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**Problem Solving Courts and Therapeutic Jurisprudence
in the children's jurisdiction**

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In the last couple of decades in the United States and in more recent times in Australian and other jurisdictions there has been a recognition of the failure of traditional law enforcement, judicial and corrective strategies to meet community needs. Amongst the changes in court processes has been the development of "problem solving" or "specialist" courts. In December 2002-January 2003 I traveled to the United States as the recipient of a Winston Churchill Memorial Trust Fellowship to study some of these so-called courts. Those that I visited, located in seven jurisdictions throughout the U.S. were in fact not "courts" in the way we would define them but programmes specially designed generally without a legislative basis in response to cases or offenders of a particular type with processes determined by local rules or policies.

Problem-Solving courts

The audience here would all be familiar with the original and most common type of specialized court being the drug court. Although there are competing claims concerning the origins of the first Drug Court in the U.S.¹, it is fair to say that the drug court movement began in the late 1980's as a new judicial strategy, in response to the increase in drug related crime. Following the development of drug courts, other "specialist" or "problem-solving" courts have emerged. It is interesting to note that the development of these new specialty courts runs contrary to court reforms in the previous decades, which were concerned with increasing efficiency and timeliness. Under the specialist or problem-solving model the court is not concerned with the volume of cases processed but with solving the problem that brings the offender before the court.

¹ The first Drug Court is generally believed to have been developed by Judge Stanley Goldstein in Miami in around 1989

Therapeutic Jurisprudence

Although it appears that these court programmes developed as a practical response to the failure of the judicial system adequately to address particular problems, rather than pursuant to legal theory, the notion of “therapeutic jurisprudence” has been put forth as the legal theory underpinning the approach taken in these courts.² Although therapeutic jurisprudence as a study preceded the specialist court movement, the nexus between the two was made at a later stage. Therapeutic jurisprudence and problem-solving courts are not the same. Therapeutic jurisprudence is concerned with the effect of legal processes on the wellbeing of individuals as the effects can promote or hinder the goals of the justice system. Problem solving courts on the other hand are concerned with solving the problems that lead to a person’s appearance in court. However, many of the tools utilized in problem solving courts are also consistent with promoting the well being of the participants. In this way problem-solving courts can be seen as an excellent example of the application of therapeutic jurisprudence to the criminal justice system.

The adoption of processes and procedures which promote therapeutic outcomes for offenders can be most clearly seen in drug courts, drink-driving courts and mental health courts in which treatment of substance-abusing or mentally ill offenders is monitored and supervised by a judicial officer. In other specialist courts, processes which promote the well being of others affected by the legal system are also employed. For example, in domestic violence courts, processes which promote therapeutic outcomes for victims of domestic violence are utilized. The study of therapeutic jurisprudence is even concerned with processes which promote the well being of court officers, judicial officers, lawyers and witnesses. One of the most interesting courts I visited, which adopts a therapeutic approach was a child welfare court in Miami. In this court the effect of the legal processes upon the children, their parents, the welfare officers, the judicial officer and treatment providers have all been considered.

Miami-Dade County Drug Dependency Court

Judge Jeri Cohen, a judicial officer who has supervised and monitored offenders in treatment programmes for many years started the Miami Dependency Drug court in 1999. Judge Cohen adapted the model she had utilised in a DWI court for alcohol and substance abusing offenders to a child welfare court setting. As with all of the specialized courts utilising judicial monitoring and supervision, there is no legislative framework for the court programme. Rather it is a court programme developed by Judge Cohen in partnership with relevant stakeholders as a result of her experience to meet the needs and attempt to solve the problems of a particular community. This court is one of eight mentor courts from various parts of the US in the dependency (that is child welfare) jurisdiction and Judge Cohen has played a key role in the

² David B Rottman, “Does Effective Therapeutic Jurisprudence Require Specialized Courts (And do specialized courts imply specialist Judges)?” (2002) 37 Court Review 22 at p23 and footnotes

training of other judges in setting up the more than 100 drug dependency courts now in existence across the country.

Dade County, centred on the city of Miami, with 2.5 million residents, has the fourth largest population of any county in the U.S. So far as child welfare cases are concerned, according to Judge Cohen, over 90% of the parents involved have substance abuse problems and a significant proportion suffer from mental illnesses. Just as the underlying aim of treatment courts in the criminal justice system is to reduce or eliminate recidivism by treating drug abuse and addiction, the underlying aim in this court is to identify and treat the problems which inhibit parents in adequately caring for their children. The court has all the hallmarks of other problem-solving courts:

- It is holistic so that services address substance abuse, parenting, psychiatric and psychological care, housing, training and education, medical services, family planning services and assessments and interventions for abused and neglected children.
- It is collaborative rather than adversarial. All players including lawyers are concerned with ensuring that their clients' needs are met rather than asserting their clients rights.
- The judge monitors and supervises the participants, encouraging and praising the parents where appropriate and applying sanctions where necessary

Participants (that is parents who have not been able to care for their children) spend between 12–15 months on the programme and appear in court regularly throughout that period. Most participants commence in residential treatment and are required to attend court only once per month at that stage. If they commence in an outpatient intensive supervision regime, they attend court once per week. In the latter part of the programme, clients attend every two weeks and then once per month. In the last three-month phase, the parent does not attend court to ensure that a co-dependency between him or her self and the court, which has inevitably developed, is broken.

Throughout the programme the participants are required to contact the addiction or mental health specialist daily, to undergo twice-weekly drug testing and to regularly attend Alcoholics Anonymous or Narcotics Anonymous. In order to graduate the participant must complete all aspects of the case plan. For example, mental health treatment (including medication) must be complied with, counseling or other treatment for parents who have been the victims of sexual or physical abuse must be undertaken and orders removing persons who have a negative influence on the family such as violent or drug-affected partners must be complied with. Parents are also required to undergo parenting classes, obtain suitable housing, obtain employment where possible and seek family planning services.

The staff attached to this court are trained specialists in substance abuse and mental health. These specialists undertake the drug and alcohol and mental health assessments and develop a comprehensive case plan for each participant. Treatment providers are required to report on the progress of clients to the court and cannot

release clients from treatment without the consent of the court. The court also employs psychologists who supervise the specialists in engaging parents and their families to participate in their case plan. The aim is to follow a therapeutic model in which addiction specialists not only report on compliance, but also interact therapeutically with and advocate on behalf of the parents. There is also a nurse who meets with participants on site at the courthouse on each court day and during the week to assist with ongoing health problems.

The day I spent with Judge Cohen was the last day that she was sitting in the court after having been the presiding judge since its inception. Each of the cases dealt with represented an example of the highly complex nature of the problems faced by clients in the child welfare court system. Through participation in this problem-solving approach many parents have been able to transform their lives through the support of the court to a degree that they are able to gain and maintain custody of their children. Judge Cohen is of the view that even failure to comply with the court programme can be seen as a success if the parents' lack of commitment can be determined early, as a permanent alternative placement for the child can then be proceeded with expeditiously.

The therapeutic effects of this court approach can be felt by many of those affected by the courts processes. In addition to the obvious therapeutic effect that the programme has upon the parents and their children, the wellbeing of the judge who acts more like a coach than an arbiter can be seen. It has also been described as increasing the morale of all system players, especially the child welfare workers who, for the first time, see the process of bringing families before the court contributing to making families healthy and creating safe permanent homes for children.”³

The Welfare Jurisdiction in Australia

Under child protection legislation generally in Australia, there has been a trend in recent years for agencies to focus on the needs of the child said to be in need of care rather than investigating and proving a particular event. This approach is consistent with problem-solving. There are also features of the approach taken in many child welfare courts which are consistent with promoting therapeutic outcomes for participants. However, the approach taken in the specialist US courts involves quite a departure from the processes taken in welfare courts in almost all Australian jurisdictions. The only exception I have been able to identify is a particular programme taken in the Magistrates court in Geraldton in Western Australia which is directly modelled on the US treatment courts. This programme is only in its infancy and has not dealt with sufficient participants for any conclusions about its success to be drawn.

³ Nancy K Young PhD, Sidney L Gardner, PPA, “Navigating the Pathways: Lessons and promising practices in linking alcohol and drug services with child welfare” 2002. SAMHSA Publication No. SMA 02-3639 Rockville, MD: Centre for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, April 2002 at p88-89

Problem-Solving Approaches in the Children's court criminal jurisdiction

Youth Drug courts are also widespread in the United States and are regarded as highly successful. In recent years they have also been developed in many Australian jurisdictions. However, in the US most of the other models available for adults developed in response to problems such as mental health and domestic violence have not been specifically developed for juveniles. I am aware of only two examples of juvenile mental health courts, both of which are located in California.⁴

There are "teen courts" available in a number of US jurisdictions which operate as a court diversion programme similar to Youth Conferencing available in most Australian states. The teen courts are however only available for first-time misdemeanors. The "courts" are presided over by an adult judge (actual or a lawyer volunteer) and are made up of teenage volunteers and former teen defendants. It has been said that requiring former defendants to serve on these "juries" is an important feature being "a type of reintegration ceremony, indicating to the former defendant that he or she is capable of participating responsibly in society".⁵ Teen juries, in the same way, as youth conferences are consistent with a restorative justice model and represent a positive and effective example of therapeutic justice.

The effective approach taken in matters involving indigenous offenders in which elders from the community participate in sentencing has been extended to juvenile offenders in Victoria with the commencement of the Children's Koori Court in Melbourne on 10 September 2005. It can be anticipated that this model of justice will have a powerful therapeutic effect on a range of those affected by the law including not only the offender and victim but the participating elders who represent the community, the judicial officer, the defence lawyers and even the prosecutor. A specially designed therapeutic model is also available to children as well as adults under the Geraldton Alternative Sentencing Regime in regional Western Australia.

Generally however, I do not think that the arguments which support the creation of problem solving courts are as powerful with respect to the children's criminal jurisdiction as they are with adults. This is because the children's criminal jurisdiction is one which is fundamentally focused upon therapeutic outcomes and rehabilitation in any event. There are already many therapeutic tools available for the judicial officer in the children's jurisdiction which are not similarly available for adult offenders except generally through the creation of specialist courts. In the children's court although a traditional adversarial approach must still of course be taken to determining guilt and resolving factual disputes, there is no reason why a therapeutic and problem solving approach cannot be taken to other tasks such as sentencing and determining bail conditions, particularly in this jurisdiction.

⁴ These are the Court for the Individualized Treatment of Adolescents in Santa Clara and the Los Angeles Juvenile Mental Health Court

⁵ David B Wexler "Just some juvenile thinking about delinquent behavior: A therapeutic jurisprudence approach to relapse prevention planning and youth advisory juries" 2000 The University of Missouri at Kansas Law Review 69 UMKC L Rev 93

The US experience-can it be applied in Australia?

It is important to bear in mind that responses that have been developed in the US to problems which appear to be similar to those encountered here may not necessarily be the most appropriate in the Australian context.

As I have already indicated, in the children's criminal jurisdiction in particular it may be unnecessary to create more problem-solving courts as the nature of that jurisdiction is both problem-solving and therapeutic. So long as services for young people within the criminal justice system are well resourced, there is great potential for the promotion of therapeutic processes in this jurisdiction which thus promote the goals of the justice system.

In the welfare or care jurisdiction however, although a more problem-solving approach is taken in all jurisdiction, than was previously the case, this approach has not been extended to the extent that it has in the United States. As welfare agencies in all Australian jurisdictions continue to grapple with better ways to respond to this enormous problem in our community a similar approach to that taken in the US treatment courts ought to be at least considered for implementation here.