Therapeutic Jurisprudence in Aotearoa New Zealand’s Family Justice System

A thesis submitted to fulfil the requirements for the degree of Master of Laws at the University of Otago, Dunedin, New Zealand – October 2019

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**Abstract**

Aotearoa New Zealand’s Family Justice System (“FJS”) has a dual therapeutic and judicial mandate. The balancing of the two roles has created difficulty since the Family Court’s inception in 1981. The FJS has been reviewed four times, and each review has considered how the dual roles should be balanced. The most recent review was completed in mid-2019. There have been concerns that the FJS is not meeting its therapeutic mandate. While some of the concerns with the FJS are related to changes made in 2014, some of the concerns have persisted for decades.

Therapeutic Jurisprudence (“TJ”), the study of the psychological impact of the law, can be used as a lens for professionals to see the law through its psychological impact. Its four areas of inquiry are the law, legal rules, legal procedures and legal roles (legal professionals in the justice system). Many of the concerns in the FJS are about professionals and the use of TJ to improve legal roles is an important change that can be brought to improve the FJS.

Changes to laws and procedures takes time, but changes to roles can happen immediately. Furthermore, even if rules and procedures are antitherapeutic, legal professionals can improve the therapeutic impact of the FJS in the way they go about their work.

This thesis sets out the background and development of TJ. It then compares TJ to the other ‘vectors’ of the comprehensive law movement. It analyses how TJ has had an impact in family law before discussing the history of the FJS, the current state of the FJS, and analysing the proposed changes to the FJS released this year through a therapeutic lens. There is then a discussion about issues relating to the FJS independent of the 2014 reforms. Finally, there is a case study and discussion that highlight professionals adopting TJ can have an important, positive impact on those involved in the FJS.

While the FJS was formed with a dual therapeutic and judicial mandate, the FJS is not meeting its therapeutic mandate in many ways. The 2014 reforms to the FJS have been largely negative and have had a largely anti-therapeutic effect. The recommendations following the 2018-2019 review of the FJS are largely consistent with TJ and give several helpful recommendations to improve the therapeutic impact of legal roles. However, the recommendations do not go far enough to ensure that the proposed changes are fully resourced and enforceable.
Acknowledgments

My supervisors, Associate Professor Nicola Taylor, Professor Mark Henaghan and Associate Professor Selene Mize were exceedingly patient with my chaotic and sporadic progress. I am grateful they understood the challenges of practising full time whilst studying, and that they took the time to go through each draft carefully and thoroughly.

Kate Thompson, law librarian was always quick to answer my endless questions. Her assistance was invaluable. Janice Munden made trips to Dunedin enjoyable. Studying was made much easier with good meals and better company. Likewise, Maree Turner was welcoming during the time I spent in Tauranga and always made sure I had somewhere to study.

My colleagues kept my interest in this thesis alive by asking questions and bouncing ideas around for which I am grateful. Claire Loftus took great care in reading over my thesis, making valuable changes.

Thank you to my parents for their unwavering support and to George Jackson for patiently listening to my thoughts, always being so encouraging and helping with editing.
For Valerie and Cecile
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<td>New Zealand</td>
</tr>
<tr>
<td>Aroha</td>
<td>Love</td>
</tr>
<tr>
<td>Hapū</td>
<td>Subtribe</td>
</tr>
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<td>Hui</td>
<td>Meeting</td>
</tr>
<tr>
<td>Iwi</td>
<td>Tribe</td>
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<tr>
<td>Karakia tīmatanga</td>
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</tr>
<tr>
<td>Karakia</td>
<td>Closing prayer</td>
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<tr>
<td>whakamutunga</td>
<td></td>
</tr>
<tr>
<td>Kaupapa</td>
<td>Topic, policy, theme, agenda</td>
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<td>Kawa</td>
<td>Marae protocol</td>
</tr>
<tr>
<td>Komiti</td>
<td>Committee</td>
</tr>
<tr>
<td>Kōrero</td>
<td>To talk/speak</td>
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<td>Korowai</td>
<td>Cloak</td>
</tr>
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<td>Kotahitanga</td>
<td>Union</td>
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<tr>
<td>Kupu</td>
<td>Words</td>
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<tr>
<td>Mahinga kai</td>
<td>Cultivation</td>
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<tr>
<td>Manaakitanga</td>
<td>Hospitality</td>
</tr>
<tr>
<td>Mana Whenua</td>
<td>The iwi or hapū who has authority over a particular area</td>
</tr>
<tr>
<td>Marae</td>
<td>Meeting place</td>
</tr>
<tr>
<td>Mokopuna</td>
<td>Grandchildren</td>
</tr>
<tr>
<td>Pākehā</td>
<td>New Zealander of European descent</td>
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<tr>
<td>Pōwhiri</td>
<td>Welcome ceremony onto a marae</td>
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<tr>
<td>Tamariki</td>
<td>Children</td>
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<td>Tāngata Whenua</td>
<td>Indigenous people (in this paper it refers to Māori)</td>
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<td>Wairua</td>
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</tr>
<tr>
<td>Tikanga</td>
<td>Rule, custom, procedure</td>
</tr>
<tr>
<td>Tūpuna</td>
<td>Ancestors or grandparents</td>
</tr>
<tr>
<td>Ture</td>
<td>Justice system</td>
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<td>Whakapapa</td>
<td>Genealogy</td>
</tr>
<tr>
<td>Whānau</td>
<td>Family</td>
</tr>
<tr>
<td>Whanaungatanga</td>
<td>Relationship, kinship</td>
</tr>
<tr>
<td>Whānau ora</td>
<td>Health initiative based on Māori health practices, focusing on whānau as a whole, rather than individuals.</td>
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**Abbreviations**

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<td>Attention Deficit Hyperactivity Disorder</td>
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<tr>
<td>AODT Court</td>
<td>Alcohol and Other Drug Treatment Court</td>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>CAN</td>
<td>Child Abuse and Neglect</td>
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<tr>
<td>COCA</td>
<td>Care of Children Act 2004</td>
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<td>EIP</td>
<td>Early Intervention Programme</td>
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<td>FDR</td>
<td>Family Dispute Resolution</td>
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<td>FJS</td>
<td>Family Justice System</td>
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<td>FLAS</td>
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<td>Family Law Section</td>
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<td>Intimate Partner Violence</td>
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<td>MoJ</td>
<td>Ministry of Justice</td>
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<td>Parenting Through Separation</td>
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<td>Post-traumatic Stress Disorder</td>
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<td>RJ</td>
<td>Restorative Justice</td>
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<td>RTM</td>
<td>Round Table Meeting</td>
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<td>STS</td>
<td>Secondary Traumatic Stress</td>
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<td>TJ</td>
<td>Therapeutic Jurisprudence</td>
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<td>United States</td>
<td>United States of America</td>
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Chapter 1

Introduction

Therapeutic Jurisprudence ("TJ") is the idea that "whether we know it or not, whether we like it or not, the law is a social force with consequences in the psychological domain". It aims to make the law more therapeutic. Beyond that, it can be difficult to summarise. It is wide, flexible, and does not provide set steps for its implementation. This thesis focuses on the presence of, and scope for, TJ in Aotearoa New Zealand’s family justice system ("FJS"). It is intended to help legal professionals make greater sense of TJ and use it to improve the lives of those who are involved with the FJS whether as clients, staff or practitioners.

TJ in Action

Although I did not realise it at the time, my interest in TJ came a few months after graduation. I was working as a District Court judges’ clerk. One of the Family Court judges was presiding over an interesting case involving at least three different pieces of Family Court legislation. I remember being shocked by the mother’s upbringing and by the poverty, violence and despair in the case. Sadly, it was almost inevitable that the children would be removed from their mother’s care.

Being a clerk was exciting, especially when a judge would take me under their wing on a particular case. This was one such occasion. I waited for the 11:30am adjournment walked eagerly to her chambers to hear about what unfolded in cross examination, and what interesting legal points had been raised by counsel.

I had expected the judge to be animated and in discussion with the registrar, about different parts of the hearing. Instead she looked serious, almost sad. She motioned for me to take a seat.

The judge proceeded to explain that the mother in the case was so fragile and damaged that if she was put on the stand, she would break. There was no way this woman would cope with

cross examination. She had avoided the woman giving cross examination by standing the matter down and telling counsel to try and find a solution by consent.

I was impressed with the Judge trying to minimise the negative impact of the hearing on this vulnerable person. At the same time, I mentally kicked myself, as I realised I had been thinking not of the parties as people, but as names on a page. I had been more excited about esoteric points of law. I certainly had not been concerned about the psychological impact of the hearing on the parties. I vowed I would not make the same mistake again.

Two and a half years later I was counsel in a six-party mediation conference before the same judge. I was confident that the case would not settle, and the mediation was a waste of time as there was too much conflict. The case had been before the courts for a long time and the parties had become entrenched in their positions. I walked into the mediation conference with my mind focused on a relationship property agreement I needed to draft in the afternoon and a mental health hearing the following day.

To my complete exasperation the judge started talking about how all the parties loved this child. She asked to see a photo of the child, discussed the child’s iwi and spoke about her own. For goodness sake, I can remember thinking, we’ve spent 40 minutes doing nothing! However, I had failed to notice how the parties were at ease and smiling and joking with each other; something I would not have previously thought possible. We did not reach agreement on final care arrangements at the mediation, but there was agreement to an interim arrangement. If the judge was frustrated that the case did not settle completely, she did not show it. Instead she congratulated the parties on the agreements they had reached. Before court, my client was nervous and angry. Afterwards, she commented on how happy she was with the outcome. In subsequent counsel led mediations (of which there were many) the parties brought up what that judge had said about them needing to work together and to put the child first.

It was not until I wrote this thesis that I realised these were examples of TJ in action. I had not appreciated that the judge was deliberately trying to minimise the harmful impact of the law on the parties, and to engage them in the process. Now I understand how helpful her work in the first part of that mediation was in reaching agreement on some issues, and also changing how the parties treated each other. Previously I had only thought of TJ in the context of legal
rules and procedures themselves, like problem-solving courts, or s 46G of the Care of Children Act 2004 (”COCA”) which enables parties to have counselling during family disputes. I had not really considered how TJ applies to legal actors in their work.

The focus on how TJ can help legal actors such as judges, lawyers, court registrars, social workers and counsellors undertake their work is the key theme of this thesis. Lawyers are trained to apply the facts to the law in a rational manner. The attitude I had in both examples is not atypical of how lawyers approach cases. If legal actors looked through a TJ lens, they would consider the psychological impact of the law on clients. The two examples show how taking the psychological impact of the law into account and trying to minimise its negative impacts can promote better outcomes for clients. The second example, in particular, shows how a concerted effort to put parties at ease and focus on things they have in common resulted in partial agreement when most lawyers in the room thought that was not possible. Legal actors using TJ to improve their work can make a real difference in family law where parties face inherently difficult situations.

The Four Spheres of TJ and the Importance of Legal Roles

There are four main areas of inquiry in TJ: the role of the law in creating psychological dysfunction, and the therapeutic aspects of legal rules, legal procedures, and legal roles. As the example of the Family Court judge above shows, the way legal actors behave can significantly influence the therapeutic or antitherapeutic impact of the law. In fact, it can be more important than the legal rules and procedures, as is evident in the following quote from a 2002 survey about the experience of Māori in Aotearoa New Zealand’s FJS:

I don’t think that changing the Act will change much for Māori – it is still going to depend a lot on your ability to relate to your lawyer, or more importantly the ability for your lawyer to relate to you. It doesn’t matter what you do to it (the Act) if the system is still cold and hard and there is no education around it or human discussion given to it…it doesn’t matter what you do…They’re only going to sugar-coat the wording.

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Concern about how legal actors treat people going through the FJS is still present today. In a 2018 seminar, her Honour Judge Mary O’Dwyer said the three main challenges facing the Family Court today are the need to:⁵

- “Adapt to and cater for increased diversity;
- Resolve our work with humanity and compassion; and
- Deliver procedural fairness and build public confidence”.

All three of these challenges can be met, at least in part, by legal actors changing the way they go about their work. Furthermore, changes to legal rules and procedures require extensive time and wider-scale reform. In contrast, legal actors as individuals can make immediate changes in their work to increase the therapeutic impact of the FJS.

**Overview**

Chapter 2 provides a history and overview of TJ, then outlines its development over time, and discusses and responds to criticisms of it. TJ is interdisciplinary, has only a nominal normative commitment⁶ and has been described as a lens through which to view the law.⁷ Therefore, it works well with other ‘vectors’ of the comprehensive law movement such as restorative justice and procedural justice which set out a more prescriptive way of improving the law. The relationship between TJ and these vectors is addressed in Chapter 3, which also focuses on how TJ can be applied to family law.

The remainder of the thesis explores the FJS in Aotearoa New Zealand. Chapter 4 addresses the background to Aotearoa New Zealand’s FJS and the reviews of the Family Court since its inception. It particularly focuses on the 2014 reforms which emanated from the 2011 review and considers why these reforms have resulted in yet another review in 2018-2019. Chapter 5 then examines the recommendations made by the independent panel appointed by the Minister of Justice in 2018 to review the FJS. It critiques these reforms from a TJ perspective.

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The principal recommendation, that there be a joined-up FJS called: Te Korowai Ture-ā-Whānau,\(^8\) is consistent with the interdisciplinary approach promoted by TJ.\(^9\)

Many of the current concerns with the FJS arose following introduction of the 2014 reforms. However, some issues existed prior to, and independently of, the reforms. These are addressed in Chapter 6 and centre on the experiences of Māori, migrants and survivors of family violence in the FJS. It addresses preventing vicarious trauma in professionals. Chapter 6 also discusses how the application of a therapeutic lens to these issues can help legal actors to achieve a more therapeutic outcome for their clients.

The final chapter, Chapter 7 examines three scenarios: one where the legal actors do not use TJ, one where they do and one which shows what may change if the Independent Panel’s recommendations are implemented. Chapter 7 draws on these scenarios, as well as the previous chapters, to show how the application of TJ to legal roles can have a significant impact on the FJS for the benefit of both the parties and the professionals.


Chapter 2

History and Overview of Therapeutic Jurisprudence

1. Introduction

TJ recognises that the law is a therapeutic agent which can have therapeutic and anti-therapeutic consequences.\(^\text{10}\) The term ‘therapeutic’ is deliberately defined in broad terms to include “anything that enhances the psychological or physical wellbeing of the individual”.\(^\text{11}\) TJ originated in the field of mental health law, but is now present across the “entire legal spectrum”.\(^\text{12}\) This chapter sets out what TJ is and where it comes from. It then discusses the four main areas of study into the therapeutic impact of the law, developments in TJ and the criticisms of it.

2. History and Overview of Therapeutic Jurisprudence

a. History and Definition of TJ

TJ began when David Wexler and Bruce Winick, noticed that mental health law had a narrow, rights based approach.\(^\text{13}\) This approach arose as a response to patient abuse by psychiatrists: and mental health law became a means of keeping psychiatrists at bay.\(^\text{14}\) As TJ emerged, mental health law focused on a debate between whether to protect wellbeing or to uphold individual rights?\(^\text{15}\) Robert Schopp, in discussing its genesis, says TJ originated from two important insights:

First, one can avoid this conflict between wellbeing and liberty if one can redesign legal institutions such that the...values converge. Second, though mental health law seemed to naturally fit with other disciplines, work in the field was not highly interdisciplinary.\(^\text{16}\)

\(^{10}\) Wexler “Putting Mental Health into Mental Health Law” above at n 9 at 9.


\(^{12}\) Wexler, above at n 1, at 17-18.

\(^{13}\) Schopp, above at n 6, at 665, Wexler above at n 1 at 17-18, Mark A Small “Legal Psychology and Therapeutic Jurisprudence” (1993) 37 St Louis University Law Journal 365.

\(^{14}\) Wexler, above at n 1, at 23.

\(^{15}\) Robert Schopp, above at n 6 at 665.

\(^{16}\) At 665 (footnote omitted).
From there, TJ has developed into a doctrine that recognises the therapeutic effect of the law.\textsuperscript{17} It claims the therapeutic impact of the law can be improved by learning from other disciplines and focusing on the social effect of the law, rather than placing weight solely on either wellbeing or rights.\textsuperscript{18} It is said to be related to legal realism because it focuses on the effect the law has on its participants and it advocates for an interdisciplinary approach to law.\textsuperscript{19}

b. TJ’s Interdisciplinary Nature

The interdisciplinary focus is an important element of TJ. David Wexler considers that TJ "tries to eschew doctrinal niceties and symmetries in favor of looking at a problem and trying to develop reasonably workable solutions".\textsuperscript{20} According to Schopp, TJ encourages the use of psychological research to:

\begin{quote}
... propose the design, interpretation, and application of law in a manner intended both to promote wellbeing without sacrificing other legal and political values served by the law and to generate further psychological research testing these proposals.\textsuperscript{21}
\end{quote}

TJ also draws on research and ideas from psychiatry, criminology, social work, philosophy, criminal justice, public health the other behavioural sciences.\textsuperscript{22} It proposes that legal actors use these other disciplines to “think creatively about improving the therapeutic functioning of the law without violating other important values, such as...due process concerns”.\textsuperscript{23}

c. Nominal Normative Commitment

TJ is an interdisciplinary, common sense jurisprudence. Its aim is to inform policy decisions, rather than propose a specific set of reforms. It has been described as a “lens” to view the law. It has only a minimal normative commitment.\textsuperscript{24} While TJ is largely normatively neutral “interested scholars maintain at least a minimal commitment to wellbeing as a good that law

\textsuperscript{17} Wexler, above at n 1, at 20.
\textsuperscript{18} Wexler, above at n 9, at 9.
\textsuperscript{21} Robert Schopp, above at n 6, at 666 and Wexler, above at n 1, at 24.
\textsuperscript{22} Wexler “Two Decades of Therapeutic Jurisprudence” above at n 1, at 24, and Wexler “Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence” above at n 9, at 9.
\textsuperscript{23} Winick and Wexler, above at n 7, at 7.
\textsuperscript{24} Schopp, above at n 6 at 666.
should advance”. This commitment to wellbeing “is consistent with a wide variety of theories of law as well as with an array of prescriptions regarding the most defensible approach to any specific legal question”. 

This minimal normative commitment means that TJ concerns descriptive ethics (ethics which address beliefs about morality) which aims to inform normative ethics (ethics which investigate how people should act from a morality perspective). Rather than prescribe how things should be done, TJ can be used as a foundation for empirical research. If scholars keep in mind that the law is a social force which can either help or harm, then TJ argues that empirical research should build on TJ and seek to influence law reform with therapeutic consequences.

TJ has empirical and non-empirical aspects. The empirical side of TJ is “best inhabited by the behavioural scientist, although legal consultation will typically prove fruitful”. Empirical research involves looking at the law, rule, procedure or legal role as an independent variable and addressing the consequences that come from alternative legal arrangements. The non-empirical aspect of TJ involves legal academics working with the behavioural sciences to consider the potential therapeutic and anti-therapeutic aspects of a legal rule, role or procedure. If there is a new therapeutic way of doing things, and it is not normatively objectionable on other grounds, this may point to law reform. An example of this could be looking at the rule that allows the state to take custody of children if there are safety concerns. Empirical evidence around this would look at what the therapeutic impact of this rule was, and how it varied depending on how the rule was used. For example, is there a difference in the therapeutic impact if the child is uplifted and placed with a non-kin caregiver or if the state has custody but places the child with a kin caregiver, or with the parents with support? The non-empirical research would address which situations had the most

25 At 666.
26 At 666.
27 Wexler, above at n 3, at 36.
28 Schopp, above at n 6, at 666 and Wexler above at n 9, at 9.
30 Wexler and Winick, above at n 29, at 303.
31 At 304.
32 At 303.
33 At 303.
therapeutic impact and how legal actors could work in a way to ensure that the most therapeutic situation came about.

d. Therapeutic Aims do not Trump Other Legal Principles

While TJ aims to drive law reform to improve the therapeutic consequences for participants, it does not claim that therapeutic considerations should override other principles. TJ does not aim to resolve questions as to which values are more important; rather “it sets the stage for their sharp articulation”. TJ “does not necessarily dominate [other principles] but rather informs and in so doing provides insight and effective results”.

The law serves many ends, including “autonomy, integrity of the fact-finding process, [and] community safety”. Alternative dispute resolution (“ADR”) involves methods of resolving disputes other than litigation. These include negotiation, mediation, consensus building and negotiated rule making, arbitration and combinations of those methods with each other and with traditional court processes. In the United States in the 1960s, there was a move to promote the use of ADR and make the justice system more responsive to litigants. ADR is consistent with TJ as it is an alternative way of approaching the law compared to the traditional adversarial model, and that this can increase the law’s therapeutic impact. Wexler considers this evident in the mission of ADR to “infuse the human element” into lawyering. ADR provides a number of different methods of resolving disputes. In contrast TJ provides a lens through which legal scholarship and practice can be viewed, rather than providing for different methods.

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35 Wexler “Justice, mental health, and therapeutic jurisprudence” (1992) above at n 34, at 518.


37 Wexler and Winick “introduction” in B Wexler and B Winick Essays in Therapeutic Jurisprudence, above at n 34, at xi.

38 Wexler “Justice, mental health, and therapeutic jurisprudence” at n 34, at 518.


40 Goss, above at n 39, at 2.

41 At 2.

42 Wexler, above at n 20, at 266-267.

43 At 267.
There are situations where the traditional, adversarial process is necessary, such as a criminal case where there are disputes about significant facts. In situations like these, ADR is unlikely to be appropriate and TJ would not advocate for ADR in these situations. Rather a strong focus on rights, and an adversarial trial (in a common law jurisdiction) would be necessary. TJ encourages legal actors to consider different ways to resolve disputes, but it does not say that this should be done at the expense of rights.

3. The Four Areas of Inquiry for Therapeutic Jurisprudence

Wexler divides research on TJ into four areas of inquiry: “(a) the role of the law in producing psychological dysfunction; (b) therapeutic aspects of legal rules; (c) therapeutic aspects of legal procedures; and (d) therapeutic aspects of judicial and legal roles”.

a. The Role of the Law in Producing Psychological Dysfunction

This first area of inquiry, the role of the law in producing psychological dysfunction involves looking at the law as a whole. One way the law provides for psychological dysfunction is the culture of adversarialism which can be present in common law jurisdictions. The adversarial legal system in the United States has been described as “a prime example of trying to solve problems by pitting two sides against each other and letting them slug it out in public”. This “reflects and reinforces our assumption that truth emerges when two polarized warring extremes are set against each other”.

Wexler says this adversarial focus can have an anti-therapeutic effect. He links it to people who dislike conflict and criticism either leaving or never entering law, journalism, academia, or politics. He points out that the legal system encourages behaviour that “we ought to find disturbing”. Examples include people charged with criminal offences not accepting responsibility for their actions, discouraging a driver from apologising after an accident and

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45 Wexler, above at n 3, at 19.
47 Wexler, above at n 20, at 266.
48 At 266.
49 At 266.
preventing people from moving on until a lawsuit has been completed.\textsuperscript{50} Wexler states that alternative dispute resolution, preventive law and TJ can help overcome the culture of adversarialism.\textsuperscript{51}

Judge William Schma, writing extra judicially, also refers to a culture of adversarialism.\textsuperscript{52} Like Wexler, he says this eschews societal values. He raises a concern not raised by Wexler, namely that an adversarial culture can interfere with pragmatic outcomes.\textsuperscript{53} An example of this could be an insistence on going to hearing, rather than attempting a mediation to see if there can be a workable compromise reached. He states that effective legal systems are those which do not give argument a privileged status and those which respond to needs in the community.\textsuperscript{54}

Wexler gives several further examples of laws having an anti-therapeutic effect. One is the law permitting insurance companies to limit a person’s access to insurance because he or she has a mental illness.\textsuperscript{55} Wexler also suggests that the laws concerning mentally unwell people not being fit to stand trial could result in people drawing out medical treatment rather than focusing on becoming well.\textsuperscript{56} Wexler uses the example of labelling people who drink alcohol in large quantities as violent as contributing to increased violent behaviour by those people.\textsuperscript{57}

Wexler’s first area of inquiry focuses on the legal system as a whole. Schma’s comments about adversarialism focus on the culture of argument and how this can have an anti-therapeutic effect. Wexler also mentions this, but also comments on how the legal system is inherently set up to be adversarial. The next three of Wexler’s areas of inquiry are more focused on specific aspects of the legal world; rules, procedures, and roles.

b. Therapeutic Aspects of Legal Rules

Wexler’s second area of inquiry is the therapeutic aspect of legal rules. He argues that when a legal rule is designed with a therapeutic purpose in mind, there should be empirical research

\begin{itemize}
\item \textsuperscript{50} At 266.
\item \textsuperscript{51} At 277.
\item \textsuperscript{52} Schma, above at n 36, at 91.
\item \textsuperscript{53} At 91.
\item \textsuperscript{54} At 91.
\item \textsuperscript{55} Wexler, above at n 3, at 20.
\item \textsuperscript{56} At 21.
\item \textsuperscript{57} At 21.
\end{itemize}
into whether the rule is having a therapeutic effect.\textsuperscript{58} Two examples of discussion around legal rules are set out below.

Durham and LaFond discuss civil commitment hearings in the United States for people who are mentally unwell.\textsuperscript{59} The rule is that there must be a hearing if a person is being destructive and needs treatment. The authors suggest the stress of the hearing for the patient and their family could create psychological harm which could be avoided by negotiations with the doctor prior to the hearing.\textsuperscript{60} This pragmatic option could provide a therapeutic solution for the patient.

Wexler addresses two sets of rules in mental health law.\textsuperscript{61} The first is a civil libertarian code which states people must be unable to cope in the community before they are committed under mental health legislation. The second is a paternalistic code where people are committed because they need treatment or because their mental state is deteriorating.\textsuperscript{62} He argues that the former set of rules may be more therapeutic than the latter but more empirical research would be required.\textsuperscript{63}

These authors give examples of using a therapeutic lens to analyse a particular rule. Durham and LaFond provide a possible pragmatic solution to avoiding harm caused by a rule to potentially maximise its therapeutic effect. Wexler looks at replacing one set of rules with another. However, neither article involves the empirical research that Wexler advocates for.

c. Therapeutic Aspects of Legal Procedures

Wexler claims that legal procedures should be investigated and, if necessary, altered to maximise therapeutic outcomes and minimise anti-therapeutic outcomes.\textsuperscript{64} The most important procedure to be examined is the “apparatus used to litigate questions of committability” – the commitment hearings.\textsuperscript{65} Wexler states that these “should be grist for

\begin{footnotesize}
\begin{itemize}
\item At 23.
\item Wexler, above at n 3, at 26-28.
\item At 26.
\item At 26.
\item At 27.
\item At 27.
\item At 30.
\item At 30.
\end{itemize}
\end{footnotesize}
the interdisciplinary research mill”. Since TJ has expanded to many areas of law, this statement could be reworded to say that the most important procedure to be examined is the court hearing of the relevant jurisdiction.

d. Therapeutic Aspects of Legal Roles

The therapeutic aspects of legal roles has been the focus of most of the scholarly enquiry on TJ. This level of inquiry addresses how individuals can make the justice system more therapeutic. I have chosen to concentrate on this area of inquiry because legal roles play an important factor in determining how therapeutic participants experience the justice system especially in areas of law where clients are particularly vulnerable and because it is the easiest way to effect change. Three main ways in which legal roles can be therapeutic can be identified in the TJ literature: the behaviour of the legal actor; how the legal actor organises or approaches a case; and the importance of teaching about the therapeutic impact of the law.

How Legal Actors Treat Clients

Lawyers

Effective communication is important. The way a lawyer acts around his or her client will inevitably have a therapeutic or anti-therapeutic effect. Sometimes, even if a lawyer’s argument is likely to fail, clients feel supported by having someone by their side. It is important that lawyers not do anything to destroy their clients’ trust. Winick provides a list of actions by counsel that promote a therapeutic outcome:

- provision of information;
- explaining the process of cross examination, and doing a role play;
- spending as much time as possible with the client between evidence and decision;
- explaining the benefits of settlement;

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66 At 31.
67 Winick and Wexler above at n 7, at 148.
70 Winick, above at n 69, at 106.
71 At 109.
• dealing with background issues, such as denial that the relationship is over;
• establishing a relationship of trust and confidence with the client; and
• respecting the client’s autonomy.\(^{72}\)

**Judges**

A judge who uses TJ treats litigants with respect, includes litigants in the court process and draws from knowledge in the problem-solving courts which are discussed below. Michael Jones, a retired judge, found that despite initial resistance from counsel, skills learned in the problem-solving courts were effective in mainstream courts.\(^{73}\) He recommends that judges use procedural justice. This includes treating people in the courtroom with respect and requiring the court to be respected, setting out the process, and ensuring everyone is heard.\(^ {74}\) He also promotes active listening.\(^ {75}\) Further suggestions are the use of gentle confrontation and encouraging counsel to act as a team on agreed matters.\(^ {76}\) Finally, he recommends using review hearings to help encourage compliance with sentences.\(^ {77}\)

Like Jones, Michael King says that a judge using TJ will be team oriented, be aware of underlying issues and engage and take an interest in those who appear before them.\(^ {78}\) He cites Petrucci’s study which found that defendants had more respect for judges who took an interest in their lives and underlying issues than for Judges who did not.\(^ {79}\) Bartells and Richards, writing about oral competence and TJ emphasise the importance of judges speaking slowly and clearly to litigants as this will promote therapeutic consequences.\(^ {80}\) This is a simple example of including participants.

Supporting Michael King’s comments about judges showing an interest in those who appear before them,\(^ {81}\) Shelley Kierstead says judges’ recommendations and comments can be “highly

\(^{72}\) At 109-116.
\(^{74}\) At 757-761.
\(^{75}\) At 762.
\(^{76}\) At 769-777.
\(^{77}\) At 753-755.
\(^{78}\) King, above at n 2, at 1120.
\(^{81}\) Shelley Kierstead “Therapeutic jurisprudence and child protection” (2011) 17(1) Barry L Review 31 at 38.
motivating”.\(^{82}\) She refers to the decision of *Catholic Children’s Aid Society of Toronto v. S.(S.).*\(^{83}\) She states the decision was therapeutic because the judge gave reasons for the decision and highlighted how well the mother had done, despite her children not being returned to her care.\(^{84}\)

### How Legal Actors approach a Case, Hearing, or Treatment Plan

Legal actors can not only treat individuals in a therapeutic way, but also approach their cases in a therapeutic way. This could include: taking a holistic approach to clients’ needs; using a therapeutic approach to improve the actor’s adversarial role; promoting self-determination and promoting indigenous law. A beneficial side effect of TJ is that it improves the lives of lawyers practising it.\(^{85}\)

#### Holistic Approach to Clients’ Needs

The traditional court process focuses on fact finding, then applying the law to the facts.\(^{86}\) Facts “are regarded as essential to a court’s proper functioning, but the emotional implications are not”.\(^{87}\) TJ involves the lawyer looking at a client holistically and considering their best interests in terms of their health, social, vocational, economic and spiritual needs as well as the facts of the case.\(^{88}\)

A judge who uses an holistic approach, even after the fact finding is complete and the sentence has been imposed, is Judge David Fletcher in Liverpool. He writes to people about why they were imprisoned and suggests suitable rehabilitative services for them.\(^{89}\) A further example of a therapeutic approach in the mental health law arena is when a client has a defence to being committed. Counsel could consider whether focusing on this defence will jeopardise a client’s chance of receiving needed treatment.\(^{90}\) In the commitment hearing itself, the adversarial nature of the lawyer’s role should be at its high point, but a lawyer

\(^{82}\) At 38.
\(^{83}\) *Catholic Children’s Aid Society of Toronto v. S.(S.),* [2010] 0.1. No. 5893 (Can.).
\(^{84}\) Kierstead, above at n 81, at 37-39.
\(^{85}\) Winick, above at n 69, at 121.
\(^{86}\) King, above at n 2, at 1119.
\(^{87}\) At 1119.
\(^{88}\) At 1121.
\(^{89}\) At 1113.
\(^{90}\) Wexler, above at n 3, at 34.
should still have therapeutic principles in mind during the hearing.\textsuperscript{91} Looking at the underlying issues includes ensuring litigants have oral competence.\textsuperscript{92} Judicial monitoring can also be an example of TJ.\textsuperscript{93}

None of these examples dissuade legal actors from taking an adversarial approach when required. Nor do they ask legal actors to ignore the application of the law to the facts or to focus on litigants’ rights. Rather they encourage legal actors to look into other aspects of their clients’ lives and take a wider view as to what the client’s best interests are, and to have this in mind whether they are running a case as counsel or from the bench.

\textit{TJ assists with Traditional Adversarial Processes}

As outlined above, a lawyer practising TJ will not stop being adversarial when required. In fact, applying TJ can improve a lawyer’s adversarial ability.\textsuperscript{94} This can be done by keeping cases out-of-court and by improving courtroom skills.

According to Michael King, TJ improves lawyers’ adversarial roles because TJ helps lawyers to be aware of underlying emotional issues which can be a barrier to cases being resolved.\textsuperscript{95} Lawyers practising TJ are also aware of the client as a whole person, so will be aware of any age, socio-economic or cultural issues which could hinder communication.\textsuperscript{96} They are also familiar with ADR and will know their client and case well enough to know whether that is appropriate for the particular case.\textsuperscript{97} For these reasons, lawyers practising TJ are adept at ensuring that only the cases that need to go through litigation do so.

In the cases that do go to court, lawyers and judges practising TJ will try to be sensitive to underlying issues. One example is children tending to agree with things they do not agree to in order to please authority or to conclude an unpleasant experience.\textsuperscript{98} A judge who is aware of this can arrange the cross-examination process to make the child as comfortable as possible, so the best evidence is given.\textsuperscript{99} Another example is lawyers seeking guidance from

\begin{flushright}
\textsuperscript{91} At 36.
\textsuperscript{92} Bartells and Richards, above at n 80, at 32.
\textsuperscript{93} Wexler, above at n 3, at 31.
\textsuperscript{94} King, above at n 2, at 1119-1120.
\textsuperscript{95} At 1121.
\textsuperscript{96} At 1124.
\textsuperscript{97} At 1121-1122.
\textsuperscript{98} At 1119.
\textsuperscript{99} At 1119.
\end{flushright}
psychologists and social workers to help them understand the psychological aspect of their role. Both examples illustrate how the interdisciplinary nature of TJ can assist legal actors with understanding people during the court process which helps with fact finding and putting the best evidence before the court.

Promoting Self-Determination and Involving Clients in Decision Making

The most important aspect of running a case, hearing, or treatment plan is that it is acceptable to the client. Michael Clark’s research into Drug Courts in the United States found four factors determined whether there would be successful behavioural change in the participant. First, client factors (the client’s pre-existing assets, challenges and relationships); secondly, the connection between the client and staff; thirdly, hope and expectancy of change; and finally, models and techniques by staff. Client factors such as optimism, skill, supportive family, or good employment accounted for 40% of the reasons for change, relationship between client and staff for 30%, and techniques used and expectancy and hope for 15% each.

From this, Clark noted that it is the client rather than the technique that makes treatment work, so the focus should be on ensuring that the client helps to develop the treatment plan. Wexler’s statement that clients should be included in strategic decisions also supports this view. Wexler and Winick cite Clark’s research to state that:

> ... although the evidence seems clear that therapeutic endeavours can be successful, the lion’s share of therapeutic work ought to be in encouraging active and meaningful client participation, in developing a strong relationship between the client and the judge and change agent, and in fostering hope and expectancy of change.

Clark’s empirical research findings are consistent with TJ’s support for client self-determination. Michael King considers that TJ promotes self-determination because it

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100 Winick, above at n 69, at 120.
102 At 138-145.
103 At 139.
104 Winick, above at n 69, at 119.
105 Winick and Wexler, above at n 7, at 130.
recognises that paternalism and coercion can create resistance to change. This is helpful for legal actors practising TJ as it reinforces why cases should involve clients and promote them making their own decisions where possible.

**Improves Lives of Lawyers**

An interesting side point is that lawyers with an interdisciplinary focus can also benefit the legal actors themselves. Winick says that if lawyers are more aware of the psychological dimension of their role, this can improve their functioning and their clients’ satisfaction. Many lawyers suffer from burn out and depression and, when winning is everything, defeat can be difficult for lawyers to bear, but helping clients to adjust to the litigation process regardless of results can bring satisfaction and emotional wellbeing for both client and lawyer. Further research on this point could be beneficial for encouraging legal actors to use TJ.

**TJ in Legal Education**

An important part of TJ is educating practitioners and law students about both TJ and the behavioural sciences. Wexler’s reasons for teaching behavioural sciences at law schools are that it:

1. introduces students to importance of social science at trial and appeal;
2. sharpens analytical skills by introducing social science methodology and
devotes familiarity with social science content sufficient to understand its potential relevance in helping shape the law and legal system.

Law students are typically taught about cases that go to trial, which lawyers have not been able to settle. Legal education has “regarded legal problem-solving as a dispassionate, detached, intellectual analysis involving the determination of legal principles, the application of the legal principles to the facts...and the arguing of the case in court”. King finds that this

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106 King, above at n 2, at 1115 and 1124.
107 Winick at n 69, at 121.
109 At 293.
110 At 294.
111 At 294.
112 At 1124.
113 At 1124.
approach does not incorporate emotional intelligence or address underlying issues.\textsuperscript{114} He recommends that legal education include TJ, restorative justice and other non-adversarial approaches.\textsuperscript{115} Both King and Wexler believe an expanded legal education will create better lawyers. Wexler, in writing about developments in TJ, notes that TJ has moved into legal and other education.\textsuperscript{116} It is important for teachers of family law to educate students about trauma, attachment theory, and the impact of conflict on children. These are all discussed in Chapter 3.

\textbf{e. The Problem-Solving Courts – A Case Study in Altering Legal Processes}

An important change to the court process in criminal law has been the introduction of the problem-solving courts. These courts address a specific situation or attend to the needs of a specific part of society. Examples include courts which focus on drug dependency and family violence which “if left untreated, result in repeated court attendance”.\textsuperscript{117} These are interdisciplinary in nature.\textsuperscript{118} Examples of problem-solving courts in New Zealand include the Alcohol and Other Drug Treatment (“AODT”) Courts in Auckland and Waitakere and the Te Kooti o Timatanga Hou\textsuperscript{119} and Special Circumstances Court which both work with homeless offenders.\textsuperscript{120}

In New Zealand, the legal rules are not altered to accommodate the AODT Courts. They operate within the same legal framework as the mainstream courts. Section 25 of the Sentencing Act 2002 allows for courts to adjourn matters for rehabilitation, and it is in this adjournment that the AODT Courts operate.\textsuperscript{121} During that adjournment, the participants undertake treatment and are monitored by the Court. If the treatment is completed, the participants are then sentenced to intensive supervision.\textsuperscript{122} The aims of the AODT Courts are:

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\textsuperscript{114} At 1124.  
\textsuperscript{115} At 1125.  
\textsuperscript{116} Wexler, above at n 1, at 17.  
\textsuperscript{117} Winick and Wexler, above at n 7, at 8-9.  
\textsuperscript{118} At 7.  
\textsuperscript{119} The Court of New Beginnings.  
\textsuperscript{122} At 181.
“to reduce reoffending and imprisonment; reduce drug and alcohol consumption and dependency; positively impact on health and wellbeing; and be cost effective”.  

**Evaluation of New Zealand’s AODT Courts – Processes and Components of the Courts**

New Zealand’s Ministry of Justice (“MoJ”) has undertaken three evaluations of its two AODT Courts. The first evaluation was undertaken following the first year of the AODT Court. It involved a mixed method approach comprising court observation, interviews with stakeholders, interviews with AODT Court participants and analysis of MoJ data. The pilot was working as intended, there was good collaboration between different sectors and that the Courts were having a therapeutic effect on participants. The challenges were largely about the allocation of resources, in particular, some of the roles becoming bigger than intended. Examples included defence counsel and court staff doing social work and judges spending more than the allocated time with each participant. While participants spoke positively of tikanga being used, whānau and stakeholders were of the view that the use of tikanga was in its infancy in the Court. A further difficulty was that court participants were getting more resources than people using treatment services outside of the AODT Courts. There were also concerns about low victim engagement. As Gregg’s and Chetwin’s evaluation was completed only a year after the AODT Court pilot began, no participants had graduated from the programme.

A similar methodology was used in the final evaluation. It reported that tikanga had become a natural aspect of the Court. A key success was “strengthening of the judicial and therapeutic interface at local and national level”, with the AODT being able to manage their roles and inter-agency boundaries, although care was needed to retain boundaries between

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123 Lisa Gregg and Alison Chetwin *Formative Evaluation for the Alcohol and Other Drug Treatment Court Pilot* (Litmus, paper published for the Ministry of Justice, March 2014) at 1.
124 Gregg and Chetwin, above at n 123.
125 At 10-12.
126 At 2, 3, and 51.
127 At 4.
128 At 4 and 52.
129 At 2.
130 At 79.
131 At 5.
132 Liz Smith; Alison Chetwin; Maria Marama *The Final Process Evaluation for the Alcohol and Other Drug Treatment Court Te Whare Whakapiki Wairua* (Litmus, Report Prepared for the Ministry of Justice, August 2016) at 3.
therapeutic and judicial decisions.\textsuperscript{133} There were improvements in informing victims and testing participants. The evaluation suggested that victims might be more likely to engage in restorative justice at the beginning of the process, rather than wait until the participant finished the programme.\textsuperscript{134} Remaining challenges included an underestimation of resources, and gaps in available treatment options, especially for women with children.\textsuperscript{135}

**Evaluation of New Zealand’s AODT Courts – Graduation and Recidivism**

New Zealand’s rates of graduation from the AODT Courts are fairly consistent with similar courts internationally.\textsuperscript{136} By August 2016, 58\% of those who left the AODT Court left through termination and 42\% through graduation. \textsuperscript{137} In New Zealand’s AODT Courts, participants in the Courts were 54\% less likely to reoffend and 58\% less likely to be re-imprisoned after 12 months.\textsuperscript{138} Graduates were 62\% less likely to reoffend and 71\% less likely to be imprisoned within 12 months.\textsuperscript{139} This is a reduction of 15\% compared to New Zealand’s mainstream courts.\textsuperscript{140} While these results are promising, in a sample of those who exited the AODT Court early, there is no noticeable difference in reoffending after two to three years.\textsuperscript{141} There is a gap in the evidence, however, because the New Zealand AODT Courts have not been in existence long enough to measure a reduction in reoffending for their graduates after several years.

**Evaluation of New Zealand’s AODT Courts – Therapeutic Outcomes**

The most consistent feedback in both MoJ evaluations is that the AODT Courts are having a therapeutic impact on participants and their whānau. This was for both the participants who exited the Court early and those who graduated.\textsuperscript{142} The final evaluation found that:

\begin{itemize}
\item \textsuperscript{133} At 3.
\item \textsuperscript{134} At 5.
\item \textsuperscript{135} At 82 and 109.
\item \textsuperscript{136} Smith, Chetwin and Marama, above at n 132, at 93.
\item \textsuperscript{137} At 86.
\item \textsuperscript{138} At 190.
\item \textsuperscript{139} At 190-191.
\item \textsuperscript{140} At 180 at 191.
\item \textsuperscript{141} At 180 at 191.
\item \textsuperscript{142} At 98.
\end{itemize}
[t]he consensus for stakeholders, participants and whānau is that the AODT Court is resulting in transformational change for graduated participants and whānau. The AODT Court is seen as giving offenders the opportunity and tools to change their lives.\footnote{At 110.}

Common themes were participants reported being happier and more grounded, and being better parents.\footnote{At 98-110.} Participants appreciated the judges speaking to them like people and being able to support other participants during court sessions.\footnote{At 60.} The AODT Courts in Aotearoa New Zealand are seen as world leading in cultural competency.\footnote{At 64.}

**Evaluation of New Zealand’s AODT Courts – Cost Saving**

It is not yet clear whether the AODT Courts in New Zealand save money. While there is a decrease in recidivism, which indicates a reduction of cost, the MoJ evaluation found the resources required had been underestimated. It found that changes would need to be made if the pilot was to be expanded to other courts. The cost savings in the New Zealand courts may not become apparent until recidivism rates can be reliably measured in several years’ time and there is appropriate resource allocation.

**The Relationship between TJ and the AODT Courts**

The AODT Courts have some therapeutic aims, but TJ is not the founding principle of the AODT Courts. Aims of the AODT Courts also include cost saving and reducing recidivism which are not aims of TJ. The way that the AODT Courts differ the most from TJ is the non-voluntary treatment.

In an evaluation of the AODT Courts in New Zealand, Katey Thom gives four underpinning principles of these courts: law, the United States best practice, recovery and lore. The law underpinning the AODT Courts include criminal justice aims, policy aims and the comprehensive law movement, which includes TJ along other ‘vectors’ such as restorative justice and preventive law. The US best practice refers to the components which have been proven to be necessary to success for the AODT Courts, lore refers to tikanga, and recovery

\footnote{At 110.}
\footnote{At 98-110.}
\footnote{At 60.}
\footnote{At 64.}
refers to the principle that sobriety is necessary for recovery, which is why the AODTs use enforced treatment.

The usefulness of enforced treatment is supported by Greg King. He proposed a ‘management court’ which would focus on the underlying needs of the participants without the court being linked to a particular set of people. After observing problem-solving courts in the United States, he found that people who signed up to problem-solving courts to avoid prison, rather than to get well, still ended up engaging with the programme and becoming well. A stakeholder in the first MoJ Justice evaluation said that many participants are externally motivated to begin with, i.e. they enter the AODT Court because they see it as easier than prison. The court team member said “[y]ou can work on their motivation once they’re in... You can start working with them and we actually find that you see a shift – the ones that stay, you see them go from being externally motivated to being internally motivated”.147

Some consider that TJ is the underlying philosophy of problem-solving courts. Michael King disagrees, saying that TJ and problem-solving courts are similar in some respects, but some aspects of problem-solving courts are inconsistent with TJ. For example, problem-solving courts tend to be paternalistic, while TJ promotes self-determination. He points out that problem-solving courts face competing principles, including resource distribution, rehabilitative principles and different sentencing principles. He does note that many problem-solving courts apply TJ and have judges providing a more team-focused approach.

Greg King’s comments about rehabilitating reluctant offenders reflect a pragmatic reality alluded to in Michael King’s comments about resource distribution above. Namely, it could be difficult to justify funding such a comprehensive and resource intensive court if only those who volunteered participated.

Katey Thom’s point about enforced treatment being an important part of the AODT Courts alongside the comprehensive law movement, seems to be an inherent conflict of underlying principles. However, it is an indication that the problem-solving courts are not solely courts

147 Greg King A New Kind of Court (Report presented following Eisenhower Scholarship, 2012).
148 Gregg and Chetwin, above at n 123, at 47.
149 King, above at n 2, at 1116.
150 At 1115.
151 At 1116.
152 At 1120.
designed to be TJ in action. Instead, they have several underlying principles including legal
principles, such as TJ, health principles such as enforced sobriety, and the need to function
within the allocated resources.

TJ’s founders helpfully discuss how the relationship between TJ and the problem-solving
courts can be used in practice and research:

Successful problem-solving courts can provide therapeutic jurisprudence with important food
for thought...and developments in therapeutic jurisprudence can in turn be brought into
problem-solving courts – and into courts in general – to improve the therapeutic functioning of
the judiciary.\(^{153}\)

The promising feedback from New Zealand’s AODT Courts in terms of their therapeutic impact
and cultural competence indicates their value in providing therapeutic justice. They will be
helpful examples for the development of TJ in New Zealand and overseas. However, TJ
researchers need to remember that these courts have other aims that will not always be
consistent with TJ.

4. Developments in Therapeutic Jurisprudence

There have been several developments in TJ since its inception. David Wexler sets out five: TJ
in legal education, the international dimension of TJ, TJ’s interdisciplinary venture, the
expansion of TJ to cover the entire legal spectrum and TJ moving from theory to practice.\(^{154}\)
In my opinion, the largest development in TJ, which incorporates all five factors, is TJ moving
into mainstream judicial and legal practice.\(^{155}\)

a. TJ in Legal Education and International Aspects of TJ

As outlined above, from the early 1990s, the founders of TJ were advocating for TJ to be a
part of legal education.\(^{156}\) This has now happened. Examples include the course in TJ at the
University of Auckland.\(^{157}\) There is a TJ journal at the Arizona Summit Law School.\(^{158}\) Wexler

\(^{153}\) Winick and Wexler, above at n 7 at 105.
\(^{154}\) Wexler, above at n 1, at 17.
\(^{155}\) Pauline Spencer, ‘Home’ on Therapeutic Jurisprudence in the Mainstream (2016)
<https://mainstreamtj.wordpress.com/> , and Jones above at n 75.
\(^{156}\) Wexler, above at n 108.
\(^{158}\) David B Wexler and others “Guest editorial: current issues in therapeutic jurisprudence” (2016) 16:3 QUT
Law Review 1 at 2.
notes that “[t]hinking in terms of therapeutic outcomes makes you more open to what may be occurring elsewhere and more willing to incorporate different developments into your own legal practice or legal system”. There is now an international conference on therapeutic jurisprudence.

b. Interdisciplinary Aspects of TJ and moving from Theory to Practice

The development of TJ has improved relationships between “lawyers and social workers, psychologists, criminologists and psychiatrists and increasingly, anthropologists and public health professionals”. Examples of this include researchers from different disciplines researching together about the experiences of family violence survivors going through the Dependency Court, including a focus on TJ in these courts. In Aotearoa New Zealand, there has been interdisciplinary research on the AODT Courts. There has been work from non-legal authors in New Zealand’s Criminal Law Review setting out how TJ, restorative justice and other forms of emotionally intelligent justice are one of the four key components of the AODT Courts. These examples show how drawing from other disciplines can help enhance the law. Maze and Hannah bring their expertise to help legal practitioners understand how TJ can work to help survivors of family violence. Thom’s and Black’s work helps legal practitioners understand the treatment part of the AODTs, for example why sobriety is important. These are all examples of disciplines outside the law helping to improve the justice system.

c. Mainstreaming TJ in all areas of Legal Practice

TJ is present in mainstream legal practice in some places. The National Judicial College of Australia has included TJ in the curriculum for the education of newly appointed judges.

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159 Wexler, above at n 1, at 18-19.
161 Wexler, above at n 1, at 24.
163 Maze and Hannah, above at n 162.
164 For example, Katey Thom and Stella Black Ngā Whenu Raranga #1: The Therapeutic Framework of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Court (Report, University of Auckland, 2017) and Katey Thom & Stella Black, Ngā whenu raranga/Weaving strands: 3. The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court (Report, University of Auckland, 2017.) Available at Thom, above at n 121.
165 King, above at n 2 at 1125.
2000, there was a joint resolution at the Conference of Chief Justices and the Conference of State Court Administrators to endorse the use of problem-solving courts and TJ to improve judicial functioning.\textsuperscript{167} There is a website dedicated to mainstreaming TJ.\textsuperscript{168} TJ has evolved from being rooted in mental health law to being applied in the following areas of law:

1. Environmental law;
2. International law;
3. Emergency response legislation;
4. Multicultural context;
5. Child labour;
6. Juvenile justice;
7. School safety;
8. Family law;
9. Criminal law;
10. Legal practice and litigation generally;
11. Civil law;
12. Appeal courts;
13. Workers’ compensation;
14. Disciplinary processes;
15. Problem-solving judging and legal practice.\textsuperscript{169}

The spread of TJ shows that it can be practised in almost any area of law. Research into TJ expanding into a new area requires an examination of the ‘legal landscapes’, the legal rules and procedures in mainstream courts and then ascertaining how ‘TJ ready’ they are.\textsuperscript{170} Chapters 4, 5 and 6 assess the legal landscape in New Zealand’s FJS and Chapter 7 sets out how legal actors can use TJ to improve the therapeutic impact of the FJS.

5. Criticisms of Therapeutic Jurisprudence

There are several criticisms of TJ. The most common is that TJ can undermine the rights of those going through the justice system. Another is its vague normative aim. On a more
practical level, there are difficulties in applying TJ in the busyness of the court system, and
the limited impact that TJ currently has. Each weakness is discussed below.

a. TJ Ignores other Important Legal Principles

There is concern that TJ does not place enough emphasis on rights, both in the practice of law
and in research.171 This potential weakness has been addressed since TJ’s inception. Its
founders say that “therapeutic goals do not trump other important goals” and that
“respecting the role of counsel as advocate may have considerable therapeutic merit”.172 TJ
acknowledges judges should be empathetic and sensitive to the parties’ emotions, but they
should not fail to be impartial or independent.173

TJ can be in tension with the adversarial system which emphasises process.174 While process
is very important, the legal system “suffers from a culture of adversarial representation and
relationships, in which argument rises to the level of privileged status”.175 This privilege,
writes Schma, obscures values such as social harmony, outcome and ethic of care and TJ
requires that those values be considered and weighed alongside due process and rights.176 TJ
does not try to diminish rights or a due process, but adds other factors as being important in
the justice system.

b. TJ is vague

TJ is criticised for its broad or even vague conception of what is ‘therapeutic’.177 TJ focuses on
the law, legal rules, legal procedures and legal roles. Michael King calls this an ambitious
scope, the wide focus of which means there will be actions that are therapeutic in one
situation but not in another.178 King’s solution to this is for TJ researchers to decide on a
definition of ‘therapeutic’ in each project or situation.179 Wexler and Winick also contend that

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171 Schopp, above at n 6, at 700.
172 Bruce Winick and David Wexler “Drug Treatment Court: Therapeutic Jurisprudence Applied” 18 Touro L Rev
479 reprinted in Bruce Winick and David Wexler (eds) Judging in a Therapeutic Key (Carolina Academic Press,
173 At 130.
174 Schma, above at n 36, at 87.
175 At 87.
176 At 87.
177 King, above at n 2 at 1115-1116.
178 At 1115-1116.
179 At 1116.
researchers should agree on the therapeutic outcomes for each study, and weigh up potentially conflicting therapeutic consequences. 180

c. Limited Impact of TJ

One critique of TJ is that it does not actually improve the therapeutic impact of participating in the justice system. Maze and Hannah conducted research into the Dependency Court Intervention Program for Family Violence ("the DCIPVF") in the United States. The study involved women who had their children removed by the state because they failed to protect them from their violent partners. It looked at the interaction between these women and the legal actors involved in the Court (lawyers, judges, social workers, etc.). 181 The study found that while judges were employing TJ techniques and thought they were connecting with participants, the mothers felt the judges were not helping them at all. 182 Some participants reported that the judge, government agencies and caregivers did not listen to them or treat them with respect. Some said there was nothing a judge could do to get their attention. 183

The reason why participants did not feel legal actors were engaging with them when therapeutic measures were in place was outside the scope of the study. Maze and Hannah did comment that the use of TJ was undermined by the difficult choice most mothers in the study were facing: the choice between leaving their partner and losing care of their children. 184 Winick and Wexler and Flies-Away and Garrow also state that people in the justice system often face difficult situations which cannot be fixed solely by therapeutic measures. 185

Empirical research has also indicated that recent litigants are less likely to have confidence in the fairness of court procedures. 186 This literature indicates that the weakness is not with TJ, but that there are sometimes underlying issues which cannot be fixed simply by having a more

180 Wexler and Winick, above at n 29, at 304.
181 Maze and Hannah, above at n 162.
182 At 44.
183 At 38.
184 At 42.
therapeutic system. A possible way to mitigate this is to tailor the process to participants as much as possible to encourage client participation. 187

d. TJ is Paternalistic

TJ is sometimes considered paternalistic. 188 John Petrila says this is because TJ delegates decision making about what is therapeutic to psychologists and lawyers and gives those facing compulsory treatment less say in whether they should be committed. 189 TJ does not say who gets to decide what is therapeutic, 190 and moving away from a rights-based focus means that those subject to compulsory treatment will be less likely to determine whether they should be subject to compulsory treatment. 191 Petrila points to studies where those who have been subject to compulsory treatment faced stigma from the mental health workforce. 192 These factors, he claims, sit uncomfortably with Wexler’s and Winick’s statement that autonomy is a core component of TJ. Petrila says that TJ honours autonomy only until other principles triumph. 193

Ian Freckelton’s response to Petrila is that there should be empirical research focusing on the experience of mental health patients to avoid having the research focus too heavily on mental health and legal professionals. 194 Petrila’s comments highlight a risk that could occur in TJ research – a bias towards what legal and medical professionals believe is therapeutic. Paternalism, however, is inherent in compulsory treatment, and Petrila’s comments are indicative of the paternalism in mental health law, rather than in TJ. A lawyer practising TJ will let the client know about his or her options, including the decision not to oppose compulsory

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188 At 1116 and Dax J Miller “Applying therapeutic jurisprudence and preventive justice to the divorce process: enhancing the attorney-client relationship and the Florida practice and procedure from ‘Marital settlement agreement for dissolution of marriage settlement agreement for dissolution of marriage with dependent or minor child(ren)’” (2009) 10 Florida Coastal Law Review 263 at 276.

189 At 881.

190 At 882.

191 At 900-901.

192 At 906.

treatment, or to negotiate with the doctor for voluntary treatment under certain circumstances. A TJ lawyer will not avoid a hearing if that is what a client wants to do.

TJ strongly opposes coercion and paternalism.195 The founders of TJ state that the most effective way for a system to be therapeutic is to have a plan which engages the participants.196 These statements are consistent with Freckelton’s comment that there needs to be empirical research about those going through the justice sector, not just the professionals who are involved. 197

e. TJ Places too great a Burden on Legal Actors and the Legal System

A practical difficulty with TJ is the burden it places on both legal actors and legal systems. Some lawyers and judges have said they are not therapists and are unable to fulfil this role.198 Some judges in the problem-solving courts have found it difficult to act as social workers.199 King, Jones, and Freckelton have all said that TJ does not require lawyers and judges to become therapists, psychologists or social workers.200 TJ encourages lawyers and judges to be aware of the therapeutic consequences of legal rules and procedures201 and legal roles.202

In addition to the burden on legal actors, there is concern that therapeutic measures put strain on court resources. Flies-Away and Garrow note that problem-solving courts can be resource intensive because they bring people from many different disciplines together and require many rehabilitative resources.203 The final evaluation of New Zealand’s AODT Courts found that for the courts to be sustainable, there would either need to be a reduction in the resources they used, or an increase in funding.204 As TJ and the other vectors move into the mainstream there will need to be consideration of the practical impact for legal actors and facilities in their expanding roles. In chapter 7 there is a discussion about how using TJ

195 King, above at n 2, at 1116.
196 Wexler and Winick above at n 172, at 130.
197 Freckleton, above at n 194 at 586.
198 King, above at n 2, at 1118.
199 Maze and Hannah, above at n 162, at 39.
200 Freckleton, above at n 194, at 579, King, above at n 2 at 1118 and 1125 and Jones above at n 73, at 757.
201 King, above at n 2, at 1125.
202 Jones, above at n 73, at 757.
204 Smith, Chetwin and Marama, above at n 132, at 112.
effectively to engage other disciplines means that lawyers actually need to do less non-legal work.

f. **Summary: Criticisms of TJ**

Of the identified weaknesses, the assertions that TJ is paternalistic and ignores rights have been discounted by the founders of TJ.\(^{205}\) The view that TJ is vague is indicative of TJ having only a nominal normative commitment. It is a lens through which to view the law and law reform, rather than a movement which prescribes a set way of doing things.\(^{206}\) Because of this, the interpretation of what is ‘therapeutic’ is necessarily wide. While this can make TJ conceptually difficult, it is also a strength, because it allows TJ to be used in any area of law and from any viewpoint. The keys to TJ based research are to set a measure for what is therapeutic and for researchers to acknowledge that what is therapeutic in one situation may not be therapeutic in another.\(^{207}\) Examples for what is therapeutic could include whether a certain aim in the legislation is being met, or whether participants in a study believed that a particular therapeutic aim was being met.

In my view, the biggest concern with TJ is that some litigants do not feel that it is having a meaningful impact on their experience in the justice system. It is possible that there are some situations that litigants face that are so difficult, it will be unlikely that any improved behaviour by legal actors will significantly mitigate the anti-therapeutic impact. There could be further research into engaging participants in the justice system given that client factors are the most important in determining a successful outcome. It could also be helpful to compare how legal actors view the impact of TJ compared to how litigants view it. There could also be further work done on how to enable legal actors to practice therapeutic jurisprudence, and courts to provide sufficient services in a time-pressured environment. There could be further research into how legal systems could be restructured into allowing more time for therapeutic matters and more training for legal actors in this regard.

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\(^{205}\) See, for example Bruce Winick and David Wexler (eds) *Judging in a Therapeutic Key* above at n 7, at 7 and Winick, above at n 69, at 115-116 and 119.

\(^{206}\) Schopp, above at n 6, at 666.

\(^{207}\) King, above at n 2, at 1116 and Wexler and Winick, above at n 29, at 304.
6. Chapter Summary

Therapeutic jurisprudence recognises that the law is a social force with therapeutic implications for those who come into contact with it. It has developed from an area of study into mental health law into a theory which “has influenced thinking on an extremely wide range of areas”.\textsuperscript{208} It has evolved to cover many areas of law and has moved into the mainstream of some areas of legal education and legal practice.

Key aspects of TJ include it being multi-disciplinary and promoting self-determination. An important characteristic of TJ is that it is a lens through which to view the law. It is not detailed or prescriptive as to how the law should be more therapeutic. This has resulted in TJ being described as normatively neutral, although a more accurate description is that it is normatively neutral in terms of theory and practice, but has a nominal normative commitment to “wellbeing as a good that the law should advance”.\textsuperscript{209}

The TJ lens focuses on four key areas. These are the law itself, legal rules, legal procedures and legal roles. This thesis focuses on the legal roles (primarily lawyers and judges) in New Zealand’s FJS and the ways their roles could be more therapeutic.

There are several criticisms of TJ. There has been concern that its focus on the therapeutic draws away from upholding rights. TJ does not do this. It encourages consideration of the therapeutic impact of the law alongside rights and aims to draw the law away from a culture of adversarialism. Another criticism, that TJ is vague, is due largely to its wide scope and nominal normative commitment. TJ’s vagueness can make it difficult to find focus, especially given that its definition of ‘therapeutic’ is also very broad. This is remedied in part by acknowledging that TJ is a lens and by choosing a narrower definition of ‘therapeutic’ to apply to the particular area of research or practice. TJ has been criticised as being paternalistic. This is not the case, as it promotes self-determination.

There is concern that TJ places too great a burden on legal actors and, in particular, requires them to undertake work outside of their roles. A common example is lawyers needing to do social work. There is a need for training legal actors to build connections with other

\textsuperscript{208} Schopp, above at n 6, at 666.
\textsuperscript{209} At 666.
disciplines, so they do not have to undertake this work. An example of this is seen in Chapter 7.

The most valid criticism of TJ is its limited impact. Many litigants face very difficult situations, and simply changing processes or the way in which legal actors behave may not have a therapeutic impact. This raises the issue of whether it is worth allocating resources to TJ when it may not actually improve the therapeutic outcome for participants. Further research may be required into how litigants think the justice system could become therapeutic, rather than focusing on what legal actors think. There could also be research with litigants who have been through the legal system where there is a TJ approach and where there has not been a TJ approach to see if there is any difference into how those litigants perceive the effectiveness of TJ. As TJ has a minimal normative commitment, it is flexible as to what methods could be used. Given that the AODTs in New Zealand have had a therapeutic impact on many of their participants, it could be worth drawing on these when working to make the FJS more therapeutic. Some methods that could help the FJS be more therapeutic are discussed in Chapter 3.
Chapter 3

Therapeutic Jurisprudence with Other Vectors and in Family Law

1. Introduction

There has been a trend in the law “towards a common goal of...more comprehensive, humane, and psychologically human way[s] of handling legal matters”\(^ {210}\). These have been described as ‘vectors’. This chapter addresses how each of the vectors in the comprehensive law movement relate to TJ. It then discusses how TJ has been adapted within family law, how disciplines such as psychology and social work can be used in family law and difficulties in applying TJ to family law. Applying other vectors and disciplines outside the law is consistent with TJ, as TJ is a ‘common sense’ theory which “eschew[s] doctrinal niceties” to help improve the therapeutic impact of the law.\(^ {211}\)

2. Therapeutic Jurisprudence and Other Vectors

TJ is one of the major vectors of the comprehensive law movement.\(^ {212}\) Others include restorative justice, preventive law, collaborative law, problem-solving courts,\(^ {213}\) facilitative mediation, holistic law and preventive justice.\(^ {214}\) The vectors have at least two things in common which distinguish them from traditional approaches to law.\(^ {215}\)

- a desire to maximise the wellbeing of those involved in a legal matter; and
- a focus on more than just legal rights, responsibilities, obligations, entitlements and duties.

These vectors help to show how family law has become more therapeutic over time. They also relate to TJ in different ways.

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\(^{211}\) Wexler, above at n 20, at 272.

\(^{212}\) Daicoff, above at n 210, at 3.

\(^{213}\) I have already outlined the relationship between TJ and the problem-solving courts in the previous chapter so they will not be discussed here.

\(^{214}\) Daicoff, above at n 210, at 3.

\(^{215}\) At 5.
a. TJ and Restorative Justice

The most commonly cited definition of restorative justice (“RJ”) is that it is a “process whereby all 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”. Like TJ, RJ has expanded from initially being applied to one area of law (criminal) to covering a wider range of law. RJ is used in schools and businesses as well as in the justice system.

TJ and RJ are similar on a practical level. They both represent “a move to emotionally intelligent justice”. Emotionally intelligent justice is a move to being aware of the role of emotions in legal problems, resolution of problems and legal outcomes. TJ and RJ have the potential to “resolve many kinds of conflict and reduce inequities in the legal system”. The voice of participants in the justice system is important in TJ and RJ as both promote self-determination.

While TJ and RJ are similar in their goal of providing more emotionally intelligent justice, the means by which they do so are different. RJ aims to give victims and offenders a more important role in the justice system. TJ has a less prescriptive approach. TJ’s aims include seeking a “more responsive and social science informed judiciary.” It also uses therapy as an alternative framework to criticise and modify the traditional legal model. TJ improves advocacy and court processes by applying therapeutic principles. Using therapeutic principles to criticise, modify and improve the law allows TJ to operate as a lens through which to view the law and to guide law reform. In contrast, RJ provides for reform to occur through one specific principle: increased participation by those involved in the justice system.

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218 Bartells and Richards, above at n 80, at 31 and King, above at n 2, at 1096.
219 King, above at n 2, at 1097.
220 Scheff, above at n 44, at 231.
221 Bartells and Richards above at n 80, at 31.
222 King, above at n 2, at 1115.
223 Scheff, above at n 44, at 231.
225 Scheff, above at n 44, at 232.
226 King, above at n 2, at 1115.
b. TJ and Preventive Law

Preventive law is the idea that lawyers help clients to avoid future legal issues; it therefore focuses on lawyers as facilitators.\textsuperscript{227} Preventive law began in California in the 1950s, primarily to prevent litigation, with legal check-ups where lawyers would meet with their clients and take steps to avoid future issues arising.\textsuperscript{228} It began largely in the fields of business planning and estate management.\textsuperscript{229}

In the 1990s there was a move to combine TJ with preventive law.\textsuperscript{230} Preventive law’s legal check-up could be used in a therapeutic way by lawyers looking at their clients’ needs and emotional wellbeing.\textsuperscript{231} Winick comments on how TJ can work with preventive law: \textsuperscript{232}

Therapeutic jurisprudence can work in tandem with the preventative model to further a shared set of lawyering goals. It calls for an attorney-client relationship involving increased psychological sensitivity, an awareness of basic psychological principles and techniques, enhanced interpersonal and interviewing skills, and approaches for dealing with the emotional issues that are likely to arise just before or during a legal encounter.

When TJ and preventive law are used together, two things happen: \textsuperscript{233} TJ “legitimizes preventive law by giving it an altruistic focus”, and preventive law provides TJ with a framework within which it can operate. Preventive law is similar to preventive medicine in that just as doctors can have a good bedside manner, preventive law applied in a therapeutic way encourages lawyers to have a good “desk side manner”.\textsuperscript{234}

Preventive law using a TJ framework can assist lawyers in being aware of psycho-legal hotspots: legal issues which can turn into psychological issues.\textsuperscript{235} This could be as simple as a lawyer being aware that, for some clients, coming to the initial lawyer’s appointment can cause stress and make a client defensive or upset. Lawyers applying preventive law in a

\textsuperscript{229} Winick, above at 227, at 189.
\textsuperscript{230} At 189.
\textsuperscript{232} Winick, above at n 228, at 600.
\textsuperscript{233} Miller, above at n 188, at 274-275.
\textsuperscript{234} Winick, above at n 228, at 600.
\textsuperscript{235} Miller above at n 188, at 275, and Winick above at n 228, at 601.
therapeutic way will be aware of this psycho-legal hotspot and, using basic psychology principles, be able to manage the hotspot so it does not escalate. 236

Lawyers can also use “the rewind technique” when applying therapeutic principles to preventive law. 237 This involves looking back to when the problem occurred and considering what could have been done differently from a legal perspective”. 238 A lawyer practising TJ will also assess what could have been done differently from a therapeutic perspective. Examples include a lawyer improving a reporting letter to enhance clarity and remove or explain legal jargon, and a lawyer reflecting on whether the client was told about appropriate support agencies, such as counsellors or a parenting course.

Traditionally, preventive law focused on avoiding litigation and so it has been viewed conceptually as not sitting easily with litigation. 239 Winick provides ways in which preventive law can be applied to litigation and help to prevent post-litigation problems. 240 He gives the example of a criminal lawyer advising a client to engage in rehabilitation so the client is less likely to offend in the future and, if completed prior to sentencing, this can then be used in the plea in mitigation. 241

Preventive law can be used in a therapeutic way in the litigation process itself. This includes lawyers: promoting settlement, making arrangements for contingencies in family law litigation, and conducting themselves during trial to minimise emotional damage so parties are more likely to cooperate in the future. 242 Applying preventive law in a therapeutic way can help change cultural positions that regard litigation as superior to counselling and ADR. 243

c. TJ and Procedural Justice

Procedural justice developed from empirical research by John Thibaut, a social psychologist and Laurens Walker, a legal academic. 244 Their research found disputants and uninvolved

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236 Winick above at n 228, at 601 – 602.
237 At 601 – 602.
238 At 601 – 602.
239 Winick, above at n 227, at 191.
240 At 191.
241 At 191.
242 At 192-195.
243 At 202.
third parties in conflict resolution processes were often as concerned with the fairness of the process, as with the fairness of the outcome.\textsuperscript{245} Research into procedural justice has found that if people had the opportunity to present information they believe is relevant to a decision, their perception of the fairness of the process is enhanced.\textsuperscript{246} Disputants will also be more likely to view the process as fair if they are treated with dignity and respect and have been listened to.\textsuperscript{247}

TJ uses the principles of procedural justice so that when they are applied, they can produce therapeutic consequences.\textsuperscript{248} In a survey of perceived fairness of the justice system in the United States, the perception of fairness was the biggest determining factor of public trust of judges’ motives and character.\textsuperscript{249} Recent litigants generally had lower levels of trust in the justice system than the general public, although recent litigants in the problem-solving courts had higher levels of trust in the justice system than those who went through the mainstream courts.\textsuperscript{250} Participants said that procedural fairness involved neutrality, respect, participation and trustworthiness.\textsuperscript{251} This research has relevance to TJ because it helps define what constitutes the therapeutic aim of procedural fairness.

Procedural justice, RJ and TJ are all linked because they value participation by stakeholders.\textsuperscript{252} Procedural justice, like RJ, gives a prescriptive way of achieving an outcome (avoiding litigation or preventing problems during or after litigation). The relationship between TJ and procedural justice is a good example of how TJ can be used as a lens to look at another vector and then use the other vector as a framework to promote therapeutic outcomes.

d. TJ and Collaborative Law

Collaborative law is a form of ADR where parties and lawyers contract to resolve matters by agreement. If court proceedings become necessary, the lawyers who are parties to the


\textsuperscript{246} For a comprehensive discussion of several studies about procedural justice up to 1990, see E Lind, P Earley and R Kanfer “Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments” (1990) 59(5) Journal of Personality and Social Psychology 952 at 952-954.

\textsuperscript{247} Winick and Wexler, above at n 7, at 129.

\textsuperscript{248} At 129.

\textsuperscript{249} Warren, above at n 186, at 132.

\textsuperscript{250} At 135-136.

\textsuperscript{251} At 133.

\textsuperscript{252} King, above at n 2 at 1114.
contract will not act as counsel in litigation. In collaborative law, there is often a panel of experts assisting the parties which includes a financial expert, a mental health professional, a coach and sometimes a children’s therapist. Sometimes the process only involves clients and lawyers.

Traditionally collaborative law has been used in relationship property (divorce) law. It is present in wider family law and it has scope to apply to other areas of law. An important aspect of collaborative law is that it promotes self-determination by clients. This is because it encourages parties to reach agreement rather than engage in litigation and have a court make a decision for them.

Collaborative law is consistent with TJ. It trains lawyers to be effective conflict managers who provide an emotionally healthy outcome for their clients. This benefits both the clients and the lawyers. Focusing on agreement provides a more therapeutic outcome for participants. Daicoff links collaborative law to procedural justice because parties participate more and have more input into the ultimate outcome, so they are more likely to view it as fair and stick to the agreement reached.

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255 Peeples and Sarratt above at n 253, at 139-140.


257 Peeples and Sarratt above at n 253, at 142.

258 At 140.


260 Cox above at n 259, at 69.

261 Daicoff above at n 259, at 133.

262 At 131.
e. TJ and Holistic Law

Holistic law encourages lawyers to focus on all aspects of the client, not just their legal rights, and to use morals in making decisions. It expressly seeks to promote holistic legal principles such as reconciliation, forgiveness, compassion and healing and to promote peace building and peaceful advocacy, and to respect each individual’s dignity and integrity. Beyond this, the movement is difficult to define because it encompasses a group of lawyers in the United States who have a diverse range of practices. TJ is similar to holistic law in that both vectors encourage therapeutic outcomes for participants in legal processes, although holistic law appears to focus more on how legal actors treat participants than on improving legal systems and rules.

f. TJ and Mediation

Mediation is an attempt to resolve conflict by using a mediator to guide a discussion between parties in a dispute, sometimes with counsel. There are different types of mediation, but analysis of these falls outside the scope of this thesis. For lawyers practising TJ, the type of mediation is less important than that legal actors aim for the mediation to have a therapeutic effect.

Mediation and TJ

Mediation and TJ are similar in that they both developed as a reaction inter alia to dissatisfaction with the legal system and to remedy some of the antitherapeutic effects of the adversarial system. They can also both be “understood as a reaction to the sceptical attitude towards law’s rationality, neutrality, and credibility”. Mediation has been described as “conflict resolution in a ‘therapeutic key’”. It promotes self-determination and recognises that if mediation works well people can leave feeling like they have achieved what
they needed rather than having a third party impose a decision on them.\textsuperscript{270} Both TJ and mediation rely on procedural justice.\textsuperscript{271} Mediation promotes self-determination in that parties have more opportunity to have their voices heard than in litigation and encourages disputants to come up with their own solutions\textsuperscript{272} rather than parties having decisions imposed upon them.

There have been concerns that mediation can be antitherapeutic. This can occur when pressure tactics are used if there is too much focus on resolution of the dispute.\textsuperscript{273} Pressure tactics are anti-therapeutic as they dismiss autonomy, agreement may be less likely to be reached, the agreement may be low quality as it does not meet the parties’ needs, and it may affect the parties’ relationship negatively.\textsuperscript{274} There is concern that mediation used as “settlement-driven bargaining based on power relations” reinforces inequality between the parties.\textsuperscript{275}

All forms of mediation place an emphasis on process, attempt to address underlying hidden layers, acknowledge emotion and promote constructive and positive intervention.\textsuperscript{276} All of these principles can be therapeutic, as they can be used to promote the participants’ wellbeing. It is the roles legal actors play in mediation, rather than the type of mediation used that has a larger effect on whether the mediation will have a therapeutic effect.\textsuperscript{277} Just as TJ has been described as legitimising preventive law by giving it an altruistic focus,\textsuperscript{278} it can be used as a lens for those practising mediation to stay focused on helping the mediation to have a therapeutic effect. Mediation will always have some focus on reaching an agreement when it is part of the formal dispute resolution process in the legal system. However, mediators and lawyers need to be conscious of the downsides of pressure tactics and the importance of promoting autonomy and preserving relationships. This is especially true when mediating

\textsuperscript{270} At 160-161.
\textsuperscript{271} Waldman above at n 267, at 161 and Michal Alberstein “The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations” (2009) 11 Cardozo Journal of Conflict Resolution 1 at 19.
\textsuperscript{273} Shapira, above at n 266, at 268.
\textsuperscript{274} At 263.
\textsuperscript{275} Alberstein above at n 271, at 2.
\textsuperscript{276} At 19.
\textsuperscript{277} Shapira above at n 266, at 277.
\textsuperscript{278} Miller above at n 188, at 274-275.
disputes between parents who will need to communicate with each other about their children for the rest of their lives.

g. **Overview of TJ and Other Vectors**

One conception of TJ is that it is a way to look at the law, rather than a theory which provides a normative way of how the law should operate. The other vectors provide a normative way of how some areas of the law should operate. In writing about the different vectors, Winick notes that:

> With its psychological orientation and focus on emotional wellbeing, therapeutic jurisprudence is a common thread running through these various movements. Therapeutic jurisprudence brings a more theoretical and interdisciplinary perspective to lawyering than these other models. As a result, one can view therapeutic jurisprudence as an organizing framework for these emerging movements.

An alternative way of looking at the link between TJ and the other vectors is that TJ is a theory with only a minimal normative commitment, to improve the therapeutic impact of the law. Because of this, TJ needs a framework, or a set procedure to apply its aim of improving the therapeutic effect of the law. This idea is outlined by Miller. Using that approach, a lawyer practising with TJ could help make legal processes more effective for his or her client by applying the other vectors. For example, using procedural law and doing legal check-ups, or using procedural justice to ensure the process is fair and the client has opportunities to have as much input as practicable. Whichever viewpoint is taken, the relationship between TJ and the other vectors is that TJ is a wider, more flexible, approach that offers a way to view the law, rather than providing a normative approach for reform.

3. **Therapeutic Jurisprudence in Family Law**

How TJ has developed and influenced family law is now addressed. Research findings are also included where studies have aimed for family law to have a more therapeutic effect, even though the term “therapeutic jurisprudence” has not been used. In family law, the culture of

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280 Winick, above at n 228, at 597-598.

281 Miller above at n 188, at 264 (footnote omitted).
critique and an adversarial approach can harm relationships that need to be preserved for the sake of third parties – the children. Therefore, TJ and the other vectors are particularly helpful in family law.

a. TJ improving the Therapeutic Aspect of Family Law

TJ has been labelled the foundation for no fault divorce and having counselling in the divorce process.282 Despite this there have been calls to make family law more therapeutic283 and to apply TJ to family law.284 Legal roles play an important part in making family law more therapeutic.

TJ can operate within a set of rules that are inherently anti-therapeutic. An example is the rule that allows the state to remove children from their parents. If social workers take a preventive approach and work with parents in need, using non-voluntary out-of-home placements as a last resort, then the law can have a therapeutic effect.285 Recommended ways to apply preventive law to avoid the need to remove children from their parents include strengthening wider families, focusing on parents’ strengths rather than weaknesses and reintegrative shaming (shaming the behaviour, but uplifting the person).286

It has been suggested that lawyers can use a mix of preventive law and TJ to improve disputes involving children. A family lawyer operating under this framework will know that the three factors that most predict a negative consequence of divorce are instability, interparental conflict, and an absence of effective parenting.287 In order to improve the therapeutic outcome for the adult client and the children, the lawyer will use preventive law to help plan matters so that the client is prepared to avoid financial decline; keep the children with friends and in the same neighbourhood; plan to avoid conflict; remind the client to stay involved with

283 At 800 – 801.
285 Gal and Schilli-Jerichower above at n 257, at 29.
286 At 32-33, 38, 44 and 45.
the child; and plan ways for the parents to communicate guardianship decisions.\textsuperscript{288} This lawyer will also inform the client of the negative impacts of conflict, instability and absence of effective parenting.\textsuperscript{289} Other actions a TJ lawyer might take include giving the client a realistic view of the process and emphasising that when parties agree in mediation and there is frequent contact with the parent who is not the primary caregiver, there is a higher child support compliance.\textsuperscript{290}

b. Other Vectors improving the Therapeutic Aspect of Family Law

Family lawyers have been recommended to incorporate knowledge from the sciences, to apply preventive law and to use ADR.\textsuperscript{291} This is an example of using TJ as a lens and using other vectors as a way of meeting TJ’s aims. These are shown in a practical case example in Chapter 7.

Collaborative law has reduced litigation in some instances. In Medicine Hat, Alberta Canada, all but one of the 17 family lawyers undertook collaborative training. After a year, the Family Court docket had “dwindled to almost nothing” and the Family Court judge was assigned to another court.\textsuperscript{292} It has been found that parents who have a more civil divorce, deciding on the issues and making decisions for themselves are less likely to inflict harm on their children and deal with each other better in future.\textsuperscript{293}

Neuro-jurisprudence, a vector which focuses on understanding the emotions behind people’s actions, has been suggested as a way to make the family legal system more therapeutic.\textsuperscript{294} In family law, for example “[t]he threat of loss of one’s children is probably the biggest threat to the [person’s] sense of survival, as the children may often be a critical part of the parent’s self-identity”.\textsuperscript{295} Divorce can feel like a threat to social and economic survival and can

\begin{itemize}
  \item \textsuperscript{288} Maxwell above at n 287, at 157-158.
  \item \textsuperscript{289} At 156-157.
  \item \textsuperscript{290} At 156-157.
  \item \textsuperscript{291} Miller, above at n 188, at 265-266.
  \item \textsuperscript{293} Freeman above at n 255, at 34.
  \item \textsuperscript{294} Janet Weinstein and Ricardo Weinstein “I Know Better Than That: the Role of Emotions and the Brain in Family Law Disputes” (2005) 7(2) Journal of Law & Family Studies 351 at 353.
  \item \textsuperscript{295} Weinstein and Weinstein, above at n 294, at 356.
\end{itemize}
generate thoughts of not being good enough. These emotions lessen over time and more rational thinking begins to occur.

Some parents struggle to muster the emotional energy to cooperate with their lawyers. Other parties, feeling their survival is threatened, will try to villainise the other party in order to win. These emotions and actions can be exacerbated by a system, which focuses on winning and losing. While legal rules do not mention emotion, emotions are relevant to those going through the divorce. One United States study of divorce lawyers found that 22% to 40% of time with clients was spent discussing the client’s emotional or psychological problems.

The legal system expects parties to react objectively and rationally. Some suggestions to help parties move through the process without worsening their emotional states include legal actors creating a culture where conflict is seen as outside the norm; lawyers not getting drawn emotionally into the fray; collaborative law; lawyers being trained about child development and basic counselling techniques; and parents having consequences for inappropriate behaviour.

A related jurisprudence is emotional law, which acknowledges that relationships go through cycles of love, hate, guilt and reparation. Because of these cycles, family law issues cannot be treated the same as a breach of contract or tort, where there is a focus on an action and remedy, with the parties having no future relationship. Acknowledgment of the cycle of emotions is necessary for parties to deal with each other in future if they have children. Currently the family law system looks at the ‘breach’ and the ‘remedy’ (i.e. the separation and the childcare arrangements) without giving the parties time to cycle through the emotions they feel. The adversarial family law system has been described as the love-hate model,

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296 At 371.
297 At 366.
298 At 371.
299 At 376.
300 At 376.
301 At 382.
302 Weinstein and Weinstein, above at n 294, at 374-375.
303 At 389-400.
305 Huntington, above at n 304, at 1250.
306 At 1248.
where the parties were once in a relationship, but no longer are. Emotional law scholars suggest a reparative model which addresses the more complex emotions in family law and the fact that the parties will have an ongoing relationship.

Emotional law also points to how legal actors can improve the experience of the FJS for clients. It suggests that judges acknowledge competing viewpoints and that lawyers move their clients away from hate and towards reparation. However, advising clients of the negative repercussions of approaches based on hate when they want to take an adversarial approach puts lawyers in a difficult position because they must follow their clients’ instructions. It has been suggested that, to enable a reparative model, the code of ethics for family lawyers may need to be reworked. Emotional law is similar to TJ in that it addresses the underlying issues parties face and looks at improving legal roles and rules to improve the experience for litigants.

4. Incorporating Non-legal Disciplines into Family Law

As discussed in Chapter 2, an important part of TJ is that it encourages legal actors to look at disciplines outside the law to improve the therapeutic impact of the law. Therefore, it is important that family lawyers who use TJ consider how other disciplines have aimed to improve family law. Psychology and social work especially are useful for their empirical studies.

a. Attachment Theory

It is important to consider attachment theory when advising clients on post-separation parenting arrangements post separation. This is especially so when family lawyers practise in jurisdictions, like Aotearoa New Zealand, where the determining factor in custody cases is the best interests of the child. There have been suggestions that the ‘best interests of the child’ is often based on legal actors’ own presumptions and common sense rather than empirical...
research.\textsuperscript{312} Awareness of attachment theory can, however, help base a ‘best interests’ decision on a firmer footing.

Using attachment theory is consistent with TJ because it is an example of an interdisciplinary approach and it also gives lawyers insight into the potential psychological impact of care arrangements on children. Legal actors who are aware of the importance of attachment theory might place more importance on children seeing their attachment figures, given the distress caused when children are away from their attachment figures. This should help reduce the anti-therapeutic impact of parental separation on children.

Attachment is based on the idea that children need “warm, supportive, and intimate” relationships with their primary caregivers in addition to having their physical needs met.\textsuperscript{313} There are four types of attachment: secure attachment and three types of insecure attachment (anxious-ambivalent attachment, anxious-avoidant attachment and disorganised attachment). These categories, other than disorganised attachment were developed by Mary Ainsworth, who observed many families and caregiver-child interactions.\textsuperscript{314}

Secure attachments develop from responsive parenting styles where caregivers provide emotional communication and responding to the children’s signals as well as giving the children space.\textsuperscript{315} Anxious-avoidant attachment can occur when caregivers give physical care and play, but in response to their own needs, not the child’s.\textsuperscript{316} Ambivalent attachments can develop when caregivers are disengaged.\textsuperscript{317} Children who have disorganised attachment are most commonly victims of maltreatment and have caregivers who cause them fear.\textsuperscript{318}


\textsuperscript{314} For a discussion of Ainsworth’s worth prior to the Strange Situation see Inge Breherton “The Origins of Attachment Theory: John Bowlby and Mary Ainsworth” (1992) 28 Developmental Psychology 759 at 771-776.

\textsuperscript{315} Willemsen and Marcel, above at n 313, at 452.

\textsuperscript{316} At 452.

\textsuperscript{317} At 452.

Children’s attachment with their caregivers is the “most reliable correlate of individual differences in psychological, social and cognitive adjustment”. Children who are securely attached are better able to have close relationships with friends. Theoretically they have developed a mental image of themselves as cared about by the person they are attached to. Securely attached children tend to have better social skills as toddlers and secure attachment is linked to better school adjustment and reading than insecurely attached children. Insecurely attached teenagers tend to be less resilient, find it more difficult to regulate their emotions, and have fewer social skills than their securely attached peers.

There has been some concern that attachment theory has been given too much importance in child development. Temperament and life events like parents divorcing can impact development. The methodology of assessing attachment has also been criticised. The Strange Situation only applies to children aged between 12 to 20 months and is a more accurate assessor of attachment for mothers than for fathers. Attachment Q Sort is a longer test which lasts two hours and can be used for children aged between one and five. No assessment should be viewed as conclusive evidence of a lack of attachment. While a thorough assessment may be done, “even the best can be distorted when administered at the time of divorce. Preoccupied, angry, and worried divorcing parents make for shaky attachment figures, though not necessarily for long.”

One way legal actors can promote a therapeutic outcome is to enable parents to improve their attachment with their children. If legal actors are aware of parenting courses and other social services, they can refer these to their clients. It is also helpful for legal actors to run their cases in a way that will promote children’s attachment to their parents where possible. This could include not using language that will inflame the situation, and encouraging the other party’s contact with the child, provided it is safe.

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Lamb, above at n 312, at 173.  
Willemsen and Marcel, above at n 313, at 441.  
At 453.  
At 456.  
At 461.  
Pamela S. Ludolph; Milfred D. Dale “Attachment in Child Custody: An Additive Factor, not a Determinative One” (2012) 46 Fam L Q 1 at 9.  
At 12-13.  
At 16.  
At 16.
It is important for legal actors to be aware that attachment theory is evolving and that there can be flaws and limitations in the methodology. When a child’s attachment is in issue, legal actors should ask questions to ensure the methodology was thorough and included a range of sources such as the past documentation and observation, and includes situations where the child faces mild to moderate stress.\textsuperscript{328} However, attachment is only one factor in determining what is in the child’s best interests. Others include the nature of the interparental relationship and any violence, abuse or high conflict.

\textbf{b. The Impact of Violence}

Factors such as violence and substance abuse can mean children may not benefit from regular and extended contact with a parent.\textsuperscript{329} Intimate partner violence (“IPV”) should be taken into account when addressing parental competence, as it has negative impacts on children’s cognitive, emotional, and behavioural development.\textsuperscript{330} Children who witness IPV have lower IQs, higher emotional instability and reactivity, are more likely to perpetuate violence, are at an increased risk of ADHD and behavioural difficulties.\textsuperscript{331} Victims of IPV are prone to depression, PTSD, suicidal ideation, increased hostility, and disengagement; they also have a diminished capacity to respond sensitively to children.\textsuperscript{332} There is a high correlation between IPV and child maltreatment.\textsuperscript{333} It is anti-therapeutic for children to be exposed to violence so legal actors practising TJ should be aware of this and of the conflict between promoting children’s attachments with their primary caregivers and protecting them children from violence.

There are various classifications of violence, although this is an evolving area. One classification divides violence into situational violence and battering.\textsuperscript{334} Situational violence occurs when arguments get out of control because of poor conflict management, rather than

\begin{thebibliography}{9}
\bibitem{328} Ludolph and Dale, above at n 324, 1 at 11.
\bibitem{331} At 347-349.
\bibitem{332} At 351.
\bibitem{333} At 352.
\bibitem{334} Lamb, above at n 312, at 185 and Rossi, Munroe and Rudd, above at n 330, at 353.
\end{thebibliography}
one partner using violence to control the other. Battering occurs when violence is used as a form of control. Other subtypes in this classification include violent resistance, a response to violent behaviour from a partner, and mutual violent control, where there are two violent partners.335 This classification is gendered and suggests that situational violence is split between genders and battering is usually perpetrated by men.336 It focuses mostly on couples who are together rather than separated.337

A more recent approach moves away from gender classifications, is interdisciplinary and also addresses separation.338 The focus on separation is important because separated women are 30 times more likely to be victims of IPV than married women.339 The classification involves; situational; controlling; violent resistance; mutual violent control; and also includes a new category of separation-instigated violence.340 Separation-instigated violence involves unexpected violent behaviour after separation when there has been little or no violence beforehand. There is little empirical research on this last classification, but it is important to be aware of in custody disputes.341 This is because different types of violence may have different levels of risk and may require different steps for the violent party to take before the child(ren) are safe having unsupervised contact with that parent.

Aotearoa New Zealand’s Family Violence Death Review Committee does not advocate for a difference between situational and coercive controlling IPV. It states that IPV needs to be seen as a form of entrapment that is analysed across all different types of violence and across different intimate partner relationships.342 It notes that Aotearoa New Zealand’s systems that work with IPV tend to “fragment

- long patterns of harm into individual incidents
- patterns of abuse into different ‘types’ of abuse
- families into individual clients
- the complexities of people’s lives into separate issues to be dealt with separately”.343

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335 Rossi, Munroe and Rudd above at n 330, at 353.
336 Lamb, above at n 312 at 185.
337 Rossi, Munroe and Rudd above at n 330, at 353.
338 At 353.
339 At 357.
340 At 353.
341 At 354.
342 Family Violence Death Committee Fifth Report January 2014 to December 2015 (February 2016) at 36-37.
343 At 111.
It points out that IPV and child abuse and neglect (CAN) are intertwined, and that exposing a child to IPV is a form of CAN. It raises concerns that the impact of IPV and CAN can be overlooked in Family Court matters where the focus turns to the user of violence doing parenting courses, or getting help for substance abuse and having unsupervised contact with the children. It says that there needs to be a period of safety before a change in behaviour by the person using violence is accepted. The Committee calls for a more integrated system which focuses on IPV as a form of entrapment, entangled with CAN. It suggests that there should be a system which is integrated between organisations and focuses on prevention, restoration and safety.

There is a lack of empirical evidence analysing the best care arrangements in light of the type of violence. The subtypes should be used with caution because people may not fit squarely into one subtype. There could also be further subtypes involving substance abuse and mental health related violence. Despite this, there are recommendations that legal actors screen for all types of violence (including physical, psychological, sexual and coercive) and ask questions about timeframe and severity. Active involvement with both parents may not be recommended for a child when there is a history of IPV. However, research has indicated that co-parenting following IPV can work when the violence is low-level separation-instigated violence, the violence has ceased and there is evidence of successful co-parenting.

There is some concern that allegations of violence can be used as a tactic in day-to-day care disputes. It is important for legal actors to get supporting evidence when violence is raised as an issue. It is also useful for legal actors to be aware of these theories if the issue of violence impacting a parent’s contact comes into issue in any specialist reports. While legal

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344 At 13.
345 At 56.
346 At 54.
347 At 37.
348 At 116.
349 Rossi, Munroe and Rudd, above at n 330, at 354.
350 At 354.
351 At 355-356.
352 At 359 (footnote omitted).
353 Rossi, Munroe and Rudd, above at n 330, at 359 (footnote omitted).
354 Lamb, above at n 312, at 185.
355 Rossi, Munroe and Rudd, above at n 330, at 359.
actors are not psychologists, if they are aware of these theories and that different types of violence impact children differently, they can tailor their roles to help litigants. Examples include being able to tailor briefs for specialist reports, being aware of developments in the psychological field, and challenging expert witnesses.

c. The Impact of Conflict

Parental conflict is one of biggest predictors of children suffering negatively from separation. The negative impacts are such that some psychologists have indicated that in high-conflict situations, as well as in violent situations as discussed above, it may not be healthy for a child to have involvement with one or both parents. Legal actors using TJ should be aware of the negative impact of conflict and look for ways to reduce it where possible.

In 2001, the interdisciplinary Wingspread Conference addressed high-conflict cases. The conference called for all participants (including lawyers, judges and mental health professionals) to acknowledge they had a role in reducing conflict. Recommendations included: research into and training in child abuse and family violence; referrals to other disciplines; using ADR; minimising conflict in the way the role is conducted; and identifying high-conflict cases.

Knowledge about the best practices for helping clients involved in high-conflict parenting cases helps to ensure that legal actors do not exacerbate conflict. If legal actors are aware of the impact of high levels of parental conflict can on children, they can use this knowledge to encourage clients to be conciliatory with their ex-partners.

d. Knowledge of Trauma

Trauma is “the harm produced by a traumatic experience” and can involve beliefs about safety and trust being “shattered”. One effect of trauma is avoidance of reliving or talking

356 Maxwell above at n 287, at 157.
357 Fabricius and others, above at n 329, at 89.
359 At 595-596.
about the traumatic experience. Common causes of annoyance for lawyers are clients missing appointments and clients failing to remember important details. It is important that these be seen as possible side effects of trauma, and that lawyers find ways to manage this and that law students are trained about the impact of trauma. Another symptom of trauma is a person becoming emotional. Some ways to help manage these symptoms include:

- keeping meetings shorter;
- allowing the client to have some control over when to talk about traumatic matters;
- having techniques for keeping the client on topic;
- having trust building techniques;
- assisting clients with remembering appointment times;
- asking the client to write matters down if that is easier;
- having a short break during the interview;
- moving to less sensitive topics when the client is on the verge of tears; and
- defining the lawyer’s role early on so the lawyer is not dragged into the role of therapist or social worker.

These techniques will help to build stronger cases as they will help clients to communicate better. They will help to minimise the antitherapeutic effect of the process, as a client will be able to engage with his or her lawyer in a safer way. This approach is an example of TJ in action as it is seeing psychological impact of the process on the client and helping to reduce anti-therapeutic effects the process may create.

**Knowledge about Vicarious Trauma assisting Lawyers**

Family lawyers deal with many emotional cases in their careers, which can lead to high rates of vicarious trauma. If lawyers practise TJ, they will be aware of the antitherapeutic aspect that practising law can have on them. They will also be aware of vicarious trauma and secondary traumatic stress (“STS”).

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362 Jenkins, above at n 361, at 392.
363 Parker, above at n 360, at 178.
364 At 171.
365 At 188.
Vicarious trauma develops from relationships with people going through trauma themselves. It can occur from brief interactions with traumatised people. It is distinguishable from burnout, which develops slowly from an accumulation of stress and intensive interaction with clients. STS is similar to post traumatic stress disorder (“PTSD”) in its symptoms, although it occurs through another person’s traumatic experience. Symptoms of vicarious trauma and STS include disruption in factors like trust, self-esteem, intimacy, safety, and independence, and difficulty functioning in daily life beyond the job. Symptoms of burnout include fatigue, poor sleep, headaches, anxiety and depression, aggression, cynicism and substance abuse, which can lead to poor work performance. High risks factors for STS and vicarious trauma include event related matters such as exposure to distressing situations, length of service in the role where there is secondary stress, and working with child victims. Circumstances which increase the risk of professionals experiencing STS include a high case load, prior history of trauma and previous psychological disorders.

**Family Lawyers and Vicarious Trauma**

Lawyers practising in family and criminal law are at risk of vicarious trauma. Levin and Greisberg conducted a study comparing vicarious trauma in family and criminal lawyers with other professionals, such as those providing medical treatment and social services to people with mental illnesses. The participants had no difference in history of childhood trauma or of treatment for emotional trauma.

The study found that the lawyers had a higher caseload of traumatised clients and had more symptoms of vicarious trauma and burnout compared with other professions. Lawyers were higher on every subscale for secondary trauma. Lawyers also had higher levels of avoiding reminders of the material, diminished pleasure in activities, sleep, irritability and poor

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368 At 246.
369 At 246.
370 At 246.
371 At 248.
372 At 247.
373 At 247.
374 At 247.
375 At 249.
376 At 250.
concentration. Qualitative responses included being over extended and doing things outside their role such as helping with housing, and having difficulty with passive clients who did not engage with the process. Several respondents said that the systems they were involved in were “a significant contributor to their distress” such as “high caseloads, hostile courts and law enforcement personnel ...[and] indifferent administration and supervisors”.

**Vicarious Trauma Manifesting in Incompetence**

Vicarious trauma can manifest in incompetence in legal actors through outbursts of anger and irritability. A survey of divorce lawyers in New Jersey found that the most common difficulty in practice was undue competitiveness from other lawyers. There has been suggestion that if practitioners were aware of vicarious trauma, and there were measures in place to help with this, there could be a reduction in incompetence driven by vicarious trauma.

**Reducing the Risk of Vicarious Trauma**

After observing law students volunteering in family law cases dealing with traumatised clients, Lynne Jenkins made the following recommendations:

- recognise vicarious trauma exists and understand the symptoms;
- be aware of risk factors for developing vicarious trauma;
- have a manageable workload;
- ensure there is work/life balance and self-care;
- set boundaries with clients;
- work proactively with regular meal breaks, gaps between difficult clients, and with sufficient supervision.

Family lawyers struggling with vicarious trauma could transfer to practising collaborative law. As there is a heightened risk of vicarious trauma when workplaces do not recognise it, managers should be trained in recognising vicarious trauma and ensuring there are appropriate supports in place for staff, especially those who display risk factors.

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377 At 250.
378 At 251.
379 At 251.
380 See Jenkins, above at n 361, at 387 and Brobst above at n 366 at 3-4.
381 See Maxwell above at n 287, at 163.
382 Brobst above at n 366, at 33.
383 See Jenkins above at n 361, at 398-400.
384 See Brobst, above at n 366, at 33.
385 See Parker, above at n 360, at 180.
family law should stay up to date with best practices in mental health and especially in dealing with secondary trauma.\textsuperscript{386}

\textit{Vicarious Trauma and TJ}

A lawyer practising TJ should be aware of the possibility of vicarious trauma, both for themselves and for their colleagues. Vicarious trauma is an example of the law having an antitherapeutic impact on those involved in it. The emotional and highly stressed nature of family law makes family lawyers susceptible to vicarious trauma. A lawyer practising TJ should look at how the law itself, legal rules, legal procedures and the way they conduct themselves in their legal role can be changed to minimise vicarious trauma.

e. \textbf{Summary of Disciplines Outside the Law}

A key aspect of TJ is that it draws on disciplines outside the law. Awareness of attachment theory, the impact of conflict and violence on children and the symptoms of trauma can help legal actors practising family law better tailor their cases to suit clients’ needs and to run a more effective case. In addition, when legal actors know that they are at risk of vicarious trauma, burnout and STS, they can actively prevent these.

5. \textbf{Difficulties in applying TJ to Family Law}

While the sections above have outlined how TJ can improve family law, there have been concerns about whether TJ can be applied to family law. These are similar to the issues raised about TJ in general in Chapter 2. They include the conflict between therapeutic aims and the fact-finding role of the courts,\textsuperscript{387} the difficulty in following rules of professional conduct whilst practising in a more therapeutic way,\textsuperscript{388} and the improper expanding of legal roles.\textsuperscript{389}

\textsuperscript{386} Brobst, above at n 366, at 53-54.
\textsuperscript{388} Freeman, above at n 284, at 238.
\textsuperscript{389} At 231.
a. Applying Social Science in Family Law

One important part of TJ is for legal actors to use disciplines outside the law to help improve the therapeutic impact of the law on those who are involved with it. Social science has been used extensively in family law decisions to support findings. However, there are concerns with how it is applied.

There is concern that social science is not being used correctly and that parties do not have an adequate opportunity to contest judicial use of social science data. In 1990, 30% of Australian family law decisions cited “social facts” to support decisions. Of those, 60% did not cite the source, 5% described the facts as “research” but did not cite it, and only 1% cited the source accurately. Examples of facts relied upon included “a ‘father figure’ is often very important in setting down moral values and moral systems...often the mother is a little less so” and “[t]he vast majority of the children of drug addicts do not themselves become drug users”.

There is concern about how social science is used in decisions when it is not in evidence. If social science is mentioned to parties and counsel for the first time at the time of the decision, the parties have not been given an opportunity to respond. Lawyers are generally untrained in empirical research. It can also be difficult for lawyers to discern which research is current and relevant and what it establishes. Social science is often changing, and can become out of date or political, be used selectively, misinterpreted or given undue weight.

There is also a concern that general research is applied to particular cases when a study involves people of a different demographic to the litigants.

In a recent study with focus groups of Australian family lawyers and specialist report writers, directions from judges about the use of social science included:

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390 Wexler, above at n 1, at 24 and Wexler above at n 9, at 3.
392 At 85-86.
393 At 88-98.
394 Rathus, above at n 391, at 88.
395 At 90.
396 Rathus above at n 391, at 90 and Babb above at n 282, at 796.
397 Rathus, above at n 391, at 103.
398 At 97.
- particular articles be made available to counsel for reading by the clients;
- specific literature be issued to all parties in the proceedings;
- specific material be given to the report writer by the lawyer for child, or occasionally a lawyer for a party; and
- requesting that a lawyer for child ask the family report writer to comment on her material about attachment theories and development and age.

Lawyers in the study said common themes in social science included: care, family violence, attachment theory, breastfeeding, the impact of parental conflict on children and parental alienation.\(^{399}\) There was concern that social science data was being interpreted by the lawyers and judges rather than the expert witnesses.\(^{400}\) There was also concern about judges relying on social science research without citing it or giving parties the opportunity to respond.\(^{401}\) Sometimes judges used it just before a trial began.\(^{402}\)

Lawyers in the study used social science materials to educate clients, reality check clients, assist with drafting documents, make submissions and cross-examine expert witnesses.\(^{403}\) Social scientists used social science research to help clients normalise matters so they know what they’re going through is not unusual, to improve their practice and to strengthen their arguments if under challenge.\(^{404}\) Some social scientists said they were reluctant to cite the literature which concerned some of the family lawyers.\(^{405}\)

The study recommended that the only appropriate way for the court to use social science evidence was through an expert witness, but many family lawyers saw social science as part of their toolkit.\(^{406}\) Recommendations following the study included further training for lawyers about how to read, understand and access social science research and how to avoid selective knowledge acquisition.\(^{407}\) There was a recommendation for expert witnesses to be trained in using social science in court, especially with how to reference their work.\(^{408}\) Other recommendations for family lawyers and judges include the need to be aware of the concerns

\(^{399}\) At 99-100.
\(^{400}\) At 97.
\(^{401}\) At 99.
\(^{402}\) At 100.
\(^{403}\) At 104-106.
\(^{404}\) Rathus, above at n 391, at 107-108.
\(^{405}\) At 110.
\(^{406}\) At 111.
\(^{407}\) At 111.
\(^{408}\) At 111.
about social science being used in the courts and that they need to ask questions about the strength of the findings and how much disagreement there is in the field.\textsuperscript{409}

Peer reviewed and replicated social science research is a useful tool for family lawyers when used properly. It helps them to address the underlying issues litigants face.\textsuperscript{410} A lawyer who understands trauma will be better able to structure interviews to make them easier for the client and so reduce the risk of missed appointments or struggling to remember important facts. A family lawyer who understands the importance of attachment will likely work harder to ensure that children are able to see their attachment figures in a safe way. One who is aware of the impact of conflict on litigants and children will do what they can to ensure that they do not exacerbate conflict they promote resolution, and a lawyer who understands the increased risk of vicarious trauma in family law will take steps to avoid it, and to keep their colleagues from experiencing it. However, it is important that family lawyers remember that they are not therapists or expert witnesses and that they take care to avoid falling into either of these roles.

6. Chapter Summary

TJ can be a lens to view the law. The other vectors of the comprehensive law movement provide legal actors practising TJ with different frameworks to improve the therapeutic impact of the law. For example, the knowledge that litigants are happier with a legal system where their voices are heard would encourage a person practising TJ to provide procedural justice. A lawyer practising TJ might use preventive law to anticipate possible problem areas before they arise, such as birthday or holiday contact to avoid future conflict.

TJ promotes legal actors using knowledge from other disciplines to improve the therapeutic impact of the law.\textsuperscript{411} This is particularly important in family law which involves the management of lifelong relationships. Legal actors in this area also are aware that children are affected by the proceedings, despite not usually being parties. Therefore, it is important

\textsuperscript{409} Babb, above at n 282, at 797.
\textsuperscript{410} At 798. However, it is important to remember that some social science studies have contradictory results.
\textsuperscript{411} Winick, above at n 228, at 597-598.
that relationships are not unnecessarily damaged. It is also important that the safety of litigants and children is not put at risk.

In family law, important disciplines to draw from include social work and psychology. Knowledge about attachment theory, the impact of parental conflict, categorisation of violence, and trauma are particularly helpful. However, it is important for legal actors to acknowledge the difficulties in applying these, especially the risk of relying on empirical evidence in court proceedings. Knowledge of trauma can also make legal actors practising family law be aware of secondary trauma.

New Zealand’s FJS has recently been reviewed. While the Family Court was designed with therapeutic aims in mind, there have been concerns about the anti-therapeutic nature of the FJS. TJ and the other vectors could be useful tools for legal actors to perform their roles in a more therapeutic way. Being aware of basic principles of attachment theory, categories of violence, the impact of parental conflict and trauma would also enable New Zealand’s legal actors to better meet the needs of their clients in the FJS.

\footnote{David Beattie Report of Royal Commission on the Courts (1978, Government Print, Wellington) at 151.}
Chapter 4

Background to New Zealand’s Family Justice System

1. Introduction

Aotearoa New Zealand’s Family Court was established in 1981 with two dual judicial and therapeutic functions. Balancing the significance of each function relative to the other has been the source of much tension ever since. The Court has subsequently been reviewed four times. This chapter sets out the underlying principles of the Family Court, and examines the 1992, 2011 and 2011 reviews and reforms that followed. The most recent 2018-2019 review is addressed in Chapter 5.

2. Underlying principles of the Family Court

a. The Beattie Report

Before the Family Court was established, family law proceedings were held in the Magistrates Court and the Supreme Court. The process was described by family lawyers as “bruising and harrowing” and the courts as having a “very severe atmosphere”. There were difficulties caused by applications needing to be brought in two different courts.

The Report of the Royal Commission on the Courts’ (“The Beattie Report”) suggested the formation of a Family Court for New Zealand. After discussing whether this was to be a court or a social agency, the Royal Commission stated:

The answer to this problem, of course, is clear. It is not...a question of adoption of one theory or another. By their very nature Family Courts have a two-fold function, judicial and therapeutic, and there is room for both theories to operate.

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413 Beattie, above at n 412, at 151.
414 Now called the High Court.
417 Peter Boshier, Nicola Taylor, and Fred Seymour “Early Intervention in New Zealand Family Court Cases” (2011) 49(4) Family Court Review 818 at 818.
418 Beattie, above at n 412, at 151.
The Beattie Report envisaged a court where efforts would be made to resolve matters by conciliation. If that failed, the court would make its decision after hearing the facts and according to law. The usual process would be safeguarded and with legal representation “wherever necessary or desirable”.419

b. Early Aims for Legal Roles in the Family Court

Against the background of the dual therapeutic and judicial envisaged by the Royal Commission, the Beattie Report made recommendations about the roles of legal actors in the Family Court. Judges were to have “the widest possible knowledge of human experience, and a very great degree of sympathy and understanding”.420 They were to have “ultimate control over both the judicial and therapeutic functions of the Family Court”.421 The Beattie Report envisaged the Family Court bench working closely with registrars, counsellors, lawyers, social workers and others to meet both the functions of the Court.422 Family Court Associations were recommended to allow appropriate resourcing and programmes.423

The Beattie Report also recommended counselling. This was to have two functions; a reception, to function like an A & E department, to define the problem and refer the party to the appropriate service.424 The second function, conciliation, was intended to provide a space where parties could work towards agreement.425 All of these recommendations were consistent with TJ as they envisaged an interdisciplinary approach which acknowledged the importance of the therapeutic aspect of the Court.

c. The Establishment of the Family Court

New Zealand’s Family Court was established in October 1981, adopting almost all of the Beattie Report’s recommendations regarding the Family Court.426 The Family Court has therefore had a therapeutic aim since its inception. Initially the Family Court dealt primarily with marriage dissolution, what was then matrimonial property, custody and access as well

419 Beattie, above at n 412, at 151.
420 At 148.
421 At 162.
422 At 162.
423 At 163.
424 At 166.
425 At 167.
426 Taylor above at n 387, at 38.
as spousal and child maintenance and non-molestation orders.\textsuperscript{427} Its jurisdiction grew significantly over time and now covers at least 29 statutes.\textsuperscript{428} These include the Oranga Tamariki Act 1989, COCA, the Family Violence Act 2018, the Family Protection Act 1955, the Protection of Personal and Property Rights Act 1998, the Property (Relationships) Act 1976 and the Child Support Act 1991.

3. Early Reviews of the Family Court

The first review of the Family Court occurred in 1992-1993. Its aim was to analyse the Court’s philosophy, examine how well the Court was functioning and address whether the therapeutic-judicial balance was correct.\textsuperscript{429} Recommendations included the establishment of a Family Conciliation Service separate from the Family Court. The intention was to have the Family Court used only when a decision needed to be made about a family law issue, or where there were significant welfare concerns.\textsuperscript{430} The recommendations regarding case management were adopted, but the Family Conciliation Service proposal was not.

The Family Court was reviewed again between 2001 and 2004 by the New Zealand Law Commission. The terms of reference focused on procedures to facilitate early resolution as well as improvements in administration and management.\textsuperscript{431} This review recommended better resourcing including more court time, psychologists, and report writers, promoting participation of children in conciliation processes, extending the role of the Family Court Coordinator and upskilling court staff.\textsuperscript{432} Following this review, the government made several changes including better provision of information about how Family Court cases were decided, using non-judge-led mediation and improved training for Family Court staff.\textsuperscript{433}

On 1 July 2005, COCA replaced the Guardianship Act 1968. COCA was significant in making the law relating to the post-separation care of children more therapeutic. One of the key

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\textsuperscript{427} Law Commission \textit{Family Court Dispute Resolution} (NZLC PP47, 2002) at 518.
\textsuperscript{428} Annis Somerville “Tikanga in the Family Court: The Gorilla in the Room” (2016) 8 NZFLJ 157 at 160.
\textsuperscript{429} Boshier, Taylor and Seymour, above at n 411, at 820.
\textsuperscript{431} Law Commission, above at n 427, at 1.
\textsuperscript{432} Gollop, Taylor and Henaghan, above at n 430, at 1-2.
\textsuperscript{433} At 2.
changes was to change “custody” and “access” to “day-to-day care” and “contact”. 434 This new wording enabled a focus on parenting time, rather than one or both parents having possession of a child. 435 COCA addresses wider family and incorporates the words “whānau”, “hapū” and “iwi”. 436 These have significance for the Court’s response to Māori as discussed in Chapter 6. It provides for children’s rights, especially their rights for their views to be taken into account. 437 This is important because procedural justice has indicated people are more satisfied with processes when they are involved in them. Children, who are not parties to the proceedings, are nevertheless affected by proceedings about them so it is important COCA protects their right to give their views when decisions are being made about them.

4. The Early Intervention Programme

In 2010, the Early Intervention Programme (“EIP”) began as an initiative in Canterbury and then became a national model. 438 This involved early triaging of cases post separation. Cases were assessed as being on the urgent track, requiring direct judicial involvement or the standard track, going to alternative dispute resolution, including counselling. 439 In 2010, 75% of the EIP cases were referred to mediation and 81.4% settled; only 2% of cases required a hearing. 440 The system recognised that complex cases required close management. 441 Settlement through mediation promotes self-determination as parties are coming to their own agreement. This is consistent with TJ. 442

5. The 2011 Review

In 2011, the MoJ was directed to review the Family Court. This review considered the respective roles of the Family Court and the roles of private citizens and addressed the areas of family life or the family dispute that should be the subject of legal intervention in the Family Court. 434 Compare s 48(1) of the Care of Children Act 2004 with ss 11 and 14 of the Guardianship Act 1968 (now repealed).

435 Huntington, above at n 304, at 1302-1305.

436 Care of Children Act, s 5(e) and (f).

437 Care of Children Act, 6.

438 Boshier, Taylor and Seymour, above at n 417, at 824.

439 Rebecca Dempsey “Narrowing the Gateway: Introducing Mandatory Family Assessments into the New Zealand Family Court” (dissertation submitted for the completion of LLB (Hons) University of Otago 2012) at 12.

440 The Judges of Te Kōti ā Whānau o Aotearoa – The Family Court of New Zealand “Submission to the Independent Panel Examining the 2014 Family Justice Reforms” (16 November 2018) at [88].

441 Boshier, Taylor and Seymour, above at n 417, at 827.

442 King, above at n 2, at 1124.
Court. It also addressed the functions of the Family Court including the extent to which it should have a therapeutic role as opposed to applying the law expediently. Other considerations included what statutes should be administered by the Family Court, the boundaries between the Family Court and the civil jurisdictions in the High and District Courts, how family law legislation could improve the efficiency of the Family Court and whether the systems in place at that time were financially sustainable. The review addressed how responsive and accessible the Court was to vulnerable individuals and the emerging issues and needs and trends in the Family Court, including whether these could be met by alternative methods. It also considered whether there were incentives for people to settle disputes outside of court.

The 2011 review found that there was a lack of focus on children and vulnerable people, that the court processes were too slow, complex and uncertain and that there was not enough support for resolving parenting disputes out-of-court. There was concern that costs had increased by 70% in the six years to 2002. The Cabinet Office Circular regarding the proposed reforms said “[e]mphasising the Court’s therapeutic function has led to more complex and confusing processes that contribute to delay in the resolution of disputes”.

6. The 2014 Reforms

The 2014 reforms aimed to address the issues identified by the 2011 review and subsequent fiscal concerns about the Court’s operations. They were intended to help vulnerable people, promote resolution outside of court and reduce the cost of the Family Court. While the Cabinet Office Circular found that the focus on the therapeutic aspect of the Family Court was contributing to delay and confusion, many of the aims of the 2014 reforms were consistent with TJ. In particular there was concern that a focus on the parties’ rights in the adversarial

443 Ministry of Justice Reviewing the Family Court: A Summary (2011) at 1.
444 At 3.
446 Cabinet Domestic Policy Committee “Reviewing the Family Court Cabinet Paper” 14 September 2011.
447 Ministry of Justice, above at n 443, at 1.
448 Ministry of Justice, above at n 437, at 1 – 2.
449 Gollop, Taylor, and Henaghan above at n 430, at 2-3.
450 Cabinet Office Circular “Family Court Review: Proposals for Reform” (2012) CAB (12) 25/10 at [28]-[29]).
process meant that parents lost sight of their children in the dispute. This focus on rights and comments about the harmful nature of litigation are similar to those raised by Wexler and Abrahamson regarding the culture of critique in Chapter 2. The review proposed out-of-court resolution as a more cost effective, timely, and less emotionally harmful way to resolve disputes. This was intended to lead to more durable outcomes as it would better suit the parties’ needs and any parenting agreements would be more likely to be followed.

The review resulted in several significant changes to New Zealand’s FJS. Completion of Parenting Through Separation (“PTS”), a parenting information programme, became a prerequisite to filing on notice applications for parenting orders and variations of parenting orders. Family Dispute Resolution (“FDR”), an out-of-court mediation service, was introduced and made compulsory prior to filing most on notice applications. Counselling prior to proceedings was removed. This counselling helped parties mediate the dispute, but also involved adopting a therapeutic approach where appropriate. Communication counselling (rather than therapeutic counselling) was instead provided for after proceedings had commenced. There was a restriction for when lawyers could act for parties in on notice applications, and the criteria for appointment of lawyer for child and specialist reports was limited.

As well as the changes to COCA, the Family Courts Rules 2002 (as they then were) were amended to provide a different procedure for COCA applications. These included the introduction of three separate tracks, different types of conferences (rather than having a judicial conference), and restrictions on filing further evidence. Legal Aid eligibility was also reduced.

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452 At 25.
453 Wexler, above at n 20, at 272.
454 Secretariat to the Independent Panel, above at n 451, at 25.
455 At 25.
456 Care of Children Act, s 47B.
457 Care of Children Act, s 46E.
458 The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [67].
459 Care of Children Act, s 46G.
460 Care of Children Act, s 7A.
461 Care of Children Act, ss 7, 132, and 133.
462 Family Court Rules 2002, part 5A.
Major concerns have been expressed about how the 2014 review was implemented. The New Zealand Law Society criticised the 2014 reform process, noting that the review “contained inadequate data, factual errors and unsubstantiated assumptions” and that there was inadequate feedback on the proposals.\(^{464}\) A MoJ regulatory statement subsequently recognised that there was a lack of statistical data for predicting costs, and there was insufficient time to pilot the proposals and to undertake a comprehensive file review to obtain data beyond that electronically recorded in the case management system.\(^{465}\) The Family Court judiciary noted that the focus on resolution in the Family Court should not be one discrete occurrence, but that it is often a “combination of alternative dispute resolution, Court orders, directions and determinations, and therapeutic assistance such as counselling”\(^ {466}\).

### 7. Outcomes of the 2014 Reforms

The response to the 2014 reforms has been largely negative.\(^ {467}\) In a 2016-2019 study involving a nationwide survey and interviews with several hundred professionals in the FJS, 70% of respondents said that the 2014 reforms made the FJS either somewhat worse or much worse.\(^ {468}\) The same study found that 69% were either dissatisfied or very dissatisfied with the current FJS.\(^ {469}\) Only 7% of the professionals agreed that the 2014 reforms had achieved their purpose of creating a “modern, accessible FJS that is responsive to children and vulnerable people, and is efficient and effective,” while 81% disagreed or strongly disagreed.\(^ {470}\)

Particular points of concern include the significant rise of without notice applications\(^ {471}\) and increased delay.\(^ {472}\) Linked to both of these are concerns about the reduced role of lawyers in COCA.\(^ {473}\) PTS has received largely positive feedback.\(^ {474}\) FDR has been well used, although

\(^{464}\) New Zealand Law Society “Submission to the Independent Panel Examining the 2014 Family Justice Reforms” (12 November 2018) at 3.


\(^{466}\) The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [44].

\(^{467}\) Noonan, Dellabarca and King, above at n 8, at 37, 74, 76 and 78.


\(^{469}\) At 372.

\(^{470}\) At 307.

\(^{471}\) Noonan, Dellabarca and King, above at n 440, at [17].

\(^{472}\) Ministry of Justice, above at n 463, at 33.

\(^{473}\) Above at n 440, at [145].

\(^{474}\) New Zealand Law Society, above at n 464, at 4.
subject to some criticism. Some themes that have emerged following the reforms are now considered.

a. Increase in Without Notice Applications and Delay

Prior to the 2014 reforms, 30% of COCA applications were made without notice, but since the reforms 70% of these applications have been made without notice. In a qualitative study of 43 Family Court litigants who had filed COCA applications the three reasons why parties filed without notice were:

- access to representation;
- the issue was time sensitive; and
- wanting to initiate action towards a decision.

The same study also interviewed three Family Court judges, eight Family Court lawyers and five Family Court staff. A major concern was that the scope of without notice applications had expanded to include applications which involved time sensitive issues but not safety concerns.

Without notice applications are dealt with on the “e-duty” platform where judges deal with all without notice applications filed throughout the country. There are 60 judge days per month dealing with without notice applications. Court staff have experienced higher workloads and increased work hours due to additional work caused by without notice applications.

b. Removal of Counsel in On Notice Court Proceedings

The removal of counsel in on notice applications has received a largely negative response. A MoJ study involving eight Family Court lawyers found that lawyers felt that they were unable

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475 The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [50], Ministry of Justice, Family Justice Reforms an Initial Cohort Analysis (April 2018) at iii, Ministry of Justice Exemptions from Family Dispute Resolution: exemptions from Family Dispute Resolution where a party did not participate (September 2017) at 7 and Office of the Children’s Commissioner “Submission to the Independent Panel Examining the 2014 Family Justice Reforms” (9 November 2018) at 4.
476 Nan Wehipeihana, Kelli Spee and Shaun Akroyd Without Notice Applications in the Family Court (Research report prepared for the Ministry of Justice, July 2017) at 11.
477 At 8.
478 At 24.
479 The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [50].
480 Wehipeihana, Spee and Akroyd, above at n 476, at 26.
to help their clients because they could not act in on notice applications.\textsuperscript{481} In a survey of several hundred FJS professionals, 80% were dissatisfied or very dissatisfied with the removal of counsel in on notice proceedings.\textsuperscript{482} The Family Court judiciary considers that lawyers not being involved has increased delay due to an increase in self represented litigants.\textsuperscript{483} The MoJ study also indicated that the lack of legal representation has been a reason litigants want to apply without notice.\textsuperscript{484} There are concerns that wealthy people have been able to access representation whereas the removal of counsel in on notice proceedings means that legal aid is not available for on notice proceedings, therefore, those less well-off have only had access to the Family Legal Advice Service ("FLAS") which was short term and limited,\textsuperscript{485} covering only two sessions. The Family Court judiciary felt that most New Zealand family lawyers promote conciliation, as required by s 9A of the Family Court Act 1980.\textsuperscript{486}

There are concerns that the 2014 reforms have reduced the number of lawyers, especially senior lawyers, practising in family law.\textsuperscript{487} The number of lawyers doing family Legal Aid work has fallen from 1850 in June 2007 to 942 in June 2016.\textsuperscript{488} From 2012 to 2016 there was a 25\% decrease in family Legal Aid lawyers nationally.\textsuperscript{489} This decrease presumably stretches beyond COCA cases to Family Violence Act 2018 and Oranga Tamariki Act 1989 cases. This shortage of lawyers has the antitherapeutic effects of forcing people at difficult times in their lives to represent themselves, and also on the remaining lawyers, judges and court staff who endure increased workloads.

c. Removal of Counselling

Counselling was a key part of the Beattie Report’s recommendations and was intended to have a therapeutic effect.\textsuperscript{490} Prior to the 2014 reforms being implemented there was funding

\begin{footnotesize}
\textsuperscript{481} At 29.
\textsuperscript{482} Taylor, Gollop, and Liebergreen, above at n 468, at 307.
\textsuperscript{483} The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [145].
\textsuperscript{484} Wehipeihana, Spee and Akroyd, above at n 476, at 8.
\textsuperscript{485} Rosslyn Noonan, La-Verne King and Chis Dellabarca Strengthening the Family Justice System: consultation document released by the Independent Panel examining the 2014 family justice reforms (Ministry of Justice, January 2019) at 22.
\textsuperscript{486} At 13b.
\textsuperscript{487} Wehipeihana, Spee and Akroyd, above at n 476, at 8.
\textsuperscript{488} Tom Hunt “Legal aid bills skyrocket, but in some cases no lawyer can be found for kids in danger” Stuff (Online ed, New Zealand, 4 May 2017).
\textsuperscript{489} “Family court lawyer shortage ‘reaching crisis point’” Radio New Zealand (Online ed, New Zealand, 19 September 2016).
\textsuperscript{490} New Zealand Law Society, above at n 464, at 7.
\end{footnotesize}
for parties to attend counselling to help them resolve their disputes. Its aim was for parties to reach agreement without needing to go to court.

The 2014 reforms removed counselling pre proceedings and instead made counselling available only after a dispute was in court.\textsuperscript{491} Given that the reforms made PTS and FDR compulsory before filing certain court applications,\textsuperscript{492} the reforms had the effect of requiring people to attend FDR and a parenting course without access to the counselling that would previously have been available from when they first engaged with the FJS. While there is preparation for mediation, this is much narrower than the counselling that existed before the reforms.\textsuperscript{493} It focuses on effective participation in mediation rather than having any therapeutic aim.\textsuperscript{494} In a study prepared for the MoJ, FDR providers mentioned it would be helpful for there to be therapeutic counselling alongside FDR.\textsuperscript{495}

The New Zealand Law Society’s Family Law Section (“the FLS”) comments that:\textsuperscript{496}

Separating parents typically experience significant stress and a range of intense emotions, including anger, jealousy and shame. Such emotions can hinder the parties’ effective communication and trigger conflict which may involve physical or psychological violence. Such emotions will also often prevent parties from engaging effectively with services (in or out of court) to resolve care arrangements for their children in a rational and child-focussed way.

Counselling can help parties manage their emotions, become ready to engage in settlement negotiations and make decisions, it increases the prospects of early settlement without needing to proceed to court and enables parties to communicate more effectively.\textsuperscript{497}

Concerns have been raised about the removal of pre-court counselling,\textsuperscript{498} about children not having access to counselling through the Family Court,\textsuperscript{499} and about a lack of kaupapa Māori

\textsuperscript{491} Care of Children Act, s 46G.
\textsuperscript{492} Care of Children Act, ss 46E and 47B.
\textsuperscript{493} New Zealand Law Society, above at n 464, at 7.
\textsuperscript{494} At 7.
\textsuperscript{496} New Zealand Law Society, above at n 464, at 6-7.
\textsuperscript{497} At 7.
\textsuperscript{498} Rosslyn Noonan, La Verne King, Chris Dellabarca \textit{Submissions Summary Independent Panel Examining the 2014 family justice reforms} (Ministry of Justice, January 2019) at 15.
\textsuperscript{499} Office of the Children’s Commissioner, above at n 475, at 5.
A recent survey of FJS professionals found that 92% of survey respondents were dissatisfied or very dissatisfied with the reduction of counselling.\textsuperscript{501} The removal of counselling removes a medium which has been shown to promote early settlement and better communication. Therefore, removal of counselling is an example of legal rules having an anti-therapeutic effect.\textsuperscript{502} This goes against one of COCA’s principles which is to encourage agreed arrangements for children and provide for the resolution of disputes about children.\textsuperscript{503} It is unlikely for the children’s best interests to include parents continuing to struggle to reach agreement about their care arrangements.

d. FDR

FDR is an out-of-court mediation service that also includes pre-mediation counselling to prepare people for mediation, and the mediation itself.\textsuperscript{504} It is a prerequisite for applying for a parenting order or to settle a dispute between guardians.\textsuperscript{505} Exceptions to this are when the application is made without notice, where there has been family violence, there is consent, the application is to enforce an order, there are proceedings under the Oranga Tamariki Act 1989 or one of the parties is unable to participate effectively in FDR.\textsuperscript{506}

Reception of FDR has been mixed. In 2014/2015, 83% of 1323 FDR participants completed mediation with partial or full resolution. In 2014/2015 there were 1,018 finalised disputes with full or partial resolution; this amounted to 85% of all mediations.\textsuperscript{507} Prior to the 2014 reforms it was expected that about 1,200 cases each year would be resolved via FDR.\textsuperscript{508}

The FDR process is typically quicker than the court process. Since the reforms, out-of-court resolution takes an average 39 days while the slowest cases were those with a combination of in and out-of-court process, with these cases taking an average of 312 days to reach


\textsuperscript{501} Taylor, Gollop and Liebergreen above at n 468, at 307.

\textsuperscript{502} See for example Wexler above at n 42.

\textsuperscript{503} Care of Children Act s 3(2)(d).

\textsuperscript{504} Fairway “Family Dispute Resolution” (date unknown) <www.fairwayresolution.com>. Pre mediation counselling is often called preparation for mediation (PFM).

\textsuperscript{505} Care of Children Act, s 46E(2).

\textsuperscript{506} Care of Children Act, s 46E(4).

\textsuperscript{507} Ministry of Justice, above at n 463, at 18.

\textsuperscript{508} At 18.
completion.\textsuperscript{509} It takes, on average, 46 days to finish an initial FDR mediation.\textsuperscript{510} People who achieved resolution out-of-court were 14 times more likely to reach long-lasting agreements than those who used in court and out-of-court processes.\textsuperscript{511} Those who used in court processes only were five times more likely to reach long lasting agreements than those who used in court and out-of-court processes.\textsuperscript{512} A MoJ evaluation of FDR found that most parents were satisfied with the FDR process.\textsuperscript{513}

While FDR’s success rate is promising, many do not participate in it. In 2014/15, 1,594 people were either exempted from FDR, withdrew from FDR or did not sign an agreement to mediate.\textsuperscript{514} This rose to 2,779 people in 2014/2015.\textsuperscript{515} Eighty percent of cases of non-participation in FDR were because one party did not participate. In 15-18\% of non-participation cases, FDR was inappropriate and the balance were due to parties saying they did not want to engage or the initiating party then did not respond.\textsuperscript{516} This lack of engagement indicates that FDR is not attracting all the people that may benefit from it. There have been criticisms of FDR, which may account for this low level of engagement.

There are concerns about children’s views not being adequately heard in FDR mediation despite the existence of guidelines for FDR providers to ensure children’s views are heard. However, these are discretionary and there is no guidance about the qualifications of people obtaining the children’s views.\textsuperscript{517} Practices vary between FDR providers. Some mediators obtain the child’s views through a consultant who then passes the views to the mediator, while others meet the child directly.\textsuperscript{518}

Other concerns include mediation occurring when there has been family violence between the parties that has not been picked up in the pre-mediation screening.\textsuperscript{519} Cost was also a

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{509} Ministry of Justice, \textit{Family Justice Reforms an Initial Cohort Analysis} above at n 475, at iii.
  \item \textsuperscript{510} Ministry of Justice, above at n 463, at 35.
  \item \textsuperscript{511} Ministry of Justice, \textit{Family Justice Reforms an Initial Cohort Analysis} above at n 475, at iii.
  \item \textsuperscript{512} At iii.
  \item \textsuperscript{513} Ministry of Justice, above at n 495, at 37.
  \item \textsuperscript{514} Ministry of Justice, above at n 463, at 18.
  \item \textsuperscript{515} At 18.
  \item \textsuperscript{516} At 20.
  \item \textsuperscript{517} Office of the Children’s Commissioner, above at n 475, at 4.
  \item \textsuperscript{518} Nicola Taylor “Child participation: Overcoming disparity between New Zealand’s Family Court and out-of-court dispute resolution processes” (2017) 25 The International Journal of Children’s Rights, 658 at 664.
  \item \textsuperscript{519} Noonan, King and Dellarca, above at n 498, at 21.
\end{itemize}
\end{footnotesize}
reason why some did not participate. Other participants wanted a lawyer at FDR or did not believe FDR would work.\textsuperscript{520}

How mediators conducted the mediation, and the mediation process were important indicators of how parents viewed the process. Parents were happy with the mediation, regardless of the outcome, when:\textsuperscript{521}

- The joint mediation session ran the way they expected.
- The mediator created a safe environment and the parents felt heard.
- The parents did not feel pressured into agreement.
- When there was a mediated agreement, it was presented professionally.

Parents were less satisfied when they felt pressured into reaching agreement. Many such agreements tended to be broken shortly after they were made.\textsuperscript{522} Parents also were less satisfied when there was a breakdown in communication, for example, where a parent was not told the other parent was allowed a support person.\textsuperscript{523} This research emphasises the importance of roles in implementing TJ and procedural justice. Even if a process, such as mediation, is designed to be therapeutic, the outcome can be antitherapeutic if legal actors do not carry out the process in a way that promotes a therapeutic outcome.

e. PTS

PTS is a four hour course that covers aspects relating to separation such as the impact of conflict on children, helping children deal with separation, finding the best care arrangement for the children, and co-parenting after separation.\textsuperscript{524} Over the 2014/15 and 2015/2016 financial years, 11,597 people completed at least one PTS session, and there has been an almost 90\% increase in parents accessing this service since the 2014 reforms were implemented, as PTS was not previously mandatory.\textsuperscript{525} Some suggestions to improve PTS include three-yearly reviews, making it accessible online and having it cater to a wider range of people, such as people with disabilities and people in prison.\textsuperscript{526} PTS fits well with TJ as it

\textsuperscript{520} Ministry of Justice \textit{Exemptions from Family Dispute Resolution} above at n 475, at 6.
\textsuperscript{521} Ministry of Justice, above at n 495, at 5.
\textsuperscript{522} At 5 and 21.
\textsuperscript{523} At 21.
\textsuperscript{524} Author unknown “Parenting Through Separation” (date unknown) <www.justice.govt.nz>.
\textsuperscript{525} Ministry of Justice, above at n 463, at 21.
\textsuperscript{526} Noonan, King and Dellarbaca, above at n 498, and Barnardo’s “Submission to the Independent Panel Examining the 2014 Family Justice Reforms” (November 2018) at 7.
provides parents with useful information about improving parental communication and understanding what care arrangements work best for children at their developmental stage. It is therefore a way for other disciplines to be used in the law to promote the wellbeing of parents and children.

8. Chapter Summary

The Family Court has dual therapeutic and judicial roles, and there is room for both aspects to operate. Since one of the Family Court’s roles is therapeutic, family lawyers should consider TJ when running their cases. There have been four reviews of the Family Court and each to some extent has been concerned about how the dual roles should relate to each other. The first review explicitly looked at this, the second increased important resources like psychologists. The EIP also promoted self-determination, one of TJ’s aims.

The 2014 reforms had many aims that were consistent with TJ. The concern about the harmful impact of litigation is similar to Wexler’s comments about the culture of critique. However, research has shown that these reforms unfortunately have not had a therapeutic impact. This is possibly due to their focus on cost savings and lessening or eliminating those services (such as counselling) that provide the therapeutic aspect to the Family Court.

Prioritising the therapeutic aspect can create difficulty with the Family Court’s consumption of expensive resources. There can be issues with the Court acting in a therapeutic role which in situations best left to out-of-court resolution. This was an aim of the 2014 reforms. However, too little emphasis on this aspect results in a focus on efficient, affordable justice. This can ignore the emotional difficulties and other issues many litigants face such as parenting capacity and mental health issues, violence and drug and alcohol abuse, which impact significantly on children. Removing services such as counselling and legal advice in the 2014 reforms has resulted in people trying to navigate the system themselves when they require assistance. The concerns with the 2014 reforms resulted in the Minister for Justice appointing an Independent Panel in 2018 to review the FJS. This most recent review is addressed in Chapter 5.

527 Beattie, above at n 412, at 479.
Chapter 5
The Independent Panel

1. Introduction

Following the change of Government in 2017, the new Minister of Justice announced in 2018 that there would be a review of the Family Court by an Independent Panel. This chapter sets out its terms of reference, findings and recommendations. It then critiques these using a therapeutic lens.

2. Terms of reference for the Independent Panel

The terms of reference focused on the 2014 reforms as they related to “assisting parents/guardians to decide or resolve disputes about parenting arrangements or guardianship matters.” The Independent Panel was asked to particularly address:

a) the effectiveness of out-of-court processes, in particular, Family Dispute Resolution;
b) the effectiveness of court processes, in particular, the increase in without notice applications and the need to ensure the timely resolution of cases;
c) the appropriate role and use of professionals, for example, family dispute resolution mediators, lawyers for parties (including legal aid lawyers), lawyers for children, and psychologists (court appointed report writers);
d) the extent to which out-of-court and in-court processes, including for determining final parenting orders, enable decisions that are consistent with the welfare and best interests of the child, with a particular focus on any differential impacts on Māori children.”

The Independent Panel was directed to consult with a wide range of people including children and young people, Māori, Pacific Peoples, disabled people, the legal profession and judiciary, academics, community organisations, interest groups, court users, other professional groups and the public. It was further directed to have regard to international and domestic research, including kaupapa Māori research and the MoJ’s evaluations of the 2014 FJS.

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528 Ministry of Justice “Family Court Rewrite” <www.justice.govt.nz>.
530 Ministry of Justice, above at n 529.
531 Ministry of Justice, above at n 529.
reforms.\textsuperscript{532} The Independent Panel consulted with the above groups and received submissions in 2018.\textsuperscript{533} It released a consultation paper with initial findings in January 2019 which then called for further submissions on specific questions, and involved further consultation.\textsuperscript{534} The Final Report was completed in May 2019 and made public in June 2019.\textsuperscript{535}

3. The Panel’s Findings

The Independent Panel found there was little data to show the 2014 reforms had reduced Family Court applications and create speedier resolution as intended.\textsuperscript{536} Rather, there were increased delays and a higher number of without notice applications following the 2014 reforms.\textsuperscript{537} The Independent Panel’s findings are consistent with many of the reports and submissions outlined in Chapter 4. The Panel found that delay was “pervasive” in the FJS,\textsuperscript{538} the system was inaccessible for those living with disability, and those with limited economic means struggled to participate in the system. It addressed how family justice services currently do not understand or respond well to family violence and its impact on children.\textsuperscript{539} The Panel was concerned that family justice professionals do not understand how trauma impacts the way people engage in COCA disputes.\textsuperscript{540} Furthermore it found that the FJS does not recognise Te Ao Māori or tikanga Māori\textsuperscript{541} and many participants felt disrespected and unprepared for the objectivity of the legal system.\textsuperscript{542} There was concern about lack of quality information about the FJS, services being siloed and strain on resources.\textsuperscript{543}

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\textsuperscript{532} Ministry of Justice, above at n 529.
\textsuperscript{533} Rosslyn Noonan, La-Verne King and Chis Dellabarca \textit{Have your say on the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms} (Ministry of Justice, September 2018).
\textsuperscript{534} Noonan, King and Dellabarca, above at n 485, at 5.
\textsuperscript{535} Noonan, King and Dellabarca, above at n 8.
\textsuperscript{536} At 14.
\textsuperscript{537} At 14.
\textsuperscript{538} At 24.
\textsuperscript{539} At 26.
\textsuperscript{540} At 25.
\textsuperscript{541} At 24.
\textsuperscript{542} At 26.
\textsuperscript{543} At 24 and 26.
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4. The Panel’s Recommendations

The Independent Panel’s principal recommendation is that the FJS should be “joined up” by bringing together the different in- and out-of-court services. The proposed name is Te Korowai Ture-ā-Whānau.544 This recommendation is consistent with TJ as it proposes an interdisciplinary approach. If different organisations are working together, this will avoid parties needing to repeat information multiple times and reduce delays in people receiving support from the appropriate organisation.

The more specific recommendations included reforms in the following areas:

- child participation;
- improving the experience of Māori going through the FJS;
- accommodating diverse cultures;
- making the FJS more accommodating for people with disabilities;
- improving the system for survivors of violence;
- providing accessible information;
- changes to roles;
- improving PTS, FDR and the way complex cases are managed; and
- improving technology and data collection.

a. Recommendations Regarding Legal Roles

Many of the recommendations involved improving how legal actors could change to better respond to the needs of FJS participants without altering the legal rules or procedures. This shows how important is the behaviour of legal actors related to how a legal system operates. Even if the rules and procedures are therapeutic, the legal system can have an antitherapeutic effect if legal actors do not work to ensure they are meeting participants’ needs.

Important recommendations that did not involve any change to procedures or legal rules include assisting registrars to build relationships with mana whenua in each region.545 The Panel also recommended that the MoJ consult with Pacific Peoples and other ethnic communities, organisations and professionals to create a diversity strategy to ensure the FJS is more responsive to the diverse needs of children and whānau.546 They suggested the FJS

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544 Noonan, King and Dellabarca, above at n 8, at 5.
545 At 8.
546 At 8.
develop relationships with community agencies\textsuperscript{547} and establish a children’s advisory group to provide insight into children’s experiences of COCA matters in the FJS.\textsuperscript{548}

Training for lawyers and judges was proposed in several areas including for lawyers working with clients with disability,\textsuperscript{549} strengthening professional development and supervision requirements for lawyers for children,\textsuperscript{550} and ensuring Family Court judges observe the Māori Land Court and participate in a tikanga Māori programme.\textsuperscript{551}

The Panel advised establishing new roles. These included: navigators based on the whānau ora model to help people navigate the FJS,\textsuperscript{552} tikanga advisors to the Family Court,\textsuperscript{553} family justice coordinators to triage on notice applications, provide information, and connect FJS participants to community agencies,\textsuperscript{554} and senior Family Court registrars to make some decisions that currently require judicial time.\textsuperscript{555}

\textbf{b. Recommendations Regarding Legal Rules}

The Panel also made several recommendations to change legal rules. These included amending COCA and the Family Dispute Resolution Act 2013 to provide guidelines about children’s participation,\textsuperscript{556} lowering the threshold for cultural reports and widening s 136 of COCA which permits a person to speak to a child’s cultural background.\textsuperscript{557} Other recommended changes involved improving rules for survivors of family violence,\textsuperscript{558} including having a checklist for assessing whether a child is safe with a person who has used violence.\textsuperscript{559} The Panel made several suggestions to encourage dispute resolution outside of court including three hours of counselling in the early stages of a dispute and making the use of PTS

\textsuperscript{547}At 13.
\textsuperscript{548}At 19.
\textsuperscript{549}At 9.
\textsuperscript{550}At 16.
\textsuperscript{551}At 8.
\textsuperscript{552}At 13.
\textsuperscript{553}At 8.
\textsuperscript{554}At 15.
\textsuperscript{555}At 15.
\textsuperscript{556}At 7.
\textsuperscript{557}At 8.
\textsuperscript{558}At 9-10.
\textsuperscript{559}At 9-10.
and FDR more flexible, allowing for PTS and FDR to occur after the in-court process had begun and for there to be more than one referral to FDR.

Several proposals were aimed at increasing access to justice. These included FLAS becoming a six-hour service, allowing lawyers to act at the beginning of proceedings and recommendations for law changes to advise how lawyers should act. These would amend COCA to place a duty on lawyers to resolve disputes as quickly, inexpensively and efficiently as possible. The appointment of lawyer for child under COCA would also include a direction that the lawyer be qualified to be the child’s lawyer by way of “personality, cultural background, training, and experience.”

Recommended rule changes included simplifying the types of conferences and tracks, and improving the response to complex cases. The Panel recommended changes to how without notice applications are made. These included ensuring orders made without notice could be rescinded and a person making a without notice application needing to answer a set of questions when making the application.

c. Recommendations Regarding Legal Procedures

The recommended changes to legal procedures complement those for legal roles and rules. Many of these were review and monitoring recommendations. The Panel suggested that Te Korowai Ture-ā-Whānau be monitored with more robust data collection, and that PTS and FDR have regular reviews. It also recommended that each lawyer for child list be regularly reviewed. The Panel proposed that the MoJ work with iwi, the Court and other professionals to develop a strategic framework to improve family justice services for Māori. As well as more oversight of lawyers for children, the Panel recommended more oversight for s 46G counselling, in that the Court should stipulate its purpose and then ask for a report back.

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560 At 12.
561 At 13.
562 At 16.
563 At 17-18.
564 At 19.
565 At 16.
566 At 8.
from counselling.\textsuperscript{571} There were also suggestions about having one judge to deal with each complex case and, where possible, have that judge preside over all family and criminal matters relating to a family.\textsuperscript{572}

Changes to procedure were also recommended to support the strengthening of roles. The Panel recommended procedures to improve retention of psychologists,\textsuperscript{573} increase the diversity of the judiciary,\textsuperscript{574} improve the cultural diversity of FDR providers, and make the selection process for lawyer for child more robust.\textsuperscript{575} Linked to improving access to legal representation were recommendations to streamline the FLAS and legal aid process.\textsuperscript{576} There were also suggestions made to improve the resourcing of the Family Court,\textsuperscript{577} and improving the information about the FJS.\textsuperscript{578}

\textbf{5. The Panel’s Recommendations through a Therapeutic Lens}

The FJS has participants with competing aims, just like any other dispute resolution system. It also has a complex mandate in that it not only makes determination of past facts, but also the present situation and looks to the future in making its decisions.\textsuperscript{579} Therefore, there will always be some situations where a decision will be therapeutic for one person involved in the FJS, but antitherapeutic for another. For example, a survivor of family violence might benefit from court delays after obtaining protection and parenting orders on a without notice basis which effectively prevent her ex-partner from contacting her and their children. She might be able to access services and get back on her feet. This court delay, however, is likely to be antitherapeutic for the ex-partner who has been forbidden from seeing his children on a without notice basis. Conversely, there will be some situations which will be therapeutic or antitherapeutic for all involved. For example, it is difficult to see how provision of good quality information about the FJS could be antitherapeutic or how poor communication between different agencies could be therapeutic.

\begin{footnotes}
\textsuperscript{571} At 18.
\textsuperscript{572} At 18.
\textsuperscript{573} At 16.
\textsuperscript{574} At 15.
\textsuperscript{575} At 16.
\textsuperscript{576} At 13.
\textsuperscript{577} At 19.
\textsuperscript{578} At 11.
\textsuperscript{579} At 78.
\end{footnotes}
Section 4 of COCA states that the Court’s paramount consideration is the child’s welfare and best interests. Therefore, this section assesses the therapeutic impact of the proposed changes from the perspective of the welfare and best interests of children involved in the FJS.

The Panel’s principal recommendation, forming Te Korowai Ture-ā-Whānau, is consistent with TJ as TJ promotes legal actors drawing from other disciplines and working together with them.580 A joined-up FJS will allow the Family Justice Coordinator to refer parties to the relevant services and ensure that people can access counselling, mediation, and legal advice in one place, rather than needing to discretely access these. In reflecting on two decades of TJ, David Wexler noted that TJ promoted cooperation between different professionals when previously there had been distrust.581 The Panel found that the fragmented FJS meant there was currently distrust between different professionals.582 Professionals working closely together in a more cohesive system should reduce this distrust and should promote the welfare and best interests of children as services should be more accessible as professionals should be more willing to refer parties to appropriate services.

An FJS that is more receptive to diversity should promote children’s welfare and best interests. The Panel’s findings, together with several other recent studies into New Zealand’s FJS, have indicated that a monocultural approach has resulted in parties not being able to participate to the extent that they would like.583 The recommendation for building a diversity strategy alongside minority communities should help to make the FJS more accessible for these communities. In turn, this should result in more therapeutic outcomes for children as they have decisions made about their lives that reflect their culture. Improved consultation and partnership with Māori should ensure Māori whānau and children have a system that responds more to their needs. Changing the rules to make it easier for a child’s culture to be addressed through cultural reports and s 136 of COCA should also increase the profile and importance of cultural issues.

580 Winick and Wexler above at n 7, at 7.
581 Wexler above at n 1, at 24.
582 Noonan, King and Dellabarca, above at n 8, at 27.
583 Noonan, King and Dellabarca, above at n 8, at 7; see also above at n 480 at 13, Pitama, Ririnui and Mikaere, above at n 4, at 43-44, and Advisory Committee on Legal Services, Te Whainga I Te Tika: In Search of Justice (1986) at 7.
Promoting children’s participation in proceedings should have a therapeutic impact. In a UMR report, which involved qualitative research about the FJS, many children felt their views were misinterpreted or ignored. Strengthening the rules about children’s views and having a children’s panel should help reduce this happening.

Some of the recommendations about responding to family violence and trauma are consistent with TJ as understanding the psychological impact of the law is an important aspect of TJ. Learning ways to help clients dealing with trauma should help avoid retraumatising clients. The recommendations about needing a prompt hearing where there are disputed allegations of violence and having a checklist could be helpful. However, the implementation of these rules of themselves are unlikely to have a therapeutic effect without the Family Court being given more resources to combat delays and or without legal actors being trained in how to work with people living with trauma. As with the changes to the rules about safety, changes to the rules about tracks are unlikely to be effective without additional resources given to the Family Court to address delays. Having a way of managing complex cases with too few staff to manage them, will not solve the issue of inadequate staff resourcing, and will be unlikely to reduce delay.

The recommendation to make FDR and PTS more flexible should have a therapeutic impact as it will allow people who may not be in a space to participate in FDR early on the dispute the opportunity to do so at a later stage. TJ’s nominal normative commitment promotes flexibility. The proposed change allows parties to access the appropriate dispute resolution process at the right time, rather than requiring certain procedures to occur when emotions are too high for them to be effective. This in turn will ensure time and resources are not wasted which should result in a better outcome for children.

There needs to be stronger resourcing for both PTS and FDR. These services will require promotion and, in the case of FDR, work to improve the legal profession’s and judiciary’s confidence in FDR. The suggestion to increase FLAS to six hours of work is positive, however there will need to be real effort to ensure that there are enough lawyers willing to take on this work. As discussed in Chapter 4, there has been a large decline in Legal Aid family lawyers.

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584 UMR Main Report (A qualitative study on behalf of the Independent Panel examining the 2014 family justice system reforms, April 2019) at 6.
585 Wexler, above at n 9, at 9.
There may need to be measures such as increasing Legal Aid renumeration or providing scholarships for junior family lawyers to promote retention.

While the Panel’s recommendations are comprehensive in terms of amendments to COCA and providing for support for certain groups, there are gaps in how to make this effective in the long term. For instance, there could have been suggested timeframes for establishing external stakeholders such as the children’s advisory panel and the kaupapa Māori advisory panel. Furthermore, there could have been guidelines about how views of these people should be taken into account in making decisions.

The Minister for Justice has not yet responded to the Independent Panel’s report as at 28 October 2019, but it is widely hoped that the government will commit to implementing their recommendations.

6. Chapter Summary

The Panel’s recommendations largely fit well with TJ. The principal recommendation of Te Korowai Ture-ā-Whānau is consistent with TJ as it promotes an interdisciplinary approach. The recommendations regarding legal roles are particularly promising as many people involved with the FJS raised concerns about how they were treated by professionals, rather than with the rules or procedures themselves. Legal actors are also the most important part of a system when a TJ lens is applied. This is because a legal actor’s behaviour can make an experience with the legal system antitherapeutic even when there are therapeutic rules and procedures.\(^{586}\) In contrast a legal actor’s behaviour or approach to a case can make an inherently untherapeutic experience less stressful. For example, applying procedural justice can improve a court appearance as those who are listened to and treated with respect are more likely to view the process as fair.\(^{587}\)

The larger scale recommendations to legal rules and procedures should promote the interests of people who have not had their needs met. Stronger rules around safety should allow for better protection for family violence survivors. Lowering the threshold for cultural reports should put more cultural information before the Court.

\(^{586}\) See Pitama, Ririnui, and Mikaere above at n 4, at 51.

\(^{587}\) Wexler and Winick, above at n 105, at 129.
While the proposed reforms have the potential to improve the therapeutic impact of the FJS, they need to be backed up by adequate resourcing. The Panel could have given more specific recommendations as to how the reforms would be resourced. It could have also provided for the new advisory roles to have more status with the MoJ being required to take their proposals into account. It is also worth noting that the Government has not yet responded to the Independent Panel’s recommendations.

Chapter 6 outlines concerns in the FJS independent of the 2014 reforms, although some of these have been exacerbated by the 2014 reforms. The Panel’s recommendations should also help these issues. The impact of the reforms and the impact of legal actors applying TJ is then illustrated through a case study in Chapter 7.
Chapter 6
The Roles of Legal Actors in Aotearoa New Zealand’s Family Justice System

1. Introduction

Legal actors can have a therapeutic or antitherapeutic effect irrespective of whether the legal rules and legal procedures are therapeutic. As discussed in Chapter 5, many of the concerns people had about New Zealand’s FJS was the way they were treated by legal actors, rather than the legal procedures or rules. This chapter focuses on several key issues regarding legal roles in our FJS: the experience of Māori, migrants, and ethnic minorities, and survivors of family violence and bullying and other unreasonable behaviour. Some of these issues are linked to the 2014 reforms, but most existed prior to the reforms. “Legal actors” in this chapter primarily refers to lawyers but also includes registrars and judges.

2. Tāngata Whenua i te Kōti-ā-Whānau

a. Te Tiriti o Waitangi and the Impact of Colonisation

The High Court held over 20 years ago that family law legislation should be coloured by the Treaty of Waitangi. However, there are strong concerns that legal actors are not meeting the needs of Māori who go through the FJS. In Barton-Prescott v Director of Social Welfare588 the full bench of the High Court held that: 589

... the familial organisation of one of the peoples, a party to the Treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly, we take the view that all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the Treaty was intended to preserve and protect.

The Court of Appeal analysed Barton-Prescott recently in Nikau v Hohepa and Tatchell590 and did not depart from its reasoning. The Family Court judiciary’s submissions to the Independent Panel have said “[t]here is a convincing argument that beyond specific statutory imperative, tikanga is engaged every time Māori are involved in Court proceedings. This

589 At 184.
590 Nikau v Hohepa and Tatchell [2018] NZCA 566.
follows from the direction of the High Court [in Barton-Prescott] to apply the colour of the principles of Te Tiriti to matters of Māori familial organisation”. These comments reflect the need for New Zealand’s legal actors to be aware of tikanga relating to families and to do what they can to engage, preserve and protect it.

Jacinta Ruru identifies three main challenges for those practising family law: 592

- how to accommodate tikanga Māori relating to families;
- how to mediate differences and conflict in relationships between Māori and non-Māori; and
- how family law should be administered and formulated “so that it guarantees all citizens equal consideration and respect for their cultural views and practices” especially in light of Te Tiriti o Waitangi and the status of whānau one the one hand and the “imbalance in access of Māori and non-Māori to political power, on the other”.

This imbalance of political power should be seen through the lens of colonisation and its impacts. Legal actors need to be conscious of the systemic process of attempted assimilation of the Māori people. They need to be conscious that the process included imposing laws that made the operation of whānau and hapū more difficult, such as land confiscation and incentivising urbanisation to three-bedroom homes which did not accommodate extended families. 593

In addition, some of the legislation family lawyers and judges use on a daily basis is inconsistent with some tikanga. For example, ss 5(b) and (c) of COCA place the role of parents above those of other people in a child’s life, which is in tension with how parents and children are regarded in the collective Māori worldview. Applying Wexler’s four categories of how the law can be therapeutic or anti-therapeutic, legal actors need to be aware of the antitherapeutic impact of the law being used to promote colonialism, that specific legal rules, such as ss 5(b) and (c) of COCA, can be damaging to the application of tikanga; and that specific rules like ss 5(e) and (f) which give room for tikanga to be applied should be promoted.

591 The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [33].
Procedures need to be used to promote tikanga. Some simple examples are opening and closing court in te reo Māori, having pōwhiri for new judges.\textsuperscript{594}

\textbf{b. Important Tikanga}

The main tikanga relating to the upbringing of children are:\textsuperscript{595}

1. The significance of whakapapa;
2. Children belonging to whānau, hapū and iwi;
3. Rights and responsibilities for raising children are shared;
4. Children have rights and responsibilities to their whānau.

Tikanga has evolved over time with its basic beliefs retaining conformity.\textsuperscript{596} Tikanga is also not uniform, it varies between iwi and hapū and different tikanga are appropriate in different situations.\textsuperscript{597} While the above summary is a useful starting point it is important to be sensitive to each person’s particular tikanga and whether the tikanga applies to the specific situation.

\textit{The Significance of Whakapapa}

Catherine Love writes that whakapapa “has traditionally provided the basis of identity, the cornerstone of social organization and the glue that holds Maori social units together” and that “[w]e exist on this earth as an element of the ongoing linking of our whakapapa. Each baby born represents another link in the chain that binds us to our past and promises our future survival”.\textsuperscript{598} It provides a Māori person’s source of spirituality, identity, purpose, and defines oneself in relation to others.\textsuperscript{599} Professor Sir Hirini Moko Mead says of whakapapa “[i]n short, Whakapapa is belonging. Without it an individual is on the outside looking in”.\textsuperscript{600} That sentiment was echoed by a participant in a study into Māori perspectives in the FJS who had parenting and guardianship orders for children she was not biologically related to. She said “[w]hakapapa is the main thing for me. That is one thing I have learned – they want to

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\textsuperscript{594} Somerville, above at n 428, at 159.
\textsuperscript{595} Pitama, Ririnui and Mikaere, above at n 4, at 93.
\textsuperscript{596} At 36-37.
\textsuperscript{597} Somerville, above at n 428, at 158.
\textsuperscript{598} Love, above at n 592, at 16.
\textsuperscript{599} At 16.
\textsuperscript{600} Hirini Moko Mead \textit{Tikanga Māori Living by Māori Values} (1st ed, Huia Publications, Wellington, 2003) at 43.
\end{flushleft}
know who they are. One thing I never do is withhold it.” 601 Legal actors need to remember that whakapapa is a fundamental part of every Māori child’s identity.

**Children Belonging to Whānau, Hapū, and Iwi**

The meanings of whānau include descendants of a common ancestor, or extended family. 602 “The former is important for management of property and choosing public representatives for the whānau” while “the latter is important for child raising, organising hui and mutual support” 603 Whānau form komiti or kotahitanga which have meetings, whānau grow then break into smaller groups. 604 Whānau accept responsibility for each other’s behaviour and are bound together by aroha, commitment to each other financially and to provide manaakitanga to guests. 605 Care of children is shared in the whole whānau and marriage is not above whānau relationships. 606 For instance, spouses are often excluded from office in whānau communities but can make important contributions by being workers. 607 Wider Māori families may not operate as a corporate whānau model, 608 and some urban Māori organisations have obligations of whanaungatanga towards each other. 609

Hapū are made up of related whānau and people can belong to more than one hapū if they choose. 610 Iwi consist of several related hapū. 611 Pre colonisation, hapū were the most politically important social grouping and controlled a portion of the tribal area with access to resources such as forests or fisheries. 612 When an area was under attack, hapū in the same iwi would work together. 613 Historically, if something went wrong with a family, the whānau was the first point of call, then the hapū and then the iwi. 614 In urban centres, where many

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601 Pitama, Ririnui and Mikaere, above at n 4, at 78. See also Joan Metge “Te Rito o te Harakeke: Conceptions of the Whaanau” 99(1) The Journal of the Polynesian Society 55 at 88 for an in-depth discussion of the meaning of whānau.

602 Ruru, above at n 592, at 60.

603 At 60.

604 At 61.

605 At 60.

606 At 62-64.


608 Ruru, above at n 592, at 84.

609 Pitama, Ririnui and Mikaere, above at n 4, at 38.

610 Ruru, above at n 592, at 61-62.

611 Te Ara “The Significance of Iwi and Hapū” (date unknown) <www.teara.govt.nz>.

612 Ruru, above at n 592, at 61-62.

613 Te Ara, above at n 611, and see Mead, above at n 600, at 220-22 for specific examples of this.

614 Ruru, above at n 592, at 62 and Mead, above at n 600 at 233.
Māori have lost ties with their roots, the first point of call is the iwi and then the iwi works to find the whānau and the hapū.\(^{615}\) Children are seen as part of the whānau, hapū and iwi, with their own place in the whakapapa, rather than as belonging to their parents.\(^{616}\)

Catherine Love writes that “maturity in Māori terms is measures by one’s ability to work cooperatively as part of a group, to place the welfare of the group above one’s own desires and to convey appropriate humility and respect to others. This is in contrast to Western ideals, which emphasize independence, individuality, and autonomy as characteristics of maturity”.\(^{617}\) This contrast between individualistic cultures and collective cultures is seen in the provisions of ss 5(b) and (c) compared to ss 5(e) and (f) of COCA.

**The Rights and Responsibilities of Raising Children are Shared and Children have rights and Responsibilities to their Whānau**

As children belong to their whānau, hapū and iwi, the responsibility of raising and protecting them is shared with grandparents, grandparents and other senior members of the whānau who have a strong role in decision making for children and younger whānau members.\(^{618}\) Sometimes children are not raised by their parents but by another member of their whānau or hapū. Called whāngai, this is different to the western concept of adoption as children do not lose their biological links and are aware of, and do not lose their place in their biological whakapapa.\(^{619}\)

There is tension between the tikanga of whāngai and the statutory mechanisms in New Zealand law. Adoption has the effect of the adopted parents becoming the child’s legal parents and the biological ties being severed,\(^{620}\) and the adopted child possibly not knowing his or her birth parents if that is what the adoptive parents choose.\(^{621}\) In fact, whāngai is expressly excluded under the Adoption Act 1955.\(^{622}\)

\(^{615}\) At 62.

\(^{616}\) Love, above at 593, at 18.

\(^{617}\) At 18.

\(^{618}\) At 18.

\(^{619}\) At 18.

\(^{620}\) Adoption Act 1955, s 16(2).

\(^{621}\) Adoption Act, s 23(2).

\(^{622}\) Adoption Act, s 19.
The other possible statutory regime to cater to whāngai is a parenting order under s 48 of COCA and the whāngai parent(s) being appointed additional guardians under s 27 of COCA. While a parenting order gives whāngai parents the right to have a whāngai child in their care, being appointed additional guardians means that while they can make decisions on behalf of a child, they must consult and agree with the other guardians. A child’s mother is always a guardian, and the birth father is usually a guardian. Unless the birth parents are removed as guardians or the whāngai parents are made special guardians, the whāngai parents will still require the consent of the birth parents to make guardianship decisions.

Another tension between tikanga and COCA is that grandparents do not have the same rights to be involved in their grandchildren’s lives as they would under tikanga. Ruru writes that “[t]he relationship between tupuna (grandparents) and mokopuna (grandchildren) is a very special one, ideally characterised by great warmth and intimacy and in important ways complementary to that between parents and children”. Tūpuna often pass knowledge down to their mokopuna “in preference to their own offspring and children should have easy access to both parents and grandparents: separation from either can result in their missing out on vital aspects of their psychological development”. In a study of Māori people over the age of 70, participants said that whānau and mokopuna were the most important factor in having active and vibrant lives.

Under ss 5(b) and (c) of COCA there is an emphasis on the nuclear family. Section 47 of COCA is also at odds with tikanga in that only parents, guardians and step parents may apply for a parenting order without leave of the Court, all other members of a child’s family must first apply for leave unless the parent is not seeing the child. Neither individualistic culture nor collective culture is superior to the other. However, it is important for legal actors to be aware

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623 Care of Children Act, ss 17 and 18.
624 Removal of a parent as a guardian requires a “grave reason” or the parent not being willing to perform the role of guardian (see s 29(3) of COCA). Appointment of a special guardian Under the Oranga Tamariki Act 1989 requires the Court to find that the child is in need of care and protection, see definition of “permanent caregiver” in s 2 of the Oranga Tamariki Act and ss 101, 110, 110A and 113A of the Oranga Tamariki Act 1989. As such it does not apply to situations where there are no concerns for a child’s safety under a whāngai situation.
625 Ruru, above at n 592, at 64.
626 At 64.
628 Care of Children Act, s 47.
that COCA is largely based on the individualistic colonising culture, with some principles relating to collective culture such as ss 5(e) and (f) of COCA. For legal actors to fulfil their obligations under the Treaty of Waitangi they need to be aware of tikanga relating to whānau being inconsistent with New Zealand’s family law statutes and make a conscious effort to apply tikanga within the available framework.

c. Criticism of New Zealand’s Legal Actors in Meeting the Needs of Māori

There have been concerns raised for decades about how Aotearoa New Zealand’s legal actors meet the needs of Māori people going through the FJS. These concerns largely stem from ignorance of tikanga and the struggles that Māori clients face. This can have serious consequences for people needing the help of the FJS at vulnerable times in their lives. In their summary of the initial consultation findings, the Independent Panel said:

Māori whānau, support workers and lawyers told us that the Family Court can be a foreign, isolating and intimidating experience. The way some family justice processes operate does not align with tikanga Māori or Māori views of whānau, particularly the role grandparents and extended whānau play in caring for children and mokopuna.

These concerns are not new. In a 1986 report to the government about legal services, lawyers were seen as “inaccessible, insensitive, disempowering, overpriced, self-interested and unaccountable.” They were regarded as being unable to relate to other cultures, were patronising to various groups, including Māori, had “gross cultural insensitivity and arrogance, basic failure to communicate, [and] use of technical jargon which excludes lay clients from understanding and taking control.” The courts were seen as “negative, dehumanising, intimidating, inefficient, overloaded, culturally-alien and insensitive, and designed to meet the needs of those in the legal industry instead of the consumers”. The report called for more Māori lawyers.

In a 2002 qualitative study into Māori perspectives of family law, there were specific criticisms and concerns raised about how legal actors made the process worse for Māori. One participant was unable to explain the concept of whāngai to the counsellor appointed by the

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629 Noonan, King and Dellabarca, above at n 485, at 13.
630 Advisory Committee on Legal Services above at n 582, at 7.
631 At 7 and 14.
632 At 7.
633 At 37-38.
One concern was Māori names being pronounced incorrectly. One lawyer described this as “jarring” for clients and pointed to a situation where a client missed court because the person calling the names of the cases pronounced the name incorrectly. There was a positive response about lawyers knowing basic tikanga such as not putting hats on the table and taking shoes off at the door. Another participant was happy that the lawyer for child came to her home and had a kōrero with her. A Māori lawyer raised concern about many of her non-Māori colleagues not being able to understand wider whānau care of children. This lawyer noted that there needed to be a fundamental change in the way people behaved because, the most important thing was for the client and lawyer to be able to relate well to one another and changing the wording of legislation would not alter that.

**d. Legal Actors can use TJ to Improve their Roles**

Unlike changes to legal rules and procedures, TJ can be quickly brought into play through legal roles by individuals changing their behaviour. These changes are important. As outlined by the studies above, the way legal actors communicate and behave has the potential to have a therapeutic or anti-therapeutic impact as much as, if not more than, the legal rules and procedures themselves.

An important step is for legal actors to be aware of colonisation and the impact this has had on Māori. TJ operates as a lens through which to view the law. Part of applying TJ in Aotearoa New Zealand when working with Māori clients is to view the law through a lens which sees the current system as one that has been imposed by colonisation.

From this it follows that the current legislation does not fit well with tikanga Māori at times. As set out in *Barton-Prescott* we need to apply tikanga, where we can, in accordance with the principles of the Te Tiriti o Waitangi. Writing extra judicially, her Honour Judge Somerville

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634 Pitama, Ririnui and Mikaere, above at n 4, at 62.
634 At 61.
635 At 50.
636 At 48.
637 At 76.
638 At 50.
639 At 50.
640 Pitama, Ririnui and Mikaere, above at n 4, Advisory Committee on Legal Services, above at n 482, and Noonan, King and Dellabarca, above at n 585.
641 Schma, above at n 36, at 88.
642 *Barton-Prescott v Director of Social Welfare* above at n 585, at 184.
describes tikanga as being in the background that goes past unnoticed while everyone is focused on the game (the court proceedings). She argues that if legal actors are aware of tikanga and recognise the tikanga for the correct circumstances then people will be able to be aware of when it is being applied correctly. She gives an example where a grandmother said that her son was not present at court because of mahinga kai. The Judge was able to assess this and find that was inappropriate, as the care arrangements for the child were more important than cultivating food. A judge who was unaware of tikanga would have either regarded the comment as irrelevant to the proceedings, or incorrectly deferred to the grandmother’s statement and incorrectly applied tikanga.

Important tikanga to be aware of include the decision-making structures of whānau and hapū as they relate to the care of children, whāngai, and the importance of a child’s whakapapa. Remembering to take shoes off if visiting a client at home and not sitting on, or putting hats on tables is important. Pronouncing te reo Māori correctly, especially clients’ names, is essential, as is remembering that tikanga varies between iwi and in different circumstances.

While the current system can make it difficult for tikanga to operate, there are also ways in which legal actors can incorporate it. Section 133 of COCA allows for a report by any person, including a cultural report, to inform the Court about a child’s cultural background. Section 136 of COCA allows a party to a proceeding to hear a person speak to a child’s background. A judge can also suggest this. The Court is required to consider the principles that a child’s identity including his or her culture can be preserved and strengthened and that a child’s relationship with his or her whānau, hapū and iwi be preserved and strengthened.

Outside of specific legal rules, there are ways that legal procedures can be adjusted to promote tikanga Māori. Client interviews can be incorporated to involve wider whānau where

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643 Somerville, above at n 428, at 158.
644 At 158.
645 Somerville, above at n 428, at 160. See also Mead, above at n 600, at 237-238 for discussion on the misuse of tikanga in legal settings.
646 Pitama, Ririnui and Mikaere, above at n 4, at 48.
647 At 50.
648 Somerville, above at n 428, at 157 at 158.
649 Care of Children Act, s 136(3).
650 Care of Children Act, s 5(e).
651 Care of Children Act, s 5(f).
appropriate. Questions to clients can discuss how wider whānau can be involved in a child’s life, either through provisions in the parenting order or a more informal arrangement. Enquiring into a child’s whakapapa and raising special occasions at marae being factors into negotiations could also help to raise awareness of tikanga.

There has been at least one Family Court sitting on marae. Many cases under COCA are resolved by roundtable meetings (“RTMs”). These are meetings with parties and counsel and led by lawyer for child. Lawyer for child can convene these meetings under their role to assist parties to reach resolution under s 9B(1)(c) of the Family Court Act 1980 and they do not need to be directed by a judge. While it would include extra resourcing and may only be appropriate when there were other family members at the meeting, RTMs could be held at marae. If this is not possible, effort could be made to include wider whānau at RTMs where appropriate and to have karakia tīmatanga and karakia whakamutunga. At these meetings there could be an effort to ensure there are discussions about how the child’s sense of identity is protected and promoted, so that they know their whakapapa.

Legal actors could promote the use of te reo Māori in the courtroom. This could involve using greetings in te reo Māori and letting clients know about their right to speak te reo Māori in court. Tikanga could also be promoted by seeking that there be karakia tīmatanga and karakia whakamutunga. Seeking leave that extended whānau be present in court, when this does not jeopardise the rules of evidence, could also promote tikanga. Tikanga could be addressed by way of affidavit evidence.

Using case law to build on submissions in court is also a way to build tikanga into case law. Examples include OT v JM where his Honour Judge Coyle said that the courts need to “chart and navigate a new course with whānau to enable the Court to have particular regard to the importance of whānau, hapū, and iwi for an individual child.” In Nikau v Tatchell the Court faced a decision as to whether a child should return to live with her whāngai parents in a small town where she would be immersed in te ao Māori, or whether she should remain in

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652 Somerville, above at n 428, at 169.
656 At [5].
657 Nikau v Tatchell [2018] NZFC 1239.
Auckland with her parents. His Honour Judge Coyle acknowledged the adverse impacts of colonisation on Māori in placing significant weight on s 5(e) and (f) of COCA:

[95] ... there is a wealth of research which shows that urbanisation as a consequence of colonialization for Māori, and indeed many indigenous peoples, has had adverse impacts upon their culture and identity. Just because the majority Pākehā culture does not understand the effects of the imposition of its culture upon Māori, does not give rise to a justification for ignoring and dismissing those impacts based in ignorance. This submission of Ms Paul, who is herself immersed in both in Te Ao Māori and Te Ao Pākehā, is afforded significant weight by me. ...

[102] The Family Court, in recognition of its Treaty obligations, should embrace Te Ao Māori and afford to Māori children, when considering s 5(e) and (f), a particular and careful focus on ensuring that the relationships as set out in the Act and a child’s sense of identity as Maori can be particularly and specially both preserved and strengthened.

(emphasis added)

The Family Court decision was appealed successfully in the High Court,658 and the High Court decision was upheld in the Court of Appeal.659 However, the higher court decisions were based on the fact that there were concerns for the child’s safety in the small town, with consideration also given to s 5(b) and (c) of COCA.660 The higher courts did not overturn the Family Court’s comments about the importance of protecting tikanga in light of the adverse impacts of colonisation.

Including Māori organisations in Family Court stakeholders’ meetings could also be a way to promote tikanga. Many iwi social services have programmes that can help Family Court litigants in a kaupapa Māori way.661 It will also build networks between the iwi and the FJS.

The Nikau cases could be used in support of applications under s 133 or 136 of COCA to ensure that the Court has information about a child’s cultural heritage. OT v JM and Barton-Prescott could be used to support an application under 72(1) of the District Court Act 2016 that a

659 Nikau v Hohepa and Tatchell above at n 590.
660 Nikau v Hohepa and Tatchell above at n 590, at [14], [17] -[18], [28] and [30]. See also Kacem v Bashir [2010] NZSC 112 at [19] where the Supreme Court discusses that safety considerations are likely to have decisive weight, when safety is in issue.
661 See for example Ngāti Kahungunu iwi social services which provide violence intervention education programmes and social work support, Ngāti Kahungunu Iwi Social Services Ki Poneke “What we do” (2016) <www.teritowellington.org.nz> and Tūwharetoa ki Kawerau iwi social services which provide mental health and drug and alcohol addiction support Healthpoint “Tūwharetoa Iwi Social Services” (date unknown) <www.healthpoint.co.nz>.
Family Court matter be held at marae on the basis that this promotes tikanga, best serves Māori people, and promotes te Tiriti o Waitangi. While colonisation has made it difficult to apply tikanga in the current legislative scheme, there are ways to use legal procedures and roles to help the law have a therapeutic effect and meet the cultural needs of Māori. Given that the reports in 1986, 2001, and 2019 have consistently criticised the way legal actors treat Māori clients, it is vital that there is an improvement in this area if the FJS is to meet the needs of Māori.

3. Migrants in the Family Court

Just as legal actors can struggle to meet the needs of Māori litigants, there are concerns about how other ethnic minorities, especially migrants experience the FJS. New Zealand is becoming more culturally and ethnically diverse. In the year to December 2018, the largest migration came from returning New Zealand citizens, and the next most populous groups were from; China, India, the United Kingdom the Philippines, and Australia. As of the 2013 census, just over 25% of New Zealand’s resident population was born overseas, with Asia being the most common birthplace region of New Zealand residents born overseas. Asian immigrants and refugees form almost 5% of New Zealand’s population. Migrants, especially those who face the language barrier and have grown up with a legal system that is different to New Zealand’s, face a distinct set of challenges in the FJS. Migrant survivors of family violence are particularly vulnerable. If TJ is a lens through which to apply the law, then viewing a case through the lens of each client in terms of their cultural situation will help these clients feel understood.

a. Some Migrant Experiences in New Zealand

One difficulty that migrants face is that they may not have legal counsel and other professionals who understand their culture. Examples include:

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662 The District Court includes the Family Court, District Court Act 2016, s 7(6), Family Court Act 1980, s 4.
• professionals not being aware of dowries, and how these can sometimes be used by a woman’s parents-in-law as a means of controlling and abusing her;666
• how the sanctity of marriage in certain cultures may be much stronger than in mainstream New Zealand;667
• that some migrants may come from countries where marital rape and other family violence is not criminalised, or is regarded as normal;668
• that some migrants may come from a background where there are set gender roles and a very high importance placed on differing roles within the family, and where women are raised not to talk in front of men or to advocate for themselves.669

Sripriya Somasekhar describes the unique challenges some Indian migrant women face:670

[T]he upbringing of a girl-child is centred on her maintaining family and community values and traditions. As a wife and mother, it is likely that she will have internalised the widespread belief that effective rearing of children requires the presence of both parents, irrespective of the father’s behaviour.

In her interviews with survivors of family violence, many were concerned about being deported or having no financial means if they separated from their husbands, as they were dependent on their husbands for their visas and for income.671 Both the women who had experienced family violence and those who worked with Indian migrant women said that there was concern about family back home losing face if the parents separated, as divorce carries a lot of stigma and women’s place in the family means they often get blamed if the family unit breaks up.672 There were also instances of leaders of New Zealand’s Indian migrant community not wanting to report abuse to avoid damaging the community’s reputation and to avoid further stigma.673

667 Pillai, above at n 665, at 965.
668 Pillai, above at n 665, at 966 and Tse above at n 665, at 176-177.
669 Somasekhar above at n 666, at 24, Noonan, King and Dellabarca, above at n 485 at 9, and Tse above at n 665 at 185.
670 Somasekhar above at n 666, at 37.
671 At 65-66.
672 At 38 and 70.
673 At 92-94.
The study also found that many migrants became more traditional and protective of their cultural norms in New Zealand as they were concerned the cultural norms would erode.\textsuperscript{674} This sometimes extended to using traditions that no longer existed in India as a means of preserving culture.\textsuperscript{675} Sometimes there was friction between women who wanted to adapt to New Zealand culture, especially if this meant more independence, and men not wanting to adapt to this.\textsuperscript{676} This was also found in a study by Samson Tse regarding family violence in Auckland’s Asian immigrant community.\textsuperscript{677} Every client’s situation is unique, but if legal actors are aware that some of these issues could apply to migrant clients, then they will be less likely to be overlooked.

\textbf{b. Feedback on New Zealand’s FJS from Migrants}

Several studies have shown that the FJS is not meeting the needs of migrants, especially those who are family violence survivors. Somasekhar’s study included women who had been through the Family Court following violence by their husbands. One of the biggest concerns was that the cultural factors mentioned above were often missed. She notes that many lawyers missed things like dowry and abuse by parents-in-law.\textsuperscript{678} The importance of marriage and stigma of divorce is also sometimes missed. Somasekhar notes that these factors can sometimes even outweigh people’s safety.

There have been concerns about people acting in an official capacity supporting the abuser. These include migrant community leaders who value the sanctity of marriage and attach stigma to divorce persuading family violence survivors to discharge protection orders.\textsuperscript{679} There have also been situations where interpreters and social workers have supported the abuser because they are related to him or her which further exposes the victim to abuse.\textsuperscript{680}

Language barriers can create problems. This includes migrants not being aware of services and also women being unable to access services.\textsuperscript{681} Somasekhar cites an example of a migrant

\textsuperscript{674} At 38.  
\textsuperscript{675} At 79.  
\textsuperscript{676} At 88.  
\textsuperscript{677} Tse above at n 666, at 177-178 the study focused on South Asian and Chinese immigrants with South Asian referring to people from India, Pakistan, Bangladesh, Indian Fijians and ‘Chinese” including China, Hong Kong, Taiwan, and South East Asia including Malaysia and Singapore.  
\textsuperscript{678} Somasekhar above at n 666, at 276.  
\textsuperscript{679} At 277.  
\textsuperscript{680} At 276-277.  
\textsuperscript{681} At 194.
family violence survivor being told to fill out her own Legal Aid form despite having a language barrier.\textsuperscript{682} There have also been instances of migrant women not being believed because they cannot adequately articulate the violence they have endured which leaves police questioning their veracity.\textsuperscript{683}

There has been mixed feedback about the FJS. Participants in Tse’s study were positive about protection orders.\textsuperscript{684} One participant in Somasekhar’s study was very happy that the Family Court judge recognised the cultural factors which led to the community leader advocating for a protection order to be dropped.\textsuperscript{685} However, there have been concerns about orders preventing removal being used as a form of power and control over migrant survivors of family violence.\textsuperscript{686} Some participants in Somasekhar’s study mentioned concerns about migrants not having support people in court.\textsuperscript{687}

c. Possible Improvements

Cultural awareness is an important way for legal actors to minimise the anti-therapeutic effect of family law for migrant communities. Barndardo’s states that PTS providers need to understand the shame and stigma associated with separation in some minority communities.\textsuperscript{688} Tse recommends cultural competence training for professionals and having expert witnesses to speak to culture.\textsuperscript{689} Somasekhar highlights the importance of this and ways legal actors can become more culturally aware:\textsuperscript{690}

As in the case of other professionals, there is a tremendous need for legal aid lawyers, assigned to Indian migrant women, to understand the dynamics of migration and pay close attention to sociocultural aspects of the home country. For instance... dowry and in-laws (sic) involvement in abuse are largely overlooked in many cases... The reason for this is the lack of knowledge among service providers about these issues... Professionals... should be cognizant of the pressures facing Indian women on a family and community level. Perhaps this awareness can be achieved if professionals asked the ‘right’ questions when women approached them for help. For instance, asking them about their relationship with their in-

\textsuperscript{682} Somasekhar above at n 666, at 191.
\textsuperscript{683} At 97-98.
\textsuperscript{684} Tse, above at n 666, at 189.
\textsuperscript{685} Somasekhar above at n 666, at 277.
\textsuperscript{686} At 38-39.
\textsuperscript{687} At 254.
\textsuperscript{688} Barnardo’s, above at n 526, at 9.
\textsuperscript{689} Tse above at n 666, 193.
\textsuperscript{690} Somasekhar above at n 666, at 276.
laws has the potential to reveal the tough constraints she operates under while navigating their safety.

Somasekhar advises lawyers of immigrant clients not to give up if their clients seem unresponsive given the extra “layers” these clients face, such as shame from their communities and financial and immigration repercussions from separation. She says that Family Court judges “should be vigilant about community leaders’ efforts to coerce women to stay in the abusive relationship”. Tse recommends that pamphlets about family violence be translated into South Asian languages. Barnardo’s submissions recommend that there are more steps taken to ensure the FDR is accessible for migrants and refugees. In July 2019, the Family Violence Act 2018 was enacted. It included specific mention to dowry abuse as a type of family violence. This was not present in the previous legislation, so this should raise awareness of dowry abuse.

Many of the suggestions relating to Māori clients can also be applied to migrant clients. Sections 133 and 136 of COCA could be used to allow the Court to be aware of any cultural considerations. Including representatives from migrant communities in Family Court stakeholder meetings would also help legal actors to be aware of networks to help migrant clients and would allow for ideas and information to flow between the FJS stakeholders and migrant communities. TJ encourages legal actors to look beyond legal rules and to the social force of the law. Using legal procedures to accommodate to minority cultures minimises the anti-therapeutic impact of going through the FJS. It is important for legal actors to find ways to make the FJS more accessible to migrant communities, especially those who require protection.

691 At 274.
692 At 277.
693 Tse above at n 666, at 187.
694 Barnardo’s, above at n 526, at 10.
695 Family Violence Act 2018, s 9(4).
4. Family Violence in the FJS

a. Importance of Protecting FJS participants from Family Violence

COCA is the applicable law for all proceedings in New Zealand relating to the custody and guardianship of children.696 The paramount principle for decision making in COCA is the children’s welfare and best interests.697 In considering each child’s welfare and best interests the Court must consider certain principles as part of its analysis.698 One of these factors is that “a child’s safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10 and 11 of the Family Violence Act 2018) from all persons, including a child’s family, family group, whānau, hapū, and iwi”.699

Under the Family Violence Act, the definition of violence includes a child seeing a person in their family being the victim of violence.700 Violence also includes a child being at risk of seeing a person who they are in a domestic relationship with being a victim of family violence.701 The Supreme Court has held that while each of the factors needs to be considered, the principle relating to safety will likely carry decisive weight.702 Since that decision, the order of the principles in s 5 of COCA have been amended so that the principle relating to safety is now listed first.703

Family violence is prevalent in New Zealand. In 2011, New Zealand had the highest rate of family violence in the OECD.704 An estimated 76% of New Zealand’s family violence incidents are not reported to police.705 In 2016, there were 5,461 applications for protection orders.706 In the same year, 7,262 children were included in protection order applications.707

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696 Care of Children Act, s 13.
697 Care of Children Act, s 4.
698 Care of Children Act, ss 4(2)(a)(i) and 5.
699 Care of Children Act, s 5(a).
700 Family Violence Act, s 11(2)(a).
701 Family Violence Act, s 11(2)(b).
703 See Lowe v Way [2015] NZHC 93 at [9] where the High Court held that Parliament would not have reordered the s 5 principles to place safety at the top if it did not intend to emphasise the importance of protecting children’s safety.
706 Protection orders are made if there is a family relationship, if there has been family violence, and the order is necessary for the protection of the application and/or an applicant’s child. See ss 8 and 60 of the Family Violence Act 2018.
707 New Zealand Family Violence Clearinghouse Data Summary: Children and Youth affected by Family Violence (June 2017) at 15.
A common theme in the submissions to the Independent Panel was that the FJS is not doing enough for survivors of family violence. Concerns have been raised with both the litigation and conciliation processes in the FJS. There could also be improvements in the way perpetrators of family violence are dealt with.

b. Concerns about the FJS’s Impact on Survivors of Family Violence

Vivienne Elizabeth interviewed 21 parents who had been involved in Family Court disputes about the care arrangements of their children New Zealand’s Family Court. Most of these parents had been the victims of family violence. The study found that:

Litigation over care and contact arrangements provides a perfect vehicle for ongoing coercive control, not only because it enables access to one’s victim – thereby causing them to feel vulnerable, anxious, and fearful – but because it does so through socially legitimate channels.

A study into the Family Court counselling that existed prior to the 2014 reforms found that conciliation processes could expose survivors of family violence to further victimisation. One participant had a counsellor who did not stop tirades that her ex-partner made towards her. Others were concerned facilitators had a dialogue that moved discussion towards the counsellor’s preferred outcome, or pressured them to compromise. The authors note that “[v]iolence is the most widely recognised threat to equality in the counselling room, with the risk of appeasement to ensure safety.”

Morgan and Coombes interviewed New Zealand women who had been victims of IPV and had partners convicted of criminal offences. That study found that the Family Court granted men who had been convicted of violent criminal offending access with their children as the women were not believed. The study found that the Family Court failed to protect survivors

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708 Noonan, King and Dellabarca, above at n 485, at 7-8
710 At 32.
711 Vivienne Elizabeth, Julia Tolmie, and Nicola Gavey “Gendered dynamics in Family Court counselling” (2011) 31(2) New Zealand Journal of Counselling 1.
712 At 11.
713 At 4.
714 At 3.
716 At 74.
of family violence and that professionals in the Family Court did not understand the complexities of family violence.\textsuperscript{717}

In 2017, the Backbone Collective surveyed 496 women who had been involved in the Family Court. The results were largely negative about how the Family Court responded to family violence, with 84\% or 417 participants saying the their “experience of violence and abuse was not believed or responded to, was minimized, or was not accepted into evidence”.\textsuperscript{718} Only 13\% of the participants said that the Family Court believed their experience of family violence.\textsuperscript{719}

The survey raised concerns about survivors being revictimised by the FJS. Over half of the survey participants said that they had been “threatened, intimidated, or physically assaulted by their abuser while attending court-related appointments/fixture or hearings”.\textsuperscript{720} In a Backbone Collective report about lawyers for child, some women raised concerns about their lawyers speaking to lawyer for child before court and their lawyer downplay the violence.\textsuperscript{721} In the 2017 survey, participants mentioned occasions when they were left alone in a courtroom with their abuser while their lawyers spoke with the judge in chambers. Some were accosted outside the courtroom or refused to attend court fixtures as they feared seeing their abuser, others hid in the bathroom to avoid their abuser.\textsuperscript{722}

One common area of concern for participants in the Backbone Collective’s 2017 report were RTMs. These are common in COCA proceedings. Participants in Backbone’s 2017 study described them as “scary and stressful”.\textsuperscript{723} While the Backbone Collective acknowledges that the 2017 survey is not a scholarly research, it has importance as it involves many Family Court participants and a comprehensive set of questions about New Zealand’s FJS.\textsuperscript{724}

\textsuperscript{717} At 73-74.
\textsuperscript{718} Backbone Collective Out of the Frying Pan and into the Fire: Women’s experiences of the New Zealand Family Court (June 2017) at 16.
\textsuperscript{719} At 16.
\textsuperscript{720} At 24.
\textsuperscript{721} Deborah Mackenzie and Ruth Herbert Backbone Collective Seen and Not Heard Lawyer for Child (3 May 2018) at 49.
\textsuperscript{722} Backbone Collective, above at n 718, at 25.
\textsuperscript{723} At 25.
\textsuperscript{724} At 35.
c. TJ and Survivors of Family Violence

There are three ways that legal actors could use TJ to improve the therapeutic impact of the FJS for the survivors of family violence: taking an interdisciplinary approach, applying procedural justice, and using their roles to shape the law and common practice.

Interdisciplinary approach

TJ is interdisciplinary. Legal actors can use psychology and social work research to learn about the impacts of family violence and trauma. For example, if a lawyer understands that avoidance is a sign of trauma, he or she can view their case through that lens when a client who is a survivor of family violence misses appointments or struggles to remember details. This, in turn, could lead to techniques to ensure the client meets appointments and finds them less traumatic. Understanding that many people who have survived family violence would have liked a support person may encourage legal actors to advocate more strongly for support people being allowed to be present in court and RTMs. Legal actors could also make themselves aware of a wide range of services that can meet different clients’ needs and ensure that providers of nonviolence courses are involved in Family Courts Association meetings. There are courses which cater for both perpetrators and survivors of family violence and for a variety of demographic groups.

Applying Procedural Justice

Legal actors can ensure their clients feel heard by asking them if they are comfortable with having someone who has been violent towards them in the room during a RTM or whether a shuttle mediation would be more appropriate, with the parties in separate rooms. Explaining beforehand about both parties normally being in the courtroom together and working with the client and court staff to ensure that the parties are not in the same room except during court could help.

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725 Wexler, above at n 1, at 24, and Wexler, above at n 9 at 9.
726 Jenkins, above at n 361, at 392.
727 See the tips outlined in Parker, above at n 360 at 176 which are outlined in Chapter 3 above.
728 For example, see Somasekhar above at n 666, and Backbone Collective, above at n 718.
729 For example, Dove Hawke’s Bay provides Women’s Education Programmes about family violence, Men’s education programmes, and children’s programmes. See Dove Hawke’s Bay “Programmes and Services” (2019) Dove Hawke’s Bay <www.dovehb.org.nz>.
Procedural justice aims to ensure that people have the ability to tell their story and be heard, and that what they have said is taken seriously.\textsuperscript{730} Given that the above studies indicated that family violence was minimised or not believed\textsuperscript{731} it is important for legal actors to not minimise family violence. Procedural justice involves talking with the client about the violence, and how to manage safety risks. Lawyers for child could consult with both parties separately about what they think needs to be done for the children to have safe contact with the parent who has been violent. Even if the lawyer for child does not follow these recommendations, the parties will have had an opportunity to provide input into the care arrangements for their children. This application of procedural justice gives parties a say in the procedure that they would like and allows them to feel heard.

*Using Rules to Shape the Law and Common Practice*

Just as legal actors can use legal procedures and legal rules to improve the FJS for Māori and migrants, they can use them to improve the system for survivors of family violence. Examples include using:

- psychologists’ reports under s 133 of COCA to analyse the impact of any violence upon the child, the survivor parent’s need for safety from the perpetrator and how these affect the child’s wellbeing;

- Sections 4 and 5(a) of COCA to ask either party to attend via teleconference for short directions or issues conferences, on the basis that it is in a child’s best interests that his or her parents are safe and not exposed to further intimidation;

- Section 12A(4) of the Family Court Act 1980 which states that the Evidence Act 2006 applies to proceedings under COCA, to apply for a survivor of family violence to give evidence behind a screen, or some alternative way under s 103 of the Evidence Act 2006;

- Sections 11A(1)(f) and s 11A(2) of the Family Court Act 1980 to ask for a client who is a survivor of violence to have a support person present, even if the other party disagrees with this.

\textsuperscript{730} Miller above at n 188, at 264 (footnote omitted).

\textsuperscript{731} MacKenzie and Herbert, above at n 721, at 49, Backbone Collective, above at n 718, at 16 and Tolmie and Gavey above at n 711, at 4.
If legal actors make a conscious effort to apply the above suggestions, the antitherapeutic impact of the court process could be minimised for survivors of family violence.

5. Unreasonable Behaviour and Bullying

There are concerns about bullying of FJS participants by professionals. It is important for these to be addressed in order to minimise the anti-therapeutic effect of the FJS. Worksafe and Employment New Zealand define bullying as “unreasonable and repeated behaviour towards a worker or group of workers that can lead to physical or psychological harm”.732

a. The Legal Profession’s Behaviour Towards Litigants

In the 2017 survey for Family Court participants, the Backbone Collective found that 166 women out of almost 500 said they had been abused by a lawyer, judge or psychologist or other official person.733 When asked for more detail, participants said the abuse involved:734

- being prohibited from speaking at all during court proceedings;
- being threatened that if they did not compromise on parenting orders they would be in contempt of court;
- being threatened by lawyer for child that if they did not compromise, the child would be taken away from them, they would lose their Legal Aid or things would get worse for them;
- being pressured by their own lawyer not to talk about the abuse or pursue the children’s safety as that would make things worse for them;
- being rushed through proceedings and pressured to agree to things they did not understand or agree with;
- having their affidavits or expert reports neither acknowledged nor read in the proceedings;
- being blamed for their children’s ill health rather than it being the effect of the violence and abuse on the children;
- being prohibited from making further applications to the Family Court;
- not having their trauma (due to the abuse and the Family Court proceedings) acknowledged and responded to appropriately;
- being belittled, shouted at and told to be quiet;
- being forced to give evidence for long periods of time with no breaks.

732 Worksafe “Preventing and responding to bullying at work” (March 2017) at 8, and Employment New Zealand “Bullying” (date unknown) <www.employment.govt.nz>.
733 Backbone Collective, above at n 718, at 20.
734 At 21.
Some of these factors such as not being able to make further applications to the Family Court, would not be classified as bullying. It is possible that those responses involve s 139A of COCA which prevents certain applications being made within two years of a final direction on a similar proceeding. Other behaviours, such as threatening that the children will be removed, and minimising violence are concerning. It could be helpful for lawyers to check in with their clients to ensure that they know they can speak up if they are unhappy with how any of the professionals are behaving. It could also be helpful for organisations such as Women’s Refuge to speak to lawyers and judges about the impacts of these sorts of behaviours on those accessing the FJS. While parties do need to know about contempt of court, how Legal Aid can be withdrawn in certain situations, and that some actions can lead to children being removed from their parents’ care, these messages should not be used to enable bullying.

6. Chapter Summary

Legal actors practising in family law often face a raft of complex issues. Individualistic, Western law does not meet the needs of many family law participants. In addition, legal actors are failing to meet the needs of people who are not part of the dominant culture. This is particularly the case with Māori in the context of Aotearoa New Zealand. It is important for legal actors to be aware about key tikanga Māori, have at least a basic understanding of te reo Māori, and to use ss 5(e) and (f) of COCA to assist their Māori clients.

Being aware of the importance of tamariki within a whānau and hapū and the importance of whakapapa would also help lawyers apply a therapeutic lens to their practice for all clients. The collective Māori culture places tamariki within a community, their whānau or hapū. Tamariki are seen as belonging to their extended family. When lawyers see each individual client as belonging to a wider family, they are cognisant of a range of relationships that will be impacted in a dispute that goes beyond the parties. This takes the focus from solely being on rights and “winning” a case, and therefore moves away from a culture of critique. For instance, if a lawyer regards a child as belonging to both sides of his or her whānau, the lawyer will be less likely to write disparaging comments about the other side’s in-laws. The individualistic Western culture is neither superior nor inferior to the collective Māori culture, but it is the dominant culture and as such, legal actors need to make a conscious effort to incorporate tikanga as much as they can.
In addition to tikanga, legal actors also need to adapt to other cultures. New Zealand is becoming increasingly diverse. If legal actors with a Eurocentric worldview can turn their minds to tikanga, this should also help develop an appreciation that other cultures may not have an individualistic foundation. While it is impossible for legal actors to be aware of the intricacies of every culture, they can use TJ to draw on other disciplines to help them. Sections 133 and 136 of COCA can both put evidence of a child’s culture before the Court. Professionals should also take any opportunities to attend any training about learning about other cultures. The diversity strategy recommended by the Independent Panel is also promising. If implemented well, there could be policies and information about different cultures readily available to legal actors.

Another way legal actors can take an interdisciplinary approach is being aware of the dynamics of family violence, especially trauma. The article by Lynette Parker discussed in Chapter 3 provides useful tips for working with clients affected by trauma. Keeping up to date with research on family violence such as those discussed in Chapter 3 is also important, although it is important to be aware of the risks of legal actors using this research if they are not trained in analysing empirical research.

One area where TJ can be immediately applied is in improving the lives of legal actors. If legal actors are aware that the law is a social force and know about vicarious trauma and burnout, they can take steps to combat this in their own practice. A focus on TJ may also help to reduce the culture of critique.

The next and final chapter discusses the benefits that TJ could bring to New Zealand’s FJS and makes recommendations to this end. It includes a fictitious case study within the current legislative framework. The legal actors first focus on applying the law and the rules. In the second part of the case study, they apply TJ to show legal actors can make a difference to the outcomes for litigants within exactly the same legislative framework. Finally, it addresses how

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735 Noonan, King and Dellabarca, above at n 8, at 8.
736 Parker, above at n 360, at 178.
737 See Rathus above at n 391, at 85 for a discussion on this point.
738 Winick, above at n 69, at 121.
739 Jenkins, above at n 361, at 394-395, 398-400.
the legal actors in the case study might act if the Independent Panel’s recommendations were adopted.
Chapter 7

Discussion and Conclusion

New Zealand’s FJS is a complex system. There are many concerns about how people going through the FJS are not having their needs met. Some of these concerns have been raised for decades.

Many of these issues could be improved significantly if legal actors applied TJ in their day-to-day work. This means that change can be made on an individual level immediately. The case study in this chapter shows the value of legal actors applying TJ, even when there is no change to the legal rules. The first example involves legal actors focusing on applying the law, without considering the psychological impact of the law. In the second example, the legal actors apply TJ. This second example highlights the importance of the other vectors and is used to respond to criticisms of TJ.

1. Scenario One: Focus on Legal Rules

Cassia and Stella

Stella, a family lawyer, first saw Cassia Ireland about three months ago. Cassia had separated from her husband, Mikaere, after he had become verbally threatening. Mikaere and Cassia have three children: Mason aged 12, Maddison aged four and a half and Ataahua aged two. Stella had advised Cassia about PTS, FDR and the on-notice process. She told Cassia that if she, or the children were in danger, then the without notice track was available, but that the threshold was not met.

Cassia returned to see Stella for a 10:30am appointment. Stella has court at noon but decides to squeeze Cassia in. She is a bit behind budget and nervous she will not meet her targets. Stella is exhausted; she has a three-day hearing next week and is still catching up from doing two without notice applications earlier in the week.

Cassia attends the appointment with the girls. She has a bruise under her eye. Stella asks quickfire questions. How did she get the bruise? When did Mikaere last see the children? Was the last separation final? Why not? Is she safe?
After ascertaining these, Stella advises Cassia about the legal tests for parenting and protection orders and ask her to outline any violence in the relationship, in reverse chronological order. While she is part-way through, Cassia bursts into tears, Stella puts some tissues in front of her and continues with more questions, advising her that the affidavit needs to be as specific as possible and that they are short on time. How often was she hit? Did she keep any evidence? Why not? Where were the children during each incident? Cassia keeps going off topic, saying she doesn’t want to take the children from their father. Stella smiles and nods and continues with her questioning, pressing Cassia for details on each incident of violence.

Stella looks at her watch; she has 15 minutes to wrap the interview up and Cassia is now sobbing constantly. Stella grinds her teeth in frustration. She is not a therapist or a social worker. Finally, Stella gets to the last section of questioning. What does Cassia want moving forwards? All Cassia can say is for the children to be safe and to have a good relationship with their father. In the long run, she would like them all to live together as a family. Stella tries to get specifics out of her. Who would she like to supervise contact? What times work best for Cassia for contact to occur? Cassia can’t seem to answer these questions. Stella suppresses a sigh and notes of ‘times as agreed’ for the contact proposal. She gives Cassia a quick outline of the difference between on notice and without notice and how the grounds for a without notice application are established. She is satisfied that this brief explanation is enough because she had already explained this to Cassia when Stella saw her earlier.

When Stella starts explaining service, Cassia seems scared and does not understand why Mikaere needs to be served, since the applications are being made without notice. Stella is well and truly exhausted by this stage and is tired of repeating the same thing over again. Stella tells Cassia that Mikaere will need to be served with the applications after the judge considers the application, that it is a fundamental part of the justice system, and that she is being unreasonable. Stella goes through the Legal Aid application, letter of engagement and books a time for Cassia to go over her affidavits once they are drafted.

Once Cassia has left Stella realises she has to leave immediately for her court appearance. After returning from court she immediately drafts the affidavits. Stella has the rules for without notice in front of her, as well as the tests for protection orders and the legislation that surrounds decision making for parenting orders. Stella focuses on wording the affidavits
to convince the Court of the urgency and danger to Cassia and the children. She includes as much detail about the violence as possible so that the Court will have the most accurate picture. She is pleased with the fact-specific and detailed outcome and is confident of a positive result. The only part that could be better is looking at the care arrangements moving forwards, but it is early days in the proceedings and those can be worked out later. Cassia will have the advantage and it will be up to the other side to get the ball rolling on his contact with his kids anyway.

Cassia misses her appointment. Stella books her in again for an hour later. Cassia apologises, saying she is struggling to remember things lately and that she is nervous about filing proceedings. She goes through her affidavit and frowns. She is no longer sure of some of the dates and thinks there was a further incident that she had forgotten. Because Stella is so busy, she has not eaten since breakfast and it is now after 4pm. Stella suppress a sigh and adds to the affidavit, rushing Cassia to read it so that it can be sworn before the end of the day. Cassia is now a bit frightened of Stella and feels like she has done something wrong.

Stella files the applications, and as expected, the orders are made. Cassia has a protection order protecting her and the children and a parenting order giving her day-to-day care of the children and Mikaere contact supervised by a professional supervision agency or a person approved by the Court. Stella rings Cassia and is surprised that she is not as happy as Stella is with the win. Cassia is particularly upset that the professional supervision will cost $90 per hour, effectively preventing the children from seeing their father until the Court approves a supervisor. She also comments that she has received a large parking ticket because she did not realise her appointments would be so long. Stella cheerfully reminds her that she is safe, that there will be a directions conference in six weeks’ time and that if there is agreement, a supervisor can be approved then and in the meantime it’s up to Mikaere to get things moving. Stella sends out a reporting letter and diarises the matter for three weeks’ time to see if service has been effected on Mikaere, relieved that she will not need to worry about this file for a few weeks.

*James and Mikaere*

James, another family lawyer, has Mikaere Ireland booked in for an appointment. Mikaere arrives looking angry and tired. James reads through the affidavits in support of the
applications for parenting and protection orders with Mikaere who becomes more and more agitated throughout the process, repeating that he cannot see his kids. Once James has finished, Mikaere comments how upset he is that Cassia has focused on the violence without raising the other positive aspects of their relationship. He also points out how the violence was exaggerated and that he was provoked. He does not want supervised contact. Mikaere does not want to do the non-violence programme directed by the Court. James takes note of his client’s position. He points out that Mikaere can have contact through a professional supervisor and that he can either apply for funding or pay for this himself. Mikaere repeats that he wants unsupervised contact on his terms, and that if he is not successful, he will apply for day-to-day care of the children.

James takes notes of Mikaere’s position. He advises Mikaere that the children’s best interests will be the Court’s paramount consideration and that family lawyers must promote consideration, as required under s 7B of COCA. He does not take those comments any further. He also does not try to engage Mikaere about finding a supervisor in the interim. James and Mikaere go through and respond to each of the points made in Cassia’s affidavit. Mikaere insists that Cassia’s failings be brought up as well, especially the fact that she uses cannabis and alcohol. She had disclosed these in her affidavit, but Mikaere is adamant that she is downplaying them and Mikaere wants a lot of emphasis placed on them. James is conscious that he must follow his client’s instructions so a large part of the affidavit is focused on Cassia’s substance use.

*Riley (lawyer for child) and Anahera and Manu (paternal grandparents)*

Riley took on the *Ireland v Ireland* case as a favour to the registry, even though she does not really have capacity for more work. Lawyers for child are thin on the ground currently. Her brief is to meet with the children, ascertain their views, meet the parents and negotiate interim contact. A standard brief. Riley emails the other lawyers urging the parties to reach agreement on interim contact for the children’s sake.

A week passes before Riley picks up the file again. She has been busy with other matters of her own and is covering for a colleague who is on leave. There has been some correspondence between the lawyers, but no compromise on either side. The directions conference is still a
month away and the children have not seen Mikaere for almost two weeks, not an uncommon occurrence when without notice applications are filed.

Riley meets the children in her office. She does not have time to travel to see them. Mason is sullen and difficult to speak to. The girls say they miss their Dad. Riley reports the contents of the meeting to the Court and the other lawyers and attempts to get the ball rolling on agreeing to a supervisor. The emails come back thick and fast; Mikaere refuses any of Cassia’s family as he thinks they will undermine him. Cassia is worried about Mikaere’s mother’s heart problems and does not want his father as he has two historic assault convictions from when he was 19. When Riley half-heartedly suggests a roundtable meeting, both lawyers write back to say it would not be workable given there is no agreement on supervisors.

Another week later, Anahera and Manu Ireland, Mikaere’s parents, come to see Riley. They are both in tears because they have not seen their mokopuna. Riley advises she cannot help because grandparents’ contact occurs normally during the contact the parent has with the children. She advises that if they want to take matters further, they need to get their own lawyer, or organise their contact to coincide with Mikaere’s contact. Anahera and Manu look incredulous. They point out that they are the grandparents and have looked after the children for part of almost every school holiday and over many weekends. Riley kindly points out that the law says children’s care is primarily the responsibility of their parents and that they need leave to apply for a court order giving them contact. After Anahera and Manu leave Riley emails the other lawyers again saying that the grandparents assert they have cared for the children for large periods of their lives and asks Cassia to reconsider them as supervisors. Stella replies Cassia’s concerns that were raised earlier have not been addressed and there is no consent.

**The Directions Conference**

At the directions conference, the judge expresses disappointment that contact has not occurred yet. He sets the matter down for a short cause hearing to determine the protection order and to determine whether either Anahera or Manu are suitable supervisors. He does not engage with the parties. Cassia cries after the directions conference, saying she didn’t understand anything. Stella looks at her watch, nervous about getting back to the office for
her next client. She tersely tells Cassia that it was a procedural matter and the matter will be set down for hearing. She has got her orders and has nothing to worry about.

**Before the Short Cause Hearing**

Mikaere comes to his appointment with James with his parents so that they can do their affidavits. Mikaere has not seen his children for seven weeks. James tells Mikaere that it will help his case if he has contact before the final hearing. Anahera and Manu talk Mikaere into commencing professionally supervised contact and James puts in an application for funding for the contact and emails the other lawyers. Stella replies, saying Cassia is grateful that Mikaere is placing the children’s safety first. This angers Mikaere as he feels that the allegations against him have been exaggerated while Cassia is minimising her own issues.

It takes about three weeks for professionally supervised contact to get up and running, because Mason is also expressing reluctance at seeing his father, which prompts Cassia to delay matters. The contact sessions go reasonably well and the supervisor writes a positive report. However, Mikaere is so annoyed at Cassia that he sends her a string of abusive text messages and is charged with breaching the protection order. This angers him further and makes him change his position to seeking day-to-day care as he believes Cassia is alienating Mason from him and his parents. He is also annoyed that no one, not even James, understands how this is impacting his parents. Mason is his parents’ eldest mokopuna, and they are struggling being parted from Mason and his sisters. Mikaere is convicted and discharged in criminal proceedings. This is his first criminal conviction and it causes him a great deal of shame.

**The Short Cause Hearing and Settlement**

The short cause hearing is held seven months after professionally supervised contact begins. It is structured to address the protection order, and then in the afternoon address the proposed supervisors, or whether supervision is necessary. During the hearing, the judge struggles to pronounce Ataahua’s name, which lowers both Cassia’s and Mikaere’s respect for him. In deciding there should be a final protection order, the judge focuses on the criminal conviction and the fact that Mikaere has refused to do the non-violence programme. The judge also makes a finding that Mikaere’s position in now seeking day-to-day care is controlling.
The judge comments that he would be very unlikely to make a ruling giving Mikaere unsupervised contact or day-to-day care at a final hearing. Mikaere slaps his hands on the table in frustration. The judge warns Mikaere that that sort of behaviour is not tolerated and if it happens again, he will be found in contempt and put in the cells. Mikaere is still embarrassed and angry from being charged with breaching the protection order and does not want to be involved in any more court matters. He is not sure what contempt is, or what he has done wrong. He does not ask James about this and does not ask the judge, who has made a lot of negative comments about him. He does not want to make things any worse for himself.

The judge then turns to Cassia and indicates that her reasoning for opposing the grandparents as supervisors is unhelpful and unfounded. He comments that the hearing can keep going to address the parenting matters or the parties can stop wasting his time and talk with their lawyers about his comments to finish proceedings. Court is adjourned. The parties and their lawyers go to separate rooms to discuss matters, with Riley going between the rooms.

Stella tells Cassia that her concerns about the grandparents are not really going to get anywhere because Cassia let them look after the children in the past. Cassia tells Stella that Anahera’s health problems are recent, and that she ensured Manu was never left alone with the children because she was nervous about him. She also tells Stella that she did not make a big issue of it during the relationship because she did not want Mikaere to get angry at her. Stella rolls her eyes and asks why this has not been brought up before. Cassia doesn’t reply. She can’t remember why she did not bring it up before, she bites her fingernail, wishing she had a support person to bounce ideas off. She is relieved to be out of the courtroom. Given the judge’s comments and behaviour towards her, she does not really think there is any point opposing the grandparents supervising. After the first couple of lawyer’s appointments, she was so exhausted she struggled to look after the children, and she feels even more tired now. She reluctantly agrees to the grandparents supervising.

James growls at Mikaere for losing his cool in court. Mikaere does not try to explain; he is too nervous he might do something wrong and get put in the cells again. He has been having nightmares about his District Court appearance where the conviction was entered and does not want to get into further trouble. He does not want supervised contact, but he does not think there is any point arguing anymore. At least his parents will get to see their mokopuna.
Mikaere proposes contact every second weekend, provided it is at his parents’ home and supervised by them, with the same conditions for half of each school holidays. The registrar comes back in and tells the parties they have five minutes left and need to come back in after that. The lawyers are a bit taken aback as none of them expected final orders were going to be made for the parenting matter. They hastily address Christmas and birthdays and Riley types up a consent memorandum. The common provision “any other supervised contact as agreed” is left out in the rush.

The parties and counsel come back into the courtroom. The judge looks at his watch and mutters his disapproval of people taking too long. He reads the consent memorandum and makes the orders. He leaves the courtroom without saying anything further. Cassia is in tears and Mikaere leaves without talking to anyone, furious with Cassia for ruining his life.

**After Court**

Stella receives a phone call from Cassia six weeks after the hearing. Cassia is concerned because Ataahua is struggling being away from her for so long. In the school holidays both girls ran away to try and come back to her. When they returned after school holiday contact, their development had regressed and Ataahua needed to be toilet trained again. Stella gives Cassia the usual advice about the proceedings not being reopened for two years unless there is a material change in circumstances or consent. She gives the opinion that just because the girls do not like contact, this is not a reason for the order to be varied. Cassia is devastated.

Stella puts her head in her hands after the phone call. She is exhausted and disillusioned with family law. The whole process has just made Mikaere’s and Cassia’s relationship worse and the children are stuck in the middle. Most of her cases seem to end up like this and she is losing faith in the FJS. Moreover, she is constantly needing to work twice as hard as the property lawyers in her firm to meet her targets because most of her clients are legally aided. The result is that she has hardly had time to see her friends or do anything outside of work in months. She is also having difficulty concentrating, and some of her high-conflict cases make her want to physically vomit or cry. She resolves to look at policy-based roles when she gets home from work.

At about the same time Mikaere rings James. He advises that the girls sometimes struggle being away from their mother, but he does not tell Cassia this because she has so much time
with the girls. He is still angry about the fact that Ataahua did not recognise him or his parents at the first contact session. Mason however is enjoying contact and sometimes wants to stay longer. James gives Mikaere the same advice as Stella gave Cassia. Mikaere knows it will be fruitless trying to talk to Stella as she has been very cold towards him since the proceedings. Instead he decides to start saving money for bringing proceedings in two years’ time. There is no way he is backing down next time.

**Family Law without TJ**

Stella, James and Riley did not break any rules. They gave their clients advice in accordance with the law. However, Mikaere, Cassia and the children were all dissatisfied with the outcome. None of the lawyers placed emphasis on protecting the relationship between the parties. Even though there has been violence, the parties are still both guardians and need to make decisions about their children’s lives. Cassia also said at the beginning of the proceedings that she wanted to live with Mikaere as a family, provided the children were safe. The proceedings have ensured that the parties will be unlikely to reconcile. The lawyers also did not consider tikanga and applied the law through a euro-centric, individualistic approach, which hurt Mikaere and his parents. The rushed nature of the consent memorandum has meant that the proceedings will likely be reopened in two years. The focus on the rules and disregarding the psychological impact of the law has resulted in a culture of critique where the parties and professionals are focusing on the weaknesses in each party’s case.

2. **Scenario Two: Legal Actors using TJ**

**Cassia and Stella**

Cassia comes in to see Stella. She is concerned about her husband’s behaviour. He is threatening to leave and also threatening to hurt her. Stella asks Cassia questions. What prompted the threats? Does Cassia feel safe? Stella gleans that Mikaere has lost his job and has become withdrawn and is often tearful. He has been drinking more and it is usually when he is drunk that the threats happen. Stella gives Cassia an overview of the law both the on notice and without notice processes, and also gives her the numbers for women’s refuge, some counsellors, and parenting courses. She then outlines that FLAS only covers two appointments but to be in touch if anything changes.
Cassia comes back a few months later with a black eye. She has a support person from Women’s Refuge with her, as well as the girls. Stella has booked out three hours for the appointment as she wants to make sure they are not pressured for time. She sees that Cassia is tearful and offers her tea or coffee. She begins the interview by outlining her role, confidentiality, and lets Cassia know that the interview could take a while, so to keep an eye on the time to ensure she does not get a parking ticket. She lets Cassia know she can take a break at any time. Before asking Cassia about the violence, she asks Cassia to give update her about how things are going. Cassia sets out that Ataahua has been acting out lately and at one stage, she had kept Mikaere and her awake for almost three days straight. After this, she and Mikaere had got into an argument and he punched her. A few days later it happened again. This time she had been knocked out. These both happened after no sleep, alcohol use, and calls from the landlord about unpaid rent.

After telling Stella this, Cassia starts crying. Stella asks Cassia if she would like a drink of water. Cassia nods and Stella leaves to collect one, allowing Cassia to regain her composure. Stella asks Cassia easier questions like the school the Mason attends and the names of the proposed supervisors. Cassia senses that Stella wants her to have a big say in her case. She says she wants to ensure she and her children are safe, but she also wants her children to know their father, and that if Mikaere can work on his issues, she wants them all to live together as a family again. Stella thanks her and asks her what sort of steps she thinks would help Mikaere to take. She also encourages Cassia to ring Mikaere’s aunty to do an affidavit to ask to be a supervisor. Cassia had been reluctant initially, but Stella told her that the best way for contact to commence quickly is to suggest someone from the outset who will work for everyone. As Cassia is not comfortable with Mikaere’s parents supervising, she needs to think of someone else. Cassia finds this difficult and Stella reminds her that the children need to come first in this situation.

Stella alternates between asking questions that are easy to answer and the difficult questions about the violence. She gives Cassia a flow chart of the without notice and on notice proceedings and each step involved. Stella drafts the proceedings in a way that outlines the need for protection, but also highlights that Mikaere has been an excellent father until recently and says that Cassia wants Mikaere to work on his issues.
Cassia is nervous about Mikaere’s reaction but is happy that her affidavit also sets out good things about Mikaere and does not vilify him. Stella files the proceedings, including an affidavit from the supervisor, without notice. The orders are made. The parenting order allows Mikaere’s aunt to supervise once she has met with lawyer for child and lawyer for child is satisfied she is appropriate. The order also allows for any other person to supervise as agreed between the parties and lawyer for child. Cassia is relieved and anxious. Stella explains the process to Cassia again, understanding that it is a lot to take in. Stella diarises to follow up in a week regarding service, lawyer for child being appointed and Mikaere’s aunt meeting lawyer for child. Stella is particularly mindful of the younger children needing to see their father frequently.

After work, Stella goes to the gym and does not take work home with her. She needs to switch off as she has a high-conflict case in court tomorrow. She makes sure to block out a day next week to catch up on the administrative parts of her job so that she does not get behind on them.

*James and Mikaere*

Mikaere comes to see James with Anahera and Manu. He explains that his aunt rang his parents outlining the situation and that his aunt and parents had supported him when he got served. His aunt was helping to liaise with Stella about getting contact up and running but that they are waiting on lawyer for child. James is impressed with how the family is working together. He also tells Mikaere that Cassia was very reasonable in her affidavit. Mikaere scoffs at this but James tells him that it is rare for an applicant to be so child focused and that it would work best for him to be child focused as well. Mikaere is focused on not being able to see the children and often makes snide comments about Cassia, but his parents remind him to stay calm, and that he needs to work on his issues.

Before going through the allegations of violence, James asks about the underlying issues leading up to the separation and violence. Mikaere talks through losing his job and feeling unsupported by Cassia and feeling like a failure. James jots down some budgeting services, counsellors and whānau ora contact details. James begins by talking about the children and what times suit for contact. He then goes through the alleged violence. He acknowledges Mikaere’s behaviour but does not minimise Cassia’s behaviour. James tells him that the most
important thing is to accept responsibility and work on his issues rather than blaming Cassia. He also tells Mikaere that if there are safety concerns with Cassia, those need to be raised as well. Mikaere raises alcohol and cannabis use by Cassia, but says that she is a really good mum. James puts these comments in the affidavit. Mikaere expresses reluctance at attending non-violence course. Anahera tells Mikaere that he needs to focus on his children and that it can’t hurt. Mikaere reluctantly agrees to do the non-violence course.

*Riley and Ripeka*

Riley has recently returned from a seminar on collaborative law. She and some the other lawyers in town have begun practising collaborative law. She also recently decided to only do collaborative law with relationship property files. As a result, she has time for more low-pressure conveying files and she has more energy and motivation for her emotionally charged lawyer for child files. She opens the *Ireland v Ireland* file and sees emails from both counsel requesting she meets Mikaere’s aunt. She sets up an appointment with her and emails around steps that she thinks would be good for both parties to think about, PTS and budgeting for both, a course for survivors of violence for Cassia and anger management for Mikaere.

Riley meets with Mikaere’s aunt, Ripeka who outlines the importance of the wider whānau for the children, that they are used to growing up with their cousins, and also that their Māori identity is very important to them. Despite this, Ripeka acknowledges that the children’s safety needs to come first. She has been through the process before with an ex-partner who abused her, and he gave up because he found the system too difficult to negotiate. She does not want the same happening to Mikaere. In addition, from what Cassia has told her, Mikaere has been violent because he is struggling with a difficult situation, he is not being violent as a way of controlling Stella. Not that this is an excuse, Ripeka explains, but she thinks that Mikaere, with the right support, can learn techniques to control his anger. She assures Riley that she will not allow the children to be exposed to any sort of violence. Riley approves Ripeka as a supervisor and confirms this with other counsel. She asks whether a roundtable meeting is needed. Counsel email back to say that they should be able to negotiate contact without needing one.
Breakdown in Communication

There is some difficulty around arranging contact through emails. On one occasion Ataahua comes to contact with a bruised forehead. Cassia does not tell Ripeka or Mikaere about this before contact. After contact Mikaere is tempted to send Cassia a string of messages telling her what he thinks. However, he remembers what James advised him about the protection order and recalls things he has learned in the non-violence course. He rings James instead, which James thanks him for. James emails Stella asking for an explanation and also for an assurance that Cassia will consult with Mikaere on all guardianship matters and advise him if the children are sick. Cassia agrees through Stella.

Seeing the communication between counsel, Riley suggests a roundtable meeting to sort out some structure to the contact arrangement prior to the directions conference. Stella agrees provided that Cassia is able to bring a support person and there is the option of Cassia and Mikaere going into separate rooms if required. This is agreed and a date is set.

Riley, Anahera and Manu

Anahera and Manu come to see Riley. They are frustrated about being left out of the loop and at the children only seeing Mikaere at contact, not them or other whānau members. They are especially hurt about not being kept in the loop about Ataahua falling over and hitting her head at day care. Riley explains that the law provides that the parents are parties and normally it is up to the parent to organise the children to see their side of the family. She points out that it is possible for them to bring their own application if they are given leave. She notes that despite the legal rules, it might be possible for them to attend the roundtable meeting to discuss matters. Anahera also requests that the meeting be held at her marae. These requests are passed on and agreed to. Both Stella and Mikaere agree that Ripeka can determine the kawa that will be followed on the marae.

Meeting the Children

Riley sends an email to other counsel requesting feedback on where the children would be most comfortable meeting her. Taking the replies in to account, she sees Mason at school, with no one else present. Mason indicates that he wants to see more of his dad. Riley sees
the girls at their mother’s home. Cassia waits in another room while the interview takes place. They both miss their dad and want their parents to live together.

**The Round Table Meeting**

Ripeka decides that a formal pōwhiri is not needed as this is a discussion between whānau. She opens with a karakia and then defers to Riley to lead the meeting. Riley points to photos of the children on the whiteboard and tells those present that the meeting is about the children and that the focus needs to be on them. She lays down ground rules: one person speaking at a time, that the meeting is without prejudice, and communication is to be respectful.

Riley outlines the children’s position. She also says that the most important consideration is the children’s safety. Then she goes through the other factors in s 5 of COCA. She praises the parents on agreeing to take the steps she had suggested. She then invites Cassia to give her position, as she is the applicant. Cassia raises concerns about the girls’ routine, as they are difficult to settle after contact, and she accuses Mikaere of hyping them up with sugar to deliberately make things difficult for her. Mikaere laughs and says Cassia is not one to talk given she has completely undermined him in making the applications to the Family Court.

Riley steps in and tells the parties that they are making assumptions. Instead of assuming that they are undermining each other, they need to make a new narrative or story. For example, Cassia might notice that the girls are more hyped after contact and there is a pattern. Instead of assuming that Mikaere is feeding the girls sugar to undermine her, she might notice that they are excited when they return. She could mention this to Mikaere and perhaps comment that it’s great they are happy to have seen him, and check whether they are eating anything that makes them hyper. If so, perhaps they could discuss the best things to feed the girls. Cassia rolls her eyes. Riley points out that she might not have the best relationship with Mikaere at the moment, but he is the father of her children, and their wellbeing should be both her and Mikaere’s priority, and Cassia’s and Mikaere’s relationship will impact their wellbeing. She advises Mikaere to do the same. She notes that Cassia has referred to lots of Mikaere’s positive qualities in her affidavits and went out of her way to find a supervisor.

Riley then encourages Cassia to outline her proposal. Cassia looks to Stella who smiles encouragingly. Cassia outlines that she would like the girls to have overnight contact every
Wednesday and Friday night and on Monday afternoons for a couple of hours. She would like Mason to have contact every second weekend from after school Friday until before school on Monday. This would need to be supervised by Ripeka, or her eldest daughter Sarah, both of whom live with Mikaere at the moment. Mikaere is staying in a two-bedroom unit at Ripeka’s property.

Mikaere scowls, outlining that he wants to move to unsupervised contact. The children were never involved in the violence and he has not been violent since the proceedings were issued. James steps in, reminding Mikaere that this is a meeting to arrange interim contact and there can be discussion for longer term progress if there is time. Mikaere nods and says he is happy for that in the interim, but he does want to see all the children for half of the upcoming school term holidays. Ripeka confirms that she and Sarah are available to supervise then.

Cassia agrees to half the school holidays but says she does not want the girls to have a full week with Mikaere as it is too long for them to be away from either parent. Mikaere, listening from Riley’s comments about a new narrative, asks Cassia why she thinks this. Cassia sets out how distressed the girls would get if either she or Mikaere went away for a few days at a time when they were together and also how hard it was for the girls when proceedings were first issued. Mikaere nods and decides that week about in the holidays will not work for the girls. The parties struggle to work out an equal sharing agreement for the holidays that is not week about, so Stella floats a 2-2-5-5 model and sets out different ways this can work, with each parent having blocks of 2 days and 5 days a fortnight with the children. The parties agree on one.

As the meeting is going reasonably well, there is time to talk about longer term arrangements. Cassia says she wants there to be unsupervised contact, and equal shared care for Mason if possible. Before this happens, she wants Mikaere to complete his DOVE course, do a budgeting course, and complete PTS. There will also have to be no breaches of the protection order or family violence reports. Mikaere agrees with these and also wants Cassia to do a budgeting course and a parenting course. Riley adds she would like to see drug and alcohol counselling added to this for both parties. Ripeka suggests a whānau ora programme which is agreed to. Cassia still would like the protection order to remain in place. Mikaere disagrees.
The lawyers draw up a consent memorandum as to interim contact. They ensure there is a provision for any other supervised contact as agreed between the parties, provided lawyer for child is satisfied the supervisor is suitable. The memorandum also seeks that the COCA matters are to be adjourned for three months pending a further roundtable meeting and sets timetabling directions for the protection order.

**The Directions Conference**

At the directions conference, the judge takes time to congratulate the parties on reaching agreement. All names are pronounced correctly. The judge takes the comments about the children from the lawyer for child report Mason being “studious and caring”, Maddison being “bubbly” and Ataahua being “gentle” and says that by all accounts it seems the parents should be proud of how they are raising the children. The judge also comments to Mikaere that it is great he is engaging with the non-violence course because the children’s safety is the priority, and he is pleased that things are progressing with contact. Both Cassia and Mikaere leave the courtroom relieved at how simple the process was and how comfortable the judge made them feel.

**Settlement**

About two months later, Cassia rings Stella. She says that Mikaere has completed the non-violence course and they are getting along well. She does not really want to go to a hearing and bring up everything about the past. She does want something to ensure that she is safe. Stella talks through the option of Mikaere doing an undertaking that he would not do anything that would amount to a breach of the protection order, and asking the Court for the protection order to be discharged. She asks Cassia if she is sure that she and the children will be safe with the order not being there. Cassia explains that the Women’s Refuge and whānau ora navigator have helped her develop a safety plan should there be violence again. They have also helped her and Mikaere with communication and dealing with frustration. She also notes that both sides of the family are stepping in and helping more. Stella tells Cassia to think over her decision for a couple of days as it is a big one, and books her in for an appointment in a few days.

Stella meets with Cassia, the whānau ora navigator, and Cassia’s support person from women’s refuge. With Cassia’s consent she speaks with the support person and then the
navigator without Cassia present. Both are satisfied that Cassia and the children will be safe. The arrangement provides that the parties will not encounter each other at changeovers, and there is a strong support network around the family. Furthermore, Mikaere is engaged with drug and alcohol counselling and has been sober since the proceedings were issued. Satisfied that neither her client nor the children will be at risk in the proposal she emails it to other counsel.

There is agreement from the others and the lawyers draft up a joint memorandum for everyone to sign, and a memorandum of counsel outlining the agreed facts and why the protection order should be discharged and Mikaere’s contact with the children be unsupervised. The memorandum addresses ss 4-6 of COCA. The proposed arrangement also takes into account birthdays, Mother’s Day, Father’s Day and the holidays and asks the Court not to make an order for either party to contribute to Riley’s costs as they are both in receipt of Legal Aid. Stella is careful to draft it so that the judge can just make the orders without needing any further information.

The judge issues a minute making the orders as sought. In the minute, he congratulates the parties on reaching agreement. He also outlines the importance of safety and explains why he is making the orders. He points to the fact that Mikaere has done the non-violence course and provided undertakings that he will not behave in a way that will breach the protection order, and that in the history of the relationship, the violence only occurred for a short period of time, that Mikaere has no other protection orders against him, there were no police call outs or criminal convictions in respect of either party. He concludes by thanking counsel and directing that there be no cost contribution for Riley’s fee from the parties.

The arrangement works reasonably well for Mikaere and Cassia. The children still struggle with their parents being separated but having different arrangements for Mason and the girls works well. The parties are happy with the support from whānau ora. With budgeting support, the financial pressures have lessened. Mikaere sometimes still gets angry about the proceedings, but is glad that they were resolved and, although he would never admit it to anyone, he is glad he did the non-violence course and counselling because he finds it much easier to navigate conflict. Anahera, Manu and Ripeka all do more to support Mikaere and Cassia now that they know they were struggling in the past, because they want to ensure that this does not happen again.
3. Analysis

The TJ scenario is somewhat idealistic. It assumes the parties will have good family support and the lawyers will have enough time to meet their clients’ needs. However, it does show how applying TJ to the same factual and legal situation can result in a markedly improved outcome for all involved.

a. The Law as a Social Force

The lawyers in the case study apply TJ by being aware that the law is a social force with consequences in the psychological domain. Stella is aware that Cassia is going to be upset, and probably suffering from trauma, in the first interview after physical assaults. She prepares for this by ensuring she is not time pressured at the interview. During the interview, she applies some of the techniques recommended by Parker for working with traumatised clients. These include letting Cassia know she can take a break, mixing the questions up so that she is not asking her lots of difficult questions at once, and moving to mundane questions when Cassia gets upset.

b. Vectors

Both James and Stella use other vectors to help improve the therapeutic outcome of the proceedings. Both use preventive law in the first interviews. Stella does this by trying (successfully) to prevent a situation where Mikaere goes a long time without seeing his children by getting a supervisor approved by the Court straight away. She also tries to prevent or minimise conflict by ensuring positive comments are made about Mikaere in the initial affidavit. James does this by speaking positively about Cassia to Mikaere and by encouraging Mikaere to do the DOVE course. All three lawyers promote preventive law by going into detail in the memorandum of consent and by ensuring that the situation suits each child. In contrast, the rushed memorandum of consent in the non-TJ scenario highlights how the lawyers are creating future problems not covering off basic issues that family lawyers should be aware of such as having other contact as agreed.

740 Wexler, above at n 1, at 20.
741 Parker, above at n 354, at 176, 182-183, and 188.
The without notice process is inherently adversarial and anti-therapeutic. The different examples in the early stages of each scenario show how the same rules and processes can be improved just by the lawyers acting differently. In the first scenario, Stella and James focus on explaining the law and do not really pay attention to their client’s emotions or the underlying cause of the violence. Stella is annoyed at Cassia’s emotions and finds them distracting. James takes Mikaere’s instructions because the law requires him to and does not go further in trying to find a supervisor or reasoning with Mikaere that if he wants to see his children promptly, he will require supervision.

Stella uses procedural justice in the second scenario by explaining the process in detail to Cassia twice. She also writes down the process for her. This contrasts with the brief overview that she gives in the first situation. She also treats Cassia with respect and promotes self-determination by encouraging Cassia to nominate a supervisor and to say what she wants as an end goal. Riley uses procedural justice with Anahera and Manu far better in the second situation. Although she explains the law and the process in the first example, she does not acknowledge the important role they play in the children’s lives. When she applies TJ, she does outline the law and how it is unfavourable to them, but she also ensures their voices are heard by encouraging their attendance at the RTM. The judge also uses procedural justice in the second scenario by treating the parties with respect and taking an interest in their lives.

All three lawyers use holistic law in applying TJ. They focus on the needs of their clients outside “winning” their case, as well as focusing on the children’s needs. They do this by using other disciplines, which is another important aspect of TJ. Riley thinks creatively by proposing the marae as a venue, and that the grandparents attend. This enables the grandparents to participate in proceedings in which the legal rules do not provide for specifically. This type of creative thinking is envisaged by Wexler and Winick when legal actors apply TJ.742 The process is more therapeutic by the lawyers encouraging whānau ora processes, counselling and a budgeting service. They are enabling their clients to get more support without trying to act as budget advisors or therapists. The wrap-around support is aimed at addressing the causes of the violence that occurred, without changing any legal rules. The support is like that provided in the AODT and Rangatahi Courts. The lawyers in the second scenario have reduced conflict.

742 Winick and Wexler, above at n 7, at 7.
by providing these supports and by using TJ, especially in the application of preventive law to avoid situations where the children will be in distress or Mikaere will go a long time without seeing his children. In contrast, the legal process in the first example exacerbates conflict, and Mikaere ends up facing criminal proceedings.

c. TJ and Mediation

The mediations in each example show how mediation can be therapeutic or anti-therapeutic depending on how the legal actors conduct it. The judge in the first example forces the parties into mediation and derides them for the positions they are taking. This places pressure on the parties and the lawyers, and the lawyers have insufficient time to produce a robust agreement, that uses preventive law to catch future issues.

In the second mediation, Riley promotes the parties’ self-determination by encouraging them to put their proposals on the table. The lawyers do not allow the meeting to lose track however, and ensure the focus is on reaching settlement, if possible, and not used as a time for the parties to insult each other. This happens when James discourages Mikaere from bringing up matters that are too far down the track, i.e. unsupervised contact, and focuses on getting an interim contact regime up and running. When Cassia struggles to put forward an equal care agreement that is not week-about, Stella draws on her experience to suggest a 2-2-5-5 model. Had the parties been left without any input from the lawyers, it would likely have taken longer for decisions to be reached because Mikaere’s comments about the violence could have detracted from a supervised contact arrangement, and the parties might not have come up with a 2-2-5-5 model on their own.

Riley looks to the psychological impact of the mediation, rather than just focusing on the legal rules. She encourages both parents to change their narratives about the other parties. At the beginning of the meeting, each party accuses the other of undermining them, and Riley encourages them to not make assumptions about the other and instead to “write” a new narrative. She also provides encouragement to the parties and praises them for the changes they have made.
The second example illustrates TJ in action. TJ “tries to eschew doctrinal niceties”. Its focus is on improving the therapeutic aspect of the law. The lawyers in the second example do not follow a set type of mediation or take an approach that is too controlling or too laid back. At times it is appropriate to let parties lead with their proposals; at others it is helpful to add suggestions or stop a line of discussion. Encouraging parties to improve the way they think about themselves and each other also has a therapeutic effect. It is the way the legal actors behave, rather than the type of mediation used that will make the mediation more – or less – therapeutic.

d. Safety

Riley, James and Stella have a basic understanding of the difference between situational violence and coercive controlling violence. They are also aware of attachment theory, and that different contact regimes are appropriate for children of different ages. Again, they do not try to be experts in this field, but they are able to rely on this basic knowledge to be confident that they are not placing anyone at risk and to recommend contact arrangements that will cause the children the least distress. The lawyers also encourage the parties to address the underlying causes of the violence and conflict, which is another important aspect of TJ.

The second situation is one where a party has unsupervised contact and a protection order is discharged after one party is violent to the other. This will not be appropriate in many cases where there is violence. The lawyers in the second example can recognise this is a case with situational rather than controlling violence. Stella is very careful and thorough about putting forward a proposal about moving to unsupervised contact. While she must follow her client’s instructions, she also knows the Court will look at the children’s safety in making its decision. She would need to advise her client if the situation was one where the Court would be unlikely to discharge the protection order or make a direction for unsupervised contact. The other professionals are helpful in moving the contact to unsupervised as they helped to create a situation where the children would be safe by providing support for the parties.

743 Wexler, above at n 20, at 272.
744 See Shapira, above, at n 266 at 277 and Waldman, above at n 267, at 156 and 167.
745 King, above at n 2, at 1121.
e. Criticisms of TJ

This case study shows that the criticisms of TJ are largely unfounded. This section addresses a criticism that this case study could be simply an example of competent versus incompetent lawyering, it then addresses each of the concerns raised about TJ in Chapter Two. It then applies them to the case study.

While it could be argued that the case study is an example of competent versus incompetent lawyering, this is not the case. All of the lawyers in the first example apply the law correctly, but they are using a rules-based focus. In the second example they are applying the principles of TJ, such as using other disciplines for practical assistance, having a knowledge base of other disciplines, and paying attention to the psychological impact of the legal rules and legal procedures, and working creatively to promote a therapeutic effect (such as having a meeting on marae) while ensuring the law is applied correctly. This deliberate focus of using other disciplines and making a concerted effort to focus attention on the psychological impact of the law goes beyond just adapting a rules-based focus to include ensuring that a client feels comfortable. It is taking a different focus, or lens and changing one’s practice to work around that therapeutic lens.

The first criticism is that TJ does not place enough emphasis on parties’ rights or other important legal principles such as impartiality and independence of the judiciary. The concept of “rights” is less clear in family law than in criminal or mental health law where the state is making an application against an individual. In COCA decisions, sections 4-6 need to be applied. The child’s welfare and best interests are of paramount consideration. Under s 4 the Court must take into account that decisions should be made in the child’s sense of time and the principles in s 5 must be taken into account. Of the principles in s 5, the only principle in mandatory terms is that the child’s safety must be protected. The other principles are couched in the language “should”. Sections 5A and 6 require consideration of a final protection order having been in place against either of the parties and the child’s views respectively. Therefore, the only rights in COCA that are required to be taken into account are

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746 Small above at n 13, at 701.
747 Winick and Wexler, above at n 187, at 130.
748 Care of Children Act, s 4.
749 Care of Children Act, s 5(a).
those relating to the child’s views, safety, and that the decision be made in their sense of time.

Furthermore, s 7B of COCA sets out that lawyers representing parties must advise that the child’s welfare and best interests are of paramount consideration in COCA proceedings, ways of resolving disputes and the process of applying to the Family Court. Parties in the FJS are in a position where they must consider the impact of the dispute on a person who is not a party, the child. The law does not provide that any particular guardian or other person has the right to day-to-day care or contact. The focus on rights is that of the child(ren) in the proceedings, rather than a party. Therefore, the “rights based” approach which focuses on parties’ entitlements does not necessarily fit well with family law. In contrast TJ fits well with the principles in ss 4-6 and 7B of COCA. In fact, TJ should help parties reach agreements they are happy with. As seen above, there is a better outcome when Stella and James take an interdisciplinary approach. Mikaere is viewed more positively by lawyer for child and the judge because he takes responsibility for his actions and seeks help, rather than denying the problem. In contrast, when James solely focuses on the rules, telling Mikaere about the law, but then not encouraging him to do the non-violence course, the outcome was worse for Mikaere.

A further criticism is that TJ’s definition of therapeutic is vague.\textsuperscript{750} The answer to this has been to first define what therapeutic mean for each situation.\textsuperscript{751} In COCA disputes, lawyers have a built-in definition of “therapeutic” in s 4: the child’s welfare and best interests. Given that parties under COCA usually all play an important part in the child’s life, it is important that parties are well supported. TJ does not set a specific procedure for each family law case to follow, as some other vectors, such as collaborative law or restorative justice do. It does provide a lens for legal actors to use in these cases. Of course, parties frequently have different ideas about what is in a child’s best interests but it should be uncontroversial that matters such a lack of conflict and violence, and having their culture understood, should all be in a child’s best interests.

\textsuperscript{750} King, above at n 2, at 1115-1116.
\textsuperscript{751} King, above at n 2, at 1116.
It has been suggested that TJ has a limited impact as people going through the justice system still find the process anti-therapeutic. The response to this is that such people are often in inherently difficult situations. In both situations, the children find their parents’ separation difficult. However, in the first scenario, they are significantly distressed because the care arrangement does not fit their development and their parents’ conflict has been exacerbated by court proceedings. They cope better in the second example. TJ cannot fix all the parties’ issues, but it can reduce the psychological harm that the justice system can cause.

An early criticism of TJ is that it is paternalistic. TJ’s founders dispute this, saying TJ promotes self-determination. In the first example, the focus on applying legal rules results in the parties being pressured into agreement, and the lawyers pay little attention to the long term durability of the agreement and preserving the parties’ relationship. While the parties came up with the care arrangement themselves, they are not happy with it in the long run because of its impact on the children. In the second scenario, Stella in particular listens to Cassia and makes an effort to show that Cassia respects Mikaere when drafting the affidavit. While the lawyers guide the parties at the roundtable meeting in the second situation, they do so only after the parties have tried to work out an agreement themselves.

TJ has been criticised for putting too much pressure on legal actors to do things outside of what they are trained for. This criticism seems to come from TJ encouraging lawyers to draw on other disciplines. The lawyers in the second example do this in two ways, by seeking assistance from non-lawyers to help with the case and by drawing on their own knowledge of other disciplines in making strategic calls (i.e. the children’s safety with unsupervised contact and the protection order being discharged) and how they treat their clients (Stella using interview techniques to help her traumatised client give a strong affidavit).

The first interdisciplinary aspect of relying on other professionals to help with the case actually decreases the burden on the legal actors. Women’s Refuge help Cassia with a safety plan, and the non-violence course helps Mikaere to address his anger issues. Without these

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752 For example, Maze and Hannah above at n 162, at 38 and 44.
753 Winick and Wexler, above at n 7, at 8 and Flies-Away and Garrow, above at n 203, at 414-415.
754 King, above at n 2, at 1116 and Miller above at n 188, at 276.
755 King, above at n 2, at 1116.
756 King, above at n 2, at 1118.
professionals, one of two things can happen: the lawyers do not address the parties’ underlying issues because that is not in their usual skill set, or the lawyers try to solve the problems themselves rather than relying on other professionals. Here the lawyers have help from others to enable better support for their clients.

The second interdisciplinary aspect is the lawyers learning about other disciplines. While this does require some effort from the lawyers, it makes them more effective. For example, Stella knows how to conduct the interview with a client suffering from trauma because she knows the symptoms. Riley knows enough about child development to recognise that Mason is at a different stage to the girls and what sort of arrangements will be more likely to suit each child. There are concerns about lawyers and judges relying on research in other disciplines without knowing how to analyse this research. However, all Stella and Riley do in the second situation is draw on basic principles rather than carrying out extensive research. If there were complex attachment or behavioural issues, then it might have been more appropriate for the lawyers to seek a psychologist’s report under s 133 of COCA.

Even though the lawyers here would have invested time to learn about trauma, violence, and attachment, this knowledge has actually made their jobs easier rather than harder. Stella manages Cassia’s emotions much more effectively in the second scenario. In the first example, Stella’s difficulty in managing the emotional side of her job manifests in incompetence on occasion. She rolls her eyes at Cassia and also calls her unreasonable without properly listening to her concerns during the adjournment of the hearing. This is an example of the culture of critique, (focusing too much on legal rules) manifesting in incompetence. The lawyers in the first scenario do not consider anything beyond the legal rules which leaves the clients dissatisfied, the children in distress and two of the lawyers burnt out. In the second example, all of the lawyers acknowledge the underlying issues the parties are facing and understand the psychological impact the legal process has on them.

757 Rathus above at n 391, at 97.
4. The Therapeutic Impact of the Panel’s Proposed Changes

If the recommendations proposed by the Independent Panel in 2019 are implemented, Cassia would likely engage with Te Korowai Ture-ā-Whānau from the outset. If she engages before Mikaere starts using violence, the Family Justice Coordinator would be able to point Cassia to a whānau ora like support programme, counselling, and a lawyer at the same time. Stella, James and Riley would be able to act from the beginning, rather than just providing one hour of FLAS and the parties being left to navigate FDR themselves. If the parties receive sufficient support through counselling, anger management, addictions and budgeting, they may be able to resolve matters through FDR mediation without needing to go to court. The children could receive counselling.

If Cassia did not approach Te Korowai Ture-ā-Whānau until Mikaere’s violence had escalated, the Family Justice Coordinator would be able to refer her to a lawyer as well as out-of-court support. The whānau ora equivalent would be significant here, as this model could provide Cassia, and then Mikaere, with interdisciplinary support. While it is likely a without notice application would still be made, the parties would be able to access counselling for the children, anger management for Mikaere, a victim’s programme for Cassia and addictions counselling and a budgeting service for both parents. This would mean that the provision of these services would be available to all parties, and not dependent on whether their lawyers have the time and knowledge to organise them.

One significant improvement under the new reforms would be the greater respect for tikanga. If the lawyers and judge are educated in tikanga, there should not be any incidences of Manu and Anahera feeling excluded from the process without good reason. The hui in the second example could be improved upon with more whānau being involved, if the parents were happy with this. If all Family Court judges attend a tikanga seminar and upskill in their te reo Māori pronunciation, then there will not be issues with mispronunciation in court like in the first example. There could possibly be more Family Court proceedings at marae with the help of the Family Court tikanga advisors.
Delay is pervasive in the Family Court.\(^{758}\) The increases in without notice applications and self-represented litigants have contributed to this. The anti-therapeutic impact of court delays is evidenced by Mikaere’s frustration, which leads him to breach the protection order. Orders made without notice often prevent the respondent from seeing the children for weeks, if not longer, because orders often say that their contact is to be professionally supervised or supervised by a person approved by the Court. If the Panel’s recommendations are acted on, then the triaging system, the provision of counselling and the repeal of s 7A of COCA will provide parties with more support. If they have access to lawyers early on and can have access to counselling, this should increase the out-of-court settlements, and so reduce court delays. Even if parties are unable to reach an agreement out-of-court, it may be that the support services available would negate the need for a without notice application in some situations, and the matter could be dealt with on notice. For example, this could occur where a person obtained counselling and other support for anger management or addictions so that the safety risk is minimised, and the issue instead becomes what the care arrangement should be. The proposed repeal of s 7A of the COCA should reduce court time being used to explain matters to self-represented litigants.

5. Conclusion

TJ fits naturally with New Zealand’s FJS. Indeed this was evident at the commencement of the Family Court in 1981 when it was designed to have both legal and therapeutic aims.\(^ {759}\) The psychological impact of the law is particularly important in care of children disputes, as parties need to be involved in each other’s lives, and there is a third party (the child(ren)) who need(s) the parties to be able to work together. TJ is a lens through which to view the law and it recognises that the law is a social force which can have therapeutic or anti-therapeutic impacts. Family lawyers can use TJ with other vectors of the comprehensive law movement, especially procedural justice and preventive law.

From a TJ perspective there is much room for improvement in New Zealand’s FJS. There are significant issues with the system not meeting the needs of Māori and those of other non-Pākehā cultures. Migrants and survivors of family violence also do not always have their needs

\(^{758}\) The Judges of Te Kōti ā Whānau o Aotearoa, above at n 440, at [49].  
\(^{759}\) Beattie, above at n 412, at 479.
met. Significant delays are evident and the most recent reforms implemented in 2014 have not improved the therapeutic impact of the FJS, but rather set it back. 760

The reforms proposed by the Independent Panel are largely consistent with TJ and their implementation will be welcomed should the Minister of Justice accept them. They address the needs of diverse communities and survivors of family violence. They fit well with the interdisciplinary nature of TJ as they propose a more unified service than the current fragmented service and provide more support at the early stage of separation and should be implemented. Legislative provisions are required to ensure that external stakeholders are consulted in certain processes. It could also be helpful to legislate the role of lawyer for child more in terms of the performance expected of them.

All aspects of the law can be therapeutic or anti-therapeutic. Even if the rules and procedures are amended to be more consistent with TJ, legal actors can still create an anti-therapeutic effect. The converse is also true: even if the current FJS has systemic weaknesses, legal actors can use TJ to greatly increase the therapeutic impact of the FJS. This sort of change is important, significant, and it can occur immediately, rather than relying on government action.

Wexler writes: 761

> Therapeutic jurisprudence looks not merely at the law on the books but rather at the law in action – how the law manifests itself in law offices, client behaviour, and courtrooms around the world. The underlying concern is how legal systems actually function and affect people.

The considerably better outcome for Mason, Maddison, and Ataahua in the second scenario was not brought about by any legislative change, but by the four legal actors applying TJ. If legal actors in the FJS remember that it is not just the law on the books that matters, but law in action, they will be more cognisant of the way they go about their work and appreciate the positive impact they can have on case outcomes for their clients’ benefit.

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760 Taylor, Gollop and Liebergreen, above at n 468 at 357-359.
761 Wexler, above at n 1, at 20.
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Word Count

44,998 excluding footnotes.

Currency Statement

This thesis is current as at 28 October 2019.