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# A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders

Ann-Claire Larsen

*Edith Cowan University*, [a.larsen@ecu.edu.au](mailto:a.larsen@ecu.edu.au)

Peter Milnes

*Edith Cowan University*

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## A CAUTIONARY NOTE ON THERAPEUTIC JURISPRUDENCE FOR ABORIGINAL OFFENDERS

Ann-Claire Larsen and Peter Milnes\*

Therapeutic jurisprudence (TJ) is a recent legal practice reform, requiring judges and lawyers to attend to offenders' wellbeing. Despite being lauded as the 'most prolific vector' of the Comprehensive Law Movement, TJ has also been condemned as ineffectual, even dangerous. In this paper we review TJ in three sections: the problems TJ seeks to address, how TJ is applied and its requirements, and the new problems TJ produces. This paper exposes tensions between established legal principles and efficacy or recidivism concerns that drive the TJ agenda. It concludes that a judiciary that concerns itself with offenders' social and psychological problems may undermine established legal principles.

### 1 Introduction

Therapeutic jurisprudence (TJ) is a new legal reform requiring judicial officers and lawyers to promote offenders' 'wellbeing'<sup>1</sup> to improve their rehabilitative prospects. Proponents of TJ promise that these reforms will relieve the 'prison crush' in Australia's overcrowded prisons and address over-representation of Indigenous people in the criminal justice system. TJ has raised theoretical questions again about the appropriateness of rehabilitation projects<sup>2</sup> involving treatment, the 'one size fits all'<sup>3</sup> approach to offenders and mandatory sentencing. In the scramble to address recidivism, further questions must be asked about what is lost and gained in applying TJ reforms: are they informed by research-based evidence including local socio-cultural considerations, how are individual offenders assessed, are judges and

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\* Ann-Claire Larsen, BA, LLB, LLM, PhD. Senior Lecturer, School of Law & Justice, Centre for Innovative Practice, Edith Cowan University, 127 Joondalup Drive, Joondalup, Western Australia 6027. Email: [a.larsen@ecu.edu.au](mailto:a.larsen@ecu.edu.au). Ann-Claire Larsen teaches international human rights and professional ethics for the School of Law & Justice at Edith Cowan University.

Peter Milnes PhD; M.Ed.Admin; B.Ed.; B.Div.; Grad.Cert.Intercultural Studies. Adjunct Associate Professor, School of Law & Justice, Edith Cowan University, 127 Joondalup Drive, Joondalup, Western Australia 6027. Email: [peter@belco.com.au](mailto:peter@belco.com.au).

Please direct all correspondence relating to this article to Ann-Claire Larsen.

<sup>1</sup> Michael King, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) June *eLaw: Murdoch University Electronic Journal of Law* para. 1.

<sup>2</sup> Samantha Jeffries, 'How Justice "Gets Done": Politics, Managerialism, Consumerism, and Therapeutic Jurisprudence' (2005) 17 *Current Issues in Criminal Justice*, 258.

<sup>3</sup> See Natasha Bakht, 'Problem Solving Courts as Agents of Change' (2004) 4 February.

<<http://www.iadtc.law.ecu.edu.au/pdfs/Problem%20Solving%20Courts%20Paper%20final%20ppr.pdf>>.

magistrates formally trained to apply TJ principles or are TJ responses idiosyncratic ideas of a magistrate, does treatment conflict with legal principles, are defendants relieved of responsibility for their actions, are victims considered? This paper goes some way to answering some of these questions; but longitudinal research in magistrates' courts is required. Answers will provide a firm base for promoting and instituting legal reforms.

The call for legal reforms followed from court officials' feelings of frustration at the narrow range of sentencing options, the heavy annual cost of incarceration to the Australian taxpayer at approximately \$100 000 per inmate, high rates of recidivism, and the debilitating effects of the legal system on Indigenous people. Recidivism concerns motivate many to seek alternative approaches to dealing with offenders. Following USA Professors David B. Wexler and Bruce J. Winick, founders of the TJ approach to legal reform, proponents began calling adversarial legal processes 'jurigenic'.<sup>4</sup> Like 'iatrogenic' processes in the health care system where some patients suffer harmful, adverse events or death, the adversarial system is deemed to have harmful psychological effects on offenders and court personnel.<sup>5</sup> As a corrective, Wexler and Winick promoted 'care-based judicial alternatives', therapeutic jurisprudence (TJ), in the 1990s as a counter to the rising rates of incarceration and recidivism in the United States.<sup>6</sup> These ideas have influenced reforms in other jurisdictions.

This paper begins by investigating perceived shortcomings of the Australian adversarial system by TJ supporters. It then explores the practical issues confronting the implementation of TJ and the challenges TJ poses to the adversarial system. The paper points to the Geraldton Alternative Sentencing Regime (GASR) in regional

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<sup>4</sup> William Schma, Diane Kjervik, Carri Petrucci, & Charity Scott, 'Therapeutic Jurisprudence: Using the Law to Improve the Public's Health' (2005) 33(Winter) *The Journal of Law, Medicine & Ethics* 61.

<sup>5</sup> Bruce Winick, & David Wexler, 'The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic' (2006) 13 *Clinical Law Review* 610.

<sup>6</sup> Candace McCoy, 'The Politics of Problem-Solving: An overview of the Origins and Development of Therapeutic Courts' (2003) 40 *American Criminal Law Review* 1515.

Western Australia that began in August 2001<sup>7</sup> under the leadership of Magistrate King. The GASR did not have legislative support. In contrast, the Koori courts dealing with Indigenous offenders in Victoria opened in 2002 under the *Magistrates' Court (Koori Court) Act 2002* (Vic).<sup>8</sup> The State Government provided funding for the Koori Court proposal and the Criminal Law Policy Section of the Department of Justice was responsible for developing the legislation required to implement the Koori Court.<sup>9</sup> TJ applications demonstrate the difficulties legal reformers encounter within Australia as well as illustrating the need for considered, well-funded and well-administered legal reforms. This paper calls for careful consideration of TJ programs involving socio-cultural research and rigorous, comprehensive evaluation. Only then will challenges that TJ poses to established legal principles be justified.

## 2 Shortcomings of the Adversarial System

In general, Australia's adversarial legal system is purported to damage offenders' mental health and emotional wellbeing.<sup>10</sup> Legal processes are considered 'alienating and disempowering' as offenders are rushed through the court system without an opportunity to voice or explain their position.<sup>11</sup> Court processes deny defendants an opportunity to express what might be appropriate for him or her to curtail offending behaviour. Dr Andrew Cannon also criticises Australia's adversarial system with, 'the traditional court paternalistic coercive model (we decide what is right and impose sanctions to enforce our view of what is right)',<sup>12</sup> that fails to encourage self-determination. An adversarial court takes a narrow, individualistic approach that

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<sup>7</sup> Michael King and Stephen Wilson, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 32 (2) (March) *Brief* 23.

<sup>8</sup> Mark Harris, 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) *eLaw Special Series* (1) 130.

<sup>9</sup> Mark Harris, "'A Sentencing Conversation'" *Evaluation of the Koori Courts Pilot Program October 2002 – October 2004* (2006) Victorian Aboriginal Justice Agreement, <[http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/3/0/30b2b88045b5b35c8eaceae6d4b02f11/Evaluation\\_of\\_the\\_Koori\\_Courts\\_Pilot\\_Program.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/3/0/30b2b88045b5b35c8eaceae6d4b02f11/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf)>.

<sup>10</sup> David Wexler, 'Therapeutic Jurisprudence' (2004) 20 *Touro Law Review* 356.

<sup>11</sup> Harris, 'The Koori Court', above n 8, 131; King, 'Applying Therapeutic Jurisprudence', above n 1, para. 43.

<sup>12</sup> Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle in Transforming Legal Processes in Court and Beyond' (Paper presented at 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, 7-9 June 2006) 129.

‘imposes imprisonment, or a bond, and takes no interest in the conduct or treatment of the defendant unless a breach of bond offence occurs’.<sup>13</sup> Complex relationships in offenders’ lives (and the victims’) are not dealt with. The Hon. David Malcolm reiterates that offenders who are in custody have difficulty receiving assessment and treatment.<sup>14</sup> Sergeant Julia Foster adds,

Adversarial prosecuting is quite an ‘isolationist’ form of advocacy. The parties appearing at the bar table have little interaction with each other aside from the swapping of further information, or the police disclosure of evidence to the accused or their counsel, according to statute. Indeed, professional duty often precludes the sharing of information beyond statutory obligations to disclose.<sup>15</sup>

The negative effects of adversarial processes are exacerbated where ‘psychological and social dysfunction’ from the ‘retributive cycle of imprisonment and offending’<sup>16</sup> contribute to Indigenous over-representation in the criminal justice system. For Aboriginal people, penalties imposed by the justice system are perceived as misplaced and detrimental to reforming individuals. Even the ‘Bush Court’ experiment in remote Indigenous communities was found also to lack ‘cultural awareness and sensitivity’.<sup>17</sup> Adversarial court processes with jurigenic effects have been targeted as actively contributing to recidivism, the revolving door syndrome.<sup>18</sup> Costs have escalated as the criminal justice system struggles to keep up with the demands for prison beds.

Jurigenic adversarial court processes are deemed responsible also for court staff’s distress. Over twenty years ago, Victorian Chief Magistrate Ian Gray claimed that

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<sup>13</sup> Ibid 136.

<sup>14</sup> David Malcolm, *The Application of Therapeutic Jurisprudence to the Work of Western Australian Courts* (2007) 17 *Journal of Judicial Administration*, 131.

<sup>15</sup> Julia Foster, ‘The Drug Court: ‘A Police Perspective’ in *Transforming Legal Processes in Court and Beyond* (Paper presented at 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, 7-9 June 2006) 107.

<sup>16</sup> Harris, *The Koori Court*, above n 8, 130.

<sup>17</sup> King, *Applying Therapeutic Jurisprudence*, above n 1, para. 43

<sup>18</sup> King & Wilson, above n 7, 25.

magistrates' days were 'nasty, brutish and short' because judges had limited 'dispositions' in the form of imprisonment, fines, probation and bonds'.<sup>19</sup> Though it may be that TJ is 'what good judges do anyway',<sup>20</sup> criticism has been leveled at USA 'attorneys [who] disproportionately rely on analytic, rational thought to make decisions'.<sup>21</sup> Similarly, Australian 'rule oriented' judges find difficulty in 'deviating from the usual process of decision-making predicated upon legal rules'.<sup>22</sup> Over time, changes have occurred in Western Australia as the Supreme Court may impose 'directions to direct that alcohol-or-drug-dependent offenders undertake treatment' if offenders are given a non-custodial sentence.<sup>23</sup> Though judges today have additional dispositions at their disposal, dealing with recidivist offenders in court adds to frustrations and possibly mental health problems in court personnel.<sup>24</sup>

Caution is needed here in assuming adversarial processes produce recidivism. Explanations for recidivism focusing on offenders' pathologies have been found wanting. The increase in prisoner numbers may have little to do with offending rates. Factors including discrimination, over-policing, 'crack downs' on crime and sentencing policies account for increased numbers of offenders.<sup>25</sup> Maxwell's<sup>26</sup> research indicates that the rising imprisonment rate in the mid-1990s in Tennessee was found to reflect 'technical violations' of parole revocations rather than an increase in offences. Similarly, the Australian Bureau of Statistics suggests that victimization rates have been relatively stable since the 1990s even though incarceration rates were rising.<sup>27</sup> If offending and recidivist rates are stable but the

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<sup>19</sup> King, Applying Therapeutic Jurisprudence, above n 1, para. 21.

<sup>20</sup> Bakht, above n 3, 33.

<sup>21</sup> Pamela Casey, & David Rottman, 'Therapeutic Jurisprudence in the Courts' (2000) 18 *Behavioral Sciences and the Law* 446.

<sup>22</sup> Harris, The Koori Court, above n 8, 134.

<sup>23</sup> Malcolm, above n 14, 130.

<sup>24</sup> See Nicola Berkovic, 'Research Finds Depression Very High in Legal Profession', *The Australian*, 19 September 2008, <[www.theaustralian.news.com.au/.../0,25197,24367557-17044,00.html](http://www.theaustralian.news.com.au/.../0,25197,24367557-17044,00.html)>.

<sup>25</sup> Cassia Spohn, *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (Sage, 2002) 279.

<sup>26</sup> Sheila Maxwell, 'Rethinking the Broad Sweep of Recidivism: A Task for Evaluators' (2005) 4 *Criminology & Public Policy*, 521.

<sup>27</sup> Jeffries, above n 2, 254.

political will to punish offenders with mandatory and longer prison terms, then prison numbers and recidivist rates will continue to rise.

Despite reasons for recidivism, many offenders fail to live law-abiding lives following release. Mahoney claims:

In Western Australia, 63% of prisoners released on parole and 68% of prisoners released to freedom are rearrested within three years. What can be done to prevent re-offending is not clear; what has been done has been effective only to a limited extent.<sup>28</sup>

Disproportionate incarceration and recidivism rates of Aboriginal people compared to the general population indicate that a 'one size approach' 'fits' one group better than any other.<sup>29</sup> Cunneen<sup>30</sup> notes that Indigenous people were 'around 17 times over-represented in New South Wales prisons on census data'; and Harris<sup>31</sup> claims that in 2002 in Victoria Indigenous people were 12.5 times more likely to be imprisoned than non-Indigenous people. The recidivism rate was also disproportionate. The Australian Bureau of Statistics reveals that an Indigenous person is re-imprisoned at double the rate of the non-Indigenous population.<sup>32</sup> When Ferrante, Loh & Maller's<sup>33</sup> research is adjusted for time spent in custody and mortality, they found that 92% of Indigenous males reoffended after two years. Finding alternatives to the 'one size fits all' approach to sanctions with its disproportionate effects drives legal reformers on.

Rehabilitation programs have failed. For example, Birgden and Vincent claim that the adversarial system in Australia 'encouraged resistance in sexual offenders against

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<sup>28</sup> Dennis Mahoney, *Inquiry into the Management of Offenders in Custody and in the Community: Report* (Government of Western Australia, 2005), 32.

<sup>29</sup> Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17 *Current Issues in Criminal Justice* 330.

<sup>30</sup> *Ibid* 340.

<sup>31</sup> Harris, *The Koori Court*, above n 8, 130.

<sup>32</sup> Australian Bureau of Statistics, 2010, 23.

<sup>33</sup> A Ferrante, N Loh and M Maller, 'Assessing the Impact of Time Spent in Custody and Mortality on the Estimation of Recidivism' (2009) 21 *Current Issues in Criminal Justice* 279.

participation in treatment'.<sup>34</sup> Moore points out that even the new drug treatment courts in Canada 'maintained the same old practices of justice and punishment'.<sup>35</sup> Winick acknowledges that past US attempts to deal with mentally ill offenders had been ineffective.<sup>36</sup> For him, too much attention had been given to the legal model of civil commitment.<sup>37</sup> Even for healthy offenders, high rates of recidivism reveal that neither the reform agenda nor the deterrent effects of incarceration have been effective in rehabilitating offenders. Disproportionate representation in the legal system from certain groups has increased the weight of argument against enforcing sanctions where imprisonment is not used as a sanction of last resort.<sup>38</sup> These findings have fueled calls for more judicial discretion and greater consideration of offender circumstances when applying the law.

### 3 Applying Therapeutic Jurisprudence

Setting aside questions about judges' roles, legal rules and discretion, and focusing on processes to repair jurigenic damage, Winick<sup>39</sup> asked: 'How can judges at commitment hearings, lawyers representing patients, and clinicians testifying as expert witnesses act so as to increase their potential as therapeutic agents?'. Winick replied to his rhetorical question by suggesting that court officials pay more attention to insights from the behavioural sciences and psychology in particular when dealing with offenders. The legal model of civil commitment rules out therapeutic approaches and leaves unattended the clinical needs of the offender/patient.<sup>40</sup> Judges in TJ inclined mental health courts and drug courts 'can use a variety of psychologically-oriented approaches, including empathy, respect, motivational interviewing, and behavioural contracting to motivate individuals to accept needed treatment and

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<sup>34</sup> Astrid Birgden & Justice Frank Vincent 'Maximizing Therapeutic Effects in Treating Sexual Offenders in an Australian Correctional System' (2000) 18 *Behavioral Sciences and the Law* 480, 481.

<sup>35</sup> Dawn Moore, 'Translating Justice and Therapy The Drug Treatment Court Networks' (2007) 47 *British Journal of Criminology*, 57.

<sup>36</sup> See Bruce Winick, 'A Therapeutic Jurisprudence Model for Civil Commitment' in K Diesfeld, & I. Freckelton, (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 24.

<sup>37</sup> *Ibid.*

<sup>38</sup> Harris, *The Koori Court*, above n 8, 137.

<sup>39</sup> Winick, above n 36, 23, 27.

<sup>40</sup> *Ibid.*

respond effectively to it'<sup>41</sup> while preserving the integrity of the legal system.<sup>42</sup> Winick argued that a humane, balanced and respectful process can be extended to the mainstream justice system while ensuring that 'care' does not 'trump' legal processes.<sup>43</sup>

By incorporating promising behavioural science developments such as insights from research on rehabilitation into the day-to-day work of lawyers and judges, the law's anti-therapeutic effects will be reduced.<sup>44</sup>

Winick's colleague, Wexler, claims that TJ is primarily a 'practice reform' that involves three steps: 'recognition, practice and assessment'.<sup>45</sup> Each step requires inputs and analyses from behavioural scientists to assist in preventing re-offending. As a result, the 'psy'<sup>46</sup> sciences and psychology have been awarded pride of place in TJ programs. Wexler claims that offenders require 'cognitive self-change' to improve compliance and teach them problem-solving skills, enabling them to anticipate and avoid high risk situations.<sup>47</sup> Similarly, Michael King, a Geraldton magistrate, asserts:

TJ has a broad-ranging application to all areas of court and legal practice and to legal education. Its application has the potential to bring about a more comprehensive, satisfying and psychologically optimal way of practising and learning law, and of addressing legal problems.<sup>48</sup>

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<sup>41</sup> Ibid 52.

<sup>42</sup> Winick (1997) cited in Astrid Birgden, 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis (2007) 14 *Psychiatry, Psychology and Law* 81.

<sup>43</sup> Casey and Rottman, above n 21, 448.

<sup>44</sup> Winick above n 36.

<sup>45</sup> cited in Casey & Rottman, above n 21, 451.

<sup>46</sup> Nikolas Rose, *Powers of Freedom Reframing Political Thought* (Cambridge University Press, 1999)

<sup>47</sup> David B. Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"' (2001) *Court Review* 20.

<sup>48</sup> Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.

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TJ empowers individuals 'to lead a productive, harmonious and fulfilling life in the community'.<sup>49</sup> Conversations are encouraged among the defendant, the magistrate and Aboriginal elders.<sup>50</sup>

With these hopeful antidotes to jurigenic damage, TJ reforms mushroomed in many jurisdictions with considerable support from the legal-academy,<sup>51</sup> even though some attempts such as a US drug court have since been abandoned.<sup>52</sup> Morris B. Hoffman claims, 'Massive net widening, coupled with dismal recidivism results, meant that our drug court was sending more drug defendants to prison than we ever did before drug court, by a factor of almost two'.<sup>53</sup> Net-widening is a phenomenon 'whereby new programs targeted for a limited population end up serving much wider populations and thereby losing their effectiveness'.<sup>54</sup> This criticism aside, for Winick & Wexler, 'rewinding the legal problem can provide both lawyer and client with important insights about how to avoid future problems'.<sup>55</sup> Others suggest that 'judges, attorneys, and expert witnesses' need to become 'sensitive',<sup>56</sup> self-reflexive, emotionally intelligent<sup>57</sup> and future oriented if recidivism is to be curtailed.

Some suggest that TJ reforms ought to extend beyond specialist courts. Rottman, for example, claims, the 'long term future of the new specialized courts depends upon their successful incorporation into larger trial court systems',<sup>58</sup> a suggestion that has been taken up. In the 1990s, TJ reformers focused on drug dependent or mentally ill

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<sup>49</sup> Michael King, 'Therapeutic Jurisprudence in Regional WA: The Geraldton Alternative Sentencing Regime' (2002) 29 (1) (February) *Brief* 22.

<sup>50</sup> Harris, *The Koori Court*, above n 8, 133.

<sup>51</sup> Peggy Fulton Hora, 'The Synergy Between Therapeutic Jurisprudence and Drug Treatment Courts' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond*, (Australian Institute of Judicial Administration, 2007) 155.

<sup>52</sup> Morris Hoffman, 'A Neo-Retributionist Concurr with Professor Nolan' (2004) 40 *American Criminal Law Review* 1567.

<sup>53</sup> *Ibid.*

<sup>54</sup> Morris B Hoffman *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous* (2002) 29 *Fordham Urban Law Journal* 2063.

<sup>55</sup> Winick and Wexler, above n 5, 611.

<sup>56</sup> Winick, above n 36, 54.

<sup>57</sup> Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.

<sup>58</sup> David Rottman, 'Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?' (2002) *Court Review*, 26.

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offenders but later attention turned to advocating 'care' and promoting wellbeing to 'the whole field of law'.<sup>59</sup> Therapeutic jurisprudence 'expanded ... to cover diverse aspects of the law including family, criminal, and civil law';<sup>60</sup> 'from tort and contract law to criminal law and family law';<sup>61</sup> to 'civil, family law, coronial, mining, industrial, native title and other court processes'.<sup>62</sup> Wexler also justifies therapeutic jurisprudence on the basis of its 'potential application...in civil cases, appellate cases, family law cases, and, of course, in criminal and juvenile cases'.<sup>63</sup> It is argued that spreading therapeutic jurisprudence to the whole field would overcome inequalities associated with a two tier system.

For TJ programs to succeed, Judge Van de Veen of Canada and Professor Wexler claim that the criminal act must be condemned not the offender.<sup>64</sup> According to this model, disparaging remarks in court should be ruled out, replaced by a 'search for and comment on whatever favourable features might eventually be woven together by the offender to constitute the "real me" or the "diamond in the rough"'.<sup>65</sup> By planting a 'helpful seed'<sup>66</sup> at a 'teachable moment',<sup>67</sup> re-offending rates will decline, community's fears allayed and trust in the criminal justice system established. In this way it is claimed, TJ would construct a 'bridge' between the rule of law, the rights of victims and the care requirements of offenders.<sup>68</sup> In the USA, this would change judges' roles from 'dispassionate, disinterested magistrates' to 'sensitive, emphatic counselors'<sup>69</sup> so that law becomes a 'helping profession' by 'humanising' lawyers.<sup>70</sup>

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<sup>59</sup> Michael King and Steve Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) (1) Special Series *eLaw: Murdoch University Electronic Journal of Law*, 9; Moore, above n 35.

<sup>60</sup> King, Applying Therapeutic Jurisprudence, above n 1, para 1.

<sup>61</sup> Scott, above n 4, 5.

<sup>62</sup> King and Ford, above n 59, 20.

<sup>63</sup> Wexler, Robes and Rehabilitation, above n 47, 18.

<sup>64</sup> Sherry Van de Veen & David Wexler, 'Therapeutic Jurisprudence Sentencing Principles in a Canadian Context' (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006) also at <<http://www.law.arizona.edu/depts/upr-intj/VandeVeenTJ.pdf>> 16.

<sup>65</sup> Wexler, Robes and Rehabilitation, above n 47, 22 citing Shadd Maruna.

<sup>66</sup> Ibid.

<sup>67</sup> see Casey & Rottman, above n 21, 449.

<sup>68</sup> Ibid, 447.

<sup>69</sup> Rottman, above n 58, 25.

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In Australia, TJ 'can address the underlying reasons why people come before a court and thus can help magistrates take a leadership role and to introduce and manage change'.<sup>71</sup> A new breed of legal practitioners – the 'affective lawyer'<sup>72</sup> and the 'preventive lawyer'<sup>73</sup> who undergo 'clinical programs'<sup>74</sup> – would emerge. The offender's rehabilitation becomes a focus of the legal process.

For these shifts to have support, TJ proponents have outlined the required re-education process for judges and lawyers. King and Wilson advocate TJ training as 'part of the education of legal practitioners and law students'.<sup>75</sup> Tapper proposes that legal education and professional development instill 'wise ways of dealing with the emotions' and responses to 'conflicts in a less adversarial way'.<sup>76</sup> Not only are radical changes in legal education and legal processes required, so too is a move for the legal system to become an 'arena of multidisciplinary networks'.<sup>77</sup> When multidisciplinary networks come into play, power relations shift from the hierarchal legal arrangement where power resides with the position of judge to a situation where power relations are diffused. These extra costs, structural changes and deep-seated risks may be worthwhile if TJ delivers the rehabilitative reforms it promises: a decrease in jurigenic damage, less stress for court personnel, better outcomes because of reduced recidivism and greater moral authority of the legal system within the wider community.

Therapeutic jurisprudence has attracted significant interest from those engaged in cross-cultural legal processes, especially those in the lower courts. 'Direct

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<sup>70</sup> Bruce, Winick, 'A Legal Autopsy of the Lawyering in Schiavo: a Therapeutic Jurisprudence/Preventive Law Rewind Exercise' (2007) 61 *University of Miami Law Review*, 595, 600-01.

<sup>71</sup> King, Applying Therapeutic Jurisprudence, above n 1, para. 20.

<sup>72</sup> Winick, above n 70, 600.

<sup>73</sup> Winick & Wexler, above n 5, 609.

<sup>74</sup> Ibid, 615.

<sup>75</sup> King and Wilson, above n 7, 25.

<sup>76</sup> Robin Tapper, 'The Peacemaking Virtues of Good Lawyers in the Adversarial Process' (Paper presented at 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006) 128.

<sup>77</sup> Moore, above n 35.

engagement, empathy and communication'<sup>78</sup> are emphasized. For Harris, the roles of 'effective' judicial officers and lawyers should be flexible in their approach to legal procedure and able to respond appropriately to Indigenous offenders with 'empathy, respect, active listening, clarity, a positive focus and non-paternalism'.<sup>79</sup> These TJ recommendations formed the basis for establishing the Koori Court where courtroom procedures were adapted to provide 'greater levels of informality'<sup>80</sup> and allowed 'Aboriginal voices to be heard'.<sup>81</sup> A 'holistic'<sup>82</sup> perspective is posited as empowering offenders to address their own rehabilitative needs. By recognizing differing needs, implementing alternatives and assessing outcomes, TJ is declared a viable alternative to the adversarial system.

TJ in Australia has required considerable modification at each stage of the process – recognition, practice and assessment – and to the philosophical approach, court structures and roles, and work loads of court personnel. A 'caring' attitude to avoid jurigenic damage to offender's wellbeing requires acquiring new skill sets such as 'affective lawyering' that deliberately embrace the emotional dimensions of the dynamic between lawyer and client.<sup>83</sup>

Taking up these ideas, Magistrate King who instituted the Geraldton Alternative Sentencing Regime (GASR) became involved in 'consciousness raising', established a number of steering groups, empowered agencies to 'own the project', struggled for resources, and maintain local commitment'.<sup>84</sup> The GASR in 2001 was 'largely reliant on existing resources and the drive, commitment and goodwill of local agencies' and private funds.<sup>85</sup> Its 'team-based, holistic, developmental approach to offender

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<sup>78</sup> Sharyn Roach Anleu, & and Kathy Mack, 'Australian Magistrates, Therapeutic Jurisprudence and Social Change' (Paper presented at 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006) 173.

<sup>79</sup> Ibid. Harris, The Koori Court, above n 8 cites Goldberg, 2005, at 9-16, 133.

<sup>80</sup> see Harris, The Koori Court, above n 8, 129.

<sup>81</sup> Ibid 133.

<sup>82</sup> King and Ford, above n 59, 11; King, Applying Therapeutic Jurisprudence, above n 1, para. 37.

<sup>83</sup> Harris, The Koori Court, above n 8, 135 cites Mills (2002).

<sup>84</sup> Harry Blagg, 'Problem-Oriented Courts' (Research Paper, Project No 96, Law Reform Commission of Western Australia, 2008) 25.

<sup>85</sup> King, Therapeutic Jurisprudence in Regional WA, above n 49, 24.

rehabilitation using judicial case management' addresses 'solvent, illicit drug and alcohol abuse, domestic violence, gambling, stress and other offending related problems'.<sup>86</sup> Magistrate King reports that 'one GASR participant is undertaking psychological counseling, a substance abuse programme and financial planning and is practicing the self-development and stress reduction programme Transcendental Meditation'.<sup>87</sup> King and Auty claim that GASR has achieved 'a high success rate and a high participation rate of Aboriginal offenders'.<sup>88</sup> However, we heard anecdotally in January 2012 that the GASR was no longer functioning.

The GASR did not replace other sentencing options but offered 'alternative pathways for selected offenders: the Court Supervision Regime which involves the offender being managed by a court management team for a period of four to six months while participating in rehabilitation programs; and the Brief Intervention Regime which also includes offender participation in rehabilitation programs but without the supervision of the court management team'.<sup>89</sup>

Regional court judges are required to take a generalist approach and exercise greater autonomy than required in metropolitan courts.<sup>90</sup> The GASR principal Magistrate King<sup>91</sup> claims that rural and regional courts have broader jurisdiction, outside the ambit of regulatory control of metropolitan courts. 'Magistrates have a great deal of autonomy in determining the procedure in the courts' enabling the GASR magistrate to exercise discretion and ensure practices are informed by local knowledge.<sup>92</sup> Increased scope in jurisprudence is also backed by the belief that regional judicial officers confront differing challenges from those faced by judges in metropolitan

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<sup>86</sup> Michael S. King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69, 72.

<sup>87</sup> King, Therapeutic Jurisprudence in Regional WA, above n 49, 22.

<sup>88</sup> King and Auty, above n 86, 72.

<sup>89</sup> Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts* (6 September 2010) <[http://www.aic.gov.au/criminal\\_justice\\_system/courts/specialist/drugcourts.aspx](http://www.aic.gov.au/criminal_justice_system/courts/specialist/drugcourts.aspx)>.

<sup>90</sup> King, Applying Therapeutic Jurisprudence, above n 1, para5.

<sup>91</sup> King, *ibid*, para. 6.

<sup>92</sup> *Ibid* para. 10.

courts.<sup>93</sup> This is an ideal setting for a TJ program where magistrates are required to be culturally sensitive, having vision and expertise beyond legal skills so that they could understand participants' needs, based on cultural, social and geographical differences.<sup>94</sup> The GASR also provided a unique opportunity to examine the effectiveness of TJ. Blagg<sup>95</sup> comments that the local magistrate is cast in the role as a 'commanding officer of a collaborative small inter-agency steering committee'. Malcolm asserts that Geraldton 'has taken an "across the board" approach to therapeutic jurisprudence, applying it in three specific programs in sentencing, restraining order application and in care and protection applications as well as in its coronial work'.<sup>96</sup>

Similarly, for the Koori Court project, judges 'monitor and review the offender's compliance with, and progress on, the program',<sup>97</sup> resulting in 'greater supervision of offenders'.<sup>98</sup> More time and extra funding are needed. However, the Koori court has been deemed to be a 'resounding success'<sup>99</sup> in reducing recidivism among Koori defendants. The Shepparton Koori Court had a recidivism rate of approximately 12.5% for the two years of the pilot program and the Broadmeadows Koori Court's re-offending rate was approximately 15.5%. Both of these figures are significantly less than the general level of recidivism at 29.4 1 %. Other achievements include enabling defendants to account for their offending, integrating cultural considerations and the work of relevant service providers in 'tailoring' community based orders, reinforcing 'the status and authority of Elders and Respected Persons and strengthening the Koori community', and broadcasting 'the vision of the Koori Courts'.<sup>100</sup>

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<sup>93</sup> Ibid para. 2

<sup>94</sup> Ibid para. 23, 37.

<sup>95</sup> Harry Blagg, 'Problem-Oriented Courts', above n 84, 25.

<sup>96</sup> Malcolm, above n 14, 133.

<sup>97</sup> see Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report*, Report No 96 (2009) <<http://www.lrc.justice.wa.gov.au/2publications/reports/P96-FR.pdf>> 5.

<sup>98</sup> Harris, *The Koori Court*, above n 8, 134.

<sup>99</sup> Harris, *Victorian Aboriginal Justice Agreement*, above n 9, 8.

<sup>100</sup> Ibid 9.

Therapeutic Jurisprudence requires making changes to the legal infrastructure that may diminish the power of the court system. King and Ford state that though TJ emphasizes rehabilitation programs in addressing issues of self-actualisation,<sup>101</sup> they admit that other programs are required for certain offences such as ‘sexual assault referral centre programs, medical treatment, domestic violence programs, financial planning, vocational guidance, accommodation support, recreation programs and stress reduction programs’.<sup>102</sup> TJ proposals have enabled the ‘traditional adversarial approach of court procedures [to be] replaced by a collaborative style of case management’<sup>103</sup> where judges and legal practitioners take on new roles in working together to ‘apply ‘smart punishment’ rather than ‘punishment for the sake of retribution’.<sup>104</sup>

#### **4 The Structural Issues Raised by TJ**

TJ requires a different approach to the administration of justice, albeit, a definitive description of personnel re-education and a radical departure from the adversarial legal process. These effects, which Nolan refers to as ‘judicial reorientation’, call into question ‘the saliency of concepts that once more profoundly define the substance and scope of criminal law’.<sup>105</sup> Judges and lawyers would be less constrained than by having to be impartial in an adversarial system governed by clearly defined roles, robes, schedules and power relations. Nolan cites Judge Langston McKinney of Syracuse as saying,

“we literally leave all that [judicial impartiality, presumption of innocence, etc.] at the doorstep.” In the drug treatment court context, “the issue of guilt/innocence is not of concern.” Judge William Schma also

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<sup>101</sup> King and Ford, above n 59, 16.

<sup>102</sup> King, *Applying Therapeutic Jurisprudence*, above n 1, para. 37.

<sup>103</sup> Tauber (1999) cited in Melissa Bull, ‘Just treatment: Testing the Limits of Therapeutic Jurisprudence’ ( Paper presented at 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006) 3.

<sup>104</sup> *Ibid.*

<sup>105</sup> James L Nolan Jr. ‘Drug Treatment Courts and the Disease Paradigm’ (2002) 37, *Substance Use & Misuse*, 1723, 1747.

agrees that in the drug treatment court the admittance of guilt is “pretty much immaterial.”<sup>106</sup>

With similar effects felt in Australia’s criminal justice system serious consideration must be given to whether TJ programs erode basic legal principles.

A TJ requisite requires offenders to move into a TJ program or court following a guilty plea.<sup>107</sup> That ‘rule’ no longer holds. In response to offenders’ needs, the magistrates in the GASR and the Koori Courts decide at what point during an offender’s progress through the court system a therapeutic regime should begin. Magistrate King claims, the GASR may intervene ‘before the defendant has entered a plea’.<sup>108</sup> To ‘allow offenders to undertake the appropriate treatment program’, sentencing may also be deferred in the Koori courts.<sup>109</sup> Harris notes, ‘Wexler (2004) has recently argued for an extension of the judicial role to the post-release phase for offenders’.<sup>110</sup> The Law Reform Commission of Western Australia<sup>111</sup> recommends that pre-sentence options become available. These recommendations clearly indicate a move to increase TJ surveillance over the accused at various points in the legal process.

The guilty plea prerequisite for an offender to qualify for a therapeutic jurisprudence program is waived ‘in certain cases [where] defendants may be admitted to the program pending determination of guilt’.<sup>112</sup>

A further question arises as to whether the offender is also giving up the right to a fair trial. Pleading guilty and embarking on a healing program for some offenders might appear an easier path than a court case. Yet treating an offender for his or her own good [without a guilty plea] may mean losing sight of a rights perspective where an

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<sup>106</sup> Ibid, 1737.

<sup>107</sup> Harris, The Koori Court, above n 8, 130.

<sup>108</sup> King, Therapeutic Jurisprudence in Regional WA, above n 49, 22.

<sup>109</sup> Harris, The Koori Court, above n 8, 134.

<sup>110</sup> Ibid.

<sup>111</sup> Law Reform Commission of Western Australia, above n 97, 37.

<sup>112</sup> King and Ford, above n 59, 11.

offender's rights to autonomy and voluntariness are paramount. Previtera<sup>113</sup> warns, 'many participants in drug courts' consider there is little choice involved when either going to jail or agreeing to an Intensive Drug Rehabilitation Order are the only available options. Further, the Law Reform Commission of Western Australia suggests voluntariness is qualified as 'offenders 'volunteer' to participate in court intervention programs'.<sup>114</sup> Birgden and Vincent are also aware of the need to avoid 'perceived unethical behavior by therapists in persuading participation in treatment'.<sup>115</sup>

As TJ courts institute 'voluntary' treatment programs, attention is diverted from the court system with the guilt and innocence of parties as its essence.<sup>116</sup> An offender's responsibility for his or her offending behaviour in these courts shifts to responsibility for complying with a treatment program. Problem-solving courts have encountered problems:

A courtroom-based team approach with specially adapted outpatient drug abuse treatment is used to coerce offenders into treatment. Judges play a central and active role in the team in the unorthodox courtroom approach that brings the defense, prosecution, treatment, and other court-related agencies together. This approach combines elements of both criminal justice and drug treatment -- two perspectives accustomed to different methods and sometimes competing aims regarding drug-involvement and its reduction.<sup>117</sup>

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<sup>113</sup> Tina Previtera, 'Responsibilities of TJ Team Members v Rights of Offenders' (2006) Special Series (1), *eLaw:Murdoch University Electronic Journal of Law* 58.

<sup>114</sup> The Law Reform Commission of Western Australia, above n 97, 32.

<sup>115</sup> Birgden and Vincent, above n 34, 482-483.

<sup>116</sup> see Hoffman, above n 54.

<sup>117</sup> Doris L MacKenzie, 'Criminal Justice and Crime Prevention' in Lawrence W Sherman et al (eds), *Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress*, Prepared for the National Institute of Justice in collaboration with members of the Graduate Program Department of Criminology and Criminal Justice, University of Maryland <<https://www.ncjrs.gov/works/>>421.

Competing aims have also troubled Australian commentators. For example, Birgden and Vincent, who highlight the effects of therapeutic strategies on sex offenders in Victoria, suggest that by incorporating ‘punishment and containment together with treatment and responsibility-taking’, the goal is to ‘reduce the likelihood of re-offenses.’<sup>118</sup> The authors suggest that ‘the law’ accepts that sexual offending can be addressed but that an ethical framework is required.<sup>119</sup> But they also point out that the effectiveness of coercing an offender into a treatment program is unknown.<sup>120</sup> An offender’s guilt and the need to make amends for wrongdoing are obscured.

Where an offender’s treatment is tied to his or her punishment, various assumptions are made. One assumption is that ‘caring’ legal practitioners are able to work collaboratively with multidisciplinary teams who know and agree on what is therapeutic, what is not, and where to draw the line between the two. Another assumption is that offenders are treatable, that tools and insights available from the behavioural sciences or new age techniques are up to the task, that offenders need and want care, and are motivated to change, and that interventions are not abusive. Finally, a blind eye must be turned to the contradictions between treating and punishing an offender simultaneously.

When primacy is given to an offender’s ‘treatment’, questions arise: where does ‘guilt’ come into the picture? Are TJ courts open to abuse by those seeking a ‘soft-option’? No, Harris writes:

Where sentencing of an offender is deferred so as to allow them to undertake an appropriate treatment program, it may be argued that they are receiving a more onerous sentence than might have been the case in the mainstream Magistrates’ Court.<sup>121</sup>

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<sup>118</sup> Birgden and Vincent, above n 34, 487.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 483.

<sup>121</sup> Harris, *The Koori Court*, above n 8, 135.

Harris claims, 'in the Koori Court there is the potential for greater judicial supervision of offenders' and the 'magistrate may continue to have a more comprehensive involvement in monitoring compliance by the offender'.<sup>122</sup> Harris also suggests that issues are resolved less quickly in therapeutic jurisprudence courts than in mainstream courts.<sup>123</sup> The Western Australian Law Reform Commission<sup>124</sup> also holds that court intervention programs have 'intensive and onerous requirements'. Problem-solving courts are also punitive in imposing cautions and conferences for young offenders.<sup>125</sup> Thus, despite the rhetoric of care endorsed by therapeutic jurisprudence reformers, offenders are tied to the legal system longer, and monitored more closely than they might otherwise have been. In these ways, a judge's control is tightened when the urge to rehabilitate takes precedence over other legal considerations.

If we see those who commit crimes as treatable and once treated appropriately as less likely to reoffend, we are likely to think that punishment has less a place on the penal agenda. Thus, therapeutic jurisprudence provides an authoritative voice and set of practices that obscure law's punitive function while arguably imposing more onerous commitments tied to treatment programs, as Harris<sup>126</sup> implies. Confirmed here are the critics' views that TJ is punitive, masquerading under an umbrella of 'care'.

Tensions between imposing the law and treating an offender are explained away under the 'first, do no harm' principle.<sup>127</sup> The question arises whether it is possible to apply the 'first, do no harm' principle while handing down 'treatment' that is tied to a sentencing or punishing regime and overlooking the contradictions between the actions. We suggest the two processes are mutually exclusive and the contradictions untenable. If offenders are ill and need treatment then their treatment must be disassociated from sentencing processes.

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<sup>122</sup> Ibid 134.

<sup>123</sup> Ibid 135.

<sup>124</sup> The Law Reform Commission of Western Australia, above n 97, 45.

<sup>125</sup> Terese Henning, and Kate Warner, 'The Criminal Process and Sentencing' in Andrew Goldsmith, Mark Israel and Kathleen Daly (eds) *Crime and Justice: A Guide to Criminology* (Lawbook Co, 3<sup>rd</sup> ed, 2006) 306.

<sup>126</sup> Harris, The Koori Court, above n 8, 135.

<sup>127</sup> see Schma et al, above n 4, 61.

When magistrates' courts become a 'one-stop' social problem solving centre,<sup>128</sup> magistrates turn to individual cases rather than case law and culturally relative positions in place of legal maxims. They may be dabbling outside their field of expertise.

Both Moore<sup>129</sup> and Harris<sup>130</sup> confirm that TJ threatens the legal system's authority. Harris, for example, claims that magistrates in 'wellbeing' courts are brought to 'the same level as the offender and other parties' especially when deferring to Indigenous Elders 'on matters of cultural concerns'.<sup>131</sup> Aboriginal community do not always agree with this change. Though some offenders may have been happy with Elders' involvement because Elders walk in 'shoes us blackfellas walk in',<sup>132</sup> Magistrate Annette Hennessy found that in the Murri Court in Rockhampton in Queensland, the Indigenous community preferred 'the Magistrate to robe and sit on the Bench' to ensure offenders 'realised that the process was a Court process with the appropriate authority and seriousness'.<sup>133</sup> The processes of changing legal practices may accord with non-Aboriginal assumptions of cultural appropriateness that may not be the case.

Making the legal system culturally appropriate and therapeutic requires careful consideration. Like the Victorian Koori Courts, the GASR adopted a 'collaborative and multi-disciplinary' pathway.<sup>134</sup> King suggests that an amalgam of disciplines including law, psychology, meditation, anthropology, sociology, and financial planning is required to work collaboratively to improve the offender's wellbeing.<sup>135</sup> Collaboration also extended to the local Indigenous community, 'representatives from the Department of Justice, members of the magistracy and representatives from

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<sup>128</sup> King and Wilson, above n 7, 25.

<sup>129</sup> Moore, above n 35.

<sup>130</sup> Harris, *The Koori Court*, above n 8, 132.

<sup>131</sup> *Ibid* 133.

<sup>132</sup> *Ibid*.

<sup>133</sup> A Hennessy, 'Reconnection to Community as a Sentencing Tool' (Paper presented at 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006) 35-44.

<sup>134</sup> King and Ford, above n 59, 25.

<sup>135</sup> King, *Applying Therapeutic Jurisprudence*, above n 1.

community organizations, police and community corrections'.<sup>136</sup> The GASR magistrate was then given the task of bringing all collaborators together to 'promote the rehabilitation of those [offenders] with substance abuse, domestic violence and other offending related problems'.<sup>137</sup> Introducing multidisciplinary teams into courts is required to address complex issues, but, in doing so, the rule of law becomes diffused. In the Koori courts, for example, deviations from the rule of law are considered 'innovative in respect to legal procedure and rules'.<sup>138</sup> It is noted that 'in some instances fundamental legal and procedural safeguards may be diminished'.<sup>139</sup> This runs counter to the requirement of a level of legal certainty built on years of precedence, and overrides the traditional discretion judges enjoy as keepers of the law and defenders of justice.

On the other hand, it can be argued that TJ further empowers the judiciary because judges are given increased powers. Conventional approaches to sentencing already allow for a nuanced approach when dealing with offenders.<sup>140</sup> For many judges the problem lay in drawing the line between adhering to the law and attempting to respond appropriately to the individual offender. By extending the discretionary powers for sentencing judges under TJ, the chances of inequitable decisions increase. In other words, increased judicial discretionary powers in TJ, outside legislated parameters, increase the possibility of two offenders who have committed similar offences being issued with different sentences (punishment). A factor such as the 'successful completion of a program is considered mitigation of sentence',<sup>141</sup> resulting in greater leniency than another who commits a similar crime has the effect of decriminalizing the crime. The attitude of the offender is judged rather than the nature of the crime.

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<sup>136</sup> Harris, *The Koori Court*, above n 8, 131.

<sup>137</sup> King, *Applying Therapeutic Jurisprudence*, above n 1, para 13.

<sup>138</sup> see Harris, *The Koori Court*, above n 8, 133.

<sup>139</sup> Law Reform Commission of Western Australia, above n 97, 15; Hoffman, above n 54, 2075.

<sup>140</sup> Bakht, above n 3, 33.

<sup>141</sup> King and Ford, above n 59, 12.

The separation of powers between the Executive and the Legislature that the High Court has sought to uphold<sup>142</sup> is also challenged. According to Sir Gerald Brennan:

The separation of judicial from legislative and executive power and the separation of the judges from political activity have been rigorously maintained by the High Court.<sup>143</sup>

Winick asserts that TJ does not trump legal principles though in practice this may not be the case. For example, under the GASR, the magistrate made a range of policy decisions, including requests for funds, allocation of resources and budget priorities, arrangement of evaluations, and the institution of ‘wellbeing’ programs – all executive functions that may compromise a magistrate’s commitment to impartiality. Harris reports finding that judges’ approaches vary despite the view that law is “neutral, invariant and consistently oriented around a set of legal principles”.<sup>144</sup> King’s response is that GASR policy initiatives enforced ‘laws more effectively’, without encroaching ‘on the executive or legislative function’<sup>145</sup> and therapeutic considerations did not *necessarily* trump other considerations’.<sup>146</sup> There is no clear indication of how the word ‘necessarily’ is interpreted and no clear guidelines in preserving the executive and legislative functions when a judge imposes policy initiatives. Richard Refshauge, Judge of the Supreme Court for the Australian Capital Territory, is reported as having said ‘the traditional separation of powers discourse is not a useful rhetoric of TJ programs’, an issue that Australia ‘has not come to terms with’.<sup>147</sup>

For the Law Reform Commission of Western Australia, tensions between the separation of powers doctrine and court intervention programs are unresolved and

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<sup>142</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lawbook Co, 2005) 237-9.

<sup>143</sup> cited in *Ibid*, 238.

<sup>144</sup> Harris, *The Koori Court*, above n 8, 134.

<sup>145</sup> King, *Applying Therapeutic Jurisprudence*, above n 1, para. 17.

<sup>146</sup> King and Ford, above n 59, 14.

<sup>147</sup> Cannon, above n 12, 136.

unlikely to be resolved.<sup>148</sup> Murray Gleeson, former Chief Justice of the High Court, notes that an ‘independent judiciary is indispensable in a free society living under the rule of law’.<sup>149</sup> Judges require discretion within legislative limits to mobilize and preserve the concept of equality before the law. On the one hand, where a nuanced approach to legal practice violates the rule of law and is unjust, legislation is required. On the other hand, where the legislature stipulates mandatory sentencing or makes pro-arrest issues a major problem, it is legislation, not the practice of law that needs reforming. TJ programs are required to walk a similar tightrope in maintaining the power and independence of the judiciary while imposing checks and balances on judicial roles.

Whereas the US founders of TJ typically advocated ‘cognitive’ psychology, offenders at the GASR suffering from ‘intergenerational stress’ and stressed court officials are required to undertake Transcendental Meditation (TM) as a self-development technique.<sup>150</sup> On one occasion, ‘the court with the defendant’s consent, imposed a condition of supervised bail that she learn Transcendental Meditation and participate in other programmes as directed by Community Justice services’.<sup>151</sup> In the GASR system, Transcendental Meditation is advocated because ‘it was easy to learn and practice and requires no change of lifestyle or beliefs’,<sup>152</sup> which contradicted the desired lifestyle change required for offenders<sup>153</sup> or ‘clients’ as they are becoming known.<sup>154</sup> In this case, the magistrate assumed offenders required this corrective therapy. This raises serious questions: did the magistrate rely on evidence based research, community-based consultation, expert opinion or a collaborative style of case management in arriving at this novel form of rehabilitation? On the other hand, it is possible that the magistrate applied this therapeutic option based on his belief that

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<sup>148</sup> Ibid.

<sup>149</sup> Chief Justice Murray Gleeson, ‘The Right to an Independent Judiciary’ (Paper presented at 14<sup>th</sup> Commonwealth Law Conference, London, September 2005).

<sup>150</sup> King and Ford, above n 59, 13.

<sup>151</sup> King, Therapeutic Jurisprudence in Regional WA, above n 49, 23.

<sup>152</sup> King and Ford, above n 59, 14.

<sup>153</sup> Bakht, above n 3, 12.

<sup>154</sup> Edie Greene et al, *Wrightsmen’s Psychology and the Legal System* (Thomson Wadsworth, 6<sup>th</sup> ed, 2007) 38; see also King, above n 57.

'he knew best'. This was confirmed as 'several participants told a psychologist assisting GASR that TM "was the single best coping tool they have ever learned", and 'many want their families to learn'.<sup>155</sup> A risk in TJ is that treatment measures could be applied with little reference to precedence, community expectations, expert opinion or evidence. As such, the sentencing options of TJ require funding, research and structure rather than leaving it to an *ad hoc* decision made alone by the magistrate.

Evaluating TJ approaches has opened another can of worms. Roberts and Indermaur found it difficult to obtain evidence about TJ program's efficacy. They found only 27 out of 117 evaluations of drug court programs in the USA were methodologically sound; thus, the findings of most evaluations are unreliable.<sup>156</sup> Similarly in Australia, the two Koori courts were reviewed after functioning for approximately two years. Harris claims, the recidivist rate was 12.5 % for the Shepparton Koori Court (October 2002), and 15.5% for the Broadmeadows Koori Court (April 2003), whereas for the State of Victoria for the period 2003-2004 recidivism was 29.4%.<sup>157</sup> Yet, in spite of these encouraging statistics, methodological issues render the results difficult to gauge because offenders appearing before the Koori courts exclude some offenders.<sup>158</sup> Longitudinal studies will clarify these issues. Harris<sup>159</sup> conceded that despite receiving therapeutic interventions, some offenders will return to their offending ways, others will modify their behaviour, whereas others still may transform their lives.

Justifying legal practice reform on the basis of a declining recidivist rate is problematic. Not only are accurate recidivist rates over time difficult to obtain, but comparisons across jurisdictions and the lack of uniformity make reliable data collection difficult. Moreover, TJ reformers assume a cause and effect relationship exists between therapeutic interventions and a decline in recidivism. Numerous

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<sup>155</sup> King, Therapeutic Jurisprudence in Regional WA, above n 49, 23.

<sup>156</sup> Lynne Roberts and David Indermaur 'Key Challenges in Evaluating Therapeutic Jurisprudence Initiatives' (2007) 17 *Journal of Judicial Administration* 60, 62.

<sup>157</sup> Harris, The Koori Court, above n 8, 137.

<sup>158</sup> *Ibid*, 131.

<sup>159</sup> *Ibid* 138.

factors though affect program outcomes including any punitive practices offenders may also encounter. As Maxwell warns, recidivism is often uncritically used to measure a program's effectiveness without considering external factors to the program that impinge on offenders' lives pre- and post-release.<sup>160</sup> Thus, to justify therapeutic jurisprudence on the basis of its effects on recidivist rates alone is pointless and a far more pervasive measure is required. Consequently, TJ reforms that attempt to deal with complex issues in the courts required careful consideration.

According to Magistrate King's evaluation of the GASR, the program 'promoted wellbeing in various domains of life, with many participants reporting decreased substance abuse, improvements in physical and mental health, financial planning, motivation to work or study and improvements in personal relationships.'<sup>161</sup> King and Ford recognise that 'controlled, longitudinal, quantitative evaluation' of therapeutic jurisprudence programs is necessary to provide greater reliability of outcomes.<sup>162</sup> They found on the basis of eighteen exit surveys that 'more than 80% of participants perceived improved physical health and mental health, reduction in depression/anxiety and greater motivation to work or study after participating in the Court Supervision Regime'<sup>163</sup> and 'community corrections officers observed that for some, Transcendental Meditation was the most important program'.<sup>164</sup> 'Participants were asked whether they noticed changes in specific areas of their life and were given five answer options ranging from "much improved," "improved," "same," "worse," "much worse".<sup>165</sup> These results based on an exit snapshot must be interpreted cautiously. At the time, funds for a longitudinal evaluation were not available. Nevertheless, the Law Reform Commission of Western Australia<sup>166</sup> advises that more funds are required to produce cost-effective outcomes of court intervention programs. Analyses of outcomes are required where judicial and legal processes are deemed to affect adversely an offender's wellbeing and contribute to reoffending rates.

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<sup>160</sup> Maxwell, above n 26, 520.

<sup>161</sup> King, *Applying Therapeutic Jurisprudence*, above n 1, para. 41.

<sup>162</sup> King and Ford, above n 59, 18.

<sup>163</sup> *Ibid* 18-19.

<sup>164</sup> *Ibid*, 19 King and Ford cite R Cant, R Downie, and D Henry, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime*, (Western Australia, Department of Justice, 2004) 30.

<sup>165</sup> *Ibid* 18.

<sup>166</sup> The Law Reform Commission of Western Australia, above n 97, 12.

TJ seeks to give offenders a 'voice, respect, neutrality and trust'.<sup>167</sup> TJ processes are also associated with, 'active and positive intervention, validation and self-worth'.<sup>168</sup> For many victims of crime and the public these are 'soft' options. How to reassure the public that justice is being served when the media is fuelling concerns, is a matter requiring attention.<sup>169</sup> Chief Magistrate Michael Hill of the Hobart Magistrate's Court refutes this concern by explaining that TJ is a sentencing alternative for 'relatively low level offending' where unnecessary or short prison sentences are involved.<sup>170</sup> Michael Hill goes on to say that TJ would not be available to 'murderers and rapists and people who were rampaging through the community'.<sup>171</sup> The Hon David Malcolm notes that the public's (and victims') perception of crime and sentencing shapes government actions and spending; and that public perceptions that criminals may be 'getting off' lightly<sup>172</sup> are matters requiring managing if legal reforms are to proceed.

Implementing TJ requires critical analyses of recent projects and further development. In some instances TJ is relatively inexpensive and resources readily available for equipping offenders with the skills requisite for a happy and constructive life in harmony with the community. In others, given increased 'caseloads involving individuals and families with complex health, mental health, and social service needs',<sup>173</sup> TJ becomes 'time-consuming, interdisciplinary, and inexact',<sup>174</sup> and open to abuse. Multidisciplinary approaches in sentencing are not new but further assessment is needed. Though it may be debatable whether some approaches are appropriate, far more resources need to be expended to assess and evaluate TJ reforms. Identifying a greater range of sentencing options requires research and

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<sup>167</sup> Kevin Burke 'Just What Made Drug Courts Successful?' 94 (3) *Judicature* 127.

<sup>168</sup> Julia Foster, above n 15, 115.

<sup>169</sup> See Malcolm, above n 14, 130.

<sup>170</sup> ABC Radio National, Mental Health Courts and the Challenge of Therapeutic Jurisprudence, *All in the Mind*, 16 April 2011 (Michael Hill).

<sup>171</sup> *Ibid.*

<sup>172</sup> Malcolm, above n 14, 129.

<sup>173</sup> Casey & Rottman, above n 21, 454.

<sup>174</sup> *Ibid.*

development based on expert opinion rather than according to a magistrate's predilection for certain programs. An amalgam of disciplines and local community representatives is required in the sentencing process to override personal preferences. On their own, TJ practices will neither reduce social dysfunction in communities nor address the antecedents of offending behavior.

## **5 Conclusion**

Innovative attempts to reduce prisoner numbers, especially of Aboriginals, are imperative, given the adverse effects incarceration has on Aboriginal communities. The time is ripe for innovative approaches to dealing with offenders such as accounting for sociological, psychological and cultural factors; and an approach that considers victims and family members left to fend for themselves. As the annual cost for each prisoner is \$100 000, questions as to the allocation of resources are overdue. More prison beds are not the answer. Relieving offenders of responsibilities for their behaviour is not the answer. Judges acting as legal arbitrators as well as social arbitrators is not the answer. To preserve the positive features of the adversarial system such as justice concerns around the separation of powers, equality and processes to protect secondary offenders, judges require a greater range of sentencing options. For example, Aboriginal fine defaulters could participate in employment opportunities with direct debit for their fines in place of incarceration. Alternatives to any ineffective and damaging practices require research, institutional and legislative change, and funding.