

## PROCEDURAL JUSTICE IN A TRIBUNAL CONTEXT: AN EXPLORATION AND EXTENSION OF THE CONCEPT FROM A HUMAN-CENTRED DESIGN PERSPECTIVE

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*Procedural justice ('PJ') recognises that court and tribunal users' perceptions of the fairness of a legal process can impact upon their ability to accept and 'live with' a decision. This study offers a novel exploration of PJ through a human-centred design lens, using a full-journey perspective of users within a Victorian civil tribunal setting. Our study confirmed that existing PJ factors are relevant both in the case management of disputes and during hearings. Importantly though, this study identified additional factors that influence tribunal users' satisfaction with the fairness of the process. Specifically, our study found balanced empathy, balanced power distance, holistic touchpoint alignment, and enhanced readiness are additional factors which contribute to PJ. This study reinforces the relevance of PJ in the tribunal context and expands the theoretical PJ construct. The findings have significant implications for a variety of legal contexts and contribute to an emerging domain labelled 'legal design'.*

### I INTRODUCTION

Legal culture and conventional justice systems have a long-engrained history of prioritising fact-finding processes, court procedures and legal principles in disputes ahead of emotion and the wellbeing of court or tribunal users.<sup>1</sup> Traditionally, legal systems and the training of lawyers have centred around an adversarial framework, promoting practices such as aggressive argument, positional bargaining, formalistic

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1 '[C]ourt processes have focused on fact-finding, determination of the law, applying the law to the facts via rules of evidence, court procedure, statutory interpretation and case law. These are regarded as essential to a court's proper functioning, but the emotional implications are not': Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32(3) *Melbourne University Law Review* 1096, 1119 <[https://doi.org/10.3316/agis\\_archive.20092690](https://doi.org/10.3316/agis_archive.20092690)>.

procedures, and strategies ‘to win’.<sup>2</sup> The adversarial system – prevalent in common law systems – centres around an impartial decision-maker who evaluates arguments presented by two adversaries in a case, evaluates the merits of these arguments and subsequently renders a decision in favour of one party.<sup>3</sup> In contrast, the inquisitorial system – used in civil law systems – involves a decision-maker who ‘retains substantial power to elicit evidence in an inquiry aimed at discovering true facts underlying a dispute’.<sup>4</sup> Extant literature suggests that ‘the adversarial system produces greater perceptions of justice than does the inquisitorial system’.<sup>5</sup> Despite this, scholars have recognised that traditional adversarial justice processes can adversely impact upon court and tribunal users, particularly on their emotional and psychological wellbeing.<sup>6</sup> Non-adversarial perspectives acknowledge the role of emotional intelligence, feelings, empathy, communication, interpersonal skills and psychological wellbeing as integral aspects of legal dispute resolution.<sup>7</sup> Procedural justice (‘PJ’) recognises that court or tribunal users’ subjective perceptions of fairness during legal processes can ultimately impact upon their satisfaction with the process, regardless of the legal outcome.<sup>8</sup> Unlike the *objective* component of PJ, which is doctrinal and focuses on legal rules and procedures,<sup>9</sup> this article adopts the social psychology construct which focuses on *subjective* user experiences.<sup>10</sup>

PJ research argues for the critical role that users’ satisfaction with a legal process can have on their ability to accept and ‘live with’ a legal outcome. Previous studies have explored the role of PJ in a multitude of contexts, including courts, tribunals, mediation and negotiation.<sup>11</sup> The increasing recognition of human factors in legal

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- 2 Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (University of British Columbia Press, 2008) 28–9. Macfarlane’s research focuses on lawyers’ professional identity and cultural change which has occurred, shifting the traditionally litigious mindsets of lawyers to values more aligned with problem-solving, negotiation, and communication as vehicles for dispute resolution.
  - 3 Justin Sevier, ‘The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems’ (2014) 20(2) *Psychology, Public Policy, and Law* 212, 212 <<https://doi.org/10.1037/law0000009>>.
  - 4 Ibid.
  - 5 Ibid 213.
  - 6 King (n 1) 1097–8.
  - 7 Ibid. See also Warren Brookbanks, ‘Non-adversarial Justice: An Evolving Paradigm’ (2017) 26(4) *Journal of Judicial Administration* 222.
  - 8 Tom R Tyler, ‘What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures’ (1988) 22(1) *Law and Society Review* 103 <<https://doi.org/10.2307/3053563>> (‘What Is Procedural Justice?’).
  - 9 Denise Meyerson, Catriona Mackenzie and Therese MacDermott, ‘Introduction: Procedural Justice in Law, Psychology, and Philosophy’ in Catriona Mackenzie, Denise Meyerson and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2020) 2 <<https://doi.org/10.4324/9780429317248>>.
  - 10 Klaus F Röhl, ‘Procedural Justice: Introduction and Overview’ in Klaus F Röhl and Stefan Machura (eds), *Procedural Justice* (Routledge, 2018) 1, 3–4.
  - 11 See, eg, Nancy Welsh, ‘Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?’ (2001) 79(3) *Washington University Law Quarterly* 787 (‘Making Deals in Court-Connected Mediation’); Kathy Douglas and Jennifer Hurley, ‘The Potential of Procedural Justice in Mediation: A Study into Mediators Understandings’ (2017) 29(1) *Bond Law Review* 69 <<https://doi.org/10.53300/001c.5647>>; Rebecca Hollander-Blumoff and Tom R Tyler, ‘Procedural Justice in Negotiation: Procedural Fairness,

disputes (such as emotional and psychological wellbeing), combined with the emerging scholarship on ‘legal design’,<sup>12</sup> make it timely to revisit the theoretical relevance of PJ in legal disputes from a human-centred perspective. Against this background, the purpose of this research is to investigate PJ from a human-centred perspective, not confining PJ to procedural perceptions of the fairness of decision-makers in a hearing (whether court or tribunal), but extending PJ to the broader (and total) experience of the court or tribunal user in the legal environment. This also includes the need to shift focus from satisfaction as an *outcome* of the legal process, to focusing on user wellbeing as a result of their experience in the legal process.

The context of this study was a Victorian civil tribunal setting, and hence the research findings emanate from – and are substantive to – a civil context. Despite this limitation, the findings are relevant and transferrable to other civil jurisdictions (such as family law, Children’s Court matters and personal injury disputes) where the nature of the dispute is highly demanding (emotionally, psychologically or viscerally) for the users involved. Thus, in this article the term ‘tribunal user’ (or ‘user’) is adopted to refer to the individuals who were interacting with the legal system in this study context.

This research study focuses predominantly on user experiences emanating from disputes regarding the *Medical Treatment Planning and Decisions Act 2016* (Vic) (*MTPD Act*), along with guardianship and powers of attorney matters, and the plight of vulnerable people who lack decision-making capacity. Our findings demonstrate that PJ is relevant in the context of this study, but that other factors were prevalent in the qualitative data. Indeed, our findings suggest that in addition to traditional understandings of PJ relating to fairness, other considerations can better complement and advance our view of the PJ concept. Specifically, our findings expand the PJ concept and reveal that elements of: (1) balanced empathy; (2) balanced power distance; (3) holistic touchpoint alignment; and (4) enhanced readiness are supplementary criteria which contribute to tribunal user satisfaction with the legal process. *Balanced empathy* seeks to understand, anticipate, relate or respond to another’s emotions that strikes a balance between, on one hand, refraining from being overly empathetic as to appear biased, to, on the other hand, showing lack of care. *Balanced power distance* involves striving for a balance of power dynamics between users, who by nature of the legal system are in a subordinate power position, and decision-makers who seek to avoid appearing excessively dominating. *Holistic touchpoint alignment* means creating cohesive and coherent processes that are accessible by users throughout the entire legal journey. *Enhanced readiness* encompasses helping users prepare cognitively and

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Outcome Acceptance, and Integrative Potential’ (2008) 33(2) *Law and Social Inquiry* 473, 478–9 <<https://doi.org/10.1111/j.1747-4469.2008.00110.x>> (‘Procedural Justice in Negotiation’); Rebecca Hollander-Blumoff, ‘Fairness beyond the Adversary System: Procedural Justice Norms for Legal Negotiation’ (2017) 85 *Fordham Law Review* 2081; Tyler, ‘What Is Procedural Justice?’ (n 8) 103.

12 Lisa Toohey et al, ‘Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design’ (2019) 19 *Macquarie Law Journal* 133 <<https://doi.org/10.3316/informit.20200929037455>>.

emotionally, supporting them for interactions with the legal system, clarifying expectations and information needs in advance, during and after the hearing where relevant. This expanding conceptual nature propels legal systems to adopt a broader perspective not limited to a courtroom but acknowledging the impact on the wellbeing and vulnerability of users that ultimately places a demand on law administration resources, across the entire court user journey.

The remainder of the article is structured as follows. Part II of this article introduces the concept of PJ, including key dimensions and extant research to demonstrate that certain factors can influence users' procedural satisfaction in legal disputes. In Part III, the authors discuss the role of human-centred design in influencing the need to explore the full journey of users in a legal process, linked to the emerging domain of legal design.<sup>13</sup> Further, the authors discuss how human-centred design can be aptly applied in a legal tribunal context. Part IV contains the qualitative methodology used in this study. Part V presents the findings and Part VI provides an analysis *adopting* and *extending* PJ dimensions. Part VII concludes by proposing that the PJ concept be broadened to encompass these additional dimensions to prioritise the needs of tribunal users and centre their experience at the heart of legal disputes.

## II PROCEDURAL JUSTICE

### A Introduction to Procedural Justice

PJ focuses on users' perceptions of fairness and transparency of legal processes, including factors such as an opportunity for users to voice their story, being treated with courtesy and respect, and to trust in the decision-maker and their neutrality.<sup>14</sup> In this way, users' treatment and experiences during dispute resolution ultimately impacts upon their perception of the legitimacy of the decision.<sup>15</sup> Hence, being afforded PJ can influence users' experiences in three ways: (1) increase perceptions of substantive justice; (2) increase compliance with the ultimate outcome; and (3) enhance perception of the legitimacy of an institution.<sup>16</sup> Significantly, several

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13 See Margaret Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System' (2020) 36(3) *Design Issues* 3 <[https://doi.org/10.1162/desi\\_a\\_00600](https://doi.org/10.1162/desi_a_00600)> ('Legal Design').

14 For an overview of the terms see Kristina Murphy, 'Procedural Justice and Its Role in Promoting Voluntary Compliance' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 43, 46–7.

15 Tom R Tyler, 'Restorative Justice and Procedural Justice: Dealing with Rule Breaking' (2006) 62(2) *Journal of Social Issues* 307 <<https://doi.org/10.1111/j.1540-4560.2006.00452.x>>; Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* 1.

16 Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice' [2002] (1) *Journal of Dispute Resolution* 179, 184–5 ('Disputants' Decision Control'). See E Allen Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988) 101.

studies have demonstrated that consideration of users' views, allowing them to tell their story and to 'be heard' can have positive therapeutic effects.<sup>17</sup>

## B Origins, Dimensions and Forms of Justice

According to scholars Hollander-Blumoff and Tyler, '[p]rocedural justice in general legal parlance refers to the fairness of a process by which a decision is reached'.<sup>18</sup> The concept concerns 'the justice of the steps used to reach an outcome, as opposed to substantive justice, which concerns the justice of the outcome itself'.<sup>19</sup> *Procedural justice* refers to 'procedures that are just from a normative perspective', a concept which can be distinguished from *procedural fairness* which focuses on legal rules and judicial notions of fairness.<sup>20</sup> Yet scholars contend that procedural and substantive justice are interlinked concepts, facilitating the use of fair and reliable processes to enforce users' substantive legal rights.<sup>21</sup>

PJ originated in social psychology scholarship,<sup>22</sup> which posits that perceptions of PJ affect users' satisfaction with outcomes, including how they perceive outcomes or agreements.<sup>23</sup> Research shows that this *subjective* perception of justice, dependent on beliefs about the fairness of a process, is a separate construct from the ultimate fairness or justice of the outcome.<sup>24</sup> Put simply, psychosocial theorists are concerned with users' lived experiences and subjective views as to whether they have experienced a procedurally fair process, supported by qualitative methods that provide insights into the subjective realities of court users. This perspective acknowledges that court users have different frames for interpretations of objects or procedures, leading to subjective phenomenal meanings of court experiences.<sup>25</sup>

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17 Lind and Tyler (n 16) 101: 'The opportunity to express one's opinions and arguments – the chance to tell one's own side of the story – is a potent factor in the experience of procedural justice'; Nancy A Welsh, 'Stepping Back through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value' (2004) 19(2) *Ohio State Journal on Dispute Resolution* 573, 595, 619–20 ('Stepping Back through the Looking Glass').

18 Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1, 3 ('Procedural Justice and the Rule of Law').

19 Therese MacDermott and Denise Meyerson, 'Australian Tribunals and Alternative Dispute Resolution: A Procedural Justice Perspective' (2018) 37(4) *Civil Justice Quarterly* 443, 450.

20 Ibid 443.

21 Ibid 444.

22 John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates, 1975); Gerald S Leventhal, 'What Should Be Done with Equity Theory?: New Approaches to the Study of Fairness in Social Relationships' in Kenneth J Gergen, Martin S Greenberg and Richard H Willis (eds), *Social Exchange: Advances in Theory and Research* (Plenum Press, 1980) 27.

23 Lind and Tyler (n 16) 120–1.

24 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law' (n 18) 3.

25 Amedeo Giorgi, 'The Theory, Practice and Evaluation of the Phenomenological Method as a Qualitative Research Procedure' (1997) 28(2) *Journal of Phenomenological Psychology* 235 <<https://doi.org/10.1163/156916297X00103>>.

In contrast, legal theorists focus on *objectively* assessing whether a procedure conforms to normative standards of justice.<sup>26</sup>

MacDermott and Meyerson posit that '[t]he perception of just treatment sends a message of social inclusion, enhances self-respect, promotes satisfaction with and willing compliance with the outcomes that are ultimately reached, and fosters a perception that legal institutions are legitimate'.<sup>27</sup> Thus, PJ is a key feature of an individual's assessment regarding the legitimacy of authorities.<sup>28</sup> This would seem to be of critical importance in tribunals which are often seen to operate using an inquisitorial, rather than adversarial, approach.<sup>29</sup> Yet, Australian tribunals do not strictly operate using an inquisitorial approach – at least in the strict European sense – and are more adversarial in nature in relying on evidence presented by the parties.<sup>30</sup> Further, PJ may also be viewed as a mode of social regulation, as court or tribunal users who are afforded respect and dignity are more likely to obey or comply with decisions of legal authorities who they perceive as legitimate.<sup>31</sup>

Contemporary scholarship on PJ derives from the work of social psychologist John Thibaut and law professor Laurens Walker in 1975,<sup>32</sup> and subsequently the work of psychologist Gerald S Leventhal.<sup>33</sup> In more modern research on PJ, Hollander-Blumoff and Tyler have identified four factors which guide users' assessments of the fairness of a process: (1) voice or an opportunity for users to 'tell their own story'; (2) the neutrality of the decision-maker, including lack of bias, transparency and consistency in the application of rules; (3) the trustworthiness of the third-party authority; and (4) courtesy and respect.<sup>34</sup> The authors of this article adopt these four criteria as central considerations in our data analysis. This decision is intentional, based on rigorous empirical findings and in line with the dominant disciplinary understanding of the concept in legal research.<sup>35</sup> For instance, recent qualitative research studies have adopted these four factors as a framework for

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26 Howieson (n 15) [18]–[20]. This does not mean that subjective elements cannot be taken into account when deciding substantive matters (eg, when the legal test in question requires satisfaction of an objective/subjective element or in sentencing matters where a court takes into account subjective factors of an offender).

27 MacDermott and Meyerson (n 19) 445.

28 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law' (n 18) 2.

29 Therese MacDermott, 'The Framing of Tribunal Procedures: A Question of Balance or a Participation-Centred Approach?' in Catriona Mackenzie, Denise Meyerson and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2020) 252, 254–6.

30 Ibid.

31 Tom R Tyler, 'Restorative Justice and Procedural Justice: Dealing with Rule Breaking' (2006) 62(2) *Journal of Social Issues* 307, 308 <<https://doi.org/10.1111/j.1540-4560.2006.00452.x>>; Murphy (n 14).

32 Thibaut and Walker (n 22).

33 Leventhal (n 22).

34 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law' (n 18) 5–6.

35 Steven L Blader and Tom R Tyler, 'A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process' (2003) 29(6) *Personality and Social Psychology Bulletin* 747 <<https://doi.org/10.1177/0146167203029006007>>.

data analysis.<sup>36</sup> Other research studies, both Australian and internationally, have recognised these four factors as central to PJ.<sup>37</sup>

### C Different Contexts (Courts, Tribunals and Alternative Dispute Resolution)

PJ research is increasingly relevant in the legal context as it can assist legal bodies and institutions to understand court/tribunal users' satisfaction. Its relevance is evident in various contexts including courts, tribunals and alternative/appropriate dispute resolution ('ADR') mechanisms, such as mediation<sup>38</sup> and legal negotiation.<sup>39</sup>

The notion of justice can change depending on the degree of formality of the setting. For instance, in formal settings tribunal users place more emphasis on bias suppression, decision quality, consistency and representation, whereas in less formal contexts the emphasis is on consistency, decision quality and ethicality.<sup>40</sup> Despite the capacity of ADR processes to vest more control in users for decision-making than in traditional litigious forums, decision control does not in itself afford disputants a sense of PJ.<sup>41</sup> Rather, it is the presence of elements such as voice, trust, neutrality, and courtesy/respect that influence users' sense of PJ regardless of whether the decision-making process is consensual or non-consensual.<sup>42</sup>

Several studies have demonstrated that consideration of users' views, allowing them to tell their story and to 'be heard', can have positive therapeutic effects.<sup>43</sup> In the context of mediation in medical negligence, Relis' study of Canadian legal actors and disputant experiences with medical malpractice mediations found that 93% of plaintiffs and 89% of doctors discussed the importance to them of 'being heard' in mediation.<sup>44</sup> Relis acknowledged that 'the opportunity to tell one's story and express one's views is a powerful factor in people perceiving procedures as just'.<sup>45</sup> Similarly, Welsh contended that court-connected mediation processes should be constructed to give effect to PJ for disputants, allowing them an opportunity for participation, voice and validation.<sup>46</sup>

MacDermott and Meyerson have argued that PJ should inform ADR procedures in Australian tribunals. They contended that while the transfer of the legal notion of procedural fairness (as distinct from PJ) from a court to the ADR procedures of tribunals is desirable, other factors such as 'voice, neutrality, trustworthiness and dignified treatment' are of greater significance to users.<sup>47</sup> Previous research

36 Douglas and Hurley (n 11).

37 Howieson (n 15) 13; Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009) <<https://doi.org/10.1017/CBO9780511575280>>.

38 Tom Tyler, 'The Psychology of Disputant Concerns in Mediation' (1987) 3(4) *Negotiation Journal* 367 <<https://doi.org/10.1111/j.1571-9979.1987.tb00432.x>>.

39 Hollander-Blumoff and Tyler, 'Procedural Justice in Negotiation' (n 11) 478–9; Hollander-Blumoff (n 11).

40 Tyler, 'What Is Procedural Justice?' (n 8) 103, 107.

41 Welsh, 'Disputants' Decision Control' (n 16) 179, 191.

42 Ibid.

43 Lind and Tyler (n 16) 101; Welsh, 'Stepping Back through the Looking Glass' (n 17).

44 Relis (n 37) 174.

45 Ibid.

46 Welsh, 'Making Deals in Court-Connected Mediations' (n 11) 791–2.

47 MacDermott and Meyerson (n 19) 461.

involving Australian tribunals has demonstrated that subjective perceptions of PJ are integral aspects of tribunal legal processes. For instance, Douglas and Hurley's study gathered reflections on PJ constructs through interviews with 16 mediators working at a Victorian tribunal.<sup>48</sup> The findings showed that 14 out of 16 participants perceived PJ as an integral aspect of mediation, particularly evident in factors such as voice, neutrality of mediators, building of trust, and showing courtesy and respect.<sup>49</sup>

In a criminal context, a United States ('US') comparison study of defendants in drug courts (as opposed to traditional courts) found support for PJ.<sup>50</sup> Defendants who received unfavourable sentences were more likely to have positive perceptions of the judge when they underwent a process in which they were treated fairly and respectfully. In developing recommendations to improve the criminal court experience, emphasis was placed on the need to 'humanize the experience' by ensuring judges appear approachable and accessible, use plain English language and engage defendants in dialogue.<sup>51</sup> Additionally, it was suggested that judges ought to appear alert, present and focused on the case at hand.<sup>52</sup>

Research shows that users of legal systems are more likely to comply with legal decisions if such decisions are made through a fair process.<sup>53</sup> Tyler's empirical study demonstrates that fear of punishment does not coerce users to obey the law, but rather, users' perception that compliance is 'the proper thing to do' promotes such compliance. Additionally, users' assessment of the fairness of an outcome was not linked to a 'win or loss', but to whether the process lent itself to meeting voice, trust, courtesy/respect and neutrality dimensions.

Tyler's subsequent research explored whether the perceived justice of a legal process influenced an individual's satisfaction with a legal outcome and how users defined 'fair process' in legal settings.<sup>54</sup> The findings support the notion that a key determinant of an individual's dealings with legal authorities is their assessment of the fairness of the process.<sup>55</sup> The results support the proposition that the manner in which legal decisions are made affects users' reactions to these decisions.<sup>56</sup> The key criteria used to assess fairness in the context of Tyler's study included ethicality, honesty and the effort to be fair.

While substantive justice and procedural fairness are important considerations in a judge or member's mind, social psychology literature emphasises users' subjective perceptions of justice over *objective* measures. PJ recognises that a user is more likely to perceive procedural justice has been attained if their subjective perceptions have been satisfied through impressions, perceptions, and appearances of legal actors. In summary, PJ is about the *subjective* experiences and impressions

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48 Douglas and Hurley (n 11) 82.

49 Ibid 82–5.

50 Shelli B Rossman et al, *The Multi-site Drug Court Evaluation* (Report No 237111, December 2011).

51 Greg Berman and Emily Gold, 'Procedural Justice from the Bench: How Judges Can Improve the Effectiveness of Criminal Courts' (2012) 51(2) *Judge's Journal* 20, 21.

52 Ibid.

53 Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990).

54 Tyler, 'What Is Procedural Justice?' (n 8) 110.

55 Ibid 128.

56 Ibid.

of users; therefore, it is crucial that court and/or tribunal employees are cognisant of impression management.

## D Building on Existing Criteria

There is conjecture about whether current conceptualisations of, and approaches to, PJ capture a user's full-journey view in dealing with the legal system. Traditionally, PJ has focused on users' experiences in both formal situations affiliated with decision-making (such as hearings) and less formal processes such as mediation,<sup>57</sup> yet contemporary views of scholars show that '[t]he court must consider the experience of the litigants and their co-users from their first contact with the legal system'.<sup>58</sup> This includes all touchpoints, including information available online, service interactions at the court/tribunal and via phone, and case management leading up to the hearing.<sup>59</sup> For instance, Hagan reported that features such as top-down design and intimidating language and interfaces are factors that can contribute to poor user experiences in civil courts.<sup>60</sup>

Emerging approaches rebalance the traditional focus on the hearing towards a *broader journey of legal experiences* with relevant touchpoints. Human-centred design inquiry engages deeply with the context of the user across their entire journey, including taking account of visible and non-visible elements, subjective elements and uncovering motivations, beliefs, behaviours, values, and efforts required by the court/tribunal user. The phrase 'across the entire journey' necessitates looking beyond the typical realm of PJ, which entails traditionally key interaction points on the day of the hearing. Contemporary scholarship on legal design, and empirical data in this study, suggests that users' construction of PJ begins when their legal need arises, and takes shape as their expectations mould through their early experiences in the legal system. Put simply, PJ is not only relevant in the central hearing of a legal dispute, but in early interactions with the legal system (such as case management procedures).

### 1 User Experience and Wellbeing

Increasingly, researchers and practitioners across disciplines recognise that satisfaction with an outcome is insufficient as a sole criterion, with a shift emerging towards *user wellbeing*. User wellbeing is a multidimensional phenomenon with a common focus on an individual's psychological or mental health.<sup>61</sup> In recent years, this perspective has been broadened by extending the wellbeing concept to include

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57 Douglas and Hurley (n 11) 74–9.

58 Margaret Hagan, 'A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly' (2018) 6(2) *Indiana Journal of Law and Social Equality* 199, 200 ('Human-Centered Design'); Hagan, 'Legal Design' (n 13).

59 Hagan, 'Human-Centered Design' (n 58) 201.

60 Ibid 209.

61 Karen Danna and Ricky W Griffin, 'Health and Well-Being in the Workplace: A Review and Synthesis of the Literature' (1999) 25(3) *Journal of Management* 357 <<https://doi.org/10.1177/014920639902500305>>; Jeremy Hayman, 'Flexible Work Schedules and Employee Well-Being' (2010) 35(2) *New Zealand Journal of Employment Relations* 76 <<https://doi.org/10.3316/informat.824547225266226>>.

emotional, physiological, social (positive relationships with others), financial or even spiritual health considerations.<sup>62</sup> Additionally, a separate stream of research connects notions of wellbeing with life happiness and an individual's ability to find balance between their available resource pool and challenges faced or goals desired.<sup>63</sup> While wellbeing emerges in different forms, for the purpose of this article and in line with emerging research, we consider wellbeing an aggregated reflection of court/tribunal users' mental, emotional, physiological, social and spiritual health.

The importance of wellbeing increases in court contexts, particularly for vulnerable and trauma-exposed court users.<sup>64</sup> For example, in cases involving family violence, juvenile crime, mental illness or medical treatment contexts, court and tribunal users are particularly at risk of compromised wellbeing.<sup>65</sup> This can be due to the adversarial nature of the legal process, the promotion of aggressive arguments between court users, formalistic rituals and language independent of user needs, re-exposure to painful memories or the need to confront potential perpetrators in the waiting area of the courthouse.<sup>66</sup> Each of these aspects can negatively influence physical, emotional, social, or spiritual wellbeing that users experience when dealing with the legal system. At the same time, the Magistrates' Court acknowledges that, '[m]any of those who come before the court are assessed to have underlying mental health or substance abuse issues, social or cultural disadvantage, or a disability', suggesting the need for psychological and spiritual attention.<sup>67</sup> Indeed, the role of mental, spiritual and emotional wellbeing becomes readily apparent to the conduct of hearings in contexts that are culturally and psychosocially sensitive. Otherwise, court and tribunal experiences can be stressful and confusing – even ineffective – and adversely impact users' wellbeing.

Scholars have suggested courts/tribunals ought to increase their focus on user wellbeing, not just satisfaction with the legal outcome or process.<sup>68</sup> This focus on wellbeing in the legal context is not foreign territory, having already been canvassed in extant literature on therapeutic jurisprudence.<sup>69</sup> Yet, the shift to wellbeing requires a broader perspective on the user experience, not limited to the court room but encompassing the courthouse/tribunal setting and any point of court contact before and after a hearing. PJ plays an important role in this context given its focus on user perceptions relating to the legal process, going beyond legal matters. Wellbeing as a concept is relevant to all parties involved in the legal

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62 Sven Tuzovic, Sertan Kabadayi and Stefanie Paluch, 'To Dine or Not to Dine? Collective Wellbeing in Hospitality in the COVID-19 Era' (2021) 95 *International Journal of Hospitality Management* 1 <<https://doi.org/10.1016/j.ijhm.2021.102892>>.

63 Elizabeth L Pollard and Patrice D Lee, 'Child Well-Being: A Systematic Review of the Literature' (2003) 61 *Social Indicators Research* 59; Ed Diener and Eunkook Suh, 'Measuring Quality of Life: Economic, Social and Subjective Indicators' (1997) 40(1–2) *Social Indicators Research* 189.

64 Magistrates' Court of Victoria, *Annual Report 2019–2020* (Report, 2020) 17.

65 Monica K Miller and Brian H Bornstein, *Stress, Trauma, and Wellbeing in the Legal System* (Oxford University Press, 2012) chs 3, 6, 7 <<https://doi.org/10.1093/acprof:oso/9780199829996.001.0001>>.

66 *Ibid.*

67 Magistrates' Court of Victoria (n 64) 6.

68 This assertion is mainly found in literature on therapeutic jurisprudence which recognises the role of emotion and wellbeing in legal disputes: see King (n 1).

69 King et al, *Non-Adversarial Justice* (Federation Press, 2<sup>nd</sup> ed, 2014) ch 2.

system.<sup>70</sup> In this study, the focus is on the wellbeing of the implicated decision-maker and family members participating in the legal process (or other proxies for the person lacking capacity).

In this article the authors argue that PJ represents a central mechanism to positively influence court user wellbeing. Aiming for wellbeing, the human experience becomes a central consideration, which is a natural ally to the philosophy that characterises PJ. Yet the question remains: what are the implications for PJ when taking a user experience and wellbeing perspective that considers the full user journey? For instance, are the common dimensions of PJ sufficient when considering wellbeing as a desired outcome? Are there other aspects that might inform PJ in view of user wellbeing? To address such questions, we propose considering a human-centred design lens, which we will outline in the following Part.

### III THE ROLE OF HUMAN-CENTRED DESIGN IN A LEGAL SETTING

The purpose of human-centred design is to promote the wellbeing of people and the systems in which they interact,<sup>71</sup> changing existing conditions into preferred ones.<sup>72</sup> Human-centred design thus represents an approach that focuses on the experiences and wellbeing of users, stimulating innovation to this effect.<sup>73</sup> In so doing, human-centred design emphasises the need to study and involve the various implicated stakeholders, so that solutions are more meaningful in context.<sup>74</sup> The human experience represents the focal phenomenon of interest for both understanding current challenges that might cause users stress, confusion, anxiety or frustration, as well as for uncovering solutions that help overcome such negative experiences and promote wellbeing across interaction points. Research suggests that human-centred design can have a positive impact on an organisation's innovation capability and organisational performance, but most importantly on individual and system wellbeing.<sup>75</sup>

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70 Miller and Bornstein (n 65).

71 Cf Charlotta Windahl, Ingo O Karpen and Mark R Wright, 'Strategic Design: Orchestrating and Leveraging Market-Shaping Capabilities' (2020) 35(9) *Journal of Business and Industrial Marketing* 1413 <<https://doi.org/10.1108/JBIM-03-2019-0133>>.

72 Herbert A Simon, *The Sciences of the Artificial* (MIT Press, 1969).

73 Maira Prestes Joly et al, 'Leveraging Service Design as a Multidisciplinary Approach to Service Innovation' (2019) 30(6) *Journal of Service Management* 681 <<https://doi.org/10.1108/JOSM-07-2017-0178>>.

74 Ingo O Karpen, Gerda Gemser and Giulia Calabretta, 'A Multilevel Consideration of Service Design Conditions: Towards a Portfolio of Organisational Capabilities, Interactive Practices and Individual Abilities' (2017) 27(2) *Journal of Service Theory and Practice* 384 <<https://doi.org/10.1108/JSTP-05-2015-0121>>.

75 Jeanne Liedtka, 'Perspective: Linking Design Thinking with Innovation Outcomes through Cognitive Bias Reduction' (2015) 32(6) *Journal of Product Innovation Management* 925 <<https://doi.org/10.1111/jpim.12163>>; Christian Homburg, Martin Schwemmler and Christina Kuehnl, 'New Product Design: Concept, Measurement, and Consequences' (2015) 79(3) *Journal of Marketing* 41 <<https://doi.org/10.1509/jm.14.0199>>; Windahl, Karpen and Wright (n 71).

Human-centred design concerns itself primarily with human experiences and the ecosystems in which those experiences unfold. Design in this sense espouses a human, and specifically a user-centred perspective. It is oriented around first-hand engagement with users and collecting rich bases of qualitative data to understand them, their experiences and their frames of reference.<sup>76</sup> However, such qualitative data is not limited to conversations. Rather, as human beings are not necessarily aware of and/or able to voice their deepest thoughts and psychosocial reactions, human-centred design often complements interviews with other ethnographic approaches. Examples include user observation and immersion in context, as well as experimentation to inch closer to innate user responses to both problems and potential solutions. Through their empathetic stance, designers search for clues to understand what makes solutions useful and meaningful in the eyes of the beholder, whether the solutions involve objects, service environments or ecosystems.

Human-centred design thus takes a rather phenomenological approach to understanding human experiences, whereby the subjective reality foregrounds and informs objective sense-making. This phenomenological orientation underpins the methodology and qualitative data collection adopted in this study, to gather the rich insights of users and tribunal staff on their experiences in medical treatment and guardianship disputes.

### A The Value of Design in the Legal Sector

The legal system is often viewed as a bureaucratic, complex and foreign entity to most laypeople, and the fundamental premises on which legal systems are built often seem to contradict the ways in which the rest of society functions. While businesses and organisations (such as social services and health sectors) have long seen the need for (and the reward in) taking a more human experience perspective through this approach,<sup>77</sup> the legal sector is starting to embrace this paradigm shift as well. For example, there is ‘a growing emphasis on the role of justice systems to improve the wellbeing of individuals and the communities that justice systems serve’.<sup>78</sup> This is evident in the *Framework for Court Excellence* which actively advocates for a user-centred perspective in the pursuit of judicial excellence, with dedicated sections for client needs and satisfaction looking to measure and improve client wellbeing.<sup>79</sup> In contemporary legal practice, leading legal institutions are going beyond operational metrics in the measurement of their success and contribution, focusing on their critical role in community healing and

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76 Kees Dorst, ‘The Core of “Design Thinking” and Its Application’ (2011) 32(6) *Design Studies* 521 <<https://doi.org/10.1016/j.destud.2011.07.006>>.

77 Marc Gruber et al, ‘From the Editors: Managing by Design’ (2015) 58(1) *Academy of Management Journal* 1.

78 Elizabeth Richardson, Pauline Spencer and David Wexler, ‘The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing’ (2016) 25 *Journal of Judicial Administration* 148.

79 *Ibid.*

wellbeing.<sup>80</sup> For example, Halsey and de Vel-Palumbo argue that ‘[c]ourts – in some fundamental way – seek to hear, resolve and/or marginally alleviate the distress in people’s lives (whether in civil or criminal jurisdictions). This is important because there is an indelible relationship between distress (as the problem) and empathy (as the solution)’.<sup>81</sup> The authors proceed to assert that ‘[g]enuine judicial empathy is an essential tool for courts in being able to address such distress and to aid in the *meaningful* rehabilitation of court participants’.<sup>82</sup> Further, while

the [Neighbourhood Justice Centre] sought consistently in its early years (and in time since) to genuinely improve the life condition of those who presented to the court ... Helping individuals access support services and integrate into their communities was viewed as just as important, if not more important, than some kind of stand-alone punishment or penalty.<sup>83</sup>

Hence, there is an emerging perspective that courts go beyond purely dispensing the law but have a critical role to play in community healing and well-being.

In an attempt to further advance the human experience and wellbeing in legal systems, in recent years the notion of *legal design* has been emerging. This domain or subdiscipline focuses on users, creativity and visualisation in legal contexts, thereby marrying ‘a human-centred design approach to the challenges and structures of the legal system’.<sup>84</sup> While early legal design focused more on improving communication from a common textual style to a more visual one so that users could better understand the legal context,<sup>85</sup> current legal design is much broader in its conception and also includes a systemic view of the legal context. Ultimately, legal design seeks to leverage human-centred design principles, processes and practices to improve individual human experiences, their wellbeing and that of the legal system overall through better legal services. For instance, human-centred design approaches have been pursued to improve access to justice as well as the procedural and architectural design of court contexts.<sup>86</sup> Furthermore, recent conceptual research highlights possible levers and benefits of human-centred design to understand and improve people’s experiences in a legal context.<sup>87</sup> However, human-centred design in a legal context not only focuses on

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80 Mark Halsey and Melissa de Vel-Palumbo, ‘Courts as Empathic Spaces: Reflections on the Melbourne Neighbourhood Justice Centre’ (2018) 27(2) *Griffith Law Review* 182, 190 <<https://doi.org/10.1080/10383441.2018.1500081>> (emphasis omitted).

81 Ibid.

82 Ibid, citing James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two Is Company, Is Three a Crowd?’ (2011) 35(2) *Melbourne University Law Review* 394 (emphasis omitted).

83 Halsey and de Vel-Palumbo (n 80) 190 (emphasis omitted).

84 Hagan, ‘Legal Design’ (n 13) 3.

85 Cf Arianna Rossi and Monica Palmirani, ‘Can Visual Design Provide Legal Transparency? The Challenges for Successful Implementation of Icons for Data Protection’ (2020) 36(3) *Design Issues* 82 <[https://doi.org/10.1162/desi\\_a\\_00605](https://doi.org/10.1162/desi_a_00605)>.

86 See, eg, Melissa A Moss, ‘The Escambia Project: An Experiment in Community-Led Legal Design’ (2020) 36(3) *Design Issues* 45 <[https://doi.org/10.1162/desi\\_a\\_00603](https://doi.org/10.1162/desi_a_00603)>.

87 Ingo O Karpen and Melis Senova, ‘Designing for Trust: Role and Benefits of Human-Centered Design in the Legal System’ (2021) 12(3) *International Journal for Court Administration* 1 <<https://doi.org/10.36745/ijca.422>>.

external court users (eg, applicants) but also seeks to improve the conditions for those working in the legal system. There are now a number of legal design labs at major universities across the world, including Stanford, Harvard, Chicago-Kent, Northeastern, and the University of Denver.<sup>88</sup> As Director of the Legal Design Lab at Stanford Law School Margaret Hagan wrote, ‘Legal design is a way of assessing and creating legal services, with a focus on how usable, useful, and engaging these services are.’<sup>89</sup>

The reasons for the clear value of human-centred design in the legal sector are manifold. First, given the complexity and overwhelming nature of the legal system to many users, human-centred design represents ‘an essential tool for simplifying and humanising’.<sup>90</sup> For example, many users – often legal laypeople, especially with regard to self-represented users – find legal text/jargon difficult to comprehend and lack appreciation for its legal consequences.<sup>91</sup> The scale of this issue has led many early design initiatives in the legal system to focus on making the system easier to use and navigate. One such way is simplifying legal communication. For instance, this includes exploring how to increase the user-friendliness of service, and how to make contracts more visually expressive and understandable.<sup>92</sup> Second, it has long been recognised that each user approaches and experiences court and tribunal services differently<sup>93</sup> – a factor which, especially for self-represented users, is centrally relevant.<sup>94</sup> This presents both challenges and opportunities for the design of legal services, which focuses on understanding and responding to individual user needs.<sup>95</sup> Importantly, this considers the entire user journey including all touchpoints that users encounter as part of the legal system experience. Third, human-centred design typically works in a participatory way,<sup>96</sup> which is particularly relevant in the hierarchical legal sector to support continuous change through its ‘grassroots approach of listening to ... people who use the system and then creating or recreating

88 ‘The Legal Design Lab’, *Stanford Law School* (Web Page) <<https://law.stanford.edu/organizations/pages/legal-design-lab/>>; ‘Access to Justice Lab at Harvard Law School’, *A2J Lab* (Web Page) <<https://a2jlab.org/>>; Chicago-Kent College of Law, ‘Center for Access to Justice and Technology’, *Illinois Tech* (Web Page) <<https://kentlaw.iit.edu/law/faculty-scholarship/centers-institutes/center-access-justice-and-technology/>>; ‘We Envision a World Where Everyone Is Empowered to Use the Law’, *NuLawLab* (Web Page) <<https://www.nulawlab.org/mission-history/>>; ‘Law & Innovation Lab’, *Strurm College of Law* (Web Page) <<https://www.law.du.edu/academics/practical-experience/law-innovation-lab>>.

89 Margaret Hagan, ‘1. Legal Design’, *Law by Design* (Web Page) <<https://www.lawbydesign.co/legal-design/>>.

90 Jon Kolko, ‘Design Thinking Comes of Age’ (2015) 93(9) *Harvard Business Review* 66, 70.

91 Catrina Denvir, Nigel J Balmer and Pascoe Pleasence, ‘When Legal Rights Are Not a Reality: Do Individuals Know Their Rights and How Can We Tell?’ (2013) 35(1) *Journal of Social Welfare and Family Law* 139 <<https://doi.org/10.1080/09649069.2013.774764>>.

92 Rossi and Palmirani (n 85); Dan Jackson, Miso Kim and Jules R Sievert, ‘The Rapid Embrace of Legal Design and the Use of Co-design to Avoid Enshrining Systemic Bias’ (2020) 36(3) *Design Issues* 16 <[https://doi.org/10.1162/desi\\_a\\_00601](https://doi.org/10.1162/desi_a_00601)>.

93 Jona Goldschmidt and Ira Pilchen, *User-Friendly Justice: Making Courts More Accessible, Easier to Understand, and Simpler* (American Judicature Society, 1996).

94 Denvir, Balmer and Pleasence (n 91).

95 Karpen, Gemser and Calabretta (n 74) 384–407.

96 *Ibid.*

the system' through collaboration and involvement of various stakeholders.<sup>97</sup> Indeed, when innovating or reforming the legal system, the goal is to integrate the perspective and contributions of various system users impacted by its setup, enabling change to develop from within the system rather than imposing change or external solutions onto the system and its users.<sup>98</sup>

Human-centred design can also be an effective way to challenge long-held, deeply embedded assumptions that undergird aspects of the legal system.<sup>99</sup> The legal system is fundamentally – and some might argue (in some ways) necessarily so – a *legacy-based* system, built on precedent, history and tradition. Judgments, interpretations and ways of working have been inherited from decades and even centuries. Hagan contends that '[t]raditionally, the rules, spaces, forms and other materials of the court have not been made based on the litigants' needs'.<sup>100</sup> In many ways – some necessary, others less so – this has led to a disconnect between the legal system and its community of (lay) users, with lawyers as 'interpreter[s] between the interests of the client and the power of the court'.<sup>101</sup>

Overall, human-centred design seeks to support legal institutions in their efforts to make legal systems better for users, including access to justice, fairness of process, solving situated problems in that the system be usable by the communities it exists to serve. Design can assist in focusing on users' needs, with legal designers contending '[t]his approach will guide us to spend limited public funds in more strategic and successful ways, with better procedural justice for litigants and efficiency for the court'.<sup>102</sup>

Legal designers have suggested that a design approach aids the legal system at large, given that focusing on better user experience across their entire legal journey and in courts can lead to users experiencing greater PJ<sup>103</sup> and greater satisfaction with – and adherence to – court and tribunal decisions. This reflects approaches adopted in psychology and behavioural science which assert that the manner in which processes are conducted drive satisfaction, foster trust and ultimately result in compliance with the law.<sup>104</sup> To elucidate how this may work in practice, the following section explores PJ in a Victorian civil tribunal context, setting the scene for a study that combined design and law to explore how PJ is relevant in a tribunal user's entire journey.

## B Procedural Justice and Legal Design in a Supported Decision-Making Context

Disputes concerning guardianship, powers of attorney and medical treatment frequently involve family conflict and are fraught with emotion due

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97 Jackson, Kim and Sievert (n 92) 19.

98 See also Moss (n 86) 45–60.

99 Josina Vink et al, 'Reshaping Mental Models: Enabling Innovation through Service Design' (2019) 30(1) *Journal of Service Management* 75 <<https://doi.org/10.1108/JOSM-08-2017-0186>>.

100 Hagan, 'Human-Centered Design' (n 58) 208.

101 Jackson, Kim and Sievert (n 92) 18.

102 Hagan, 'Human-Centered Design' (n 58) 210.

103 Ibid.

104 Tyler, *Why People Obey the Law* (n 53) (emphasis added).

to the deteriorating health of a loved one. Hence, medical decision-making and guardianship disputes provided a fruitful site to gather data regarding the role of PJ in enhancing the experience of tribunal users in this emotive context. This also aligns with human-centred design which has been a guiding framework for the context of this study. This section will concisely provide an overview and background to the legislation which acts as the backdrop to the disputes which are the focus of this article and will outline the role of the focal tribunal in hearing these disputes.

The freedom to make decisions is central to an individual's autonomy, their identity and personhood. Despite recognition of patient autonomy and the right to self-determination, laws within society sometimes grapple with circumstances where decision-making capacity is not clear.<sup>105</sup> Where an individual's capacity for decision-making has deteriorated, the law has traditionally responded by allowing appointment of a substituted decision-maker or guardian to make decisions on behalf of the individual who lacks capacity.<sup>106</sup> However, the appointment of a substitute decision-maker (or guardian) displaces that individual's autonomy and right to make their own decisions regarding medical treatment.

Substitute decision-makers are legally authorised to make decisions on behalf of people who lack capacity ('affected persons'). These decisions may be about financial, lifestyle or medical issues.<sup>107</sup> In Victoria, substitute decision-making in relation to medical treatment is governed by the *MTPD Act* which commenced operation in 2018.<sup>108</sup> The legislation represents a paradigm shift in the emphasis of decision-making for affected persons from making decisions that are considered to be in their 'best interests' to prioritising their own 'preferences and values', including a shift in terminology from 'substituted' to 'supported' decision-making.<sup>109</sup>

Under the *MTPD Act* a person with decision-making capacity no longer appoints an attorney; instead, they appoint a 'medical treatment decision-maker'

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105 Soumitra Pathare and Laura S Shields, 'Supported Decision-Making for Persons with Mental Illness: A Review' (2012) 34(2) *Public Health Reviews* 1, 2 <<https://doi.org/10.1007/BF03391683>>.

106 See Nick O'Neill and Carmelle Peisah, 'Preface' in Nick O'Neill and Carmelle Peisah (eds), *Capacity and the Law* (Sydney University Press, 2011).

107 *Medical Treatment Planning and Decisions Act 2016* (Vic) s 26 (appointment of medical treatment decision maker), pt 4 (medical treatment decisions) ('*MTPD Act*'). See also *Guardianship and Administration Act 2019* (Vic) pt 3 (guardianship orders and administration orders), s 38 (powers of guardians) ('*GA Act*'); *Powers of Attorney Act 2014* (Vic) pt 3 (enduring powers of attorney) ('*POA Act*').

108 The *MTPD Act* (n 107) came into effect on 12 March 2018. The purpose of this legislation was to repeal the *Medical Treatment Act 1988* (Vic) and replace the previous ability to appoint medical agents under powers of attorney with medical treatment decision-makers. Since the commencement of the *MTPD Act*, medical enduring powers of attorney are no longer used, though ones created prior to 12 March 2018 continue to be valid.

109 The *MTPD Act* (n 107) altered the terminology used in substituted decision-making. The previous 'best interests' test in the *Medical Treatment Act 1988* (Vic) required that decisions be made on behalf of an individual with deteriorated capacity, according to their best interests. The current approach prioritises patient autonomy and requires that every effort be made to ascertain an individual's values and preferences in relation to medical treatment. Thus, the current approach adopts a supported, rather than substituted, basis for decision-making. See *MTPD Act* (n 107) sections 1 (purpose), 7 (principles) which outline the focus on supported decision-making and individual autonomy.

(‘MTDM’).<sup>110</sup> The person must have decision-making capacity at the time of appointment. More than one MTDM can be appointed, though only one decision-maker can act at any given time.<sup>111</sup>

Further, Victoria’s new *Guardianship and Administration Act 2019* (Vic) (‘*GA Act*’) came into effect on 1 March 2020.<sup>112</sup> The *GA Act* presumes that a person has decision-making capacity unless there is contrary evidence.<sup>113</sup> The legislation emphasises supported decision-making to prioritise autonomy and rights to self-determination. A primary object of the statute is to protect and promote the human rights and dignity of a person with a disability, giving greater effect to the *Convention on the Rights of Persons with Disabilities*.<sup>114</sup> The *GA Act* places the ‘will and preferences’ of the person whose decision-making capacity is impaired at the forefront of decision-making.<sup>115</sup> Laws governing powers of attorney also focus on supported decision-making per the *Powers of Attorney Act 2014* (Vic). This legislation created the category of ‘supportive attorney’ to empower attorneys to support a principal to make and implement decisions. This approach prioritises the autonomy of the principal and places them at the forefront of decision-making.<sup>116</sup>

Applications concerning medical treatment, guardianship and administration, and powers of attorney are heard in the Human Rights Division of the focal tribunal. The Human Rights Division manages two lists: (1) the Guardianship (including Powers of Attorney) List; and (2) the Human Rights List. In the Guardianship List, the focal tribunal has jurisdiction to hear applications for guardianship and administration and to hear applications and determine disputes relating to powers of attorney and medical treatment decision-making for individuals who lack decision-making capacity due to a disability.<sup>117</sup> The Human Rights List manages disputes including equal opportunity, racial and religious vilification, health and privacy, disability and reviews decisions made by the Mental Health Tribunal.

Pursuant to the *MTPD Act*, eligible applicants may apply to the focal tribunal for orders that a person does or does not have decision-making capacity. An ‘eligible applicant’ means the treating health practitioner of a person, the person’s MTDM, the person’s support person, the Victorian Public Advocate or any other person whom the focal tribunal is satisfied has a special interest in the affairs of

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110 The *MTPD Act* (n 107) provides that an adult is presumed to have decision-making capacity unless there is evidence to the contrary: at s 4.

111 The form for appointment must be signed by two witnesses, including a medical practitioner and a person authorised to witness affidavits (for example, a lawyer). The legislation also allows for the appointment of a support person. The support person can also represent interests in relation to medical treatment (eg, talking to doctors and nurses on behalf of the person requiring medical treatment). The support person does not have power to make medical treatment decisions unless they are also appointed as the medical treatment decision-maker.

112 *GA Act* (n 107) s 2.

113 *Ibid* s 5.

114 *Ibid* s 7.

115 *Ibid* s 8.

116 *POA Act* (n 107) s 1.

117 Pursuant to the *MTPD Act* (n 107), the *GA Act* (n 107) which came into effect 1 March 2020 and the *POA Act* (n 107).

the person concerned.<sup>118</sup> For example, an order may be sought to challenge a health practitioner's determination that a person does not have decision-making capacity.

Thus, disputes concerning guardianship and medical treatment involve vulnerable individuals and challenging circumstances that have significant potential to impact upon the wellbeing of users. The focal tribunal was an appropriate site for exploration of the needs of users and their perceptions to the processes. The research team was able to gather data which supported the integration of procedural justice and human-centred in the design and implementation of legal processes. The subsequent Part outlines the study and findings.

#### **IV PROCEDURAL JUSTICE AND SUPPORTED DECISION-MAKING IN VICTORIA: A PRIMARY RESEARCH STUDY**

This article reports on the results of a qualitative study involving interviews with 29 stakeholders involved in the guardianship and administration process. The broader aim of this study was to explore and gather insights into the user experience in the resolution of applications regarding guardianship/medical treatment at the focal tribunal. Specifically, the research outcomes focused on the central role of human users of tribunal processes to design more effective experiences in tribunal contexts.

##### **A Methodology**

The research data that informed this project is rooted in interpretivist epistemology and used a qualitative methodological design.<sup>119</sup> The data was gathered through semi-structured, in-depth interviews with 29 participants (consisting of 16 external users and 13 internal employees of the focal tribunal). The research team intended to gather rich insights of the participants' experiences, rather than to attain a representative sample.<sup>120</sup>

Interviews were selected as the most appropriate data collection method, as they provide deep qualitative insights with the benefit of full participant attention, probing and the ability to understand context and human experiences more fully. Semi-structured interviews were based on an interview guide containing prompt questions. The interview guide was designed to allow the question order to change, depending on the flow of the conversation,<sup>121</sup> allowing users to play a leading role

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118 *MPTD Act* (n 107) s 3 (definition of 'eligible applicant').

119 Christina Quinlan et al, *Business Research Methods* (Cengage Learning, 1<sup>st</sup> ed, 2015); Alan Bryman, *Social Research Methods* (Oxford University Press, 4<sup>th</sup> ed, 2012); Jill Collis and Roger Hussey, *Business Research: A Practical Guide for Students* (Palgrave Macmillan, 4<sup>th</sup> ed, 2014) <<https://doi.org/10.1007/978-1-137-03748-0>>.

120 This is evident in contemporary qualitative research undertaken in legal contexts such as: Relis (n 37); Douglas and Hurley (n 11); Tina Popa and Kathy Douglas, "'Best for the Protagonists Involved": Views from Senior Tort Lawyers on the Value of Mediation in Victorian Medical Negligence Disputes' (2019) 45(2) *Monash University Law Review* 333 <<https://doi.org/10.3316/informit.198441162526282>>.

121 David K Saunders et al, 'Redesigning Research' (2003) 32(6) *Journal of College Science Teaching* 377.

in the discussion.<sup>122</sup> To supplement the interview guides, researchers also asked follow up questions such as: ‘Can you tell me more about that?’<sup>123</sup> Semi-structured interviews allow the researcher to reach areas of the reality of the participants that would otherwise remain inaccessible, such as people’s subjective experiences and attitudes.<sup>124</sup> This was particularly important in this project as gathering the subjective thoughts and experiences of the focal tribunal users to collate their perceptions on the effectiveness of the process was integral. Semi-structured interviews offer the possibility to remain flexible, as questions are adjustable when important new avenues present themselves.<sup>125</sup>

In this study, a sample of key stakeholders at the focal tribunal were purposively selected and invited by email to participate. Purposive sampling involves selecting participants based on certain characteristics,<sup>126</sup> the sole criteria of this project was to examine people’s first-hand experience with the Guardianship List at the focal tribunal, in order to be able to shed light on the user journey within this legal context and corroborate findings across informants. The participants have been categorised into two subgroups:

1. *External users* (16): Comprising applicants at the focal tribunal (but not the affected/represented person), interested persons, support persons, health and medical practitioners, social workers, nurses, legal practitioners and representatives from the Office of the Public Advocate.
2. *Internal users* (13): employees of the focal tribunal with experience in the Guardianship List, including case managers, operational managers and members.

Ethics approval for this project was granted by the RMIT University Ethics Committee on 6 March 2019.<sup>127</sup>

The identity of participants was protected through the use of codes such as ‘External, Professional 3’ which meant the participant was an *external* user (rather than an internal employee) and the term *professional* signals they affiliated with the focal tribunal in a professional capacity such as a healthcare worker.

The interviews consisted of open-ended discussions based on a set of interview prompts. Examples of interview questions include: ‘Can you tell me about the circumstances that have led to you being involved in medical treatment decision-making proceedings with [institution]?’ and ‘What type of challenges or complexities have you experienced in the process, if any?’ Interviews ranged from

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122 John W Creswell et al, ‘Advanced Mixed Methods Research Designs’ in Abbas Tashakkori and Charles Teddlie (eds) *Handbook of Mixed Methods in Social and Behavioral Research* (Sage Publications, 2003) 209; Nigel King, ‘Using Templates in the Thematic Analysis of Text’ in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage Publications, 2004) 256 <<https://dx.doi.org/10.4135/9781446280119.21>>.

123 Creswell et al (n 122) 240.

124 Anssi Peräkylä, Johanna Ruusuvoori and Sanna Vehviläinen, ‘Introduction: Professional Theories and Institutional Interaction’ (2005) 2(2) *Communication and Medicine* 105 <<https://doi.org/10.1515/come.2005.2.2.105>>.

125 Bryman (n 119).

126 Quinlan (n 119) 213.

127 Project number 21927.

60 to 140 minutes in duration. Interviews were audio recorded with the consent of the participants. The audio was subsequently transcribed, and participants were given an opportunity to review and amend the transcript.

Data analysis followed a qualitative, iterative and inductive content analysis approach.<sup>128</sup> Audio recordings were transcribed by a trusted commercial third party and text transcripts were analysed using NVivo 12, a qualitative data analysis software.

The researchers used thematic analysis to analyse the participants' responses.<sup>129</sup> The first stage of coding – 'primary coding' – consisted of labelling initial themes that emerged from participants responses such as 'emotion', 'control of the process', and 'desire to have voice heard'. These themes were subsequently categorised into higher-order themes, such as those aligning with existing PJ factors – voice, neutrality, trust, courtesy/respect – or relating to broader themes such as 'access to justice' or 'case management' and new PJ factors.

## V RESEARCH FINDINGS

Analysis of the data shows that themes correlating to the four traditional characteristics of PJ (voice, courtesy/respect, neutrality and trust) were strongly embedded in the users' responses. A strong theme from all interviews was the importance of giving voice to applicants and interested parties, and showing users courtesy and respect. Trust in the tribunal and neutrality of tribunal members was also an important finding, whereby the majority of external users commenced their legal journey with great trust and reverence for the tribunal and its role in the legal system. This impression was either reinforced or eroded throughout their journey, depending on the quality of their experience.

### A The Four Traditional Criteria of Procedural Justice

#### 1 Voice and Storytelling

External users acknowledged elements of voice and storytelling as critical to their perceptions of justice. The users perceived that members made strident efforts to gather and give effect to the affected person's wishes, values and preferences. This was articulated by one external user:

[The hearings] that I've been to lately, the member would actually verbally say to the person 'I need to consider your wishes and so does the office of the public advocate. What are your wishes?' Whereas previously you wouldn't necessarily

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128 See, eg, Kevin G Corley and Dennis A Gioia, 'Identity Ambiguity and Change in the Wake of a Corporate Spin-Off' (2004) 49(2) *Administrative Science Quarterly* 173 <<https://doi.org/10.2307/4131471>>; Kevin G Corley, Dennis A Gioia and Aimee L Hamilton, 'Seeking Qualitative Rigor in Inductive Research: Notes on the Gioia Methodology' (2013) 16(1) *Organizational Research Methods* 15 <<https://doi.org/10.1177/1094428112452151>>; Matthew B Miles and Michael A Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, 2<sup>nd</sup> ed, 1994).

129 Corley, Gioia and Hamilton (n 128).

hear that as much. So, there's definitely more consideration, as far as I'm concerned, given to the patient's wishes.<sup>130</sup>

Analysis of the data suggests that many external users had prepared speeches in the lead-up to hearings and had an expectation that the hearing would provide a podium or avenue to voice their stories. When external users did not receive an opportunity to voice their stories, they commented that they were not permitted to speak during the hearing. In practice, members invite external users to speak and engage with them, but interestingly on many occasions this did not meet users' expectations of 'talking':

We were all very frustrated actually because I don't think we all felt like we got heard.<sup>131</sup>

They didn't give him as much time to talk. And every time he tried to challenge something or question something [the member] just shut him down.<sup>132</sup>

Well, I assumed – as stupid as you do assume – that we would have all had a fair say. We were not permitted to say anything.<sup>133</sup>

These quotes suggest that external users perceived that their opportunity to voice within the hearing was curtailed, thus impacting upon their perceptions of PJ. However, given hearings are time-constrained, naturally a tension arises between the need to allow all users to have voice versus the critical need to prioritise the wishes of affected persons. One tribunal staff member explained that ultimately there was a need to ascertain the affected person's values and preferences, and that did not equate to allowing *all* interested parties a chance to speak, especially if it could have an adverse impact on the affected person:

If the hearing's contested then the person whose voice should be preferred is the represented person, and if I know I'm going to make an order – and I often do – then I don't think that I should necessarily give other people a lot of opportunity to talk if what they're going to say is going to be distressing to the represented person because although I have procedural fairness obligations to all the interested parties, the primary obligation, I think, is to the represented person.<sup>134</sup>

Participant responses highlighted a tension between external users' perception they would have their 'day in court', compared with internal users who highlighted guardianship matters were decided in an inquisitorial rather than adversarial jurisdiction:

We thought it was going to be like a big court case; everyone would get heard.<sup>135</sup>

It's really hard with guardianship cases because you forget that it's not your typical adversarial litigation environment where people feel like they come and they want their day in court, and it's really not ... I think part of what the Case Management Team also does try to do is remind people that actually this is not about the ills you suffered, it's about the [affected person], but it's hard because people don't view

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130 Interview with External 4 Professional (2019).

131 Interview with External 9 Personal (2019).

132 Interview with External 7 Personal (2019).

133 Interview with External 3 Personal (2019).

134 Interview with Internal 13 Member (2019).

135 Interview with External 9 Personal (2019).

tribunals in that way and they don't view cases in that way. They do think it's about 'your day in court'.<sup>136</sup>

Voice was undoubtedly a significant theme in our study, which highlights the importance of allowing user contributions within legal institutions. However, this must be balanced with practicalities including confined hearing times, limited resourcing and the need to prioritise the voice of the affected person who is at the core of such guardianship disputes.

## 2 Trust

Trust is an integral aspect of PJ and a key indicator of whether a decision-maker will treat court/tribunal users in a fair manner. Trustworthiness captures elements such as whether the authority/decision-maker appears to act in users' best interest and can be relied upon.<sup>137</sup> The importance of a 'trusting relationship' was acknowledged by many participants:

It's a very intimidating experience. So what they say to the member who comes from the back, dressed in a suit, sit there, they've never met this person. And they've got a cognitive impairment, it takes us 3, 4 months to build up a trusting relationship with these people. Just because you're a member in [the focal tribunal], you walk in with a suit, you sit down, you say well I'm here to hear your case. They're not going to just trust them.<sup>138</sup>

I suppose had I not trusted the system, which I would never do again, I would have kidnapped him from the facility before they had a chance to neuropsych test him. I would have allowed them to discharge him because they haven't acted in his best interest, nor has [the tribunal]. So that would be the first thing. Never again. And nor would I ever recommend it to anyone.<sup>139</sup>

The trust dimension was also acknowledged by internal staff, as part of the case management and hearing process:

I thought that Case Management should include an element of engagement with the customer, how you build a rapport, how you establish trust and, overall, how you impact their experience of the organisation not just process.<sup>140</sup>

[Experiencing] genuine interest makes people feel like they're engaging in a process that they can trust, feel safe in.<sup>141</sup>

Consistent with previous studies where trust was not widely discussed in the data,<sup>142</sup> users in this study also did not use the term *trust* frequently. However, their responses on courtesy and respect (below) often overlapped with this element and showed that members' sensitivity to external users' needs often assisted with building that trust in the process/institution as a whole.

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136 Interview with Internal 7 Registry (2019).

137 Murphy (n 14) 46. See also Hollander-Blumoff (n 11) 2085: '[T]rust relates to the parties' belief that a decision maker is motivated by the desire to be fair and accurate'.

138 Interview with External 4 Professional (2019).

139 Interview with External 5 Personal (2019).

140 Interview with Internal 7 Registry (2019).

141 Interview with Internal 10 Member (2019).

142 Douglas and Hurley (n 11) 84.

### 3 *Courtesy and Respect*

Users discussed concepts pertaining to courtesy and respect, sometimes multiple times through their interviews. External users reported that members within a hearing were exhibiting professionalism and considerateness to the users and to the person subject of the application:

He was lovely, and he gave us the time, he was very professional, and just very honest, basically.<sup>143</sup>

In a similar tone, two other external users reported feeling that their member experience was characterised by professionalism and a considerate temperament.

I thought the member was very professional, very considerate of Mum. I thought he was considerate of all parties and I thought he was very fair. He gave us a chance to say what we thought.<sup>144</sup>

But most are the ones that I've dealt with, I have had no problem, they treat everybody with equal respect.<sup>145</sup>

In contrast, some users reported feeling disrespected. They explained that while their matter was marred with family conflict, there were genuine concerns regarding an elderly parents' welfare; however, when an attempt was made to explain these concerns, it was perceived as being borne out of friction:

I think I felt in both of the hearings a sense of being disrespected. I feel that our concerns haven't been taken seriously, that we've just been viewed as 'Oh [they're] just a pack of squabbling brothers and sisters'.<sup>146</sup>

Another participant reported feeling upset that their fragile emotional state was dismissed in the hearing:

I was emotional and [the member] really didn't want a bar of it.<sup>147</sup>

Overall, the majority of responses showed that tribunal staff and members were respectful and cognisant of the needs of external users, showing an ability to meaningfully engage with their needs. For example,

I think they're all actually pretty good at being clear in what this meeting is about, what the hearing is for. I think they generally give good explanations. Some people, some members are maybe more able to engage with the clients, at recognising and engage with the client at their level, so that the client has a better understanding, well, as best that they can depending on their cognition and things, but recognition of that.<sup>148</sup>

### 4 *Neutrality*

Tribunal users also referred to the concept of neutrality and bias, reporting some instances where the 'minds' of the member appeared to be 'made up' prior to the hearing. This occurred mainly when the speaking time within a hearing was mostly oriented to the applicant, which detracted from perceptions of PJ:

143 Interview with External 11 Personal (2019).

144 Interview with External 14 Personal (2019).

145 Interview with External 10 Personal (2019).

146 Interview with External 7 Personal (2019).

147 Interview with External 9 Personal (2019).

148 Interview with External 6 Professional (2019).

And [the member] was not interested in anything but the basic facts and [the member] didn't care if there was backup or not. [The member] made up [their] mind up as soon as we walked in ...<sup>149</sup>

My interpretation of it was that [the member] had made up her mind that I was the baddie.<sup>150</sup>

I would probably put money on that they do have a standard decision for the first time it comes around.<sup>151</sup>

External users' perceptions were heavily influenced by comments made by members during the hearing, and comments about usual practices or procedures often led users to think the tribunal had a 'standard approach' to determining matters. Many quotes around the theme of neutrality emerged through discussions of the diligence with which the member appeared to evaluate evidence. If external users perceived a member had not considered documents presented to them, the user was more likely to perceive that member's neutrality negatively:

And we understood from the information from [the focal tribunal] that we could present photos and everything, which we had ... But no one was interested.<sup>152</sup>

They receive the documents beforehand, so they read through probably quite quickly, they read through all the things that we sent them. I feel like they already have an opinion about what the decision is going to be before they make it. I feel like we walk in to a decision that's already been made.<sup>153</sup>

Documents for a hearing are submitted to the tribunal registry and members well in advance of a hearing, and members are given ample opportunity to read evidence and prepare for a hearing. However, the limited nature of a hearing can impress upon users a perception that their 'evidence' has not been taken into consideration, and can influence upon dimensions of neutrality. The quotes highlight the critical need to instil an impression that relevant documents from both opposing users have been considered.

## **B Case Management and Journey Perspective**

Analysis of the data showed that the entire legal process, the journey of the court users within a tribunal setting, as opposed to the hearing itself, had a tremendous impact upon external users' wellbeing and perceptions of justice. The application, lead-up and hearing process at the tribunal significantly impacted users, including their emotional, psychological and sometimes physical health. External users in this project indicated the emotional toll the journey had on them. A tribunal hearing and its associated pre and post hearing touchpoints thus represent important events in the external users' lives with significant follow-on implications. The findings showed that factors pertaining to PJ remain at the forefront of case management and decision-making, as users' experience during the application and hearing process can impact upon their wellbeing and ultimate ability to live with an outcome. The

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149 Interview with External 3 Personal (2019).

150 Interview with External 5 Personal (2019).

151 Interview with External 9 Personal (2019).

152 Interview with External 3 Personal (2019).

153 Interview with External 9 Personal (2019).

following quotes from internal staff acknowledge the significance and impact of PJ factors throughout the process:

That's why the [case management] calls are so lengthy, because they're wanting to tell their story.<sup>154</sup>

You certainly do get a lot of parties who they don't get what they want but they at least feel that they've been treated with that dignity through the process and been given that opportunity.<sup>155</sup>

There's an opportunity to vent and obviously really clarify their issues. That's another reason why, obviously, we call these individuals, because a lot of them are private, they're not familiar with the tribunal and what's really required of them. So it gives us a good chance to get clarification as to what exactly they're seeking.<sup>156</sup>

These responses are significant as they support the emerging scholarly work of legal design that highlights that the entire user journey in a legal process can impact upon perceptions of justice, not only those where a decision-maker is involved (such as in a hearing). The case management process in the lead-up to a hearing, the ability of users to feel heard and be treated with dignity and respect by registry staff, are salient considerations in a legal process. The quotes support the need for legal institutions to prioritise the needs of external users through all touchpoints in a legal process.

## C Additional Procedural Justice Factors

In addition to quotes reflecting PJ dimensions accepted by scholars and the findings suggesting that PJ factors are relevant throughout users' legal journeys, this study showed that additional factors were strongly affiliated with satisfaction with the entire process. Such factors included balanced empathy, balanced power distance, holistic touchpoint alignment and readiness, suggesting that the PJ construct is broader than the four criteria it is traditionally affiliated with.

### 1 *Balanced Empathy*

Empathy and compassion were significant themes raised by tribunal users. In extant literature, these concepts point towards the ability of a person to understand, anticipate, relate or respond to another's emotions.<sup>157</sup> In the legal context, it is also imperative that a balance is struck between showing excess empathy so as to appear biased (which would undermine the element of neutrality) and showing lack of care. Being able to take other people's perspectives can manifest in helping and caring behaviours, for instance, leading a user to feel warmth and concern of a service provider.<sup>158</sup> The overarching themes relating to members and registry

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154 Interview with Internal 4 Registry (2019).

155 Interview with Internal 11 Registry (2019).

156 Interview with Internal 6 Registry (2019).

157 Jan Wieseke, Anja Geigenmüller and Florian Kraus, 'On the Role of Empathy in Customer-Employee Interactions' (2012) 15(3) *Journal of Service Research* 316 <<https://doi.org/10.1177/1094670512439743>>.

158 Liliana L Bove, 'Empathy for Service: Benefits, Unintended Consequences, and Future Research Agenda' (2019) 33(1) *Journal of Services Marketing* 31 <<https://doi.org/10.1108/JSM-10-2018-0289>>.

staff recognising and empathising with the vulnerabilities of affected persons, and responding to the needs of such users are evidenced in the following quotes:

[The member] was very understanding, he was very compassionate...<sup>159</sup>

The second member just totally got it ... she totally empathised with the sort of being involved with someone with dementia, and the issues that we were facing. She was very empathetic to the whole [situation] ...<sup>160</sup>

[S]ome members are maybe more able to engage with the clients, at recognising and engage with the client at their level, so that the client has a better understanding, well, as best that they can depending on their cognition and things, but recognition of that.<sup>161</sup>

I think some members are quite intuitive and they'll pick up when someone, you know, has got severe dementia and they really don't know what's going on ... they will come down and they will sit with the person at the table. But then there's others where the member will just sit up there ... [I]t feels like a court when they do that.<sup>162</sup>

The members are usually quite lovely and nice and compassionate ... [G]enerally, they're quite pleasant, they're nice, they introduce themselves ... the last one, she was absolutely lovely. She talked about her background, where she came from.<sup>163</sup>

The preceding quotes highlight that in a jurisdiction that deals with 'human' disputes, where the central focus point is a vulnerable person with physical or mental health challenges, the ability for tribunal staff to empathise with these circumstances and create a personal atmosphere is a key component in external users having a positive experience. However, some of the users' lived experiences suggested that a lack of perceived empathy on the part of members tainted their overall experience. As Bove highlights, 'not only the presence of empathy but also its notable absence can negatively affect customers' experiences'.<sup>164</sup>

In the following quotes, participants pointed to an 'us and them' mentality where they perceived that tribunal staff were making decisions about matters they could not relate to:

The city people making decisions about country people's lives that they don't understand and they have no interest in understanding.<sup>165</sup>

I don't know what status [the member] has, but it was very cold. It was uncaring and it was cold. And [the member] was not interested in anything but the basic facts ...<sup>166</sup>

Even when judicial officers seek to empathise and create a more personal atmosphere, it involves a fine line of balancing demands. For example, one participant questioned an attempt at empathy as potentially inappropriate behaviour:

She was a mixture of things. She was in a way warm and in a way quite harsh at the same time ... She was presumptuous. She just wanted to get to the point I guess and was just doing her job. She did at some point say, which I thought maybe was

159 Interview with External 11 Personal (2019).

160 Interview with External 2 Personal (2019).

161 Interview with External 6 Professional (2019).

162 Interview with External 4 Professional (2019).

163 Interview with External 8 Professional (2019).

164 Bove (n 158) 31.

165 Interview with External 5 Personal (2019).

166 Interview with External 3 Personal (2019).

a bit inappropriate, that she had a family member with dementia as well and so she understands what it's like.<sup>167</sup>

While empathy enables a person to imagine oneself in another's position to understand their experience, these quotes highlight that in some instances, external users did not feel understood or empathised with; for example, when there was an appearance or perception of systematic bias or a noncaring attitude for others' circumstances. It is important that judicial officers take into consideration the broader context or lifeworld of the users – even if that is simply acknowledged – so that users are not given an impression of legal foreigners (or 'city people') who do not (want to) understand the context of those users interacting with the legal system. At the same time, a balanced approach that avoids over-empathising seems to be equally relevant to avoid perceptions of bias (eg, a high empathic concern for only one party might lead the other party to question neutrality) or over-extending empathic concern in public settings might be perceived as inappropriate.

In summary, external users reported that within hearings members exhibited professionalism, compassion, empathy and consideration to themselves and the people affected by the decision. The quotes suggested that when a member demonstrates an authentically empathetic, fair and compassionate demeanour in a hearing, frustrations of the parties relating to the process may be reduced. Conversely, users reported that the demeanour of a member within a hearing had the potential to detract from their sense of voice or PJ if there was a perceived lack of empathy or potentially presumptive attitudes.

## 2 *Balanced Power Distance*

Themes surrounding balanced power distance were prevalent in external users' responses. Building on extant literature, power distance here describes perceptions of unequally distributed power.<sup>168</sup> Courts and tribunals are naturally characterised by power disparity given the need for ultimate decision-makers (eg, judicial officers) in power, and those who are subordinated to that power and thus the influence on their agency (eg, court users). Yet, despite defined court/tribunals roles and associated levels of power, the legal context also mirrors perceptions of power dynamics.<sup>169</sup> That is, across the various interactions throughout the user journey, court users can perceive levels of power to vary and manifest in changing asymmetrical social relations.<sup>170</sup> Many responses in this study suggested that inexperienced or vulnerable users perceived detrimental power distance between themselves as navigators of a foreign legal system and the tribunal as a daunting government institution. In face of the power distance between an authority that

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167 Interview with External 9 Personal (2019).

168 See Jiing-Lih Farh, Rick D Hackett and Jian Liang, 'Individual-Level Cultural Values as Moderators of Perceived Organizational Support–Employee Outcome Relationships in China: Comparing the Effects of Power Distance and Traditionality' (2007) 50(3) *Academy of Management Journal* 715 <<https://doi.org/10.5465/amj.2007.25530866>>.

169 See generally Michał Dudek and Mateusz Stępień, *Courtroom Power Distance Dynamics* (Springer, 2021).

170 Ibid 9.

delivers a decision and the recipient of that decision, there is a need to create a balance in how that authority is conveyed and the asymmetrical relationship is managed, as these quotes articulate:

We went there blindfolded. We were naïve, we sat there like dummies. We [were around] this huge table, much longer than this, and the member was way across the other side of the room and we were pretty much yelling to try and communicate because he should have been sitting at our table so that he could speak to us like human beings, but we [were] just like in the classroom and he is a teacher and you are the student.<sup>171</sup>

Like the one we've just had in the city with the four hour hearing, I mean that was like a courtroom with a member sitting up there and we were all sitting at the table and there's no eye contact with anyone. So you're sitting in one long row and even you know the other parties, legal counsel, you can't look at anyone. So the set-up is not good, so you can't have that conversation with people.<sup>172</sup>

[H]e says, 'Okay we can go in', and we go in and then the member comes in through the back door up there. They usually come to the table with us but, this time, she just came out of a door and sat at her microphone chair and seat up there. They are quite high.<sup>173</sup>

In the next quote, a professional worker outlines the challenges of perceiving tribunal staff in a position of dominance:

You have to remember that the member is a stranger to them. They don't know this person's intentions. They feel like they are in trouble ... I don't think it's an ideal environment.<sup>174</sup>

A different participant illustrated that they felt they did not have control, particularly about what their input was during the hearing:

Well, they just kept shutting everybody down but not actually allowing people to then come back. You know having some control about, okay, what it is that you want to say...<sup>175</sup>

As the above quote shows, imbalanced power distance manifests when tribunal users have a need to respond to members' decisions during a hearing and want to have meaningful input or contribution to the process, but feel they are unable to. Being dependant on a member's decision places tribunal users (especially first-time users) in a vulnerable position. Even the physical design or layout of the court/tribunal setting can affect perceptions of power distance. Yet, legal contexts can positively contribute to balancing asymmetrical relationships in a way that enhance court users' experiences, as the following quote highlights:

We thought we had to like be really serious about 'Dear Member'. We thought it was going to be much more official than it was. It was quite relaxed, the environment. We were all quite nervous. We thought we were going to have to read statements but she just wanted a chat. It felt a lot more relaxed than we thought it was going to be.<sup>176</sup>

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171 Interview with External 3 Personal (2019).

172 Interview with External 4 Professional (2019).

173 Interview with External 8 Professional (2019).

174 Interview with External 4 Professional (2019).

175 Interview with External 7 Personal (2019).

176 Interview with External 9 Personal (2019).

### 3 Holistic Touchpoint Alignment

Courts and tribunals can be perceived as complex environments for users. The number of touchpoints across service contexts, such as courts, are generally proliferating compared to even a decade ago. For example, legal information is now available on websites, apps, service hotlines, through service staff on site, legal communities and other platforms, rather than just primarily from a user's lawyer. Those touchpoints under the control of a focal legal institution need to be carefully managed and designed. Building on extant literature, we understand holistic touchpoint alignment in such a way that the various user journey elements are designed in a coherent and 'thematically cohesive, consistent, and context-sensitive way'.<sup>177</sup> External users described that moving through 'the process' of a legal dispute had significant potential to impact their wellbeing, particularly experiencing inconsistent and incohesive touchpoints:

Oh, it was hell. It was hell. It was hell. I didn't get any rest. I was shaking. I was crying all the time. My depression medication wasn't working and I was a mess. We weren't getting any sleep. We were just trying to make sense of it. Because none of it made sense.<sup>178</sup>

My concern is ... we're able-bodied, intelligent, educated, caring, capable people. Three of us together ... and none of us could make a difference. My heart goes out to anybody that's trying to do this by themselves. I'm not saying it's a fault necessarily with the [tribunal] system. I obviously don't understand the system fully, you probably have a much better idea, but my heart really goes out to anybody that's trying to do this but doesn't have capacity in one way or another. We would just spend our days off work on the phone, phoning ... What can we do? Who do we call? Where do we go? What do we do?<sup>179</sup>

For others, the length of the dispute impacted their wellbeing, with one participant describing what they perceived to be a never-ending process:

That's where the length of the [tribunal] process was just, it just allowed this to go on and on and on and on and it was just ... it was pretty nasty for a very long time and I almost lost my health over it. It was horrible.<sup>180</sup>

While their journey in, or directly associated with, the hearing can be daunting, users also highlighted inconsistent and potentially confusing experiences. For example, a professional external user discussed the need for consistency in three separate occasions throughout their interview, stressing that lack of consistency in tribunal hearings made it challenging to train professional workers to support clients:

So when you compare notes, you know, you can have 10 social workers in the room and each one will have a different experience, which is a problem because when you train people up and you need to sort of tell them and prepare them for a [tribunal] hearing, it's really hard because there is no consistency.<sup>181</sup>

177 Christina Kuehnl, Danijel Jozic and Christian Homburg, 'Effective Customer Journey Design: Consumers' Conception, Measurement, and Consequences' (2019) 47(3) *Journal of the Academy of Marketing Science* 551, 552 <<https://doi.org/10.1007/s11747>>.

178 Interview with External 1 Personal (2019).

179 Interview with External 11 Personal (2019).

180 Interview with External 14 Personal (2019).

181 Interview with External 4 Professional (2019).

Another professional external user outlined the importance of well-coordinated hearings:

We need to organise that report and because it's going to [the tribunal] it has to go through a process. ... [I]f you don't have a date or once you receive [the notification of hearing] you realise it's next week, it puts enormous pressure on us to get everything organised. The other complication is that we don't get notified if there is going to be legal counsel present. So sometimes we will, you know, go to [the focal tribunal] and the other party has got legal counsel and we have not been informed, which creates a huge issue for us.<sup>182</sup>

The above quote also underscores the need for timely information or responses that allow for smooth subsequent action. This might also include a relevant degree of responsive or adaptiveness to situational developments or goals (eg, pushing back a hearing date in order to allow for all relevant reports to be ready).

In another example, a private external user described the challenge of receiving inconsistent information across touchpoints:

I rang [the tribunal] many times before we went because we didn't know what we were faced with when we walked into that.<sup>183</sup>

Sometimes you do get that automated response, other times you don't. You ring them up and they will ask you which email address. So far, we've collected three email addresses that every time you ring up you get a different email address that you're supposed to submit the information to. So sometimes we just send it to all three. I don't know if there's more, there could be five or six, I don't know.<sup>184</sup>

Due to these inconsistencies, some participants reported that they called multiple times and spoke to multiple tribunal representatives (eg, call centre staff) in order to validate previous information and converge to a reliable conclusion as to nature of the ensuing process.

Holistic journey alignment emerged as an important dimension of PJ. Without thematically cohesive, consistent, and context-sensitive information or interactions across touchpoints, users could easily get confused, irritated or anxious, with potentially negative implications for their wellbeing. In contrast, a holistically aligned legal system and PJ helps users to more effortlessly and satisfactorily move through their legal process.

#### 4 *Enhanced Readiness*

The final theme of 'readiness' related to supporting users in preparing them cognitively and emotionally for interactions with the legal system. Extant research views readiness among users as being willing and able ('ready') to effectively navigate a focal context.<sup>185</sup> In our data, enabling users to feel ready manifested in clarifying expectations upfront about dealings with a tribunal, and how prepared

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182 Interview with External 4 Professional (2019).

183 Interview with External 3 Personal (2019).

184 Interview with External 4 Professional (2019).

185 Ilias Danatzis, Ingo Oswald Karpen and Michael Kleinaltenkamp, 'Actor Ecosystem Readiness: Understanding the Nature and Role of Human Abilities and Motivation in a Service Ecosystem' (2022) 25(2) *Journal of Service Research* 260 <<https://doi.org/10.1177/10946705211032275>>.

users feel for the hearing day. External users raised a desire to have access to more detailed information to assist with feeling ready for the legal context. A common theme among users' responses was their 'lack of knowledge' about the legal system which caused them anxiety:

I think it would be helpful to have really definitive information about what you should prepare yourself with [the tribunal] for these cases.<sup>186</sup>

[W]e were underprepared. There was no one really within [the tribunal] that actually said, 'This is what's going to happen, you will not be allowed to speak, you will have to wait until you are spoken to'. It's like watching *Law & Order* on TV. Except they have the good lawyers, we have no one.<sup>187</sup>

Did I call [the tribunal]? I don't know that I did. I probably didn't think that I could. Otherwise, I would have, because I rang everybody else [laughs]. I'm assuming there was no warm and fuzzy, ring us for advice [line]....<sup>188</sup>

I didn't feel like there was going to be a lot of value ringing [the tribunal] because they'd already said we can't give you legal advice and blah, blah, blah, sort of thing.<sup>189</sup>

A professional external user elucidated the importance of preparing clients for tribunal hearings, so they are equipped with knowledge of what to expect during the hearing:

A lot of people [appear] fearful of what the [tribunal] hearing is, so I try and explain it beforehand. Sort of say, 'Well, this is what would happen' and talk them through a [tribunal] hearing and try and just reassure them that it's okay ... it is more like a court if you're going into the city. It will look like a courtroom that you see on television, if you've never been to one in your life and the member will usually sit down lower, but they are away from the table still. So, they get that sense of like *Judge Judy*...<sup>190</sup>

Expectation management across the legal process was a key theme in users' responses, as relayed by this participant (private user) who depicted the stark reality of having a one-hour hearing to make significant decisions for a loved one:

I was told by [the tribunal] that when you go into your meeting it could be an hour or two; they gave us an hour to decide on the rest of my mother's life, which breaks my heart. But I was told that it might be 15 minutes for the applicant and then you would have your say, and your sister would have her say, and we would all get a fair 10 or 15 minutes or whatever length of time it took to put our thoughts and words and opinions down, and explanations down. None of that happened.<sup>191</sup>

As for the process, it's pretty scary, because it is a casual sort of environment. You know like with the normal court you sort of know what to expect... there's a process. Whereas this is very relaxed. And it's supposed to be non-threatening and very relaxed, but that creates its own stress by not knowing what to expect.<sup>192</sup>

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186 Interview with External 14 Personal (2019).

187 Interview with External 3 Personal (2019).

188 Interview with External 5 Personal (2019).

189 Interview with External 7 Personal (2019).

190 Interview with External 6 Professional (2019).

191 Interview with External 7 Personal (2019).

192 Interview with External 2 Professional (2019).

External ‘personal’ users, which included lawyers, family members and medical treatment support persons typically described being nervous and unsure as to what to expect within a hearing. For external users, levels of readiness for a hearing in relation to self-learning about the legal regimes and the tribunal processes varied. In summary, the interviews showed that external users had varying levels of preparedness for their hearings that importantly developed significantly before the actual hearing day. Within a hearing, users respond to questions by the member and may be called upon to explain their conduct, or to tender evidence. These can all be quite confronting for first-time users interacting with a legal institution.

## VI DISCUSSION AND RESEARCH LIMITATIONS

As evidenced by users’ responses, dimensions of PJ are reflected in the guardianship jurisdiction in the Victorian tribunal subject of this study. The quotes show that external users value traditional notions of PJ, including voice, trust, neutrality and courtesy and respect. The findings of our study show tribunal staff actively prioritised the needs of external users by allowing them (including affected persons) to be heard and meaningfully partake in the process. This is consistent with past research on PJ which suggests that tribunal users value these four dimensions, even outside a courtroom.<sup>193</sup>

Despite these initiatives, recent developments such as the increased application of non-adversarial legal perspectives or the implementation of service excellence frameworks in legal contexts, enhance the need to better understand and support human experiences and wellbeing. To this effect we draw on a human-centred design perspective to conceptually question and empirically inquire whether the conventional PJ concept best reflects court user experiences; or alternatively, whether there are further dimensions that manifest PJ in this context. We purposefully selected a guardianship/medical treatment environment as the vulnerability of court users provided a meaningful context for our study. We found that many users had strong expectations of voice, and an express need to ‘tell their story’ or ‘have their day in court’. This finding is consistent with past studies, such as Relis’ study of medical negligence disputes, that shows that disputants prioritise the need to be heard in disputes.<sup>194</sup> Where tribunal staff curtailed the right to speak (for legitimate reasons), users were more likely to perceive that their right to a voice was denied. Interested parties who were not the applicant commented that they were ‘not permitted to say anything’ during the hearing. Analysis of the data suggests that in reality they were permitted to talk and engage with members but this did not meet their expectations of ‘talking’. Often, expectations were formed prior to the hearing that it would be a forum for interested persons to ‘voice their story’. Many users had prepared speeches and expected to be able to share their

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193 MacDermott and Meyerson (n 19) 461.

194 Relis (n 37) 174.

perspective at the hearing. When these opportunities for storytelling were not given, or when the opportunities to speak were shorter than the individual expected, this resulted in a perceived lack of or at least diminished PJ.

Building on and cross-validating the established understanding of PJ, this research advanced this concept through identifying four new and complementary dimensions of PJ: (1) balanced empathy, (2) balanced power distance, (3) holistic touchpoint alignment, and (4) enhanced readiness. These new dimensions in combination enhance perceptions of fair and transparent legal processes, thus giving greater effect to PJ. For example, research argues that empathy can increase users' forgiveness towards service providers.<sup>195</sup> Similarly, it can be argued that legal system users who experience balanced empathy are more likely to accept and live with an unfavourable legal outcome as they are more forgiving due to the fair legal process. In a similar line of argumentation, balanced power distance helps legal users to feel respect and dealt with fairly, despite the relational and structural asymmetry built into the legal system. Furthermore, holistic touchpoint alignment helps legal users to receive consistent, coherent and timely information across communication channels, which in turn helps increase their perceptions fair legal processes. And finally, enhanced readiness emerges through helping legal users to have clear expectations about the legal process and assisting them in preparing for the hearing.

Importantly, the additional dimensions of PJ account for users' needs to experience a fair process not just in the hearing itself, but also in the lead-up and across the various interactions with the system. Informed through a human-centred legal design perspective, this research underscores the role of recognising the entire user journey as pivotal to PJ, as perceptions of fairness are not only formed in the hearing room but across all touchpoints that users interact with. Ultimately, this approach to PJ is also likely to contribute to greater user wellbeing by way of the extended dimensions, as this view of PJ comprises intentional efforts to minimise confusion, frustration, anxiety and other negative emotions that can significantly compromise legal experiences, while simultaneously contributing to greater clarity, understanding and forgiveness in the process. In turn, this approach to PJ likely facilitates greater emotional, mental, physical and potentially even spiritual wellbeing.

By expanding the established dimensions of PJ, our findings demonstrate that the tribunal, and by implication the legal system, ought to provide greater consideration to new dimensions of PJ as they have the potential to inform or influence legal processes, legal contexts, and the acceptance of legal outcomes. Practical implications and reform recommendations can be derived from our research findings, with opportunities to manage user expectations about the nature of a hearing and to educate users that a tribunal hearing is not an opportunity to have a 'day in court'. This is particularly prevalent in the guardianship jurisdiction which adopts an inquisitorial rather than an adversarial system.

Neutrality was another significant theme that emerged from the data. In order for external users to perceive neutrality there is an objective need for members to appear diligent and to appear to have considered the evidence of all interested parties. External users were more likely to view member neutrality negatively if these objective signals of neutrality were not apparent. A second recommendation for reform relates to the need to demonstrate to external users (through a verbal statement or through factsheets) that material is considered prior to hearings and that not all material can be canvassed in time-pressed hearings.

The negative perception of an imbalanced power distance was a consistent theme in participant responses. Given the highly emotional nature of guardianship disputes and the prevalence of vulnerable and first-time users, it is understandable that some users viewed the tribunal institution (and its staff) to be in a position of superiority or authority. Akin to US research in the criminal context, there is a need to ‘humanize the experience’ of interacting with the legal system and ensure that tribunal members appear approachable and as we find, also to balance their empathetic concern for users.<sup>196</sup> This can be achieved with members sitting at the same level as users during a hearing rather than on an elevated bench. Further, the data supports the need for members to appear present and engaged with the dispute at hand, including appearing to have diligently engaged with evidence.<sup>197</sup>

While extant PJ literature has focused on procedural satisfaction primarily with the decision-making process, our study supports the contemporary and emerging work of legal design which recognises the needs of users throughout the entire user journey.<sup>198</sup> This includes initial touchpoints, case management processes and the lead-up to the final hearing. A third recommendation for reform stemming from our data suggests that legal institutions need to ensure all touchpoints in legal systems support external users – for instance, accessibility onsite and via the website and critically acknowledging that the case management process is a fundamental influence on users’ perceptions of procedural satisfaction.

A fourth recommendation from our findings relates to adoption of processes that can support ‘enhanced readiness’. As our data shows, users frequently navigated a foreign system, felt unable to seek information about processes, or received inconsistent information which added to the confusion. In systems that involve vulnerable users, it is important that appropriate resources are adopted to support those users to feel ‘ready’ for legal processes. The adoption of screening processes with suitably qualified staff can assist to ensure ‘enhanced readiness’ or triage users where necessary.

The findings of our study support the assertion that the focal tribunal is a leader in the legal design space, by taking steps to actively prioritise the non-legal needs of users, acknowledging that the overall experience with a legal institution can influence the users’ perceptions of fairness and ultimate satisfaction. The focal

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196 Berman and Gold (n 51) 21.

197 *Ibid.*

198 Hagan, ‘Human-Centered Design’ (n 58).

tribunal is captaining initiatives to implement mechanisms to enhance users' experience at all touchpoints throughout their entire user journey.

The focus on the holistic user experience also aligns with and gives greater legitimacy to contemporary work on legal design.<sup>199</sup> Specifically, while legal design has been relatively recently emerging and often focuses on textual or architectural court elements, the current study highlights the benefits of legal design to question and inform legal concepts and practice with a focus on human experiences and wellbeing. Legal design accordingly warrants further development by combining human-centred and systemic perspectives, which can inform not just tribunal but general court and legal contexts.

### A Research Limitations

While this study reports on ground-breaking qualitative research reflecting emerging scholarship on legal design, it nevertheless has limitations. The first limitation was the inability to gain the direct perspective of affected persons due to ethical constraints around engaging with people with cognitive impairment. This was flagged at the outset to the focal tribunal, and the team proceeded to interview a cross-section of all other relevant stakeholders, from whom the perspective of the affected person was elicited and synthesised. Therefore, insights around affected persons' experiences were gained indirectly.

The second limitation of this research was that the sample of research participants led us only to cases of the 'typical' affected person as an elderly individual suffering from dementia and Alzheimer's. This is acknowledged as a limitation because this conceptualisation of an affected person is not representative of all types of disability or impairment that affects decision-making capacity, nor all cases in which a person might need representation.

A third limitation of this research project is that the external tribunal user participants represented a broad group of participants relating to applications for powers of attorney, guardianship and administration. Thus, the users were not exclusively involved in applications for medical treatment. This was predominantly due to the low volume of cases within the focal tribunal since the *MTDP Act* was enacted in March 2018.

A fourth limitation is that the interviews required self-selection by external users who were required to opt-in to the research project. While the researchers contacted users who were identified as being involved in applications pertaining to medical treatment, it was not always possible to verify the application related solely to medical treatment decisions.

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199 Ibid.

## VII CONCLUSION

Legal contexts have traditionally been procedure driven. While this can assist in maintaining efficiency within the justice system, the drawback is that it can impact upon users' perceptions of access to justice and the fairness of the process. Human-centred design places people at the centre in the design of processes and solutions that cater to the real-world needs of people. This study has contributed to emerging scholarship on legal design by applying a human-centred design lens in a legal context to understand user experiences in the guardianship jurisdiction of the focal tribunal. We have used qualitative analysis to gather rich insights into the needs of tribunal users in what they often perceive as a foreign legal process. The findings of this study not only reflect traditional dimensions of procedural justice (voice, trust, neutrality and courtesy/respect), but offer data on additional dimensions that further enrich our understanding of PJ; factors such as balanced empathy, balanced power distance, holistic touchpoint alignment and enhance readiness. Significantly, users' quotes suggested that elements of PJ were relevant through the entire user journey, including stages such as case management interactions with registry staff. This supports literature on legal design that advocates enhancing all key touchpoints in a users' legal journey. The findings show that the focal tribunal is a leader in taking steps to not only gather user experiences and acknowledge that users' perceptions of justice are critical at all touchpoints, but to use such data to continue to meaningfully make changes to enhance user experiences. The findings of this study can be extrapolated to the wider network of courts and tribunals in Australia and internationally and to the emerging discipline of legal design.