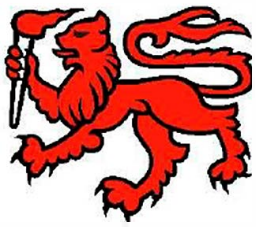

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Improving therapeutic outcomes for defendants: measuring the therapeutic contributions of legal actors.

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Dedicated to all of the many wonderful people
who have supported, encouraged, and otherwise helped me along the way,
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Associate Adjunct Professor (Law) Terese Henning, Dr Isabelle Bartkowiak-Theron Senior Lecturer and Researcher (Sociology and Police Studies), Associate Professor Kimberly Norris (Psychology) and Dr Mandy Mathewson, Senior Lecturer (Psychology)
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Abstract

‘Improving therapeutic outcomes for defendants: measuring the therapeutic contributions of legal actors.’

The question of how to **improve therapeutic outcomes for defendants with mental health concerns moving through criminal court systems** is an enduring dilemma. Unfortunately, research suggests that mainstream criminal court experiences can themselves be criminogenic and the question becomes even more complex when dealing with individuals experiencing mental illness, social disadvantage, drug addiction, or other endemic social problems.

This thesis examines the possible methods of action within the court system to improve outcomes for the above identified group of defendants, firstly by reviewing the possibilities offered by legal reform, diversion to mental health and other services, and mainstreaming therapeutic jurisprudence principles to the magistrates criminal courts. After finding limitations to all in terms of the likelihood of non-optimal therapeutic outcomes, the thesis then focusses on how to utilise therapeutic jurisprudence principles to change the qualitative nature of court experiences so as to render them a powerful venue for therapeutic change themselves. This goal is realized by the development of a behavioural description of desirable magistrate behaviours when interacting with a defendant within a courtroom so as to have the best chance of facilitating therapeutic change for a defendant. This behavioural description is the first evidence-based description of its kind, derived from the literature on common denominators of therapeutic change, procedural justice and legitimacy of justice, and founded in ‘court craft’ descriptions of therapeutic jurisprudence.

The thesis then developed a qualitative research tool in consultation with experts in the field of therapeutic change and therapeutic jurisprudence. The Legal Actor Contribution Scale (or Survey in the most recent form) is a research and training tool which can quantitatively measure therapeutic magistrate behaviours in real-time interactions in open court. It is made available for court outcomes researchers to help improve research design and also for magistrates training or self-development. The research also has applications when incorporated into court based programs designed to combat endemic problems situation within the intersection of the social - economic – criminal – mental health nexus.

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Declaration of Originality

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis, nor does the thesis contain any material that infringes copyright.
I certify that the intellectual content of this thesis is the product of my own work and that all assistance received in preparing this thesis and sources have been acknowledged, nor has this thesis been submitted for any degree or other purposes.

I declare that this is my own work and has not been submitted in any form for another degree or diploma at any university of other institution of tertiary education. Information derived from the published or unpublished work of others has been duly acknowledged in the text and a list of references is given

Signed: Dated: 1/7/2021

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Statement of Co-Authorship

The following people and institutions contributed to the publication of work undertaken as part of this thesis:

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Paper located in Chapter 2:

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Author contributions:

Conceived and designed the research and review: Author 1
Conducted the legal research: Candidate
Data collection and analysis: Identified, Located, Collected, Tabulated, Compared and Analysed the Data from each Australian jurisdiction: Candidate
Wrote the original manuscript: Author 1
Reviewed the original manuscript draft and assisted in development of subsequent drafts: Candidate, Author 1
Reviewed and assisted in final draft of the manuscript: Authors 1,2,3,4 and Candidate.

We, the undersigned, endorse the above stated contribution of work undertaken for the co-authored published peer-reviewed manuscript contributing to this thesis:

Supervisor and Head of School Declaration

Signed:

Rhondda Waterworth	Professor Terese Henning Primary Supervisor	Professor Michael Stuckey Head of School
PhD Candidate	School of Law	School of Law
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Date: 14/05/2021	19/05/2021	20/05/2021

Statement of Ethical Conduct

The research associated with this thesis abides by the international and Australian codes on human and animal experimentation, the guidelines by the Australian Government's Office of the Gene Technology Regulator and the rulings of the Safety, Ethics and Institutional Biosafety Committees of the University. Ethics Approval No H0018036.

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Table of Contents

List of Acronyms

Legal Actor Contributions Scale or Legal actor Contributions Survey (LACS)
Therapeutic Jurisprudence (TJ)
Procedural Justice (PJ)
Legitimacy of Justice (LJ)
Court Integrated Services Program (CISP), (for those on bail who need referral for support to prevent reoffending),
Assessment and Referral Court (ARC) list (for those suffering from mental health or cognitive impairment.

Chapter One: Introduction

"Alone we can do so little; together we can do so much." - Helen Keller

'How to improve therapeutic outcomes for defendants with mental health concerns moving through criminal court systems?

The question of how best to deal with those who break the law is an enduring social and legal problem. The question becomes even more complex when dealing with individuals experiencing mental illness, social disadvantage, drug addiction, or other endemic social problems.
Viewed from a systems perspective, the modern world is comprised of contexts and structures that are often difficult to navigate for those with mental illness, addictions, or social disadvantage. Individuals with mental illness may find it difficult to control their actions. They may live with varying post traumatic sequelae that cause a range of behaviours that do not conform to societal norms (and at the extreme end, criminal laws). They may lack the capacity, resources, or motivation to comply with or navigate through life without infringing criminal laws. This situation can then result in the accumulation of debt, fines, and/or criminal charges.

The over-representation of those with mental illness at every stage in the criminal justice system is a phenomenon that has been reported in numerous studies. [1] As emerged from the author's literature review

[1] Fiona Davidson, Edward Heffernan, David Greenberg, Rhondda Waterworth & Philip Burgess 'Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia' (2017) 24:6 *Psychiatry, Psychology and Law* 888-898, DOI: 10.1080/13218719.2017.1327305; Rhondda Waterworth 'The Feasibility of Mainstreaming Therapeutic Jurisprudence within the South East Queensland Magistrate's Courts in 2021: A Systemic Wine and Bottles Analysis of Systems of Care

summarized in the article presented in Chapter Three,[2] it is apparent that existing social and legal structures tend to criminalize and ensnare individuals with mental health problems, addictions, and social disadvantage in the criminal justice system. Those who are mired in these systems struggle both to obtain treatment and to gain equal access to justice. The phenomena described above are also, perversely, more likely to entrench this positioning of being separate from society while being governed by its laws.[3]

At the same time, this vulnerable group of people may find it increasingly difficult to find or access appropriate support to address the underlying issues (such as mental illness, social disadvantage, drug addiction) that they were initially facing along with those that are added into the mix as time progresses, such as increasing financial problems or homelessness.[4]

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and Control in Queensland' (in review); Rhondda Waterworth 'The Case for Measuring Legal Actor Contributions in Court Proceedings' (2018) 26:1 *Psychiatry, Psychology and Law* 77-86. DOI: 10.1080/13218719.2018.1483273; Joyce C. Anestis, and Joyce L. Carbonell, 'Stopping the Revolving Door: Effectiveness of Mental Health Court in Reducing Recidivism by Mentally Ill Offenders' (2014) 65(9) *Psychiatric Services* 1105; Lacey Schaefer 'On the reinforcing nature of crime and punishment: An exploration of inmates' self reported likelihood of reoffending' (2016) 55(3) *Journal of Offender Rehabilitation* 168.

[2] *Ibid*, Waterworth (2018) 77-86.

[3] V Braithwaite 'Criminal Prosecution within Responsive Regulatory Practice' (2010) 9 *Criminology and Public Policy* 515; V Braithwaite, 'Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions' in V Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, 2003) 15–39, discussed in Rhondda Waterworth 'Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change' (2019) 28(4) *Journal of Judicial Administration*.

[4] DJ Kavanagh, KT Mueser, 'Current evidence on integrated treatment for serious mental disorder and substance misuse' (2007) 44 *Journal of Norwegian Psychological Association* 618; A Kenny, S Kidd, J Tuena, M Jarvis, A Robertson, 'Falling through the cracks: supporting young people with dual diagnosis in rural and regional Victoria' (2006) 12(3) *Australian Journal of Primary Health* 12; WC Torrey, M. Tepper, J.

Accordingly, the risk of criminalisation is heightened for people who are traumatised or severely mentally ill, who lack support networks, and are unlikely to be able to advocate for themselves. Additionally, criminal justice processes are largely ill adapted to their needs. These processes may entrench their alienation and produce a revolving door result for their involvement in the criminal justice system.[5]

Research Questions Investigated in this Thesis

An understanding of the literature regarding courts and therapeutic change led to the observation that therapeutic jurisprudence offers an optimally rehabilitative approach for offenders with mental health or other disadvantages.[6] From this starting foundation, the overarching question addressed in this thesis then develops the question of whether, and how, the therapeutic jurisprudence approach could be improved to maximise its therapeutic utility.

More specifically this thesis investigates the following questions: *where is the best point of therapeutic intervention in the criminal justice system for this group of offenders; how is that intervention to be delivered and what tools are needed to optimise the delivery of the requisite therapeutic approach for them?*

Greenwold, 'Implementing integrated services for adults with co-occurring substance use disorders and psychiatric illnesses: a research review' (2011) 7(3) *Journal of Dual Diagnosis* 150; NSW Ministry of Health 'Effective Models of Care for Comorbid Mental Illness and Illicit Substance Use' (2015) *Mental Health and Drug and Alcohol Office*, NSW Ministry of Heath, 9 <http://www.health.nsw.gov.au/mentalhealth/publications/Publications/comorbid-mental-carereview.pdf>EVIDE

[5] Ibid, see also M.L. Perlin "Wisdom is thrown into jail": Using therapeutic jurisprudence to remediate the criminalization of persons with mental illness' (2013) *Michigan State University Journal of Medicine and Law*, 343.

[6] Waterworth (2019) see above n 4.

This thesis identifies the therapeutic contributions of magistrates as the fundamental ingredient in therapeutic court interventions.[7] This is the first time in the literature that the nature of the contributions made by magistrates (outside of ongoing curial supervision) has been identified as fundamentally important and of strong therapeutic potential, based on an understanding of the processes thought to be at play within a court room, seen through the lens of the therapeutic change literature on what works to facilitate change.

Further, this thesis articulates a behaviorally-anchored, evidence-based description of therapeutically useful magistrate in-court contributions. This is the first description of its kind in the literature and has many useful applications in the field of therapeutic jurisprudence, as will be discussed in Chapters Four, Five and Six.

This thesis then presents a practical qualitative measurement tool which has been refined via expert consultation, the Legal Actor Contribution Survey (LACS). This tool is designed to help researchers and magistrates to quantify and control for the important court outcome variable of in court judicial contributions when conducting research into therapeutic court outcomes. Prior to the research reported in this thesis there had been no means to quantify and measure magistrates' therapeutic contributions.[8] The LACS also has other potential uses, such as aiding magistrates to develop their therapeutic skills and court craft using evidence based suggestions. It might also be used to assess higher court judges' therapeutic contributions, and as a basis to develop a measurement tool of the therapeutic contributions of other legal actors and court personnel who interact with defendants.

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[7] Waterworth (2019) see above n 4.

[8] *Ibid*; Waterworth (2018) above n2, also, as will be discussed later on in Chapter 3, since the publication of the present research, another author has since made this claim, with a paper published in 2020.

Scope

This thesis explores how best to improve therapeutic outcomes for particular defendants in criminal magistrates courts, specifically, defendants with mental health concerns, non-neurotypical cognitive capacities, drug addictions, and socio-economic disadvantages linked to these concerns. It does not look at those with specific communication disorders, nor other types of disadvantage linked to language, political status or culture, such as immigrants or refugees. Nor does it delve into tailored approaches based on specific therapeutic concerns such as magistrate contributions within drug courts. As discussed in the conclusion, however, this research could usefully be applied to these groups of defendants and the courts in which they are seen.

Within the scope limitations listed above, this thesis remains resolutely general in approach with regards to the type of court in which the research outcomes and measurement tool could be applicable. This has been done to preserve the widest utility for the research outcomes, so as to be useful for measuring interactions within problem solving and therapeutic courts, but also so as to have potential applications for mainstreaming therapeutic jurisprudence ideas into mainstream magistrates courts. However, mainstreaming therapeutic jurisprudence principles is approached with the understanding that mainstream courts present significant contextual and practical constraints to judicial interactional parameters (for example, limited face to face engagement) when compared to therapeutic courts.

Magistrates courts, (as opposed to higher courts) are chosen as the focus for this thesis as this is where the bulk of most criminal matters are dealt with, generally speaking, and specifically because this is where most of the criminal matters related to the social, mental health and addiction issues mentioned earlier also tend to be dealt with. These are therefore the courts

in which there is the widest application for a therapeutic and / or problem solving approach to judging.

Prior to this research thesis, there was no behaviourally-anchored, evidence-based description of therapeutically useful magistrate in-court contributions. There was also no way for magistrates or researchers to quantify and measure this integral therapeutic contribution occurring within therapeutic courts. This meant that the fundamental ingredient in therapeutic court intervention could neither be quantified nor measured, and that as a consequence, all research into therapeutic court outcomes was not able to control for this variable, nor measure it as part of the research design, meaning that outcomes research could be expected to give confounded outcomes data which would be difficult to interpret in a meaningful way with regards to the effectiveness of therapeutic courts. Additionally, this gap in the literature meant that there were no evidence-based guidelines or feedback available for magistrates wanting to develop their therapeutic skills. This led to a lack of paths for developing therapeutic magistrates, although therapeutic magistrates and judges have been in action in courtrooms for some time, having developed their therapeutic skills via their own reading of the therapeutic jurisprudence and general therapeutic literature, judicial training conferences, refined into expertise via repeated application of these techniques and ideas in court room interactions.

The following terms used in this thesis have the meanings set out below for them;

Problem-oriented or problem-solving courts: Problem-solving courts are specialised courts within the criminal justice system that attempt to deal with the underlying factors contributing to criminal behaviour; they usually involve a close collaboration between the judge, community health and

other services, and the defendant.[9] Problem solving courts can include courts that deal with specialized issues, such as such as drug courts, homelessness, domestic violence, or mental health courts. They deal with the therapeutic needs of specific types of defendants, for example those with mental health concerns, non-neurotypical cognitive capacities, drug addictions, and socio-economic disadvantages linked to these concerns. They are able to process cases in ways that are procedurally and qualitatively different from traditional judicial processes, and usually try to move defendants out of the traditional court system, either prior to conviction, or afterwards.

Mainstream magistrates' criminal courts: A traditional magistrates' court deals with the less serious criminal offences and criminal cases.[10] This type of court normally handles summary offences which do not require a trial by jury, but can also deal with indictable offences where the court has accepted jurisdiction, as permitted by statute. Summary offences are defined specifically based on offence type, type of possible sentence, including amount of fine or length of imprisonment that may be imposed. Summary types of offences include, for example, common assault, trespass, domestic violence, driving offences, burglary, less serious drugs offences, like possession as opposed to trafficking (although some courts do deal with trafficking cases such as those in Victoria or Western Australia).

Legal actors: This term is used in this thesis to mean legal actors who are legal professionals who operate professionally within the criminal court room, including lawyers, barristers, magistrates and court personnel who

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[9] G Berman and J Feinblatt 'Problem Solving Courts: A Brief Primer' (2002) *Law and Policy* 23; Prof Arie Freiberg 'Specialised Courts and Sentencing' Paper presented at the conference Probation and Community Corrections: Making the Community Safer Conference convened by the Australian Institute of Criminology and the Probation and Community Corrections Officers' Association Inc. and held in Perth, 23-24 September 2002) https://www.researchgate.net/publication/255614053_SPECIALISED_COURTS_AND_SENTENCING

[10] Magistrate's Court, *Britannica.* www.britannica.com/topic/magistrates-court

interact with defendants.[11] However, this thesis focusses specifically on magistrates. Accordingly, the term 'legal actor' has been used in some contexts to refer more narrowly to magistrates.

Facilitating a therapeutic outcome: 'Facilitating' in the context of this thesis means providing the right context to the in-court interaction as much as possible, within the scope of the legal actors' control or influence.[12] This can include using a range of verbal and non-verbal measures, as well as paying attention to procedural matters such as turn taking when speaking. A **therapeutic outcome** for a defendant can take many forms, and has been the subject of debate in terms of how best to define this within the therapeutic jurisprudence and court research literature.[13] It is the author's opinion that a therapeutic outcome in this case means instilling hope, a sense of being respected and heard, and a wish and expectation on the part of the defendant that practical steps taken by them could lead to an improvement in their behaviour and quality of life. It is sometimes measured by the rate of recidivism, however, given the range of possible therapeutic improvements a defendant could gain from a therapeutic intervention, recidivism needs to be positioned as just one possible indicator of therapeutic improvement, and is a rather blunt measurement tool.[14] Other possible indicators of therapeutic improvements could include (a non exhaustive list): ceasing or moderating drug use, entering treatment for a chronic health problem, enrolling in a parenting course, advocating for a

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[11] See for example Pauline, Spencer, 'From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream' (2014) 39 *Alternative Law Journal* 4; Richardson, Spencer and Wexler (2016) above n 3, 148.

[12] M S. King, *Solution Focussed Judging Judicial Bench Book*, (Australasian Institute of Judicial Administration Incorporated 2009) https://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf

[13] See for example Lynne Roberts and David Indermaur 'Key Challenges in Evaluating Therapeutic Jurisprudence Initiatives' (2007) 17 *Journal of Judicial Administration* 69.

[14] Hiday, VA., and B Ray, 'Arrests two years after exiting a well-established mental health court' (2010) 61 *Psychiatric Services* 463; Hiday, VA., Wales, HW., and B Ray, 'Effectiveness of a short-term mental health court: criminal recidivism one year postexit.'(2013) 37 *Law and Human Behavior* 401.

child's educational needs at school, being able to have children returned home to a family, being able to maintain a stable tenancy, engaging with psychiatric help, and being compliant with medication regimes and thus experiencing less frequent manic episodes, feeling a sense of belonging to a community, developing friendships with neighbours, investigating and potentially engaging in training options, or re-entering the workforce, being able to manage own finances.

Thesis Background, Structure and Content

This thesis has been undertaken by research and publication, and its structure follows the evolution of ideas and their resulting research and published outcomes. It includes five research articles, two presentations at international conventions, and structured explanations to give context to, and link these articles together into a cohesive whole.

Chapter One provides the background to the central research question, the scope, definitions and guide for this thesis.

Chapter Two examines the first wave of ideas that contributed to this research thesis about facilitating therapeutic interventions within existing courts, legislative frameworks, and mental health treatment systems. This chapter examines mental health diversion, legislative reform to facilitate diversion and treatment, and then delves into the opportunities offered by therapeutic justice, and the therapeutic capacity of court systems themselves. Two articles analysing these facets of legal-system based therapeutic intervention are presented in this chapter.

Chapter Three moves the central research question forwards by focusing on therapeutic courts. This chapter presents an in-depth literature review of the state of research into therapeutic courts, learning and developing research areas, as well as ways to enhance the therapeutic scope and

effectiveness of courts. This chapter culminates with a published article summarizing the reasons to measure legal actor, and more specifically, magistrates' and other judicial officers', contributions to court proceedings from a therapeutic perspective. The reason to measure these contributions is that the research literature across multiple fields (psychology, criminology, sociology, therapeutic jurisprudence, legitimacy of justice and procedural justice) indicates that the behaviour of judges towards defendants in courts is crucial as to whether the court intervention is at all likely to achieve a therapeutic outcome for the defendant. A therapeutic outcome for a defendant may take many forms, but ultimately involves generating hope that life could be different, and that practical steps can be taken by defendants to improve their behaviour and quality of life.

Chapter Four develops the central theme of this thesis of finding ways to measure magistrates' (in court) contributions, with a published article that summarises several parallel literature reviews from psychology, therapeutic jurisprudence, criminology and sociology that have investigated common therapeutic denominators that may be utilised effectively and measured within a court room; the types of therapy that may realistically and ethically be implemented by a judge within a criminal court, and what the therapeutic jurisprudence literature recommends for judges' contributions when practising therapeutic 'court craft'. The literature relating to procedural justice and legitimacy of justice were also interrogated with regards to desirable and effective contributions from magistrates. The article culminates by offering a behaviourally anchored definition of therapeutic magistrates' contributions, and a draft measurement tool to capture these contributions within the courtroom setting.

Chapter Five moves the thesis into the second phase of development for the legal actor contributions measurement tool. It describes the expert consultation process that was undertaken to refine the measure. The first part of this chapter describes the presentation of the research at the

International Academy of Law and Mental Health conference hosted by the Università degli Studi Internazionali di Roma, in Rome, in July 2019, as well as brief feedback provided by participants.

Part Two of Chapter Five contains the next phase of the expert consultation conducted to refine and verify the measure. This was attempted in part by using a Delphi study to consult psychologists and magistrates regarding the content of the scale. The research results are presented in an article, along with a refined version of the legal actor contribution courtroom measurement scale ('LACS').

The refined version of this tool is then presented in Chapter Six as a future mechanism to be used in magistrate court craft development, and research into therapeutic courts and court outcomes. Future applications of the LACS are discussed in greater detail in this chapter.

Impact

It is hoped that the creation of the LACS research measurement tool will facilitate the following:

- Increased self-awareness and improved training for magistrates in therapeutic court craft. For example, the LACS might be used as a self-evaluation tool by magistrates reviewing recordings of their own court sessions;
- Effective research design when investigating the operation of therapeutic courts and their outcomes;
- Effective, evidence-based funding and policy decisions regarding legislation and court-based interventions for disadvantaged, mentally unwell and other marginalised groups involved in the criminal justice system;

- Support for the mainstreaming of the Therapeutic Jurisprudence movement (which is a world-wide movement operating in mainstream and specialist courts in a variety of jurisdictions), through operationalising and describing the desirable magistrate behaviour that has been shown by research to be most likely to facilitate therapeutic change in a courtroom for defendants, in a way that is accessible to legal actors across different jurisdictions and types of courtroom.

In summary, this research thesis deals with a critical aspect of the therapeutic response to those experiencing mental health issues whilst progressing through the criminal justice system. It culminates in the development of a systemic intervention with multiple applications and possible uses.

CHAPTER TWO

'How to improve therapeutic outcomes for defendants with mental health problems who are involved in the criminal court process?'

The question of how to improve the therapeutic outcomes for defendants with mental health problems moving through criminal court pathways is central to the present thesis. It is a challenging question that has occupied the minds of many researchers within the parallel fields of social sciences and legal reform. The current chapter describes different approaches to dealing with offenders with mental illness within the criminal justice system, firstly from a systems change perspective and standardized diversion practices, then from a legislative reform perspective, and lastly from a mainstreaming therapeutic jurisprudence perspective. These articles show the initial evolution of thinking and research direction that has occurred within this thesis. These approaches will now be discussed in more detail.

The first article explores the possibility of creating change within systems using standardisation via legislation. It evaluates the movement that sought to use legislation to standardise therapeutic curial responses to those defendants experiencing mental health problems thought to contribute to their offending. The second article discussed in this chapter evaluates using legislative reform to create systemic structural change, and considers the drawbacks of this approach.[15] The article is not reproduced or included in this thesis because it was submitted as part of other research undertaken for another degree, however, it is discussed and referenced as it provides relevant context and the initial stepping stones for the later development of the Legal Actor Contribution Scale.

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[15] Rhondda Waterworth 'The New Mental Health Act 2016 (Qld): an evaluation of the impact on mental health clients in the Magistrate's Courts of South East Queensland' (2017) 2 (2) *International Journal of Therapeutic Jurisprudence*, 195.

This article examines the impact of the changes in the law as it relates to offending and mental health in Queensland, which were introduced via the *Mental Health Act 2016* (Qld) (from a defendant patient's perspective).[16]

The third article discussed in this chapter examines the dichotomy between structural and systemic change, identifying as a major catalyst for qualitative change the interactions between magistrates and defendants, which seem to be particularly useful in improving therapeutic outcomes for defendants. This observation is made within the context of an analysis of the possibilities to mainstream therapeutic jurisprudence practices to magistrates courts to improve therapeutic outcomes. This article was inspired by an earlier analysis (with a more simplified methodology) undertaken as part of earlier studies and research.

Creating Change within Systems: Standardisation through Legislation

Some authors, particularly those in the mainstreaming therapeutic justice movement, advocate strongly for standardisation of an effective legislative structure ('bottles' in the nomenclature of therapeutic jurisprudence) for each jurisdiction.[17] This approach focuses on having

[16] *Ibid.*

[17] 'Bottle' refers to the containers or structures which shape the law in a given jurisdiction, specifically, the legislation of the jurisdiction. For more information, please refer to, as an example, David B. Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) 68 *Review of Jurisprudence* University of Puerto Rico 691; David B. Wexler, 'Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law' (2014) *Arizona Legal Studies Discussion Paper* 15. http://www.civiljustice.info/cgi/viewcontent.cgi?article=1005&context=tj; Susan Goldberg, 'Problem-solving in Canada's Courtrooms: A Guide to Therapeutic Justice' (2011) *Therapeutic Jurisprudence.* Paper 3. <http://www.civiljustice.info/tj/3> ; King,

legislation in place that facilitates diversion, rehabilitation and treatment agendas for offenders appearing in court who have mental health or social problems. The rationale for this approach is that it is inappropriate at best, and potentially harmful at worst, to process defendants via a courtroom and the experience of being judged and punished for behaviour which is driven by mental health problems, social issues or drug addiction. The defendant is instead diverted into a treatment program or other program specifically designed to address their needs (such as help finding housing and employment).

In Australia one in five people suffer from a mental illness, and, when in contact with the criminal justice system they will often experience difficulties in accessing, navigating, and effectively participating in that system.[18] People with mental health problems are over-represented in the criminal justice system, and accordingly many academics have engaged with the topic of the criminalisation of people with mental health issues.[19] Working in the mental health diversion program, charged

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above n 14; Peggy, F. Hora, Schma, William G., and John T.Rosenthal 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439; Bruce. Winnick, and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003); Wexler, David B., 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices' (2014) *Therapeutic Jurisprudence*. Paper 7. <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1006&context=tj>

[18] Anti-Discrimination Commission Queensland, *Submission by the Anti-Discrimination Commission Queensland to the Department of Health: Review of the Mental Health Act 2000 - Discussion Paper* (5 August 2014) Anti-Discrimination Commission Queensland at [71].

[19] See, for example, Joyce C. Anestis, and Joyce L. Carbonell, 'Stopping the Revolving Door: Effectiveness of Mental Health Court in Reducing Recidivism by Mentally Ill Offenders' (2014) 65(9) *Psychiatric Services* 1105; Lacey Schaefer 'On the reinforcing nature of crime and punishment: An exploration of inmates' self reported likelihood

with ensuring continuity of care for individuals moving between court, prison and mental health systems, exposed the author to the idea of diversion as an effective mental health intervention, situated effectively within the larger health and corrections systems.

In an attempt to utilize standardisation of diversion as an effective intervention tool for mental health defendants, the author systematically collated the mental health diversion provisions in place in all State legislative regimes in Australia. This research provides the legislative analyses for the co-authored article included below, which highlights the lack of consistency and standardization in the mental health diversion options available to those appearing in court, who need treatment and support.[20] The article also noted that how well diversion works as a strategy to address defendants with mental health, addiction or social problems depends on the capacity of the mental health and social support services to meet mental health needs and address other underlying criminogenic factors.

The article recommended further research into diversion to develop evidence for models of diversion best practice, as well as consultation with defendants within the criminal justice system who have mental illness so as to ascertain their views on what works.[21]

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of reoffending' (2016) 55(3) *Journal of Offender Rehabilitation* 168; M.L. Perlin 'Wisdom is thrown into jail: Using therapeutic jurisprudence to remediate the criminalization of persons with mental illness' (2013) *Michigan State University Journal of Medicine and Law*, 343.

[20] Fiona Davidson, Edward Heffernan, David Greenberg, Rhondda Waterworth & Philip Burgess 'Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia' (2017) *Psychiatry, Psychology and Law,* 9.

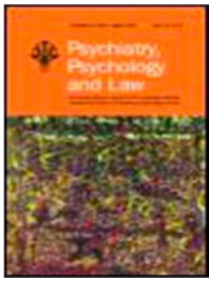
[21] *Ibid,* at 9.

Article 1: Fiona Davidson, Edward Heffernan, David Greenberg, Rhondda Waterworth & Philip Burgess 'Mental Health and Criminal Charges:

Variation in Diversion Pathways in Australia' (2017) Psychiatry, Psychology and Law, 1.[22]

The author contributed the relevant legal research to identify and describe the legislated diversion provisions for each jurisdiction in Australia, which has been summarised by the lead author in the article.

[22] This is the author's accepted manuscript of a coauthored article published as the version of record in Psychiatry, Psychology and Law © The Australian and New Zealand Association of Psychiatry, Psychology and Law, reprinted by permission of Taylor & Francis Ltd, http://www.tandfonline.com on behalf of The Australian and New Zealand Association of Psychiatry, Psychology and Law. https://doi.org/10.1080/13218719.2017.1327305. Authors contribution: the relevant legal research to identify and describe the legislated diversion provisions for each jurisdiction in Australia, which has been summarised by the lead author in the article.



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Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia

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Mental health and criminal justice legislation must provide the appropriate mechanisms for ensuring the assessment and care of mentally ill individuals. It must also balance the right to justice of these individuals with the rights of the community. In Australia, each jurisdiction has its own legislative provisions related to mental health, criminal legislation and sentencing, with variation in the mental health diversion options that are available. This article uses a national survey of court liaison services and mental health courts in Australia and a review of the relevant legislative frameworks to compare jurisdictional approaches to mental health diversion. Despite calls from the National Mental Health Commission for consistency, the Australian approach to the provision of mental health services to people in the criminal justice system is heterogeneous and piecemeal. Variation in the diversion pathways available to individuals with mental illness exists across Australia. The presence of problem-solving courts in some, but not all, jurisdictions results in differences in access to legal and treatment options.

Key words: court diversion; court liaison; fitness to plead; mental health defence; mental health legislation; problem-solving court.

Introduction

Internationally the prevalence of mental disorder is markedly higher in the offender population than in the general population (Fazel & Seewald, 2012; James, 2006). In Australia, there is evidence to support this assertion at all stages of the criminal justice procedure: at the time of police contact (pre-arrest; Ogloff, Davis, Rivers, & Ross, 2007), in police custody (Baksheev, Thomas, & Ogloff, 2010), and in prisons (Butler et al., 2006). The prev-alence of mental disorder in custodial popula-tions has been estimated to be between three and twenty times greater amongst those in custody depending on the type of disorder and the cohort, with the highest differentials found amongst remanded populations, women, and Indigenous Australians (Butler et al., 2006; Heffernan, Andersen, Dev, & Kinner, 2012; Ogloff et al., 2007). It is there-fore critical that the criminal justice system has diversionary methods to address the high prevalence of mental disorder.

Definitions of mental health diversion differ in the literature. Mental health court diversion has been described as the process

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whereby individuals are transferred from the criminal justice system to treatment that is provided by the mental health system (Greenberg & Nielsen, 2002). In situations where diversion is not possible, individuals with mental illness are referred to mental health care within custodial settings. Court diversion does not necessarily equate with the discontinuation of criminal prosecution; rather it enables the processes of treatment and criminal justice to coexist (Greenberg & Nielsen, 2002). A broad definition has been developed by the National Justice Mental Health Initiative Working Group, which states:

> Mental health diversion and support aims to improve wellbeing and reduce recidivism in people whose mental illness significantly contributes to offending behaviour. The aim is to provide interventions and support targeted to their illness and related problems in place of, alongside, or integrated with other criminal justice system processes. (Thomas, 2010, p. 17).

Diversion Pathways in Australia

In 2013, the Australian National Mental Health Commissioner described prisons as the 'dumping ground' for the mentally ill (Dun-levy, 2013), echoing the views of others who have described prisons as the 'mental health institutions of the 21st century' (White & Whiteford, 2006, p. 302). Inconsistent approaches to the identification and provision of specialised mental health care for people with mental illness in contact with the criminal justice sector was identified in 2005 as a priority for change (Mental Health Council of Australia, 2005). Subsequently Australian jurisdictions have implemented a range of responses to address the needs of these individuals, including the development of court liaison services, specialised problem-solving mental health courts, and legislative approaches to support the diversion of people with mental disorder from the criminal justice sector to the health sector.

Court Liaison Services

In Australia, court liaison services are speci-alised clinical teams that aim to intervene early in the criminal justice process by identi-fying mentally ill individuals at the pre-trial stage of the court process, before conviction and incarceration. Court liaison services aim to provide timely advice to courts and linkage with treatment providers. Therefore, these services have been described as a 'gateway' for access to mental health services for the criminal justice system (Australian Institute of Criminology, 2012).

Problem-solving Mental Health Courts

An alternative approach to diversion is prob-lem-solving mental health courts. These oper-ate according to the principle of 'therapeutic jurisprudence', which seeks to use the law as a therapeutic agent (Lim & Day, 2013). Payne (2006) provides the following definition: 'Specialty courts […] are typically defined as new criminal court structures and procedures, developed to manage and deal with specific offender populations, where it is recognised that traditional criminal justice procedures have not been effective' (p. 1). The procedural features of problem-solving courts include a level of judicial monitoring, cross-agency collaboration, the use of sanctions and rewards, and voluntary participation.

Legislative approaches to the nexus between mental health and criminal justice face the challenging task of providing appropriate mechanisms for enabling the assessment and care of mentally ill individuals while also balancing the right to justice of this population with the concerns of the community. The approach to the provision of mental health services to people in the criminal justice system in Australia has been described as hetero-geneous, largely inadequate and often piecemeal (National Mental Health Commis-sion, 2013; Richardson & McSherry, 2010). The National Mental Health Commission

(2013) has called for consistency in the legal provisions related to mental illness across jurisdictions in order to ensure equitable mental health treatment and criminal justice outcomes. However, each Australian state and territory has its own court system and all have magistrates' courts (sometimes referred to as local courts), which are the lowest level of state courts charged with attending to summary matters (cases that can be heard by a magistrate instead of a jury).

For the present study, a national survey of court liaison services and mental health court programmes in Australia was undertaken in order to provide an overview of the diversioary options available to people with mental dis-order charged with a criminal offence that can be dealt with in magistrates' courts. Analysis of the survey identified variability in the options for individuals with mental illness who are charged with a criminal offence that can be dealt with in a magistrates' court in Australia. This study describes how adults (aged over 18 years) with mental illness who have been charged with an offence are identified in each jurisdiction, the diversion options available for less serious criminal charges including the various court-mandated mental health pro-grammes, and the various approaches within different Australian jurisdictions. Additionally, court liaison services in each jurisdiction are described and reviewed, a summary of which is also described in another study (Davidson, Heffernan, Greenberg, Butler, & Burgess, 2016).

Method

Key representatives (clinical directors and team leaders) of services in each jurisdiction were contacted by the lead author and surveyed with respect to the types of programmes and services that support mental health diversion in their jurisdiction for individuals who are charged with a criminal offence that can be dealt with in a magistrates' court. Eligibility criteria, processes and structure of pro-grammes, relevant legislation and the range of legal outcomes were explored. Participants were asked to describe all diversion options and services that were available in their state or territory. A three-phase process was employed:

2 A written survey;
3 A 90-minute face-to-face or tele-phone interview; and
4 A desktop audit and summary of rele-vant legislation.

Ethical approval for the study was provided by the University of Queensland's Human Research Ethics Committee.

Participants

A total of 12 programmes that provided either a court liaison service or a mental health problem-solving court in Australia were iden-tified. In one jurisdiction, Tasmania (Tas), a single representative was nominated for both the court liaison service and the mental health court diversion list, as this person performed a role within both service types. A total of 11 individuals were invited to participate in the survey and all consented, resulting in a 100% response rate.

Results

Addressing the Needs of Individuals Experiencing Mental Illness in Police Cells and at Court Proceedings – Court Liaison Services

People with mental illness who enter into the criminal justice system need to be identified and provided access to mental health treat-ment agencies. In Australia, legislative options exist in each state and territory to ensure that the immediate mental health needs of people with serious mental disorders (and in some cases cognitive impairment) who have been charged with an offence are evaluated by a mental health professional and that, where required, treatment is made avail-able. The meeting of these legislative

requirements in most jurisdictions is the responsibility of the public health system through the provision of clinical mental health (court liaison) services to the courts, police cells and prisons.

Court liaison services perform a consulta-tion and liaison role within criminal justice system settings. In all jurisdictions, this role is described as involving a broad range of referring agencies, including legal representa-tives, the police, magistrates, family, other mental health providers and self-referral. In addition to referrals to services for assess-ment, the cross checking of custody and court lists with mental health databases to identify individuals with current and past mental health treatment access who may be subject to mental health legislative provisions or have mental health needs is employed in some jurisdictions: Queensland (Qld), Western Australia (WA), Victoria (Vic), Australian Capital Territory (ACT) and New South Wales (NSW). Brief structured clinical assessments are undertaken by clinicians in both court and police cell environments. In the Northern Territory (NT), a dedicated court liaison service did not exist at the time of the survey; instead a small number of forensic mental health staff met this need in addition to a broader clinical role. As a result, in the NT there was a reliance on police contacting local mental health services to seek examinations. Following the release of the report of the national survey conducted for this study, two court-based mental health clinical roles have now been established in the NT.

Access to Court Liaison Services – Geographic Coverage

It is important to note that court liaison clinicians are outnumbered by the number of magistrates' courts and police cells in Australia, and that geographical impediments can limit access to mental health assessment. While three of the jurisdictions (WA, Tas and the ACT) describe an ability to provide mental health assessments in all magistrates' court locations, the remainder were not able to meet this need, with metro-politan courts tending to have greater access than those in regional or remote areas. In WA, the use of videoconference linkage provides access to court liaison for regional and remote courts.

Comprehensive Mental Health Assessment Following Court Liaison Contact

All Australian jurisdictions have legislative provisions that permit magistrates to autho-rise the transfer of individuals who are believed to be experiencing mental illness to a mental health service for the purpose of comprehensive mental health assessment and treatment (if indicated). The mechanisms by which this process takes place vary, as do the mental health settings and methods for the disposal of charges. Table 1 provides a brief summary of the relevant legislation in each Australian jurisdiction, which is further described below.

In NSW (Mental Health Forensic Provi-sions Act 1990), Qld (Mental Health Act 2000 and Mental Health Act 2016), Vic (Mental Health Act 2014), WA (Mental Health Act 2014), South Australia (SA; Mental Health Act 2009), Tas (Mental Health Act 2013), the ACT (Crimes Act 1900) and the NT (Mental Health Act 1998), there are pro-visions for the transfer of an individual before the court or in the police cells to authorised inpatient assessment centres for the purpose of psychiatric assessment. While transfer to mainstream acute inpatient mental health settings for further assessment is permitted in the majority of jurisdictions, in WA, the person must be detained in the state's secure forensic hospital by a court issuing a hospital order under section 5 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) where the accused may later become subject to the provisions of the Mental Health Act 2014 (WA). In some jurisdictions (e.g., Vic, NSW, Qld and Tas), bail may be issued to

Table 1. Legislative provisions related to individuals charged with offences that can be heard at a magistrates' courts.

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Magistrates can authorise the transfer of individuals in custody to an authorised mental health inpatient service for assessment (without bail)	Yes, as per s. 33 (1) (a) of the Mental Health (Forensic Provisions) Act 1990 (NSW)	Yes, as per s. 10(d) of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), the court can make an order for assessment	Yes, as a 'classified patient', as defined in s. 64–65 of the Mental Health Act 2016 (Qld), while s. 66 outlines a similar process for someone in custody who is under a treatment authority	Yes, as per s. 24 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA), transfer to forensic mental health inpatient facility	Yes, as per s. 269F of the Criminal Law Consolidation Act 1935 (SA)	Yes, as per s. 36A of the Corrections Act (Tas), transfer to a secure mental health unit can take place, and magistrates can also remand to the secure mental health unit	Yes, s. 309 of the Crimes Act 1900 (ACT) allows diversion into a mental health facility for assessment and care directly from magistrates' court, by the magistrate.	Yes, as per s. 74A & s. 75 of the Mental Health and Related Services Act 1998 (NT)
Magistrates can authorise the transfer of individuals in custody to a community mental health service for assessment	Bail is not required under the Mental Health (Forensic Provisions) Act 1990 (NSW), part 3 s. 31–36 describes how a mentally ill person in custody on summary offences is dealt with; specifically, as per s. 32(3)(a) &(b), the magistrate can release the person on the condition that they go for a mental health assessment	If bail is permitted, the community assessment provisions of the Mental Health Act 2014 (Vic) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2016 (Qld) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2014 (WA) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2009 (SA) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2013 (Tas) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2014 (ACT) apply	Bail is not required according to s. 74A (1) of the Mental Health and Related Services Act 1998 (NT)
Continuation of charges depends on determination regarding fitness for trial and/or soundness of mind	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes

allow this evaluation to take place. In Tasmania individuals requiring transfer are placed in protective custody. Remand in custody in a correctional centre may also take place, followed by a transfer via the Corrections Act 1997 (Tas) to the secure mental health inpatient facility. Magistrates in two Australian jurisdictions (NSW and ACT) are able to order mental health assessments in non-inpatient settings for individuals charged with an offence without issuing bail.

Following transfer to a mental health inpatient service, in all Australian jurisdic-tions with the exception of NSW, charges are held over (essentially put on hold) by the courts during the period of the mental health assessment. If it is determined that mental disorder is not relevant to the legislative requirements under consideration with respect to unsoundness of mind at the time of offence and fitness for trial, the person is returned to custody or court and the charges proceed according to law. In the NT, magistrates also have an option to dismiss charges on the advice of the chief health officer following an examination by a psychiatrist if legal requirements are met with respect to soundness of mind at the time of the offence.

Unique Legislation in Two Australian Jurisdictions

The legislative provisions in both NSW and Qld include diversionary features that are not replicated in other Australian jurisdictions. NSW has unique provisions to support diversion from the criminal justice system for non-indictable (summary) offences. These provisions allow for early diversion to treatment providers for individuals with mental illness to either community or inpatient care. Legislation in NSW includes three relevant definitions in its Mental Health Act 2007: mental illness, mentally ill persons and mental disorder. It defines a mentally ill person as someone who is suffering from a mental illness and for whom there are reasonable grounds for believing that care, treatment or control of this person is necessary. Mental illness is defined as a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence of any one or more of the fol-lowing symptoms: delusions, hallucinations, serious disorders of thought form, severe dis-turbance of mood, and/or sustained or repeated irrational behaviour indicating the presence of any one or more of these symptoms. A 'mentally disordered person' under the act is described as 'someone whose behaviour is so irrational that there are rea-sonable grounds for deciding that the temporary care, treatment or control of the person is necessary to protect them or others from serious physical harm' (Mental Health Act 2007). Under section 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW, p. 18), if during the course of proceedings it appears that a defendant is a mentally ill person then the magistrate may order that the defendant be taken to and detained in a mental health facility for assessment. Alternatively, the magistrate may discharge the defendant unconditionally or subject to conditions into the care of a responsible person. In circum-stances where the defendant is assessed as not being mentally ill or a 'mentally disordered person' then he or she may be brought back before a magistrate. Under section 32 of the same act, if it appears to the magistrate that the person is (or was at the time of the offence) developmentally disabled, suffering from a mental illness or suffering from a mental condition for which treatment is avail-able, but is not a mentally ill person, the mag-istrate may adjourn proceedings, grant bail, or make an order dismissing the charge either with or without conditions. NSW legislation is unique in that the disposal of criminal charges at the level of the magistrates' court is not dependant on the concepts of unsound-ness of mind at the time of the offence or fit-ness for trial, as is the case in other jurisdictions.

Qld's Mental Health Act 2016 was recently passed by parliament, with plans for the act to be commenced in 2017. The act will provide magistrates with a range of

powers in relation to individuals with mental illness that they have not previously had available to them. In matters concerned with simple offences (any offence – indictable or not – that can be dealt with summarily), mag-istrates will be permitted to dismiss charges under section 172 if they are reasonably satis-fied that the person was unsound of mind at the time of the offence or is unfit for trial at present. Provisions will permit proceedings in magistrates' courts to be adjourned for up to six months in cases where the person is considered to be unfit but is likely to become fit within six months (section 173). Diversion options will be available to magistrates, who will be able to issue involuntary examination orders (inpatient setting) under section 177 in situations where they consider an examina-tion by a doctor is needed.

Qld is the only jurisdiction with specific provisions related to persons on (or who become subject to) involuntary treatment (including forensic) orders who are charged with an offence. These provisions relate to outstanding charges for any offence. In this situation, the current Mental Health Act 2000 (Qld) mandatorily requires an examination and completion of a psychiatric report of the issues related to unsoundness of mind and fitness for trial. Following completion of the report, the Director of Mental Health decides whether to refer the matter to Qld's unique mental health court for a hearing, or to the Director of Public Prosecutions. Currently, individuals under involuntary mental health treatment orders are unable to opt to have their charges dealt with according to law, as the process of assessment and psychiatric report is mandatory. While these provisions are intended to act as a safeguard for individuals with mental illness who have been charged with a criminal offence, it has been asserted that this mandatory process has resulted in sig-nificant delays by unduly prolonging the resolution of criminal proceedings (Fanelli, Fouhy, & Wu, 2013). This process has been revised in the Mental Health Act 2016 (Qld), which removes the mandatory requirement for a psychiatric report and gives individuals the right to decide how to pursue their legal defence.

Mental Health Courts

Mental health courts exist in five Australian jurisdictions (Vic, Qld, WA, SA and Tas). The Qld mental health court varies significantly in its purpose to those in other jurisdictions (the determination of unsoundness or mind and fitness for trial) and is not considered to meet the definition of a problem-solving mental health court (Scott, 2007). Specialist problem-solving mental health courts exist in the remaining four Australian jurisdictions, providing a different diversion option for those individuals with mental ill-ness who meet eligibility criteria. A number of Australian problem-solving mental health courts are established under their own statute (the Victorian Courts and Other Justice Legislation Amendment Act 2013 and the Magistrates Court Act 1989); others are based on bail powers (SA, WA, and Tas). Eligibility and exclusion criteria for mental health courts in Australia are linked with diagnostic criteria and the seriousness of the charges. Pro-gramme eligibility and duration varies across jurisdictions (Table 2).

Mental health courts provide an additional option for some individuals with mental disorders who have been charged with less serious offences in four Australian jurisdic-tions. The presence of such courts in only four Australian jurisdictions is indicative of the debate concerning the effectiveness of this approach and varied political and com-munity perceptions. Eligibility for mental health court programmes is dependent on the location of the court in which the charge will be heard in all jurisdictions. As a result, mental health court programmes are not available to all people with a mental disorder who meet other eligibility criteria with programmes pre-dominantly located in metropolitan rather than rural or remote areas.

Table 2. Mental health problem-solving courts in Australia.

Jurisdiction	Programme name (commencement)	Eligible diagnoses	Eligibility criteria	Exclusions	Programme duration
Victoria	Assessment and Referral Court (2010)	Mental illness, intellectual disability, acquired brain injury, autism spectrum disorder, neurological impairment (including dementia)	Charged with a criminal offence listed at Melbourne Magistrates' Court (based on geographical area within Victoria), guilty plea required	Offences that involve serous violence or sexual assault; a sex offences list is conducted first and the magistrate presiding determines whether referral to ARC is appropriate	Up to 12 months
Western Australia	Start Court (2014)	Mental illness (primary diagnoses of intellectual disability or drug use are excluded, as other specialist courts target these)	Eligible for bail, guilty plea required.	Serious charges that require immediate remand in custody; individuals deemed to pose a high risk to self or community	Approximately 6 months
South Australia	Treatment Intervention Court (1991)	Programme has three streams: mental impairment, including mental illness, intellectual disability, personality disorder, acquired brain injury and neurological disorder (including dementia); co-occurring mental impairment and substance use; substance dependence	Summary offence or minor indictable offence; a link between the offending behaviour and mental impairment and/or substance dependence must exist; those with mental impairment may only be required to agree to the objective elements of the charges; defendants with substance abuse as the primary issue must be prepared to plead guilty to their most serious offences.	Major indictable offences	Approximately 6 months, or 12 months for a separate drug court programme
Tasmania	Diversion List (2007)	Mental illness, intellectual disability, acquired brain injury, autism spectrum disorder and/or a neurological impairment (including dementia)	Summary offence or indictable offence triable summarily, guilty plea not required but must agree to objective facts of the offence	Offences that involve serious violence or sexual assault, unless the court considers the harm to be minor	Approximately 6 months

Discussion

Currently, most jurisdictions have processes for identifying individuals with immediate mental health needs who are in police custody or involved in court proceedings. This article has identified that variation exists not only in the legislative provisions but also in the range of services that are available for identifying arrestees and court attendees with mental illness and to then provide linkage with the treatment providers and social support that may be required. Differences in access to services exist both between jurisdictions and within jurisdictions, particularly where geographical challenges exist. This may be a significant issue for those court liaison services that are unable to provide an equal level of service to all courts. As a result, in the majority of Australian states and territories (with the exception of Tas, the ACT and WA), individuals arrested and attending court in areas without court liaison services do not have access to this specialised service.

For the criminal justice sector, access to appropriate advice regarding defendants with mental illness reduces the time spent ascer-taining the complex needs of this population and then providing determinations. The majority of Australian jurisdictions have leg-islative options for magistrates to make a variety of dispositions, including orders for mental health assessment or treatment. A strength of the NSW legislative approach is that it provides magistrates with options to divert people who have been charged with summary offences to either community or inpatient treatment. The NSW model thus provides a less restrictive option that does not appear to be a regular feature of the approach currently taken in other states and territories. Qld's Mental Health Act 2016 will introduce new powers for magistrates to address this issue.

The current problem-solving mental health courts in four Australian jurisdictions offer an alternative treatment pathway for mentally ill offenders. In the jurisdictions where mental health court programmes and court liaison services coexist, the relationship between the two types of court-based mental health service and their degree of integration is an area that warrants further investigation. The mental health court and court liaison services in Tas are staffed by the same team, thus providing a level of integration that is less evident in other jurisdictions.

This article focuses specifically on mental illness, and does not include consideration of cognitive disability, although it is important to acknowledge that mental illness and cognitive (including intellectual) disability can be comorbid diagnoses. The area of legislative options and available supports for people who come to the attention of the criminal jus-tice sector with intellectual or cognitive dis-ability is one which warrants its own specific focus and has been identified as an area of need in Australia (National Mental Health Commission, 2013).

Future Directions

The outcomes of diversion from the criminal justice system to the health care sector are reliant on the ability of the mental health and social support systems to not only meet men-tal health treatment needs but to also ensure that criminogenic issues and socio-economic needs such as social inclusion, housing and employment are met. Given the varied legis-lative approaches and service models used throughout Australia, a comparison of the mental health, social and criminal justice out-comes of mentally ill offenders in each juris-diction, while challenging, is an area that warrants further research and may yield evi-dence for best practice in this area. An assess-ment of the views of mentally ill people who have had contact with the criminal justice system is another important area of further exploration.

Conclusion

To date, there has been limited comparison of the various legislative approaches to mental health diversion within Australia. This article addresses a gap in existing knowledge by

providing an overview of the different path-ways related to mental illness in the criminal justice system. While it is legislation that pro-vides the framework for the various pathways that individuals with mental illness who are charged with a criminal offence may have available to them, access to these options requires that such individuals are accurately and systematically identified. Mental health court liaison services are charged with this responsibility. In Australia, each of the exist-ing court liaison services has been formed as a component of a broader forensic mental health system. A comprehensive study of the structure, function and outcomes of court liai-son services, which act as a gateway to men-tal health care for people with mental illness who are charged with a criminal offence in Australia is needed.

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Legislative Reform to Create Systemic Structural Change

In Queensland, the *Mental Health Act 2016* (Qld) forms the backbone of diversion for defendants with mental health concerns from prison services to (in theory) the mental health service. This Act prescribes how a mental health affected defendant is to be dealt with, and how the government services involved in that person's care, such as the Court Liaison Service (part of the Queensland Health Forensic Mental Health Service) are to be provided.

The new *Mental Health Act 2016* (Qld) replaced the *Mental Health Act 2000* (Qld) and changed the way mental health defendants are managed and the processes that enable them to access care. [23] This article examines the impact of the Mental Health Act reforms for mental health clients passing through the Magistrates Courts in South East Queensland. However, changing the boundaries and the movement of people through courts on a flow chart can only go so far, and this article highlights the issues with relying on legislative reform and diversion alone to achieve therapeutic outcomes. The article is considered in here in more detail to illustrate the usefulness, and also the limitations to intervention using legislative reform as a tool.[24]

As articulated by the Australian Anti-Discrimination Commission, defendants with mental health problems need legal protection so as to divert them from custodial and court settings into appropriate care and treatment.[25] For this reason, legislative reform to increase access to mental health diversion for defendants has been a priority for at least the last twenty years.[26] It is essential that the legislation and processes of the health and justice systems enforce the rights of those with mental illness,[27] and the new *Mental Health Act 2016* (Qld) was designed to achieve this.[28]

The author conducted a review of the new and old legislation, and a comparative case study to examine the differences between their diversion and treatment provisions within the court system and custodial environment. The author also compared their potential relative effects from a treatment and human rights perspective using a hypothetical case study.[29]

Both Acts were designed to divert, protect the rights of, and facilitate treatment for defendants with mental illnesses in Queensland.[30] The new legislation was designed to

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[23] Waterworth (2017) see above n 17.
[24] *Ibid.*
[25] Anti-Discrimination Commission Queensland, Submission by the Anti-Discrimination Commission Queensland to the Department of Health: Review of the Mental Health Act 2000 - Discussion Paper (5 August 2014) *Anti-Discrimination Commission Queensland* at 71.
[26] *Ibid* at 72.
[27] *Ibid* at 69.
[28] See above n 17, Waterworth (2017).
[29] See above n 17, Waterworth (2017).
[30] See above n 17, Waterworth (2017).

operate within the court system to facilitate diversion for those with a mental illness who lacked capacity to consent to treatment whilst incarcerated, and to facilitate rapid diversion for those believed to be of 'unsound mind' at the time of offending.[31] One of the areas the 2016 Act was designed to address was the infringement of the human and procedural rights[32] of those who were experiencing severe mental illness and were unfit to stand trial, so as to avoid undesirable and counter therapeutic outcomes, (for example, indefinite incarceration due to being continually unfit for trial), which is inconsistent with the requirement of international rights treaties.[33]

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[31] Queensland Parliament, Inquiry Overview, *Mental Health (Recovery Model) Bill 2015 and Mental Health Bill 2015* (2015) Queensland Parliament.

[32] The human rights which were often infringed under the preceding legislative regime, and the relevant legislative basis for each of these, are;

- the right to freedom from discrimination and equality before the law (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 7; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976), art. 26; Convention on the Rights of Persons with Disabilities, UN GA/RES/61/106, (24 January 2007), arts. 5, 12; *Human Rights Act 2019* (Qld) s. 15, *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s. 8; *New Zealand Bill of Rights Act 1990* (NZ) s. 19)),
- protection from inhuman, cruel or degrading treatment (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 5; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976), art. 7; Convention on the Rights of Persons with Disabilities, UN GA/RES/61/106, (24 January 2007), art. 15; *Human Rights Act 2019* (Qld) s. 17, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 10; *Human Rights Act 2004* (ACT) s. 10; *New Zealand Bill of Rights Act 1990* (NZ) s. 19.),
- freedom from arbitrary detention (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 9; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976), art. 9; *Human Rights Act 2019* (Qld) s. 29, *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s. 21; *New Zealand Bill of Rights* Act 1990 (NZ) s. 22.),
- humane treatment when deprived of freedom of movement (International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976), art. 10; Convention on the Rights of Persons with Disabilities, UN GA/RES/61/106, (24 January 2007), art. 14, *Human Rights Act 2019* (Qld) s. 30, Charter of Human Rights and Responsibilities Act 2006 (Vic) s. 22; New Zealand Bill of Rights Act 1990 (NZ) s. 23(5)),
- a fair hearing by an impartial tribunal to decide rights recognised by law (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 10; *Human Rights Act 2019* (Qld) s. 31 & 32, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 2; *New Zealand Bill of Rights Act* 1990 (NZ) s. 23(3)).
- Additionally, that those with disabilities are entitled to recognition of legal capacity equally to others, and access to support in exercising their legal capacity (Convention on the Rights of Persons with Disabilities, UN GA/RES/61/106, (24 January 2007), art. 12).

[33] *Ibid.*

[33] See above n 17, Waterworth (2017), also Arie Freiburg, 'The Disposition of Mentally Disordered Offenders in Australia: 'Out of Mind, Out of Sight' Revisited' (1994)1 *Psychiatry,*

Specifically, as noted by the author,[34] the diversion provisions in the *Mental Health Act* 2000 (Qld)[35] presumed incapacity in relation to people on existing Forensic Orders or Involuntary Treatment Orders, contravening the right to avoid arbitrary incarceration contained in Article 12 of the Convention on the Rights of Persons with Disabilities, UN GA/RES/61/106, (24 January 2007) ('CRPD'),[36] as well as the right to a fair hearing by a court,[37] and access to support for the individual to exercise their legal capacity.[38] An unfortunate side effect of this process was that defendants found unfit for trial could be subject to prolonged incarceration for longer than was necessary or fair, without ever being convicted of any offence or having the chance to have the evidence against them heard by a court.[39] This contravened the right to be free from arbitrary detention.[40] Worse, indefinite incarceration was possible under the legislation if a defendant was deemed unfit for trial, or while awaiting the results of psychiatric assessments, which in practice could quite often take quite some time to complete. [41] This possibility brought with it the risk that defendants with significant mental heath concerns might plead guilty to crimes they had not committed,

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Psychology and Law, 97; Dr Penelope Weller 'Taking Reflexive Turn: Non-Adversarial Justice and Mental Health Review Tribunals' (2011) 37(1) *Monash University Law Review*, 81; Gerard G Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, 2002).
The international treaties involved are; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976).

[34] See above n 17, Waterworth (2017).

[35] Contained in Ch 7, Pt 2 of the *Mental Health Act 2000* (Qld).

[36] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 10; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 2; *New Zealand Bill of Rights Act 1990* (NZ) s. 23(3).

[37] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 10; *Human Rights Act 2019* (Qld) s. 31 & 32, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 2; *New Zealand Bill of Rights Act* 1990 (NZ) s. 23(3)).

[48] Convention on the Rights of Persons with Disabilities, UN GA/RES/61/106, (24 January 2007), art. 12.

[49] I Freckelton, 'Indefinite Detention in Australia: The Ongoing Risk of Governor's Pleasure Detention' (2014) 21(4) Psychiatry, *Psychology and Law* 469 at 469-470.

[40] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 9; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976), art. 9; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 21; *New Zealand Bill of Rights Act 1990* (NZ) s. 22.

[41] Waterworth (2017) above n 17 cited the case of Marlon Noble as an example of this issue: Australian Human Rights Commission, 'Marlon Noble will only be truly free when his name is cleared' (9 January 2012) *Australian Human Rights Commission* < https://www.humanrights.gov.au/news/media-releases/marlon-noble-will-only-be-truly-free-when-his-namecleared-2012-media-release>

just to avoid potentially being incarcerated indefinitely.[42] This is clearly unacceptable. It is the author's contention that criminal justice legislation must preclude such inequitable consequences.

Following an extensive consultation phase with relevant parties and service providers,[43] the *Mental Health Act* 2016 was designed to reform the legislative framework and address the concerns discussed above. For example, the new provisions of the *Mental Health Act 2016* allow a Magistrate's Court to dismiss a complaint for a simple offence if the court is satisfied that on the balance of probabilities the person charged with the offence was of unsound mind at the time of the offence.[44]

After a comparison of the functioning of the two Acts, and an analysis of how well they safeguarded the rights of the mentally unwell as defined in international human rights treaties, the author concluded that the new legislation may be a welcome change. Applied to a hypothetical case example, the provisions of the *Mental Health Act 2016* (Qld) appear to result in a material improvement in the experience of mentally unwell individuals appearing before the criminal court. These improvements are: a more rapid mental health assessment process; a streamlined and easier means to finalize offence charges; facilitation of rapid access to inpatient treatment for those in need of it, and a more timely release from custody.[45] At face value, the legislative provisions of the Mental Health Act show promise for improving the mental health and treatment access for mentally unwell defendants in Queensland. The legislation appears to enable rapid, effective and routine diversion for mental health patients facing summary charges from magistrates' courts into mental health services occurred. However, critical examination of the legislative provisions (as demonstrated by the case study included in the article) that there are limits to the beneficial effects of legislative reform that relies solely on diversion and involuntary treatment orders.

Mandated diversion via legislative provisions, and involuntary treatment (as mandated by legislation) are just the first steps of a larger system of care. The results of the case study reveal that mandated diversion and/or mandated treatment that rely on traditional therapy services (such as local Mental Health Services) may have only limited therapeutic outcomes for defendants with mental health problems. Effective diversion is just the first step of a process of engaging with the right combination of treatment and support services, which might also usefully include, for example, addiction treatment, domestic violence intervention, accommodation support, parenting classes, specialist neurological assessment and treatment. Yet the need for these services is not always identified, and the relevant services are often not readily available or accessible. Additionally, the services themselves may not have the capacity to accept referrals in a timely manner, and diverted defendants

[42] Freckleton (2014), see above n 49.
[43] Queensland Government, Mental Health Bill (17 September 2015) Queensland Government.
[44] *Mental Health Bill 2015* (Qld), s 22(1).
[45] See above n 17, Waterworth, (2017).

may lack the requisite skills, resources or motivation to engage with the right service. Some defendants whose offending is clearly related to mental health problems, addictions, or socioeconomic disadvantage, also do not meet the legislative criteria for diversion as their problems are not obviously or definitively classifiable within the diagnostic criteria for mental health issues.

It was apparent to the author while working in a professional capacity in a diversion service[46] and tasked with tracking patients who were routinely diverted under the *Mental Health Act 2016* (Qld), that they often disengaged easily from treatment services unless under involuntary treatment orders, which were usually time limited and marked the end of therapeutic engagement. This experience is reflected in research that suggests that defendants who were diverted to treatment were often in no better position after a diversion and disengagement experience than when they were first arrested.[47] Over time a pattern emerged of many offenders being harmed by repetitively cycling through the criminal and then mental health systems, each turn of the wheel depleting their financial, physical, and mental health, as well as exhausting those who tried to give them practical aid. The literature reports many such observations about the effect of the criminal justice system on mental heath clients.[48] Reflecting on this systemic cycling, makes it clear that the current legislative regime's reliance on diversion alone has not been effective in achieving therapeutic outcomes and that, instead it has potentially been counter-productive.[49] This reflection directed the author's attention to other potential sources of therapeutic change.

As will be discussed further in the subsequent chapters, there is significant research evidence suggesting that crucial elements in human change are appropriate exchange between humans, and skilled intervention to move offenders towards finding new ways to experience being in the world.[50]

This leads to the question: *'rather than maintaining the status quo, from a systems' perspective, what points of intervention, aside from diversion, would create useful change for the system's participants?'*

Structural versus Qualitative Change

The research considered above suggests that neither legislative reform nor diversion alone are sufficient to create the necessary conditions for significant therapeutic change and improvements for defendants involved in the criminal justice system who suffer from

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[46] The Court Liaison Service which forms part of the Queensland Forensic Mental Health Service, Queensland, Australia. This service operates in the magistrates courts of south east Queensland providing diversion for defendants who are suffering from severe mental health concerns.
[47] See, for example, Anestis and Carbonell (2014) above n 2.
[48] *Ibid*.
[49] *Ibid.*
[50] See Waterworth (2019) above n 4, 207.

mental health problems or other underlying criminogenic stimuli. This points to the need for analyses of where in the criminal justice and health care system, and what sort of additional processes and mechanisms could most usefully be added in to improve outcomes. Existing research in the fields of psychology and therapeutic change, as well as recent literature within the field of Therapeutic Jurisprudence, have highlighted the importance of courtroom interactions between judicial officers and defendants in decreasing and potentially eliminating defendants' repeated cycling through the criminal justice system.[51]

While there are many approaches that could be adopted to achieve change in this system, a qualitative change in the interactions themselves seems to offer significant promise in slowing down and decreasing repeated cycling through the system, as well as improving outcomes for the criminogenically vulnerable defendants. This is where the field of therapeutic jurisprudence, or 'TJ', becomes particularly meaningful, as it provides a values framework and practical guidance on how magistrates can have meaningful interactions with defendants in courtrooms, from a therapeutic perspective.[52]

It was a cold winter's morning at the Dandenong Drug Court, 2016, and Magistrate Greg Connellan had just finished a judicial monitoring session with a defendant in open court. The effectiveness of the magistrate's responses to the issues that the defendant struggled with revealed a depth of therapeutic knowledge and skill ('court craft') that translated into an impressive therapeutic intervention taking place in real time within the courtroom, allowing the magistrate to intervene effectively with defendants who were struggling with co-occurring mental health, addiction, and socioeconomic issues, accompanied by intergenerational trauma, all of which are incredibly difficult to treat within mainstream mental health settings.[53]

In fact, it is difficult to emphasize sufficiently how difficult these issues are to treat even within a mainstream mental health setting. These types of entrenched problems require a systems stepped care approach, encompassing a range of services and agencies, including the mental health system, the penitentiary system, social services, housing, family liaison, child protection, training providers, medical treatment, help with social skills, family liaison, child protection, training providers, specialist addiction treatment, etc. Effective intervention requires ***accountability*** to ensure that the defendant follows through, the service providers follow through, the housing providers follow through, and so on. All of the stakeholders have different roles, but without the court's role in overseeing and maintaining accountability, there is no oversight to ensure these different roles are discharged in a cohesive and effective manner, regardless of any practical obstacles that may arise (and often do for this defendant population group). Courts have the power to ***coordinate and maintain continuity*** in the necessary service provision in a way that cannot be achieved by individual offenders on parole, government or nonprofit employed case managers, mental

[51] See Waterworth (2019) above n 4.
[52] See Wexler (2014) above n 19, 15.
[53] See, for example, Anestis and Carbonell (2014) above n 2.

health practitioners or social workers. Above all, ensuring ***therapeutic engagement*** in these services requires ***a shift in the defendant's perspective,*** which magistrates' are uniquely placed to have both ***the skills and the authority*** to achieve. The courtroom scene described above is an example of this in action.

An analysis of the courts structure and legislation for Queensland and the feasibility of implementing a mainstream therapeutic jurisprudence approach on a wider scale within the Queensland Magistrates' Courts is provided in the article that follows. This article analyses the legislative provisions, court structures, the programs and the resources available to magistrates to determine if the Queensland jurisdiction is 'TJ friendly' using Systemic Evaluation Theory and a 'Wine and Bottles' analysis. (A table describing how these analytical approaches map onto each other is included below.)

The jurisdictional analysis provides a case study of this thesis' proposition that magistrates are ideally positioned to achieve enduring therapeutic change by means of their interactions with defendants. While this case study is limited to the Queensland jurisdiction, it could also be replicated in other jurisdictions to support efforts for mainstreaming therapeutic jurisprudence as well, as it is an approach that lends itself to being easily generalizable to other jurisdictions.[54]

Table 1: Combined Wine and Bottle Analysis and Systems Evaluation Theory

Wine and Bottles Analysis	Systems Evaluation Theory
Bottles: What features are already present in the legal and geographical jurisdiction that would enable the mainstreaming of therapeutic jurisprudence practices in the magistrate's courts? (This includes court structures, legal actors, services and programs, and legislation.)	Defining the system will include defining the system boundaries, components, subsystems, processes, relationships, feedback mechanisms, attributes, inputs and common goals. (This includes factors traditionally analysed, as 'bottles', and goes further by also describing rules, processes and feedback mechanisms as part of the existing system. These are important to include as systems of care and control are highly complex and operate reflexively.)
Wine: What TJ practices are already present in the jurisdiction? How much space is there for TJ practices to take place within the courtrooms in the jurisdiction?	Evaluation of system efficiency. System efficiency is a necessary prerequisite for optimal system effectiveness. Survey of what TJ practices are or could be implemented in the jurisdiction.

[54] For a good review, please see above n 13 Spencer (2014) 4.

Evaluation of how welcoming the jurisdiction is to TJ practices.	Evaluation of system effectiveness, after evaluating system efficiency. (How TJ-welcoming is this jurisdiction?) This will identify any gaps in the system, as well as identifying where efficiency could be improved.

Article 2: Rhondda Waterworth 'The Feasibility of Mainstreaming Therapeutic Jurisprudence within the South East Queensland Magistrate's Courts in 2021: A Systemic Wine and Bottles Analysis of Systems of Care and Control in Queensland'
(12900 words including references)

This articled was accepted in July 2021 for publication in the Journal of Judicial Administration, it was inspired by an earlier wine and bottles review which used a more simplified methodology which was conducted as part of earlier research studies.

The Feasibility of Mainstreaming Therapeutic Jurisprudence within the South East Queensland Magistrate's Courts in 2021: A Systemic Wine and Bottles Analysis of Systems of Care and Control in Queensland

By Rhondda Waterworth

Abstract

This article examines the feasibility of mainstreaming therapeutic jurisprudence court craft techniques to the magistrates criminal courts in south east Queensland, Australia. The article examines the court structures, court programs, legal actors and other staff and the legislation in place using a 'systemic wine and bottles analyses' (a hybridisation of systems measurement theory and the 'wine and bottles' analysis technique taken from the field of therapeutic jurisprudence)The article concludes that there is ample systemic opportunity to mainstream therapeutic jurisprudence techniques within the criminal magistrates courts. The potential positive implications of this are discussed with reference to the existing systems of care and control, the effect for offenders, magistrates, and communities.

Introduction

The concept of group responsibility for the care of individual members may seem unusual when applied to the criminal justice system. However, it is here, in the nexus between the criminal justice system, the mental health and other health services, and socioeconomic disadvantage, that we see those who are likely to be most in need of collective support to change their life patterns.[1] The idea of externally imposed care systems with multiple entry points is already well-accepted within the health and mental health care arenas,[2] and when dealing with socioeconomic disadvantage.[3] Ethically and pragmatically, there is a strong argument to be made that those in contact with the criminal justice system as defendants

[1] According to the Australian Bureau of Statistics, there is currently no publicly available data on mental health conditions and other prejudicial issues for defendants going before the courts, (Email from Russell Cook, Research Officer Corrections, to Rhondda Waterworth, 9/05/2021) however it is possible to extrapolate from the data for people who have recently entered prison: 2 out of 3 prisoners had used illicit drugs just prior to entering prison, 1 in 3 had a chronic health condition, 1 in 3 prisoners were in insecure accommodation or homeless in the four weeks before entering prison, 1 in 4 receive medication for a mental health condition while in prison. For more detail refer to Australian Government, *Prisoners* (2021) Australian Institute of Health and Welfare <https://www.aihw.gov.au/reports-data/population-groups/prisoners/overview>

[2] See, for example, Queensland Health, *Service delivery for people with dual diagnosis (co-occurring mental health and alcohol and other drug problems)* (Queensland Health, 2008). <https://www.health.qld.gov.au/publications/clinical-practice/guidelines-procedures/clinical-staff/mental-health/guidelines/ddpolicy_final.pdf>

[3] See, for example to Australian Government, *DSS Demographics* (December 2020), <https://data.gov.au/dataset/ds-dga-cff2ae8a-55e4-47db-a66d-e177fe0ac6a0/distribution/dist-dga-0429d083-d8d2-4fff-bc75-f9100e1723ad/details?q=>

are often those most in need of therapeutic intervention.[4] Additionally, further reflection indicates that the systems of care and control (as will be defined shortly) operating upon this group could make more efficient use of resources to effect therapeutic intervention and change for defendants.

Cognizant of the research demonstrating the often deleterious effects on an individual moving through these systems,[5] and the potential benefits offered by adopting a mainstreamed therapeutic approach within the magistrates courts,[6] it appears strategically useful to conduct a systemic wine and bottles analysis of the possibilities for mainstreaming therapeutic jurisprudence practices into the magistrates courts in south east Queensland.

It is useful at this point to define the terminology used in this article. For the purposes of this article, a system is described as a defined pattern of interactions, relationships and component parts. It contains subsystems, feedback mechanisms, receives inputs, and interacts with the surrounding environment to work towards a common goal.[7] The phrase

[4] Joyce C Anestis and Joyce L Carbonell, 'Stopping the Revolving Door: Effectiveness of Mental Health Court in Reducing Recidivism by Mentally Ill Offenders' (2014) 65(9) *Psychiatric Services* 1105; G Cote, S Hodgins 'Co-occurring mental disorders among criminal offenders.' (1990) 18(3) *Journal of the American Academy of Psychiatry and the Law* 271–81; M Krakowski, J Volavka, D Brizer 'Psychopathology and violence: a review of literature.' (1986) 27(2) *Comprehensive Psychiatry* 131–48. doi: 10.1016/0010- 440X(86)90022-2.; N van Buitenen, C van den Berg, JM Meijers, J Harte (2020). 'The prevalence of mental disorders and patterns of comorbidity within a large sample of mentally ill prisoners: A network analysis.' (2020) 63(1) *European Psychiatry* 1–12. https://doi.org/10.1192/j.eurpsy.2020.63.

[5] According to the Australian Bureau of statistics (see above n 1), 3 out of 4 new prisoners had previously been imprisoned, please also refer to Australian Bureau of Statistics, '1351.0.55.031 - Research Paper: An Analysis of Repeat Imprisonment Trends in Australia using Prisoner Census Data from 1994 to 2007' (Aug 2010) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/1351.0.55.031>; A Thompson 'The revolving door of penal institutions: a narration of lived experience'(2007) *Flinders Journal of Law Reform* 591; Lacey Schaefer 'On the reinforcing nature of crime and punishment: An exploration of inmates' self-reported likelihood of reoffending' (2016) 55(3) *Journal of Offender Rehabilitation* 168.

[6] Wexler, David B. 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' (2011) 37 *Monash University Law Review* 33, 38; David B. Wexler, 'The Relevance of Therapeutic Jurisprudence and Its Literature' (2011) 23 *Federal Sentencing Report* 278; David B. Wexler, 'Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development' (2010) 7 *Irish Probation Journal* 94; Wexler David B., 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices' (2014) *Therapeutic Jurisprudence.* Paper 7. <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1006&context=tj>; David B., Wexler, and James E. Rogers (2014) 'The International and Interdisciplinary Project to Mainstream Therapeutic Jurisprudence (TJ) in Criminal Courts: An Update, a Law School Component, and an Invitation', University of Arizona, *Arizona Legal Studies Discussion Paper No. 14-4.*

[7] WF Buckley *Society—a complex adaptive system: essays in social theory* (Gordon and Breach, 1998); WF Buckley *Sociology and modern systems theory* (Prentice-Hall, 1967); TR Burns 'System theories', in G Ritzer (ed), (2007) *The Wiley Blackwell Encyclopedia of Sociology* (MA and Blackwell Publishing, 2007); AY Cohen and BM Kibel (1993) *The basics of open systems evaluation: a resource*

'systems of care and control' means, in this context, the complex system including the health system, the mental health system, the courts systems, the system of watchhouses, remand and prison centres, as well as the legal and medical systems which operate within these contexts, and their staff. The system under examination in this article also includes the rules that govern the operation of the system, such as laws, principles, professional guidelines, and other patterns to the ways in which the parts interact. This concept will be explored further later on in this section.

Viewing the nexus of the intersection between mental health care and the courts through the lens of systems theory has many potential advantages.[8] Primary amongst these is that it is likely to enhance the accurate capture and accurate representation of real world data,[9] and subsequently, the potential exposure of new ways to make sense of the interactions and patterns that take place in complex systems of care and control.[10] Most importantly, this approach provides meaningful information to inform decision making regarding programs related to the care and control arenas.[11] This approach deals with concerns that systems of care and treatment often operate in a linear and siloed fashion, as will be discussed later on in this article.[12]

The Therapeutic Jurisprudence (TJ) movement has a lot to offer defendants who are moving through systems of care and control, and who struggle with mental health problems, addictions, homelessness, intellectual disability, or other socioeconomic disadvantage.[13] TJ offers defendants a different court experience, one which is designed with therapeutic goals in mind,[14] and which is likely to have a more effective long term impact than traditional court and sentencing approaches.[15] In this regard, the effective application of therapeutic justice principles[16] can enhance defendants' engagement with various goals designed to prevent further offending and improve their living circumstances. Generally, these will often

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paper (The Pacific Institute for Research and Evaluation, 1993); B Williams, and R Hummelbrunner (2010) *Systems concepts in action: a practitioner's toolkit,* (Stanford University Press, 2010).

[8] R Renger 'System evaluation theory (SET): A practical evaluation framework for evaluators to meet the challenges of system evaluation.' (2015) (Spring) *Evaluation Journal of Australasia* 16.

[9] PJ Rogers 'Using program theory to evaluate complicated and complex aspects of interventions' (2008) 14(1) *Evaluation* 29–48; see Williams and Hummelbrunner (2010) above n 7.

[10] BH Banathy 1992 *A systems view of education: concepts and principles for effective practice,* Educational Technology, Englewood Cliffs, New Jersey; please refer to Renger (2015) above n8 at 16.

[11] Please refer to Renger (2015) above n8 at 16.

[12] Renger, see above n 8, also, JA Morell 'Why are there unintended consequences of program action, and what are the implications for doing evaluation?' (2005) 26(4) *American Journal of Evaluation* 444.

[13] VA Morgan, F Morgan, G Valuri, A Ferrante, D Castle and A Jablensky 'A whole-of-population study of the prevalence and patterns of criminal offending in people with schizophrenia and other mental illness.' (2013) 43(1) *Psychological Medicine* 869–80.

[14] David B. Wexler, 'Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law' (2014) *Arizona Legal Studies Discussion Paper* 15. <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1005&context=tj>

[15] Rhondda Waterworth 'The Case for Measuring Legal Actor Contributions in Court Proceedings'(2018) *Psychiatry, Psychology and Law* 77-86, DOI: 10.1080/13218719.2018.1483273

[16] See Wexler (2014) above n 6.

include accessing treatment, rehabilitation, finding and keeping accommodation, and engaging with employment, and improving social networks and communities. [17] Historically, gaining and maintaining effective engagement with these aspects of treatment can be quite challenging for this group of people.[18] However, as they are quite likely to come into contact with the justice system, and this will often occur prior to contact with mental health services, the criminal justice system offers scope to intervene with offenders much earlier in their offending trajectories via mainstreaming TJ approaches.[19]

The current analysis provides a case study that seeks to review the systems of care and control, as they function in South East Queensland, based on System Evaluation Theory (SET)[20] and the 'wine and bottles' analysis elaborated with the Therapeutic Jurisprudence community[21] to ascertain if the jurisdiction is receptive to therapeutic judging practices which is necessary if mainstreaming of TJ practices is to occur. Focusing on the south east Queensland magistrates courts as a case study, this article will analyse the scope for mainstreaming TJ practices within the magistrates courts in South East Queensland, when dealing with offenders whose recidivism is driven by underlying mental health or other issues of the kind identified above. The article will also ascertain whether there are additional reforms or structures that could be implemented to enhance outcomes for this defendant group.

The jurisdiction of South East Queensland was chosen due to the author's familiarity with the jurisdiction and the courts operating within it, the presence of courts and legislation aimed at rehabilitation, and the ease with which a case study undertaken in this jurisdiction could be transferred to inform analysis within another jurisdiction, particularly within another Australian state.[22] It provides an exemplar for evaluating the potential for mainstreaming TJ practices in sentencing courts elsewhere. This analyses is based on an observation at a set point in time, with the tacit assumption that the

[17] See Wexler (2011) above n 6 at 38*;* (2011) above n 6; Wexler (2010) see above n 6; Wexler 2015, see above n 25; Wexler, See Wexler and Rogers (2014) above n 6.
[18] DJ Kavanagh, KT Mueser, 'Current evidence on integrated treatment for serious mental disorder and substance misuse' (2007) 44 *Journal of Norwegian Psychological Association* 618; A Kenny, S Kidd, J Tuena, M Jarvis, A Robertson, 'Falling through the cracks: supporting young people with dual diagnosis in rural and regional Victoria' (2006) 12(3) *Australian Journal of Primary Health12*; WC Torrey, M. Tepper, J. Greenwold, 'Implementing integrated services for adults with co-occurring substance use disorders and psychiatric illnesses: a research review' (2011) 7(3) *Journal of Dual Diagnosis* 150; NSW Ministry of Health 'Effective Models of Care for Comorbid Mental Illness and Illicit Substance Use' (2015) *Mental Health and Drug and Alcohol Office, NSW Ministry of Heath*, 9 <http://www.health.nsw.gov.au/mentalhealth/publications/Publications/comorbid-mental-care-review.pdf>
[19] Please refer to above n 6.
[20] Renger, see above n 8.
[21] See above n 6 Wexler and Rogers (2014).
[22] See Pauline Spencer, 'From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream' (2014) 39 *Alternative Law Journal* 4; David B. Wexler and Michael Jones 'Employing the 'Last Best Offer' Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation' (2013) 6 *Phoenix Law Review* 843.

systems themselves can, and have, evolved over time.[23] It is worth highlighting that the methodology used to analyze the South East Queensland jurisdiction could be used in other legal jurisdictions world wide.

In this article we will first examine the south east Queensland context, the prison population, the mental health needs of those passing through court, the mental health and other effects of incarceration, and the presence of diagnostic comorbidities in this population group, as well as treatment recommendations fort his client population. Next, we will examine what TJ can offer in general to defendants with these characteristics and treatment needs, and specifically, what mainstreaming TJ could usefully offer. The article then sets out the research questions, describes the analysis method, and applies this to the south east Queensland jurisdiction. The results of this analyses are discussed, as well as conclusions and suggestions for future directions.

Background

Queensland's offender population

The numbers of defendants before the magistrates courts have been increasing over time: the criminal jurisdiction of the magistrates court saw an increase of 16804 defendants (8.42%) in 2013-2014,[24] and of 1481 (.26%) in 2014-2015.[25]

Writing in mid-2021, it is interesting to note that the national crime and incarceration rates have dropped slightly over the last year, most likely due to the COVID-19 epidemic control measures.[26] Despite these national trend for rates to decrease, there has been a 5% growth in the Queensland prisoner population in the last quarter (Dec 2020),[27] and the prisons are currently at 125% capacity.[28] Taking a longitudinal perspective, Australia has

[23] For example as noted by P McClelland 'Courts in the 21st century : should we do things differently?' (2006) October *The Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales.* The Judicial Commission of NSW. <>https://search.informit.org/doi/10.3316/agispt.20063470). Also, for a good review of the evolution and current system of psychiatric care in Australia please refer to A Ellis. (2020). 'Forensic psychiatry and mental health in Australia: An overview.' (2020) 25(2) *CNS Spectrums* 119-121. doi:10.1017/S1092852919001299

[24] Justice Orazio Rinaudo, *Magistrates Courts of Queensland Annual report 2013 – 2014* (Chief Magistrate Queensland Courts, Chambers of the Chief Magistrate, 2014), 4.

[25] Ibid.

[26] Australian Bureau of Statistics, *Corrective Services*, Australia (December Quarter 2020) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>

[28] Lydia Lynch 'Work starts on 'mega-jail' west of Brisbane as prison population overflows' (March 2021) *Brisbane Times* <https://www.brisbanetimes.com.au/national/queensland/work-starts-on-mega-jail-west-of-brisbane-as-prison-population-overflows-20210304-

experienced a strong rise in prison populations, with an associated human and economic cost,[29] as the national rate of incarceration has grown by 46% since December 2010.[30] It is clear that a decrease in prison populations could be useful for Queensland.[31]

The Effect of Incarceration

Although there are different perspectives on what is a justifiable ethical and practical position with respects to rehabilitation,[32] the use of incarceration within the justice system is generally conceptualized as a deterrent,[33] with rehabilitation goals in mind.[34] As noted by a 2007 Australian Bureau of Statistics analysis of reimprisonment trends, while prison acted as a deterrent for some offenders, this was not true for all offenders, and for some it actually fostered criminal behaviour.[35] The ABS analysis identified that reimprisonment was strongly linked to having already served prison time.[36] Rather depressingly, the ABS analysis in 2007 found that reimprisonment rates in all Australian jurisdictions aside from Queensland were higher in the years leading up to 2007 than in the mid 1990's.[37]

p577qe.html#:~:text=Construction%20has%20started%20on%20a,crisis%20in%20the%20state's%20prisons.>

[29] SA. Kinner, Preen, DB., Kariminia, A., Butler,T., Andrews,JY., Stoové, M., and M Law, 'Counting the cost: estimating the number of deaths among recently released prisoners in Australia' (2011) 195 *Medical Journal Australia* 64; Sheryl Kubiak, Roddy, Juliette, Comartin, Erin, and Elizabeth Tillander,'Cost analysis of long-term outcomes of an urban mental health court' (2015) 52 *Evaluation and Program Planning* 96; John Roman, 'Cost Benefit Analysis of Criminal Justice Reforms' (2013) 272 *National Institute of Justice Journal* 31.

[30] *Ibid.*

[31] See above n 28.

[32] Please refer, for example to E Currie 'Consciousness, solidarity and hope as prevention and rehabilitation' (2013) 1(2) *International Journal for Crime, Justice and Social Democracy* 3-11; and A Birgden 'Therapeutic Jurisprudence and 'Good Lives': A Rehabilitation Framework for Corrections' (2002) 37(3*) Australian Psychologist* 180.

[33] See for example, Valerie Wright, *Deterrence in Criminal Justice*, The Sentencing Project, (November 2010) at 2. < https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>

[34] See Birgden (2002) above n 32; Michelle Edgely 'Solution-focused court programs for mentally impaired offenders: What works?' (2014) 22 *Journal of Judicial Administration,* 208; JE Thomas, 'Diversion and Support of Offenders with a Mental Illness: Guidelines for Best Practice' (Justice Health, Department of Justice (Vic), 2010) p 63, <http://www.aic.gov.au/en/crime_community/communitycrime/mental%20health%20and%20crime/njceos.aspx>; See above n 34 Edgely (2013); J Ogloff and M Davis 'Advances in Offender Assessment and Rehabilitation: Contributions of the Risk-Needs-Responsivity Approach' (2004) 10(3) *Psychology, Crime, Law* 230; J Skeem, S Manchuk and JK Peterson 'Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction' (2011) 35 *Law Human Behaviour* 121.

[35] Please refer to the Australian Bureau of Statistics, above n 5.

[36] *Ibid*.

[37] *Ibid*.

There are many different reasons as to why this might be the case.[38] In an address to the Royal Commission into NSW prisons (more than twenty years ago) Justice Nagle identified that, in his opinion, the major cause of recidivism for prisoners was their release into the same communities that encouraged them to 'turn to crime' in the first place, without adequate support, accommodation, or enough money.[39] This observation still holds true, and with consultation of the literature, it appears that there are several ways in which imprisonment itself might actually be criminogenic and lead to recidivism.[40]

Most of the criminology theories relating to offending relate to identity, personal boundaries, evaluation of cost benefit, socioeconomic positioning, and maladaptive ways of dealing with 'strains' (ie difficult emotions triggered by adversity).[41] Most of these criminogenic factors identified by theory are exacerbated by periods of incarceration. Let us take, for example, the idea of offending being normalised and becoming part of an individual's identity. Being incarcerated confines the individual to a situation where the social interactions are all with individuals for whom criminal behaviour is the norm, for long periods of time, while restricting the opportunity for interactions with others who have different norms. In this way, being imprisoned, and the experiences that go with that, can solidify an 'offender identity'.[42]

All of these factors together could work to reduce the an offender's commitment to avoiding further criminal behaviour.[43]

Comorbidity

The population of individuals who could benefit the most from the mainstreaming of TJ approaches appear to be those with co-existing, layered or cross-sectional vulnerabilities.[44] Comorbidity is a variable that is particularly relevant in this context, as a fundamental feature of the system under consideration which will strongly influence the type of intervention and treatment that is desirable for defendants passing through the courts, as well as their ability to engage.[45]

[38] Please refer to above n 5; Thompson (2007) and Schaefer (2016).

[39] B Hampton *No Escape: Prisons, Therapy and Politics, Frontlines 3*, (NSW University Press 1994) 15.

[40] Charis E. Kubrin, Thomas D. Stucky, Marvin D. Krohn *Researching Theories of Crime and Deviance* (1st Edn, Oxford University Press 2008).

[41] *Ibid.*

[42] See Thompson (2007) above n 5.

[43] See Schaefer (2016) above n 5, 168.

[44] Please refer to above n 18; Kavanagh and Mueser (2007); Kenny et al (2006); Torrey, Tepper and Greenwold (2011).

[45] *Ibid*.

Comorbidity is defined as the co-occurrence of more than one psychiatric disorder for any given individual. This is a very common phenomenon in clinical psychiatric or psychology settings, across jurisdictions.[46]

This is particularly relevant to this research, because those with comorbid psychiatric disorders tend to experience higher rates of antisocial behaviour[47] more functional impairment,[48] and to have higher rates of public service use.[49] Comorbidity negatively effects treatment outcome,[50] as well as the severity of symptoms.[51]

The percentages of defendants in Queensland's magistrates courts presenting with mental health concerns are not publicly available, however it is possible to develop an idea of the potential magnitude of the problem by extrapolating from the statistics relating to the mental health of the general population and also the prison population.

In Queensland, one in five people in the general population have a mental or behavioral condition, a statistic which has been increasing.[52] Rates of mental health in the Australian

[46] DL Newman, TE Moffitt A Caspi, PA Silva. 'Comorbid mental disorders: implications for treatment and sample selection.' (1998) 107(2) *Journal of Abnormal Psychology* 305–11. doi: 10.1037/0021-843X.107.2.305; RC. Kessler, KA McGonagle, S Zhao, CB Nelson, M Hughes, S Eshleman, HU Wittchen, KS Kendler 'Lifetime and 12-month prevalence of DSM-III-R psychiatric disorders in the United States: results from the National Comorbidity Survey.' (1994) 51(1) *Archives of General Psychiatry*, 8–19. doi: 10.1001/archpsyc.1994.03950010008002; please refer to van Buitenen, van den Berg, Meijers and Harte (2020) n 4.

[47] See Cote and Hodgins (1990) above n 4, 271.

[48] L Frost, T Moffitt, R McGee 'Neuropsychological correlates of psychopathology in an unselected cohort of young adolescents.' (1989) 98(3) *Journal of Abnormal Psychology* 307–13; K Bakken, AS Landheim, P Vaglum 'Axis I and II disorders as long-term predictors of mental distress: a six-year prospective follow-up of substance dependent patients.' (2007) 7(1) *BMC Psychiatry* 29. doi: 10.1186/1471- 244X-7-29

[49] R De Graaf, RV Bijl, M Ten Have, ATF Beekman, WAM Vollebergh 'Pathways to comorbidity: the transition of pure mood, anxiety and substance use disorders into comorbid conditions in a longitudinal population-based study.' (2004) 82(3) *Journal of Affective Disorders* 461–467. doi: 10.1016/j.jad.2004.03.001; see above n 48 Bakken, Landheim and Vaglum (2007) 29.

[50] T Overbeek, K Schruers, E Vermetten, E Griez 'Comorbidity of obsessive– compulsive disorder and depression: prevalence, symptom severity, and treatment effect.' (2002) 63(1) *Journal of Clinical Psychiatry* 1106–12. doi: 10.4088/JCP. v63n1204; BO Olatunji, JM Cisler, DF Tolin 'A meta-analysis of the influence of comorbidity on treatment outcome in the anxiety disorders.' (2010) 30(6) *Clinical Psychology Review* 642–54. doi: 10.1016/j.cpr.2010.04.008.

[51] Please note that comorbidity also includes addictions. Please refer to above n4, Cote and Hodgins (1990), and above n 48 Frost, Moffitt, and McGee (1989); DN Klein, EB Taylor, K Harding, S Dickstein 'Double depression and episodic major depression: demographic, clinical, familial, personality, and socioenvironmental characteristics and short-term outcome.' (1988) 145(10) *American Journal of Psychiatry* 1226–31. doi: 10.1176/ajp.145.10.1226; Please refer to De Graaf, et al (2004) above n 49, 461–7.

[52] Australian Bureau of Statistics *Mental Health 2017- 2018 financial year* (12/12/2018) <https://www.abs.gov.au/statistics/health/health-conditions-and-risks/mental-health/latest-release>

prison population are well above that of the average population, and a significant concern.[53] Internationally, rates of mental health and comorbidities within prison populations are also well above that of the general population, including higher levels of non neurotypical presentations and other issues (such as speech and language disorders) that would be expected to affect functioning and engagement with systems of care and control.[54]

Psychiatric patients who are involved in the criminal justice system, are likely to have complex presenting issues including comorbid diagnoses, socioeconomic barriers to employment, unpredictable geographic mobility, and, at times, homelessness. Because of these factors they are possibly the most difficult group of patients within a health service to treat effectively.[55]

The evidence base for treating individuals with comorbid substance disorder and mental health disorders favours an integrated or stepped care approach.[56] This is where the level of care provided is always the least restrictive option in terms of the intensity of treatment and the cost and personal inconvenience to patients, but enough to be still likely to create improvements. Additionally, the model of care should be self-correcting, which means that engagement and outcomes of therapy are closely monitored and care is 'stepped up' if the current level of intervention isn't showing enough benefit to the patient.[57] Inherent to this approach is a care system that responds to lack of responsiveness on the part of the patient.

Treatment systems and comorbidity

Existing treatment via traditional government mental health and other health services is usually organised around treatment for a dominant condition.[58] As noted in a recent NSW government review, this sequential approach to treatment, where treatments are administered in a linear, sequential manner, can often result in externally imposed barriers

[53] 65% of newly incarcerated women and 36% of newly incarcerated men reported a history of mental health concerns, 18% of new prison entrants were referred due to mental health concerns for observation and treatment upon arrival to prison. For more detail, please refer to the Australian Government *The Health of Australia's Prisoners* (2019) The Australian Institute of Health and Welfare at 27. <https://www.aihw.gov.au/reports/australias-health/health-of-prisoners>

[54] R Byng and A Forrester 'Mental Health in Offenders and Prison Populations' in L Gask, T Kendrick, R Peveler ad C Chew-Graham (eds) *Primary Care Mental Health* (Cambridge University Press, 2018) 343-352. Press. Doi: 10.1017/9781911623038.025; E, Perdacher, D Kavanagh, and J Sheffield 'Well-being and mental health interventions for Indigenous people in prison: Systematic review' (2019) 5(6) *British Journal of Psychology Open* E95. Doi:10.1192/bjo.2019.80; J McCarthy, L Underwood, H Hayward, E Chaplin, A Forrester, R Mills, and D Murphy. 'Autism Specturm Disorder and Mental Health Problems Among Prisoners' 30(S1) *European Psychiatry,* 1 -1. Doi: 10.1016/S0924-9338(15)30674-X

[55] See above n 18; Kavanagh and Mueser (2007); Kenny et al (2006); Torrey, Tepper and Greenwold (2011).

[56] See n 18; Kavanagh and Mueser (2007); Kenny et al (2006); Torrey, Tepper and Greenwold (2011).

[57] *Ibid.*

[58] AR Roberts, and K. Corcoran 'Adolescents growing up in stressful environments, dual diagnosis, and sources of success' (2005) 5:1 *Brief Treatment Crisis Intervention* 1.

preventing defendants gaining access to treatment.[59] From a systems perspective, it is not an ideal decision making environment, and does not encourage effective system functioning from a patient perspective.[60] Treatment integration, where treatment occurs in parallel and at the same time (and from the same treatment provider) for multiple issues at once, is essential for those with co-occurring conditions.[61]

Unfortunately, as noted earlier, health treatment systems often operate as segregated silos of knowledge working in parallel.[62] For the defendant with comorbid diagnoses and a consequent complex presentation, this usually results in more frequent interactions with multiple systems of care. For example, a person with psychosis, drug addiction and homelessness would need to access three separate services for help with these issues, as opposed to one service which facilitates treatment for all three issues.[63] Whereas it could be predicted that the likelihood of them successfully being able to access any service would be expected to be less than that of the average person in the population. The comorbid issues are likely to have an impact on their ability to attend court reliably, which may compound their legal problems. An integrated approach would be to facilitate management of their mental disorder via the appropriate services, provision of support to enable them to maintain stable accommodation and a stable financial situation, while also facilitating court attendance (for example by providing help with diary management, transport, support in court, therapy for emotional regulation, as needed).

As is becoming apparent, the need to navigate these complex systems of care can be a bewildering and ineffective experience for defendants with mental health problems, causing problems ranging from difficulties in getting to multiple appointments due to health issues and / or lack of funds, to increased distress, to actually creating a further

[59] NSW Ministry of Health see above n 11, 9; H Proudfoot, M Teesson, E Brewin, K Gournay 'Comorbidity and delivery of services.' In M Teesson, H Proudfoot (eds). *Comorbid Mental Disorders and Substance Use Disorders: Epidemiology, Prevention and Treatment.* (Australian Government Department of Health and Ageing, 2003).

[60] R Renger, J Foltysova, J Renger, W Booze 'Defining Systems to evaluate system efficiency and effectiveness.' (2017) 17(3) *Evaluation Journal of Australia* 4-13.

[61] RE Drake, KT Mueser, MF Brunette, GJ McHugo, 'A review of treatments for people with severe mental illnesses and co-occurring substance use disorders.' (2004) 27(4) *Psychiatric Rehabilitation Journal* 360; RE Drake, EL O'Neal, MA Wallach, 'A systematic review of psychosocial research on psychosocial interventions for people with co-occurring severe mental and substance use disorders.' (2008) 34(1) *Journal of Substance Abuse Treatment* 123; MP McGovern, D, Urada C, Lambert-Harris, ST, Sullivan, NA, Mazade, 'Development and initial feasibility of an organizational measure of behavioral health integration in medical care settings.' (2012) 43(4) *Journal of Substance Abuse Treatment,* 402; see above n 18 Torrey, Tepper and Greenwold (2011).

[62] Medibank Private, Nous Group. *The Case for Mental Health Reform in Australia: A Review of Expenditure and System Design.* (Medibank Private and Nous Group, 2013). <https://www.medibankhealth.com.au/files/editor_upload/File/Mental%20Health%20Full%20Report.pd f>

[63] The phrase 'accessing a service' in this case means to arrive at an appointment on a regular basis , engage in meaningful discussion focalized around improving a problem situation, and follow through with recommendations.

sense of disempowerment, an exacerbating mental health issues, or encouraging further offending behaviour (for example using public transport without paying because of being unable to afford the fare).[64]

The deleterious effects of a 'silo' approach has led to the policy of a 'no wrong door' approach at the national and state health care levels for those with comorbid disorders.[65] What this policy means is that, ideally, a patient who comes into contact with one arm of the health service will have a comprehensive review of all of their needs, and receive support and facilitated referral to as many services as they need to address their global situation. This approach could very usefully be extended to the include contact with the criminal justice system.

What Therapeutic Jurisprudence has to offer

Therapeutic Jurisprudence (TJ) is the field of inquiry into how the law, its actors and processes affect offenders in contact with the legal system.[66] Developed by David Wexler and Bruce Winnick in the USA,[67] TJ aims to makes use of principles and knowledge from the fields of the social sciences and medicine to shape the impact of legal process on defendants so as to create therapeutic outcomes for them.[68]

TJ employs a range of techniques that focus on engaging with defendants and their needs, and encouraging the process of internalizing principles of autonomy, self-determination, and accountability. [69] TJ also encourages engagement with the needs of the victim of the crime, and the needs of the wider community.[70]

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[64] Australian Government, *Budget: National mental health reform.* (Australia Government, Canberra: 2011) 5.

[65] Queensland Health, *Service delivery for people with dual diagnosis (co-occurring mental health and alcohol and other drug problems)* (Queensland Health, 2008). <https://www.health.qld.gov.au/publications/clinical-practice/guidelines-procedures/clinical-staff/mental-health/guidelines/ddpolicy_final.pdf>

[66] Please see above n 34 Edgely (2014); D Wexler and B Winick 'Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research'(1991) 45(5) *University of Miami Law Review* 983; Winick B and Wexler D (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7; M King *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration Inc, 2009) p 24; M King 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16(2) *Journal of Judicial Administration* 92.

[67] David B. Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) *Review of Jurisprudence University of Puerto Rico* 691.

[68] *Ibid,* see also E Zafirakis 'Curbing the Revolving Door Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens' (2010) 20 *Journal of Judicial Administration* 84; L Kondo 'Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill' (2001) 28(3) *American Journal of Criminal Law* 262.

[69] See Wexler (2014) above n 14.

[70] See Winnick and Wexler (2003) above n 66.

Traditional TJ approaches have emerged via initiatives to create specialist, problem solving, or (solution-focussed) courts.[71] TJ principles have been used successfully in 'problem solving' courts,[72] however they have a potentially broader application to generalist courts as well,[73] hence the movement to 'mainstream' TJ. In Victoria, specialist court support programs such as the Court Integrated Services Program (CISP), (for those on bail who need referral for support to prevent reoffending), and the Assessment and Referral Court (ARC) list (for those suffering from mental health or cognitive impairment), have become examples of best practice in supporting mainstream TJ court practices.[74]

Mainstreaming TJ

The TJ movement was initially focused on developing and promoting TJ practices amongst magistrates.[75] The change in focus towards mainstreaming TJ principles into the mainstream court system has been termed the 'TJ Mainstreaming Project'.[76] This movement encourages the participation of practitioners with the dual goal of promoting TJ practices, and developing a framework for criminal justice procedures which would enhance therapeutic outcomes for defendants moving through the criminal justice system.[77] Mainstreaming encourages analysing the features of the legal landscape within specific jurisdictions to see how, and in what way, TJ principles and practices could best be promoted in that jurisdiction.[78]

TJ practices are often described as 'interstitial', as they are able to fill the spaces within legal practice and structures.[79] As noted by Wexler,[80] mainstreaming TJ practices means cultivating a legal landscape that has the expertise and necessary structures to allow for therapeutic processes (clinical or supportive) to be implemented for defendants within the criminal justice system. When analysing a legal jurisdiction for TJ friendly attributes, the legislation and court structures could be seen as 'the bottles' and the process of how

[71] For example, as comprehensively described by Jelena Popovic, 'Mainstreaming Therapeutic Jurisprudence in Victoria: Feelin' groovy?' (2014) *Australasian Institute of Judicial Administration,* 187, 190, also reviewed in Lacey Schaefer and Mary Beriman (2019) 'Problem-Solving Courts in Australia: A Review of Problems and Solutions' (2019) 14:3 *Victims & Offenders* 344.
[72] See above n 34, Edgely (2014).
[73] Please refer for an example to Dana Segev, 'The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act' (2014) 7 *Arizona Summit Law Review* 527.
[74] Pauline Spencer, 'To dream the impossible dream? Therapeutic jurisprudence in mainstream courts' (*2012) International Conference on Law & Society* Magistrates' Court of Victoria State of Victoria, Australia, 4.
[75] *Ibid,* 527; Susan L. Brooks, 'Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education', (2005) 17 *St Thomas Law Review* 513; see above n 6 Wexler (2014).
[76] See also Wexler (2014) n 14; Winnick and Wexler (2003) above n 66.
[77] See Wexler and Rogers (2014) above n 6; see also Wexler (2014) *ibid.*
[78] See Segev (2014) above n 74; see Brooks (2005) above n 75; Wexler (2014) above n 6 .
[79] See Wexler (2011) above n 6 at 38.
[80] See Wexler, (2014) above n 6.

things are done could be seen as 'the wine',[81] which can be 'poured' into the available bottles.[82]

Efforts to find ways in which TJ can be made use of in mainstream courts are needed to resolve the tension between the body of knowledge regarding the effectiveness of problem-solving courts, and the economic constriction which has (at times) led to the dismantling of many problem-solving courts,[83] as had been the case in Queensland in the mid 2000's[84] and also in other jurisdictions, most notably in the United Kingdom, again during the same time period.[85]

Mainstreaming TJ is also desirable so as to allow equitable access to therapeutic court interactions outside of the narrow scope of geographically localised and problem-specific problem-solving court. This process would also, ideally, help to improve overall (and sentence) outcomes for those who would benefit form a TJ approach, and mitigate the difficulties that the current healthcare system has in screening and reaching this population, due to the complicated nature of their presentations (as noted earlier in the 'Cormorbidity' and 'Treatment Systems' sections of this paper). A mainstreamed TJ approach could almost act as an advance screening step and first point of contact for defendants who have unidentified mental health or other needs which are underpinning their offending behaviour. It appears to be a necessary step to counteract what has been described as the criminalization of mental illness.[86]

Research questions

The questions that will be asked of the south east Queensland jurisdiction in this article are the following:

[81] See Wexler (2011) above n 6 at 278.

[82] See Wexler (2010), (2014), and (2015) above n 6.

[83] Monidipa Fouzder *Renewed call for problem-solving courts to be piloted* (30 August 2016) The Law Society Gazette <https://www.lawgazette.co.uk/law/renewed-call-for-problem-solving-courts-to-be-piloted/5057246.article>; Stephen Walker *Lord Chief Justice calls for new 'problem solving' courts* (17 March 2016) BBC News, Northern Ireland <http://www.bbc.com/news/uk-northern-ireland-35831915.

[84] For example, Queensland had a list, known as the 'Special Circumstances Court' which was discontinued in 2012: T Moore, *Diversionary Courts Fall Victim to Funding Cuts,* (13 September 2012) Brisbane Times <http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html>

[85] Ibid, and also see for example Jon Robbins, *Where Next for community justice? Pioneering court closes* (24 October 2013) The Justice Gap < https://www.thejusticegap.com/next-community-justice-pioneering-court-closes/>; Rita Panahi, Soft justice is failing us all (22 November 2016) Herald Sun <http://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-soft-justice-failing-us-all/news-story/c8498e470d21c60b7901dae20b286cf6>

[86] M.L. Perlin 'Wisdom is thrown into jail": Using therapeutic jurisprudence to remediate the criminalization of persons with mental illness' (2013) *Michigan State University Journal of Medicine and Law*, 343.

1. What features are already present in the Queensland legislative and court landscape that would enable the mainstreaming of therapeutic jurisprudence practices in the magistrate's courts?
    a. What 'bottles' are present?
    b. What 'wine' is present?

2. Are there any identifiable gaps?
    a. Do we need new bottles or a different vintage?

3. Are there other considerations that complicate the project to mainstream TJ practices in this jurisdiction?

Analysis Method

As mentioned earlier, the analysis method that will be used in this interrogation is an integration of two methodologies which map well onto each other. The analysis will be achieved via a 'wine and bottles' analysis,[87] enriched with reference to the principles of System Evaluation Theory (SET).[88] SET focuses on using proven systems theory principles to guide evaluation of real world systems. It is a type of analysis founded in systems theory, giving it a solid theoretical basis,[89] which is particularly useful for evaluating programs and systems.[90] This usefulness stems from being able to capture a wholistic view of the parts, rules and actors within a system, rather than a linear analyses without an awareness of context which is hard to interpret in real world conditions. [91] The inclusion of SET within the analysis is so as to improve the systemic robustness of the jurisdictional analysis, with acknowledgement that court systems (and systems of care and control) are highly complex, non-linear and often synergistic systems, embedded within larger, more complex societal systems.

In general within the system analyses literature the principle components of an effective analyses are: the boundaries, components, and relationships.[92] Similarly, there are three

[87] Wexler and Rogers (2014) see above n 6.
[88] Renger (2015) see above n 8.
[89] See Buckley (1998) above n 7; CA Ericson, *Concise encyclopedia of system safety: Definition of terms and concepts*. (John Wiley & Sons, 2011).
[90] R Renger 'System Evaluation Theory (SET)' (2015) 15(4) *Evaluation Journal of Australasia*, 16; R Renger 'Illustrating the evaluation of system feedback mechanisms using system evaluation theory (SET).' (2016) 16(4) *Evaluation Journal of Australasia,* 15.
[91] P. Lee, 'What's wrong with logic models?' (2017) *Local Community Services Association: Occasional Paper No. 1*. <http://resultsaccountability. com/wp-content/uploads/2014/03/No1-Whats-wrong-with-logic-models.pdf>; Please see above n 60 Renger, Foltysova, Renger and Booze (2017), 4; Patton, 2008; Williams, 2015
[92] MB Hargreaves and D Podems (2012). 'Advancing systems thinking in evaluation: a review of four publications.' (2012) 33(3) *American Journal of Evaluation* 462–470; Williams, B. and Hummelbrunner, R. *Systems concepts in action: a practitioner's toolkit.* (Stanford University Press 2010).

guiding principles of SET, associated with the corresponding parts of a traditional 'wine and bottles' analysis in brackets, are as follows:

1. Define the system before evaluating for efficiency and effectiveness. Defining the system will include defining the system boundaries, subsystems, processes, relationships, feedback mechanisms, attributes, inputs and common goals. (Bottles: court structures, legal actors, services and programs, and legislation)
2. Evaluate system efficiency. System efficiency is a necessary prerequisite for optimal system effectiveness. (Survey of what TJ practices could be implemented in the jurisdiction)
3. Evaluate system effectiveness, after evaluating system efficiency. (How TJ-welcoming is this jurisdiction?)

In this analysis, we will apply the steps of the SET analysis, which map directly onto a 'wine and bottles' analysis.

The research design utilises Wexler's suggested analysis methods to analyse the legislative and court features of the Queensland jurisdiction, to ascertain ways in which TJ could be mainstreamed within the magistrate's jurisdiction in South East Queensland.

The first step in the SET analysis is to define the system, including the structures, parts, actors, and relationships, programs, and any feedback mechanisms, etc (as noted above). This requires a survey to ascertain the following;

- what court structures are in operation within the jurisdiction,
- what actors operate within the magistrates courts in the jurisdiction,
- what programs are in operation within the jurisdiction,
- legislative survey to find which provisions are available within the legislation in force in that jurisdiction that could be useful from a TJ perspective.

The second step is to analyse the 'efficiency' of the system (this means efficiency from a TJ perspective. This will be evaluated via a survey of the TJ literature to see what aspects of TJ could potentially be implemented in the jurisdiction.

The third step is to analyse the effectiveness of the system, which means evaluating how welcoming this jurisdiction could be to mainstreaming TJ practices within magistrates courts in South East Queensland.

Data Collection

1. Survey of the available court structures in South East Queensland.

2. Survey of the applicable legislation in Magistrates Courts in South East Queensland.

3. Survey of the legal and other actors operating within these courts.

4. Survey of the program structures in place that operate within these courts.

5. Survey of the literature on what features can be utilised by TJ in a mainstream way.

6. Analysis of the Queensland Magistrate's jurisdiction for the potential for TJ mainstreaming to occur.

Results

The 'Bottles': Court Structures

Mainstream courts: The courts operating in South East Queensland are the Queensland Civil and Administrative Tribunal, the Magistrate's, District, Supreme and Federal Courts, and Courts of Appeal.[93]

Specialist or Problem-Solving Courts: The previous Newman state government in Queensland had seen the closure of five problem solving courts in Queensland from November 2012 onwards. However there have been recent projects to reinstate and commence new, local, problem solving court initiatives. court initiatives in place in south east Queensland. These will now be discussed in greater detail.

Specialist courts include the following: the Mental Health Court in Brisbane,[94] the Murri Court, which focuses on diverting defendants from custodial sentences and addresses their behaviour through interventions, case management, and referral to support agencies.[95] The Indigenous Sentencing List is another initiative, which includes elders in a yarning circle for sentencing so as to recommend suitable programs for indigenous defendants.[96] Additionally, a specialist Drug and Alcohol Court has been in operation in Brisbane since 2018 [97]

[93] Queensland Law Society *Understanding Queensland's Court System* (2021) <https://www.qls.com.au/For_the_community/Legal_brochures/Understanding_Queenslands_court_system>

[94] S Coghlan and Scott Harden 'The Queensland mental health court: a unique model' (2019) 16(4) *British Journal of Psychiatry International* 86.

[95] Justice Orazio Rinaudo, *Magistrates Courts of Queensland Annual report 2014-2015* (Chief Magistrate Queensland Courts, Chambers of the Chief Magistrate, 2015).

[96] See above n 97 Rinaudo (2015) at 26.

[97] QNADA 'Reinstatement of Queensland's Drug and Alcohol Court' QNADA Fri 5 2018 https://qnada.org.au/reinstatement-queenslands-drug-alcohol-court/

The Special Circumstances Diversion Program[98] offers a range of multidisciplinary referral options for defendants with drug and alcohol issues, mental health or cognitive impairment, and other life situations such as homelessness which have brought them into contact with the criminal justice system.[99]

A specialist Domestic Violence Court has been in operation in Southport since September 2015, joined now by another specialist Domestic and Family Violence Court at Beenleigh.[100]

Specialist Court Programs: In addition to a legislative regime which is TJ friendly, there are several structured programs currently in operation in the south east Queensland courts that are designed to ensure that defendants have access to treatment and support, acting as a support for the mainstreaming of TJ practices within Queensland courts.

The Queensland Courtlink program operates out of many major courts in south east Queensland, including Brisbane, Cairns, Ipswich, Southport, Caboolture, Redcliffe and Maroochydore. This program is a bail-based process designed to facilitate referrals to agencies to try to address the causes of the offending behaviour (for example, intellectual disability, drug or alcohol addiction or dependency, mental illness, homelessness).[101]

Additionally, the Courts Innovation Program develops programs to respond to the needs of justice defendants with multiple complex needs, focusing on Indigenous Justice Programs and Diversion and Referral Services.[102]

The 'Bottles': Legislation

The legislation that is most useful from a TJ perspective is that which facilitates TJ friendly practices during court interactions, and also legislation that guides diversion from criminal court proceedings, bail conditions, sentencing, and post court processes.[103] Finally, the legislation which gives the conditions and processes that lead to release from custody

[98] See above n 97 Rinaudo (2015) at 26.
[99] See above n 97 Rinaudo (2015) at 27.
[100] See above n 97 Rinaudo (2015); also Christine Bond, Robyn Holder, Samantha Jeffries and Chris Fleming *Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport: Summary and Final Reports.* (2017) Queensland Courts <https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/515428/dfv-rpt-evaluation-dfv-court-southport-summary-and-final.pdf; Specialist Domestic and Family Violence Court, Queensland Courts, (2011) https://www.courts.qld.gov.au/courts/domestic-and-family-violence-court>
[101] Rinaudo, 2015, above n 40, 7.
[102] Rinaudo, 2014, above n 40, 23.
[103] See Wexler (2014) above n 6, 465.

during time served can also be useful from a TJ perspective.[104] Examples of TJ-friendly legislative provisions will be discussed in detail in the analysis section.

Diversion

Diversion from court proceedings in the Queensland context means diversion from court to a mental health service for treatment.[105] It can also mean that a defendant's charges are suspended so as to ascertain whether they are fit for trial, and whether they may have a partial or full defense of unsoundness of mind.[106] Within the magistrate's court, the judge may dismiss charges if satisfied that the defendant is unfit for trial and likely to remain so for at least the next six months, or that they were of unsound mind at the time of the offence.[107]

Diversion can also refer to a sentencing option available to offenders on pleading guilty. An example of this is the Illicit Drug Court Diversion Program, which operates out of the Magistrates and Children's Magistrates Court and enables defendants to be sentenced to a good behaviour bond and conditions requiring them to attend and participate in drug assessment and education sessions.[108]

Within the south east Queensland magistrates courts, diversion provisions also allow for a defendant with more serious charges to have their case referred to the mental health court for a determination as to whether they have a mental health defense for the offence in question.[109] If they do, they can then be placed on a Forensic Order.[110]

A diversion approach focusses on removing the individual from the court system, rather than utilising their engagement in that system so as to work towards therapeutic goals. Once removed from the court system, the 'diverted' individual is then released to hospital or the community, and management and treatment is passed on to the local health district, which often find this subset of defendants quite difficult to engage with, as noted in the literature regarding the 'revolving door phenomenon'.[111] While this approach is a well-

[104] See Wexler (2014) above n 6, 465.

[105] Fiona Davidson, Edward Heffernan, David Greenberg, Rhondda Waterworth & Philip Burgess 'Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia' (2017) *Psychiatry, Psychology and Law* 1.

[106] *Mental Health Act 2016* (Qld) s3(b); also see *Mental Health Act 2016* (Qld) s 116.

[107] *Mental Health Act 2016* (Qld), ss171-174.

[108] See above n 97 Rinaudo (2015), at 27.

[109] *Mental Health Act 2016* (Qld) Ch 5.

[110] *Mental Health Act 2016* (Qld), Part 4.

[111] Eg. Anestis and Carbonell (2014) see above n 4.

intentioned attempt to safeguard the legal rights of the more vulnerable mental health defendants involved in the justice system, it unfortunately does not allow for many TJ friendly practices within the current legislation.

Bail Conditions

Bail conditions can be used therapeutically to impose conditions that can be monitored by the court and are designed to support the defendant's wellbeing, for example, by engaging in therapy, attending medical appointments, or participating in a drug rehabilitation program. Given that these are generally aims associated with sentencing, this use of bail conditions to achieve therapeutic aims could be considered to be a type of 'glass blowing' technique, where existing legislation is used to encourage defendants to engage in therapeutic behaviour. [112]

Overall, the Queensland bail conditions as set down in the *Bail Act 1980* (Qld) appear to be conducive to TJ principles. In particular, s 11(9)[113] states that the court can impose bail conditions requiring the individual to participate in treatment, rehabilitation or other intervention programs or courses, while taking into account the nature of the offence, and the defendant's circumstances and likely benefit from the treatment, as well as the public interest. Additionally, s11(9A)[114] states that the court can impose a bail condition that the individual complete a drug and alcohol assessment referral course.

The *Bail Act 1980* (Qld) also contains provisions designed to facilitate an investigation by appropriate qualified professionals to enable a better understanding to be gained of the defendant's needs. Specifically, under s 11(6)[115] the court can grant bail or an adjournment of the matter if it considers that the individual's mental or physical condition requires further investigation. Bail conditions can also include the requirement that the defendant receive a medical examination, but only if that examination is of a type that the individual would lawfully be required to undergo if they remained in custody.[116] If a medical examination does take place, the examining doctor must receive information regarding the legal matters the individual is facing, and the concerns that the court has for the defendant's wellbeing.

Additionally, under s 11A a person who has an intellectual impairment due to mental health or cognitive impairment, and doesn't appear to understand the charges, can be released

[112] Wexler (2014) above n 14, 465.
[113] *Bail Act 1980* (Qld) s 11(9).
[114] *Bail Act 1980* (Qld) s11(9).
[115] *Bail Act 1980* (Qld) s11(6).
[116] *Bail Act 1980* (Qld) s11(7).

into the care of the person who normally cares for them, or may otherwise be free to go. However they are to be served (along with their carer) with a notice to appear for the court proceedings.[117]

Section 11(2) is also TJ friendly and of broad potential application,[118] in that it enables the court to impose whatever bail conditions are deemed necessary so as to ensure the defendant doesn't endanger the welfare of themselves or others, or interfere with witnesses. Also, under s 11(3)[119] the court has the ability to ban a person from specific licensed premises and the precinct adjoining them, which could be quite useful in cases of dual diagnoses with alcohol related issues.

It's worth noting that it is not an offence or breach of bail not to meet the conditions imposed under s 11 powers, (see s29(2)(c)). However, if the defendant does not meet these conditions that have been imposed by the court, then bail can be revoked using s 30(2)(b)(ii).

Sentencing

The usual aims of sentencing are to punish an offender, deter future criminal acts, to 'denounce' the offending behaviour and to protect the community, as well as rehabilitate the offender.[120] Sentencing usually includes the option of imprisonment, which can be served as a determined length of time, or with an option for parole depending on specific conditions being met.[121] A common condition of parole is having already served a specific percentage of time in the original sentence.

Factors which can influence the usefulness of sentencing from a TJ perspective are the type of sentencing, the length of sentence, and factors that enable the individual to be released from prison. For example, if parole is only dependent on the amount of time served, then it is of limited use from a TJ perspective,[122] as a sentencing procedure that increases the opportunity for therapeutic impact potential would be one that rewards individuals for making changes in their behaviour and for addressing the underlying causes of criminal behaviour. Additionally, the conditions that will be in place after release for a person can be utilised in a therapeutic manner.

Where appropriate, rehabilitation should aim to reduce recidivism and improve wellbeing by addressing the driving factors for criminal behaviour, utilising evidence-based

[117] *Bail Act 1980 (Qld)* s 11B.
[118] *Bail Act 1980* (Qld) s11(2).
[119] *Bail Act 1980* (Qld) s 11(3).
[120] Please refer to *Penalties and Sentences Act 1992* (Qld) Part 1.
[121] *Penalties and Sentences Act 1992 (Qld)* Part 9 Div 2.
[122] Spencer (2014) see above n 72, 4; Wexler (2014) see above n 14

interventions from the behavioural sciences and field of medicine. This includes the wider network of the defendant, including his or her peer group, family, friends, and employer and other services involved in supporting the defendant.

In Queensland, the following guiding provisions from the *Penalties and Sentences Act 1992* (Qld) also appear to be 'TJ friendly'. These include the requirement that sentences have the overarching purpose of facilitating a defendant's rehabilitation via the inclusion of 'useful conditions',[123] and that sentences that impose a term of imprisonment are only to be used as a last resort.[124]

Within the sentencing legislation in place in Queensland, there also appear to be many sentencing options which could be used to encourage defendants to meet therapeutic goals. These allow magistrates a wide scope to impose sentences that are adapted to the therapeutic needs of the defendant, and a court imposed sentence is likely to have sufficient coercive authority to ensure that the defendant engages in accessing practical support and engaging in therapeutic change process. The sentencing options which are TJ friendly are;

- Diversion from court proceedings;[125]
- Discharge;[126]
- Bonds;[127]
- Fines;[128]
- Community Service Orders;[129]
- Probation;[130]
- Intensive Correction Orders;[131]
- Imprisonment;[132]
- Concurrent sentences;[133]
- Wholly or partially suspended sentences;[134]

[123] *Penalties and Sentences Act 1992 (Qld)* s 9(1)(b).
[124] *Penalties and Sentences Act 1992 (Qld)* s 9(2)(a)(i).
[125] *Mental Health Act 2016 (Qld);* Drug diversion: s 15B–15F, ss 16–19, ss 20–21 *Penalties and Sentences Act 1992 (Qld);* Property offences: ss 22–28 *Penalties and Sentences Act 1992 (Qld)*; Other bonds: ss 29–33 *Penalties and Sentences Act 1992 (Qld).*
[126] *Penalties and Sentences Act 1992 (Qld)* ss 44–51, 52–89, 185; *State Penalties Enforcement Act 1999* (Qld); ss 65, 79, 63, 104, 119.
[127] *Penalties and Sentences Act 1992 (Qld,* ss 100–109.
[128] *Penalties and Sentences Act 1992 (Qld),* ss 90–99.
[129] *Penalties and Sentences Act 1992* (Qld), ss 111–119.
[130] *Penalties and Sentences Act 1992* (Qld) ss 152–160H; *Corrective Services Act 2006* (Qld) ss 205, 209, 213.
[131] *Penalties and Sentences Act 1992* (Qld) S 155.
[132] *Penalties and Sentences Act 1992* (Qld) Ss 143 – s151A.
[133] *Penalties and Sentences Act 1992* (Qld) s 159A.
[134] *Penalties and Sentences Act 1992* (Qld) For suspended sentences s 151 A, and otherwise, ss 160

- Taking into account pre-sentence custody time;[135]
- Parole conditions;[136]
- Restitution and compensation orders;[137]
- Non-contact orders;[138]
- Banning orders.[139]

If the offence involves violence, the court must take into account the defendant's antecedents, age and character,[140] any remorse they have expressed,[141] and any medical, psychiatric, prison or other relevant report written in relation to the defendant.[142]

If the offence involves a sexual offence against a child under 18, then the court must take into account the prospects of rehabilitation including the availability of any medical or psychiatric treatment that will ensure the defendant or defendant can behave in a way acceptable to the community,[143] and the defendant's age, character and antecedents,.[144]

A summary of the factors the court needs to take into account for general sentencing is similar to the above contexts, but with additional salient aspects:

- Any remorse, or lack of, shown by the defendant;[145]
- Any medical, psychiatric, prison or other relevant report relating to the defendant;[146]
- If subject to a community-based order, compliance with that order;[147]
- If on bail, compliance with bail conditions requiring rehabilitation, treatment or other intervention program or course attendance;[148]
- Aboriginal or Torres Strait Islander community justice group submissions, that is, submissions regarding defendant's relationship with the community, cultural considerations, programs or services established by a community justice group;[149]

– 160H.

[135] *Penalties and Sentences Act 1992 (Qld)* ss 34–43, s 190.

[136] *Penalties and Sentences Act 1992 (Qld)* ss 43A–43F.

[137] *Penalties and Sentences Act 1992 (Qld)* Part 3B ss43G-43O.

[138] *Penalties and Sentences Act 1992 (Qld)* S 9(4)(h).

[139] *Penalties and Sentences Act 1992 (Qld)* Part 3B

[140] *Penalties and Sentences Act 1992 (Qld) s9(3)(h)*

[141] *Penalties and Sentences Act 1992 (Qld)* S 9(3)(i).

[142] *Penalties and Sentences Act 1992 (Qld)* s 9(3)(j).

[143] *Penalties and Sentences Act 1992 (Qld)* S 9(6)(g).

[144] *Penalties and Sentences Act 1992 (Qld)* S 9(6)(h).

[145] *Penalties and Sentences Act 1992 (Qld)* S 9(6)(i).

[146] *Penalties and Sentences Act 1992 (Qld)* S9(6)(j).

[147] *Penalties and Sentences Act 1992 (Qld)* s 9(2)(n).

[148] *Penalties and Sentences Act 1992* (Qld) s 9(2)(o).

[149] *Penalties and Sentences Act 1992 (Qld)* S 9 (2)(p).

When the court has to determine a defendant's character, relevant matters that are to be considered include aspects which encourage TJ practices. These include any significant contributions made to the community by the defendant;[150] and any such other matters as the court considers are relevant.[151] The court has the discretion to take these factors into account could act as a motivating factor for defendants to engage in therapeutic processes so as to improve their life circumstances.

Further areas within the legislation which encourage the use of therapeutic jurisprudence are the discretion that the court can exercise as to whether to record a sentence, including taking into account the nature of the offence, the person's character and age, and the impact that recording a conviction will have on that person's economic or social wellbeing or chances of finding future employment.[152] The court can also consider a pre-sentencing report prepared by Corrective Services[153] and should state their reasoning for the sentence imposed.[154] Another measure that might also encourage defendants to take responsibility for their actions, is that a guilty plea may reduce the sentence imposed.[155]

TJ principles aim to address the needs of victims by incorporating restorative justice principles and practical support, including compensation. Queensland legislation allows for meaningful involvement of victims of crime in the sentencing process. The law in Queensland allows the impact of the offence on the victim to be taken into account.[156] Preference is given to victim compensation in sentencing decisions,[157] and orders for restitution and compensation can be incorporated into sentences.[158] Victims can also seek compensation directly from defendants via civil suit.

As noted earlier, some jurisdictions (for example New Zealand) have adopted 'glass blowing' techniques to make use of the legislation already in place regarding sentencing to encourage therapeutic engagement for defendants.[159] At face value, after analysing the legislation, it doesn't seem as if 'glass blowing' in the Queensland jurisdiction would be necessary. As enumerated above, there are many legal mechanisms already in place within the current legislative framework that could be used effectively to encourage and coerce defendants towards making positive, therapeutic changes to enhance their wellbeing.

Unfortunately, it is beyond the scope of this paper to evaluate to what degree the measures in the legislation are already being made use of in the magistrate's courts

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[150] *Penalties and Sentences Act 1992 (Qld)* s11(b).
[151] *Penalties and Sentences Act 1992 (Qld)* s11(c).
[152] *Penalties and Sentences Act 1992* (Qld) s12 (2)(c).
[153] *Corrective Services Act 2006* (Qld) s344.
[154] *Corrective Services Act 2006* (Qld) s10.
[155] *Penalties and Sentences Act 1992* (Qld) s 13(b).
[156] *Penalties and Sentences Act 1992* (Qld) S 9(2)(i).
[157] *Penalties and Sentences Act 1992* (Qld) s 14.
[158] *Penalties and Sentences Act 1992* (Qld) ss 34 – 43.
[159] Wexler (2014) above n 14, 465.

towards therapeutic aims, nor to assess what factors could be preventing relevant measures from being made use of in a therapeutic manner.

The Wine: Legal Actor Contributions

TJ also guides the role of the legal actors. The personnel present within the magistrates courts in South East Queensland include notably lawyers, barristers, magistrates, also police officers, government-employed mental health staff from the Court Liaison Service (who would usually be qualified mental health nurses, occupational therapists, social workers and psychologists),[160] and variously qualified staff from non-governmental organisations designed to provide specific support, additionally, volunteers are present in some courts to provide referrals and information as needed.

Unfortunately, it is difficult to determine to what extent the legal professionals operating out of the magistrates' courts in southeast Queensland are utilising TJ friendly practices. Anecdotal evidence from the Court Liaison Service personnel suggests that the practices amongst legal professionals and magistrates are widely variable and idiosyncratic to each professional.

The roles of magistrates, prosecutors and defence lawyers are crucial in facilitating therapeutic jurisprudence within the court system. As articulated by Wexler, defense lawyers have an important role in working with their defendants to identify underlying causes for their offending behaviour, finding potential treatment and support options, and making submissions to the court regarding this.[161] Defense lawyers are also in a privileged position to help their defendant to define and articulate their treatment goals, and to inform their defendants.

There are a variety of mechanisms that defence lawyers could use to help defendants to identify and articulate their treatment goals. These include questionnaires to raise issues discretely, and structured interviewing with questions and facilitated discussions. Of note, interviewing may need to occur over a series of meetings, with gradually improving disclosure comfort levels and hopefully developing a level of rapport. These discussions have an important role to play by helping the defendant to reflect on their position and identify what might help to improve their situation.[162]

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[160] Queensland Government, *Court Liaison Service, Chief Psychiatrist Policy Mental Health Act 2016 (2016)* Queensland Government <https://www.health.qld.gov.au/__data/assets/pdf_file/0030/638454/cpp_court_liaison_service.pdf>

[161] Wexler, David B., 'Therapeutic Jurisprudence and Readiness for Rehabilitation', (2006) 8 *Florida Coastal Law Review* 111.

[162] See above n 163 Wexler (2006) 111; also, see above n 14, Wexler (2014).

As also described by Wexler, a 'TJ informed' prosecutor would have a decent understanding of the underlying issues in offending behaviour as they relate to drug addiction or mental health issues, and know the available treatments. This is crucial when advising clients and making submissions to the court about what might be in their client's best long term interests.[163]

A comprehensive, evidence-based description of magistrate behaviours which have the best chance of facilitating a therapeutic change for defendants, as well as the means to measure these is available in the TJ literature.[164] A 'TJ informed' magistrate would have a good mastery of therapeutic micro-skills, alongside the capacity and opportunity to build a useful working alliance with the defendant.[165] Once developed this relationship can then become a resource for the defendant when struggling to effectively participate in their court experience, or when finding it difficult to envisage or take practical steps to improve their lives.[166] Judicial supervision is a core component of TJ, because it can promote accountability for the defendant (and any services involved), and also motivate behavioural change.[167]

TJ friendly court practices encourage experiences with a consistent magistrate, and regular review by the same magistrate.[168] A TJ approach encourages the magistrate to make use of therapeutic approaches when dealing with the defendant which encourage self-respect, self-determination, and a separation of the defendants from their actions, so as to facilitate their acceptance of responsibility for their actions, and that foster choices to behave differently in the future.[169]

Additionally, a TJ approach would see the magistrates make use of their authority to motivate, ensure compliance and monitor the defendant's progress,[170] and provide individually tailored judicial responses to that particular offender as the relationship

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[163] Stephanie Taplin, *The New South Wales Drug Court Evaluation: A Process Evaluation* (NSW BOSCAR, 2002), NSW Government <http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/

[164] Rhondda Waterworth "Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change" (2019) 28(4) *Journal of Judicial Administration,* 220.

[165] *Ibid* for an evidence-based, comprehensive description of therapeutic microskills, as well as a review of the literature supporting this description.

[166] See above n 74, Segev (2014) 529; David B. Wilson, Ojmarrh Mitchell & Doris L. Mackenzie, 'A Systematic Review of Drug Court Effects on Recidivism' (2006) 2 *Journal of Experimental Criminology* 460.

[167] See Waterworth (2019) above n 166; Spencer 2014, see above n 72.

[168] Wexler, 2014, see above n 14, and also see above n 168, Wilson, Ojmarrh, Mitchell & Doris (2006) 459.

[169] Waterworth (2019) above n 166.

[170] See above n 163 Wexler (2006); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, (2002) 30 *Fordham Urban Law Journal* 1055, at 1060.

develops,[171] including consistent and predictable behavioural rewards and punishments.[172]

A strengths-based approach would see the magistrate search for and comment on strengths to construct a foundation for positive change,[173] condemn the behaviour, not the person,[174] and strengthen hope that change is possible for the defendant.[175] Additionally, there is evidence to suggest that when offenders perceive court processes to be fair they are more likely to comply with their outcomes.[176]

A TJ inspired magistrate would encourage family and friends to attend court as witnesses to the defendant's participation and improvement, also so as to be able to learn about the participant's release conditions, and to form a support network for the participant.[177] Further techniques from Narrative therapy include congratulatory statements by the magistrate,[178] graduation ceremonies for the program,[179] criticism of the offending behaviour, rather than the defendant,[180] and labelling the defendant a 'graduate' of the court program, rather than an offender.[181]

The TJ approach seeks to promote defendants' self-determination, and to increase their positive behaviour as well as their satisfaction with the court process.[182] With this in mind, Wexler has articulated a clear set of sentencing remarks' do's and don'ts, which are designed to be straightforward and therapeutically effective.[183] As Wexler notes, sentencing remarks work best if designed to be a 'letter to the loser', rather than as statements made

[171] Wexler, David B., 'Adding Color to the White Pape: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence' (2008) 44 *Court Review,* 78, at 79;
[172] See above n 168 Wilson, Ojmarrh, Mitchell & Doris (2006) 459.
[173] Waterworth (2019) above n 166; David B. Wexler, 'Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence' (2008) 44 *Court Review,* at 79.
[174] *Ibid.*
[175] Waterworth (2019) above n 166; Wexler 2014, see above n 14.
[176] *Ibid*.
[177] Gill McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts', (2009) 9 *Criminology and Criminal* Justice 37; David B. Wexler, 'Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence' (2008) 44 *Court Review,* 78-79; Bruce J. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', (2002) 30 *Fordham Urban Law Journal* 1083-84.
[178] See above n 163 Wexler (2006) 279.
[179] see above n 168 Wilson, Ojmarrh, Mitchell & Doris (2006) at 460.
[180] See Wexler (2014) above n 6.
[181] Shadd Maruna, 'Elements of Successful Desistance Signaling', (2012) 11 *Criminology and Public Policy* 73, Shadd Maruna, and Thomas P. LeBel, 'Welcome Home? Examining the "Reentry Court" Concept from a Strengths-Based Perspective', (2003) 4 *Western Criminology Review* 91.
[182] *Ibid*
[183] David B. Wexler, 'Robes and Rehabilitation: How Courts Can Help Offenders "Make Good"' (2001) 38 *Court Review* 18.

to the successful prosecutor, but also need to maintain sensitivity to the victim involved.[184] Additionally, sentencing remarks should provide a clear explanation about the conditions for release, the sentencing process, the reasons for the sentence,[185] and should encourage the development of a 'bilateral behavioural contract' between the defendant and the magistrate.[186]

Additionally, Spencer stresses that TJ advocates for the application of the principles of self-determination, procedural justice, accountability, and autonomy to facilitate positive behaviour change on the part of the offender. The magistrate should demonstrate an ethic of care by listening to offenders. This also complies with requirements of procedural justice.[187]

Judicial supervision is useful so as to hold parties accountable and to monitor progress, reward efforts and achievements made, and to impose sanctions where necessary.[188] As Spencer notes, the skills required to enact TJ in a courtroom are a reasonably new skill set for some judges, which needs thoughtful and ongoing professional development.[189] The tools and the supporting research are available for training to address this if necessary.[190] It is beyond the scope of this essay to comment on the extent to which TJ practices are currently being utilised in the magistrates courts of south east Queensland.

Discussion

Overall, when adopting a SET-enhanced 'wine and bottles' analysis of the magistrates jurisdiction in south east Queensland, it appears that, at face value, the jurisdiction is very TJ friendly. The legislation and court structures appear to allow the space and explicit mechanisms necessary for TJ practices to work within these courts, without the need for legislative reform or new court structures. There are already court programs in place for diversion, and some specialist courts are already in operation, so that the groundwork is already laid for mainstreaming TJ practices.

At face value, Queensland appears to be well situated with regards to mainstreaming TJ within the jurisdiction, perhaps better placed than some other jurisdictions internationally.[191] From a review of the legislation, it appears that the provisions which already exist in Queensland can be made use of in a therapeutic manner by the justice system to facilitate defendants to access and engage in treatment, to work towards

[184] Wexler (2014), see above n 14.
[185] Wexler 2014, see above n 29.
[186] Wexler, 2008, above n 115, at 79.
[187] Spencer, 2014, above n 72, 4.
[188] Spencer, 2014, above n 72, 4.
[189] Spencer, 2014, above n 72, 4.
[190] See above n 166, Waterworth (2019).
[191] Wexler, 2014, above n 14, 465.

improving their wellbeing, and to reduce the risk of recidivism, there does not appear to be a need for 'glass blowing', where the existing legislation is bent into different shapes to accommodate and encourage therapeutic interventions.[192] South east Queensland would therefore appear to be in a strong position to mainstream TJ within magistrates courts.

Mainstreaming TJ: The Barriers

Unfortunately, it is beyond the scope of this project to review systematically the current practices in the magistrate's courts of south east Queensland to ascertain whether TJ is being implemented there, and to what level of consistency. However, when considering mainstreaming TJ from a SET perspective it does also make sense to look at any potential barriers.

Potential barriers which deserve consideration relate to the practical constraints of available resources, which include time pressures and perceptions of cost, as well as the basic issue of what key performance indicators are currently used to measure magistrate performance. Additional barriers could include the more difficult to define but which a SET analysis highlight as key parameters to system functioning, are:

- Societal and cultural resistance to change, which in turn would be strongly linked to community and legal system perceptions and models of what is justice,
- Political agendas and levels of awareness of the causes for recidivism.
- Organizational values,
- Leadership culture with regards to defendant therapeutic input.

A move to mainstream TJ within the magistrate's courts of South East Qld would most likely need to address these (as yet) undefined variables as effective entry points to system change.

Is there Policy Support?

National health policy frameworks appear to be largely supportive of a move to mainstream TJ, by encouraging a 'no wrong door' policy for defendants in accessing treatment.[193] The most rational approach to implementing this policy would be to include the court system as another entry point to healthcare, which can be seen occurring already in the Queensland jurisdiction with the court referral programs such as QMERIT. However,

[192] As noted by Wexler, 2014, above n 14, 465, 'glass blowing' often points to a need for legislative reform in the jurisdiction, as has occurred in Victoria with the incorporation of judicial monitoring provisions into the Victorian Community Corrections Order (*Sentencing Act 1991*(Victoria), Section 48K, Division 4, Section 21.)

[193] NSW Ministry of Health *Effective Models of Care for Comorbid Mental Illness and Illicit Substance Use* NSW Government page 9- 10. < http://www.health.nsw.gov.au/mentalhealth/publications/Publications/comorbid-mental-care-review.pdf

it is possible to go further with this policy approach by mainstreaming TJ practices within the court interactions and practices themselves, thereby making courts a venue for therapeutic experiences themselves, rather than just a referral entry point, a process that is expressly intended by the mainstreaming TJ movement.

Additionally, a move to mainstream TJ practices would help meet 'priority 1, to promote person centered approaches' and 'priority 5' (to improve access to high quality services and supports) of the agenda outlined in the Roadmap for National Mental Health Reform.[194]

Queensland Health policy is also tacitly supportive of the processes that would be implemented if TJ were to be mainstreamed in the magistrates courts in southeast Queensland. The policy guiding treatment of defendants with comorbid health disorders[195] stipulates the use of evidence and consensus based research and clinical practices for people with dual diagnoses,[196] in respect of which the evidence for problem solving courts is clearly supportive. Additionally, as already noted earlier, the policy endorses the 'no wrong door approach' and articulates treatment principles which would be well met by a movement to mainstream TJ in the magistrates courts. The treatment principles are designed to help the individual to be an active participant in their own care, and to also encourage an integrated care approach with continuity of care between services and across service provision sectors.[197] These principles would also encourage facilitated access to treatment for individuals with dual diagnoses (comorbid mental health and drug use disorders) via effective collaborative partnerships and effective therapeutic alliances between the defendant and health care and legal professionals.

As can be seen, there appears to be ample space at a policy level for the mainstreaming TJ movement to meet the policy goals and treatment commitments outlined by the national and state level health systems.

Improved System Efficiency

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[194] The Council of Australian Governments, *The Roadmap for National Mental Health Reform 2012-2022* (Council of Australian Governments, 2012). < http://www.coag.gov.au/node/482>

[195] Queensland Health, *Service delivery for people with dual diagnosis (co-occurring mental health and alcohol and other drug problems)* (Queensland Health, 2008). <https://www.health.qld.gov.au/publications/clinical-practice/guidelines-procedures/clinical-staff/mental-health/guidelines/ddpolicy_final.pdf>

[196] COCE (2006). Overarching principles to address the needs of persons with co-occurring disorders, Overview Paper 3, Cooccurring Center for Excellence, Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services. <*www.coce.samhsa.gov*>; Minkoff, K. (2001) *Behavioural health recovery management service planning guidelines co-occurring psychiatric and substance use disorders*. Illinois Department of Human Services' Office of Alcoholism and Substance Abuse.

[197] Please see Queensland Health (2008) above n 200.

A range of research has shown that sentencing that attempts to address underlying causes of offending can reduce recidivism and be more cost effective than traditional sentencing procedures.[198] Multiple studies have noted that mental health courts are effective in reducing recidivism, as participants tend to take longer to reoffend,[199] reoffend less frequently,[200] and with less severity.[201]

As described by Spencer, solution-focused approaches that make use of judicial communication techniques and creative use of the sentencing process can be employed in a court setting without any systemic change or additional resources.[202] Approaches that would make effective use of existing court resources to achieve TJ aims in the magistrates court are effective use of court craft,[203] an appropriate balance between fast resolution of matters and solution focused court interventions, and deferred sentencing and judicial monitoring.

Magistrates' Court Craft

As noted by Spencer, 'TJ skills' could be a new skillset for some magistrate's, depending on their professional background and experience.[204] Effective and targeted professional development is needed to develop these skills for magistrates.[205]

Professional development on a wide range of relevant therapeutic modalities and intervention types, delivered in a short course, weekend workshop format, or year long part time options, are readily available for psychologists, social workers and other therapeutic professional's professional development. These could be readily utilized by magistrates wishing to upskill themselves.

[198] Anestis and Carbonell (2014) above n 4; Dr S Ross (2009) *Evaluation of the Court Integrated Services Program: Final report.* Melbourne Consulting & Custom Programs, University of Melbourne; CM. Sarteschi, Vaughn, MG., and K Kim, 'Assessing the effectiveness of mental health courts: a quantitative review' (2011) 39 *Journal of Criminal Justice*, 12.

[199] Anestis and Carbonell 2014, above n 4, 1105; VA., Hiday, and B Ray, 'Arrests two years after exiting a well-established mental health court' (2010) 61 *Psychiatric Services* 463; ME. Moore, and VA Hiday, 'Mental health court outcomes: a comparison of re-arrest and re-arrest severity between mental health court and traditional court participants' (2006) 30 *Law and Human Behavior* 659.

[200] Anestis, and Carbonell (2014) above n 4, 1105; PA Dirks-Linhorst Linhorst, 'Recidivism outcomes for suburban mental health court defendants' (2012) 37 *American Journal of Criminal Justice* 76; see above n 204 Moore and Hiday (2007) 659; PJ Burns, Hiday VA, Ray B, 'Effectiveness 2 years postexit of a recently established mental health court' 57 *American Behavioral Scientist* 189; 2013; VA, Hiday, Wales HW, Ray B, 'Effectiveness of a short-term mental health court: criminal recidivism one year postexit' (2013) *Law and Human Behavior*, 401.

[201] See above n 204, Moore and Hiday (2006) 659.

[202] Spencer (2012) above n 72, 4.

[203] Eg as elaborated in Waterworth (2019) see above n 166.

[204] Spencer (2014) above n 93.

[205] Spencer (2014) above n 93.

Additionally, recent developments in the literature provide a behavioural definition of effective therapeutic behaviours for magistrates in court,[206] as well as a means to measure these,[207] which could be utilised by magistrates themselves to review recordings of their own work and develop their therapeutic court craft skills.[208]

Is there a Need for Legislative Reform?

Structured judicial discretion is useful for encouraging TJ practices within mainstream courts. From a mainstreaming TJ perspective, it would be useful to reform legislation so as to facilitate judicial monitoring post-sentence as part of a community corrections order, as this would be useful to help defendants to deal with or prevent relapse,[209] and also to include deferred sentencing so as to be able to obtain medico-legal reports to inform sentencing if needed. Legal reform to support TJ practices could be very useful to protect TJ from political changes and the vagaries of public opinion related to current events.[210] It is also important that too much judicial discretion is avoided, as there is a danger that allowing too much legal flexibility encourages judges' moral views to have too much influence when making decision, a perception that could undermine the mainstreaming of TJ.[211]

Other factors that would support a mainstreaming TJ movement in the south east Queensland magistrate's courts are strong court leadership, strategic business plans, performance measures and targets that are supportive of TJ friendly practices, and refining the job descriptions for judicial officers to include a mandatory TJ element.

Conclusion

For many individuals suffering from serious psychological, physical, financial and legal problems, contact with the court system offers them a crisis point which contains the opportunity, if therapeutic principles are applied, for significant therapeutic change. Contact with the criminal justice system provides the opportunity to intervene in a defendant's life, and a possibility to facilitate therapeutic change that society cannot afford to miss. The current human, health and financial cost of increasing incarceration is significant, and yet research shows that imprisonment can be counterproductive to reducing recidivism. Adoption of therapeutic justice approaches has the potential to address these problems as well as other, less tangible negative effects of mental health concerns, criminality and incarceration on individuals, their families and social networks,

[206] See Waterworth (2019) above n 166, 220.
[207] See Waterworth (2019) above n 166, 222.
[208] *Ibid.*
[209] See Spencer (2012) above n 72.
[210] Refer to above n 85 for several articles which relate to this issue.
[211] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice*, (OUP Oxford 3rd ed. 2012) 36-68 cited in Segev 2014, see above n 74.

any victims of offending behaviour, and the systems of care and control and their staff. In this regard, the sentencing legislation and court structures in south east Queensland appear to be potentially conducive to a movement towards mainstreaming TJ which would be expected to provide useful therapeutic intervention for the defendant population.

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Where to Next?

As noted in the preceding article, there are constraints on mainstreaming TJ. Notably, budgetary and practical pressures on magistrates, alongside vulnerability to politically motivated funding changes which are often exacerbated by difficulties in researching and demonstrating positive outcomes, have been seen to influence the viability of mainstreaming TJ within several jurisdictions.[56]

This observation regarding the limitations of mainstreaming TJ leads to the next phase of the thesis: identifying the best forum, modality, and actors for intervention with mental health clients appearing before the criminal courts, and then designing a systemic intervention to enhance sentencing outcomes that could ethically be implemented in a courtroom and would be acceptable to all courtroom participants.

[56] Reviewed in Waterworth (2019) above n 4; please also refer for examples to Monidipa Fouzder 'Renewed call for problem-solving courts to be piloted' (30 August 2016) *The Law Society Gazette* <https://www.lawgazette.co.uk/law/renewed-call-for-problem-solving-courts-to-be-piloted/5057246.article>; Rita Panahi 'Soft justice is failing us all' (22 November 2016) *Herald Sun* <http://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-soft-justice-failing-us-all/newsstory/c8498e470d21c60b7901dae20b286cf6>; Queensland had a list, known as the 'Special Circumstances Court' which was discontinued in 2012: T Moore, *Diversionary Courts Fall Victim to Funding Cuts,* (13 September 2012) Brisbane Times http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html; Jon Robbins, *Where Next for community justice? Pioneering court closes* (24 October 2013) The Justice Gap < https://www.thejusticegap.com/next-community-justice-pioneering-court-closes/>; Stephen Walker Lord Chief Justice calls for new 'problem solving' courts (17 March 2016) BBC News, Northern Ireland http://www.bbc.com/news/uk-northern-ireland35831915.

Chapter Three: Literature Review

Second wave of ideas: From flowcharts to people skills, changing direction

As described in Chapter Two,[56] an understanding of the possibilities of structural change and legislative reforms related to diversion pointed to the hypothesis that qualitative changes in interpersonal interactions within a courtroom could be a catalyst for individual therapeutic improvements.

Chapter Three is comprised of an in-depth literature review of the state of research, learning and research directions into therapeutic courts, and ways to enhance the therapeutic scope and effectiveness of courts. Please note that an article published in late 2020 was not included in this literature review as it postdates this research and the resulting Legal Actor Contribution Scale which was published in June 2019. This article merits discussion as it claims to present the first empirically validated courtroom measurement tool for judicial officers,[57] however it was not included in the original literature review as it was not published until substantially after the present research. That article is considered further in the concluding chapter of this thesis.

This chapter presents the comprehensive literature review undertaken to ascertain the current state of therapeutic interventions within courts, which then served as the foundation for finding ways to enhance these interventions. The review indicated a strong need to define effective therapeutic legal actor in-court contributions, and for a mechanism to measure them, so as to advance both research into therapeutic court processes and outcomes, and therapeutic practices themselves.

The review concludes with a published article summarizing the reasons to measure legal actor therapeutic contributions in criminal court proceedings. Measuring legal actor contributions was chosen as a more effective way to intervene using already existing resources within existing systems, when compared to prior ways of intervening therapeutically using court systems, for example via legislative reform, or standardisation of legislative diversion provisions.

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[56] See Davidson et al (2017), above n 2, Waterworth (2017) above n 17, and 'The Feasibility of Mainstreaming Therapeutic Jurisprudence within the South East Queensland Magistrate's Courts in 2021: A Systemic Wine and Bottles Analysis of Systems of Care and Control in Queensland' included in this thesis in Chapter Two.

[57] A Kawalek *'A* tool for measuring therapeutic jurisprudence values during empirical research.' (2020) 71 *International Journal of Law and Psychiatry* 101581.
DOI: https://doi.org/10.1016/j.ijlp.2020.101581

The emphasis is on catalysing change via interpersonal interaction, which is a cornerstone of therapeutic intervention. The types of therapeutic improvement that might be achieved for defendants vary, however, and are not limited to desisting from further offending. The overarching goal of the therapeutic intervention would generally be to catalyse the necessary hope, motivation and determination to enable and support offenders to engage therapeutically within the court setting and in the various treatment programs offered to them which might fit their specific needs, and to take the necessary steps to create a sustainably healthy lifestyle for themselves. Achievable outcomes might include cutting back or ceasing substance misuse; accessing a waiting list for a Hep C treatment program; attaining the level of emotional endurance to engage in therapy for intergenerational trauma; developing a financial plan to pay off debts or determining a feasible bankruptcy plan; or attending regular parenting classes to try to improve relationships with and/or regain custody of children.

Accordingly, the current research focus pivoted to an analysis of how to build therapeutic interpersonal interactions between offenders and the judiciary. This analysis incorporated reflection on how to improve and strengthen practices in existing therapeutic courts, and on how to protect therapeutic court programs from deleterious external pressures such as funding cuts, to which therapeutic courts have historically been quite vulnerable.[58] Reduction in funding may be occasioned by cost-benefit misperceptions that seem to be related to issues in research design and definition of effective outcomes.[59] There have been difficulties in researching therapeutic courts caused by the complexity of the interactions that occur within them, the wide variety of their programs, the different approaches of individual magistrates, difficulties in defining and measuring court 'outcomes', and difficulties in researching these outcomes on a longitudinal basis.[60]

Nevertheless, there is an extensive body of research that has demonstrated the success of therapeutic courts in supporting defendants to take steps towards improving their mental health, and to work on various problems, like addiction and entrenched social problems.[61] A substantial portion of this research has documented apparently small positive outcomes for

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[58] See, for example, Dominic Madell, Katey Thom and Brian McKenna, 'A Systematic Review of Literature Relating to Problem-Solving Youth Courts' (2013) 20(3) *Psychiatry, Psychology and Law*, 412

[59] Richard L Wiener, Bruce J Winick, Leah Skovran and Anthony Castro 'A Testable theory of problem solving courts: Avoiding past empirical and legal failures' (2010) 33 *International Journal of Law and Psychiatry* 419.; David B. Wilson, Ojmarrh Mitchell and Doris L. MacKenzie 'A systematic review of drug court effects on recidivism,' (2006) *Journal of Experimental Criminology* 2, 459.

[60] See above n 60, Maddell, Thom and McKenna (2013); also Wiener, Skovran Georges, and Castro (2010), above n 61 at 417; see above n 61 Wilson, Mitchell and McKenzie (2006) 459.

[61] As reviewed in Waterworth (2018) above n 4; see also Maddell, Thom and McKenna (2017) above n 60; also Wiener, Winick, Skovran, and Castro (2010), above n 61; also see above n 61 Wilson, Mitchell and McKenzie (2006) 459.

therapeutic court interventions that are however more significant and of greater long term impact than traditional sentences or interventions.[62]

The author's literature review, reported in the article that follows, shows that one of the key ingredients in therapeutic change - the interactions between offenders and judicial officers, with some notable exceptions, has not been well researched nor defined, and has not usually been included as a measurable variable in research into court outcomes.[63] Yet, the author has encountered considerable interest on the part of magistrates and other judicial officers in how they might improve their therapeutic court craft skills, in a way that is informed by the literature on therapeutic change, as will be discussed further in the methods section, on page 93.

At the time when this thesis research findings were published, there was no clear, evidence-based way to describe or measure judicial officers' contributions to offenders' in-court experience. Yet, judicial officers have primary responsibility for this interaction, which is expected to be the driver of therapeutic change. This responsibility includes being charged with directing, interacting, controlling, and deciding on appropriate sentencing, while also interacting in a qualitatively therapeutic manner (without this being universally well defined from a judicial perspective).

The line of enquiry into this matter is presented in detail in the article that follows, 'The Case for Measuring Legal Actor Contributions in Court Proceedings'. This article reviews the therapeutic jurisprudence literature and observes that at that point in time there was no way to measure or adequately and systematically describe what legal actors contribute to offenders' courtroom experiences, from an objective or therapeutic perspective. At the time the article was published, no court evaluations had included in their research design an **objective** measurement of judicial officers' contributions from a therapeutic perspective, although several projects had attempted to measure this variable relying on self-reports or the perceptions of other legal actors. The literature review made it clear that there was an urgent need to develop a tool for researchers and the judiciary that was capable of capturing the important therapeutic contributions made by judicial officers in courtroom settings. Such a tool would not only be useful to specialist therapeutic courts but would also potentially assist in mainstreaming the TJ movement. It would also be useful in providing feedback, at the individual level, to judicial officers about their therapeutic interactions, and could potentially be used in court skills programs for magistrates and other interested judicial officers.

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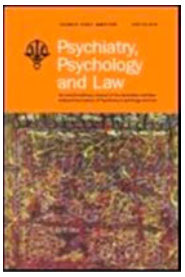
[62] *Ibid.*

[63] See Waterworth (2018), above n 4.

Article 3: Rhondda Waterworth 'The Case for Measuring Legal Actor Contributions in Court Proceedings' (2018) 26:1 *Psychiatry, Psychology and Law* 77-86. (5400 words, including references)

Psychiatry, Psychology and Law



The Case for Measuring Legal Actor Contributions in Court Proceedings

Journal:	*Psychiatry, Psychology and Law*
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Manuscript Type:	Original Article
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The Case for Measuring Legal Actor Contributions in Court Proceedings

in Mainstream and Problem-Solving Courts

Rhondda Waterworth

Ethical standards

Declaration of conflicts of interest

The author has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

Abstract

The importance of Legal Actor Contributions has been highlighted in recent international guidelines proposed for the evaluation of court programs, and is evident when reviewing the literature on good research design. However, attempts to measure Legal Actor Contributions from an **objective** and **therapeutic** perspective as part of the ongoing therapeutic jurisprudence movement are depressingly scarce in the literature.

To date, no court evaluation programs have included an objective measurement of legal actor contributions as a feature of their research design. However, several programs have attempted to measure this variable via self-report, or the perceptions of other legal actors.

This article highlights the necessity and usefulness for both the mainstreaming therapeutic jurisprudence movement and problem-solving courts to find a way to effectively and objectively measure legal actor contributions when evaluating court processes, impacts and outcomes. The proposed measurement tool could also function as a respectful mechanism to give feedback for magistrates wishing to embed therapeutic jurisprudence practices into their work in mainstream courts, and could potentially be used in judicial training.

Introduction

Therapeutic Jurisprudence (TJ) is the interdisciplinary study of the use of law as a therapeutic agent and social force.[1] Since the inception of the TJ movement in the 1990's, TJ specialist court programs proliferated, however many were not able to stay the distance, often due to a perceived poor performance on program evaluations, and, or lack of support or funding.[2] The more recent mainstreaming TJ movement has advocated strongly for the implementation of TJ principles in mainstream courts, in line with the original conceptualisation of how TJ could function.[3]

1 See for example D B Wexler and B J Winick (eds) *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991).

2 Dominic Madell, Katey Thom and Brian McKenna, 'A Systematic Review of Literature Relating to Problem-Solving Youth Courts' (2013) 20(3) *Psychiatry, Psychology and Law*, 412; Dr Stuart Ross, 'Evaluation of the Court Integrated Services Program: Final Report' (December 2009) University of Melbourne. < https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf>

3 David B. Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) 68 *Review of Jurisprudence University of Puerto Rico* 691; David B. Wexler, 'Moving Forward on Mainstreaming

This article deals with the evaluation of legal actor contributions from a therapeutic perspective across the spectrum of courts, including problem solving courts, mainstream courts, and mainstreaming TJ approaches. [4]

The term 'legal actor contribution' refers to the contribution of the actors in a legal setting to the experience of the defendant (or client) of that court. For the purposes of this discussion this means the contribution of the judge and the lawyers to the defendant's experience of the court process.

This review will explore the therapeutic potential of the judge's role, review the attempts so far at measuring these contributions, identify potential issues with the measurement of legal actors, and also the potential benefits that could stem from measuring these.

Therapeutic Potential of Legal Actors' Contribution: The court as a site of intervention and systemic entry point

The potential therapeutic input of legal actors in mainstream court has been discussed in depth both in the early[5] and more recent therapeutic jurisprudence literature.[6] However, recognising the full scope of the court as intervention site means recognising the extent that legal actors can impact on a client both by what they say (content) and how they say it and interact (process). There is an argument to be made that the most reliable and powerful point of intervention in the life narrative of a person in contact with the justice system is what, and how, the judge speaks to them in public court.

Within the cast of characters and the narrative of an offender-client's life, the unique attributes of a judge arguably make them very well placed to be an agent for change.[7] Judges are usually highly motivated, have high intelligence, and are able to rapidly acquire new skills. They are also in a position of power and trust, and could be conceptualised as the mouthpieces of 'society' speaking to those who are disenfranchised. They have the resources, the intellect, and the opportunity to self-reflect and develop what they bring to this interaction from a process point of view.

From a judgement *content* perspective, it's important for a skilled and motivated judiciary to use the effective tools that are available when dealing with defendant clients, based on the evolving intervention evidence base, through appropriate use of referrals and the sentencing regimes and the court processes (eg judicial review) and programs open to them. The evidence as to what works, for whom, and in what form, will necessarily keep evolving with new evidence-based treatments.

Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law' (2014) *Arizona Legal Studies Discussion Paper 15* http://www.civiljustice.info/cgi/viewcontent.cgi?article=1005&context=tj; David Wexler 'From theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' (2011) 37(1) *Monash University Law Review* 33; E. Richardson, P. Spencer and D. Wexler 'International Framework for Court Excellence and Therapeutic Jurisprudence: Creating excellent court and enhancing wellbeing' (2016) 25 *Journal of Judicial Administration* 148.

[4] Bruce J. Winick and David B. Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' in Bruce J. Winnick, and David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 106, 109.

[5] Ibid.

[6] See for example Michael S King *Solution-Focussed Judging Bench Book* (Australasian Institute of Judicial Administration Incorporated, 2009) 21.

[7] Ibid.

This review focusses on the argument for measuring what judges (and lawyers) do, from an objective, *process* perspective.[8]

If the court is conceptualised as a point of intervention in the lives of offenders (and their families, social networks, and communities),[9] and an entry point into intervention for those who may not receive therapeutic intervention otherwise, then the logical question is what can a judge (and other legal actors), contribute that will make the best use of that interaction to maximise therapeutic intervention for the defendant?

As Cannon points out, TJ had been practiced by many magistrates for quite some time before the descriptive label of 'therapeutic jurisprudence' came along.[10] As noted by Clark, general relationship factors such as empathy, warmth and acceptance are amongst the most effective predictors of a therapeutic impact for a client in a therapeutic relationship.[11] This concept has been developed throughout the literature on psychological research into therapeutic outcomes as 'therapeutic alliance', which is the common underlying denominator that correlates highest with client therapeutic outcome.[12]

As noted by several authors, using techniques from therapy in the courtroom (or good 'court craft'[13]), including encouraging self-determination,[14] can increase client compliance with court orders and sentences,[15] an observation which has been echoed by the procedural justice literature. The presence of these factors, for example, in a judicial – client interaction could create a 'shared respect process' that would contribute to a therapeutic impact on offender behaviour.[16]

Certainly, when viewed through the lenses of various systems of therapy, the argument for measuring legal actor contributions goes beyond the relationship factors already noted, and beyond

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[8] This is distinct from the nomenclature of Therapeutic Design of the Law (TDL), and Therapeutic Application of the Law via the practices of legal actors (TAL) utilised in the recent comprehensive article on court excellence by E Richardson, P Spencer and D Wexler 'International Framework for Court Excellence and Therapeutic Jurisprudence: Creating excellent court and enhancing wellbeing (2016) 25 *Journal of Judicial Administration* 148.

[9] Bruce. Winnick, and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003).

[10] Andrew Cannon 'Therapeutic Jurisprudence in courts: Some issues of practice and principle' (2007) 16 *Journal of Judicial Administration* 258

[11] Michael D. Clark, A Change-Focused Approach for Judges, in in Bruce J. Winnick, and David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 137, 140-42.

[12] E. Bordin 'The generalizability of the psychoanalytic concept of the working alliance' (1979) 16 *Psychotherapy* 252; C. Gelso and J. Carter 'Components of the psychotherapy relationship: their interaction and unfolding during treatment' (1994) 41 *Journal of Counselling Psychology* 296; A. Horvath, L. Luborsky 'The role of the therapeutic alliance in psychotherapy' (1993) 61 *Journal of Consulting Clinical Psychology* 561; J. Krupnick, S. Sotsky, S. Simmons, J. Moyer, L. Elkin, J. Watkins 'The role of the therapeutic alliance in psychotherapy and pharmacotherapy outcome: findings in the National Institute of Mental Health Treatment of Depression Collaborative Research Programme' (1996) 64 *Journal of Consulting Clinical Psychology* 532.

[13] See King above n 6.

[14] M King 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 Journal of Judicial Administration 131, citing BJ Winick 'The Judge's Role in Encouraging Motivation for Change' in BJ Winick and DB Wexler *Judging in a Therapeutic Key* (Carolina Academic Press, 2003) 182.

[15] See King above n 6.

[16] See King above n 6.

even whether there could be said to be a therapeutic relationship occurring between the defendant client and their judge during that court experience. For example, many types of therapy (and TJ)[17] conceptualise crises points as points which are perfect for intervention,[18] as the client is likely to be at their highest motivation point for change.

Review of efforts so far to evaluate legal actor contributions

Some researchers in the TJ field have raised concerns about the inconclusiveness of empirical research (at times), and the risk of TJ 'resting on shaky grounds' if it is based on the social sciences and research evidence.[19] However, there are significant funding narratives which demand an evidence-based approach to the implementation of TJ programs.[20]

Roberts and Indermauer, writing in 2007, suggested guidelines for evaluating TJ initiatives,[21] however unfortunately these did not include any evaluation of the contributing court factors, namely the legal actors and their contributions, in their article, aside from a mention of the question of how to assess and account for the 'impact of contextual factors' (for example a change in judge).[22] More recently in 2016, Richardson, Spencer and Wexler formulated comprehensive criteria for evaluating court practices, which included measurement of legal actor contributions, however did not go as far as to operationalise how this could be achieved. [23]

The problem-solving court approach to TJ casts the judge in the role of judge, case manager, therapist, and treatment auditor, and the role of the judge is central to a TJ approach. Although there remain important distinctions between the role of the judge, and the role of the therapist, in the use of therapeutic jurisprudence, a judge is expected to utilise therapeutic principles and techniques, in addition to judicial sanctions (and additionally for problem solving courts) referral to practical support services, to achieve a therapeutic outcome. When reviewing the literature on therapeutic interventions, the quality of the relationship with the therapist, and especially what the therapist contributes to this, is a crucial factor in the therapy outcome. [24] Generally speaking, when

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[17] Utilising the crisis of legal involvement and court attendance as an opportunity to change behaviour and improve motivation to change; Peggy F. Hora et al., The Importance of Timing, in Bruce J. Winnick, and David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 178; Bruce J.Winick, The Judge's Role in Encouraging Motivation to Change, in Bruce J. Winnick, and David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 181.

[18] Wexler, David B., 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices' (2014) *Therapeutic Jurisprudence*. Paper 7. <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1006&context=tj>

[19] C Slobogin 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and Law* 193.

[20] See, for example, Centre for Justice Innovation *Problem-solving courts: A delivery plan* (2016) Centre for Justice Innovation 7 < http://justiceinnovation.org/portfolio/problem-solving-courts-delivery-plan/>

[21] Lynne Roberts and David Indermaur 'Key Challenges in Evaluating Therapeutic Jurisprudence Initiatives' (2007) 17 *Journal of Judicial Administration* 69.

[22] See Roberts and Indermauer above n 21, 66.

[23] E Richardson, P Spencer and D Wexler, 'The International Framework for Court Excellence and therapeutic jurisprudence: Creating excellent court and enhancing wellbeing (2016) 25 *Journal of Judicial Administration* 148.

[24] S. Baldwin, B. Wampold, and Z. Imel 'Untangling the alliance–outcome correlation: Exploring the relative importance of therapist and patient variability in the alliance' (2007) 75 *Journal of Consulting and Clinical Psychology*, 842; U. Dinger, M. Strack, F. Leichsenring, F. Wilmers, and H. Schauenburg 'Therapist effects on

asked to rate the interaction, the ratings of the client or an objective observer have been found to be most accurately correlated with the outcome of the interaction.[25] The literature unanimously indicates that the way in which legal actors are evaluated is fundamental to effective measurement of their contributions, and the predictive validity of these measurements for the outcome of the court intervention.

Unfortunately, of the literature reviewed, very few studies were identified that attempted to measure judges' contribution within a courtroom from a therapeutic perspective. It is unclear as to why this crucial element of a TJ intervention has not been developed further in court evaluation research design.

Herzog-Evans, writing in 2016, measured the therapeutic input of lawyers, however this has been from the defendant's perspective, rather than from an objective viewpoint of what would be therapeutically desirable during the court interaction.[26]

Additionally, Perlsen's 2008[27] review of the correlation between judge and lawyer attitudes towards each other's practice of what was essentially therapeutic jurisprudence utilised the perspective of members of each profession to evaluate what they appreciated most from the other in a courtroom interaction. The survey also clearly indicated a strong interdependence between the professions when utilising therapeutic jurisprudence interventions.[28] However, this study did not include an independent measurement of legal actor contributions.

It is highly problematic that no research designs in the field of therapeutic jurisprudence have included an **independent** observational measurement of legal actor contributions, when read together with the literature base related to therapeutic change, therapeutic alliance, and effective ways of measuring this. It renders existing research into 'what works' in courtrooms, and evaluations of TJ programs difficult to interpret or potentially invalid. From a research design perspective, the observed outcomes of all programs have been complicated by an important confounding variable, a variable which is likely to have a potentially determinative impact on the outcomes when read

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outcome and alliance in inpatient psychotherapy.' (2008) 64 *Journal of Clinical Psychology*, 344; D. Marcus, D. Kashy, M. Wintersteen, and G Diamond 'The therapeutic alliance in adolescent substance abuse treatment: A one-with-many analysis' (2011) 58(3) *Journal of Counseling Psychology*, 449; D Zuroff, A. Kelly, M. Leybman, S. Blatt, and B. Wampold 'Between-therapist and within-therapist differences in the quality of the therapeutic relationship: Effects on maladjustment and self-critical perfectionism' (2010) 66 *Journal of Clinical Psychology* 681.

25 A. Bachelor and A. Horvath, (1999). 'The therapeutic relationship.' In M. A. Hubble, B. L. Duncan, and S. D. Miller (Eds.), The heart and soul of change: What works in therapy (Washington, DC: American Psychological Association) 133; Lisa Fenton, John Cecero, Charla Nich, Tami Frankforter, and Kathleen Carroll 'Perspective is everything: The predictive validity of six working alliance instruments' (2001) 10(4*) Journal of Psychotherapy and Practical Research* 262; E. Marziali and L. Alexander 'The power of the therapeutic relationship' (1991) 61(3) *American Journal of Orthopsychiatry* 383.

26 Martine Herzog-Evans 'Release and Supervision: Relationships and Support from Classic and Holistic Attorneys' (2016) 1 *International Journal of Therapeutic Jurisprudence* 23.

27 Karni Perlman 'It Takes Two for TJ: Correlation Between Bench and Bar Attitudes Toward Therapeutic Jurisprudence: An Israeli perspective' (2008) 30 *Thomas Jefferson Law Review* 351.

28 Ibid.

together with research on the impact of therapeutic alliance on outcomes from the psychological research literature.[29]

The research design literature emphasises the need to control, or measure, all variables in an evaluation which could affect the outcome being measured.[30] In the case of evaluating the effectiveness of a problem-solving court for a client of that court, the impact of the judge and their contribution to the client's experience and outcome is highly significant.

Attempts to measure the legal actor contributions from the perspective of the judicial officers and lawyers are to be commended for their ingenuity, but are also unfortunately likely to be inaccurate in measuring the interaction due to the reasons stated above.[31]

As previously discussed, when reviewing the literature on therapeutic interventions, the quality of the relationship with the therapist is a crucial factor in therapy outcome. This leads to the question from a TJ perspective, how can the court experience, including judges, create the best therapeutic effect for clients of the court?

Therapeutic Jurisprudence Research Design Issues

After their substantial literature review in 2007 Roberts and Indermaur reluctantly observed that the problem-solving courts appeared to have moved ahead of the research demonstrating their effectiveness.[32] They also noted that the 'imperative of accountability' and the 'demand for more effective tools' for justice and rehabilitation [33] created the risk of 'wearing out the welcome' if the empirical evidence for a TJ intervention wasn't also readily available alongside the rhetoric.[34]

Developing empirical evidence for the effectiveness of a TJ approach, both in a problem-solving court, or in a mainstream court, is not straightforward. As noted throughout the TJ literature, there is a difficulty in the evaluation and formal measurement of outcomes proving that the TJ approach 'works'. This is because the definition of 'what works' is a multidimensional construct and difficult to

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29 A. Horvath, A. C. Del Re, C. Flückiger, and D. Symonds (2011). 'The alliance.' In J. C. Norcross (Ed.), *Relationships That Work* (Oxford University Press) 25.

30 See for example S. Baldwin, B. Wampold, and Z. Imel 'Untangling the alliance–outcome correlation: Exploring the relative importance of therapist and patient variability in the alliance' (2007) 75 *Journal of Consulting and Clinical Psychology*, 842

31 A. Bachelor and A. Horvath, (1999). 'The therapeutic relationship.' In M. A. Hubble, B. L. Duncan, and S. D. Miller (Eds.), The heart and soul of change: What works in therapy (Washington, DC: American Psychological Association) 133; Lisa Fenton, John Cecero, Charla Nich, Tami Frankforter, and Kathleen Carroll 'Perspective is everything: The predictive validity of six working alliance instruments' (2001) 10(4*) Journal of Psychotherapy and Practical Research* 262; E. Marziali and L. Alexander 'The power of the therapeutic relationship' (1991) 61(3) *American Journal of Orthopsychiatry* 383.

32 Belenko S, "The Challenges of Conducting Research in Drug Treatment Court Settings" in LD Harrison, FR Scarpatti, M Amir and S Einstein (eds), *Drug Courts: Current Issues and Future Perspectives* (Vol 3) (Office of International Criminal Justice (OICJ), Sam Houston State University, 2002); CW Huddleston, K Freeman-Wilson and D Boone, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Courts I*(1) (National Drug Court Institute, Alexandria VA, 2004); RH Peters and MR Murrin, 'Effectiveness of Treatment-based Drug Courts in Reducing Criminal Recidivism' (2000) 27(1) *Criminal Justice and Behavior* 72; S Turner, D Longshore, SL Wenzel, E Deschenes, P Greenwood, T Fain, A Harrell, A Morral, FS Taxman, M Iguchi, J Greene and D McBride, "A Decade of Drug Treatment Court Research" in LD Harrison, FR Scarpatti, M Amir and S Einstein (eds), *Drug Courts: Current Issues and Future Perspectives* (Vol 3) (Office of International Criminal Justice (OICJ), Sam Houston State University, 2002).

33 See Roberts and Indermaur above n 21, 60.

34 Ibid.

even define, and even harder to measure.[35] Roberts and Indermauer used the terms 'micro-analytic' and 'macro-analytic', to conceptualise this in terms of constructs related to the individual, and to the community in which the TJ initiative is taking place.[36] However, they conclude their review citing methodological flaws in the evaluation of TJ programs[37] including the difficulty of finding an appropriate control group, and insufficient follow up times.

Roberts and Indermauer highlighted some of the key challenges facing those researchers trying to build the evidence base for therapeutic jurisprudence interventions, [38] these are:

- The dilemma of how to define success
- The difficulty in finding suitable comparison and control groups, how to avoid selection bias of a comparison group
- Assessing the impact of contextual factors – these include changes in judicial staff, variability in the input or treatment that the client receives[39]
- Timing of evaluation and follow up
- The best way to measure recidivism and treatment outcomes
- Conducting cost – benefit analysis
- Writing evaluations that are accessible to practitioners
- Research design when evaluating therapeutic jurisprudence programs
- Lack of guidance as to best practice in TJ program evaluations
- The need to identify active components of the process which contribute to success for participants[40]
- The range of interventions ('eclectic approaches'[41]) on offer between and within programs, resulting in a treatment 'black box'.[42]

Possible models for better court evaluation procedures have been put forward by Wiener et al (2010)[43] which included legitimacy of justice and offenders' reactions whilst progressing through the court process, however this did not include a measurement of legal actor contributions. Their model

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35 JS Goldkamp, MD White and JB Robinson "Do Drug Courts Work? Getting Inside the Drug Court Black Box" (2001) 31(1) *Journal of Drug Issues* 27.

36 See Roberts and Indermaur above n 21, 61

37 B Lind, D Weatherburn, S Chen, M Shanahan, E Lancsar, M Haas and R De Abreu Lourenco, *New South Wales Drug Court Evaluation: Cost-effectiveness* (New South Wales Bureau of Crime Statistics and Research, 2002).

38 See Roberts and Indermaur above n 21, 63.

39 Wolff N, "Using Randomized Controlled Trials to Evaluate Socially Complex Services: Problems, Challenges and Recommendations" (2000) 3 *Journal of Mental Health Policy and Economic* 97; N Wolff "Randomised Trials to Evaluate Socially Complex Interventions: Promise or Peril?" (2001) 6(2) *Journal of Health Services, Research and Policy* 124.

40 Belenko S, "The Challenges of Conducting Research in Drug Treatment Court Settings" in Harrison LD, Scarpatti FR, Amir M and Einstein S (eds), *Drug Courts: Current Issues and Future Perspectives* (Vol 3) (Office of International Criminal Justice (OICJ), Sam Houston State University, 2002); N Wolff and W Pogorzelski, "Measuring the Effectiveness of Mental Health Courts: Challenges and Recommendations" (2005) 11(4) *Psychology, Public Policy and Law* 539.

41 See Roberts and Indermaur above n 21, 68.

42 J Bouffard and F Taxman 'Looking Inside the 'Black Box' of Drug Court Treatment Services Using Direct Observations'(2004) 34(1) *Journal of Drug Issues* 195.

43 R.L. Wiener, B.J. Winick, L. Skovran Georges, & A. Castro 'A testable theory of problem solving courts: Avoiding past empirical and legal failures.' (2010) 33 *International Journal of Law and Psychiatry* 417.

highlights the need for a well-developed research model, so as to avoid faulty research design which doesn't allow for generalisation to other programs or initiatives.[44]

Additionally, Pawson and Tilley's realistic evaluation model[45] recommends defining and testing context-mechanism-outcome patterns so as to see what type of intervention works for what type of court participant.[46] This model allows space to measure the contribution of legal actors within the theoretical framework of the proposed evaluation model, however does not mention measuring them explicitly. There is a strong argument to be made that legal actor contributions should be measured as a part of a TJ, or mainstream court evaluation, as part of basic research design. This measurement process could be incorporated into existing research models already discussed in the TJ literature, for future evaluation projects.

Benefits of better evaluation procedures

The potential benefits put forward are:

- Better research design and clearer interpretation of outcomes when evaluating therapeutic jurisprudence programs,
- Better support for TJ problem solving programs due to 'evidence-based practice'
- Improving performance when attempting to mainstream TJ practices into regular courts,
- Improved therapeutic input for magistrates to the court process and individuals who might not otherwise receive therapeutic input, and
- A tool that could be useful for magistrate professional development and training.

Evidence-based practice and perceptions of Therapeutic Jurisprudence

The Centre for Justice Innovation recommended evidence-led innovation for problem solving courts,[47] following a well-developed discourse in the TJ review literature. As noted by most authors writing in the field, [48] there is a strong need for critical evaluation of problem-solving courts, including a transparent and critical analysis of problem-solving court processes. This position also applies, in the author's opinion, to the evaluation of the impact of mainstream court procedures from a therapeutic jurisprudence perspective, including an incorporation of a theoretical foundation from the social sciences into the evaluative process. In 2017 Lanier and De Vall[49] reviewed attempts to evaluate and explain the functioning of problem-solving drug courts and noted that they were only able to find eight studies which attempted to incorporate social science theories into the

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[44] R.L. Wiener, B.J. Winick, L. Skovran Georges, & A. Castro 'A testable theory of problem solving courts: Avoiding past empirical and legal failures.' (2010) 33 *International Journal of Law and Psychiatry* 421.

45 R Pawson and N Tilley *Realistic Evaluation* (SAGE Publications Ltd; 1 ed., 1997).

46See Roberts and Indermaur above n 21, 68.

[47] Centre for Justice Innovation *Problem-solving courts: A delivery plan* (2016) Centre for Justice Innovation 7 < http://justiceinnovation.org/portfolio/problem-solving-courts-delivery-plan/>

[48] For example, Andrew Cannon 'Therapeutic Jurisprudence in courts: Some issues of practice and principle' (2007) 16 *Journal of Judicial Administration* 259; E. Richardson, P. Spencer and D. Wexler 'International Framework for Court Excellence and Therapeutic Jurisprudence: Creating excellent court and enhancing wellbeing' (2016) 25 *Journal of Judicial Administration* 148; See Roberts and Indermaur above n 21, 68; M Quinn 'The modern problem-solving court movement: Domination of discourse and untold stories of criminal justice reform.' (2009) 31 *Washington University Journal of Law and Policy*, 57; Richard L Wiener, Bruce J Winick, Leah Skovran and Anthony Castro 'A Testable theory of problem solving courts: Avoiding past empirical and legal failures' (2010) 33 *International Journal of Law and Psychiatry* 419.

[49] Christina Lanier and Kristen E. DeVall 'How'd You Do It? Applying Structural Ritualization Theory to Drug Treatment Court's (2017) 47(2) *Journal of Drug Issues* 289.

evaluation.[50] It is difficult to understand why existing theories of therapeutic change from the literature on therapeutic intervention are not being quantifiably and systematically included and measured when evaluating problem solving court programs.

As encountered by the earliest problem-solving court recorded, Judge Kross's early Wayward Minor's Court for Girls,[51] public opinion, and data to support the efficacy of the court intervention is crucial.[52] One of the difficulties in gaining political and funding support for TJ initiatives has been to 'prove' that TJ legal practices result in 'better' outcomes for individuals in contact with the legal system. There is a wealth of diversity of opinion in terms of how something can be 'proven', and although most people in the field would agree that TJ focusses on improving the lives of court clients, and hopefully reducing their future negative impact on their community, as already discussed, it can be difficult to operationalise and measure in an effective way what a 'good' or 'better' outcome for a court client looks like, so as to fully capture the impact of TJ practices on the populations in which they are being utilised, who can be some of the most difficult health populations to treat and intervene with.

As can be seen in the history of TJ initiatives worldwide, 'evidence-based practice' and 'cost-effectiveness', and the misguided dialectic of 'tough on crime' vs 'soft on crime' are strong narratives determining public perception and support, and subsequently political support and funding for these initiatives.[53] Additionally, there is at times a political temptation to reinforce and make use of the popular construction of courts as sites of judgement and punishment only, while ignoring the rehabilitative aspect of the legal system, and the great power it can hold as a positive

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[50] These were DeVall, K. E., Gregory, P. D., & Hartmann, D. J. (2012). The potential of social science theory for the evaluation and improvement of drug courts: Do we need a theory of drug court effectiveness? (2012) 42 *Journal of Drug Issues*, 320; A. S., Gilmore, N., Rodriguez and V. J. Webb, 'Substance abuse and drug courts:

The role of social bonds in juvenile drug courts.' (2005) 4 *Youth Violence and Juvenile Justice,* 287; B. Liang, M. A. Long and J. D Knottnerus 'What do clients achieve in drug/DUI court? Examining intended and unintended outcomes' (2016) 37 *Justice System Journal*, 272; D. B. Marlowe, D. S. Festinger, C. Foltz, P. A. Lee and N.S.

Patapis 'Perceived deterrence and outcomes in drug court.' (2005) 23 *Behavioral Sciences & the Law,* 183; C. K. May 'Drug courts: A social capital perspective' (2008) 78 *Sociological Inquiry,* 513; T. D., Meithe, H., Lu, and E Reese 'Reintegrative shaming and recidivism risks in drug court: Explanations for some unexpected findings.' (2000) 46 *Crime & Delinquency,* 522; R. E. Narag, S. R. Maxwell, and B. Lee 'A phenomenological approach to assessing a DUI/DWI program' (2013) 57 *International Journal of Offender Therapy and Comparative Criminology*, 229; L. Wolfer 'Graduates speak: A qualitative exploration of drug court graduates' views of the strengths and weaknesses of the program.' (2006) 33 *Contemporary Drug Problems*, 303.

[51] M Quinn 'The modern problem-solving court movement: Domination of discourse and untold stories of criminal justice reform.' (2009) 31 *Washington University Journal of Law and Policy*, 57.

[52] See for example Shailesh Vara, Member of Parliament for North West Cambridgeshire, *North Liverpool Community Justice Centre Debate* (2017) Shailesh Vara MP <http://www.shaileshvara.com/content/north-liverpool-community-justice-centre-debate>; also M Quinn 'The modern problem-solving court movement: Domination of discourse and untold stories of criminal justice reform.' (2009) 31 *Washington University Journal of Law and Policy*, 57.

[53] See for example Jon Robbins, *News* (2015) The Justice Gap: Know your rights, <http://thejusticegap.com/2013/10/next-community-justice-pioneering-court-closes/>; Monidipa Fouzder *Renewed call for problem-solving courts to be piloted* (30 August 2016) The Law Society Gazette <https://www.lawgazette.co.uk/law/renewed-call-for-problem-solving-courts-to-be-piloted/5057246.article>; Rita Panahi, *Soft justice is failing us all* (22 November 2016) Herald Sun <http://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-soft-justice-failing-us-all/news-story/c8498e470d21c60b7901dae20b286cf6>; Stephen Walker *Lord Chief Justice calls for new 'problem solving' courts* (17 March 2016) BBC News, Northern Ireland <http://www.bbc.com/news/uk-northern-ireland-35831915>

intervention in the lives of those passing through. All of these factors can create a context in which it is difficult for TJ, and the imperative of a culture of rehabilitation, to thrive.

As can be seen, for TJ to be effective (and to be funded), effective and comprehensive evaluation needs to be developed, including the necessary tools to evaluate aspects of court functioning.

Magistrate training and self-development for mainstreaming initiatives

The act of observing something changes it. Once it is possible to measure an aspect of legal actor contribution, from a therapeutic perspective, then these observations could have many potential implications. They could be utilised by judges themselves for their own self-development, and they could also be incorporated into training packages for judges and lawyers.

Cannon (along with most schools of psychology training) assert that it is possible to teach someone how to be 'therapeutic in their interactions with others.[54] From this perspective, TJ is a process that can be taught and mainstreamed for legal actors.[55] The Centre for Justice Innovation has highlighted a practice development need,[56] and, aside from the humanist considerations, from a cost effectiveness standpoint, it is evident that basic training in therapeutic interaction skills should be 'an essential part' of training for specialist courts,[57] and it would be reasonably straightforward to include basic therapeutic interactional skills in lawyer and judge training for mainstream courts.

The need to create scalable and replicable models of service delivery has been highlighted by the Centre for Justice Innovation,[58] and intervening via the training and evaluation of legal actors offers a potent and cost-effective way to do so. It also offers an entry point for discussion and efforts to 'mainstream' TJ practices within existing legal structures and staffing, while sidestepping objections regarding costs and the 'soft on crime' debate. If a regular magistrate continued to function as usual in sentencing, however employed therapeutic intervention skills while doing so, this would not cost the state any extra, and would not result in 'criminals' being 'let off the hook' either.[59] The potential improvements in terms of recidivism outcomes, and perceptions of procedural justice and compliance with orders, would be very interesting to measure.

Conclusion

This article has examined the current state of TJ research with reference to the evaluation of legal actor contributions across mainstream and specialist courts, and examined overarching problems with TJ research design referenced in the literature. The potential usefulness of measuring these contributions has been discussed, as well as the potential for the development of legal actor contributions to greatly contribute to the therapeutic impact of mainstream and specialist courts.

The potential benefits from measuring legal actors include better research design, clearer TJ research outcomes, better support for TJ programs, improved mainstreaming efforts, contribution to

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[54] Andrew Cannon 'Therapeutic Jurisprudence in courts: Some issues of practice and principle' (2007) 16 *Journal of Judicial Administration* 259.

[55] Ibid.

[56] Centre for Justice Innovation *Problem-solving courts: A delivery plan* (2016) Centre for Justice Innovation 8 < http://justiceinnovation.org/portfolio/problem-solving-courts-delivery-plan/>

[57] Cannon 2007 above n 54.

[58] Centre for Justice Innovation *Problem-solving courts: A delivery plan* (2016) Centre for Justice Innovation 8 < http://justiceinnovation.org/portfolio/problem-solving-courts-delivery-plan/>

[59] As the TJ debate is so often depicted, please see above n 53 for multiple sources.

judge and lawyer training, and subsequently, improved therapeutic input from magistrates to the court process and use of the opportunity to intervene for individuals who might not otherwise receive therapeutic input. Further potential knock-on effects of therapeutic input for offender - clients include better justice outcomes, less recidivism, better perceptions of procedural justice, and potentially, less costs in ancillary systems involved with defendants progressing through courts (for example the child protection system, the health system, costs of medications, cost of maintaining incarceration).

Given these factors, it is imperative to develop and systematize ways of objectively measuring legal actor contributions from a therapeutic perspective, utilising the existing knowledge base of the therapeutic and psychometric literature.

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Moving On

After having considered how best to utilize existing legal and courtroom structures to achieve therapeutic aims, who is best placed to intervene to encourage therapeutic outcomes via a consultation of the therapeutic jurisprudence literature, and pitfalls to avoid in research design, the type and style of intervention has narrowed. In the following chapters we will pass on to the next stages in the evolution of this thesis in answering the question;

'How to improve therapeutic outcomes for mental health defendants moving through criminal court systems?'

The next stage sees the narrowing of the question being asked to;

'*How to design a systemic intervention within the systems already in place, so as to enhance court participant therapeutic outcomes?*'

CHAPTER FOUR

Methodology for the development of the draft measurement tool

As discussed in the introduction and first chapter, this thesis has followed an iterative developmental path, using as a starting point the general question:

'How to improve therapeutic outcomes for mental health defendants moving through criminal court systems?'

The enquiry generated by this question has led to the inductive development of a qualitative measurement tool for the contributions of judicial officers in interactions with defendants in courtrooms from an objective, therapeutic perspective.

The central research question has been developed through several phases. The first phase has been presented in Chapters One, Two and Three.

Chapter One introduced the topic, and Chapter Two examined the following aspects of the central thesis question:

- Standardization of interventions (via automatic diversion) utilizing legislation that requires legal systems to divert defendants with mental health concerns or other criminogenic issues outside of the legal system, into existing health systems.
- Structural change using legislative reforms to improve access to and the availability of therapeutic interventions, that is, as it relates to mandated treatment regimes and the definition of legal responsibility, as well as diversion programs.
- Strategies to mainstream therapeutic exchanges in court room interactions within existing or new court structures, that is, the mainstreaming TJ movement examined via the lens of a case study of one jurisdiction – the magistrates courts in south east Queensland.

The next phase of the research (presented in Chapter Three) considered by means of a literature review, how best to utilize existing courtroom structures and therapeutic courts, and who is best placed within those structures to facilitate therapeutic change for defendants. The methodology and rational for this analysis, along with the conclusions, are presented in a published article summarizing the reasons to measure the therapeutic contributions of legal actors in the sentencing context,[64] and particularly, those of magistrates, because they are best placed in terms of competency, legitimate authority, and access to mental health resources to facilitate therapeutic change within court settings, via interactions as they occur within real time court proceedings.

The present chapter (Chapter Four) deals with the methodology for the development of the draft measurement tool. In this way it develops the central thesis theme of finding ways to intervene effectively to improve therapeutic outcomes for defendants with mental health problems and other underlying criminogenic issues appearing before criminal courts systems, by refining this question further into:

How to design a systemic intervention within the systems already in place, so as to enhance court participant therapeutic outcomes?

This line of enquiry builds on the research observations in Chapters One, Two and Three. This analysis casts the courts as a potent site of therapeutic intervention, with the legitimate power to maintain engagement by defendants, as well as the requisite access to resources to ensure adequate therapeutic interaction (if properly informed and supported by court systems, practices and training) and redirection to further effective supportive resources. It is widely accepted that legal actors, particularly judges and magistrates, play a significant role in the therapeutic justice process, both in encouraging defendants' rehabilitation and their resistance to future

[64] Waterworth (2018) see above n 2.

reoffending.[65] Review of the Therapeutic Jurisprudence literature in Chapter Three showed that research into therapeutic outcomes for TJ initiatives was often controversial or prone to methodological flaws,[66] with one of the sticking points being how to define and measure the therapeutic interactions occurring within the courtroom. Taken together, these findings argued for an effective tool to capture and measure these interactions, most notably those therapeutic contributions made by the judiciary within courtrooms.[67] The research direction from this chapter onwards focuses on the steps needed to develop such a measurement tool. This has been achieved via an inductive process, utilizing parallel literature reviews, as will be described here.

To measure something, it must first be defined. The task addressed in this chapter is to define an effective and comprehensive, behaviourally-anchored definition of what a legal actor could, or should, do in a courtroom interaction to facilitate change, based on what the literature indicates would be useful judiciary behaviours in this regard. A behaviourally anchored definition was preferred to one derived from ideals and principles because behaviours are easier to quantify and measure. Moreover, a behaviourally anchored definition, based on the literature review, inherently incorporates TJ ideals and principles. As discussed in the resulting article,[68] included here, prior to the present research, there was no behaviourally anchored, evidence-based description of therapeutically useful magistrate behaviour. There was also no way for magistrates or researchers to quantify and measure this integral therapeutic contribution occurring within therapeutic courts. This meant that the fundamental ingredient in therapeutic court intervention was impossible to quantify and measure, and that magistrates wanting to develop their therapeutic skills did not have evidence based suggestions available to them.

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[65] *Ibid*; King (2009) see above n 14, 21; Bruce J. Winick and David B. Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' in Bruce J. Winnick, and David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 106, 109.
[66] Reviewed in Waterworth (2018), above n 2.
[67] See Wexler (2014) above n 19; David Wexler 'From theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' (2011) 37(1) *Monash University Law Review* 33; Richardson, Spencer and Wexler (2016) above n 3, 148.
[68] See Waterworth (2018) above n 2.

Some informal observer rating systems had been used in courtroom research in the past to gather data on legal actors,[69] as well as via mutual ratings systems.[70] However, the literature from which these scales had been derived was not articulated, and the scales were not available to the wider research community. Additionally, at a scale derivation level, mutual rating systems are not generally accurate predictors of therapeutic outcomes, as demonstrated by empirical research into the predictive validity of therapeutic alliance ratings and therapeutic outcomes.[71]

This line of enquiry led naturally to a review of the therapeutic change literature to ascertain what types of therapeutic interventions could be most useful (ethical, effective, and also practically possible) in a courtroom, alongside identification of the most powerful common denominators to all therapeutic interventions (therapeutic alliance). Additionally, a survey of the therapeutic jurisprudence literature produced a set of recommendations vetted and developed by judges themselves, as the experts in creating therapeutic change by utilising 'court craft'.[72] The literature on procedural justice and legitimacy of justice was also interrogated to identify desirable and effective contributions from legal actors. The resulting article synthesised these review results to achieve a behaviourally anchored definition of judges' contributions in their criminal court interactions with defendants, that would have the best chance of facilitating therapeutic change for defendants.

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[69] As reviewed in Waterworth (2018) above n 2; or for example M Herzog-Evans, 'Release and Supervision: Relationships and Support from Classic and Holistic Attorneys' (2016) 1 *International Journal of Therapeutic Jurisprudence* 23.
[70] As reviewed in Waterworth (2018) above n 2; see also Karni Perlman 'It Takes Two for TJ: Correlation Between Bench and Bar Attitudes Toward Therapeutic Jurisprudence: An Israeli perspective' (2008) 30 *Thomas Jefferson Law Review* 351.
[71] See for example E Marziali and L Alexander, 'The Power of the Therapeutic Relationship' (1991) 61 *American Journal of Orthopsychiatry* 383; L Fenton et al, 'Perspective is Everything: The Predictive Validity of Six Working Alliance Instruments' (2001) 10 *Journal of Psychotherapy and Practical Research* 262.
[72] Reviewed in Waterworth (2019) above n 4, 77; see also King (2009) above n 14, 21; and Richardson, Spencer and Wexler (2016), above n 3.

A detailed description of the methodology utilised for the literature review, and the reasoning behind the development of the behavioural definition, is presented in the published article that follows, 'Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change'.[73] This article utilized systematic literature reviews of several fields of knowledge, which include, the common important determinants of therapeutic outcomes, the outcomes and recommended legal actor contributions from the fields of therapeutic jurisprudence (TJ), procedural and legitimacy of justice (PJ and LJ), alongside a brief discussion of the therapeutic modalities which could reasonably be implemented within a courtroom setting. The article culminates with a draft qualitative measurement tool, the 'Legal Actor Contributions Scale' (LACS), designed to capture and measure the therapeutic contributions of legal actors in a criminal court setting during exchanges with defendants.[74]

The behaviourally-anchored description of therapeutic judicial behaviour consists of the following elements,[75] which are described as necessary and sufficient in the literature:[76]

1. "**Introductions**: good eye contact, warm to neutral emotional tone, calmly and firmly setting boundaries and roles in the courtroom, explaining the goals of the hearing, and helping the participant to feel confident to participate in the hearing. The judge takes the time to explain the court processes and how to address the judge. If at all possible, the judge and the defendant create a collaborative definition of goals, and take turns in speaking.
2. **Discussion about the problem:** the judge asks neutral and open questions about the context to the reason defendants are in court, and includes defendants' own words in describing those

[73] Waterworth (2019), see above n 4.
[74] *Ibid,* 222.
[75] *Ibid,* 221.
[76] *Ibid,* 207-220.

reasons. If possible, the judge notices and discusses the strengths that are present in the current situation, despite the reasons for being in court. The judge also notices and discusses the point of view and experiences of other participants in or contributors to the problem.

3. **Sentencing:** The judge gives a summary for sentencing or judgement that includes a collaborative definition of the problem, and incorporates the parties involved in the summary remarks. The judge describes the responsibility for action as internal to the defendants, and describes the situation and summary to include the defendants as having choices over their actions, and also highlights context and possible supports available. The summary includes an acknowledgement of the possible experiences of other people who are also involved in the problem situation, for example the victim of the crime.
4. **Judicial Communication Skills:** The judge uses open questions, with active listening skills, and attentive and encouraging body language, and uses non-verbal prompts to encourage defendants to express themselves well. Judges adapt their language and speed of speaking to the language abilities and comprehension of the defendants, and asks questions to check that defendants have understood them. The judge facilitates other legal actors present in the court in doing the same, to ensure that the defendant understands what is being communicated, and the processes involved. Are there open or closed questions, active or passive listening, invitations to the defendant to participate, turn taking in discussion, effective body language? Turn-taking and collaborative dialogue occurs during the interaction.
5. **Judicial Alliance:** The judge has a neutral to warm emotional tone, has open but authoritative body language, and actively allies themselves with the defendant against 'the problem' (for example, how to stop offending while dealing with causative problems like using drugs; or how to stop behaving in a violent manner towards family members, or how to separate from a

partner in the least damaging way for the children and both partners)."

The potential mechanisms by which these facilitating behaviours act to achieve specific potential therapeutic outcomes is summarized in the table below.

Table 2: Summary of judicial therapeutic behaviours, their theoretical action mechanisms, and expected outcomes

Judicial introduction

- Setting clear boundaries
  - This should increase the defendant's sense of trust and safety with magistrate.
- Increasing participant understanding of the processes occurring
  - The magistrate is more likely to be viewed as fair and comprehensible by the defendant.
- Facilitating communication
  - This could increase the defendant's participation in the court process.
  - Potentially better compliance from the defendant with sentencing objectives.

Discussion about the problem

- Using neutral and open questions
  - A neutral judicial stance encourages participation and a feeling of emotional safety by the defendant.
  - Open questions encourage a sense of being heard and further participation by the defendant.
- Enquiring about the context to offending
  - This gives the defendant the chance to explain their situation and feel heard.
- Including the defendants' own words in describing the problem
  - Including the defendants words helps them to feel heard and (hopefully) understood.
  - This should hopefully also help the defendant to see the problem as something related to them, that they can and should act on.

- Ultimately this could encourage a sense of personal responsibility regarding offending behaviour.

- Looking for and discussing the strengths present in the situation
  - This therapeutic technique can help to engage the defendant to notice the resources available, and to make use of these to support behaviour and life circumstance changes.
- Discussion of the point of view and experiences of other participants
  - This is designed to enhance perspective taking for the defendant, and to increase their empathy for victims of the crime, which may decrease their future offending and increase compliance with sentencing.

Sentencing

- The sentencing summary includes a collaborative definition of the problem and incorporates the parties involved in the offending situation.
  - This should increase the sense for the defendant of being heard.
  - This defines the problem in a way that includes the defendant's perspective, making it more likely to be accepted by them.
  - Greater chance of accepting the courts definition of the problem means that the defendant is more likely to accept the court's authority and sentencing.
- The magistrate attributes internal locus of responsibility for the defendant's actions
  - An internal locus of control is essential for the defendant to perceive that they have a sense of control over their past and future actions. This is essential for accepting responsibility for past actions (and the courts authority) and also for behaviour to change in the future.
- The magistrate highlights the defendant's choices regarding their actions
  - As above.
- The magistrate highlights the context to offending
  - It is useful for context to be discussed in relation to sentencing, as quite often defendants explain their actions as due to context. Explicitly incorporating this as a factor, while also mentioning the other factors that encourage individual responsibility, may change the way that defendant's reasoning and narrative regarding their offending, and reduce future offending in similar contexts.
- The magistrate highlights the possible supports available to the defendant
  - Offenders may not realise that they have support available, nor feel confident or able to access these. It can be useful for an authority figure in a public forum to emphasis the supports that are available, for two reasons; the defendant may feel a sense of confidence that it is

worthwhile accessing supports, that they have worth and a right to access these supports, and the defendant may actually access them, and they may help create behaviour and life circumstance change.

- The magistrate includes an acknowledgement of the possible experiences of other parties to the offending (ie victims perspectives)
  - This is designed to enhance perspective taking for the defendant, and to increase their empathy for victims of the crime, which may decrease their future offending and increase compliance with sentencing.

Judicial Communication Skills

- open questions
- active listening skills
- attentive and encouraging body language
- using non-verbal prompts to encourage defendants to express themselves
- adapt their language and speed of speaking to the language abilities and comprehension of the defendants
- asking questions to check comprehension
- turn-taking and collaborative dialogue occurs during the interaction
- facilitating other legal actors present in the court in doing the same themselves
  - These are all relationship building and active listening techniques routinely taught to therapists to encourage dialogue and willingness to participate, as well as effective two-way communication. If these are not present it may be very difficult for a defendant to communicate or feel heard during a court appearance. The result of not feeling heard nor participating in the court process means that the defendant may disregard or emotionally 'opt out' of that process, which is likely to render it ineffective in affecting future behaviour change.

Judicial Alliance:

- The magistrate employs neutral to warm emotional tone and open but authoritative body language
  - These are aspects which facilitate communication, trust, and therapeutic alliance, with the same effects as the previous section.
- The magistrate actively allies themselves with the defendant against 'the problem'
  - This is an aspect of therapeutic alliance, whereby a defendant is more likely to engage to fight against 'a problem' if that problem is positioned outside of themselves, and they have an ally who is seen to be helping them to fight against that problem.

These elements were combined into a survey (in draft form) as a qualitative measure, the 'Legal Actor Contribution Scale' (LACS),[77] which captured, described and quantified therapeutically desirable legal actor behaviours in a courtroom, as they occur in real time. This type of measurement is necessarily qualitative and subjective. However, it provides a first step in capturing legal actor contributions from a therapeutic perspective. Further development of the LACS is presented in Chapter Five, which describes the consultation and refinement process used in further developing the scale.

The LACS is, at the time of writing, the only published and readily available behavioural measurement scale able to capture legal actor contributions from a literature derived, independent therapeutic perspective.[78]

Following the development of the draft LACS the research reported in this thesis then sought to develop the measure further via consultation with the expert therapeutic community, in order to refine the scale, and facilitate its acceptance as a useful tool to work with within the therapeutic court community. The consultation process occurred in two parts, via an informal research presentation, and then via an individual research study.

The informal consultation process, presented in Chapter Five: Part 1, took place through the presentation of the research and the LACS tool at the International Academy of Law and Mental Health (IAMHL) conference hosted by the Università degli Studi Internazionali di Roma, in Rome, in July 2019. The presentation in this forum allowed for informal consultation and feedback with audience participants, as well as the development of initial thoughts regarding possible future applications.

The second part of the consultation and refinement process, presented in Chapter Five: Part 2, consisted of a formalised expert consultation process conducted by means of a Delphi study based in Australian jurisdictions. The Delphi study methodology provides a structured, empirically sound

[77] Waterworth (2019) above n 4 at 222.
[78] Waterworth (2019) above n 4 207-220.

consultation process for a novel measure, as is recommended for pilot studies and new ideas.[79] The Delphi study methodology, was also considered appropriate because it has been commonly used in medical, nursing and health services research,[80] where there is an element of forecasting or novel research.[81] Despite some criticism,[82] Delphi panels can generate more accurate approaches than unaided individual decisions.
The last two steps of the consultation and refinement process are presented in detail in Chapter Five.

[79] Neda Milevska-Kostova, William N. Dunn *'Delphi Analysis' Methods and Tools in Public Health: A Handbook for Teachers, Researchers and Health Professional*s (2010) 433.
[80] See for example P L Williams and C Webb 'The Delphi technique: an adaptive research tool.' (1994) 61(4) *British Journal of Occupational Therapy* 153; S Kirk, C Carlisle and K A Luker (1996) 'The changing academic role of the nurse teacher in the United Kingdom.' (1996) 24 *Journal of Advanced Nursing* 1054; JME Gibson 'Using the Delphi to identify the content and context of nurses continuing professional development needs.' (1998) 7 *Journal of Clinical Nursing* 451.
[81] Milevska-Kostova and Dunn (2010), n 107; O Kuusi 'Expertise in the future use of generic technologies' in *Research Reports 59* (Helsinki: Government Institute for Economic Research Finland, 1999)
[82] *Ibid.*

Article 4: Rhondda Waterworth 'Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change' (2019) 28(4) *Journal of Judicial Administration,* 207.

Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change

Rhondda Waterworth*

The court can be conceptualised as a point of intervention in the lives of offenders as well as their families, social networks and communities. It therefore seems reasonable to investigate what a judge (or other legal actors) can contribute to this interaction and to find ways it can be effectively measured. This article articulates a behaviourally anchored description of a judge's contribution in a courtroom interaction between a judge and a defendant that would have the best chance of facilitating therapeutic change for a court participant. The description is based on a review of the therapeutic jurisprudence literature, procedural justice and legitimacy of justice literature, a brief review of types of therapy that could be effective in a courtroom setting, and research into the common effective denominators in therapy outcomes, most notably the literature on therapeutic alliance and therapeutic change. The article concludes with a brief rating scale designed to quantitatively measure the desired judicial behaviours in open court.

INTRODUCTION

As described in the therapeutic jurisprudence (TJ) literature and more recently discussed in the popular press, in addition to delivering judgments, enforcing legal norms and protecting the community, the court may be conceptualised as a public health intervention entry point in the lives of offenders as well as their families, social networks and communities.[1]

Additionally, the act of observing an event necessarily changes it.[2] Given this, it seems reasonable to investigate what a judge (or other legal actors) can contribute in court to make the best therapeutic use of this opportunity for intervention and to find effective ways it can be measured.

This article reviews the literature regarding the common important determinants of therapy outcome, TJ, procedural justice (PJ) and legitimacy of justice (LJ), alongside a brief discussion of the therapeutic modalities available to the courtroom setting.

Descriptions in the TJ, PJ and LJ literature of an effective and therapeutic juridical intervention tend to be based on ideals and concepts.[3] Some have included brief descriptive examples of ways to intervene effectively, linked to the psychological literature on therapy intervention types[4] and improving sentence adherence;[5] all are aimed at having a positive impact on the lives of offenders and reducing recidivism.

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[1] BA Babb and JA Kuhn, "A Therapeutic, Holistic, Ecological Approach to Family Law Decision Making" in BJ Winick and DB Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 124, 129; MS King, *Solution-Focused Judging Bench Book* (AIJA Inc, 2009) 73.

[2] See, eg, M Sassoli de Bianchi, "The Observer Effect" (2013) 18 *Foundations of Science* 213.

[3] E Richardson, P Spencer and D Wexler, "International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Court and Enhancing Wellbeing" (2016) 25 JJA 148.

[4] King, n 1.

[5] M King, "Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education" (2006) 15 JJA 131. BJ Winick, "The Judge's Role in Encouraging Motivation for Change" in BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key* (Carolina Academic Press, 2003) 182.

However, as noted by other authors, in regards to the question of "what works" when evaluating court programs, the contribution of legal actors has been a particularly amorphous concept to operationalise.[6] At times the overlap and convergence of these ideas can be reminiscent of the Indian proverb of the blind men each describing their own part of an elephant, with the "elephant" being what exactly a judge should do to have a therapeutic impact on their defendants.

Taking the pragmatic starting point of "what works to effect therapeutic change in a courtroom?", this article develops a basic behaviourally-anchored description of what a judge can, and arguably should, contribute to a courtroom interaction to facilitate a therapeutic change for a defendant. This description includes the procedures, behaviours and statements identified from the major therapeutic legal movements as important to client change and adherence to judgments, as well as suggestions for ways to measure the therapeutic alliance as it could exist within a courtroom setting. The article also outlines a basic qualitative measure designed to be used in open court (mainstream or specialist) to capture this contribution. This measure is not exhaustive and is designed as a starting point for dialogue regarding judicial contributions to therapeutic change; it could also be used as a base for future add-on measures designed to capture interactions in specialist courts.

THE ROLE OF JUDGES

Despite judicial roles and actions being culturally and legally determined,[7] core judicial competencies that relate to the judge's role in upholding individual rights and freedoms could be viewed as independent of culture or jurisdiction.[8] These are: adjudication; investigation; and delivering and authorising coercive sanctions.[9] As observed by Scott,[10] the role of the judge has been slowly evolving to also include motivating and improving the possibility of treatment and personal change for litigants. Supporting this from a legislative perspective, most common law jurisdictions include rehabilitation goals in their sentencing legislation and procedures.

Therapeutic Jurisprudence and a Judge's Role

The law has a potential to be a healing agent, as does a courtroom. The TJ literature unanimously describes judges as active therapeutic agents and the focus of a TJ judicial intervention as to create positive outcomes for court participants.[11] As a judicial approach based only on observation does not improve recidivism outcomes for court participants,[12] the judicial officer is cast as an active facilitator of change. In addition to traditional judicial roles, from a TJ perspective the judge would also support a court participant to engage in their own natural change process, and the court process would become a facilitator of change and potentially also participant empowerment.[13] From this perspective, judges and lawyers could be viewed as creative problem-solvers, in pursuit of peace to conflictual situations.[14]

[6] R Waterworth, "The Case for Measuring Legal Actor Contributions in Court Proceedings" [2018] *Psychiatry, Psychology and Law* 1.

[7] J Hodgson, "Conceptions of the Trial in Inquisitorial and Adversarial Procedure" in A Duff et al (eds), *Judgement and Calling to Account* (Hart, 2006) 223–242; D Salas, "The Role of the Judge" in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, 2002) 488–540.

[8] Salas, n 7.

[9] Hodgson, n 7.

[10] C Scott, "Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts" (2004) 25 *Journal of Legal Medicine* 379.

[11] Scott, n 10, 384.

[12] A Freiberg, "Australian Drug Courts" (2000) 24 Crim LJ 213, 219; King, n 1, 13–14.

[13] See Waterworth, n 6, 26.

[14] W Schma, "Judging for the New Millennium" (2000) 37 *Court Review* 90, 94–96; DP Stolle, DB Wexler and BJ Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000).

King[15] has provided an exhaustive definition of the role of a judge in a therapeutic court, which has been refined by later authors.[16] In addition, the judicial role has been described variously as analogous to a coach,[17] project manager, mentor, confessor, cheerleader,[18] motivator, problem-solver, monitor of progress[19] and transformative leader,[20] utilising the transformational leadership methods of inspirational motivation, idealised influence, intellectual stimulation and individualised consideration.[21]

Guiding Principles for Judges

Importantly, rehabilitation for an offender in a courtroom is not just the absence of offending; it includes the necessary changes that will enable that person to lead a healthy and fulfilling life.[22] Generally, the court is seen as a *facilitator* of change rather than forcing or obliging the individual to change.[23]

Judicial intervention, as noted by multiple TJ authors but most notably King, should also include evidence-based strategies to improve outcomes for court participants.[24] The basic principles from a psychological perspective that increase motivation and positive behaviour change include self-determination, PJ and health compliance principles.[25]

TJ emphasises processes that encourage self-determination for court participants so as to avoid increasing resistance and potential resentment of the judicial process.[26] TJ also encourages responsible use of the power that judges wield,[27] to practice with an ethic of care[28] and act as role models for other legal actors, as well as setting the tone for other court staff in their interactions with the defendant.[29] Judges are expected to have a positive impact on the people appearing before them and their communities, with the court as a possible facilitator of healing.[30]

As noted above, most TJ descriptions of judging have been theoretical and goal based, rather than behaviourally anchored. However, King operationalised the TJ literature goals into a description of the ideal solution-focused judge,[31] and more recently Richardson, Spencer and Wexler[32] articulated a model for measuring TJ court processes that included a description of TJ judging in the criteria for court excellence.

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[15] King, n 1.

[16] Richardson, Spencer and Wexler, n 3.

[17] King, n 1.

[18] PF Hora et al, "The Importance of Timing" in BJ Winick and DB Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 178.

[19] CJ Petrucci, "*The Judge-Defendant Interaction: Toward a Shared Respect Process*" in BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 263.

[20] King, n 1.

[21] B Bass and R Riggio, *Transformational Leadership* (Lawrence Erlbaum Assocs, 2006); W Bennis and B Nanus, *Leaders: Strategies for Taking Charge* (Collins Business Essentials, 2005).

[22] King, n 1, 5.

[23] W Miller and S Rollnick, "What Is Motivational Interviewing?" (1995) 23 *Behavioural and Cognitive Psychotherapy* 325.

[24] King, n 1, 3.

[25] King, n 1, 26.

[26] King, n 1, 5.

[27] Scott, n 10.

[28] RK Warren, "Public Trust and Procedural Justice" (2000) 12 *Court Review* 132, 135; WG Schma, "Judging for the New Millennium" in BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 91.

[29] See Waterworth, n 6, 10.

[30] See Waterworth, n 6, 9.

[31] See Waterworth, n 6.

[32] Richardson, Spencer and Wexler, n 3.

Judicial Communication – What Does TJ Say a Judge Should Do?

TJ recommendations for judicial behaviour include problem-solving courts and also, more recently, the mainstream courts.[33] Judges in problem-solving courts have a context that allows them to (in theory) implement many more types of therapeutic interactions. Mainstream judges at face value do not. However, the mainstream TJ movement describes ways to implement TJ imperatives in mainstream courtrooms.[34] The solution-focused judging skills described by King (below) would be difficult to generalise to mainstream court settings due to practical limitations, and King acknowledged that at times there would be tension between the different considerations involved in judging in a problem-solving court context. For example, the need to promote positive behavioural change and improved wellbeing is counter balanced by the need to hold participants accountable for their actions and to maintain the integrity of the court program. Encouragingly, there are common elements from the description of solution-focused judging and the psychological intervention literature, which are accessible to mainstream judges and desirable to implement in mainstream courtrooms.[35] This article examines these in greater depth to better inform the behaviourally anchored description of desirable judge interactions.

Stages of Interaction

As discussed by King,[36] the relationship between a judge and a client can be broken down to introduction, development and conclusion. As King noted, these stages have different purposes, but will use similar skills. These stages will also be present in an abbreviated form when there is a shorter interaction or limited judicial monitoring.[37]

The introduction phase of a hearing focuses on developing rapport, taking into account the likely challenging emotional state of the client and their potential history of difficulty in forming trusting relationships with authority or helping figures.[38] King cited theory from transformational leadership to make the highly relevant point that trust must be earned, even in a courtroom.[39]

During this phase, basic communication techniques, such as active listening, utilised in a patient and sensitive manner is best;[40] for example, starting with general questions, and identifying any steps the defendant has taken to address the issue and recognising these.

Solution-Focused Judging

King adapted the leadership theory definition of transformational leadership to recommend the following behaviours in an effective solution-focused judge:[41]

- Individualised consideration, which could be demonstrated by showing a strong interest in the participant, utilising effective listening skills (active listening), effective communication skills, practicing an ethic of care towards defendants, asking about positive life events and also about the individual's progress, as well as being empathic when discussing problems or failures. Also,

[33] D Wexler, "Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law" (Arizona Legal Studies Discussion Paper No 15, The University of Arizona, 2014) <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1005&context=tj>.

[34] Wexler, n 33.

[35] See Waterworth, n 6, 184.

[36] King, n 1, 158–159; MD Clark, "Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavioural Change" (2001) 3 *National Drug Court Institute Review* 35.

[37] King, n 1, 158, 737.

[38] King, n 1.

[39] King, n 1, 158, 738.

[40] King, n 1.

[41] King, n 1, 37.

utilising strategic discussions to empower participants via collaborative problem-solving rather than imposing external solutions.[42]

- Idealised influence, which could be demonstrated by encouraging self-determination and self-efficacy, putting goals and strategies in place, having realistic but high expectations of a defendant.
- Inspirational motivation, which could be demonstrated by allowing participants to set their own goals, publicly validating the participant's intrinsic worth and their ability to return to the community, and officially endorsing their goals and offering practical help in meeting these.
- Goal setting (where positive behaviour change is an aim of the process),[43] explaining, negotiating, cautioning, warning, positive encouragement and active listening, and including client responses in judgments.[44]

As King notes, different leadership styles are associated with differing levels of follower satisfaction and transformational leadership is most effective.[45] Unfortunately, mainstream judging tends to operate as "management by exception", which is the least effective management style.[46]

Specific Communication Skills

Effective communication has been eloquently described as commitment to the person and commitment to the message.[47] It is viewed by TJ authors as vital to effective judging.[48] Communication includes both verbal and non-verbal elements, which are equally important to effective communication skills. As noted by Porter,[49] observations of trial judges (in Minnesota) found judges often used non-verbal behaviour that could be considered ineffective and about one-third used these behaviours frequently.

Communication between a judge and a defendant has specific features not found in other settings. Effective non-verbal behaviour for solution-focused judges should include:[50]

- active listening – that is, allowing space for defendants to speak and refraining from interruption while they are speaking, asking clarifying questions to ensure the communication by the defendant is clear and well developed, and including relevant details so as to make sense to the listener;[51]
- empathic or relational listening;[52]
- reciprocity and dynamism;[53]
- turn-taking;
- connection;
- co-creation of a narrative explanation of events and understanding of proceedings;[54]
- connection between what each person says in turn;

[42] King, n 1, 138.

[43] King, n 1, 138.

[44] King, n 1, 148.

[45] King, n 1, 146.

[46] King, n 1, 146.

[47] RB Adler and RF Proctor, *Looking Out, Looking In* (Thomson, 12th ed, 2007) 32.

[48] See Waterworth, n 6, 123.

[49] LL Porter, *Nonverbal Communication in Courtrooms at the Hennepin County Government Center: A Report on Observations of Fourth Judicial District Judges in March and April 2001* (Hennepin Co, 2001) 4.

[50] See Waterworth, n 6, 30; K Freeman, *New South Wales Drug Court Evaluation: Health, Wellbeing and Participant Satisfaction* (NSW Bureau of Crime Statistics and Research, 2002).

[51] See Waterworth, n 6, 147; see also CB Rogers and RE Farson, "Active Listening" in RG Newman, MA Danziger and M Cohen (eds), *Communication in Business Today* (Houghton Mifflin, 1987) 589.

[52] King, n 1, 139; KK Halone and LL Pecchioni, "Relational Listening: A Grounded Theoretical Model" (2001) 14 *Communication Reports* 59.

[53] J Brownell, *Building Active Listening Skills* (Prentice-Hall, 1986) 5; also King, n 1, 121.

[54] G Egan, *The Skilled Helper* (Thomson, 8th ed, 2007) 72; also King, n 1, 121.

- space and support for participants to say what they need to say;[55]
- non-stereotyping;[56]
- mutual influencing;[57]
- non-coercive communication;[58]
- cognitive complexity – that is, an understanding of ideas, events and reasons in a way that integrates multiple elements and a nuanced understanding of the interaction of these;[59]
- multiple lenses for problem formulation;[60]
- appropriate self-monitoring and self-awareness on the part of the judge (but not to the point of distraction);[61]
- strategies to create effective dialogue via eliciting, challenging, clarifying and asking open questions[62] (generally, "what' questions are more effective and less confronting);[63]
- body language that shows the judge is listening, including open body language and body gestures that indicate listening (such as head tilting, evaluative poses);[64]
- effective non-verbal prompts to encourage contributions from the defendant;
- suggested format – ask open questions about wellbeing, then life events, then issue with non-compliance;
- understanding of the impact of the context on anxiety, and the subsequent impact of this on communication;[65]
- strategies to encourage participants to make sense of the proceedings – for example, focusing on one issue after another systematically;
- effective non-verbal prompts;
- care taken to limit negative statements about the defendant in open court so as to avoid creating "defensiveness" or a shame reaction that gets in the way of constructive change;[66]
- care taken in discussions with other staff to limit legal jargon during discussions in front of the defendant; and[67]
- care to recognise achievements and not inadvertently discount these.

Legitimacy of Justice and Procedural Justice

Any pragmatic discussion regarding what works from a judicial perspective in motivating and effecting therapeutic change for defendants must include a brief reflection on the concepts espoused by the LJ and PJ movements in order to be well anchored in the existing literature.

LJ is based on the observation that individuals participating in the justice system make judgments about the legitimacy of that justice system.[68] These judgments include an evaluation of the organisation(s)

[55] Egan, n 54, 72; also King, n 1, 122.

[56] King, n 1, 122.

[57] King, n 1, 122.

[58] King, n 1, 122.

[59] Adler and Proctor, n 47, 32; see also King, n 1, 122.

[60] Adler and Proctor, n 47, 32; King, n 1, 123.

[61] Adler and Proctor, n 47, 32; see also King, n 1, 123.

[62] King, n 1, 72.

[63] King, n 1, 126.

[64] King, n 1, 132.

[65] King, n 1, 126.

[66] King, n 1, 130.

[67] King, n 1, 131.

[68] TR Tyler, "The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities" (1997) 1 *Personality and Social Psychology Review* 323.

involved, an internalised belief regarding the effectiveness with which the authority polices the rules, and whether they should be co-operated with and obeyed.[69]

When an authority is judged to be legitimate, individuals accept the rules implemented by that authority, and defer to them due to a feeling of obligation, rather than expecting a reward or fear of punishment.[70] As could be expected, when an authority is not viewed as exercising legitimate authority, the reverse is true.[71]

Additionally, these judgments of legitimacy can differ between courts, and confidence in court systems differs depending on the type of courts involved.[72]

PJ describes the procedures involved in a justice-related decision-making situation, and the perceived fairness of these procedures and the treatment received by the decision-maker.[73] These can include subjective perceptions of being heard, being treated with dignity and respect, and receiving concerned and attentive treatment by the courts.[74] The experience of being heard by the court decision-maker has a strong influence on the assessment made by the participant as to whether the procedure is fair. If the defendant decides that the court process is fair, they are more likely to comply with directions or judgments made by the court,[75] which improves the therapeutic effect of interacting with the court.[76]

PJ communicates a message of respect and value to the individual, whereas "unfair" treatment can be experienced as devaluing that person's importance in the community.[77]

Perceptions of PJ can strongly influence whether an authority is perceived to be legitimate, and therefore the willingness of individuals to co-operate with that authority. For example, individuals are more likely to want to co-operate with police when they expect fair, respectful and impartial treatment.[78]

Social Distancing

Adding further richness to the contextualisation of the influence exerted on court participants by the judiciary during court interactions is Braithwaite's theory of "social distancing".[79] This theory observes that individuals evaluate authority over time and interactions, including their system of laws, how they enforce these laws and what their authority "stands for". Social distancing theory notes that individuals develop their own position in relation to the authorities over time, based on the principles of "social distancing", which describes the degree to which individuals have positive feelings for others and also towards institutions and legal systems.

[69] M Hough et al, "Procedural Justice, Trust and Institutional Legitimacy" (2010) 4 *Policing: A Journal of Policy and Practice* 203.

[70] Hough et al, n 69.

[71] Hough et al, n 69.

[72] SC Benesh and SE Howell, "Confidence in the Courts: A Comparison of Users and Non Users" (2001) 19 *Behavioural Sciences and the Law* 199; H Kritzer and J Voelker, "Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts" (1998) 82 *Judicature* 58.

[73] K Burke and S Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction" (2007) 44 *White Paper of the American Justice Association, Court Review* 4; J Sunshine and TR Tyler, "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing" (2003) 37 *Law and Society Review* 513.

[74] EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988).

[75] Lind and Tyler, n 74, l; also TR Tyler and YJ Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and the Courts* (Russell Sage Foundation, 2002) 248.

[76] KE Canada and VA Hiday, "Procedural Justice in Mental Health Court: An Investigation of the Relation of Perception of Procedural Justice to Non-Adherence and Termination" (2014) 25 *The Journal of Forensic Psychiatry & Psychology* 321; TR Tyler, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings" (1992–1993) 46 *SMU Law Review* 401.

[77] Lind and Tyler, n 74.

[78] K Murphy, L Hinds and J Fleming, "Encouraging Public Cooperation and Support for Police" (2008) 18 *Policing and Society* 136; Bennis and Nanus, n 21, 199.

[79] V Braithwaite, "Criminal Prosecution within Responsive Regulatory Practice" (2010) 9 *Criminology and Public Policy* 515; V Braithwaite, "Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions" in V Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, 2003) 15–39.

According to Braithwaite, individuals engage in "positioning motivational posturing" whereby they position themselves in relation to legal authorities.[80] Those who are committed to accepting the authority (are aligned with that authority) are more likely to do "the right thing" by those authorities, and to feel a "moral obligation" to co-operate.

Others may put a greater distance between themselves and authority due to uncertainty about whether an authority will act appropriately to achieve its goals. Those who socially distance themselves from authority are more likely to show resistance towards the authority's rules or disengage from interactions with authority or laws.

Resistance to authority can be shown by expressing a right to challenge authority or policies or treatment seen as unreasonable. Dealing directly with the concerns expressed by someone who is resisting can often encourage that person to move to a "posture of commitment".

Disengagement from the legal system is a desire to step outside of the legal system, where there is a disagreement about the authority's goals and also their ways of achieving these. Disengagement can be shown as avoidance behaviour, where the individual avoids all interaction with a legal authority or compliance with its authority. An extreme form of disengagement could see the individual seeking out alternative forms of justice.[81]

An individual's posture with regards to authority can and will change over time and with repeated interactions.[82] Treating people well can reduce social distancing; treating people badly can increase social distancing. Clearly, if a court expects people to participate in the process and to comply with directions, as well as to affect therapeutic change, then court procedures need to be sensitive to theories of social distancing and the principles of PJ.

THE INTERACTION BETWEEN THESE AND THERAPEUTIC JURISPRUDENCE

As might be expected, there is a strong overlap between whether a judicial procedure or policing procedure is perceived as fair and whether the authority exercising that procedure is perceived as legitimate, and subsequently whether an individual "socially distances" themselves or cooperates and accepts that institution's authority.

PJ is particularly important for marginalised or stigmatised members of society, including those with mental illness, or low socioeconomic status.[83] As could be expected, the elements of PJ – including being treated with respect, being heard and the perception that those in charge are concerned with the defendant's wellbeing – can improve perceptions of the legitimacy of the authority of the justice system (LJ) and improve compliance with the justice system and the outcomes of a court process,[84] as well as lead to that person's alignment with society's rules and authority.

Importantly, from a therapeutic perspective, there are indications that if a court participant (eg in the mental health court) has positive experiences of PJ over a period of time, they will experience positive engagement and change,[85] as well as an increase in a sense of hope and empowerment – elements that are highly important for therapeutic change.[86]

[80] Braithwaite (2003), n 79.

[81] Braithwaite (2010), n 79; R Weitzer and RK Brunson, "Strategic Responses to the Police Among Inner-City Youth" (2009) 50 *Sociological Quarterly* 235.

[82] See n 81.

[83] Lind and Tyler, n 74.

[84] Lind and Tyler, n 74; also S Kopelovich et al, "Procedural Justice in Mental Health Courts: Judicial Practices, Participant Perceptions and Outcomes Related to Mental Health Recovery" (2013) 36 *International Journal of Law and Psychiatry* 113; NG Poythress et al, "Perceived Coercion and Procedural Justice in the Broward Mental Health Court" (2002) 25 *International Journal of Law and Psychiatry* 517.

[85] G McIvor, "Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts" (2009) 9 *Criminology and Criminal Justice* 29; DB Wexler, "Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence" (2008) 44 *Court Review* 78.

[86] Kopelovich et al, n 84.

Review of the Common Denominators of Therapy Outcomes

There are several ways of looking at "what works" for therapeutic change and how to measure it. Unfortunately, most court review research has tended to define "success" as decrease or cessation in recidivism.[87]

This focus is understandable from a legal perspective, but somewhat two-dimensional when seen from a therapeutic or pragmatic health economics perspective.[88] After addressing the question from the perspective of the TJ, PJ and LJ literature, it is worth looking at "what works" therapeutically from the perspective of the helping professions. The following discussion examines the variety of clients passing through the courts, their needs and the types of therapeutic interventions available that could be adapted to a court setting. It then looks at the common denominators of therapeutic outcomes that are considered effective in encouraging therapeutic change.

Court Participants

It is difficult to get precise statistics on the mental health and socioeconomic concerns of individuals passing through the courts; however, there are commonalities to the types of mental health problems that people going through court systems struggle with. These range in type, symptomatology and severity, and can include the effects of trauma (PTSD), chronic trauma (complex trauma, personality disorders such as antisocial personality disorder), drug addiction, depression, anxiety, self-harm and suicidal ideation. When looking at adolescents progressing through the juvenile justice system, they show a similar range of mental health problems, and in addition, developmental problems such as autistic spectrum disorder, and attachment disorders such as reactive attachment disorder. Experience would suggest that due to a combination of mental health factors, developmental issues and the effect of anxiety due to the context, participants may experience difficulties in communication in the court setting.[89] This is likely to mean that courts will need to adjust their manner of communicating with clients if they want the client to completely take in and respond to the communication that occurs in court.

It is useful to match the type of psychological intervention to the presenting issues. So, what works with these presenting problems from a therapeutic perspective?

Types of Therapy

Psychotherapy is defined as the deliberate application of clinical methods and "interpersonal stances" from psychological principles to help a person change their behaviour, thoughts and emotions.[90]

There have been four major developmental waves for psychotherapy, as the ideas and principles of psychotherapy have evolved over time:

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[87] JC Anestis and JL Carbonell, "Stopping the Revolving Door: Effectiveness of Mental Health Court in Reducing Recidivism by Mentally Ill Offenders" (2014) 65 *Psychiatric Services* 1105; PJ Burns, VA Hiday and B Ray, "Effectiveness 2 Years Postexit of a Recently Established Mental Health Court" (2013) 57 *American Behavioral Scientist* 189; PA Dirks-Linhorst and DM Linhorst, "Recidivism Outcomes for Suburban Mental Health Court Defendants" (2012) 37 *American Journal of Criminal Justice* 76; VA Hiday and B Ray, "Arrests Two Years after Exiting a Well-Established Mental Health Court" (2010) 61 *Psychiatric Services* 463; VA Hiday, HW Wales and B Ray, "Effectiveness of a Short-Term Mental Health Court: Criminal Recidivism One Year Postexit" (2013) 36 *Law and Human Behavior* 401; S Maruna, "Elements of Successful Desistance Signaling" (2012) 11 *Criminology and Public Policy* 73; ME Moore and VA Hiday, "Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity Between Mental Health Court and Traditional Court Participants" (2006) 68 *Law and Human Behavior* 659; S Ross, "Evaluation of the Court Integrated Services Program: Final Report" (Melbourne Consulting and Custom Programs, University of Melbourne, 2009); CM Sarteschi, MG Vaughn and K Kim, "Assessing the Effectiveness of Mental Health Courts: A Quantitative Review" (2011) 39 *Journal of Criminal Justice* 12; DB Wilson, O Mitchell and DL Mackenzie, "A Systematic Review of Drug Court Effects on Recidivism" (2006) 2 *Journal of Experimental Criminology* 459.

[88] D Wexler, "Robes and Rehabilitation: How Courts Can Help Offenders 'Make Good'" (2001) 38 *Court Review* 18; D Wexler, "Therapeutic Jurisprudence and Readiness for Rehabilitation" (2006) 8 *Florida Coastal Law Review* 278.

[89] SO Lilienfeld and H Arkowitz, "Are All Psychotherapies Created Equal?" (2012) 23 *Scientific American Mind* 68.

[90] JO Prochaska and JC Norcross, *Systems of Psychotherapy: A Transtheoretical Analysis* (Brooks/Cole Publishing Co, 1999).

- The psychodynamic theories originated with the work of Freud (1895–1939) with the assumption that the past strongly influences a person's current behaviour, and therefore that the past needs to be made conscious in order to change behaviour and emotional reactions. Common techniques used in psychodynamic therapies include neutrality, interpretation, and use of the awareness of transference and counter transference.[91] These do not readily adapt to a courtroom setting and could cause participants harm.
- Cognitive-behavioural therapies – cognitive therapies target change in thought patterns, and behavioural therapies focus on behavioural patterns.[92] The approach is problem oriented, directive and intellectually based. Within these modalities, the therapeutic relationship can also be important (eg used for modelling new behaviours). This approach has been adapted by King[93] for a solution-focused judge; however, it would be more difficult to implement in a mainstream courtroom.
- Existential and humanistic theories – these are the backdrop to the development of the major principles behind the counselling process, and the vision of the therapeutic relationship as a means for therapeutic intervention, as well as providing material for therapy.[94] Therapeutic intervention utilising the relationship include authenticity, listening skills and the use of empathy. The guiding basis of this therapy is an understanding that individuals are motivated to lead healthy, fulfilling lives, and to find meaning in experiences and life. Rogers[95] defined six necessary and sufficient conditions for therapy to impact on personality change, including: the therapeutic relationship; unconditional positive regard; and accurate empathy from the therapist. The goal of therapy is the creation of personal meaning and personal growth. This therapeutic approach could be adapted to a mainstream court environment.
- Emerging theories – these include constructivist, feminist, multicultural and transpersonal theories. Constructivist theories view knowledge and experience as constructed, rather than objective.[96] Generally, from these perspectives, personal problems are viewed as emerging from the tension between a person and their context. Constructivist theories have lead to solution-focused therapy and narrative therapy.[97]

Of these, two appear to be particularly adaptable for both a mainstream and a problem-solving courtroom setting.[98] These are:

- Solution-focused therapy is usually a brief intervention; it assumes that the individual is an expert on their own life, can define their goals for therapy, and are able to generate solutions to their problems and to reach their goals.[99] The brevity and focused questioning of this therapy makes it potentially useful in a courtroom setting.
- Narrative therapy focuses on how clients can "reauthor" their life narratives to create new meaning and new experiences of reality.[100] Emphasis is placed on creating and reinforcing stories about self,

[91] S Freud, "On the Beginning of Treatment: Further Recommendations on the Technique of Psychoanalysis" in J Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol 12, 1911–1913 (trans, The Hogarth Press and the Institute of Psycho-analysis, 1958).

[92] AT Beck, *Cognitive Therapy and the Emotional Disorders* (Meridian, 1976); KS Dobson and L Block, "Historical and Philosophical Bases of the Cognitive-behavioral Therapies" in KS Dobson (ed), *Handbook of Cognitive Behavioral Therapies* (Guilford Press, 1988) 3–38; A Ellis, "The History of Cognition in Psychotherapy" in A Freeman et al (ed), *Comprehensive Handbook of Cognitive Therapy* (Plenum Press, 1989) 5–19.

[93] King, n 1.

[94] AH Maslow, "A Theory of Human Motivation" (1943) 50 *Psychological Review* 370; CR Rogers, *Client-Centered Therapy* (Houghton Mifflin, 1951).

[95] Rogers, n 94.

[96] JD Raskin, "Constructivism in Psychology: Personal Construct Psychology, Radical Constructivism, and Social Constructionism" (2002) 5 *American Communication Journal* 1.

[97] S de Shazer et al, *More Than Miracles: The State of the Art of Solution-Focused Brief Therapy* (Routledge, 2007).

[98] King, n 1.

[99] de Shazer et al, n 97.

[100] MK White and D Epston, *Literate Means to Therapeutic Ends* (Dulwich Centre Publications, 1989).

others and relationships that are useful for the client to have a healthy self-esteem, sense of self-efficacy and positive interactions with others. A court experience is a powerful facilitator to develop and witness new life narratives.

An additional therapy that specifically targets antisocial behaviour also deserves inclusion in this review – this is multisystemic therapy.[101]

As noted, there are many different types of therapy[102] and some treatments can be harmful in certain circumstances.[103] Is there a simpler way to conceptualise a therapeutic intervention in a courtroom setting in a way that avoids the risk of iatrogenic harm?

THERAPEUTIC ALLIANCE

Research on outcomes has tended to focus on the most frequently used types of therapies[104] – that is, cognitive behaviour therapy, psychodynamic therapy, person-centred therapy and interpersonal therapy. However, over time research into "what works" in therapy has become inextricably linked with research into the therapeutic alliance (relationship). Early psychotherapy authors observed that therapy types appeared to have equal impact (the dodo bird effect).[105]

As has been demonstrated to a significant degree in the psychological and psychotherapeutic research literature, the type of treatment does matter.[106] However, despite the presenting problem of the client and the type of intervention adopted, the strength of the therapeutic alliance is a major process variable with central impact on therapeutic outcomes.[107]

Although the therapeutic relationship has been defined differently depending on theoretical orientation and discipline,[108] a basic definition is the collaborative relationship between a therapist and patient with the central aspects being the link between the therapist and their patient and their agreement both on goals and tasks for therapy.[109]

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[101] TS Van der Stouwe et al, "The Effectiveness of Multisystemic Therapy (MST): A Meta-Analysis" (2014) 34 *Clinical Psychology Review* 468.

[102] JC Norcross, *Psychotherapy Relationships That Work: Therapist Contributions and Responsiveness to Patients* (OUP, 2002).

[103] SO Lilienfeld, "Psychological Treatments That Cause Harm" (2007) 2 *Perspectives on Psychological Science* 53.

[104] Lilienfeld and Arkowitz, n 89.

[105] L Luborsky and B Singer, "Comparative Studies of Psychotherapies: Is It True That 'Everyone Has Won and All Must Have Prizes?'" (1975) 32 *Archives of General Psychiatry* 995; S Rosenzweig, "Some Implicit Common Factors in Diverse Methods of Psychotherapy" (1936) 6 *American Journal of Orthopsychiatry* 412.

[106] DF Tolin, "Is Cognitive-Behavioral Therapy More Effective Than Other Therapies? A Meta-Analytic Review" (2010) 30 *Clinical Psychology Review* 710.

[107] AC Del Re et al, "Therapist Effects in the Therapeutic Alliance-Outcome Relationship: A Restricted-Maximum Likelihood Meta-Analysis" (2012) 32 *Clinical Psychology Review* 642; R Elvins and J Green, "The Conceptualization and Measurement of Therapeutic Alliance: An Empirical Review" (2008) 28 *Clinical Psychology Review* 1167; R Elliott, WB Stiles and DA Shapiro, "Are Some Psychotherapies More Equivalent Than Others?" in TR Giles (ed), *Handbook of Effective Psychotherapy* (Plenum Press, 1993) 455–479; C Flückiger et al, "The Alliance in Adult Psychotherapy: A Meta-Analytic Synthesis" (2018) 55 *Psychotherapy* 316; ML Friedlander et al, "Alliance in Couple and Family Therapy" (2011) 48 *Psychotherapy* 25; C Gelso and J Carter, "Components of the Psychotherapy Relationship: Their Interaction and Unfolding During Treatment" (1994) 41 *Journal of Counselling Psychology* 296; AO Horvath and L Luborsky, "The Role of the Therapeutic Alliance in Psychotherapy" (1993) 61 *Journal of Consulting Clinical Psychology* 561; L Luborsky, "Helping Alliances in Psychotherapy: The Groundwork for a Study of Their Relationship to Its Outcome" in JL Cleghorn (ed), *Successful Psychotherapy* (Brunner/Mazel, 1976) 92–116; BD McLeod, "Relation of the Alliance with Outcomes in Youth Psychotherapy: A Meta-Analysis" (2011) 31 *Clinical Psychology Review* 603; RS Shirk, MS Karver and R Brown, "The Alliance in Child and Adolescent Psychotherapy" (2011) 48 *Psychotherapy* 17; MJ Welmers-van de Poll et al, "Alliance and Treatment Outcome in Family-involved Treatment for Youth Problems: A Three-Level Meta-Analysis" (2018) 21 *Clinical Child and Family Psychology Review* 146; BE Wampold et al, "A Meta-Analysis of Outcome Studies Comparing Bona Fide Psychotherapies: Empirically 'All Must Have Prizes'" (1997) 122 *Psychological Bulletin* 203.

[108] MR Fitzpatrick, S Iwakabe and A Stalikas, "Perspective Divergence in the Working Alliance" (2005) 15 *Psychotherapy Research* 69.

[109] ES Bordin, "The Generalizability of the Psychoanalytic Concept of the Working Alliance" (1979) 16 *Psychotherapy* 252; AO Horvath et al, "The Alliance" in JC Norcross (ed), *Relationships That Work* (OUP, 2011) 9; MS Karver et al, "Meta-Analysis

The relationship also demonstrates structured parameters to the interaction, which is formed early on in the interaction between the parties and appears to be stable over time.[110] Bordin's formulation of the therapeutic alliance delineates three essential elements: agreement on the goals of therapy; agreement on the tasks involved in therapy; and the development of a bond (mutual positive regard and trust) between the therapist and the client.

How Important is the Therapeutic Alliance?

The therapeutic alliance has been described variously as "a potent curative factor in all forms of treatment",[111] "crucial for successful therapy outcome",[112] or "a critical component of effective therapy".[113] Del Re et al noted that, from research spanning 30 years, the therapeutic alliance has been demonstrated to be a consistent predictor of therapy outcome.[114] All studies reviewed found a correlation between the therapeutic alliance and positive therapy outcome. In Del Re et al's meta-analysis, the average alliance-outcome correlation was .4; however, other studies have shown a more modest correlation.[115]

Additionally, there is evidence to suggest that some research may have underestimated the strength of the correlation between therapeutic alliance and client outcome[116] – although there is great variability between clients' outcomes, there is very little variability within a therapist's own clients of the correlation between alliance and outcome.[117] This means that therapist contribution to the therapeutic alliance is crucial.[118] Also, some therapists seem to have a significantly better ability to form a healthy therapeutic relationship with their clients, and this differing ability is significantly related to their client's outcomes.[119]

Crucial for a successful court intervention, the alliance is an essential ingredient in the client accepting therapeutic intervention and following a plan towards personal growth.[120]

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of Therapeutic Relationship Variables in Youth and Family Therapy: The Evidence for Different Relationship Variables in the Child and Adolescent Treatment Outcome Literature" (2006) 26 *Clinical Psychology Review* 50; Shirk, Karver and Brown, n 107; KJ Miller and JS Mizes (eds), *Comparative Treatments of Eating Disorders* (Free Association Books, 2000).

[110] AO Horvath, "The Therapeutic Relationship: Research and Theory" (2005) 15 *Psychotherapy Research* 3; Horvath and Luborsky, n 107; B Mallinckrodt, "Session Impact, Working Alliance, and Treatment Outcome in Brief Counseling" (1993) 40 *Journal of Counseling Psychology* 25; DJ Martin, JP Garske and KM Davis, "Relation of the Therapeutic Alliance with Outcome and Other Variables: A Meta Analytic Review" (2000) 68 *Journal of Consulting and Clinical Psychology* 438.

[111] E Marziali and L Alexander, "The Power of the Therapeutic Relationship" (1991) 61 *American Journal of Orthopsychiatry* 383.

[112] CE Hill and MM Corbett, "A Perspective on the History of Process and Outcome Research in Counseling Psychology" (1993) 40 *Journal of Counseling Psychology* 3; AO Horvath and BD Symonds, "Relation Between Working Alliance and Outcome in Psychotherapy: A Metaanalysis" (1991) 38 *Journal of Counseling Psychology* 139.

[113] Horvath et al, n 109; Miller and Mizes, n 109; Shirk, Karver and Brown, n 107.

[114] Del Re et al, n 107; see also Flückiger et al, n 107.

[115] Flückiger et al, n 107; Horvath et al, n 109.

[116] Del Re et al, n 107.

[117] S Baldwin, B Wampold and Z Imel, "Untangling the Alliance-Outcome Correlation: Exploring the Relative Importance of Therapist and Patient Variability in the Alliance" (2007) 75 *Journal of Consulting and Clinical Psychology* 842.

[118] Baldwin, Wampold and Imel, n 117.

[119] See Hora et al, n 18; U Dinger et al, "Therapist Effects on Outcome and Alliance in Inpatient Psychotherapy" (2008) 64 *Journal of Clinical Psychology* 344; D Zuroff et al, "Between-Therapist and Within-Therapist Differences in the Quality of the Therapeutic Relationship: Effects on Maladjustment and Self-Critical Perfectionism" (2010) 66 *Journal of Clinical Psychology* 681.

[120] Bordin, n 109.

Research has demonstrated the impact of therapeutic alliance across different problems and different treatment modalities – for example, depression,[121] anxiety,[122] PTSD,[123] eating disorders[124] and personality disorders.[125]

Research has found that therapist qualities are more important to outcome than client variables.[126] Patient contribution factors to patient and therapist alliance are distinct and can be reliably measured.[127] Although earlier studies indicated that the client variable of attachment style influenced client report of therapeutic alliance,[128] more recent studies have shown that what a therapist contributes to the interaction has a larger impact on the alliance – that is, outcome correlation.[129] The pattern of the therapeutic alliance over time is also very important to the therapeutic outcome.[130]

In particular, therapist responsiveness to the client is a key ingredient in good therapeutic alliance.[131] Responsiveness means the attentiveness with which the therapist responds to new information that emerges during their interaction.[132]

Responsiveness is not influenced by client variables, such as personality disorder or type of diagnosis, meaning that focusing on the quality of the interaction between the therapist and client is more likely to show a beneficial outcome, despite the wide variety (or absence) of diagnoses and types of diagnoses seen in defendants progressing through the courts.

Measuring Therapeutic Alliance

Given the importance of therapeutic alliance to therapy outcome, it is not particularly surprising that there are multiple types of rating scales to measure it. Of these, research shows that observer ratings of therapeutic alliance are the most accurate predictors of therapeutic outcome;[133] and second to that, client ratings.[134]

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[121] J Krupnick et al, "The Role of the Therapeutic Alliance in Psychotherapy and Pharmacotherapy Outcome: Findings in the National Institute of Mental Health Treatment of Depression Collaborative Research Programme" (1996) 64 *Journal of Consulting Clinical Psychology* 532; P Raue, M Goldfried and M Barkham, "The Therapeutic Alliance in Psychodynamic-Interpersonal and Cognitive-Behavioral Therapy" (1997) 65 *Journal of Consulting Clinical Psychology* 582.

[122] MC Cloitre et al, "Therapeutic Alliance, Negative Mood Regulation, and Treatment Outcome in Child Abuse-Related Posttraumatic Stress Disorder" (2004) 72 *Journal of Consulting and Clinical Psychology* 411.

[123] Cloitre et al, n 122.

[124] MJ Constantino et al, "The Association Between Patient Characteristics and the Therapeutic Alliance in Cognitive-Behavioural and Interpersonal Therapy for Bulimia Nervosa" (2005) 73 *Journal of Consulting and Clinical Psychology* 203.

[125] A Andreoli et al, "Crisis Intervention in Depressed Patients With and Without DSM-III – R Personality Disorders" (1993) 181 *The Journal of Nervous and Mental Disease* 732; DN Klein et al, "Therapeutic Alliance in Depression Treatment: Controlling for Prior Change and Patient Characteristics" (2003) 71 *Journal of Consulting Clinical Psychology* 997; JL Strauss et al, "Early Alliance, Alliance Rupture, and Symptom Change in a Nonrandomized Trial of Cognitive Therapy for Avoidant and Obsessive-Compulsive Personality Disorders" (2006) 74 *Journal of Consulting and Clinical Psychology* 337.

[126] Baldwin, Wampold and Imel, n 117; Del Re et al, n 107; Dinger et al, n 119; Zuroff et al, n 119.

[127] Krupnick et al, n 121.

[128] Mallinckrodt, n 110; B Mallinckrodt, HM Coble and DL Gantt, "Working Alliance, Attachment Memories, and Social Competencies of Women in Brief Therapy" (1995) 42 *Journal of Counseling Psychology* 79; B Strauss and B Schwark, "Die Bindungstheorie und ihre Relevanz für die Psychotherapy [Attachment theory and its practical relevance for psychotherapy]" (2007) 52 *Psychotherapeut* 405.

[129] Baldwin, Wampold and Imel, n 117; Dinger et al, n 119; DK Marcus et al, "The Therapeutic Alliance in Adolescent Substance Abuse Treatment: A One-With-Many Analysis" (2011) 58 *Journal of Counseling Psychology* 449; Zuroff et al, n 119.

[130] DM Kivlighan and P Shaughnessy, "Patterns of Working Alliance Development: A Typology of Client's Working Alliance Ratings" (2000) 47 *Journal of Counseling Psychology* 362.

[131] WB Stiles, "Responsiveness as an Obstacle for Psychotherapy Outcome Research: It's Worse than You Think" (2009) 16 *Clinical Psychology: Science and Practice* 86; WB Stiles, L Honos-Webb and M Surko, "Responsiveness in Psychotherapy" (1998) 5 *Clinical Psychology: Science and Practice* 439.

[132] Stiles, n 131.

[133] Marziali and Alexander, n 111; L Fenton et al, "Perspective Is Everything: The Predictive Validity of Six Working Alliance Instruments" (2001) 10 *Journal of Psychotherapy and Practical Research* 262.

[134] A Bachelor and A Horvath, "The Therapeutic Relationship" in MA Hubble, BL Duncan and SD Miller (eds), *The Heart and Soul of Change: What Works in Therapy* (American Psychological Association, 1999) 133.

Observer rating scales – such as the Vanderbilt Therapeutic Alliance Scale (VTAS),[135] the Working Alliance Inventory-Observer Form (WAI-O)[136] and the California Psychotherapy Alliance Scales (CALPAS) – are highly correlated to each other, and have high construct validity.[137] As per Fenton et al,[138] the Penn Helping Alliance Rating Scale, the CALPAS, the VTAS and Working Alliance Inventory (Observer, Therapist and Client versions), had significantly correlated observer ratings, while ratings completed by therapists or clients were not[139] – meaning that there were only minimal differences between the types of rating scales used.

Implications for Therapeutic Jurisprudence

Horvath and Luborsky found that the early phase of therapy is crucial,[140] and that therapeutic alliance tends to be formed very early in the interaction and is stable over time.[141] It should be possible to utilise the interaction between a judge and a defendant as a short-lived therapeutic interaction, and to focus on the interaction from a therapeutic alliance formation perspective.

This discussion needs to be contextualised, so as to emphasise the importance of incorporating up-to-date psychological intervention techniques available, via court referral, based on the evolving evidence base. As new therapies and programs become available it is important to make use of them as appropriate. However, the features of what constitutes an effective therapeutic relationship or alliance are stable across therapeutic situations, and these features can be readily adapted to a TJ context to foster therapeutic change for defendants. It is also possible to teach these behaviours to therapists[142] (and by inference) also to the judiciary.

For a legal actor in a court setting, this means the judge taking active steps: to delineate, invite and form a positive working relationship with the defendant with clear roles, boundaries and evidence of respect and trust in the interaction; to invite the defendant to participate and agree in defining the goals of the hearing; and to invite the contribution to, and agreement with, the tasks of the hearing from the defendant.

Additionally, as Del Re et al observed, it is crucial to ensure that institutions and workplaces are conducive to therapists and other intervenants exercising their skills in alliance development.[143] Care needs to be taken to develop judicial contexts that are conducive to therapeutic legal actor contributions and not judicial burn out – for example, by managing the size of court lists.

A Behaviourally Anchored Description of Legal Actor Contributions

After a review of common determinants of therapy (particularly the impact of therapeutic alliance and the interpersonal factors that facilitate this), as well as a review of the PJ and TJ literature and research into court outcomes, it is possible to compile a behavioural description of what a judge could do in a mainstream court to have the best chance of facilitating change. This is as follows.

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[135] DE Hartley and HH Strupp, "The Therapeutic Alliance: Its Relationship to Outcome in Brief Psychotherapy" in J Masling (ed), *Empirical Studies in Analytic Theories* (Erlbaum, 1983) 1–38.

[136] R Di Giuseppe, JJ Linscott, and R Jilton, "Developing the Therapeutic Alliance in Children-adolescent Psychotherapy" (1996) 5(2) *Applied and Preventive Psychology* 85–100; TJ Tracey and AM Kokotovic, "Factor Structure of the Working Alliance Inventory" (1989) 1 *Psychological Assessment* 207.

[137] V Tichenor and CE Hill, "A Comparison of Six Measures of Working Alliance" (1989) 26 *Psychotherapy: Theory, Research, Practice, Training* 195.

[138] Fenton et al, n 133.

[139] Fenton et al, n 133.

[140] Horvath and Luborsky, n 107.

[141] Horvath, n 110; Horvath and Luborsky, n 107; Mallinckrodt, n 110; Martin, Garske and Davis, n 110.

[142] Marziali and Alexander, n 111; JC Muran and JP Barber, *The Therapeutic Alliance: An Evidence-Based Guide to Practice* (Guilford, 2010).

[143] Del Re et al, n 107; A Donabedian, "Evaluating the Quality of Medical Care" (2005) 83 *The Milbank Quarterly* 691.

Introductions

During the introductions it is important to maintain good eye contact, use warm to neutral emotional tone, calmly and firmly set boundaries and roles in the courtroom, explain the goals of the hearing, and help the participant to feel confident to participate in the hearing. The judge should take the time to explain the court processes and how to address the judge. If at all possible, the judge and the court participant should create a collaborative definition of goals, and take turns in speaking.

Discussion About the Problem

The judge should ask neutral and open questions about the context as to why they are in court, and include the court participants' own words in defining "the problem". If possible, the judge should notice and discuss the strengths that are present in the current situation, despite the reasons for being in court. The judge should also notice and discuss the point of view and experiences of other participants to the problem.

Sentencing

The judge should give a summary for sentencing or judgment that includes a collaborative definition of the problem and incorporates the parties involved in the summary remarks. The judge should describe the responsibility for action as internal to the court participant, and describe the situation and summary to include the participant as having choices over their actions, and also highlight context and possible supports available. The summary should include an acknowledgment of the possible experiences of other people who are also involved in the problem situation – for example, the victim of a crime.

Judicial Communication Skills

The judge should use open questions, with active listening skills and attentive and encouraging body language, and use non-verbal prompts to encourage the court participant to express themselves well. The judge should adapt their language and speed of speaking to the language abilities and comprehension of the court participant, and ask questions to check that the court participant has understood them. The judge should facilitate other legal actors present in the court to do the same, so as to ensure that the court participant understands what is being communicated and the processes behind this. The judge should consider and promote the use of open or closed questions, active or passive listening, invitations to the defendant to participate, turn-taking in discussion and effective body language. Turn-taking and collaborative dialogue should occur during the interaction.

Judicial Alliance

The judge should employ a neutral to warm emotional tone and an open but authoritative body language, and actively ally themselves with the court participant against "the problem" (ie how to stop offending while using drugs, or how to stop behaving in a violent manner towards family members, or how to separate from a partner in the least damaging way for the children and both partners).

This composite picture leads to the development of a behaviourally defined description of desirable judicial interactions from a therapeutic perspective, described in detail in Figure A, which could be used as a brief rating scale for use by an independent observer to capture elements of this description and measure this in a courtroom setting. This measure is not designed to be comprehensive, but rather a starting foundation point for future conversations about judicial contributions to therapeutic change, and a foundation for potential future developments of measures for specific court settings.

FIGURE A. Legal Actor Contributions Court Checklist

Legal Actor Contributions Court Checklist

Introductions

○ The judicial officer establishes context: explains how the court works and the multiple functions of justice

The judicial officer addresses to the defendant

○ personally

○ eye contact

○ in a 'non-intimidating' manner

○ by name

○ explains to defendant how to address the judge

Judicial Emotional tone

1 2 3 4 5 6 7

warm ---------positive but firm----------neutral ----------cold ---------- hostile

Judicial Body language (circle one):

open / closed

dominant / encouraging

○ The judicial officer explains the goals of hearing: for defendant, for court and for society

○ The judicial officer explains rules for participating in the court (adaptive communication)

Discussion about problem

○ Enquiry about the background by the judicial officer

○ Enquiry about the defendant by the judicial officer

○ Enquiry about the context to the defendant and the problem by the judicial officer

○ Inclusion of defendant's words into statements and questions (creation of a shared description of 'the problem')

Summary or Sentencing Remarks

- ○ Collaborative definition of the problem used by the judicial officer
- ○ Incorporation of defendant and context into sentencing by the judicial officer

Location of the problem (please circle one)

The judicial officer describes the defendant as the problem

OR The judicial officer describes the problem as external to the defendant

Location of responsibility to act (agency and accountability) (please circle one)

The judicial officer describes the defendant as responsibility for their actions

OR The judicial officer describes the defendant as not responsible for their actions

- ○ Explanation of reasons for sentencing by the judicial officer
- ○ The judicial officer includes emotions and wishes of defendant in sentencing remarks
- ○ The judicial officer includes acknowledgement of the victim's experience in sentencing remarks
- ○ Guiding conversations for change: the judicial officer makes defendant aware of future choices and their possibilities for change

Resources: Discussion of resources available to help support change for the defendant in the future

<----------→

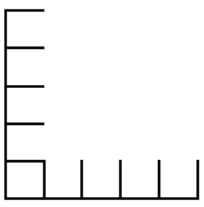
No mention of resources and support / Mentions resources and support / Multidisciplinary practice

Judicial Communication Skills

Questions

Open

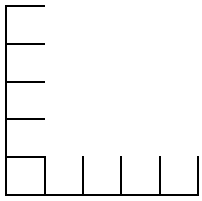
Closed



% of time

Listening

Active



Passive

% of time

Active listening shown by the judicial officer

◯ Paraphrasing

◯ Asks clarifying questions

◯ Validation / minimal encouragers

Participation encouraged by the judicial officer

◯ Invited defendant to participate

◯ Turn taking

◯ Adaptation of communication style to meet the defendant's abilities (cognitive ability, language, communication disorders)

◯ Cultural referencing appropriate to client

◯ Choices offered

Judicial positioning / trust / rapport

Emotional tone of the judicial officer overall:

1 2 3 4 5 6 7

warm ---------positive but firm----------neutral ----------cold ---------- hostile

Body language of the judicial officer overall (please circle one):

1 2 3 4 5 6 7

open ----------closed

1 2 3 4 5 6 7

encouraging ----------dominant

Judicial officer positioning overall:

1 2 3 4 5 6 7

Allied ----------neutral----------adversarial

- ○ Agreement on goals of the hearing
- ○ Agreement on tasks to be completed during the hearing

Judicial Body language

- ○ Attentive and open (looking at the defendant, arms uncrossed, leaning in, head tilting, slow nodding, furrowed brow, interest noises eg. 'hmmm hmmm')
- ○ Dominant (disapproving expression, body positioned to take up a lot of space, interrupting, grooming behaviours, chin stroking, aggressive gestures, rolling eyes)
- ○ Bored or tired (mostly looking away from the defendant, drumming fingers, tapping toes, tapping other objects, yawning, or sagging posture)
- ○ Closed (arms crossed, head tilted down and away)
- ○ Evidence of reciprocity in body language between the judicial officer and the defendant during the interaction

  (mirroring in body posture, emotional tone, facial expressions)

CONCLUSION

The role of the judiciary varies depending on the cultural, legal and social context. However, the core role of judging in enforcing legal norms, delivering punishment with a view to facilitating rehabilitation and protecting the community appears relatively stable across jurisdictional boundaries.

Focusing on rehabilitation, the TJ literature recommends specific goals and guiding principles for judicial interactions to achieve therapeutic aims. The PJ literature also inform specific procedures for judicial interaction.

Alongside these recommendations, the literature on common determinants of therapeutic outcome (and therapeutic change) identifies therapeutic alliance as a powerful common facilitator of therapeutic change across therapeutic interactions. The literature indicates that this alliance is best measured by an objective observer.

This article has developed a behaviourally anchored description of a judicial interaction, which stands the best chance of facilitating therapeutic change, along with a checklist designed to capture these aspects in a courtroom setting.

This measure could prove to be an effective tool to capture the courtroom contributions of legal actors, and their impacts on defendants from a therapeutic perspective, and would be extremely useful for future court research projects. As noted by many researchers in the natural world, the act of observing changes what is observed. In this case, it is hoped that measuring the important contribution that judges make to their defendants' movement towards rehabilitation will be the start of an enriching dialogue.

Chapter Five

Consulting With Experts

Chapter Five moves the thesis into the consultation phase of the development of the legal actor contributions measurement tool. This chapter describes the process of expert consultation in the development of the measurement instrument. The consultation with the therapeutic change community took place in three ways.

Part 1 of this chapter describes the presentation of the research at an international conference, the International Academy of Law and Mental Health conference hosted by the Università degli Studi Internazionali di Roma, in Rome, in July 2019, as well as brief feedback from participants.

Part 2 of this chapter then describes the Delphi consultation research study, with an article summarizing the process undertaken to further refine the LACS measure via systematized expert consultation. This article was accepted for publication in July 2021, in the *Journal of Judicial Administration*.

Part 3 of this chapter includes details about the presentation of the research to a wider, France specific audience, where the practical implications of using the measurement tool and the larger implications for including TJ within mainstream courts in France were discussed. The presentation took place at the Université Catholique de Lyon (UCLY) as part of the International Conference on Psychology, on 22/01/2021.

Part 1

In July 2019, the author presented the state of the research at the International Academy of Law and Mental Health conference hosted by the

Università degli Studi Internazionali di Roma, in Rome, as part of their section of seminars entitled 'Judging in a Therapeutic Key'.

The abstract for that presentation was as follows:

"What Can Judges Do to Facilitate Change: Measuring Legal Actor Contributions in Court from a Therapeutic Perspective
By Rhondda K. Waterworth, University of Tasmania
(rhonddawaterworth@gmail.com)

> *"The court can be conceptualized as a point of intervention in the lives of offenders as well as their families, social networks, and communities. Given this, it seems reasonable to investigate what a judge (or other legal actors) can contribute to this interaction to make the best therapeutic use of this opportunity for intervention. This presentation compiles a behaviourally anchored description of a judge's contribution in a courtroom interaction between a judge and a defendant, which would have the best chance of facilitating therapeutic change for a defendant. This description is based on a review of the therapeutic jurisprudence literature, procedural justice, and legitimacy of justice literature, and places these observations alongside a brief review of types of therapy that could be effective in a courtroom setting. This presentation also reviews research into common denominators in therapy outcomes, most notably the literature on therapeutic alliance and therapeutic change. It concludes with a brief rating scale designed to quantitatively measure the desired judicial behaviours in open court."*[83]

[83] David N Weisstub (ed) *Abstracts of the XXXVIth International Congress on Law and Mental Health*, 50.

There were several overt and also implicit aims to this research presentation:

- To present the research formally and let other researchers know that this instrument would soon be available for use in research projects if needed (one of the aims for which the instrument has been developed).
- To conduct an informal litmus test for how the measurement tool would be received by the many magistrates attending the conference.
- To prepare the way for acceptance of the tool (in its final form) by the judiciary who would be most likely to come across it or use it in the future.
- To introduce the instrument to those who might later participate in formal research on the tool by evaluating and providing feedback on it.

The responses of participants to the presentation helped develop the following lines of thought which were useful for later stages of development and will be discussed further in the conclusion chapter. These were:

- Possibilities for how best to propagate ideas about the work across a network of people.
- How to take stock of the work done by parallel researchers.
- The numbers of people who were interested in further research collaboration making use of the tool.
- The importance of finalising the research thesis so as to be able to collaborate with those researchers further.

The slides from the presentation are included in Appendix 5 for reference.

Part 2: Consulting with Experts

Part 2 of this chapter describes the process of refining the LACS via systematic consultation with experts. This was attempted via a Delphi study consulting with psychologists and magistrates regarding the content and style of the Legal Actor Contribution Scale. The research results are presented in an article, along with a refined version of the legal actor contribution courtroom measurement scale ('LACS'). The refined version of this tool is then presented as a future tool for magistrate court craft development, and research into therapeutic courts and court outcomes. The revised version is also in Appendix Four of this thesis.

The second part of the consultation process for further development of the LACS was to consult with experts in the field of therapeutic change and court craft, and courtroom interactions, and to obtain their feedback and suggestions for how best to refine the scale in a systematic manner. The methodology that is most suited to this type of development is the Delphi study.[84] The Delphi study is an iterative process that allows for the validation of novel ideas. The process involves recruitment of experts[85] in the field of knowledge being researched, who then provide systematic feedback to a series of set questions about the topic, in this case the draft measurement tool. This feedback is then used to modify the next round of questions, and to include or exclude questions and aspects of the measurement tool from future round of expert questioning. Participants are also given individual feedback on how their results compare to the response norms for each item,

[84] See above n 107, Milevska-Kostova and Dunn (2010) 433; J Surowiecki *The Wisdom of Crowds: Why the Many Are Smarter Than the Few*. (2004) London: Abacus; see above n 108 Williams and Webb (1994) 153.
[85] *Ibid.*

prior to responding to the next survey round.[86] This process allows anonymous feedback and the development of expert consensus on novel questions or areas of knowledge development.[87]

The Delphi study that was subsequently conducted is described in detail in the article that follows, "Development of a Measurement Tool for Courtroom Legal Actor Contributions: a Delphi Study Consulting the Experts". The consultation process enabled invaluable feedback to be obtained that greatly facilitated the development of the LACS. It resulted in the amendment of a number of items, including the abbreviation of some items and the omission of others. Additionally, the measurement scaling for many questions was subtly changed to make it more comprehensible for users of the rating scale, of higher discriminatory value and easier to use for statistical purposes if needed during future work to develop the psychometric properties of the LACS. These changes and their justifications are discussed in greater detail in the research article itself.

It must be noted that there were significant challenges encountered during this part of the consultation process. The pool of potential magistrate research participants within Australia was already objectively not particularly large, and with the combination of a particularly severe Australian bushfire season and the subsequent stressors encountered by the courts, research participants were under significant pressures outside of research participation. The implementation of the Delphi technique in this situation was flawed by a lack of responses to the second round of questionnaires, which meant that the usual Delphi iterative process could not really be

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[86] Felicity Hasson, Sinead Keeney and Hugh McKenna 'Research guidelines for the Delphi survey technique.' (2000) 32(4) *Journal of Advanced Nursin*g 1008; see Kirk, Carlisle and Luker (1996) above n 108, 1054; Gibson (1998) above n 108, 451; Milevska-Kostova and Dunn (2010) see above n 107; Surowiecki (2004) above n 112; Williams and Webb (1994) above n 108.

[87] Milevska-Kostova and Dunn (2010), see above n 107.

engaged, leading to a lack of confidence in reliability and validity.[88] Interestingly, the first round of respondents gave very similar (nearly unanimous) responses to questions, which does raise the question of the potential homogeneity of participants or contextual factors, as well as encouraging the need for a larger group of participants.[89] The participants' lack of response to the second round could also be interpreted in various ways: for example, potentially as not needing to add anything further, or potentially discontinuing research participation due to extreme role pressure that judicial officers experienced due to the conditions at that time.

Through Part 1 and Part 2 of the consultation process, the survey tool has evolved and developed, and this development has crucially occurred in consultation with those who hold the necessary knowledge to aid in its development. The benefit of this has been twofold, firstly to improve the measure, and second, to make sure that it is regarded as, and is actually useful to, the group of people most likely to make use of it.

The Delphi study is described in detail in the article that follows.

Article 5: Rhondda Waterworth 'Development of a Measurement Tool for Courtroom Legal Actor Contributions: a Delphi Study Consulting the Experts' (sole author), accepted in July 2021 for publication in the Journal of Judicial Administration, it was also presented as part of a larger presentation by the author entitled 'Novel applications of psychology: Improving longer term therapeutic outcomes and recidivism for defendants in courtrooms by measuring the therapeutic contributions of magistrates.' at the Université Catholique de Lyon (Lyon Catholic University 'UCLY') for the International Conference on Psychology, on 22/01/2021 in Lyon, France, July 2021.

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[88] Boulkedid R, Abdoul H, Loustau M, Sibony O, Alberti C 'Using and Reporting the Delphi Method for Selecting Healthcare Quality Indicators: A Systematic Review.' (2011) 6(6) *PLoS ONE*: e20476. <doi:10.1371/journal.pone.0020476>; Marlen Niederberger, Julia Spranger 'Delphi Technique in Health Sciences: A Map' (2020) Sept. *Frontieres in Public Health* <https://doi.org/10.3389/fpubh.2020.00457>

[89] See above n 88, Boulkedid et al (2011).

Development of a Measurement Tool for Courtroom Legal Actor Contributions: A Delphi Study Consulting the Experts

Rhondda Waterworth*

This article describes the development of a qualitative measurement tool – the Legal Actor Contributions Scale (LACS) – designed to measure legal actor contributions (primarily magistrates) in courtroom interactions from a therapeutic perspective. The measure was refined using a Delphi study to collect advice from research participants who are experts in the field of therapeutic change and magistrates' therapeutic contributions (court craft). Despite adverse research conditions, the LACS measure was successfully developed into a refined form, presented in the article. This measurement scale will be useful for therapeutic and problem-solving court outcomes research, for magistrate court craft self-development, and in mainstreaming the therapeutic jurisprudence movement.

INTRODUCTION

It is widely accepted that legal actors, particularly judges and magistrates, play a significant role in the therapeutic justice process, both in encouraging defendants' rehabilitation and their resistance to future reoffending.[1] There is a current lack of information about the extent to which legal actors engage in behaviours that have been recognised to have a therapeutic impact and to be a significant variable in the therapeutic outcome for defendants.[2]

Research into the efficacy of therapeutic practices in courtrooms has generally been hampered at a research design level by the lack of available measures to adequately describe or quantify the therapeutic contribution of the legal actors involved.[3] Recent research and trends in the field of therapeutic jurisprudence (TJ) have demonstrated the need for a measurement tool to capture the therapeutic contributions of legal actors, most notably the judiciary.[4] This article describes the development of such a tool via systematised consultation with experts in the therapeutic change field using the Delphi study methodology, and the incorporation of their feedback into a refined version of the measurement tool. The future potential applications for the measurement tool are then discussed.

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[1] R Waterworth, "The Case for Measuring Legal Actor Contributions in Court Proceedings" (2018) 26(1) *Psychiatry, Psychology and Law* 77; Michael S King, *Solution-Focused Judging Bench Book* (AIJA, 2009) 21; Bruce J Winick and David B Wexler, "Drug Treatment Court: Therapeutic Jurisprudence Applied" in Bruce J Winnick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 106, 109.

[2] See Waterworth, n 1.

[3] See Waterworth, n 1.

[4] DB Wexler, "From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part" (2011) 37(1) *Monash University Law Review* 33; DB Wexler, "Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law" (Arizona Legal Studies Discussion Paper, 2014) 15; E Richardson, P Spencer and D Wexler, "International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Court and Enhancing Wellbeing" (2016) 25 JJA 148.

The Legal Actor Contributions Scale (LACS) is a qualitative measurement scale designed to capture legal actor contributions to interactions in court[5] – in this case, magistrates in the magistrates court, particularly therapeutic and problem-solving courts.

The LACS is, at the time of writing, the only published and readily available behavioural measurement scale able to capture legal actor contributions from an objective, therapeutic perspective.[6] While some informal observer rating systems have been used in courtroom research in the past to gather data on legal actors,[7] as well as mutual ratings systems,[8] the literature base from which these scales have been derived has not been articulated, and the scales themselves have not been shared with the wider research community. Additionally, mutual rating systems are not generally accurate predictors of therapeutic outcomes.[9]

It is fundamentally useful to court outcomes for defendants, court-quality improvement, magistrate training and court outcomes research to be able to capture and describe the therapeutic contributions of magistrates (and, eventually, other legal actors) within a court setting.[10]

Overview of LACS Development

The LACS was first published in draft form in 2019. It was grounded in a synthesis of the literature on common important determinants of therapeutic outcomes, as well as how it relates to TJ, procedural justice (PJ) and legitimacy of justice (LJ).[11]

The first step in the development of the LACS was to pinpoint and define, based on empirical research and the work of experts in therapeutic court craft, the desirable behaviour of magistrates during courtroom interactions with defendants that would have the best chance of facilitating therapeutic change.[12]

The resulting behaviourally anchored description of therapeutic judicial behaviour consists of the following elements, as defined as necessary and sufficient by the literature:[13]

(1) *Introductions:* The judge maintains good eye contact, warm to neutral emotional tone, calmly and firmly sets boundaries and roles in the courtroom, explains the goals of the hearing, and helps the participant to feel confident to participate in the hearing. The judge takes the time to explain the court processes and how to address the judge. If at all possible, the judge and the court participant create a collaborative definition of goals and take turns speaking.
(2) *Discussion about the problem:* The judge asks neutral and open questions about the context to the reason they are in court, and includes the court participant's own words in the definition of "the problem". If possible, the judge notices and discusses the strengths that are present in the current situation, despite the reasons for being in court. The judge also notices and discusses the points of view and experiences of other participants to the problem.
(3) *Sentencing:* The judge gives a summary for sentencing or judgment that includes a collaborative definition of "the problem", and incorporates the parties involved in the summary remarks. The

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[5] R Waterworth, "Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change" (2019) 28 JJA 207.

[6] Waterworth, n 5, 207; Waterworth, n 1.

[7] See, eg, M Herzog-Evans, "Release and Supervision: Relationships and Support from Classic and Holistic Attorneys" (2016) 1 *International Journal of Therapeutic Jurisprudence* 23.

[8] Karni Perlman, "It Takes Two for TJ: Correlation Between Bench and Bar Attitudes Toward Therapeutic Jurisprudence: An Israeli Perspective" (2008) 30 *Thomas Jefferson Law Review* 351.

[9] See, eg, E Marziali and L Alexander, "The Power of the Therapeutic Relationship" (1991) 61 *American Journal of Orthopsychiatry* 383; L Fenton et al, "Perspective Is Everything: The Predictive Validity of Six Working Alliance Instruments" (2001) 10 *Journal of Psychotherapy and Practical Research* 262.

[10] Waterworth, n 1; Waterworth, n 5.

[11] Waterworth, n 5, 207.

[12] Waterworth, n 5, 220.

[13] Waterworth, n 5, 221.

judge describes the responsibility for action as internal to the court participant and describes the situation and summary to include the participant as having choices over their actions. The judge also highlights context and possible supports available. The summary includes an acknowledgment of the possible experiences of other people who are also involved in the problem situation – for example, the victim of a crime.

(4) *Judicial Communication Skills:* The judge uses open questions, with active listening skills, and attentive and encouraging body language, as well as non-verbal prompts to encourage the court participant to express themself well. The judge adapts their language and speed of speaking to the language abilities and comprehension of the court participant, and asks questions to check they have understood. The judge facilitates other legal actors present in the court to do the same, so as to ensure that the court participant understands what is being communicated and the processes behind this. Turn-taking and collaborative dialogue occur during the interaction.

(5) *Judicial Alliance:* The judge has a neutral to warm emotional tone, has open but authoritative body language, and actively allies themselves with the court participant against "the problem" (ie how to stop offending while using drugs, or how to stop behaving in a violent manner towards family members, or how to separate from a partner in the least damaging way for the children and both partners).

The draft measurement scale was designed to capture this behavioural definition in a qualitative way when observing judicial interactions in courtrooms in real time.[14]

Overview of LACS Item Development

The items on the LACS map directly onto the behavioural definition discussed above.[15] The scale design followed an inductive process. The desirable characteristics of the judicial interaction were defined with reference to the relevant literature and then scale items were identified to measure each feature of the construct. The scale is designed to be rated by an observer of the interaction, rather than the participants; this approach was adopted because an "observer-rater perspective" was shown to be the most accurate perspective when rating the relevant elements of behaviour.[16] The scale can also be used by magistrates when watching a recording of their own sitting sessions in court. It is not designed to be used by a participant to the interaction in real time, however, due to the limitations in accuracy this usage would introduce.[17]

The scale commences with the "Introductions" section, designed to evaluate how the court interaction begins, with questions about the way in which the judge addresses the defendant, how they explain the court process, the judge's body language and their emotional tone.

The next section, "Discussion about the problem", relates to the way in which the judge frames the issue that has brought the defendant to court – primarily, have they asked about the background to the situation, the defendant's history as it relates to the problem, and have they allowed the defendant to participate in a collaborative definition of the problem (as much as appropriate).

Following this is the section evaluating the "Summary or Sentencing Remarks", which again looks for aspects of a collaborative dialogue designed to enhance therapeutic change. This can include: a collaborative definition of the problem; incorporation of defendant and context into sentencing; externalisation of the problem but internalisation of a sense of responsibility and self-agency; an explanation of the sentencing reasons; and inclusion of the defendant's wishes and the victim's experience (if this is available) into the sentencing narrative. This section also evaluates whether the defendant is signposted to or facilitated in accessing any therapeutic or practical resources that have been identified as potentially useful.

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[14] Waterworth, n 5, 221.

[15] Waterworth, n 5, 222.

[16] Marziali and Alexander, n 9.

[17] Fenton et al, n 9.

Following on from this, the measure evaluates the overall efficacy of the "Judicial Communication Skills" in use throughout the hearing, noting the types of questions that have been used (open/closed), the type of listening used (active/passive) and the percentage of times these have been employed. Other effective communication skills are also noted, such as paraphrasing, asking clarifying questions, validation/minimal encouragers, participation, encouragement for the defendant to participate, turn-taking, adaptation of communication style to defendant's abilities, cultural referencing appropriate to the defendant, and offering appropriate choices.

"Judicial positioning/trust/rapport" is the final section. It measures evident aspects of the relationship alliance between the judge and the defendant, including: the emotional tone of the judge overall; body language overall; judicial positioning overall (allied or adversarial); agreement on goals of the hearing; agreement on tasks to be completed during the hearing; and judicial body language as it relates to an allied or adversarial position within the interaction.

The draft scale was then refined by means of a Delphi study. Opinions, feedback and suggestions for improvement were sought, in a systematic way, from experts in the field of therapeutic change with a view to obtaining expert consensus about the appropriateness and usefulness of the items on the scale. This was to ensure the scale accurately measures therapeutic behaviour in a court context and that it is a usable measurement tool. With regard to the latter, the Delphi Study also sought to answer the question of whether, and to what extent, the tool can be utilised to assess legal actors' therapeutic contributions in mainstream court systems in the sentencing context, specifically in Australian magistrates courts (criminal matters) and problem-solving courts.

A broader aim of the study was to facilitate the development of an effective and acceptable measurement scale to capture and qualitatively describe legal actor contributions more generally from a therapeutic perspective. The refined measurement LACS scale could potentially be used across a wide range of legal contexts, including mainstream criminal courts, problem-solving courts and court diversion lists, in both common law jurisdictions and civil law jurisdictions. The development of the measurement scale has started with an initial focus on magistrates, with the possible future expansion to other legal officers.

METHODOLOGY

How Best to Validate the LACS

Validation of a novel measuring tool can be problematic. New measures are often normed or validated on a comparative basis against a similar or parallel measure, or several measures with overlapping constructs. However, such validation was not possible for the LACS measurement tool. There are (at the time of writing) no other similar measurement tools that operate in a comparative environment and measure the same constructs. Measures of therapeutic alliance already in existence – such as the Vanderbilt Therapeutic Alliance Scale, the Working Alliance Inventory-Observer Form and the California Psychotherapy Alliance Scales – reliably measure some overlapping constructs;[18] however, the contexts in which they are applied are significantly different to that of the LACS and so render redundant any attempts to validate the LACS via those parallel measures.

In the absence of a comparative measurement device against which to assess the validity of the LACS, and given the explorative and collaborative nature of the work at this stage in its development, a

[18] V Tichenor and CE Hill, "A Comparison of Six Measures of Working Alliance" (1989) 26 *Psychotherapy: Theory, Research, Practice, Training* 195; R Di Giuseppe, JJ Linscott and R Jilton, "Developing the Therapeutic Alliance in Children-Adolescent Psychotherapy" (1996) 5(2) *Applied and Preventive Psychology* 85; TJ Tracey and AM Kokotovic, "Factor Structure of the Working Alliance Inventory" (1989) 1 *Psychological Assessment* 207; DE Hartley and HH Strupp, "The Therapeutic Alliance: It's Relationship to Outcome in Brief Psychotherapy" in J Masling (ed), *Empirical Studies in Analytic Theories* (Erlbaum, 1983) 1–38.

Classical Delphi research design methodology was chosen to verify its utility.[19] This approach offers not only the opportunity to refine the measurement tool itself, but also provides a rigorous methodology for consulting with "legal actor" experts in the fields of therapeutic change and therapeutic court craft, in order to develop the measure and its contents on a collaborative basis, with the added advantage of promoting its use.

RATIONAL FOR USING THE DELPHI STUDY METHODOLOGY

Named after the Delphic oracle,[20] the Delphi study methodology involves systematic consultation with experts on an aspect of research that usually involves novel ideas or forecasting of some sort.[21] In this case, it was used to engage with experts in the therapeutic change field – that is, psychologists with experience of facilitating psychological change and magistrates with practical therapeutic court experience. In a nutshell, this research design secures the input of a "wise crowd"[22] in the development of a novel research measure or question.

The Delphi study methodology was also considered appropriate because it has been commonly used in medical, nursing and health services research,[23] where there is an element of forecasting or novel research.[24] Despite some criticism,[25] Delphi panels can generate more accurate approaches than unaided individual decisions.

Risks and Advantages of the Delphi Methodology

The results of this approach are only as valid as the knowledge and opinions held by the participants.[26] As such, this methodology carries with it the risk of participants' personal subjectivism or lack of knowledge about the specific topic having a deleterious effect. Clearly, at its worst, this effect could derail the research process simply because the participants lack the necessary competence to offer useful opinions or feedback, or if the basic assumptions behind their feedback are erroneous.[27] Selection of the participants must be based on careful evaluation of their level of knowledge and expertise.[28]

There is also the risk that experts may oversimplify complex issues, or view issues in isolation rather than as related events.[29] Further, the opinions and suggestions given by the experts need to have a high level of consistency and reliability, otherwise their forecasts may not be reproducible or valid. These concerns point to the need to provide a reverification process among participants of their contributions. In the present study, the responses to each questionnaire were fed back in summarised form to the participants for further reflection. The initial questionnaires in Delphi studies also collect qualitative

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[19] Neda Milevska-Kostova and William N Dunn, "Delphi Analysis" in L Zaletel-Kragelj and J Bozikov (eds), *Methods and Tools in Public Health: A Handbook for Teachers, Researchers and Health Professionals* (Hans Jacobs Publishing Co, 2010) 433.

[20] Felicity Hasson, Sinead Keeney and Hugh McKenna, "Research Guidelines for the Delphi Survey Technique" (2000) 32(4) *Journal of Advanced Nursing* 1008.

[21] Milevska-Kostova and Dunn, n 19.

[22] J Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few* (Abacus, 2004).

[23] See, eg, PL Williams and C Webb, "The Delphi Technique: An Adaptive Research Tool" (1994) 61(4) *British Journal of Occupational Therapy* 153; S Kirk, C Carlisle and KA Luker, "The Changing Academic Role of the Nurse Teacher in the United Kingdom" (1996) 24 *Journal of Advanced Nursing* 1054; JME Gibson, "Using the Delphi to Identify the Content and Context of Nurses Continuing Professional Development Needs" (1998) 7 *Journal of Clinical Nursing* 451.

[24] Milevska-Kostova and Dunn, n 19; O Kuusi, "Expertise in the Future Use of Generic Technologies" (Government Institute for Economic Research Finland, 1999) 59.

[25] Milevska-Kostova and Dunn, n 19.

[26] J Martino, "The Precision of Delphi Estimates" (1970) 1 *Technological Forecasting and Social Change* 293.

[27] Milevska-Kostova and Dunn, n 19.

[28] S Makridakis and SC Wheelwright, *Forecasting Methods for Management* (Wiley, 5th ed, 1989).

[29] Milevska-Kostova and Dunn, n 19.

comments, which are fed back to the participants in a quantitative form through a second questionnaire for further comment.[30] The Delphi study is therefore an iterative multistage process designed to achieve consensus of an expert group.[31]

This methodology is particularly useful when evaluating a research question in a context where there is considerable existing knowledge, using simple questions within defined project objectives.[32] It is also useful in complex, multi-dimensional modelling situations, when supported by additional data from more than one source.[33]

Procedure for the Delphi Study: Participant Selection and Recruitment

The literature indicates that anywhere between four and 3,000 panelists may be appropriate in conducting Delphi studies.[34] On a practical level, the pool of experts in the present field is not, objectively speaking, particularly large. Additionally, because of the constraints of ethics approval, the participants were further narrowed to Australian participants only. Bearing in mind these limitations, while also ensuring that sufficient data could be obtained, the initial aim was to recruit at least five participants from each of the two occupational categories included in the study, giving a total of 10 potential participants.

Two groups of experts were originally recruited:

- Group 1: five judges/magistrates/other court workers who work in a range of court settings with some expertise in a therapeutic court intervention.
- Group 2: five psychologists with experience in facilitating therapeutic change.

These occupational categories were chosen as Group 1 professionals were assumed to be experts in court craft and court interactions, and Group 2 professionals were assumed to be experts in therapeutic change and the interactional requirements that best facilitate therapeutic change. These groups were later combined due to a high dropout rate in survey return, the reasons for which are discussed below.

The judges and psychologists contacted were from a range of jurisdictions, geographical locations and levels of therapeutic expertise across Australia. This diversity meets the criterion for engaging a "wise crowd" as proposed by Surowiecki,[35] which is necessary to ensure the effectiveness of the Delphi model. Additionally, inclusion of the legal community of experts at such a fundamental stage of the development of the measure is likely to facilitate acceptance of the end product by the same community.

Recruitment for both groups occurred via the TJ listserv group, the professional body for psychology in Australia and informal professional networks. An initial letter of invitation was sent to the contact email address for the professional bodies involved and to specific therapeutic courts, as well as those meeting the "expert" eligibility criteria identified from the listserv group and informal professional networks within Australia. A subsequent follow-up letter with more information and a consent form

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[30] Hasson, Keeney and McKenna, n 20, 1009.

[31] HP McKenna, "The Delphi Technique: A Worthwhile Approach for Nursing?" (1994) 19 *Journal of Advanced Nursing* 1221; MR Lynn, EL Laman and SP Englebardt, "Nursing Administration Research Priorities: A National Delphi Study" (1998) 28(5) *Journal of Nursing Administration* 7.

[32] M Adler and E Ziglio, *Gazing into the Oracle* (Jessica Kingsley Publishers, 1996); E Cornish, *The Study of the Future: An Introduction to Understanding the Art and Science for Understanding and Shaping Tomorrow's World* (World Future Society, 1977).

[33] European Commission, *Evaluating Socio Economic Development. Sourcebook 2: Methods & Techniques, Delphi Method* (2005) 110.

[34] Shane R Brady, "Utilizing and Adapting the Delphi Method for Use in Qualitative Research" (2015) *International Journal of Qualitative Methods* 1; Anthony F Jorm, "Using the Delphi Expert Consensus Method in Mental Health Research" (2015) 49(10) *Australian and New Zealand Journal of Psychiatry* 887; HA Linstone, *The Delphi Technique. Handbook of Futures Research* (Greenwood, 1978) 271–300; F Hassan, S Keeney and H McKenna, "Research Guidelines for the Delphi Survey Technique" (2000) 32 *Journal of Advanced Nursing* 1008.

[35] Surowiecki, n 22.

was then sent to participants who indicated interest in participating in the study. The recruitment letters and information sheet are included in Appendix 1. As noted above, initially, five psychologists and five magistrates were approached. The draft measurement tool and the initial survey sent out for the first round of surveys are contained in Appendix 2 and 3 respectively.

The subsequent return rate of surveys was 50%, resulting in an actual participation pool of five experts in total – three psychologists and two magistrates. This rate appears acceptable when referencing the literature with similar methodology.[36] The reason for the low return rate is hypothesised to have been due to an extremely difficult and unusually prolonged bushfire season during the Australian summer of 2019–2020, which affected many of the communities where the prospective participants lived and worked, thereby making research participation potentially of low priority.Results from the five returned surveys were analysed for median, mode and mean responses. Most items were well endorsed; however, some were identified as being too similar to each other, or less relevant. The participant's qualitative comments and feedback were incorporated directly into the design of the scale. Items that had been identified as too close in meaning were removed, the likert rating scale throughout was changed from a seven-point scale to a five-point scale to give it a higher discriminative value, and several items were reworded to be more precise in meaning (see discussion below).

The survey questionnaire was also revised, with items on the survey form that were no longer included in the measurement tool being removed. This revised measurement tool was then returned to participants for a second round of surveys. Survey participants also received individualised feedback as an attached word document on how their survey responses compared to the (anonymised) group responses on each item.

The second round of surveys was also unfortunately timed due to the worldwide COVID-19 outbreak that occurred from early 2020 onwards – an event that may explain why, of the five surveys sent out, only one was returned. An alternate explanation, one endorsed by the respondent who returned their survey, is that survey participants did not see the need to add any extra feedback. The returned survey endorsed the items as they were, without suggesting any further changes.

RESULTS

The feedback from the participants in this study was invaluable, and the results of the survey are included in Appendix 3. The changes that were made to the first LACS measurement tool were:

(1) The deletion of items that appeared to overlap and be measured elsewhere (1e–1h, 2a, 2b).
(2) Changing all likert scales to a five-point scale (1i, 5a–5d).
(3) The addition of an extra item (3hi).
(4) Slight rewording of some scale items to be more precise (see discussion below).

The revised version of the measure is included in Appendix 4.

DISCUSSION

At present, the LACS is a qualitative measurement scale designed to capture the contributions of legal actors (particularly magistrates) within a courtroom setting (particularly therapeutic and problem-solving courts). Prior to the LACS, there was no published measure of therapeutic contributions from an objective perspective. However, there are many compelling reasons to have such a measure available to the judiciary, researchers and decision-makers.[37] As discussed above, the constructs captured by the measurement scale, and the items covering these constructs, map directly onto the therapeutic change literature, incorporating the available research on TJ, PJ, LJ, sociological theory

[36] See, eg, Hanna Tolonen et al, "Differences in Participation Rates and Lessons Learned About Recruitment of Participants – The European Health Examination Survey Pilot Project" (2015) 43 *Scandinavian Journal of Public Health* 212.

[37] Waterworth, n 1; Waterworth, n 5.

and psychological therapy outcomes as to what constitutes desirable judicial behaviour that has the best chance of facilitating therapeutic change.[38]

However, it is useful to consider whether, from a methodological perspective, the dropout rate for this study undermines its generalisability. Recent research has found that a 50% return rate (or lower) is quite common in the social sciences, and does not preclude the study continuing, however, there is a counter argument that the Delphi technique in this situation was potentially flawed as the usual Delphi iterative process could not be engaged, leading to a lack of confidence in reliability and validity.[39] Interestingly, the first round of respondents gave very similar (nearly unanimous) responses to questions, which could be viewed as either unanimous agreement, or a problem with homogeneity of respondents. The participants' lack of response to the second round could be interpreted in various ways: for example, potentially as not needing to add anything further, or potentially discontinuing research participation due to extreme role pressure that judicial officers experienced due to the local conditions at that time.

It is a truism that two heads are better than one; in this case, even though the participation numbers were low due to unforeseen and unprecedented world events, five heads are still definitely better than one.

Commentary provided by participants on the tool via the survey was particularly useful in gaining insight into how best to improve the measure. First, participants observed that several items overlapped in the constructs they were designed to measure 1e–1h:

- 1e: The judge addresses the defendant by name.
- 1f: The judge explains to the defendant how to address the judge.
- 1g: The judge explains the goals of the hearing: defines goal for defendant, for court and for society.
- 1h: The judge explains the rules for participating in the court using language the defendant can understand.

These items seemed to be adequately covered in items 1a and 1b:

- 1a: Establishes context: The judge explains to the defendant how the court works and the aims of the hearing.
- 1b: The judge addresses the defendant personally.

Similarly, items 2a "The judge asks about the defendant's background" and 2b "The judge asks about the defendant" appeared to be adequately and more precisely dealt with by items 2c "The judge asks about the context of the defendant's life and the reason they are in court" and 2d "The judge includes the defendant's words into statements and questions". Items 2a and 2b were removed from the revised LACS based on this feedback.

Feedback from the participants also led to structural changes in the measurement scale, whereby all likert scales were changed from a seven-point scale to a five-point scale for ease of use and scoring (items 1i, 5a–5d). A five-point likert scale provides a clearer differentiation between poor and excellent performance on the scale, and therefore has higher discriminative value; it can also more easily be converted into a percentage rating.

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[38] Summarised in Waterworth, n 5, 208–218.

[39] For example, participation rates ranged from 16% to 57% for men and 31% to 74% for women of the studies, as reviewed by Tolonen et al, n 36, for information regarding the countering perspective regarding response rate, please refer to R Boulkedid, H Abdoul, M Loustau, O Sibony, C Alberti 'Using and Reporting the Delphi Method for Selecting Healthcare Quality Indicators: A Systematic Review.' (2011) 6(6) PLoS ONE: e20476. <doi:10.1371/journal.pone.0020476>; Marlen Niederberger, Julia Spranger 'Delphi Technique in Health Sciences: A Map' (2020) Sept. Frontieres in Public Health https://doi.org/10.3389/fpubh.2020.00457.

Feedback by survey participants for items 3b and 3c recommended separating out an offender from their actions, while encouraging them to accept responsibility for their behaviour – this is a core therapeutic change technique common to multiple strands of therapy, particularly Narrative Therapy.[40] This feedback also led to the addition of an extra item – 3hi "The judge builds a coherent story or narrative of the context of the crime" – to aid in the measurement of this style of narrative intervention.

Item 4 feedback recommended not letting TJ court craft (or culture, prior trauma or socioeconomic status) in any way justify criminal behaviour, nor allowing a defendant to deliberately cause distress to others in court – again a key component of maintaining safety and boundaries within a hearing setting.[41]

Additionally, item 4j received the useful commentary that providing too many choices for defendants could be unhelpful or overwhelming in a court setting. Instead, the item was reworded to reflect the desirability of offering fixed choices, which is a technique effective for those under stress as it facilitates their decision-making. Fixed choices offered within useful parameters by those with (expert) knowledge about the desirable behavioural options available can be particularly useful within a courtroom environment.[42]

Generally, feedback was positive about the possibility of the measure being available to the court community, and its potential positive application. Some feedback went beyond the scope of this study and the LACS in its current form, and could not therefore be incorporated within the refinement of the measure. For example, it was suggested that different types of hearings might be taken into account (ie different versions of the LACS for different types of hearings or courts), that the length of the hearing be measured and that an assessment of the behaviour of the defendant be included. Two respondents also suggested non-specific changes to the measure's format so as to promote its use.

The revised version of the measure with the suggestions included is available in Appendix 4.

The LACS has evolved and developed via consultation with those with the necessary and relevant knowledge. The benefit of this process has been twofold: first, to improve the measure; and second, to make sure that it is regarded as useful to the group of people most likely to use it. Given the low survey return rate, it would be worthwhile repeating the Delphi study with a larger pool of participants in Australia, and also in other jurisdictions, to further refine and validate it, and to ensure that the scale is refined with feedback from across different legal systems.

The scale design followed an inductive process, whereby the desirable characteristics of the judicial interaction were defined by reference to the literature and then scale items were designed to measure the resulting constructs via observable behaviour and communication. The next stage in the development of the measurement tool is to trial its use with magistrates in court and in training sessions, as well as utilising it in an independent research pilot study. However, this is beyond the scope of the current Delphi study. In the meantime, the LACS could be included in training for magistrates in therapeutic court craft, and used as a self-evaluation tool when revisiting recordings of court sessions.

Further thought could be given to ease of user application, and to developing a user instruction guide for each item in the measure, to ensure user consistency in its application. The measure could also undergo further qualitative refinement, and could be studied to develop its psychometric properties and enable the generation of quantitative data. To develop into a more psychometrically robust measurement tool, the current measure would need to progress through the stages required to develop

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[40] See, eg, P Jenkins, *Invitations to Responsibility: The Therapeutic Engagement of Men Who Are Violent and Abusive* (Dulwich Centre Publications, 1990); King, n 1, 21.

[41] King, n 1.

[42] See, eg, SS Iyengar and MR Lepper, "When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?" (2000) 79(6) *Journal of Personality and Social Psychology* 995; B Scheibehenne, R Greifeneder and PM Todd, "Can There Ever Be Too Many Options? A Meta-Analytic Review of Choice Overload" (2010) 37(3) *Journal of Consumer Research* 409; AG Miller, "The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information" (1956) 63(2) *Psychological Review* 81.

these psychometric properties, designed to determine the discriminant and convergent validity, the inter-rater reliability and factor/cluster analysis of the data obtained from the scale.[43] The mechanics of these steps are beyond the scope of the discussion here, and await further exploration in future research.

Pilot testing linking the scale measures to court participants' outcome measures would be a further useful stage, as would the process of test validation and norming over multiple instances of application.

CONCLUSION

This article has charted the refinement of the first literature-derived, behavioural measurement scale for legal actors within a courtroom setting, from an objective, therapeutic perspective. The present study is the first step in a potentially long process to develop the scale's psychometric properties.

After vetting (and significant encouragement) from an expert portion of the therapeutic change community, the LACS is now available as a measurement tool for incorporation into court outcomes research design, for magistrate court craft development and for further studies aiming to link measurements of court craft to therapeutic outcomes.

There is considerable scope for this scale to be used in its current form as a qualitative measurement tool to support the mainstreaming of the TJ movement. It could also be used to inform professional development planning for the judiciary in consultation with the relevant professional bodies.

Ultimately, this Delphi study should encourage use of the LACS to capture and measure hitherto hidden therapeutic contributions of magistrates (and other legal actors) in court settings, and the therapeutic impact of their court craft. This will necessarily make a useful contribution to advancing the interests of those passing through the court system and in need of therapeutic change.

[43] Paul E Spector, *Summated Rating Scale Construction: An Introduction Sage University Papers Series. Quantitative Applications in the Social Sciences; No. 07-082* (Sage Publications Inc, 1992).

Chapter Five : Part 3

An overview of the research, the development of the tool, and its practical applications to help with endemic social, criminal and terrorism issues, was presented at the Universite Catholique de Lyon (UCLY), France, as part of the International Conference on Psychology, on 22/01/2021.

The abstract for the presentation is included here for reference:

"Novel applications of psychology: Improving longer term therapeutic outcomes and recidivism for defendants in courtrooms by measuring the therapeutic contributions of magistrates."

By Rhondda Waterworth

Abstract

"The question of how best to deal with those who break the law is an enduring social and legal problem. The question becomes even more complex when dealing with individuals experiencing mental illness, social disadvantage, drug addiction, or other endemic social problems.
Viewed from a systems perspective, the modern world is comprised of contexts and structures that are often difficult to navigate for those with mental illness, addictions, or social disadvantage.

This systemic and endemic issue is examined from the perspective of utilising the criminal justice system as both a forum in which to gain access so as to intervene, and a tool itself that can be used to intervene therapeutically. The parallel fields of therapeutic jurisprudence, legitimacy of justice, procedural justice, sociology, and applied psychology research into common denominators of therapeutic outcomes were interrogated from the perspective of court room intervention.

This endeavour led to the development of a behaviourally-anchored, evidence-based description of therapeutically useful magistrate in-court

contributions. This is the first description of its kind in the therapeutic literature and has many ground-breaking applications in the field of therapeutic jurisprudence, court research, magistrate training, and other areas less obvious, such as decreasing radicalisation and terrorist incidents by creating better court outcomes over the long term for disadvantaged groups in society.

The resulting behavioural definition was then developed into a qualitative measurement tool designed to measure in-court behaviour from magistrates, named the 'Legal Actor Courtroom Scale' (LACS). The LACS was then developed more formally via an expert consultation process, utilising a Delphi study, and the final tool published online as a tool for researchers into court systems, magistrates wishing to improve their court craft skills so as to achieve more therapeutic aims for defendants.

The rational, implications and practical uses for this tool will be discussed further, particularly as they relate to structural reform, and systemic courtroom interventions to reduce endemic social problems and the effects of these on society, such as recidivism, and, particularly in the French context, terrorism."

The presentation was also recorded and made available to UCLY staff and students as a future resource. The slides for this presentation are in Appendix 6.

Chapter Six: Conclusion

Chapter Six draws together the lines of enquiry pursued in this thesis, to summarise and highlight the contribution that the research presented in this thesis makes to the field of therapeutic jurisprudence. This chapter explores the importance of the LACS, both in terms of its potential value as a research tool, and also as a mechanism for enabling judicial officers to develop their therapeutic court craft. The LACS will also provide a foundation for the development of similar measurement tools for use by others who have a therapeutic role in relation to offenders, for example, those responsible for designing or delivering therapeutic change programs within the health and justice sectors.

This research thesis started out with the basic aim to improve therapeutic outcomes for mental health and other disadvantaged clients involved in the judicial, health and penitentiary systems. This overarching goal was progressively refined to the question regarding what sort of therapeutic-change-facilitating judicial behaviours could, and should, occur within a courtroom setting, as well as how best to measure them.

The evolution of the central thesis question and the research following it has led to the development of the only evidence-based measurement tool for legal actor contributions from an objective, therapeutic perspective which currently exists in the literature, the Legal Actor Contributions Scale (LACS).

The design of the LACS has followed an inductive process, whereby the desirable characteristics of a courtroom-based judicial interaction were behaviourally defined from the literature, and then scale items were identified to measure the essential aspects of that behavioural definition. A Delphi study was then undertaken to revise and refine the LACS based on the advice of experts in therapeutic jurisprudence and therapeutic change. It is useful to acknowledge the limitations of the validation process that the LACS has gone through, as the Delphi technique could not be fully applied (due to

overwhelming consensus on the first round, as well as practical issues related to the Australian bushfire and the later COVID19 epidemic). The low number of participants means that this phase of the empirical validation process could be considered to be similar to a pilot study.

This thesis makes an original and significant contribution to the field of therapeutic justice. This includes the identification within the literature of the fundamental behavioural ingredients of therapeutic contributions from magistrates in therapeutic court interventions, and a behaviourally based description of these elements of behaviour, speech and procedure. These legal actor contributions had not previously been based on research, nor behaviourally articulated. The behavioural description enables magistrate therapeutic contributions to be quantified and measured from an objective and therapeutic standpoint for the first time via the LACS, a quantitative measurement tool which has then been refined with reference to experts within the therapeutic change community.

A recent publication regarding judicial behaviours by Dr A Kawalek may validate the constructs included in the LACS.[90] What is perhaps most useful to take from this article for the purposes of moving the research forward, is that the researcher had found that many elements of the therapeutic alliance are present from the defendant's perspective for participants in a particular TJ court, the Manchester Review Court. Finding that elements of therapeutic alliance are present in courtroom interactions for therapeutic courts validates the central premise of this thesis that the therapeutic alliance is of fundamental importance for defendants participating in courtroom interactions, and should be measured and encouraged.

Unfortunately it is difficult to be sure about the frequency and globality of this finding.[91] From the point of view of statistical analysis and psychometric tool

[90] See above n 57 Kawalek (2020) 101581. As noted at page 101581, the paper was received in August 2019, revised and resubmitted in March 2020, and available online from July 2020.
[91] See above n 57 Kawalek (2020).

development, the article under discussion raised several issues about the way the research was conducted, but primarily failed to include the crucial information of the sample size on which the statistical analysis was performed. From a research design and statistical analyses perspective, this makes it impossible to ascertain the reliability, generalizability and power of the statistical analyses performed, which in general all rely on a robust sample size to achieve results that are statistically not just due to chance. Without giving the sample size, or any data on the proportionality or representationality of the sample size, it is unfortunately very difficult to know whether the scale mentioned in that article is actually generalizable.[92]

As explained in the articles that form the primary part of this thesis, the science behind the LACS is located in multiple therapeutic and justice traditions and the behavioural definition is evidence-based, being derived from the research literature. The availability of an evidenced-based behavioural description of optimally therapeutic judicial interactions with defendants, along with a tool for measuring this phenomenon, are of fundamental value for therapeutic court outcome researchers, and also for legal actors wishing to verify and/or enhance their therapeutic court craft.

The ability to evaluate court outcomes effectively is crucial to the development of therapeutic courts and their long term viability. The inability to measure and control for the therapeutic contribution of magistrates has been an ongoing research design flaw, which few studies have found the means to address. The empirically-based drawbacks to these attempts have been discussed elsewhere in the publications included in this thesis.[93]

The LACS is different from prior attempts to measure legal actor in-court therapeutic contributions. These differences include the derivation of the

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[92] See above n 57 Kawalek (2020).
[93] Waterworth (2019) see above n 4; see also for examples; Madell, Thom and McKenna (2013) above n 60; Dr Stuart Ross, 'Evaluation of the Court Integrated Services Program: Final Report' (December 2009) *University of Melbourne*. < https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf> ; Wexler, 1999 see above n 25; Wexler, 2014 see above n 25.

constructs measured by the LACS from empirical research evidence into what behaviours and interventions actually work to facilitate change. Another difference is that the behaviour is designed to be measured from an independent, third-party observer perspective, which has been shown by research studies to be more accurate when measuring therapeutic alliance. In this way the LACS has been designed to supersede the available attempts at measuring legal actor in court behaviour, with the primary aim of helping researchers quantify and control for the important court outcome variable of in-court legal actor contributions when conducting research into therapeutic court outcomes.

However, the LACS has many other potential uses and effects, which will be discussed in greater detail next.

Potential Useful Applications of the LACS

The LACS presented in this thesis has been developed primarily for use by judicial officers and those engaged in researching judicial officers' interactional contributions to offenders' therapeutic change. Nevertheless, its application is not limited to these groups.

Potential applications include:

- Use by magistrates in developing their therapeutic skills and court craft by using an evidenced-based behavioural description of optimally therapeutic judicial interactions with defendants.
- Use by magistrates and criminal court judges who are practicing therapeutic court craft, when self evaluating their therapeutic interactions with defendants, using recordings of their court sessions.
- Use by those delivering therapeutic programs for defendants in assessing the therapeutic nature of their interactions.
- Use as a foundation for the development of similar measurement tools for use by others who have a therapeutic role in relation to offenders,

for example, those responsible for delivering therapeutic change programs.

Ultimately, more effective therapeutic legal actor contributions in courtrooms means that the courts have a better chance to work more efficiently to effect therapeutic change in behaviour for defendants. This has benefits for defendants, their families and also, via a flow-on effect, for any victims of their behaviour and society more generally. The potential flow through benefits of this could include 'better court outcomes' for defendants, for example engaging in therapy, treatment, training or work, and less recidivism. This could also likely result in 'improved' and more cohesive communities with lower crime rates, and less social services interventions needed, which are more agreeable places to live for the community members. Additionally from a pragmatic monetary perspective, less rapid cycling through courts, lower recidivism rates and effective therapeutic intervention for mental health and other problems will likely create, over the longer term, a reduction in court volumes, health care costs, and reduced cost to society in terms of policing, courts, and the penitentiary system.

It is important not to lose sight of the impossibility of really quantifying the lived experience for an offender who decides to, and succeeds in, 'turning their life around' (in whatever multivariate form that might take), and their potential future positive impact as a contributing member of society.

It is envisaged that the LACS will be useful for the therapeutic jurisprudence (TJ) community, for the mainstreaming TJ community, for specialist courts such as drug courts, domestic violence courts, mental health courts, and, fundamentally, for those seeking to ensure that courtroom experiences have the effect of re-including those who are in the process of distancing themselves from society, rather than further alienating them in an entrenched but harmful position vis a vis society and its laws.

Where to from here

The measurement tool has evolved and developed, and this development has occurred in consultation with those with the expertise to assist most

effectively in its development. The benefit of this process has been twofold, first to improve the measure, and secondly, to make sure that it is regarded as actually useful by the group of people most likely to make use of it.

It would be useful for the LACS to undergo further qualitative refinement, and further development of its psychometric properties to enable the generation of quantitative data.

Development as a qualitative tool would include, for example, repeating the Delphi study with a larger pool of participants in Australia, as well as in overseas jurisdictions, to validate the results of the present study and, if necessary, to refine the LACS further with help from the expert therapeutic jurisprudence community. This process might also be utilised to adjust the LACS for use with other cohorts that engage in therapeutic interactions with defendants in the criminal justice process.

Further qualitative development could occur via inclusion in court outcomes research, or in research designed to validate the effectiveness of therapeutic, mental health or problem solving courts.

Additionally, the LACS could be developed further via feedback from use with magistrates in court and in training sessions. These are future applications which follow on naturally from the LACS in its current form.

As a qualitative tool with future quantitative ambitions, further thought could be given to developing the LACS into a more psychometrically robust measurement tool via progression through the stages required to develop the psychometric properties of the tool.[94] As discussed in the preceding article,[95]

[94] Paul E Spector 'Summated Rating Scale Construction : An Introduction Sage University Papers Series' *Quantitative Applications in the Social Sciences* (1992) No. 07-082 (Sage Publications, Inc. 1992).

[95] Rhondda Waterworth 'Development of a Measurement Tool for Courtroom Legal Actor Contributions: a Delphi Study Consulting the Experts' in Chapter Five Part B of this thesis (presented as part of a larger presentation by the author entitled 'Novel

these stages would be designed to determine the discriminant and convergent validity of the scale items, the interrater reliability for each item in the scale, and a factor / cluster analysis of the data obtained from the scale. Additionally, to facilitate ease of user application and to ensure consistency in use across users, a user instruction guide for each item in the measure might be developed along with a user training manual (or short youtube video, for example).

If the psychometric properties of the LACS were developed further so as to allow it to generate quantitative data, this could be fundamentally useful for comparison of different courtroom settings and raters. For example, if reconfigured in this way it could be useful in researching the effectiveness of mainstream courtrooms in effecting therapeutic change, for investigating which court features and contexts best facilitate therapeutic intervention by magistrates, or for benchmarking a minimum therapeutic performance standard for magistrates in therapeutic courts or other contexts. However, care would need to be taken to prevent political misuse of the data collected by the LACS. There is a risk that scores could be misunderstood when collected in a context constrained by time requirements or the type of matters being heard in a court, or other legal or procedural imperatives, and then misrepresented as evidence of lack of court or magistrate effectiveness if presented out of context.

The work involved in the future research described here is beyond the scope of the current research thesis, which has investigated the options to improve therapeutic outcomes for court participants, and has concluded with a quantitative measurement tool to capture legal actor therapeutic contributions in courtrooms. Somewhat interestingly, there is some evidence that fundamental aspects of therapeutic relationship have been reported as experienced by defendants appearing before a therapeutic court,[96] a finding

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applications of psychology: Improving longer term therapeutic outcomes and recidivism for defendants in courtrooms by measuring the therapeutic contributions of magistrates.' at the Université Catholique de Lyon (Lyon Catholic University 'UCLY') for the International Conference on Psychology, on 22/01/2021 in Lyon, France).

[96] See above n 57 Kawalek (2020).

that in turn validates the usefulness of including measurements of this fundamental aspect of therapeutic change in the LACS.

Conclusion

This thesis started with the general, overarching question of;
'How to improve therapeutic outcomes for mental health clients moving through criminal court systems?'

The thesis subsequently charted the context and development of the first behavioural measurement scale for magistrates within a court room setting, from an objective, therapeutic perspective. This thesis is the first step in a long process of further developing the scale with a view to integrating its use broadly into therapeutic courtroom practice, and even more broadly into other arenas of therapeutic criminal justice practice.

The research reported in this thesis resulted in the development of a behavioural definition of therapeutic judicial criminal court practice derived from a review of the relevant literature.[97] It also resulted in the development of a draft qualitative scale to measure judicial behaviours that promote therapeutic change for defendants. After review and significant encouragement by an expert portion of the therapeutic change community, the LACS is now available as a measurement tool for incorporation into court outcomes research designs, to assist in the development of judicial officers' court craft, and for use in further studies to link directly measurements of courtcraft to therapeutic outcomes.

There is considerable scope for this scale to be used in its current form as a qualitative measurement tool to support research into specialty or problem solving courts (including mental health, domestic violence, and drug courts), and to support the mainstreaming of the Therapeutic Jurisprudence

[97] The final, revised version of this is included in Appendix 4.

movement (which is a world-wide movement operating in mainstream and specialist courts in many jurisdictions). Given that specialty courts have caseload limitations and geographic boundaries to their operation, the usefulness of using the LACS to facilitate mainstreaming therapeutic principles to mainstream magistrates courts becomes apparent.

The measurement tool could also potentially be used to inform professional development planning for the judiciary in consultation with the relevant professional bodies. There is also considerable scope for the tool to be developed further and to elaborate psychometric properties, which will increase it's operational scope.

In summary, this research thesis has touched on multiple aspects of how to serve the needs of those experiencing mental health issues whilst progressing through the criminal justice system, culminating in a systemic intervention with multiple applications and possible uses.

Ultimately, the presence of this scale in the literature gives researchers, legal actors, and training bodies the ability to capture and measure hitherto hidden therapeutic contributions of judicial officers (and other legal actors) in court settings, and to aid in potentiating the therapeutic impact of their court craft. This will necessarily make a useful contribution to advancing the therapeutic interests of offenders passing through criminal court systems and in need of therapeutic change.

Appendix 1

Research Participant Recruitment and Information Form

Development of a Measurement Tool for Courtroom Legal Actor Contributions: Delphi Study Involving Consultation with Experts

We are seeking your participation as an expert in therapeutic change or court practices in a cross-disciplinary research study to develop an instrument to measure the impact of legal actors (magistrates, judges, lawyers and barristers) on the therapeutic experience of court participants, specifically, criminal defendants. This thesis research project by PhD candidate Rhondda Waterworth, who is supervised by Associate Professor Terese Henning, Director of the Tasmanian Law Reform Institute (TLRI) in the College of Arts, Law and Education, University of Tasmania and Dr Isabelle Bartkowiak-Theron, Senior Researcher at the Tasmanian Institute of Law Enforcement Studies (TILES), and Dr Mandy Matthewson, Clinical Psychologist and Senior Lecturer in the Division of Psychology, School of Medicine, University of Tasmania.

This research is a first and necessary step in the development of a psychometric tool (part checklist, part ranking questionnaire) which can be used in a courtroom to measure the contribution that a magistrate or lawyer makes to the therapeutic experience of defendants. The contributions made by legal actors, specifically magistrates and other figures of authority, has been shown in the research literature in the fields of psychology, criminology, therapeutic jurisprudence, procedural justice and legitimacy of justice, to be essential to reducing recidivism and increasing prospects for rehabilitation for defendants, as well as acceptance of the legitimacy of the courts' authority by court participants.

Measuring this contribution is essential to progress effective court intervention. By participating in this project participants may make a significant contribution to the development of court evaluation procedures, and effective court intervention for criminal defendants, and to the evaluation of therapeutic jurisprudence initiatives generally.

The Study Process

This research will evaluate the consensus of a group of experts in the field of therapeutic jurisprudence with regards to their perspectives on what constitutes a useful and 'therapeutic-outcome-facilitating-behaviour' on the part of a magistrate. The study will survey the opinions of psychologists expert in facilitating therapeutic change and judicial officers and other legal actors with experience of working in therapeutic courts.

Participation in this study is completely voluntary, and participants can withdraw their permission and participation up until two weeks after submitting their information to the study, without any effect. They will not be able to withdraw their data from the study once 7 days after the submission of their responses to the first round of data collection in the Delphi study have elapsed. There are no specific benefits or risks that have been identified for individual participants in this study, however exposure to therapeutic jurisprudence ideas and therapeutic techniques might be interesting or potentially professionally enriching for participants who work with individuals progressing in courts, if participants have not already come across these ideas.

Participants will be sent an email with a word document survey attached, with questions surveying their opinion of the usefulness of specific behaviours in a court setting, from the perspective of facilitating change for defendants. These items will be taken from a draft psychometric measurement tool (the Legal Actor Contributions survey, also referend to as (the 'LAC') designed to capture therapeutic behaviours in a courtroom setting. The measurement tool will also be sent out to all participants for reference. Participants will be given feedback on the anonymised data analysis of the group responses on each item, and then given the option to change any of their responses in the light of that feedback, should they so wish. This process will be conducted in a way, through coding of the responses, that preserves the confidentiality of all responses. After the second round of responses has been received, the items on the measure (the LAC) will be adjusted according to the consensus achieved by the group of experts in each field. Neither individual participants, nor their individual responses, will be identified to other participants, nor will their individual responses or identities be identifiable in the final data or at publication. During analysis of participants' responses, steps will be taken to deidentify their responses by assigning their replies a participant number, so that their data is not readily identifiable during analysis, and will not be

identifiable in the results. Completion of the survey form is estimated to take around thirty minutes maximum, on two occasions, with the second round of survey questions being sent out approximately six weeks after the first round of survey questions.

The deidentified data analysis results from this study will be included in research papers documenting the development of the measure, and also in research papers regarding therapeutic jurisprudence. Care will be taken to ensure that participants, and their responses, are not identifiable from the data kept, nor any subsequent publications.

Debriefing is available as needed upon completion of the study.

Ethics approval

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or ss.ethics@utas.edu.au. If you have a complaint about this study please contact the Executive Officer, with the ethics reference number [H0018036].

You are free to withdraw your participation up to a week after the online survey has been completed. If you wish to withdraw your results from the study, please contact rhondda.waterworth@utas.edu.au before this date. It may be difficult to remove your results after this time as the raw data will have been de-identified, compiled and processed for analysis.

All research data from this study will be securely stored on the University of Tasmania's secure cloud storage for five years from the first publication of the study results. Data analysis from this study, once all possible identifiers have been removed may be made available to other researchers. If you are willing to participate in this study, and would like more information prior to the study, please do not hesitate to make contact with the researchers via the contact details below.

Kind Regards,

Rhondda Waterworth (primary contact)

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Appendix 2
Round 1: Expert Survey Form and Draft Legal Actor Contribution Scale

Legal Actor Contributions Survey (LAC):

In-Court Measurement Tool

(for the researcher to use during observation,

and for reference only for expert participants)

1. **Introductions (section 1)**

Initial address by the judge to the defendant in court (please check the circle if these elements are present):

1.a **Establishes context: The judge explains to the defendant how the court works and the aims of the hearing.**

1.b **The judge addresses the defendant personally**

1.c **The judge makes eye contact**

1.d **The judge is non-intimidating, speaks calmly, with a neutral tone.**

1.e **The judge addresses the defendant by name**

1.f **The judge explains to the defendant how to address the judge**

1.g **The judge explains the goals of the hearing: defines goal for defendant, for court and for society**

1.h **The judge explains the rules for participating in the court using language the defendant can understand**

1.i Emotional tone (select number closest to the tone on the continuum below)

1 2 3 4 5 6 7

warm ----------positive but firm----------neutral ----------cold ----------hostile

1.j Body language (circle one In each option):

i. open / closed

ii. dominant / encouraging

2. <u>Discussion about problem (section 2)</u> (please check the circle if these elements are present):

2.a The judge asks about the defendant's background

2.b The judge asks about the defendant

2.c The judge asks about the context of the defendant's life and the reason they are in court.

2.d The judge includes the defendant's words into statements and questions

3. <u>Summary or Sentencing Remarks (section 3)</u> (please check the circle if these elements are present):

3.a The judge creates a collaborative definition of the problem with the defendant

3.b The judge incorporates the defendant and their context into sentencing

3.c Location of the problem (please circle one)

The judge describes the defendant as the problem

OR The judge describes the problem as external to the defendant

3.d The location of responsibility to act (agency and accountability) in judicial speech (please circle one)

The judge describes the defendant as responsible for their actions

OR The judge describes the defendant as not responsible for their actions

Please check the circle if these elements are present:

3.e The judge explains the reasons for sentencing

3.f The judge includes emotions and wishes of defendant in sentencing remarks

3.g The judge includes acknowledgement of the victim's experience in sentencing remarks

3.h The judge guides conversations within the courtroom with participants and themselves that have an overt agenda for change

3.i Resources: (please make a mark on the line which corresponds to your overall impression of the judicial discussion)

<------ (10 cm long line, the score is made by measuring the length of the line indicated by the mark)------à

No mention of resources and support / Mentions resources and support / Mentions multidisciplinary practice resources and supports

4. <u>Judicial Communication Skills (section 4)</u>

4.a Questions

Open
_____Closed

% of time

4.b Listening

Active_____Passive

% of time

Active listening: does the judge make use of the following techniques? (please check the circle if these elements are present):

4.c Paraphrasing

4.d Asks clarifying questions

4.e Validation / minimal encouragers

Participation: does the judge make use of the following techniques?

4.f Inviting defendant to participate

4.g Turn taking in discussion

4.h Adaptation of communication style to defendant (cognitive ability, language, communication disorders)

4.i Cultural referencing appropriate to client

4.j Offering the defendant choices

5. Judicial positioning / trust / rapport (section 5)

5.a Observed emotional tone of the judge overall (please circle one):

1 2 3 4 5 6 7

warm ----------positive but firm----------neutral ----------cold ----------hostile

5.b Body language overall (please circle one):

1 2 3 4 5 6 7

Positioned as an ally ----------neutral----------adversarial

5.c 1 2 3 4 5 6 7

Positioned as an ally ----------neutral----------adversarial

5.d Judicial positioning overall (please circle one):

1 2 3 4 5 6 7

Positioned as an ally ----------neutral----------adversarial

Please check the circle if these elements are present:

5.e Did the judge and defendant agree on goals of the hearing

5.f Did the judge and defendant agree on the tasks to be completed during the hearing

Judicial Body language: the body language displayed by the judge during the hearing

5.g Attentive and open (looking at the defendant, arms uncrossed, leaning in, head tilting, slow nodding, furrowed brow, interest noises eg. 'hmmm hmmm')

5.h **Dominant (stern or disapproving expression, body positioned to take up a lot of space, display of expensive items, interrupting, preening or inspecting nails, stroking chin, aggressive gestures, rolling eyes)**

5.i **Bored or tired (mostly looking away from the defendant, drumming fingers, tapping toes, tapping other objects, yawning, sagging posture)**

5.j **Closed posture (arms crossed, head tilted down and away)**

5.k **Evidence of reciprocity in the interaction between the judge and the defendant**

(mirroring in body posture, emotional tone, facial expressions)

Appendix 3A : Round 1 Survey for Experts

Development of a Measurement Tool for Courtroom Legal Actor Contributions

Delphi Study Involving Consultation with Experts

Expert participant survey: Item analysis

Each item here refers to the legal actor measurement tool (LAC), which has been sent to you.

Please refer to the LAC to complete this survey. It will take you about 15 minutes to complete this survey.

For each item in the LAC, please circle a number between 1 and 5 to indicate your level of endorsement for each item.

1 = you do not endorse its inclusion in the measure

3 = you are neutral regarding the inclusion of this item in its current form

5 = you wholeheartedly endorse its inclusion in the measure.

Question 1: Please indicate your level of agreement with the overall content and relevance of section 1 in capturing the therapeutic contributions of legal actors in court?

1 2 3 4 5

Not at all relevant Highly relevant

In greater detail:

Please indicate your level of endorsement for each item in the Legal Actor Contribution Survey. There is space below each item to suggest changes as you think may be relevent.

1.a : 1 2 3 4 5

Not at all relevant Highly relevant

Suggestions and comments:

[NB. This question format was reproduced for each item in the LACS.]

[For each section, there was an additional free text box as follows;]

If you could add any additional items, please describe them below, along with your reasons for this?

[At the end of the survey, the final question was;]

Any additional comments or feedback you would like to communicate to the researchers with regards to this survey:

Thank you for your participation.

Appendix 3 B
Round 1 Survey Results

Magistrates			Psychologists				Average	Mode
1.	4	5	1.	5	5	5	4.8	5
1.a	5	5	1.a)	5	5	5	5	5
I wonder if 1a. To 1h. Could all be likert scales?								
b	5	5	b	4	5	5	4.8	5
c	5	5	c	5	5	5	5	5
d	5	5	d	5	5	5	5	5
e	5	5	e	5	5	5	5	5
f	2	3	f	5	5	5	4	5
Sets boundaries for manners / etiquette in a court of law.								
g	3	4	1.g	5	5	5	4.4	5
h	5	4	1.h	5	5	5	4.8	5
i	5	5	1.i	5	5	3	4.6	5
Tone also has an emotional content / value in communication. This seems very similar to 1.d so I'm not sure if it's relevant or contributes any more.								
j	5	5	1.j	4	5	4	4.6	5
Nothing to add, it looks great.								
2.	4	5	2.	5	5	5	4.8	5
a	5	5	a	5	5	5	5	5
b		4	b	4	5	3	4	4
Maybe more specific, asks what about the defendant exactly? Personal qualities?								
c		5	c	4	5	5	4.75	5
d		4	d	4	5	5	4.5	4
I wonder about asking about trauma or adverse events. Remove or adjust 2.b - it's a little too general.								

Phrased suitably (eg. 'it is noted here that you stated….' None. Added items: Trauma or abuse related items. Drug and alcohol use could be considered. Family / cultural context too.

3. 5 5 3. 5 3 5 4.6 5

I would include more in this section.

a 5 4 a 3 5 5 4.4 5

Once we are in the therapeutic domain, this is essential.

Not sure what collaborative here means

I wonder if these would be better as a likert scale too

b 5 4 b 5 5 5 4.8 5

Ditto re 3.a

c 5 5 c 5 5 4 4.8 5

Maybe try to capture here how the judge might separate 'person' vs 'person's behaviour' ie. Person is bad (stigmatisation), vs persons behaviour is bad (agency)

If the court describes the offender as the problem then it is doubtful any therapeutic progress will be achieved.

Preferably external to the problem.

d 5 5 d 5 5 5 5 5

The reverse of 3.a in many ways, if the court suggests the offender is not responsible for their actions there can be no reason for the offender to make changes in their life.

e 5 5 e 5 5 5 5 5

f 5 3 f 5 5 4 4.4 5

Depends, depends depends - see comments at 2d. Context is everything here. For balance

g 5 5 g 5 5 5 5 5

This is part of the offenders need to understand what they are being held accountable for and the reasons why they need to make positive changes in their life.

h 5 5 h 5 5 5 5 5

Once we are in the therapeutic key highly necessary.

i 5 5 i 5 5 5 5 5

I wonder if you could say something like 'builds a coherent story or narrative of the context of the crime'

4. 5 4 4. 5 5 5 4.8 5

Again context is important. Once we are operating in a therapeutic key then 'open' and 'active' are critical. However, there are times when a courts authority has to be exercised and this may involve shutting an offender down particularly if they are deliberately seeking to cause harm / distress to others in the court.

a	**5**	**5**	**a**	**5**	**5**	**5**	**5**	**5**
b	**5**	**5**	**b**	**5**	**5**	**5**	**5**	**5**
c	**5**	**5**	**c**	**5**	**5**	**5**	**5**	**5**
d	**5**	**5**	**d**	**5**	**5**	**5**	**5**	**5**
e	**5**	**5**	**e**	**5**	**5**	**5**	**5**	**5**
f	**5**	**5**	**f**	**4**	**5**	**5**	**4.8**	**5**
g	**5**	**4**	**g**	**4**	**5**	**5**	**4.6**	**5**
h	**5**	**5**	**h**	**5**	**5**	**5**	**5**	**5**
i	**5**	**5**	**i**	**5**	**5**	**5**	**5**	**5**

However care needs to be taken to ensure we are open (ie. To seek and find out what the cultural norms are) and not to allow culture to be used as somehow justifying criminal behaviour.

Impresses that the legal system acknowledges cultural factors.

j	**5**	**3**	**j**	**4**	**5**	**5**	**4.4**	**5**

Sometimes giving a person choices is counter productive or too many choices can actually be disempowering. Offering supported and perhaps guided, focussed and limited choices is sometimes therapeutically much more effective.

I assume within the contexts and limits of the law.

I wonder about how they deal with difficult clients / communications ie. Outbursts in court?

5.	**5**	**5**	**5.**	**4**	**5**	**5**	**4.8**	**5**

Again since we are judging in a therapeutic key all of these matters are highly relevant provided they are applied without giving the appearance that the court lacks objectivity or is failing to hold the offender accountable for their actions and commitment to achieving positive changes.

a	**5**	**5**	**a**	**4**	**4**	**5**	**4.6**	**5**

I think scales with 1 to 5 will be easier to score and understand.

b	**5**	**5**	**b**	**4**	**5**	**5**	**4.8**	**5**
c	**5**	**5**	**c**	**4**	**5**	**4**	**4.6**	**5**
d	**5**	**5**	**d**	**4**	**5**	**5**	**4.8**	**5**

Neutral and just.

e	**5**	**4**	**e**	**4**	**5**	**5**	**4.6**	**5**

Whilst agreement on goals is important it is more important the offender owns the goals.

f	**5**	**4**	**f**	**4**	**5**	**4**	**4.4**	**4**

Again agreement is important but it is more important the offender is owning the tasks and not agreeing because of the power imbalance.

g	**5**	**4**	**g**	**4**	**5**	**5**	**4.6**	**5**

At the end of a long day in the saddle it can be hard to maintain attention and sometimes it is better to persist rather than adjourn.
Impresses that the judge has interest in the defendant.

h	**5**	**5**	**h**	**4**	**5**	**5**	**4.8**	**5**

Highly relevant but highly unlikely to be helpful.
It would emphasise the power of the differential present.

i	**5**	**5**	**i**	**4**	**5**	**4**	**4.6**	**5**

Ditto

j	**5**	**5**		**4**	**5**	**4**	**4.6**	**5**

Ditto

k	**5**	**5**		**4**	**5**	**5**	**4.8**	**5**

Reciprocity opens windows if not doors.

Cool! Great work!!
Thankyou for your interest and work on this important issue.
I found the tool for the observation tool interesting . The use of observational percentages will only be valuable if there is one observer so all is relative.
I think it would be useful to measure approximately how long the cases are or type of case. Pre or post sentence will be important.
That is, mention hearings- short procedural hearings; plea guilty hearings or contested matters. Judicial monitoring (JM) on bail related programs is overwhelmingly pre sentence. JM on corrections orders are of course post sentence. I think there will be big differences to engagement, motivation and investment by the accused and the judicial officer and this would be useful to gauge and then measure.
Observations should also be made of the accused, to match those taken of the judicial officer. This may assist in understanding levels of engagement and motivation.
Very important measure and I think would make the court process better for victims and perpetrators
Excellent and important research. Some aspects of the LAC are a little hard to complete given formating. Could consider how to display the survey so it's consistent, making it easier for participants to complete.

Appendix 4

Revised Version: Legal Actor Contributions Survey (LACS)

1. **Introductions**

Initial address by the judge to the defendant in court (please check the circle if these elements are present):

1.a ○ Establishes context: The judge explains to the defendant how the court works and the aims of the hearing.

1.b ○ The judge addresses the defendant personally

1.c ○ The judge makes eye contact

1.d ○ The judge is non-intimidating, speaks calmly, with a neutral tone.

1.i Emotional tone (select number closest to the tone on the continuum below)

1 2 3 4 5

warm --positive but firm-------neutral ----------cold ---------- hostile

1.j Body language (circle one In each option):

i. open / closed

ii. dominant / encouraging

2. **Discussion about problem (please check the circle if these elements are present):**

○ **2.a** The judge asks about the nature, context and reasoning behind the defendant's crimes.

○ **2. b.** The judge asks the defendant what they think the problem and their solution might be.
Including, enquiring about;
adverse or traumatic life events.
Substance misuse, abuse or dependence
Mental health issues
Family and cultural norms
Other social or economic issues

○ **2.c** The judge includes the defendant's words into statements and questions (while enhancing responsibility)

3. **Summary or Sentencing Remarks (please check the circle if these elements are present):**

○ **3.a** The judge creates a collaborative definition of the problem with the defendant

○ **3.b** The judge incorporates the defendant and their context into sentencing

3.c Location of the problem (please circle one)

The judge describes the defendant as their behaviour
OR The judge separates the behaviour from the defendant

3.d The location of responsibility to act (agency and accountability) in judicial speech (please circle one)

The judge describes the defendant as responsible for their actions
OR The judge describes the defendant as not responsible for their actions

Please check the circle if these elements are present:

3.e ○ The judge explains the reasons for sentencing

3.f ○ The judge makes reference to the emotions and wishes of defendant in sentencing remarks

3.g ○ The judge includes acknowledgement of the victim's experience in sentencing remarks

3.h ○ The judge guides conversations within the courtroom with participants and themselves that have an overt agenda for change

3.h.i ○ The judge builds a coherent story or narrative of the context of the crime

3.i ○ Resources: (please make a mark on the line which corresponds to your overall impression of the judicial discussion)

<------ (10 cm long line, the score is made by measuring the length of the line indicated by the mark)------→

No mention of resources and support / Mentions resources and support / Mentions multidisciplinary practice resources and supports

4. Judicial Communication Skills

4.a Questions

Open

_____Closed

% of time

4.b Listening

Active_____Passive

% of time

Active listening: does the judge make use of the following techniques? (please check the circle if these elements are present):

4.c ○ Paraphrasing

4.d ○ Asks clarifying questions

4.e ○ Validation / minimal encouragers

Participation: does the judge make use of the following techniques?

4.f ○ Inviting defendant to participate

4.g ○ Turn taking in discussion

4.h ○ Adaptation of communication style to defendant (cognitive ability, language, communication disorders)

4.i ○ Cultural referencing appropriate to client

4.j ○ Offering the defendant relevant and supportive choices

5. Judicial positioning / trust / rapport

5.a Observed emotional tone of the judge overall (please circle one):

1 2 3 4 5

warm----positive but firm----neutral ---------cold ---------- hostile

5.b Body language overall (please circle one):

1 2 3 4 5

open ----------closed

5.c 1 2 3 4 5

encouraging ---------- dominant

5.d Judicial positioning overall (please circle one):

1 2 3 4 5

Positioned as an ally ----------neutral----------adversarial

Please check the circle if these elements are present:

5.e ○ Did the judge and defendant appear to honestly agree on the goals of the hearing

5.f ○ Did the judge and defendant appear to honestly agree on the tasks to be completed during the hearing

Judicial Body language: the body language displayed by the judge during the hearing

5.g ○ Attentive and open (looking at the defendant, arms uncrossed, leaning in, head tilting, slow nodding, furrowed brow, interest noises eg. 'hmmm hmmm')

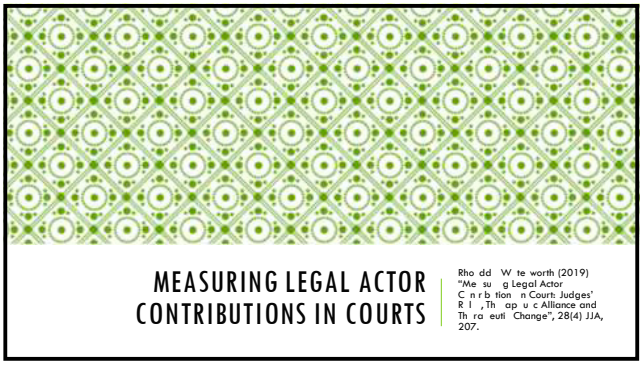
5.h ○ Dominant (stern or disapproving expression, body positioned to take up a lot of space, display of expensive items, interrupting, preening or inspecting nails, stroking chin, aggressive gestures, rolling eyes)

5.i ○ Bored or tired (mostly looking away from the defendant, drumming fingers, tapping toes, tapping other objects, yawning, sagging posture)

5.j ○ Closed posture (arms crossed, head tilted down and away)

5.k ○ Evidence of reciprocity in the interaction between the judge and the defendant
(mirroring in body posture, emotional tone, facial expressions)

Appendix 5: Presentation Slides 'What Can Judges Do to Facilitate Change: Measuring Legal Actor Contributions in Court from a Therapeutic Perspective' at the International Academy of Law and Mental Health conference hosted by the Università degli Studi Internazionali di Roma (Rome, Italy), July 2019.



MEASURING LEGAL ACTOR CONTRIBUTIONS IN COURTS

Rho dd W te worth (2019) "Me su g Legal Actor C n r b tion n Court: Judges' R l , Th ap u c Alliance and Th ra euti Change", 28(4) JJA, 207.

1

The court can be a point of intervention in the lives of offenders as well as their families, social networks, and communities.

-> Reasonable to investigate what a judge can contribute to this interaction.

Behaviourally anchored description of a judge s contribution in a courtroom:

-> So as to have the best chance of facilitating therapeutic change for a court participant.

2

BEHAVIOURALLY ANCHORED FACILITATIVE BEHAVIOURS DESCRIPTION

Based on a review of the literature rega d ng;
of the therapeutic jurisprudence,
- *procedural j st ce,*
- *legitimacy of justice literature,*
- *types of therapy that could be effective in a courtroom setting,*
- *research into the common effective denominators in therapy outcomes,*

-> therapeutic alliance and therapeutic change.

3

Descriptions in the TJ, PJ and LJ literature of an effective and therapeutic juridical intervention tend to be based on ideals and c ncepts.

The contribution of legal actors has been a particularly amorphous concept to op rati a i

Some have included brief descriptive examples of ways to intervene effectively, not really behaviourally anchored however.

4

TH ROLE OF JUDGES

Judi i l rol s and a tio bei g ul ur lly an l g ly determined

Cor j di i l mp ten i s that r lat to the j dge's rol i upholding : adjud at on; nve iga o ; nd d liv ng nd au h ri ing ive sanctions.

The rol f he j dg h been lowly vol ing t als in lu motivating and i pr i g t e possibility of tr atment d p rs na change for litigants.

Most c mmo l w juri di ion clude habilit t on goals in their

sente ing legi l ti nd procedures.

5

TJ PERSPECTIVE

The law has a potential to be a healing agent, as does a courtroom. The TJ literature unanimously describes judges as active therapeutic agents.

The judicial officer is cast as an active facilitator of change.

The judge would also support a court participant to engage in their own natural change process.

Court process would become a facilitator of change and potentially also participant empowerment.

6

SPECIFIC RECOMMENDATIONS FROM TJ

Ki g S l tion-f c ed judging

Spe ifi Co m c t on skills: is ning skills, etc

A ou t xperi ce is a pow rf l facilitat to develop nd it ess new life narratives.

7

COMMON DETERMINANTS OF THERAPY: THERAPEUTIC ALLIANCE

Research into "what works" in therapy has become inextricably linked with research into the therapeutic alliance (relationship).

The type of treatment does matter.

The strength of the therapeutic alliance is a major process variable a with central impact on therapeutic outcomes.

the collaborative relationship between a therapist and patient,
- particularly the link between the therapist and their patient
- their agreement both on goals and tasks for therapy

The alliance is an essential ingredient in the client accepting therapeutic intervention and following a plan towards personal growth.

8

BEHAVIOURALLY ANCHORED DESCRIPTION:

The elements described in the behaviourally anchored description lead to the development of a behaviourally defined description of desirable judicial interactions r h p ti p r p tiv

This could be used as a brief rating scale for use by an independent observer to capture elements of this description and measure this in a courtroom setting.

This measure is not designed to be comprehensive, but rather a starting foundation point for future conversations about judicial contributions to therapeutic change, and a foundation for potential future developments of measures for specific court settings.

9

INTRODUCTIONS

D ri g t i t du ti i i imp t t t ma ta go d ye t t, us a m t n ut l e t l t n , almly and firmly set boundaries and roles in the courtroom, explain the goals of the hearing, and help the participant to feel confident to participate in the hearing.

The judge should take the time to explain the court processes and how to address the judge. If at all possible, the judge and the court participant should create a collaborative definition of goals, and take turns in speaking.

10

DISCUSSION ABOUT THE PROBLEM

T judge shoul a k n t al nd open q stion b u th ntext a to hy they are i c urt, d

include the court participants' own words in the definition of the problem. If possible, the judge should

notice and discuss the strengths that are present in the current situation, despite the reasons for being in

court. The judge should also notice and discuss the point of view and experiences of other participants

to the problem.

11

SENTENCING

The judge ho d gi summa y f r s nte cing r j gmen that in ud s collaborati definitio o

the prob m a d n o p rat the p rtie i volv d i the umma y m rks. The judge should des ri e h spo ibility fo action as i t nal t the court pa ti ipant, a d describe h s uat n d s mma y to i lud th p ticipant a aving ch ice ov r their acti s, an lso highlight ont x a d p sible s pp ts vail bl . The umma y should in lud a a k owledg en of the po si le xp r en of th people wh are also involv d i the pr b em situ io – f r ample, the victim of a rim .

12

JUDICIAL COMMUNICATION SKILLS

The judge should use open questions, with active listening skills and attentive and encouraging body language, and use non-verbal prompts to encourage the court participant to express themselves well.

The judge should adapt their language and speed of speaking to the language abilities and comprehension of the court participant, and ask questions to check that the court participant has understood them.

The judge should facilitate other legal actors present in the court to do the same, so as to ensure that the court participant understands what is being communicated and the processes behind this. The judge should consider and promote the use of open or closed questions, active or passive listening, invitations to the defendant to participate, turn-taking in discussion and effective body language. Turn-taking and collaborative dialogue should occur during the interaction.

13

JUDICIAL AL IANCE

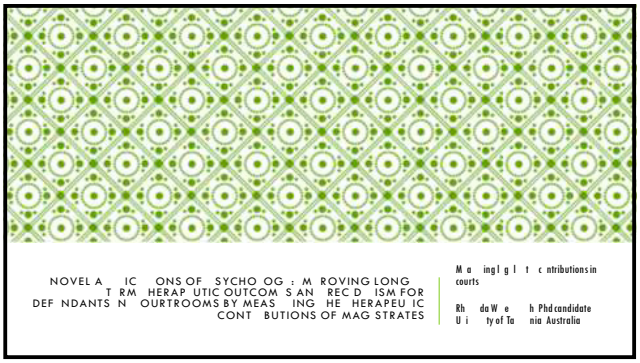
The judge should employ a eutral t arm motio al t ne, ope but authoritati body langu ge, nd actively lly thems lve with the ou t parti ipant ag i st "the problem"

14

QUESTIONS...

15

Appendix 6: Presentation Slides 'Novel applications of psychology: Improving longer term therapeutic outcomes and recidivism for defendants in courtrooms by measuring the therapeutic contributions of magistrates.' at the Université Catholique de Lyon (UCLY) as part of the International Conference on Psychology, Lyon, France, on 22/01/2021.



1

THE COURTS CAN BE AN INTERVENTION TOOL

The court can be a point of intervention in the lives of offenders as well as their families, social networks, and communities.

-> Reasonable to investigate what a judge can contribute to this interaction.

Behaviourally anchored description of a judge s contribution in a courtroom:

-> So as to have the best chance of facilitating therapeutic change for a court participant.

***'Court craft'** : therapeutic intervention skills used by a judge within a court room when interacting with a defendant.*

2

WHY IS THIS IMPORTANT?

Effective court intervention using good 'court craft' can;

- Reduce recidivism, criminalisation, and other social problems in France

  Prevent social distancing and radicalism

  For example, work to counteract radicalisa ion, prevent terrorist attacks

3

THE RESEARCH PROCESS

This research PhD set out to find ways to use courts more effectively to intervene to prevent recidivism, address mental ealth concerns, and tackle social problems by making use of therapeutic court craft.

The research proceeded via;

- Literature review of parallel fields to identify useful ways to intervene which are feasible in a courtroom.
- Development of these findings into a behaviourally anchored description of desirable judge behaviours.
- Transformation of this description into a qualitative checklist designed to be used in court to measure judge behaviour 'Legal Actor Contribution Scale'.
- Vetting and refining of this measurement tool via a Delphi study consultation process using Australian psychologists and magistrates involved in therapeutic justice.

4

THE BEHAVIOURALLY ANCHORED FAC LITAT VE BEHAVIOURS DESCRIPTION

Op a i n lis d a c n ept whi h had be n v r ag ly de c ibed in the erapeutic ju i pr den e literature.

Lit t re re iew f th foll wing fields;

- her p uti ju i prudence,
  p o d ral justice,
- leg ti cy of justice,
  ypes of therapy th t cou d be eff ctiv i o r o m setting,
  r s ar h into th om n effe ti e d n min to s in the apy outcomes,
  > h ape tic all an e and t e p tic change.

5

THE ROLE OF JUDGES

Core judicial competencies are:

- adjudicat on; investigation; and deliver ng and authorising coercive sanctions.

Judicial roles and actions:

- culturally and legally determined
- evolving to also include therapeutic change

E.g. most common law jurisdictions include rehabilitation goals in their sentencing legislation and procedures.

6

TH RAPEUTIC JUR SPRUDENCE PERSPECTIVE

TJ lit rat e anim s y d s ribe judges a ctiv th ra eutic agents.

The judi ial office is an a e fac litator f change.

Co rt oom app ranc ha e the potenti l t b a h ling agent.

Co t p o ess w ld be om a fac litato of ch nge a d pa ti ip nt empowerment.

Ki g 'Sol ti n fo us d judging' > tran late Na ati e Th apy t chniques into a c urt room.

E g a c u t xp ien i a pow ful fa ili tor to de elop d witn ss new life narratives.

7

COMMON DETERMINANTS OF THERAPY: THERAPEUTIC ALLIANCE

"what works" in therapy -> underpinned by the therapeutic alliance (relationship).

The type of treatment does matter, BUT:

The strength of the therapeutic alliance is a major process variable with a central impact on therapeutic outcomes.

Therapeutic alliance is the collaborative relationship between a therapist and patient,

- Focusses on;
- the link between the therapist and their patient
- their agreement both on goals and tasks for therapy

The alliance is an essential ingredient in the client accepting therapeutic intervention and following a plan towards personal growth.

8

BEHAVIOURALLY ANCHORED DESCRIPTION:

A des ript on n behavioural terms of desirable judicial interactions (from a therapeutic perspective).

Transformed into a brief rating scale for use by an independent observer to describe judicial behaviour and measure this in a courtroom setting.

The measurement tool for magistrate behaviour is online here;

www.practicalsolutionscounselling.fr/legal-actor-contributions-survey/

-> Qualitative checklist

9

USEFUL MAGISTRATE BEHAVIOUR

Introductions:

- Carefully explained
- Neutral
- Inviting active participation

Discussion about the problem:

- neutral and open questions about the context as to why they are in court
- include the court participants' own words in the definition of the problem
- notice and discuss the defendant's strengths as well as existing supports
- notice and discuss the point of view and experiences of other participants to the problem.

10

SENTENCING REMARKS

Th j dge hould g e a summary for sentencing or judgment that includes;

A collaborative definition of the problem & the parties involved.

Internalised responsibility for action for the court participant,

Highlight defendants choices over actions

- Highlight context and possible supports available,

Include an acknowledgment of the possible experiences of other people who are also involved in the problem situation – for example, the victim of a crime.

11

EFFECTIVE JUDICIAL COMMUNICATION SKILLS

- Effective udici l llia e – p itioning the s lve ***ith*** th defenda ***, against*** the criminal behavi u
- Open que tio s
- A ti li t n ng kill
- Attentive and en o ragi g body ang age
- Non-verba pro p s o nco r g th cou t parti ipant to xp e thems lves well
- Adapt language nd s ed of sp ki g t th cou t participant
- Check comp he io
- Turn-taking
- Collaborativ ly nst cted dial g e

12

APPLICATIONS FOR THE LACS

Effective research into therapeutic effects of courts – controls for major confounding variable

- Research into specialist courts effectiveness and required process variables
- Magistrate training in therapeutic skills
- Magistrate self evaluation of own court recordings for self development
- Building block for other court-based research tools...
- Effective court craft' can reduce recidivism and other problems that go along with it such as overcrowded prisons endemic' criminality and to help those suffering from mental health problems to change their life situation.

13

BUT HOW D ES TH S RELATE TO TERRORISM?

The features th t fa li t r d li i (pro n e ary t p to t ism) ar dir tly dres d ing o rt yst a d go d o rt craft.

Up until recently te r s ie ed l g l pr blem

-> 'hard' counte te r ris e p e

No 'soft' counte adi a satio e r t l m r c ly

This research fa l tate 's r' o te adi isati i ter tio in t oom , bas d o effec i court in r tio nd p e e ing th cond tions that f i t r di a i a ;

- Improving legitima y f | tic nd se s f rei lu io
- Decreasing sen f a i atio (' ocia di t n ing)
- Reducing sense o ci m f om m ity (eg ia pr ctical o t de di te n i n t dd s a t rs cling to rimi al y)
- Decreasing ike ho d f re f ndi g
- Decreasing pris pop lati (ide l)

14

THIS DIRECTLY INTERRUPTS SEVERAL ASPECTS OF THE RADICALISATION PROCESSES

Th s nterrupts the psychological setting conditions, e.g. as per the Quest for Signif cance Model

(Dugas and Kruglanski 2014; Kruglanski et al. 2009, nb there are many different models of radicalisation, but they have s milar psychological elements of sense of 'other' and 'victimisation' or 'positioning outs de of society')

Th s model assimilates many of the purported and established antecedents of violent radical zation.

A meeting of three conditions initiates radicalization:

1. Personal misfortune, leading to an ind vidual sense of diminished significance -> Indiv duals experience a stronger need for s gnificance or meaning.

2. Individuals develop the belief that ideologies that defend violent extrem sm may be an appropriate means to achieve this s gnificance. They adopt ideologies that include the narrative that;

their community has suffered an injustice,

this injustice can be attr buted to a specific enemy,

violence towards this enemy is a suitable means to redress this injustice

3. The competing goals of individuals, such as the goal to survive, need to be suppressed.

15

RADICALISATION OFTEN OCCURS WITHIN THE PRISON SYSTEM

Good 'court craft' over time should positively impact the prison population via tackling underlying criminogenic factors, and reducing recidiv sm,

In France, 57% of prisoners reconvicted within 5 years of their release (similar stats n Australia)

French prisons are recruitment grounds for radicalisation, for several reasons;

- Large number of Muslim prisoners alongside a large number of Islamist prisoners: facilitates proselytization and radicalizat on of those in prison
- Inmates are vulnerable, stressed, potentially physically unsafe
- Prison usually marks a personal crisis, existent al questions, isolated, experiencing a complete break w th that person's prior life
- Inmate population are a receptive and captive aud ence to extremist approaches
- 'Rel gion' can be seen as the solution to the prison experience: safety, networks, sense of belonging, 'the answers', redemption.
- Radical Islamic prison gangs can be intim dating to others in the prison context.

16

HOW CAN GOOD COURT CRAFT PREVENT TERRORISM?

Go d court craft';

- lps t ckl so i l and h pr bl ms leadi g to rimin l behaviour
- H lps t edu e s e f alienation

lnte up s ' oci l dis ancing via p si iv or effe ti e per nce wit in the criminal ju tice system

Can he p p eve eoff ndi g nd duce pri on p pulat o s over time.

➢ Di e tly interrupt the p o ess s invol d n r dicalizatio a d terrorist recruitment.

17

QUESTIONS…

18

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