# "TAKING NEW ZEALAND'S SPECIALIST CRIMINAL COURTS 'TO SCALE' FOR BETTER CRIMINAL JUSTICE OUTCOMES"

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## I. INTRODUCTION

Currently totalling over 9,700, New Zealand's prison population has close to tripled over the past three decades.[1] Fifty-one per cent of those incarcerated are Māori,[2] though Māori make up only 15 per cent of the general population. The government spends around $120,000 per sentenced prisoner per year.[3] Despite the costs involved, within two years of release 60 per cent of people are reconvicted and over 40 per cent reimprisoned.[4]

So what can be done to fix a system that the Minister of Justice has described as "broken"?[5] The current situation necessitates reform of the criminal justice system. This article discusses the potential of specialist courts and therapeutic jurisprudence to build a more effective and socially responsible criminal justice system.

### *A. Unpacking the issue: a lack of focus on the underlying drivers of offending*

Behind high incarceration levels and stubborn reoffending rates lie alarming statistics on the prevalence of mental health and addiction amongst offenders. A 2016 report found 91 per cent of prisoners have had a diagnosis of a mental health or substance abuse disorder at some point in their lives, compared to 40 per cent of the general population.[6] Prisoners were three times more likely to have had a diagnosis in the past 12 months.

More broadly, a wide range of social problems underlie offending such as poverty, homelessness, trauma, and for Māori the impacts of cultural alienation and colonisation. For many, these issues are so insurmountable that the court becomes a 'revolving door' through which they cycle, charged with low-level offences that are symptomatic of underlying social and psychological issues. New Zealand's

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[1] Bob White (ed) *The New Zealand Official 1990 Year Book* (Department of Statistics), Table 10.13 (statistics for prison population as at 1988) and Department of Corrections "Prison facts and statistics – December 2018" <www.corrections.govt.nz>.

[2] Department of Corrections "Prison facts and statistics – December 2018", above n 1.

[3] Department of Corrections *Annual Report 1 July 2017 – 30 June 2018* (8 October 2018) at 32; based on the average cost per day of housing a sentenced prisoner of $330.

[4] Department of Corrections *Annual Report 1 July 2017 – 30 June 2018*, above n 3, at 166.

[5] Andrew Little, Minister for Justice and Courts "Speech to the United Nations Human Rights Council for the third Universal Periodic Review" (United Nations, Geneva, 21 January 2019).

[6] Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Department of Corrections, June 2016) at 9.

mainstream adult criminal courts are not currently geared towards addressing these non-legal issues as part of the sentencing process.

*B. The underlying ethos of the criminal justice system: how we came to be this way*

Rehabilitation was once a stronger focus of the criminal justice system.[7] However, policy making over the past three decades has largely focused on denunciation, deterrence and traditional concepts of retribution. This mentality was spurred by the rise of penal populism.[8] Overwhelming affirmation of the 1999 Citizens Initiated Referendum, which asked whether there should be "a reform of our criminal justice system, placing greater emphasis on the needs of victims … and imposing minimum sentences and hard labour for all serious offenders" seemed to reflect a shift in attitudes towards crime and punishment. Political parties rushed to support what one politician described as a "clarion call from the community for tougher law and order measures."[9] The prison population rose from 2,775 in 1985 to over 5000 by 2000.[10] By 2017, that figure had doubled again.

The tough on crime approach has been tested and it has failed. Fortunately, successive governments in recent years have been supportive of change. As early as 2011, the then Minister of Finance Bill English famously described prisons as a "fiscal and moral failure."[11] Social investment initiatives implemented around the country by the National Government in the years before Labour came to power included a focus on identifying the underlying causes of offending.[12] The current Labour led government aims to reduce the prison population by 30 per cent in 15 years. Minister of Justice and Courts Andrew Little has publicly denounced the "so-called law-and-order policies" of the past several decades, stating New Zealand "needs to completely change the way criminal justice works".[13] In August 2018 the government hosted a Criminal Justice Summit, where over 600 participants from a wide range of backgrounds began a conversation about how to improve the justice system. The Government Inquiry into Mental Health and Addiction was also commissioned in 2018. The Inquiry involved widespread public consultation on New Zealand's current approach to mental health and addiction, and has resulted in 40 recommendations proposing major changes to current laws and policies.[14]

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[7] See Sian Elias, Chief Justice of New Zealand "Blameless Babes" (Annual Shirley Smith Address, Victoria University, Wellington, 9 July 2009) at [8]. Research from the 1920s into the drivers of crime identified personal backgrounds and social circumstances of offenders as key factors in offending, resulting in a focus on rehabilitative interventions.

[8] Defined by John Pratt as the pursuit of penal policies to win votes rather than reduce crime or promote justice: John Pratt *Penal Populism* (Routledge, Oxfordshire, 2007) at 3.

[9] John Pratt *A Punitive Society: Falling Crime and Rising Imprisonment in New Zealand* (Bridget Williams Books, Wellington, 2013) at 9–10.

[10] Institute for Criminal Policy Research "New Zealand" World Prison Brief <www.prisonstudies.org>.

[11] Bill English, Minister of Finance (speech to Families Commission 50 Key Thinkers Forum, May 11, 2011).

[12] Amy Adams "Social Investment in the Criminal Justice System" (press release, 3 May 2016).

[13] David Fisher "Andrew Little: 'Longer Sentences, more prisoners – it doesn't work and it has to stop'" *The New Zealand Herald* (online ed, Auckland, 22 February 2018).

[14] *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (2018, New Zealand).

Two movements that are receiving increasing attention in New Zealand are specialist or "problem-solving" courts, and therapeutic jurisprudence. Specialist courts take a novel approach to sentencing that focuses on addressing the underlying issues that cause or contribute to an individual's offending. Therapeutic jurisprudence is "the study of the law's impact on psychological well-being",[15] and is often seen as a philosophical basis for the courts' operation.

Part Two of this article introduces these two movements, outlines New Zealand's specialist court landscape and discusses concerns associated with specialist courts generally. Part Three explores expansion possibilities and argues that to effectively take specialist courts 'to scale', the most successful aspects of the courts must be mainstreamed across all sentencing courts.

## II. Specialist Courts and Therapeutic Jurisprudence

### *A. Introduction*

Specialist courts and therapeutic jurisprudence are international movements that have developed in recent decades as academics and judges have realised the need to develop practical and effective approaches to criminal justice.

Therapeutic jurisprudence is "the study of law as a therapeutic agent".[16] Its premise is that law and legal processes can produce therapeutic or anti-therapeutic outcomes for those affected by it. Law's inherent "potential toxicity" if applied improperly is particularly significant in areas that involve a high degree of emotional human involvement, such as criminal law.[17] Anti-therapeutic effects impact not only on individuals, but "may well inhibit the achievement of justice system outcomes such as the prevention of crime … and respect for the law."[18] Therapeutic jurisprudence has an interdisciplinary focus, relying on social sciences such as psychology and criminology to "explore models of practice that are more relationally engaged, less adversarial, more psychologically beneficial, and more capable of producing non-exploitative outcomes."[19]

Specialist or "problem-solving" courts as they are known in the United States represent a practical application of the aim to minimise the anti-therapeutic effects of criminal law and procedure. Bruce Winick and David Wexler, the founders of therapeutic

[15] Bruce Winick and David Wexler "Drug Treatment Court: Therapeutic Jurisprudence Applied" (2002) 18 Touro L Rev 479 at 479.
[16] David B Wexler "Applying the law therapeutically" (1996) 5 Applied & Preventive Psychology 179 at 179.
[17] Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) at 5 and 9.
[18] Michael King, Arie Freiberg and Becky Batagol *Non-Adversarial Justice* (Federation Press, Sydney, 2014) at 25.
[19] Brookbanks, above n 17, at 6.

jurisprudence, note:[20]

> Traditional courts limited their attention to the narrow dispute in controversy. These newer courts, however, attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to deal effectively with the problem in ways that will prevent recurring court involvement.

The courts "seize upon a moment when people are open to changing dysfunctional behaviour — the crisis of coming to court — to give them the opportunity to change".[21]

Problem-solving courts originated in the United States as pragmatic judicial responses to the justice system's inability to meaningfully deal with 'revolving door' offenders. In 1989, tired of seeing offenders repeatedly appearing on low-level charges driven by drug addictions, a Judge in Dade County Miami offered offenders the option of completing a court-monitored drug treatment plan instead of imprisonment.[22] The experiment was a success. There are now over 3,000 drug courts in the United States,[23] as well as other specialist courts which focus on issues ranging from mental health to problem gambling. The courts incorporate increased judicial interaction and supervision, and offenders are connected to relevant services and treatment. Sentencing is delayed, allowing the offender's progress to be taken into account.

The "overlay of a philosophical basis" to these pragmatic beginnings occurred as therapeutic jurisprudence developed.[24] Therapeutic jurisprudence focuses on the role of the court and court processes in improving the wellbeing of court participants, especially (in the specialist court context) offenders. Characteristics of specialist courts that are "often aligned" with therapeutic jurisprudence include a non-adversarial approach, consistency of judges, immediacy of treatment, and a physical court layout that fosters communication.[25]

*B. New Zealand's specialist courts*

New Zealand has developed a variety of specialist courts that target issues from homelessness to sexual violence. As in the United States, the courts have typically resulted from judicial innovation to meet community needs, and the realisation that particular groups of people require a more intensive and individualised program to reduce the likelihood of re-offending.

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[20] Bruce J Winick and David B Wexler (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, North Carolina, 2003) at 3.
[21] Michael King "What can mainstream courts learn from problem solving courts?" (2007) 32(2) Alt LJ 91 at 91.
[22] National Association of Drug Court Professionals "Treatment Courts" <www.napcd.org>.
[23] National Criminal Justice Reference Service "In the spotlight: Drug Courts Facts and Figures (as at June 2015) <www.ncjrs.gov>.
[24] Arie Freiberg, "Problem-Oriented Courts: Innovative Solutions to Intractable Problems?" (2001) 11 JJA 8 at 11.
[25] Katey Thom "New Zealand's Solution-Focused Movement: Development, Current Practices and Future Possibilities" in Brookbanks, above n 17, 325 at 327.

*1. Alcohol and Other Drug Treatment (AODT) Court / Te Whare Whakapiki Wairua (The House that Uplifts the Spirits)*

The AODT Court aims to reduce reoffending, imprisonment, alcohol and other drug use and dependency, and to positively impact the health and wellbeing of its participants.[26] Established in 2012 as a joint initiative between the government and the judiciary, the Court provides "an intensive therapeutic process supervised by the Court for repeat offenders with alcohol and drug (AOD) dependencies as an alternative to prison".[27] It sits weekly at Waitakere and Auckland District Court. In June 2017, the initial five-year pilot was extended for another three years.

The Court has a cap of 50 participants at each location. Offenders must be facing up to three years imprisonment, be charged with offending driven by AOD dependency, have a high risk of reoffending and present a risk to self and others.[28] Sentencing is deferred to allow offenders to undertake a treatment plan developed and monitored by the Court. Participants undertake a three-phase programme before they 'graduate', which takes on average 18 months.[29] On graduating, participants are sentenced to either supervision or intensive supervision, with a typical sentence length being 15 months. Conditions of release include abstaining from drugs and alcohol and judicial monitoring at three-month intervals.

Weekly pre-court meetings are held where the court team (the judges, court coordinators, defence lawyers, police prosecution, case managers, social workers, probation officers, and AOD clinicians) discuss existing cases and possible additions. The Court adheres to the 10 best practice guidelines of the American Drug Association foundation,[30] but has also developed its own unique features to respond to New Zealand needs. A Pou Oranga role has been established, a position designed to provide cultural and family support to participants. The position is held by a person with knowledge of te reo Māori and tikanga as well as personal experience of recovery and treatment. Mentors with a lived experience of addiction are also involved in the programme.

*2. The New Beginnings Court / Te Kooti o Timatanga Hou*

Based in Auckland District Court, Te Kooti o Timatanga Hou is a "solution-focused

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[26] Litmus Ltd *Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot* (31 March 2014, Ministry of Justice) at 1.

[27] Cabinet Social Policy Committee "Report-back on the Alcohol and Other Drug Treatment Court Pilot and other AOD-related Initiatives" (undated) at 1.

[28] Katey Thom and Stella Black *Ngā Whenu Raranga/Weaving Strands: #2. The processes of Te Whare Whakapiki Wairua/The Alcohol and other Drug Treatment Court* (University of Auckland, Auckland, 2017) at 11. Offenders must reside in Auckland City or Waitakere City, be over 18, and plead guilty to all charges. Serious violent or sexual offending disqualifies offenders. Participants may leave at any time and return to the mainstream court system.

[29] At 15.

[30] Katey Thom and Stella Black *Ngā Whenu Raranga/Weaving Strands: #1. The therapeutic framework of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (University of Auckland, Auckland, 2017) at 8–9.

court that attempts to deal with multiple issues of homelessness, mental impairment, and drug dependency."[31] The Court sits one half day per month and aims to connect offenders to social and health supports to address the underlying causes of homelessness and offending, while also delivering accountability and ensuring the victim's needs are met.[32] A treatment plan is devised for the offender, with the focus on finding appropriate housing and accessing a benefit, or other treatment support. The judge is assisted in monitoring the plan by a court coordinator and a professional team with representation from a wide variety of areas.

### *3. The Special Circumstances Court*

The Special Circumstances Court was established in 2012 in Wellington by Judge (now Justice) Susan Thomas. She was concerned at the frequency of court appearances by repeat offenders committing low level crime, whose offending was fuelled by the challenges posed or exacerbated by having no stable accommodation often accompanied by a dependency and/or mental health problems.[33] The SCC operates from the Wellington District Court, and sits one half day per month. It was set up with no additional funding or allocated judge time, relying on the goodwill of those involved and relationships with community agencies. Offenders must have pleaded guilty and typically cannot be charged with serious violent offending. They also must be homeless or at the risk of being homeless, and have an identifiable need with which they want help (for example, addiction, accommodation, or mental health issues).

A pre-court meeting is held every month, where the progress of participants in the Court is discussed by the Court team (which includes the judge, lawyers, a court liaison nurse, AOD clinician, probation officers, representatives from NGOs and peer counsellors).[34] The AOD clinician acts as court co-ordinator and develops treatment plans for each participant.

### *4. Te Kooti o Matariki*

Based in Northland, Te Kooti o Matariki was established by the late Chief District Court Judge Russell Johnson in 2010. The Court encourages the whānau, hapū and iwi of the offender to address the Court pursuant to s 27 of the Sentencing Act 2002. Proceedings are adjourned to enable offenders to be linked to "wrap around services" to address underlying issues before sentencing.[35] Tikanga principles are incorporated into court proceedings.

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[31] Thom, above n 25, at 336.

[32] "New Beginnings Court: Te Kooti o Timatanga Hou" (undated) <www.districtcourts.govt.nz>.

[33] Interviews with Susan Thomas, High Court Judge (the author, 5 September 2017 and 24 October 2018).

[34] Lisa W Lunt *Preserving the Dignity of the Mentally Unwell: Therapeutic Opportunities for the Criminal Courts of New Zealand* (Fulbright New Zealand, Wellington, 2017) at 34.

[35] Hauāuru Takiwā "Te Kooti o Matariki" (October 2012) <www.hauauru.org>.

*5. Family Violence Court and Sexual Violence Pilot Court*

New Zealand's first specialist court was a family violence court (FVC) established in Waitakere in 2001. Today eleven courts operate FVCs.[36] They aim to provide a more timely and holistic response to family violence, enhance the safety of victims and families, and provide specialist services to victims and offenders.[37]

In December 2016, a two-year pilot of a sexual violence court was launched in district courts in Whangarei and Auckland.[38] The pilot covers all serious sexual violence cases heard by a jury in those district courts, and aims to reduce delays and improve the court experience for participants via "proactive, best-practice trial management" and a judicial education programme on sexual violence.[39] Best practice guidelines have been developed for the Court by its governance board.

*6. The Youth Court*

The Youth Court in its entirety has been described as a "therapeutic specialist court".[40] The Oranga Tamariki Act 1989 (the Act) provides a comprehensive framework for the Youth Court's operation. The Act prioritises diverting youth from formal court proceedings, and connecting them to their whanau and community. Legislative changes due to come into force in July 2019 will embed the tikanga Māori concepts of mana tamaiti, whakapapa and whanaungatanga into the Act.[41]

The Youth Court uses Family Group Conferences (FGCs) to encourage youth to own up to their offending and identify the underlying reasons behind their conduct."[42] The youth, the victim (if they wish to be present), the offender's family or support people, a Youth Justice coordinator and other relevant professionals attend. An individualised plan is developed to provide both accountability and also address any identified issues. The plan is monitored by up to 12 professionals working with the judge. From within the Youth Court, two smaller subsets of specialist courts have also developed.

(a) Te Kooti Rangatahi and Pasifika Courts

Rangatahi and Pasifika courts apply the same law and procedure as other youth courts but are held on marae or in Pasifika churches or community centres with the involvement of Maori and Pasifika elders. The courts are designed to better engage Maori and Pasifika youths with the youth justice system, and to involve their families

[36] Office of the Chief District Court Judge, Judicial Resourcing Team.
[37] Lunt, above n 34, at 35.
[38] Though the two years are up, at the date of writing there have been no announcements about the future of the pilot.
[39] Jan-Marie Doogue, Chief District Court Judge "District Courts to Pilot Sexual Violence Court" (press release, 20 October 2016).
[40] Thom, above n 25, at 332, quoting an anonymous New Zealand Judge.
[41] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.
[42] Oranga Tamariki "Family Group Conferences" (2018) <www.orangatamarki.govt.nz>.

and communities in the process.[43] The first Rangatahi Court was developed in 2008 as a community-based response to the disproportionate number of Maori youths appearing in the district court. There are now 15 across the country. Maori language and cultural processes are incorporated into the courts, which monitor FGC plans. The two Pasifika courts, both located in Auckland, perform a similar function.

(b) Christchurch Youth Drug Court and the Auckland Intensive Monitoring Group

The Christchurch Youth Drug Court was established by Judge John Walker in 2002. It builds on the pre-existing team approach in the Youth Court to provide a specialised approach for youth offenders with a serious alcohol or drug dependency that has contributed to their repeat offending.[44] Youths are accepted into the Court following a recommendation from a FGC. After the FGC plan has been agreed upon, the offender appears before the court every fortnight. The Intensive Monitoring Group was developed in Auckland in 2007 and based on the Christchurch Youth Drug Court model. However it soon adapted to meet the particular needs of the community it served, and now primarily serves those with a 'care and protection' status, and serious mental health or addiction issues.[45]

*C. Common characteristics of specialist courts*

Given their wide-ranging focuses and typically ad-hoc origins, there is significant variance in the operation of specialist courts both in New Zealand and overseas. However, they have the same fundamental nature. As Winick explains, specialist courts:[46]

> … extend help to people in need by connecting them to community resources, motivating them through creative uses of the court's authority to accept needed services and treatment and monitoring their progress in ways that help to ensure their success.

Specialist courts share the following key features.

*1. Active and involved judging style*

Specialist courts involve a re-imagining of the judicial role. Traditional courtrooms are defined by an adversarial structure, in which judges are expected to be "impartial referees of the litigant led battle".[47] Judges use established rules to control the hearing process and make an "objective and calculated determination of who is right on the basis of established principles of law".[48] In a specialist court, the style of judging employed is often called 'solution focused'. Judges interact directly with offenders and have an ongoing role in the case, monitoring the offender's progress

[43] Ministry of Justice "Rangatahi Courts & Pasifika Courts" <www.youthcourt.govt.nz>.
[44] Lunt, above n 34, at 27.
[45] Thom, above n 25, at 336.
[46] Bruce J Winick "Therapeutic Jurisprudence and Problem Solving Courts" (2003) 30 Fordham Urb LJ 1055 at 1061.
[47] Francine Timmins "Therapeutic Jurisprudence, Justice and Problem-Solving" in Brookbanks, above n 17, 121 at 130.
[48] At 130.

over the course of their time in the programme. They are put at the centre of the rehabilitation process and are a "principal mechanism for delivering behavioural change".[49]

*2. Multi-disciplinary team approach*

Specialist courts adopt a cooperative, multi-disciplinary team approach. This supports the active judicial role described above. With a team of professionals from various areas to inform and advise them, the judge is able to focus on facilitating an individualised strategy and monitoring regime for offenders. A key part of the collaborative and multi-disciplinary approach lies in creating relationships with community and government agency providers. As Berman and Feinblatt comment, "problem-solving courts seek to open the court-house doors, bringing new tools and new ways of thinking into the courtroom."[50]

*3. Targeting high risk, high needs offenders*

Specialist courts generally target high-risk high-need offenders. The ideal candidate for a successful specialist court experience has a high risk of reoffending and clearly identifiable needs that they are struggling to cope with without assistance. Evidence suggests intensive rehabilitation is best suited to offenders with a medium to high risk of reoffending. In fact, intensive interventions delivered to low-risk offenders can actually increase the likelihood of them reoffending.[51]

*4. Procedural fairness*

Finally, the processes employed by specialist courts are not only therapeutic but are procedurally fair. Procedural justice refers to whether an individual appearing before court believes the decision was reached by a fair process. Procedural justice or fairness is important because evidence suggests that if people feel they have been treated fairly, they are more likely to see the court's power as legitimate and comply with its decisions.[52] Four key components of procedural fairness have been identified: neutrality, respect, trust, and voice.[53] The approaches adopted by specialist courts aim to adhere to these values.

*D. Problems associated with specialist courts*

Both practical and theoretical concerns have been raised about the operations of specialist courts.

[49] Centre for Justice Innovation *Problem-solving courts: An evidence review* (23 August 2016) at 3.
[50] Greg Berman and John Feinblatt *Good Courts: The Case for Problem-Solving Justice* (The New Press, New York, 2005) at 37.
[51] See the discussion in James Bonta and DA Andrews *Risk-need-responsivity model for offender assessment and rehabilitation* (2007) Public Safety Canada at 10 <www.publicsafety.gc.ca>.
[52] Centre for Justice Innovation, above n 49, at 5.
[53] Tom R Tyler "Procedural Justice and the Courts" (2007) 44 Court Rev 26 at 30.

*1. Practical concerns*

Inequity of access is a major concern associated with specialist courts. Specialist courts offer offenders a comprehensive support network "that simply does not exist in mainstream court," and offenders who complete a treatment programme may avoid imprisonment or even conviction.[54] However, accessing these programmes depends on the offender living or having offended in the vicinity of a specialist court. This situation is known as 'postcode justice' or 'justice by geography'.[55] In New Zealand, specialist courts for adult offenders only exist in the certain parts of the North Island. Access is further limited by capacity restrictions.

Specialist courts also put pressure on services (such as drug and mental health treatment providers) that are already overloaded. If referrals provided by specialist courts allow offenders to 'skip the queue' in this regard, this undermines the ability of other community members to access these services.[56]

Another concern is net-widening - the concept that "criminal justice interventions which offer services may inadvertently lead to more people being drawn into the court system and made subject to its supervision".[57] If specialist courts are seen as the only way for an individual to receive help, people may be actively directed into the court system when they would not have otherwise been.

*2. Theoretical concerns*

(a) Do specialist courts provide "justice"?

Specialist courts aim to dispense justice as well as addressing issues that underlie offending. To some, those aims are conflicting. Critics argue the courts' focus on rehabilitation may "exclude more traditional justice considerations, such as accountability and punishment".[58]

However, participation in specialist courts is not an easy way out. Remaining in a treatment programme requires compliance with strict requirements, and offenders must address complex and deep-seated personal issues. As one AODT Court participant commented, "this is the hard road, actually, the easy road is to stay in prison."[59] Long before the advent of specialist courts in New Zealand the Court of Appeal echoed this statement, saying of sentences of rehabilitation and supervision that:[60]

> There is a punitive element in it, because the strict regime of Odyssey House [a treatment

[54] Lunt, above n 34, at 41.
[55] Katey Thom, Stella Black *Ngā Whenu Raranga/Weaving Strands: #4. The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (University of Auckland, Auckland, 2017) at 16.
[56] Lunt, above n 34, at 44.
[57] Centre for Justice Innovation, above n 49, at 29.
[58] Timmins, above n 47, at 135.
[59] Jim Boyack *Drug Court Poems: A Journey to Recovery* (BookPrint, Auckland, 2016) at 97.
[60] *R v Ward* CA182/89, 29 September 1989 at 6.

> provider] in particular is a considerable challenge; it is not unknown for offenders to prefer a prison sentence when given that option.

Notably, offenders who do successfully "graduate" from specialist courts are still sentenced at their final court appearance, typically to intensive supervision. In this regard the courts do provide both accountability and punishment.

More broadly, justice should be seen as encompassing more than solely punishment or accountability through retribution. As one Judge commented, "one thinks of justice in the context of deterrents, of retribution. But too infrequently is justice looked at as a form of healing."[61]

Deterrence will always be a key principle in any effective justice system. However, absolute notions of responsibility and punishment for the sake of punishment will not deter offenders whose decisions are governed not by rationality but by addiction, desperation or mental health issues. Specialist courts deal with individuals "who have been marginalised by their conditions and circumstances."[62] Dispensing effective justice in this context does not mean excusing offending, but should involve providing accountability and appropriate repercussions in an environment designed to foster healing and the adoption of pro-social habits. As the then Chief Judge of the District Court Jan-Marie Doogue stated in a 2018 speech, to deliver justice effectively we must have "a more holistic view of what justice looks like."[63]

(b) The legitimacy of the court's re-invented role

The reconceptualised role of the court and the judge in a specialist court is said to be both inappropriate and illegitimate. This sentiment is reflected in a 2017 article published in The Australian entitled "society expects justice from courts, not therapy."[64]

Specialist courts and therapeutic jurisprudence openly challenge the "resolutely adversarial" nature of mainstream criminal proceedings.[65] Based on a collaborative structure, specialist courts function as a therapeutic agent, using the court forum to address social and psychological issues that drive offending, Judge William Schma of Michigan endorsed this reinvention of the judicial role, stating that:[66]

> Judges must take the lead and assume responsibility for these issues. If we do not … we will have failed in our responsibility as leaders. We will reap the resulting public disaffection with us and the system we supervise. We'll deserve it.

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[61] William Schma "Judging for the New Millenium" (2000) 37 Court Rev 4 at 6, citing Justice Richard Goldstone of the South African Constitutional Court in 1997.

[62] Boyack, above n 59, foreword by Judge Lisa Tremewan.

[63] Jan-Marie Doogue, Chief District Court Judge "Generations of Disadvantage: A View from the District Court Bench" (22nd Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address, Dunedin, 15 October 2018) at 3.

[64] Jennifer Oriel "Society expects justice from courts not therapy" (29 January 2017) *The Australian* (online ed, Sydney) <www.the australian.com.au>. Oriel opined "Therapy is no substitute for justice. We expect justice in our court rooms. Leave therapy to the therapists."

[65] Boyack, above n 59, foreword by Sir Edmund Thomas.

[66] Schma, above n 61, at 6.

However, other judges do not believe "courts should be in the mix of trying to solve society's problems."[67] Judge Morris Hoffman, another American judge, describes problem-solving courts as follows:[68]

> Defendants are "clients", judges are a bizarre amalgam of untrained psychiatrists, parental figures, storytellers and confessors: sentencing decisions are made off the record by a therapeutic team… and court proceedings are unabashed theatre.

While theatrical concerns appear limited to the American context,[69] the underlying concern is that specialist courts threaten both the legitimacy and credibility of the justice system and judicial impartiality. The involved and interdisciplinary approach to judging in specialist courts is very different from the detached and neutral persona conventionally associated with judges. However just as substantive law evolves to respond to changing societal values, so too should its application. Judges in the twenty-first century in New Zealand are facing a more complex and challenging social environment than ever before. An increasing number of offenders are presenting with issues of substance abuse, homelessness and other 'psychosocial' issues. In appropriate contexts, a solution focused judging style enhances the credibility of the justice system. As recognised by Victoria's highest appellate court, protection of the public and the rehabilitation of offenders are interlinked.[70]

The Chief Judge has said that the role of New Zealand's district courts has "evolved beyond the traditional decision making or adjudicatory role" and that the courts are "joining in the search for solutions to many of society's malaises."[71] Concerns that the courts are not the appropriate actors to fulfil such a role are understandable and do have some validity. Appropriate intervention and change should ideally occur via much earlier interventions than a sentencing court may be able to provide. However, the current situation necessitates such an approach and it is justifiable and legitimate. Ultimately, courts themselves do not act as a treatment provider (a role for which they are certainly not equipped) but rather facilitate and monitor treatment.

Judges must however be aware of several dangers associated with an active judging role, as outlined below.

(c) Psychological impact, coercion and paternalism

Judges have "enormous psychological power" over those appearing before them.[72]

[67] James Nolan *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press, Princeton, 2009) at 141.
[68] Morris Hoffman "Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous" (2002) 29 Fordham Urb LJ 2063 at 2066.
[69] Reports from American problem-solving courts include one North Carolina Judge performing cartwheels when participants achieve a certain goal: James L Nolan Jr "Freedom, Social Control, and the Problem-Solving Court Movement" in James J Chriss (ed) *Social Control: Informal, Legal and Medical* (Emerald Group Publishing Ltd, Bingley (UK), 2010) 65 at 70.
[70] *R v Koumis* [2008] VSCA 84, (2008) 18 VR 434 at 438.
[71] Jan-Marie Doogue, Chief District Court Judge, above n 63.
[72] "Judicial Roundtable: Reflections of Problem-Court Justices" (June 2000) 72 NY St BJ 9 at 11.

This is particularly true for a specialist court judge given the higher level of engagement with offenders. One problem-solving court judge reflected that she has "much greater opportunities, I think, to harm someone than I would if I just sat there, listened, and said guilty or not guilty."[73] The potential anti-therapeutic effects as well as the benefits associated with this style of judging must be noted.

The coercive elements of specialist courts are also a concern. New Zealand's specialist courts require offenders to plead or have been found guilty before they can enter the court. Lunt explains that though entrance is voluntary, the alternative of challenging the prosecution's case and risking a more severe sentence presents a "coercion dilemma."[74] Once in the court, there are concerns the offender may be pressured into compliance or into remaining in the court. Perceived coercion risks "mistrust of, and disengagement from, the court, which in turn will negatively impact on beneficial outcomes".[75] The voluntary nature of specialist court participation must be stressed, and there should be automatic recognition of time spent in specialist courts if an offender is transferred back to the mainstream system.

Finally, the operation of specialist courts may risk paternalism: the belief that the judge and treatment providers know best. One scholar argues the courts seek to "reform" individuals by "putting their superior expertise to work deciding who this individual is, what this individual's problems are, and what set of services can best help this individual re-integrate himself or herself into the community."[76] A related concern is that judges or specialist court teams may make treatment decisions that do not align with evidence based practices. Physicians for Human Rights, an American NGO, reported in 2017 that drug courts in the United States "routinely fail to provide adequate, medically-sound treatment for substance use disorders, with treatment plans that are at times designed and facilitated by individuals with little to no medical training."[77]

Paternalism, like coercion, is anti-therapeutic because it negates self-motivation and choice. The absence of offenders from pre-court meetings is often criticised in this regard. However such meetings provide valuable triaging for the court, and participants consent to this process when they enter specialist courts. Ultimately, a balance between offender involvement and team collaboration must be struck. While the judge and treatment team may see a clear pathway for an offender, lasting change requires the offender to be involved in and take ownership of positive behavioural change. Care must also be taken to ensure any treatment or intervention is medically sound and evidence based.

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[73] Nolan, above n 67, at 140, citing Judge Cindy Lederman.

[74] Lunt, above n 34, at 42.

[75] Katey Thom and others *Evaluating problem-solving courts in New Zealand: A synopsis report* (Centre for Mental Health Research, Auckland, 2013) at 26.

[76] Greg Berman "What is a traditional judge anyway?" (September-October 2000) 84 Judicature 78 at 80, citing Richard Cappalli.

[77] Christine Mehta "Neither Justice Nor Treatment: Drug Courts in the United States" (June 15, 2017) Physicians for Human Rights <www.phr.org>.

*E. Effectiveness*

Evaluations of New Zealand's specialist courts are limited due to their largely ad hoc origins and relatively short history. The small sample bases must also be acknowledged. Preliminary analysis of the AODT Court indicates it reduces re-offending by 15 per cent.[78] Youth offenders who participate in Rangatahi or Pasifika courts have been found to be 15 per cent less likely to reoffend over the following 12-month period than youths with similar backgrounds who do not participate in the Court.[79] The District Courts' 2015 annual report stated that evaluations of the Court of New Beginnings showed that the Court reduced reoffending rates by 66 per cent, nights spent in prison by 78 per cent, and hospital admissions by 57 per cent.[80] Analysis of the results of the Wellington Special Circumstances Court is currently underway.

Internationally, several meta-analyses have concluded drug courts reduce recidivism by an average of 8 to 14 per cent.[81] Individual results vary: some courts report a crime reduction by as much as 80 per cent, others have had no impact and a small percent have been associated with an increase in crime.[82] In Australia, evaluations of the New South Wales Drug Court (which has now been running for 20 years), has found participation in the court (whether the offender competed or not) decreased the likelihood of reconviction by 17 per cent, while those who completed were 37 per cent less likely than a comparison group to be reconvicted of any offence during the follow up period.[83]

Cost wise, international evidence suggests that drug courts produce an average of 2.21 dollars in direct benefits to the criminal justice system for every dollar invested.[84] When more indirect effects are taken into account, studies have reported economic benefits of up to 27 dollars per dollar spent.[85] The majority of New Zealand's specialist courts operate without extra funding. The AODT Court's preliminary analysis indicated the Court was directly saving about 60 prisoner places at any one time. A cost comparison performed by the Ministries of Justice, Health, Corrections and Police to estimate the direct costs that would have resulted from the same cases indicated the AODT Court was operating at an estimated net cost of $1.3m when a conservative pricing model was used. If higher values were used (relating to infrastructure costs, for example) then the court would be operating at an estimated

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[78] Cabinet Social Policy Committee, above n 27, at [5].
[79] Ministry of Justice: *Regulatory Impact Statement: Including 17 year olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system* (undated) at 17.
[80] District Courts of New Zealand *Annual Report 2015* (2015) at 51.
[81] See Carl Leukefield, Thomas Gullotta and John Gregrich (eds) *Handbook of Evidence-Based Substance Abuse Treatment in Criminal Justice Settings* (Springer, 2011) at 124.
[82] Douglas B Marlowe, Carolyn D Hardin, and Carson L Fox *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States*" (National Drug Court Institute, June 2016) at 16–17.
[83] Don Weatherburn and others "The NSW Drug Court: A reevaluation of its effectiveness" (2008) 121 Crime and Justice Bulletin 1 at 8 and 11.
[84] Douglas Marlowe *Research Update on Adult Drug Courts* (National Association of Drug Court Professionals, December 2010) at 3.
[85] At 3.

net saving of $1.6 million.[86] Crucially, often evaluations do not consider the impacts on wellbeing caused by specialist courts. They focus on cost and recidivism.

### *F. Conclusion*

The concerns outlined above require serious consideration. Ultimately, however, the criticisms of specialist courts provide a clear foundation for devising future improvements, rather than a case for discontinuing the courts. Part Three discusses these possibilities for improvement.

## III. Mapping a Future Pathway for a Solution-Focused Approach

### *A. Introduction*

There is clear support for reforming the criminal justice system and targeting the drivers of offending. The next step is to solidify the still "liminal" space specialist courts occupy in New Zealand's criminal justice system,[87] and shape their continuing growth. To realise the full potential of specialist courts to benefit both offenders and society, their solution focused approach must be "taken to scale". This may be achieved by either replicating specialist courts across the country, or by integrating a solution-focused approach to sentencing into all courts; known as mainstreaming.

There are indications that New Zealand is headed towards the former approach. In late 2017 the government said it would be taking steps to "roll out" alcohol and drug courts across the country.[88] Frustrations with the fact the AODT Court is in its eighth year as a 'pilot' were expressed at a January 2019 conference titled Future Directions of the Alcohol and Other Drug Treatment Court. Speaking to the conference, Andrew Little expressed support for the courts but indicated any further expansion would have to wait until results of a further evaluation are finalised (expected mid-2019) and can be presented to Cabinet. Calls are growing in the Waikato for the establishment of an alcohol and drug court; work has already begun to establish "capacity and engagement" so the foundations of a court can be established in Hamilton if government support is forthcoming.[89]

### *B. Replication*

Creating more specialist courts would improve the current inequity of access issue. However, the work of specialist courts is "complex and resource hungry",[90] requiring a dedicated team of professionals and relationships with community support services. The District Court has 58 courthouses across the country, few of which operate from

[86] Cabinet Social Policy Committee, above n 27, at [24].
[87] Thom, above n 25, at 328.
[88] Kirsty Lawrence "Government to roll out specialised drug and alcohol courts from 2018" (24 December 2017) <www.stuff.co.nz>.
[89] Aaron Leaman "Calls grow for roll-out of drug courts across New Zealand" (March 29, 2019) <www.stuff.co.nz>.
[90] Jan-Marie Doogue, "Specialist Courts: Their time and place in the District Court" (2017) *Lawtalk 905* <www.lawsociety.org.nz>.

areas with both the necessary population to justify an intensive specialist approach and the resources necessary to provide one.

Even if feasible, a justice system "devoted to proliferating problem-solving courts" is arguably undesirable.[91] The Chief Judge has warned against "carving out more and more specialty areas without careful planning and forethought" in the District Court, indicating a 'fragmented approach' would be unsustainable, as all district courts operate within the same legal system and must spread their resources across the country.[92] Specialist courts are also likely to result in "personality-dependent" programmes, which risk collapsing without particularly involved members of the court team or the judge.[93] They may be susceptible to government funding cuts in a way that mainstream courts are not. Finally, as they exist only as an alternative pathway to traditional courts, arguably they fail to "challenge the underlying premise of the validity or usefulness of adversarial justice."[94] Increasing the number of specialist courts would benefit the offenders and communities they would reach, but also risks deepening the divides currently present in New Zealand's criminal justice system.

Widening the scope of issues addressed by specialist courts has also been suggested as a way to increase their impact. However even disregarding the cost and resourcing issues associated with creating "full service courts" in "every region for every purpose",[95] this approach would remove the degree of specialisation that enables the development of best practice and expertise whilst also not achieving the mainstreaming benefit of systemic change.

As the Chief Judge has noted, "the real value of specialist courts is the pathway they represent to integrating tested, innovative approaches across all courts".[96] The nature of specialist courts mean they not only do valuable immediate work but also act as "centres of expertise and training for staff" and "foci of research and evaluation".[97] In this regard they can be seen as "rich and fascinating laboratories from which to generate and refine therapeutic jurisprudence approaches."[98] Specialist courts should be developed where they can be sufficiently resourced and where they are needed. Particular communities or areas of the country may have specific needs that require an individualised and resource heavy approach. However it is vital that their solution-focused approach to addressing offending, of which therapeutic jurisprudence is an integral part, is instilled into the general court system.

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[91] Berman, above n 76, at 85.
[92] Doogue, above n 90.
[93] Lunt, above n 34, at 45. She notes the AODT Court judges have been described as the "heart and soul" of the Court.
[94] King, Freiberg and Batagol, above n 18, at 165.
[95] At 165.
[96] Doogue, above n 90. See also Thom, above n 25, at 343.
[97] King, Freiberg and Batagol, above n 18, at 165.
[98] Winick and Wexler, above n 15, at 484.

*C. Mainstreaming a solution-focused approach*

Mainstreaming involves "altering the DNA" of mainstream courts so that a solution focused approach becomes part of the courts' daily practice.[99] Specialist courts draw on considerable resources to provide comprehensive and individualised support to participants. The Chief Judge comments that "in an ideal world, where resources are plentiful, the courts might be able to take such a thoroughly tailored approach to the circumstances of every individual who comes to court, especially where there are good prospects for rehabilitation".[100] However even where resources are scarce, a foundation can still be laid in mainstream district courts now to support judging that involves an ethic of care, maximises therapeutic outcomes where appropriate, and connects offenders to treatment and support.

The District Court is able to draw assistance from the Youth Court (which has already mainstreamed therapeutic jurisprudence approaches) specialist courts and a wealth of literature on therapeutic jurisprudence to effectively integrate a solution-focused approach across all district courts. A solution-focused approach to sentencing low-level repeat offenders can be practically integrated into all district courts in the following ways.

*1. Solution-focused judging without additional resources*

The tools necessary to take a solution-focused approach to sentencing already exist within the wider court system. Firstly, all judges can use the opportunity presented by a sentencing hearing to maximise the likelihood of positive outcomes for offenders, by using therapeutic jurisprudence techniques and approaches. Secondly, the legislative framework already enables judges to impose sentences that both provide accountability but also meaningful intervention and support for offenders who require it.

(a) The therapeutic potential of direct judicial interaction

Judicial interaction with individuals involved in a particular case is the "most basic and informal" level at which therapeutic jurisprudence can be practised in any court setting.[101] Such interaction has been identified as an integral component of a therapeutic approach to judging,[102] and its simplicity may belie its importance. Judicial engagement with an offender during sentencing "can have a profound effect on whether the offender will buy into the sentence and comply with court orders."[103] Research has shown that spending a minimum of only three minutes with

[99] Berman and Feinblatt, above n 50, at 190.
[100] Doogue, above n 90.
[101] David B Rottman, "Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts imply Specialist Judges?)" (Spring 2000) Court Rev 22 at 27.
[102] Michael King, "Applying therapeutic jurisprudence from the Bench: Challenges and opportunities" (February 2003) 28 Alt LJ 172 at 173.
[103] David Wexler "Health care compliance principles and the judiciary" (1991) 27 Crim L Bull at 18.

an offender substantially increases positive outcomes.[104]

However, achieving these results requires the effective use of interpersonal skills. Therapeutic jurisprudence's multidisciplinary approach to analysing the therapeutic impact of various processes provides important guidance on which interpersonal skills should be emphasised. Two concepts are particularly important: behavioural science relating to behavioural change and motivation, and procedural fairness. With a knowledge of these areas, judges can interact with offenders in a manner which seeks to spark positive behavioural change and increases the likelihood of compliance with the law.

(i) Promoting behavioural change

In many instances, to address the issues underlying their offending the offender must ultimately change their behaviour.[105] Though the treatment and rehabilitation that specialist courts can provide is important, the "starting point for behavioural change is a person acknowledging their problem and committing to change."[106] All judges can help to facilitate this crucial first step, and doing so is consistent with the sentencing principles of deterrence, community protection, and rehabilitation and reintegration.[107]

Behavioural science can assist in understanding the process of change and the means that can be used to promote it. Two key concepts sentencing judges should ideally be familiar with are the stages of change model and motivational interviewing (MI). The Transtheoretical Stages of Change Model (the TTM), developed in the field of psychotherapy, identifies the following five stages of change:[108]

1. Pre-contemplation (no acknowledgement of a problem which needs to be changed)
2. Contemplation (recognition of a problem, contemplating whether to take action)
3. Preparation (decision made, getting ready to change)
4. Action (engaging in action to address the issue, e.g. counselling)
5. Maintenance (progress made in addressing the problem, taking action to prevent or recover from relapse)

Many offenders appearing before the court will be 'pre-contemplative' or 'contemplative', and the "key is for the offender to shift towards change."[109] For

[104] National Drug Court Institute "Best Practices in Drug Courts" (2012) VIII Drug Court Rev at 22–24. The study demonstrated a linear effect on positive outcomes when more judge time was spent with a drug court participant: "moving from under three minutes to just over three minutes effectively doubles the reduction in recidivism, while spending seven minutes or more effectively triples the positive outcome".
[105] Pauline Spencer "To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts" (paper presented to International Conference on Law and Society, 2012) at 6.
[106] At 6.
[107] Sentencing Act 2002, s 7(1)(f),(g) and (h).
[108] James O. Prochaska, Wayne Velicer, "The Transtheoretical Model of Health Behaviour Change" (1997) 12 American Journal of Health Promotion 38 at 38, as outlined in Michael S King *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, Melbourne, 2009) at 153.
[109] Spencer, above n 105, at 6.

many a court appearance in itself is a "catalyst for change."[110] Sentencing provides judges with the opportunity to encourage such change. Judges can employ MI techniques to interact with offenders in a manner that increases the chances of positive behavioural change. MI is a style of interaction which seeks to facilitate an individual taking responsibility for change.[111] Its key tenets include expressing empathy, commenting on discrepancies between current behaviour and identified goals, and encouraging self-efficacy.

This is a concerted shift from the adversarial nature of mainstream courts, which reduces offenders to passive bystanders. Magistrate Pauline Spencer of Victoria commented that "sometimes I will have to ask defence lawyers to move so I can actually see the person we are all talking about."[112] Listing issues an offender needs to address fails to encourage self-reflection or self-determination. Solution-focused judging inverts this approach. Judges make active efforts to involve offenders in the proceedings.

Where appropriate, mainstream judges should adopt the same approach. Magistrate Spencer explains that she asks offenders "a range of open questions aimed at having them identify their substance abuse as a problem, to acknowledge and take responsibility for their behaviour, and to identify what they need to change."[113] Detailed resources for judges can be found online, including templates of written questionnaires that may be provided to offenders.[114] Former Perth Drug Court Magistrate and academic Michael King has authored the *Solution-Focused Judging Bench Book*, a resource which includes a useful guide to which MI strategies to employ depending on what stage of behavioural change an offender appears to be at.[115] A New Zealand specific bench book should be developed that provides judges with similar tools albeit tailored to the New Zealand context, for example with a focus on the cultural framework and principles of the Rangatahi and Matariki courts. Training programmes and conferences should be established to help judges develop a solution-focused judging toolkit.

Paternalism must of course be avoided, and judicial interaction should be characterised by "persuasion, not coercion."[116] Various factors will affect the success of even the most skilful persuasion. However, the benefits of an involved approach should not be underestimated. When involved in proceedings, "offenders often comment that this is the first time that anyone has asked them what they need to do about their life."[117]

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[110] Lunt, above n 34, at 18.
[111] Michael S King, "The therapeutic dimension of judging: the example of sentencing" (2006) 16 JJA 92 at 100.
[112] Spencer, above n 105, at 6.
[113] At 8.
[114] See for example International Society for Therapeutic Jurisprudence "For Judges - Therapeutic Jurisprudence in the Mainstream" <www.mainstreamtj.wordpress.com>.
[115] King, above n 108, at 100.
[116] Winick, above n 46, at 1078.
[117] Spencer, above n 105, at 9.

(ii) Procedural fairness

Judges can also follow a solution focused judging approach by adhering to the elements of procedural fairness. As discussed, procedural fairness is a key ingredient in public satisfaction. Wexler states that therapeutic jurisprudence "has long looked to the procedural fairness literature to improve the therapeutic functioning of the law".[118] Procedural justice is a key aspect of a solution-focused approach because offenders are more likely to comply with court decisions if they believe the decision was made in a fair manner.[119]

In seeking to "use the psychology of procedural justice to support its goals", literature on therapeutic jurisprudence suggests that the "voice, validation and respect" goals of procedural justice are particularly relevant.[120] Voice is especially important, both for achieving procedural fairness and the therapeutic value attributed to the act of telling one's own story and creating a narrative for life events.[121] Engaging directly with an offender enables them voice. Active listening is also required to provide both validation and respect. Again, there is a wealth of international literature available regarding active listening and displaying empathy and respect in a courtroom setting. Techniques include rephrasing an offender's statements back to them, being aware of body language and calling the offender by name.[122]

Identifying and encouraging the use of effective interpersonal skills and elements of procedural fairness is not done so as to encourage judges to depart from their traditional role entirely, or to act as a social worker or counsellor. Rather, the idea is that "even in a short hearing, by taking the right approach, the court can help to promote modification of behaviour and a more comprehensive resolution of the matter."[123] These approaches will set the scene for a more comprehensive solution-focused approach to be integrated into all courts.

(b) Using the existing sentencing regime

All judges are able to implement a sentence which seeks to address the offender's underlying issues, and also incorporates judicial monitoring. If used effectively, this can replicate a specialist court approach even without a specialist court team.

A range of sentences are already geared towards rehabilitation. A standard condition of supervision, intensive supervision and home detention sentences is that offenders must attend a rehabilitative or re-integrative needs assessment if directed to do so by

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[118] David B Wexler "Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence" (2007) 44 Court Rev 78 at 80.
[119] See Kevin Burke and Steve Leben "Procedural Fairness: A Key Ingredient in Public Satisfaction" (2007) 44 Court Rev 4 at 6.
[120] Timmins, above n 47, at 129.
[121] See Warren Brookbanks "Narrative Medical Competence and Therapeutic Jurisprudence: Moving Towards a Synthesis" (2003) 20 LIC 74 and Dawn Duncan "The Narrative Lawyer: Exploring Narrative Competence in Legal Practice" in Brookbanks*,* above n 18, at 21.
[122] See generally Susan Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (National Judicial Institute, Ottawa, 2005).
[123] King, above n 111, at 99.

a probation officer.[124] Judges may also impose special conditions on the above sentences, which can include directions to attend counselling or other "programme", or to be subject to an alcohol or drug condition (involving testing or continuous monitoring by an alcohol or drug monitoring device).[125]

Under section 25 of the Sentencing Act, judges also have the ability to defer sentencing for a variety of purposes, including "to enable a rehabilitation programme or course of action to be undertaken."[126] This general power provides the legislative basis for the operation of specialist courts in New Zealand. Under section 27, the court can adjourn sentencing in order to permit a person to address the court on a variety of matters concerning the offender. Both this provision and the provision of pre-sentence reports under section 26 of the Act can be used by judges to obtain more information about the circumstances of an offender.

Judges consequently have a considerable degree of flexibility to consider the personal circumstances of offenders and, if deemed appropriate, defer sentencing in order for the offender to complete or begin a rehabilitative sentence. When sentencing is deferred, the offender may be remanded at large, remanded on bail, or remanded in custody during this time.[127]

Mainstream courts already use adjournment to enable rehabilitation, in some cases. In *R v Baird,* Chambers J used section 25 to impose a three-month adjournment in order for the defendant to continue a rehabilitation programme that he had begun, with the intention that he appear for sentence drug-free.[128] This provision should be used more frequently, particularly when judges are confronted with offenders whose offending is clearly driven by issues such as addiction. As suggested by Barker J in *Hamahona v Police*, to assist a court in assessing an offender's proclaimed desire to rehabilitate themselves a report from a recognised rehabilitation programme should be provided to the court, indicating whether the report writer considers the offender would benefit from the programme.[129] There should also be an objective assessment of the offender's willingness to participate in such a programme, and a prognosis of whether the treatment would be successful. In this regard awareness and engagement by defence counsel is paramount, so that a solid plan for an alternative to imprisonment can be given to the Judge. If an offender breaches the conditions of

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[124] Sentencing Act, ss 49(1)(i), 54F(1)(j) and 80C(2)(g).
[125] Sections 50–51, 54G and 80D. Special conditions may be imposed if the court is satisfied there is a significant risk of further offending by the offender, standard conditions alone would not adequately reduce that risk, and the offender requires a programme to reduce the likelihood of further offending through the rehabilitation and reintegration of the offender.
[126] Section 25(1)(d).
[127] Geoffrey Hall *Hall's Sentencing* (online looseleaf ed, LexisNexis) at [SA25.4–25.7].
[128] *R v Baird* HC Auckland T023827, 13 December 2002. The defendant was charged with manufacturing a Class A drug and a Class B drug. Chambers J said "I strongly believe that the best course from society's point of view is to get you drug free. Once we have achieved that, I do not believe that we will see you before the courts again…": at [4]. The offender was subsequently sentenced to 18 months supervision, after displaying steady progress towards rehabilitation: see *R v Baird* HC Auckland T023827, 23 March 2003. See also *Heke v Police* HC Whangarei CRI-2006-488-60, 3 April 2007.
[129] *Hamahona v Police* AP51/92, 3 November 1992 at 3.

a sentence of supervision or intensive supervision, including drug and alcohol conditions, they can be recalled to court and sentenced to a term of imprisonment.[130]

Another important sentencing tool is judicial monitoring. Requiring offenders to report back to court is "one of the least controversial and most effective practices that could be applied in conventional criminal courts."[131] Judicial monitoring may be imposed as a special condition for sentences of intensive supervision or home detention.[132] The process is that probation officers must prepare progress reports for the judge, and after considering the report, the judge may require the offender to appear before the court.[133] Judges can use these review hearings to both address compliance concerns, but also to comment on the progress an offender has made and offer praise and encouragement. Research suggests that even if treatment is not provided, monitoring can positively impact reoffending.[134] One Judge explained that:[135]

> I have started telling people that they are ordered back and I will have them come back once a month. And I intend to use sort of a drug court model. I don't have all the resources of a drug court, I don't have the testing and I can't get probation to really supervise them. But I think the issue of judicial supervision and accountability … makes a difference.

Judicial monitoring provisions are not commonly used in mainstream New Zealand courts. The use of judicial monitoring should be emphasised, and arguably permitted for a wider range of sentences such as supervision. The principal practical barrier to its use is inadequate time. District Court judges have heavy workloads and limited time. This would therefore require more judicial support, possibly more judicial officers, and ultimately acceptance of the importance of such review hearings. Listing practices could be used to devote certain hours in a week to monitoring. Judicial monitoring should however only be used as is proportionate to the offence, and if it appears to have good prospects of assisting in an offender's rehabilitation.

Ideally, judges would be assisted in imposing judicial monitoring or adjourning sentencing through having access to a treatment plan that has been prepared for the offender. Former Principal Youth Court Judge Becroft has suggested that a "community group conference" could be explored as an adult equivalent to the FGC, which could create a plan that could be used as an option to assist in sentencing decisions.[136] Alternatively, the questions a judge asks an offender about their goals

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[130] Sentencing Act, ss 70, 70AA, 70A and 70B.
[131] Donald Farole and others, "Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts" (2005) 26 Justice System Journal 57 at 63.
[132] Sentencing Act, ss 54I(3)(d) and 80D(4)(d).
[133] Sections 80ZJ and 80ZK.
[134] Adele Harrell, Shannon Cavanagh and John Roman *Findings from the Evaluation of the D.C. Superior Court Intervention Programme* (Urban Institute, Washington DC, 1998), cited in Berman and Feinblatt, above n 50, at 157. This study indicated that ongoing monitoring and gradual sanctions and rewards helped drug offenders avoid re-arrest in the year after sentencing, even if the offenders were not linked to treatment.
[135] Farole and others, above n 131, at 64.
[136] Andrew Becroft "10 Ideas that Might 'Cross-Pollinate' from the Youth Court into the Adult District Criminal Court" (September 2012) <www.youthcourt.govt.nz>.

and planned behavioural change (as discussed above) could be made into a plan for rehabilitation.[137]

These approaches can all be taken without any change occurring. However, they may be bolstered by integrating a solution focused approach at another 'level' of mainstream courts; through the development of a court team and relationships with local treatment providers.

*2. Introducing a multi-disciplinary collaborative team approach in all courtrooms*

In order to take a truly comprehensive approach to offending, developing relationships between district courts and community providers and government agencies is key. It has been commented that "[r]egardless of the way in which each jurisdiction chooses to go with problem-solving approaches to justice, all options rest on the ability of the legal, health, and welfare sectors to collaborate effectively."[138]

New Zealand "is blessed with many government social agencies" and also has a variety of effective private organisations such as the Salvation Army and the City Mission.[139] Ideally a "community engagement strategy"[140] would be developed by each court, which would map all relevant agencies, identify any particular focus areas of the relevant court, (for example, mental health support) and establish points of contact. Realistically, mainstream court judges simply do not have the time to perform this exercise. Here, an analysis of specialist courts' collaborative team approach is valuable.

In specialist courts, collaboration and community engagement are fostered by the representation of community providers in the court team. As discussed, this multi-disciplinary team plays a critical role in the assessment of the individual, the creation of a treatment plan, and advising the judge. In the Youth Court, a "collaborative team of professionals ensures a holistic, wraparound service that seeks to address the many potential causes of offending."[141] Becroft comments that this approach "could benefit the adult District Courts greatly."[142] Given the prevalence of AOD and mental health issues in offenders appearing before the District Courts, arguably roles that deal with these issues are of particular urgent importance. Two roles relating to AOD and mental health issues do already exist within mainstream courts, but are limited and should be expanded.

Court liaison nurses (CLNs) work in the Youth, District and High Courts, and conduct assessments of offenders with the principal purpose of establishing whether an

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[137] Spencer, above n 105, at 9.
[138] Elizabeth Richardson, Katey Thom, Brian McKenna "The Evolution of Problem-Solving Courts in Australia and New Zealand: A Trans-Tasman Comparative Perspective" in R Weiner and E Brank (eds) *Problem Solving Courts: Social science and legal perspectives* (Springer, New York, 2013) 185 at 198.
[139] Greg King *A new kind of court – a new level of judicial oversight and offender management* (May 2012) at 24.
[140] Spencer, above n 105, at 15.
[141] Becroft, above n 136.
[142] Becroft, above n 136.

individual has an issue severe enough to raise doubts about their fitness to stand trial.[143] One study indicated that only half of CLNs have the reasonable resources required to perform even this limited role.[144] As Lunt notes, CLNs are "uniquely qualified to conduct assessments with a broad goal of identifying any mental health issue."[145] If this role were enhanced, CLNs could assist in forming treatment plans for offenders that may have less acute mental health issues.[146]

The other relevant role is the alcohol and drug (AOD) clinician. AOD clinicians were a "judiciary-led initiative to improve the health information available to judges to inform their sentencing decisions."[147] They serve as a link between the court and treatment providers, and carry out assessments of offenders who have pleaded guilty; both for AOD issues but also other coexisting problems such as homelessness or family issues.[148] Only nine district courts have access to an AOD clinician however, and a study indicated there was "no uniform or best practice framework for the AOD clinician services across sites."[149]

If expanded, these two roles could form the basis of a professional court team for all district courts, which can assist the judge in implementing an effective sentence, which may be an alternative to imprisonment or remand, that involves a treatment plan. To supplement these two roles, the creation of a more general liaising role would also be valuable. In specialist courts, court coordinators are the "glue" that keeps the various parties involved together.[150] Creating a similar position in all district courts to assist with triaging, case management and linking the court to treatment providers would greatly assist the creation of a core therapeutic team. To this effect, Lunt has recommended the creation of a role called "Health Navigator" for district courts.[151] Leah Davison, a key member of the SCC court team, has suggested the creation of a "Court Liaison" coordinator for all district courts, a role which would seek to link individuals appearing at court to community services they

[143] Lunt, above n 34, at 19.
[144] Patsy-Jane Tarrant *Court liaison nurses: Advanced practice and Untapped resource* (2014) at 74. For example, a computer at court, a room in which to interview people privately.
[145] Lunt, above n 34, at 54.
[146] At 54.
[147] Ministry of Justice *Alcohol and other drug (AOD) clinicians in court* (August 2016) at 14.
[148] Lunt, above n 34, at 22.
[149] Ministry of Justice, above n 147, at 6.
[150] Katey Thom and Stella Black *Ngā Whenu Raranga/Weaving Strands: #3. The roles of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court team* (University of Auckland, Auckland, 2017) at 8.
[151] Lunt, above n 34, at 51. She suggests the Health Navigator (HN) would be an experienced social worker, preferably with AOD assessment skills and close ties to local community services. The role would include assessing the health and socio-economic needs of offenders, identifying and facilitating access to appropriate services for offenders, and making a treatment plan for the offender. For offenders with less acute needs, the HN could assist in generating referrals, making appointments and providing solutions "to what may be relatively straight-forward issues [for offenders] but that can be overwhelming".

may need.[152] These recommendations are logical, practical and relatively inexpensive. They would be best tested through a pilot role. A general liaising role, together with the expansion of the CLN and AOD clinician role, would effectively mainstream the benefits of a specialist court approach in a more compact and less resource intensive manner. The team can help to devise treatment plans, assist in monitoring, and build relationships with the community.

### *D. Conclusion*

Unless the justice system does more to address the drivers of criminal behaviour, repeat low-level offenders will continue to pass through the courts' doors in numbers that are unsustainable and indefensible. Specialist courts and therapeutic jurisprudence provide a pathway to better outcomes for offenders and their communities that New Zealand can quite literally no longer afford to ignore. The approaches taken in these courts represent a complementary expansion rather than replacement of traditional understandings of justice and of the court's role. As the Court of Appeal has recently affirmed, rehabilitation is "a cornerstone" of the Sentencing Act.[153]

The specialist court landscape in New Zealand provides intensive assistance to offenders and is also enabling the development of New Zealand specific best practices. The current specialist courts should be retained in order to keep developing best practice processes and to allow assessment of their effectiveness. Benefits will be obtained from "rolling out" alcohol and drug courts in cities with a suitable need, population and the necessary resources. However, the best outcomes for the criminal justice system and our incarceration crisis lie in mainstreaming the therapeutic and solution focused approach used in specialist courts to all district courts. As discussed, many practical steps can be taken by all judges without any extra resourcing or investment. Building on these opportunities is however essential. The development of a New Zealand-specific solution focused judging bench book, and investment into creating a core "team" in each District Court, including the piloting of the court liaison officer role, are two simple and low-cost steps which can begin this process.

## **Postscript**

On 12 December 2019 Justice Minister Andrew Little announced that the pilot Alcohol and Drug Treatment Courts in central Auckland and Waitakere will be made permanent, and a new alcohol and drug court will be opened in Hamilton. Judge Heemi Taumaunu was also appointed as the new Chief District Court Judge in September 2019, and has expressed support for mainstreaming therapeutic principles underlying specialist courts across district courts more widely.

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[152] Interview with Leah Davison, Public Defence Service Wellington duty lawyer supervisor (the author, July 11, 2017). Davison comments that a key benefit of having a court liaison coordinator would be to assist in the creation of bail plans, which can help to give judges confidence in bailing someone with a tight plan around them, coordinated by the court liaison coordinator and through community resources.

[153] *Taylor v R* [2018] NZCA 444 at [17].