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MICHAEL JONES : A THERAPEUTIC LEGACY

David B. Wexler¹

On December 31, 2017, all of us—his loving family, his many friends, his Arizona bar and judicial colleagues, his faculty colleagues, staff and students, and indeed the entire worldwide therapeutic jurisprudence (TJ) community—lost Michael Jones, a gentle, multi-talented, inspirational, and larger-than-life man.

How wonderful and appropriate for Arizona Summit’s *International Journal of Therapeutic Jurisprudence* to dedicate this entire issue to Judge (and Professor) Jones. Mike, as the general law review advisor, proposed a related but nonetheless separate law review devoted exclusively to TJ, and he then served as well as faculty advisor to this exceptional new journal.

I first met Mike when he was a law student, and it was obvious from his character and values that TJ was “made” for him! Some years later, when TJ was explicitly “born”, Mike was an early adherent and creative contributor to the project. He was a superb force in explaining and demonstrating how TJ can be applied effectively in practice, bringing needed real-world legitimacy to the academic-sounding therapeutic jurisprudence perspective.

On the bench, he was a leader in properly administered problem-solving courts, in sensitive opinion-writing, and in forging fair, effective, and therapeutic criminal settlement conferences.

¹ Honorary President, International Society for Therapeutic Jurisprudence; Professor of Law, University of Puerto Rico; Distinguished Research Professor of Law Emeritus, University of Arizona.

Later, in academia, Mike excelled in teaching TJ, law and psychology, and “comprehensive law” (of which TJ is a major component). He published an important article on “mainstreaming” TJ—that is, in using TJ in “ordinary” legal situations, not only in the more specialized problem-solving courts. Soon thereafter, he and I co-authored an article on how a judge could infuse TJ and restorative justice elements into criminal sentencing hearings. And only shortly before his passing, Mike and I published a Blog on how a receptive judge could use a creative Arizona technique known as a “probation tail” to in essence create his or her own reentry court for particular defendants.

Besides his teaching and publishing, Mike Jones’ academic career exemplified superb relations with students and masterful mentoring—mentoring that included his traveling to international TJ conferences where a number of his students presented professional papers originally prepared for his class or for this very *International Journal of Therapeutic Jurisprudence*.

Fortunately, Michael Jones’ efforts and major contributions have been noticed and rewarded. The newly-formed *International Society for Therapeutic Jurisprudence*—at <https://www.intltj.com>—named Mike as one of its select Board of Trustees (of a dozen leaders from the US, Canada, Australia, France, and the Netherlands). That same Board, during Jones’ life, created an award in the honor of Mike and Judge Peggy Hora, a retired drug court judge who basically brought TJ to the judiciary several years ago. The Board established the Peggy Hora/Michael Jones Therapeutic Jurisprudence Award for Distinguished Judging, and there will likely be considerable excitement for years to come regarding recipients of this award. Incidentally, a few years ago, Mike Jones himself was presented with the prestigious Bruce Winick Award of the International Academy of Law and Mental Health.

That award was named for the late Bruce Winick, a great friend, co-author, and co-developer of TJ. Makes you wonder, if there's a TJ heaven, they must have a helluva journal!

INTRODUCTION

Katey Thom and Kate Diesfeld

In this special issue of the *International Journal of Therapeutic Jurisprudence*, you will read diverse perspectives from practising lawyers and health professionals, academics and researchers. They offer insights from Australia and Aotearoa/New Zealand. We aim to continue the rich cross-pollination of ideas created at the Fourth International Therapeutic Jurisprudence Conference held in Aotearoa/New Zealand in September 2015. Inspired by the conference theme, ‘weaving strands/Ngā whenu rāranga’, the current issue of the journal demonstrates how the vital precepts of therapeutic jurisprudence have been uniquely interlaced in Australasia. The contributors have explained how the philosophy of therapeutic jurisprudence has been woven within cultural, legal, psychological and social practice.

Australia and New Zealand had the great fortune to host one of the ‘creators’ of therapeutic jurisprudence in 2003 when Professor David Wexler travelled as a Fulbright Senior Specialist. His visit inspired many initiatives, including publication of *Involuntary Detention and Therapeutic Jurisprudence* (Ashgate, 2003) and specialist conferences in Perth in 2006 and Auckland in 2015. The latter resulted in a stimulating and informative edited book, *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomas Reuters, 2016). Both Professor Wexler and Professor Winick supported, inspired and mentored many advocates of therapeutic jurisprudence, within and beyond our shores.

The ‘mainstreaming therapeutic jurisprudence project’ has become a central feature of contemporary scholarship on the topic, and nowhere more so than in Australia with Magistrate Pauline Spencer taking the lead (see <https://mainstreamtj.wordpress.com/>). In this issue, Penelope Weller considers the current

issues Australians face in progressing the project, and urges that the voices of people who have experienced the criminal justice system be central to all relevant initiatives.

Practitioners and researchers from outside the discipline of law can shape the future of therapeutic jurisprudence. We can see this in the work of Astrid Birgden, who explores the alignment of therapeutic jurisprudence with two offender rehabilitation models, Risk-Need-Responsivity and the Good Lives Model. Her analysis reinforces the need for TJ scholars to seek diverse perspectives to achieve therapeutic results.

Alice Mills and Katey Thom question the impact of family violence courts in Aotearoa New Zealand, illuminating the complexity of therapeutic jurisprudence in the context of intimate partner violence. They conclude that family violence courts may be producing anti-therapeutic consequences for both victims and offenders, and observe that the lack of research in this area hampers progressive change. Anthony O'Brien uses a therapeutic jurisprudence lens to investigate the role of mental health nurses in compulsory assessment and treatment, focusing on how they might practise so that the legislative intent of New Zealand's mental health legislation is more fully realised. His paper underscores the benefits of sharing insights from the coal face, by those who actively attempt to bring therapeutic jurisprudence to life in coercive settings.

We all benefit from understanding how therapeutic jurisprudence fits within the context of other, seemingly compatible, philosophies. In Australasia, careful consideration of converging global and local philosophies is required. This juncture is particularly significant for indigenous people who experience the 'anti-therapeutic' impacts of the law. Restorative justice has been seen to benefit indigenous people in both Australia and New Zealand by placing the power back with families to make decisions about how to respond to offending behaviour. In this

issue, Jared Sharp and Crystal Triggs illustrate the concrete benefits of connecting restorative justice and therapeutic jurisprudence strategies for aboriginal youth offender programmes in the Northern Territory. In contrast, Elizabeth Gresson surveys restorative justice practices in Aotearoa/New Zealand with a view to increasing their therapeutic impacts. Katey Thom, Stella Black and Rawiri Pene describe the integration of Te Ao Māori (Māori worldview) within Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court, thereby illustrating how the culturally competent drug court model was crafted.

The current issue was orchestrated by Katey Thom, Kate Diesfeld and Marta Rychert, with the tremendous support of Professor David Wexler and vision of Professor Warren Brookbanks. The volume was only made possible by the scrupulous work of the journal's editors and the thoughtful feedback of peer reviewers. We are deeply grateful for the dedication of each author. We hope that our international audience shares our belief that collaboration in the spirit of therapeutic jurisprudence will create positive change.

We look forward to continuing exchanges of information on the Australasian chapter of the newly formed International Society for Therapeutic Jurisprudence! Join us at <https://www.intltj.com/>.

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*RESTORATIVE JUSTICE IN CRIMINAL OFFENDING:
MODELS, APPROACHES AND EVALUATION*

Elizabeth M. Gresson*

Abstract

Restorative justice has been practised in a range of countries since the 1990s. The aim is to approach criminal justice in a more socially engaged, problem-solving way. This paper considers different models and approaches to restorative justice and canvases factors of definition and perception, ethos and practical application. The discussion considers outcomes of offender-victim mediations and group conferencing in the context of relevant legislative changes in common law jurisdictions of New Zealand and the State of Victoria, Australia. The discussion then asks how such approaches may relate to a Therapeutic Jurisprudence (hereinafter, “TJ”) model of justice with specific reference to Drug and Alcohol Courts. The aim is to highlight the shift of emphasis in criminal justice from adversarialism and blame to responsibility and reparation, and to provide some understanding and evaluation of the effectiveness of such approaches to criminal offending.

* Elizabeth M. Gresson is a lawyer and academic in New Zealand and Australia. She qualified in law in Victoria, Australia and in 2016 returned to New Zealand to practice as a barrister at Vulcan Chambers, Auckland in criminal and refugee law. Elizabeth holds a PhD in Education (University of Auckland), a Juris Doctor with Distinction (RMIT), Master of Arts (1st CI Hons), and postgraduate diplomas in education and law. She is known in Australia and New Zealand for her work in education and law, for her research leadership and publications in the philosophy of education, aesthetics, law and justice. Known also by her previous name Grierson she is an Emeritus Professor of RMIT University, Melbourne.

I. INTRODUCTION

Approaches to criminal justice too often exemplify partisan political attitudes to public policy. Ideas of being ‘tough on crime’ suggested by the Coalition Government of Victoria, Australia in 2014 were under general discussion. For example, in the lead-up to the 2014 election in Victoria, *The Age* announced “New police powers proposed.”¹ Propositions such as this arise out of a political desire to seek solutions to crime by increasing the provision for incarceration and “overhauling criminal investigation powers.”² In 2017, the New Zealand National Government, in context of affirming its political promise of ‘law and order’ for all New Zealanders, announced their consideration of a policy targeted at the most serious youth offenders. It involved the introduction of “special boot camps” at the Waiouru Army training camp and holding “negligent parents” accountable, because “there is a small group of around 150 very serious young offenders for whom our Youth Justice .System in its current form just doesn’t work.”³ But are these ‘law and order’ and ‘tough on crime’ approaches to criminal justice the answer to public safety and youth justice? What are the alternatives?

This paper considers models that approach criminal justice in a more solution-focused and socially-engaged way. This paper also looks at ways of approaching crime, punishment, repair and reconciliation through legal frameworks, and considers specifically what ‘restorative justice’ is about and its effective-

¹ Henrietta Cook, *New Police Powers Proposed By Napthine*, THE AGE NEWSPAPER (Oct. 29, 2014, 6:53 PM), <https://www.theage.com.au/national/victoria/new-police-powers-proposed-by-napthine-20141029-11dv4s.html>.

² *Id.*

³ Stacey Kirk, *Special Bootcamp For Youth Offenders at Waiouru Army Camp, Under National*, STUFF (Aug. 13, 2017, 5:24 PM), <https://www.stuff.co.nz/national/politics/95727988/special-bootcamp-for-youth-offenders-at-waiouru-army-camp-under-national>.

ness. Are the philosophical or ethical drivers of restorative justice identifiable? Where did restorative justice come from, what are its practical applications and what may be revealed by research and evaluation? The focus here is on the jurisdictions of New Zealand and the State of Victoria, where, as an academic and lawyer I have experienced and researched restorative and therapeutic models of justice.

The discussion reviews examples of restorative justice programmes and processes to consider the shift of focus from retributive models of justice that privilege punishment in dealing with crime, to restorative models invoking responsibility and reconciliation. The aim is to come to a greater understanding of how restorative justice processes and outcomes might work for all parties, victims, offenders, families, communities, and lawyers.

II. THE STORY OF RESTORATIVE JUSTICE

A. *Public Perceptions and Justice Models*

The adversarial process of lawyering has long been the normative approach to justice in the Westminster legal system. It exemplifies a “model of justice on legal rights, entitlements and remedies.”⁴ Restorative approaches offer a different model of justice requiring a changed mind-set in lawyering, and often a changed mind-set in public perceptions of crime and punishment.⁵

⁴ Judy Gutman, *Legal Ethics in ADR Practice: Has Coercion Become the Norm?*, 21 AUSTRALASIAN DISP. RESOL. J. 218 (2010).

⁵ Chris Marshall, *Restoring What? The Practice, Promise, and Perils of Restorative Justice in New Zealand*, in THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES 147-60 (Warren Brookbanks ed., Thomson Reuters 2015) [hereinafter Marshall, *Restoring What?*]; TANIA SOURDIN, ALTERNATIVE DISPUTE RESOLUTION (Thomson Reuters, 5th ed. 2012); Colmar Brunton Social Research Agency, PUBLIC PERCEPTIONS OF CRIME AND THE CRIMINAL JUSTICE SYSTEM SURVEY 2014 – RESULTS (2014).

Public perceptions vary on the relevance and efficacy of restorative justice as the following story demonstrates. I had occasion recently to address a university group on the subject of restorative justice, my presentation coming from experiences as an educator and lawyer. The event was attended by about 100 members of the public, and I was both heartened and surprised by the responses. During question time, many in the audience conveyed their support for the potential of 'restorative' processes for turning harm to healing for individuals and community. On the other hand, there were others in the audience who were quite offended that such a system of justice could be fostered through parliament and the courts.

It was apparent that the latter group felt quite comfortable with the adversarialism, blame, and punishment approach to criminal justice and were resistant to change. The group was somewhat suspicious of what it considered "soft" solutions involving mediated meetings and apologies and the talk of responsibility and reparation. It even saw restorative approaches as a withdrawal of State responsibility. From its perspective, the law is a proven agent of societal order and those who transgress the normative rules deserve punishment through the courts, and justice must appear to be served.

These different responses may serve as an indicator of public perceptions of restorative justice and its efficacy. Before continuing to look at restorative justice, outlining the different approaches to justice may be useful. Firstly, retributive justice, where the focus is on the defendant and solutions are found through punishment, the attitude of 'they deserve to be punished' predominates. This approach seeks to isolate an offender as a form of deterrence, with little attention to the victim's needs and little attention to the offender's rehabilitation.

On the other hand, in restorative justice a crime is seen as a disruption to interpersonal relationships and community harmony or wellbeing. The restorative approach, with input

from victims, offenders and the community, seeks to repair the harm to victims by healing the hurt, and restoring the relationships that have been damaged. Repairing that harm for all parties and preventing its reoccurrence is the guiding force. This may have a ‘therapeutic’ role grounded in therapeutic principles of wellbeing.

The third approach to justice relevant to this discussion, is therapeutic justice, exercising principles from Therapeutic Jurisprudence (“TJ”). This approach in criminal justice focuses on an offender’s actions as a problem requiring rehabilitation. The aim is to open the possibility of transformative outcomes.⁶ TJ approaches characterise problem-solving or solution-focused courts, including “integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behaviour, multi-disciplinary involvement, and collaboration with community based, and government organizations.”⁷ This is the approach of specialist courts such as Alcohol and Drug Courts, Mental Health Courts, Koori Court, Assessment Referral List Court, Community Justice Centre Court (the latter three specific to Victoria).

Additional to the TJ approach adopted in specialist courts, there is an increasing mainstream of TJ in the District Courts of New Zealand and in the Magistrates’ Court of Victoria, Melbourne. This is evidenced by judicial standpoints, attitudes and directions.

⁶ THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES (Warren Brookbanks (ed), Thomson Reuters 2015); Sourdin, *supra* note 5; DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (Carolina Academic Press, 1990); DAVID B. WEXLER, REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (Carolina Academic Press, 2008).

⁷ ARIE FREIBERG, SPECIALISED COURTS AND SENTENCING (2002).

Do the overarching principles of TJ, working with law as a healing agent, also inform restorative justice where the methodology is formalised through victim-offender meetings? This will be considered further in a discussion of Alcohol and Drug Courts.

B. Definitions and Ethos

Restorative justice is not an easy field to define. That it comes from a social reform impetus is probably agreed, and it emphasises healing for all stakeholders. How is restorative justice recognisable as a methodology for just outcomes of criminal offending?

Put simply, restorative justice aims “to restore the well-being of victims, offenders and communities damaged by crime, and to prevent further offending.”⁸ One United Kingdom report defines restorative justice as “a process which brings those harmed by crime or conflict, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward.”⁹

In the words of Donald Schmid:

[P]arties with a stake in a criminal offence (including the offender, the victim, and the communities of each) collectively resolve how to deal with the aftermath of the criminal act with an emphasis on repairing the harm from that act; ...[and] it gives new

⁸ MARIAN LIEBMANN, *RESTORATIVE JUSTICE, HOW IT WORKS* 25 (1st ed. 2007).

⁹ DUCKFOOT, *THE GENERAL PUBLIC'S RESPONSE TO RESTORATIVE JUSTICE, COMMUNITY RESPONSES* (2012).

voices to victims, to offenders, and to community representatives. In this way, the participants – including even police – feel a greater sense of ownership in the process and of the outcomes produced by the process.¹⁰

Chris Marshall's chapter in Warren Brookbanks' 2015 book, acknowledges the difficulties of defining restorative justice. The book offers commentary on the ethos of restorative justice, as "reframing or reimagining the criminal justice problem in relational and reparative terms, rather than in solely legal and retributive terms; it is not just about abstract principles, or legal doctrines, or human rights, or metaphysical beliefs; it is about changing things on the ground."¹¹

Marshall shows that this approach comes from "a concern to rectify the imbalances created by crime in a morally serious manner, and the approach resembles utilitarianism in its rejection of avoidable suffering in the quest for resolution."¹²

The concept and working of trust and the restoration of trustful relationships may be identified as an underlying ethos of restorative justice. "It is almost impossible to imagine everyday life without trust," affirms Arie Freiberg in his writing on regulative procedures in social and institutional practices.¹³ Following Freiberg, one could deduce that when criminal offending oc-

¹⁰ Donald J. Schmid, *Restorative Justice: A New Paradigm for Criminal Justice Policy*, 34 VICTORIA U. OF WELLINGTON L. REV. 91 (2002).

¹¹ Marshall, *supra* note 5.

¹² *Id.*

¹³ ARIE FREIBERG, *THE TOOLS OF REGULATION* 13 (The Federation Press 2000).

curs, there is not only a breach of trust in interpersonal relationships, but there is also a fundamental rupture in the sustenance of public safety.¹⁴

Marshall attests to this underlying value of trust in the ethos and practices of justice: “True justice restores what has been lost; it rectifies or repairs what has been broken; it transforms lived experience.”¹⁵ Perhaps it is true to say that restorative justice is part of a wider change of approach to law away from harsh operations of law and towards law as a healing agent.

The New Zealand Ministry of Justice defines restorative justice by how it works. “*Restorative justice helps you put things right*” provides an explanation of restorative justice conferencing from the perspective of offenders:

A restorative justice conference is an informal, facilitated meeting between a victim, offender, support people and any other approved people, such as community representatives or interpreters. At a restorative justice conference, you will have the chance to: take responsibility for your offending; apologise to your victim; decide how to put right the harm you’ve caused; find ways to make sure you don’t reoffend.¹⁶

¹⁴ *Id.*

¹⁵ Marshall, *supra* note 6.

¹⁶ CRIMINAL: HOW RESTORATIVE JUSTICE WORKS, MINISTRY OF JUST. (Nov. 16, 2017, 12:05 PM), <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works> [hereinafter How Restorative Justice Works].

A trained facilitator will be at the conference to keep everyone safe and supported. He or she will also make sure the discussion stays on track.

Restorative justice takes place before a defendant is sentenced in court. The judge will consider any agreements made during the restorative justice conference at the time sentencing takes place.¹⁷

From the above discussion it may be said that the overall aim of this restorative process is to turn harm to healing, to turn anger or fear to wellbeing, to elicit a sense of responsibility through acceptance of wrongdoing and accountability, to restore trust between parties, and agree on processes for restitution and remediation. Restitution may include financial or other compensations, and includes apologies.

John Braithwaite, a leading proponent of restorative justice, explains: “With crime, restorative justice is about the idea that *because crime hurts, justice should heal*.¹⁸ It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.”¹⁹ Victims who agree to participate, come together with offenders of a criminal event, and with the guidance of a trained facilitator, they seek solutions acceptable to all parties. The potential to repair harm, assist offenders to change behaviours, and give victims a voice in the process of justice, is the guiding principle of the restorative process.²⁰

¹⁷ How Restorative Justice Works, *supra* note 16.

¹⁸ John Braithwaite, *Restorative Justice and De-Professionalization*, 13 THE GOOD SOC'Y 28, 28-31 (2004), https://muse.jhu.edu/journals/good_society/v013/13.1braithwaite.html [hereinafter Braithwaite, *De-Professionalization*].

¹⁹ *Id.*

²⁰ *Id.*

C. *The Story of Restorative Justice*

With regard to youth justice in New Zealand, the Ministry of Justice declares that “the New Zealand system represented the first legislated example of a move towards a restorative justice approach to offending which recognises and seeks the participation of all involved in the offending and focuses on repairing harm; reintegrating offenders; and restoring the balance within the community affected by the offence.”²¹ But where had restorative justice come from?

Tracing the story of restorative justice is an effective way to understand its difference from retributive justice, and to follow its guiding principles in action. If retributive justice sees crime as an offence against the State, restorative justice sees crime as an offence between one person and another, a violation of relationships.

The antecedent of restorative justice via victim-offender mediation may be traced to Canada in 1974,²² when a probation officer and prison worker brought together two young men who had vandalised property and the victims of the offending. The outcome was an agreement for restitution to the victims, which was ordered by the judge through the court sentencing process.²³ In Ontario in 1976, a Victim Offender Reconciliation Program was implemented to work towards reparation and reconciliation for victims and offenders of criminal events, and this soon extended to the United States.²⁴ In those early years, the process

²¹ How Restorative Justice Works, *supra* note 16.

²² Robert Cormier, *Restorative Justice Promising Beginnings*, PUB. SAFETY CANADA (last visited Nov. 16, 2017, 12:42 PM), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/prmsg-bgns/index-eng.aspx>.

²³ *Id.*

²⁴ IDAHO COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE, VICTIMOL-
OGY: CRIME AND VICTIMIZATION AND VICTIM SERVICES 458 (Lisa Growette
Bostaph & Danielle D. Swerin eds., Wolters Kluwer 2016).

did not carry the name restorative justice, but it did offer a restorative course of action.

In the influential, 1990 book, *Changing Lenses*,²⁵ American criminologist Howard Zehr focused on the harm caused by a retributive system of justice and the need to turn harm to healing. He advocated bringing the voice of victims from the margins of criminal justice to a central position.²⁶ Within a decade, restorative justice was considered by reformist views on justice, as a way to change crime statistics and change the stories of crime and hurt, crime and recidivism, crime and retribution.

Soon the restorative approach was being considered in a range of countries. In New Zealand, family group conferencing was introduced in a statute in 1989,²⁷ with a focus on the rights of children and young persons, and providing for families to take an active role in assisting young offenders. Although the process of group conferencing was considered restorative, it was another five years before the term restorative justice was actually used.

Retired Judge Fred McElrea explains that in 1994 volunteers were being trained in group conferencing facilitation and they would provide reports to the Court for consideration at sentencing.²⁸ There was no formalised commitment to this process other than granting an adjournment by judicial discretion for the holding of a restorative conference. However, the cases that followed this procedure, with judicial notice being taken of the conferencing report, proved to be positive for the participants. This

²⁵ HOWARD ZEHR, *CHANGING LENSES, A NEW FOCUS FOR CRIME AND JUSTICE* (Herald Press 1990).

²⁶ *Id.*

²⁷ Children, Young Persons and Their Families Act 1989 (NZ).

²⁸ Fred W.M. McElrea, *Twenty Years of Restorative Justice in New Zealand*, TIKKUN (Jan. 10, 2012), <https://www.tikkun.org/nextgen/twenty-years-of-restorative-justice-in-new-zealand>.

somewhat informal approach led to a three-year pilot scheme funded by the New Zealand Ministry of Justice and implemented in four District Courts.²⁹ The outcomes and evaluations noted high rates of victim satisfaction, and of the offenders a seventeen percent reduction in reoffending after two years, and where the offender did re-offend there was a fifty percent reduction in seriousness of the offences.³⁰ Over the next decade, the Ministry of Justice extended its funding to further restorative justice projects, which led to restorative principles being incorporated into New Zealand's codification of sentencing laws.³¹

D. *Legislation and Lawyering*

In 2014, an amendment to New Zealand's *Sentencing Act 2002* reviewed the provision of restorative justice, requiring Courts to consider the appropriateness of restorative justice under certain defined circumstances in the matter on foot.³²

Section 24A provides for adjournment for restorative justice processes in certain cases if the offender appears before a District Court at any time before sentencing; and has entered a guilty plea; and there are one or more victims of the offence; and no restorative justice process has previously occurred in relation to the offending; and appropriate services can be accessed by the Registrar.³³

As increased demand for restorative justice services became apparent, Chris Marshall, Chair in Restorative Justice at Victoria University, Wellington, rightly pointed out:

²⁹ The Courts are Auckland, Dunedin, Hamilton and Waitakere. See SUE TRIGGS & CRIME AND JUSTICE RESEARCH CENTRE, VICTORIA UNIVERSITY WELLINGTON, EVALUATION OF THE COURT-REFERRED RESTORATIVE JUSTICE PILOT: TECHNICAL REPORT (2005), <https://www.justice.govt.nz/assets/Documents/Publications/rj-tech-report-full.pdf>.

³⁰ McElrea, *supra* note 28.

³¹ *Id.*

³² Sentencing Amendment Act 2014 (NZ).

³³ Sentencing Act 2002 (NZ) s 24A(1)(a)-(e).

It will take time to build capacity in the sector without short-changing the process. ... I would encourage judges, prosecutors and community providers to work together on finding ways to focus available services at the more serious end of the spectrum and to ensure that restorative justice is not reduced to a check box process.³⁴

In restorative justice processes, there is an ethical demand to open the way for some sort of healing to occur, and this requires buy-in of two or more parties, the victim and offender, and others affected in families and community. Crucially, the victim(s) must be willing to participate if the process, a conference, is to proceed. The intervention of an independent trained facilitator is a crucial part of the process, as is judicial direction and resource support. In New Zealand, the Ministry of Justice is monitoring the legislative provision to ensure its aims are met.

Managing disputes, repairing harm, reintegrating into the community, repairing relationships and overcoming addictions are all part of the transformative approach that many in the legal profession already work with. Many work comfortably with social justice models from a TJ approach. However, lawyering roles change with this shift of mind-set, be it a shift to restorative justice in practice, or more broadly to a TJ approach to thinking about and exercising justice.

³⁴ Chris Marshall, *New Restorative Justice Requirements*, VICTORIA U. WELLINGTON NEWS ONLINE (Jan. 15, 2015), <http://www.victoria.ac.nz/news/2015/01/new-restorative-justice-requirements>.

The overarching aims of restorative justice contrast with conventional adversarialism, which prioritises right/wrong, win/lose.³⁵ In restorative justice approaches the lawyer moves from an emphasis on the adversarial role to a focus on support and advocacy.³⁶ For some participants, including some lawyers and judges, this is new terrain and may be challenging.³⁷ In restorative justice, if a client pleads guilty to an offence and there is an identifiable victim, the defence lawyer may advise on restorative justice and seek the client's views on involvement.³⁸ Following a judicial adjournment of the matter in Court, the restorative justice process is managed by a trained facilitator, who writes a report for judicial attention.³⁹ The lawyer will also receive a copy of this report and may refer to it in the sentencing submission.⁴⁰

The shift from the adversarial model of litigation to restorative justice evidences something quite fundamental. There is a move from preoccupation with legal rights, entitlements and blame, to concern for responsibility and consequential harm “what effect has my action had on you the victim?” There is also a move from attention on past actions to practical concern for present and future “what could I do to repair this harm to make the victim feel better and safer, for me to accept responsibility, and for the community to be safe?” For the lawyer, the judge, and the restorative justice coordinator there is a need for

³⁵ Sourdin, *supra* note 5, at 284.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Helen Bowen & Rosie Abbott, *The New Restorative Justice Regime*, AUCKLAND DISTRICT L. SOC'Y (May 15, 2015), <https://www.adls.org.nz/for-the-profession/news-and-opinion/2015/5/15/the-new-restorative-justice-regime/>.

³⁹ *Id.*; How Restorative Justice Works, *supra* note 16.

⁴⁰ *Ministry Outlines Defence Lawyer Role in Restorative Justice*, NEW ZEALAND L. SOC'Y (last visited April 9, 2018), <http://myold.lawsociety.org.nz/in-practice/practising-law/litigation/ministry-outlines-defence-lawyer-role-in-restorative-justice>.

balance in finding solutions – to balance the need for offender rehabilitation, the rights of victims to protection, and a duty to protect the public. Deterrence is not side-lined. It just manifests another way. Instead of being embedded in the punishment model, deterrence is embodied in personal responsibility and accountability. That is the aim.

In Australia, the restorative model of victim-offender mediation was forming the basis of group conferencing processes by 1994, although it had been trialled in 1991 rather unsuccessfully by the Dispute Resolution Branch of the Queensland Department of Justice.⁴¹ Increasingly, during the 1990s and 2000s, the meeting of parties to seek solutions was seen in both New Zealand and Australia, as well as in other common law jurisdictions, as advantageous to all parties. This solution-seeking approach includes a range of approaches from group conferencing and victim-offender mediation, following the ethos of restorative justice, to judicial interventions following a social justice or TJ approach.

In court, judicial intervention and monitoring of the defendant is an important aspect of a social justice or TJ regime. In my work as counsel, particularly in family violence matters, I have seen shining examples of judicial interventions and monitoring in Australian and New Zealand courts, and witnessed the beneficial effects on offenders as they work towards change in their lives with the objective of never again appearing in court as an offender. The aim of judicial monitoring is to enhance self-responsibility and responsibility to others. In family violence rehabilitation is a crucial aspect of the justice process. Judicial monitoring follows a guilty plea where an offender takes responsibility for the offending and shows a willingness to make changes. The monitoring takes place in court over several months of appearances, and before a sentencing date is set. The

⁴¹ Peter Condliffe & Kathy Douglas, *Reflections on Conferencing Practice: The Need for Accreditation and the Dangerous Debate?*, 18 ADJR 140 (2007).

process calls for evidence of offender participation in counseling, courses or programmes appropriate to the offending, such as drug and alcohol, anger management or stopping violence programmes, and the uptake of, and commitment to these will inform sentencing directions. Judicial enquiry of offenders ensures there is an integrated understanding of why change is needed and how it may be sustained. This takes a willing commitment to social justice outcomes by counsel and the judiciary if it is to succeed.

III. VICTIM-OFFENDER MEDIATION

A. *Focus on Crime, Harm, Reparation*

The victim-offender mediation focuses on the crime and its aftermath, and the effect of the offending on the victim as the participants discuss steps to rectify the identified wrongs as much as possible.⁴² The aim of this process is to shift the emphasis from winning or destroying legal point by legal point, to a position where perpetrators takes responsibility for an action and take steps towards repair for both themselves and the victims.⁴³ Voice is important. Victims have the chance to be heard as they become part of the process of deciding how the offender may make reparations.

From the articles and reports cited through this discussion the following offers a summary of key points of the restorative justice process. Offender accountability is crucial, and this

⁴² Burt Galaway, *Victim-Offender Mediation by New Zealand Probation Officers: The Possibilities and the Reality*, CONFLICT RESOL. Q., Spring 1995, at 249-62; B. Jervis, *Developing Reparation Plans through Victim-Offender Mediation by New Zealand Probation Officers*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 417, 417-28 (Burt Galaway and Joe Hudson eds., Criminal Justice Press 1996).

⁴³ Marshall, *Restoring What?*, *supra* note 5; *Restorative Justice in New Zealand*, RESOL. INST., (last visited May 31, 2018), <https://www.resolution.institute/qualifications/restorative-justice-in-new-zealand>.

in the presence of the victim.⁴⁴ The meeting is conducted by a trained facilitator or mediator, and other support people may be present.⁴⁵ The aim is to see and hear and understand as much as possible the effect of the offending actions upon the victim, and to acknowledge the harm that has been perpetrated by these actions.⁴⁶ The facilitator's role is to ensure the offender's rights and victim's rights are fully and equally part of seeking solutions acceptable to all parties.⁴⁷

If there is a continuum of approaches within the definition of restorative justice, then meetings may vary from quite informal to very formalised. Here is an example of an informal approach in the mid-1990s. This arose from judicial intervention at a hearing I attended at the Auckland District Court. A self-represented defendant was appearing on a charge of assault. After listening to the testimonies of both offender and complainant, the Judge ordered a discharge without conviction. A formal submission seeking such a discharge had not been made, but His Honour saw the potential benefit to both parties for a judicial intervention and he ordered a restorative process entailing an apology. Both parties were asked to step into the centre of the courtroom for a victim-offender 'meeting.' The judicial requirement was for the offender to apologise to the complainant over a handshake, and for the complainant to verbally indicate acceptance of this, at which the matter was drawn to a close and the parties dismissed.

Formalised restorative justice meetings between victim and offender give rise to numerous and nuanced outcomes, such as those presented in Crosland and Liebmann's book of forty

⁴⁴ Restorative Justice Best Practice Framework, MINISTRY OF JUST. NEW ZEALAND, <https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

cases.⁴⁸ The editors recount case studies that demonstrate “more of the actual range of issues, feelings, needs and strategies that either do or don’t help people and communities meet their individual and collective needs.”⁴⁹

One such example was an opportunistic theft of a ring from a jeweller by a young woman out shopping with her children. The victim-offender mediation went like this. At the facilitated meeting the offender heard from the store manager about the significant problem of shoplifting in the district and effect of this on businesses. The offender wrote an apology letter and verbally expressed how sorry she was and how ashamed she felt to have done this in front of her children. The police noted later that it was most unlikely she would ever re-offend.

IV. YOUTH JUSTICE

A. *Family Group Conferencing, New Zealand*

How is the restorative approach positioned in youth justice? “New Zealand has run its entire youth justice system in a non-adversarial manner since 1989. It provides the world’s strongest example to date of how a national juvenile justice system can transition to something incorporating restorative justice.”⁵⁰ This endorsement is made by retired Judge Fred McElrea who was appointed a Youth Court Judge in 1990 after two years as a District Court Judge, which role he continued with adult offenders. By sitting at the two courts, Judge McElrea could observe first-hand the effects and outcomes of the Westminster adversarial system in the District Courts for adults seventeen-years and over, alongside what he called the “home grown system” of family group conferences and Youth Courts,

⁴⁸ 40 CASES, RESTORATIVE JUSTICE AND VICTIM-OFFENDER MEDIATION (Paul Crosland & Marian Liebmann eds. Mediation UK 2003).

⁴⁹ *Id.*

⁵⁰ *Id.*

as introduced by the 1989 legislation.⁵¹ Schmid notes, “the New Zealand invention of the Family Group Conference (“FGC”) for youth offenders has been hailed as a pioneering model of restorative justice.”⁵²

The enactment of the *Children, Young Persons and their Families Act 1989* (NZ) (“CYPF Act”) established an alternative system of justice for child and youth offending in New Zealand, through Youth Court and Family Group Conferencing.⁵³ The CYPF Act authorised *whānau* (family) status for the first time in the criminal justice setting; and established a specific statutory framework for Lay Advocates.⁵⁴ Both measures were ground breaking. Of the provision for Lay Advocates, Former Principal Youth Court Judge Andrew Becroft said there was “no known counterpart in any other legislation anywhere in the world.”⁵⁵ He outlined the specific provisions of the CYPF Act in meeting the needs of youth justice.

There are general principles underpinning the CYPF Act. The first is that a child or young person’s *whānau, hapū, iwi* and family group should participate, wherever possible, in any decision making that will effect the child or young person, and regard should be given to their views.⁵⁶ The second principle is that measures dealing with offending should be designed to strengthen the *whānau, hapū, iwi* and family groups. They should also be designed to enhance ways for the groups to develop their own measures of dealing with offending by the children and young people.⁵⁷

⁵¹ *Id.*

⁵² Schmid, *supra* note 10.

⁵³ Oranga Tamariki Act 1989, ss 20-38 (N.Z.).

⁵⁴ Oranga Tamariki Act 1989, s 163 (N.Z.).

⁵⁵ Andrew Becroft, *The Rise and Rise of Lay Advocates in Aotearoa New Zealand*, COURT IN THE ACT, Aug. 2015, at 4-6.

⁵⁶ Oranga Tamariki 1989, s 5(a) (N.Z.).

⁵⁷ *Id.*

This was a time of political reform in New Zealand, concerning how the State should make decisions involving children, young people and their families. The legislation was enacted at the time of the rise of the neoliberal state and changes in state governance and institutional practices.⁵⁸ Along with the focus on economic outcomes of public services, there was new focus on individual human rights.⁵⁹ Concerns for policy reforms were apparent in law as in education, health, social welfare and other sites where the rights of civil liberties take a central position.⁶⁰ The *New Zealand Bill of Rights Act*⁶¹ was introduced in 1990 to provide protection for the civil and political rights of all citizens and to provide a legislative consistency for the recognition of rights in any other legislative instrument or proposed laws.⁶² There was also renewed attention to social and legal responsibilities under the *Treaty of Waitangi*,⁶³ including collective responsibility of Māori *whānau* (extended family), *hapū* (clan), and *iwi* (people, tribe) in community-based justice.⁶⁴

These legal, social and political moves led to changes in legislation restructuring juvenile justice and child protection, with provision for Family Group Conferences explicitly recognising the involvement of *whānau*, *hapū* and *iwi* in reaching solutions for juvenile offending.⁶⁵ The model influenced practice in other common law jurisdictions of Australia, UK, Canada,

⁵⁸ MARIE CONNOLLY, *UNDERSTANDING CHILD AND FAMILY WELFARE: STATUTORY RESPONSES TO CHILDREN AT Risk* (Te Awatea Press, 2004).

⁵⁹ Human Rights Act 1993 (N.Z.).

⁶⁰ Human Rights Act 1993 (N.Z.).

⁶¹ New Zealand Bill of Rights Act 1990 (N.Z.).

⁶² New Zealand Bill of Rights Act 1990 (N.Z.).

⁶³ Treaty of Waitangi, British Crown—Māori Tribes NZTS (opened for signature 6 February 1840).

⁶⁴ Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, W. CRIMINOLOGY REV. 1 (1998).

⁶⁵ Oranga Tamariki Act 1989 (N.Z.).

USA and South Africa, “adding a new theoretical vitality to restorative justice” as Braithwaite observed.⁶⁶

A. *Legislative Changes: Oranga Tamariki*

In 2016-17, a Bill was making its way through the New Zealand parliamentary process of consultation and readings: The Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill.⁶⁷ Its purpose was to amend the *Children, Young Persons and Their Families Act 1989*, and extend legislative protection for vulnerable children. Parliament stated that the new legislation “will support the new operating model for the Ministry for Vulnerable Children, Oranga Tamariki, and will establish the statutory framework required to create a more child-centred operating model to meet the needs of vulnerable children and young persons.”⁶⁸

The *Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act* received Royal Assent on 13 July 2017, amending the CYPF Act.⁶⁹ It included a name change of the CYPF legislation to, *Oranga Tamariki Act 1989, Children’s and Young People’s Well-being Act 1989*.⁷⁰ The object of the amended Act, in Section 4 is to “promote the well-being of children, young persons, and their families and family groups,” with seven sub-sections (a) to (g),⁷¹ providing specifically in (f):⁷²

⁶⁶ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME AND JUST. 1 (1991).

⁶⁷ Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill 2017 (N.Z.).

⁶⁸ Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill (select committee report) at 2 (N.Z.).

⁶⁹ *Oranga Tamariki Act 1989* (N.Z.).

⁷⁰ *Oranga Tamariki Act 1989* (N.Z.).

⁷¹ *Oranga Tamariki Act 1989*, s 4(a)-(g) (N.Z.).

⁷² *Oranga Tamariki Act 1989*, s 4(f) (N.Z.).

(f) ensuring that where children or young persons commit offences, —

(i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and

(ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.

Underpinning principles are comprehensively set out in Section 5.⁷³ The sub-sections provide for the child or young person's well-being and rights, their views to be taken into account in any decisions affecting them, and a multi-faceted approach to their age and developmental potential, educational and health needs, their whakapapa, cultural and gender identity, their sexual orientation and any disability, and their place in the family and relationship with the family group.⁷⁴ Section 18AAA of the amending legislation provides for the Chief Executive to make group conferencing available in certain circumstances:

If the Chief Executive is not satisfied that a child or young person is in need of care or protection but believes that holding a family group conference would best assist in formulating a plan to help a child or young person, the chief executive may refer the case to a care and protection

⁷³ Oranga Tamariki Act 1989, ss 5(a)-(g) (N.Z.).

⁷⁴ Oranga Tamariki Act 1989, ss 5(a)-(g) (N.Z.).

co-ordinator, who must convene a family group conference under Section 20.⁷⁵

The principles and practices of family group conferencing are comprehensively provided by Sections 20 to 38, guiding any court or person exercising jurisdiction under this legislation.⁷⁶ One of the aims of holding the Family Group Conference (“FGC”) is to determine the question of prosecution. If there is a charge, and the young person agrees to it, the Conference will devise a FGC Plan, developed by agreement and input from all stakeholders. The aim of the FGC Plan is to hold a young person accountable for the offending and take the needs of victims into account. The process also addresses rehabilitation and supports reintegration into community.⁷⁷

The New Zealand Ministry of Justice makes official acknowledgement of the values of this process:

[T]he values underlying family group conferences are seen as reflecting restorative justice values. Both family group conferences and restorative justice give a say, regarding how the offence should be resolved, to those most affected by it – that is, victims, offenders and their ‘communities of care’ – and

⁷⁵ Children, Young Persons and Their Families (Oranga Tamariki) Legislation Act 2017, s 18AAA (N.Z.).

⁷⁶ Oranga Tamariki Act 1989, ss 20-38 (N.Z.).

⁷⁷ Oranga Tamariki Act 1989, ss 259(a), 260 (N.Z.).

both give primacy to their interests.⁷⁸

Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes'.⁷⁹ In conferencing all 'stakeholders affected by an injustice have an opportunity to discuss how they have been affected and to decide what should be done to repair the harm.⁸⁰

If the young person denies the charge, the FGC will determine that he or she is to be dealt with in the Youth Court, which is a division of the District Court.⁸¹ Youth justice principles apply.⁸² The legal age for criminal offending in New Zealand is ten years, thus a child under ten cannot be charged with a criminal offence.⁸³ The jurisdiction of Youth Court and children's liability to be prosecuted for criminal offending is set out in section 272 of *Oranga Tamariki Act 1989, Children's and Young People's Well-being Act 1989*.⁸⁴

Perceptions of youth justice vary. Youth Court does not provide a 'soft' option for offenders who might have otherwise gone to the District Court.⁸⁵ Of the Youth Court, the Minister of Justice Amy Adams explains:

⁷⁸ YOUTH JUSTICE PRINCIPLES AND PROCESSES, MINISTRY OF JUST., <https://www.youthcourt.govt.nz/youth-justice/youth-justice-principles-and-processes/> (last updated Sept. 7, 2016) (Hereinafter "Youth Justice Principles").

⁷⁹ NADRAC, *cited in* Tania Sourdin, *supra* note 5, at 100.

⁸⁰ Braithwaite, *De-Professionalization*, *supra* note 18.

⁸¹ Oranga Tamariki Act 1989, ss 272-280A (N.Z.).

⁸² YOUTH JUSTICE PRINCIPLES AND PROCESSES, *supra* note 78.

⁸³ Crimes Act 1961, s 21 (N.Z.).

⁸⁴ Oranga Tamariki Act 1989, s 272(1)-(5) (N.Z.).

⁸⁵ EMILY WATT, *A HISTORY OF YOUTH JUSTICE IN NEW ZEALAND* (2003).

[I]t offers our best opportunity to break the cycle of reoffending. It's shown that it is effective at reducing crime and holding young offenders to account, by giving them tough but targeted punishments when they commit crime. ...[and] the Youth Court offered young offenders rehabilitation and support to tackle the underlying causes of their offending.⁸⁶

In December 2016, the Minister of Justice and Minister for Social Development announced the age for youth justice will be raised to eighteen in New Zealand, coming into effect in 2019, to ensure lower-risk seventeen-year olds will be eligible for Youth Court. This move is endorsed by the Human Rights Commission: "Children's rights advocates in New Zealand have been calling for this change for years in order to bring our children's legislation more fully in line with the Convention on the Rights of the Child."⁸⁷

B. Te Kooti Rangatahi and Pasifika Courts

In any discussion of Youth Justice in New Zealand, attention must be paid to two specialist Courts with cultural traditions at their core. They are not restorative justice Courts if and when the concept of restorative justice is defined solely in terms of the victim-offender equation, as these courts are essentially

⁸⁶ *Government Raises Youth Justice Age to 18*, NEW ZEALAND HERALD (Dec. 7, 2016, 6:03 PM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11762423 (quoting Amy Adams, Minister of Justice).

⁸⁷ *Id.* (quoting David Rutherford, Human Rights Commission Chief).

offender-focused. The victim may or may not be present. However, I would argue that the justice principles alight upon restorative justice here in that restoring the young offender – and the community – to some sort of wellbeing is the approach taken.

The Rangatahi Court is held on a marae and the Pasifika Court is held in a Pasifika church or community centre.⁸⁸ The aim is to assist young Māori and Pacific Islanders, and to involve their families and communities in the justice process.⁸⁹ The Courts operate within the Youth Court justice system, to monitor the FGC Plan for the offender and, with the assistance of Lay Advocates, to strengthen the young person’s sense of identity through cultural practices and protocols.⁹⁰

There are fifteen Rangatahi Courts in New Zealand and two Pasifika Courts, the latter in Auckland, which has the largest Pasifika population in New Zealand. The first sitting of the Rangatahi Court was in May 2008, at Te Poho o Rawiri Marae, Gisborne,⁹¹ with Judge Heemi Taumaunu presiding. In December 2015, Te Kooti Rangatahi ki Tūwharetoa, the fourteenth Rangatahi Court was launched at Rauhoto Marae, Taupō,⁹² and the fifteenth was launched in February 2018 on the Terenga Parāoa Marae in Whangārei.⁹³ The difference between the Rangatahi Court and other courts is that the Rangatahi Court is held on a marae, the traditional Māori meeting place, and it incorporates

⁸⁸ RANGATAHI COURTS AND PASIFIKA COURTS, MINISTRY OF JUST., (last visited May 31, 2018), <https://www.youthcourt.govt.nz/about-youth-court/rangatahi-courts-and-pasifika-courts/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Introduction*, 1 RANGATAHI CTS. NEWSL. 1, 1 (2012), <http://www.districtcourts.govt.nz/assets/Uploads/RCN1.pdf>.

⁹² *E ngā mana, e ngā reo, e ngā hau e whā, tēnā koutou katoa*, 7 RANGATAHI CTS. NEWSL. 1, 1 (2016), <http://www.districtcourts.govt.nz/assets/Uploads/Rangatahi-Courts-Newsletter-Issue-7.pdf>.

⁹³ Te Tai Tokerau Welcomes Rangatahi Court, *OrangaTamariki*, Ministry for Children, (last viewed May 31, 2018), <https://www.orangatamariki.govt.nz/news/te-tai-tokerau-welcomes-rangatahi-court/>.

Te Reo, Māori language, and traditional values of *Tikanga Māori*, protocols and customs.

In Auckland, there are two Pasifika Courts and they use the Pasifika cultural protocols with an expectation, as with the Rangatahi Court, that the young person will learn, perhaps embrace, their traditional greeting, language and cultural identity, and deepen relationships with community.

For the young people who participate in the Rangatahi and Pasifika Courts, they must have admitted the charge (entering a plea of ‘guilty’ is not the protocol for youth justice) and participated in a Family Group Conference, where it has been decided by agreement how they can take responsibility for their actions, with guidelines to prevent reoffending. Judge Heemi Taumaunu (Ngāti Porou, Ngāi Tahu) National Rangatahi Courts Liaison Judge explains:

The purpose of the hearing is to monitor the young person's completion of his or her Family Group Conference (“FGC”) Plan ... designed to: hold the young person accountable and responsible for their offending; provide for the interests of the victims of the offending; deal with the risks and needs of the young person; while at the same time attempting to address the underlying causes of their offending.⁹⁴

⁹⁴ Heemi Taumaunu, *Rangatahi Courts in New Zealand* 1 RANGATAHI CTS. NEWSL. 1, 1-2 (2012), <http://www.districtcourts.govt.nz/assets/Uploads/RCN1.pdf>.

The young participant may elect to attend the Rangatahi Court or Pasifika Court. The Court's role is to monitor the FGC Plan; to hold the young person accountable and responsible for their offending; to provide for the interests of the victims of the offending; to deal with the risks and needs of the young person; while at the same time attempting to address the underlying causes of offending.⁹⁵

Under judicial monitoring the young person appears at the Court every two weeks until the FGC Plan is completed. In attendance at the appearances, as well as the offender and the judge, are the police, the elders, family supporters, social workers and court staff, a lawyer or youth advocate, lay advocate and victims if willing to participate.⁹⁶ As with the Koori Court in Victoria Australia, which is a specialist problem-solving Court within the jurisdiction of the Magistrates' Court of Victoria, the elder comes from the same cultural, if not tribal, background as the offender, and plays an important part in encouraging and guiding the young person and their family towards a state of wellbeing and reintegration into community.⁹⁷

⁹⁵ *Id.* at 2.

⁹⁶ Andrew Becroft, *Rangatahi Courts as Part of the Wider Youth Court* 1 RANGATAHI CTS. NEWSL. 1, 7-8 (2012), <http://www.districtcourts.govt.nz/assets/Uploads/RCN1.pdf>.

⁹⁷ For further discussion on the Koori Court and the Rangatahi Court see Elizabeth Grierson, *Raising Alterity: Working Towards a Just City*, in TRANSFORMATIONS: ART AND THE CITY 159 (Intellect Pub. 2017); on Te Kooti Rangatahi Court, see Katey Thom, *New Zealand's Solution-Focused Movement: Development, Current Practices and Future Possibilities*, in THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES 325 (Warren Brookbanks ed., Thomson Reuters 2015); on Māori approaches to justice, see Khylee Quince, *Therapeutic Jurisprudence and Māori*, in THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES 347 (Warren Brookbanks ed., Thomson Reuters 2015).

V. CONFERENCING IN VICTORIA AUSTRALIA

A. *Restorative Interventions*

Collaborative practice as a form of group conferencing is used also in the State of Victoria, Australia, working with juvenile offenders.⁹⁸ As with New Zealand, the standard age for criminal responsibility in Australian jurisdictions is ten years.⁹⁹ And for children between ten and fourteen there is “a refutable presumption that they are incapable of forming the criminal intent necessary to be guilty of a crime (*doli incapax*).”¹⁰⁰ This is established by case law in Victoria.

Group conferencing for juvenile justice commenced in 1995 under Anglicare Victoria, with the mission:

To ensure care, custody and supervision for young offenders through the provision of programs which will assist them to develop the knowledge, skills and attitudes to manage their lives effectively without further offending and to provide mechanisms, resources and direction to achieve this.¹⁰¹

⁹⁸ Models of group conferencing vary from State to State. Victoria is presented by way of example.

⁹⁹ Criminal Code Act 1995, s 7.1 (N.Z.).

¹⁰⁰ Lisa White, *Children's Rights: Australia*, LIBR. OF CONGRESS, <https://www.loc.gov/law/help/child-rights/australia.php> (last updated July 2, 2015).

¹⁰¹ *Youth Justice*, VICTORIAN ASS'N OF RESTORATIVE JUST., <https://www.varj.asn.au/youth-justice>.

From 1997, the Victorian Government took over responsibility from Anglicare, with advisory committee representatives from the Children's Court, Department of Human Services, Victoria Police, and Legal Aid, and from 1998 the Department of Justice.¹⁰² As of 3 April 2017 the Department of Justice and Regulation ("DJR") took responsibility for the youth justice system, including all custodial and community-based youth justice services from the Department of Health and Human Services ("DHHS").¹⁰³ By 2001-02 the Juvenile Justice Group Conferencing programme had extended from metropolitan Melbourne to rural areas, Gippsland and Hume. "Victoria's three-pronged Reform Strategy aims to prevent low risk young people from entering the criminal justice system, rehabilitate more serious young offenders and support them to establish crime-free lifestyles after their release."¹⁰⁴ This echoes the principles of New Zealand's Youth Justice.¹⁰⁵

The *Children, Youth and Families Act*¹⁰⁶ was enacted in Victoria, in 2005, to provide for group conferencing intervention based on principles of restorative justice. The Act applies to youth and young adults, with court (pre-sentence) being the point of referral. As in New Zealand, it does not extend to serious sex offences or crimes of violence.

The legal age of a 'child' who is alleged to have committed an offence, as defined under the *Children, Youth and*

¹⁰² Gabrielle Maxwell & Hennessey Hayes, *Restorative Justice Developments in the Pacific Region: A Comprehensive Survey*, 9 CONTEMP. JUST. REV. 127 (2006).

¹⁰³ Caitlin Grover, *Youth Justice in Victoria* 3 (Parliamentary Library & Information Service Research Paper No. 2, 2017), <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13806-youth-justice-in-victoria>.

¹⁰⁴ *Id.*

¹⁰⁵ Youth Justice Principles, *supra* note 78.

¹⁰⁶ Children, Youth and Families Act 2005 (Victoria, Austl.).

Families Act, is over the age of ten and under the age of eighteen.¹⁰⁷ The target group for Juvenile Justice in Victoria is ten to sixteen year olds referred from Children's Court under particular criteria (pleaded guilty, previously appeared in court, serious offence); with sentencing adjourned until a group conference is undertaken;¹⁰⁸ after this the magistrate assesses the conference report.¹⁰⁹ Through a collaborative process, the stakeholders define the dimensions of restoration that matter to them in each specific criminal offence, with the aim of making things better for everyone impacted by the criminal event.¹¹⁰

The Youth Justice Group Conferencing Program is underpinned by the need to develop and maintain natural support networks in order to reduce the likelihood of reoffending. This involves engaging parents, family members and other supports in the pre-Conference and Conference process, and encouraging these people to support the young person to complete their outcome plan.¹¹¹

¹⁰⁷ *Id.* at § 3(1)(a).

¹⁰⁸ Children, Youth and Families Act 2006 (Vic), § 25(1).

¹⁰⁹ *Id.* at § 136(b).

¹¹⁰ DEPARTMENT OF HUMAN SERVICES, REVIEW OF YOUTH JUSTICE GROUP CONFERENCING PROGRAM 1 (2010).

¹¹¹ *Id.* at 13.

B. *Process and Structure*

Conferencing follows a set structure involving offender, victim, family, supporters and wider communities of care, informant, lawyer and mediator, facilitator or coordinator. The aim is to foster dialogue.

Conferencing proceeds with five phases.¹¹² Firstly there is the Preparation Phase; when the coordinator explains the process and ground rules, and invites introductions of participants.¹¹³ Pre-conference planning is considered most important for clarifying risks for victims, potential impacts on a young offender, and his or her need for support and supervision.¹¹⁴ There is evidence that if the pre-conference preparation is not undertaken thoroughly the conference may have negative consequences.¹¹⁵

The second phase is Information Sharing; when the informant outlines the offending event, and participants give their versions of the offence and its impact on them; this may elicit emotional responses of anger or hurt. Thirdly, Private Sessions; when the offender and family or supporters devise an outcome plan, to restore harm caused to the victim, and ways to reduce risks of re-offending.¹¹⁶ This leads to the phase of Seeking Agreement by the parties who return to hear the outcome plan, discuss and agree to it. At this stage, the lawyers may clarify the

¹¹² This approach is followed in Victoria Australia, and variations of it are followed in other States. See Maxwell & Hayes, *supra* note 102.

¹¹³ Christopher Hooper, *Your Story and Theirs: The Youth Justice Group Conferencing Program*, 39 MONASH U. L. REV. 539 (2013).

¹¹⁴ *Id.*

¹¹⁵ Mark S. Umbreit et al., *Restorative Justice, an Empirically Grounded Movement facing many Opportunities and Pitfalls*, 89 MARQUETTE L. REV. 251 (2005).

¹¹⁶ Children, Youth and Families Act 2005, s 415(4)-(5) (Victoria, Austl.).

plan and its implications privately with the offender to ensure it is fully understood and there is full agreement.¹¹⁷

The final phase is the devising of a Post-Conference Report; the coordinator includes the agreed plan with a court report and hands it to the magistrate or judge after the conference.¹¹⁸ The aim is for the offender to be an active and willing participant throughout, foregrounding respect for all parties.¹¹⁹

Punishment looms large in the traditional adversarial model, but punishment is never far away in the restorative justice approach. As Braithwaite notes, restorative justice takes place “in the shadow of punishment,”¹²⁰ punitive action always a possibility if reoffending occurs.

VI. DRUG AND ALCOHOL COURTS

A. *Therapeutic or Restorative?*

Where lie the similarities and differences between restorative justice and Therapeutic Justice? An overarching goal of Therapeutic Jurisprudence is, as David Wexler put it, “to infuse the legal culture with a TJ and interdisciplinary sensitivity.”¹²¹ Further, Wexler positions TJ in terms of “psychological wellbeing, procedural fairness, and access to justice.”¹²² Surely, no one in a democratic society could argue with this for a fundamentally ethical approach to justice.

¹¹⁷ Children, Youth and Families Act 2005, s 415(6) (Victoria, Austl.).

¹¹⁸ Children, Youth and Families Act 2005, ss 415(8), 358(b), 362(3)–(4) (Victoria, Austl.)

¹¹⁹ Department of Human Services, *supra* note 110.

¹²⁰ GERRY JOHNSTONE, *RESTORATIVE JUSTICE, IDEAS, VALUES, DEBATES* 17 (Routledge, 2d ed. 2011).

¹²¹ David B. Wexler, *Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law*, in *THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES* (Warren Brookbanks ed., Thomson Reuters 2015).

¹²² *Id.*

The principles outlined by Wexler are crucial for a TJ approach, but could they not be equally crucial for a restorative justice approach? In terms of an underlying ethos of justice, where does one end and the other begin? Or are they slippery around their definitional edges? Perhaps the difference is a methodological one in that the victim-offender mediation of restorative justice provides a specific and systematic situation for reparation, restoration and reintegration to occur.

Being therapeutic in approach, the drug and alcohol courts may be considered to be 'restorative' in that there is a restoring ethos at work, but with a different methodology to work towards its outcomes. Drug and alcohol courts are characterised more normally as therapeutic courts focusing on offenders, with the power to enhance wellbeing over time, rather than operating in the restorative justice arena. Victim involvement or victim-offender mediations are not characterised as the priority.

Notwithstanding this denotation, there are many victims in the scenarios of drug and alcohol offending. There are families, partners, friends, communities, and those specific victims of targeted criminal activities. Perhaps it could be said that these specialist courts are both therapeutic and restorative. Even though their processes may differ methodologically from the formalised victim-offender mediations and group conferencing, the ethos and overarching principles would seem to be very closely related.

B. Drug Court Dandenong

The Dandenong Drug Court in Victoria, Australia, operates a robust process of pre-Court case conferencing with case managers, social and housing services, and Corrections Victoria,

with pre-court conferencing and judicial monitoring in court.¹²³ The emphasis is on offender responsibility to keep drug offenders out of prison and to reintegrate them into community. In that sense, it is a social justice or therapeutic approach.

There are specific criteria to be met in order to participate in the Court. Those taking part must reside in the catchment area; they must be charged with offences punishable by imprisonment, not including violent offending, and must have entered a guilty plea; and importantly they must agree to go onto the judicial monitoring programme.¹²⁴

The intervention works with a carrot and stick approach. If the participants abstain from alcohol and stay off illegal substances, the main ones in Victoria being methamphetamine (ice), heroine, cannabis, and illicit use of prescription drugs, they have points deducted and they stay out of prison.¹²⁵ On the other hand, if the participants do not stay off illegal substances, or if they are untruthful about testing, or miss a monitoring appointment, they ‘earn’ unwanted points as sanctions.¹²⁶ Fifteen points will equal fifteen days in custody. The pride that rewards instil in participants is evident, and likewise the shame of sanctions. The threat of sentence is always present, operating as an incentive to stay clean. The offenders have regular meetings with counsellors and social services, assistance with housing and health provisions, and weekly judicial monitoring.¹²⁷

The guiding principles and practices sound compelling to effect change, but what are the results? As reported in *The*

¹²³ *Drug Court*, MAGISTRATES’ COURT OF VICTORIA, <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/drug-court> (last updated Jan. 3, 2018, 1:28 PM).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

Age newspaper, from 2003 to 2015, about 500 completed the program.¹²⁸ The report continues by stating that of these, about twenty percent have overcome addiction, and about twenty percent have reduced drug use and criminal offending, equalling about 200 participants.¹²⁹ If these 200 had gone to prison it would have cost more than AU\$300 a day for upkeep; and on release approximately eighty percent of them would reoffend (State government average recidivism rate).¹³⁰

There are many success stories of re-integration into the community. Not only has the Drug Court saved millions in State expenditure in Victoria, over and above operating costs, but also it has saved the community, the individuals and victims, from suffering continued effects of reoffending.

C. *Alcohol and Other Drug Treatment Courts, Auckland and Waitakere*

At the 2015, International Therapeutic Jurisprudence conference in Auckland, New Zealand, *Weaving Strands: Ngā Whenu Rāranga*, Judge Lisa Tremewan of the Waitakere District Alcohol and Other Drug Treatment Court (“AODT”) *Te Whare Whakapiki Wairua* made an impressive presentation along with her graduates from the treatment programme.¹³¹ Personal testimonies gave evidence of self, family and community transformations and the session concluded with a *haka* to give

¹²⁸ Nino Bucci, Tammy Mills & Jane Lee, *The Dandenong Drug Court That Wants To Do More*, THE AGE (Mar. 5, 2015, 2:36 PM), <http://www.theage.com.au/victoria/the-dandenong-drug-court-that-wants-to-do-more-20150126-12yuq6.html#ixzz3k5ZQFgWO>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Lisa Tremewan, Waitakere District Court Judge, Keynote Presentation at the 4th International Therapeutic Jurisprudence Conference, “Weaving Strands: Ngā Whenu Rāranga” (Sept. 2015).

thanks to the Court.¹³² It was impressive because it was a powerful demonstration of the aims, outcomes and effectiveness of the specialist AODT Courts. As with the Drug Court Dandenong, the AODT Court is based on the ten components of best practice as identified by US National Drug Court Institute,¹³³ but there is one crucial difference, and that is the inclusion of *Tikanga Māori* (protocols and customs) in the New Zealand AODT Court.¹³⁴ Cultural practices, such as the *haka*, *Te Reo* and other forms of *Tikanga Māori* can be powerful in the way they perform and activate their meanings and *wairua*. Elsewhere, I have made an argument for the inclusion of aesthetic or cultural practices in Therapeutic Jurisprudence models such as demonstrated here.¹³⁵

If this is a therapeutic model of justice, then how may it be defined and understood? The New Zealand Ministry of Justice puts it this way:

Therapeutic courts aim to reduce reoffending, alcohol, drug use, and addiction. They try to help a person's health and well-being so they can move on with their lives. If someone appears before a therapeutic court, they're sentenced in the same way and

¹³² *Id.*

¹³³ See Shannon M. Carey, Juliette R. Mackin & Michael W. Finigan, *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, 3 DRUG CT. REV. 6 (2012).

¹³⁴ THERAPEUTIC COURTS, MINISTRY OF JUST., <https://www.justice.govt.nz/courts/criminal/therapeutic-courts/> (last visited November 18, 2017).

¹³⁵ Grierson, *supra* note 97, at 159.

the same laws apply as in other New Zealand courts.¹³⁶

The AODT Court, which is within the New Zealand District Court jurisdiction, began operating as a Pilot in November 2012, for high-risk, high-needs offenders, with the aim of reducing reoffending, reducing alcohol and other drug consumption and dependency and imprisonment, and aiming to impact upon health and wellbeing in positive ways.¹³⁷ In both the Auckland and Waitakere Courts the participants are engaged actively in a programme of recovery for twelve to eighteen months, under close supervision and scrutiny throughout this time.¹³⁸ As with the Dandenong example, the carrot and stick approach ensures praise and acknowledgement of compliance and progress, as well as sanctions for breaches.

Transformational change and healing for participants, their families and communities is the ultimate objective. This is restorative for all parties. The Court approach “creates holistic, therapeutic and wrap-around support for participants and whānau, which is embedded in a tikanga Māori approach.”¹³⁹ The Final Process Evaluation reports positive outcomes:

Experience of the AODT Court for participants and their whānau is positive and substantially different from their previous court experiences. Participants and whānau describe the AODT

¹³⁶ THERAPEUTIC COURTS, *supra* note 134.

¹³⁷ LIZ SMITH, ALISON CHETWIN & MARIA MARAMA, FINAL PROCESS EVALUATION FOR THE ALCOHOL AND OTHER DRUG TREATMENT COURT, TE WHARE WHAKAPIKI WAIRUA (LITMUS 2016), <https://www.justice.govt.nz/assets/Documents/Publications/FINAL-AODT-Court-final-process-evaluation-20160818.pdf> (last visited November 18, 2017).

¹³⁸ THERAPEUTIC COURTS, *supra* note 134.

¹³⁹ *Id.* at 5.

Court as inclusive, caring and non-judgemental; court processes are perceived as fair, with clear and consistent sanctions when breaches occur. AOD testing and judicial monitoring are regarded as important to the success of participants' recovery journey. Graduates experience leaving the court as a challenging time and draw on their whānau, the 12-Step fellowship and their own graduates' group for support.¹⁴⁰

Transformational outcomes of the AODT Court are affirmed, while noting realistically in the final paragraph, "More time is needed to determine whether the outcomes achieved can be sustained."¹⁴¹ Recognising this need, the New Zealand Justice and Courts Minister, the Honourable Amy Adams, announced an extension of funding for the AODT Court for a further three years in order "to determine whether the Court is the best way to achieve a long-lasting reduction in the harm associated with alcohol and drug abuse before we look at permanently establishing the model."¹⁴²

Identifying beneficial outcomes via success rates that have a lasting effect is an important aspect of on-going evaluations to determine the longevity of the AODT Court model.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 114.

¹⁴² Press Release, Amy Adams, Minister of Justice (June 23, 2017) (on file with Scoop News), <http://www.scoop.co.nz/stories/PA1706/S00214/alcohol-and-drug-court-pilot-extended.htm>.

VII. SUCCESS RATES

What is the success of models that focus on restorative justice; and how is success measured? Is it in terms of recidivism or in terms of the victim's sense of wellbeing? Or is it about overcoming the sense of normalisation that an offender may experience when the offending is accepted and acceptable within the offender's peer group? Or is it about overcoming neutralisation factors of denial of harm and refusal to take responsibility?

Empirical research from studies of programmes in five countries measures a range of factors.¹⁴³ Mark S. Umbreit et al. analyse factors as: participation rates and reasons; participant satisfaction; fairness; restitution and repayment of harm; diversion; recidivism; costs.¹⁴⁴ They focus on victim-offender mediation, group conferencing, circles, and 'other.'¹⁴⁵ Their evaluations show a higher proportion of victim and offender satisfaction than is evident in court cases; a high level of compliance with agreements made via restorative justice compared to court sentencing;¹⁴⁶ and reduction in recidivism, the prevention of which is a key goal of restorative justice with benefit to offenders and communities.

A meta-analysis by Bradshaw and Roseborough showed twenty-six percent reduction in recidivism following victim-offender mediation and conferencing.¹⁴⁷

¹⁴³ *Supra* note 64.

¹⁴⁴ Umbreit, *supra* note 115.

¹⁴⁵ *Id.*

¹⁴⁶ Paul McCold, *A Survey of Assessment Research on Mediation and Conferencing*, in REPOSITIONING RESTORATIVE JUSTICE 67 (Lode Walgrave ed., Willan Pub. 2003) 67; Umbreit, *supra* note 115, at 73.

¹⁴⁷ Umbreit, *supra* note 115, at 73-4 (citing WILLIAM BRADSHAW & DAVID ROSEBOROUGH, RESTORATIVE JUSTICE DIALOGUE: THE IMPACT OF MEDIATION AND CONFERENCING ON JUVENILE RECIDIVISM, FEDERAL PROBATION 18 (2005)).

A United Kingdom study analysed recidivism from four previous studies,¹⁴⁸ with a sample of 1,298 juvenile offenders, 619 participating in victim-offender mediation compared to 679 who did not. It was found that of the former, youth recidivism was thirty-two percent lower than the latter group: a compelling outcome.¹⁴⁹

Evaluating youth justice conferencing in Victoria, the Department of Human Services Review (“KPMG”) of 2010 reported not only cost benefits, but importantly, victims experienced beneficial effects as they felt heard; and, “Young people who participated in Youth Justice Group Conferencing were much less likely to have reoffended within twelve or twenty-four months than young people who received initial sentences of Probation or Youth Supervision Order.”¹⁵⁰ Again, a compelling outcome is in evidence.

In New Zealand, a Centre for Mental Health Research Report in 2013 shows there is not one definitive model, as each model responds to the needs of the local communities it serves.¹⁵¹ In their comprehensive overview and evaluation of community courts and justice centres, Thom et al. reinforce the need for further research.¹⁵² They conclude:

The review of research-based
literature found a significant

¹⁴⁸ William R. Nugent et al., *Participation in Victim-Offender Mediation and Reoffense: Successful Replications?* 11 RES. ON SOC. WORK PRAC. 5, 11 (2001).

¹⁴⁹ *Id.*

¹⁵⁰ Department of Human Services, *supra* note 110.

¹⁵¹ KATEY THOM, ALICE MILLS, CLAIRE MEEHAN, & M. CHETTY, *EVALUATING COMMUNITY JUSTICE: A REVIEW OF RESEARCH LITERATURE* (Centre for Mental Health Res. 2013).

¹⁵² *Id.*

lack of peer-reviewed evaluations and a modest assortment of unpublished evaluative documents. Community justice offers promising local solutions to local problems. Unfortunately, the continued absence of formal evaluations in some jurisdictions leaves questions around what really works in this context unanswered.¹⁵³

Evidence from New Zealand shows that system-wide change, which incorporated group conferencing in legislation in 1989,¹⁵⁴ made a difference within a year with “significant reduction in both court cases and incarcerations, with no evidence of increased recidivism.”¹⁵⁵ Former Principal Youth Court Judge Andrew Becroft testified, “New Zealand’s youth justice system seems to be regarded as innovative, principled, and as providing other jurisdictions with a potential model for developing a standalone youth justice system, with the necessary adaption and appropriate changes.”¹⁵⁶

However, noting a low uptake of restorative justice in adult offending despite supportive legislation, retired Judge McElrea said, “Lack of funding is obviously one factor. This is frustrating because reduced reoffending rates, and reduced use of imprisonment in restorative justice cases, make the economics compelling.”¹⁵⁷

¹⁵³ *Id.*

¹⁵⁴ Oranga Tamariki Act 1989 (NZ).

¹⁵⁵ See Umbreit, *supra* note 115, at 73-44 (citing Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects*, in RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION AND CIRCLES 59, 61 (Allison Morris & Gabrielle Maxwell eds., 2001).

¹⁵⁶ Andrew Becroft, *Editorial*, COURT IN THE ACT, Aug. 2015.

¹⁵⁷ McElrea, *supra* note 28.

More recently in New Zealand, since the passing of the amendment to the *Sentencing Act* in 2014 there have been just over 12,000 cases referred for a restorative justice assessment. In 2016, the Honourable Amy Adams claimed that greater use of restorative justice is reducing crime rates in New Zealand:

Data from 2008 to 2013 shows reoffending rates for those who participated in the service within twelve months was fifteen percent lower than comparable offenders who did not participate. Restorative justice was highly beneficial for young offenders aged seventeen to nineteen, where reoffending rates were seventeen percent lower, and thirty percent fewer offences were committed per offender. Based on these findings, it's estimated the 1,638 restorative justice conferences across all age groups held in the 2013/14 financial year led to 620 fewer offences being committed and 359 fewer offences being prosecuted over the following year.¹⁵⁸

The process evaluation report of the Alcohol and Other

¹⁵⁸ Amy Adams, *Restorative Justice Lowering Reoffending Rates*, NEW ZEALAND GOVERNMENT (Apr. 14, 2016), <https://www.beehive.govt.nz/release/restorative-justice-lowering-reoffending-rate> (referencing data analysis of reoffending rates from <http://www.justice.govt.nz/publications/global-publications/r/reoffending-analysis-for-rj-cases-2008-13>).

Drug Treatment Court in New Zealand offers further useful commentary on these specialist courts and their effectiveness in a Therapeutic Jurisprudence approach, which as I have argued has all the hallmarks of restoring individuals, families and community. The Ministry's report notes that the exited participants came to an understanding of their journey of recovery and they benefit from the service of the twelve-step programme.

The issue around when to introduce restorative meetings with the victim is addressed and raises some interesting points for further consideration. At present, restorative justice meetings are held late in the programme on the presumption that the recovery from drug and/or alcohol will be more settled. The report suggests: "bringing restorative justice hearings forward from phase three to phase one may engage more victims and improve their understanding and perceptions of the court."¹⁵⁹ However, "as noted by stakeholders, asking victims to take part in restorative justice more than eighteen months after the offending is not appropriate or helpful. And when contacted after eighteen months, few victims want to take part in restorative justice."¹⁶⁰

On the other hand, during phase one, the conditions for the programme participants may not be ideal as they may still be suffering from the drug and/or alcohol abuse and pattern of offending. Perhaps the needs of the victims and those of the offenders are different in terms of when they are ready to meet and 'restore' the harm. Out of this discussion, it would appear that this is an area requiring further research and evaluation.

VIII. REFLECTION

Analysing success factors in restorative justice and therapeutic models of justice is not an exact science. There are many

¹⁵⁹ Smith, Chetwin & Marama, *supra* note 137, at 5.

¹⁶⁰ *Id.* at 73.

variables within the statistics, and a “gap between theory and practice.”¹⁶¹ In spite of empirical studies and statistical data there is little real analysis of why restorative practices work, but the outcomes are showing that they do.

Limits will always be imposed on any approach no matter how inchoate it may be; and such limits are imposed most particularly from institutional constraints and public perceptions of what crime and justice might mean. As Daly says, “It will take time ... for people to become familiar with new justice scripts and social relations responding to crime.”¹⁶²

The evaluations and statistics are presenting quite an optimistic picture. However, as Declan Roche suggests, “we should interpret these findings carefully as the majority of evaluations have tested restorative justice programs on offenders who have been offered this option based on their cooperativeness and good backgrounds.”¹⁶³ Although Roche does not clarify the qualitative judgement of ‘good’, her point regarding the variables of offender characteristics deserves consideration for further research.

Thought should be given also to the tendency to binarise rights-based adversarial justice and restorative justice, as though the former is ‘tough’ and the latter ‘soft’ on crime; and from the perspective of traditional lawyering the former may be seen as ‘positive’ and the latter ‘negative.’ Perhaps the words of former Judge Fred McElrea may bring a note of caution, while acting as a reminder to the legal profession for necessary uptake and understanding of restorative justice approaches and processes:

¹⁶¹ Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? (Hirsch et al. eds., Hart Pub. 2003).

¹⁶² *Id.*

¹⁶³ Declan Roche, *Dimensions of Restorative Justice*, 62 J. OF SOC. ISSUES 217 (2006).

The adversary ethos is so deeply imbedded in our legal structures, the legal profession, and judges, who (in common law countries) are drawn from the profession, that restorative justice is continually pushed to the margins, despite the encouragement of legislation.¹⁶⁴

IX. CONCLUSION

In considering restorative justice programmes and projects, this discussion has focused on significant factors of definition, perception, practice, research and evaluation. It has examined aims and evaluated specific models and approaches, to highlight the shift of emphasis from adversarialism and blame to responsibility and reparation, and what this shift entails. The discussion has also taken a step into the stream of specialist courts with the Alcohol and Drug Courts, while proposing that the Therapeutic Jurisprudence approach has the hallmarks of being restorative, and the restorative approach as being therapeutic.

It seems that restorative justice programmes are proving their value in addressing crime in meaningful ways, but more must be done in evaluating time and resources against outcomes. The available evidence suggests that restorative justice has the capacity to turn harm to healing by working towards reparation, restitution and reconciliation, and that this outcome is occurring increasingly, at least in New Zealand and the State of Victoria since the introduction of formalised processes of victim-offender mediation and family group conferencing.

¹⁶⁴ McElrea, *supra* note 28.

In the defining terms for restorative justice there is an emphasis on harm caused by crime, repairing that harm for all parties and preventing reoccurrence. These are worthy aims if challenging. However, many questions remain unanswered regarding the flow-on effects of harm, offender responsibility and reintegration into community, and of a victim's healing and its longevity.

To ensure the sustenance of restorative justice, there is a requirement for continuing resources, but the question of where the emphasis of resource provision should lie remains political and contestable. Public benefits of reducing recidivism while promoting restitution and restoration are a relevant focus for further analysis. Good evidence-based argument may speak persuasively for further and increased funding into this sector of justice. There is also value in increasing international dialogue of examples and benefits of solution-focused courts and the values of mainstreaming social justice approaches.

This discussion has focused on proven examples of restorative justice, family group conferencing in youth justice contexts, and therapeutic specialist courts in New Zealand and the State of Victoria. The characteristics of restorative justice and its incorporation of principles from TJ, and vice versa, is a conversation that will continue to be relevant particularly concerning the role of victims and their voice in the process of offender rehabilitation and community restoration.

The paper ends by endorsing the value of restorative justice approaches in criminal justice, while acknowledging the need for further research on the challenges and outcomes of restorative programmes and therapeutic approaches to criminal justice.

FAMILY VIOLENCE COURTS IN NEW ZEALAND: “THERAPEUTIC” FOR WHOM?

Alice Mills and Katey Thom*

Abstract

Family violence is a major social problem in New Zealand. It has the highest prevalence of partner assault among westernised countries, and nearly half of all homicides and reported violent crimes are related to family violence (Ministry of Justice, 2015). Family Violence Courts (hereinafter “FVCs”) were first established in New Zealand in 2001 and have been conceptualised as broadly based on the principles of Therapeutic Jurisprudence (hereinafter “TJ”) (Knaggs, Leahy, Soboleva, & Ong, 2008a). The aim of FVCs is to improve efficiency in the processing of family violence cases whilst ensuring offender accountability and the safety of victims (Ministry of Justice, 2008). Drawing on existing literature and observations of FVCs in New Zealand, this paper aims to explore the tensions that may arise between achieving these goals. Specifically, this paper considers early guilty pleas and the need to expedite the court process; the quality of judicial monitoring and limited information-sharing between agencies; the questionable efficacy of offender treatment programmes; and, the promotion of victim safety. It also examines the granting of Section 106, “discharge without conviction,” for offenders who submit an early guilty plea, and complete an offender treatment programme. Although this may help to expedite cases, this paper explores how this may also risk sending a message to vic-

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tims that family violence is not taken seriously and may potentially endanger their safety, particularly where the efficacy of such treatment programmes is unknown. Overall, the paper questions whether such courts can be described as “therapeutic” in their current form, and it outlines an agenda for further research in this area.

I. INTRODUCTION

Family violence is a serious and enduring social problem in New Zealand. The term “family violence” in the New Zealand context, can be defined as occurring:

within a variety of close interpersonal relationships, such as between partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household, but are part of the family and/or are fulfilling the function of family. (Ministry of Social Development, 2002, p. 8).

New Zealand has the highest prevalence of intimate partner physical and sexual assault in the Organization for Economic Cooperation and Development (hereinafter “OECD”) (OECD, 2013). One in three women experience physical and/or sexual intimate partner violence in their lifetime. In 2014, New Zealand police carried out 101,981 investigations of family violence (Statistics New Zealand, 2015). Family violence accounts for nearly half of all homicides and reported violent crimes in New Zealand, and takes a third of police resources (Ministry of Justice, 2015). Yet, it is estimated that only 20% of domestic violence is ever reported to the police (Ministry of Justice, 2015). Family violence has substantial and serious consequences for victims in terms of mental and physical health and well-being. It also has secondary effects on those who witness such violence, including any chil-

dren of the household. Conservative estimates suggest that the cost of family violence and child abuse in New Zealand is between \$4.1 billion and \$7 billion per annum (Kahui & Snively, 2014).

Family Violence Courts were first established in New Zealand in 2001 (Knaggs et al. 2008a). FVCs, like other specialist solution-focused courts in New Zealand, were initially established as a “grassroots judicial innovation” (Richardson, Thom, & McKenna, 2013, p. 185) in response to community concerns about the increase in family violence cases (Ministry of Justice 2008). Consequently, FVCs predominantly draw on existing judicial and other sector resources, and operate within existing legislation (see Thom and Black in this special issue). They also have limited overt political support or public awareness. The first FVC was introduced in Waitakere District Court, a jurisdiction in the west of Auckland, the largest city in New Zealand (Knaggs et al. 2008a). By 2011, there were eight such courts, all located on the North Island (Boshier 2011). It remains unclear why there is no access to FVCs in the South Island of New Zealand.

As with domestic violence courts in other jurisdictions (for example, the United States (Wolff, 2013), and the United Kingdom (Burton, 2006)), FVCs are designed to ensure that offenders are held accountable for their actions efficiently, and that they receive assistance to address the underlying issues behind their offense whilst also ensuring victim safety. Described as providing a more “timely” and “holistic” response to family violence than the conventional court setting (Knaggs et al., 2008a), FVCs have four key aims:

- To get offenders to take responsibility for their actions and think about how they affect other people;
- To promote victim safety;
- To ensure that those affected by family court cases can get the right support and information;

- To reduce the time it takes for family violence cases to be heard or resolved. (Ministry of Justice 2008: 4)

FVCs are held in District Courts¹ at a regular time and place. They operate with dedicated FVC judges, police prosecutors, community probation officers and court staff, including victim advisors (Ministry of Justice, 2008). Defended hearings take place on separate occasions from “list days,” which deal with pleas, sentencing indications, remands and sentencing. In order to expedite domestic violence cases, charges should be heard and determined, with the exception of sentencing, within thirteen weeks, with pleas entered not more than two weeks after defendant’s first court appearance (Ministry of Justice, 2008). Once a defendant has pleaded guilty, sentencing may be deferred to allow participation in a treatment programme such as a stopping violence programme, anger management, or drug and alcohol counselling with the indication given that if the defendant completes treatment, they may be given a lesser sentence, or even a discharge. The defendant is then subject to judicial monitoring during the treatment process. Although FVCs deal with violence within a range of family relationships, in practice, the bulk of their work appears to involve physical violence between intimate partners – usually by male offenders against female victims.

II. FAMILY VIOLENCE COURTS AND THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence identifies that the law as a social force that can produce therapeutic (or alternatively non-therapeutic) consequences. TJ directs a focus on studying whether legal rules and procedures and the way they are applied by various actors could be reshaped to enhance their ther-

¹ The lower tier of criminal court in New Zealand.

apeutic potential (Shavers, 2013; Winick, 2013). The overall goal is to empower offenders to take responsibility and control of their own treatment (Wiener & Georges 2013). It is within this context that FVCs in New Zealand have been reported as using TJ practices or techniques (Knaggs et al., 2008a).

As with solution focused/problem-solving courts internationally, FVCs aim “to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities” (American Bar Association 1996). Additionally, FVCs seek to engage a variety of professionals to work with the presiding judge and the offender to address the underlying problems behind the offending behaviour and to explicitly recognise the emotional issues involved. They aim to use a less adversarial process with greater collaboration between agencies to help individuals to deal with these problems in order to prevent re-offending (Johnson, 2005; Berman & Feinblatt, 2001; Burton, 2006; Shavers, 2013; Winick, 2013). At the same time, FVCs consider both the safety and needs of the victim, in addition to the accountability of the offender (Toki, 2009).

Central to this exploration, is the meaning of the term “therapeutic,” if we are to assess the therapeutic intent of FVCs. Indeed, one of the key dilemmas outlined in the critical discourse on TJ is related to this (Roderick & Krumholz, 2006; Slogobin, 1995; Roderick & Krumholz, 2006). What is meant by “therapeutic?” Who decides what should count as therapeutic? For whom should court practice be therapeutic? Victims? Offenders? The broader community? Wexler (1995) has argued that the term should be deliberately left vague and not “tight,” so as to provide researchers with the flexibility to “roam within the intuitive and common-sense contours of the concept . . .” (p. 579). Slogobin (1995) argued that “therapeutic” could refer to measures that are beneficial to the *psychological or physical well-being of an individual*. Using this definition, the current paper understands the term “therapeutic” relative to the varying aims of the court, and who they are ad-

dressings, whilst recognising the complexity of the family violence situations. Explanations of family violence are extensive and vary from biological explanations that have emphasised the role of alcohol/drug abuse, brain injury and genetic factors (Montalto, 2016; Roberts, 1988; Roy, 1977), to psychological theories which suggest that family violence is linked to poor emotional intelligence (Winters, Clift, & Dutton, 2004), anger control issues (Moffit, Robins, & Caspi, 2001), low self-esteem, poor conflict resolution strategies (Hasting & Hamberger, 1988), personality disorders, and childhood experiences of violence and aggression (Howell & Pugliesi, 1988). Feminist theories of domestic violence have highlighted the role of traditional patriarchal family structures which endorse, or, at the very least tolerate family violence (Buzawa & Buzawa, 2003; Harne & Radford, 2008). As a result of this structure and normative cultural expectations of masculinity, male abusers may claim the right to assert their control and power over other family members (Montalto, 2016). As FVCs are highly limited in their ability to tackle the structural causes of family violence, their ability to treat the causes of these crimes is restricted to dealing with individuals, for example, through addiction treatment and stopping violence programmes end violence based on psychological and educational approaches such as counselling, attitude adjustment, anger management, and conflict resolution.

In this paper, we draw upon the existing international and national FVC literature and brief observations of FVCs in New Zealand. In addition, we critically examine whether FVCs are operating in a therapeutic way, and whether these practices are actually leading to therapeutic outcomes for offenders and victims. We explore the tension between the therapeutic discourse of FVCs, the treatment of offenders, and the needs of victims. Finally, this paper questions whether such courts can truly be described as therapeutic for both parties, particularly when “discharges without conviction” are taken into consideration.

III. RESEARCH SETTING AND SOURCES

The New Zealand based observations and evaluation research are largely focused on three FVCs in the Auckland region of New Zealand. The first is located in Waitakere, West Auckland. As noted above, this was the first FVC in New Zealand (Knaggs et al. 2008a). It is the only FVC to date that has been formally recognised as operating as a true problem-solving court, with support from a network of community organisations to provide a more holistic and rapid response to family violence. This FVC has adopted an innovative approach involving independent community victim advocates, and input provided by local community organisations (Knaggs et al., 2008a). The second court, Manukau in South Auckland, was established later in 2005 (Knaggs et al. 2008a). It operates in a low socio-economic area, with relatively large Maori and Pasifika populations. Of those convicted by courts in the Manukau area in 2014, 38% are Maori, 28% are Pacific Peoples, and 16% are European in comparison to figures of 25%, 17%, and 35%, respectively, in the wider Auckland court area (Statistics New Zealand, 2017). Maunkau FVC has only Ministry of Justice appointed Victim Advisors rather than victim advocates, and was established with little consultation with the local community (Knaggs et al. 2008b). The third court is located in the central business district of Auckland City. It was established in 2007, and appears to follow the Manukau model, with little community in-reach, and Ministry of Justice appointed victim advisors.

All of these courts have been subject to independent evaluation (Morgan, Coombes, Te Hiwi, & McGray, 2007; Morgan et al., 2008; Knaggs, Leahy, Soboleva, & Ong, 2008a; Knaggs et al., 2008b; McKenzie & Carrington, 2007), and this literature will be drawn upon to critically evaluate the therapeutic potential of these courts. Additionally, we draw upon our own observations of the three courts which were undertak-

en to ensure that the researchers were acquainted with the operation of the courts and the roles of the various actors therein. Each court was observed for two “list days” by two researchers, and short discussions were held with each of the judges. Only public proceedings were observed. Therefore, discussions between lawyers and defendants, or victims and victim’s advisors, were excluded, as were defended trial hearings. Notes were written and agreed upon by the researchers within 48 hours of each observation. Data regarding guilty pleas, the length of time before cases were disposed, and discharges without conviction were also obtained from the Ministry of Justice through an Official Information Act request.

Whilst these observations gave some insight into the workings of the courts, they did not include discussions with most of the court participants and professionals, thus allowing only highly limited access to the meanings of social events, and processes for these actors. Due to the lack of interviews, we were unable to explore court participants’ own thoughts of how the court might be “therapeutic.” To go some way to counteract this deficit, we have analysed existing evaluations of FVCs in terms of their contributions to the understanding of the therapeutic impacts of the courts on offenders and victims. Throughout the discussion, we also include relevant critical international literature that has discussed similar challenges in the family violence court context.

IV. THERAPEUTIC IN PRINCIPLE, BUT NOT IN REALITY?

Despite something of a therapeutic jurisprudence foundation to the FVCs in New Zealand, our examination revealed several significant aspects of the courts, which demonstrate that in their current form, FVCs are limited in their therapeutic potential to meet their two key aims: to hold offenders accountable for their actions, and to promote victim safety (Min-

istry of Justice 2008). The following discusses five significant factors impeding the ability of FVCs to optimise therapeutic outcomes. These include early guilty pleas and expediting the court process; judicial monitoring; the questionable efficacy of offender treatment programmes; the promotion of victim safety; and discharges without conviction.

A. Early Guilty Pleas and Expediting the Court Process

One of the main methods used by FVCs to bring offenders to justice and ensure they are accountable for their actions is the enticing of early guilty pleas which can also assist in the aim of expediting the court process. Previous research has indicated that the longer a family violence-related case goes on, the greater the likelihood that couples will reconcile, or victims will withdraw from the case (Morgan et al., 2007). This is due to direct pressures put upon them by the defendant and/or family members, or indirect pressures such as economic and housing difficulties, or access to children (Morgan et al. 2007). FVCs, therefore, aim for family violence charges to be heard, and determined within thirteen weeks (Ministry of Justice, 2008).

Existing research suggests that FVCs in New Zealand have had mixed success in enticing guilty pleas and ensuring the swift completion of cases. In the early days of the Waitakere FVC, guilty pleas increased from around 15% to 65%², and around 80% of victims were able to see the cases through to completion (Johnson, 2005). In Manukau FVC, 68% of charges were disposed of within 13 weeks in the first

² More recent figures from 2016 obtained under the Official Information Act suggest that this effect has been sustained, with 80% of family violence defendants at Waitakere and 76% at Manukau entering guilty pleas (Ministry of Justice, 2017).

22 months of the court's operation, compared to 59% prior to the implementation of the court (Knaggs et al., 2008b). However, high case numbers (60 cases per list in South Auckland), limited judge time, and increasing not guilty pleas have since led to delays between court appearances, diminishing its ability to promote offender accountability (Knaggs et al., 2008a; 2008b). Figures from 2016 suggest that just 53% of cases at Manukau and 59% of Waitakere were completed within 13 weeks (Ministry of Justice, 2017).

Furthermore, the aim of expediting cases can be subverted by the attitude and action of defence counsel. Despite two of the FVCs in the current study having protocols which clearly set out the FVC process and expectations, our observations and conversations with the judges revealed that some lawyers actively chose not to engage with this process and frequently appeared, or sent replacement representatives, without the required information leading to adjournments and further delays in cases. The lack of active participation by lawyers was an issue also noted by Morgan et al., (2008).

FVCs have not always been favourably reviewed by lawyers in New Zealand. Defence lawyers and others have expressed concerns that FVCs place improper pressure on individuals to plead guilty when in a regular criminal court, they would not because the supporting evidence is weak, and the case for acquittal is strong (Mansfield, 2008; Hannah-Moffat & Maurutto, 2012). However, Burton (2006) counters that in non-specialist courts, family violence defendants have traditionally benefited from judicial ignorance about stereotypes that defendants and their lawyers often use to justify their behaviours. FVCs could therefore represent a levelling of the playing field that has usually been tilted against the victim (Berman & Feinblatt, 2005).

B. Remand and Judicial Monitoring

Once a guilty plea has been entered, an offender in the FVC may be remanded to voluntarily undertake a treatment programme before sentencing with the incentive of a more lenient sentencing outcome if the treatment is successfully completed. Whilst this aims to encourage offenders to engage with what appear to be therapeutic measures, potentially improving their wellbeing and that of others by minimising the risk of violence, this can substantially lengthen the time it takes for cases to be fully disposed (Coombes, Morgan, & McGray, 2007).

Whilst undertaking treatment programmes, participants in New Zealand FVCs are usually subject to judicial monitoring. This can give judges the opportunity to provide motivational interactions with defendants who seek to minimise the effects of their behaviour as well as potentially enhancing offender accountability (King & Batagol, 2010). It has been found elsewhere to dramatically reduce treatment programme non-completion rates (Gondolf, 2000). Although judicial monitoring can allow the court to examine the experiences of victims who may appreciate the extended length of time the offender is under the supervision of the court (Morgan et al., 2007), the quality of judicial monitoring and its ability to enhance the therapeutic potential of the court varied widely during our observations. At the Waitakere FVC treatment programme, providers sit in the court to enable feedback of FVC participants' progress, and the judge can also liaise with community victim advocates who can speak on behalf of victims (see also Knaggs et al., 2008a). In the other two courts observed for this study, however, judicial monitoring could be rather cursory due to busy court lists. Confidentiality provisions prevented programme providers from giving details about offenders' engagement other than programme attendance. Judges were therefore reliant on defendants' self-reported accounts of their own behaviour and attitudes which may be

highly untrustworthy (Robertson, 1999). The quality of judicial monitoring, therefore, was impacted by the information made available for each judge to draw on, and the number of cases they were expected to deal with at each sitting.

C. *The Questionable Efficacy of Offender Treatment Programmes*

Perhaps the most critical element of the therapeutic potential in FVCs for both offenders and victims is “batterer treatment” programmes. Such programmes are relied upon as a “magic bullet” to family violence (McKenzie & Carrington, 2007; Mansfield, 2008), potentially giving victims the impression that perpetrators have been “cured” (Stewart, 2011). Yet these programmes are no guarantee of behavioural reform (Mansfield, 2008). Internationally, evidence to establish their efficacy in reducing recidivism is mixed, weak or inconclusive (Burton, 2006; Wilson & Webber, 2014; Wolff, 2013; Westmarland, Kelly & Chalder-Mills, 2010; Robertson, 1999). In general, either no effect, or a very modest effect on recidivism has been found, with studies consistently finding that batterer programmes perform “no better than community service or probation alternatives on rates of reoffending” (Wolff, 2013:87). In New Zealand an evaluation of the Waitakere FVC found that offenders who had completed programmes were less likely to reoffend than those who had not (Coombes et al., 2007). Generally, however, the lack of evidence for programme efficacy is limited by the evaluative research designs used, including lack of control groups, small sample sizes, uneven monitoring of recidivism and inadequate follow-up periods (Mills, Thom, Meehan, & Chetty, 2013; Wolff, 2013).

In a rare study involving victims using a FVC in New Zealand, respondents reported little change in their partners’ behaviour after their attendance at a treatment programme. Additionally, many experienced on-going threats to their safety sometime after their partner’s participation in the FVC (Mor-

gan et al., 2007). In some cases, victims felt that the offenders had simply learned how to hide the violence better, for example, they started to hurt victims in ways that left no visible marks (see also Knaggs et al., 2008b). Whilst the court and treatment process had held offenders accountable to the court, victims did not feel it had held offenders accountable for behavioural change (Morgan et al., 2007). The appropriateness of problem-solving approaches for domestic violence has therefore been called into question, primarily because, as Burton (2006) suggests, there is no effective treatment for domestic violence, implying that the therapeutic potential of FVCs may be highly limited.

One potential explanation for the apparent inefficacy of treatment is lack of offender motivation to change their behaviour. Such motivation is acknowledged to be an “essential ingredient in treatment success” (Winick, 2013:221), yet FVCs cannot “mandate batterer’s receptivity to the goals of treatment” (Wolff, 2013:94). Motivation is likely to be lacking if offenders have been compelled by way of the promise of a lesser sentence to undertake the treatment by the court, a practice that has been critically characterised as “coerced volunteerism” (Burns & Peyrot, 2008; Nolan, 2009). In such circumstances, offenders may feel powerless, reducing their openness to change (Robertson, 1999). Treatment programmes may act only as a method to monitor the offender and supervise their compliance rather than leading to behavioural change (Labriola, Bradley, O’Sullivan, Rempel, & Moore, 2009).

Winick (2013) has suggested, however, that judges and other court officials should use their interpersonal skills to create an environment which engages offenders’ intrinsic motivation and persuades them to participate in services and commit to behavioural change. A sense of intrinsic motivation is also likely to develop if offenders perceive the court procedures to be fair and just (Monahan, et al., 2005), a process described in the procedural justice literature (Tyler, 2003). This may be dif-

difficult to achieve in the FVC in situations where the judges are not provided with information or time they need to motivate offenders to change their behaviour. The victims in Morgan et al.'s (2007) study reported that their partners' anger and violence intensified during the programmes as they blamed the victim for what they felt was their forced participation in the course. Nevertheless, little is known about the perceptions of procedural fairness of FVC participants, and given the large court lists in two of the FVCs observed, assessing such issues would be valuable.

Additionally, the offender treatment programmes offered in New Zealand FVCs largely take a "one size fits all" approach which fails to differentiate between different forms of violence and motivation for using violence. One approach to what works in offender rehabilitation has proposed that outcomes are moderated by whether programmes address the offender's *risk*, targets their *needs*, such as substance misuse, and are *responsive* to their individual characteristics including their strengths and motivations (the risk-need-responsivity model) (Andrews et al., 1990). An alternative, strengths-based approach, the Good Lives Model, also requires programmes to be targeted to individuals' criminogenic needs (Ward et al., 2012). Although different programmes were available in the FVCs we observed, little assessment took place to ascertain which programme might be more suitable to meet offenders' risk, needs and strengths. In two of the courts under observation, participants were allocated to programmes according to their geographical proximity to the offenders' homes rather than the offenders' suitability, a practice which is likely to diminish the potential effectiveness of the programmes.

D. *Promoting Victim Safety*

Given the apparent lack of effectiveness of batterer treatment programmes, the efficacy of FVCs in promoting victim safety is somewhat questionable. However, other aspects

of FVCs appear more successful in addressing victims' safety concerns. In all New Zealand courts, Victim Advisors encourage victims to take part in the court process, advise them on their rights, help them to understand, and participate in the court system, and represent their views to the court (McKenzie & Carrington, 2007). They can also assist victims to access support, government, or community agencies, and the Police. Uniquely, the Waitakere FVC has independent Community Victim Advocates who liaise with community family violence services, programme providers and the courts, and can speak on behalf of victims at the court (Knaggs et al., 2008a). They also provide highly valued emotional support and safety advice, even after the case has finished in the courts, and share some of the practical responsibilities for executing safety plans (Morgan et al., 2007). In a previous study, the representation provided by the Community Victim Advocate was found to be highly appreciated by victims because it meant that they did not feel they had to attend court to have their views represented concerning on-going emotional and physical risks to their safety. They were given swift, useful information about the progress of their case which could facilitate plans to ensure their safety (Morgan et al., 2007). Having the victims' advocate prepare and take responsibility for the victim impact statement also ensured that victims could not be blamed for the consequences of what was said in court (Morgan et al., 2007). In contrast, any input given by victims to court Victims' Advisors can be accessed by defence counsel and therefore also the defendant possibly limiting what information victims are prepared to provide and therefore undermining victim safety (McKenzie and Carrington, 2007). Furthermore, unlike victim advocates, victims' advisors are only able to present information to the court that has been directly provided by the victim, thus excluding information relating to victim safety and risk that may have come from other sources such as community support organisations (McKenzie and Carrington, 2007). Whilst FVCs in New Zealand may appear to do little to reduce re-offending, if community victim advocates are employed,

they may help to minimise the risk to victim safety during the court process and beyond.

E. Section 106: Discharges Without Conviction

In some cases, perpetrators in FVCs in New Zealand who have entered an early guilty plea, committed a relatively minor offence and are first time offenders, may be given a Section 106 “discharge without conviction” if they successfully complete a treatment programme with the associated judicial monitoring. Such sentencing leniency is designed to encourage offenders to plead guilty, cooperate with the court, address the psycho-social problems thought to underlie their offending (Coombes et al., 2007), and complete a court mandated treatment programme in a timely fashion, with the threat of a more severe penalty if they do not follow the court’s recommendations (Morgan et al., 2008). Discharges without conviction may also encourage families to report violence and seek help from the criminal justice system, something which they may not do if the offender is likely to be fined or imprisoned for fear of causing further tension and financial difficulties for the rest of the family. Section 107 of the Sentencing Act 2002 makes provision for such a discharge if “the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.” Under Section 106(2) of the Sentencing Act 2002, such a discharge is deemed to be an acquittal, although courts may require offenders to pay costs or compensation to the victim (S.106(3)).

New Zealand FVCs have heavily utilized discharges, particularly in the early days of their operation. In the first three months of the Auckland court, 71% of cases were remanded for the offender to complete a treatment programme with an indication that this will result in a Section 106 discharge without conviction (McKenzie and Carrington, 2007). The number of Section 106 outcomes given in family violence cases increased substantially when FVCs were first introduced,

with 10.3% of offenders in the Waitakere FVC and 16.3% in the Manukau FVC being given a discharge without conviction compared to figures of just 5.5% and 1.5% respectively before the introduction of FVCs (Knaggs et al., 2008a). In 2016, 13% of defendants at Waitakere charged with a family violence offence were given a discharge without conviction compared to 9% at Manukau, although these data do not distinguish between FVC and other District Court cases (Ministry of Justice, 2017).

However, Section 106 discharges are not without controversy and represent a site of considerable tension between the two goals of family violence courts to promote offender accountability and ensure victim safety. Whilst discharges can be useful in enticing guilty pleas and establishing relationships between the judge and defendants for judicial monitoring purposes, they may endanger the safety of victims (Morgan et al., 2007). International research suggests family violence rarely consists of a one-off incident or series of discrete events but more usually takes the form of an ongoing pattern of abuse (Robinson and Cook, 2006; Morgan et al., 2007). As only a small proportion of family violence comes to the attention of the criminal justice system, judges may be unaware of whether an incident is part of a broader pattern of violent behaviour and ‘coercive control’ (Stark, 2012). Without a record of convictions, it is more difficult to hold offenders accountable in the context of patterns of such ongoing violence (Coombes et al., 2007; Toki, 2009), and an accurate record of offending needs to be available if the offender is found guilty of subsequent offences and in Family Court matters. FVC judges can ask for the full police history of the offender which includes call-outs, breaches of protection orders and Police Safety Orders³ and

³ Police Safety Orders are issued when police have reasonable grounds to believe that it is necessary to remove the perpetrator to ensure the victim’s

discharges without conviction. This information is now to be provided routinely in family violence cases (Ministry of Justice, 2015), but nevertheless will include only those incidents that have come to the attention of the police.

Evaluation research reported that in the Waitakere FVC, Community Victim Advocates maintain records of Section 106 discharges so they can alert judges to prior offending even where there is no court record of a conviction, and take contextual and historical information from a variety of sources into account when preparing their safety assessments for presentation at the court (Morgan et al., 2007). However, McKenzie and Carrington (2007) note several cases in the Auckland City FVC where a sentence indication of a Section 106 discharge without conviction was given, but where community agencies knew about previous violent behaviour but were not permitted to present this information to the court. As there is a lack of visible or lasting consequences for the offender, Section 106 discharges also risk sending a clear message to offenders, victims and the public that family violence is not taken seriously (Morgan et al., 2007; McKenzie and Carrington, 2007). This diminishes the accountability of the offender (Morgan et al., 2008; Knaggs et al., 2008a; 2008b), and the therapeutic potential of the court for victims.

Additionally, the use of Section 106 could be seen as inconsistent with Māori cultural practices. Whilst the concept of punishment is not always necessary in Pākehā (New Zealand European) culture, in Māori cultural practice, where a wrong

safety. A person bound by an order must leave the property whilst the order is on place and must not have contact with the person at risk. Orders can last up to five days and can be issued without the consent of the victim (Ministry of Justice, 2015).

has been committed against a community or individual, a form of *utu* or reciprocity is always necessary to restore the *mana* (integrity, status) of both the offending and victimised parties (Toki, 2009). Much like diversion programmes, discharges may leave victims feeling as if the courts have failed to meet their needs to have the offender punished (Shavers, 2013), therefore limiting the therapeutic effect for the victim and the restoration of community. Nevertheless, these perspectives may misjudge the complexities and realities of domestic violence, including the fact that victims wish to continue in a relationship with the perpetrator and the consequences of a conviction may end up punishing the family as much as the offender. To be a more therapeutic measure, Morgan et al. (2007) suggested that Section 106 discharges should therefore take account the offender's on-going risk to their partner's safety and decisions to grant such discharges should only be informed by victims' views on whether this would be appropriate. It would be imperative that the victim's views on sentencing be carefully considered by the court since this may put victims at further risk if offenders hold them responsible if a Section 106 is not granted.

V. DISCUSSION: THERAPEUTIC FOR WHOM?

Applying a TJ lens, we would argue the evidence suggests in their current form FVCs are limited in their therapeutic potential. FVCs have shown no decline in re-offending rates or any improvements in the reporting of intimate violence to state authorities (Bennett et al., 1999, Mills, 1998; Knaggs et al., 2008b). Although they may bring offenders to justice by ensuring that family violence cases are completed swiftly, FVCs appear less successful in forcing offenders to confront their underlying psychological and social problems, and change their behaviour through participation in treatment programmes. In two of the New Zealand FVCs we observed, little was done to engage offender motivation or monitor their progress in conjunction with community treatment providers. Further re-

search, including interviews with offenders to explore their perceptions of judicial monitoring and treatment programmes would be highly useful, as well as further investigations into how information could be safely shared between the varying sectors.

Little is also currently known about the effectiveness of the treatment programmes on offer in New Zealand, and the lack of any meaningful assessment to match offenders with suitable programmes will further restrict their likely efficacy. Qualitative research that explored participants' experiences of these programmes, alongside professionals' views of the programme operations would be highly beneficial for the future of FVCs in New Zealand.

Furthermore, although specialist courts such as FVCs are designed to be therapeutic, they have been criticised by Hannah-Moffatt and Maurutto (2012) who argue they could be re-defined as 'an extension of the punitive state' (2012:215). Judicial monitoring subjects offenders to more intrusive forms of penal governance and control than would be the case in regular criminal courts by increasing regulation of the offender's self and body to produce a 'governable liberal responsible subject' (Hannah-Moffat and Maurutto, 2012:210). These authors argue that by encouraging offender participation in treatment programmes whilst on bail or remand, specialised courts are also 'enabling a new form of pre-punishment' (Hannah-Moffat and Maurutto, 2012:203). Mansfield (2008) has argued that pre-sentence regimes are justified with reference to therapeutic and rehabilitative goals, but such requirements or conditions to complete a programme may be overly punitive in relation to the offence committed.

Research on victims' perspectives of FVCs is limited but has suggested that victims are still subject to offender violence and aggression both during and after the completion of treatment programmes (Morgan et al., 2007). The suitability of

problem solving courts for dealing with domestic violence has therefore been challenged as they have a primary focus on the offender and addressing the problem in his or her life rather than the safety of the victim (McKenzie, 2006). The use of Section 106 discharges illustrates the tension between the twin goals of holding offenders accountable and promoting victim safety. They may incentivise early guilty pleas and treatment participation but if court processes are unable to consider the context of family violence and treatment programmes are found to be ineffective, the potential therapeutic value and role of FVCs in securing victims' safety must be called into question. Community denunciation of the crime has been found to be of substantial importance to victims of sexual and domestic violence (Herman, 2005), and yet may also be substantially diminished by the use of Section 106.

So what then could FVCs do to hold offenders accountable for change in a way that does not damage their families further (Morgan et al., 2007)? To answer this, more longitudinal research is clearly needed with the main participants of FVCs, both offenders and victims, rather than 'snapshot' process evaluations. Due to the nature of family violence and its tendency to go unreported, and the methodological problems associated with recidivism studies (Mills et al., 2013), the only way of truly gauging the therapeutic potential of FVCs is to ask those most affected by family violence. Such research would need to consider whether a problem-solving approach is appropriate for family violence and if so, how family violence courts could be made genuinely therapeutic for both victims and offenders. Further research is also needed on the family violence treatment programmes and on offender motivation. To what degree might motivation be improved by better assessment and allocation to such programmes? Or by more effective and more empathetic judicial monitoring? Or clearer information sharing and consultation between the FVCs and treatment providers?

In order to improve the efficacy of FVCs, Wolff (2013) advocates the use of empirically informed understanding of the dynamics of domestic violence, including the victim's behaviour as well as that of the perpetrator. For Wolff (2013), FVCs should consider the "victimogenic" risks and needs as well as the 'criminogenic' risks and needs of the offender, and put in place interventions to help victims change their behaviour, such as returning to a partner who repeatedly abuses them, to prevent subsequent incidents of domestic violence. Others, notably Shavers (2013), caution against this by questioning whether it is appropriate to label a victim as a person with a problem that can be addressed through problem-solving approaches, or whether this might lead to 'victim' blaming and minimising of the need for a strong law enforcement response in domestic violence cases (Weber, 2000).

A recent enquiry into family violence in New Zealand recommended the establishment of an integrated family violence court which would deal with all matters, both civil and criminal, relating to family violence. These courts would prioritise victim safety and would take an inquisitorial approach, with a specially trained judiciary and workforce. This would remove the confrontational approach of adversarial justice and help to expedite family violence cases. An intensive case management approach would be used for each family and a court co-ordinator, similar to a treatment manager in drug courts, would liaise between the court and community and other state services, including treatment providers. The coordinator would also ensure ongoing compliance with court orders and would report back to the judge on a family's progress in order to improve the monitoring of cases (Wilson & Webber, 2014). The use of Community Victim Advocates at the Waitakere FVC demonstrates how information sharing between criminal justice and community agencies can help to better inform risk assessments and sentencing. Nevertheless, considerable questions remain about the degree to which this extra-legal information

may affect due process, putting the rights of offenders and victim safety in conflict.

Furthermore, FVCs remain marginalised in the political landscape of New Zealand. A recent public consultation on strengthening New Zealand's legislative response to family violence, mentioned FVCs briefly in the context of expediting family violence cases (Ministry of Justice, 2015), but makes no mention of reforming them or expanding them further throughout New Zealand. FVCs are therefore likely to continue to operate with limited resources or political support.

VI. CONCLUSION

Family violence is a highly complex social issue. Despite their laudable aims to both hold offenders accountable and to promote victim safety, the evidence suggests that FVCs in New Zealand are struggling to meet these aims due to a variety of reasons including pressures on court time, limitations of information sharing, lack of assessment and evidence of treatment efficacy and the use of Section 106 Discharges without Conviction. In their current form, FVCs in New Zealand therefore remain limited in their therapeutic and problem-solving potential.

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MAINSTREAMING TJ IN AUSTRALIA: CHALLENGES AND OPPORTUNITIES

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Abstract

This article recognises that the TJ movement is poised to extend its influence into mainstream courts. It argues that mainstreaming invites a new set of questions and issues for TJ scholarship. Mainstreaming also provides the opportunity to create a body of robust and appropriate research to carry TJ into the future. This article discusses the need for research that supports the development of consistency and authenticity in active judging. It considers the contribution that procedural justice research has made to the understanding of the justice system and the role and impact of legal actors other than judges or magistrates. The second part of the article considers the alignment between TJ approaches and human rights values, with reference to concerning the concept of voluntariness and the presence of individuals with disabilities in the criminal justice system. The article argues for an active alliance between TJ practitioners and academics to create a dedicated body of TJ relevant research.

I. INTRODUCTION

In recent years Therapeutic Jurisprudence (“TJ”) has become a vibrant interdisciplinary and international movement with significant scope and influence (King, Freiberg, Batagol

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& Hyams, 2014; Wexler, Perlin, Vols, Spencer & Stubbs, 2016, p.1). In Australia and New Zealand TJ approaches are being applied in drug courts, solution focused and problem-solving courts (King, et al., 2014; Brookbanks, 2015). Innovative practices have proceeded on the basis of by 'pragmatic incrementalism' augmented by a growing TJ Scholarship (Freiberg, 2003, as cited in Wexler & King, 2011, fn 85). While TJ proponents have long argued that TJ techniques can 'be applied in judging in any context' (King, 2009, p.184). TJ is now poised to become 'mainstream' (Spencer, 2014). Mainstreaming describes a process of applying the principles and practices of TJ to any and all aspects of the legal system where a TJ focus may "make a difference" (Richardson, Spencer & Wexler, 2016, p.1). This article argues that mainstreaming underscores the already present need for TJ scholarship to pursue greater theoretical coherence. This is because a body of theoretically informed TJ research is needed to guide its future development (Freiberg, 2003, p.11). In addition to existing dilemmas, mainstreaming offers new perspectives and will demand new forms of scholarship. Mainstreaming raises questions about how TJ will maintain consistency and authenticity among judicial officers across a wide range of legal contexts, legal institutions, and jurisdictions (Richardson, et al., 2016). It raises questions about the way legal actors other than judges can develop and incorporate TJ approaches in and around the court (Wexler, 2011). Mainstreaming also points to the need to consider how the needs of different populations in mainstream courts might shape TJ techniques. Mainstreaming also brings into sharper focus the general principle that a TJ approach does not seek to override or displace the fundamental values that shape form the law (Wexler & King, 2011).

The article begins with an overview of TJ as a mainstreamed approach. Part two discusses the challenge of identifying consistency and authenticity in active judging. Part three considers the contribution that procedural justice research

has made to our understanding of justice system and to the role and impact of legal actors other than judges or magistrates. Parts four and five consider the alignment between TJ approaches and human rights values. Part four takes up this question with respect to concerning the concept of voluntariness, while part five does so in relation to about the specific needs of individuals with disabilities in the criminal justice system. The final part section of the article discusses the need for TJ dedicated research and a closer engagement between academics and TJ practitioners.

II. AN OVERVIEW OF TJ IN THE MAINSTREAM

TJ has been described as a portable legal theory, a philosophy or field of inquiry that recognizes law as “therapeutic agent” (Wexler, 1999, 2005, 2011). TJ sees the law as “a social force that can produce therapeutic or anti-therapeutic consequences” (Winick & Wexler, 2003, p.7). It is an approach to law that attempts to “reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected” (Winick & Wexler, 2003, p.479; Yamada, 2017). TJ is remedial, focused on “law in action” and on the wellbeing of participants in the legal process (King, et al., 2014, p.24).

TJ encompasses innovative practices, techniques, and strategies, drawing on the insights of social science and other disciplines to understand the full impact of the law (Wexler, 2014). Wexler (2000) explains this as a stance that looks “carefully at promising literature from psychology, psychiatry, clinical behavioral sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system” (p.127). Armed with these insights, TJ prompts legal actors to “reach out to explore models of practice that are more relationally engaged, less adversarial, more psychologically beneficial and more capable of producing non-exploitative outcomes” (Wexler, 2014, p.6).

TJ aims to support participants in the court process to act as autonomous change agents in their own lives, helping them to deal with the issues that cause them to offend and to reduce the likelihood of re-offending (Wexler & King, 2011; Bartels, 2017, p.32). Lorana Bartels describes the common features of a TJ court as:

- Case outlook - a stance that works on tangible outcomes for defendants, victims, and society;
- System change - seeking to re-engineer how government systems respond to problems, such as drug and alcohol dependence and mental illness;
- Judicial monitoring - active use of judicial legal authority to solve problems the issues and change defendants' behaviour;
- Collaboration - engaging government and non-government partners to reduce the risks of re-offending; and
- Non-traditional roles - for example, altering aspects of the adversarial court process, as well as ensuring defendants play an active role in the process (Bartels, 2009, 2017; see also Berman & Feinblatt, 2001, p.125).

With respect to Concerning mainstreaming, David Wexler (2014b) offers a wine and bottle metaphor referring to the therapeutic design of the law (the bottle) and the therapeutic application of the law (the wine). Wexler restates the tripartite model of TJ practice as a method involving a

focus on “legal rules, legal procedures and the roles and behaviours of legal actors” (2011, p.33). For Wexler (2014c) the mainstreaming approach includes the assessment and promotion of TJ “outside the more special contexts of solution-focused or problem-solving courts — such as drug treatment courts and mental health courts — where TJ is currently best known²”. Wexler urges TJ practitioners to be mindful of the “readiness” of the law and legal frameworks in which they work. He invites practitioners to consider the “therapeutic design of the law (“TDL”)” in terms of regarding the extent to which relevant legal structures permit the application of TJ techniques, and the therapeutic application use of the law (“TAL”) in terms of concerning TJ practice (2014b). If the design of the law is poor weak, it is argued, TJ analysis may point to the need for law reform (Richardson, et al., 2016, p.155). If the law is amenable, legal actors may be able to deploy TJ techniques, or be encouraged to do so with TJ training (Spencer, 2014).

III. CONSISTENCY AND AUTHENTICITY IN ACTIVE JUDGING

TJ acknowledges the “law’s considerable impact on emotional life and psychological well-being” (Winick & Wexler, 2003). TJ’s focus on individual well-being “...invites the institution and the judicial officer to administer the law, so far as possible, consistently with promoting the wellbeing of the participants” (Bell, 2009, p.82; King, 2008a). The concern with individual wellbeing well-being informs active judging as a core technique (King, 2009; Bartels, 2009). TJ also “directs the judge’s attention beyond the specific dispute before the court and toward the needs and circumstances of the individuals involved in the dispute” (Rottman & Casey, 1999, p.14).

TJ judges and magistrates seek to build rapport with program participants through active judging techniques (King,

2009). King (2008b) describes the key critical techniques methods as like active listening, respectful interaction, displays of empathy and the ability to encourage the access and utilisation of “wrap around” services. The goal is to solicit active participation, engagement with the court process, and engagement with services as a way of transforming people’s lives (King, 2009). Winick & Wexler (2003) argue that active judging demonstrates an ethic of care (p.17). They see the formation of meaningful, close personal relationships among drug court participants and judicial officers as “more important than the substance of therapies and sanctions” (Winick & Wexler, 2003, p.17).

The importance of the interpersonal bonds is affirmed by empirical research. Empirical research affirms the importance of the interpersonal bonds. Writing in 2001, Scott and Leip (2001) found a positive association between positive judicial comments and improved drug tests and positive judicial legal comments and program completion. Frazer (2006) found that judicial factors were the best predictors of court users reporting overall fairness in the court process. Other studies have similarly identified recognized the importance of the judicial role (Johnson, Hubbard & Latessa 2000; Goldkamp, White & Robinson, 2001; Marlow, Festinger, Dugosh & Benasutti, 2006; Taylor, 2012). In the Australian context, Jones and Kemp (2014) conclude that the judge “appears to be crucial to the . . . rehabilitation process” underpinned by “. . . the formation of strong interpersonal bonds” (p.165).

Empirical research has not yet identified the exact interpersonal mechanisms that create rapport or identify why active judging may lead to improved outcomes (Johnson, Hubbard & Latessa, 2000; Goldkamp, et al., 2001; Marlow, et al., 2006; Gover, Brank & MacDonald, 2007; McIvor, 2009; Wales, Hiday & Ray, 2010; Wiener, Winick, Georges & Castro, 2010; Scott & Leip, 2001; Fischer & Geiger, 2011;

Taylor, 2012; Canada & Watson, 2012). Moreover, Kasier and Holfreter (2016) argue that the growing body of positive research lacks theoretical and methodological consistency. They claim that some studies have no theory at all, while others mix concepts from therapeutic jurisprudence with procedural justice (Kasier & Holfreter, 2016).

Active judging and the practice of TJ courts are not without critics (Slobogin, 1995). John Petrila (2013) warns that the close judicial supervision of offenders may be intrusive, paternalistic, and coercive. Others warn that TJ may encourage insufficient attention to traditional court principles such as clarity, transparency, consistency, and impartiality (Zetterberg, Sjöström & Markström, 2014). Kimberly Kaiser and Kristy Holfreter (2016) also warn that the emphasis on active judging is a key critical vulnerability for the mainstream TJ movement. They are concerned that “the innovative nature of the new specialized court movement” may be sustainable if its success is based on the work of “judges (who) are naturally charismatic and effective leaders” (Kaiser & Holfreter, 2016, p.58). If TJ is reliant on charismatic leaders, efforts to create lasting cultural change in the courts may be undermined. As time passes and inspired judges may move on, there may be “a crisis of legitimacy” when “the original people are replaced over time with new less attuned judges” (Kaiser & Holfreter, 2016, p.58).

Recent research in Australia indicates that magistrates view TJ with both enthusiasm and trepidation. In their study of Children’s Court magistrates in New South Wales, Richard and Bartels report that “magistrates are enthusiastic about the philosophy of both restorative and therapeutic measures, but are reluctant to embrace them if they consider them under-resourced, poorly understood and/or poorly implemented”

(Richards, Bartels & Bolitho, 2017).¹ The authors also report that most respondents believed “early intervention measures that keep young people out of trouble in the first place were preferable to court” (Richards, et al., 2016, p.34).

IV. A SYSTEMS APPROACH INVOLVING A BROADER RANGE OF LEGAL ACTORS

A positive feature of the mainstreaming approach is the new attention given to legal actors other than judges and magistrates (Spencer, 2014). David Wexler (2011) refers to the “involvement of legal actors other than the judicial officers, including family or other supporters” (p. 36). Between the two poles of the magistrate and the family, mainstreaming TJ contemplates the actions and attitudes of all the professional and administrative staff involved with the court as contributing to the individual’s experience of the justice system (Spencer, 2014).

TJ research has not yet fully addressed the question of how TJ should modify the stance of other court staff. Procedural Justice (“PJ”) research and scholarship, on the other hand has grappled with the relationship between individual experience and the legitimacy of the law. PJ is an area of empirical research that is broadly concerned with the question of why people obey the law (Thibaut & Walker, 1975). It is especially focused on the question of why people are more willing to accept court decisions if they believe court procedures are fair (see Maccoun, Allan Lind, Hensler & Ebener, 1988, pp.56-57; Tyler & Huo 2002, pp. xv, 123-129; Allan Lind, Kulik, Ambrose & De Vera, 1993; Casper, Tyler &

¹ Restorative refers to restorative justice methods that are described by Chris Marshall as: “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (1996, p. 37).

Fisher, 1988). The PJ literature shows that satisfaction, and hence cooperation with court decisions, is increased when people perceive the exercise of authority to be legitimate and processes of the court to be fair and (Tyler, 1996, c.f. Paternoster, Bachman, Brame & Sherman, 1997).

Tom Tyler identifies four key indicators of satisfaction: neutrality, participation, dignity, and trustworthiness (2006a; Tyler & Blader, 2003; Tyler & Bies, 1990). These factors were identified in research that showed practices of fairness, including whether decision makers demonstrated impartiality and good faith, generated a personal or subjective sense of dignity in those who participate in the justice system (Tyler, 2006). In addition to the four indicators of fairness, Tyler (2006) identified the dimension of legitimacy as whether there was legal representation, consistency of decisions, impartiality, ‘good’ decisions, correctability, and ethicality. Tyler argues that people tend to strive toward self-management and are encouraged to do so when they offered respect and dignity from a legitimate authority. He postulated that such individuals will seek to disrupt authority if respect is not forthcoming or the authority is seen as illegitimate (Tyler, 2006b; Tyler, 1990; Tyler & Huo, 2002).

Legal actors must be “fair,” but must also be “seen as being fair” (Meares & Tyler, 2014). Fairness involves transparency in procedures, explanation of rules and decisions, and the promotion of procedures that give interested parties a voice in the proceedings (Meares & Tyler, 2014). Satisfaction in court processes is increased when people believe that all parties in the proceeding have the opportunity to present their case; that the decision makers have received the necessary information; and the decision makers will consider the information or evidence impartially and apply rules consistently across a number of cases (Meares & Tyler, 2014; see also Galligan 1996; Solum, 2004).

PJ research shows that individuals are concerned with the relationship between figures of authority and members of different social groups (Meares & Tyler, 2014). Tyler and Allan Lind (1992) argue that individuals assess the quality of the system based on their own observations and experience of how people in their own group are treated. Describing this as the “relational component of justice,” Meares and Tyler (2014) conclude that the way people

...are treated by legal authorities provides them with information about how that authority views them and the group or groups to which they belong. In other words, the way people interpret the fairness of procedures has a substantial relational component (p.527).

Research concerned with the relational component of justice has led procedural justice scholars to argue that people believe their rights will be respected when they perceive that the rights of people in their own social group are respected (Meares & Tyler, 2014). Meares and Tyler (2014) argue that if people with whom a person identifies are treated as marginal, or treated differently from others, people will themselves feel personally devalued, socially inferior and undesirable. However, if they “see evidence that fair procedures are shaping decisions, rules, and policies, then they merge their sense of self with the group, intertwining their identities with group values” (Meares & Tyler 2014, p.538). Meares and Tyler conclude that people will accept decisions and cooperate with authorities when respect is shown by authorities to their social group (Tyler 2011; Tyler & Blader, 2000; Welsh, Stienstra & McAdoo, 2013; Kopelovich, Yanos, Pratt & Koerner, 2013).

Scholarship concerning the relational component of justice suggests that individuals in the justice system are

sensitive to qualities in the system beyond their own situation: they are influenced by matters other than the rapport that has been established with a particular judge or magistrate. If this is the case, it is a powerful basis upon which to make a claim for the need to transform all legal processes and relationships across the justice system in a way that afford respect to all.

V. ALIGNMENT WITH FUNDAMENTAL VALUES OF THE JUSTICE SYSTEM

TJ has consistently affirmed its respect for the fundamental values of the legal system from the outset (Wexler, 1991). Autonomy, for example, represents one such value:

...autonomy – (is) the right of an individual to make choices concerning how they are to live their lives. TJ sees self-determination as important for individual health and wellbeing. But it also acknowledges that it is a value cherished as integral to human life in political, philosophical, economic, Indigenous and religious literature and that it is embodied in the constitutional framework and legal system of the United States, Australia, Canada and other democracies. TJ suggests that the individual's right to choose – including the right to choose treatment – should be respected, and only disregarded in exceptional circumstances such as proven incompetency (Wexler & King, 2011, p.10) (footnotes removed).

Writing in the context of mental health courts, the late Bruce Winick (1995) argued that excluding people from participation in the decision-making process infringed their basic right of autonomy. Winick (1995) pointed out that being labelled 'incompetent,' even where procedural safeguards exist to challenge such a determination, induces feelings of helplessness and impedes the basic human need for self-determination and self-actualisation.

In the TJ literature, approaches that respect autonomy are contrasted with "heavy handed" or "paternalistic" practices (Wexler & King, 2011, p.2). Wexler and King (2011) warn that some practices in problem solving courts compromise the role of defense counsel and also impinge on autonomy (p.3 see Wexler, 2008). Defence lawyers working in specialist courts in Australia are beginning to question the role of legal practitioners in TJ or non-adversarial court models, especially when they are involved with specialist treatment and support service teams, and where crime prevention and community capacity buildings are employed (Black, 2017). Mainstreaming is likely to increase the need to identify how TJ changes traditional court roles.

Questions of legal representation and the role of defence lawyers resonates with the emphasis on voice and validation in the procedural justice literature. Amy Ronner claims that the four key principles of "voice, validation, respect and voluntariness" are central to the positive experience of a court participant (2002; Tyler 2006a). For Ronner, voice is the opportunity to explain one's concerns; neutrality is the belief that decisions are made on facts and without partiality; respect and validation is the experience of being treated with respect, courtesy and dignity, which in turn elicits the dimension of trustworthiness (King, 2008a), and voluntariness is the experience of being able to participate in legal processes as a matter of choice (Ronner, 2002). Voice, validation and respect are obviously consistent with TJ principles. The question of

voluntariness however is more difficult. Criminal defendants are not “volunteers.” At best they are participants who may be able to make limited choices about some aspects of their case.

Writing in the context of coercive policing, Tom Tyler argues that the use of coercion or force by individuals in authority is associated with the failure to respect or acknowledge the dignity of the person (2006a; 2011). He observes that the use of force increases resistance and non-compliance, and that patterns of coercion and resistance are created by certain styles of interpersonal interaction (Tyler, 1996). More importantly, he observes that people would seek to disrupt authority if respect is not forthcoming or the authority is not seen as legitimate (Tyler, 2006b; Tyler, 1990; Tyler & Huo, 2002). Questions about voluntariness and coercion by authorities are raised whenever specialist courts require participation in treatment programs or mandate adherence to mental health treatment. Clearly “there are limits to which the state can interview for therapeutic purposes” (King, et al., 2014, p.29), but there seems to be no consensus in the TJ discourse about what those limits might be or how they might be defined and applied in practice.

VI. RESPONDING TO THE MAINSTREAM POPULATION

Another question raised by mainstreaming is whether it is appropriate to apply the specialist TJ approach to the general population of court users. One of the key strengths of the TJ approach is its insistence that law, legal processes and legal actors can have therapeutic or non-therapeutic impacts. In contrast to the traditional criminological focus on the social, mental or moral deficits of those who come in contact with the criminal justice system, TJ positions the law as a key player and active agent of change (King, et al., 2014). The techniques adopted in drug courts, problem-solving and solution focused courts have been developed in response to the perceived needs of those with complex needs. They have developed intuitively

and tested by trial and error. A mainstreaming approach might consider whether TJ techniques are appropriate for the general court population. Are they sufficiently flexible? Do they require adaptation? Or are other approaches or techniques more suitable?

Recent analyses of the court and prison populations have found that people who come in contact with the criminal justice system are frequently those who have experienced poverty, low levels of education, high unemployment, high rates of drug or alcohol use and homelessness. They are also likely to have prior experience of domestic violence and poor mental and physical health (Australian Human Rights Commission, 2014). These factors are thought to lead to higher levels of contact with the criminal justice system, resulting in a general court population that includes significant numbers of people with complex needs. TJ appears to be well suited to such groups. Indeed, some procedural justice scholars have argued that members of traditionally stigmatized groups, such as those with mental health issues, may be particularly responsive to procedural justice (Kopelovich, et al., 2013). For example, Kopelovich et al. (2013) have observed that when offenders with mental health issues are treated with respect, their perceptions of procedural justice improve over time and become “positively associated with offenders’ hope in their recovery and with reduced symptoms.”

People with cognitive impairment also appear in the court system following experiences of loss of employment, identity, social relationships, networks and financial security leading to poverty, dislocation, and homelessness (Baldry, Dowse, Snoyman, Clarence & Webster, 2009; McCausland, Baldry, Johnson & Cohen, 2013). McCausland and colleagues have found that people with acquired brain injury and mental illness are vulnerable to manipulation and exploitation by other offenders, and more likely to have their motivations misconstrued by police (Dowse, Clarence, Baldry, Trofimovs

& James, 2011). They may experience poor memory and concentration, a reduced ability to plan and problem solve and exhibit inflexible thinking (Fortune & Wen, 1999). Cognitive impairment, episodes of emotional instability, irritability and impulsivity are “mistaken as drunk, unintelligent, uncooperative, unmotivated, aggressive and unpredictable” (Rushworth, 2011, p.5; Fortune & Wen, 1999). The combined effect of memory and behavioural deficits means that such individuals are less able to deal with the supervision demands placed on them by the courts, resulting in violations of parole and probation orders (Dowse, et al., 2011).

In the criminal justice system, people with disabilities rarely receive adequate support, advice, information or protection, including in the court room and during the legal processes that lead to imprisonment (AHRC, 2014). In Australia, Aboriginal and Torres Strait Islander people who experience high rates of brain injury, constitute approximately three percent of Australia’s total population, but twenty-seven percent of the total Australian prison population (Australian Bureau of Statistics, 2014). They are fifteen times more likely than other Australians to be imprisoned (AHRC, 2014, p.12-13). Eighty seven percent of women in prison in Australia have experienced abuse of some kind (Johnson, 2004, p.xiv). Many have a history of sexual abuse or physical abuse leading to brain injury (Colantonio, Kim, Allen, Asbridge, Petgrave, & Brochu, 2014, p.25). A recent study in New South Wales, Australia has shown that 77% of the adult prison population have has mental health conditions, 49% have brain injuries, and 8% have intellectual disabilities (McCausland, et al., 2013). In prison, disability is frequently ignored, overlooked or simply missed (AHRC, 2014). Although TJ is likely to be helpful, the profile of the prison population suggests that approaches that respond to trauma and are specifically tailored to the needs of those with cognitive impairment and mental illness may be even more appropriate.

In the United Kingdom court practices are being transformed to accommodate the needs of cognitively impaired and mentally ill defendants (Gerry & Cooper, 2017). Traditional court practices concerning case preparation, the conduct of investigatory interviews, decisions to prosecute, fitness determinations and the structure of defences are being adjusted to ensure that people with disabilities are able to can participate in court processes without being subject to inappropriate criminalization (Gerry & Cooper, 2017, p.1). The Advocates Gateway provides research and practice practices informed “toolkits” to guide advocates who are working with vulnerable people (Gerry & Cooper, 2017, p.2). Gerry and Cooper (2017) argue that these managerial tools are capable of accommodating the access to justice needs of people with cognitive impairment and mental illness (p.2). The Advocate Gateway material is complemented by the Equal Treatment Bench Book, published by the Judicial College in the United Kingdom to guide disability sensitive court practice (Judicial College, 2013).

The Advocate Gateway material and the Equal Treatment Bench Book respond to the United Kingdom’s human rights obligations under the Convention on the Rights of Persons with Disabilities (“CRPD”). The CRPD aims to address disability discrimination throughout the law, inviting close attention to unrecognized forms of discrimination. Articles 12, 13 and 14 have direct relevance for the criminal justice system. Article 13 (Access to justice) requires the facilitation of effective access to justice, including the introduction of appropriate training for police and prison staff. Article 14 (Liberty and security of the person) requires states parties to ensure that any deprivation of liberty occurs in accordance with the law. It requires that the existence of a disability shall in “no case justify a deprivation of liberty” and that people who are deprived of their liberty are treated in compliance with the objectives and principles of the CRPD. Authoritative commentary on Article 14 states that under

CRPD principles, detention is unlawful when it “is grounded in the combination between mental and intellectual disability and other elements such as dangerousness or care and treatment” (UNHRC, 2009, [48]). Article 12 (Equal recognition before the law) is especially important because it is directly relevant to determinations of fitness to plead or the operation of the insanity defence (2015). To achieve the overarching obligation to avoid discrimination on the basis of based on disability, courts must provide ‘reasonable accommodation’ (CRPD, article 2). In short, Articles 12, 13 and 14 demand a re-evaluation of the way in which law, policy, administration and practice in the criminal law and elsewhere engage with people with mental disabilities (Weller, 2008; 2010; 2013a; 2013b; Perlin, 2011).

Australia has ratified the CRPD. TJ practice in Australia should therefore thus support Australia’s international human rights obligations. CRPD perspectives provide an opportunity to augment and extend the transforming of court practices that have evolved or the case management of matters involving people with disabilities, including those with cognitive impairment and mental illness.

VII. DISCUSSION

Some commentators have argued that TJ would benefit from a more cohesive theoretical framework to “provide the framework for the study of the relevant phenomena and act as a guide or blueprint for the future” (Freiberg, 2003, p.11; Freiberg, 2010). Mainstreaming emphasizes the need for that approach. It also offers new areas of inquiry. As is outlined above, mainstreaming calls for scholarship about the relationship between TJ practice and the structure of the law (Richardson, et al., 2016, p.155). For example, TJ might examine the scope of discretionary powers as a key element for TJ practice, assess the elements of statutory regimes that facilitate TJ practice, and provide a framework for law reform.

Writing in 2002 Nathalie Des Rosiers has described the principles of a TJ approach to law reform as:

- Law as lived as the scope of inquiry,
- Multidisciplinary analysis as the method,
- Empirical studies as sources of knowledge
- Consultation and participation as control mechanisms,
- Beyond statutory reform as the response, and
- Change cultures as a measure of success (cited by Wexler in Brookbanks, 2015).

TJ scholarship might also pursue comparative analyses of the law. The present absence of comparative scholarship limits the ability of TJ to assess the transferability of different schemes and practices. Comparative techniques are also a way of identifying the critical elements of any TJ program.

Thirdly, the mainstream approach considers the contribution of legal actors other than judges and magistrates. Mainstreaming TJ implies a whole of court approach, indeed a whole of system approach. It invites consideration of the role that might be played by everyone in the courtroom, including court personnel, registrars, defence lawyers, and police. Consideration of the systemic impact of the justice system, and the therapeutic contribution that might be made beyond the confines of the specialist offers a broad perspective for TJ scholarship.

Fourth, the mainstream approach raises the importance of dedicated TJ training, and that education may be necessary to facilitate a TJ transformation. The development of TJ training models, packages, and courses is another areas area of

TJ scholarship that is ripe for exploration, especially as the task set by the mainstream movement is one that is focused on profound cultural change throughout the legal system.

Finally, TJ scholarship in the mainstream might grapple with the relationship between TJ and human rights. In addition to theoretical and comparative analyses, research concerned with the relationship between TJ and human rights, appropriately includes first-hand accounts or “lived experience” accounts of the justice system (Campbell & Oliver, 2013). The lived experience of people with disabilities has made a significant contribution to disability theory and the development of human rights by positioning people with disabilities as “experts in their own cause” (Oaks, 2011, p.20). By laying claim to a counter-expertise people with disabilities have successfully challenged the dominance of “objective” professional knowledge (Jones, 2011). TJ research will also benefit from research approaches that include the expertise of lived experience.

VIII. CONCLUSION

In his recent address to the Canadian Psychological Association, Ken Pope² states “[t]he history of psychology overflows with an almost endless catalogue of (the) shared human tendencies....to overlook, avoid or ignore what fails to fit our belief and loyalties” (2017).

The same accusation may well be leveled at TJ. Rigorous and appropriate research and a willingness to explore open questions are an antidote to this tendency. TJ is well placed to pursue its goals with the support of robust research. One way to progress to the future is to create active collaborations between academics, TJ practitioners and those with lived experience of the justice system.

² Ken Pope was awarded the John C. Service Member of the Year Award.

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*CRAFTING A CULTURALLY COMPETENT THERAPEUTIC
MODEL IN DRUG COURTS: A CASE STUDY OF TE WHARE
WHAKAPIKI WAIRUA/THE ALCOHOL AND OTHER DRUG
TREATMENT COURT IN AOTEAROA NEW ZEALAND*

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I. INTRODUCTION

A solution-focused approach¹ to the underlying drivers of adult offending in specialised courts has been slowly developing in Aotearoa New Zealand (Aotearoa NZ). Although many judges have been using solution-focused practices in their everyday District Courts², it is only relatively recently that such an approach has become “specialised” into courts devoted to specific issues, such as addiction.³ Currently, there are twenty-six

¹In New Zealand there is a tendency to use King’s term “solution-focused” in preference to “problem-solving” courts. The use of solution-focused reflects the belief that courts should be encouraging the participants of programmes to address factors relating to their offending behaviour themselves via an individualised plan monitored by the court. In this article, the use of the term solution-focused courts recognising that it is often interchanged in the Aotearoa context with ‘problem-solving’ or ‘therapeutic’ courts. When referring to the United States context, we use ‘problem-solving’ courts. See, ELIZABETH RICHARDSON, KATEY THOM & BRIAN MCKENNA, THE EVOLUTION OF PROBLEM-SOLVING COURTS IN AUSTRALIA AND NEW ZEALAND: A TRANS-TASMAN COMPARATIVE PERSPECTIVE, in RICHARD WEINER & EVE BRANK (eds) *Special Problem Solving Courts: Social Science and Legal Perspectives* (Springer Press, New Jersey, 2013); Michael King & Becky Batagol, *Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts*, INT’L J. OF L. & PSYCHIATRY, 33 (2010); Michael King et al., *Non Adversarial Justice* (Federation Press, Sydney, 2009).

²District Courts are the lower courts of New Zealand that deal with almost all criminal cases except murder, manslaughter, and some treason-related offences. There are fifty-eight (58) District Courts across the nation. See, THE DIST. COURT OF N.Z. (Sep. 8, 2017), <http://www.districtcourts.govt.nz/about-the-courts/jurisdiction-of-the-district-court/>.

³See, KATEY THOM, NEW ZEALAND’S SOLUTION-FOCUSED MOVEMENT: DEVELOPMENT, CURRENT PRACTICES AND FUTURE POSSIBILITIES in Warren Brookbanks (eds) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomas Reuters, Auckland, 2015), for an overview of judicial perspectives on the development of the solution focused movement in New Zealand; ELIZABETH RICHARDSON, KATEY THOM, & BRIAN MCKENNA, *THE EVOLUTION OF PROBLEM-SOLVING COURTS IN AUSTRALIA AND NEW ZEALAND: A TRANS-TASMAN COMPARATIVE PERSPECTIVE*, in RICHARD WEINER & EVE BRANK (eds)

solution-focused courts aimed at responding to offending by youth and adults that is associated with: loss of cultural identity; family violence; homelessness; and alcohol and other drug addiction.

As is the case internationally, solution-focused courts in Aotearoa NZ are largely a pragmatic response to the inadequacy of traditional legal approaches in addressing the underlying problems that drive offenders' criminality, leading to patterns of recurring incarceration. Research has indicated that within five years of release from prison, 58% of prisoners are again convicted and sentenced to a further prison term.⁴ The government has also been accused of mass imprisonment, with over 50% of the prison population being Māori, despite Māori comprising only 14.9% of Aotearoa NZ's population.⁵ More recently, the overrepresentation of Māori in the criminal justice system has been recognised by the United Nations Committee Against Torture, which argued:

The State party should increase its efforts to address the overrepresentation of indigenous people in prisons and to reduce recidivism, in particular its underlying causes...through the overall judicial system and by intensifying and strengthening community-

Special Problem Solving Courts: Social Science and Legal Perspectives (Springer Press, New Jersey, 2013).

⁴ *Reconviction Patterns of Released Prisoners: A 48-months Follow-up Analysis*, DEPARTMENT OF CORRECTIONS (2009).

⁵ Kim Workman, *Politics and Punitiveness: Limiting the Rush to Punish*, (presented at *The Annual Australian and New Zealand Association of Psychiatry, Psychology and the Law Conference*, Wellington, New Zealand, (2011).

*based approaches with the involvement of all relevant stakeholders and increased participation of Māori civil society organizations.*⁶

With mounting pressure from the public to respond to these issues, the integration of a therapeutic approach in the criminal justice system, inclusive of Māori principles and practices, has begun to gain political and public support.⁷ In 2011, for example, political commentary spoke of the ‘moral and fiscal failure’ of prisons⁸ and a criminal justice policy aimed at targeting “drivers of crime” was implemented.⁹

As part of the drivers of crime policy, a five year pilot of a Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court (“AODT Court”) was introduced in 2012. The AODT Court is the most resourced solution-focused court in Aotearoa NZ, with specific budgets set aside for its operation by the Ministry of Justice, Ministry of Health, New Zealand Police and Corrections. In contrast, other solution-focused courts operate within the existing budgets for each organisation. In June 2017, the pilot was extended for three additional years to allow for a longitudinal evaluation of recidivism and cost-benefits related to the AODT Court. Apart from two process evaluations

⁶ THE UNITED NATIONS COMMITTEE AGAINST TORTURE, *Sixth Periodic Reports of New Zealand* (CAT/C/NZL/6), 14, (MAY, 2015), https://www.hrc.co.nz/files/2814/3192/5666/CAT_Report_May_2015.pdf.

⁷ Simon Power & Georgina Te Heu Heu, *Drug Court Pilot Announced for Auckland*, (Oct. 19, 2011. 15, 2013), beehive.govt.nz/release/drug-court-pilot-announced-auckland.

⁸ *No more Prisons, says English*, (New Zealand One News television broadcast (June 16, 2013), <http://tvnz.co.nz/politics-news/no-more-prisons-says-english-4183616>).

⁹ NEW ZEALAND CABINET SOCIAL POLICY COMMITTEE, *Addressing Drivers of Crime*, (June 16, 2013), justice.govt.nz/justice-sector-drivers-of-crime/documents/DoCJune11%20Cab%20Paper.pdf.

commissioned by the Ministry of Justice,¹⁰ the AODT Court has not been the subject of independent research. This research aimed to meet that gap in research, focusing initially on the philosophical foundations of the AODT Court, which led to this paper on the culturally specific components of the court.¹¹

II. BACKGROUND

There is now extensive literature on drug courts internationally, largely originating from the United States with a focus on evaluating drug courts. Non-evaluative social science research is less common. Nolan's ethnographic research on drug courts has drawn attention to the "reinvention of justice" in drug courts of the United States. His research examined how legal roles and procedures are shaped through therapeutic practices as well as the theoretical foundations of drug courts.¹² His later comparative analysis highlighted that, outside the United States, local cultural and structural needs led to drug courts with their own "legal accent."¹³ Just as the European New Zealanders'

¹⁰ LITMUS, *Interim Process Evaluation for the Alcohol and Other Drug Treatment Court: Te Whare Whakapiki Wairua*, (2014); *Therapeutic Courts*, N.Z. MINISTRY OF JUSTICE (June 14, 2017), <https://www.justice.govt.nz/courts/criminal/therapeutic-courts/>; LITMUS, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court: Te Whare Whakapiki Wairua*, (2016), <https://www.justice.govt.nz/courts/criminal/therapeutic-courts/>. [hereinafter LITMUS 2016].

¹¹ JUSTICE SPEAKERS INSTITUTE, *THE ALCOHOL AND OTHER DRUG TREATMENT COURT: TE WHARE WHAKAPIKI WAIRUA*, <http://www.justicespeakersinternational.com/new-zealands-aodtc-court/> (demonstrating the authors have previously published on the philosophical foundations of the AODT Court in four summary report).

¹² JAMES L NOLAN, *LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT* (Princeton University Press, 2009).

¹³ *Id.* (noting in particular, Nolan observed how judges in the United Kingdom and Australia practised in a less emotive and expressive manner than

unique accent has evolved from its British origins, for example, Aotearoa NZ's solution-focused courts have evolved with unique characteristics. In making such observations, Nolan underscores that inextricable link between law and culture.

Philosophically, there has been a strong connection made between drug courts and therapeutic jurisprudence ("TJ").¹⁴ TJ considerations within the problem-solving court movement have directed attention to the impact of the law on the psychological and emotional wellbeing of offenders.¹⁵ There are key practices in problem-solving courts that are often aligned with what Wexler has described as the therapeutic application of the law (or "TAL")¹⁶ in the literature. This includes practices such as a non-adversarial approach; consistency of judges and other multi-disciplinary professionals; immediacy of treatment; a physical layout of the court that fosters communication; motivational judicial monitoring; and a team approach that work together to form an individualised treatment pathway for each offender.¹⁷

their American counterparts; the former appeared more concerned about ensuring procedural rights were protected and that principles of open justice were upheld).

¹⁴ Peggy Fulton Hora, William G Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRA DAME L. REV. 439-538.

¹⁵ Bruce Winick, *Therapeutic Jurisprudence: Enhancing the Relationship between Law and Psychology*, 9 L. & PSYCHOL: CURRENT LEGAL ISSUES 30 (2006).

¹⁶ See DAVID WEXLER, MOVING FORWARD ON MAINSTREAMING THERAPEUTIC JURISPRUDENCE: AN ONGOING PROCESS TO FACILITATE THE THERAPEUTIC DESIGN AND APPLICATION OF THE LAW, in Warren Brookbanks (eds) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomas Reuters, Auckland, 2015) (for an overview of TAL).

¹⁷ Andrew Becroft, *Problem Solving and Therapeutic Youth Courts in New Zealand: Restoring Cultural Links* (paper presented at the Annual Meeting of the South Pacific Council of Youth and Children's Court, Sydney, (2010).

Importantly, not all commentators or practitioners automatically align problem-solving courts with TJ or see TJ as encompassing principles that can be applied.¹⁸ In part, the criticism is lack of a clear definition of “therapeutic.” Strongly critical views expressed that the concept of TJ is “woolly,” lacking clarity, too encompassing,¹⁹ and representing “epistemological freefall.”²⁰ Wexler and Winick appear to interpret the “therapeutic” arm of the concept more broadly than its clinical origins, allowing for general considerations of wellbeing relative to different contexts.²¹ The wide scope given to TJ has been suggested as leading to the concept being used too flexibly, becoming a term used synonymously with the practices of problem-solving courts when they may be shaped by different conceptual frameworks, including indigenous worldviews.²²

In summary, the existing drug court literature has pointed to that attention to the detail of the philosophical foundations of these courts within their localised contexts is important, yet we know little about the distinctive developments in the AODT Court. To fill the gap in knowledge, we explore a significant legal accent of the AODT Court. This includes the cultural strand of the therapeutic model used in this court resulting from the commitment to a meaningful partnership with

¹⁸ Julie Stewart, *Specialist Domestic Courts: What We Know Now – How Far Have Australian Jurisdictions Progressed*, Australian Domestic and Family Violence Clearinghouse (2011).

¹⁹ Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, (2008).

²⁰ Samuel J Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J ON CRIM. & CIV. CONFINEMENT, 455 (2007).

²¹ DAVID B. WEXLER & BRUCE J WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (Carolina Acad. Press, 1996).

²² KATEY THOM, NEW ZEALAND’S SOLUTION-FOCUSED MOVEMENT: DEVELOPMENT, CURRENT PRACTICES AND FUTURE POSSIBILITIES, in Warren Brookbanks (eds) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomas Reuters, Auckland, 2015).

Māori as the indigenous people of Aotearoa NZ. While highlighting the importance of understanding aspects of the court that are unique to Aotearoa NZ, this paper also considers the place of therapeutic model of the AODT Court in the international therapeutic jurisprudence movement. Overall, we hope that this paper may contribute to the development of culturally competent and safe drug court models internationally.

III. THE RESEARCH SETTING

The AODT Court pilot operates in two district courts in Auckland, the biggest city in Aotearoa NZ. Both courts sit once a week, and together have a total cap of 100 participants. Each court has a multi-disciplinary AODT Court team composed of the AODT Court judge, court-coordinator, police prosecutor, case managers, defence lawyers, probation officer, peer support and pou oranga working with participants.²³ The AODT Court day includes a pre-court team meeting in the morning, followed by open court that includes judicial monitoring, as well as the acceptance of new participants, graduation ceremonies, and exit hearings.

²³ See, Katey Thom & Stella Black, Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court (AODTC) in New Zealand, JUSTICE SPEAKERS INST., (2017), <http://www.justicespeakersinternational.com/new-zealands-aodtc-court/> explaining the pou oranga is the Māori advisor to the AODT Court and the role is described in further detail later in the paper, also note that there are also peer support workers who are present at open court, and support participants and the team; see also, Katey Thom & Stella Black, Ngā Whenu Raranga/Weaving Strands: #3, JUSTICE SPEAKERS INST., (2017), <http://www.justicespeakersinternational.com/wp-content/uploads/2017/06/Nga-whenu-raranga-weaving-strands-3-WEB.pdf>, for an in-depth analysis of the practices of each team member role.

The criminal justice aims of the AODT Court are to provide an alternative, non-adversarial approach for responding to criminal offending where it is driven by a dependency on alcohol or other drugs.²⁴ The AODT Court is founded on a post-plea, pre-sentence model and operates as a specialist district court within existing Aotearoa NZ legislation. Section 25 of Aotearoa NZ's Sentencing Act 2002 allows for judges to explicitly adjourn a sentencing matter to enable offenders who have pleaded guilty to their offences an opportunity to access rehabilitation. This can be contrasted with other jurisdictions, where special statutes govern drug courts.

The recovery model used in the AODT Court is abstinence-based and addiction is viewed as a disease, rather than moral failing.²⁵ As with most drug court models internationally, the AODT Court uses "coerced treatment."²⁶ By providing an alternative to traditional criminal justice processes, the belief is that engagement in treatment will reduce drug-related harm and reoffending.²⁷ Addiction-related treatment is determined by the AODT Court team led by the judge. The AODT Court team expect that the externally-driven direction to treatment allows participants the opportunity to internalise motivation to change.

²⁴ MINISTRY OF JUSTICE, ALCOHOL AND OTHER DRUG TREATMENT COURT HANDBOOK TE WHARE WHAKAPIKI WAIRUA (2016), <https://www.justice.govt.nz/assets/Documents/Publications/alcohol-other-drug-treatment-handbook.pdf>.

²⁵ See, LITMUS, 2015, explain, that there are a range of interventions provided, including: treatment readiness sessions that participants access while on remand; residential and intensive day programmes for addictions; specialist drink driving programmes, as well as various other community based support services. Recovery-focused peer support is offered to every participant and attendance at twelve (12) Step Fellowship meetings strongly encouraged.

²⁶ National Association of Drug Court Professionals. *Adult Drug Court Best Practice Standards: Volume I*, (Virginia: NADCP, (2013).

²⁷ Seddon, T., *Coerced drug treatment in the criminal justice system: Conceptual, ethical and criminological issues*, 7 CRIMINOLOGY & CRIMINAL JUSTICE, at 269-286 (2007).

The external authority of the AODT Court is harnessed by the incentive of an alternative pathway to imprisonment and the implementation of a range of approaches that compel the participant to comply with the programme. The ultimate goal is that this coercive process creates enduring positive change in participants' lives, and therefore their family/whānau and the community.

The most recent process evaluation²⁸ outlined the strong alignment of the AODT Court with best practice from the United States. Previous research by the authors has also illustrated the reliance on *Defining Drug Courts: Ten Key Components* in the mechanisms of the AODT Court. To briefly summarise how these are illustrated in AODT Court processes:

- An array of services are coordinated to respond to offenders dependent on alcohol or other drugs, thereby integrating treatment services within criminal justice processing.
- The program aims to have eligible participants enter the AODT Court as soon as possible and ideally within 50 days of arrest to allow for early and prompt intervention.²⁹
- Participants undertake a three-phased drug court programme. Phase 1 involves intensive treatment and rehabilitation, random drug testing and frequent appearances in court for judicial monitoring. Phases 2 and 3 continue to include treatment and rehabilitation, inclusive of

²⁸ 2016, *supra* note 10.

²⁹ NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, *supra* note 26 explaining that the '50 day advisory rule' is considered important to the AODT Court programme. This rule draws on the best practice from the United States, which indicates that drug courts have the most positive impact on participants when the period between arrest, offending or violation and entry into the AODT court is no more than 50 days. This rule becomes important in this early stage of identifying and determining the eligibility of potential participants.

trauma counselling and behavioural modification programmes, and drug testing. However, there are increasing intervals between court appearances and a stronger focus is placed on longer-term solutions. This may include training, employment and working towards personal goals. Phase 3 also includes preparations for transitioning into living in the community in a relatively stable state of recovery. Participants exit the AODT Court by a formal graduation process following successful completion of the three phases or termination due to serious non-compliance.

- Graduated incentives and sanctions are used throughout the three phases. Incentives may include encouragement or praise from the AODT Court judges, ceremonies to mark advancement through the three stages or decreased frequency of court appearances. Non-compliance may be met with the sanctions of being called last in court, having to appear for more frequent monitoring, doing written work requiring reflection on the behaviours of concern, or reconsideration of bail conditions.
- Finally, the AODT Court is assisted by the Community Advisory Group, which helps raise financial support and community awareness of the programme.³⁰

³⁰ This is not an exhaustive list of the various ways in which the AODT Court structure is guided by U.S Best Practice, *see*, Katey Thom & Stella Black, *Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court (AODTC) in New Zealand*, JUSTICE SPEAKERS INST., (2017), <http://www.justicespeakersinternational.com/new-zealands-aodtc-court/>; Katey Thom & Stella Black, *NGA Whenu Raranga/Weaving Strands: #2*, JUSTICE SPEAKERS INST., (2017),

<http://www.justicespeakersinternational.com/wpcontent/uploads/2017/05/Nga-whenu-raranga-weaving-strands-2-WEB.pdf>, providing further examples of the *Ten Key Components* and also the additional NADCP Standards being used in practice. Litmus; Liz Smith, Alison Chetwin & Maria Marama, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court: Te Whare Whakaoiki Wairua*, MINISTRY OF JUSTICE (Aug. 17, 2016), <https://www.justice.govt.nz/assets/Documents/Publications/FINAL-AODT-Court-final-process-evaluation-20160818.pdf>, providing alignment of the AODT Court with best practice for thee U.S. Litmus.

IV. METHODS

The findings presented in this paper are part of an ongoing research programme investigating the development, current practices, and underlying philosophy of therapeutic specialist courts in Aotearoa NZ. Specifically we report from an ethnographic case study of the AODT Court. The case study involved observations of pre-court team meetings and courtroom proceedings over three months from August-December 2014 (approximately forty one court days, 200 hours). A total of twenty-nine Court team professionals took part in semi-structured individual or group interviews. The data was analysed using a thematic analysis approach throughout the data collection process so that we could become familiar with the data as a whole, generate initial coding of patterns, and eventually group codes into broader themes. We then took our thematic analysis to selected members of the AODT Court team and invited feedback to further build a “thick descriptions” of the construction, shaping and collective negotiation of the meaning of “therapeutic” in this context.³¹ In this paper, we continued to work in partnership with the pou oranga to co-produce this presentation of the developing culturally competent therapeutic model in the AODT Court.

The overall project was funded by the Royal Society of New Zealand Marsden Fund. The case study of the AODT Court received approval from University of Auckland Human Participants Ethics Committee April 11th, 2014 (ref 011293), for a three-year period and was also approved by the Ministry of Justice, AODT Court Steering Committee, New Zealand Police, Corrections, Odyssey House, and the Judicial Research Committee.

³¹ CLIFFORD GEERTZ, *The INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3 (New York: Basic Books, Inc. Publishers 1973).

V. CRAFTING CULTURAL COMPETENCY IN THE AODT COURT

Although we have outlined how the AODT Court uses best practice models of drug courts operating in the United States, this paper describes the integration of tikanga within the therapeutic framework of the AODT Court. Tikanga is what Māori see as guidelines based on values and beliefs for living and interacting with others.³² Kawharu and Henare refer to tikanga as Māori customs, legal obligations, and conditions.³³ In this section, we illustrate the integration of tikanga into the AODT Court therapeutic framework by briefly describing the AODT Court team role of the pou oranga, followed by an outline of the cultural framework, the “two-house model.” We provide illustrations of how the two-house model has become a normalized feature of processes and practices of the AODT Court led by the pou oranga.

A. *The Role of Pou Oranga*

The pou oranga is a full-time member of the AODT Court team, funded by the Ministry of Health, and supported by the Māori Cultural Advisory Group.³⁴ The role of pou oranga

³² Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia Publishers, 2003).

³³ Merata Kawharu & James Henare, *Local Māori Development and Government Policies*, 16 SOC. POL'Y J. N. Z. 1 (2001), <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj16/16-pages1-16.pdf> [<https://perma.cc/ZQ3Z-UCMZ>].

³⁴ The Māori Cultural Advisory Group is composed of mana whenua representation of Ngāti Whātua, cultural advisors from each treatment provider that supports the AODT Court, and representation from Hoani Waititi Marae. Mana whenua refers to the Māori people of the land, who have power, au-

came about in the early days of the AODT Court when key stakeholders realized that there was a lack of cultural support for participants and the AODT Court team. The current pou oranga was inspired by the passion of the AODT Court judges to change the lives of those with addictions in the criminal justice system. Determined to work collaboratively with the AODT Court, the initial vision of the pou oranga was to provide cultural support to ensure meaningful incorporation of tikanga Māori within the AODT Court. The pou oranga wanted to develop strategies to actively engage whānau³⁵, hapū³⁶, iwi³⁷, and the wider community. The role represents a strong commitment by the AODT Court judges to the principles of the Treaty of Waitangi and inclusion of tikanga:

It is about partnership and about participation with Māori, not the court dictating to Māori what the court will be for Māori. We judges take seriously the concept of tikanga (sometimes referred to as Kupe's laws) and also note its conceptualisation as a system of values and principles which have application in the AODT Court context (AODT Court team #37).

The pou oranga explained his role translates in English to a “healing post.” It is a role, therefore, that provides support for the healing of AODT Court participants by drawing on the extensive cultural, recovery, and treatment experience of the pou

thority, and jurisdictions. Ngāti Whātua is a tribal group of the northern region of New Zealand, specific to the area from Kaipara to Tāmaki-makaurau (Auckland). Hoani Waititi marae is an urban marae in Waitakere, West Auckland. Marae is a culturally significant meeting place that refers to the space in front of a meeting house and the adjoining buildings.

³⁵ Whānau refers to family or blood kin, today this has been extended to various special interest groups who function as kin.

³⁶ Hapū refers to extended family group, usually described as a sub-tribe that retains its importance as an autonomous social and political group.

³⁷ Iwi refers to descent group, nation, people. It acts as a social and political cohesive kin group.

oranga. The pou oranga has cultural standing and experience in the addiction treatment sector, and has been described as a “role model of Māori recovery with twenty-seven years of healing himself, alongside his whanau toto and kaupapa whanau oranga.”³⁸ Other AODT Court team members described the personal characteristics of the pou oranga as adding immense value to the functioning of the AODT Court. Members of the AODT Court team, for example, described the pou oranga as having “mana”³⁹ and “commanding attention” (AODT Court team #32), so that “whenever he speaks almost everyone listens” (AODT Court team #38). AODT Court team #12 further characterised the pou oranga as “centred” and “calming.” Although there may have been some initial trepidation from members of the AODT Court team about the necessity for the appointment of the pou oranga, these feelings have largely dissipated as the role developed and tikanga became strongly embedded as part of the court processes demonstrating the meaningfulness of the role.

VI. THE TWO-HOUSE MODEL

The pou oranga, in partnership with the Māori Cultural Advisory Group, developed the “two-house model,” which provides a Māori structure for the AODT Court. The framework creates meaningful connections between the ancestral meeting house on marae and the courtroom through the twelve-step Fellowship recovery paradigm.⁴⁰

³⁸ Kim Whaanga-Kipu, *National Kaupapa Whānau Oranga Recovery Hui Report*, Hoani Waititi Marae, Oct. 4-8, 2016 at 6. Whānau toto refers to biological relatives whereas kaupapa whānau can refer to whānau of making and may include those within a recovery fellowship.

³⁹ Mana refers to prestige, authority, or status.

⁴⁰ The two-house model is specific to tupuna whare on Ōrākei marae. At the same time, the intention of the two-house model is to provide a Te Ao Māori (Māori worldview) structure to the AODT Court that are reflective of tikanga and kawa commonly practiced on marae throughout New Zealand. The model acknowledges there needs to be room for variation in how this model

The pou oranga explained that the foundation for the two-house model came from the taonga⁴¹ gifted to the AODT Court. The taonga include a three-piece artwork that represents the three stages of recovery outlined in the twelve-step Fellowship serenity prayer: 1) serenity/te wairua mārie; 2) courage/manawanui; and, 3) wisdom/māramatanga.



The two-house model aims to map these three stages of recovery onto the physical layout of the courtroom and Tumutumuhenua, the ancestral meeting house on Ōrākei marae.⁴² This connecting of the two houses creates a guide for culturally

is adapted and applied should drug courts expand throughout the country. The pou oranga explained that local manu whenua need to be able to express their unique tikanga and kawa practised in their takiwā.

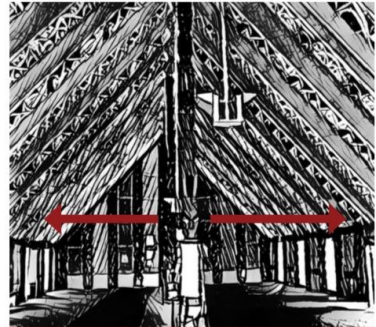
⁴¹ Taonga is a precious gift or treasure.

⁴² Tumutumuhenua is the ancestral meeting house or tupuna whare of Orakei Marae that represents the tribal ancestor Tumutumuhenua. Orakei Marae is the name of the marae located at Ōrākei a suburb in Auckland city. The people of Ngāti Whātua Ōrākei are a hapū (sub-tribe) of the Ngāti Whātua iwi.

meaningful and responsive practices in the AODT Court. The following outlines the house model in further detail by drawing on interviews with the pou oranga, accompanied by pictures to illustrate the mapping of the two houses.



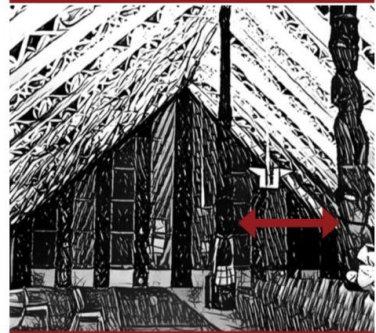
Serenity



Te Wairua Mārie



Courage



Manawanui



Wisdom



Māramatanga

The model begins with the courtroom, which is divided into three domains: entrance, midsection, and bench:

If you look at the courtroom, you have got have three sections in the court room: [1] you have got the public gallery, [2] then you have got the mid-section where prosecution, lawyers, and case managers sit, [3] then you have got the last section, which is where the judge sits (AODT Court team #21).

The pou oranga then explain the representativeness of recovery, symbolised in the panel art, as manifest in the courtroom space through the interactions that occur within each of the three courtroom domains:

So the idea of taking those [panels of art] off the wall, literally... and placing them in the [court]house. [For example] you enter into the public gallery and that realm, is the realm of serenity, so you want peace to abide in the [court]house as people enter ...

In the midsection is where a lot of rigorous conversations are had, courageous conversation are had in the court.

And then finally, in the courtroom you have the bench, which is where judgments or conversations are had [that are] wisdom based. Because in pre-court you gather all the information, so now you have all the concepts, ideas, and the wisdom to deliver back (AODT Court team #21).

The three core domains of Tumutumuwhehua parallel the courtroom space in the two-house model. The three stages of recovery are also represented in the purpose and practices that occur in Tumutumuwhehua:

Likewise when you enter the tupuna whare, same goes, Rongomaraeroa⁴³: [that you enter the] house in peace. So there we have correlation straight away, great, OK, so that fits upon entry.

Then you look at Tumutumuwhenua. When the pōwhiri⁴⁴ begins and the whaikōrero⁴⁵ begins, it's in the midsection Tumutumuwhenua at this house. So then there was a direct correlation. It sat right. So we can agree on these [two] domains.

In the tupuna whare, which you have from that pou, which is all in here to the wall, is ngā tūpuna⁴⁶, the puna mātauranga, or the access to the wisdom of the past, the future and the present (AODT Court team #21).

The AODT Court cultural framework provides a detailed illustration of how the different paradigms work together to create a unified treatment model in the context of justice. The stages of recovery - serenity, courage, and wisdom - are given life within two houses, the space of the AODT Court, and within the ancestral meeting house on Orākei marae.

VII. THE TWO-HOUSE MODEL IN ITS LIVING FORM

The two-house model guides cultural interventions for participants throughout the AODT Court programme.

A. *Early Cultural Supports*

The pou oranga suggested that cultural interventions should transpire through tikanga and create connectedness as

⁴³ Rongomaraeroa means Māori God of peace.

⁴⁴ Pōwhiri is a ceremony that takes place to welcome manuhiri (visitors) on to a marae.

⁴⁵ Whaikōrero refers to formal speech.

⁴⁶ Ngā tūpuna refers to ancestors.

soon as when a potential participant applies for a place in the AODT Court:

So ideally, in my opinion, the continuum is to get them right at custody and when they apply [to the AODT programme], and that be the first point of cultural intervention. [It could be] as simple as just having a meeting with them, having a karakia⁴⁷ with them and just making them feel a part of [the process] at this point of the journey (AODT Court team #21).

This quote shows the tikanga of the AODT Court processes should mirror tikanga and marae kawa of the pōwhiri. In this way, the participant is extended an invitation and hailed into the two houses and shown arohatanga,⁴⁸ manaakitanga,⁴⁹ and whanaungatanga.⁵⁰ Through the latter, participants are embraced and welcomed as whānau, with the reciprocal responsibilities and accountabilities. Participants' spiritual needs, therefore, are met in custody, and they remain supported until they exit or graduate.

The pou oranga has also developed processes at the first point of entry into the AODT Court. All potential participants are offered a cultural questionnaire as part of their alcohol and other drug assessment on referral to the AODT Court. The questionnaire includes four questions that ask potential participants:

- 1) Whether they identify as having Māori ancestry;
- 2) If they are interested in findings out more about their Māori heritage;
- 3) If they or their whānau know the name of their iwi or marae; and,

⁴⁷ Karakia translates to prayer or blessing. Although this may not necessarily be related to any particular faith or religious belief.

⁴⁸ Arohatanga refers to love.

⁴⁹ Manaakitanga refers to hospitality.

⁵⁰ Whanaungatanga refers to connectedness.

4) What in particular they would like to know and develop culturally.

The pou oranga and AODT Court team then draw on that initial referral information for determination hearings to develop a pathway for culturally appropriate treatment.

The pou oranga ensures mihi whakatau processes occur in the AODT Court for all new participants. Mihi whakatau translates as official welcoming of AODT Court participants on entry into the court. The pou oranga described his practices of mihi whakatau in the AODT Court setting:

I stand on behalf of Ngāti Whātua, which is the tribal region here, and if it is in Waitakare then I also make mention of the iwi of that side, which is Te Kawerau a Maki, in acknowledging mana whenua. From there I move into her honour, the court team, fellow participants, which is all part of welcoming the new one [participant] into the court (AODT Court team #21).

With this, the pou oranga refers to the taonga on the wall of the AODT Court, emphasising the first step in recovery from addictions is the surrendering to the process and the control addiction has over AODT Court participant' lives.

One AODT Court team member described this cultural process and the perceived impact that a welcoming environment had on participants accustomed to less sympathetic mainstream court processes:

They seem to be extremely moved when he [pou oranga] does the official welcome. It's like it is the first time they [AODT Court participants] have ever been welcomed properly into any environment. I suppose it is a shock to the system when you normally view court as somewhere that is going to lock you up. Then suddenly you've got someone welcoming you in

and saying we're all here to help you and these are the steps (AODT Court team #12).

The mihi whakatau process was also described as creating a sense of belonging for all participants, regardless of ethnicity:

I like where everyone is mihi'd on as they come onto the court because even if they are Pacific Island or Pākehā (European), there is still that sense of belonging that they all gain from it (AODT Court team #3).

B. *The Integration of te reo me ōna tikanga⁵¹ in the Three-Phased Programme.*

Te reo me ōna tikanga, led by the pou oranga, continues to guide the processes in the AODT Court throughout the three-phased programme. The pou oranga has instigated the opening and closing of both closed and open AODT Court in accordance with tikanga by way of karakia and waiata.⁵² The pou oranga explained:

One of the many benefits of karakia at the beginning and end of court proceedings is that it provides a united connectedness of everyone in the courtroom that automatically calls forth a solemn and respectful moment of engagement (AODT Court #21).

Karakia is being described by the pou oranga as a “heart to heart” korero⁵³ that focuses on a new beginning and a common closure to AODT Court sessions. Karakia, therefore, becomes about the participant as a person, and their beliefs, and

⁵¹ This refers to te reo, the Māori language, and tikanga and signifies their inseparableness.

⁵² Waiata means song or singing a song.

⁵³ Korero means talk.

is not based on any particular religious faith. The pou oranga also supports all participants (irrespective of ethnicity) who may be struggling with karakia and may extend to include whanau hui (family meetings) with participants where appropriate. At each AODT Court graduation, the pou oranga ensures that the recovery haka⁵⁴ is performed by the peer support workers and the current AODT court participants to signal an acknowledgement of the participant's achievement.

The pou oranga also has an active function in contributing to the collective discussions of the AODT Court team during pre-court meetings where his expertise from a cultural, recovery, and treatment focus is considered pertinent. During open court, he is also requested to give advice or comment by the AODT Court judge. The pou oranga explained the extent of his contribution to open court stating: "If there is one other person who is as vocal as the judge, it is the pou oranga" (AODT Court team #21). One of the AODT Court judges described the pou oranga as a "conduit." In this sense, the pou oranga possesses the depth of mātauranga⁵⁵ Māori, including te reo Māori, and tikanga, to safeguard and ensure the appropriate cultural processes are followed. At the same time, the pou oranga ensures the values of these processes are understood in both directions, to assist the AODT Court and its participants.

C. Building the Cultural Competency of the AODT Court Team

The normalisation of tikanga into the everyday practices of the AODT Court serves the function of building the teams' cultural competency. The pou oranga described how it was important to develop the tikanga in both open and closed sittings to ensure the continued upskilling of the AODT Court

⁵⁴ Haka is a ceremonial dance. The recovery haka is specifically performed by those in recovery community for their peers.

⁵⁵ Mātauranga refers to Māori knowledge.

team who may not have developed themselves culturally. In this way, the pou oranga also has an important role in providing cultural education and support to the AODT Court team.

AODT Court team members described how the introduction of tikanga in the AODT Court has had profound effects on them as individuals and their practices outside the AODT Court. Treatment #3, for example, explained they now integrate karakia and waiata into therapeutic practices outside AODT Court sittings:

I like the karakia process that [the pou oranga] does that we don't necessarily see with those that are struggling themselves, he will go down [to custody] and do that the process. I like the whole karakia process and I've started doing the waiata process with MRT [Moral Reconciliation Therapy] group. So we do the court opening and closing [in MRT] (AODT Court team #3).

Other AODT Court team members had committed to learning te reo to improve their ability to understand and be confident in integrating tikanga while working with their participants.

D. Whakawhanaungatanga: Building Relationships With Māori Communities

Crafting a culturally competent and safe therapeutic model for the AODT Court also involves building connections between the AODT Court and local Māori communities. The pou oranga referred to this as his “external work.” The intention of this work is making sure the effort with the AODT Court participants is as much about working from with the community as well as from within the AODT Court. In ensuring community connectedness, participants are supported long after they are discharged from the AODT Court.

The pou oranga described the work he does externally to the AODT Court processes as a major undertaking. It involves facilitating collaboration with key stakeholders, Māori communities, whanau of participants, and participants themselves. Central to this aspect of his role is what he called, “hei wharikitia mai te papa” or in English ‘collective skills and communication’. He described how he initially set out to achieve this:

My role is to get us at the table and then discuss how we culturally move forward. Those critical people to that discussion were the cultural advisors to those addiction treatment organisations and kaumātua Ngāti Whātua who are already involved in the therapeutic communities, so that was really great. Critical to that as well, are other service providers, team leaders, court [staff] and just a whole array of, you know, stakeholders (Court team #21).

The pou oranga described three goals for the AODT Court that are achieved through the process of whakawhanaungatanga (or the ability of those collaborating with the AODT Court). These aspirational goals include: 1) continuing support for AODT Court participants beyond the AODT Court programme; 2) developing culturally specific addiction treatment pathways; and, 3) developing kaupapa whānau oranga support structures. In this paper, we describe work towards continuing support for participants beyond the AODT Court.

E. He Takitini: Continuing Care

The pou oranga also leads work with community probation services in this regard through the development of what he described as a “continuing care body,” which is the grouping of graduates from the AODT Court who continue to support one another:

Once they have travelled through the court to graduation, [the focus] is now the transition out of the treatment bubble, if you want to put it in that context, back into the community, back into life... (AODT Court team #21).

He Takitini (the many who stand together) can be understood as an alumni group of graduated participants and involves creating a sense of belonging beyond the AODT Court. He Takitini is cemented by the development of graduation outside of the AODT Court sittings that occur twice a year. He Takitini ceremonies have taken place at Ōrākei Marae and Hoani Waititi Marae, as well as at the treatment provider services. As Judge #1 described, He Takitini is unique to the Aotearoa NZ setting and may be understood as representing belonging and strength gained from being connected to others:

Acknowledgement of their [participants] continued commitment to their recovery with the presentation of a specially blessed pounamu [greenstone] taonga [treasure, in this form, a pendant to wear around their neck]. These ceremonies are named 'He Takitini' meaning 'the many that stand together' representing those in recovery, which is very different terminology to the term 'alumni' frequently used in the US drug courts for graduates (AODT Court team #37).

In conclusion, the internal and external work of the pou ora ensures meaningful incorporation of tikanga in the AODT Court and active engagement with whānau, hapū, iwi, and the wider community. The role was incredibly valued by all of the AODT Court members and perceived as beneficial for all AODT Court participants.

VIII. CONCLUSION

This paper has detailed a case study on the crafting of a culturally competent drug court model. Drawing on Nolan's concept of legal accent, we described the unique features of the AODT Court, focusing on the role of pou oranga and the design and application of the cultural framework provided by the two-house model.

The cultural framework symbolically brings together two houses – the courtroom and ancestral meeting house. In doing so, the two houses weaves together the westernised foundations of the legal system with Te Ao Māori.⁵⁶ The two-house model provides a structure that is meaningful for Māori inside and outside the AODT Court that is closely intertwined with recovery. At the same time, the two-house model recognises the drug court model originating from the United States, as with the three-phased programme explained above. It could be considered that the three-phased programme is mirrored in the three stages of recovery outlined in two-house model. This makes the concept of legal accent valuable in understanding the shaping of the international drug court model to the localised needs of the people of Aotearoa NZ. Further research into the inner-workings of the shaping of this model is worthy of more investigation.

In our introduction, we described the close relationship that has been made between TJ and drug courts. How might we understand the relationship between TJ and the therapeutic model of the AODT Court, and in particular, the cultural aspects presented in this paper? At a broad level, TJ and solution-focused courts share a similar concern: that traditional legal approaches lead to anti-therapeutic effects by not reducing re-offending (thereby decreasing public safety) due to a lack of consideration of the underlying problems that may lead a person to commit offences. The imposition of Western law in Aotearoa

⁵⁶ Māori worldview inclusive of te reo, tikanga, marae, Waahi Tapu (sites of importance) and access to whānau, Hapū and iwi.

NZ has had devastating “anti-therapeutic” consequences for Māori. As Quince has argued, this “epiphany” by TJ scholars is a “lesson the colonised peoples have learned in the five centuries since the Western Europeans set forth to conquer the new world.”⁵⁷ Prior to colonisation, Māori used tikanga to control and monitor behaviour in the community in a way that prioritised the production of therapeutic outcomes in resolving hara (transgression) to restore harmony and balance, called utu.⁵⁸ The redesign of the law to produce therapeutic outcomes is a *starting point* that better aligns with the tikanga Māori forms of dealing with disputes.⁵⁹ By engaging the local Māori communities in the design of the programme, the AODT Court has begun drawing on therapeutic approaches tikanga can offer to all participants.

Aotearoa NZ based Māori scholars have also argued that there are beneficial linkages to be made between tikanga and therapeutic jurisprudence, particularly with respect to the relational and forward thinking aspects that underpin both concepts. As we have illustrated in this paper, the overall aim for the pou ora is finding the right way or the “tika” way, ultimately resulting in healing for the participants.”⁶⁰ This approach is strength-based, beginning with acknowledgment of capabilities rather than deficits⁶¹ and a whānau-focused or collective approach is prioritised to surround the participant with support for a stable recovery. A relational style of justice that humanises criminal justice processes and is shaped by an ethic of care that asks questions leading to solutions for all, rather than primarily focused on retributive notions of punishment are considered crucial tools in the TJ friendly-kit. This indicates some of the ways

⁵⁷ KHYLEE QUINCE, THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES 348 (Warren Brookbanks ed., 2015).

⁵⁸ KHYLEE QUINCE, CRIMINAL JUSTICE IN NEW ZEALAND 333-39 (Julia Tolmie Warren Brookbanks eds., 2007).

⁵⁹ *Id.*

⁶⁰ Valmaine Toki, *Domestic Violence and Women: Can Therapeutic Jurisprudence Assist*, 78 REV. JUR. UPR 73 (2009).

⁶¹ *Supra* note 57 at 363.

TJ may be in tune with tikanga and is an area for further consideration beyond this paper.

We caution, however, the use of global concepts such as TJ in a way that leads to the simplification of a Te Ao Māori, which is unique to the indigenous people of Aotearoa NZ. While it may represent a legal accent of United States drug courts, tikanga Māori and marae protocol creates a whole new procedure for practice that cannot be subsumed under umbrella terms of “TJ,” nor is it synonymous with mainstream law in Aotearoa NZ. Instead, tikanga is considered the first law of Aotearoa NZ⁶² and some would find it difficult to see how Western law could ever be a “therapeutic agent” or that tikanga should be compromised by being integrated into Western law at all.⁶³ Therefore, in crafting a culturally competent drug court, it is necessary to consider and acknowledge the origins and history of concepts and complexities that occur in weaving divergent approaches to create a programme, rather than constraining them all under the umbrella of TJ. Additionally, TJ scholars should not restrict their considerations of legal reform and practices within the context of Western law alone, but consider how kaupapa Māori justice or marae-based justice dictated by tikanga may provide therapeutic outcomes for all in the criminal justice system.

In conclusion, it is important to note the pou oranga carefully crafted the cultural framework in a way that ensures the safe integration of tikanga in the AODT Court applicable for the takiwa or location it is situated. This was done by virtue of who the pou oranga is and how he went about crafting the cultural framework. For example, the pou oranga used the process of whakawhanaungatanga or built relationships with the mana whenua of this takiwa *throughout* the crafting of the framework. The pou oranga can be understood to have the authority

⁶² Ani MIKAERE, *COLONISING MYTHS – MAORI REALITIES* (Huia Publishers, 2011).

⁶³ *Id.*

(mana) to do this via his birthright and personal and professional recovery experience. That is not to say a culturally competent drug court model could not be crafted in other takiwa, but a similar localised approach should be used.

*A COMPULSORY MEANS TO A THERAPEUTIC END?
ANALYSIS OF THE ROLE OF DULY AUTHORISED OFFICER
USING PRINCIPLES OF THERAPEUTIC JURISPRUDENCE.*

Anthony O'Brien*

Abstract

Therapeutic jurisprudence is a concept developed to articulate how the law can be applied in ways that have a positive, rather than negative, impact on the health of the individual. Originating within the field of mental health law, therapeutic jurisprudence has expanded into a wide range of legal contexts in an attempt to infuse legal practice with insights from psychological and social sciences. Literature on therapeutic jurisprudence has been developing over the past three decades, but so far the concept has not received attention in mental health nursing literature. This paper uses principles of therapeutic jurisprudence to discuss mental health nursing practice in the role of duly authorised officer (“DAO”) under New Zealand’s Mental Health (Compulsory Assessment and Treatment) Act (1992) (the “MHA”). The principles considered are balancing benefits and adverse effects, and maximising autonomy in the context of civil commitment. In the DAO role nurses are required to facilitate the operation of the MHA. In practice, this involves a number of tasks,

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including an explanation to the “proposed patient¹” that they are about to undergo an assessment examination, the outcome of which may be that they are made subject to civil commitment. This paper considers how nurses can discharge their responsibility to facilitate the operation of the MHA in a way that maximises the therapeutic intent of the MHA and imposes the least restrictions on the person’s autonomy. These issues will be discussed using two clinical case studies. Therapeutic jurisprudence offers a lens of analysis which may assist nurses in reflecting on the tensions experienced in clinical practice involving mental health legislation. However, therapeutic jurisprudence is not a panacea, and does not conveniently dissolve ethical conflicts. In particular, therapeutic jurisprudence does not provide a renewed justification for psychiatric paternalism; in fact the view of “benefits” inherent in therapeutic jurisprudence should include enhanced autonomy. But therapeutic jurisprudence can act as a reminder to mental health nurses that the criteria of mental health legislation do not provide a detached perspective, indifferent to its impact on individuals. Instead, therapeutic jurisprudence should offer mental health nurses a renewed moral sense of clinical practice, one which attends to the experience of being subject to compulsion, and the effects of that experience on the individual.

¹ The term ‘proposed patient’ refers to the person in the initial stage of the committal process, when an application for assessment has been made. The application triggers an ‘assessment examination’, the outcome of which is recorded in a certificate of preliminary assessment. The tentative wording recognises that the outcome of the assessment examination might be either that the person is subject to a period of compulsory assessment and treatment (becoming a ‘patient’ in the language of the MHA), or that the application is not upheld, and the person is released.

I. INTRODUCTION

Therapeutic jurisprudence is a concept developed to articulate how the law, as a set of enforceable obligations on individuals, can be applied in cases involving mental health concerns, in a way which has a positive impact on the health of the individual. The reason for thinking of the law as a therapeutic agent arises in response to concerns about the coercive power of legislation, in particular the lack of procedural rights accorded individuals subject to civil commitment procedures (Wexler & Winick, 1991). In the latter part of the 20th century mental health legislation based on a medical “need for treatment” standard was replaced with legislation focused on risk or dangerousness, and a greater emphasis on individual legal rights (Appelbaum, 1994, 1997). However even with greater emphasis on individual rights, legal processes were seen to frequently have a negative impact on people with mental illness.

The notion of the law as a “therapeutic” agent arose as legal theorists sought a more balanced approach than the medical or legal models alone could provide (Gray, 2010). According to Gray, the aim was to establish a position where neither medical nor legal views were privileged, but to consider how the most benefit could be provided to the individual. As of yet, there has been very little nursing literature exploring therapeutic jurisprudence (for examples of this sparse literature see Hutchinson, 2002; Kjervik et al., 1999, and Roberson and Kjervik, 2008). The lack of mental health nursing interest is perhaps surprising given the emphasis in nursing literature on therapeutic relationships (Henderson, 2014; Welch 2005) and concerns expressed about the coercive nature of mental health legislation (Andreasson & Skärsäter, 2012; Olofsson & Jacobsson, 2001). In this paper, the focus is on one aspect of the New Zealand Mental Health (Compulsory Assessment and Treatment) Act (1992) (the MHA), the role of duly authorised

officer (DAO).² The role of the DAO is outlined, followed by two case studies of the DAO role in practice. Two principles of therapeutic jurisprudence are considered: balancing short term anti-therapeutic effects of coercion against longer term benefits (Wexler & Winick, 1990) and maximising autonomy in civil commitment (Winick, 2005). The case studies are then discussed to show how therapeutic jurisprudence can assist in understanding this role, can inform the practice of clinicians acting in the DAO role, and can improve the experience of individuals subject to compulsory assessment. It is argued that DAOs should conceptualise the use of statutory provisions, for example for compulsory assessment, in therapeutic terms. The discussion argues that mental health nurses could usefully engage with the concept of therapeutic jurisprudence not only in specific statutory roles such as that of DAO, but also in considering their more general role in working with people subject to mental health legislation. However, a degree of caution is also necessary and the limits of therapeutic jurisprudence are also discussed.

II. MENTAL HEALTH NURSING THEORY

Mental health nursing is an interpersonal process in which the nurse, using herself as a therapeutic instrument, forms a relationship with a health consumer in an attempt to help that consumer meet his or her unmet needs (Peplau, 1952/1988). Since Peplau, mental health nurses have conceptualised their role using the concept of the therapeutic relationship (Henderson, 2014; O'Brien, 2001; Welch, 2005). For the most part, mental health nursing theory does not deal explicitly with coercion or with practice in roles such as that of

² Changes to the legislation confirmed in January 2018 are not reflected in this paper.

DAO. When mental health nursing literature has considered legislated roles, it has usually been to highlight the sense of conflict felt between those roles and the traditional mental health nursing focus on therapeutic relationships. This sense of conflict was specifically highlighted when the DAO role was first developed (Walsh, 1994) and has since extended to other legislated roles in New Zealand (Fishwick, Tait and O'Brien, 2003; McKenna et al, 2006) and overseas (Coffey & Hannigan, 2013; Hurley & Linsley, 2007; Veitch & Oates, 2017). Traditionally, it seems that mental health nurses have not embraced statutory functions such as DAO within their professional roles. This may seem surprising given that mental health nursing has its origins in the asylum era when most patients were held under mental health legislation. The very limited nursing literature on therapeutic jurisprudence suggests that mental health nurses have not seen the concept as relevant to their practice. This suggests a lost opportunity to engage with a concept that might offer some prospect of managing the tensions experienced between therapeutic and statutory roles.

III. THERAPEUTIC JURISPRUDENCE

An early definition of therapeutic jurisprudence is “the extent to which substantive rules, legal procedures and the roles of lawyers and judges produce therapeutic or anti-therapeutic consequences” (Wexler and Winick, 1991, p. 981). In the theoretical literature on therapeutic jurisprudence, the term “therapeutic” is given a somewhat broader meaning than within health literature. A legal intervention is generally considered to have been therapeutic if it leads to benefits or avoids harms. In the criminal justice system, a benefit might be less time in jail or referral to counselling. Diversion into the health system could be considered therapeutic in itself, although from the perspective of health, therapeutic effects are usually considered to be a result of health intervention. Balancing this notion of therapeutic outcome, some mentally

disordered offenders may consider imprisonment preferable to compulsory mental health treatment because imprisonment usually involves a finite period whereas compulsory mental health treatment may continue indefinitely.

From its origins in civil commitment law, therapeutic jurisprudence has come to embrace a range of legal interventions in which court processes have been focussed on personal change rather than punishment (Freckleton, 2007). The concept of therapeutic jurisprudence therefore extended the focus of mental health law from a narrow concern with individual rights, to a concern with the impact of legal processes. Therapeutic jurisprudence reaches beyond mental health law to consider the therapeutic impact of criminal and other law and has been applied in a wide range of legal contexts (Freckleton, 2007) where its practitioners attempt to infuse legal practice with insights from psychology and the social sciences. In New Zealand, therapeutic jurisprudence is practised in courts dealing with drug and alcohol problems and problem solving courts which address a range of health and social issues (Richardson, Thom & McKenna, 2013).

Ultimately, the aim of therapeutic jurisprudence is to maximise the potential of the law to achieve beneficial outcomes and to minimise the potential for adverse effects. Although civil commitment is an inherently coercive practice, Wexler and Winick (1990) have argued that the short term adverse effects of coercion should be weighed against the potential for longer term benefits. In addition, therapeutic jurisprudence draws attention to the need to maximise autonomy in civil commitment processes (Winick, 2005). Nursing practice in the DAO role involves interpersonal engagement which can offer opportunities to work with these tensions. However, this molding of clinical practice does not subjugate the law to notions of what is therapeutic. The intent of therapeutic jurisprudence is not to supplant other normative considerations in application of the law, for example justice. Neither is it intended that therapeutic jurisprudence will

subjugate the law to clinical expertise. Commentators have warned against therapeutic jurisprudence as a vehicle for a reassertion of psychiatric authority at the expense of autonomy (Diesfeld & McKenna, 2007). Clearly, in the mental health context, clinical expertise is critically important to decisions about compulsory care and treatment. However, within the framework of therapeutic jurisprudence, the focus of decisions is benefits to the person subjected to legislation.

IV. NEW ZEALAND MENTAL HEALTH LEGISLATION

New Zealand's mental health legislation (the Mental Health (Compulsory Assessment and Treatment) Act (1992) (the "MHA") was introduced in 1992, towards the end of the period deinstitutionalisation. The intent of the MHA was to provide mental health care to the least restrictive standard. The last stand-alone psychiatric hospital closed in 1997. Current services are community focussed, supported by inpatient mental health units attached to general hospitals in all major centres. As in the international context, the 1992 legislation aimed at better protection of individual rights and enhanced procedures for review and appeal.³ The legislation is framed around the concept of "mental disorder." This is a broader concept than mental illness, and given a phenomenological definition in section 2 of the MHA. In including the term "assessment" in the title of the MHA, the legislators were concerned to signal that psychiatric diagnosis was neither necessary nor sufficient to trigger committal. The "abnormal state of mind" of the definition⁴ might be of short duration, and

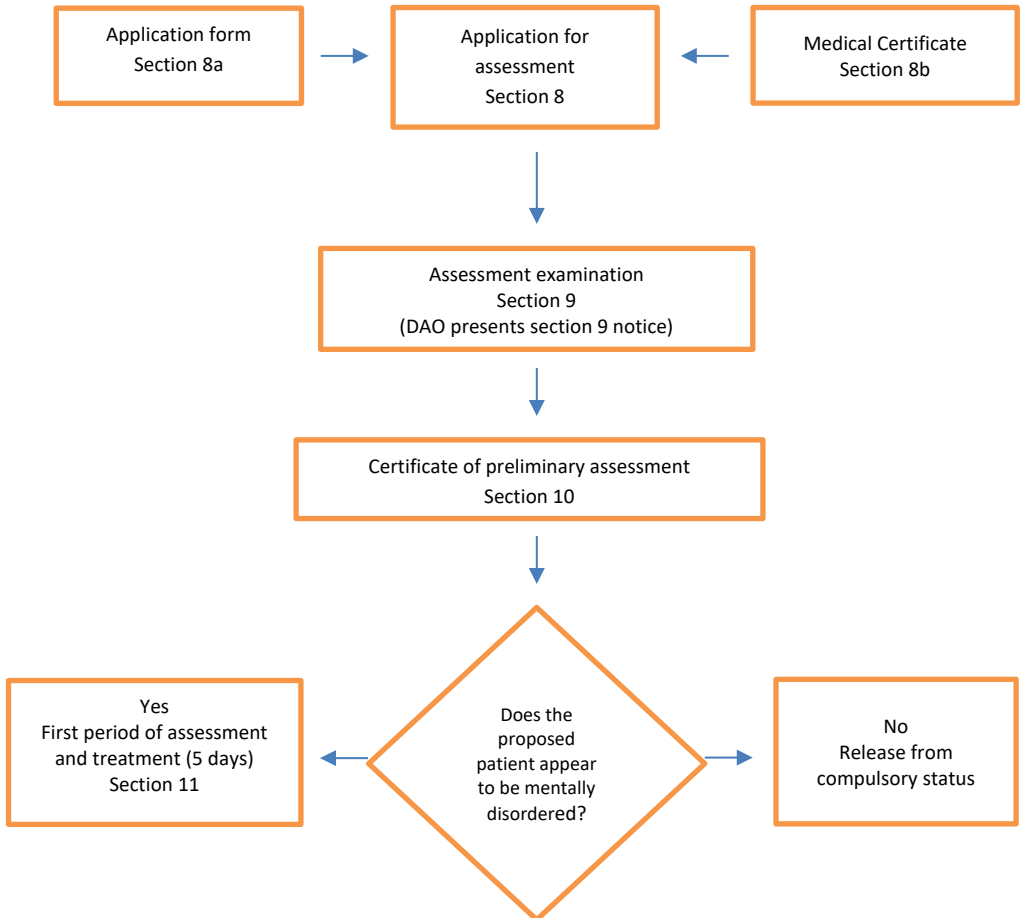
³ For a comprehensive overview of New Zealand mental health legislation see J. Dawson & K. Gledhill (Eds.), *New Zealand Mental Health Act*. Wellington: Victoria University Press.

⁴ The criteria for compulsory treatment under the MHA are that the person has an "abnormal state of mind"...of such a degree that it "(a) poses a serious danger to the health or safety of that person or of others; or (b)

its nature might not be fully clear on initial presentation. The criteria also include reference to “serious danger,” either to the individual or others. The initial stages of compulsory assessment and treatment are shown in Figure 1. Key to the current legislation was the introduction of new statutory roles, some of which, including that of DAO, have been assumed by mental health nurses (McKenna & O’Brien, 2013). While the focus of this paper is on the DAO role, the concept of therapeutic jurisprudence could equally be applied to other aspects of the MHA. For example, review tribunals, court hearings to determine applications for compulsory treatment orders, and judge’s reviews of patients’ compulsory status.

seriously diminishes the capacity of that person to take care of himself or herself...” (Mental Health (Compulsory Assessment and Treatment) Act (1992)).

Figure 1. Initial stages of compulsory assessment and treatment under the New Zealand Mental Health (Compulsory Assessment and Treatment) Act (1992) (the MHA). Adapted from Ministry of Health (2012b). *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992*. Wellington: Ministry of Health.



V. THE DAO ROLE

The DAO is one of a number of statutory roles created by the MHA. Comparable roles are provided in other jurisdictions, for example the United Kingdom (Bressington, Wells and Graham, 2011; Veitch and Oates, 2017) and Victoria, Australia (Mental Health Act, 2014). The general focus of the DAO role is a practical one, to provide advice and assistance to members of the public, health professionals, and police about the operation of the MHA. Clinicians are not employed as DAOs, but are assigned DAO responsibilities as part of a wider clinical role, often in community crisis teams. Most DAOs are mental health nurses, with functioning in the DAO role dependent on their existing skills in clinical assessment (Street & Walsh, 1998) and knowledge of the range of mental health services available. Knowledge of the operation of the MHA is gained through clinical experience and through training in the DAO role. In the DAO role, nurses have a concern to maintain their traditional (clinical) therapeutic role but will also use the powers inherent in mental health legislation to provide benefits, especially safety, of the proposed patient and others. In New Zealand, the initial stage of applying mental health legislation involves an application for assessment, and then an assessment examination which will determine whether the “proposed patient” meets criteria for committal and is to undergo an initial period of up to five days compulsory assessment and treatment. Duly authorised officers have numerous responsibilities in this process. The focus in the current paper is on the specific responsibility to inform the proposed patient, by presenting a statutory written notice, that they are required to attend an assessment examination. However, it is also intended that the analysis can be applied to other DAO responsibilities, such as providing information to members of the community, calling for police assistance, and arranging the initial medical certificate to accompany the application for assessment.

Guidelines for the DAO role are provided in the Ministry of Health's *Guidelines for the Role and Function of Duly Authorised Officers: Mental Health (Compulsory Assessment and Treatment) Act 1992* (Ministry of Health, 2012a). Drawing on clinical expertise, a DAO might advise how a mental health issue can be resolved without use of the MHA, about whether a case is within the scope of the MHA, or about resources available for mental health care. For example, in the general hospital setting it is not uncommon for DAOs to advise that refusal of consent for medical treatment is not usually something that can be addressed by compulsory treatment under the MHA. Similarly, in a community setting, a DAO might advise that a case involving self-harm can be safely managed on a voluntary basis. In cases that are within the scope of the MHA, the DAO will advise clinicians, family members, police and patients about procedural aspects of the MHA, and will make the necessary arrangements for initial assessments. This includes explaining the processes of the MHA to individuals being assessed, and informing them of their legal rights, including the right to consult a lawyer.

The MHA and the DAO role contain provisions that support therapeutic jurisprudence. For example, the clinician responsible for care of the patient is required to release the patient from civil commitment as soon as the patient no longer meets the criteria of the MHA. This requirement of the MHA is intended to limit coercion to the minimum extent necessary, thus attenuating the adverse effects of civil commitment while providing an opportunity to maximise its benefits. Secondly, in providing advice about the MHA, and in facilitating its operation, the DAO is required to consider the necessity for use of the MHA, and therefore to consider the possibility of less coercive alternatives. The process of presenting the section 9 notice allows the DAO the opportunity to follow principles of procedural justice which have been argued to support therapeutic jurisprudence (Winick, 2003). These aspects of the

DAO role can help to maximise autonomy, even under the constraints of civil commitment.

From the perspective of a DAO, a critical point in the operation of the MHA occurs under section 9(2). Under this section, the DAO presents the proposed patient with a written notice advising that an application has been made for their compulsory assessment, and that they are now required under the MHA to undergo an assessment examination. The MHA requires that a third party is present during the presentation of the section 9 notice, with a clear preference for the third party to be a family member.⁵ This procedural step is aimed at ensuring the process of committal is transparent and that the proposed patient is well supported. The patient is also advised that the outcome of the assessment examination will determine whether or not they are required to undergo a period of up to five days compulsory assessment and treatment. The presentation of the section 9 notice is an opportunity for the DAO to engage with the proposed patient, to explain the therapeutic intent of the legislation, and to enhance the proposed patient's engagement in the process of compulsory assessment and treatment. Explanation of rights under the Act can also enhance engagement and is a further opportunity to reinforce the potential benefits, or therapeutic effects, of compulsory treatment. The opportunity for therapeutic engagement provided in section 9(2) is one of many provisions of the MHA which similarly seem designed to enhance the therapeutic impact of the MHA. These include section 5

⁵ A 2007 series of High Court cases considered who should fulfil the requirement for a third party to attend the presentation of the section 9 notice. These cases have resulted in some health service providers requiring DAOs to engage a Justice of the Peace ("JP") as the third party, if a family member is not available. A JP is a statutory official with powers to witness documents and oaths. Typically, witnessing the presentation of the section 9 notice is a passive role. JPs have no formal status in the MHA. The role of the third party in the section 9 process was examined by Thom et al. (2008).

(respect for cultural identity and personal beliefs) section 7a (obligation to consult with family) and Part 6 (Rights of Patients).

The Ministry's *Guidelines* for DAOs states that when practising in the DAO role "a complex balancing often arises between therapeutic approaches and statutory requirements" (Ministry of Health, 2012a, p.1). This contrasting of therapeutic and statutory functions suggests that these functions are distinct, even incompatible. Reading of the legislation and the related guidelines shows an intent that patients receive support and information during the process of initial assessment rather than simply being passively subjected to clinical procedures. A therapeutic intent can therefore be discerned in the DAO role. This therapeutic intent can be utilised by DAOs by conceptualising the use of statutory provisions in therapeutic terms. For example, compulsory assessment can be seen as providing the benefits of containment and stability in a time of acute distress and ultimately of supporting autonomy.

It seems obvious to state that legislation with the word "health" in the title should serve therapeutic ends. Health is generally considered to be a good to which individuals aspire. Furthermore, the Ministry of Health (2012b) *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* gives expression to the therapeutic intent of the MHA by stating "Compulsory treatment under the Act provides an opportunity for a person experiencing a serious mental illness to begin to live well in the community and take self-ownership of their health care" Ministry of Health (2012b, p.1). The reference to "self-ownership" implies that the MHA is intended to support autonomy, which might seem at odds with compulsion.

*A. Case Study I*⁶

Mr. Smith was a fifty-four-year-old single man who was a current client of a community mental health service. He had a diagnosis of bipolar affective disorder. Mr. Smith arrived to the emergency department with an infected and swollen foot which had not responded to intravenous antibiotics. Prior to his admission he had been staying in a community respite facility as his mood was elevated and he was considered to be at risk of relapse. While he tolerated his stay in the respite facility, his mental state continued to deteriorate. On presentation to the emergency department he was agitated, pacing, and threatening in manner. Mr. Smith was distractible, tangential in his thoughts, and had paranoid ideas. He was not accepting medical or psychiatric treatment, and was thought to present significant risk of deterioration in his physical and mental health. The need for a mental health assessment was identified early in Mr. Smith's admission to the emergency department. The mental health team considered that Mr. Smith likely met the criteria for compulsory mental health admission. An application for compulsory assessment was made and an assessment examination arranged by a DAO. On presentation of the section 9 notice, Mr. Smith's preference to leave hospital was acknowledged and attempts were made to explain concerns for his mental and physical health. Within the limits of his tolerance, his rights were explained. As there was no family member available, a Justice of the Peace attended the presentation of the section 9 notice. The result of the assessment examination was that Mr. Smith was admitted to the inpatient unit as a compulsory patient, with aims of maintaining his safety, providing containment, stabilising his mental state and continuing treatment of his infected leg.

⁶ Identifying details of both case studies have been changed to ensure anonymity.

1. Commentary on Case Study 1

There were two compelling and related reasons that Mr. Smith needed hospital care. His mental state had been deteriorating prior to his hospital admission, something observed by his community mental health team. Despite this, Mr. Smith may not have met the threshold for compulsory treatment as long as he was comfortable in respite care and maintained a degree of engagement with the clinical team. Until his admission to the emergency department, he was adherent with his prescribed medication. However, it was doubtful if that adherence would now continue, due to Mr. Smith's elevated mood and his perception that he had no need for mental health care. From a clinical perspective there were anticipated benefits to admission to the mental health unit, although Mr. Smith did not want this. At this stage the harms of compromising his autonomy outweighed the potential benefits. However, the development of an infection to his leg made a difference to how benefits and risks were assessed. An improved mental state was considered necessary for adequate treatment of a potentially dangerous infection. Although the DAO was aware that compulsory status under mental health legislation could not be used to enforce antibiotic treatment, improvement in mental state was likely to mean that Mr. Smith would be more amenable to treatment of his infection. Mr. Smith was initially accepting of a general hospital admission, allowing a degree of support and monitoring of safety that would also have been achieved by admission to the mental health unit. However, he remained elevated in mood and insistent that he was safe to leave the hospital. His general hospital stay was managed under a duty of care until the point where his infection was sufficiently treated to be managed as an outpatient, assuming his willingness to take oral antibiotics. At that point Mr. Smith's acute mental health deterioration became the primary issue, and attention was focussed on whether he met criteria for committal.

Despite there being a clear sense of benefits to Mr. Smith's mental health unit admission, he did not agree to this. Considerations for the DAO were that Mr. Smith was currently acutely mentally unwell, and his disturbed mental state meant that he did not appreciate the significance of his leg infection. The DAO's clinical knowledge about the treatment for acute hypomania informed the explanations given about the compulsory assessment process, and Mr. Smith's rights under the MHA. His preferences were acknowledged during the presentation of the section 9 notice, although ultimately those preferences were overruled. The time frame for considering benefits was an influential factor. The role of time is discussed by Wexler and Winick (1991) who argue that the short term anti-therapeutic impact of a decision needs to be weighed against longer term therapeutic effects. Time is frequently a major consideration in acute or crisis mental health work. This is recognised in the MHA's staged process of implementation where initial commitment is for up to five days only, in recognition that with supportive care crises may resolve quickly. Further recognition of the importance of time is the MHA's provision for immediate release from compulsory status if the psychiatrist in charge of the patient's care considers that the patient no longer meets the criteria of the MHA. In an acute mental health crises, consent can be tenuous and fluctuant. Patients may voluntarily accept treatment only to withdraw consent a short time later, and be re-assessed to meet criteria for compulsory assessment and treatment. Clinicians must consider whether consent will be sustained. From the perspective of therapeutic jurisprudence, compulsion would be limited to the shortest time possible, to reduce its anti-therapeutic effect while maximising benefits. Explanations given by the DAO are key to this process. While it may not be anticipated that a patient with hypomania will sufficiently recover with a day or two, the DAO's explanation that release from the MHA is possible at any stage can enhance the therapeutic effect of the MHA by reinforcing that the goal

of compulsory treatment is improved mental health and is not indefinite.

B. Case Study 2

Mr. Connor was a thirty-six-year-old European male admitted to hospital after a near lethal hanging attempt and a probable hypoxic brain injury. Once sufficiently recovered in the critical care unit, he was seen by the mental health team for assessment of his suicidality and ongoing health needs. When first seen he was confused, disoriented, agitated, and had only a partial recall of the events leading to his suicide attempt. His clinical history revealed that he was a user of the stimulant drug methamphetamine. The application for assessment was completed and a DAO arranged to present the section 9 notice. Mr. Connor's mother was invited to attend the presentation of the notice but she declined. Instead, the ward charge nurse was present. Mr. Connor had some resolving cognitive impairment following his near hanging but could understand basic explanations about his health care. His rights were explained and he was advised of his right to contact a lawyer. The assessment examination found that Mr. Connor met the criteria for compulsory assessment and treatment and he was admitted to the mental health unit under the MHA. Throughout this process, the DAO provided support to Mr. Connor's mother and involved her in process of assessment. Mr. Connor was cooperative with the admission process.

1. *Commentary on Case Study Two*

Mr. Connor accepted his hospital care, albeit passively, and had not fully recovered from his episode of hypoxia. He had limited recollection of the events leading to his suicide attempt and so could not be fully assessed when initially referred. As the trauma to his brain resolved it could be expected that some of the Mr. Connor's cognitive impairment would show improvement. However, it was clear from the history of his attempted hanging that this was a serious suicide

attempt. The wording of the MHA reflects that the circumstances of a mental health crisis may not be fully clear at the time of a person's first presentation. The intent of the MHA at this stage is to "buy time"; to provide an opportunity for a full assessment to occur to simultaneously meet the protective intent of the MHA to reduce the risk arising from Mr. Connor's suicidality. As with case study one, any short term anti-therapeutic effects of using the MHA need to be weighed against longer term therapeutic effects. In Mr. Connor's case this would include helping him to engage in substance use treatment as his suicidal crisis appeared to have been driven in part by his methamphetamine use. The therapeutic intent of the MHA is clear in these circumstances. In another parallel to case study one, the possibility of immediate release from compulsory status could attenuate any sense of coercion. Considering this case through the lens of therapeutic jurisprudence, it is clear that practising within the MHA involves doing much more than simply applying legal criteria. Clinical decision making in relation to the MHA involves deliberation about potential harms and benefits; in Mr. Connor's case, the positive benefits of immediate safety and substance use treatment must be weighed against the harms of limiting his autonomy.

VI. DISCUSSION

The two case studies presented above do not represent the full scope of the DAO role, much less the full range of mental health nursing practice in relation to mental health legislation. But they do serve as illustrative examples of how the concept of therapeutic jurisprudence could contribute to mental health nursing theory and practice. Most mental health nursing practice involves voluntary patients, not patients subject to compulsory treatment under mental health legislation. This is perhaps another reason for the limited current interest among nurses in therapeutic jurisprudence.

However, when nurses do turn to consider practice in relation to mental health legislation, the sense of conflict noted in this article, and evident in the Ministry's *Guidelines* to DAOs, suggests that therapeutic jurisprudence could become a useful item in the nursing conceptual toolbox.

Therapeutic jurisprudence borrows heavily from clinical professions, such as psychology and social work, and has even been suggested to operate within an "ethic of care" (Wexler, 2014), a notion familiar to nursing (Woods, 2011). It seems natural, then, for nursing to look to therapeutic jurisprudence for a conceptual approach to practice in a legal context. Therapeutic jurisprudence constructs the law as a mechanism for providing benefits to those subject to legal processes, not simply for the blind application of rules. As noted earlier, it would be surprising to think an act of parliament with the word "health" in the title, was not intended to confer benefits. Yet as the Ministry of Health's *Guidelines* for DAOs implies, the therapeutic "approaches" and statutory "requirements" of the MHA are distinct, and require "balancing" (Ministry of Health, 2012a), like two competing influences. Perhaps it would be better for nurses (and other clinicians acting in statutory roles under the MHA, especially doctors) to think of the law itself as a potentially therapeutic agent, something that can have either therapeutic or anti-therapeutic effects. If it is good enough for the criminal law to be thought of in this way it seems reasonable to apply the same thinking to laws concerned with health.

In the case studies presented above, DAO practice is considered through the lens of therapeutic jurisprudence, focussing attention on providing benefits, and preventing adverse effects. Time is a consideration in both cases, as the perceived benefits of the MHA, especially short term safety, may be achieved relatively quickly and are considered to offset anti-therapeutic effects. Some of these considerations are apparent in the current MHA in the many procedural

protections that distinguish the current MHA from its predecessors. However, as Freckleton (2007) noted, therapeutic jurisprudence should not be used to simply assert psychiatric treatment as a benefit that trumps other considerations in decision making. Concepts such as “pretextuality” and “sanism” (Perlin, 1999) have been used to critique psychiatric clinical practice for assuming its own correctness and therefore admitting little counterargument. Simply assuming that whatever psychiatric professionals assert as “therapeutic” is beneficial is no advance in mental health nursing practice, or in patients’ experience of care. Freckleton (2007) has responded to this critique by noting that the therapeutic jurisprudence literature does not support the abrogation of advocacy and decision making to a paternalistic “best interests” approach, pointing to the need to attend to statutory criteria in decision making. However, the point of therapeutic jurisprudence is that the criteria of legislation are not a sufficient basis for decision making.

In terms of the much-cited metaphor of “old wine in new bottles” (Wexler, 2014) the current bottle of the MHA needs revision in terms of the United Nations Convention on the Rights of People with Disabilities. For example, the areas of supported decision making (Morrissey, 2012) and the adoption of a capacity test in place of the current dangerousness standard need revision. It may be that a “fusion” model of legislation (Dawson & Szmukler, 2006) rather than separate mental health legislation, would also better serve the purposes of therapeutic jurisprudence, especially that of supporting autonomy. However, the old bottle of the MHA does have the potential for DAOs to decant the “new wine” of therapeutic jurisprudence. Current legal processes such as the mechanisms for immediate release of the patient from civil commitment, and the presentation of the section 9 notice provide DAOs with the opportunity to consider the law as a therapeutic agent. Procedural justice offers a model of

engagement which could align therapeutic jurisprudence with existing interpersonal nursing theory.

VII. CONCLUSION

This article has introduced the concept of therapeutic jurisprudence to mental health nursing, using one example of professional practice to illustrate the potential for therapeutic jurisprudence to inform practice. Mental health nursing theory pays scant attention to nurses' roles in coercive practices and hence provides little direction on how coercion can be minimised. Consideration of therapeutic jurisprudence offers a means of enhancing the therapeutic effects of legislation that might otherwise be seen as simply coercive. In introducing the concept of therapeutic jurisprudence, the intent is not to minimise the reality that committal under mental health legislation is a coercive practice with serious implications in terms of human rights and the normally accepted right to consent to health interventions. The cases illustrate that the MHA extends considerable discretion to clinicians and therefore significant potential for coercion when applied to a particular case.

Incorporating therapeutic jurisprudence into a model of nursing practice does not exhaust the need to work with patients towards achieving consensus about the processes of and nature of care. To that end, procedural justice has been advocated as a model for limiting experiences of coercion in psychiatry (Winick, 2003) and mental health nursing (Galon & Wineman, 2010). Therapeutic jurisprudence is not a simple solution to a complex issue, but it does appear to offer an additional useful concept, especially in clinical practices such as the DAO role, that involve operationalising mental health legislation.

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*RESTORATIVE JUSTICE IN THE NORTHERN TERRITORY -
THE FUTURE IS LOOKING BRIGHT FOR A PRE-SENTENCE
CONFERENCING REVOLUTION*

Crystal Triggs and Jared Sharp*

I. INTRODUCTION

For many years, the Northern Territory (“NT”) of Australia had a pre-sentence conferencing process in name only. The *Youth Justice Act* sets out how pre-sentence conferencing is to take place.¹ However, since the Act’s introduction in 2005, court-referred pre-sentence conferences have been rarely utilised.²

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¹ *Youth Justice Act 2017* (NT) pt 6 div 2 s 84 (Austl.) (providing:

- (1) The Court may, when determining the appropriate sentence for a youth who has been found guilty of an offence, adjourn the proceedings and order the youth to participate in a pre-sentencing conference.
- (2) A pre-sentencing conference may be with any of the victims of the offence the youth is charged with, community representatives, members of the youth's family or any other persons as the Court considers appropriate.
- (3) The Court may:
 - (a) direct that the conference be convened at a specified time and place; and
 - (b) appoint a person who is appropriately qualified as the convenor of the conference.
- (4) The convenor must report to the Court as to the outcome of the conference.)

² Transcript of Proceedings, *Royal Commission in the Child Protection and Youth Detention Systems of the Northern Territory* (May 9, 2017), <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/transcripts-2017/Transcript-9-May-2017.pdf> [hereinafter *Royal Commission*].

At the same time, young people in the NT are facing criminal charges more than ever before. In 2008-09 the total youth offender rate in the NT was 6,031 offenders per 100,000 persons aged ten to nineteen years. In 2013-2014 the rate was 7,241 per 100,000³, and youth detention rates in the NT are increasing against the national trend of overall decreasing youth detention rates.⁴

Recently, there have been suggestions that these things might be starting to change. In the last two years, the authors have personally been involved in approximately thirty pre-sentence conferences – a substantial increase in the number of matters referred for pre-sentence conferences – perhaps as many have occurred over the preceding decade!⁵

This paper will consider existing research on the potential benefits of group conferencing and some of the culturally strengthening practices to support participation by Aboriginal youth. We draw our experience from representing clients who have participated in conferencing and delivering group conferencing in both the NT and Victoria. This paper will also consider case studies that the authors have personally been involved in, showing the change that is possible, even for young people seemingly entrenched in the youth justice system. The paper will conclude with a consideration of a possible framework for the future of pre-sentence conferences as well as provide a link to therapeutic jurisprudence in the Northern Territory.

³ AUSTRALIAN BUREAU OF STATISTICS, *4519.0 – Recorded Crime – Offenders, 2013-2014* (Feb. 25, 2015), <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2013-14~Main%20Features~State%20and%20Territories~18>.

⁴ *Id.* at 2 (explaining between 2012-13 and 2013-14, the youth offender rate decreased in all states and territories except the Northern Territory and South Australia, where it increased by 2,393 offenders (49%) and 219 offenders (5%) respectively.)

⁵ *Royal Commission*, *supra* note 2, at 2.

II. THEORISING RESTORATIVE JUSTICE BASED ON EXISTING LITERATURE

Restorative justice as a process seeks to bring together a young offender and the victim(s) they offended against. Pre-sentence conferences are a particular type of restorative justice process that occurs within the youth justice system. A pre-sentence conference takes place after a young person has pled guilty to the offence(s) with which they were charged. Having accepted responsibility, the pre-sentence conference aims to bring home to the young offender how their actions have impacted the victim and the wider community. The conference also supports the young offender to take steps to repair harm caused and avoid future involvement in the justice system.

The group conference takes place in a relatively informal setting, but is carefully planned and prepared. Those present sit in a circle, with the offending youth and the person harmed facing each other. The wrongdoer is asked to describe what happened, and what they were thinking at the time of the offence. The person harmed is then asked to describe how the offence has impacted them. Others present also explain how the offending behaviour has impacted them. After this, the youth is asked to come up with a plan to repair the harm caused, and to think of things that might prevent them from reoffending. The person harmed and others present are then asked to consider whether the plan appears fair, or whether other tasks should be included. If there is agreement amongst those present, the details are recorded, and participants are asked to sign the agreement.⁶

Restorative justice has been utilised in the majority of Australian youth justice jurisdictions for over twenty years. There is now overwhelming evidence supporting approaches that divert young people from the formal justice system. A study

⁶ Gabrielle Maxwell & Allison Morris, *Youth Justice in New Zealand: A Restorative Model*, RESTORATIVE JUSTICE ONLINE (Aug. 26, 2005, 6:10 AM), <http://www.restorativejustice.org/10fulltext/maxwellandmorris>.

by the Australian Institute of Criminology found that young people diverted from the court system were less likely to have further involvement in the criminal justice system.⁷ The effectiveness of restorative justice processes is well documented. An evaluation of youth reoffending rates in Victoria concluded that rates of not reoffending after two years were: 80% from Youth Justice Conferencing pre-sentence, 57% from community-based supervision, and 43% from detention.⁸ Another study by Strang et. al. similarly looked at a large number of evaluations of restorative justice programs and concluded that group conferencing was effective in reducing the likelihood of reoffending two years post-conference and offered a cost-effective alternative to imprisonment.⁹ The study also found high rates of victim satisfaction and positive victim impact.

New Zealand (“NZ”) is the world’s leader in family-led, group conferencing processes, having enacted the *Children, Young Persons and Their Families Act* in 1989. The NZ *Children, Young Persons and Their Families Act* ushered a “new paradigm of re-integration, restorativeness, diversion, and family empowerment.”¹⁰ It brought in a Family Group Conferencing (“FGC”) regime, which seeks to delegate decision-making responsibility to family/whānau and those directly involved in or impacted by an offence(s). The FGC process emerged as a Māori-driven response, largely in a context of a colonial, Western justice system that does not meet the needs of Māori people.

⁷ Troy Allard et al., *Police Diversion of Young Offenders and Indigenous Over Representation*, 390 AUSTRALIAN INSTITUTE OF CRIMINOLOGY, (Mar. 2010).

⁸ See KPMG AUSTRALIA, *REVIEW OF THE YOUTH JUSTICE GROUP CONFERENCING PROCESS – DEPARTMENT OF HUMAN SERVICES (VIC SEP. 2010)*.

⁹ STRANG ET AL., *RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMATIC REVIEW*, Campbell Systematic Reviews, 2013.

¹⁰ MORRIS & MAXWELL, cited in NESSA LYNCH, ‘PLAYING CATCH UP? RECENT REFORM OF NEW ZEALAND’S YOUTH JUSTICE SYSTEM,’ *CRIMINOLOGY AND CRIMINAL JUSTICE* (Jan. 9, 2012) at 1.

Through harnessing tikanga and involving family/whānau in the decision-making process, it re-empowers whānau/family. The process allows a means for harnessing culture, mentors and strong cultural influences to help young people back onto a rehabilitative path.

The New Zealand model has been the subject of a significant number of studies which have considered the effectiveness of the FCG process established by the *Children, Young Persons and Their Families Act*. As one measure, FCG in New Zealand has been shown to have positively impacted youth reoffending rates and youth crime rates. In the last decade, the number of young people apprehended, charged, and appearing in the Youth Court has decreased, as has the youth crime rate and the number of young people in detention.¹¹

A. *RJ in Practice in the NT*

The NT's *Youth Justice Act* provides for two types of restorative justice. The first is pre-court diversion. The NT has a long-established police diversionary scheme,¹² which creates a presumption that a young person must be diverted unless an exclusionary provision applies. The NT's youth diversion scheme has been a best-practice example of diverting young people from the formal justice system. An evaluation of the pre-court diversion scheme in the NT by Cunningham in 2007, found that over three quarters of participants (76%) did not reoffend in the first twelve months following pre-court diversion.¹³ The Northern Territory Police, Fire and Emergency

¹¹ See PRINCIPAL YOUTH COURT JUDGE ANDREW BECROFT, CHILD AND YOUTH OFFENDING: INTRODUCTORY NOTES. (stressing the increased violent offence apprehensions for 14-16 year olds over the last decade, which is of significant concern.)

¹² See section 39 of the *Youth Justice Act*.

¹³ See *Diverting Indigenous offenders from the criminal justice system*, AIHW,

<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545614> (last visited December 2013).

Services (“NTPFES”) Annual Report states the rate of reoffending was 15% for 2015-2016.

However, diversion is not accessible for every young person. Although creating a presumption in favour of diversion, the Youth Justice Act also allows police significant discretion to prefer formal charges to diversion. In 2015-2016, only 36% of young people were given the opportunity to complete youth diversion.¹⁴ In the NT, some young people who might have previously been given the opportunity to undertake diversion are not given this opportunity a second time. Alternatively, some youths are not considered suitable for diversion because they have complex needs (for example, a cognitive impairment) or they lack the family support that would allow them to complete the lengthy and onerous diversionary process.¹⁵ This exercise of police discretion has been shown to disproportionately impact Aboriginal young people.¹⁶

In addition to police diversion, Section 84 of the *Youth Justice Act* also allows the Court to consider referring a young person who has pled guilty to an offence(s) to a pre-sentencing conference prior to a sentence being imposed. A pre-sentence conference can be a victim-offender conference or a family group conference (i.e., no victim, no police attendance). The court identifies both who is to convene the conference as well as possible attendees. Where the court orders a victim-offender conference, the convenor will contact the victim(s) to see whether they wish to participate. If they do not, a conference can still be convened. It may be possible to identify a victim

¹⁴ 2015-2016 Annual Report, Northern Territory Police, Fire & Emergency Services, <http://www.pfes.nt.gov.au/Publications-and-forms.aspx> (last visited Sept. 9, 2017).

¹⁵ See section 39(4)(d) of the Youth Justice Act (NT). In addition to this, systemic factors resulting in Aboriginal young people having less access to diversion are well documented. See *surpa* note 13.

¹⁶ Austl. Inst. Health Welfare, *Diverting Indigenous offenders from the criminal justice system*. Res. sheet no. 24. (Dec. 2013).

representative (such as a family member or a representative from the Witness Assistance Service) or a community representative to speak about the impact on the community of the type of offending that the young person has engaged in. Attendance by the victim, however, is by far the preferred outcome in terms of illustrating to a young person the impact of their offending.

In February 2017, Jesuit Social Services received funding to commence a pre-sentence conferencing program in the Darwin region.¹⁷ The funding is to convene sixty-five pre-sentence conferences over a twelve-month period. This is a significant step forward – although pre-sentence conferences were legislated in 2005, this is the first time in the Northern Territory that funding has been provided to facilitate court-referred pre-sentence group conferences. Jesuit Social Services has employed three convenors with this funding. In its first three months of operation, Jesuit Social Services' youth justice group conferencing program has achieved victim attendance in twelve of sixteen conferences, with a victim representative attending a further three conferences (where the victim had chosen not to participate in the conference, but wished to have a voice in the process).

At the end of the conference, the convenor prepares a detailed report for the court, giving a thorough description of what was discussed at the conference and how the young person engaged with the process. Direct quotes of the attendees are included wherever possible. The court then considers the extent to which the young person's participation in the conference

¹⁷ See KPMG AUSTRALIA, REVIEW OF THE YOUTH JUSTICE GROUP CONFERENCING PROCESS – DEPARTMENT OF HUMAN SERVICES (VIC. SEP. 2010). Jesuit Social Services has a lengthy history of providing youth justice group conferences in Victoria, commencing in 2003. Its model has been held up as a best practice example of youth justice group conferencing and has been successfully evaluated.

http://www.jss.org.au/files/Docs/Programs/justice%20and%20crime%20prevention/Final_Group_Conferencing_review_full_report.pdf.

should be taken into account in formulating the appropriate sentence.

B. The Benefits of Restorative Justice

From the authors' perspective, a primary benefit of the restorative justice process is its educational value. A significant proportion of the young people who have been referred to attend a Jesuit Social Services pre-sentence conference have a cognitive impairment or disability.

Similarly, the majority of young people before the courts (and referred to attend a Jesuit Social Services pre-sentence conference) are marginalised from the education system. A significant number of young people participating in group conferences have been either completely disengaged from school or are attending an alternative, part-time educational program. These young people are disengaged not only from formal education, but the protective factor that the education process provides.

In this context, the cohort of young people attending pre-sentence conferences are arguably those most in need of an intervention that teaches, guides, and instructs. The RJ process encourages a young person to see the impact of their actions by coming face to face with the person(s) they have harmed. By asking questions like, "What were you thinking when you were inside the house?", a group conference pushes young people to reflect on their actions and choices, and urges them to think about making better decisions about future behaviour.

By hearing directly from the person(s) they have harmed, the young person is able to see that even a seemingly "victimless" crime (like being a passenger in a stolen car) can have devastating consequences for the owner of that car. This can help them to develop empathy for others, see the harm they have caused, and take responsibility for making amends for this harm. Similarly, questions asked of parents like, "How did you feel

when your son or daughter got in trouble and had to go to police station?” allow the young person to see that their actions impact their family as well. This can help them to think about how their choices and actions affect others.

By the end of the conference, a young person almost always has a greater ability to see the impact of their actions on others. The authors have been struck by how often, after hearing about the impact of an offence on a victim, a young person spontaneously apologises to the victim, in a genuine and heartfelt way, finally giving a victim closure and the ability to move on themselves. Each of the sixteen pre-sentence conferences Jesuit Social Services has conducted so far has included some form of apology to the victim, whether that be verbally at the conference, through a letter of apology, or an artwork given to the victim. This act of apology is an important step towards helping that young person to develop insight and break patterns of behaviour that could easily lead to similar offending in the future.

There is growing evidence that participating in a group conference can be the catalyst for that young person not offending in the future, or else reducing or decreasing the seriousness of a future offence.¹⁸ According to a 2010 KPMG study of Youth Justice Group Conferencing in Victoria, over 80% of young people did not go on to re-offend after two years. Those who did re-offend were more likely to commit a lower level offence or re-offend less frequently. There are also positive indications that young people in the NT who have attended a pre-sentence conference are showing reductions in recidivism, or the

¹⁸ KPMG AUSTRALIA, REVIEW OF THE YOUTH JUSTICE GROUP CONFERENCING PROCESS – DEPARTMENT OF HUMAN SERVICES (VIC. SEP. 2010). *See also*, Steve O’Connor. Director Challenge 2000 March 2017, *The Youth Justice process and the effectiveness of the Family group conference* (Mar. 2017) (evaluations of the effectiveness of the New Zealand FGC process on youth reoffending rates) https://www.parliament.nz/resource/en-NZ/51SCSS_EVI_00DBHOH_BILL72055_1_A553260/d69afac2_ad2_58eb428b0c3c18c5d5327f8a0b8fc.

frequency or seriousness of their re-offending. Because the Jesuit Social Services program only commenced in February 2017, it is difficult to assess the impact of attending a conference on future offending. However, only one young person who has participated in a Jesuit Social Services pre-sentence conference reoffended at the time of writing.

Young people and victims involved have typically expressed how positive and well supported they feel at the end of the process.¹⁹ In the authors' experience, it is not uncommon to hear young people express positive sentiments at the end of a group conference for the opportunity to have heard from the victim, and the other attendees. Similar feedback has frequently been provided by victims, police and Witness Assistance Service workers. One child protection court liaison officer who attended a conference commented, "This should be done for every one of our children, whether they have offended or not."

The other great benefit is that for many young people, a restorative justice youth conference is the first time that people have come together with their needs in mind. The highly-scripted format gives a structure to this conversation that is not possible in daily life. This does not change the fact that for some young people, the process can be like pulling teeth. A young person might initially clam up, or might not be overly communicative to start with. But, by the end of the conference, and after a young person hears messages of support and encouragement (even from those the young person had thought would be antagonistic to them), it is often the case that a young person will thank everyone for attending and supporting them.

¹⁹ KPMG AUSTRALIA, REVIEW OF THE YOUTH JUSTICE GROUP CONFERENCING PROCESS – DEPARTMENT OF HUMAN SERVICES (VIC. SEP. 2010) at 56 – 57.

http://www.dhs.vic.gov.au/__data/assets/pdf_file/0006/675564/review-youth-group-conferencing-report-2011.pdf.

On the other side, the benefits for victims are also substantial. It is significant that victims and victim support groups are generally amongst the loudest proponents of pre-sentence conferencing and restorative justice. In one recent case, a victim commented that a young person who was involved in stealing his car had “restored his faith in humanity” because he had not only attended the group conference and accepted responsibility for his actions, but also taken tangible steps to repair harm caused to the victim and his wife. In this case, the young person wrote a beautiful card and painted a picture of a cat for the victim’s wife, having been told that she loves cats.

C. Cultural Safety

In the NT, almost all young people in the youth justice system are Aboriginal. Approximately 98% of young people in youth detention are Aboriginal. This is also seen in the numbers of Aboriginal young people participating in pre-sentence conferencing. Since Jesuit Social Services commenced its youth justice pre-sentence conferencing program in February 2017, twenty-six of the twenty-six young people referred to the program have been Aboriginal.

It is therefore essential that all programs and services for young people be designed and delivered with cultural safety and culturally strengthening as foremost considerations. Although Jesuit Social Services has run a highly successful youth justice group conferencing program in Victoria for fourteen years, the Victorian context is very different – only a small percentage of Aboriginal young people participate in the program.

With this in mind, cultural safety is paramount in our process. Organisationally, we have formed a partnership with the Aboriginal health service for the Darwin region, Danila Dilba Health Service. They are linked to almost every Aboriginal family in Darwin, and their support has been vital in the establishment of our program. Danila Dilba has been enormously

generous in the establishment of the program, providing advice and guidance, making available culturally safe venues for conferences to be held, and sitting on interview selection panels to help assess the suitability of new staff. Danila Dilba's youth engagement workers, in particular, have provided crucial support to young people participating in group conferences. They bring their knowledge and relationships with the young person, and the ability to link young people with health, social and emotional wellbeing support, drug and alcohol counselling as the needs of the young person require.

Jesuit Social Services has also been very mindful of the need for convenors to have highly developed cross-cultural skills. Where non-Aboriginal convenors are used, they must have the highest levels of cross-cultural communication skills. This includes ensuring that interpreters are used where required, how to use an interpreter effectively, the family and cultural background of the young person, and how the process can bring out and harness these strengths. It is also the authors' view that Aboriginal convenors are especially well suited to this role, which is very much about creating a culturally safe process for participants (for example choice of venue, role of Elders, use of cultural practices in the process), as well as one that involves the right support people are on hand to help set up a young person for success.

In this regard, there may be other Aboriginal people outside a young person's family who are appropriate to invite into the conferencing process. For example, a worker for an Aboriginal health-based organisation, such as the Danila Dilba Health Service in Darwin, who might have a pre-existing relationship with that young person or who could help to address unmet health and well-being needs the young person might have would be appropriate to invite. In one recent conference, a highly respected local doctor was invited to attend and provide information to the group conference about the dangers of unmanaged

epilepsy, especially as the young person was known to be using drugs and alcohol.

There may also be instances where a particular young person who does not have any positive male or female role models might benefit from being linked with a strong role model. Some role models may have a background in counselling or youth work while others will have a lived experience in the youth justice system that helps them to connect with the young person in a way that others simply cannot. Where an Aboriginal support person is brought into the conference process, they should meet the young person prior to the conference to ensure the development of trust and rapport.

Another key consideration is to ensure the conference is held in a culturally safe location. As an example, Jesuit Social Services recently held a conference outside at a location where the convenor knew that the young person would feel safe and comfortable. In other conferences, the Healing Room of the Danila Dilba Health Service has been used. The Healing Room is a place that is special and significant for Aboriginal people in Darwin. It is a safe place where Stolen Generation survivors meet which is comfortable, relaxed and creates an atmosphere conducive to restoration.

Finally, there should be capacity for an Aboriginal support person to continue to work with the young person after the conference. This serves a number of purposes. First, it recognises that a young person will likely hear more at a conference than they can take in. An Aboriginal support person can help embed learnings from the conference. Also, they can continue one-on-one work with the young person after the conference, when the young person wishes to do so. This is especially important given that Aboriginal young people frequently do not access mainstream health, education, or therapeutic services. This continued work can ensure mentoring support.

As one example of the need to adapt the well-established interstate program, Jesuit Social Services have ensured a funding stream to employ cultural expertise in its process. Jesuit Social Services have a specific funding allocation to compensate Elders and strong role models for the time they contribute to attending group conferences and supporting young people in the process. It is very much hoped that this model can be replicated in the court process (similar to the lay advocate model in New Zealand). This would enable courts to appoint and employ Elders and role models on a case-by-case basis to support Aboriginal people in the court system and for the Aboriginal young people to reconnect with their culture and sense of identity and community.

The utilisation of cultural support in the conference process will, obviously, also be on a case-by-case basis. This will also only be with the consent of the young person, with convenors being mindful to respect a young person's wish for privacy. But where a young person is agreeable, consideration is given to supports from a respected family member, perhaps an uncle, older brother, or an Elder significant to that young person.

D. Case Studies

In this section, we use case studies to illustrate some of the key benefits of the pre-sentence conference process. These case studies are de-identified, and drawn from co-author, Ms. Crystal Triggs' experience as the lawyer who referred these matters for the group conference and attended the conference with the young people concerned. Ms. Triggs still works in Youth Court and knows firsthand about the continuing progress of these clients. Overall, we explore the ways in which a pre-sentence conference can have a "circuit breaker" effect for some young people. In this way, a pre-sentence conference can get through to a young person and help them be accountable for their actions in a way that the court process simply cannot.

1. Kieron's case

Kieron was a 15-year-old boy based in Palmerston who grew up in a close, loving family environment and attended school and sport regularly. His brother passed away and this affected the family terribly. The effect of grief on his parents led to a breakdown of the relationship between Kieron and his parents.

Kieron had a consistent pattern of offending with no sign of slowing down. He was facing his fifth sentencing exercise, with eight new charges including aggravated assaults, unlawful use of motor vehicle, stealing, and escaping lawful custody over a period of seven months. His offending breached community work orders and supervised good behaviour bonds.

Kieron was having problems at home with his father, which culminated in his father calling police because Kieron was not listening to him. Prior to the conference, Kieron and his father, along with the Aboriginal convenor, attended an Aboriginal Men's Health meeting. The convenor of the conference was a regular attendee at the meetings and deemed it an appropriate activity to form a part of the conference for this client and booked in Kieron to attend with his father.

The meeting included some very dedicated and positive Aboriginal men in the community. Discussion covered a wide range of health and well-being topics. At the end of the session, the convenor asked Kieron what he thought of the meeting, and he replied, "That's what I want to be." When the convenor asked what he meant, Kieron said, "A role-model."

The conference was held with Kieron, his father, and his lawyer. Unfortunately, the victims were unwilling to

attend, but it was considered that a conference was nevertheless beneficial for Kieron to look at the reasons behind his offending and how it affects the community, his family, and his future.

Kieron was engaged throughout the conference. He expressed genuine gratitude at having been able to attend the Men's Health meeting and in receiving assistance to address the issues that led to his offending behaviour. He expressed a desire to change this behaviour and to keep attending the Men's Health group, which provided a connection to role models for Kieron. Outcomes from the conference were written into an agreement, which everyone signed. Kieron has not been in trouble since the conference, which is a period of nearly three years.

This case study illustrates the way a pre-sentence conference can also be vital to address welfare issues a young person might be facing. This can be especially important for young people in the care of the Department and can unearth new information about a youth's background and circumstances. This is crucial to addressing the underlying causes of their offending. In turn, this can prove to be the catalyst for coordinated action and support for the young person.

2. Sabrina's case

Sabrina has been in care of the Department since she was a baby. She attended the conference three days after she turned eighteen. Sabrina is intellectually disabled. At age sixteen, a psychological report noted that Sabrina had the equivalent intelligence of an 8.3-year-old. Sabrina was also diagnosed with foetal alcohol syndrome ("FASD"), and at the time of the conference, was pregnant.

All of Sabrina's offending was care-based. It arose out of her responses to rules changing in the care environment, certain directions from carers, or her perception that treatment she received from carers was unfair. Her responses were typically to assault the carer in question, damage property, or steal a motor car from her caretakers.

On the day of the conference, Sabrina was not feeling well and felt shame in attending. But with encouragement from her lawyer and support person, she eventually agreed to attend. Sabrina's NAAJA lawyer, her support person (who was a young friend of hers), and the convenor, an Indigenous Elder with youth mediation qualifications and experience all attended the conference. Once there, she participated extraordinarily well. Sabrina was able to differentiate behaviours towards her that she perceived as being wrong, and her inappropriate behaviours in response. Sabrina was able to apologise for her behaviour, notwithstanding the unfair treatment she had perceived.

The conference also served an educative function. It was explained that spitting on someone, which she did to one of her carers, was considered to be a very significant assault – more serious than hitting someone in certain circumstances. Sabrina had not realised this. As Sabrina is now eighteen, these responses were especially important given that future offending will be dealt with in an adult court. Sabrina has also stayed out of trouble since the conference three years ago.

This case study illustrates the important role a conference can play in the life of a young person in out of home care. This case also illustrates the significant role a conference can have for a young person with complex issues. The impact of

taking time to explain to a young person the effect their behaviour has on people around them in a safe environment can be profound. Similarly, the ability to give young people a voice, where they are respectfully listened to, can provide a unique opportunity. This process can facilitate understanding and reflection that then impacts future behaviour.

III. DISCUSSION – WHERE TO FROM HERE FOR PRE-SENTENCE CONFERENCING IN THE NT?

The recent increase of pre-sentence conferences has been a welcome development in the Northern Territory youth justice system, which for so long has been bereft of therapeutic options. If the Northern Territory is to develop a high-quality youth conferencing model, however, structural changes and procedural safeguards must be considered.

In particular, we argue that the Northern Territory should follow the lead of New Zealand and reconceive the role of courts in the sentencing process. The revolutionary New Zealand model reconceptualised the role of the court in sentencing young people. Instead of simply imposing a sentence, the New Zealand model empowers those directly impacted by, involved in, and affected by offending behaviour to determine a pathway for a young person to take responsibility for their actions, make amends for harm caused, and come up with a plan to prevent reoffending. In New Zealand, it is not an individualised approach singling out the individual young person. In fact, it is quite the opposite. The New Zealand family group conferencing model is built on empowering the whānau/family and mobilising family members who can help a young person back onto the right track by reconnecting them with their whānau and culture. We argue this is an equally appropriate consideration for Aboriginal young people. As described above, bringing Elders, strong family members, and male and female role models into our process is crucial to ensuring the process works effectively for Aboriginal young people. The young person knows that

these people come from a position of love, support, and understanding. They often have a lived experience or ability to communicate with the young person that “cuts through” to the youth and reinforces other positive messages being imparted in the conference process by other participants.

The New Zealand model is based on solution-focused approaches, where the court takes on a role of overseeing and monitoring the outcome plan developed at the conference. The judicial actor uses a series of “carrots and sticks” to encourage a young person to continue on the restorative path agreed to at the conference over a period of several months. In this regard, participation in a family group conference becomes the starting point for a process of judicial monitoring that is built from the outcome plan developed at the group conference. Recent initiatives such as the Rangatahi Court take this one step further, where the judicial monitoring process occurs on marae and using tikanga to draw on the wisdom of kaumatua (Māori elders) to reconnect a Māori young person with their language, customs, and community. This all ensures a culturally strengthened judicial monitoring process.

Restorative justice has strong links with what Wexler determined to be the key components of therapeutic jurisprudence, described as “therapeutic design of the law” and “therapeutic application of the law.” For example, the New Zealand model provides a follow-up process and a way of checking in with the young person in the months following a conference. This can include determining whether the young person has followed through with undertakings made at the conference to write an apology letter to the victim, or to do community work, or to enroll in school or drug and alcohol counselling. This ensures the optimisation of well-being or therapeutic outcomes for the young person.

The authors argue that the Northern Territory should learn from the New Zealand experience of combining restorative justice with a culturally-strengthening process of judicial monitoring that could further therapeutic outcomes for young people. We consider that a new sentencing option should be included in the *Youth Justice Act* that would enable the sentencing court to:

Order the youth to participate in a pre-sentence conference under Section 84 and adjourn the matter for a period not exceeding six months for the youth to complete an outcome plan as agreed at the pre-sentence conference. If, at the completion of the adjourned period, the youth has completed the outcome plan and has not committed any further offence, the sentence shall be deemed to have been served and the youth discharged without any further sanction or penalty.

This new section would recognise the comprehensive nature of outcome plans and that completing all of the actions in an outcome plan can take several months. Outcome plans frequently include actions the young person is to take to:

- (a) make amends for some of the harm caused to the victim(s), for example by a written apology, completing an artwork (such as a painting, or making an object) as a means of acknowledging responsibility for their actions and making amends to the victim, and/or undertaking volunteer work or making restitution to the victim;
- (b) to prevent further offending, such as attending counselling, education, sticking to curfew, participating in sporting activities, or attending one-on-one mentoring sessions.

This new approach would also build in the cultural competency of the court, an approach analogous to the Rangatahi Court, to help motivate and encourage a young person to complete all the actions and remain offence free.

As well as this structural change, there are a number of procedural safeguards that must be adopted as standard practice. First, the pre-sentence conference process must be culturally-strengthening from beginning to end. It is well established that the professional expertise of the convenor(s) is the most significant factor in determining the effectiveness of the group conference process.²⁰ But, given the overwhelming proportion of Aboriginal young people involved in group conferences in the Northern Territory, increased efforts are needed to train Aboriginal convenors who are best placed to oversee a process that is inclusive of Elders, strong role models, extended family, and held in a culturally appropriate location. But it is also critical that the important role of non-Aboriginal convenors is also acknowledged. Continued efforts should be made to ensure non-Aboriginal convenors have highly developed cross-cultural skills, including in areas such as cross-cultural communication (especially the effective use of interpreters), intergenerational trauma, and working with Aboriginal partner organisations to ensure a process that is inclusive of Elders, strong role models, extended family, and convened in a culturally appropriate location.

Second, conferences need be convened quickly in a time frame that is relevant given the age and level of maturity of the young person involved.²¹ In addition, the conference time frame must be one that fits with the time frame requirements of the court.

²⁰ KPMG AUSTRALIA, REVIEW OF THE YOUTH JUSTICE GROUP CONFERENCING PROCESS – DEPARTMENT OF HUMAN SERVICES (VIC. SEP. 2010).

²¹ *Youth Justice Act (NT) pt 6 div 2 s 4(d) (Austli.)* (emphasizing that consideration in relation to all justice processes involving young people).

Third, the skillset and qualifications of the convenor must be regulated. Several reviews have clearly identified²² that the expertise of the convenor is perhaps the single most determinative factor in ensuring an effective group conferencing process. But in the NT, there is no accreditation process to guarantee high quality convenors. Most convenors will have undertaken a three-day restorative practice training course, but this is by no means mandatory. There is no requirement for professional accreditation, supervision, or ongoing professional development. Some organisations such as Jesuit Social Services have well-developed practices that provide professional support and supervision to convenors, ongoing professional development, and a link to state-based accreditation bodies (such as the Victorian Association for restorative Justice). However, in the authors' view, this must be systemically addressed to ensure consistency and high quality in the group conference process.

Fourth, it is imperative that the *right* support people be able to attend the conference. For the young person, it is vital that a support person who can continue to support the young person post-conference is identified. This is essential to ensure that the momentum of the conference is maintained, and that the support person can work with the young person to implement the plan that comes out of the conference and help keep the young person on the right track.

The conferencing process is equally important for the victim as well. The NT Witness Assistance Service ("WAS") has performed a remarkable role so far in supporting victims to attend a pre-sentence conference. It is essential that victim support agencies, such as the WAS, have dedicated resources to support group conferences. WAS staff are involved before and after the conference to ensure a victim is not re-traumatised or adversely affected by the conference experience. It is imperative that WAS be acknowledged for its expertise in this specialist

²² See KPMG AUSTRALIA, REVIEW OF THE YOUTH JUSTICE GROUP CONFERENCING PROCESS – DEPARTMENT OF HUMAN SERVICES (VIC. SEP. 2010).

role and provided with the resources to effectively undertake this work.

IV. CONCLUSION

This paper has considered existing research on the potential benefits of group conferencing and some of the culturally-strengthening practices to support participation by Aboriginal young people. It has explored the authors' experience of delivering and supporting young people who participate in the group conferencing in the NT and Victoria.

In our view, restorative justice has the potential to bring transformation to the NT youth justice system, so long plagued by brutalisation and a mono-cultural justice system that has failed to meet the needs of Aboriginal young people. Our experience is that Aboriginal young people, including those seemingly entrenched in the youth justice system, respond extremely well to the group conferencing process. The authors argue that the NT should learn from the New Zealand experience of combining restorative justice with a culturally-strengthening process of judicial monitoring. Consideration must be urgently given to a possible framework for future pre-sentence conferences built on cultural strength, high quality practice, and linked to a culturally-strengthening process of judicial monitoring that can embed the positive outcomes achieved at the group conference and ensure coordinated support for young people to set them up for success.

THERAPEUTIC JURISPRUDENCE PRINCIPLES AND OFFENDER REHABILITATION: WHICH REHABILITATION THEORY IS THE BEST MATCH?

Astrid Birgden*

Abstract

Therapeutic jurisprudence is interested in the law, legal procedures, and the role of psycholegal actors in rehabilitating offenders in courts and the correctional system. Therapeutic jurisprudence focuses on improved well-being while considering evidence-based and ethical approaches in correctional services being applied in the courts to support rehabilitation. A good offender rehabilitation theory specifies the aims of treatment, justifies the values underpinning the approach, and outlines how treatment should proceed to realize these values. In this endeavor, two contemporary offender rehabilitation approaches are compared to therapeutic jurisprudence principles: Risk-Need-Responsivity and the Good Lives Model. The values, treatment targets, and practice strategies within the two offender rehabilitation models are compared. It is concluded that the principles and practices of the Good Lives Model are better aligned to the values of therapeutic jurisprudence as both approaches aspire to a humanistic approach within an ethic of care aimed at improving well-being in both offenders and the community.

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I. INTRODUCTION

Therapeutic jurisprudence (“TJ”) can be described as a legal theory and/or philosophy that can assist the courts and the correctional system in rehabilitating offenders by aiming to reduce the likelihood of re-offending and successfully reintegrating the person back into the community. Whether offender rehabilitation occurs within the courts or corrections, TJ principles can guide the law, legal and correctional procedures, and the role of court and correctional staff as legal actors to engage offenders in rehabilitation. TJ literature has considered offender rehabilitation, more so in the courts than corrections. David Wexler has transposed empirically-derived social science strategies applied in the correctional system to courts, with an emphasis on cognitive skills programs and relapse prevention strategies (1997, 2006, 2016). Martine Herzog-Evans (2016) has considered the interface between the law and offender rehabilitation in arguing for improved interaction between correctional services and the legal system. Astrid Birgden and co-authors have applied TJ principles to offender rehabilitation within corrections (e.g., Birgden, 2004; Birgden & Ward, 2003; Ward & Birgden, 2007; Birgden & Perlin, 2008, 2009).

The following article will compare the application TJ principles with two offender rehabilitation models - Risk-Need-Responsivity (“RNR”) and the Good Lives Model (“GLM”). It will be argued that the GLM is better aligned with TJ principles because of shared values in aspiring to a humanistic approach within an ethic of care aimed at improving offender well-being.

II. OFFENDER REHABILITATION

As a psychological endeavor, offender rehabilitation is to be underpinned by a theoretical approach. Ward, Melser, & Yates (2006) have suggested that a rehabilitation theory requires three levels. The first level articulates general aims and principles of rehabilitation (i.e., values). The second level addresses

the etiological or causal assumptions that explain offending and identify its functions (i.e., treatment targets). The third level considers assessment, treatment, and management (i.e., practice strategies). This three-level theory approach will be utilized to consider the interrelationship between TJ principles and both RNR and GLM.

III. Level 1: A Values-Based Approach

A rehabilitation theory provides a values-based approach by articulating general aims and principles.

A. Risk-Need-Responsivity

RNR is a model of correctional assessment and rehabilitation or crime prevention, derived from the Psychology of Criminal Conduct (“PCC”). PCC is considered a science that encompasses the ethical application of psychological knowledge, methods to predict and influence the likelihood of offending and reduce the social, and human costs associated with criminal justice processing (Andrews & Bonta, 2010). RNR is based on justice principles with a concern to manage offender risk; imposing rehabilitation on the offender for the community (Birgden, 2009).

The PCC theory is a general personality and social learning approach. The values espoused by PCC include respecting human diversity (i.e., individual differences in biology, personality, cognition, behavioral history, and associates), acknowledging the complexity of human behavior (i.e., no single biological, social, psychological, or sociopolitical explanation of behavior but a holistic and interdisciplinary approach). Importantly, PCC serves the community’s well-being, resulting in community protection at the expense of offender well-being as such concerns are not considered the purview of correctional rehabilitation. Birgden (2009) had critiqued RNR for ignoring offender autonomy as a value. In the most recent edition of their

book, the authors acknowledged that: "Respect for autonomy is a key aspect of ethical practice. Recent contributions in forensic/clinical psychology (e.g., Birgden, 2004) have alerted us to our previous failure to highlight such value...we think respect for personal autonomy should be underscored..." (Andrews & Bonta, 2010, pp. 6-7). However, it is difficult to discern how respect for offender autonomy is subsequently operationalized within RNR with its emphasis on justice principles and risk management. In contrast, the GLM emphasizes therapist values, the therapeutic alliance (or ethic of care), and the need to include offenders in decision-making to support the value of autonomy.

Eighteen (18) principles underpin RNR, with the following four (4) overarching principles (Andrews, Bonta, & Wormith, 2011): (1) respect for the person- ethical, legal, humane etc services; (2) theory- an empirically solid psychological theory (i.e., the PCC); (3) human service- human service delivery rather than punishment; and (4) crime prevention- to disseminate RNR widely throughout the justice system and beyond. Of concern, is that Andrews and Dowden (2007) had critiqued the application of TJ in the courts (misrepresented as a mental-health objective reflecting the clinical language of forensic mental health or "therapy"). The authors suggested that TJ be *replaced* by RNR principles and the approach to be labeled "crime-prevention jurisprudence". In response, Birgden (2009) stated, "[t]he authors erroneously claim that therapeutic jurisprudence is a mental-health concept whose aim is to provide therapy that improves the well-being in offenders rather than to demonstrate concern for victims" (pp. 93-94). A similar claim is made of the GLM by Andrews et al. (2011), in which crime prevention is seen as incidental to "the mental health task of reducing suffering and enhancing personal fulfillment" (p. 741), appealing to those with a "traditional clinical focus" (p. 749). As in the correctional system, Birgden (2009) concluded that applying RNR alone failed to add value to the court system (p. 94).

RNR espouses three (3) core principles that serve to guide treatment: (1) the risk of re-offending - who should be targeted for intervention; (2) treatment need - what should be targeted for treatment which are to be criminogenic needs (or dynamic risk factors) rather than non-criminogenic needs; and (3) responsivity - how treatment should be delivered, consisting of specific or internal responsivity (tailoring treatment matched to strengths, treatment readiness, motivation, personality, mental status, learning ability, learning style etc.) and general or external responsivity (applying social learning methods to influence behavior through active, engaging, and participatory delivery (Andrews et al., 2011; Serin & Kennedy, 1997). However, Andrews et al. (2011) acknowledged that responsivity factors such as relationship skills, client input, consumer satisfaction, advocacy, brokerage, and motivational interviewing may have “fallen by the wayside” in the implementation of RNR programs.

B. *Good Lives Model*

The GLM is a psychological theory that considers human well-being in determining ways of living that are beneficial and fulfilling to the offender, in meeting their basic human needs or life goals (Ward, 2002; Ward & Stewart, 2003a, 2003b). *Physical well-being* includes the healthy functioning of the body. *Social well-being* includes family life, social support, meaningful work opportunities, and access to leisure activities. *Psychological well-being* includes autonomy (informed decision-making), relatedness (emotional connectedness to others), and competence (increasingly mastering challenges). The GLM encourages the offender to explore: *How can I live my life differently?* or *What matters to me?* Facilitating these questions through correctional services (and courts) by providing the necessary conditions- values, capacities, and social supports - improving offenders well-being and reducing re-offending. While GLM was initially applied to sexual offenders, it has since been applied to

other offence types such as violent offenders, drug-related offenders, young offenders, offenders with mental disability or cognitive disabilities, fire-setters and so on.¹

The GLM is a strengths-based approach to offender rehabilitation because it is responsive to offenders' particular interests, abilities, and aspirations (Ward & Maruna, 2007; Willis, Ward, & Levenson, 2014). The GLM aims to: (1) address the causes of offending; (2) identify broad treatment targets; (3) guide treatment style; and (4) consider the values underpinning the entire treatment program- it aims to be holistic, positive, and ethical (Yates et al., 2010). The GLM is based on clinical principles with an additional concern to meet offender needs: offering rehabilitation with the offender for the offender and the community (Birgden, 2009). The overarching principle in the GLM is that practitioners ought to support autonomy in offenders as active agents seeking meaning in their lives. That is, the dual goals of improving quality of life and reducing re-offending (Ward & Stewart, 2003a, 2003b).

In contrast to RNR, the GLM views risk of re-offending as a distorted way for offenders to meet their internal capacities (skills) and external conditions (social supports) required to achieve their life goals. Dynamic risk factors are merely "red flags" that signal problems in ways that life goals are being achieved and therefore non-criminogenic needs can also be essential treatment targets. For example, child sexual offending may be the result of trying to achieve the goal of relatedness. Meeting intimacy needs is not the issue, but the strategies to achieve it are. The task then is to find alternative, replacement pro-social strategies to achieve relatedness (e.g., form adult relationships, join a club, find pro-social supports). The previously demonstrated motivation to achieve life goals in anti-social ways can be harnessed by practitioners to develop the skills and social supports to meet a good life plan in pro-social ways.

¹ See <https://www.goodlivesmodel.com/information#Programmes> [<https://perma.cc/MT4V-6NKF>].

Offender engagement is more likely “. . . when the language used is non-judgmental and when the approach to intervention is future-oriented, optimistic, and focused on what clients can personally gain from treatment” (Yates et al., 2010, p. xi).

Herzog-Evans (2016) indicated that offender rehabilitation models have “not taken stock of the Legitimacy of Justice and the Self-Determination literatures” (p. 146). However, these two (2) theories have been applied to offender rehabilitation in practice based on the GLM. The GLM draws heavily upon Deci and Ryan’s (2000) self-determination theory; the empirical evidence for autonomy, competence, and relatedness is incorporated within the GLM definition of psychological well-being (see Ward & Stewart, 2003a, 2003b). A drug treatment prison established by the author in Sydney, Australia in 2006 supports self-determination (via the GLM) and applies Tyler’s (2000, 2010) procedural justice principles within drug court and prison case management processes (Birgden & Grant, 2010). As a result, the GLM practitioners, as required by Herzog-Evans (2016), “. . . do not ‘do things to’ offenders, but ‘with’ offenders and respect their sense of agency, by giving them choices, whenever possible, and collaborating with them in drafting their [good lives or healthy lifestyle] plan” (p. 150).

RNR authors are highly critical of GLM aims because: “We may help an offender feel better, which is important and valued, but this may not necessarily reduce recidivism” (Andrews & Bonta, 2010, p. 49). Regarding the application of self-determination theory and well-being to offenders in particular, it was noted that: “. . . the studies cited as supportive of this link as far as we can tell, are based on noncriminal populations” and “[t]his vision is quite bold; Criminal conduct will be prevented when an offender becomes more intrinsically motivated and more self-determined. Does this really mean that offenders must learn, for example, to pay less attention to societal standards of conduct and more attention to enhancing their personal well-being?” (Andrews et al., 2011, pp. 739 & 740). If a value is that

offenders are to be viewed primarily as human beings, the need to determine the link between psychological well-being and offending behavior alone is considered immaterial. Furthermore, the RNR response misrepresents GLM values that explicitly balance managing risk and meeting needs:

Either goal on its own is insufficient to successfully rehabilitate individuals and may on the one hand lead to an aversive and rather barren “managed” lifestyle, and on the other hand, to a self-indulgent preoccupation with individual welfare over broader concerns about community safety. (Ward & Brown, 2004, p. 248).

McGrath, Cumming, Zeoli, Burchard, and Allerby (2010) conducted a survey of 649 adult male and female sexual offender treatment programs in North America for The Safer Society to which there were 1,349 respondents rank ordered the three top theories that best reflected their work with with sexual offenders. More than one-half of the Canadian programs selected GLM as their top-three choice. In Canadian community programs, GLM ranked as third for men (53%) and first, on par with cognitive behavioural treatment, for women (75%) while RNR ranked lower for men (26%) and women (50%). In Canadian residential programs GLM ranked third for men (50%) while RNR ranked lower for men (38%). Approximately one-third of US and adolescent programs selected the GLM as a top-three choice. In US community programs, GLM ranked third for men (29%) and third, on par with psychosocial education, for women (28%) while RNR ranked lower (19% for men and 16% for women). In US residential programs, GLM ranked third, on par with psychosocial education, for men (33%) while RNR ranked slightly lower for men (32%) and GLM and RNR were ranked third and on par for women (37%). In total, approximately one-third of of programs endorsed GLM. GLM was

ranked more often as the first choice than RNR in treating sexual offenders in all settings, except women in residential programs. However, GLM is embraced more in Canada than the US. RNR was selected by less than one-third of programs in total. Note that the data set for Canada is small ($n = 31$) in comparison to the US ($n = 593$).

C. Therapeutic Jurisprudence and Offender Rehabilitation

TJ principles include an overarching goal of incorporating social science findings into the legal system, followed by a set of principles that have been supported to uphold problem-solving courts in particular: “(1) ongoing judicial involvement; (2) close monitoring of and immediate response to behavior, (3) the integration of treatment services with judicial case processing, (4) multidisciplinary involvement, and (5) collaboration with community based and government organizations” (Wexler, 2016, p. 368). In relation to TJ and offender rehabilitation specifically, Birgden (2002) proposed the following set of principles: (1) the law has a positive, negative, or neutral effect on offender well-being; (2) the law should capitalize on the teachable moment to engage offenders in change; (3) rehabilitation should be a cooperative multidisciplinary endeavor; (4) the law should balance community protection (justice principles) and offender autonomy (clinical principles); and (5) TJ is a normative theory that maximizes the overarching aims of the law.

Herzog-Evans (2016) argued that criminologists and psychologists had not integrated the legal system into offender treatment theory, although Ward and Birgden had “broached the issue of practitioners’ ethics, but not those of the wider legal system per se” (p. 146). Ward and Birgden (2007) first proposed a human rights model of offender rehabilitation in which offender rights were recognized through legal rights (prescribed by particular objects as listed by the United Nations), social rights (guaranteed by a social institution such as a prison), and most importantly moral rights (based on a moral theory or principle).

Further, moral rights were divided by the authors into the value of autonomy (the objects of personal freedom and social recognition) and the value of well-being (the objects of personal security, material access, and equality). In their human rights treatment model, Ward and Birgden emphasized the impact of the legal system; “if the law is to be psychologically-minded, it ought to promote well-being, “do good”, and assist the State to give practical meaning to the aspirations of the community” (Melton, 1992, p. 637). In this context, TJ was considered a useful platform for interdisciplinary discourse on human rights matters. Elsewhere, examples of potentially anti-therapeutic psycholegal soft spots from a TJ perspective were considered: denial of parole to treated sexual offenders; treated offenders unnecessarily retained in prison and so lacking the motivation to change; and practitioners perceiving their clients as dangerous (Birgden & Ward, 2003). The role of psychologists within correctional services and human rights law has also been considered (Birgden & Perlin, 2008, 2009).

The external responsivity principle in RNR considers staff and setting characteristics (Serin & Kennedy, 1997). Herzog-Evans (2016) considered the role of the legal system in the external responsivity principle and concluded that a “new” principle of “extrinsic responsivity” should be created to address the responsivity of correctional services to the legal system. Within extrinsic responsivity, Herzog-Evans listed institutional and practitioner goals, the institutional structure, the professional culture, practitioner skills, treatment availability, and the legal system in general, and indicated that practitioners needed to become “autonomy supportive” in particular. These areas have been previously addressed within a TJ framework for corrections by considering both internal and external responsivity with a subsequent emphasis on offender autonomy. Birgden (2004) had extended the concept of the external responsivity principle in harnessing correctional staff as psycholegal actors and potential therapeutic agents, whereby responsivity had been neglected in relation to the law. Birgden (2004) applied TJ principles to

the Victorian correctional system in Australia to develop an organizational culture change strategy in general, and provide correctional officers behavioral skills in motivating offenders to contemplate change in particular.

It has been stated by its founders that the focus of the PCC is on the psychology of the criminal conduct of individuals rather than encompassing the many other roles of psychologists in the criminal justice system or other disciplines such as forensic mental health, sociological criminology, or the law (Andrews & Bonta, 2010). This puts the values of PCC at odds with TJ, which is broadly multidisciplinary in general and is concerned with the interaction between the law, ethics, and social science in particular.

In contrast, TJ and GLM complement each other because both theories espouse values that are humanistic and aim to maximize offender *and* community well-being. Birgden (2002) combined TJ and GLM to propose seven principles regarding offender rehabilitation: (1) the law has an impact on rehabilitation, (2) rehabilitation should enhance well-being, (3) autonomous decision-making is necessary in rehabilitation, (4) rehabilitation is a multi-disciplinary and multi-agency endeavor, (5) rehabilitation needs to be individualized, (6) rehabilitation requires an individual-community balance; and (7) rehabilitation is normative or value-laden. Later, Birgden (2008) extended the normative balance of TJ by incorporating offender rights in rehabilitation to: (1) recognize normative values in rehabilitation; (2) respect human rights and the core values of autonomy and well-being; (3) assess risk of re-offending; (4) treat both dynamic risk factors and human needs; (5) ensure autonomy in supporting due process and informed decision-making; and (6) create multi-agency approaches. Since 2006, these principles have been applied in a compulsory drug treatment prison in Sydney (Birgden & Grant, 2010).

IV. LEVEL 2: TREATMENT TARGETS Level 2

A rehabilitation theory is to address the etiological or causal assumptions that explain offending and identify its functions (i.e., what to target and how).

A. *Risk-Need-Responsivity*

In general offenders, treatment targets are considered the empirically-derived “central eight” risk factors: (1) a history of anti-social behavior (untreatable *per se*); (2) anti-social personality pattern; (3) anti-social cognition; (4) anti-social associates; (5) family/marital circumstances; (6) school/work problems; (7) leisure/recreation problems; and (8) substance abuse (Andrews & Bonta, 2010). In drug-related offenders, dynamic risk factors are considered to be substance use, criminal peers, impulsivity, poor academic achievement, economic hardship, hostile beliefs, anti-social rationalisations, and criminal lifestyle (McMurrin & Priestley, 2004). In sexual offenders, dynamic risk factors include: sexual pre-occupation, multiple paraphilias, offence-supportive attitudes, emotional congruence with children, lack of emotionally satisfying adult relationships, lifestyle impulsiveness, resistance to supervision, grievance/hostility, and negative social influences (Mann, Hanson, & Thornton, 2010).

Minor dynamic risk factors that are considered less promising intermediate targets (i.e., non-criminogenic needs) include personal/emotional distress; major mental disorders; physical health issues; fear of official punishment; physical conditioning; low IQ; social class; seriousness of offence; and so on (Andrews & Dowden, 2007). However, the GLM would argue that physical, social, or psychological problems with well-being may impact upon re-offending. Regarding offenders with intellectual disability in particular, Haaven (2006) responded that a study described by Andrews and Bonta (2003) regarding the applicability of RNR to disability “focused on a rather narrow con-

tinuum of social skills and on non-developmentally disabled offenders” (p. 80), and attending to basic needs in offenders with disability *is* relevant in reducing re-offending. Further, Lindsay, Hogue, Taylor et al. (2008) viewed that those forensic disability clients who were internalizing emotional problems of anxiety, depression, and low self-esteem were at risk of re-offending. Likewise, Johnston (2002) noted that such offenders required attention to physical health, communication, and detailed past life experience in assessing intellectual and social ability, personality, and the nature of the offence.

A further criticism of RNR has been that it results in “one size fits all” programs. It has been acknowledged that large scale application of treatment programs to large numbers of offenders have resulted in an “emphasis on bureaucratic, cookie-cutter implementation and massive, manualized training of treatment staff and program facilitators” (Andrews et al., 2011, p. 749) which fail to achieve the results initially obtained by demonstration projects.

B. Good Lives Model

Rather than focusing on risk alone, what human needs the person was trying to achieve through offending behavior is considered. Consistent life goals² have been identified in Western culture from psychological, social, biological, evolutionary, and philosophical anthropological research (Ward & Stewart, 2003a).

The following eleven life goals are considered to apply to all human beings, whether offender or not:³

1. Life- including healthy living and functioning;

² Life goals are labeled in the GLM literature as human needs or primary goods.

³ See <https://www.goodlivesmodel.com/information#Aetiological>.

2. Knowledge- being well-informed about things that are important to them;
3. Play- mastery of leisure skills;
4. Work- mastery of work skills;
5. Agency- autonomy, power, and self-direction;
6. Inner peace- freedom from turmoil and stress;
7. Relatedness- intimate/romantic/familial relationships;
8. Community- connection to wider social groups with shared interests;
9. Spirituality- in a broad sense finding meaning and purpose in life;
10. Pleasure- feeling good in the here and now; and
11. Creativity- expressing oneself through alternative forms.

The underlying causes of offending in the GLM is considered to be the interaction of the following four problem areas (Ward & Stewart, 2003a): lack of *scope* that fails to achieve life goals and so neglects well-being (e.g., lack of interpersonal skills obstructs relatedness and community); anti-social *actions* (e.g., seeking inappropriate relatedness with a child); lack of *capacity* regarding skills (e.g., poor impulse control) and social supports (sound interpersonal relationships); and/or *conflict* between life goals (e.g., a workaholic will have a conflict between achieving both excellence in work and relatedness).

Treatment then determines the pro-social or anti-social actions to achieve life goals with an understanding that participants may find it easier to articulate concrete actions rather than life goals.⁴ Again these actions may reflect dynamic risk factors

⁴ Strategies are labeled in the GLM literature as instrumental or secondary goods.

as “red flags” pointing to problem areas. RNR authors query why the criminal justice system should be charged with providing offenders with a good life in terms of “optimal sexual satisfaction, excellence in play and work, inner peace, creativity, self-determination, and on and on” (Andrews et al., 2011, p. 750). However, addressing strategies or dynamic risk factors is not an end in itself. A deeper understanding of what life goals were being achieved *through offending* is required to target treatment, rather than the implication that goods are randomly provided to offenders.

C. *Therapeutic Jurisprudence and Offender Rehabilitation*

Wexler (1997) noted that the greatest empirical support for offender rehabilitation had been concrete behavioral, skills-based, and multimodal interventions and suggested such “what works” practice approaches that could be applied within the courts. Judges can grant conditional probation using behavioral contracting, avoiding unnecessary jargon, and encouraging the defendant to make a public commitment to comply with family members present at the hearing (i.e., compliance strategies). Judges can extensively question guilty-pleading defendants (e.g., confronting cognitive distortions about sexual offending). Teen court can involve peers in the process (to enhance victim empathy). Finally, the courts, parole boards, and probation can rehabilitate offenders by reinforcing offender reasoning (cognitive self-change treatment and relapse prevention planning). Wexler (2006) also discussed encouraging a defendant to better understand the sentencing process and maximizing treatment readiness, providing the example of preparation for an allocution statement conducted by an Assistant Federal Defender in the United States. Mr. Lacy provided the defendant with a list of questions to consider prior to appearing in court (see Wexler, 2006, pp. 120-122 and pp. 123-127). These questions reflect GLM principles as they focus on strengths (your best accomplishments and attributes, what are you proud of, why are you a better person now, your educational/vocational/ medical needs

etc.) rather than a deficit-based approach identifying high risk thoughts, feelings, and behaviors alone.

V. LEVEL 3: PRACTICE STRATEGIES

A rehabilitation theory results in assessment, treatment, and management strategies. In considering the interaction between the legal system and rehabilitation literature, Wexler (1997) considered the legal system itself serving a rehabilitative function as a potential therapeutic agent by delivering the evidence-based approaches described above. Later, Wexler (2006) indicated that responsivity to treatment (Birgden, 2004) or treatment readiness (the Multifactor Offender Readiness Model; Ward, Day, Howells, & Birgden, 2004) were also important considerations to motivate and engage offenders, via the roles of judges and lawyers.

A. *Risk-Need-Responsivity*

RNR considers additional practice principles that guide assessment, treatment, and management (see Andrews et al., 2011).

1. Assessment: Actuarial Assessment

RNR assessment includes assessing risk, criminogenic need, and responsivity using structured and validated tools, along with assessment of personal strengths, identifying non-criminogenic needs *if* they are barriers to change (e.g., lack of motivation), and using professional discretion regarding assessment outcomes if deviating from RNR principles.

There are three possible methods for practitioners to utilize in assessing the risk of re-offending- clinical judgment, actuarial assessment, and structured clinical judgment (Andrews & Bonta, 2010). *Clinical judgment* predicts risk based on an unstructured interview, files searches, psychological testing, and

so on. This approach is not supported by RNR. In contrast, *actuarial assessments* use empirical research to develop a list of static risk (unchangeable) factors to produce a score to categorize the person with a probability estimate of re-offending or not re-offending while *structured clinical judgment* extends to static and dynamic (treatable) risk factors with an overall opinion of risk provided. It is important to note that actuarial assessments only have moderate predictive accuracy (e.g., Doren, 2002 regarding the STATIC-99 assessment of sexual offenders). In general, all risk assessment tools pose scientific and ethical problems. Szmukler (2003) has contrasted the consideration of “numbers” in risk assessment; empirically- the statistical likelihood of re-offending within a particular timeline versus ethically- attaching a value to the risk assessment outcome and determining what to do about it.

2. Treatment: Dynamic Risk Factors or Criminogenic Needs

RNR treatment principles include placing higher risk offenders in more intensive programs that target the identified dynamic risk factors. Note that these risk factors are *correlated* to re-offending, they do not *cause* re-offending and continue to be described as “promising intermediate targets of change” (Andrews et al., 2011, p. 743). RNR treatment aims to enhance self-management and problem-solving skills and reward alternatives to anti-social thinking, feeling, and behaviors (Andrews et al., 2011).

Proponents will often espouse the evidence in support of RNR treatment however the outcomes are not clearcut. For example, a recent meta-analysis was conducted of three key RNR principles applied to drug treatment programs using a data set of 243 independent comparisons (Prendergast et al., 2013). For reducing re-offending, each principle obtained a small to moderate relationship regarding risk (.27), need (.17), and responsivity

(.33), and where combined was “somewhat positive” (.46). Importantly, programs following the RNR principles had little effect on drug use outcomes, each principle obtained a “very small” relationship support regarding risk (-.06), need (.05), and responsivity (.05), but where combined provided a larger effect (although still only .16). That is, the three RNR principles have greater impact on reducing re-offending than reducing drug use, and so their effect on drug use outcomes is weak. The authors speculated that this result could be because: drug dependence may have a different cause and be associated with different psychological and social consequences than offending behavior (highlighting the need for clinical case formulation); the treatments to reduce drug use and to reduce offending are focused on different processes and mechanisms (even though both may be behavioral); offending behaviors do not possess the pharmacological addictive properties of drug dependence and so the process of change is substantially more difficult and the probability of treatment success is lower; and/or the RNR principles are not being appropriately adapted by clinicians to drug users. It was opined that perhaps the three principles have an indirect effect on re-offending rates within drug treatment programs by reducing the propensity to re-offend, and so may contribute to the overall success of drug programs.

Likewise, a national demonstration project in two United States jurisdictions using blocked random assignment tested RNR applied to drug offenders based on risk of re-offending and substance abuse (Taxman, Thanner, & Weisburd, 2006). Intensive services were provided to offenders considered “hard core” (at least two prior arrests) with drug testing, graduated sanctions, and at least six months treatment. While intervention worked better for higher risk offenders (and not for ex-users or alcohol/marihuana users), Taxman et al. emphasised the requirement to assess need, including non-criminogenic needs (rather than risk) as some aspects of substance use may affect offending when other aspects may not. That is, the traditional classifica-

tion of substance abuser may be too generic and there are differences based on drug of choice and the impact on daily functioning- “this is the challenge in advancing the RNR principle” (Taxman et al., p. 49).

In drug court, the risk principle matched to the level of judicial supervision and intensity of treatment was explored. Marlowe, Festinger, Lee, Dugosh, & Benasutti (2006) randomly assigned 194 drug court clients respectively to bi-weekly versus standard court hearings based on risk status. Participants assessed as high risk and attending bi-weekly hearings had better treatment outcomes than the participants assigned to hearings-as-usual. Later, Marlowe et al. (2012) randomly assigned 125 drug court clients to periodically adjusting the schedule of judicial status hearings and clinical case management sessions versus baseline (high risk to bi-weekly judicial hearings and low risk to as-needs judicial hearings). Improved drug abstinence was attributed to adjusted and more intensive supervision of recalcitrant offenders rather than more intensive or individualized treatment to meet unmet needs, although it was noted that: “It is possible that some individuals were low risk from a criminological perspective but still had serious treatment needs that were not being addressed by increasing their contacts with a judge” (p. 518). This observation supports the GLM notion of meeting needs on an individualized basis. Both studies defined “high risk” as a diagnosis of anti-social personality disorder and providing more drug-negative urine samples while enrolled in a drug court program, rather than an actuarial assessment of the risk of re-offending (although the second study identified the items in the Risk and Needs Triage tool that predicted re-arrest and re-conviction rates and could tentatively match drug-related defendants and probationers to appropriate dispositions, Marlowe et al., 2011).

In mental health court, Campbell et al. (2015) considered adherence to an RNR model of case management. Utilizing scores on the Level of Service/Risk Need Responsivity tool,

mental health recovery data, and recidivism rates, the authors compared 196 offenders who completed mental health court compared to non-completers or those referred but not accepted into the program. Small but significant improvements in dynamic risk factors and some indicators of mental health recovery were identified but the recidivism rate between the two groups was similar (29% and 33% respectively). Case management adherence to the risk principles was considered in 107 cases and to the needs principle in 48 cases (due to poor information identifying criminogenic needs in the case plans). There was only moderate adherence to RNR principles (e.g., treatment services offered to medium and low risk offenders were the same, only one of four identified criminogenic needs were targeted and 25% of the sample did not have the identified needs addressed at all, and treatment was focused on mental health concerns). The authors suggested that a structured risk/need tool be included in assessment and re-assessment but treatment address both dynamic risk factors and mental health needs.

3. Management: Relapse Prevention

RNR treatment generally leads to a relapse prevention plan (Andrews et al., 2011). Relapse prevention is a cognitive-behavioral approach that promotes self-management in high risk situations, and has been applied to addictions, general offending, and sexual offending, with “promising” effectiveness found in alcohol and drug treatment programs (Andrews & Bonta, 2010). In the survey of sexual offender treatment programs in North America for The Safer Society described above, McGrath et al. (2010) included relapse prevention as an option for the three top choices for describing work with sexual offenders. In US community programs, relapse prevention was consistently ranked second in US community programs for adults (67% for men and 58% for women) and in US residential programs (67% for men and 58% for women). Relapse prevention continued to be an influential model in Canadian community programs

(74% for men, 75% for women) but much less so in Canadian residential programs for adult males (13%) and no data for women. Again, the data set for Canadians is small ($n = 31$).

In sexual offenders, relapse prevention focuses on immediate risk factors that precipitate and perpetuate repeated offending and requires participants to consider the deviancy of their thoughts and decisions (Stinson & Becker, 2013). That is, maladaptive problem solving combined with negative emotion and high-risk situations results in sexual offending. In relapse prevention, participants are required to recount this “offence cycle” in terms of internal and environmental factors, understand the risks of lapse and relapse, identify potential risk of recidivism, and then develop a concrete plan to avoid or cope with high risk situations and pro-offending thoughts. However, relapse prevention does not explain what initially prompted the offending. Applied to sexual offenders, there is little evidence of lasting behavior change and the model has been criticized for being too confrontational (Stinson & Becker, 2013; Yates & Kingston 2006). A confrontational approach does not serve the values of TJ.

B. Good Lives Model

The GLM is a theory rather than a “how to” treatment model. Like TJ, it provides a framework from which practitioners can develop practice strategies matched to their context. As a values-based practice, the GLM enquires into an offender’s core commitments in life and then identifies their goals and underlying values evident in offending behavior (Ward & Stewart, 2003a; 2003b). Ward, Mann, and Gannon (2007) have provided six GLM principles for sexual offender treatment that reflects the values base: (1) many sexual offenders lack the capacities to achieve a coherent good life plan due to adversarial childhood experiences; (2) sexual offenders lack skills and social supports necessary to achieve a fulfilling life; (3) sexual offending is an attempt to achieve desired life goals, where the skills and social

supports are lacking or to relieve conflict arising from failing to reach life goals; (4) the absence of certain life goals- autonomy, inner peace, relatedness- are more strongly associated with sexual offending; (5) assisting sexual offenders to develop skills and social supports to address the identified needs will reduce sexual offending; and (6) treatment should add to a socially acceptable level of functioning rather than simply removing or managing a problem.

On an international basis, the application of relapse prevention to sexual offenders in particular has declined over time. For example, McGrath et al. (2101) noted that the application of relapse prevention had declined between 2002 and 2009, probably due to it attending to only one offence pathway and emphasizing avoidance goals. Well over a decade ago, Ward and Hudson critiqued the relapse prevention on conceptual and empirical grounds. Briefly, the problems with its application include: it is conceptually confusing when applied to sexual offenders; only one offence pathway is captured (triggered by unpleasant emotions when offences can be triggered by positive emotions); relapse prevention assumes covert planning; and the concepts of lapse and relapse are not clear cut (Hudson & Ward, 2000; Ward & Hudson, 2000).

1. Assessment: Clinical Assessment

In contrast to relapse prevention, GLM assessment entails a clinical case formulation and hypothesizing an offence pathway in order to develop a good lives plan.⁵ All good clinical practice requires a case formulation- “case formulation has been part of, and a guide for, psychological treatment programs since such interventions began” (Marshall, Marshall, Serran, & O’Brien, 2011, p 34). Being based on clinical principles, the

⁵ Note that in a sexual offender treatment program revised in 2015 by the author and a colleague- the Better Lives Program, Corrections Victoria, Australia- the participants develop their own case formulation and hypothesized offence pathway.

GLM emphasizes a clinical case formulation to determine biopsychosocial functioning. A *case formulation* is a set of hypotheses framed around what may cause, trigger, and maintain offending behaviors (see Nezu, Nezu, & Lombardo, 2004). In the GLM, a case formulation of the offender's pathway is derived from a file search, clinical interview, and structured clinical judgment (including actuarial assessment). The practitioner develops a case formulation together with the offender to: (1) obtain a detailed understanding of the offender's problems; (2) identify the variables functionally related to the problem areas; and (3) define treatment targets, goals, and objectives. Importantly, case formulation is considered an ongoing dynamic process, from assessment to treatment, which is refined over time as more is known about the participant. A GLM case formulation: (1) weights the eleven life goals listed above; (2) identifies past and current actions; (3) determines any flaws in the plan (scope, actions, capacity, and conflict); (4) highlights strengths (current and past appropriate actions); and (5) makes links to self-regulation (Willis, Yates, Gannon, & Ward, 2013). The focus of a GLM case formulation is on increasing autonomy (informed decision-making), improving individual psychological well-being, and maximising opportunities to develop a life plan (Ward & Gannon, 2006).

RNR authors have criticized the case formulation approach as a return to weak and unstructured assessments, while simultaneously stating that a functional analysis may identify a minor risk factor that is major for an individual (Andrews et al., 2011). Actuarial risk assessments can be utilized to identify dynamic risk factors (as red flags for problem areas) and then be incorporated into the case formulation and offence pathways to hypothesize what life goals the offender was attempting to achieve through offending. Willis et al. (2013) indicated that unpublished structured assessments of life goals have been developed with promising psychometric properties. This author has developed a card sort of the eleven human needs, labeled in

the participant's own words and sorted on a continuum by importance and capacity (also unpublished).

Hudson and Ward (2000) subsequently revised relapse prevention for sexual offenders using self-regulation theory, placed within a problem behavior process with four distinct offence pathways. Self-regulation refers to internal and external processes that monitor, evaluate, select, and modify behavior to accomplish personal goals in satisfying, and hopefully adaptive, ways (Ward, Hudson, & Keenan, 1998). Unlike RNR, self-regulation theory is not just focused on inhibiting maladaptive behavior but also emphasizes enhancing adaptive behavior (i.e., enhancing an emotional state may serve to improve self-regulation; it is not just about repressing an emotion). This self-regulation model was later revised by Yates and Ward (2008) to include life goals and replace relapse prevention concepts with appropriate language and pro-social actions. Self-regulation also focuses on the person-environment interaction. In the survey of sexual offender treatment programs in North America for The Safer Society described above, McGrath et al. (2010) included self-regulation as an option for the three top choices for describing work with sexual offenders. Self-regulation was ranked low for adults in US community programs (22% for men and 18% for women) and in US residential programs (23% for men and 26% for women). Self-regulation was also ranked low in Canadian community programs (22% for men, nil for women) but in Canadian residential programs it was ranked second for males (74%) and no data for women. Again, the data set for Canadians is small ($n = 31$).

The offence pathway approach, based on self-regulation theory, describes offenders attempting to achieve life goals in the following ways: *under-regulation*- loss of control of thoughts, emotions, and behaviors triggered by positive or negative emotions (e.g., sexual urges); *mis-regulation*- ineffective or counterproductive strategies (e.g., viewing child pornography triggered by negative emotions); or *controlled self-regulation*-

intact with goals that are false, self-serving, or distorted and triggered by positive emotions (e.g., women enjoy forced sex). The offence-related goals that offenders are attempting to achieve are: *avoidant goals*- inhibitory in that the goal is to avoid situations or behaviors (failure to achieve pro-social goals is therefore all-or-nothing, succeed or fail) or *approach goals*- the goal is to increase skills or access through what individuals want to achieve (failure to achieve pro-social goals may increase the individual's efforts). The strategies used to achieve life goals include: *passive strategies*- failure to implement strategies to avoid offending (e.g., ignore urges, engages in poorly planned or impulsive behaviors); or *active strategies*- prevents an offence from occurring *or* plans an offence (e.g., removal from a high-risk situation, copes with an emotional state, or explicitly plans to offend).

Once the individualized offence process has been mapped out with the participant, treatment planning hypothesizes the offence pathway combining self-regulation, offence-related goals, and offence-related strategies (see Yates & Ward, 2008): *avoidant-passive pathway*- a desire to avoid offending but failing to do so (under-regulation);⁶ *avoidant-active pathway*- a direct attempt to unsuccessfully control deviant thoughts, fantasies, or emotions (mis-regulation); *approach-passive pathway*- following overlearned behavioural scripts that lead to offending (under-regulation); and *approach-active pathway*- conscious and well-crafted planning as an acceptable means to a valued end (controlled self-regulation).

The following table summarizes the pathways approach, underpinned by a case formulation:

⁶ The traditional relapse prevention hypothesis.

Table 1

Offence Pathways

Offence-Related Goals	
Avoidant Goals	Approach Goals
<i>Under-regulation</i>	<i>Under-regula-</i>
Negative emotions.	<i>tion</i>
Does not want to offend but lacks the skills to prevent offending.	Positive or negative emotions.
<i>"I tried to stop offending but couldn't help myself"</i>	Wants to offend but strategies are poorly planned.
	<i>"It just happened and now it's too late".</i>

Strategies
Passive Strategies

Passive Strategies

	<i>Mis-regulation</i>	<i>Controlled self-</i>	
	Negative emotions.	<i>regulation</i>	
	Does not want to offend	Positive emo-	
	but strategies are inef-	tions.	
Active Strategies	fective or counter-pro-	Wants to offend	Active Strategies
	ductive.	and successfully	
		plans to offend.	
	<i>“I tried to stop offend-</i>	<i>“I want to offend</i>	
	<i>ing but my strategies</i>	<i>and I will of-</i>	
	<i>didn’t work”.</i>	<i>fend”.</i>	
Case Formulation			

Yates and Kingston (2006) had evaluated the validity of the GLM offence pathways. Based on 80 sexual offenders in treatment, empirical support was found for distinguishing between the four offence pathways associated with offender type, and static and dynamic risk factors were shown to vary in the expected direction consistent with the theoretical model; incest offenders tended to follow an avoidant-passive pathway while adult rapists tended to follow both approach-passive and approach-active pathways, and those offenders following the approach pathways were at significantly higher risk of re-offending. Offence pathways have also been applied to sexual offenders with intellectual disability (Courtney, Rose, & Mason, 2006;

Keeling, Rose, & Beech, 2007; Langdon, Maxted, Murphy, & SOTSEC, 2007; Lindsay, Steptoe, & Beech, 2008).

The offence pathways approach has been described by Wormith et al. (2007) as having empirical support for sexual offenders, allowing for individualized offence cycles and treatment plans, and being congruent with RNR principles. While offence pathways are a way of understanding patterns of cognition and behavior, they are not a typology and so a participant cannot be described in this way in terms of overall functioning (Yates et al., 2010).

2. Treatment: Goal-Setting

Like RNR, the GLM also supports cognitive behavioral approaches in determining how beliefs, expectations, and behavioral contingencies interact with values and goals that direct behavior (Stinson & Becker, 2013). As described in the Multifactor Offender Readiness Model (Ward et al., 2004), the GLM considers the interaction between the person (skills- thoughts, feelings, behavior, volition or autonomy, and personal and social identity) and their environment (social supports- treatment provided at the right time in the right context). Some of these obstacles are traditionally dynamic risk factors while others are non-criminogenic needs; the distinction between them is less polarized due to an individualized approach. The objectives of GLM treatment are to: (1) determine the life goals that are important to the participant; (2) reinforce the importance of these goals; (3) help the participant overcome barriers to obtaining life goals; (4) explore the relationship of life goals to offending and other life problems; and (5) build the participant's capacity to attain life goals in socially acceptable ways (Yates et al., 2010).

In one North American program reviewed by Ward et al. (2014), the "good life" was pictorially displayed as a lifestyle wheel, with the life goals grouped according to four areas: (1) feeling good- satisfaction, inner peace, free of worry, and stress

etc.; (2) clear thinking/healthy decisions- clear and balanced thinking, healthy beliefs about the self, others, and the world; (3) freedom and personal control- enjoy work and play, look after self, free of pain; and (4) good relationships/support. Treatment targets (i.e., the skills required) were mapped on to these four areas (problem-solving, emotion regulation etc.). The “opposite life” was also represented within the same four segments. For example, feelings (numb and empty, sad, unhappy, depressed) and freedom and personal control (cannot do what want to do, cannot work or keep a job etc.). Treatment aimed to move participants away from the opposite life and toward the good life.

While human needs are universal across all human beings, offenders may use anti-social means to meet their life goals and therefore goal-setting *with* the participant is considered important. The agreed treatment goals that may subsequently reduce re-offending include: *approach goals*- actively approach appropriate situations that will meet life goals, for the offender to meet desirable outcomes (e.g., sexual satisfaction, social skills training, regaining a driver’s license, intimate relationships, improve autonomy and self-responsibility); and *avoidant goals*- actively avoid inappropriate situations to reduce risk, for the community to prevent undesirable outcomes (e.g., manage high risk situations and behaviors through urine testing, intensive supervision, and engaging in daily structured activities). Approach treatment goals are more effective because they are motivational, more easily attained, and more likely to be sustained in times of distress (Wilson & Yates, 2009). That is, offenders guided by approach treatment goals are more likely to experience positive cognitions while avoidant treatment goals are more likely to result in failure-related cognitions.

Emphasizing approach treatment goals results in GLM treatment modules that focus on strengths and skills as well as deficits. The following table compares an RNR and GLM approach to group treatment for sexual offenders. By way of example, the GLM *Relationships Module* emphasizes establishing

satisfying relationships with intimates and community members rather than merely identifying intimacy deficits (Willis, Prescott, & Yates, 2013).

Table 2

RNR versus GLM Modules (reprinted from Willis, Prescott, & Yates, 2013)

<i>RNR Modules</i>	<i>GLM Modules</i>
Autobiography	Good life plan (past and present)
Offence Progression	Knowledge, good life plan (past and present)
Cognition/Problem-Solving	Knowledge, agency, inner peace, relatedness
Relationships/Intimacy Deficits	Relatedness, community
Sexual Self-Regulation	Happiness, inner peace, relatedness
General Self-Regulation	Inner peace, autonomy

Relapse Prevention Plan	Integrated Good Life/Self-Regulation/Risk Management Plan (present and future-oriented)
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3. Management: Good Lives Plan

Treatment culminates in a good lives plan. All humans have roadmaps or an implicit good life plan, which may be pro-social or anti-social (or flawed). An alternative good life plan should build upon skills and social supports and allow offenders to achieve personal goals to reduce risk. Good life plans are variously described as Good Life Plan, Life Management Plan, Healthy Lifestyle Plan, Personal Plan, Good Life/Self-Regulation/Risk Management Plan, Plan for Living, and so on. Yates et al. (2010) have developed a matrix that provides for a future-oriented Good Life Plan that lists: (1) desired life goals; (2) ways to obtain life goals; (3) how I know that I am getting there; (4) problems I will need to manage; (5) risk factors; and (6) risk management strategies. The good life plan provides a balance between achieving life goals and managing risky situations.

C. Therapeutic Jurisprudence and Offender Rehabilitation

In the TJ literature, Wexler (1997) supported relapse prevention planning. Later, Wexler (2016) provided an example in applying relapse prevention in rewinding a situation to determine what went “wrong” (e.g., “What do you propose to do to avoid getting into this situation in the future?”). However, with its emphasis on risk, this conversation could be described as “falling down” rather than “getting up” (Clark, 2005) incompatible with TJ values; the difference between RNR and GLM.

An alternative to a relapse prevention plan is suggested here, to be applied in the courts and corrections. The sample Healthy Lifestyle Plan incorporates practice strategies suggested by the GLM and aligns well with TJ values. In this instance, the number of Life Goals the participant is trying to achieve through offending depends upon the individual's offending behavior. In assessment and treatment, a GLM card sort can determine up to three possible life goals (described in the participant's own words)- the participant determines what she or he has been attempting to achieve through offending. In the sample, the life goals are life, inner peace, and a sense of community. The culmination of treatment results in a plan that focuses on how to manage a dynamic risk factor (drug use) by replacing it with prosocial thoughts, feelings, and behaviors to meet the life goals, and includes insight into high risk situations, strategies in the event of a lapse, and ongoing self-evaluation. The plan is to be very brief to increase the likelihood of it generalizing to the participant's environmental context.

Table 3

Sample Healthy Lifestyle Plan (adapted from Yates, Prescott, & Ward, 2010)

My Life Goals		
What I was trying to achieve when I got involved in stealing to buy drugs to manage chronic pain.		
Life Goals	Unhealthy ways to meet my Life Goal	Healthy ways to meet my Life Goal

<p>Life Goal 1: Life- being healthy</p>	<p>Using heroin to manage cravings.</p>	<p>Think- I will talk to friends. Feel- Relaxed knowing I'm not using. Do- Making an appointment with the GP, take prescribed medication.</p>
<p>Evaluate</p>	<p><i>How will I know it's working?</i></p>	<p>I've stuck to my methadone program. I haven't stolen to get money for heroin.</p>
<p>High Risk Situations (Lapses)</p>	<p><i>What is my high risk situation?</i> Having trouble managing the urge to use when feeling stressed.</p>	<p>Think- I need more help. Feel- Confident I can cope. Do- Make an appointment with the GP, make sure someone is around me at the moment.</p>

<p>Life Goal 2: Inner peace- to manage pain</p>	<p>Smoking cannabis to manage chronic back pain.</p>	<p>Think- I will seek help. Feel- Hopeful I can man- age. Do- Plan strategies with a GP to manage chronic pain, go to a physiothera- pist, learn meditation.</p>
<p>Evaluate</p>	<p><i>How will I know it's working?</i></p>	<p>My back pain is reducing. I am smoking less pot.</p>
<p>High Risk Situations (Lapses)</p>	<p><i>What is my high risk situation?</i> Twisting my back at work and thinking “stuff it, pot will be quicker to manage the pain”.</p>	<p>Think- I will get more help. Feel- Determined to suc- ceed. Do- go back to the physi- otherapist, ask a friend to meditate with me, go swimming.</p>

<p>Life Goal 3: Community- being part of a social group</p>	<p>Hanging around with bikies who deal speed.</p>	<p>Think- I need to find a different bunch of people. Feel- Sociable. Do- Find a club or group of pro-social people, do voluntary work.</p>
<p>Evaluate</p>	<p><i>How will I know it's working?</i></p>	<p>I'm meeting new people. I do other things besides drinking and drugging.</p>
<p>High Risk Situations (Lapses)</p>	<p><i>What is my high risk situation?</i> I'm invited to a BBQ at the home of a bikie and think I'll just drop in for an hour, but stay longer and start drink- ing and drugging.</p>	<p>Think- I need to make sure I leave it for twice as long next time before I catch up with my old ma- tes. Feel- Thoughtful. Do- Get out of there as soon as I can.</p>

While both RNR and GLM aim to reduce re-offending, fundamental difference in practice exists between RNR that targets criminogenic needs and GLM that enhances quality of life in targeting criminogenic and non-criminogenic needs. While the evidence-based approaches proposed by Wexler (1997, 2006, 2016) are supported in general, the application of GLM strategies that also meet offender needs (e.g., case formulations, offence pathways, goal-setting treatment, and a good life plan) is considered preferable to RNR risk management strategies (e.g., actuarial predictions of risk, cognitive self-change treatment programs, and relapse prevention strategies).

RNR authors argue that GLM interventions do not differ substantially from RNR, as long as they “actually address the offender’s dynamic risk factors in powerful ways” (Andrews et al., 2011). This misses the point that dynamic risk factors are merely problem areas (the what) that require a more clinically nuanced approach to determine what life goals the offender has been trying to achieve through their behavior (the why). The outcome question in RNR is: *Does treatment of dynamic risk factors reduce the likelihood of re-offending?* The outcome question in GLM is: *Does treatment find pro-social ways for offenders to meet their physical, social, and psychological needs?*

VI. CONCLUSION

RNR is a risk management approach in which a standardized actuarial assessment of risk and the treatment of dynamic risk factors is a necessary, but insufficient condition, to engage offenders in change (see Birgden, 2009; Birgden & Grant, 2010). While RNR is useful for assessing risk of re-offending and case managing offenders, the GLM is better equipped to engage offenders in treatment and management because it is based on an individualized case formulation, balances the individual and environmental context, and includes the participant in setting their goals. These principles are more closely

aligned with those of TJ as, again, both approaches are humanistic, delivered within an ethic of care, and aimed at improving well-being.

In considering well-being, therapeutic jurisprudence has an interest in considering the evidence-based and ethical aspects of GLM.

A. *The Evidence: Does It Work?*

TJ considers social science evidence. A criticism of the GLM by RNR proponents is that the model has not been subject to comparative or large-scale research to determine its effectiveness. However, research and evaluation is occurring, in addition to the vast body of existing research that support behavior change in all humans (in the same vein, Andrews & Bonta, 2010 have commenced incorporating positive psychology). Willis et al. (2013) reported that preliminary empirical research suggests that the GLM can enhance RNR-based approaches to sexual offenders, especially in terms of improving client engagement in treatment. Willis et al. reported that taking a GLM approach resulted in significantly higher rates of treatment engagement and completion, significantly lower rates of attrition, higher levels of motivation, and greater within-treatment change in areas such as coping skills, as compared to a traditional relapse prevention approach (Simons, McCullar, & Tyler, 2006). Willis et al. also reported that sexual offenders who received a GLM approach to treatment planning ($n = 96$) were more likely to complete treatment and remain in treatment longer compared to those in traditional relapse prevention ($n = 100$) and pre- and post-treatment comparisons on a range of measures (social skills, victim empathy, problem-solving, and coping skills) showed that GLM clients improved similarly, or better than relapse prevention clients (Simons et al., 2006). Mann, Webster, Schofield, and Marshall (2004) compared twenty-four sexual offenders completing an approach-focused relapse prevention intervention (what to do) with 23 sexual offenders completing an

avoidant-focused relapse prevention intervention (what not to do) and found that only the approach-focused participants were fully engaged in treatment (as measured by homework completion and willingness to disclose relapses) and were rated by the therapists to be more motivated, although there were no differences in self-esteem measures. More recently, Harkins, Flak, Beech, and Woodhams (2012) compared a relapse prevention and GLM version of a community-based sexual offender treatment program and found while there was no difference between attrition rates or treatment progress between the two versions, both facilitators and participants reported that the GLM version was more positive and future-focused. Note that a summary of GLM research is available in Willis and Ward (2013) and further information regarding publications are available on the GLM website.⁷

B. The Ethics: Is It The Right Thing To Do?

TJ is normative or value-laden. The GLM assumes that life goals are met through offending and identifies pro-social means to meet those identified life goals. Willis et al. (2013) provided a set of overarching guidelines to serve as a foundation for empirically-supported sexual offender interventions, that align well with TJ values to guide legal actors in interacting with offenders:

1. Program aims and orientation- to assist offenders to attain a better life and reduce life problems in addition to living an offence-free life (e.g., “attend each treatment session alert and sober so as to best benefit” rather than “do not take drugs”).

⁷ www.goodlivesmodel.com [<https://perma.cc/2QHM-L5DX>].

2. Offender assessment- to apply structured clinical judgment to assess static and dynamic risk factors, determine any responsivity requirements, and identify weighted life goals as to what is currently important in their life; a collaborative approach recognizes client autonomy.
3. Intervention planning- to provide a roadmap to address the dual aims- enhance well-being and reduce risk. Treatment plans are dynamic and are revised as participants progress. Treatment planning commences with an assessment feedback process to ensure that there is an accurate understanding of weighted life goals, the relationship to offending and life problems and client strengths, and to provide feedback regarding dynamic risk factors. The treatment plan is designed to equip participants with skills and resources to live a pro-social life consistent with their life goals.
4. Intervention content- to provide an overarching rehabilitation framework rather than specific intervention content. Core constructs explored in treatment modules include risk factors, treatment targets, and effective strategies. Each module aims to incorporate approach-oriented goals linked to the fulfillment of life goals and adding to a future-oriented good

life plan, including reintegration planning.

5. Intervention delivery- to address correctional staff attitudes and approaches in terms of language and procedure. The ethical stance is that (sexual) offenders are “people like us” with the right to be treated with dignity and respect. A therapeutic alliance or ethic of care includes warmth, respect, praise, empathy, and appropriate humor with transparent assessment, intervention planning, and intervention processes to support offender autonomy.

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