Therapeutic Jurisprudence

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Index

1. Introduction

There are two fundamental difficulties with the way in which sentencing occurs in New South Wales. First, the purpose or purposes of sentencing are confused and conflicting. Second, there is little evidence to support the manner in which identified sentencing purposes are to be served.

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Parliament introduced section 3A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("purposes of sentencing")[1] with the stated aim of guiding decisions about sentence, and promoting consistency, transparency, and public understanding.[2]The sentencing court is required to give weight to each of these purposes, and none of them can be considered in isolation when determining the appropriate sentence in a particular case. However, as the High Court stated in *Veen v The Queen (No 2)* (1988):

> "The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."[3]
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Or, as Wells J put it in *R v Kear* (1978) 2 CLJ 42, "[t]he purposes jostle one another for paramountcy."[4]

When competing sentencing purposes conflict (for example specific deterrence and rehabilitation) and no purpose is given priority, the prospect that any purpose will be achieved is diminished.

A more fundamental problem is the absence of evidence to support the assumptions driving the way in which courts apply the s 3A sentencing purposes. For example, it is assumed that a longer sentence of imprisonment equates to heavier punishment. But what if offenders experience the greatest suffering when they are apprehended and publicly denounced?

In relation to specific (personal) deterrence, there is a large body of evidence to the effect that heavier penalties do not reduce the risk of re-offending. For example, a 2007 Bureau of Crime Statistics and Research (BOCSAR)[5] study on the deterrent effect of heavier penalties (both fines and disqualification) on recidivism for driving offences identified 70,000 NSW persons who received a court-imposed fine for a driving offence. Researchers then followed each offender for a period of five years to see whether they committed another driving offence. After controlling for a wide range of other factors likely to influence re-offending, the Bureau found no relationship between the magnitude of the penalty imposed and the likelihood of a further driving offence. Similarly, a 2009 BOCSAR[6] study on the specific deterrent effect of custodial penalties on juvenile re-offending found no significant difference between juveniles given a custodial penalty and those given a non-custodial penalty.

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[1] Section 3A The purposes for which a court may impose a sentence on an offender are as follows:
(a) to ensure that the offender is adequately punished for the offence,
(b) to prevent crime by deterring the offender and other persons from committing similar offences,
(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and the community.

[2] NSW, *Parliamentary Debates,* Legislative Assembly, 23 October 2003, 5813 (Bob Debus).

[3] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [476].

[4] Judicial Commission of NSW, *Sentencing Benchbook: NSW,* (at Release 17) [2-210] Quoted with approval in *R v Patison* (2003) 143 A Crim R 118 at [69].

[5] S Moffatt & S Poynton 'The deterrent effect of higher fines on recidivism: Driving Offences' (2007) 106 *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research, Sydney).

[6] D Weatherburn, S Vignaendra & A McGrath 'The specific deterrent effect of custodial penalties on juvenile re-offending' (2009) 132 *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research, Sydney).

If sentencing is to be credible, sentencing purposes need to be consistent or, at least, prioritized. The means of achieving those purposes need to be evidence-based.

In the 21st century, the primary sentencing purposes should be rehabilitation and the protection of the community through the reduction of future criminal activity. Levels of recidivism can be monitored to determine whether particular rehabilitation processes are effectively reducing criminal activity. It may well be that other sentencing purposes (personal and general deterrence, punishment, denunciation, the achievement of accountability and recognition of the harm done to the complainant and the community) can be achieved through the criminal justice process and do not need to be reflected in the sentencing outcome.

The purposes of rehabilitation and reduction of future criminal activity are paramount in relation to persons sentenced under section 5 of the *Drug Court Act* 1999[7] and Clause 35 of the *Criminal Procedure Regulation* 2010.[8]

Jurisdictions that prioritise the purposes of rehabilitation and reduction of recidivism provide a framework within which "therapeutic jurisprudence" can be applied to enhance the prospects of offender rehabilitation.

This paper is primarily concerned with the application of therapeutic jurisprudence within the criminal justice context. However, the tenets of therapeutic jurisprudence also apply to most areas of civil litigation.

2. The emergence of therapeutic jurisprudence and the "drug court movement"

David Wexler and Bruce Winick, United States law professors, were responsible for coining the term "therapeutic jurisprudence "[9]. Initially, they used the term in the context of mental health law, observing that mental health law often produced anti-therapeutic consequences. Defining "therapeutic jurisprudence" as the study of the therapeutic and anti-therapeutic consequences of the legal process, Wexler and Winick postulated that therapeutic jurisprudence would have application in other legal fields, including criminal law and family law. [10]

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[7] Section 5
(1) The objects of this Act are:
(a) to reduce the drug dependency of eligible persons and eligible convicted offenders, and
(b) to promote the re-integration of such drug dependent persons into the community, and
(c) to reduce the need for such drug dependent persons to resort to criminal activity to support their drug dependencies.

[8] Clause 35 Objectives of the program
The objectives of the program are as follows:
(a) to include members of Aboriginal communities in the sentencing process,
(b) to increase the confidence of Aboriginal communities in the sentencing process,
(c) to reduce barriers between Aboriginal communities and the courts,
(d) to provide more appropriate sentencing options for Aboriginal offenders,
(e) to provide effective support to victims of offences by Aboriginal offenders,
(f) to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process,
(g) to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong,
to reduce recidivism in Aboriginal communities.

[9] David B. Wexler 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) 68 *Revista Juridica Universidad de Puerto Rico Revista Juridica Universidad* 691, 692.

[10] David B. Wexler 'Therapeutic Jurisprudence: An Overview' (Public Lecture delivered at The Thomas Cooley Law Review Disabilities Law Symposium, Thomas M. Cooley Law School, 29 October 1999) <http://www.law.arizona.edu/depts/upr-intj-o.html>.

The emergence of drug courts was a separate but parallel development[11]. In 1971, the US declared a "War on Drugs," increasing the number of drug related arrests and overwhelming the courts with drug cases. Penalties were increased and rates of incarceration soared. However, the high rate of recidivism caused scepticism about whether imprisonment was the appropriate response to drug offending.[12]

In 1989, in a judge-initiated response to the "revolving-door" syndrome[13], the first US drug court was established in Miami-Dade County, Florida. There was little theoretical underpinning.[14] The court sought to focus on addressing the root cause of drug-related crime (substance abuse) rather than prosecutorial outcomes.[15] Such courts multiplied so that by 2009 there were reportedly 1600 drug courts operating in 50 US states.[16] A mantra of the "movement" was: "Insanity is doing the same thing over and over and expecting a different result".[17] Figures as at February 2011, indicated there were more than 2,560 drug courts in the United States and an additional 1,220 problem-solving courts addressing other issues.[18]

Rather than promoting the rehabilitation of drug addicts by consciously applying therapeutic jurisprudence or investigating the psychology of behavioural change, the US courts responded to the cycle of drug addiction/crime/imprisonment in a common sense or intuitive way. [19] They took the "carrot and stick" approach to achieving behavioural change. Generally, they used an abstinence-based model rather than a harm minimisation model.[20] Within drug courts, the theory of therapeutic jurisprudence evolved from practice, rather than vice versa.

In 1998, the first Australian drug court was established at Parramatta, New South Wales. Unlike most United States drug courts, the NSW Drug Court was the subject of legislation and special funding that ensured that the Court had adequate powers to deal with offenders in the most appropriate way.

In 1999, the United Nations Office on Drugs and Crime convened an expert working group, which formulated 12 key principles for drug court programs:

1. Integrated justice/health care system processing of common casework.
2. Non-adversarial approach to case problem-solving by the judge, prosecutor and defence.

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[11] Michael King, 'Therapeutic Jurisprudence' in Michael King, Arie Freiberg, Becky Batagol and Ross Hyams (eds), Non-Adversarial Justice (The Federation Press, 2009)
[12] Marian Shanahan, Emily Lancsar, Marion Haas, Bronwyn Lind, Don Weatherburn, Shuling Chen 'Cost-effectiveness analysis of the NSW Adult Drug Court Program' (2004) 28(1) *Evaluation Review* 3, 3. See also: Judge Kevin S. Burke 'Just What Made Drug Courts Successful?' (2010) 36(1) *New England Journal on Criminal and Civil Confinement* 39, 39-40
[13] "Revolving door syndrome": whereby substance abuse leads to crime, crime leads to serving "time", and on release from prison the offender continues on the cycle of drugs, crime and "doing time".
[14] Hon. Peggy Fulton Hora 'A Dozen Years Of Drug Treatment Courts: Uncovering Our Theoretical Foundation And The Construction Of A Mainstream Paradigm' (2002) 37 *Substance Use & Misuse* 12 & 13 1469, 1470
[15] Hon. Peggy Fulton Hora 'Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits' (2011) 2(1) *Chapman Journal of Criminal Justice* 7,10.
[16] Burke, above n 12, 40.
[17] Accredited to Albert Einstein
[18] Hora, above n 15, 11.
[19] David Wexler, 'Foreward' in Michael King, Arie Freiberg, Becky Batagol and Ross Hyams (eds), Non-Adversarial Justice (The Federation Press, 2009) 56.
[20] This may reflect a cultural bias, a desire to avoid an impression that offenders were being "rewarded" with legal drugs and to reinforce the impression that offenders were "doing it tough", and the unavailability of low-cost pharmacological interventions.

3. Prompt and objective identification and program placement of eligible offenders.
4. Access by participants to a broad continuum of treatment and rehabilitation services.
5. Objective monitoring of participants' compliance through substance abuse testing.
6. Coordinated strategic response to program compliance and non-compliance by all disciplines involved (police, prosecution, probation, treatment, social workers, court).
7. Ongoing direct judicial interaction with participants.
8. Program performance monitoring and evaluation (of both process and impact).
9. Ongoing inter-disciplinary education of the entire drug court team.
10. Partnerships for program effectiveness and local community support
11. Ongoing case management including social re-integration support.
12. Adjustable program content for groups with special needs (e.g., mental disorders).[21]

Today, New South Wales mainstream criminal courts find themselves in the same position as that in which the US courts found themselves during the "War on Drugs. An analysis of NSW sentencing outcomes over the past 15 years shows that NSW criminal courts have generally become more harsh, both in terms of the use of imprisonment and in terms of the length of sentence imposed.[22]Nevertheless, the majority of NSW residents (66%) consider sentences to be too lenient.[23] Studies considering the relationship between public knowledge and perceptions of leniency consistently suggest that high levels of public dissatisfaction stem from a lack of knowledge and misperceptions about penalties available and trends.[24] Therefore, if there is to be public support for a change of sentencing emphasis within mainstream courts to prioritise rehabilitation and reduction of criminal activity, there will need to be a campaign of public education.

3. The key components of therapeutic jurisprudence

Therapeutic jurisprudence identifies “social forces” within the legal system as:

> “(1) substantive law- whether the law actively promotes therapeutic objectives by balancing community rights against individual rights;
> (2) legal procedures- whether the legal system maximizes therapeutic effects and minimizes anti-therapeutic consequences; and
> (3) legal roles- whether the behaviours of legal actors are therapeutic or anti-therapeutic”[25]

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[21] United Nations Office on Drugs and Crime, *UNODC and Drug Treatment Courts ("Drug Courts")* <http://www.unodc.org/unodc/en/legal-tools/Drug-Treatment-Courts.html>.
[22] Lulham, R & Fitzgerald, J ‘Trends in bail and sentencing outcomes in New South Wales Criminal Courts: 1993–2007’ (2008) 124 Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research, Sydney, 6
[23] A Butler & K McFarlane, ‘Public Confidence in the NSW Criminal Justice System,’ Monograph 2, May 2009) NSW Sentencing Council, 5
[24] Ibid, 6-7.
[25] Astrid Birgden ‘A compulsory drug treatment program for offenders in Australia: Therapeutic jurisprudence implications’ (2008) 30 *Thomas Jefferson Law Review* 367, II

Astrid Birgden argues that, within the criminal justice system, there are five key components to therapeutic jurisprudence, which can be summarised as follows[26]:

- Therapeutic jurisprudence recognises that legal process will have an impact in any event, and that the impact can be harnessed to achieve a positive outcome: behavioural improvement
- It capitalises on the moment of crisis in the offender's life (the offender "at the crossroads")
- It takes a multidisciplinary approach to behavioural change
- It recognizes that a therapeutic approach must occur within the constraints of the legal system
- It accepts the legal system's value judgments about desirable behaviour.

4. Concepts related to therapeutic jurisprudence

Vectors are practical carriers or processes for applying theories. Concepts such as procedural justice, restorative justice and problem solving (solution-focused) courts have been described as vectors of therapeutic jurisprudence[27].

Winick and Wexler have stated:

> "There is a clear symbiotic relationship between problem-solving courts [specifically drug courts] and therapeutic jurisprudence. Simply put, problem-solving courts can serve as laboratories for therapeutic jurisprudence, insofar as therapeutic jurisprudence is especially interested in *which* legal arrangements lead to successful therapeutic outcomes and *why*."[28]

Problem-solving (solution-focused) courts

Drug courts and other courts that focus on rehabilitation and long-term behaviour change are known as "problem-solving courts" or "solution focused courts". The procedures in such courts are less adversarial than those in mainstream courts. They utilise therapeutic processes and a multidisciplinary approach to achieve behavioural change. For example, drug courts seek to address the underlying issue of drug addiction, thereby both improving the offender's lifestyle and reducing the risk of future criminal behaviour.

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[26] Astrid Birgden 'Therapeutic Jurisprudence and Responsivity: Finding the will and the way in offender rehabilitation' (2004) 10(3) *Psychology, Crime & La*w 283, 285.

[27] Wexler, above n 22. More broadly, "therapeutic jurisprudence and drug courts have been described as a vector of the comprehensive law movement" in Hon. Peggy Fulton Hora, above n 14, 12; David B. Wexler, Arizona Legal Studies, *Therapeutic Jurisprudence, Criminal Law Practice, and Relationship-Centred Lawyering*, Discussion Paper No 9-29 (2011) 93 [95].

[28] B. Winick and D. Wexler 'Therapeutic jurisprudence as an underlying framework' in B. Winick and D. Wexler (eds), Judging in a Therapeutic Key: therapeutic jurisprudence and the courts (Carolina Academic Press, 2003) 105-6.

Restorative justice

Restorative justice involves mediated encounters between victims and offenders. Crime is seen as an offence against the victim/community rather than against the state. The objects of restorative justice extend beyond behavioural change. Offenders are encouraged to take responsibility for their actions, eg by apologising to the victim and undertaking community service. Victims are given a voice: there is a dialogue between offender and victim that may extend beyond the immediate offence.

Circle sentencing employs this approach. It aims to achieve healing for the victim and the offender, accountability and ongoing monitoring by the community. The NSW model for circle sentencing Aboriginal offenders was adapted from a 1992 Canadian model. One stated object is to reduce the likelihood of future offending behaviour.[29] There are four components to the program: the court makes a participation order and the offender enters into an agreement to participate in the program; a circle sentencing group is convened, including a project officer, Aboriginal elders and a magistrate. The group develops a rehabilitation plan and recommends an appropriate sentence. [30]

Procedural justice

"Procedural justice" uses the psychology of conflict management to understand and manage the way in which people respond to decisions. The research indicates that acceptance of decisions is strongly influenced by perceptions about the fairness or "justice" of the decision making process.[31] Applied to the legal setting, in theory, if the legal decision making process is viewed as fair, the decision will be seen as

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[29] *Criminal Procedure Act* 1986 (NSW) s 345
Objects
(1) The objects of this Part are:
(a) to provide a framework for the recognition and operation of programs of certain alternative measures for dealing with persons who have committed an offence or are alleged to have committed an offence, and
(b) to ensure that such programs apply fairly to all persons who are eligible to participate in them, and that such programs are properly managed and administered, and
(c) to reduce the likelihood of future offending behaviour by facilitating participation in such programs.

Criminal Procedure Regulation 2010 (NSW) cl 28:
Program declared to be intervention program
For the purposes of section 347 (1) of the Act, the program of measures described in this Part for dealing with offenders is declared to be an intervention program for the purposes of Part 4 of Chapter 7 of the Act.

[30] *Criminal Procedure Regulation* 2010 (NSW) cl 37:
Measures that constitute the circle sentencing program
The program is constituted by the following measures:
(a) Offender enters into agreement to participate in the program
A participating court refers an offender for participation in a circle sentencing intervention program by making a program participation order and the offender enters into an agreement to participate in the program.
(b) Constitution of circle sentencing group
The Project Officer for the declared place, in consultation with the presiding Magistrate, convenes a circle sentencing group for the referred offender.
(c) Circle sentencing group determines intervention plan for offender and recommends sentence
The circle sentencing group meets:
(i) to determine an appropriate plan (if any) for the treatment or rehabilitation of the referred offender, and
(ii) to recommend an appropriate sentence for the offender.
(d) Offender to comply with intervention plan
The offender complies with the requirements of an intervention plan (if any) determined by the circle sentencing group.
Note. Section 346 (1) of the Act defines *intervention plan* to mean a plan, agreement or arrangement arising out of the participation of an offender or an accused person in an intervention program.

[31] Tom Tyler, "Introduction" in Tom Tyler (ed), Procedural Justice: Volume 2 (Ashgate, 2005)

legitimate, and judicial decisions will be effective both in the short and long term and, in turn, decrease recidivism.

The essential elements of procedural fairness[32] are:

- Voice: the opportunity to tell one's story to the decision maker, who listens carefully
- Neutrality
- Respect
- A trustworthy, benevolent decision maker who is impartial and sincere, and who acts out of concern for the community and the well being of the parties involved[33]

In other words, people may be satisfied with any outcome as long as they feel that they had a voice, and were listened to and respected by a fair and neutral decision-maker who was concerned for their well - being.

Although different demographics have diverging views about what constitutes a fair outcome to rule breaking, they have similar views about the fairness of procedure. The essential elements of "procedural justice" apply across ethnic groups, income and educational levels, ideologies, genders and age groups.[34] This indicates the broader possibilities of procedural fairness as a mechanism for diverse communities to "find generally acceptable solutions to social problems."[35]

Results from the Australian Reintegrative Shaming Experiment (RISE) compared the effects of conventional court processes and diversionary conferencing for adult drink driving on recidivism and offender attitudes towards the legitimacy of the law. The experiment found that recidivism was strongly associated with views about the legitimacy of the law. The researchers classified the participants according to the degree to which they viewed the law as legitimate. The 'very high legitimacy' group had a recidivism rate of 3.3% while the 'very low legitimacy group' had a 15.6% rate of recidivism.[36]

Within the area of feminist jurisprudence (as opposed to therapeutic jurisprudence) it has been argued that feminist judges should adopt an approach that is similar to "procedural justice": understanding the context in which litigants operate, and according respect, and listening to litigants in a caring way.[37] It has been argued that fairness and impartiality do not require disinterest and disengagement.[38]

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[32] Burke, above n 12, 53-54.
[33] Tyler, above n 30, xvii
[34] Tyler, above n 30, xix
[35] Ibid.
[36] Tom R Tyler, Lawrence Sherman, Heather Strang, Geoffrey C Barnes, Daniel Woods, Reintegrative Shaming, 'Procedural Justice and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment,' (2007) 41(3) *Law & Society Review* 553.
[37] Rosemary Hunter, 'Can feminist judges make a difference?'(2008) 15(1-2) International Journal of the Legal Profession 7,12.
[38] Ibid, 16.

5. Therapeutic jurisprudence in the NSW Drug Court

The legislative framework provided by the *Drug Court Act* 1998 enables therapeutic jurisprudence to be applied at all three levels identified by Wexler: substantive law, legal procedures (where "procedural justice" is employed) and legal roles.

- There is no confusion of sentencing objectives: the legislature has mandated the objectives of behavioural change and reduced recidivism.
- In order to reinforce behavioural change, the Court may reward or sanction a participant ("carrot and stick")[39]
- The participant has a "voice" and speaks from "centre stage"
- The emphasis is on the participant taking responsibility: within the courtroom, the participant is active rather than passive.
- The participant is part of a group and may learn from the successes (and failures) of other members of the group, who may serve as role model.
- The judge's role is, in part, to be a team leader, working with an interdisciplinary team that includes health-care professionals. While the judge makes the decision, the decision-making process is collaborative.
- The judge has direct and ongoing communication with the participant (who is no longer "the offender").
- The judge requires an understanding of the psychological science behind behavioural change, and ways of communicating so as to promote behavioural change.
- The courtroom structure reflects the courtroom process: all team members sit at the bar table; the participant comes forward in front of the bar table to speak to the judge; other participants are present and observing.

6. Does therapeutic jurisprudence reduce recidivism?

Therapeutic jurisprudence is a theoretically attractive way of improving offender behaviour and reducing recidivism. But does the evidence support the theory?

The NSW Drug Court

Between 1999 and 2002, a large-scale randomised comparison of offenders was carried out by the BOSCAR. A group of 309 participants in the NSW Drug Court Program (i.e. treated subjects) was compared with a control group of 191 offenders who had been deemed eligible for the Program but sanctioned in the usual way (generally, by imprisonment). The object of the comparison was to assess both the effectiveness and cost-effectiveness of the Drug Court in reducing recidivism.

Allowing for the time when imprisonment incapacitated the untreated subjects, treated subjects were found to take significantly longer than the control group to their first shop stealing and drug offences. Treated subjects outperformed the control group in having lower rates of offending for most categories of offence, but the differences were only significant for drug offences.

[39] *Drug Court Act* 1998 s 16 Conditions of program

The study found little difference between the Drug Court and conventional sanctions in terms of their cost-effectiveness in increasing the time to the first offence. There was a larger difference between the alternatives in terms of the cost-effectiveness of reducing the rate of offending.

The report recommended that the cost-effectiveness of the Drug Court could be improved by measures such as improved identification of offenders who would be most likely to benefit from the program and earlier termination of Program participants who were not performing. Changes were implemented.

In 2008, the BOCSAR re-evaluated the effectiveness of the Drug Court in reducing recidivism compared with conventional sanctions. Controlling for other factors, participants who completed the Program were 17% less likely to be reconvicted for any offence, 30% less likely to be reconvicted for a violent offence and 38% less likely to be reconvicted for a drug offence at any point during the follow-up period.

Circle Sentencing

In 2002, a pilot circle sentencing project for Aboriginal offenders commenced in Nowra. After 12 months, it was proclaimed a "success" by the NSW Judicial Commission: helping to "break the cycle of recidivism"[40]. By 2008, the Program had spread to 7 other centres across NSW[41]. It was not until 2006 that the NSW Attorney-General commissioned a comprehensive review by the BOCSAR [42]. The BOSCAR was tasked with ascertaining the rate of recidivism[43]. The rate of re-offending had decreased but so had the re offending rate for the control group that had been sentenced in a traditional court setting. Further, "participation in circle sentencing was not a significant predictor of time to re-offend." There was no statistically significant reduction in the seriousness of further offending.[44]

The BOCSAR Director, Dr Weatherburn, argued that the Program should be "strengthened rather than abandoned"[45]. He pointed out that, while the involvement of Aboriginal elders encouraged offenders to reflect on their misconduct, it was also necessary that resources be allocated to enable offenders to address the factors that caused them to become involved in crime in the first place, particularly drug and alcohol abuse.

As has been pointed out by White, knowing what works is not enough. For evidence-based programs to be effective, they must be properly funded and implemented. Even with highly experienced staff, it is difficult to precisely execute a program.

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[40] Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (2008) 115 *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research, Sydney) 1, 2. However, the BOSCAR reveals that the claim of "success" was based on information available in 4 case studies that had follow up periods ranging between 3-6 months. Out of the four, only 1 had re-offended,[40] making the claim, as Jacqueline Fitzgerald describes, somewhat premature.

[41] Armidale, Bourke, Brewarrina, Dubbo, Kempsey, Lismore, Mt Druitt.

[42] Fitzgerald, above n 40, 3." 68 circle sentencing participants and an equivalent 68 from the control group were analysed.

[43] Ibid, 2. Recidivism was defined as "re-conviction in court for an offence committed after the circle sentence (i.e, a proven offence). Time to reoffend is always based on the offence date of the individual's first subsequent proven offence, not the date that the matter was finalised in court."

[44] Ibid, 6.

[45] Bureau of Crime Statistics and Research, 'Circle Sentencing Evaluation' (Media Release, 16 July 2008) <http://www.ipc.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf /pages/bocsar_mr_cjb115>.

Therefore, programs require constant review and oversight to ensure that they stay on track.[46]

7. Anti-therapeutic aspects of the mainstream legal system

In Australia, the mainstream legal system has anti-therapeutic aspects at the levels of substantive law, procedures and lawyer behaviour. For example:

- Behavioural change is achieved through coercion: prison and other forms of punishment
- It employs an adversarial process that is inherently combative and alienating.
- Courtroom architecture and layout reflects a paternalistic and adversarial approach to decision-making: the grandeur and authority of the court building, the elevated bench, the accused standing alone in the dock, the witness/complainant standing alone in the witness box (or in an isolated and musty former storeroom converted to a CCTV facility).
- It focuses on fairness in terms of outcomes, rather than fairness in terms of the process.
- While the "right to be heard" is a key concept (essential to ensuring a fair outcome), there is no real concept of a litigants/witnesses having a "voice" or of respect for litigants/witnesses. The system stifles the witnesses "voice", i.e. discourages the witness from telling his/her story. The litigant speaks only through the filter of his/her advocate. There are exceptions: the victim impact statement.
- The process may psychologically undermine litigants/witnesses through suggesting disrespect (eg the witness is bullied into answering only the precise question that has been asked).

These aspects of substantive law, procedure and the associated behaviour of legal participants (judges, lawyers, court staff) can have unintended negative impacts for litigants/witnesses and present obstacles to behavioural change.

It is difficult to change substantive law or murder the holy cows of legal procedure. However, by appreciating the impact of the legal process and lawyer behaviour, judges and lawyers operating within mainstream courts can modify procedures and behaviour so as to maximise positive impacts (therapeutic consequences) and minimise negative impacts (anti-therapeutic consequences) on litigants/witnesses.[47] This requires common sense, some appreciation of the psychology of behaviour and an ability to communicate and behave in appropriate ways.

8. Strategies for "solution-focused" judges working in mainstream courts

[46] R White, 'Community corrections and restorative justice' (2004) 16(1) Current Issues In criminal Justice 42, 42.
[47] D Wexler, above n 27.

In 2007, a survey[48] of more than a thousand US trial court judges conducted by the Centre for Court Innovation and the Californian Administrative Office of the Courts' Centre for Families, Children and the Courts found that **"**most trial judges held attitudes consistent with the key principles of problem-solving justice" (Key Finding 1) and many regularly engaged in practices commonly employed in specialised problem-solving courts[49]. Anecdotally, those observations apply to NSW trial court judges.

If mainstream judges wish to adopt a "solution focus" and to apply therapeutic jurisprudence techniques within their courts, it is important that they understand the psychology of behavioural change. For example, motivational interviewing techniques can be applied at different stages of change readiness: the pre-contemplation stage (to elicit problem recognition), the contemplation stage (to strengthen confidence in ability to change), the preparation stage (to strengthen intention to change and identify barriers to success), the action stage (to assist with practical steps towards change and promote optimism about change) and the maintenance stage (to maintain optimism about change and monitor a good life plan).[50]

In 2006, the US National Judicial College (NJC) produced a "bench card" entitled "Effective Outcome Judging"[51] it was designed to assist judges who wish to take a solution-focused approach. In summary, the document advised that judges:

1. Establish an "outcome focus" and convey that focus to lawyers, court staff, litigants and potential service providers[52].
2. Converse directly with litigants for the purposes of identifying core issues such as mental illness and drug abuse, and communicating goals and expectations.
3. Seek professional assistance from health-care providers and others.
4. Create a "roadmap" (treatment plan) in consultation with the litigant and his/her lawyer

The following strategies may be applied within mainstream courts.

- *Contract with the offender or other litigant*: "if you do X, then I will do Y". A remand under section 11 of the *Crimes (Sentencing Procedure) Act* 1999 may take the form of a contract. The conditions of the remand may seek to ensure that the offender both avoids risk situations (the alcoholic may be forbidden to enter licensed premises) and undertakes treatment.

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[48] Donald J. Farole, Jr., Michael Rempel, Francine Byrne and Yueh-Wen Chang, 'Problem-Solving and the American Bench A National Survey of Trial Court Judges' (Center for Court Innovation, California Administrative Office of the Courts February 2008) <http://www.courtinnovation.org/sites/default/files/natl_judges_survey.pdf>.
[49] Ibid, iii-iv.
[50] Birgden, above n 25, 288.
[51] The National Judicial College, 'Effective Outcome Judging' (2006) <http://www.judges.org/pdf/bench_card.pdf>.
[52] The National Judicial College, 'Effective Judging for Busy Judges,' (2006) <http://www.judges.org/pdf/effectivejudging_book.pdf> The bench note accompanies the bench book. At 7: "Most judges operate their courtrooms with a "process" focus. They deal with issues presented, apply all applicable rules and statutes, and proactively move cases forward based on the premise that "justice delayed is justice denied." Problem-solving judges combine the "process" focus with an "outcome" focus. They focus on resolving the issues that brought the parties to court as well as applying all applicable rules and statutes…Combining a process focus with an outcome focus may require a cultural change in the court."

- *Involve the offender in formulating a treatment plan* so that he/she feels committed to it.

- *Ensure accountability by requiring that the offender report back to the court* for treatment updates.

- *Respect for the witness/ victim*: Victims may be re-traumatised by the process of giving evidence. They may benefit from knowing that the offender is remorseful and sincerely apologetic. Whether or not they have submitted a victim impact statement, victims may benefit when they are treated respectfully and the court acknowledges the injury that they have suffered.[53]

- *Address the litigant/offender directly:* Particularly when passing the sentence or giving judgement in a civil matter.

"A good judge understands that you can both care and be neutral. A good judge understands that you can be neutral and engaged."[54]

9. Strategies for solution-focused lawyers working in mainstream courts

Is the role of the lawyer confined to achieving the best outcome in the case at hand, or should the lawyer take more responsibility for general client well - being?

The following strategies may be useful to lawyers who wish to take more responsibility for their clients' general well-being.

- *Encourage an early plea of guilty*: The entry of a plea of guilty may enable an offender to accept responsibility for criminal conduct and address underlying causes

- *Facilitate the development of a treatment plant*: There is a role for the legal representative in developing a treatment plan for presentation to the court; ensuring that the plan is client-initiated rather than judge-imposed.

- *Encourage the client to apologise*: Research worldwide supports the view that a sizeable amount of litigation is avoided by "a timely, genuine and comprehensive apology." [55] The NSW Ombudsman has cited the findings in an American study exploring the interpretations of apologies by recipients and the impact of those apologies on the willingness of recipients to accept a settlement offer in a hypothetical dispute, suggest that recipients view a full apology "as more sufficient than either a partial apology or no apology." [56] The

[53] Ulrich Orth, 'The effects of legal involvement on crime victims' psychological adjustment' in Margit E. Oswald, Steffen Bieneck and Jorg Hupfeld-Heinemann (eds.) *Social Psychology of Punishment of Crime* (John Wiley & Sons Ltd, UK, 2009).
[54] Burke, above n 12, 55.
[55] Chris Wheeler, Deputy Ombudsman, 'The Power of Sorry' (Speech delivered to the Judicial Commission of NSW, Ngara Yara Program Twilight Seminar, 16 February 2011) 8 <http://www.ombo.nsw.gov.au/publication/PDF/speeches /SP_ PowerSorry_JudicialCommissionNSW-16Feb11.pdf>
[56] NSW Ombudsman, 'Apologies: A practical guide,' (2nd ed, March 2009), 9. The hypothetical scenario was a personal injury dispute as a result of a pedestrian- bicycle accident. Where no apologies were received, 52% of respondents were inclined to accept while 43% were inclined to reject the offer. 35% of the recipients were inclined to accept a partial apology while 25%

Ombudsman of British Columbia refers to similar research to demonstrate that "an apology from a medical practitioner would have stopped 30 percent of negligence claims going to court."[57]

The most effective apologies incorporate six aspects[58]:

- Recognition (recognition of wrong/acknowledgement of harm)
- Responsibility (acceptance of responsibility)
- Reasons (explanation of the cause of the problem or a promise to investigate it)
- Regret (sincere apology)
- Redress (action to be taken to address the problem or provide compensation)
- Release -- optional (request for forgiveness)

In NSW, an apology is not admissible in civil proceedings as evidence of fault.[59]

10. Conclusion

There is evidence that dedicated solution-focused courts can achieve the sentencing purposes of rehabilitation and reduced recidivism. Those purposes will be best achieved if judges and others working within such courts are trained in the psychology of behavioural change and the courts are properly resourced.

If sentencing within the mainstream criminal justice system is to be credible, sentencing purposes should be consistent or, at least, prioritized. The means of achieving those purposes need to be evidence-based. The primary sentencing purposes should be rehabilitation and the protection of the community through the reduction of recidivism.

Judicial officers and lawyers working in mainstream courts should consider strategies to enhance the therapeutic impact and diminish the anti-therapeutic impact of the legal process on litigants and witnesses with whom they deal.

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were inclined to reject such an apology. A full apology was the most likely apology to be accepted (73%), with 13-14% likely to reject the offer.

[57] Wheeler, above n 53, 8.

[58] NSW Ombudsman, above n 54, 12.

[59] *Civil Liability Act* 2002 (NSW) s 69.