

AN ARGUMENT FOR THERAPEUTIC JURISPRUDENCE IN AOTEAROA: A MAORI MENTAL HEALTH COURT UNDERPINNED BY PRINCIPLES OF *TIKANGA* AND THERAPEUTIC JURISPRUDENCE

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Whakataukī

*Ma Te huruhuru, Ka rere Te manu
Adorn the bird with feather so it can fly*

Mihimihi

*Ko Ngāpuhi te iwi
Ko Te Hikutu te hapū
Ko Hokianga taku Tūrangawaewae
Ngā mihi mahana kia a koutou
Ko Jessica Aroha Hope Reid taku ingoa*

The imperative for this paper comes from the fact that in modern day Aotearoa, the number-one health concern for Māori is mental health.¹ Yet despite this fact, Māori are more likely to be come into contact with mental health services through a justice doorway than a primary care point². This essay will make the argument that it is time for a Māori Mental Health Court based on principles of *Tikanga* and therapeutic jurisprudence. This Māori Mental Health Court would use the principles of therapeutic jurisprudence to enhance the law's therapeutic agency and promote the healing of individuals within the court process. This would open the door for a holistic incorporation and realisation of principles of *Hauora Māori*, *Tikanga* and *Wairua* within the court. Together, the complementary principles of *Tikanga* and therapeutic jurisprudence could be interwoven to underpin a Māori Mental Health Court which could bring Maori mental health back into balance.

MAORI MENTAL HEALTH: THE NEED FOR A MAORI MENTAL HEALTH COURT

Māori are one of the most prominent groups in Aotearoa's criminal justice and mental health system. Māori feature highly in the criminal justice system, where they have increasingly high rates of incarceration and a greater recidivism and offending rate than non- Māori.³ Māori also dominate the statistics in the mental health sector, where they manifest a higher level of mental illness than non-Māori, with one in two Māori experiencing at least one disorder in his or her lifetime, and are gravely over-represented in forensic mental health services.⁴ However, the most telling statistics are those that show the close nexus between incarceration and mental illness; Māori are overrepresented in prisons⁵ and have a much

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¹ New Zealand Ministry of Health, *Te Puawaitanga: Maori Mental Health National Strategic Framework* (2002) 4.

² Baxter et al, *Te Rau Hinengaro: The New Zealand Mental Health Survey* (2006).

³ Morrison et al, *Conviction and Sentencing Offenders in New Zealand: 1997 – 2006* (2008) 6.

⁴ Baxter et al, above n 2.

⁵ Morrison et al, above n 3.

higher prevalence of substance abuse and psychotic illness.⁶ One explanation for this is that the policy of deinstitutionalisation has led to higher numbers of people with mental illness living in the community.⁷ Many of these people cannot or refuse to maintain their treatments and, left unchecked, this can lead to behaviour that the justice system regards as ‘criminal’, such as urinating in public or petty theft.⁸ Many commentators have referred to this process as the ‘criminalisation of the mentally ill’⁹ and for Māori this can be disproportionately exacerbated by the stress of remand, court appearances and possible sentencing, all of which can lead to further deterioration.¹⁰ This raises serious questions about whether imprisonment is the appropriate response for Māori individuals whose presence in the criminal justice system is more a result their mental illness than their criminality.

THE IMPORTANCE OF *WAIKUA* IN *TIKANGA* AND *HAURORA MĀORI*

The reason that Māori are one of the most prominent groups in the legal and mental health systems may be because they are also one of the most vulnerable. It has been contended that the acute negative statistics for Māori indicate that something is out of balance in world of Māori mental health. One explanation for this lies in the fact that the Māori approach to *hauora* (health), *mate Māori* (sickness) and *mate hinengaro* (mental illness) is based on a holistic wellness model which is grounded in principles of *Tikanga*, the right way(s) of living for Māori.¹¹ This means Māori understandings of mental health are inextricably linked to *Te Ao Māori* (the Māori world view) and the especially important *Te Ao Wairua* (the spiritual world).¹² This connection is acknowledged in Mason Durie’s foundational model for Māori mental health, *Te Whare Tapa Wha*.¹³ In this model, *hauora* is represented as *te whare*, the house, in which the four sides of the house represent the four cornerstone elements of *hauora*. If one of the four dimensions is missing or damaged, then a person or a collective may become ‘unbalanced’ and unwell. The four dimensions are: *te taha hinengaro* (the health of the mind), *te taha tinana* (the health of the body), *te taha whānau* (the health of the family) and *te taha wairua* (the health of the spirit).

While Māori health and well-being is a multi-faceted experience, it is acknowledged that *wairua* is the most vital part of that experience.¹⁴ For Māori, the spiritual essence of a person is their *Mauri*, their life force. *Wairua* is not only a sense of spirituality; it determines them as an individual and as a collective, who and what they are, where they have come from and

⁶ Simpson et al, *The National Study of Psychiatric Morbidity in New Zealand Prisons: An investigation of the prevalence of psychiatric disorders among New Zealand inmates* (1999).

⁷ See generally Brian McKenna and Karen Seaton ‘Liaison services to the Courts’ in Warren Brookbanks and Sandy Simpson (eds) *Psychiatry and the Law* (2005) 447–48.

⁸ Bruce Winick and David Wexler, *Judging in a Therapeutic Key Therapeutic Jurisprudence and the Courts* (2003) 59.

⁹ Robert Miller, ‘The continuum of coercion: constitutional and clinical considerations in the treatment of mentally disordered persons’ (1997) 74(4) *Denver University Law Review* 116.

¹⁰ Valmaine Toki, ‘Therapeutic Jurisprudence and mental health courts for Maori’ (2010) 33 *International Journal of the Legal Profession* 440.

¹¹ Note that many Maori acknowledge that terms such as *tikanga*, *hauora* and *wairua* can, like other tenets of *Te Ao Maori*, escape precise definition in the English language. While measures have been taken to adequately represent these concepts in this paper, a more in-depth exploration can be found in Hirini Moko Mead, *Tikanga Maori, Living by Maori Values* (2003).

¹² See generally Mason Durie, *Mauri Ora, The Dynamics of Maori Health* (2005).

¹³ See M Durie, *Whaiora, Maori Health Development* (2nd ed 1998); see generally Maori Mental Health Provider, Ministry of Health, *Maori health models* (2006).

¹⁴ Huakere Valentine, *Kia Ngawari te Awatea: The Relationship Between Wairua and Maori Well-being: A Psychological Perspective* (Doctoral thesis, Massey University, 2009).

where they are going. A traditional Māori analysis of physical manifestations of illness will unquestionably focus on *wairua* as a key element in determining whether damage there is a contributing factor to any illness. Despite the significance of *wairua*, as recognised by the Ministry of Health, for many Māori, modern health services lack recognition of this spiritual element of *te taha wairua*.¹⁵ Indeed, many Māori believe that these negative health statistics are directly linked to the loss of Māori spiritual beliefs and practices. This sentiment was captured well in the words of Māori Marsden, a prestigious Maori *tohunga*, who said:

The approach to life is governed by one's perception of reality. Since ultimate reality for Māori is the reality of the spirit, the concept plays a major role in his approach to healing. While the Western world has begun to take on board the psychological aspects of its practice, in the Māori view, psycho-somatic medicine is still deficient in that the spiritual element is not taken into account.¹⁶

This quote from Reverend Marsden reflects the fact that Western health professionals have historically struggled with the notion that spirituality could be studied empirically and scientifically as a factor in health.¹⁷ While this element is now becoming increasingly recognised, it is still limited to a Western perception of spirituality. This is seen in certain Western characterisations of *tohunga* as priests, rather than healers,¹⁸ and *mākutu* as a curse of bewitchment rather than a transgression on the ancient *Tikanga* of *tapu*.¹⁹ Thus this quote is also poignant in the fact that it expresses the sentiment that as *Te Whare Tapa Wha* reflects *Te Ao Māori*; the modern Western medical model that currently dominates mental health reflects and is perhaps limited by *Te Ao Pakeha*, the Western worldview.

THERAPEUTIC JURISPRUDENCE AND MENTAL HEALTH COURTS

The touchstone principle of therapeutic jurisprudence: Therapeutic agency

Therapeutic jurisprudence is, at its simplest, the study of the law's healing potential.²⁰ It is a movement which was pioneered by American mental health law academics, Professors Bruce Winnick and David Wexler, who observed that the operation of the law can have a direct psychological impact on the offenders, lawyers, judges and other actors it encounters and, importantly, that this impact can be either therapeutic or anti-therapeutic.²¹ Herein lies the challenge posed by therapeutic jurisprudence: to become aware of this effect and to seek to make and apply law in a therapeutic way to achieve a criminal justice system which helps

¹⁵ Ibid. 47.

¹⁶ Te Ahukaramū Charles Royal (ed), *The Woven Universe: Selected Writings of Rev Maori Marsden* (2003).

¹⁷ Valentine, above n 14, 5.

¹⁸ See the sub-chapter on Wairua, Healing and the Tohunga Suppression Act in *ibid.* 30.

¹⁹ *Makutu*, despite the treatment in the *R v Raiwiri* case, CRI- 2007 – 032 – 005294, 14 August 2009, has been recognised by the Ministry of Justice itself as a regulator of behaviour. See New Zealand Ministry of Justice, *He hinatore ki te ao Māori: a glimpse into the Māori world* (2001).

²⁰ As defined by Wexler in his foundation text, 'Inducing therapeutic compliance through the criminal law, in David Wexler and Bruce Winick (eds), *Essays in Therapeutic Jurisprudence* (1991) 187. Note this definition has been altered slightly by William Schma to mean 'the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects'. William Schma, 'Therapeutic Jurisprudence, Recognising Law as One of the Healing Arts' (2003) *Michigan Bar Journal* 25.

²¹ See Winick and Wexler, above n 8; David Wexler, 'Therapeutic Jurisprudence and the Criminal Courts' (1993) 35 *William and Mary Law Review* 279; Bruce Winnick, 'Therapeutic Jurisprudence and Problem-Solving Courts' (2002) 30(3) *Fordham Urban Law Journal* 1055.

people to receive and achieve mental health, while still respecting traditional judicial values such as justice and due process.²² In this way, the law can be given therapeutic agency to make a real change in the psychological and physical well-being of an individual.

Manifesting therapeutic agency through Mental Health Courts

Mental health courts are one of the newest and most effective means by which one of the key goals of therapeutic jurisprudence is realised; to interrupt the ‘revolving door’ cycle of repeat offending and incarceration. It has been contended by advocates of therapeutic jurisprudence that one of the newest and most effective ways to limit the entry of the mentally ill into the prison system and successfully treat them outside this environment is through the establishment of mental health courts.²³ A mental health court would be in the position to link the offender to the critically needed medical treatment, apply the appropriate release conditions and incentivise compliance through the threat of imprisonment.²⁴ In this way, the court could move toward effectively breaking the cycles of endemic psycho-social dysfunction that defies resolution in the conventional courts. The critics of the mental health courts have deemed this approach as ‘soft’ law in the sense that it is overly paternalistic, anti-intellectual and unsubstantiated.²⁵ Yet, problem-solving courts, such as American drug courts, have been one of the most heavily examined and researched areas in mental health law.²⁶ Thus, although therapeutic jurisprudence and its mental health courts are not without their criticisms, it must also be acknowledged that advocates of the discipline have made great efforts to address these concerns.²⁷

THE INTERWEAVING OF *TIKANGA* AND THERAPEUTIC JURISPRUDENCE

The reasons that a Maori mental health court based on principles of *Tikanga* and therapeutic jurisprudence could be successful way forward for Māori mental health are three-fold. Firstly, a significant feature of therapeutic jurisprudence, which separates it from other disciplines, is that therapeutic jurisprudence is not intended to be an over-riding charter but rather a lens through which the law and legal processes can be examined.²⁸ It does not assert that therapeutic concerns are more important than other factors in or consequences of the process. In this case, therapeutic jurisprudence would be concerned with the fact that often for Māori individuals with mental health concerns, the law has an anti-therapeutic effect through involvement in the justice system itself and that this is magnified by the Western

²² See Winick and Wexler, above n 8.

²³ See Mark Heerema, ‘An Introduction to the Mental Health Court Movement and its Status in Canada’ (2005) 50 *Criminal Law Quarterly* 255.

²⁴ Warren Brookbanks, ‘Making the Case for a Mental Health Court in New Zealand’ (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006) 2.

²⁵ Mae Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539. See also Morris Hoffman, ‘Therapeutic Jurisprudence, Neorehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous’ (2002) *Fordham Urban Law Journal* (2002).

²⁶ See generally Peggy Hora, William Schma and John Rosenthal, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s response to drug abuse and crime in America’ (1999) 74 *Notre Dame Law Review* 439.

²⁷ See generally David Wexler, ‘An Orientation to Therapeutic Jurisprudence’ (1994) 20 *New England Journal on Crime and Civil Confinement* 259 and Bruce Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ in David Wexler and Bruce Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996), 665.

²⁸ Toki, above n 10.

view of ‘justice’ through which legal processes are carried out. Yet, importantly, therapeutic jurisprudence does not assert a substantive process by which this should be remedied. Thus *Tikanga* can be the ‘first law’ of the Maori Mental Health Court.²⁹ This is important, as a Māori mental health court must be ‘for Māori by Māori’,³⁰ meaning that the court must be authentically grounded in principles of *Tikanga* and a background of *Te Ao Māori* to avoid risking any further erosion of Māori understandings of *hauora*.

The second element which makes *Tikanga* and therapeutic jurisprudence ideal partners to found a mental health court is they are both principle-based, forward-looking and based on a relational ethic; thus they are able to co-exist well together in a legal system. Firstly, both *Tikanga* and therapeutic jurisprudence are principle- or value-based, rather than rule-based.³¹ For the therapeutic component, this means the focus is on enhancing the therapeutic nature of the process and using the tools of the social sciences to promote psychological and physical well being.³² For the *Tikanga* component, this opens the door for the utilisation of key dispute resolution values such as *utu*, *mana* and *tapu*. Secondly, both therapeutic jurisprudence and *Tikanga* are forward-looking in that, unlike the traditional criminal justice system which is primarily penalty-oriented, they look for the ‘right way’ or the *tika* way, which ultimately results in healing for the participants and the community.³³ Finally, both disciplines have a relational-based ethic. *Tikanga* holds collectivity to be of great importance to Māori and *Te Ao Maori* emphasising relational principles such as *whanaungatanga*.³⁴ Therapeutic jurisprudence also promotes itself as a relational-based method, promoting an interdisciplinary approach and collaborating with communities and community-based government organisations.³⁵

Thirdly, Aotearoa has been embracing principles of therapeutic jurisprudence for many years but has simply not recognised it as therapeutic jurisprudence. This can be seen in the many problem-solving courts already at work in New Zealand. The most prominent cluster of therapeutic jurisprudence principles in action can be seen in the New Zealand Youth Court, which has long embraced the principles of restorative justice, a theoretical cousin to therapeutic jurisprudence.³⁶ In the Youth Court, the mechanisms involved in the Family Group Conference, Intense Monitoring Group and Youth Drug Court all display the key elements of a therapeutic approach to justice.³⁷ Therapeutic jurisprudence has also manifested itself in the adult criminal justice system, as seen in the Drug and Alcohol Courts, Family Violence Courts, Homeless Court and the ‘Restorative Justice Process’ utilised in the District Courts. Furthermore, and most importantly to this cause, therapeutic jurisprudence has already met principles of *Tikanga* and produced a successful problem-solving court, as seen

²⁹ The first law of Aotearoa being *Tikanga*, as characterised in Ani Mikaere, ‘The Treaty of Waitangi and Recognition of Tikanga Māori’ in M Belgrave et al., *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2004) 330.

³⁰ This has been said many times, most recently by Hauora Hokianga mental health worker Kathryn Johnston with the author. Interview with Kathryn Johnston (Telephone interview, 20 October 2010).

³¹ Toki, above n 10.

³² Valmaine Toki, ‘Will Therapeutic Jurisprudence Provide a Path Forward for Maori’ (2005) 170 *Waikato Law Review* 170, 174.

³³ Toki, above n 10, 444.

³⁴ See J. Paterson, *Exploring Maori Values* (2005).

³⁵ Winnick, above n 21, 1055.

³⁶ See generally Micheal King, ‘Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice’ (2008) 32 *Melbourne University Law Review* 1098.

³⁷ See generally Principal Judge Andrew Beacroft, *Restorative Justice in the Youth Court* (Paper presented at the 9th International Conference on Alternative Dispute Resolution, Wellington, New Zealand, 19 September 2007).

in the Youth Rangatahi Courts, which utilise the location of a *marae*, processes such as *pōwhiri*, and attempts to reconnect the young person with their cultural roots through rituals such as *mihimihi*.³⁸ This indicates a great deal of work has already been done toward the creation of a Maori mental health court and such momentum will be greatly beneficial in movements forward from this point.

CONCLUSION/POROPOROAKI

*Ka pu te ruha, ka hao te rangatahi,
The old worn out net is cast aside, and the new net goes fishing.*

This *whakataukī* was an important element in the formation of the Rangatahi Court and contributes to the court's namesake. It reflects a notion that both Principal Judge Andrew Becroft and the founding judge of the Rangatahi courts, Judge Heemi Taumaunu, have emphasised: that the new problem-solving courts do not abandon the law, they are merely an attempt to become more culturally appropriate by bringing together the elements of the justice process and *Te Ao Māori*. It is clear from the research that the current 'one size fits all' model of health is deficient in that it does not respect *Tikanga Māori*, which is the basis of the holistic approach to *hauora Māori*, and the vital element of *wairua* which is critical to Māori mental health. This means Māori pass through the justice system again and again, without accessing the appropriate care and treatment they so desperately need to break this cycle. Therapeutic jurisprudence is a unique innovative framework which eschews this model for a framework which seeks to obtain and promote therapeutic legal processes which maximise the law's potential to heal, rather than harm. These two strong cores of *Tikanga* and therapeutic jurisprudence could be interwoven to form a pathway forward for Māori mental health. If this is done and *waiho wa te ma*, the time and space, is given to allow this promising initiative to develop, what could be produced is something which is *tika*, right, meaningful and effective for Māori and for the future of Māori mental health.

³⁸ See generally Haimona Hone Hiki-Tia-Te-Rangi Waititi, *Toituu Te Mana Rangatahi: Marae-based Youth Courts – Negotiating Pathways for Rangatahi Offending* (MA thesis, Victoria University, 2012).

³⁸ Valentine, above n 14, 47.