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PROBLEM-SOLVING COURT PROGRAMS IN WESTERN AUSTRALIA

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Problem-solving court programs in Western Australia

Following conviction of a criminal offence commonly a court imposes a sentence and then moves on to another case leaving the carrying out of the sentence to others. Therapeutic jurisprudence suggests that during a time of crisis such as being before a court for a criminal offence a person may be highly motivated to change for the better. Courts can perform a valuable role in facilitating such change. However to perform such a role, judicial officers, lawyers, court staff, community corrections officers and others need to become familiar with new principles and procedures based on findings from the behavioural sciences as to ‘what works’ in promoting positive behavioural change. Such principles inform how they interact with program participants and with each other. But they have not been the subject matter of judicial or legal education generally.

Court programs range from those where a case is adjourned for an offender to engage in rehabilitation programs to those where the program is managed judicially with the aid of a multi-disciplinary case management team using the techniques of therapeutic jurisprudence. They may seek to address one or more offending related problems such as alcohol and illicit substance abuse, solvent abuse, domestic violence, gambling and stress.

The Magistrates’ Court in conjunction with or separate from the executive has initiated problem-solving programs in Western Australia. Country programs have been assisted by a unanimous resolution of country magistrates passed in 2004 agreeing to adopt therapeutic jurisprudence principles in their courts. Distance, a lack of resources, the diversity of offenders and their problems and the novelty of therapeutic court procedures for the legal profession, government, media and public are among the challenges encountered in establishing such programs. These programs have sought to be innovative. For example, in Geraldton the stress reduction and self-development technique Transcendental Meditation[®] was used by some offenders and program officers.

Results from problem-solving court programs in Western Australia are generally positive but have mostly been limited due to a lack of adequate statistics and resources. Further studies are needed to measure not only the impact of these programs on recidivism but also on wellbeing generally. Country programs in particular have suffered due to a lack of resources. A unit is also needed to coordinate program development and promote research and ongoing training for judicial and administrative staff.

Introduction

Problem-solving court programs give a court the opportunity to enable litigants to address issues underlying the legal problem. Though predominantly applying in criminal cases, problem-solving programs do operate in other contexts such as in care and protection applications. In criminal cases, they enable a court to help offenders address problems underlying their offending such as substance abuse, anger problems, stress and other forms of psychological dysfunction.

There has been a proliferation of problem-solving courts in the US, including drug courts (including special courts for adults, juveniles, driving under the influence offenders, university students and parents), domestic violence courts, mental health courts, re-entry courts, tribal healing to wellness courts and community courts of various kinds.¹ The Harlem Housing Court is taking a problem-solving approach. And, in another “only in America” story, New York has a Gun Court to deal with violations of firearms laws.

My paper deals not only with specialist courts set up to take a problem-solving approach, but also special lists and diversionary programs that endeavour to address underlying issues in criminal cases.

According to Berman and Feinblatt, there are five elements of the problem-solving court approach:

1. A tailored approach to justice—ensuring judicial resources meet the needs of the case.
2. Creative partnerships—involving citizens and service agencies in the delivery of justice.
3. Informed decision-making: Here judicial officers receive more information about the individual case and the impact of such offending on the community than in other cases.
4. Accountability—judicial monitoring.
5. A focus on results—measuring the impact of such court programs (eg, through evaluations).²

Problem-solving courts emerged with the establishment of the first domestic violence court and the first drug court in the USA in the 1980s. At about the same time, therapeutic jurisprudence emerged in the US.³ In 1999 an article by Hora, Schma and Rosenthal proposed that therapeutic jurisprudence be the underlying philosophy behind problem-solving courts.⁴ This link between therapeutic jurisprudence and problem-solving courts is now widely accepted. And it is in this philosophical context that most of Australia’s problem-solving court programs have been established. Such programs are now operating in most states and territories. I will cover general principles applicable to problem-solving courts generally but will use the Western Australian experience by way of illustration. I will also refer to particular issues of concern in relation to problem-solving court programs in that state.

¹ Huddleston C, Freeman-Wilson K and Boone D, ‘Painting the Picture: A National Report Card on Drug Courts and Other Problem-solving Court Programs in the United States’ (National Drug Court Institute, 2004), <http://www.ndci.org/publications/paintingcurrentpicture.pdf>.

² Berman G and Feinblatt J, *Good Courts* (The New Press, 2005), pp 5–7.

³ Wexler DB and Winick BJ (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991); D Wexler and B Winick (eds), *Law in a Therapeutic Key* (Carolina Academic Press, 1996). For further information on therapeutic jurisprudence including an extensive bibliography, see: <http://www.therapeuticjurisprudence.org>.

⁴ Hora P, Schma W and Rosenthal J, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America’ (1999) 74 *Notre Dame Law Review* 439.

It has been suggested that Aboriginal courts are not part of therapeutic jurisprudence and are also different from problem-solving courts as they involve Aboriginal Elders.⁵ I suggest that they do come within therapeutic jurisprudence.⁶ Therapeutic jurisprudence firstly provides a particular lens through which the law and its processes can be studied: their impact upon the wellbeing of those affected by them. Using such an analysis and drawing from the behavioural sciences it says that court and other legal processes can be designed to minimise any negative impact and indeed to promote a positive impact upon participant wellbeing. Clearly Aboriginal courts can be subject to the analysis proposed by therapeutic jurisprudence.

By involving Aboriginal Elders in court proceedings, an Aboriginal court shows respect to the Elders and their culture. Having them present and involved can also contribute to the wellbeing of the offender. While unique in its operation, it is nevertheless a legal process that has therapeutic effects. I also note that the National Judicial Institute of Canada acknowledges that Aboriginal courts in that country are an example of therapeutic jurisprudence.⁷

There also has been an exchange between therapeutic jurisprudence and the traditional dispute resolution methods of traditional cultures. Wexler acknowledges the similarities between the approach of therapeutic jurisprudence and conflict resolution methods used in traditional cultures.⁸ Methods used by traditional cultures of peoples of North America, Australia and elsewhere have been seen to be of value in therapeutic jurisprudence and adapted for use in court systems in North America, Australia and New Zealand. An analysis of Navajo therapeutic jurisprudence noted that the Navajo people commenced therapeutic jurisprudence some twenty years previously when they began to use traditional practices in conjunction with their tribal courts.⁹ Further, the tribal courts in North America generally have drawn on their own traditional practices and the therapeutic principles of mainstream drug courts in the development of their own drug court system.

I acknowledge that Aboriginal courts are a response to the problem of the legal system's inadequate response to the law-related needs of Aboriginal people.¹⁰ However, it should also be recognised that Aboriginal courts can be problem-solving in their approach: bringing in Elders as part of a court process to try to more comprehensively deal with the offending related problem before the court and reduce offender recidivism.

Therapeutic Jurisprudence and Problem-solving Court Programs

⁵ Marchetti E and Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 4.

⁶ King MS, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.

⁷ Goldberg S, *Judging for the 21st Century: A Problem-solving Approach* (National Judicial Institute of Canada, 2005), <http://www.nji.ca/Public/downloads.htm>, viewed 19 September 2005.

⁸ Wexler D, 'Therapeutic Jurisprudence: It's Not Just for Problem-solving Courts and Calendars Anymore' (2004) *Future Trends in State Courts*, <http://www.ncsconline.org/WC/Publications/Trends/SpeProTherapTrends2004.html>

⁹ Zion J, 'Navajo Therapeutic Jurisprudence' (2002) 18 *Touro Law Review* 563, 569.

¹⁰ Aboriginal Customary Laws Discussion Paper (Law Reform Commission of Western Australia, 2005).

Therapeutic jurisprudence is not confined to problem-solving courts. It proposes that laws and legal processes can be examined to see their effect on the wellbeing of those affected by it. The program agenda of the Third International Conference on Therapeutic Jurisprudence to be held in Perth from 7-9 June 2006 exemplifies the broad focus of therapeutic jurisprudence, including sessions on its relevance to judging, civil law practice, criminal law practice, corrections, family law, Indigenous issues, legal and judicial education and international law.

Therapeutic jurisprudence asserts that legal processes can be designed to promote participant wellbeing and thereby promote justice system goals such as offender rehabilitation. It says that findings from the behavioural sciences can be used as a resource to design court processes that can better promote justice system goals. After all, here the courts are concerned with the modification of human behaviour and with communication between the court and the offender. What works in modifying human behaviour and in communication is not the sole province of the law. Behavioural science professionals conduct research as to what works in these areas. Therapeutic jurisprudence draws on findings in areas such as procedural justice and counselling in the design of problem-solving court processes.

In the time available I can give but one example of how therapeutic principles can guide a problem-solving court. For example, following a plea of guilty, a sentencing court could hear submissions from prosecution and defence and then tell a convicted person that all the reports say that the person has a drug problem and that the best thing would be for the accused to engage in rehabilitation programs and that it is adjourning a matter, that the accused is to engage in rehabilitation programs and that the convicted person will be imprisoned if there is non-compliance. At such a hearing all the accused person may say is an acknowledgement of his identity and a plea of guilty. From a therapeutic standpoint, such an approach smacks of paternalism and coercion. Indeed, the legal system has in the past taken a paternalistic attitude to dealing with cases involving, for example, Indigenous people, women and the mentally ill. It also has taken and still takes an overtly coercive approach in many cases. From a therapeutic viewpoint coercion and paternalism may well promote resistance to change.¹¹ It sends a message to the person that the person is incompetent to make proper decisions and needs someone else to make the decisions for them.

Alternatively the court could engage in a dialogue with the convicted person, asking why the person offended, what the person wishes to do about it and then take what the person has said into account in determining the outcome, such as offering a person a place in a problem-solving court program. This approach promotes self-determination, which, from a therapeutic viewpoint, upholds the integrity of the individual and promotes wellbeing—which I would argue are important for rehabilitation. It sends a message that the court considers the person is perfectly able to make competent decisions about his or her life. It is the kind of approach taken in a problem-solving court. Such an approach takes time, time that commonly magistrates sitting in

¹¹ Winick BJ and Wexler DB (eds), *Judging in a Therapeutic Key* (Carolina Academic Press, 2003).

sentencing and remand lists do not have due to the large number of cases before the court, but is a luxury granted to problem-solving courts.

In a problem-solving court self-determination may also be promoted by the use of behavioural contracts, positive interaction from the court and actively involving the person in determining the rehabilitation agenda and in the day-to-day management of the case. Thus one of the first tasks for those admitted to a Perth Drug Court program is to determine goals and strategies for the time in drug court and beyond. These goals and strategies may relate to each aspect of life. The court team then supports the participant in implementing their strategies and achieving their goals.

The Nature of Problem-solving Court Programs in Western Australia

Problem-solving court programs in Western Australia range from those with minimal therapeutic jurisprudence aspects to those with more extensive use of therapeutic jurisprudence principles. Like other states, Western Australia has court diversion programs that allow a magistrate to adjourn a case for a person to participate in rehabilitation programs. For example, the Presentence Opportunity Program allows a court to adjourn a case where a person has a relatively minor illicit drug or alcohol problem to enable them to participate in rehabilitation programs. It applies whether there is a plea of guilty or not. There is no judicial case management involved. Here the only therapeutic aspect may be the rehabilitation programs themselves; there may be little interaction between bench and participant or other therapeutic court process. There is the potential for interaction between bench and participant but the nature of any interaction between them will depend to a large degree on the approach taken by the magistrate.

On the other hand, the Perth Drug Court and the Geraldton Alternative Sentencing Regime both use therapeutic jurisprudence principles extensively. They involve judicial case management including ongoing review hearings in which there is encouragement from the bench for the participant, the use of behavioural contracts, the involvement of the participant in the design of the rehabilitation program and ongoing case management and graduation ceremonies. Judicial case management is supported by a team involving prosecution, defence, community corrections officer and the magistrate. In the Perth Drug Court, a person may supervised by the court for between 6 and 12 months depending on the kind of order the court makes. Both programs accept referrals from the District Court.

The Joondalup Family Violence Court lies somewhere in between the Presentence Opportunity Program and the Perth Drug Court and the Geraldton Alternative Sentencing Regime. A person is referred into the program post presentence report and only appears in court again 3 months later for review. If there is satisfactory compliance, the participant completes the program in a further 3 months and appears for sentence; if there has not been compliance, the person is sentenced. A multi-disciplinary team manages the case without involvement of the magistrate. The evaluation of the Joondalup Family Violence Court said that the person is coerced into entering the program rather than through positive engagement and motivation but the exact approach taken may vary according to the individual magistrate.

It is said that problem-solving courts can differ in their focus. For example, the focus of many family violence courts is on the needs and protection of victims. But the focus of drug courts is on promoting the wellbeing of offenders so as to facilitate their rehabilitation. A criticism of drug courts is that they do not place enough weight on the interests of victims.¹² One response to such criticism is that if offenders are rehabilitated, then they are not going to create further victims. Further, drug courts and similar programs can take into account the wishes of victims. The court can receive and consider victim impact statements. Victim offender mediation is now commonly ordered in relation to new matters coming into the Perth Drug Court and has been ordered in connection with the Geraldton Alternative Sentencing Regime.

A common feature to all post-conviction problem-solving court programs is that successful completion is taken into account in mitigation of sentence.

The Effectiveness of the Problem-solving Approach

Research on problem-solving courts generally is positive. US research has found that drug court participants had a recidivism rate 13% lower than comparable defendants not engaged in a drug court program. US research has also found that drug courts save money. Evaluation of drug courts in Australia in terms of their cost-effectiveness and impact on recidivism is in broad terms consistent with the US research.¹³

An evaluation of the Perth Drug Court pilot found there was little difference in effect on recidivism between the drug court and other dispositions.¹⁴ However, it acknowledged the limitations of its evaluation and recommended a further study on recidivism be undertaken. That has not been done. The evaluation also suggested that although the cost of drug court and other dispositions was similar, the drug court produced wider benefits than other dispositions in terms of ensuring offenders undertook treatment, reducing their drug use and promoting their wellbeing.

The evaluation of the Geraldton Alternative Sentencing Regime found that it had a significantly higher participation rate for Indigenous people than the Perth Drug Court

¹² Stewart J, 'Specialist Domestic/Family Violence Courts Within the Australian Context' (Australian Domestic and Family Violence Clearinghouse Issues Paper 10, 2005).

¹³ Lind B, Weatherburn D, Chen S, Shanahan M, Lancsar E, Haas M and Lourenco R, New South Wales Drug Court Evaluation: Cost-Effectiveness (NSW Bureau of Crime Statistics and Research and Centre for Health Economics Research Evaluation, 2002), <http://www.lawlink.nsw.gov.au/bocsar>; Freeman K, New South Wales Drug Court Evaluation: Health, Wellbeing and Participant Satisfaction (NSW Bureau of Crime Statistics and Research, 2002), <http://www.lawlink.nsw.gov.au/bocsar>; Payne J, Final Report on the South Queensland Drug Court (Australian Institute of Criminology, 2005), <http://www.aic.gov.au/publications/tbp/tbp017>; Makkai T and Veraar K, Final Report on the South East Queensland Drug Court (Australian Institute of Criminology, 2003), <http://www.aic.gov.au/publications/tbp/tbp006.html>; Alberta S, Panjari M, Ritter A and Swan A, Health and Wellbeing Study—Victorian Drug Court Final Report (Turning Point Alcohol and Drug Centre, 2004), www.justice.vic.gov.au; King J and Hales J, Victorian Drug Court: Cost-Effectiveness Study: May 2002 to December 2004 (Department of Justice, Victoria, 2004); Corlett E, Skrzypiec G and Hunter N, Offending Profiles of SA Drug Court Pilot Program 'Completers' (Office of Crime Statistics and Research, 2005), http://www.ocsar.sa.gov.au/docs/evaluation_reports/DrugCourt1.pdf.

¹⁴ Evaluation of the Perth Drug Court Pilot: Final Report (Crime Research Centre, 2003), www.justice.wa.gov.au.

and the Joondalup Family Violence Court.¹⁵ The evaluation reported that “a Yamatji person widely known and respected in the Aboriginal community, saw the GASR court processes as a positive experience for Indigenous participants—an empowering and essentially remedial and restorative experience for them.” GASR has a high rate of participation by Aboriginal people as compared to the Perth Drug Court and the Joondalup Family Violence Court. The evaluation reported that participants noted significant improvements in physical and psychological wellbeing, motivation to work or study and motivation to stop offending as well as decreased substance abuse and recidivism. It found the role of the magistrate was important in contributing to these results. It recommended that the department of justice recognise the strengths of the Geraldton Alternative Sentencing Regime model. It also noted the value of the use of the stress reduction and self-development technique Transcendental Meditation[®] by participants and recommended that its use be further investigated. These recommendations have not been implemented and the Geraldton Alternative Sentencing Regime continues to operate with little government support. The evaluation was limited in its scope due to insufficient data being recorded by the computer record system in use by the court and a lack of funding.

US research suggests that ongoing judicial monitoring of offenders—a key component of many problem-solving court programs—is effective in promoting compliance with court orders.¹⁶ One study found that ongoing judicial monitoring along with sanctions and rewards can assist offenders to avoid further arrests even when they are not linked in to drug treatment. Another study found that judicial monitoring had a greater effect on recidivism than treatment programs for perpetrators of domestic violence. Reports from participants in the Geraldton Alternative Sentencing Regime suggest that the ongoing interest from and interaction with the magistrate promoted participant self-esteem and compliance with the regime.

As to domestic violence courts generally, research on effectiveness is less extensive than that for drug courts but some US results include higher rates of pleas of guilty by perpetrators of domestic violence, reduced re-arrest rates by perpetrators and greater co-ordination of services.¹⁷ The evaluation of the Joondalup Family Violence Court generally supported its approach and in particular noted that the associated specialist police unit set up to investigate domestic violence cases had a very high rate of prosecutions arising out of cases investigated.

US research also suggests that judicial officers involved in problem-solving courts have higher levels of job satisfaction than in other courts. One study found higher levels of satisfaction amongst judges applying sitting in a therapeutic jurisprudence court such as a drug court or a unified family court as compared to judges exercising the usual

¹⁵ Cant R, Downie R and Henry D, “Report on the Evaluation of the Geraldton Alternative Sentencing Regime” (Social Systems and Evaluation, 2004).

¹⁶ Key US studies are summarised in Berman and Feinblatt, n 3.

¹⁷ See Berman and Feinblatt, n 3.

criminal or family law jurisdiction.¹⁸ These findings are understandable given that a judge sitting in a problem-solving court has the opportunity of contributing to a more comprehensive resolution of the legal problem and of seeing first hand the improvement in a participant's situation. Judicial officers sitting in a conventional court do not often have such an experience.

Problems Addressed by Problem-solving Court Programs

Problem-solving court programs in Western Australia mainly address one of two areas related to offending: drug abuse or domestic violence. This follows the international practice of the establishment of specialist drug or domestic violence courts. An exception is the Geraldton Alternative Sentencing Regime which uses the same general problem-solving court framework to address a broad range of offending related problems including alcohol, illicit drug and solvent abuse, domestic violence, stress and gambling.¹⁹ The US also is seeing the emergence of 'hybrid' courts where multiple causes of offending are addressed at once. This approach merits further study. Geraldton also has used a problem-solving approach in care and protection applications and restraining order proceedings.

The Chief Magistrate of Western Australia conducts a list for those with Intellectual Disabilities—and he can correct me if I misrepresent what he does. It is generally for those with an intellectual disability who come before the court for less serious offending such as nuisance offences and possession of cannabis but can include less serious indecent assaults and burglaries. The case is referred to the Intellectual Disabilities Diversion Program Coordinator by a variety of people including prosecution, defence lawyer, accused person or their support person.²⁰ The Coordinator assesses the accused's situation and provides recommendations to the court. The aim is to ensure the accused's needs are being comprehensively met. The case can be adjourned for up to 6 months with reviews by the court on a 6-8 week interval. At the review, the court encourages the participant for progress made. Anecdotal evidence suggests this list is effective in helping those with intellectual disabilities to gain greater assistance for their particular needs.

Geographical and Resource Issues

Different programs are available in different parts of Western Australia. The Perth Drug Court and Joondalup Family Violence Court were established as pilot programs. It was contemplated that they should be later rolled out to other parts of the state but this has not happened. The Western Australian government has recently announced that a family violence court is to be established in the metropolitan area and that a program has been planned for Geraldton. How the latter will fit in with Geraldton court's existing

¹⁸ Hora PF and Chase D, 'Judicial Satisfaction When Judging in a Therapeutic Key' (2004) 7 *Contemporary Issues in Law* 8.

¹⁹ King MS, 'Innovation in Court Practice: Using Therapeutic Jurisprudence in a Multi-Jurisdictional Regional Magistrates Court' (2004) 7 *Contemporary Issues in Law* 86.

²⁰ Davis C, 'Magistrates Court of Western Australia Intellectual Disabilities Diversion Program', paper presented by Chief Magistrate Heath to the "Disability and the Law" conference, Melbourne, 13–15 July 2005.

programs targeting family violence has not been explained. At present different programs are available in different locations.

Only the Perth Drug Court and the Geraldton Alternative Sentencing Regime offer programs where all of the key components of a problem-solving, therapeutic jurisprudence based approach are available. The Perth Drug Court will accept people from outside Perth but they need to move to Perth to take part in the program. Some regional courts have the Presentence Opportunity Program and a program called the Supervised Treatment Intervention Program, that lies somewhere in between the POP and Perth Drug Court programs in terms of level of supervision, provision of services and seriousness of offenders assisted. There is a need for problem-solving court services to be more widely available in WA. Part of the problem is the lack of adequate rehabilitation services in some areas. While the therapeutic court processes are important, it is vital that they operate in the context of appropriate rehabilitation services.

There is a need for a review of program and offender rehabilitation needs at each magistrate's court in the state and the establishment of problem-solving court programs at these locations where necessary. Some locations will require greater provision of rehabilitation programs. While a metropolitan area of Perth may justify the establishment of specific problem-solving courts like the Perth Drug Court and the Joondalup Family Violence Court, smaller population sizes, a lack of rehabilitation programs and the demands on court time would not justify their establishment in regional areas. The model of the Geraldton Alternative Sentencing Regime, which can be easily structured into the demands of a regional court list and allows for a multiplicity of problems to be dealt with under the one framework and according to the rehabilitation resources of the area, is the best alternative for regional areas.

The kind of problems addressed by problem-solving court programs should also be expanded. For example, alcohol is a significant contributor to offences of violence and some driving offences. As the Geraldton Alternative Sentencing Regime and the US experience has shown, alcohol problems can be addressed by a problem-solving court approach. Further, only the Joondalup Family Violence Court and the Geraldton Alternative Sentencing Regime offer programs whereby less serious domestic violence offenders undertake rehabilitation programs while under supervision of the court and with the support of a management team. The problem-solving approach to domestic violence also deserves further application.

The Role of Magistrates

The development of therapeutic jurisprudence in courts in WA has had a strong regional component. Here it is the Magistrates' Court that has been largely responsible for the introduction of innovative court programs. Magistrate Wilson was involved in the introduction of an Aboriginal court at Wiluna and Magistrate Sharratt was involved in the introduction of the Yandeyarra Community Court. The Geraldton Magistrates Court was involved, with local justice and community agencies, in the implementation of the Geraldton Alternative Sentencing Regime, and its Roads to Healing and Family Care

Programs. The country magistrates' resolution in 2004 endorsing and adopting therapeutic jurisprudence is evidence of their commitment in this field.²¹

In Western Australia, regional magistrates have control over their lists. In all regional locations there are only one or two magistrates. This gives greater flexibility for innovation than in a large metropolitan court where there may be a diversity of views amongst magistrates as to the processes to be used in court.²² Regional magistrates have worked closely with their local communities to design court processes suitable for local need whilst being consistent with the statutory and common law framework in which they operate.

But one may ask, is this a role of a magistrate or judge? Problem-solving court programs involve an expansion of the judicial role. Instead of simply deciding sentence and moving on to the next case, judicial officers presiding in problem-solving courts are called upon to not only be aware of the underlying problems leading to the particular offending but to work with a team and the offender to try to resolve these problems. There are judicial officers in this country and abroad and other justice system professionals who query whether this is the role of a judicial officer. In response, firstly I would say that the stable door has been long opened and the horse well and truly bolted. Problem-solving courts are on the rise both in this country and elsewhere and the trend is unlikely to be reversed—particularly given the research that supports their cost-effectiveness. Secondly, the judicial role needs to adapt according to social need. Thirdly, traditional judicial values such as independence, impartiality and fairness can be protected with proper safeguards in the context of a problem-solving court.

Future Directions

The Law Reform Commission of WA is about to release a discussion paper on problem-solving courts and judicial case management in WA.²³ I anticipate that many of the issues I have addressed in this paper (and more) will be covered by the Commission in its discussion paper and that appropriate recommendations will be made.

If problem-solving court programs are to be expanded then it is vital that this be done with appropriate resources and support. Not only do proper treatment services need to be available but there must also be an adequate number of magistrates and support staff. There also needs to be proper training and continuing education for judicial officers and lawyers in relation to the duties involved in presiding in or appearing before a problem-solving court, such as working as part of a therapeutic court team, therapeutic court techniques and interaction with community agencies. Training should also provide an understanding of the nature of criminal and other litigation related problems such as

²¹ King MS and Auty K, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69.

²² King MS, 'Applying Therapeutic Jurisprudence in Regional Areas: The Western Australian Experience' 10(2) *E Law—Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>, (2003); Heath S, 'Innovations in Western Australian Magistrates Courts' Paper delivered to the Colloquium of the Judicial Conference of Australia, 3 September 2005, <http://www.jca.asn.au/pubs/coll9.html>.

²³ See: <http://www.lrc.justice.wa.gov.au>.

substance abuse and domestic violence and current treatment and other approaches to addressing these problems. To date the judiciary in each state or territory has been largely responsible for educating itself in that regard. The National Judicial College of Australia should consider implementing such judicial education programs.

Several issues are pressing in relation to the Perth Drug Court. Unlike some other jurisdictions, the Perth Drug Court does not have any specific legislation, instead relying on the provisions of the Sentencing Act and Bail Act in relation to the imposition of presentence orders, the power to adjourn cases and the power to set conditions of bail. It would be preferable to have legislation by which Parliament endorses the court's approach and sets out its powers and duties.

The Perth Drug Court is also in need of further Courts Assessment and Treatment Service (CATS) officers to supervise participants in drug court programs. At present the court has the maximum number of people it can accept given the present number of CATS officers and has resorted to a waiting list in order to deal with the demand. The situation concerning demand significantly exceeding the available places is unlikely to change on present resource levels. There also needs to be a review of the resources allocated to the Perth Drug Court in other areas. For example, due to a limitation of resources it has no longer been possible to have a psychologist present at case management meetings, thus limiting the multi-disciplinary nature of such meetings. Input from a psychologist had previously assisted the meeting in determination of the management of particular cases and also assisted the magistrate in deciding courtroom technique in interacting with the participant.

There also needs to be greater education of the legal profession, the media and the general public as to the nature and benefits of problem-solving courts. There is still a mentality in the community that anything less than immediate imprisonment for a long time is somehow “going soft on crime”. Those involved in problem-solving court programs can attest that it is often less demanding to take a term of imprisonment than to address entrenched offending-related problems such as substance abuse through thrice weekly urinalysis, attending counselling and a CATS officer and appearing weekly before a magistrate to account for their progress. Problem-solving courts are a recent introduction in Australia. Their ability to promote offender responsibility and accountability for rehabilitation and to promote decreased offender recidivism in a cost-effective manner deserves greater promotion.

There is a need for a body that conducts research on ‘what works’ in therapeutic court processes, supports innovative court programs and provides ongoing training to the judiciary, justice system professionals and legal profession in relation to such matters. Of necessity the body should be multi-disciplinary in nature involving legal professionals and professionals from the behavioural sciences. In that regard, I support the suggestion made by Professor Arie Freiberg that there be a body established similar to the impressive Center for Court Innovation in New York.²⁴ Like that centre, the

²⁴ Freiberg A, ‘Innovations in the Court System’ Paper presented to the conference ‘Crime in Australia: International Connections’, Melbourne, 29-30 November 2004, <http://www.aic.gov.au/conferences/2004/freiberg.html>.

mandate of such an institution should not be confined to criminal law. I agree with Professor Freiberg's suggestion that it be a collaboration between government and community agencies and universities. It also should be a national endeavour.

Problem-solving court programs are a valuable addition to the court system. They allow a court to take a more comprehensive approach to the resolution of legal problems. Their success is likely to give rise to a greater use of the problem-solving approach and the need for ongoing judicial and legal education in the approach of therapeutic jurisprudence. Their success also raises issues in relation to the conduct of court proceedings generally. For example, is the factory assembly line style court list the best way to proceed in a magistrate's court? Is disposing of most matters within a couple of minutes or less in order to deal with the high volume of cases the best way to go? If by giving parties to proceedings a more user friendly environment by a court spending more time on a case, giving a chance for the issues to be explored more fully and the parties a better chance of expressing themselves, there can be greater respect for court orders and a better resolution of legal problems, is this not a better way to organise court proceedings?

As with many things to do with courts, it is a largely a matter of resources: having enough judicial officers and support staff for such an approach to be manageable. The attitude of the judiciary towards therapeutic jurisprudence is also a significant factor. Judicial officers and legal academics both in Australia and elsewhere have begun to explore the application of therapeutic jurisprudence to court proceedings outside the problem-solving court environment.²⁵

The Geraldton experience suggests that the problem-solving approach taken in the Geraldton Alternative Sentencing Regime is beneficial for Aboriginal people, providing a healing and caring court environment for them. This accord with the experience of tribal drug courts in North America. There is also evidence that Aboriginal Courts such as the Yandeyarra Court and the Koori Court are effective in reducing offending and in promoting greater community support for the court system. For Aboriginal people with entrenched substance abuse and/or a history of less serious violent offending, there may be some merit in considering an approach that uses key features of both Aboriginal courts and drug courts. Here the court with the active participation of Community Elders would review offenders intensively while they participated in treatment programs with the support of a court team and their community. Behavioural contracts, graduation ceremonies and other tools of a problem-solving court could be used. I note that tribal drug courts in the US also use an approach of reviewing offenders with similar problems while they participate in treatment programs.²⁶ They have adapted the key

²⁵ King MS, 'Applying Therapeutic Jurisprudence From the Bench: Challenges and Opportunities' (2003) 28(4) *Alternative Law Journal* 172; Popovic J, 'Complementing Conventional Law and Changing the Culture of the Judiciary' (2002) 20(2) *Law in Context* 121; Winick and Wexler, n 12; Goldberg, n 8.

²⁶ Healing to Wellness Courts: A Preliminary Overview of Tribal Drug Courts (Bureau of Justice Assistance, 1999), <http://www.tribal-institute.org/download/heal.pdf>.

principles of drug courts to the practice of tribal drug courts in order to create a therapeutic court environment.²⁷

It would also be worthwhile considering the use of other problem-solving court models such as the community court. I note that the Victorian Government is about to establish a community court in Collingwood modelled on similar courts in New York. Such courts provide a “one-stop shop” for resolving local disputes that may have resulted in cases across criminal, civil and family law lines. The US experience suggests community courts are cost effective and have a high degree of community support.²⁸ An evaluation of the Midtown Community Court reported decreased arrest rates for certain offences in the area of the court. It may be that such courts could be a model for magistrates’ courts around the country in the future.²⁹

Complementary and holistic approaches are increasingly being introduced into our health care system. There is growing acknowledgement by the medical profession of the value of some of these approaches.³⁰ There is growing evidence of the effectiveness of some of these practices on wellbeing. There is also an increasing overlap between health and justice as courts such as drug courts exemplify.

Holistic approaches to health deserve consideration for further use in the rehabilitation of offenders. However, they should be evidence-based. For example, there are significant differences between meditation techniques in terms of their impact on wellbeing with some, for example, reducing trait anxiety and others not having that effect.³¹

The Geraldton Alternative Sentencing Regime successfully used the stress reduction and self-development technique Transcendental Meditation® in offender rehabilitation. It was used because of growing evidence linking stress to substance abuse and offending, the high incidence of stress in Aboriginal communities, evidence of the traditional use of meditation in Aboriginal culture and research finding that the Transcendental Meditation technique reverses neurophysiological abnormalities associated with aggression, significantly reduces substance abuse and offender recidivism and promotes improved health.³² It was found to be beneficial for both

²⁷ Tribal Healing to Wellness Courts: The Key Components (Bureau of Justice Assistance, 2003). http://www.tribal-institute.org/lists/drug_court.htm.

²⁸ Kralstein D, ‘Community Court Research: A Literature Review’ (Center for Court Innovation, 2005), <http://www.courtinnovation.org/uploads/documents/cc%20research.pdf>.

²⁹ King MS and Wilson S, ‘Country Magistrates’ Resolution on Therapeutic Jurisprudence’ (2005) 32(2) Brief 23.

³⁰ Cohen MM, Penman S, Pirota M and Costa CD, ‘The Integration of Complementary Therapies in Australian General Practice: Results of a National Survey’ (2005) 11(6) *Journal of Alternative and Complementary Medicine* 995.

³¹ Eppley K, Abrams A and Shear J ‘Differential Effects of Relaxation Techniques on Trait Anxiety: A Meta-Analysis’ (1989) 45 *Journal of Clinical Psychiatry* 957.

³² King MS (2000) ‘Deterrence, Rehabilitation and Human Nature: The Need for a Holistic Approach to Offenders’ 24 *Criminal Law Journal* 335; National Institute on Drug Abuse, ‘Stress and Drug Abuse’, <http://www.nida.nih.gov/DrugPages/Stress.html>; National Aboriginal and Torres Strait Islander Social Survey 2002 (Australian Bureau of Statistics, 2004); Zubrick S, Silburn S, Lawrence D, Mitrou F, Dalby R, Blair E, Griffin J, Milroy H, Cox A and Li J The Western Australian Aboriginal Child Health Survey: The Social and Emotional Wellbeing of Aboriginal Children and Young People (Curtin University of Technology and Telethon Institute for

Aboriginal and non-Aboriginal participants decreasing stress and improving wellbeing. The Geraldton experience and the research on the Transcendental Meditation technique suggest it would be worthwhile using in other justice system contexts. The Perth Drug Court would be an appropriate venue for further trials in relation to the use of the technique.

The trend in Australia and internationally is for the development of problem-solving courts. The development of best practice of such courts is likely to be more and more an international and multi-disciplinary endeavour involving the judiciary and legal profession along with other professionals associated with the justice system and professionals from the behavioural sciences.

The emergence of problem-solving courts is also part of a wider trend in the law including therapeutic jurisprudence, restorative justice and holistic approaches to law and legal practice. The trend is towards a more humane, comprehensive, less adversarial, collaborative, conciliatory, participatory and multi-disciplinary approach to the law.³³ This trend is gaining momentum. Its effect is not confined to the criminal law; it is likely to affect all areas of the law.

Child Health Research, 2005), http://www.ichr.uwa.edu.au/waachs/publications/volume_two.lasso; Elkin A, *Aboriginal Men of High Degree* (University of Queensland Press, 1977); Hume L, *Ancestral Power: The Dreaming, Consciousness and Aboriginal Australians* (Melbourne University Press, 2002); Alexander C, Walton K, Orme-Johnson D, Goodman R and Pallone N, *Transcendental Meditation in Criminal Rehabilitation and Crime Prevention* (Haworth Press, 2003).

³³ Daicoff, S 'The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement' in Stolle DP, Wexler DB and Winick BJ (eds), *Practicing Therapeutic Jurisprudence* (Carolina Academic Press, 2000) p 465; King, n 7.