hōkai Rangī*”.¹⁵⁸ The Minister’s expected actions of Corrections included (among other things):¹⁵⁹

- i) accepting the Office of the Inspectorate’s preliminary findings and recommendations;
- ii) outlining in a detailed plan how Corrections would address systemic issues raised about ARWCF;
- iii) overhauling the maximum-security classification for women, the development of management plans for women, and commencing a review of all women’s prisons; and
- iv) ensuring that additional training was provided to frontline custodial staff with a focus on use of force, segregation, use of cells and searches, and management of difficult situations.

Overall, Minister Davis told the media that Corrections was “looking at many things to make life more bearable for prisoners,” and expressed confidence that the proposed actions in response would go “some way in helping to address these issues”.¹⁶⁰ He said that it was now appropriate for Corrections to apologise to the women, and that as the Minister, “I will also apologise for the harm caused, given the system I am responsible for failed to treat them in line with what is right, what is good and what is promised in *Hōkai Rangī*”.¹⁶¹

In a statement, Corrections said representatives met with each of the women on 19 March 2021, after the Chief Inspector provided the Department with the preliminary findings, and had acknowledged and apologised to the women for the way they were managed at ARWCF between February 2019 and February 2020.¹⁶² Corrections said that it would await the Inspectorate’s final

¹⁵⁸ Hon Kelvin Davis, above n 156.

¹⁵⁹ Letter from Minister of Corrections Kelvin Davis to Chief Executive of the Department of Corrections, Jeremy Lightfoot (22 March 2021) cited in Justin Giovanetti “Review, apologise, overhaul: Kelvin Davis dramatically changes tune on women’s prison abuses” *The Spinoff* (22 March 2021) <thespinoff.co.nz>.

¹⁶⁰ Tumamao Harawira “Corrections told to buck up its ideas on the treatment of prisoners” *Te Ao Māori News* (24 March 2021) <www.teaomaori.news>.

¹⁶¹ *Radio New Zealand*, above n 3.

¹⁶² Department of Corrections “Media release from the Department of Corrections” (23 March 2021) [Media Release].

findings to determine its full response, but that all recommendations would be accepted. It had already acted on the various recommendations of the preliminary findings and the directions from the Minister in the meantime, and began to implement those changes at ARWCF.

C Final findings of the Special Investigation

While writing this article, the Chief Inspector released the final findings into her Special Investigation (final findings).¹⁶³ The final findings mirrored and expanded on the preliminary findings, but importantly the Chief Inspector was able to incorporate the women’s own perspective into the narrative of the final report. (The Office had interviewed two of the women in person, and reviewed the court’s evidence transcript for Mihi’s disputed facts hearing for the third.)¹⁶⁴

The Chief Inspector explained that the timing of the Special Investigation ran in parallel with the Office’s notified inspection of ARWCF in June 2020.¹⁶⁵ She acknowledged that the 2020 report did not deal directly with some of the matters dealt with in the Special Investigation, given the Special Investigation was the more appropriate forum to go into detail about those matters. Clear inconsistencies, for example, can be seen in the Office’s different findings about the legality of the women being held in de facto segregation, and the quality of their management plans. The 2020 report failed to identify that “wāhine were being housed in confinement cells for reasons not directly connected to disciplinary matters”, and that “prisoners were effectively kept segregated without following the process for directed segregation”.¹⁶⁶ In the 2020 report, the Office had found that “each maximum-security wāhine had an up-to-date, tailored management plan”,¹⁶⁷ and that the plans for the maximum-security women were “particularly good”.¹⁶⁸ This is a long way from the Chief Inspector’s view in the preliminary findings that the management plans were inappropriately “based on maximum-security male prisoners”, and

163 Office of the Chief Inspectorate *Special Investigation: Report of investigation into the management of three wāhine at Auckland Region Women’s Corrections Facility* [Final Findings] (9 September 2021).

164 At 10 and 17–22.

165 At 13.

166 Preliminary Findings, above n 135, at [8.1] and [11]; and see the Final Findings, above n 163, at 84–86.

167 Office of the Chief Inspectorate, above n 67, finding 54 at 8.

168 Media Release, above n 162.

that Corrections should review the use of the maximum-security classification for women more broadly.¹⁶⁹

Disappointingly, neither report inquired into the use of pepper spray or the use of Cell Buster more specifically—both of which, it is clear from the publicly-available statistics, had increased at ARWCF since 2018. Coupled with Corrections’ own identification of a “punitive culture” at ARWCF,¹⁷⁰ the statistics should have been especially concerning to the Office. The Chief Inspector explained that her Final Findings deliberately avoided conclusions about the authorisation and use of pepper spray, in light of [Karma and Mihi’s] application for judicial review against Corrections, challenging the authorisation and use of Cell Buster.¹⁷¹

D Women’s Strategy 2021

On the same day the Chief Inspector’s final findings were publicly released, Corrections launched its updated *Women’s Strategy 2021*. As noted in Part III above, the *Women’s Strategy 2021* improves significantly on the promises of the 2017 Strategy to be “culturally responsive” to (Māori) women’s needs—both substantively and by the process in which the 2021 Strategy was formulated. For example, the *Women’s Strategy 2021* begins to hone in on some of the marginalised experiences of Māori women compared to non-Māori women.¹⁷² It applies tikanga Māori values and concepts, such as viewing wāhine both as individuals and as part of their collective (for example their family, whānau, hapū and iwi),¹⁷³ and demonstrates how those values and concepts can be applied practically, and in a healing way for the benefit of women in Corrections’ care.¹⁷⁴ It sets out initiatives specifically for wāhine Māori, such as “Te Waireka”, which is “an innovative ‘by Māori for Māori’ residential therapeutic

169 Final Findings, above n 163, at 7.

170 Operational Review, above n 133, at [12].

171 Final Findings, above n 163, at 5.

172 *Women’s Strategy 2021*, above n 81: For example, by referencing the effects of colonisation (at 6), and the cyclical effects on tamariki Māori (Māori children) of having generations of māmā Māori (Māori mothers as primary caregivers) in prison (at 8).

173 At 14. More broadly, one of the four “focus areas” in the 2021 Strategy is “Holistic approaches –see the whole of me”, which envisages that women in prison will be “seen in the context of [their] whole” (at 14 and 18).

174 *Women’s Strategy 2021*, above n 81: For example, by contextualising tikanga Māori principles such as manaakitanga (“staff I work with are welcoming and encouraging”, at 19), whanaungatanga (“staff take the time to get to know me and my circumstances”, at 19), and whānau, whakapapa and whare tangata (family connections, lineage and women as the sacred house of humanity, at 15).

community that provides reintegrative support for Māori women”;¹⁷⁵ as well as other initiatives that may not be specifically for wāhine but are nonetheless informed by tikanga and kaupapa Māori, such as the “Te Pae Oranga” pilot that will support women to transition out of prison.¹⁷⁶ It also acknowledges the role of the Crown in the disproportionate imprisonment rates of Māori, as found by the Waitangi Tribunal in its failure to prioritise the reduction of the high rate of Māori reoffending.¹⁷⁷

Importantly, the *Women’s Strategy 2021* was formulated in close consultation and engagement with “predominantly” wāhine Māori, including those with lived experience of the corrections system.¹⁷⁸ Corrections stated that this engagement represented its ongoing commitment to Te Tiriti o Waitangi and partnering with Māori to achieve better outcomes.¹⁷⁹

However, while the *Women’s Strategy 2021* incorporated these, and other aspects of te reo, tikanga and the history of Māori, it does not appear to be informed by Mana Wāhine theory and did not seek to implement a Mana Wāhine approach. Especially in light of the Waitangi Tribunal’s findings, this is a significant missed opportunity for Corrections to revolutionise, rather than just improve, its treatment and care of Māori women. The next Part advocates for a Mana Wāhine approach toward Māori women in Corrections’ care in the short to medium term, and fully analyses the extent to which the *Women’s Strategy 2021* does or does not incorporate a Mana Wāhine approach already.

VI ANALYSIS

There is whakaaro and kōrero, among Māori working with and within the law, that there must be progressive change within current systems, as well as an overarching vision for structural change. The objectives are multi-faceted. In the long term, structural and transformative change is necessary to create a more fair, just and equitable society, and to realise the vision for Aotearoa under Te Tiriti and the Treaty of Waitangi. In the meantime, Kaupapa Māori approaches are necessary to address the consequences of inequality as a result of colonisation, and to create better outcomes for Māori. One cannot work

175 At 10.

176 At 20.

177 At 8; see Waitangi Tribunal “Tu Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates” (WAI 2540, 2017).

178 *Women’s Strategy 2021*, above n 81, at 2.

179 At 2.

without the other, and those working within the system cannot lose sight of the overall vision, otherwise they risk becoming part of the problem.

This thinking provides a framework for analysing the two camps of critique of the response to Mihi Bassett’s case. The first camp would hold that the corrections system, and the wider criminal justice system that it sits within, requires transformative, structural change—the long-term vision for which the Department and the Minister currently lack. The second camp would hold that the Minister’s directions and Corrections’ actions in the short to medium term are insufficient, because they do not go far enough to put wāhine Māori at the centre of the proposed solutions. Both critiques are valid. Both tell us that while the response to Mihi Bassett’s case has been positive—in the sense that the Department and the Minister have apologised to the women personally for their treatment, and that what happened to Mihi has become a catalyst for change—it has also been underwhelming, and is simply not enough.

A Structural and transformative change is necessary

As has been canvassed above, the New Zealand corrections system is just one part of the broader criminal justice system inherited from Britain. Since its inception in Aotearoa, these systems have failed Māori and have failed women, and in particular have failed Māori women—as demonstrated by the exponential increase in their incarceration, disproportionately harsh treatment, and lack of any cultural and gender-specific response for Māori women. So although what happened to Mihi was horrifying, it was perhaps not so shocking as to defy belief. As JustSpeak director Tania Sawicki-Mead said about the focus on punishment in prisons, “it is not an accident that horrific stories like [Mihi’s] keep being unearthed from prisons across the country – it’s a feature of an outdated colonial system that needs to be radically transformed”.¹⁸⁰

As Jared Davidson has pointed out, the State’s response to Mihi Bassett’s case is typical.¹⁸¹ He says that as long as prisons in New Zealand have existed, there have been countless commissions, reviews and reports drawn up, tabled and then quietly filed away. Moana Jackson’s *He Whaipaanga Hou*,¹⁸² and Sir Clinton Roper’s *Te Ara Hou: The New Way*,¹⁸³ which both proposed fundamental

180 Alex Braae “The Bulletin: pepper-spray, solitary confinement incidents show prison culture” *The Spinoff* (25 November 2020) <www.thespinoff.co.nz>.

181 Davidson, above n 69.

182 Moana Jackson *The Maori and the Criminal Justice System – A New Perspective – He Whaipaanga Hou* (Department of Justice, Wellington, February 1987) [He Whaipaanga Hou].

183 Sir Clinton Roper *Prison Review: te ara hou = the new way* (Ministerial Committee of Inquiry into Prisons System, Wellington, 1989) [Te Ara Hou].

transformative approaches to justice, were heralded as landmark reports over thirty years ago. But in the decades since, reforms to criminal justice have been ad hoc, with only minor improvements made “to a system that is inherently broken”.¹⁸⁴ The inadequacies of the prison system and its proposals for reform are noted by the government of the day, “only for another report some years down the track to make exactly the same criticisms”.¹⁸⁵

The authors note, for example, that Minister Davis’ promise to “look at what is appropriate for the management of women in prisons”¹⁸⁶ was already promised in the *Women’s Strategy 2017*, which proclaimed that “our corrections system has largely been built around the needs of male offenders... Our women’s strategy redresses that imbalance, based on international best practice and our own research into what works best”.¹⁸⁷ Belying the Minister’s statement about wanting to “make life more bearable for prisoners”, there also appears to be some reliance on, and acceptance of the same prison institutions that have failed Māori, women, and Māori women since their implementation. It is this lack of insight into the genealogy of the corrections system and its failings that has earned the critique that the proposed steps to make women’s prisons “more gender-conscious” is only “a band-aid solution to a systemic issue”.¹⁸⁸ This is not to say that the response so far, or the impending changes, are not necessary or important, just that these proposed changes cannot be the only changes. Change will also take a lot more than the effort of the Department of Corrections alone. The Department and its Minister should look to independent experts for guidance on reforming—not just improving—the corrections system. One such independent group of experts is Te Uepū Hāpai i te Ora.

In 2018, Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group (Te Uepū) was tasked with leading public discussion to develop proposals that addressed the failures of the criminal justice system.¹⁸⁹ The resounding call in its first report, *He Waka Roimata*, was one of no confidence in the criminal justice system, and for urgent transformative change.¹⁹⁰ Te

184 Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *Turuki! Turuki! Transforming our criminal justice system* (2019) [*Turuki! Turuki!*] at 3.

185 Davidson, above n 69.

186 Radio New Zealand, above n 3.

187 *Women’s Strategy*, above n 65, at 3.

188 Davidson, above n 69.

189 *Turuki! Turuki!*, above n 184, at 9.

190 Te Uepū Hāpai i te Ora—Safe and Effective Justice Advisory Group *He Waka Roimata – Transforming our criminal justice system* (2019). “He Waka Roimata” translates to “a vessel of tears”.

Uepū's recommendations for transformation were outlined in its second report, *Turuki! Turuki!*¹⁹¹ Te Uepū said it was not advocating for minor measures but laying out a pathway for transformation. It presented the challenge not just to those in Government and Parliament, but to everyone involved with the criminal justice system, and to all New Zealanders.¹⁹²

Of particular importance to the discussion about structural change, *Turuki! Turuki!* made tangible recommendations for reformation of the prison system, and for an increased focus on the rehabilitation of offenders rather than punishment per se.¹⁹³ Among other things, these recommendations included the gradual replacement of most prisons with community-based “habilitation” centres—clearly contrary to the system’s current reliance on prison institutions. The report acknowledged that it was Sir Clinton Roper who first recommended community-based therapeutic centres thirty years prior, when New Zealand’s prison population was at 30 per cent of today’s levels. At that time, Sir Clinton wrote that prisons “have failed both as a deterrent and as a rehabilitative measure, [and] it follows that their central role in the criminal justice system must be displaced”.¹⁹⁴ It was his vision that habilitation centres would be places where people who had harmed could be held to account and supported to address their offending.¹⁹⁵ According to Te Uepū, the term “habilitation” differs from “rehabilitation” in that the focus is on supporting a person to learn, retain and enhance skills and ways of living in the world that they had never had the opportunity to learn previously.¹⁹⁶ The idea of habilitation implies a therapeutic rather than punitive setting, enabling offenders to examine their lives and, with support, find the motivation to cease offending and start a new life. The authors consider there are important symmetries in this approach with traditional Māori approaches to justice, for example by focusing on rehabilitation and reintegration rather than punishment, including a lesser reliance on confinement as a means of that punishment, as the logical conclusion of the criminal justice process.

In the context of transformation for New Zealand’s constitution, Moana

191 *Turuki! Turuki!*, above n 184. “Turuki! Turuki!” is a traditional call to the crew of a waka or canoe being portaged, or anyone trying to move a large inert object or create a forward motion with urgency – it was a call for collective action.

192 *Turuki! Turuki!*, above n 184, at 7.

193 At 53.

194 *Te Ara Hou*, above n 183, cited in *Turuki! Turuki!*, above n 184, recommendation 11 at 53.

195 *Te Ara Hou*, above n 183, at 4, cited in *Turuki! Turuki!*, above n 184, recommendation 11 at 53.

196 *Turuki! Turuki!*, above n 184, endnote 91 at 58.

Jackson has written that Te Tiriti and the Treaty of Waitangi suggested a constitutional framework “that could be unique to this land”.¹⁹⁷ He said it is always difficult to change what is seen as the reality, especially when the current reality is experienced as an entrenchment and privileging of power and wealth for some in our society. But:¹⁹⁸

...the idea of a different constitutional arrangement as a way of doing politics differently has always been present... It is certainly not diminished because it has been denied by others or by the fact that the challenge to exercise it seems too hard or unrealistic. Instead, it is the imaginative and very real hope for something different that has remained alive, like the flickering flame of ahi kaa.

Similarly, it may be said that Te Tiriti and the Treaty of Waitangi envisaged something greater than the current reality of our corrections system; something greater than simply substituting Māori approaches with British systems—especially when the majority of people who are forced to traverse those systems are Māori. The *Turuki! Turuki!* recommendations are mere examples of what the overarching vision for structural change could entail; the full picture will be much more complex. Decarceration certainly is not so simple as “opening the doors and letting prisoners free and run wild”,¹⁹⁹ as Te Uepū recognises in its challenge not just to those in Government and Parliament, but to all New Zealanders.²⁰⁰ So while the Minister and Department of Corrections must absolutely focus on the short-term and medium-term recommendations and actions in response to Mihi Bassett’s case, those proposed changes cannot be the only changes. And those working with and within the system cannot become complacent with the current system and lose sight of the overall vision for structural change, otherwise we risk becoming part of the problem rather than the solution.

197 Jackson (23 September 2017), above n 62, writing about Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation (2012–2015).

198 Jackson (23 September 2017), above n 62.

199 As per Minister Davis’s offhand comments about the goals of People Against Prisons Aotearoa, quoted in Tumamao Harawira “Corrections told to buck up its ideas on the treatment of prisoners” *Te Ao Māori News* (24 March 2021) <www.teaomaori.news>.

200 *Turuki! Turuki!*, above n 184, at 7.

B Wāhine Māori-centred solutions are necessary in the meantime

Structural and transformational change to the criminal justice system is absolutely necessary. In the meantime, wāhine Māori-centred solutions are required to create better outcomes for Māori women in prison, and to address the consequences of their inequality as a result of colonisation. Corrections should do this by employing not only a Kaupapa Māori approach, but a “Mana Wāhine” approach—one that puts wāhine Māori and their interests at the centre of decision making.²⁰¹

Mana Wāhine theory, as a theoretical framework or approach, derives from Kaupapa Māori.²⁰² Kaupapa Māori is a “decolonising methodology” that can be described as a method, framework or approach that places Māori people and Māori practices at the centre of a given initiative or project.²⁰³ Mana Wāhine, then, as a “daughter” of Kaupapa Māori, is an approach to an initiative or project that places Māori women, and the primary concerns of Māori women, at its centre.²⁰⁴ The theory integrates the priorities of Kaupapa Māori, which are te reo Māori me ona tikanga (Māori language, practices and culture), with more feminist theory-oriented interests of gender, class, race and sexuality.²⁰⁵ Western feminist theory alone could never capture the unique position of Māori women, at the intersection of “being Māori, female... and living with the legacy of colonisation,”²⁰⁶ just as theories founded on asserting collective Māori autonomy and sovereignty are not specifically designed to focus on the experiences of Māori women.²⁰⁷

To take a Mana Wāhine approach goes much further than intersectional

201 Elisabeth McDonald, Rhonda Powell, Mamari Stephens and Rosemary Hunter “Introducing the Feminist and Mana Wāhine Judgments” in *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Oxford and Portland, Oregon, 2017) 25 at 42.

202 J Hutchings “Mana Wāhine me Te Raweke Ira: Māori Feminist Thought and Genetic Modification” (2005) 19 *Women’s Studies Journal* 48, cited in McDonald, Powell, Stephens and Hunter, above n 201, at 41.

203 McDonald, Powell, Stephens and Hunter, above n 201, at 41.

204 At 42.

205 Kuni Jenkins and Leonie Pihama “Matauranga Wāhine: Teaching Maori Women’s Knowledge Alongside Feminism” in Leonie Pihama, Linda Tuhiwai Smith, Naomi Simmonds, Joellee Seed-Pihama and Kirsten Gabel (eds) *Mana Wāhine Reader: A Collection of Writings 1999-2019, Volume II* (Te Kotahi Research Institute, Hamilton, 2019) 38 at 39.

206 McDonald, Powell, Stephens and Hunter, above n 201, at 42.

207 Leonie Pihama “Mana Wāhine Theory: Creating Space for Maori Women’s Theories” in Leonie Pihama, Linda Tuhiwai Smith, Naomi Simmonds, Joellee Seed-Pihama and Kirsten Gabel (eds) *Mana Wāhine Reader: A Collection of Writings 1999-2019, Volume II* (Te Kotahi Research Institute, Hamilton, 2019) 60 at 61.

feminism. Being intersectional means understanding how women’s gender and ethnic identities (as well as other identities such as class, education, ability, sexuality, etc) combine to create different modes of discrimination and privilege. There are glimmers of this in the *Women’s Strategy 2017* and *Women’s Strategy 2021*, with both versions promising that Corrections will be “culturally responsive to meet women’s needs”,²⁰⁸ and the 2021 Strategy acknowledging (among other things) the intergenerational trauma of wāhine as a result of colonisation,²⁰⁹ and the Crown’s failure in addressing reoffending rates of Māori;²¹⁰ and in *Hōkai Rangī*, recognising that wāhine have “specialised needs” that need to be addressed within Corrections.²¹¹ But to take a Mana Wāhine approach to the corrections system would go further. It is more than just seeing wāhine Māori as a distinct identity with distinct needs in a diverse contemporary New Zealand—but seeing them, as individuals and as a collective, in their true light and potential as promised in te ao mārama.²¹² It means an explicit recognition and understanding of the inherent mana and tapu of wāhine Māori in te ao Māori. It requires acknowledgement and definition of the specific effects of colonisation suffered by wāhine (including as distinct from those of tāne),²¹³ and of the challenges and needs of wāhine in prison in a colonised Aotearoa. It requires a distinct and targeted plan for the treatment and rehabilitation needs of wāhine Māori that is rooted in te ao Māori and traditional Māori views of justice such as those described by Moana Jackson, as well as trauma-informed practices to best respond to the complex realities of contemporary Māori women’s lives. It requires an attitudinal shift in Corrections leadership, officers and staff based on traditional Māori values such as whakamana, manaakitanga and aroha. And it requires the Department

208 *Women’s Strategy*, above n 65, at 11; *Women’s Strategy 2021*, above n 81, at 4, 6, 10, 13 and 20.

209 *Women’s Strategy 2021*, above n 81, at 6.

210 At 8.

211 *Hōkai Rangī*, above n 89, at 20.

212 “Te ao mārama” means “the enlightened world” or “world of light”, and in Te Ao Māori can represent opportunity and potential. See Chief Judge Heemi Taumaunu’s media release on the District Court’s new “Te Ao Mārama model” for an explanation of the potential of an approach based on te ao mārama being implemented in the criminal justice system: Chief District Court Judge for New Zealand, Judge Heemi Taumaunu “Transformative Te Ao Marama model announced for District Court” (press release, 11 November 2020) <www.districtcourts.govt.nz>.

213 The Waitangi Tribunal’s “Mana Wāhine Kaupapa Inquiry” is underway, relevantly inquiring into “the alleged denial of the inherent mana and iho of wāhine Māori and the systemic discrimination, deprivation and inequities experienced”, as distinct from Māori men, as a result of Crown breaches of the Treaty of Waitangi. See: Waitangi Tribunal Mana Wāhine Kaupapa Inquiry (Wai 2700, in progress) <waitangitribunal.govt.nz>.

of Corrections to further acknowledge the role of it and its predecessors, as an arm of the Crown, in perpetuating inequalities, such as the disproportionately harsh treatment and intergenerational trauma of Māori women in prison.²¹⁴

It should be obvious then, why, although the *Women's Strategy 2021* significantly improves upon the *Women's Strategy 2017*, it does not go far enough to put wāhine at the heart of its solutions. It is not a Māori women's strategy but remains a strategy for all women, albeit with several key improvements for the care of wāhine Māori. Not creating a Mana Wāhine strategy was a significant missed opportunity for Corrections to revolutionise, rather than just improve, its treatment and care of Māori women. This is especially so in light of the Waitangi Tribunal finding that the Crown breached its obligations under Te Tiriti and the Treaty of Waitangi by failing to specifically address the overrepresentation of Māori,²¹⁵ and in circumstances where wāhine Māori still comprise 66 per cent of the women's prison population (which has increased from 62 per cent in May 2021).²¹⁶ The fact that Corrections acknowledged both of these realities for wāhine, but chose to update the *Women's Strategy* rather than create a Mana Wāhine strategy for them, is disappointing.

Similarly, although *Hōkai Rangī* is a strategy deliberately designed to implement “overarching” and “systemic” change for all Māori prisoners, it is not a “Māori women's” strategy. The fact that Māori women are covered by both strategies, but there is no specific space in the corrections system carved out for them, is a fundamental feature of our corrections system creating amendments to the system that are only minor and ad hoc, like patchwork. Instead, applying a Mana Wāhine approach, Corrections should implement a strategy specifically for wāhine Māori that puts their experiences, needs and interests at the centre.

It is envisaged that the overarching goal of a Mana Wāhine approach would be a better *quality of care* for wāhine in the corrections system, rather than a target for a reduction in reoffending or similar—just as tikanga is about the correct *way* of doing things, rather than arriving at one correct answer or solution. It is envisaged that tangible outcomes such as better engagement in rehabilitation and a decrease in recidivism, and over time breaking cycles

214 The Department of Corrections' role in failing to the disproportionate reoffending rates of Māori was canvassed in the Waitangi Tribunal report “Te Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates” (WAI 2540, 2017).

215 *Women's Strategy 2021*, above n 81, at 8; also see Waitangi Tribunal, above n 210.

216 Compare *Women's Strategy 2021*, above n 81, at 7 and OIA Request, above n 68.

such as the intergenerational trauma of whānau members in prison, would flow organically from this creation of a fairer, more understanding, trauma-informed and quintessentially Mana Wāhine approach for wāhine that is embedded in the values of te ao Māori.

These changes may require legislative and regulatory reform, for example to the Corrections Act and its Regulations,²¹⁷ and changes to internal policies and practices (including monitoring practices) such as the Prison Operation Manual. Most importantly, it will require Corrections to openly commit to addressing the inequality of Māori women in the corrections system by taking positive steps toward reforming itself of its own systemic, racist treatment of Māori women. In the authors' view, the creation of a Mana Wāhine approach in the corrections system is certainly a goal that can be met in the medium term, provided appropriate resourcing is allocated and counsel sought on the creation and implementation of such an approach. This would certainly be warranted in light of 66 per cent of women in prison being Māori, and treating the fact that wāhine Māori are the most incarcerated indigenous women in the world as the crisis that it is.

VII CONCLUSION

Prisons are such an accepted part of the criminal justice system today that their relatively recent introduction, both in Britain and Aotearoa New Zealand, is forgotten.²¹⁸ Incarceration is accepted as a natural, inevitable and necessary part of managing crime. But if the history of the British justice system in Aotearoa tells us anything, it is that the approaches and policies within the corrections system have not evolved very much over the last 181 years, and the deficiencies of a system not designed for women, or for indigenous people, have exacerbated over time. Today, Māori women are significantly overrepresented in the prison population and are the subject of disproportionately harsh treatment—such as the punitive use of segregation and pepper spray—and stories like Mihi Bassett's are just “a feature of an outdated colonial system”.²¹⁹ The Minister

²¹⁷ Section 6 of the Correction Act 2004 (“principles guiding corrections system”) could be amended to be more aspirational, for example, similar to the aspirational operating principles in sections 12 and 14 of the Kāinga Ora-Homes and Communities Act 2019 that govern the functions and powers of the Crown's social housing provider (for example, “to contribute to sustainable, inclusive and thriving communities..” in section 12 of that Act).

²¹⁸ Jackson (23 September 2017), above n 62.

²¹⁹ Per Tania Sawicki-Meda, Director of JustSpeak, quoted in Alex Braae, above n 180.

and the Department’s proposed changes as a response to her case do not go far enough, and are merely a continuation of the past 181 years.

Mihi’s story gives rise to important questions about the way we treat some of the “most vulnerable and disadvantaged and damaged citizens” in our society— wāhine Māori.²²⁰ So while the Crown’s case against Mihi ended with her sentencing on 22 March 2021, the ripple effects continue. While the Minister and the Department of Corrections’ actions taken in response to Mihi’s case have been positive, necessary and important, they could also go significantly further to achieve better outcomes for wāhine Māori in the corrections system. Adopting a Mana Wāhine approach to the care of wāhine in the short to medium term is a relatively simple suggestion for improvement, that would create a significant impact.

In the long term, the corrections system requires fundamental overhaul. With calls for “transformative change” loud and clear from justice and prison advocates, from advisory and independent working groups such as Te Uepū Hāpai i te Ora, and as early as thirty years ago from Moana Jackson and Sir Clinton Roper, perhaps now we are mature enough as a country to accept that the current corrections system—and the criminal justice system as a whole—is ineffective, harmful and requires urgent structural change. The vision for a new system of justice is not diminished by those who seek to deny or oversimplify the concept of decarceration, or by the fact that the challenge seems difficult at this point in time. Aotearoa must continue to challenge the current reality, and keep the vision for structural, transformative change alive “like the flickering flame of ahi kaa”.²²¹

On our journey toward structural change, we remember the words of Judge McNaughton to Mihi on her final day in court, encouraging her to “be strong, be brave, and be steadfast” on her journey through prison, and for a fresh start outside of it: Kia kaha, kia toa, kia manawanui e.

220 Per Judge McNaughton’s sentencing notes, *R v Bassett*, above n 2, at [20].

221 Jackson (23 September 2017), above n 62.