The Feasibility of Mainstreaming Therapeutic Jurisprudence within the South-East Queensland Magistrate's Courts in 2021

Article · December 2021

DOI: 10.3316/agispt.20220113060235

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The Feasibility of Mainstreaming Therapeutic Jurisprudence within the South-East Queensland Magistrate's Courts in 2021

Rhondda Waterworth*

This article examines the feasibility of mainstreaming therapeutic jurisprudence (TJ) in the criminal magistrates courts in south-east Queensland. It 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 TJ. The article concludes that there is ample systemic opportunity to mainstream TJ techniques within the criminal magistrates courts. The potential positive implications of this are discussed with reference to the existing systems of care and control, and the effect on offenders, magistrates and communities.

I. 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, mental health and other health services, and socioeconomic disadvantage – that those who are likely to be most in need of collective support to change their life patterns reside.[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 are often those most in need of therapeutic intervention.[4] Additionally, further reflection indicates that the systems of care and control (defined below) operating upon this group could make more efficient use of resources to effect therapeutic intervention and change for defendants.

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[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 May 2021. However, it is possible to extrapolate from the data for people who have recently entered prison: two out of three prisoners had used illicit drugs just prior to entering prison; one in three had a chronic health condition; one in three were in insecure accommodation or were homeless in the four weeks before entering prison; one in four receive medication for a mental health condition while in prison. See Australian Institute of Health and Welfare, "Prisoners" (Australian Government, 2021) <https://www.aihw.gov.au/reports-data/population-groups/prisoners/overview>.

[2] See, eg, Queensland Health, *Service Delivery for People with Dual Diagnosis (Co-occurring Mental Health and Alcohol and Other Drug Problems)* (Queensland Government, 2008) <https://www.health.qld.gov.au/publications/clinical-practice/guidelines-procedures/clinical-staff/mental-health/guidelines/ddpolicy_final.pdf>.

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

[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 and S Hodgins, "Co-occurring Mental Disorders among Criminal Offenders" (1990) 18(3) *Journal of the American Academy of Psychiatry and the Law* 271; M Krakowski, J Volavka and D Brizer, "Psychopathology and Violence: A Review of Literature" (1986) 27(2) *Comprehensive Psychiatry* 131; N van Buitenen et al, "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.

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 (TJ) practices into the magistrates courts in south-east Queensland.

It is expedient at this point to define relevant terminology. 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 "systems of care and control", in this context, includes 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 that operate within these contexts, and their staff. The system under examination in this article also includes the rules that govern its operation, such as laws, principles, professional guidelines and other patterns to the ways in which the parts interact. This concept is explored further below.

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 among these is that it is likely to enhance the accurate capture and 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] it also deals with concerns that systems of care and treatment often operate in a linear and siloed fashion.[12]

The TJ movement has much 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 that is designed

[5] Three out of four new prisoners had previously been imprisoned: Cook, n 1. See also Australian Bureau of Statistics, "An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007" (Research Paper 1351.0.55.031, 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) 10 *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] David B Wexler, "From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part" (2011a) 37 *Monash University Law Review* 33, 38; David B Wexler, "The Relevance of Therapeutic Jurisprudence and Its Literature" (2011b) 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; David B Wexler, "New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices" (2014) 7 *Arizona Summit Law Review* 463; David B Wexler and James E Rogers, "The International and Interdisciplinary Project to Mainstream Therapeutic Jurisprudence (TJ) in Criminal Courts: An Update, a Law School Component, and an Invitation" (Arizona Legal Studies Discussion Paper No 14-4, University of Arizona, 2014).

[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), *The Wiley Blackwell Encyclopedia of Sociology* (MA and Blackwell Publishing, 2007); AY Cohen and BM Kibel, *The Basics of Open Systems Evaluation: A Resource Paper* (Pacific Institute for Research and Evaluation, 1993); B Williams and R Hummelbrunner, *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) 15(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; see also Williams and Hummelbrunner, n 7.

[10] BH Banathy, *A Systems View of Education: Concepts and Principles for Effective Practice* (Educational Technology, 1992); see also Renger, n 8, 16.

[11] See Renger, n 8, 16.

[12] Renger, n 8; 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 et al, "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.

with therapeutic goals in mind,[14] and that is likely to have a more effective long-term impact than traditional court and sentencing approaches.[15] In this regard, the effective application of TJ principles[16] can enhance defendants' engagement with various goals designed to prevent further offending and improve their living circumstances. Generally, these will include accessing treatment, rehabilitation, finding and keeping accommodation and 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 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 the mainstreaming of 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 TJ community[21] to ascertain if the jurisdiction is receptive to therapeutic judging practices, which is necessary for the mainstreaming of TJ practices. Adopting a case study method, this article analyses 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. It also considers whether there are additional reforms or structures that could be implemented to enhance outcomes for this defendant group.

The area 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 here could be transferred to inform analysis within another jurisdiction, particularly another Australian State.[22] It provides an exemplar for evaluating the potential for mainstreaming TJ practices in sentencing courts elsewhere. This analysis is based on an observation at a set point in time, with the tacit assumption that the systems themselves can, and have, evolved over time.[23] It is worth highlighting that the methodology used to analyse the south-east Queensland jurisdiction could be used in other legal jurisdictions worldwide.

The article first examines the south-east Queensland context, the prison population, the mental health needs of those passing through the courts, the mental health and other effects of incarceration, and the presence of diagnostic comorbidities in this population group, as well as treatment recommendations for this client population. Next, it examines what TJ can offer in general to defendants with these

[14] David B 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 15, University of Arizona, 2014).

[15] Rhondda Waterworth, "The Case for Measuring Legal Actor Contributions in Court Proceedings" (2018) 26 *Psychiatry, Psychology and Law* 77.

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

[17] See Wexler (2011a), n 6, 38; Wexler (2011b), n 6; Wexler (2010), n 6; Wexler and Rogers, n 6.

[18] DJ Kavanagh and KT Mueser, "Current Evidence on Integrated Treatment for Serious Mental Disorder and Substance Misuse" (2007) 44 *Journal of Norwegian Psychological Association* 618; A Kenny et al, "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 and 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; Mental Health and Drug and Alcohol Office, "Effective Models of Care for Comorbid Mental Illness and Illicit Substance Use" (Evidence, NSW Ministry of Health, 2015) 9.

[19] See n 6.

[20] Renger, n 8.

[21] See Wexler and Rogers, n 6.

[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.

[23] See, eg, P McClelland, "Courts in the 21st Century: Should We Do Things Differently?" (2006) 8 *The Judicial Review* 23. For a good review of the evolution and current system of psychiatric care in Australia, see A Ellis, "Forensic Psychiatry and Mental Health in Australia: An Overview" (2020) 25(2) *CNS Spectrums* 119.

characteristics and treatment needs, and specifically what mainstreaming TJ could usefully offer in this context. 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 analysis are then discussed, as well as conclusions and suggestions for future directions.

II. Background

A. Queensland's Offender Population

The numbers of defendants before the Queensland magistrates courts have been increasing over time: the criminal jurisdiction of the magistrates court saw an increase of 16,804 defendants (8.42%) in 2013–2014,[24] and 1,481 (.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 pandemic control measures.[26] Despite these national trends, there has been a 5% growth in the Queensland prisoner population in the last quarter (December 2020),[27] and the prisons are currently at 125% capacity.[28] Taking a longitudinal perspective, Australia has 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 beneficial for Queensland.[31]

B. 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 conceptualised as a deterrent,[33] with rehabilitation goals in mind.[34] As noted by a 2007 Australian Bureau of Statistics (ABS) 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

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

[25] Rinaudo, n 24.

[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>.

[27] Australian Bureau of Statistics, n 26.

[28] Lydia Lynch, "Work Starts on 'Mega-Jail' West of Brisbane as Prison Population Overflows", *Brisbane Times*, 4 March 2021.

[29] SA Kinner et al, "Counting the Cost: Estimating the Number of Deaths among Recently Released Prisoners in Australia" (2011) 195 *Medical Journal Australia* 64; Sheryl Kubiak et al, "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] See Australian Bureau of Statistics, n 26.

[31] See Lynch, n 28.

[32] See, eg, E Currie, "Consciousness, Solidarity and Hope as Prevention and Rehabilitation" (2013) 1(2) *International Journal for Crime, Justice and Social Democracy* 3; A Birgden, "Therapeutic Jurisprudence and 'Good Lives': A Rehabilitation Framework for Corrections" (2002) 37(3) *Australian Psychologist* 180.

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

[34] See Birgden, n 32; Michelle Edgely, "Solution-Focused Court Programs for Mentally Impaired Offenders: What Works?" (2014) 22 JJA 208; JE Thomas, "Diversion and Support of Offenders with a Mental Illness: Guidelines for Best Practice" (Justice Health, Department of Justice (Vic), 2010) 63 <http://www.aic.gov.au/en/crime_community/communitycrime/mental%20health%20and%20crime/njceos.aspx>; 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] See Australian Bureau of Statistics, n 5.

identified that reimprisonment was strongly linked to having already served prison time.[36] Sadly, the ABS analysis found that reimprisonment rates in all Australian jurisdictions aside from Queensland were higher in the years leading up to 2007 than in the mid-1990s.[37]

There are many different reasons as to why this might be the case.[38] In an address to the Royal Commission into New South Wales prisons (more than 20 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 money.[39] This observation still holds true, and the literature suggests 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 are in regard 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 the criminogenic factors identified by these theories 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 their 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] These factors together could work to reduce an offender's commitment to avoiding further criminal behaviour.[43]

C. Comorbidity

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

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

[36] Australian Bureau of Statistics, n 5.

[37] Australian Bureau of Statistics, n 5.

[38] See Thompson, n 5; Schaefer, n 5.

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

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

[41] Kubrin, Stucky and Krohn, n 40.

[42] See Thompson, n 5.

[43] See Schaefer, n 5, 168.

[44] See Kavanagh and Mueser, n 18; Kenny et al, n 18; Torrey, Tepper and Greenwold, n 18.

[45] See Kavanagh and Mueser, n 18; Kenny et al, n 18; Torrey, Tepper and Greenwold, n 18.

[46] DL Newman et al, "Comorbid Mental Disorders: Implications for Treatment and Sample Selection" (1998) 107(2) *Journal of Abnormal Psychology* 305; RC Kessler et al, "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; van Buitenen, n 4.

[47] See Cote and Hodgins, n 4, 271.

[48] L Frost, T Moffitt and R McGee, "Neuropsychological Correlates of Psychopathology in an Unselected Cohort of Young Adolescents" (1989) 98(3) *Journal of Abnormal Psychology* 307; K Bakken, AS Landheim and 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.

higher rates of public service use.[49] Comorbidity negatively effects treatment outcomes,[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 behavioural condition – a statistic that has been increasing.[52] Rates of mental health in the Australian prison population are well above that of the average population, and are 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. Due to 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 restrictive enough to be likely to create improvements. Additionally, the model of care should be self-correcting – that is, engagement and outcomes of therapy are closely monitored and care is "stepped up" if the current level of intervention is not 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.

D. 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 New South Wales government review,

[49] R De Graaf et al, "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; see Bakken, Landheim and Vaglum, n 48, 29.

[50] T Overbeek et al, "Comorbidity of Obsessive – Compulsive Disorder and Depression: Prevalence, Symptom Severity, and Treatment Effect" (2002) 63(1) *Journal of Clinical Psychiatry* 1106; BO Olatunji, JM Cisler and DF Tolin, "A Meta-Analysis of the Influence of Comorbidity on Treatment Outcome in the Anxiety Disorders" (2010) 30(6) *Clinical Psychology Review* 642.

[51] Please note that comorbidity also includes addictions. See Cote and Hodgins, n 4; Frost, Moffitt and McGee, n 48; DN Klein et al, "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; see also De Graaf et al, n 49, 461–467.

[52] Australian Bureau of Statistics, "Mental Health 2017–2018 Financial Year" (12 December 2018) <https://www.abs.gov.au/statistics/health/health-conditions-and-risks/mental-health/latest-release>.

[53] Sixty-five per cent of newly incarcerated women and 36% of newly incarcerated men reported a history of mental health concerns; 18% of new prison entrants were referred for observation and treatment upon arrival to prison due to mental health concerns. See Australian Institute of Health and Welfare, *The Health of Australia's Prisoners* (Australian Government, 2019) 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 et al (eds), *Primary Care Mental Health* (CUP, 2018) 343–352; 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; J McCarthy et al, "Autism Spectrum Disorder and Mental Health Problems Among Prisoners" (2015) 30(S1) *European Psychiatry* 1.

[55] See Kavanagh and Mueser, n 18; Kenny et al, n 18; Torrey, Tepper and Greenwold, n 18.

[56] See Kavanagh and Mueser, n 18; Kenny et al, n 18; Torrey, Tepper and Greenwold, n 18.

[57] See Kavanagh and Mueser, n 18; Kenny et al, n 18; Torrey, Tepper and Greenwold, n 18.

[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.

this sequential approach to treatment – where treatments are administered in a linear, sequential manner – can often result in externally imposed barriers 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 above, health treatment systems often operate as segregated silos of knowledge working in parallel.[62] For the defendant with comorbid diagnoses and a 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, as opposed to one service that facilitates treatment for all three issues;[63] it could also be predicted that the likelihood of them successfully being able to access any service would be less than that of the average person in the population. The comorbid issues are also likely to have an impact on their ability to reliably attend court, which may compound their legal problems. An integrated approach would: facilitate management of their mental disorder via the appropriate services; provide support to enable them to maintain stable accommodation and a stable financial situation; and facilitate court attendance by, for example, 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 issues. It can lead to problems ranging from difficulties in getting to multiple appointments due to health issues and/or lack of funds, to increased distress, to creating a further sense of disempowerment, thereby exacerbating mental health issues or encouraging further offending behaviour (eg 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 "no wrong door" policy 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 necessary to address their global situation. This approach could very usefully be extended to include contact with the criminal justice system.

[59] See Mental Health and Drug and Alcohol Office, n 18, 9; H Proudfoot et al, "Comorbidity and Delivery of Services" in M Teesson and H Proudfoot (eds), *Comorbid Mental Disorders and Substance Use Disorders: Epidemiology, Prevention and Treatment* (Department of Health and Ageing, Australian Government, 2003).

[60] R Renger et al, "Defining Systems to Evaluate System Efficiency and Effectiveness" (2017) 17(3) *Evaluation Journal of Australia* 4.

[61] RE Drake et al, "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 and 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 et al, "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; Torrey, Tepper and Greenwold, n 18.

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

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

[64] Australian Government, *Budget: National Mental Health Reform* (2011) 5.

[65] Queensland Health, n 2.

III. THERAPEUTIC JURISPRUDENCE

A. What TJ Has to Offer

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 Winick in the United States,[67] TJ aims to make 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 these individuals.[68]

TJ employs a range of techniques that focus on engaging with defendants and their needs and encouraging the process of internalising 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]

Traditional TJ approaches have emerged via initiatives to create specialist, problem-solving or solution-focused courts.[71] While TJ principles have been used successfully in "problem-solving" courts,[72] 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 (for those on bail who need referral for support to prevent reoffending) and the Assessment and Referral Court list (for those suffering from mental health or cognitive impairment) – have become examples of best practice in supporting mainstream TJ court practices.[74]

B. Mainstreaming TJ

The TJ movement was initially focused on developing and promoting TJ practices among 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]

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[66] See Edgely, n 34; 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; B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7; M King, *Solution-Focused Judging Bench Book* (AIJA, 2009) 24; M King, "The Therapeutic Dimension of Judging: The Example of Sentencing" (2006) 16(2) JJA 92.

[67] David B Wexler, "The Development of Therapeutic Jurisprudence: From Theory to Practice" (1999) 68 *Review of Jurisprudence University of Puerto Rico* 691.

[68] Wexler, n 67; see also E Zafirakis, "Curbing the Revolving Door Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens" (2010) 20 JJA 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, n 14.

[70] See Winick and Wexler, n 66.

[71] See, eg, Jelena Popovic, "Mainstreaming Therapeutic Jurisprudence in Victoria: Feelin' Groovy?" in Greg Reinhardt and Andrew Cannon (eds), *3rd International Conference on Therapeutic Jurisprudence: Transforming Legal Processes in Court and Beyond* (AIJA, 2014) 187, 190; Lacey Schaefer and Mary Beriman, "Problem-Solving Courts in Australia: A Review of Problems and Solutions" (2019) 14(3) *Victims and Offenders* 344.

[72] See Edgely, n 34.

[73] See, eg, 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" (International Conference on Law and Society, Magistrates' Court of Victoria, State of Victoria, 2012) 4.

[75] Segev, n 73, 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; Wexler (2014), n 6.

[76] See Wexler, n 14; Winick and Wexler, n 66.

[77] See Wexler and Rogers, n 6; Wexler, n 14.

Mainstreaming encourages analysis of 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 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 used 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 that has (at times) led to the dismantling of many of these courts.[83] The was the case in Queensland in the mid-2000s[84] and also in other jurisdictions, most notably in the United Kingdom 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 courts. This process would also, ideally, help to improve overall (and sentence) outcomes for those who would benefit from a TJ approach, and mitigate the difficulties that the current health care system has in screening and reaching this population, due to the complicated nature of their presentations (as discussed above). A mainstreamed TJ approach could potentially act as an advance screening step and first point of contact for defendants who have unidentified mental health or other needs that underpin their offending behaviour. This is a necessary step to counteract what has been described as the "criminalisation of mental illness".[86]

IV. METHODOLOGY

A. Research Questions

The questions asked of the south-east Queensland jurisdiction in this article are the following:

(1) What features are already present in the Queensland legislative and court landscape that would enable the mainstreaming of TJ practices in the magistrates courts?
   (a) What "bottles" are present?
   (b) What "wine" is present?

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[78] See Segev, n 73; Brooks, n 75; Wexler (2014), n 6.

[79] See Wexler (2011a), n 6, 38.

[80] See Wexler (2014), n 6.

[81] See Wexler (2011b), n 6, 278.

[82] See Wexler (2010), n 6; Wexler (2014) n 6.

[83] Monidipa Fouzder, "Renewed Call for Problem-Solving Courts to Be Piloted", *The Law Society Gazette*, 30 August 2016 <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", *BBC News*, 17 March 2016 <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", *Brisbane Times*, 13 September 2012 <http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html>.

[85] Moore, n 84; see also, eg, Jon Robbins, "Where Next for Community Justice? Pioneering Court Closes", *The Justice Gap*, 24 October 2013 <https://www.thejusticegap.com/next-community-justice-pioneering-court-closes/>; Rita Panahi, "Soft Justice Is Failing Us All", *Herald Sun*, 22 November 2016 <http://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-soft-justice-failing-us-all/news-story/c8498e470d21c60b7901dae20b286cf6>.

[86] ML Perlin, "'Wisdom Is Thrown into Jail': Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness" (2013) XX *Michigan State University Journal of Medicine and Law* 343.

(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?

B. Analysis Method

As mentioned above, the analysis method used in this interrogation is an integration of two methodologies that map well onto each other. It is a "wine and bottles" analysis,[87] enriched with reference to the principles of SET.[88] SET focuses on using proven systems theory principles to guide evaluation of real-world systems. It has a solid theoretical basis,[89] which is particularly useful for evaluating programs and systems.[90] This usefulness stems from being able to capture a holistic view of the parts, rules and actors within a system, rather than a linear analysis without an awareness of context that is difficult to interpret in real-world conditions.[91] The inclusion of SET within the analysis improves the systemic robustness of the jurisdictional analysis, with acknowledgment that court systems (and systems of care and control) are highly complex, non-linear and often synergistic, and are embedded within larger, more complex societal systems.

In general, within the system analyses literature the principle components of an effective analysis are: the boundaries; the components; and the relationships.[92] Similarly, there are three guiding principles of SET, associated with the corresponding parts of a traditional "wine and bottles" analysis (provided in brackets):

(1) *Define the system before evaluating for efficiency and effectiveness*. This includes 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 welcoming is this jurisdiction to TJ?)

This research applies the steps of the above 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, 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?

[87] See Wexler and Rogers, n 6.

[88] See Renger, n 8.

[89] See Buckley (1998), 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?" (Occasional Paper No 1, Local Community Services Association, 2017) <http://resultsaccountability. com/wp-content/uploads/2014/03/No1-Whats-wrong-with-logic-models.pdf>; see also Renger et al, n 60, 4.

[92] MB Hargreaves and D Podems, "Advancing Systems Thinking in Evaluation: A Review of Four Publications" (2012) 33(3) *American Journal of Evaluation* 462; Williams and Hummelbrunner, n 7.

- What programs are in operation within the jurisdiction?
- What 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 – that is, efficiency from a TJ perspective. This is 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 – that is, evaluating how welcoming this jurisdiction could be to mainstreaming TJ practices within magistrates courts.

C. Data Collection

Data collection involved the following:

(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 magistrates jurisdiction for the potential for TJ mainstreaming to occur.

V. Results

A. The "Bottles": Court Structures

1. Mainstream Courts

The courts operating in south-east Queensland are the Queensland Civil and Administrative Tribunal, the magistrates courts, district courts, Supreme and Federal Courts, and Courts of Appeal.[93]

2. Specialist or Problem-solving Courts

The previous Newman State Government saw 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 in south-east Queensland.

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, which includes elders in a yarning circle for sentencing so as to recommend suitable programs for Indigenous defendants;[96]
- a specialist Drug and Alcohol Court, which has been in operation in Brisbane since 2018;[97]
- the Special Circumstances Diversion Program,[98] which offers a range of multidisciplinary referral options for defendants with drug and alcohol issues, mental health or cognitive impairment, and

[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" (Chambers of the Chief Magistrate, 2015).

[96] See Rinaudo, n 95, 26.

[97] QNADA, "Reinstatement of Queensland's Drug and Alcohol Court" (2018) <https://qnada.org.au/reinstatement-queenslands-drug-alcohol-court/>.

[98] See Rinaudo, n 95, 26.

other life situations such as homelessness, which have brought them into contact with the criminal justice system;[99] and

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

3. Specialist Court Programs

In addition to a legislative regime that is TJ friendly, there are several structured programs currently in operation in the south-east Queensland courts that are designed to ensure defendants have access to treatment and support. These programs act 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 involves a bail-based process designed to facilitate referrals to agencies to try to address the causes of the offending behaviour (eg intellectual disability, drug or alcohol addiction or dependency, mental illness and 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]

B. 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 guides diversion from criminal court proceedings, bail conditions, sentencing and post-court processes.[103] Finally, the legislation that provides the conditions and processes that lead to release from custody during time served can also be useful from a TJ perspective.[104] Examples of TJ-friendly legislative provisions are discussed in detail below.

C. Diversion

Diversion from court proceedings in the Queensland context means diversion 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 defence of unsoundness of mind.[106] Within the magistrates 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

[99] See Rinaudo, n 95, 27.

[100] See Rinaudo, n 95; see also Christine Bond et al, "Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport: Summary and Final Reports" (Queensland Courts, 2017) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/515428/dfv-rpt-evaluation-dfv-court-southport-summary-and-final.pdf>; Queensland Courts, "Specialist Domestic and Family Violence Court" (2011) <https://www.courts.qld.gov.au/courts/domestic-and-family-violence-court>.

[101] Rinaudo, n 95, 7.

[102] Rinaudo, n 24, 23.

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

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

[105] Fiona Davidson et al, "Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia" (2017) 24 *Psychiatry, Psychology and Law* 1.

[106] *Mental Health Act 2016* (Qld) s 3(b); see also s 116.

[107] *Mental Health Act 2016* (Qld) ss 171–174.

magistrates courts 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 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 defence for the offence in question.[109] If they do, they can then be placed on a Forensic Order.[110]

A diversion approach focuses 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-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.

D. 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 a type of "glass blowing", 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) 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.[113] Additionally, s 11(9A) states that the court can impose a bail condition that the individual complete a drug and alcohol assessment referral course.[114]

The *Bail Act* also contains provisions designed to facilitate an investigation by appropriately qualified professionals to enable a better understanding of the defendant's needs. Specifically, under s 11(6) 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.[115] 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 the court has for the defendant's wellbeing.

Additionally, under s 11A a person who has an intellectual impairment due to a mental health or cognitive disorder, and does not appear to understand the charges, can be released into the care of the person who normally cares for them, or may otherwise be free to go. However, they must be served (along with their carer) with a notice to appear for the court proceedings.[117]

[108] See Rinaudo, n 95, 27.

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

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

[111] See, eg, Anestis and Carbonell, n 4.

[112] Wexler, n 14, 465.

[113] *Bail Act 1980* (Qld) s 11(9).

[114] *Bail Act 1980* (Qld) s 11(9).

[115] *Bail Act 1980* (Qld) s 11(6).

[116] *Bail Act 1980* (Qld) s 11(7).

[117] *Bail Act 1980* (Qld) s 11B.

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 to ensure the defendant does not endanger the welfare of themselves or others, or interfere with witnesses. Also, under s 11(3) the court has the ability to ban a person from specific licensed premises and the precinct adjoining them, which could be useful in cases of dual diagnoses with alcohol-related issues.[119]

It is worth noting that it is not an offence or breach of bail not to meet the conditions imposed under s 11 powers (see s 29(2)(c)). However, if the defendant does not meet the conditions that have been imposed by the court, then bail can be revoked using s 30(2)(b)(ii).

E. Sentencing

The usual aims of sentencing are to: punish an offender; deter future criminal acts; "denounce" the offending behaviour; protect the community; and 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 percentage of time in the original sentence.

Factors that 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] – 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 in place after release 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 interventions from the behavioural sciences and field of medicine. This includes consideration of the wider network of the defendant, including their peer group, family, friends, employer and other services involved in their support.

In Queensland, the following guiding provisions from the *Penalties and Sentences Act 1992* (Qld) appear to be "TJ friendly": 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 that 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. Further, a court-imposed sentence is likely to have sufficient coercive authority to ensure the defendant engages in accessing practical support and in the therapeutic change process. The TJ-friendly sentencing options include: diversion from court proceedings;[125] discharge;[126] bonds;[127] fines;[128] Community Service

[118] *Bail Act 1980* (Qld) s 11(2).

[119] *Bail Act 1980* (Qld) s 11(3).

[120] See *Penalties and Sentences Act 1992* (Qld) Pt 1.

[121] *Penalties and Sentences Act 1992* (Qld) Pt 9 Div 2.

[122] Spencer, n 22, 4; Wexler, n 14.

[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: *Penalties and Sentences Act 1992* (Qld) ss 15B–15F, 16–19, 20–21. Property offences: *Penalties and Sentences Act 1992* (Qld) ss 22–28. Other bonds: *Penalties and Sentences Act 1992* (Qld) ss 29–33.

[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.

Orders;[129] probation;[130] Intensive Correction Orders;[131] imprisonment;[132] concurrent sentences;[133] wholly or partially suspended sentences;[134] taking into account pre-sentence custody time;[135] parole conditions;[136] restitution and compensation orders;[137] non-contact orders;[138] and 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 can behave in a way that is 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] and
- Aboriginal or Torres Strait Islander community justice group submissions – that is, submissions regarding the defendant's relationship with the community, cultural considerations, programs or services established by a community justice group.[149]

When the court determines a defendant's character, relevant matters to be considered include aspects that encourage TJ practices, such as any significant contributions made to the community by the defendant,[150] and any other matters the court considers relevant.[151] The court has the discretion to take these factors

[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 143–151A.

[133] *Penalties and Sentences Act 1992* (Qld) s 159A.

[134] *Penalties and Sentences Act 1992* (Qld). For suspended sentences, see s 151A, and otherwise ss 160–160H.

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

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

[137] *Penalties and Sentences Act 1992* (Qld) Pt 3B ss 43G–43O.

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

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

[140] *Penalties and Sentences Act 1992* (Qld) s 9(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) s 9(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).

[150] *Penalties and Sentences Act 1992* (Qld) s 11(b).

[151] *Penalties and Sentences Act 1992* (Qld) s 11(c).

into account as a motivating factor for defendants to engage in therapeutic processes so as to improve their life circumstances.

Further areas within the legislation that encourage the use of TJ 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 encourage defendants to take responsibility for their actions is a guilty plea, which may also reduce the sentence imposed.[155]

TJ principles aim to address the needs of victims by incorporating restorative justice and practical support, including compensation. Queensland legislation allows for meaningful involvement of victims of crime in the sentencing process, including taking into account the impact of the offence on the victim.[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 above, some jurisdictions (eg 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 does not 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 article to evaluate to what degree the measures in the legislation are already being made use of in the magistrates courts towards therapeutic aims.

F. 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 lawyers, barristers, magistrates, 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] variously qualified staff from non-governmental organisations designed to provide specific support, and volunteers 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 south-east Queensland are utilising TJ-friendly practices. Anecdotal evidence from the Court Liaison Service personnel suggests that practices among legal professionals and magistrates are widely variable and idiosyncratic.

The roles of magistrates, prosecutors and defence lawyers are crucial in facilitating TJ within the court system. As articulated by Wexler, defence lawyers have an important role in working with their defendants to identify underlying causes for their offending behaviour, finding potential treatment and

[152] *Penalties and Sentences Act 1992* (Qld) s 12(2)(c).

[153] *Corrective Services Act 2006* (Qld) s 344.

[154] *Corrective Services Act 2006* (Qld) s 10.

[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, n 14, 465.

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

support options, and making submissions to the court regarding this.[161] Defence lawyers are also in a privileged position to help their defendant to define and articulate their treatment goals, and to inform their defendants of their options.

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 the development 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]

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 would 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 that 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, and regular review by, a consistent magistrate.[168] When dealing with the defendant, a TJ approach encourages the magistrate to make use of therapeutic approaches that 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 to 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 to provide individually tailored judicial responses to that particular offender as the relationship develops,[171] including consistent and predictable behavioural rewards and punishments.[172]

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

[162] See Wexler, n 161, 111; see also Wexler, n 14.

[163] Stephanie Taplin, "The New South Wales Drug Court Evaluation: A Process Evaluation" (BOSCAR, NSW Government, 2002) <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 JJA 220.

[165] See Waterworth, n 164 for an evidence-based, comprehensive description of therapeutic microskills, as well as a review of the literature supporting this description.

[166] See Segev, n 73, 529; David B Wilson, Ojmarrh Mitchell and Doris L Mackenzie, "A Systematic Review of Drug Court Effects on Recidivism" (2006) 2 *Journal of Experimental Criminology* 460.

[167] See Waterworth, n 164; Spencer, n 22.

[168] Wexler, n 14; see also Wilson, Mitchell and Mackenzie, n 166, 459.

[169] Waterworth, n 164.

[170] See Wexler, n 161; Bruce J Winick, "Therapeutic Jurisprudence and Problem Solving Courts" (2002) 30 *Fordham Urban Law Journal* 1055, 1060.

[171] 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.

[172] See Wilson, Mitchell and Mackenzie, n 166, 459.

A strengths-based approach would see the magistrate search for and comment on the defendant's strengths to construct a foundation for positive change,[173] condemn the behaviour and 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 court outcomes.[176]

A TJ-inspired magistrate would encourage family and friends to attend court as witnesses to the defendant's participation and improvement, as well as to learn about the participant's release conditions and 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' "dos 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 to the successful prosecutor; however, they 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 and 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 reasonably new for some judges, and so require thoughtful and ongoing professional development;[189] tools and supporting research in this area are available.[190]

[173] Waterworth, n 164; Wexler, n 171.

[174] Waterworth, n 164; Wexler, n 171.

[175] Waterworth, n 164; Wexler, n 14.

[176] Waterworth, n 164; Wexler, n 14.

[177] Gill McIvor, "Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts" (2009) 9 *Criminology and Criminal Justice* 37; Wexler, n 171; Bruce J Winick, "Therapeutic Jurisprudence and Problem Solving Courts" (2002) 30 *Fordham Urban Law Journal* 1083.

[178] See Wexler, n 161, 279.

[179] See Wilson, Mitchell and Mackenzie, n 166, 460.

[180] See Wexler, 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] Maruna, n 181.

[183] David B Wexler, "Robes and Rehabilitation: How Courts Can Help Offenders 'Make Good'" (2001) 38 *Court Review* 18.

[184] Wexler, n 14.

[185] Wexler, n 14.

[186] Wexler, n 171, 79.

[187] Spencer, n 22, 4.

[188] Spencer, n 22, 4.

[189] Spencer, n 22, 4.

[190] See Waterworth, n 164.

VI. Discussion

Overall, when adopting a SET-enhanced "wine and bottles" analysis of the magistrates jurisdiction in south-east Queensland, it would seem, at face value, that 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 court programs in place for diversion and some specialist courts in operation, and as such the groundwork is 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 seems existing provisions can be used by the justice system in a therapeutic manner to facilitate defendants to access and engage in treatment, to work towards 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 its magistrates courts.

A. Mainstreaming TJ: The Barriers

Unfortunately, it is beyond the scope of this research to review systematically the current practices in the magistrates 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 is logical to consider any potential barriers.

Potential barriers that deserve consideration relate to the practical constraints of available resources, including 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 that are more difficult to define but which a SET analysis highlights as key parameters to system functioning include:

- societal and cultural resistance to change, which in turn would be strongly linked to community and legal system perceptions and models of justice;
- political agendas and levels of awareness of the causes for recidivism;
- organisational values; and
- leadership culture with regards to defendant therapeutic input.

A move to mainstream TJ within the magistrates courts of south-east Queensland would most likely need to address these (as yet) undefined variables as effective entry points to system change.

B. Is There Policy Support?

National health policy frameworks appear to be largely supportive of a move to mainstream TJ, primarily 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 health care, which is already occurring in the Queensland jurisdiction with the court referral programs such as QMERIT. However, 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 rather than merely a referral entry point – a process that is expressly intended by the mainstreaming TJ movement.

[191] Wexler, n 14, 465.

[192] As noted by Wexler, 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* (Vic) s 48K, Div 4, s 21).

[193] Mental Health and Drug and Alcohol Office, n 18, 9–10.

Additionally, a move to mainstream TJ practices would help to 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 south-east 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 noted above, the policy endorses the "no wrong door" approach and articulates treatment principles that 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 encourage an integrated 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.

C. Improved System Efficiency

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 utilise judicial communication techniques and make 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 include: 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.

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[194] Council of Australian Governments, *The Roadmap for National Mental Health Reform 2012–2022* (2012).

[195] Queensland Health, n 2.

[196] COCE, "Overarching Principles to Address the Needs of Persons with Co-occurring Disorders" (Overview Paper 3, Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services, 2006); K Minkoff, "Behavioural Health Recovery Management Service Planning Guidelines Co-occurring Psychiatric and Substance Use Disorders" (Office of Alcoholism and Substance Abuse, Illinois Department of Human Services, 2001).

[197] See Queensland Health, n 2.

[198] Anestis and Carbonell, n 4; 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.

[199] Anestis and Carbonell, 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, n 4, 1105; PA Dirks-Linhorst Linhorst, "Recidivism Outcomes for Suburban Mental Health Court Defendants" (2012) 37 *American Journal of Criminal Justice* 76; Moore and Hiday, n 199, 659; PJ Burns, VA Hiday and B Ray, "Effectiveness 2 Years Postexit of a Recently Established Mental Health Court" (2013) 57 *American Behavioral Scientist* 189; VA Hiday, HW Wales and B Ray, "Effectiveness of a Short-Term Mental Health Court: Criminal Recidivism One Year Postexit" (2013) 37 *Law and Human Behavior* 401.

[201] See Moore and Hiday, n 199, 659.

[202] Spencer, n 74, 4.

[203] See, eg, Waterworth, n 164.

D. Magistrates' Court Craft

As noted by Spencer, "TJ skills" could be a new skillset for some magistrates, depending on their professional background and experience.[204] Effective and targeted professional development is needed to develop these skills.[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 professionals. These could be utilised by magistrates wishing to upskill.

Additionally, recent literature provides a behavioural definition of effective therapeutic behaviours for magistrates in court,[206] as well as a means of measurement.[207] These could be used by magistrates to review recordings of their own work and develop their therapeutic court craft skills.[208]

E. 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 in order to: facilitate judicial monitoring post-sentence as part of a Community Corrections Order so as to help defendants to deal with or prevent relapse;[209] and 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 useful to protect TJ from political changes and the vagaries of public opinion related to current events.[210] It is also important that expansive judicial discretion is avoided, as there is the danger of judges' moral views having too much influence on their decision-making – a perception that could undermine the mainstreaming of TJ.[211]

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

VII. Conclusion

For many individuals suffering from serious psychological, physical, financial and legal problems, contact with the court system offers both a crisis point and an opportunity for significant therapeutic change – if TJ principles are applied. 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 TJ approaches has the potential to address these problems, as well as: other less-tangible negative effects on mental health concerns; the impact of criminality and incarceration on individuals, their families and social networks, as well as any victims of offending behaviour; and improvement of the systems of care and control and the wellbeing of 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 could provide useful therapeutic intervention for the defendant population.

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[204] Spencer, n 22.

[205] Spencer, n 22.

[206] See Waterworth, n 164, 220.

[207] See Waterworth, n 164, 222.

[208] Waterworth, n 164.

[209] See Spencer, n 74.

[210] See n 85 for several articles that relate to this issue.

[211] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (OUP, 3rd ed, 2012) 36–68, cited in Segev, n 73.