



The Australasian Institute of
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Solution-Focused Judging Bench Book

MICHAEL S KING

B.Juris, LL.B(Hons), MA, PhD

Senior Lecturer, Faculty of Law, Monash University

Formerly Perth Drug Court Magistrate and Geraldton Magistrate, Western Australia

*Prepared with the assistance of grants from the
Australasian Institute of Judicial Administration and the
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Orders for this publication should be sent to:

The Secretariat
AIJA
Level 1, 472 Bourke Street
Melbourne Victoria 3000
Australia

Telephone: (61 3) 9600 1311
Facsimile: (61 3) 9606 0366

Website: www.aija.org.au

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Foreword

If one complaint could be made of this book it is that it is too substantial to be called a bench book. For judicial officers serving in courts required to deal repeatedly with cases involving substance abuse, mental health problems and family violence it provides a conceptual framework suggesting a general approach to judging and specific strategies that can be applied when adopting what the author calls "a problem-solving methodology" in relation to such cases.

The courts to which the bench book is addressed are largely specialist courts. However, much of the material in it will reward reading by judges in courts of general jurisdiction extending to such subject areas.

The traditional judicial process operates within well-defined boundaries. Judges are required to decide cases by identifying the relevant legal rules, ascertaining the facts and applying the legal rules to the facts to determine an outcome. In the administration of criminal justice the outcome will be dismissal or conviction of a criminal charge. In the latter event there will be a disposition which may take a variety of forms. The narrow focus of the judicial process reflects its constitutional character. The judiciary is the third branch of government, not just an agency delivering one among many possible forms of dispute resolution service.

There are nevertheless classes of case with which the book deals in which the judicial process cannot be quarantined from underlying, interdependent, personal and social issues. A judicial process with no awareness of those underlying issues and unable to fashion outcomes informed by such awareness is likely to be ineffective in contributing to their long-term resolution. In this respect drug courts, family violence courts, community courts, re-entry courts and mental health courts represent important developments. They reflect the view that a more comprehensive resolution of legal problems is possible than in the traditional judicial process, by the courts engaging with problems of substance abuse, family violence, mental health, housing, employment and relationship questions. Generally, the approach of these courts is not confined to a discrete disposition, but involves monitoring of participants, the assistance of a multi-disciplinary court team, promotion of notions of participant accountability and provision of a range of rehabilitation and community support services.

The judges and magistrates who preside in these courts have an important role to play in promoting better outcomes for offenders, the legal system and the community. The particular challenge they face is to discharge the core judicial function described earlier but to do so with an awareness of the nature of the underlying problems and the steps to positive behavioural change. They are required to apply interpersonal skills not normally associated with judging.

Existing legal literature generally provides little guidance concerning the function of judges in these courts. The bench book is a significant step towards remedying this deficiency. It provides important information on

topics relevant to "problem-solving courts" including key challenges faced by those involved in court programs, judicial communication skills, and strategies and techniques for promoting positive behavioural change.

The publication of the bench book is part of an ongoing commitment by the Australasian Institute of Judicial Administration to this important area of judging. While the term "therapeutic jurisprudence" may continue to raise eyebrows amongst some members of the judiciary, it reflects an important endeavour to improve the administration of justice in those areas, upon which the bench book is focused, where the traditional judicial model of decision-making operating in isolation is inadequate to the task.

I commend Dr Michael King, former Magistrate in Western Australia and now Senior Lecturer in the Faculty of Law at Monash University, the author of this bench book, for his considerable and practical contribution in this important and developing area in the administration of justice.

Robert French
Chief Justice of Australia
High Court of Australia

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Michael S King

Introduction

Michael King

“Judicial officers can help to make a difference for people appearing before them not only by according procedural fairness but also, despite the constraints of a busy list, by expressing concern and compassion for the situation of their fellow human beings and by using processes conducive to a therapeutic effect. This has the potential...to promote public confidence in the court as an institution that listens, acts and responds to the needs of those it serves. It allows a judicial officer to take a more comprehensive and creative approach to determining cases.”¹

Over the last fifteen years, various specialist courts and court lists have been established in Australia and New Zealand (and many jurisdictions overseas) that require judicial officers to take what has been called a “problem-solving” approach to judging. Often judicial officers have been required to sit in such courts and lists with the minimal of training. While a good deal of case law and commentary guide the processes that a judicial officer uses in other judging contexts – such as trials, bail applications, interlocutory applications and sentencing – there is very little case law concerning taking a therapeutic approach to judging, as is required in these courts.

The approach to judging in these programs differs significantly from what has been regarded as mainstream judging. The materials on the techniques of problem-solving judging that are available have been published in diverse articles in overseas, Australian and New Zealand law journals and in books and online resources that have not been made known to or readily accessible by judicial officers. Hence the need for a bench book on the subject.

The Approach of the Bench Book

This bench book acknowledges that judging in problem-solving programs involves a number of considerations, such as the need to promote positive behavioural change and the wellbeing of participants;² the need to hold

¹ M. S. King, "Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities" (2003) 28 *Alternative Law Journal* 172, 175.

² The term “participant” is commonly used in problem solving courts rather than “offender” or “defendant” to reflect a positive view of these individuals and their potential to address their problems. It seeks to avoid the possible labelling effect of these other terms. See the discussion of expectations of participants in Chapter 7. As far as possible the bench book uses the term “participant”. In some cases, it has been necessary to use the term “offender”. Where it is used, it is in the sense of a person who

participants accountable for their actions; the need to maintain the integrity of the court program and the wellbeing of the court team; and the obligation to apply relevant provisions of statute law and the common law. Sometimes there is tension between two or more of these considerations. The final chapter (Chapter 9) of this bench book, amongst other things, discusses the challenges involved in resolving such tensions.

The bench book takes an optimistic, “glass half full” approach to participants in problem-solving court programs. It sees them not only as citizens who have offended and who have offending-related problems, or who otherwise have problems with the law, but also as human beings who have strengths and insight into, and possible solutions for, their problems.³ In this respect it is similar to that tradition within psychology that has studied what makes a psychologically healthy and happy human being, one who engages positively with others – a tradition that has its most recent manifestation in “positive psychology”. It also resembles practices in other fields – such as transformational leadership – that seek to engage people’s strengths and address their weaknesses in order to promote performance and job satisfaction.

The bench book draws on therapeutic jurisprudence⁴ principles to suggest a general judging approach, and offers specific strategies judicial officers can use when adopting a problem-solving methodology. Its judging approach is, as far as possible, designed to engage participants in the resolution process and to see them as an important and active partner rather than a silent partner in the process. The bench book uses processes that promote participants having choices and being able to express their views, and having them taken into account and being treated with respect. It seeks to promote and support participants’ internal commitment to change for the better. It sees the promotion of change in the context of a broad concept of rehabilitation, one that is more than the absence of offending, but also the ability to live a constructive, happy and law-abiding life in the community.

This judging approach relies more on the standing of the judicial officer as a respected authority acting on behalf of the community than on the judicial

has committed an offence or offences rather than as suggesting a permanent attribute of a person.

³ A strengths-based approach to participants in problem-solving courts has also been suggested elsewhere. See, for example: M. D. Clark, "Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavioural Change" (2001) 3 *National Drug Court Institute Review* 35, at <<http://www.ndci.org/publications/publication-resources/national-drug-court-institute-review>> viewed 29 August 2009; M. S. King, "Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership" (2008) 17 *Journal of Judicial Administration* 155; M. S. King and B. Batagol, "Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts" (forthcoming) *International Journal of Law and Psychiatry*; S. Maruna and T. P. LeBel, "Welcome Home? Examining the "Reentry Court" Concept from a Strengths-Based Perspective" (2003) 4 *Western Criminology Review* 91; B. J. Winick, "Therapeutic Jurisprudence and Problem Solving Courts" (2003) 30 *Fordham Urban Law Journal* 1055; B. J. Winick and D. B. Wexler, *Judging in a Therapeutic Key* (Carolina Academic Press, 2003).

⁴ "Therapeutic jurisprudence" is defined and discussed in Chapter 1.

officer's coercive powers.⁵ Indeed, in many cases, arguably the judicial officer refraining from taking a coercive approach and instead taking an approach that demonstrates trust in the participant's ability to initiate and maintain the change process, may have a far more significant effect on the participant than simply ordering the participant to comply.

It is suggested that this approach to judging can be applied in all problem-solving courts and, depending on the nature of the proceeding, to other court processes as well. Although family violence courts differ from other problem-solving courts in that they are not offender-focused but rather victim-focused – promoting the safety of and providing support for the victims of family violence – implicit in the concept of the victim's safety is the perpetrator desisting from acts of violence or related acts of abuse. In other words, this involves the perpetrator engaging in positive behavioural change. The problem-solving approach and strategies described in this bench book are based on behavioural science findings as to what is effective in promoting positive behavioural change and are therefore relevant to judging in all problem-solving courts, including family violence courts. While further research is needed to test their effectiveness in the context of judging in a family violence court (and other courts), it is suggested that the research generally justifies taking this approach. Certainly the research on a judicial approach that simply observes perpetrators in case they do the wrong thing suggests that that form of judging is ineffective in promoting decreased recidivism.⁶ In any event, the approach suggested in this bench book can be applied along with support and safety promotion strategies for victims of family violence.

From Problem-Solving to Solution-Focused Judging

Although drug courts, family violence courts, community courts and the like are commonly called "problem-solving courts", in Australia the terminology has started to shift. Recent Australian work on judging in family violence courts has suggested a solution-oriented, transformational approach to judging in these courts.⁷ A group principally constituted of judicial officers interested in the judging that takes place in such "problem-solving courts" was formed in Australia and New Zealand in early 2009 under the banner of "Courts as Solutions".

A difficulty with the term "problem-solving court" is the implication that it is the court that solves the participant's problem.⁸ A possible implication is that

⁵ M. S. King and J. Wager, "Therapeutic Jurisprudence and Problem Solving Judicial Case Management" (2005) 15 *Journal of Judicial Administration* 28, 32; D. K. Malcolm, "The Application of Therapeutic Jurisprudence to the Work of Western Australian Courts" (2007) 17 *Journal of Judicial Administration* 127, 132.

⁶ See the discussion on this point in Chapter 1.

⁷ King and Batagol, above n 3; M. S. King and B. Batagol, "Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts", paper presented at *Just Partners: Family Violence, Specialist Courts and the Idea of Integration*, Canberra, 22-23 May 2008.

⁸ M. S. King, "What Can Mainstream Courts Learn from Problem-Solving Courts?" (2007) 32 *Alternative Law Journal* 91. A more extensive critique is presented in M. S. King, "Should Problem-Solving Courts Be Solution-Oriented Courts?", paper presented at 31st

the participant is unable to solve the problem and must come to a court to have the problem solved. The question arises whether such a message is in the interests of the participant and his ability to address life problems both during his time in the court program and once the program has been completed. Surely problem-solving courts should be promoting participants' ability to resolve their own problems albeit with resort to appropriate community support and treatment agencies where needed.

To assert that a court solves participants' problems – as claimed in the problem-solving court literature – is to discount participants' efforts made prior to entering the program, while on the program and after completing the program in the direction of positive behavioural change.⁹ As with other interventions that have a therapeutic effect, problem-solving courts should be regarded as time-limited interventions that help facilitate and support the change process.¹⁰ In other words, the efforts of the individual participant and the support of the court and allied treatment and support services combine to promote the change process.

As Winick has observed:

...problem solving court judges must understand that although they can assist people to solve their problems, they cannot solve them. The individual must confront and solve her own problem and assume the primary responsibility for doing so.¹¹

Of course each of these programs does not bear the generic name “problem-solving court”. They are instead called a “drug court” or “family violence court” and the like. Yet the concept of a problem-solving court may influence the approach of government in establishing these programs, and the attitudes adopted by judicial officers, lawyers and the court team once the program is underway.

The judging approach suggested in this bench book proposes that the court is more a facilitator and a change agent than an institution that makes the change. The court sees participants as being able to engage in the natural change process themselves, with the support of the judicial officer and the court team. Indeed, the fact that much positive behavioural change in individuals with problems occurs without the intervention of authorities or treatment agencies¹² supports the proposition that change is natural.

In the case of individuals before courts with offending-related problems, most likely there will be particular issues that inhibit the change process. For example, a participant may lack confidence in her ability to implement and maintain change or lack family and social support. In a solution-focused approach, the judicial officer and the court team support the participant's

Congress of the International Academy of Law and Mental Health, New York, 28 June-4 July 2009.

⁹ King (2009), above n 8.

¹⁰ Ibid.

¹¹ Winick, above n 3, 1067.

¹² W. R. Miller and S. Rollnick, *Motivational Interviewing: Preparing People for Change* (The Guilford Press, 2nd edn, 2002), 4.

self-determination and problem-solving skills, and the participant's confidence in her ability to resolve the offending-related problems – attributes which should stand the participant in good stead to address life challenges well beyond the time she has completed her court program.

Solution-focused judging focuses on both the process and the outcome. In terms of the outcome, solution-focused judging has a positive and comprehensive focus. For example, instead of seeing rehabilitation as the absence of a negative – offending – it sees it as the existence of a positive – the ability to lead a happy, constructive and law-abiding life in the community. The process is concerned with empowering participants to determine the essential requirements for them to lead a happy, constructive and law-abiding life; identify the problems that affect their ability to lead it; facilitate them in developing and implementing solutions; and, as far as possible and guided by their needs and wishes, provide ongoing support for them.

For the reasons given in this section, the judicial approach proposed in this bench book will be described as “solution-focused judging”. It is acknowledged that the term “problem-solving courts” remains widely in use and that problem-solving lies at the core of the approach taken by these courts. In recognition of this fact and to avoid confusion, the term “problem-solving courts” will continue to be used in the bench book.

The Use of Behavioural Science Research

This bench book often cites psychological research or observations made by theorists from the behavioural sciences. The object is not to turn judicial officers into counsellors or psychologists. Rather, the citation of such literature is done on the basis that areas of interest to judging in a therapeutic or solution-focused manner – such as communication, motivation and behavioural change – are shared by psychology and other behavioural sciences. Other areas of human life also have this interest – such as leadership, business, community service organisations and coaching. Indeed, the judicial role in a problem-solving court program has been seen to be very similar to that of a coach.¹³

Research and practices in the behavioural sciences and in other areas where behavioural science findings are applied may assist judicial officers and lawyers in the performance of their work. Indeed, noted humanistic psychologist Carl Rogers observed that what is true in a relationship between therapist and client may also apply in human experience broadly.¹⁴

The bench book also relies on the author's experience as a magistrate presiding in the Perth Drug Court and in therapeutic, problem-solving style programs at the Geraldton Magistrates' Court in Western Australia. In those programs he sought to apply therapeutic jurisprudence principles in his

¹³ M. Town, "Coaches, Judges Have Much in Common", *Honolulu Advertiser*, 1 May 2006, at <<http://the.honoluluadvertiser.com/article/2006/May/01/op/FP605010303.html/?print+on>> viewed 16 December 2006.

¹⁴ C. R. Rogers, *A Way of Being* (Houghton Mifflin, 1980), xvi.

approach to judging and that experience has informed his description of solution-focused judging.

Some judicial officers may disagree with the overall approach proposed in this bench book or with individual strategies that have been suggested. However, the broad-ranging nature of the material will, it is hoped, make it a useful resource for all judicial officers, whether presiding in problem-solving courts or not. It is intended as a toolbox from which judicial officers may draw to enhance their judging.

Judicial Styles and Judicial Communication

Naturally there will be differences in judging styles between judicial officers seeking to take a therapeutic approach – just as there are differing judging styles between judicial officers generally – and thus there may be differing views concerning particular applications of therapeutic judging discussed in these pages. As Chief Justice Robert French observed: “[t]he institutions of the law are human and so long as they are, diversity is inescapable.”¹⁵ However, if therapeutic jurisprudence is to be the basis of judging in a problem-solving court, then basic therapeutic principles should guide the judging approach – such as voice, validation, respect and self-determination.

The bench book covers communication skills as they relate to judging. Communication skills in the law have been mainly concerned with the obtaining of evidence, persuading a court or another party as to the merits of a particular argument, and the delivery of judgments; that is, the linguistic and logical dimensions of communication. They have largely not been concerned with other dimensions of communication including emotional and behavioural aspects or with cognitive processes. Observations of trial judges in court in a county of Minnesota in the United States found that “almost all the judges observed used nonverbal behaviors...that are considered to be ineffective and in need of improvement. About one-third of the judges used these ineffective behaviors frequently.”¹⁶ In their white paper for the American Judges Association, Judges Burke and Leben suggested that “this is an area of great potential for improvement by judges.”¹⁷ There is no reason to believe that the same is not equally applicable in other common law countries such as Australia and New Zealand.

Prior to the advent of therapeutic jurisprudence, procedural justice and problem-solving courts, legal communication skills had generally not

¹⁵ R. S. French, "Don't You Know Who I Am? - Ego and Identity in the Administration of Justice", speech delivered to the *New South Wales Bar Association Bench and Bar Dinner*, Sydney, 8 May 2009, at <http://www.hcourt.gov.au/speeches/frenchcj/frenchcj8may09.pdf> viewed 16 May 2009, 5.

¹⁶ L. L. Porter, *Nonverbal Communication in Courtrooms at the Hennepin County Government Center: A Report on Observations of Fourth Judicial District Judges in March and April 2001* (Hennepin Co., June 2001), 4.

¹⁷ K. Burke and S. Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction" (2007) 44 *Court Review* 4, at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf> viewed 24 July 2009, 14.

included skills directed to promoting party and community respect for the judiciary, the justice system, the legal profession and the law. A key aspect of judging in a solution-focused manner is to promote an ethic of care and to be seen to be doing so by participants. To do this requires sound communication skills, including skills not only in comprehending what is said and in explaining decisions, but also in empathetic listening and other aspects of communication. It is these areas of communication that are given particular emphasis in this bench book.

One of the prime aims of the bench book is to provide information to assist judicial officers in developing skills in the courtroom. It is natural that in the early stages of developing a solution-focused technique of judging that one may be tentative in applying the appropriate skills. However, it is important that in taking a solution-focused approach, the judicial officer's actions and concern for those involved in the court process should not appear contrived. Such an approach is likely to suggest to participants that the judicial officer is not genuine. Interest in others, empathy and willingness to engage with and involve participants in problem-solving processes are at their most powerful in promoting participant motivation and compliance when judicial officers are and appear to be genuine. As with other skills, this ability develops with practice. However, an authentic commitment to taking an empathetic and therapeutic approach in judging can help in developing proficiency in applying solution-focused judging skills and in avoiding the appearance of being contrived.¹⁸

This bench book cannot hope to be complete. By reason of the interface between the law and the behavioural sciences through the vehicle of therapeutic jurisprudence, judging principles and practices in this important area will continue to develop as research in the behavioural sciences develops and as more connections are made between behavioural science findings and judging. The bench book simply seeks to describe fundamental principles underlying judging in problem-solving courts, to give insight into basic problems facing many participants in these programs and in mainstream criminal lists, and to suggest a general approach and associated judging techniques to aid judicial officers presiding in these lists.

Following on from these points it is also vital that there be initial training for judicial officers presiding in these court programs for the first time and for continuing professional development for judicial officers presiding in these courts.¹⁹

Other Resources for Judicial Officers

There are a variety of other sources that can also assist judicial officers in developing their judging knowledge and techniques. Winick and Wexler's *Judging in a Therapeutic Key*²⁰ and the National Judicial Institute of Canada's

¹⁸ King, above n 3, 162-164.

¹⁹ M. S. King, "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32 *Melbourne University Law Review* 1096.

²⁰ Winick and Wexler, above n 3.

publication by Susan Goldberg, *Judging for the 21st Century: A Problem-Solving Approach*,²¹ are excellent resources for solution-focused judicial officers. The [Australasian Therapeutic Jurisprudence Clearinghouse](#) provides commentary, resources and links concerning problem-solving courts, therapeutic jurisprudence oriented judging and the application of therapeutic jurisprudence to other areas of the law.²² A forthcoming article in the *Journal of Judicial Administration*²³ explores guidelines concerning the conduct of judicial officers taking a solution-focused approach in the light of the [Guide to Judicial Conduct](#).²⁴

The website of the [International Network on Therapeutic Jurisprudence](#)²⁵ has an extensive bibliography on the use of therapeutic jurisprudence in diverse areas of the law – including problem-solving courts – and other resources. The website of the [Center for Court Innovation](#)²⁶ has useful information concerning the innovative court and community programs used in New York and elsewhere in the United States of America. The [Therapeutic Jurisprudence Center](#) at the University of Miami promotes therapeutic jurisprudence educational courses, research and publications. The book *Non-Adversarial Justice* provides a general introduction into problem-solving courts and other aspects of non-adversarial justice, including therapeutic jurisprudence, restorative justice, creative problem-solving, holistic approaches, diversion programs, Indigenous sentencing courts and preventive law and their implications for courts, the legal profession and legal education.²⁷

It is not possible to review the various problem-solving court programs used in Australia and New Zealand (and internationally) within these pages. The bench book introduces various categories of problem-solving courts. The Australasian Therapeutic Jurisprudence Clearinghouse provides more information and resources concerning individual court programs and links to international sites that are of interest.

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- ²¹ S. Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (National Judicial Institute of Canada, 2005), at <<http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf>> viewed 11 January 2009.
- ²² Australasian Institute of Judicial Administration, Australasian Therapeutic Jurisprudence Clearinghouse, at <http://www.aija.org.au/index.php?option=com_content&task=view&id=206&Itemid=103> viewed 16 May 2009.
- ²³ M. S. King, "Therapeutic Judging and the Principles of Judicial Conduct" (forthcoming) *Journal of Judicial Administration*.
- ²⁴ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration Inc., 2nd edn, 2007), at <[http://www.aija.org.au/online/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf)> viewed 18 July 2009.
- ²⁵ International Network on Therapeutic Jurisprudence, at <<http://www.law.arizona.edu/depts/upr-intj>> viewed 16 May 2009.
- ²⁶ Center for Court Innovation, at <<http://www.courtinnovation.org>> viewed 16 May 2009.
- ²⁷ M. King, A. Freiberg, B. Batagol and R. Hyams, *Non-Adversarial Justice* (Federation Press, 2009).

Judicial Officers as Role Models

The principal focus of this bench book is the use of judging practices that support the positive behavioural change process of participants. However, judicial officers working in this way also have a wider role in promoting appropriate advocacy when a solution-focused judging approach is used. Working in problem-solving courts such as drug courts, mental health courts, family violence courts and community courts not only requires a change in the approach of judges, but also a change in the approach of lawyers. Lawyers who are used to advocacy in a mainstream court may have difficulty in adjusting to the more collaborative, therapeutic approach to advocacy that is needed in these problem-solving courts.

A lawyer taking a “responsible advocate” approach will be mindful of pursuing the client’s interests in the context of upholding the integrity of the rule of law and of the court system. A “moral advocate” will be more interested in using litigation and other means to pursue social justice goals.²⁸ In a conventional court, a lawyer is likely to focus more heavily, or solely, upon the responsible advocate role. He or she may be the zealous advocate, vigorously challenging the position, credibility and evidence of other parties in a one-pointed pursuit of the client’s perceived best interests. However, elements of both the responsible and moral approaches to advocacy are relevant to the work of a problem-solving court. The client’s best interests are important and their contribution to decision-making valued in most courts of this kind. Further, the solution-focused advocate needs to ensure that clients are protected and that their interests are promoted by the court process. In problem-solving courts, the integrity of the court process is important – so the lawyer needs to be alert that what are variously called natural justice or due process rights of the participant/client are not compromised. Further, these courts address a wider social concern than conventional courts. They seek to deal with not only the legal problem of participants’ offending behaviours, but also the wider problems that have caused them.

Nevertheless, the most relevant approach to advocacy in problem-solving courts is an ethic of care approach, which values the nurturing of relationships and community.²⁹ Here the approach of the lawyer is to view the client and the legal problem holistically, to promote client/lawyer collaboration in addressing the problem and to engage in non-adversarial, preventive, problem-solving approaches.³⁰ These values of holism, participation, prevention and facilitating problem-solving and the exercise of an ethic of care underlie solution-focused judging.

²⁸ The different approaches to legal practice referred to in this section are described in: C. Parker and A. Evans, *Inside Lawyers Ethics* (Cambridge University Press, 2007), 21-40.

²⁹ *Ibid.*

³⁰ *Ibid* 31-32.

A judicial officer taking a solution-focused approach can act as an example for the lawyers practising in the court. The judicial officer can model proper ways of interacting in court by:

- The way the judicial officer interacts with counsel, participants and other parties.
- Demonstrating respect for other parties' views.
- Using empathetic communication techniques.
- Promoting dialogue.
- Facilitating parties and team members involved sharing ideas and suggestions for the conduct of a case.
- Using a non-confrontational style in addressing differences between parties thereby modelling proper ways of interacting in court.

Bench Book Overview

Being a bench book, the focus of this work is on how judicial officers operate in court and allied processes. It is acknowledged that an important aspect of some problem-solving court judicial officers' work is engaging with community and justice agencies outside the court context. This aspect of the work of problem-solving court judicial officers is not considered in this bench book – although the communication skills and some of the other interpersonal skills described in the bench book will be relevant to some degree to that aspect of their work. The focus of the bench book also means that issues concerning the constitutional status of problem-solving courts and judging will not be considered.³¹

Chapter 1 gives a general overview of problem-solving courts and judging in those courts. Chapter 2, Chapter 3 and Chapter 4 discuss the prevalence, nature, effects and treatment of substance abuse, mental illness and family violence. Drawing on the communications literature, Chapter 5 and Chapter 6 explore listening and other communication strategies in solution-focused judging. Chapter 7 discusses the processes involved in problem-solving courts – the processes required for deliberate behavioural change and the processes involved in participants progressing through problem-solving court programs – and suggests strategies for judging in these programs.

While a therapeutic approach to judging is commonly associated with problem-solving courts, increasingly judicial officers exposed to this kind of approach are applying its techniques outside the context of problem-solving courts more broadly (see Chapter 8). It is likely this trend will continue. Indeed, Western Australian Chief Justice Wayne Martin observed of this approach to addressing legal problems that:

³¹ However, the constitutional implications of judging in problem-solving courts are considered in King et al, above n 27, ch 14.

I have no doubt that it will evolve from an approach which focuses upon special problems, like drugs, to a much more pervasive approach covering most, if not all, the problems which present in our Courts.³²

For this reason, Chapter 8 examines possible applications of problem-solving or solution-focused judging outside of problem-solving courts.

Chapter 9 discusses the professional and personal challenges for judicial officers embracing this approach in their work. While these challenges are the key focus of the chapter, there is research that has found higher levels of job satisfaction for judicial officers in problem-solving courts – drug courts and unified family courts – than family and criminal courts, suggesting the increased challenges also bring increased rewards for judicial officers working in these courts.³³

Michael King and Natalia Blecher are the co-authors of Chapters 2 and 3 of the bench book. Michael King is the author of this introduction and the remaining chapters of the bench book.

Table 1 in Chapter 1 is drawn from *Judging in a Therapeutic Key*, page 6, and is based on earlier work by Judge Roger Warren.

It is hoped that this bench book will be a useful resource for judicial officers new to the solution-focused approach to judging and for those who are experienced in it. The bench book may also be of assistance to counsel who appear for clients in these courts and to other professionals who are involved in the work of these courts.

³² W. Martin, "Justice in the Twenty First Century", speech delivered to the *Biennial Conference of the Association of Australian Magistrates*, Fremantle, 10 June 2006, at <<http://www.supremecourt.wa.gov.au/publications/pdf/Justice21stCentury-10062006.pdf>> viewed 16 May 2009, 4.

³³ D. Chase and P. Hora, "The Best Seat in the House: The Court Assignment and Judicial Satisfaction" (2009) 47 *Family Court Review* 209; P. Hora and D. Chase, "Judicial Satisfaction When Judging in a Therapeutic Key" (2004) 7 *Contemporary Issues in Law* 8.

Chapter 1: Problem-Solving Courts and Judging: An Overview

Michael King

Problem-solving courts emerged due to social need. They provide unique methods to address legal problems in a more comprehensive way.

Judicial officers presiding in these courts should promote therapeutic values such as self-determination and active participation by those involved in the court program.

These judicial officers assume a leadership role when judging in these courts and transformational leadership practices can assist in the judging process.

Problem-solving courts are a new but established part of the legal landscape. They represent a radically different way of doing court business. They present challenges to judicial officers, lawyers and other professionals involved in their operation. Problem-solving courts can also be seen to be part of a wider trend in the justice system towards the use of more optimal, healthy, socially conscious and holistic methods of addressing legal problems. The trend has been called “non-adversarial justice” in Australia and “the comprehensive law movement” in the United States.³⁴ This chapter describes the origin and nature of problem-solving courts and introduces basic principles underlying their judicial processes. It also explores the relationship between problem-solving courts and other modes of non-adversarial justice.

The Emergence of Problem-Solving Courts

Problem-solving courts emerged as a response to the need for better methods to address offending related problems including promoting offender participation in treatment and community support programs.

A key factor in the emergence of problem-solving courts has been the recognition that existing approaches to addressing offending were inadequate in many cases and that a different approach was needed. Courts often become the dumping ground for those with significant problems – problems society has otherwise been unable to

resolve or that society has aggravated due to poorly conceived and/or executed policies. For example, a significant proportion of offenders have a substance

³⁴ King et al, above n 27; S. Daicoff, "The Role of Therapeutic Jurisprudence in the Comprehensive Law Movement", in Stolle, Wexler and Winick (eds.), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000) 465.

abuse problem of some kind – whether with alcohol, illicit drugs and/or solvents. The options available to the justice system in addressing these issues were inadequate to prevent people in that situation from coming back to court for substance abuse related offending again and again. As the Law Reform Commission of Western Australia stated:

Overall, the traditional approach to drug-related offending...has been punitive; drug-dependent offenders are held fully accountable for their criminal behaviour and the need to halt the cycle of drug-dependency and crime has been largely ignored.³⁵

In the case of people with mental health and/or substance abuse problems who had offended, their health problems then also became justice problems. Yet courts were poorly equipped to provide the kind of support and treatment that these people required. The court system and justice system generally was unable to accommodate cycles of relapse and progress – which the health and behavioural sciences recognise may be a natural part of the process of healing and deliberate behavioural change.³⁶ They were unable to provide the supervision, treatment and support services necessary to address the particular needs of those with mental health or substance abuse problems.³⁷

Often offenders would end up in prison – where their problems could not be adequately addressed – and, at the end of their sentence were released back into a community that had not properly supported them in the first place and that generally provided inadequate reintegration support. As to the situation of those with mental health problems who are incarcerated, the Law Reform Commission of Western Australia has observed:

These prisoners are often vulnerable to assault and intimidation by other prisoners and studies show that they will typically be held for much longer than other prisoners. Management of the mentally impaired within prison generally follows the dominant correctional culture, with prisoners who are perceived to be difficult isolated from the mainstream population regardless of whether their behaviour is simply 'bad' or stems from a mental illness or intellectual impairment.³⁸

Growing court lists, recognition of the courts as “revolving doors”, increasing prison populations and judicial and community dissatisfaction with the inability of the court system to address the complex needs of such people who had offended contributed to the call for a new approach to be tried.

The modern problem-solving court movement began with the establishment of the first drug court in Miami in 1989. Instead of simply processing cases in terms of determination of guilt and sentence, these courts took a new approach: viewing offender rehabilitation as an essential aspect of the court's role. The

³⁵ Law Reform Commission of Western Australia, *Problem-Oriented Courts and Judicial Case Management (Court Intervention Programs)*, Project No. 96 (2004-), at http://www.lrc.justice.wa.gov.au/3_poc.html viewed 9 May 2009, 46.

³⁶ A. Freiberg, "Australian Drug Courts" (2000) 24 *Criminal Law Journal* 213, 219.

³⁷ *Ibid.*

³⁸ Law Reform Commission of Western Australia, above n 35, 95.

approach involved judicial supervision of offenders with the aid of a treatment team, which included the judicial officer.³⁹

The success of this initiative led to the establishment of other drug courts in the United States and then in a growing number of other jurisdictions, including Australia, Canada, Scotland, Ireland, Brazil, England and Wales. Further, the problem-solving approach was then adapted for use in addressing other offending related problems, including mental health, domestic violence and community justice problems. Another application was its use in relation to offenders returning to the community following release from prison. Today there is a broad range of types of problem-solving courts, including drug courts, domestic or family violence courts, mental health courts, homeless courts, community courts, re-entry courts and veterans' courts. In the United States, family justice centres now address child abuse and neglect as well as juvenile substance abuse and domestic violence using a problem-solving approach. Some programs endeavour to address a broad range of offending-related factors and have not been limited to a particular problem.⁴⁰

Australia and New Zealand have established drug courts and family violence courts.⁴¹ Increasing awareness of the destructive nature of family violence for victims, perpetrators and communities and of the inadequacy of a justice system response largely predicated upon the belief that family violence was a private issue rather than an entrenched social problem led to reform involving a more interventionist court and police approach. Domestic or family violence courts have become an integral part of that response.

There are also mental health lists or mental health courts in some jurisdictions. Australia has one community court – at Collingwood, Victoria. The New South Wales Drug Court acts also as a re-entry court in connection with the Compulsory Drug Treatment Centre. Australia has also had one problem-solving court program that has taken a generalist approach.⁴²

³⁹ Winick, above n 3, 1056-1057.

⁴⁰ M. S. King and S. Ford, "Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime" (2006) 1 *eLaw: Murdoch University Electronic Journal of Law (Special Series)* 9, at <<https://elaw.murdoch.edu.au>> viewed 10 May 2009.

⁴¹ For further information about these specific programs, see: King et al, above n 27, ch 9 and the Australasian Therapeutic Jurisprudence Clearinghouse, above n 22, *Resources*.

⁴² See below n 74 and associated text.

The Nature of a Problem-Solving Court

Problem-solving courts involve new roles for judicial officers and lawyers; promote broader goals such as addressing issues underlying offending, involve collaborative, team-based decision making processes; use judicial monitoring; and develop community connections.

Winick has observed that problem-solving courts:

extend help to people in need by connecting them to community resources, motivating them through creative uses of the court's authority to accept needed services and treatment and monitoring their progress in ways that help to ensure their success.⁴³

According to Berman and Feinblatt, the following are key aspects of problem-solving courts:⁴⁴

1. **Redefining goals.** Problem-solving courts seek outcomes that are broader than those traditionally sought in mainstream courts. While mainstream courts principally focus on a legal outcome, such as a sentence or an order concerning placement of children in need of care and protection, problem-solving courts seek to address the underlying issues – such as substance abuse, mental health problems, family violence, and related health, economic, housing, financial planning, relational and other issues – that have contributed to the offending. Depending on the court, they seek to address wide-ranging needs of victims and/or offenders so as to prevent a recurrence of the law-related problem.
2. **Making the most of judicial authority.** The use of judicial authority in monitoring participants in problem-solving court programs is seen as important in promoting participant engagement and/or compliance with the court program. The idea is that participants are more likely to perform if a judicial officer is reviewing them rather than a community corrections officer or other authority figure. The use of judicial authority is likely to be oriented in most cases to the positive use of the judicial officer's standing rather than the threatened use of force to promote compliance.
3. **Forming creative partnerships.** The court does not work in isolation but in collaboration with justice agencies, treatment agencies and community organisations connected with the problem that the court is seeking to address. In community court programs, collaborative partners may also involve local government. As Berman and Feinblatt note: "The idea here is that problem-solving courts seek to open the courthouse

⁴³ Winick, above n 3, 1061.

⁴⁴ G. Berman and J. Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (The New Press, 2005), 34-38. It has been argued that a further component of these courts should be: "to assist participants in gaining an awareness of their strengths and weaknesses and the underlying causes of their offending and to empower them to formulate and implement rehabilitation plans with the assistance of the court team" (King (2009), above n 8).

doors, bringing new tools and new ways of thinking into the courtroom".⁴⁵

4. **Putting problems in context.** Judicial officers presiding in problem-solving court programs will often familiarise themselves with wider issues concerning the particular problems their courts address. Thus information from the behavioural sciences may be used to provide background understanding to support them in their role. For example, knowledge of the nature and prevalence of family violence or of the theories concerning substance abuse problems and how to address them. They may understand the transtheoretical stages of change model that explains deliberate behavioural change and motivational interviewing, which is widely used to promote and support the change process for those with problems such as substance abuse.
5. **Rethinking traditional roles (and processes).** In a mainstream court, the adversarial mode predominates, with each party seeking to promote their interests (or in the case of the prosecutor, the fairness of the process and the community's interests) in the presence of a largely uninvolved, independent judicial officer who rules on competing arguments during and at the conclusion of hearings. In problem-solving courts, such as drug courts, mental health courts and some family violence courts, the process is largely collaborative with counsel (or the police prosecutor) and the judicial officer being members of a larger and often interdisciplinary court team. Court teams seek to promote consensual decision-making in relation to participants' cases. Further, often participants are seen as having an important role in the decision-making process concerning their own cases.

For participants, many problem-solving courts provide the opportunity to address the underlying issues that caused the legal problem in a supportive environment. These courts also offer participants the incentive of obtaining a better outcome in their court case, such as avoiding an immediate term of imprisonment in criminal cases or the return of their children into their care in child welfare cases.⁴⁶

⁴⁵ Ibid 37.

⁴⁶ Berman and Feinblatt, above n 44.

Types of Problem-Solving Courts

Drug Courts

Problem-solving courts such as drug courts, mental health courts, family violence courts, re-entry courts, community courts and general programs have some unique features but share a common goal in taking a more therapeutic approach to their work.

Drug courts provide a means for offenders with offending related substance abuse problem to address their problems by voluntarily undertaking a treatment program whilst under judicial supervision supported by a team of justice and other professionals. Research suggests that drug courts are effective in promoting decreased recidivism and improvement in quality of life variables and that they

are cost-effective.⁴⁷

According to the National Association of Drug Court Professionals, there are ten essential components of drug courts:

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

⁴⁷ See, for example: S. Alberta, M. Panjari, A. Ritter and A. Swan, *Health and Wellbeing Study - Victorian Drug Court Final Report* (Turning Point Alcohol and Drug Centre, 2004); Department of the Attorney General, *Review of the Perth Drug Court* (2006), at <http://www.courts.dotag.wa.gov.au/files/Drug_court_review_2006.pdf> viewed 10 May 2009; K. Freeman, *New South Wales Drug Court Evaluation: Health, Wellbeing and Participant Satisfaction* (NSW Bureau of Crime Statistics and Research, 2002); R. S. King and J. Pasquarella, *Drug Courts: A Review of the Evidence* (The Sentencing Project, 2009), at <<http://www.sentencingproject.org/Publications.aspx>> viewed 10 May 2009; J. Latimer, K. Morton-Bourgon and J. Chrétien, *A Meta-Analytic Examination of Drug Treatment Courts: Do They Reduce Recidivism?* (Research and Statistics Division, Department of Justice, Canada,, August 2006), at <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_7/index.html> viewed 10 May 2009; J. Payne, *The Queensland Drug Court: A Recidivism Study of the First 100 Graduates* (Australian Institute of Criminology, Research and Public Policy Series No. 83, 2008), at <<http://www.aic.gov.au/publications/rpp/83/index.html>> viewed 10 May 2009; D. Weatherburn, C. Jones, L. Snowball and J. Hua, *The NSW Drug Court: A Re-Evaluation of Its Effectiveness* (NSW Bureau of Crime Statistics and Research No. 121, 2008), at <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB121.pdf/\\$file/CJB121.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB121.pdf/$file/CJB121.pdf)> viewed 10 May 2009.

9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organisations generates local support and enhances drug court program effectiveness.⁴⁸

In relation to the role of the judicial officer in the drug court, the National Association of Drug Court Professionals (NADCP) states:

The judge is the leader of the drug court team, linking participants to AOD treatment and to the criminal justice system. This active, supervising relationship, maintained throughout treatment, increases the likelihood that a participant will remain in treatment and improves the chances for sobriety and law-abiding behaviour. Ongoing judicial supervision also communicates to participants - often for the first time - that someone in authority cares about them and is closely watching what they do.⁴⁹

The judicial officer reacts to both the positive and negative behaviours of participants, using a system of rewards and sanctions, amongst other approaches, to promote compliance with the court program. He or she is expected to “encourage appropriate behavior and to discourage and penalize inappropriate behavior”.⁵⁰ It has been said that the drug court judicial officer “assumes the roles of confessor, taskmaster, cheerleader and mentor. They exhort, threaten, encourage and congratulate participants for their progress or lack thereof”.⁵¹ However, this bench book suggests that a judging approach that emphasises being a taskmaster or making threats is a less effective method to promote participant compliance with program conditions than one that engages, empowers and encourages.

Family Violence Courts

While the focus of drug courts and mental health courts is the condition of the offender, family violence courts have a different emphasis. Family violence courts arose at a time when there was increasing awareness of the social and personal cost to family members of family violence and to the community at large, and therefore calls for a more proactive, stronger and victim-oriented criminal justice system response to the problem. The principal purpose of these courts is the protection of victims and the holding of perpetrators accountable for their actions.

Given the victim-oriented response and scepticism concerning the effectiveness of perpetrator programs, the rehabilitation of offenders is not seen as important

⁴⁸ National Association of Drug Court Professionals Drug Courts Standards Committee, *Defining Drug Courts: The Key Components* (Drug Courts Program Office, US Department of Justice, 1997), at <<http://www.nadcp.org/docs/dkeyp.pdf>> viewed 10 May 2009.

However, see also above n 44 concerning a proposed additional component of drug courts.

⁴⁹ National Association of Drug Court Professionals Drug Courts Standards Committee, above n 48, 27.

⁵⁰ Ibid.

⁵¹ J. A. Inciardi, D. C. McBride and J. E. Rivers, *Drug Control and the Courts* (Sage Publications, 1996), 71.

in many domestic violence courts in North America.⁵² Some, however, do see offender rehabilitation as important. Such courts take a problem-solving approach to perpetrators using techniques similar to those used by drug courts, including judicial supervision, referral to treatment programs and the use of rewards and sanctions.⁵³ Australian family violence courts see the promotion of perpetrators' positive behavioural change as part of their mandate.⁵⁴ However, research from the United States suggests it remains unclear whether deterrent or rehabilitation practices promote victim safety and hold perpetrators accountable.⁵⁵

King and Batagol note the following concerning family violence courts:

There are various models of family violence courts, but most include several of the following elements: the issue of protection orders in favour of victims; the provision of court, treatment and welfare related support services for victims; a coordinated approach to the detection and prosecution of family violence cases through the cooperation of justice and community agencies; expeditious trial processes for family violence cases; unified jurisdiction to deal with criminal, civil and family law aspects of family violence cases; and courts ordering offenders to participate in treatment programs often whilst subject to judicial monitoring.⁵⁶

Some Australian family violence courts use judicial review of perpetrators – albeit on a far less intensive basis than drug courts. Other family violence courts do not use judicial review but direct perpetrators into treatment programs as a part of sentencing (where appropriate).⁵⁷

Family violence courts have not been as extensively evaluated as drug courts. It is too early to say whether they are effective in lowering the incidence of family violence. An evaluation of the Joondalup Family Violence Court found an increased number of arrests and referrals of perpetrators to perpetrator programs.⁵⁸ A New South Wales study found that a family violence court program increased victim satisfaction and promoted more effective court and

⁵² King and Batagol, above n 3.

⁵³ R. B. Fritzler and L. M. J. Simon, "Creating a Domestic Violence Court: Combat in the Trenches" (2000) 37 *Court Review* 28, at <<http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9FritzlerSimon.pdf>> viewed 11 September 2009.

⁵⁴ For example, the Department of the Attorney General (Western Australia)'s website on family violence courts states: "Family Violence Courts aim to break the cycle of family violence by providing the option of programs to address the offender's violent behaviour before sentencing" (Government of Western Australia Department of the Attorney General, "Family Violence Court" *Court & Tribunal Services*, at <http://www.courts.dotag.wa.gov.au/f/family_violence_court.aspx> viewed 18 July 2009.) See also: Magistrates' Court of Victoria, "Family Violence Court Programs", at <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/Family+Violence+Programs/>> viewed 18 July 2009.

⁵⁵ D. MacLeod, R. Pi, D. Smith and L. Rose-Goodwin, *Batterer Intervention Systems in California: An Evaluation* (Administrative Office of the Courts, 2008), at <<http://www.courtinfo.ca.gov/reference/batintsys.htm>> viewed 10 May 2009, 97.

⁵⁶ King and Batagol, above n 3.

⁵⁷ For a review of family violence courts in Australia, see King et al, above n 27, ch 9 and Law Reform Commission of Western Australia, above n 35.

⁵⁸ Department of Justice and Western Australian Police Service, *Joondalup Family Violence Court Final Report* (2002).

support services, but that it did not produce an increase in arrest or conviction rates.⁵⁹

Mental Health Courts

Mental health courts have been established for various purposes: the speedy determination of fitness to plead issues, diverting offenders into treatment programs, ensuring offenders' mental health problems are treated, and preventing the "revolving door" of offending by engaging offenders in a program with similar features to a drug court, including judicial supervision.⁶⁰ Generally the aim of these courts is to identify offenders with mental health problems early in the court process and divert them into treatment and support services.⁶¹ Court supervision to promote compliance is a key feature of many of these programs. The courts mostly deal with low-level offenders.⁶²

Although there are more than 90 mental health courts in North America, the quality of research on their efficacy is limited. There is a lack of randomised controlled studies. The variance in practice between courts has also made it difficult to have global studies as to their efficacy. There are a growing number of studies on individual court programs that are promising, suggesting decreased recidivism, high levels of satisfaction with the program, low levels of perceived coercion and increased participation in treatment.⁶³ Despite the equivocal nature of the research, the high uptake of mental health programs in North America and the growing number of such courts internationally, suggests that mental health courts are a valuable addition to the court system. An evaluation of the South Australian Magistrates' Court Diversion Program for offenders with mental health problems found a decrease in offending for a high proportion of participants in the 12 months following their participation in the program.⁶⁴ Further research is needed to establish when the program works and for whom.

Community Courts

Community courts work with local communities to address their justice concerns. The particular justice concerns will vary from community to community. For example, the Midtown Community Court in Manhattan, New York addresses issues concerning prostitution, drug offences and vandalism in the vicinity of Times Square.⁶⁵ The Red Hook Community Justice Centre in

⁵⁹ L. Rodwell and N. Smith, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (NSW Bureau of Crime Statistics and Research, 2008), at <<http://www.bocsar.nsw.gov.au>> viewed 28 April 2009.

⁶⁰ R. D. Schneider, H. Bloom and M. Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Irwin Law, 2007), 2.

⁶¹ King et al, above n 27, ch 9.

⁶² Schneider et al, above n 60.

⁶³ Ibid 182-204.

⁶⁴ G. Skrzypiec, J. Wundersitz and H. McRostie, *Magistrates Court Diversion Program: An Analysis of Post-Program Offending* (Office of Crime Statistics and Research, 2004), at <http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf> viewed 10 May 2009.

⁶⁵ For information on the Midtown Community Court, the Redhook Community Justice Center and other problem-solving court projects, see the Center for Court Innovation's website, above n 26.

Brooklyn works with the local community to address problems such as drugs, domestic violence, other crimes and landlord-tenant disputes.

Key components of community courts include:

- The court being part of a component of a neighbourhood resource centre.
- The centre offering a wide range of justice and other programs – such as mediation, counselling, vocational, homeless outreach and treatment services – to those attending court and members of the community generally.
- The involvement of the community in the administration of the centre.
- A problem-solving approach linking offenders to appropriate treatment and support services.
- Having offenders perform community work in their local communities to repay their debt to the community and to demonstrate the work of the community court.

Community courts “promote community voice, validation and respect and other therapeutic values such as self-determination and participation”.⁶⁶ It has been suggested that magistrates’ courts should operate as community courts in addition to performing their usual roles.⁶⁷

The first and only community court in Australia was established at Collingwood, Victoria in 2007 as a three-year pilot program. It is being evaluated and the evaluation will affect whether the project continues.⁶⁸ Community courts have already gained popularity in the United States and in England.

Re-entry Courts

Re-entry courts apply a problem-solving approach involving judicial supervision and the provision of treatment and support services to offenders who have completed or are about to complete their sentence. A number of re-entry courts have been established in the United States. For example, the key components of the Harlem Re-entry Court, which operates as part of the Harlem Community Justice Center are:

- *Assessment and planning*: Identification of candidates prior to release; needs assessments and planning prior to release; involvement of the offender, community corrections and other key partners.
- *Active oversight*: Regular court appearances beginning immediately after release involving the participant, Re-entry Court staff, and family or other informal support mechanisms.
- *Coordination of support services*: Identification of necessary resources including substance abuse treatment providers, job training programs, private employers, family members, housing services, and other community- and faith-based organisations, with a case management approach accountable to the court.

⁶⁶ M. S. King, "The Therapeutic Dimension of Judging: The Example of Sentencing" (2006) 16 *Journal of Judicial Administration* 92, 101.

⁶⁷ King (2007), above n 8; M. S. King and S. Wilson, "Country Magistrates' Resolution on Therapeutic Jurisprudence" (2005) 32 *Brief* 23.

⁶⁸ King et al, above n 27, 164.

- *Graduated sanctions and incentives*: Use of a predetermined range of sanctions for violation of supervision conditions that can be administered swiftly, predictably, and universally; and the use of incentives to recognise program milestones.
- *Neighbourhood focus*: A narrowly defined geographic area covering three police precincts (23rd, 25th and 28th) in East and Central Harlem; access to on-site services available at the Harlem Community Justice Center.⁶⁹

The only problem-solving court that has a re-entry style program in Australia is the New South Wales Drug Court, which supervises certain offenders subject to terms of imprisonment who are admitted to the Compulsory Drug Treatment Centre program.⁷⁰ It has also been suggested that a problem-solving approach could be used in relation to certain serious offenders who are subject to applications for continuing detention at the end of their sentences.⁷¹ However, such an approach has not been taken to date in Australia.

There is little research on the effectiveness of re-entry courts. What research has been undertaken is inconclusive. Preliminary findings in relation to the Harlem Re-entry Court found decreased new non-drug convictions compared to controls within one year following offender release, but slightly higher return to prison rates.⁷² The New South Wales Compulsory Drug Treatment Centre is being evaluated⁷³ and the evaluation should provide some further insight into the value of these programs in the Australian context.

General or Hybrid Problem-Solving Programs

These programs are not confined to dealing with one particular problem such as illicit drug abuse or family violence. They accept offenders with various problems and seek to facilitate participants addressing their problems through a problem-solving approach. The only example of such an approach in Australia was the Geraldton Alternative Sentencing Regime, which used judicial supervision, a team based approach, collaborative problem-solving, therapeutic jurisprudence-based judging and advocacy to address a wide range of problems.⁷⁴ It was innovative in that it used the stress reduction and self-development technique Transcendental Meditation® as a pilot program for offenders. It is well recognised that stress contributes to substance abuse and

⁶⁹ D. J. Farole, *The Harlem Parole Reentry Court Evaluation: Implementation and Preliminary Impacts* (Center for Court Innovation, 2003), at <http://www.courtinnovation.org/uploads/documents/harlemreentryeval.pdf> viewed 10 May 2009, vii.

⁷⁰ A. Birgden, "A Compulsory Drug Treatment Program for Offenders in Australia: Therapeutic Jurisprudence Implications" (2008) 30 *Thomas Jefferson Law Review* 367, at <http://www.tjeffersonrev.org/30-2/Birgden.pdf> viewed 4 May 2009.

⁷¹ M. S. King, "Problem Solving under the Dangerous Sexual Offenders Act 2006 (Western Australia)" (2007) 11 *eLaw: Murdoch University Electronic Journal of Law* 32, at <https://elaw.murdoch.edu.au/archives/elaw-14-1-2007.html> viewed 10 May 2009.

⁷² Farole, above n 69.

⁷³ Birgden, above n 70.

⁷⁴ King and Ford, above n 40; M. S. King, "Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush" (2002) 26 *Criminal Law Journal* 260; M. S. King, "Innovation in Court Practice: Using Therapeutic Jurisprudence in a Multi-Jurisdictional Regional Magistrates Court" (2004) 7 *Contemporary Issues in Law* 86.

research has found that the Transcendental Meditation® technique is effective in offender rehabilitation.⁷⁵ Though limited in its scope, the independent evaluation of the program provided support for its approach in addressing offenders' problems.⁷⁶

Therapeutic Jurisprudence and Solution-focused Judging

Therapeutic jurisprudence, though having application to all areas of the law, has become the underlying philosophy behind problem solving courts.

Judicial officers can promote more therapeutic outcomes by applying an ethic of care in their judging.

Therapeutic jurisprudence is the study of how the law, its officials, processes and institutions affect the people who come under its influence.⁷⁷ While it sees that ideally law should do no harm, in some cases, by reason of the particular values that the law must promote, some harm is possible but it may be minimised through the use of therapeutic jurisprudence

techniques. Therapeutic jurisprudence is a mechanism for promoting law reform using wellbeing as the lens through which the law is studied and the behavioural sciences as the source of possible remedies that could be adapted for use within the legal system. It sees a commonality between the law and the behavioural sciences in their interest in the functioning of the human psyche and how healthy behaviour may be promoted.⁷⁸ While therapeutic jurisprudence is commonly identified with problem-solving courts or the promotion of offender rehabilitation, its scope is far wider. For example, it has been applied to mental health law, victims of crime, workers compensation, family law, and international law and as a vehicle for critiquing the Northern Territory Emergency Intervention legislation.⁷⁹ Arguably it is relevant at each stage of judging – from interlocutory processes through to a final appeal.⁸⁰

⁷⁵ US National Institute on Drug Abuse, "Stress & Drug Abuse", at <<http://www.drugabuse.gov/Drugpages/Stress.html>> viewed 10 May 2009. For a collection of research on the use of Transcendental Meditation in offender rehabilitation, see: C. N. Alexander, K. G. Walton, D. W. Orme-Johnson, R. S. Goodman and N. J. Pallone (eds.), *Transcendental Meditation in Criminal Rehabilitation and Crime Prevention*, (Haworth Press, 2003).

⁷⁶ R. Cant, R. Downie and D. Henry, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Social Systems and Evaluation, 2004).

⁷⁷ See generally: D. B. Wexler and B. J. Winick (eds.), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, (Carolina Academic Press, 1996). Resources and a list of references on therapeutic jurisprudence are available at the International Network on Therapeutic Jurisprudence website, above n 25 and the Australasian Therapeutic Jurisprudence Clearinghouse, above n 22.

⁷⁸ King, above n 66.

⁷⁹ Winick, above n 3; D. Bryant and J. Faulks, "The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia" (2007) 17 *Journal of Judicial Administration* 93; J. M. Cooper, "State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law" (1999) 17 *Behavioral Sciences & the Law* 607; M. S. King, "Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial" (2008) 32 *Criminal Law Journal* 303; M. S. King and R. Guthrie, "Using Alternative Therapeutic Intervention Strategies to Reduce the

The relevance of therapeutic jurisprudence to judging has been recognised by the judiciary in Australia and internationally. For example, in the United States in 2000, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution in favour of problem-solving courts and the use of therapeutic jurisprudence.⁸¹ In 2004, the Western Australian country magistrates resolved to apply therapeutic jurisprudence in their work.⁸² The Australasian Institute of Judicial Administration and the Magistrates' Court of Western Australia were involved in organising the Third International Conference on Therapeutic Jurisprudence in Perth in 2006.⁸³ Therapeutic jurisprudence is included in the national curriculum for judicial development for Australian judicial officers produced by the National Judicial College of Australia.⁸⁴

Since the publication of a seminal article by Hora, Schma and Rosenthal in the late 1990s, therapeutic jurisprudence has been regarded as the underlying philosophy of drug courts.⁸⁵ It is also recognised as guiding mental health court practices as well.⁸⁶ The use of therapeutic jurisprudence in mental health courts is not surprising given the origins of therapeutic jurisprudence in work by Wexler and Winick, which found that mental health laws did not adequately promote mental health.⁸⁷ Therapeutic jurisprudence is also influencing the practice of family violence courts.⁸⁸ It has also been applied in more general

Costs and Anti-Therapeutic Effects of Work Stress and Litigation" (2007) 17 *Journal of Judicial Administration* 30; M. S. King and R. Guthrie, "Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response" (2008) 89 *Precedent* 39; D. B. Wexler and B. J. Winick (eds.), *Essays in Therapeutic Jurisprudence*, (Carolina Academic Press, 1991).

⁸⁰ On the relevance of therapeutic jurisprudence to appeals, see: N. Des Rosiers, "From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts" (Spring, 2000) *Court Review* 54, at <<http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9DesRosiers.pdf>> viewed 10 May 2009; M. S. King, "Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts" (2008) 30 *Australian Bar Review* 201.

⁸¹ The text of the resolution is available at: Conference of State Court Administrators, COSCA Resolution IV: In Support of Problem-Solving Courts, at <<http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionproblemsolvingcts.html>> viewed 18 July 2009.

⁸² See: *Western Australian Country Magistrates Resolution on Therapeutic Jurisprudence* (2004), at <<http://www.law.arizona.edu/Depts/upr-intj/intj-wacmr.html>> viewed 18 July 2009.

⁸³ See: "Transforming Legal Processes in Court and Beyond" *3rd International Conference on Therapeutic Jurisprudence*, 7-9 June 2006, Perth Convention & Exhibition Centre, Perth, Western Australia, Conference Program, at <<http://www.ajia.org.au/TherapJurisp06/FINALPROGRAM.pdf>> viewed 18 July 2009.

⁸⁴ See, for example: National Judicial College of Australia, A Curriculum for Professional Development for Australian Judicial Officers, at <<http://njca.anu.edu.au/Projects/Curriculum/Curriculum%20flyer4.pdf>> viewed 18 July 2009.

⁸⁵ P. Hora, W. Schma and J. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 *Notre Dame Law Review* 439.

⁸⁶ Schneider et al, above n 60.

⁸⁷ Ibid.

⁸⁸ King and Batagol, above n 3; B. J. Winick, "Applying the Law Therapeutically in Domestic Violence Cases" (2000) 69 *University of Missouri-Kansas City Law Review* 33.

programs and is seen as important in community courts.⁸⁹ It is not every form of judging that takes place in a problem-solving court that is necessarily therapeutic. There are varying degrees to which therapeutic jurisprudence principles are applied in these courts. For example, if a court were to overly rely on remands in custody as a means of promoting compliance, then therapeutic jurisprudence would see the practice to be anti-therapeutic.

Therapeutic jurisprudence does more than suggesting some techniques that could be used to assist judging in problem-solving courts. It suggests that there are basic principles associated with motivation and positive behavioural change that are based on empirical research that should inform all judging and advocacy practices in problem-solving courts. Among these basic principles, self-determination, the promotion of procedural justice values and practices based on health compliance principles are those most emphasised. We shall discuss values of self-determination and procedural justice here and consider health compliance techniques in the processes and strategies chapter (see Chapter 7).

Self-determination or Autonomy

Self-determination has been valued as being vital for health, motivation and successful action in various traditions and disciplines over hundreds of years. It is recognised as such in politics, economics, health disciplines, Eastern and Western philosophy, religion and law.⁹⁰ In law, self-determination – the exercise of free will to make choices as to how one is to think, speak and act – is at the basis of contract law, marriage law and criminal law, and other areas of the law. Self-determination allows a person to choose action that is personally meaningful and for which she has an internal commitment to perform. Choice promotes motivation, confidence, satisfaction and “increased opportunities to build skills necessary for successful living”.⁹¹

According to self-determination theory “motivation, performance, and development will be maximised within social contexts that provide people the opportunity to satisfy their basic psychological needs for competence, relatedness and autonomy”.⁹² In this theory, competence means understanding how to achieve goals and self-efficacy in doing so; relatedness concerns stable and satisfying relationships; and autonomy is the capacity to begin and manage one’s actions. Research has found that self-determined motivation is linked to educational outcomes including educational performance, retention at school, conceptual learning and memory.⁹³ It is seen as important for cognitive flexibility, creativity and self-esteem.⁹⁴ Managers supporting the autonomy of their employees have been found to promote greater job satisfaction, higher

⁸⁹ King and Ford, above n 40. In relation to community courts, see, for example: *Magistrates Court Act 1989* (Vic) s 4M(5).

⁹⁰ King, above n 8; B. J. Winick, "On Autonomy: Legal and Psychological Perspectives" (1992) 37 *Villanova Law Review* 1705.

⁹¹ Winick, above n 90, 1766.

⁹² E. L. Deci, R. J. Vallerand, L. G. Pelletier and R. M. Ryan, "Motivation and Education: The Self-Determination Perspective" (1991) *Educational Psychologist* 325, 327-328.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

performance evaluations and greater psychological adjustment in their employees.⁹⁵

Giving participants the choice to enter a problem-solving court program and the use of the goals and strategies exercise, behavioural contracting and the involvement of participants in problem-solving – described in Chapter 7 – are means of promoting participant self-determination, motivation and commitment to change.

Therapeutic jurisprudence sees approaches that are the opposite of self-determination – paternalism and coercion – as inhibiting successful action. Paternalism and coercion effectively tell a person that he is not competent enough to make worthwhile decisions and so someone else must make them for him. Paternalism and coercion promote resistance. People naturally do not like to be told how to live their lives. As Winick has noted, “[p]aternalism is often experienced as offensive by its recipients. It may produce resentment, and as a result, may backfire, producing a psychological reactance to the advice offered that might be counter-productive.” In relation to coercion, Winick has commented that: “[p]eople who feel coerced...may respond with a negative psychological reactance, and may experience various other psychological difficulties”.⁹⁶

Ideally the graduate from a problem-solving court program will have substantially addressed the problem that brought her into the program in the first place and have the skills and confidence to deal with any life challenges that come along, drawing on community and treatment services if the need should arise. The judging approach needs to be consistent with this ideal. A paternalistic judging approach is unlikely to promote the development of those skills or participants’ self efficacy – their confidence in their ability to perform. Indeed, as noted, paternalism sends the opposite message. As Clark has observed in the context of a drug court:

Change rests with a participant’s full participation, energy and commitment. However, if staff assumes a role where their ideas and expertise constantly trump those of the client, the participant is relegated to a passive role. If a client’s experiences and know-how are subjugated to the wisdom and methods of the professional, then the term drug court ‘participant’ could well be in danger of becoming an incongruous or contradictory term.⁹⁷

Judicial officers coming from mainstream judging are steeped in coercive and paternalistic approaches. In criminal cases, coercive orders – sentences – are the bread and butter of judging in a criminal court. In the case of imprisonment and orders involving community supervision, they rely on the belief that these methods lead to behavioural change. Sentencing remarks often also include a condemnation of the offender’s behaviour (and in some cases the offender personally). In non-criminal cases, parties to a dispute hand the decision-making

⁹⁵ M. Gagné and E. L. Deci, "Self-Determination Theory and Work Motivation" (2005) 26 *Journal of Organizational Behavior* 331.

⁹⁶ M. S. King, "Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education" (2006) 15 *Journal of Judicial Administration* 129, 131.

⁹⁷ Clark, above n 3, 46.

process over to a judicial officer who will decide the justice of the case and make an order that is backed by force. As a result, it may be argued that it is difficult to avoid a coercive approach being similarly adopted in problem-solving courts.

Indeed, some have described the approach to judging in problem-solving courts as “benevolent coercion”.⁹⁸ However, therapeutic jurisprudence suggests that if judicial officers give people the choice about whether to participate in problem-solving court programs and respect and promote their active participation in decision-making during their time in the court program, then participants are unlikely to perceive the process as coercive and it should not be considered as such.⁹⁹

Although it can be challenging to shift from an authoritarian mode into a mode of judging that promotes participant self-determination and involvement in collaborative decision-making, it is desirable to achieve therapeutic aims. Judicial officers need to be vigilant not to lapse back into a coercive or paternalistic mode when taking a therapeutic approach to judging.

Procedural Justice and Judicial Interaction with Participants

The field of procedural justice offers important insights into how judicial officers presiding in problem-solving lists and judicial officers generally should interact with those coming before them. Findings from procedural justice research can assist courts to promote litigant satisfaction with the process and compliance with court orders. A recent white paper produced for the American Judges Association supports the value of courts applying procedural justice findings to promote these purposes.¹⁰⁰

Procedural justice suggestions concerning judicial interaction with participants are in accord with key findings concerning the promotion of deliberate positive behavioural change. They are also consistent with the transformational leadership principle of individualised consideration discussed below.

Procedural justice research has explored the effect of the processes used by justice system authorities, such as courts and police, on those coming into contact with them. According to social psychologist Tom Tyler, a principal researcher in the area:

People value affirmation of their status by legal authorities as competent, equal citizens and human beings, and they regard procedures as unfair if they are not consistent with that affirmation. To understand the effects of dignity, it is important to recognise that government has an important role in defining people’s view about their value in society. Such a self-evaluation shapes one’s feelings of security and self-respect.¹⁰¹

⁹⁸ Winick, above n 3, 1073.

⁹⁹ Ibid. This approach is discussed in great detail in Chapter 7.

¹⁰⁰ Burke and Leben, above n 17.

¹⁰¹ T. Tyler, “The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings”, in Wexler and Winick (eds.), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 3, 10-11.

Acknowledging people as competent human beings is effectively recognising their self-efficacy - their ability to function as citizens in the community. As we shall discuss in the processes and strategies chapter below, self-efficacy is recognised as important to the process of positive behavioural change.

Procedural justice research has found that those coming into contact with justice system authorities, such as courts and police, who are accorded procedural justice are more likely to respect the legal authority and to comply with her orders.¹⁰² For instance, Paternoster and colleagues found that there were fewer subsequent family violence incidents when police accorded perpetrators procedural justice than when they did not.¹⁰³

According to Warren there are four principal components of procedural justice: neutrality, respect, participation and trustworthiness.¹⁰⁴ Neutrality is a key concept of judicial office: acting independently and free from bias. Respect is encompassed in the quote from Tyler above. Participation means giving people the opportunity to explain their situation in circumstances where the person in authority is actually listening to what they say; demonstrating that what participants have said has been taken into account by the authority in making its decisions; and treating the participants with respect.¹⁰⁵ As to trustworthiness, Warren has commented:

Whether a judicial officer is trustworthy does not depend primarily on the officer's honesty or reliability. It is generally assumed that judges are honest. Rather, 'trustworthiness' is based upon a perception of the judge's motives, *i.e.*, whether the judge truly cares about the litigant (demonstrates 'an ethic of care') and is seeking to do right by the litigant. Trustworthiness is not a measure of the judge's knowledge, skills, or abilities. It is a measure of the judge's character, not the judge's competence.¹⁰⁶

While following procedural justice principles is an important aspect of a solution-focused approach to judging, it is not the only aspect that is important. As Wexler has noted:

The point is, of course, is that procedural fairness takes us a good distance – especially regarding public perception and satisfaction with the court system – but it needs to be combined with [therapeutic jurisprudence] if judges are to realize their potential in enhancing compliance and reducing re-offending.¹⁰⁷

The term “ethic of care” encapsulates the general approach that a judicial officer takes when judging in a problem-solving mode. South Australian Deputy Chief Magistrate Andrew Cannon has summarised this approach as follows:

¹⁰² Tyler, above n 101; E. A. Lind and T. R. Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988); T. Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

¹⁰³ R. Paternoster, R. Bachman, R. Brame and L. Sherman, "Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault" (1997) 31 *Law and Society Review* 163.

¹⁰⁴ R. K. Warren, "Public Trust and Procedural Justice" (Fall, 2000) *Court Review* 12, at <<http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Warren.pdf>> viewed 10 May 2009.

¹⁰⁵ Winick, above n 3; King, above n 1.

¹⁰⁶ Warren, above n 104, 14.

¹⁰⁷ D. B. Wexler, "Adding Colour to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence" (2008) 44 *Court Review* 78, at <<http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf>> viewed 30 April 2008, 79.

It is a respectful and proactive engagement with people involved in the court process to pay attention to their needs, rather than a neutral but mechanical and unsatisfying closing of files. It is a more exposed judicial role compared to the relatively mute and remote figure who only pronounces at the end and then in detached language.¹⁰⁸

The Difference between Solution-focused Judging and Other Judicial Approaches

A problem-solving court judicial officer's therapeutic role requires the judicial officer to be more active and involved, and to have a broader understanding of offending related problems and a wider range of inter- and intra-personal skills than a mainstream judicial officer.

Problem-solving courts involve a departure from traditional roles for judicial officers and lawyers and the use of different processes in interacting with participants and in dealing with their cases.

Table 1 sets out some of the principal differences between the operation of mainstream courts and the operation of problem-solving courts.

Mainstream Court Process	Problem-Solving Court Process
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case oriented	People oriented
Rights based	Interest or needs based
Emphasis based on adjudication	Emphasis placed on non-adjudication and alternative dispute resolution
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent based	Planning based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Commonsensical
Formal	Informal
Efficient	Effective

Table 1: Key Differences between the Operation of Mainstream Courts and the Operation of Problem-Solving Courts

In addition to these differences in court processes, a list prepared by Popovic contrasted the key features of the work of traditional judicial officers with the

¹⁰⁸ A. Cannon, "Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle", in Reinhardt and Cannon (eds.), *Transforming Legal Processes in Court and Beyond* (Australasian Institute of Judicial Administration, 2007) 132.

key features of the work of problem-solving court judicial officers. Disparate themes included: dispassionate versus interested (in litigant's welfare); impersonal versus personal; decisions made in legal language versus decisions made in language understood by the parties; limited communication versus open communication; impervious to nuance versus perception to nuance and special needs of litigants; omnipotent versus empowering others; and punitive versus positive/affirming.¹⁰⁹

The contrasting principles between mainstream courts and problem-solving courts mostly reflect matters of difference in emphasis rather than mutual exclusion. For example, although problem-solving courts are less concerned with how courts have dealt with matters in the past and are more concerned with the development of strategies to promote the resolution of individual cases, they do not ignore precedent. Principles of the common law and statute law – such as natural justice or due process – still apply in these courts. The outcome they seek is certainly a therapeutic outcome, but it must also be in accord with the law. Important legal principles such as due process are never trumped by therapeutic concerns. Finally, the judicial role in problem-solving courts has coaching or leadership aspects in a collaborative context, but the arbiter role and adversarial context are not entirely absent. For example, in dealing with matters of admission or termination from the program, the judicial officer acts in the role of arbiter in an adversarial process.

In judging in a problem-solving list, a judicial officer must not only consider the rehabilitation of individual participants but also statutory provisions concerning the program, the need to preserve the program's integrity, holding participants accountable for their actions and when to use collaborative decision-making and when to use adversarial decision making processes. Giving due weight to the appropriate factors at any one time can be challenging. We discuss these principles and the difficulties involved in balancing them in the judicial challenges chapter of the bench book below.

Approaches to Judging in a Problem-Solving Court

Research suggests that judicial styles differ in their effect on participant engagement and progress in problem-solving courts.

Judicial officers should use strategies that have been found to promote positive behavioural change.

The development of problem-solving courts has introduced several challenges, one of which has been determining the best approach to judging to be used in these courts. Varied judging approaches have emerged according to the purpose of the court and the personality and views of individual judicial officers presiding in these courts. Therapeutic jurisprudence has also

¹⁰⁹ J. Popovic, "Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary" (2003) 20 *Law in Context* 121, 129.

been a significant influence.¹¹⁰ The various approaches to judging in problem-solving courts involve differing degrees of interaction between judicial officers and participants.¹¹¹ At a minimum, a case may be adjourned while a participant engages in treatment and other programs. There may be only a minimal number of review hearings. This is the situation with some family violence courts, such as Joondalup in Western Australia and the Adelaide Magistrates' Court in South Australia. The closer monitoring of participants is left to other members of the court team.¹¹²

Another approach is to use judicial review hearings for the purpose of deterrence. Judicial review in this context is directed at monitoring perpetrator compliance with court orders and ensuring the safety of a victim, rather than addressing offender rehabilitation. Indeed, scepticism concerning the effectiveness of perpetrator rehabilitation programs is a reason for taking this approach.¹¹³ One New York judge succinctly described this approach as follows: "I see defendants every two to three weeks just to let them know the court is watching them."¹¹⁴ Rempel, Labriola and Davis found that review hearings in the Bronx Domestic Violence Court involved a retired judge receiving a report as to participant compliance, and then adjourning cases where there had been compliance to another date and referring cases of non-compliance to a sitting judge.¹¹⁵

A further approach to judging in problem-solving courts is to promote participant rehabilitation by using strategies that seek to enhance participants' motivation to change and that support the change process. There can be significant variation between courts and judicial officers concerning the judicial strategies used to promote these goals.¹¹⁶ Here there is significant scope for the individuality of the particular judicial officer to influence the style of judging that is used in court. However, as noted below, the evidence suggests that the style of judging used affects the outcome for participants. It is therefore important that judging in these courts be evidence-based.

Some courts seeking to promote offender rehabilitation rely heavily on the use of sanctions and rewards to promote compliance. Sanctions can include more stringent program conditions, but for some courts there is also the regular use of time in custody as a sanction. Other courts use a sanctions and rewards program but place greater emphasis on strategies that promote internal sources of motivation – such as promoting participant self-determination, goal setting and problem-solving. There is conflicting evidence as to whether sanctions promote improved participant performance in drug courts, with some studies finding that sanctions are associated with decreased program completion and/or increased

¹¹⁰ Hora et al, above n 85; Schneider et al, above n 60; Winick and Wexler, above n 3.

¹¹¹ King and Batagol, above n 3.

¹¹² Law Reform Commission of Western Australia, above n 35, 131-132.

¹¹³ Ibid.

¹¹⁴ Quoted in J. S. Kaye and S. K. Knipps, "Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach" (1999-2000) 27 *Western State University Law Review* 1, 7.

¹¹⁵ M. Rempel, M. Labriola and R. C. Davis, "Does Judicial Monitoring Deter Domestic Violence Recidivism? Results of a Quasi-Experimental Comparison in the Bronx" (2008) 14 *Violence Against Women* 185.

¹¹⁶ See, for example: King and Batagol, above n 3.

rearrest rates and other studies finding a correlation between sanctions and increased program success.¹¹⁷ It may be that sanctions are effective when used along with other program elements, but further research is needed to establish whether this is the case.¹¹⁸ However, the research suggests that the manner in which the sanctions are applied may be important if they are to be effective.¹¹⁹

A comparative study conducted by Carey, Finigan and Pukstas of 18 United States drug courts found evidence that several judging practices employed in these courts were associated with decreased cost to taxpayers due to decreased recidivism.¹²⁰ Interestingly the study found that it did not appear to matter that it was someone other than the judge imposing sanctions for breaches of program requirements, but that the judge bestowing rewards was what decreased cost to taxpayers.¹²¹ While this study was limited in its methodology and further research is needed, it does provide evidence that it may be judicial practices that encourage and support, rather than coercive practices, that are the most effective in promoting positive behavioural change.

At its broadest, it has been suggested that judging in problem-solving courts should be solution focused in the sense that the objective is to promote participants taking responsibility for finding solutions for their problems with the assistance and support of the court and its team. As King and Batagol have noted:

Essentially the approach would be for the judicial officer to engage with defendants, see them as whole human beings with strengths, weaknesses and solutions, actively involve them in decision-making directed at promoting their rehabilitation, take an active interest in and support their progress and, as far as possible, use techniques that promote them developing a solution in the event that a problem arises. It is solution-focused judging rather problem-focused judging.¹²²

Research on judging in problem-solving courts is in its very early stages. Although no firm conclusions can be drawn, research does suggest that the nature of the relationship and interaction between judicial officers and participants has a significant effect on participant outcomes.

A study by the Matrix Knowledge Group of the operation of drug courts in England and Wales found that where the same judge or magistrate supervised

¹¹⁷ Concerning evidence that supports the use of sanctions, see, for example: J. S. Goldkamp, M. D. White and J. B. Robinson, "Do Drug Courts Work? Getting inside the Drug Court Black Box" (2001) 31 *Journal of Drug Issues* 27; D. B. Marlowe, D. S. Festinger, C. Foltz, P. A. Lee and N. S. Patapis, "Perceived Deterrence and Outcomes in Drug Court" (2005) 23 *Behavioral Sciences & the Law* 183. For a review of the evidence concerning the use of sanctions, see: King and Pasquarella, above n 47, 9-12; D. C. Gottfredson, B. W. Kearley, S. S. Najaka and C. M. Rocha, "How Drug Treatment Courts Work: An Analysis of Mediators" (2007) 44 *Journal of Research in Crime and Delinquency* 3.

¹¹⁸ King and Pasquarella, above n 47, 12.

¹¹⁹ Gottfredson et al, above n 117.

¹²⁰ S. M. Carey, M. W. Finigan and K. Pukstas, *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs* (US Department of Justice, 2008), at <<http://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf>> viewed 10 May 2009, 53-59.

¹²¹ Ibid 52-53.

¹²² King and Batagol, above n 3.

participants there was: decreased likelihood of missed court appearances by participants; reduced probability that participants would fail a heroin test; increased likelihood of participants completing their sentence; and a lowering of the likelihood of reconvictions.¹²³ Similarly, an earlier study led by Goldkamp, White and Robinson of a United States drug court that had varying judicial staffing situations over time, found that the greater number of judges participants saw, the poorer the participants' outcomes in relation to treatment attendance, termination from the program and rearrest in relation to non-drug offences.¹²⁴

Exploratory research by Senjo and Leip suggests that the style of interaction between judges and participants in drug courts may affect treatment compliance and drug use.¹²⁵ They found that participants who received the most supportive comments (praise and encouragement) from a judge were more likely to finish the court program than those who received fewer such comments. However, Gottfredson and colleagues suggest that the results of this study are difficult to interpret in terms of causation in that those performing well on the program would be the ones who would most likely receive the most praise and encouragement.¹²⁶

A focus group study of participants in drug court programs found significant support for the judge's role in promoting treatment compliance and wellbeing.¹²⁷ There has also been similar support for the role of the magistrate in a general court program – the Geraldton Alternative Sentencing Regime.¹²⁸ As a result of her study of judicial interaction with participants in Scottish Drug Courts during which she observed sheriffs encouraging participants and recognising and reinforcing their progress and participants responding positively to the interaction, McIvor concluded that the judicial officer and participant interaction may contribute to “enhanced perceptions of procedural justice” and “increase

¹²³ Matrix Knowledge Group, *Dedicated Drug Court Pilots: A Process Report* (Ministry of Justice, 2008), at <<http://www.justice.gov.uk/publications/docs/dedicated-drug-courts.pdf>> viewed 27 April 2009.

¹²⁴ J. S. Goldkamp, M. D. White and J. B. Robinson, *From Whether to How Drug Courts Work: Retrospective Evaluation of Drug Courts in Clark County (Las Vegas) and Multnomah County (Portland)* (Crime and Justice Research Institute, 2002), at <<http://www.ncjrs.gov/pdffiles1/nij/grants/194124.pdf>> viewed 27 April 2009, 157; see also: National Institute of Justice, *Drug Courts: The Second Decade* (Office of Justice Programs, US Department of Justice, 2006), at <<http://www.ncjrs.gov/pdffiles1/nij/211081.pdf>> viewed 10 May 2009, 10-11.

¹²⁵ S. R. Senjo and L. A. Leip, "Testing and Developing Theory in Drug Court: A Four Part Logit Model to Predict Program Completion" (2001) 12 *Criminal Justice Policy Review* 66; S. R. Senjo and L. A. Leip, "Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process" (2001) 3 *Western Criminology Review*, at <<http://wcr.sonoma.edu/v3n1/senjo.html>> viewed 10 May 2009.

¹²⁶ Gottfredson et al, above n 117, 7.

¹²⁷ J. S. Goldkamp, M. D. White and J. B. Robinson, "An Honest Chance: Perspectives on Drug Courts: Findings from Drug Court Participant Focus Groups in Brooklyn, Las Vegas, Miami, Portland, San Bernadino and Seattle April 2002" (2002) 14 *Federal Sentencing Reporter* 369, 371.

¹²⁸ Cant et al, above n 76.

the perceived legitimacy of the court and by so doing encourage increased compliance with treatment and desistance from crime".¹²⁹

Similarly, Petrucci found that judicial interaction that promoted shared respect between judges and participants in a domestic violence court may help to promote compliance with the court program.¹³⁰ She observed an approach to judging that was "caring, genuine, and consistent but firm"¹³¹ and was one that included "actively listening to defendants and seldom interrupting them when they spoke, body-language that demonstrated attentiveness, and speaking slowly, clearly and loudly enough to be heard, while conveying concern and genuineness".¹³² The different aspects of judging observed involved judicial officers explaining, negotiating, providing positive encouragement, confronting, cautioning, warning, thanking and referring to the participant's expected and current progress.¹³³ Procedural justice highly values judges adopting strategies such as treating participants with respect, enabling them to present their cases, carefully listening to them, and taking what they say into account in decision-making. However, aspects of the judicial role noted by Petrucci involved more than according someone procedural justice. The judges' influence was a product of the judges assuming multiple roles such as "authority, motivator, problem-solver, and monitor".¹³⁴

All problem-solving courts are directed at behavioural change of some sort – whether it be desistance from family violence or substance abuse or the taking of positive steps to address mental health issues. Therefore strategies that uphold deliberate positive behavioural change are relevant to judging in all cases. These strategies are explored in depth in the processes and strategies chapter (see Chapter 7).

¹²⁹ G. McIvor, "Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts" (2009) 9 *Criminology & Criminal Justice* 29.

¹³⁰ C. J. Petrucci, "Respect as a Component in the Judge-Defendant Interaction in a Specialised Domestic Violence Court That Utilises Therapeutic Jurisprudence" (2002) 38 *Criminal Law Bulletin* 263.

¹³¹ *Ibid* 288.

¹³² *Ibid* 299.

¹³³ *Ibid*.

¹³⁴ *Ibid* 288.

Judging in Problem-Solving Courts and Transformational Leadership

Research has found that transformational leadership promotes follower satisfaction and performance.

The transformational leadership approach of idealised influence, inspirational motivation, intellectual stimulation and individualised consideration can assist judicial officers in taking a therapeutic approach to judging in problem-solving courts.

As noted above, problem-solving judging has been compared to coaching. Both involve particular forms of influence by a person in authority to promote greater levels of motivation and achievement. Coaching is a particular application of a wider concept: leadership. Leadership involves influencing people towards the achievement of particular goals.¹³⁵ It is exercised in diverse situations in the community: in families, schools, workplaces, government, community groups, sport, and religious organisations,

and in the work of legal professionals, such as judicial officers and lawyers.

Problem-solving court judging that applies the principles of therapeutic jurisprudence has been compared to transformational leadership.¹³⁶ Leadership in the judicial sphere has mainly been considered in other contexts: the role of judges in developing the common law in judgments, in speaking and writing on legal issues affecting the community and in legal scholarship.¹³⁷ However, given that leadership involves positively influencing people in the direction of the attainment of common goals and solution-focused judging involves positive influence on participants in the direction of rehabilitation, it is appropriate to consider the work of solution-focused judging as a form of leadership.

There have been several formulations of transformational leadership.¹³⁸ There are significant similarities between the three principal theories and each has similarities to processes used in the therapeutic jurisprudence approach to solution-focused judging. We will briefly consider the relevance of one of these theories – that of Bernard Bass – to solution-focused judging.¹³⁹

According to Bass, transformational leadership has the following components: idealised influence, inspirational motivation, intellectual stimulation and individualised consideration. Idealised influence concerns a leader's charismatic ability to promote identification of followers with the leader and to inspire them to follow his example. Leaders provide inspirational motivation "by providing meaning and challenge to their follower's work" and "[l]eaders get followers

¹³⁵ See generally: P. G. Northouse, *Leadership: Theory and Practice* (Sage, 4th edn, 2007).

¹³⁶ King, above n 3, 171.

¹³⁷ Ibid 177.

¹³⁸ B. Bass and R. Riggio, *Transformational Leadership* (Lawrence Erlbaum Associates, 2006); W. Bennis and B. Nanus, *Leaders: Strategies for Taking Charge* (Collins Business Essentials, 2005); J. M. Kouzes and B. Z. Posner, *The Leadership Challenge* (Jossey-Bass, 2002). For a brief review of these theories, see: King, above n 3.

¹³⁹ For a discussion of the relevance of the three principal formulations of transformational leadership to therapeutic jurisprudence and judging in a problem-solving manner, see: King, above n 3.

involved in envisioning attractive future states; they create clearly communicated expectations that followers want to meet and also demonstrate commitment to goals and the shared vision".¹⁴⁰ The promotion of enthusiasm and team spirit is an important aspect of idealised influence.

Intellectual stimulation refers to the leader's use of processes that expand followers' capabilities. The leader encourages the followers' exercise of creativity and innovation in addressing problems and meeting new challenges. Individualised consideration involves treating the follower as a whole person. Here the leader communicates with and carefully listens to the follower and supports, coaches and mentors him as needed.¹⁴¹

Each of these elements of the transformational leadership theory of Bass can be seen in the approach of therapeutic jurisprudence to solution-focused judging. Many of the strategies discussed in the processes and strategies chapter of this bench book utilise one or more of these elements (see Chapter 7).

While judicial officers do not normally embody charisma in the common sense of the word, they are in a position to influence participants in the direction of the attainment of higher ideals:

a judicial officer who does his or her job well, who affirms participants as competent human beings worthy of respect, can create a positive impression on participants and generate respect and admiration for the judicial officer and respect for the court system.¹⁴²

Through having high (but not unrealistic) expectations of participants, promoting their self-determination, having them set goals and strategies for their time in the program and supporting their self-efficacy in being able to implement the strategies and achieve their goals, judicial officers exercise idealised influence.

Inspirational motivation can be seen in the techniques used by judicial officers applying therapeutic jurisprudence. For example, having participants set their own goals and strategies helps them tap into sources of motivation deep within. This is likely to produce a stronger internal commitment to change than an approach commonly used in conventional judging. The judicial officer then endorses the participant's goals as worthwhile and offers the support of the court team to promote their attainment. Representing the community, the judicial officers endorse the worth of the participant and the participant's ability to return to the community as a contributing citizen. Further, involving participants in setting goals and strategies, problem-solving and assuming responsibility for their rehabilitation gives them the opportunity to exercise creative, affective and other skills.

Individualised consideration is a hallmark of therapeutic judging in problem-solving courts. The judicial officer takes a keen interest in each participant and exercises an ethic of care in relation to her. At each review hearing the judicial

¹⁴⁰ Bass and Riggio, above n 138, 6.

¹⁴¹ Ibid 7.

¹⁴² King, above n 3, 163.

officer will ask the participant about how life is progressing for her. The judicial officer will note significant events in the participant's life such as a restoration of contact with children, attaining a new job, the loss of a family member or graduating from an educational program. The exercise of communication and listening skills and the use of strategies that engage participants and promote their self-efficacy are important aspects of individualised consideration. Demonstrating empathy for the participant is an important part of the judicial officer's approach to communication and listening. Further, the judicial officer takes an empathetic approach to addressing problems that arise in a participant's performance. As far as possible, instead of imposing a solution, the judicial officer engages the participant in a collaborative problem-solving exercise.¹⁴³

Leadership theory also offers insights into the different approaches to judging in problem-solving courts. Bass has asserted there are three different approaches to leadership other than transformational leadership: laissez faire, where the leader allows the followers to do as they wish; management by exception, where the leader only becomes involved to correct mistakes or to monitor in case problems occur; and transactional leadership, where the leader offers a reward to followers in exchange for particular achievements or performance.¹⁴⁴ Management by exception has some similarities to a minimal involvement style of problem-solving judging; transactional leadership is similar to the rewards and sanctions approach to judging; and transformational leadership is closest to a fully therapeutic or solution based approach to judging. Management by exception also resembles conventional judging where a court does not intervene in relation to community based orders or probation orders unless it is alleged the order has been breached.¹⁴⁵

Significantly, research has found that transformational leadership promotes follower satisfaction, motivation and performance.¹⁴⁶ Research has also found that transformational leadership is more effective in promoting the satisfaction and performance of followers than transactional leadership.¹⁴⁷ Management by exception has been found to be not as effective as transactional leadership in promoting these outcomes.¹⁴⁸ Molero and colleagues have noted that:

people who assign high scores to their leaders in transformational leadership, compared to those who give low scores, consider their leaders and work units more effective, they are willing to expend more extra effort, and they feel more

¹⁴³ This approach is discussed more fully in Chapter 7.

¹⁴⁴ Bass and Riggio, above n 138.

¹⁴⁵ I am grateful to Peggy Hora for this observation about conventional judging.

¹⁴⁶ Bass and Riggio, above n 138; G. A. Yukl, "An Evaluation of Conceptual Weaknesses in Transformational and Charismatic Leadership Theories" (1999) 10 *Leadership Quarterly* 285.

¹⁴⁷ Bass and Riggio, above n 138, 19-56; R. Dum Dum, K. B. Lowe and B. J. Avolio, "A Meta-Analysis of Transformational and Transactional Leadership Correlates of Effectiveness and Satisfaction: An Update and Extension", in Avolio and Yammarino (eds.), *Transformational and Charismatic Leadership: The Road Ahead* (JAI, 2002); K. B. Lowe, K. G. Kroeck and N. Sivasubramaniam, "Effectiveness Correlates of Transformational and Transactional Leadership: A Meta-Analytic Review of the Mlq Literature" (1996) 7 *Leadership Quarterly* 385.

¹⁴⁸ Bass and Riggio, above n 138, 4.

satisfied at work.¹⁴⁹

Issues of increased motivation, satisfaction and performance are important for participants in progressing through problem-solving courts. Although research has not evaluated the effectiveness of transformational leadership as an approach to judging in problem-solving courts, the evidence of its success in other areas where motivation, satisfaction and performance¹⁵⁰ are important suggests it may be of value to judging in problem-solving courts. The fact that the judging strategies proposed by therapeutic jurisprudence for problem-solving courts would be seen to be transformational in transformational leadership theory adds further weight to this suggestion. Finally, research has found that the effect of transformational leadership on follower attitudes may be mediated through processes that promote the empowerment of followers.¹⁵¹ That is, where followers are involved in setting goals rather than having them imposed on them, are able to exercise choice, perceive they are competent in what they do and believe that their actions can have an impact on the organisation, then job satisfaction and commitment to the organisation improves. If this finding were replicated in applying transformational leadership to judging in problem-solving courts, then one would expect there to be greater participant satisfaction and compliance with the process and respect for the judicial officer and the court program. That is, transformational leadership would further the goals of solution-focused judging.

The concepts of transactional leadership and transformational leadership have implications for the style of judging in a problem-solving court. Problem-solving courts' use of rewards and sanctions is a transactional leadership approach – you do well, you get the reward, you do poorly and the court will sanction you (e.g., time in custody, more court appearances etc). These rewards and sanctions represent an external means of promoting motivation. On the other hand, transformational leadership seeks to promote internal motivation through idealised influence, inspirational motivation, individualised consideration and intellectual stimulation.

We have noted above the mixed results in relation to the use of sanctions in drug courts. It may be that the rewards and sanctions approach becomes more effective when transformational practices – those that promote internal sources of motivation – are used as well. However, research is needed to establish the value of transformational leadership in this context.

¹⁴⁹ F. Molero, I. Cuadrado, M. Navas and J. F. Morales, "Relations and Effects of Transformational Leadership: A Comparative Analysis with Traditional Leadership Styles" (2007) 10 *The Spanish Journal of Psychology* 358, 366.

¹⁵⁰ See the references cited in nn 146-149.

¹⁵¹ C. B. Castro, M. V. M. Períñan and J. C. C. B. Bueno, "Transformational Leadership and Followers' Attitudes: The Mediating Role of Psychological Empowerment" (2008) 19 *The International Journal of Human Resource Management* 1842.

Problem-Solving Courts and Other Approaches

Solution-focused judging often involves the exercise of creative problem solving.

Like restorative justice, holistic approaches and creative problem solving, this judging practice values active participation by parties and more comprehensive approaches to resolving legal problems.

Problem-solving courts emerged at a time when other developments – including greater use of technology and the introduction of case management processes in courts – were changing the way that some judicial officers, lawyers and the legal system approached legal work. We have also noted the influence of therapeutic jurisprudence on problem-solving courts. However, other approaches – such as holistic

approaches to law, creative problem-solving and restorative justice – also have potential application in relation to the solution-focused judicial response. In this section, we will briefly examine the relevance of these approaches to problem-solving courts and judging.

Holistic Approaches to Legal Problems

Holism means viewing a matter from the perspective of the whole rather than from the perspective of its constituent parts. Traditionally the legal system has identified particular aspects of a party's problem, determined whether the problem fitted within certain categories of problems regarded as entitling the party to relief, and then made consequent orders. Non-legal aspects of problems generally received little or no attention from the legal system as it often considered them irrelevant.

A holistic approach to legal problems has differing meanings in different contexts.¹⁵² For example, some law firms see a holistic approach as addressing all of a client's legal problems at the same time. Others see a holistic approach as addressing all of the underlying issues in relation to the legal problem. The broadest view sees these issues as important but also takes into account the different dimensions of the client's and (where appropriate) the lawyer's self – including the spiritual dimension.¹⁵³ This most broad concept of holistic law practice has been mainly confined to a small number of lawyers in North America.¹⁵⁴

A holistic approach to court practice has also been taken in relation to problem-solving court programs. It is principally seen in the broader concepts of rehabilitation that inform their approach to assisting participants. Here rehabilitation is seen as more than the absence of offending but rather the ability to live happy, constructive and law-abiding lives in the community. Problem-solving programs that take this approach seek to provide assistance to participants where needed and appropriate in major life domains, such as health

¹⁵² King et al, above n 27.

¹⁵³ Ibid ch 6.

¹⁵⁴ Ibid.

(addressing substance abuse and other problems), employment and training, accommodation, financial planning, other life skills, recreation and relationships. The Geraldton Alternative Sentencing Regime has taken this approach in a problem-solving context, and the Court Integrated Services Program has taken this approach at a diversion level in Victoria.¹⁵⁵ Further, some drug courts are also assisting participants to address multiple problems. For example, Payne reported that some Queensland Drug Court participants have engaged in a domestic violence perpetrators program and in life skills programs.¹⁵⁶

Some problem-solving courts are also taking a holistic approach in the way they interact with participants. They are using communication and problem-solving strategies that engage with and help to motivate and support participants through the court process. In contrast, conventional methods of communicating in court have largely ignored the diverse cognitive, affective and motivational factors that are necessary for effective communication directed at positive behavioural change. Some problem-solving court programs also try to see participants as whole human beings with strengths, weaknesses, threats and opportunities. The approach then becomes to assist participants to build on their strengths, address their weaknesses and problems (including those that are associated with offending), handle risky life situations, and make the most of the opportunities available to rebuild their lives.¹⁵⁷

Creative Problem-Solving

King and colleagues have described creative problem-solving in the law as follows:

Creative problem solving is about expanding the repertoire of methods that legal professionals such as lawyers and judicial officers use to address legal problems. It invites them to think differently and more broadly about how they identify, understand and seek to address legal problems. It places their work in a wider social context, beyond the interests of an individual case or client, one involving a duty to promote social justice; it challenges them to develop and apply a wider range of problem-solving skills; and it asserts that the development of cognitive skills, original thinking and interpersonal and intra-personal skills is important to the legal role (Morton, 1998, pp 379-380).¹⁵⁸

Creative problem-solving does not advocate discarding the traditional analytic legal method. However, it says that there are other forms of problem-solving that can assist lawyers and judicial officers in promoting a more comprehensive resolution of a client's/party's problem and avoid negative side-effects that can arise from a more analytical, adversarial approach to problem-solving. Creative problem-solving sees other disciplines, the client and other parties to a legal dispute as sources of problem-solving methods. Like holistic approaches it sees the need to take into account the multiple dimensions of a person's life in considering the nature of a legal problem and the effect of different alternative solutions on each of those dimensions.

¹⁵⁵ Law Reform Commission of Western Australia, above n 35, ch 5.

¹⁵⁶ Payne, above n 47.

¹⁵⁷ This is the approach taken in this bench book and is described more fully in Chapter 7.

¹⁵⁸ King et al, above n 27, ch 5.

Problem-solving courts are an example of creative problem-solving in the law. They often use collaborative problem-solving methods and an interdisciplinary team. Where judicial officers apply therapeutic jurisprudence techniques in problem-solving programs, they involve participants in problem-solving, valuing them as important sources of solutions for their problems. As with other forms of creative problem-solving, problem-solving court judges applying therapeutic jurisprudence strategies take an interdisciplinary approach. They apply techniques from the behavioural sciences to enhance problem-solving methods.¹⁵⁹

Solution-focused judging also requires “the development of cognitive skills, original thinking and interpersonal and intra-personal skills”.¹⁶⁰ At times, it requires judicial officers to “think outside the box” – to think creatively as to ways of addressing problems that arise and of assisting participants to address particular issues. It may require a judicial officer to take a chance with a participant – after an appropriate risk assessment – and to allow a participant to implement his strategy to address a problem even though there may be some doubts concerning whether the participant should be permitted to do so. It requires judicial officers to be more sensitive concerning communication with participants and to be aware of the affective, cognitive and behavioural aspects of communication as well as the content of what is being said.¹⁶¹

The wider social context emphasised by creative problem-solving is also an important consideration for problem-solving courts. Such courts often operate cooperatively with community and government agencies to address the particular problem that comes within their jurisdiction, such as substance abuse or family violence. The judicial officer’s work is not confined to court and chambers but involves interacting with community groups in connection with the work of the court generally.¹⁶²

Restorative Justice

Like problem-solving courts that apply therapeutic jurisprudence, creative problem-solving and holistic approaches to law, restorative justice values the participation of those with a legal problem in processes designed to promote its resolution. Restorative justice is concerned with the harmful conduct, its effect on the people involved and the community and with what must be done to resolve the matter in terms of the needs of the victim, the offender and the community. While some see restorative justice as encompassing a broad range of processes that are said to be restorative – including processes such as unpaid community work performed by offenders – the most common understanding of restorative justice is the use of mediated meetings involving victims, offenders and, in some cases, supporters of the parties and/or community members.¹⁶³ These meetings commonly take the form of victim-offender mediation, family

¹⁵⁹ See: Chapter 7.

¹⁶⁰ Ibid.

¹⁶¹ See: Chapter 5, Chapter 6 and Chapter 7.

¹⁶² King (2007), above n 8, 93-95.

¹⁶³ For a more detailed discussion of the differences between these broad (maximalist) and narrow (purist) concepts of restorative justice, see: King et al, above n 27, ch 3.

group conferences and circles. In each form, parties and certain others discuss what happened, why it happened, its effect on the parties and, where possible, reach agreement as to what reparative action should be undertaken. It is this concept of restorative justice that is discussed in this section.

Restorative justice processes have become a fundamental aspect of the justice system's response to juvenile crime. It is also used in relation to adult offenders in most jurisdictions, either before or after sentencing. Western Australia has statutory provisions empowering a court to order a victim-offender mediation report to assist it in relation to sentencing. Restorative justice is also being used in schools and workplaces to deal with issues of harmful conduct and its consequences.¹⁶⁴

A meta-analysis of 22 studies involving 35 restorative justice programs found that, compared with traditional justice system processing, on average these programs produced a greater reduction in offender recidivism.¹⁶⁵ Other meta-analyses have also found decreased recidivism following participation in victim-offender mediation¹⁶⁶ and family group conferencing.¹⁶⁷ The bulk of the recidivism research involving restorative justice concerns juvenile offenders. Some studies of adult offenders have found that restorative justice practices lessen offence-related factors¹⁶⁸ and in some cases produce reduced recidivism.¹⁶⁹ The dynamics of restorative justice conferences are said to be responsible for the reduced offending.¹⁷⁰ Here, it is said, both victim and offender are able to gain further insight and information about what happened, why it happened and its effect. In addition, both are able to express, and to some degree, release feelings concerning the incident that may have hindered their ability to move on with their lives.

Both victim and offender may feel shame – the victim the shame of being violated and the offender the shame of having caused primary harm to the victim and

¹⁶⁴ B. Morrison, *Restoring Safe School Communities* (Federation Press, 2007); T. O'Connell, B. Wachtel and T. Wachtel, *Conferencing Handbook: The New Real Justice Training Manual* (Piper's Press, 1999).

¹⁶⁵ J. Latimer, C. Dowden and D. Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (2005) 85 *The Prison Journal* 127. For a review of the research on restorative justice and the criminal justice system, see: L. Sherman and H. Strang, *Restorative Justice: The Evidence* (The Smith Institute, 2007), at <http://www.smith-institute.org.uk/publications/restorative_justice_the_evidence.htm> viewed 17 May 2009.

¹⁶⁶ W. Bradshaw and D. Roseborough, "Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism" (2005) 69 *Federal Probation* 15, 19; W. R. Nugent, M. Williams and M. S. Umbreit, "Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis" (2003) *Utah Law Review* 137, 161-163.

¹⁶⁷ Bradshaw and Roseborough, above n 166, 19.

¹⁶⁸ J. P. Beven, G. Hall, I. Froyland, B. Steels and D. Goulding, "Restoration or Renovation? Evaluating Restorative Justice Outcomes" (2005) 12 *Psychiatry, Psychology and Law* 194, 195-196.

¹⁶⁹ J. Shapland, A. Atkinson, H. Atkinson, J. Dignan, L. Edwards, J. Hibbert, M. Howes, J. Johnstone, G. Robinson and A. Sorsby, *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes* (Ministry of Justice, London, 2008), at <http://www.justice.gov.uk/publications/docs/restorative-justice-report_06-08.pdf> viewed 17 June 2009.

¹⁷⁰ For a discussion of these dynamics, see: King et al, above n 27, ch 3; King, above n 19.

secondary harm to those affected by the offending, including the offender's own family. Some commentators have seen restorative justice conferences as mechanisms by which parties can manage feelings of shame, producing remorse in and eliciting an apology from the offender in many cases and forgiveness from the victim in some cases.¹⁷¹ Others have seen the dynamics of conferences in terms of each party feeling empathy for the other.¹⁷² In any event, one party opening up and expressing her feelings is a potentially vulnerable situation – because either negative or supportive responses from the other party is possible – that can result in the other responding in a supportive manner and sharing his feelings also. From there, an apology, the expression of forgiveness and an agreement concerning reparation can follow.¹⁷³

The question arises whether restorative justice processes can and should be used for participants involved in a problem-solving court program. There are a number of potential advantages to such an approach. First, where restorative justice practices involve not only the victim and offender but also their supporters and community representatives, there is the basis for community support for participants as they go through the problem-solving court process. Indeed, part of the reparation agreement could be that the participant completes the program. Second, restorative justice processes give victims voice, validation and respect – and the possibility of reparation. Third, these practices may also promote victim interest in and support for the court program. Fourth, they provide a mechanism for participants to deal with unresolved emotional issues that may affect their rehabilitation process and their ability to move on with their lives.¹⁷⁴ Some also consider that having offenders feel genuine sorrow for their actions and the effects of their actions on other people is an important part of offender rehabilitation:

If a defendant is to be truly healed, s/he needs to extend his or her consciousness beyond the selfish and develop an awareness of, and concern for, the needs of other people affected by his or her conduct. This needs to be genuine and beyond mere regret...Regret is an 'I' experience...In contrast to be sorry is to enter the experience of the victim.¹⁷⁵

Certainly restorative justice conference processes foster this kind of awareness and response, although they are not always forthcoming.

There are also a number of issues that need to be addressed when considering the use of restorative justice processes for participants in problem-solving programs. First, particularly in drug courts, some participants come into the program in a delicate psychological state. The emotional demands of a restorative justice process may be too much for them to handle. Second, where intimate partner violence is involved, there may well be questions about

¹⁷¹ N. Harris, L. Walgrave and J. Braithwaite, "Emotional Dynamics in Restorative Conferences" (2004) 8 *Theoretical Criminology* 191.

¹⁷² G. Maxwell and A. Morris, "The Role of Shame, Guilt and Remorse in Restorative Justice Processes for Young People", in Weitekamp and Kerner (eds.), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002).

¹⁷³ The emotional dynamics of restorative justice conferences are discussed at greater length in King et al, above n 27, ch 3.

¹⁷⁴ Ibid.

¹⁷⁵ Cannon, above n 108, 135.

whether the participant may abuse the restorative justice process, using the apology and forgiveness strategy to replicate the dynamics that often exist in abusive relationships.¹⁷⁶ Third, there may be an issue as to whether participants are being overloaded, with court review, treatment program and other requirements, and attending and implementing a reparation agreement arising out of a restorative justice conference.

The first and the third of these issues can be addressed by having each case and potential participant assessed for suitability. This is a common feature of restorative justice conferences in any event. Screening and, where appropriate, preparation of both victim and offender is important to ensure that the conference is not likely to go off the rails and traumatise one or both parties.¹⁷⁷ The second issue can also to some degree be addressed by screening and preparation. However, the most important strategy would be to have supporters of the victim and the offender present at the conference and a mediator alert to the issues who could intervene where necessary.

There is no research on the use of restorative justice alongside problem-solving court programs. The Perth Drug Court began to use victim-offender mediation for participants several years ago, but there were difficulties concerning its implementation and its use. Thus, that program does not provide the basis for assessing the worth of this approach.

Conclusion

Solution-focused judging has emerged as a result of the innovation of problem-solving courts in the justice system. It is a unique approach that draws on behavioural science findings and a wider understanding of the nature of problems facing court participants. It requires a more involved and comprehensive approach to judging than that commonly required in mainstream lists. It requires that an ethic of care be exercised in relation to all those involved in the court program. It also requires knowledge of relevant behavioural science findings concerning behavioural change and their integration into judicial practice. In taking this approach judicial officers also need to be mindful of the provisions of the common law and statute law. This chapter has laid the foundation for the exploration of the nature of key underlying issues facing those coming to a criminal court – and in some cases, non-criminal courts – and the specific processes and techniques used in solution-focused judging that occupies the balance of this bench book.

¹⁷⁶ King et al, above n 27, ch 3; A. Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Publications, 2004).

¹⁷⁷ King et al, above n 27, ch 3; M. S. Umbreit, *Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* (Jossey-Bass, 2001).

Chapter 2: Substance Abuse

Michael King and Natalia Blecher

Substance abuse is ubiquitous in our communities and criminal justice systems. The harms that lead to and derive from alcohol and other substance abuse can be devastating for drug users, their families, and the wider community.

A multi-factorial approach, taking into account genetic and environmental factors, may offer the best explanation for substance abuse.

The transition from casual or experimental use to substance abuse is neither a straightforward nor a predictable process. However, much insight can be gained from pharmacological, behavioural and philosophical attempts to explain it.

There is a vast array of treatment options available for substance users and their families. Whether expressly or not, each treatment option embodies a particular understanding of what causes substance abuse and what should be done to address it.

Introduction: Alcohol and Drugs in Society

Prevalence, Use and Availability

Alcohol and other drugs have an extraordinarily pervasive presence in society. According to the most recent *National Drug Strategy Household Survey*, approximately 90% of Australians over 14 have consumed alcohol. Eighty-three percent of respondents (14.2 million) had consumed it “recently” (in the previous 12 months). Of this group, 41% (7.1 million) drank weekly and 8% (1.4 million) on a daily basis. Almost 40% of Australians (6.6 million) have taken illicit drugs (including inappropriate use of licit drugs, such as inhalants and naturally-occurring hallucinogens) at some time in their lives. Around 13% (2.3 million) had recently used drugs. By far the most common recently used illicit drug apart from alcohol and tobacco was cannabis (9.1% or 1.6 million users).

Most illicit drugs are widely available and easily accessible. They are most commonly sourced from friends and acquaintances, with the exception of heroin (which is obtained from dealers) and analgesics and inhalants (which are purchased in shops).

Most illicit drugs are widely available and easily accessible. In New Zealand in 2007, for example, 45% of frequent drug users said they could normally purchase cannabis within 20 minutes; 42% said they could purchase opiates within 20 minutes; and 65% said they could purchase methamphetamines within one hour.¹⁷⁸

Drugs and Criminal Conduct

Substance abuse can often precede and contribute to criminal conduct. A recent study of 3,911 persons arrested and held in custody in Australian police stations¹⁷⁹ found that 43% of all adult detainees were dependent on illicit drugs and 32% were dependent on alcohol at the time of arrest.¹⁸⁰ Those found to be dependent were the most likely to have had prior contact with the criminal justice system. Approximately one third of all detainees attributed some part of their offending to drugs other than alcohol.¹⁸¹

Sixty-two percent of respondents had obtained illicit drugs in the 30 days preceding their arrest. Of the adult respondents who had drunk heavily within the 48 hours preceding detention, 65% also tested positive to one or more illicit drugs.¹⁸² The average age of initial use of alcohol and cannabis was 14, and of heroin and methamphetamine, 19. These figures are significantly lower than those applying to the general population where, for example, the average age of initial use of cannabis is 19 and of heroin, 22.¹⁸³

A New Zealand study of 895 detainees¹⁸⁴ reported similar findings:

- Seventy-one percent of detainees who agreed to provide urine samples tested positive to one or more illicit drugs. Cannabis was the most commonly detected illicit drug (69%), followed by amphetamines (11.1%), methamphetamines (10.5%) and opiates (3.6%). Forty-eight percent reported that they had been using at least one drug at the time of arrest (36% alcohol, 18% cannabis, and 6% methamphetamines).
- Alcohol was the most widely used drug, but cannabis was consumed most frequently: 56% of detainees reported using it on at least 11 days in the previous month, and 41% reported using it on at least 21 days.

¹⁷⁸ C. Wilkins, P. Sweetsur and M. Girling, *Recent Trends in Illegal Drug Markets in New Zealand, 2005-2007: Findings from the 2005, 2006 and 2007 Illicit Drug Monitoring System (IDMS)* (Centre for Social and Health Outcomes Research and Evaluation, Massey University 2008), at <[http://www.ndp.govt.nz/moh.nsf/pagescm/7515/\\$File/recent-trends-in-illegal-drug-use-in-nz-05-07.pdf](http://www.ndp.govt.nz/moh.nsf/pagescm/7515/$File/recent-trends-in-illegal-drug-use-in-nz-05-07.pdf)> viewed 11 September 2009, 24.

¹⁷⁹ K. Adams, L. Sandy, L. Smith and B. Triglone, *Drug Use Monitoring in Australia: 2007 Annual Report on Drug Use among Police Detainees, Research and Public Policy Series No. 93* (Australian Government Institute of Criminology, 2008), at <<http://www.aic.gov.au/publications/current%20series/rpp/81-100/rpp93.aspx>> viewed 15 July 2009.

¹⁸⁰ *Ibid* xiv.

¹⁸¹ *Ibid* xv.

¹⁸² *Ibid* xiv.

¹⁸³ *Ibid* 34.

¹⁸⁴ J. Hales and J. Manser, *New Zealand Police: NZ-ADAM Annual Report 2007* (Health Outcomes International, 2008), at <<http://www.police.govt.nz/resources/2008/nzadam-annual-report>> viewed 12 May 2009.

- More than half of all detainees who had used drugs (other than those who had used cannabis) felt that their drug use contributed to their criminal activity. Twenty-seven percent of cannabis users indicated that their drug use contributed to some or all of their offending.
- The average age of initial use of all drugs other than methamphetamines and methadone was under 18. Methamphetamines and methadone were first consumed at around 20 years of age.
- Thirty-seven percent of respondents reported having been dependent on at least one drug (including alcohol) in the previous year. Twenty-four percent said they were dependent on cannabis, 15% on alcohol and 7% on methamphetamines.
- Thirty-four percent had previously undergone substance abuse treatment and 6% were undergoing treatment at the time of arrest. Eight percent had previously been patients in a psychiatric ward or hospital for an overnight stay or longer.

Comorbidity

There is a significant correlation (“comorbidity”) between substance abuse and mental illness. Approximately 29% of Australians with a mental disorder have a comorbid substance use disorder.¹⁸⁵ Comorbid disorders can exist independently of one another or may be linked. In the first instance, a mental disorder might be directly caused by a substance use disorder: for example, cannabis use can trigger schizophrenia in certain individuals.¹⁸⁶ In other instances, the substance use disorder produces an effect that *indirectly* brings about a mental disorder: such is the case when drug use causes or entrenches an individual’s financial debt, which in turn triggers depression.¹⁸⁷ Finally, substance use and mental illness may derive from a common aetiology such as genetic predisposition, low socioeconomic status or family separation.¹⁸⁸ Common comorbid pairings include cannabis with schizophrenia and mood disorders,¹⁸⁹ and alcohol with depression and anxiety.¹⁹⁰

¹⁸⁵ N. Goren and J. Mallick, "Prevention and Early Intervention of Coexisting Mental Health and Substance Use Issues" (November 2007) *Prevention Research Quarterly: Current Evidence Evaluated*, at <http://www.druginfo.adf.org.au/downloads/Prevention_Research_Quarterly/PRQ_07Nov_Prev_mental_health_sub_use.pdf> viewed 16 July 2009, 1.

¹⁸⁶ L. Arseneault, M. Cannon, R. Poulton, R. Murray, A. Caspi and T. E. Moffitt, "Cannabis Use in Adolescence and Risk for Adult Psychosis: Longitudinal Perspective Study" (2002) 325 *British Medical Journal* 1212; W. Hall and L. Degenhardt, "Cannabis Use and Psychosis: A Review of Clinical and Epidemiological Evidence" (2000) 34 *Australian and New Zealand Journal of Psychiatry* 26; S. Zammit, P. Allebeck, S. Andreasson, I. Lundberg and G. Lewis, "Self Reported Cannabis Use as a Risk Factor for Schizophrenia in Swedish Conscripts of 1969: Historical Cohort Study" (2002) 325 *British Medical Journal* 1199.

¹⁸⁷ L. Degenhardt, W. Hall and M. Lynskey, "Exploring the Association between Cannabis Use and Depression" (2003) 98 *Addiction* 1493.

¹⁸⁸ C. Caron and M. Rutter, "Comorbidity in Child Psychopathology: Concepts, Issues and Research Strategies" (1991) 32 *Journal of Child Psychology and Psychiatry* 1063; F. Smit, L. Bolier and P. Cuijpers, "Cannabis Use and the Risk of Schizophrenia: A Review" (2004) 99 *Addiction* 425.

¹⁸⁹ L. Arseneault, M. Cannon, J. Witton and R. M. Murray, "The Causal Association between Cannabis and Psychosis: Examination of the Evidence" (2004) 184 *British Journal of*

Initial Drug Use: Predictors and Shielding Factors

While it is impossible to explain categorically why people take drugs, there are a number of common predictors of initial use. The most common reason for initial drug use, across all drug classes except sedatives, is simply to experience the effect of the drug.¹⁹¹ Consumers of amphetamines, cocaine and hallucinogens – typically young people – tend to use drugs for social or psychological pleasure.¹⁹² Users of heroin and inhalants tend to use in order to manage negative feelings¹⁹³ and a common reason for using cannabis is to cope with boredom and anxiety.¹⁹⁴ Other factors predictive of initial drug use include:

- *in utero* exposure to drugs;
- use of other drugs;
- fragmentation of the family unit;
- poor family communication;
- lack of parental role modelling and familial support;
- traumatic life events such as child abuse (including sexual abuse), death of family members, war and natural disaster;
- academic failure, truancy and low value attached to education;
- social ostracism or associating with drug-taking peers;
- boredom (particularly in rural communities);
- psychological and psychiatric disorders and negative states including stress;
- frequent exposure to drugs, together with their high availability and low cost; and
- poverty and socioeconomic marginalisation.¹⁹⁵

Psychiatry 110; L. Degenhardt and W. Hall, "The Association between Psychosis and Problematic Drug Use among Australian Adults: Findings from the National Survey of Mental Health and Well-Being" (2001) 31 *Psychological Medicine* 659; D. M. Fergusson, L. J. Horwood and N. R. Swain-Campbell, "Cannabis Dependence and Psychotic Symptoms in Young People" (2003) 33 *Psychological Medicine* 15.

¹⁹⁰ B. F. Grant and T. C. Harford, "Comorbidity between DSM-IV Alcohol Use Disorders and Major Depression: Results of a National Survey" (1995) 39 *Drug and Alcohol Dependence* 197; E. B. Raimo and M. A. Schuckit, "Alcohol Dependence and Mood Disorders" (1998) 23 *Addictive Behaviors* 933; M. A. Schuckit and V. Hesselbrock, "Alcohol Dependence and Anxiety Disorders: What Is the Relationship?" (2004) 2 *Focus* 440.

¹⁹¹ L. Gowing, H. Proudfoot, S. Henry-Edwards and M. Teesson, *Evidence Supporting Treatment: The Effectiveness of Interventions for Illicit Drug Use* (Australian National Council on Drugs, 2001), 7.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid* 7-8; Goren and Mallick, above n 185, 6; Fitzroy Legal Service Inc., *Handbook: Services Directory for Drug and Alcohol Users* (Fitzroy Legal Service Inc., 2009), at <<http://www.vicdrugguide.org.au/handbook/bk01-toc.php>> viewed 16 July 2009, 55; M. Hamilton, "Preventing Drug-Related Harm", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 159; R. West, *Theory of Addiction* (Addiction Press, 2006), 36, 64, 68, 83. See also: Fitzroy Legal Service Inc., *Services Directory for Drug and Alcohol Users*, at <<http://www.vicdrugguide.org.au>> viewed 16 July 2009.

Gender plays a significant role in the onset of dependence (though not necessarily initial use). Females are less inclined to seek treatment for problematic drug use, and are more likely to progress from frequent to dependent use. Barriers to women seeking treatment include:

- a lack of awareness of the availability and variety of treatment options;
- concerns about the stigma attached to dependence (particularly if pregnant);
- concerns that custody of children might be jeopardised by seeking help; and
- a lack of family and/or partner support.¹⁹⁶

Factors that tend to guard against initial drug use and dependence include:

- high intelligence and problem-solving capacity;
- resilient temperament;
- gender (females are less susceptible to developing a drug habit, although they may be more reluctant to seek treatment);
- varied social interests and activities;
- strong familial and social bonds;
- religious or community involvement;
- economic security; and
- a personal outlook opposed to illicit or problematic drug use.¹⁹⁷

Key Concepts

Psychoactive drug	Any substance, other than food or water, that is capable of affecting mood, perception, cognition or behaviour. ¹⁹⁸
Administration, Absorption, Distribution and Metabolism	Drugs are normally <i>administered</i> through ingestion, injection, inhalation, or insertion. ¹⁹⁹ They are <i>absorbed</i> into the bloodstream and <i>distributed</i> to various parts of the body. The user's <i>metabolism</i> governs the rate at which a drug is then eliminated from the body. Drugs are normally expelled through the lungs, bladder or gut.
Toxicity or Overdose	Occurs where the rate of consumption exceeds the rate of metabolism and the drug is toxic at high levels.
Tolerance	Drugs produce their effects by occupying the same receptors in the brain used by the body's naturally occurring mood controllers (endorphins). Sustained or heavy use of a psychoactive drug can cause these receptors to change shape, so that the effect of the drug as experienced at first use can no longer be attained by consuming the same quantity. ²⁰⁰ Persons who are

¹⁹⁶ Hamilton, above n 195, 176-177; S. Donath, "Women and Drugs", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 102.

¹⁹⁷ Gowing et al, above n 191, 8; Goren and Mallick, above n 185, 6.

¹⁹⁸ Fitzroy Legal Service Inc., *Handbook*, above n 195, 4.

¹⁹⁹ *Ibid* 6.

²⁰⁰ F. Chaloupka, *Economic Models of Addiction and Applications to Cigarette Smoking and Other Substance Abuse*, at <http://tigger.uic.edu/~fjc/Presentations/Slides/rational.addiction.pdf> viewed 21 September 2008.

	tolerant to a particular drug require increasingly larger doses of it in order to achieve the same desired drug effect. ²⁰¹
Dependence	<p>A chronically relapsing condition, combining physiological, behavioural and cognitive aspects, that is characterised by a compulsion to take a drug or class of drugs on a sustained and/or intensive basis.²⁰² The world's leading clinical handbook of mental disorders, the <i>Diagnostic and Statistical Manual of Mental Disorders</i> lists the symptoms of drug dependence as:²⁰³</p> <p>(i). Tolerance (a need to consume larger amounts of the drug to achieve the same effect or a significantly diminished drug effect when the same dosage is taken).</p> <p>(ii). Withdrawal (manifested either in the drug-specific withdrawal syndrome, or by the individual using the same or similar drug to relieve or avoid withdrawal symptoms).</p> <p>(iii). Consumption of larger or more frequent amounts of the drug than was originally intended.</p> <p>(iv). Persistent desire or previous failure to reduce or control use.</p> <p>(v). Dedication of a great deal of time and effort in sourcing and purchasing the drugs or recovering from their effects.</p> <p>(vi). Prioritisation of drug habit over other valuable social, recreational or vocational pursuits.</p> <p>(vii). Continued use despite knowledge of dependence and its attendant harms.</p> <p>Dependence is really a set of two processes: a change in the brain that occurs as a response to chronic exposure to a drug, and a "psychosocial dimension comprising both the underlying reasons for using drugs, and the consequences of a drug-using lifestyle."²⁰⁴ Thus whether a person is drug-dependent depends not only on their physiological state but also on their physiological, psychological and social profile.</p> <p>The transition to dependence is likewise a very personal process,²⁰⁵ but generally follows a prolonged period of frequent use. In the case of heroin, a period of one or two years is normally required for the user to progress from experimental, to casual, to intensive, and finally to compulsive, use.²⁰⁶</p>
Withdrawal	The body's negative response to cessation of drug use. A determinant of continued drug use as well as a characteristic of dependence. Withdrawal symptoms may be physical, such as sweating or nausea, or psychological, such as dysphoria, anxiety or irritability. Symptoms are normally the inverse of those attached to the particular drug. For example, constipation is a common side-effect of heroin use; diarrhoea a symptom of heroin withdrawal. ²⁰⁷
Relapse	Following protracted abstinence, a person's drug habit may be reactivated by drug-related cues such as exposure to the drug or to one's former

²⁰¹ Gowing et al, above n 191.

²⁰² World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organization, Geneva, 1992), at <<http://www.who.int/classifications/icd/en>> viewed 12 May 2009, 75.

²⁰³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (American Psychiatric Association, 2000), 192-195.

²⁰⁴ Gowing et al, above n 191, x.

²⁰⁵ G. Koob, P. Sanna and F. Bloom, "Neuroscience of Addiction" (1998) 21 *Neuron* 467, 467.

²⁰⁶ Gowing et al, above n 191, 6.

²⁰⁷ Chaloupka, above n 200.

“dealer”, or even inhaling the scent of a restaurant located in a neighbourhood frequented during the period of dependence.²⁰⁸ A “lapse” can also be triggered by the induction of familial, social, or financial stress.²⁰⁹ A lapse occurs when a person first uses drugs or alcohol after protracted abstinence, while relapse constitutes “a return to uncontrolled use.”²¹⁰

Relapse is now widely conceived as inbuilt into the recovery process.²¹¹ Relapse is not a sign that treatment has failed, or that the patient is doomed to chronic dependence. It is best seen as an interruption to recovery, a warning that the patient is doing something he should not be (for example, gambling or socialising with drug-using friends) or not doing something that he should be (such as attending counselling sessions or spending time with family).

Table 2: Key Concepts

Psychoactive drugs can be grouped into three broad categories: stimulants, depressants and hallucinogens. *Stimulants* speed up the functioning of the central nervous system; *depressants* suppress it; and *hallucinogens* alter the user’s sensory perceptions.²¹² Table 3 sets out details of the main drugs falling within these three categories.²¹³

Stimulants					
Examples	Street names and cost	How taken	Immediate effects	Withdrawal effects	Chronic effects / risks
Amphetamines (including MDMA and crystalline methamphetamine or “ice”)	Speed, ecstasy, XTC, whiz, pills, uppers, ice, crystal meth A\$50-\$100 per gram	Orally, injected, snorted, smoked	<u>Desired:</u> Euphoria, alertness, talkativeness, well-being, hyperactivity, sense of omnipotence, increased concentration <u>Adverse:</u> Dry mouth, vomiting, nausea, diarrhoea, rash, dilated pupils, paranoia, insomnia, restlessness, flashbacks, shivers, headache, tremors	Craving, exhaustion, depression, anxiety, dysphoria, deep but disturbed sleep lasting 24-48 hours, extreme hunger, headaches, sweating, breathing difficulties	Amphetamine-induced psychosis, restlessness, suicidal ideation, sleep disruption, coma, respiratory depression, death

²⁰⁸ T. W. Robbins and B. J. Everitt, "Drug Addiction: Bad Habits Add Up" (1999) 398 *Nature* 567.

²⁰⁹ See, for example: R. H. Moos and J. W. Finney, "The Expanding Scope of Alcoholism Treatment Evaluation" (1983) 38 *American Psychologist* 1036.

²¹⁰ P. Dietze, A. Lanagan, D. Thornton and P. Gardiner, "Demystifying the Language of Drugs: A Select Glossary of Terms", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 259, 269.

²¹¹ Gowing et al, above n 191, 14.

²¹² Fitzroy Legal Service Inc., *Handbook*, above n 195, 9; Australian Institute of Criminology, "Hallucinogens", at <<http://www.aic.gov.au/research/drugs/types/hallucinogens.html>> viewed 9 December 2008.

²¹³ Fitzroy Legal Service Inc., *Handbook*, above n 195, 12-15; A. Campbell, *The Australian Illicit Drug Guide* (Black Inc., 2001), 5-6.

Cocaine	Coke, C, crack, snow, charlie A\$200-250 per gram	Orally, snorted, injected, smoked	<u>Desired:</u> Euphoria, talkativeness, energy, strength, self-confidence, well-being. <u>Adverse:</u> Panic, agitation, feelings of persecution	Anxiety, depression, panic, severe craving	Weight loss, damage to nasal passage, delusions, violent behaviour
Depressants					
Examples	Street names and cost	How taken	Immediate effects	Withdrawal effects	Chronic effects / risks
Alcohol	Booze, grog, piss Variable cost	Orally	<u>Desired:</u> Relaxation, calm, reduction in stress or inhibition <u>Adverse:</u> slurred speech, confusion, impaired judgment, low blood pressure, nausea, vomiting, reduction in heart rate and breathing, hangover, dry mouth, mood swings	Sweating, tremor, convulsions, seizures, insomnia, hallucinations, delusions	Low blood pressure, hyper-reactivity, nausea, hand tremor, anxiety, hallucinations, seizures, sleeplessness, irritability, liver damage, death
Heroin	H, hammer, smack, gear, horse A\$50 "deal", A\$150 half-gram	Injected, smoked, snorted, taken orally	<u>Desired:</u> Sedated, dream-like states, "nodding off," pain relief <u>Adverse:</u> Drowsiness, depressed breathing, nausea, vomiting, diarrhoea, slurred speech.	Flu-like symptoms, vomiting, muscle aches, papillary dilation, sweating, diarrhoea, insomnia, dysphoria	Chronic constipation, reduction in general health, damage to immune system, HIV/AIDS or hepatitis through use of shared or infected needles, death
Cannabis (THC)	Green, smoke, weed, pot, dope, cone, mull A\$20-\$35 per gram	Smoked, ingested	<u>Desired:</u> Euphoria, relaxation, distorted time-space perception <u>Adverse:</u> loss of energy, apathy, distorted time-space perception	Mild insomnia, anxiety, sweating, craving	Apathy, psychiatric problems, loss of energy, reduced memory and concentration, risk of respiratory illness, reduced sex drive, lower sperm count, irregular menstrual cycles
Volatile substances (including LPGs found in aerosols etc; liquid solvents such as cleaning fluid, paint, petrol; solvent-based glues)	Air blast, choo choo, furniture polish, gas, glue, hair spray, sniff Variable cost	Inhaled from container or plastic bag	<u>Desired:</u> intense intoxication, excitability, auditory and visual hallucinations <u>Adverse:</u> Sudden Sniffing Death Syndrome, headache, asphyxiation, violent and risk-taking behaviour,	None	Short term memory loss, loss of cognitive skills, truancy, problems with speech and balance, personality disturbance, collapse, anorexia, loss of appetite, mouth infections, irreversible brain damage, coma, death

Hallucinogens					
Examples	Street names and cost	How taken	Immediate effects	Withdrawal effects	Chronic effects / risks
LSD	Trips, acid A\$25-\$50 per tab	Taken orally	<u>Desired</u> : "Trip"; visual, auditory and tactile hallucinations <u>Adverse</u> : "Bad trip" – acute dysphoria, sustained panic, rapid identity diffusion, frightening hallucinations, disorientation, out-of-body experiences, increased pulse, high body temperature, insomnia, flashbacks	None	Psychosis, self-harm, violence
Magic mushrooms	Mushies, rooms, dimple tops, shrooms Cost: Nil if found; A\$50 per bag if bought	Ingested	<u>Desired</u> : Euphoria, spontaneous laughter, visual and auditory hallucinations. <u>Adverse</u> : dizziness, nausea	Few	Few

Table 3: Taxonomy of Drug Classes and Effects

It is important to bear in mind that drug effects are highly variable and individualised. Much depends not only on the quantity and purity of the drug taken, but also the frequency of use, the mode of administration (for example, injection yields a more intense effect than ingestion), the user's physical characteristics (height, weight, gender, body fat and metabolism), the social environment in which the drug is taken (uncomfortable settings are more likely to produce adverse effects), the user's tolerance to the particular drug, and whether the drug has been taken in combination with other substances.²¹⁴

²¹⁴ Fitzroy Legal Service Inc., *Handbook*, above n 195, 5–7.

Grand Theories of Drug Abuse

Drugs are both widely available and widely used.

There is a significant relationship between substance use, crime and comorbid mental illness.

While the transition to dependence is a highly individualised process, there are common antecedents to initial and problematic substance use.

Over time, various attempts have been made to formulate “grand theories”²¹⁵ to authoritatively explain the cause of drug dependence. Grand theories, however, are limited in two respects. They are too narrow in their conceptions of dependence as readily ascribable to one cause or set of causes. They are also too broad in their tendencies to make sweeping – and frequently untested – assumptions about individual users. Nevertheless, they provide useful insights into both the historical development of dependence theory and the principles underlying modern treatment approaches.

The Sinner: A Moral Theory

The moral theory of dependence attributes dependence to defective education, character deficiency or moral weakness.²¹⁶ Religious undertones emerge in the linking of temperance with virtue and of indulgence with sin.²¹⁷ Moral theorists tend to utilise the term “addict” over the less pejorative “consumer” descriptor, because they consider dependence to be a deliberate submission to evil.²¹⁸ Thus “addict” is applied as a master status trait denoting weakness or deviance.

The Sick Person: A Disease Model

The disease model focuses on the inherently addictive properties of drugs. It argues that it is the addictive pull of drugs, and the classification of compulsive use as a progressive *disease*, that explains dependence.²¹⁹ The most common criticisms of the disease model are that:

- It does not sit well with empirical studies demonstrating that dependent users *can* control their intake and overcome dependence without resorting to lifelong medical treatment.²²⁰
- It attempts to draw a clear “addict/non-addict” distinction by designating users as either “sick” or “well”, but there is “no clear dividing line between addicts and non-addicts”.²²¹ The question of whether a person is

²¹⁵ A. Kellehear and S. Cvetkovski, “Grand Theories of Drug Abuse”, in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 53, 54.

²¹⁶ J. Krivanek, *Understanding Drug Use: The Key Issues* (WEF Associates, 2000), 50-51.

²¹⁷ *Ibid* 51.

²¹⁸ Gowing et al, above n 191, 6.

²¹⁹ Krivanek, above n 216, 47.

²²⁰ West, above n 195, 77.

²²¹ Krivanek, above n 216, 48.

dependent upon a drug must therefore be approached holistically, having regard to the individual's physiological, genetic, social and psychological backgrounds and identities.

- It is worryingly paternalistic: it implies that dependent users are mere "impotent onlookers"²²² powerless to resist the lure of drugs.
- By designating dependence as a disease, it discounts viable non-medical and alternative treatment options.
- Labels such as "sick" and "unwell" presume a certain helplessness on the part of the affected individual, which can impede the recovery of those who regard their "affliction" or "illness" as beyond their control.²²³

Addiction as a Social Construct: Rational Addiction Theory

Rational addiction theory is an example of relativism in the extreme. It argues that "addiction" and "loss of control" are in fact illusions.²²⁴ We as onlookers presume that the individual would prefer not to be dependent, rather than considering that "[t]he pleasure or escape that the addict obtains from a drug [may be] worth whatever short- and long-term costs there might be for that individual."²²⁵ As novel as rational addiction theory might be, however, it fails to satisfactorily explain the multitude of harms that arise out of drug use and it does not account for the "reality of the phenomena of addiction, including the feelings of craving and compulsion"²²⁶ – realities that can simply not be termed illusory.

Contemporary Models of Drug Dependence

Grand theories of substance abuse, while providing a historical perspective, are limited in their capacities to explain why certain individuals become drug-dependant. More insight can be gained from contemporary neuroadaptive and behavioural theories.

Contemporary models of dependence tend to be far less generalised than grand theories. They tend to subscribe to a certain discipline (such as psychology) or premise (for example, dependence as a conscious choice). They do, however, overlap considerably.

Neuroadaptive Models

Neuroadaptive models focus on the changes that occur in the brain with prolonged or repeated exposure to psychoactive drugs.

²²² Ibid.

²²³ Ibid 49.

²²⁴ West, above n 195, 30–31.

²²⁵ Ibid.

²²⁶ Ibid 30.

The Dopamine Theory of Drug Reward

According to the dopamine hypothesis, drug use is pleasurable because it activates the brain's reward circuitry. Dopamine, a neurotransmitter, is a central component of the brain's pleasure system. All naturally rewarding sensations, such as food, exercise and sex, are positive reinforcers: they activate the brain's reward circuitry by increasing the concentration of dopamine in the brain. A release of dopamine is experienced as the sensation of pleasure.²²⁷

Many psychoactive drugs increase the concentration of dopamine in the brain.²²⁸ This not only makes a drug effect pleasurable *when* experienced ("liking"), it also increases *motivation* for drug-seeking and drug-taking behaviour ("wanting"). This explains why a person might progress from experimental to casual drug use, and why she might then develop a drug habit, with the reward system constantly satisfied by drug use. Prolonged activation of the brain's pleasure system by means of psychoactive drugs can eventually result in a numbing or desensitisation of the brain's reward system.²²⁹ More of the drug is required to activate the positive reinforcement process and for the user to experience pleasure. The dopamine hypothesis does not explain why someone might first use a drug, but it does explain why someone may continue using, use more, or find that higher dosages are required to experience pleasure.

Opponent Process Theory

Opponent process theory is essentially a psychological variant of the dopamine hypothesis.²³⁰ To understand this theory it is necessary to understand the concept of homeostasis. Homeostasis refers to the body's mode of maintaining equilibrium, whether in temperature, blood sugar, iron, calcium or blood pressure. For example, a homeostatic response to high blood sugar is the release of insulin. Changes in "hedonic balance" (pleasure state) will also trigger brain responses opposing the disruption. When applied to drug action, however, the homeostasis process is slightly complicated.

Whenever a drug is administered, two processes occur simultaneously in the brain: an "a-process" and a "b-process". The a-process is the pleasurable sensation engendered by the drug, while the b-process is the brain's opposed homeostatic response. The sum of the a- and b-processes is the emotional state actually experienced by the user. Where the a-process outweighs the b-process, the user experiences pleasure and where the b-process outweighs the a-process, the user experiences a "come down".²³¹ When a drug is administered, the a-process is initially much more intense than the b-process, so the drug experience is positive. After a matter of hours, depending upon the nature and quantity of

²²⁷ G. Di Chiara and G. Di Chiara, "The Role of Dopamine in Drug Abuse Viewed from the Perspective of Its Role in Motivation" (1995) 38 *Drug and Alcohol Dependence* 95; N. M. White, "Addictive Drugs as Reinforcers: Multiple Partial Actions on Memory Systems" (1996) 91 *Addiction* 921; R. Wise, "Neurobiology of Addiction" (1996) 6 *Current Opinion in Neurobiology* 243, 244.

²²⁸ Wise, above n 227, 244; West, above n 195, 96.

²²⁹ Wise, above n 227, 244.

²³⁰ T. Robinson and K. Berridge, "Addiction" (2003) 54 *Annual Review of Psychology* 25, 29.

²³¹ *Ibid* 28.

drug consumed, the processes invert, so the a-process gives way to the more unpleasant b-process. Generally speaking, when a person takes a drug for the first time, the a-process is large and the b-process is small.²³² the drug experience is overwhelmingly positive. But with repeated or prolonged use, the b-process is strengthened and lengthened.²³³ The “high” becomes less pronounced, the body’s homeostatic response initiates sooner, and the “come-down” is more acute and takes longer to wear off. In cases of dependence, the so-called “pleasure state” is really no more than “a state of just normal functioning.”²³⁴

The strength of opponent process theory is that it recognises the role of both reward-seeking and distress-avoidance in drug dependence.²³⁵ It also appears to accord with the concept of drug tolerance described above. There is still, however, much research to be done on the potency of withdrawal as a motivator of drug-seeking behaviour.²³⁶ A final concern about opponent process theory is that it cannot explain why so many recovered ex-users relapse after protracted abstinence, well after the b-process has supposedly decayed.²³⁷

Learning and Conditioning Models

Learning and conditioning models focus on the ability of drugs to usurp and distort the brain’s learning and memory processes.

Classical Pavlovian Conditioning

Pavlovian conditioning theory posits that dependence arises out of repeated pairings between a drug and its surrounding environmental stimuli.²³⁸ Sensory cues such as sights, sounds, smells and places associated with drug seeking or drug use trigger urges to use the drug.²³⁹ This stimulus-response linkage only occurs after repeated pairings and hence repeated instances of drug use. However, when it does occur, it can swiftly frustrate any attempt at abstinence.

Operant Conditioning

Operant conditioning models invoke four interrelated learning processes to explain the transition to dependence:²⁴⁰

1. **Positive reinforcement:** a drug’s rewarding effects “train” a person to continue using it.²⁴¹
2. **Negative reinforcement:** unwanted withdrawal symptoms “train” a person to take the drug to avoid withdrawal. Negative reinforcement is an

²³² Ibid.

²³³ Ibid.

²³⁴ West, above n 195, 42–43.

²³⁵ Ibid 40.

²³⁶ Robinson and Berridge, above n 230, 29.

²³⁷ Ibid 31.

²³⁸ D. C. Drummond, T. Cooper and S. P. Glautier, "Conditioned Learning in Alcohol Dependence: Implications for Cue Exposure Treatment" (1990) 85 *British Journal of Addiction* 725.

²³⁹ West, above n 195, 99.

²⁴⁰ Ibid 92.

²⁴¹ Ibid.

- extremely potent form of learning because it relies on automatic learning processes similar to those that teach children not to touch hot surfaces.²⁴²
3. **Occasional reinforcement:** the user may administer a drug in anticipation of pain relief but it may “miss”, leaving the underlying symptoms unaffected. Paradoxically, occasional reinforcement is a *more* effective learning method than unmediated positive reinforcement. A drug need only ameliorate undesirable symptoms *enough* times for the user to learn that consistent use will eventually yield reward.²⁴³
 4. **Avoidance:** the user learns to administer drugs not only to escape from unpleasant consequences of withdrawal, but also to avoid those consequences entirely. It is the very *idea* of withdrawal that motivates drug use.²⁴⁴

The utility of operant conditioning is its characterisation as an unconscious learning model. Neither reinforcement nor avoidance requires any conscious decision-making on the part of the user: they circumvent the conscious mind.²⁴⁵ They therefore provide a neat fit with the classification of dependence as a *compulsive* need to continue drug use.

Incentive Sensitisation Theory

Incentive sensitisation theory holds that drug-related cues can trigger an excessive appetite for drugs, which sets in motion the transition from use to habit to compulsion to relapse.²⁴⁶ Incentive sensitisation theorists argue that, once a drug has become successfully “paired” with a drug-related cue, such as an ashtray, straw or needle (via classical conditioning), all it takes is for that cue to reappear and “irrational bursts of “wanting””²⁴⁷ will ensue. Once “wanting” is triggered, it can cause compulsive drug-seeking “whether or not an addict has any withdrawal symptoms at all.”²⁴⁸

Other features of the incentive sensitisation theory include:

- Variability of individual susceptibility to sensitisation according to genetic makeup, hormone composition and past trauma.²⁴⁹
- Decoupling of *wanting* from *liking*: this explains why heavily dependent users often experience a powerful compulsion to take drugs despite a gradual decrease in the pleasure value of doing so.²⁵⁰
- Conceptualisation of dependence as a physical distortion of the brain²⁵¹ that may require years of abstinence to repair.²⁵²

²⁴² Ibid.

²⁴³ Ibid 93.

²⁴⁴ Ibid 94.

²⁴⁵ Ibid 95.

²⁴⁶ Robinson and Berridge, above n 230.

²⁴⁷ Ibid 29, 44.

²⁴⁸ Ibid.

²⁴⁹ Ibid 38.

²⁵⁰ T. Robinson and K. Berridge, "The Incentive Sensitization Theory of Addiction: Some Current Issues" (2008) 363 *Philosophical Transactions* 3137, 3142.

²⁵¹ Robinson and Berridge, above n 230, 37.

²⁵² Ibid.

Incentive sensitisation theory has three main strengths. First, it accommodates for the fact that “not all users become addicts”.²⁵³ Second, because it argues that the physiological damage caused by drug use can take years to repair, it explains why even fully recovered users are vulnerable to relapse. Finally, because it centres on dissociation between wanting and liking, it explains why individuals may engage in compulsive behaviour without deriving much or any pleasure from it.

Social Learning Theory

Social learning theory focuses on individuals’ capacities to absorb information through observation of, and communication with, others.²⁵⁴ It can be used to explain how children can acquire knowledge of drug use from their drug-using parents.²⁵⁵ It is important to note that simply *learning* about drug use does not necessarily translate into actual drug-taking. Much depends on the perceived consequences of drug-taking (or being caught drug-taking) as assessed by the child,²⁵⁶ as well as a constellation of environmental factors, including “positive role models and pressure by peers, school, law enforcement authorities, and nondrug-using significant others”.²⁵⁷ Social learning theory is not a comprehensive explanation for dependence, nor does it purport to be. It does, however, explain why drug-using households are more likely to produce drug-using children.

Self-Efficacy Theory

Self-efficacy refers to one’s confidence in her capacity to “organise and complete actions that lead to particular goals.”²⁵⁸ Self-efficacy plays a critical role in the onset, maintenance and treatment of substance abuse in four main ways: it helps determine the goals set by individuals; it influences how much time and effort is invested in achieving those goals; it affects the prospects of those goals being realised; and it influences the chances of perseverance in the face of setbacks.²⁵⁹ A person with high self-efficacy who has resolved to cease problematic drug use is more likely to succeed than a person with low self-efficacy. Previous successful attempts to curb drug use can enhance an individual’s self-efficacy and thereby his likelihood of overcoming dependence. As a corollary, drug users who have previously relapsed or failed in their attempts at abstinence are less likely to be able to “kick” their addictions.²⁶⁰ The empirical basis for self-efficacy theory is currently rather thin because it is very difficult to isolate and test the contribution of self-confidence to dependence recovery.

²⁵³ Ibid 38.

²⁵⁴ West, above n 195, 106.

²⁵⁵ G. F. Jensen and D. Brownfield, "Parents and Drugs: Specifying the Consequences of Attachment" (1983) 21 *Criminology* 543.

²⁵⁶ R. Dembo, G. Grandon, L. La Voie, J. Schmeidler and W. Burgos, "Parents and Drugs Revisited: Some Further Evidence in Support of Social Learning Theory" (1986) 24 *Criminology* 85, 87.

²⁵⁷ Ibid.

²⁵⁸ West, above n 195, 80; A. Bandura, *Self-Efficacy: The Exercise of Control* (Worth Publishers, 1997).

²⁵⁹ Bandura, above n 258.

²⁶⁰ West, above n 195, 81.

Other Approaches

Expectancy Theory. Expectancy theorists argue that because drugs interfere with how the brain forms memories, sustained drug use is the product of inflated expectations of what a particular drug will do.²⁶¹ Memories of previous drug use become particularly vivid, and predictions of the reward offered by future use become “excessively optimistic.”²⁶² However, expectancy theory is out of step with the reality of drug dependence. In Robinson and Berridge’s terms, most dependent users “do not seem to have rose-coloured delusions of reward...Instead, they accurately predict drug pleasure and often agree their drug use is not justified by the pleasure they get.”²⁶³

Relapse Prevention Theory. Relapse prevention theory focuses on the mechanisms concerning why people with substance abuse problems relapse.²⁶⁴ It identifies high-risk situations and an individual’s poor coping skills as important factors in accounting for relapse. It highlights the importance of social support and self-efficacy in overcoming dependence.

Behavioural Economic Theory. Behavioural economics posits that market concepts of supply and demand regulate the prevalence of drug consumption in society.²⁶⁵ Significant increases in the price of an addictive drug will drive consumption down, and vice versa, where “price” is defined broadly to include the time and effort involved in acquiring the drug.²⁶⁶

The Influence of Genetics. A further theory is that genetic factors may cause or contribute to substance abuse. There is strong evidence that genetic factors predispose a person to substance abuse problems.²⁶⁷ While early research examined the clustering of substance abuse in families, more recent research has been mainly concerned with studying twins. This research has found that 50-70% of alcoholism is heritable;²⁶⁸ 30-75% of nicotine use is heritable;²⁶⁹ and 34-

²⁶¹ R. N. Cardinala, J. A. Parkinson, J. Halla and B. J. Everitt, "Emotion and Motivation: The Role of the Amygdala, Ventral Striatum, and Prefrontal Cortex" (2002) 26 *Neuroscience & Biobehavioral Reviews* 321; R. Hays, "An Integrated Value-Expectancy Theory of Alcohol and Other Drug Use" (1985) 80 *Addiction* 379; B. T. Jones, W. Corbin and K. Fromme, "A Review of Expectancy Theory and Alcohol Consumption" (2001) 96 *Addiction* 57.

²⁶² West, above n 195, 32.

²⁶³ Robinson and Berridge, above n 230, 33.

²⁶⁴ N. Lee, "Psychological Theories of Drug Use and Dependence", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 85; A. Ritter and N. Lintzeris, "Specialist Interventions in Treating Clients with Alcohol and Drug Problems", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 221, 231-232.

²⁶⁵ West, above n 195, 59.

²⁶⁶ R. Secades-Villa, O. Garcia-Rodriguez, J. R. Fernandez-Hermida and J. L. Carballo, "Psychological Bases of the Treatment of Drug-Dependence" (2007) 28 *Papeles del Psicologo* 29.

²⁶⁷ For a review of the research, see: A. Agrawal and M. T. Lynskey, "Are There Genetic Influences on Addiction: Evidence from Family, Adoption and Twin Studies" (2008) 103 *Addiction* 1069; M. D. Li and M. Burmeister, "New Insights in the Genetics of Addiction" (2009) 10 *Nature Reviews Genetics* 225.

²⁶⁸ Agrawal and Lynskey, above n 267, 1072.

²⁶⁹ *Ibid* 1073.

78% of cannabis use is heritable.²⁷⁰ There have also been studies on adopted children that have found a higher incidence of substance abuse problems in children whose biological parents themselves had a substance abuse problem.²⁷¹

There is less research on genetic influence in respect of the abuse of illicit drugs, but the existing literature does suggest abuse of these drugs is heritable. For example, work by Kendler and colleagues in the United States has found that genetic factors may have an influence in the order of 87% in the case of sedative dependence, 79% in both cocaine and hallucinogen dependence, but only 22% in the case of dependence on stimulants.²⁷²

The mechanics by which genetic factors predispose individuals to drug use and abuse is the subject of ongoing research.²⁷³ Genetic factors are now recognised as an important component of a multi-factorial explanation of drug abuse that also takes into account other individual factors – such as the time of first use of drugs and method of administration – and environmental families, including family, peer and school influences.²⁷⁴

Harms Arising from Drug Use and Dependence

The physiological effects of drug abuse are outlined in Table 3 above, but the harms extend well beyond physical symptoms. Drug dependence can affect the user's short- and long-term psychological health, relationships, economic and employment prospects and physical safety. There are also others less directly, but equally palpably, touched by dependence: the individual's family, friends, workmates and fellow community members.

It is important to note that drug-related harms are not confined to the dependence stage but can occur with any level of drug use.²⁷⁵ Dependence may be an antecedent of harm, but is by no means a prerequisite. It is also important to avoid generalising about the occurrence of drug-related harm. Not all persons who use or abuse drugs will experience these harms; some can maintain relatively "normal" lifestyles in spite of their dependence.²⁷⁶

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² K. S. Kendler, L. Karkowski and C. A. Prescott, "Hallucinogen, Opiate, Sedative and Stimulant Use and Abuse in a Population-Based Sample of Female Twins" (1998) 99 *Acta Psychiatrica Scandinavica* 368; K. S. Kendler and C. A. Prescott, "Cocaine Use, Abuse and Dependence in a Population-Based Sample of Female Twins" (1998) 173 *The British Journal of Psychiatry* 345; see also: Agrawal and Lynskey, above n 267, 1074.

²⁷³ Agrawal and Lynskey, above n 267.

²⁷⁴ National Institute on Drug Abuse, "Drugs, Brain and Behavior: The Science of Addiction", at <<http://www.nida.nih.gov/scienceofaddiction>> viewed 3 May 2009.

²⁷⁵ Fitzroy Legal Service Inc., *Handbook*, above n 195, 6.

²⁷⁶ New South Wales Department of Health, "Opioid Treatment Program: Clinical Guidelines for Methadone and Buprenorphine Treatment" (2006), at <http://www.health.nsw.gov.au/policies/gl/2006/GL2006_019.html> viewed 12 May 2009, 43.

Neural and Other Disorders

Neural disorders associated with chronic alcoholism ("Alcohol-Related Brain Impairments") include cerebellar atrophy (deterioration of the parts of the brain responsible for muscle coordination and balance), frontal lobe dysfunction (which distorts the cognitive processes of thinking, planning and feeling), hepatic encephalopathy (which results in mood changes, confusion and hallucinations) and Korsakoff's Amnesic Syndrome (which causes loss of short term memory and confabulation).²⁷⁷ Neural disorders associated with chronic drug use ("Substance-Related Brain Impairments") include psychosis and amotivational syndrome (a mood disorder).²⁷⁸ Psychological disorders (such as depression and anxiety)²⁷⁹ and physiological diseases (such as liver cirrhosis and HIV) are other common results of chronic exposure to drugs and alcohol. Each of these conditions, disorders, syndromes and diseases can require hospital admission and ongoing medical treatment administered separately to that for the underlying dependence.²⁸⁰

Mortality

Loss of life is the most extreme consequence of substance abuse. In 2001, 0.8% (1,038) of all registered deaths in Australia were drug-induced (not including alcohol) and the total years of potential life lost was 37,356.²⁸¹ Drug-induced death typically results from accidental suicide, crime, illness contracted in connection with drug use and road accidents.²⁸²

Wider Community Costs Including Crime

Drugs (particularly alcohol) are ubiquitous across a wide category of social ills, including personal financial debt, absenteeism and lost productivity, divorce, domestic violence, child abuse, accidental drowning, crime, suicide and road accidents.²⁸³ Drug use and criminal conduct are closely entwined, as noted

²⁷⁷ ARBIAS Ltd. - Alcohol Related Brain Injury Australian Services, "What Is Alcohol Related Brain Impairment (ARBI)?", at <<http://www.arbias.org.au/general-information-on-arbi/what-is-alcohol-related-brain-impairment.html>> viewed 16 July 2009.

²⁷⁸ ARBIAS Ltd. - Alcohol Related Brain Injury Australian Services, "Substances That Can Cause Brain Injury (SRBI)", at <<http://www.arbias.org.au/substances-that-can-cause-brain-injury-srbi/>> viewed 16 July 2009.

²⁷⁹ Gowing et al, above n 191, 14.

²⁸⁰ P. Dietze, A. M. Laslett and G. Rumbold, "The Epidemiology of Australian Drug Use", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 33, 47.

²⁸¹ Australian Bureau of Statistics, "Drug Induced Deaths, 1991-2001", at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3321.0.55.001Explanatory%20Notes11991-2001?OpenDocument>> viewed 13 November 2008.

²⁸² Dietze, Laslett and Rumbold, above n 280, 33, 46.

²⁸³ See, for example: Gowing et al, above n 191, 12; Fitzroy Legal Service Inc., *Handbook*, above n 195, 5-6; Australian Bureau of Statistics, "Suicides, Australia, 2005", at <http://www.abs.gov.au/AUSSTATS/subscriber.nsf/log?openagent&33090_2005.pdf&3309.0&Publication&952361A2A29BDBB4CA25729D001C09CF&0&2005&14.03.2007&Latest> viewed 10 December 2008; T. Chikritzhs, H. Jonas, P. Heale, P. Dietze, K. Hanlin and T. Stockwell, "Alcohol Caused Deaths and Hospitalisations in Australia, 1990-1997" (December 1999) *National Alcohol Indicators: Bulletin No. 1*, at <<http://ndri.curtin.edu.au/local/docs/pdf/naip/naip001.pdf>> viewed 16 July 2009; D.

above. While the nexus between drugs and crime is undeniably complex, Goldstein sets out three main ways in which drugs can contribute towards criminal offending.²⁸⁴ First, offences may occur as a direct result of the psychoactive effects of a drug (for example, driving while intoxicated). Second, offences may be committed in order to obtain funds to purchase drugs. Finally, offences may be committed in the specific context of the marketing of illicit drugs (territory wars, contract disputes, and the like).

Economic Costs

The economic costs associated with substance use and abuse are enormous. At an individual level, drug dependence can cause immense financial strain. A recent New Zealand study reported that "frequent injecting drug users spent a mean of \$270 per week on illegal drugs, the frequent methamphetamine users spent a mean of \$246 on illegal drugs and the frequent ecstasy users spent a mean of \$67 per week on illegal drugs".²⁸⁵ Economic costs extend beyond those attaching to the individuals immediately affected. A New Zealand study found that the social costs of harmful drug use in 2005/2006 was an estimated \$NZD 6,881, which was equivalent to the gross domestic product of the country's agricultural industry and its finance industry.²⁸⁶

Collins and Lapsley's most recent (2004-2005) assessment of drug-related costs in Australia placed the overall cost at over \$AUD 24 billion.²⁸⁷ "Cost" in this context denotes tangible costs (arising from health and welfare services, law enforcement, criminal justice, road accidents and loss of productivity) as well as intangible costs associated with loss of life.²⁸⁸ It also includes costs associated with the treatment of patients with comorbid mental health problems, who are more dependent on welfare services than patients with a single disorder.²⁸⁹ Selected portions of the costs breakdown are set out in Table 4.

Collins and H. Lapsley, *Monograph 64 - the Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05* (Australian Government, National Drug Strategy, 2008), at <<http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/mono64>> viewed 16 July 2009; I. Mackie, "Patterns of Drowning in Australia, 1992-1997" (1999) 171 *Medical Journal of Australia* 587, at <http://www.mja.com.au/public/issues/171_11_061299/mackie/mackie.html> viewed 12 May 2009.

²⁸⁴ P. J. Goldstein, "The Drugs/Violence Nexus: A Tripartite Conceptual Framework" (Fall 1985) *Journal of Social Issues* 493.

²⁸⁵ C. Wilkins, R. Griffiths and P. Sweetsur, *Recent Trends in Illegal Drug Use in New Zealand 2006-2008: Findings from the 2006, 2007 and 2008 Illicit Drug Monitoring System* (Centre for Social and Health Outcomes Research and Evaluation, Massey University, 2009), at <http://www.shore.ac.nz/projects/idms_study.htm> viewed 8 July 2009, 12.

²⁸⁶ A. Slack, G. Nana, M. Webster, F. Stokes and J. Wu, *Costs of Harmful Alcohol and Other Drug Use Final Report* (Business and Economic Research Limited, 2009), at <<http://www.berl.co.nz/874a1.page>> viewed 8 July 2009.

²⁸⁷ Collins and Lapsley, above n 283.

²⁸⁸ Ibid 49.

²⁸⁹ Goren and Mallick, above n 185, 1.

	Alcohol (\$m)	Illicit drugs (\$m)	Total (\$m)
Tangible costs	10,829.5 <i>Labour – 3,538</i> <i>Healthcare – 1,977</i> <i>Road accidents – 2,202</i> <i>Crime – 1,424</i>	6,915.4 <i>Labour – 1,649</i> <i>Healthcare – 202</i> <i>Road accidents – 528</i> <i>Crime – 3,645</i>	17,744.9
Intangible costs	4,488.7 <i>Loss of life – 4,135</i> <i>Pain & suffering (road accidents) – 354</i>	1,274.5 <i>Loss of life – 1,205</i> <i>Pain & suffering (road accidents) – 70</i>	5,763.2
Total costs	15,318.2	8,189.8	

Table 4: Economic Costs of Drug-Related Harm in Australia, 2004-2005

Risks Facing Pregnant Women

Pregnant women and their babies face a unique set of drug-related harms. Because drugs can cross the placenta, a pregnant woman's drug use can have deleterious effects on the foetus. Excessive drug use can increase the risk of poor foetal development, premature birth, miscarriage, birth defects, low birth weight, Foetal Alcohol Spectrum Disorders (FASD), Sudden Infant Death Syndrome (SIDS) and Neonatal Abstinence Syndrome (NAS).²⁹⁰ The risk of harm is not averted once the baby is born, for drugs can pass into breast milk.²⁹¹

The following table summarises the most common drug-related harms sustained over time from the perspective of the individual drug user.²⁹² Note of course that much will depend on the particular individual and the nature and quantity of the drug taken.

Obtaining drugs	Financing drug use	Mode of administration	Intoxication	Intoxicated behaviour	Longer term effects
Criminal offences (possession, sale, purchase of illicit drugs)	Financial debt Theft of drug itself (e.g. inhalants) Income-generating criminal activity (e.g.	Contraction of HIV, hepatitis B or hepatitis C Transmission of HIV, hepatitis B or hepatitis C Infection of site of injection	Toxicity or overdose Physical effects of the drug Psychological effects of the drug	Aggression and violence Participation in high-risk activities e.g. unprotected sex, needle sharing, intoxicated	Poor performance and absenteeism from school or workplace Neglect of home duties Withdrawal

²⁹⁰ Fitzroy Legal Service Inc., *Handbook*, above n 195, 53.

²⁹¹ *Ibid* 55.

²⁹² Drawn in part from: N. Lintzeris and P. Spry-Bailey, "Harm Reduction with Problem Users", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 206, 216.

Obtaining drugs	Financing drug use	Mode of administration	Intoxication	Intoxicated behaviour	Longer term effects
	prostitution, property crime) Social and family disruption	System infection		driving, crime Poor performance and absenteeism from school or workplace Family disruption	complications (e.g. seizures, hallucinations) Discomfort arising from withdrawal

Table 5: Summary of Drug-Related Harms From User Perspective

Major Treatment Models and Interventions

There is a broad spectrum of options for substance abuse management and treatment, ranging from assessment only to non-residential behavioural interventions to residential detoxification.²⁹³ The decision to offer or to embark upon a particular course of treatment will depend on numerous factors: the “stage of change” of the dependent person; his or her age, gender, area of residence and socioeconomic status; the costs involved in treatment; and personal preference. Many treatment centres offer more than one form of intervention.²⁹⁴ Table 6 below summarises the main tenets of the more common intervention models available and provides examples of treatment centres in Australia and New Zealand that utilise these various approaches.

Theoretical Approaches to Treatment

Transtheoretical Stages of Change

Prochaska and DiClemente’s stages of change theory offers a way to conceptualise most forms of deliberate behavioural change, including the change involved in recovering from substance dependence.²⁹⁵ The model is “transtheoretical” because it draws upon a number of discrete behaviour change theories.²⁹⁶ It proceeds on the basis that individuals “do not necessarily come to treatment committed to change and may vary in their readiness to control or stop drug use.”²⁹⁷ Successful recovery from substance abuse requires passage

²⁹³ For a summary of the main forms of treatment received by Australian consumers in 2006-2007, see: Australian Institute of Health and Welfare, *Alcohol and Other Drug Treatment Services in Australia 2006-07: Report on the National Minimum Data Set, Drug Treatment Series No. 8* (2008), at <<http://www.aihw.gov.au/publications/index.cfm/title/10590>> viewed 16 July 2009.

²⁹⁴ A. T. McLellen, "What We Need Is a System: Creating a Responsive and Effective Substance Abuse Treatment System", in Miller and Carroll (eds.), *Rethinking Substance Abuse and What We Should Do About It* (The Guilford Press, 2006) 275, 284-286.

²⁹⁵ Lee, above n 264, 75, 86.

²⁹⁶ J. Prochaska, C. DiClemente and J. Norcross, "In Search of How People Change: Applications to Addictive Behaviours" (1992) 47 *American Psychologist* 1102, 1107.

²⁹⁷ Lee, above n 264, 75, 86.

through distinct stages of change involving various cognitive, affective and behavioural processes.²⁹⁸ In this model, relapse is considered to be a natural part of the change process. We consider this model more extensively in Chapter 7.

Many of the treatment approaches discussed below are expressly or impliedly oriented around the transtheoretical framework, with different interventions catering for those at different stages of change.

Abstinence

Abstinence-based programs regard dependent users as powerless to resist the compelling pull of drugs and for this reason advocate a strictly drug-free lifestyle.²⁹⁹ In doing so, they appear to endorse aspects of the moral model of dependence.

Harm-Minimisation

Harm-minimisation approaches strive to reduce (not necessarily eliminate) problematic drug use by encouraging dependent users to return to “safe” or manageable levels of drug use.³⁰⁰ Abstinence is frequently, but not invariably, a goal or component of harm-minimisation.

Treatment Options

Self-Help Groups

Self-help groups such as Alcoholics Anonymous, Narcotics Anonymous, Alateen and Marijuana Anonymous are all examples of abstinence-based self-help programs.³⁰¹ Each is oriented around a 12-step recovery process, which typically includes admitting powerlessness over the problem drug, acknowledging the presence of a higher power, self-scrutinising, and repairing the damage caused by dependence. Group meetings (which are anonymous and normally free of charge) run multiple times a week and participants may attend as many or as few as they wish. These meetings provide a forum in which both recovering and recovered individuals can exchange stories about the recovery process and discuss the problems facing them in their struggle to acquire or maintain a drug-free lifestyle.

The appeal of self-help groups, as perceived by participants, lies in the protection afforded by anonymity, the reinforcement derived from interpersonal engagement, the comfort provided by the rituals observed at meetings, and the satisfaction derived from graduating through the 12 steps and having the chance to volunteer one’s time to the fellowship.³⁰² Disadvantages include a high initial

²⁹⁸ West, above n 195, 66. See also the discussion of the Transtheoretical Stages of Change model in Chapter 7.

²⁹⁹ Kellehear and Cvetkovski, above n 215, 57.

³⁰⁰ M. Hamilton and G. Rumbold, "Addressing Drug Problems: The Case for Harm Minimisation", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 129, 134-137.

³⁰¹ A summary of the self-help approach is in Ritter and Lintzeris, above n 264, 223.

³⁰² Ritter and Lintzeris, above n 264, 221, 223.

drop-out rate³⁰³ and, for some participants, the distinctly spiritual undertones of many of the more prominent programs.

Controlled-Use Interventions

Controlled-use interventions enable individuals to manage their drug usage.³⁰⁴ The aim is not total abstinence in every case (as with self-help groups), but rather a reduction in use according to the individual's preferences. While some commentators see controlled use to be incompatible with the goal of leading a drug-free lifestyle, it has been suggested that for some individuals, controlled-use may lead to a complete cessation of drug use over time.³⁰⁵ Controlled-use interventions have proven reasonably effective in the treatment of alcoholism, but given the natural reluctance on the part of treatment staff to facilitate (controlled) use of illicit drugs, they have not been properly tested for drugs such as heroin and amphetamines.³⁰⁶

Withdrawal (Detox) Interventions

Some individuals manage withdrawal symptoms through drawing on their own resilience or support from family and friends. Others – particularly those fearing complications such as seizures, psychosis or aggression – may prefer assistance during this process. Withdrawal or “detox” interventions are short-term interventions designed to address the physical side of withdrawal; the psychological aspect is treated separately as part of longer-term counselling or residential rehabilitation.³⁰⁷ Thus withdrawal is “not in itself a treatment” but rather “a necessary stepping stone to drug-free treatment.”³⁰⁸

Withdrawal treatment may be residential (in-patient at a hospital or clinic), outpatient (requiring daily visits) or home-based (whereby a nurse and/or general practitioner attends the individual's home to monitor the withdrawal process).³⁰⁹ The period of withdrawal depends on the particular drug and the particular individual, but withdrawal symptoms for alcohol and heroin usually peak after four to seven days.³¹⁰ Medications are provided for one of three purposes: to manage withdrawal symptoms, to ease or slow the withdrawal process, or to intensify but hasten the withdrawal process.³¹¹

Maintenance Pharmacotherapy

Maintenance pharmacotherapy involves ongoing, controlled provision of medication to prevent cravings and relapse.³¹² It is considered suitable for

³⁰³ Ibid.

³⁰⁴ A. Ritter and N. Lintzeris, "Pharmacotherapy Maintenance Treatment", in Hamilton, King and Ritter (eds.), *Drug Use in Australia: Preventing Harm* (Oxford University Press, 2nd edn, 2004) 236, 236.

³⁰⁵ Ibid 236-237; Ritter and Lintzeris, above n 264, 224.

³⁰⁶ Ritter and Lintzeris, above n 264, 113, 225.

³⁰⁷ Ibid.

³⁰⁸ Gowing et al, above n 191, 16.

³⁰⁹ Fitzroy Legal Service Inc., *Handbook*, above n 195, 59.

³¹⁰ Ritter and Lintzeris, above n 264, 113, 227.

³¹¹ Fitzroy Legal Service Inc., *Handbook*, above n 195, 59.

³¹² Ibid 60.

dependent users who have not succeeded in completing withdrawal.³¹³ The medication prescribed is normally a legal (and safer) variant of the drug of dependence. Methadone, for example, has been considered the “mainstay treatment for heroin dependence since the 1960s.”³¹⁴ Some maintenance pharmacotherapies operate at the behavioural as well as purely pharmacological level. For example, disulfiram (Antabuse), which is used to treat alcoholism, causes nausea and vomiting upon ingestion of alcohol in an aim to generate a pairing of alcohol use with these undesired symptoms.³¹⁵ Naltrexone hydrochloride not only reduces the craving for alcohol but “blunts the high” if a person consumes alcohol. Thus, rather than making the alcoholic ill with the medication, naltrexone in either a daily pill or a monthly injection reduces the desire to use and reduces the award for using. It is also used in the case of opioids. Unlike methadone, it is not addictive.³¹⁶

The rationale for prescribing one – sometimes addictive – drug in place of another is to enable the dependent person:

to improve significantly their physical health, relationships, and emotional well-being – while also obviating the need to engage in criminal behaviour to support the drug habit and decreasing the likelihood that the client will engage in high-risk harmful behaviour such as injecting heroin with a used syringe.³¹⁷

The substitution of high-risk activity for lower-risk activity is at the core of any harm minimisation approach to drug treatment. Without cognitive treatment, however, the risk is that the patient may become dependent on the maintenance drug thereby simply substituting one addiction for another.³¹⁸

Counselling, Psychotherapy and Behaviour-Change Interventions

Behaviour-change interventions address the psychological aspect of drug dependence by equipping the individual patient with the skills to control their dependence. These interventions may be directed towards any one or more of the following: managing emotional responses, acquiring new or altered social skills (including time-management) and developing assertiveness skills with which to address interpersonal conflict.³¹⁹

Motivational Interviewing. Motivational interviews are brief interventions that can last anywhere from 10 minutes to four hours.³²⁰ They are structured as one-on-one counselling sessions in which a counsellor works to resolve the client’s ambivalence and encourage change from within (rather than imposing it from

³¹³ Gowing et al, above n 191, 17.

³¹⁴ Ritter and Lintzeris, above n 264, 236–237.

³¹⁵ Ibid 243.

³¹⁶ J. Bell, J. Kimber, N. Lintzeris, J. White, B. Monheit, S. Henry-Edwards, R. Mattick, R. Ali, A. Ritter and A. Quigley, *Clinical Guidelines and Procedures for the Use of Naltrexone in the Management of Opioid Dependence* (Australian Government Department of Health and Ageing, 2003), 1.

³¹⁷ Ritter and Lintzeris, above n 264, 230.

³¹⁸ Ritter and Lintzeris, above n 304, 243.

³¹⁹ Ibid 225.

³²⁰ Ibid. Motivational interviewing is discussed at length in Chapter 7 (see: Motivational Interviewing).

outside).³²¹ Motivational interviews are suitable for those at any stage of change. For those who deny that their use is problematic (pre-contemplation) or who seek motivation to change (contemplation and preparation), or alternatively who have overcome dependency and are looking for reinforcement (maintenance), brief interventions have proven quite successful,³²² particularly for those at the lower end of the dependency spectrum.³²³

Cognitive Behaviour Therapy (CBT). CBT is in fact a range of treatments,³²⁴ each of which proceeds from the assumption that dependence is – at least in part – caused by poor coping skills and distorted cognitions. The emphasis in CBT is on the reversibility of human learning processes. If dependence is a set of learned beliefs (cognitions) and actions (behaviours), then it can be addressed through unlearning these beliefs and actions. CBT is not a brief intervention; on the contrary, it is only seen to be effective when applied for long enough that the client can “sustain, over the long term, the changes they have made to their behaviour.”³²⁵ By helping individuals to develop their coping, social and relationship skills, CBT equips them with the capacity to resist any future urge to return to drug use. It is also used to assist those with offending-related problems.³²⁶

Family Therapies. Family therapy acknowledges that drug abuse rarely exists in isolation and is more often a “functional expression of deeper conflict”.³²⁷ One component of this deeper conflict is the concept of *reciprocal causality* – the vicious cycle whereby the user claims that her substance abuse is caused by a family member’s nagging, but the family member maintains that the nagging arises only due to the substance abuse.³²⁸ A second component is *familial homeostasis* – the tendency of families to guard the status quo (including drug abuse) lest family stability be upset.³²⁹ The final component is *codependency* – a situation that arises when a non-dependent family member becomes so emotionally dependent upon the dependent person that they lose their own sense of self: their world shrinks to the world of their dependent family member.³³⁰ Family therapies acknowledge the prevalence of reciprocal causality, homeostasis and codependency in cases of substance abuse and aim to address them by inviting the family into the treatment process.

Family therapy interventions are multi-component approaches that focus on improving the family relationships so often disrupted by drug use.³³¹ Importantly, the focus is equally on the wellbeing of the family as on that of the

³²¹ Miller and Rollnick, above n 12; W. Miller and S. Rollnick, "What Is Motivational Interviewing?" (1995) 23 *Behavioural and Cognitive Psychotherapy* 325.

³²² Fitzroy Legal Service Inc., *Handbook*, above n 195, 59.

³²³ Ritter and Lintzeris, above n 264, 225.

³²⁴ *Ibid.*

³²⁵ *Ibid* 231.

³²⁶ See Chapter 4 for a discussion of the use of cognitive behavioural therapy with perpetrators of intimate partner violence.

³²⁷ Lee, above n 264, 87.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ Secades-Villa et al, above n 266, 36.

affected individual. Variations include behavioural marital therapy, community reinforcement and family training. Family treatment approaches have proven particularly successful as components of alcoholism treatment.³³²

Relapse Prevention Interventions. Relapse prevention interventions align with the relapse prevention theory of dependence. They encompass three main components: skills training to enable individual clients to identify high-risk situations and to manage drug cravings; cognitive restructuring to assist individuals to redirect their thinking away from drug use and to implement strategies if abstinence is broken; and lifestyle changes to minimise the chances of high-risk situations occurring.³³³ Relapse prevention techniques have proven very effective for alcohol and cocaine dependence.³³⁴

Cue Exposure Therapy. Cue exposure therapy aims to break the nexus between cue and response by reversing the conditioning effect of psychoactive drugs. Cue exposure therapy takes place in the presence of "cues of pre-ingestion"³³⁵ such as bottles of alcohol, syringes, spoons, and aluminium foil. The aim is to desensitise users to these cues and enable them to function normally in the presence of what would otherwise be a high-risk situation.³³⁶

Therapeutic Communities

Therapeutic communities are long-term residential facilities in which residents proceed through a graduated treatment program with the eventual aim of complete abstinence. The average length of stay is four months. While the initial stages of these programs are characterised by a high drop-out rate, patients who successfully work through the treatment program gain increased responsibility and more privileges and become role models for other residents.³³⁷ Therapeutic communities typically incorporate highly-structured drug education programs, basic living skills, vocational training, sport, community activities and recreational pursuits such as camping and bushwalking.³³⁸ They are normally situated in outer suburbs or rural areas so as to minimise the "chance of contact between residents and the outside world."³³⁹ In Australia, therapeutic community residents are typically young (between 28 and 32) heroin users with complex psychosocial and physical health issues, who have been using drugs for an average of 10 years.³⁴⁰ Empirical research on the effectiveness of therapeutic

³³² Ibid; B. S. McCrady, R. Stout, N. Noel, D. Abrams and H. Fisher Nelson, "Effectiveness of Three Types of Spouse-Involved Behavioral Alcoholism Treatment" (1991) 86 *Addiction* 1415.

³³³ Secades-Villa et al, above n 266, 35.

³³⁴ Ibid.

³³⁵ Ibid 36.

³³⁶ Ibid.

³³⁷ G. De Leon and J. T. Ziegenfuss (eds.), *Therapeutic Communities for Addictions: Readings in Theory, Research and Practice*, (Charles C Thomas, 1986).

³³⁸ The Buttery, "Treatment Strategies", at <<http://www.buttery.org.au/tc/cms/philosophy-of-treatment/treatmentstrategies/16>> viewed 13 December 2008.

³³⁹ Ritter and Lintzeris, above n 264, 233.

³⁴⁰ Ernst & Young, *Review of Long Term Residential Treatment for People with Alcohol and Other Drug Use Problems* (National Drug Strategy, Canberra, 1996); W. Hall, R. Chen and B. Evans, "Changes in the Characteristics of Clients Admitted to an Australian Therapeutic Community, "The Buttery", 1980-92" (1995) 14 *Drug and Alcohol Review* 125; M. Kelaher, S. Darke, W. Hall and B. Flaherty, *NDARC Technical Report No. 32, Characteristics of Admissions*

communities is limited, but it appears that longer stays (up to one year) are most likely to promote lasting behavioural change.³⁴¹

Contact and Engagement Interventions

Personnel involved in contact and engagement interventions take active steps to seek out the “hidden” populations of dependent users – those who have not come forward to seek treatment.³⁴² Examples of contact and engagement interventions include peer education, safe injecting rooms, clean needle and syringe distribution, and community outreach services.³⁴³ Often these interventions will involve personnel involved in outreach services contacting drug users “on the street, at their home, in public spaces, or at cafés.”³⁴⁴ Because they aim to provide information about drug use and to encourage entry into treatment, these interventions are targeted towards those at very early stages of change, such as pre-contemplation.³⁴⁵

Complementary and Natural Therapies

There is also a range of complementary and natural therapies designed to aid the recovery process. These include aromatherapy, reflexology, reiki, acupuncture, herbal remedies for withdrawal symptoms, massage, hypnotherapy and drumming or percussion circles.³⁴⁶ The practice of Transcendental Meditation® – a technique designed to relieve stress and promote meaningful self-development – has proved particularly successful as a component in the treatment of substance abuse.³⁴⁷

Special Interest Interventions

A range of specifically-tailored treatment models are available for indigenous persons, youth, men, women and many other groups.³⁴⁸

to Residential Drug Treatment Agencies in New South Wales, 1988-1992: Alcohol Problems (University of New South Wales, 1995).

³⁴¹ G. De Leon, "Therapeutic Communities for Addictions: A Theoretical Framework" (1995) 30 *Substance Use & Misuse* 1603; J. W. Toumbourou, M. Hamilton and B. Fallon, "Treatment Level Progress and Time Spent in Treatment in the Prediction of Outcomes Following Drug-Free Therapeutic Community Treatment" (1998) 93 *Addiction* 1051.

³⁴² Gowing et al, above n 191, 15.

³⁴³ Ibid.

³⁴⁴ Ritter and Lintzeris, above n 264, 233.

³⁴⁵ Gowing et al, above n 191, 15.

³⁴⁶ Fitzroy Legal Service Inc., *Handbook*, above n 195, 64–65; M. Winkelman, "Complementary Therapy for Addiction: "Drumming out Drugs"" (2003) 93 *American Journal of Public Health* 647.

³⁴⁷ C. Alexander, P. Robinson and M. Rainforth, "Treating and Preventing Alcohol, Nicotine, and Drug Abuse through Transcendental Meditation", in O'Connell and Alexander (eds.), *Self Recovery* (Haworth Press, 1994) 13; M. A. Hawkins, "Effectiveness of the Transcendental Meditation Program in Criminal Rehabilitation and Substance Abuse Recovery: A Review of the Research", in Alexander, Walton, Orme-Johnson, Goodman and Pallone (eds.), *Transcendental Meditation in Criminal Rehabilitation and Crime Prevention* (Haworth Press, 2003) 47.

³⁴⁸ See, for example: D. Gray, M. Green, S. Saggars and E. Wilkes, *Review of the Aboriginal and Torres Strait Islander Community-Controlled Alcohol and Other Drugs Sector in Queensland* (National Drug Research Institute, 2009), at

Treatment Category	Main Tenets/Points of emphasis	Where Offered (in Australia and New Zealand)	Possible model adopted
SELF-HELP GROUPS			
	12 step program Group meetings Anonymity	Alcoholics Anonymous, Narcotics Anonymous, Alateen, Marijuana Anonymous	Abstinence
CONTROLLED USE INTERVENTIONS			
	Reduction in harmful use	Herbert Street Clinic Controlled Drinking Program (Royal North Shore Hospital, Sydney, NSW)	Harm minimisation
WITHDRAWAL/DETOXIFICATION			
	Alleviation of physical withdrawal symptoms via provision of medication	Harbour House, Lyttleton Harbour, NZ; Salvation Army Bridge Program (residential); Parramatta Centre For Addiction Medicine (outpatient); Brisbane North Home-Based Detoxification and Rehabilitation Service (home-based); Auckland City Mission Social Detoxification Service (non-medical, residential)	Harm minimisation
MAINTENANCE PHARMACOTHERAPY			
	Long-term treatment Prescription of medication to prevent cravings and relapse	Auckland Methadone Service (Pitman House), First Step VIC	Harm minimisation
COUNSELLING, PSYCHOTHERAPY AND BEHAVIOUR-CHANGE			
CBT	Reversal of poor coping skills and distorted cognitions	Salvation Army Oasis NZ	Stages of change Harm minimisation Abstinence
Family Therapy	Support for families of those affected by substance misuse	Mary of the Cross Centre VIC Gold Coast Drug Council QLD Alcohol & Drug Service Hawera NZ Family Drug Support Helpline NSW	
Relapse Prevention	Skills training Cognitive restructuring Lifestyle changes	Cyrenian House NSW The Sydney Clinic	
Cue Exposure	Desensitisation to drug-related cues via exposure	Australian Centre for Addiction Research	
Motivational interviewing	Empowerment Encouragement through stages of change	Tranx Auckland Eastern Hume Dual Diagnosis Service	
THERAPEUTIC COMMUNITIES			
	Long term residential treatment program Drug education Vocational/skills training Recreational activities Community involvement	Rosella House, Geraldton, WA Higher Ground, Auckland West The Buttery, NSW	Abstinence
CONTACT AND ENGAGEMENT			
	Active seeking out of "hidden populations" of dependent drug users	Methadone Regional Outreach Workers VIC (MROW), Queensland Injectors Health Network, Victorian Needle and Syringe Program, Sydney Medically Supervised Injecting Centre (MSIC), Salvation Army Follow-on Youth Recovery	Harm minimisation Stages of change

<<http://ndri.curtin.edu.au/local/docs/pdf/publications/T194.pdf>> viewed 9 July 2009. See also: Indigenous Australian Research Program, Indigenous Australian Alcohol and Other Drugs Bibliographic Database, at <<http://www.db.ndri.curtin.edu.au/>> viewed 16 July 2009.

Treatment Category	Main Tenets/Points of emphasis	Where Offered (in Australia and New Zealand)	Possible model adopted
		Support Team (FYRST) Program	
COMPLEMENTARY, ALTERNATIVE AND NATURAL			
		Windana VIC Cyrenian House NSW	
SPECIAL INTEREST			
		Corella Drug Treatment Services NSW (dual diagnosis), Teen Challenge QLD (youth), Lucinda House QLD (women), Campbell House NSW (men), Fairlight Centre NSW (homeless), Ngwala Willumbong Co-operative VIC (indigenous), (rural), Community Alcohol and Drug Service Auckland (65+), CADS Auckland Lesbian and Gay Counselling Service (gay and lesbian), CADS Auckland Pregnancy and Parental Service (pregnant women and parents)	

Table 6: Summary of Treatment Models

Conclusion

The prevalence of drug (including alcohol) use and misuse in society is well established, as are the human, social and economic costs associated with drug dependence. Drugs are readily available and widely used, particularly amongst those who come into contact with the criminal justice system. The harms can be disastrous regardless of the drug's social acceptability or legal status. Drug abuse bears a close relationship with criminal offending, and a startling correlation with mental illness.

There are numerous competing and complementary explanations as to why people initially take drugs, and what can precipitate a transition from experimentation through to heavier use and finally, dependence. Attempts at explaining dependence have progressed from the moralistic and religious through to the medical and welfarist, and finally to the neuroadaptive and behavioural. No matter which model is adopted, it is worth bearing in mind at all times the complex and highly personalised nature of drug use and dependence.

Current research suggests that a combination of genetic and environmental factors – including the influence of family, schools and peers – may offer the best explanation for drug abuse.³⁴⁹ Evidence suggests that drug abuse produces changes in the brain that promote decision-making in the direction of ongoing use of drugs.³⁵⁰

The harms associated with drug abuse can be catastrophic for the individual concerned. Further, such harms are not limited to the users. Drug dependence can fracture familial and social bonds, hamper productivity and jeopardise public safety. A pregnant mother's dependence can endanger not only her life but also that of her child. Drug dependence also causes massive economic strain, both at personal and governmental levels.

³⁴⁹ This is the approach taken by the US National Institute on Drug Abuse: National Institute on Drug Abuse, above n 274.

³⁵⁰ Ibid.

Individuals who consider their use to be problematic have at their disposal a vast range of treatment options. Interventions are also available for family members of substance users as well as for “hidden” populations of dependent users. Some interventions are directed towards persons at early (pre-contemplative and contemplative) stages of change, others towards those in the midst of a struggle against dependence, and yet others towards those who have overcome their dependence and who are looking to maintain their reduced-use or drug-free lifestyle.

Chapter 3: Mental Health

Michael King and Natalia Blecher

Mental health is a key area of concern in Australia and New Zealand. A startlingly high proportion of Australians and New Zealanders will experience a mental disorder at some point in their lifetime. Certain populations are particularly prone to developing mental disorders.

Mental disorders give rise to a range of health, social and legal risk factors. There is, for instance, a well-documented association between certain mental disorders and substance abuse. Other risk factors associated with mental disorder include physical disability, unemployment, homelessness and discrimination upon contact with law enforcement agencies.

Individuals affected by mental disorder are particularly vulnerable to alienation from the court process and the legal profession.

Introduction

Mental health is a key area of community and policy concern in Australia and New Zealand. Almost half of all Australians aged between 16 and 85 have suffered a mental disorder at some point in their lives; 20% within the previous 12 months.³⁵¹ A 2006 New Zealand survey found that 46.6% of the population are expected to meet the diagnostic criteria for mental illness at some point in their lives. Of the group surveyed, 39.5% had already done so; 20.7% within the previous 12 months.³⁵² Mental disorders are a leading cause of disability and death worldwide. For instance, in Australia, mental disorder accounted for approximately 13% of the total burden of disease and injury in 2003.³⁵³

Comorbidity (dual diagnosis or co-occurring disorders)

Commonly, persons suffering from a mental health problem experience concurrent or “comorbid” health problems. The comorbid disorder can be mental or physical. Almost 12% of Australians interviewed in the 2007 *National*

³⁵¹ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Findings* (2007), at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4326.0>> viewed 12 May 2009, 7.

³⁵² M. O. Browne, J. E. Wells and K. M. Scott (eds.), *Te Rau Hinengaro: The New Zealand Mental Health Survey*, (Ministry of Health, Wellington, 2006), xix.

³⁵³ S. Begg, T. Vos, B. Barker, C. Stevenson, L. Stanley and A. Lopez, *The Burden of Disease and Injury in Australia 2003* (Australian Institute of Health and Welfare, 2007), at <<http://www.aihw.gov.au/publications/index.cfm/title/10317>> viewed 12 May 2009, 59.

[Survey of Mental Health and Wellbeing](#) reported suffering a mental disorder and comorbid physical condition, while 8.5% reported suffering two or more mental disorders.³⁵⁴ One of the most prevalent comorbid relationships is that between mental disorder and substance abuse, discussed in detail below.³⁵⁵ In the criminal justice setting, comorbidity appears to be “the rule rather than the exception”.³⁵⁶ In a 2003 study of Victorian forensic psychiatric patients, 74% of interviewees met the diagnostic criteria for substance dependence or abuse at some point in their lives; 12% within the past month.³⁵⁷

Prevalence of mental disorder amongst particular populations

Higher rates of mental illness and disorder are evident amongst socioeconomically disadvantaged groups,³⁵⁸ migrants,³⁵⁹ war veterans³⁶⁰ and indigenous populations (including Aborigines, Torres Strait Islanders,³⁶¹ Maori and Pacific Islanders³⁶²). One of the stark disproportions is that between the general community and the prison population. The 2007 [National Survey of Mental Health and Wellbeing](#) found that the rate of recent mental disorder amongst persons who had ever been incarcerated was more than double that of persons who had never been incarcerated.³⁶³ Persons who had ever been incarcerated were roughly five times as likely to suffer a substance use disorder, three times more likely to suffer an affective disorder, and twice as likely to suffer an anxiety disorder.³⁶⁴ Epidemiological data reveals the following about persons currently in Australian prisons:

- Prisoners are three to five times more likely than members of the general community to suffer one of the major forms of mental illness, such as depression or schizophrenia.³⁶⁵
- Approximately 13.5% of male prisoners and 20% of female prisoners have had one or more psychiatric admissions.³⁶⁶

³⁵⁴ Australian Bureau of Statistics, above n 351, 22.

³⁵⁵ Law Reform Commission of Western Australia, above n 35.

³⁵⁶ J. R. P. Ogloff, M. Davis, G. Rivers and S. Ross, *The Identification of Mental Disorders in the Criminal Justice System, Report to the Criminology Research Council* (2006), at <<http://www.criminologyresearchcouncil.gov.au/reports/2006-ogloff.html>> viewed 12 May 2009, 17.

³⁵⁷ J. R. P. Ogloff, A. Lemphers and P. Dwyer, "Dual Diagnosis in an Australian Forensic Psychiatric Hospital: Prevalence and Implications for Services" (2004) *Behavioral Sciences & the Law* 22, 543.

³⁵⁸ Australian Bureau of Statistics, *Mental Health in Australia: A Snapshot 2004-05* (2006), at <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4824.0.55.001>> viewed 12 May 2009.

³⁵⁹ Australian Institute of Health and Welfare, *Australia's Health 2008: The Eleventh Biennial Health Report* (2008), at <<http://www.aihw.gov.au/publications/index.cfm/title/10585>> viewed 12 May 2009, 92.

³⁶⁰ *Ibid* 100.

³⁶¹ *Ibid* 71.

³⁶² Browne, Wells and Scott, above n 352, 5–6.

³⁶³ Australian Bureau of Statistics, above n 351, 15.

³⁶⁴ *Ibid*.

³⁶⁵ Ogloff et al, above n 356.

³⁶⁶ P. E. Mullen, C. L. Holmquist and J. R. P. Ogloff, *National Forensic Mental Health Scoping Study* (Department of Health and Ageing, Canberra, 2003).

- Approximately 8% of male prisoners and 14% of female prisoners suffer from a “major mental disorder with psychotic features”.³⁶⁷
- The prevalence of schizophrenia amongst the prison population is between 2-5%,³⁶⁸ compared with the rate in the general population of about 1%.³⁶⁹

The same “markedly elevated prevalence rates”³⁷⁰ amongst prison populations has also been documented in New Zealand. Increased prevalence is particularly prominent for disorders such as substance dependency, schizophrenia, major depression and bipolar disorder.³⁷¹ The high prevalence rates of mental illness in prison populations may be due to the fact that prisoners commonly are members of community groups with higher rates of mental illness than population norms – such as socio-economically disadvantaged groups and indigenous populations – a lack of access to suitable community treatment services, a lack of court diversion programs and “social intolerance of deviant behaviour of the mentally ill.”³⁷²

Key Concepts and Definitions

Defining “mental disorder”

There are numerous definitions of “mental disorder” and many ways to classify the various categories of disorder. The reason for the lack of any settled definition is that definitions of “mental disorder” tend to be rather discipline-specific.

Social definitions often conceive of “disability” and “disorder” as terms attaching to society rather than to individuals. In other words, they view mental disorder as a product of “society’s failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organisation.”³⁷³ It is difficult, however, to arrive at a positive or precise definition of mental disorder utilising the social standard.

Medical definitions are designed to aid clinical diagnosis and treatment, and are therefore guided by the presence or absence of clinically recognised symptoms. There are two internationally accepted standards for classifying and diagnosing mental illness: the World Health Organization’s *International Classification of Diseases* (ICD-10) and the American Psychiatric Association’s *Diagnostic and*

³⁶⁷ Ibid Table 1.

³⁶⁸ Ibid.

³⁶⁹ SANE Australia, *Factsheet: Schizophrenia* (2005), at <<http://www.sane.org/Information/Factsheets/Schizophrenia.html>> viewed 27 September 2008.

³⁷⁰ P. M. J. Brinded, A. I. F. Simpson, T. M. Laidlaw, N. Fairley and F. Malcolm, "Prevalence of Psychiatric Disorders in New Zealand Prisons: A National Study" (2001) 35 *Australian and New Zealand Journal of Psychiatry* 166.

³⁷¹ Ibid 166.

³⁷² T. Butler, S. Allnutt, D. Cain, D. Owens and C. Muller, "Mental Disorder in the New South Wales Prisoner Population" (2005) 39 *Australian and New Zealand Journal of Psychiatry* 407, 410.

³⁷³ M. Oliver, *Understanding Disability: From Theory to Practice* (MacMillan Press, 1996), 32.

Statistical Manual of Mental Disorders (DSM-IV). According to the ICD-10, mental disorder is “not an exact term”, but refers to “the existence of a clinically recognizable set of symptoms or behaviour associated...with distress and with interference with personal function.”³⁷⁴ The DSM-IV, the more widely-used standard in Australia and New Zealand, defines mental disorder as “a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress...or disability...or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom”.³⁷⁵

Legal definitions are designed for even more specific purposes, for example, determining legal competence, assessing criminal responsibility, and establishing eligibility for disability entitlements. The “imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis”³⁷⁶ means that what constitutes “mental disorder” in medicine is often insufficient to establish a mental disorder, mental disability, mental disease or mental defect at law.³⁷⁷ For the purpose of this chapter, the DSM-IV classification system is adopted.

Key Concepts

The following table provides a glossary of key concepts.

Acquired brain injury	Injury to the brain that has been sustained after birth. Heavily dependent on the nature and extent of the brain damage. Onset may be sudden or insidious. Sudden onsets are usually brought about by impacts to the head, infections, stroke, oxygen deprivation and episodes of drug or alcohol use. Insidious onsets normally arise from prolonged substance abuse, tumour or degenerative neurological disease. The impairment may be physical, cognitive or a combination, and may be transient or permanent.
Catatonic behaviour	A feature of some (particularly psychotic) disorders that may involve extreme physical rigidity, immobility, motiveless resistance, peculiar posture, and stereotyped movements.
Cognitive impairment	General term used to describe various neurological impairments that can hinder learning, memory, concentration and problem-solving. Can range from mild through to severe and be acquired at birth or later in life. Often associated with dementia, acquired brain injury and intellectual disability.
Intellectual disability	Developmental disorder characterised by significantly low IQ and demonstrated difficulty with obtaining basic personal skills.
Mental disorder	A “clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress...or disability...or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.” ³⁷⁸ Categories of mental disorder include the following:

³⁷⁴ World Health Organization, above n 202, 5.

³⁷⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition: Text Revision* (American Psychiatric Association, 2000), xxxi.

³⁷⁶ *Ibid* xxxiii.

³⁷⁷ *Ibid*.

³⁷⁸ *Ibid* xxxi.

Developmental disorders – intellectual disorders normally diagnosed during infancy, childhood or adolescence. These include intellectual disability, learning disorders, motor skills disorders and communication disorders.

Dementia disorders – multiple cognitive deficits (such as memory loss) that arise from an underlying general medical condition, the effects of a substance, or a combination of both. These disorders include Alzheimer’s Disease, dementia due to Parkinson’s Disease and alcohol-induced persisting dementia. Dementia disorders are most common amongst, but certainly not limited to, geriatric populations.

Substance related disorders – Disorders related to the use of, or exposure to, psychoactive drugs, including medications and toxins. These include alcohol-induced persisting dementia, amphetamine-induced sleep disorder, cannabis-induced psychotic disorder, inhalant-induced mood disorder, opioid dependence and polysubstance dependence.

Psychotic disorders – Disorders that feature symptoms such as prominent hallucinations, delusions, disorganised speech and catatonic behaviour. Examples include schizophrenia, schizoaffective disorder, delusional disorder and substance-induced psychotic disorder.

Mood disorders – Disorders that have a mood disturbance as the predominant feature. These include major depressive disorder, bipolar disorder and manic episode.

Anxiety disorders – Disorders that have anxiety as the predominant feature. These include panic attack, agoraphobia, posttraumatic stress disorder, generalised anxiety disorder, acute stress disorder and obsessive-compulsive disorder.

Dissociative disorders – Disorders characterised by a disruption in consciousness, memory, identity, or perception. Examples include dissociative identity disorder and depersonalisation disorder.

Impulse control disorders – Disorders characterised by an inability to resist impulse, drive or temptation to perform harmful acts. Affected individuals may experience a heightening sense of tension or arousal before committing the harmful act, followed by pleasure, gratification or relief once the act has been committed. Examples of impulse control disorders include intermittent explosive disorder, kleptomania, pyromania and pathological gambling.

Personality disorders – Lasting pattern of inner experience and behaviour that deviates from cultural expectations. These disorders generally begin in adolescence or early adulthood, are long-lasting and stable over time, and cause distress or impairment. Examples include paranoid personality disorder, schizoid personality disorder, antisocial personality disorder and borderline personality disorder.

Table 7: Key Concepts

Health, Social and Legal Issues Associated with Mental Disorder

Persons affected by a mental disorder are particularly vulnerable to health risks (such as decreased physical health and substance abuse), social risks (such as unemployment, homelessness and isolation) and legal risks (in particular, an increased likelihood of contact with the criminal justice system).

Unrecognised or untreated mental health problems can create a range of health, social and legal risk factors for the affected individual.

Health Risk Factors

Physical ill-health

Mental disorders pose risks to the individual's physical health. In many cases, these risks manifest in the symptoms of the disorder itself (for example, muscular immobility in catatonic schizophrenia).³⁷⁹

In other cases, they manifest in an

increased risk of related or comorbid conditions (for example, coronary heart disease as a risk of depression).³⁸⁰

Substance use and dependence

There is an established link between problematic substance use and mental disorder. Mental illness features disproportionately amongst persons with drug and alcohol problems.³⁸¹ Common diagnoses associated with problematic substance use include depression, anxiety, and increasingly psychosis and other serious mental disorders.³⁸² Even where an individual's consumption level is not exceptionally high, an alcohol or drug habit can still exacerbate or alter the course of the disorder.³⁸³

Mortality

Mental disorder can lead to death, whether by its own progression or by setting in motion a chain of events that eventually results in death. An example of the latter would be where an individual's mental disorder results in him becoming homeless, which results in pneumonia and ultimately death. In Australia in 2006, mental disorder was the underlying cause of 5,156 registered deaths – 3.9% of all registered deaths.³⁸⁴ When deaths *associated* with such disorders are included, the total comes to 18,943. The years of potential life lost was calculated

³⁷⁹ Ibid 300.

³⁸⁰ S. J. Bunker, D. M. Colquhoun, M. D. Esler, I. B. Hickie, D. Hunt, V. M. Jelinek, B. F. Oldenburg, H. G. Peach, D. Ruth, C. C. Tennant and A. M. Tonkin, "'Stress' and Coronary Heart Disease: Psychosocial Risk Factors" (2003) 178 *Medical Journal of Australia* 272, at <http://www.mja.com.au/public/issues/178_06_170303/bun10421_fm.pdf> viewed 13 May 2009.

³⁸¹ Department of Human Services, *Dual Diagnosis: Key Directions for Service Development* (Victorian Government, 2007), at <<http://www.health.vic.gov.au/mentalhealth/dualdiagnosis>> viewed 13 May 2009, 4.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Australian Bureau of Statistics, *Causes of Death: Australia 2006* (2008), at <<http://www.abs.gov.au>> viewed 13 May 2009, 19.

at 6,653 for males and 3,571 for females.³⁸⁵ These figures do not include deaths by suicide, although suicide is “the main cause of premature death among people with a mental illness.”³⁸⁶

Underuse of mental health services

Mental health services are notoriously under-used.³⁸⁷ One explanation for this is an insufficiency of mental health services, which is most prominent amongst indigenous communities. In Australia, for instance, 74% of residents in indigenous communities were found to have “inadequate access to visiting or resident mental health workers”.³⁸⁸ Cost issues also inhibit access by Aboriginal and Torres Strait Islander people to general practitioners and mental health specialists.³⁸⁹ A second explanation for the under-use of mental health services is the lack of culturally appropriate services to meet the mental health treatment needs of indigenous communities; the “psychiatric services in Australia is designed to meet the needs of the mentally ill who present in the European manner”.³⁹⁰

A final explanation for under-use of available mental health services is the reluctance of many clients to access such services. This is certainly a common concern in relation to indigenous and migrant groups. A recent New Zealand study found that, of New Zealanders who had suffered a mental disorder in the past 12 months, only 25.4% of Pacific people and 32.5% of Maori people had visited a mental health service.³⁹¹ In Australia, this disinclination of indigenous clients to access mental health services is thought to be attributable, at least in part, to the fact that externally-run services are seen as intruding into what is essentially a family matter.³⁹² Other factors that can act as barriers to accessing mental health services more generally include:

lack of knowledge of the existence of, or eligibility for, a service; mistrust of service providers; lack of capacity to seek assistance because of a chronic mental or physical condition; inability to cope with daily interactions or communicate effectively; embarrassment or shame about a mental health problem or intellectual

³⁸⁵ Ibid 8.

³⁸⁶ Australian Bureau of Statistics, above n 351, 19.

³⁸⁷ Law Reform Commission of Western Australia, above n 35, 99; Browne, Wells and Scott, above n 352, 8.

³⁸⁸ T. Calma, *Creating Futures – Influencing Social Determinants of Mental Health and Well-Being in Rural, Indigenous and Island Peoples*, Presentation by Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and National Race Discrimination Commissioner, 5 September 2006 (Australian Human Rights Commission, 2006), at <http://www.hreoc.gov.au/about/media/speeches/social_justice/social_determinants_and_mental_health.html> viewed 17 July 2009.

³⁸⁹ Ibid.

³⁹⁰ Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness* (1993), 711, quoting Dr John Spencer and colleagues; see also: P. Swan and B. Raphael, *Ways Forward: National Aboriginal and Torres Strait Islander Mental Health Policy National Consultancy Report* (Australian Government Publishing Service, 1995), 43.

³⁹¹ Browne, Wells and Scott, above n 352, 8.

³⁹² E. Robinson and R. Parker, *Prevention and Early Intervention in Strengthening Families and Relationships: Challenges and Implications*, *Afrc Issues No. 2* (2008), at <<http://www.aifs.gov.au/afrc/pubs/issues/issues2.html>> viewed 13 May 2009.

disability; or denial of an underlying mental impairment or substance abuse problem.³⁹³

In relation to men in rural areas, the stigma associated with mental ill-health, coupled with the considerable “pressure to be stoic in the face of adversity” combine to discourage many from accessing available services.³⁹⁴ As Judd and colleagues have noted:

In the case of farmers, stoicism may arise from a crucial imperative to fulfil the farming role, as the number of workers on a farm is often small, and time off for illness would have a significant impact on productivity. As such, men perceive taking practical steps, remaining optimistic and getting on with the job as the most useful strategies to deal with problems.³⁹⁵

This widespread reluctance to access mental health services further compounds the above health risk factors, and means that many individuals suffering from mental disorders are not receiving necessary treatment and support.

Social Risk Factors

Sufferers of mental disorders are clearly among “the most vulnerable and disadvantaged in our community.”³⁹⁶

Unemployment

Many people with mental disorders find it difficult to obtain and maintain employment.³⁹⁷ At the same time, unemployment can entrench and even contribute towards mental ill-health.³⁹⁸ In part the relationship between mental disorder and unemployment arises due to the nature of mental disorder, the symptoms of which may, in many cases, impede the individual’s capacity to work productively. However, even where the individual is receiving appropriate medical treatment, other impediments to employment exist. Most notable is the pervasive sense of stigma attached to those with mental illnesses that emanates from within the workforce.³⁹⁹

³⁹³ Law Reform Commission of Western Australia, above n 35, 99.

³⁹⁴ F. Judd, H. Jackson, A. Komiti, G. Murray, C. Fraser, A. Grieve and R. Gomez, "Help Seeking by Rural Residents for Mental Health Problems: The Importance of Agrarian Values" (2006) 40 *Australian and New Zealand Journal of Psychiatry* 769.

³⁹⁵ *Ibid*; see also: Robinson and Parker, above n 392.

³⁹⁶ M. Karras, E. McCarron, A. Gray and S. Ardasinski, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (Law and Justice Foundation of New South Wales, 2006), at <<http://www.lawfoundation.net.au/report/mental>> viewed 13 May 2009, xvi.

³⁹⁷ Law Reform Commission of Western Australia, above n 35, 96.

³⁹⁸ Australian Bureau of Statistics, *Mental Health and Wellbeing: Profile of Adults* (1998), at <<http://www.abs.gov.au>> viewed 13 May 2009, 9.

³⁹⁹ *Ibid*.

Social exclusion and family breakdown

Many individuals suffering from mental disorders lack or lose the social skills required to build and maintain personal relationships.⁴⁰⁰ This can lead to social ostracism, discrimination and breakdown of family bonds.⁴⁰¹

Homelessness

Mental disorder and homelessness are closely-entwined phenomena. Mental illness can bring about homelessness – either as a consequence of deinstitutionalisation or “simply because mentally ill people do not get the support they need to cope with normal life.”⁴⁰² At the same time, homelessness can contribute towards the development of, or exacerbate existing, mental disorders.⁴⁰³ In the 2007 Australian *National Survey of Mental Health and Wellbeing*, the rate of mental disorder amongst persons who had ever been homeless was 54% – almost three times that attaching to persons who had never been homeless.⁴⁰⁴

The 1960s philosophy of deinstitutionalisation developed from the notion that the mentally ill “should be receiving treatment through community mental health services, with hospital admissions for the occasional acute episode.”⁴⁰⁵ In fact, deinstitutionalisation was not accompanied by a corresponding increase in support services for the mentally ill. Many of these patients did not – and still are not – receiving proper treatment or accommodation.⁴⁰⁶ The plight of homeless people with mental illnesses is one of the most devastating failings of deinstitutionalisation, characterised by inadequate accommodation services and a widespread denial of medical treatment. Indeed, the Human Rights and Equal Opportunity Commission has stated of such persons that: “[t]he most poverty-stricken group in our community, stricken and alone, lost, eke out their days in a monotonous way, often still tormented by the symptoms of florid mental illness.”⁴⁰⁷

Although the stereotypical homeless person conjures up the image of a middle-aged single male, the homeless population is in fact far from homogenous: it includes the young, the old, the single and married. It encompasses those with no fixed address as well as those who spend years at one shelter.⁴⁰⁸ What homeless persons do have in common, however, is low socioeconomic status. The homeless live in abject poverty, lacking income and essential social support.⁴⁰⁹ Many homeless persons are also socially isolated, having no living relatives or

⁴⁰⁰ Law Reform Commission of Western Australia, above n 35, 96.

⁴⁰¹ Ibid; Australian Institute of Health and Welfare, above n 359, 219.

⁴⁰² Human Rights and Equal Opportunity Commission, above n 390, 755.

⁴⁰³ Ibid 556.

⁴⁰⁴ Australian Bureau of Statistics, above n 351, 14.

⁴⁰⁵ Human Rights and Equal Opportunity Commission, above n 390, 553.

⁴⁰⁶ Ibid 299.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid 548.

⁴⁰⁹ Ibid 549.

close friends.⁴¹⁰ The vulnerabilities accruing to homeless persons generally are only compounded when combined with mental disorder.

Many persons with mental disorders do not recognise their need for medical treatment⁴¹¹ nor have family and friends to ensure they are taking their prescribed medication.⁴¹² Therefore, when persons with mental illnesses residing in hostels or shelters refuse to take their medication (as is often the case),⁴¹³ crisis accommodation workers, who lack medical training, may feel bound to compel them to take their medication:

They will lock themselves in...and when we go up there and they say, 'I do not want to see anybody'— in fact we have no powers. We would not force anyone to do anything they would not do. But it gets to the stage...where we need some sort of power to — here we go, we are talking about human rights here — but to try and force people to take their medication.⁴¹⁴

In rare cases, hostel residents are taken to a hospital. However, all too commonly, this simply results in their being turned away.⁴¹⁵ Of this, the Human Rights and Equal Opportunity Commission has observed:

Most, sadly, cycle backwards and forwards from shelter to hospital back to shelter again like some endless game of musical chairs, competing for the few beds available and leaving often prematurely from hospital, and often inappropriately, before any response to treatment.⁴¹⁶

Legal Risk Factors

Contact with the criminal justice system

Those affected by a mental disorder are markedly over-represented in the criminal justice system. Whether this is because they commit more offences or are simply more likely to be picked up for offending (or both) is unclear.⁴¹⁷ In either case, any correlation between mental disorder and criminal offending must be viewed in the context of the “confounding influences of the social dislocations which so often accompany disorder and disability.”⁴¹⁸ Criminality is often the product of various health and social problems such as mental disorder, homelessness, substance abuse and lack of effective treatment. Frequently these problems combine to make offending virtually inevitable, for example where a homeless person with a mental illness has little choice but to urinate in public, commit trespass (in search of shelter) or steal (in pursuit of food).⁴¹⁹ In other

⁴¹⁰ Ibid 578 (Neil Buhrich, Oral Evidence, Sydney, 18 June 1991).

⁴¹¹ Ibid.

⁴¹² Ibid 554.

⁴¹³ Ibid.

⁴¹⁴ Ibid 553 (Bill Aldcroft, Oral Evidence, Canberra, 18 March 1992).

⁴¹⁵ Ibid.

⁴¹⁶ Ibid 554 (David Leonard, Oral Evidence, Melbourne, 10 April 1991).

⁴¹⁷ Ibid 758.

⁴¹⁸ P. E. Mullen, *Mental Health and Criminal Justice: A Review of the Relationship between Mental Disorders and Offending Behaviours and on the Management of Mentally Abnormal Offenders in the Health and Criminal Justice Services* (Criminology Research Council, 2001), at <<http://www.criminologyresearchcouncil.gov.au/reports/mullen.html>> viewed 13 May 2009, 3.

⁴¹⁹ Law Reform Commission of Western Australia, above n 35, 96.

cases, criminal offending is a direct manifestation of a person's mental illness, as is often the case with resisting arrest and offensive language.⁴²⁰

The bulk of offences for which those with mental disorders come to the attention of police are minor offences like non-payment of fines, public drunkenness, loitering, disorderly conduct and vagrancy.⁴²¹ While a common conception is that mental illness causes violent behaviour, a recent longitudinal study of 34,653 United States subjects found that severe mental illnesses such as schizophrenia, bipolar disorder and major depression alone did not predict violent behaviour. However, the presence of other violence-related factors such as substance abuse did result in the subjects experiencing a greater incidence of violent acts than other people.⁴²² Those with mental disorders who commit violent crimes tend to be those who are not receiving treatment, who are abusing alcohol or other drugs, and whose violence is provoked more by fear or lack of understanding than by a desire to cause harm.⁴²³

Disadvantage upon contact with the criminal justice system

Persons affected by mental disorders experience further disadvantage once contact with the criminal justice system is made. Mental disorder is a key determinant of whether an individual is arrested.⁴²⁴ Once arrested, mentally disordered individuals are less likely to be released on bail. This may be because they have no fixed address at which they could be reliably located, because they lack the funds to raise bail, or because they cannot understand or comply with the bureaucratic requirements associated with bail (for example, where bail is denied because a delusional offender refuses to sign the requisite form).⁴²⁵ Denial of bail "means people affected by mental illness are frequently remanded in custody – even on quite trivial charges."⁴²⁶ Where the offender is tried and eventually convicted, the judge or magistrate in fixing a sentence will be confronted by the same questions faced by police at the arrest stage:

The policy of most court systems is to favour non-custodial sentences such as fines, bonds, home detention and community service orders. But these cannot be imposed on someone who has no money and no secure accommodation. Thus people with a mental illness, for whom prison is a particularly inappropriate and harmful penalty, often go to jail for minor offences which normally would attract a noncustodial sentence.⁴²⁷

Mental disorder is thus a key variable that influences legal decisions concerning arrest, the grant of bail, and the formulation of criminal sentences.

⁴²⁰ Ibid 95.

⁴²¹ Human Rights and Equal Opportunity Commission, above n 390, 758.

⁴²² E. B. Elbogen and S. C. Johnson, "The Intricate Link between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions" (2009) 66 *Archives of General Psychiatry* 152.

⁴²³ SANE Australia, *Factsheet 5: Mental Illness and Violence* (2008), at <http://www.sane.org/information/factsheets/violence_and_mental_illness.html> viewed 27 September 2008.

⁴²⁴ Law Reform Commission of Western Australia, above n 35, 95.

⁴²⁵ Human Rights and Equal Opportunity Commission, above n 390, 759.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

Barriers to due process in criminal proceedings

A host of other factors can work to threaten due process for mentally disordered defendants in criminal proceedings. Time management is one such factor. Legal service providers can find it difficult to get a case off the ground where defendants fail to attend court appointments or miss meetings with their lawyers. A defendant with a mental disorder may miss an appointment because disorganisation is a symptom of his mental disorder, because substance abuse distorts his priorities, or even because the side effects of the prescribed medication make it difficult for him to get up in the mornings to attend meetings.⁴²⁸

Lawyers are not commonly trained in skills required for communicating with special needs clients.⁴²⁹ As such, many may find it difficult to communicate with and obtain instructions from mental health consumers and in particular those whose behaviour is perceived as bizarre or aggressive. As with failure to attend meetings, inability to properly communicate can be a symptom of the disorder itself, a side effect of its treatment, or the result of interplay between a mental disorder and substance abuse. In each case, the obtaining of proper instructions is hindered, and the quality of the representation may be compromised.⁴³⁰ Sufferers of particular categories of mental disorder may be unable to communicate effectively with their lawyers for other reasons. Defendants who suffer from paranoia may, for example, refuse to speak in appointments for fear that anything they say will be passed on to police or to the government. As one disability awareness trainer has remarked:

They may have a broadened belief that everybody, and I encounter this all the time, that you are all connected up together, and you are connected up with the police, and anything I say to you, you are going to put that on your computer, and you are all in on this together.⁴³¹

Access to justice is of course a wide-ranging problem, but one with particular relevance to defendants who suffer the twin perils of poverty and mental disorder. The limited availability of pro bono legal services and Legal Aid can obstruct access to justice for those defendants who cannot afford private representation.⁴³² Court processes can also be extremely confusing and intimidating for these defendants. The physical courtroom environment is daunting from the moment of entry. Karras and colleagues have recorded this experience from the perspective of one such individual:

You've been through security, there are all these people walking around in uniforms, and there's police and then there's all these cameras watching. [You think] 'I'm not going to say anything more, in fact I am going to walk out because I can't handle this place...I'm anxious, I can't make words happen, how

⁴²⁸ Karras et al, above n 396, 96.

⁴²⁹ Ibid 121; Law Reform Commission of New South Wales, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues, Discussion Paper No. 35* (1994), at <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP35TOC>> viewed 13 May 2009.

⁴³⁰ Karras et al, above n 396; Human Rights and Equal Opportunity Commission, above n 390, 760.

⁴³¹ Karras et al, above n 396, 99.

⁴³² Ibid 106.

humiliating'.⁴³³

Additionally, many mentally disordered defendants find the processes inside the courtroom equally, if not more, daunting than those outside:

What if you don't know how the court system works, what if you are too embarrassed to admit you don't know what to say or do? Or admit that you are scared, or that you have anxiety, or you have a mental illness and you can't cope? What if you don't know who to talk to?⁴³⁴

Further, the language and formality of the courtroom can be anxiety-provoking, particularly for defendants who are uncomfortable with new situations or who lack the cognitive capacity to understand legal proceedings.⁴³⁵ As Karras and colleagues have noted, this can severely impair due process within the trial setting:

Trying to lead evidence out of someone who is already intimidated or psychotic is really difficult. The language of the courtroom is foreign to most people who aren't legally trained, let alone someone with a mental illness. It is incredibly difficult for them to make appropriate responses.⁴³⁶

A number of consumers interviewed by Victoria's Mental Health Legal Centre stated that they felt as though their magistrate had an incomplete or inaccurate understanding of mental disorder, and that this was evident in their comments to consumers. The following are examples of the consumers' statements in this regard:⁴³⁷

- Theresa: "I don't know if a lot of them [the Magistrates] understand. It is kind of like, 'Pull your socks up, or you go to jail'. 'Don't do this'. 'Take your medication, and everything will be wonderful'. And it's not that easy...because you don't realise a lot of stress can bring on illnesses...".
- Wayne: "I felt belittled...[as the Magistrate said], 'I wish you well for the future, be of good behaviour...'...[the Magistrate further said], '...You seem to be doing good work, I encourage that and I ask you to maintain good health.'"
- Wayne: "We have a mental health system that still can't deliver the type of outcomes that consumers, families, carers and friends are still trying to push for and work hard to get. [In addition]...we've got...[a court] system that punishes you further...[with] a whole range of...legal jargon as well as a whole range of...bureaucracy that still can't deliver timely and respectful procedures and decisions. Just simply for...being a part of having a mental illness."

In preparing the report entitled *Lacking Insight*,⁴³⁸ staff from the Mental Health Legal Centre in Victoria interviewed a number of involuntary patients about their experiences in appearing before Victoria's Mental Health Review Board. While there are clear differences between court and the Mental Health Review Board (the latter of which operates an inquisitorial tribunal, not an adversarial

⁴³³ Ibid 136.

⁴³⁴ Ibid 127.

⁴³⁵ Law Reform Commission of Western Australia, above n 35, 108.

⁴³⁶ Karras et al, above n 396, 136.

⁴³⁷ Mental Health Legal Centre, *Mad and Caught* (unpublished paper).

⁴³⁸ V. Topp, M. Thomas and M. Ingvarson, *Lacking Insight: Involuntary Patient Experience of the Victorian Mental Health Review Board* (Mental Health Legal Centre, October 2008).

forum), documented experiences of Board proceedings may assist in explaining why court experiences are so commonly negative. The report identified various factors that inhibit meaningful involvement of the consumer in her own matter. For example, some members of the Mental Health Review Board were observed to be “keen to resolve all the matters before lunch.”⁴³⁹ Rushing through proceedings can cause the consumer to feel as though she is not really being heard, and as though any decision or outcome is predetermined.⁴⁴⁰ Hurrying through matters is particularly dangerous in the case of consumers experiencing side-effects of medication, whose comprehension and sense of inclusion may be further impeded as a result. Further, the physical setting of the Mental Health Review Board may be perceived as overpowering and oppositional:

Consumers wait outside the hearing room until Board members are ready to receive them. The Board is already seated in the hearing room. For consumers this contributes to the feeling that they are entering a space that ‘belongs’ to the members. This gives people the impression that they commence the hearing already ‘on the defensive’ or at a disadvantage.⁴⁴¹

Similarly, excessive formality was seen to preclude meaningful consumer participation in Board proceedings:

Just as important as the physical space in which the Board hearing takes place are other dynamics. These dynamics, which include factors such as salutations, developing rapport, the warmth and politeness of Board members, the speed of the hearing, whether explanations of terminology are provided, and whether or not the consumer is represented by an advocate or legal representative, have a great impact upon the perceived formality and inclusiveness of the hearing process.⁴⁴²

Finally, an air of impersonality was considered to significantly diminish the perceived inclusiveness of the proceedings. In some instances before the Board, this was a product of failed attempts at active listening. In one case, a consumer was perturbed by a member’s habit of interrupting the former with “yes, yes, yes, yes”.⁴⁴³ Many consumers were troubled by a failure of Board members to make eye contact with consumers,⁴⁴⁴ while others noted the absence of common courtesies such as smiling and handshaking.⁴⁴⁵

Factors facilitating a positive experience of the court system

While formality, impersonality, lack of understanding of mental disorder, discourtesy, poor listening skills, and an intimidating physical setting are just some of the factors that can operate to thwart meaningful participation of consumers in their own cases, other factors have been demonstrated (or are likely) to foster a positive experience of the court system. For instance, one

⁴³⁹ Ibid 36.

⁴⁴⁰ Ibid; I. Freckelton, "Mental Health Review Tribunal Decision-Making: A Therapeutic Jurisprudence Lens" (2003) 10 *Psychiatry, Psychology and Law* 44, 47.

⁴⁴¹ Topp et al, above n 438, 49.

⁴⁴² Ibid 52.

⁴⁴³ Ibid 53. In one case, a consumer was perturbed by a member’s habit of interrupting the former with “yes, yes, yes, yes”.

⁴⁴⁴ Ibid 54.

⁴⁴⁵ Ibid 53.

consumer suggested that consumers' fears could be allayed through the provision of a separate waiting room:

It would be nice if they had like a special waiting area [for people with a psychiatric disorder. It would be good if there was]...a quiet room...Because most of the times I was pretty scared too. I mean I was unwell, but I knew I was in trouble, and I was scared out of my wits that I was going to get locked up for a long time. And they should do something to put your mind at ease, because I was scared out of my wits.⁴⁴⁶

A more general mechanism for enhancing a positive experience for those with mental illnesses within the justice system is via the adoption of particular behaviours by judicial officers.

When magistrates and judges treat consumers with dignity and empathy, the latter are more likely to emerge from their proceedings feeling as though they have been respected and thereby more likely to record a positive experience of the proceedings. For example, one consumer commented:

Well, I suppose...having a Magistrate who's more understanding...it seems so little about justice and all about these rules. And that's quite shocking and you don't feel like you're getting...your story [across], or getting to have your say...because the rules all manipulate you into a certain thing and...you can't actually say what it is you did or didn't do.⁴⁴⁷

Additionally, magistrates and judges who are equipped with an appreciation of mental health issues, and who take an active interest in such issues, are also more likely to be regarded in a positive light by consumers. Another consumer, for example, stated that: "I was very lucky with the Judge...[I had]...She was very interested with all the mental health stuff...Usually the Judges have got their mind made up before they even come into court." The importance of such empathy cannot be overstated. As noted by a former president of the Mental Health Review Board:

I think it's really important for them [Board members] to try to understand what it would be like to have three people sitting there, to be nervous, to need time to settle down, to need time to assess the room. Don't launch into the questions straightaway, try and have some warmers. There are various techniques that would try to assist somebody to as far as possible feel more at ease and therefore more able to put their case.⁴⁴⁸

Commitment to Court-Ordered Treatment and Diversion Programs

As part of the worldwide trend towards non-adversarial justice mechanisms, specialist court jurisdictions and programs have emerged in various jurisdictions to deal specifically with issues facing mentally ill offenders.⁴⁴⁹ For example, the South Australian Magistrates' Court Diversion Program, established in 1999,

⁴⁴⁶ Mental Health Legal Centre, above n 437.

⁴⁴⁷ Ibid.

⁴⁴⁸ Topp et al, above n 438, 81.

⁴⁴⁹ W. J. Brookbanks, "Making the Case for a Mental Health Court in New Zealand", paper presented at *The 3rd International Conference on Therapeutic Jurisprudence*, Perth, 7-9 June 2006, at <<http://www.aija.org.au/TherapJurisp06/FINALPROGRAM.pdf>> viewed 30 April 2009.

operates as a pre-sentence referral program the aim of which is to reduce the likelihood of repeat offending through the provision of appropriate treatment.⁴⁵⁰ A 2004 evaluation of that program identified a set of factors that appeared to predict which offenders were more likely to reoffend within two years post-program. The findings can be summarised as follows:

- **Offending Profile:** Persons who offend *during* the program, who have at least five prior convictions, or who have been charged with three or more offences in the preceding two years, are more likely to offend after completing the program.
- **Health Status:** Persons who suffer from current substance abuse or dependency, who have physical health problems or disabilities, or who suffer comorbid mental health disorders are more likely to engage in post-program offending.
- **Accommodation Problems:** Persons with accommodation problems at the time they enter the program are more likely to offend in the two years after completing the program.⁴⁵¹

Interestingly, the following factors were found not to be reliably predictive of post-program offending: the defendant's age or gender, the seriousness of the offence(s) committed pre-program, a personal history of familial disintegration or foster care, and whether the defendant was taking medication at the point of entry into the program.⁴⁵²

Predictors of program success (i.e. no recidivism) were typology-specific. For example, Skrzypiec, Wundersitz and McRostie have reported that case workers found that:

- Offenders with a bipolar disorder benefit from continual reinforcement of the need to comply with treatment and medication;
- Offenders with an intellectual disability cope better if they are involved in employment programs;
- Those with a personality disorder respond better if there is involvement with only one agency and one case worker, rather than with multiple agencies;
- Those with schizophrenia are assisted by program plans that set clear guidelines and boundaries, and that have direct consequences for non-compliance with these conditions;
- Offenders with an anxiety disorder benefit from intervention programs that increase motivation and engagement with treatment; and
- Those with substance related disorders gain the most benefit from interventions that are able to assist them with living arrangements and daily functioning.⁴⁵³

Conclusion

The high prevalence of mental disorder in modern society has brought mental health to the forefront of law and policy. Mental disorder affects all segments of

⁴⁵⁰ Courts Administration Authority, *Annual Report 2006-07* (2007), at <http://www.courts.sa.gov.au/caa/annual_report.html> viewed 14 May 2009, 23.

⁴⁵¹ Skrzypiec et al, above n 64.

⁴⁵² Ibid 12.

⁴⁵³ Ibid 14.

the community, although it is more prevalent amongst certain groups, including the socioeconomically disadvantaged, indigenous populations and prisoners. Mental disorder is commonly accompanied by a comorbid mental or physical health problem.

The health, social and legal issues associated with mental disorder are as numerous as they are grave. Health risk factors associated with mental ill-health include physical disability or disease, substance dependence and mortality. Each of these problems is further compounded by the inaccessibility and underuse of mental health services. Social risk factors include unemployment, social exclusion, family breakdown and homelessness. The legal risk factors associated with mental disorder are especially concerning. Individuals suffering from a mental disorder are significantly over-represented in the criminal justice system. They are more likely to be arrested by police, less likely to be released on bail, and less likely (in the case of homeless offenders) to be given a non-custodial sentence. They are unlikely, due to their socioeconomic status, to be able to afford their own legal representation. The nature of their mental disorder may cause many to miss court appointments. Communication barriers can cause many to be assessed by their lawyers as incomprehensible or aggressive.

The highly structured and formalised courtroom setting can work to aggravate and humiliate people with mental illnesses. Magistrates and judges who lack training or interest in mental health issues (and the techniques of active listening, and communication of empathy and respect) may be perceived as paternalistic or having “missed the point”. Rushing through proceedings can lead to a perception that the defendant has been denied natural justice. On the other hand, when special facilities are available for use by these defendants, when magistrates and judges treat them with dignity and respect and when judicial officers evince a sense of empathy for and an understanding of issues facing mentally ill defendants, the latter are more likely to have a positive experience of the court process.

The global trend towards non-adversarial justice initiatives has seen the development of specialist mental health lists and diversion programs across Australia and New Zealand.⁴⁵⁴ Whilst many such schemes are still in their infancy, numerous factors have been found to be relatively reliable predictors of “success” (with lack of offending being seen as the key determinant of success). These predictors include: few convictions, no offences committed during the program, good physical health (no substance abuse, physical disability or comorbid mental health problems), and the provision of stable accommodation.

⁴⁵⁴ See the Australasian Therapeutic Jurisprudence Clearinghouse, above n 22, for a list of articles and online resources on court programs in this area.

Chapter 4: Family Violence

Michael King

Family violence is one of the most significant social problems in our society – affecting intimate partners, children, elders, siblings, relationships between children and parents and the wider community.

Family violence can produce diminished quality of life and long-lasting problems for victims in areas of physical and psychological health and financial and social wellbeing.

A multi-factorial model that includes personal factors – including any past trauma of childhood abuse – environmental stressors, beliefs concerning gender relations and the perpetrator’s ability to make a rational choice may offer the best explanation for why a perpetrator is violent.

Justice system responses need to protect and support victims, to hold perpetrators accountable for their actions and to help motivate perpetrators to address their violent behaviour.

Family violence is a significant problem affecting communities around the world. Australia and New Zealand are no exception. Family violence affects a large number of families, has adverse effects on the physical and psychological health and social and economic wellbeing of victims, and places a substantial burden on community resources – including the justice system. Indeed, Access Economics estimated that in 2002-2003 the cost of domestic violence in Australia was \$8.1 billion, with the largest contributor being pain, suffering and premature mortality at \$3.5 billion.⁴⁵⁵ The cost to victims represented \$4.04 billion, to children \$769 million, to perpetrators \$555 million and to the community \$1.19 billion.⁴⁵⁶ According to VicHealth, intimate partner violence is the leading risk factor contributing to disease in women aged 15-45 in Victoria, well ahead of factors such as high blood pressure and use of tobacco and illicit drugs.⁴⁵⁷

⁴⁵⁵ Access Economics, *The Cost of Domestic Violence to the Australian Economy* (Commonwealth of Australia, 2004), at http://www.accesseconomics.com.au/publicationsreports/showreport.php?id=23&searchfor=2005&searchby=year_earlier viewed 10 May 2009.

⁴⁵⁶ Ibid.

⁴⁵⁷ VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004), at <http://www.vichealth.vic.gov.au/en/Resource-Centre/Publications-and->

Communities previously regarded violence in families as a private matter, to be addressed by the family itself. Consequently the justice system was reluctant to intervene. However, with increasing community awareness of the nature, incidence and effects of family violence, it is now regarded as a substantial public problem. The growing body of research and the work of family violence lobby groups have been important in raising community awareness. The response of many justice systems has also changed to zero tolerance and mandatory intervention by police; increased use of support services for victims; intervention or restraining orders against perpetrators; promotion of perpetrator accountability; and the establishment of specialist courts – family violence courts – to deal with family violence problems.⁴⁵⁸

The literature reveals differences in how domestic and family violence are defined. This chapter adopts the approach of the Australian Institute of Criminology and the Law Reform Commission of Western Australia by defining domestic violence as violence against a current or past intimate partner.⁴⁵⁹ It is therefore more properly regarded as “intimate partner violence”. Family violence is a wider term that includes domestic violence as well as violence against other family members such as children, siblings and the elderly. Although these aspects of family violence will be touched on, the main focus of the chapter is on the principal form of family violence – violence between current or former intimate partners.⁴⁶⁰

The Nature of Family Violence

Family violence includes a broad range of behaviours causing trauma to victims, including physical, sexual, psychological, economic and social abuse and property damage.

Increasingly it is recognised that it is not only the infliction of physical harm that causes pain and possible ongoing physical, psychological and behavioural problems, but also some other actions can have a similar effect. Thus in the context of families, the wider term of “abuse” is used to connote the broad range of behaviours that are harmful for victims, perpetrators and families. Some expand the term “violence” to

include these actions. Family violence is often not confined to one form of abuse, but can entail multiple aspects of abuse.⁴⁶¹

[Resources/Mental-health-and-wellbeing/Preventing-violence/The-Health-Costs-of-Violence.aspx](#)> viewed 10 May 2009.

⁴⁵⁸ King and Batagol, above n 3.

⁴⁵⁹ See: Law Reform Commission of Western Australia, above n 35; Australian Institute of Criminology, at <<http://www.aic.gov.au>> viewed 17 July 2009.

⁴⁶⁰ Child abuse, particularly child sexual abuse, is considered in greater depth in: Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (forthcoming, 2009).

⁴⁶¹ I. Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (Centre for Women’s Studies and Gender Research, Monash University, 2007), 13.

The broader concept of family violence includes:⁴⁶²

- Physical acts such as punching, biting, kicking, shaking, choking, hair pulling, the use of a weapon, or the taking of a wheelchair away from someone with a disability.
- Damaging property.
- Sexual assault.
- Social abuse – such as controlling a person’s access to social networks and social events.
- Psychological or emotional abuse – manipulative behaviour, diminishing a person’s worth and self-esteem etc.
- Economic abuse – unequal control of family finances including minimising a victim’s access to financial resources, taking money from family members and making threats concerning money.
- Verbal abuse – threats to harm family members, pets and property. It is related to psychological abuse.

The justice system is increasingly taking into account this broader concept of violence or abuse in proceedings concerning family violence.⁴⁶³

The Prevalence of Family Violence

Family violence is a significant social problem in Australia, New Zealand and beyond and affects people from all socioeconomic backgrounds. In relation to intimate partner violence, both same sex and different sex relationships are affected at similar rates.

In the last twenty years there has been extensive research on the prevalence, nature and effects of family violence. There are differences between studies in terms of methodology, including the definition of family violence adopted and research measures used – such as the types of questions asked in studies using surveys. Despite these differences, the research has overall lead to a greater understanding of the mechanics of family violence and its health, economic, justice and social costs to

victims, perpetrators and the community.

In this part we summarise some of the key findings in relation to the prevalence of family violence in Australia and New Zealand. It is unlikely that the research referred to in this chapter reveals the full extent of family violence. Given the private, covert nature and dynamics of violence within the family, many events may only be known by the parties involved and, in some cases, to people close to them to whom they have confided. In addition, there may be specific cultural or social reasons why intimate partner violence may go unreported,⁴⁶⁴ such as differences in perception as to what constitutes violence and the existence of

⁴⁶² Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (Victorian Law Reform Commission, 2006), at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Family+Violence/LAWREFORM+-+Review+of+Family+Violence+Laws+-+Report> viewed 10 May 2009, 15-19.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid 38

social structures for addressing intimate partner violence in the couple's country of origin that do not exist in Australia. Further, some countries have not legislated against family violence and so, in those countries, there is technically nothing to report.⁴⁶⁵ In relation to Aboriginal people, the absence of trust between communities and the police may mean that victims are reluctant to report incidents of violence.⁴⁶⁶

Other people may be particularly vulnerable to forms of abuse due to physical or mental disabilities. One report suggested that women with disabilities are subjected to assault, rape and abuse at a rate twice to 12 times the rate of other women.⁴⁶⁷ In part violence and other forms of abuse against people with disabilities arise from distorted attitudes in the community that devalue the status of their minds, emotions and bodies.⁴⁶⁸

Intimate Partner Violence

In relation to intimate partner violence, our focus is on violence in different sex relationships. There is far less research on the nature and extent of violence in same sex relationships.⁴⁶⁹ While a common belief is that violence in same sex relationships is far less prevalent than in different sex relationships, international research suggests that there is little difference between rates of intimate partner violence in different sex relationships and those concerning same sex relationships.⁴⁷⁰

Australia

Between December 2002 and June 2003 a total of 6,677 Australian women ranging in age from 18 to 69 were surveyed as part of the [International Violence Against Women Survey \(IVAWS\)](#).⁴⁷¹ They supplied information concerning their experiences of physical and sexual violence. Here are some findings from the survey:

- Fifty seven percent reported at least one act of physical violence or sexual assault during their lifetime – more so physical violence (48%) than

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Victorian Law Reform Commission, above n 462, 39; C. Frohmader, *Violence against Women with Disabilities: A Report from the National Women with Disabilities and Violence Workshop* (1998).

⁴⁶⁸ Victorian Law Reform Commission, above n 462, 39.

⁴⁶⁹ D. Lievore and P. Mayhew, *The Scale and Nature of Family Violence in New Zealand: A Review and Evaluation of Knowledge* (Ministry of Social Development, 2007), at <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/scale-nature-family-violence>> viewed 10 May 2009.

⁴⁷⁰ J. McLennan, "Domestic Violence between Same-Gender Partners: Recent Findings and Future Research" (2005) 20 *Journal of Interpersonal Violence* 149; M. J. Potoczniak, J. E. Mourot, M. Crosbie-Burnett and D. J. Potoczniak, "Legal and Psychological Perspectives on Same-Sex Domestic Violence: A Multi-Systemic Approach" (2003) 17 *Journal of Family Psychology* 252.

⁴⁷¹ J. Mouzou and T. Makkai, *Women's Experience of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, *Research and Policy Series No. 56* (Australian Institute of Criminology, 2004), at <<http://www.aic.gov.au/publications/rpp/56/RPP56.pdf>> viewed 10 May 2009.

- sexual violence (34%).⁴⁷²
- Thirty four percent of women reported experiencing at least one form of violence during their lifetime from a current (10%) or a former (36%) intimate partner. Violence from former partners was also more likely to result in women sustaining injuries and feeling that their lives were in danger.⁴⁷³
 - Fifty eight percent of women rated violence from a former partner as “serious” compared to 25% in relation to a current partner.⁴⁷⁴
 - Eighty six percent of women did not report the violence to the police. More reports to police were made in relation to former partners (16%) than current partners (8%).⁴⁷⁵
 - Where former or current intimate partner violence was reported to the police, in 77% of cases the offender was not charged. Where charges were laid, in 65% of cases a conviction was recorded.⁴⁷⁶
 - The principal reasons for not reporting intimate partner violence were a belief that the matter was too minor to report (42%) and a desire to deal with the problem themselves (27%). Other reasons included wanting to keep the issue private (9%), fear (7%), it being an isolated incident or one that happened in another country (6%) and not wanting the offender to be arrested (4%).
 - Women who reported having been abused as children experienced higher levels of violence than those who had not been abused.⁴⁷⁷
 - Thirty six percent of women who had experienced intimate partner violence reported that their children had witnessed an incident of abuse.⁴⁷⁸
 - Indigenous women reported higher levels of physical, sexual and other violence both in the preceding 12 months and in their lifetime than non-indigenous women.⁴⁷⁹

The Australian Bureau of Statistics’ *Personal Safety Survey* carried out in 2005 found that 4.7% of women (363,000) had experienced physical violence – assault and/or attempted or threatened assault – in the 12 months prior to the survey.⁴⁸⁰ The survey also found that 10.4% of men (779,800) had experienced physical violence in that time. The experience of sexual violence for both groups was 1.6% and 0.6% respectively.⁴⁸¹ For both men and women, violence was more prevalent in the 18-24 years age range as compared with the 35-44 and over 55 years age ranges.⁴⁸² In the case of the 31% percent of women who were

⁴⁷² Ibid 19.

⁴⁷³ Ibid 44.

⁴⁷⁴ Ibid 93.

⁴⁷⁵ Ibid 102.

⁴⁷⁶ Ibid 103-104.

⁴⁷⁷ Ibid 87.

⁴⁷⁸ Ibid 90.

⁴⁷⁹ Ibid 30.

⁴⁸⁰ Australian Bureau of Statistics, *Personal Safety Survey* (2006), at <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)> viewed 10 May 2009, 5-6.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

physically assaulted, the perpetrator was a current or a former partner. In contrast, in the case of 4.4% percent of men who were physically assaulted, the perpetrator was a current or a former partner.⁴⁸³

Socioeconomics has been observed to play a crucial role in differing rates of family violence and its effects. Children from lower socioeconomic backgrounds have been found to witness violence against a parent one and a half times more frequently than those from upper socioeconomic backgrounds.⁴⁸⁴ Indigenous youth are more likely to have witnessed violence against a parent than non-Indigenous youth. Young women from lower socioeconomic backgrounds were more likely to have been subjected to relationship violence than those from higher socioeconomic backgrounds.⁴⁸⁵

Of the 4,421 victims of homicide during the period 1989-2002, 1,671 (or 38%) were killed by a family member (as the primary offender).⁴⁸⁶ On average, about 129 family homicides occur each year, with intimate partner homicides accounting for three out of five family homicides. Seventy five percent of these cases involved males killing their female partners.⁴⁸⁷ A recent study has found that the incidence of intimate partner homicide in Australia declined by a quarter for the 18 years leading up to 2007.⁴⁸⁸ However, the proportion of child victims of homicide in Australia has increased from 12% of all homicides in 1989-1990 to almost 15% in 2006-2007.⁴⁸⁹ The greatest increase concerned homicides of children less than 10 years of age. Of these, 91% were killed by a parent or a step-parent.⁴⁹⁰ A 1998 study by Carcach and Grabosky found that 43% of murder-suicides involved the murder of current or former partners; 14% the murder of the perpetrator's children; and 6% the murder of current or former partners and their children.⁴⁹¹

New Zealand

There are a number of studies that have measured the prevalence of intimate partner violence in New Zealand.⁴⁹² The 2001 *New Zealand National Survey of Crime Victims* found that 26% of women and 18.2% of men who had ever had an intimate partner had experienced physical violence, the threat of violence,

⁴⁸³ Ibid 9.

⁴⁸⁴ D. Indermaur, "Young Australians and Domestic Violence" (February 2001) *Trends & Issues in Crime and Criminal Justice*, No. 195, at <<http://www.aic.gov.au/documents/C/8/B/%7BC8BCD19C-D6D0-4268-984F-B6AF9505E5EA%7Dti195.pdf>> viewed 17 July 2009.

⁴⁸⁵ Ibid.

⁴⁸⁶ J. Mouzos and C. Rushworth, *Family Homicide in Australia* (Australian Institute of Criminology, 2003), at <<http://www.aic.gov.au/publications/tandi2/tandi255.pdf>> viewed 10 May 2009.

⁴⁸⁷ Ibid.

⁴⁸⁸ Australian Institute of Criminology, *Crime Facts Info No. 182: Intimate-Partner Homicides* (2008), at <<http://www.aic.gov.au/publications/cfi/cfi182.html>> viewed 10 May 2009.

⁴⁸⁹ Australian Institute of Criminology, *Crime Facts Info No. 183: Child Victims of Homicide* (2008), at <<http://www.aic.gov.au/publications/cfi/cfi183.htm>> viewed 10 May 2009.

⁴⁹⁰ Ibid.

⁴⁹¹ C. Carcach and P. N. Grabosky, *Murder-Suicide in Australia* (1998), at <<http://www.aic.gov.au/publications/tandi/ti82.pdf>> viewed 10 May 2009, 3.

⁴⁹² Lievore and Mayhew, above n 469.

destruction of property or the use or threatened use of a weapon at the hands of an intimate partner.⁴⁹³ The Survey also found that the lifetime incidence of intimate partner violence on this measure was significantly higher for Maori women (39.3%) than for women of New Zealand European (21.4%) or Pacific ethnicity (17.3%).⁴⁹⁴ Three percent of women surveyed reported being subjected to violence by their intimate partner in the year 2000.⁴⁹⁵

Similar results were obtained in a 2005 study conducted by Fanslow and Robinson. They interviewed 2,855 women aged 18–64 years in Auckland and Waikato about their experiences of violence. Thirty-three percent of Auckland interviewees and 39% of north Waikato interviewees stated that they had experienced at least one act of physical and/or sexual violence by an intimate partner in their lifetime.⁴⁹⁶ As in Australia, sexual violence is less common than physical violence and rarely occurs without it.⁴⁹⁷ The highest rates of family violence were among young adults of low socioeconomic background who were cohabiting and who had children.⁴⁹⁸

Homicides in families have been described as a “rare event” in New Zealand.⁴⁹⁹ Between 1978 and 1996, there was an average of 11 familial homicides each year.⁵⁰⁰ Every year, nine women and two men on average are killed by their partners. Most murder-suicides are committed by men who kill their current or former partners, often following a violent relationship.⁵⁰¹

In respect of the 56,380 family violence occurrences recorded by police in 2005,⁵⁰² around 65,000 children were recorded as being present at these incidences. Further, a study by Lievore and Mayhew in Christchurch noted four in 10 children had witnessed at least one violent act by a parent.⁵⁰³ In cases where children witness such acts there are usually other problems– such as social and economic problems and family dysfunction.⁵⁰⁴

⁴⁹³ A. Morris and J. Reilly, *The New Zealand National Survey of Crime Victims 2001* (2003), at <<http://www.justice.govt.nz/pubs/reports/2003/victims-survey/index.html>> viewed 10 May 2009, 139.

⁴⁹⁴ Ibid 142.

⁴⁹⁵ Ibid 145.

⁴⁹⁶ J. Fanslow and E. Robinson, "Violence against Women in New Zealand: Prevalence and Health Consequences" (2004) 117 *The New Zealand Medical Journal*, at <<http://www.nzma.org.nz/journal/117-1206/1173/content.pdf>> viewed 17 July 2009.

⁴⁹⁷ Ibid; Lievore and Mayhew, above n 469, 30.

⁴⁹⁸ Lievore and Mayhew, above n 469; T. E. Moffitt, R. W. Robins and A. Caspi, "A Couples Analysis of Partner Abuse Prevention Policy with Implications for Abuse" (2001) 1 *Criminology & Public Policy* 5.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² New Zealand Family Violence Clearinghouse, *Overview of Family Violence Factsheet* (2007), at <<http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12541>> viewed 10 May 2009.

⁵⁰³ Lievore and Mayhew, above n 469, 8.

⁵⁰⁴ Ibid.

Other Forms of Family Violence

Most of the existing literature concerns intimate partner violence. Research referred to in this section suggests that other forms of family violence are also of significant concern. However, there is a need for additional research in Australia and New Zealand in relation to other forms of family violence – including child abuse, sibling violence, child to parent violence and violence against elderly family members.

Child Abuse

Our understanding of the extent of child abuse largely comes from statistics concerning the numbers of reports of child abuse to child welfare authorities and the proportion of complaints that have been substantiated. In Australia, child protection notifications increased from 266,745 in 2005-2006 to 309,517 in 2006-2007; an increase of 42,722.⁵⁰⁵ Over the five years leading up to 2006-2007, they increased by 50%.⁵⁰⁶ Although the number of substantiated notifications of child abuse increased by over 2,600 during that period, in some jurisdictions the number of notifications decreased.⁵⁰⁷ Aboriginal families have disproportionately higher rates of notifications and substantiations.⁵⁰⁸

One New Zealand study found that 4% of children studied reported experiencing overly frequent, harsh or abusive punishment by parents, while another study found that 6% of subjects reported having been subjected to overly harsh punishment as children.⁵⁰⁹ In an Otago study one in eight women reported having been sexually abused by a family member before they attained 16 years of age.⁵¹⁰ In another study, 17% of girls and 3% of boys said they had been subjected to sexual abuse before the age of 16 years.⁵¹¹

Sibling Violence

There are varying findings regarding the rates of sibling violence. Research from the United States suggests sibling violence is more prevalent than violence committed by parents against their children. Kiselica and Morrill-Richards observed that while 2.3% of parents have been found to have been committed serious acts of violence against their children, 53% of children have been found to have committed serious acts of violence – including punching, stabbing, kicking and attacking with objects – against a sibling.⁵¹²

Several New Zealand studies have measured rates of sibling violence but have been limited due to the small numbers involved or the nature of the cohort group

⁵⁰⁵ Australian Institute of Health and Welfare, *Child Protection Australia 2006-07* (2008), at <<http://www.aihw.gov.au/publications/cws/cpa06-07/cpa06-07.pdf>> viewed 10 May 2009, 20-21.

⁵⁰⁶ *Ibid* x.

⁵⁰⁷ *Ibid* 20-21.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ Lievore and Mayhew, above n 469, 42.

⁵¹⁰ *Ibid* 43.

⁵¹¹ *Ibid*.

⁵¹² M. S. Kiselica and M. M. Morrill-Richards, "Sibling Maltreatment: The Forgotten Abuse" (2007) 85 *Journal of Counseling and Development* 148.

studied.⁵¹³ For example, a review of research by Lievore and Mayhew noted that one study of juvenile male sex offenders found that one third of their victims were siblings, while two other studies found that just over one half and one fifth had offended against siblings respectively.⁵¹⁴

Parental Violence

Our understanding of the prevalence of violence by children – particularly adolescents – against their parents is limited due to a lack of research. Further, the problem is likely to be hidden due to shame experienced by victims, victims' desire to keep the family unit intact, and victims assuming blame for the problem. These factors make reporting of the problem unlikely.⁵¹⁵ In the United States, the incidence rate of child-parent violence has been estimated at 7-18% in two parent families and at 29% in one parent families; in Canada, it has been estimated that 1 in 10 parents are assaulted by their children; and in France, the figure is 0.6%.⁵¹⁶ Due to the lack of local research, it is difficult to ascertain rates of child-parent violence in New Zealand and Australia and the differing definitions of parental abuse by children inhibit adequate comparison between jurisdictions.

Elder Abuse

Violence against the elderly is usually categorised as a subset of what is known as “elder abuse” which covers areas such as neglect, economic exploitation, violence and psychological abuse. The rate of elder abuse in Australia and New Zealand is unknown.⁵¹⁷ A review of international research found rates of elder abuse of between 1.2% and 5.6% of the elderly population.⁵¹⁸ However, international research has used various methods to measure elder abuse, which makes it difficult to ascertain precise rates.⁵¹⁹

⁵¹³ For a review of the New Zealand research, see: Lievore and Mayhew, above n 469, 54.

⁵¹⁴ Lievore and Mayhew, above n 469, 54.

⁵¹⁵ N. Bobic, *Adolescent Violence Towards Parents* (Australian Domestic and Family Violence Clearinghouse, 2004), at <http://www.austdvclearinghouse.unsw.edu.au/publications_index.htm> viewed 10 May 2009; M. Stewart, D. Jackson, J. Mannix, L. Wilkes and K. Lines, "Current State of Knowledge on Child-to Mother Violence: A Literature Review" (2004-2005) 18 *Contemporary Nurse* 199.

⁵¹⁶ Bobic, above n 515.

⁵¹⁷ Some indication of the prevalence of elder abuse in New Zealand appears in the number of referrals to Age Concern, which provides support for elderly people subjected to abuse. From 1996/1997 to 2000/2001, new referrals rose from just under 600 to 975. Age Concern also expanded its geographical coverage during that period, but as at 2007 still did not cover all areas: Lievore and Mayhew, above n 469, 13.

⁵¹⁸ C. Thomas, "The First National Study of Elder Abuse and Neglect" (2000) 12 *Journal of Elder Abuse & Neglect* 1, 12.

⁵¹⁹ *Ibid* 5.

The Nature and Effects of Intimate Partner Violence

A combination of personal and social factors may contribute to intimate partner violence.

It commonly takes the form of males asserting control over female victims. It is also typified by a cycle: a build up of tension, abusive acts, reconciliation and absence of abuse before the cycle repeats.

Victims often suffer substantial loss of quality of life and significant damage to physical and psychological health due to the abuse.

Family violence myths have inhibited justice system responses.

Programs have been developed to support victims and to help perpetrators to address their problems.

The justice system and society generally has undertaken a proactive, involved and pro-enforcement response to address the problem.

Dynamics of Intimate Partner Violence

The Significance of Control

The perpetrator's desire to exercise power and control is an important aspect of family violence, particularly intimate partner violence. As Thomas has stated:

Many perpetrators use a combination of subtle and unsubtle methods to maintain their control over a victim. They want them to act, talk and think in ways that please them. They also make family members responsible for their own [the perpetrator's] fears and problems.⁵²⁰

As noted above, the methods of intimate partner violence can include a combination of forms of abuse, such as physical, psychological and social.

Even though violence is used as a mechanism of control, perpetrators often claim that their action was the product of having lost control. However, few individuals who have assaulted their partners were suffering from a mental disorder that would explain the alleged lack of control.⁵²¹ In the case of intimate partner violence, the perpetrator can exert considerable control over her actions – such as being perfectly pleasant and personable when dealing with police attending to investigate a family violence incident or amiably taking a telephone call before returning to the assault of the victim.⁵²² A perpetrator's assertion of a lack of control can simply mean a denial of responsibility. That denial can extend to the

⁵²⁰ Ibid 26.

⁵²¹ Ibid 27.

⁵²² Ibid 28-29.

perpetrator of intimate partner violence blaming the victim or someone or something else – such as alcohol or drugs –for her abusive behaviour.⁵²³

In considering the issue of control in family violence more broadly, it is important to note that power dynamics can differ between relationships and between families. In the case of elder abuse, for example, the perpetrator of abuse may be economically and/or emotionally dependent on the victim (see below).

Past Abuse

Perpetrators may have been subjected to abuse as children. There is evidence, discussed below, that exposure to abuse can adversely affect physical and psychological development. It may also mean that the perpetrators have learnt that abuse is an acceptable means of acting towards family members. While past exposure to abuse may make it more likely that a person may respond violently in a relationship, it does not remove the person's capacity to choose how they act. Perpetrators are not violent all the time, nor are they violent to everyone.⁵²⁴

The Role of Alcohol and Drugs

Alcohol and some drugs, such as amphetamines, can make it easier for some people to engage in violent behaviour.⁵²⁵ However, people have a choice whether they use drugs and drink to excess in the first place. While these substances may make it easier to engage in poor decision-making, it does not provide a justification for subsequent decisions and behaviour.⁵²⁶

Indigenous Violence Factors

The effects of intergenerational trauma through the process of colonisation and loss of culture along with strains in race relations contribute to social stress placed on Indigenous perpetrators of family violence.⁵²⁷

Refugees

The Victorian Law Reform Commission has noted that newly arrived refugees may have “suffered terrible trauma in their home country, the fracturing of their extended family and community, and significant loss of their role and status in their new country, causing internal confusion and pain.”⁵²⁸

Social Structure and Gender

The Victorian Law Reform Commission has observed that ideas as to the male role and the role of the patriarch may have some influence on the violent conduct of some perpetrators.⁵²⁹ Feminist theories similarly assert that family violence is

⁵²³ R. Alexander, *Domestic Violence in Australia: The Legal Response* (Federation Press, 3rd edn, 2002), 6.

⁵²⁴ Victorian Law Reform Commission, above n 462, 30.

⁵²⁵ *Ibid* 29.

⁵²⁶ Alexander, above n 523, 6-7.

⁵²⁷ Victorian Law Reform Commission, above n 462, 29.

⁵²⁸ *Ibid*.

⁵²⁹ *Ibid*.

a product of wider, dominant structural aspects of society whereby men exert power over women.⁵³⁰ From this perspective, unequal power relations exist within the family and are a means by which men can exert control over family members. Yet violence does not exist in all families in which there is a patriarchal structure⁵³¹ and not everyone who is exposed to past abuse or stress commits family violence.

It may be that a combination of factors including matters personal to the perpetrator and family context and wider social factors contribute to the perpetrator's commission of intimate partner violence and abuse in a particular case.⁵³² Thus, past abuse and other stressors may mean that a person is more disposed to be violent, while social conditioning concerning gender relations may inform the person as to the manner and context in which violence can be expressed as a mechanism of control within family relationships.

The Intimate Partner Violence Cycle

Intimate partner violence can be one incident of violence, an irregular event or part of an ongoing cycle. In an ongoing cycle, tensions build and the perpetrator:

engages in increasingly abusive behaviour – verbal abuse, constant criticism, harassment, public embarrassment, humiliation and minor physical incidents. The victim may react by withdrawing or avoiding contact with the perpetrator to avoid 'setting him or her off'.⁵³³

The perpetrator then progresses to committing an act of significant violence and/or abuse, for which he is later remorseful and seeks forgiveness. The victim forgives and there is a "honeymoon" period before the cycle begins again. It may be that a crisis, such as the intervention of the police, separation from the abused partner and/or the matter going to court, is the catalyst for the perpetrator seeking forgiveness and promising to change his ways. However, perpetrators can use the seeking of forgiveness as a means of re-asserting control over the victim. Such a cycle can continue over many years. It can also involve progressively severe, cruel and diverse forms of abuse.⁵³⁴

Barriers to Addressing Intimate Partner Violence

Common misconceptions concerning intimate partner violence have meant that the justice system and community's response to the problem have been inadequate to prevent and to rectify it. These misconceptions include:

- Violence in the home is a private matter. The perceived private nature of violence in the home has meant that courts and police have historically been reluctant to intervene in family violence cases. Further, for some people the notion that it is a private matter may be reinforced by the availability of protection orders from the court.⁵³⁵ However, such violence

⁵³⁰ For a summary of feminist theories of violence, particularly family violence, see: J. Milner and S. Myers, *Working with Violence* (Palgrave Macmillan, 2007), ch 5.

⁵³¹ Alexander, above n 523, 6.

⁵³² Ibid.

⁵³³ Victorian Law Reform Commission, above n 462, 30.

⁵³⁴ Ibid.

⁵³⁵ Alexander, above n 523, 31.

is a criminal offence and is therefore very much a public matter,⁵³⁶ and increasingly not tolerated by the courts.

- The victim “asked for it” by being provocative or overly demanding.⁵³⁷ However, violence is an unacceptable response to such conduct.
- The victim enjoys the violence. This belief is not substantiated by evidence.⁵³⁸
- Violence between partners is confined to people from particular backgrounds.⁵³⁹ Although the incidence of violence can vary between groups, educated and wealthy individuals can be violent in relationships as can those from poorer socioeconomic backgrounds.
- Questions like “why doesn’t she just leave him?”. Leaving a violent partner may not be easy and does not necessarily guarantee that the violence will stop. This issue is discussed in greater detail below.

The Situation of Victims

As the vast majority of victims of intimate partner violence are women, this section will focus on their experiences. This section considers the question that often arises concerning intimate partner violence in existing relationships: “why doesn’t she just leave him?”. It also explores the long-term consequences of intimate partner violence for women.

Why Doesn’t She Just Leave Him?

A common community response to intimate partner violence is to ask: “why doesn’t she just leave him?”. However, separating from a violent partner is often not a straightforward matter. There are a number of factors that affect a woman’s decision whether or not to leave, including:⁵⁴⁰

- The woman may not wish to leave. She may love her partner, wish to stay with him, but want him to stop being violent or abusive towards her.
- The woman may fear that violence will escalate if she does leave him. Evidence suggests this is a legitimate concern. A perpetrator may perceive the woman leaving him as a challenge to his control over her and attempt to reassert the control. As noted above, there is a high level of homicides committed in the context of intimate partner violence.
- The psychological manipulation and control of the victim by the perpetrator.
- The woman may be economically dependent on her partner. Leaving may be the difference between being well off and being poor.
- There may be a lack of appropriate support services for women who wish to leave violent partners. This is particularly the case in some regional areas.
- The woman may not know of the availability of support services.
- There may be no access to legal representation.

⁵³⁶ Ibid 8.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid 4-5.

⁵⁴⁰ Victorian Law Reform Commission, above n 462, 32-35; Alexander, above n 523, 10-12.

- There may be no affordable alternative housing.
- The woman may not wish to leave friends and family who provide her with support.
- Concerns about the effects of leaving on her children.

In considering whether a victim stays or leaves, it is important to note that she is not powerless in the situation. The Victorian Law Reform Commission has stated that “victims are not completely deprived of their ability to act for themselves and protect their children. Some women exercise the capacity or ‘agency’ in a violent relationship to cope with or ‘survive’ the violence”.⁵⁴¹

The Long-Term Effects of Intimate Partner Violence

Intimate partner violence can produce long-lasting physical, psychological, behavioural, social, and economic consequences for victims of intimate partner violence and their children. Evans found that specific consequences of intimate partner violence on survivors of it included:

- Fifty seven percent suffered from depression; 13% from severe depression.
- Ninety percent of participants reported symptoms of posttraumatic stress disorder, with the most common symptom reported being flashbacks.
- Seventy five percent reported sleep disturbances and/or nightmares.
- Only 12% reported being in good health, with the balance suffering health conditions possibly related to the prior abuse, including headaches, chronic pain, vision and/or hearing loss and arthritis.
- Victims had higher than average rates of attendances to see general practitioners.
- Victims were likely to suffer economic disadvantage following separation and to rely on Centrelink benefits, but were later able to re-enter the workforce.⁵⁴²

Similarly, health costs to victims measured by Access Economics consisted of depression, physical injuries, alcohol abuse, smoking, anxiety, homicide, violence, drug use, sexually transmitted disease, suicide and self-injury, eating disorders and cervical cancer.⁵⁴³

The psychological consequences of intimate partner violence can often be aggravated due to the emotional attachment that the victim has to the perpetrator. The following experience reported by a subject of Evan’s study of intimate partner violence captures the intensive and lasting effect of such psychological abuse:

I still find myself dissolving into tears or thinking that killing myself would be a better alternative at times. I have come such a long way and am extremely proud of myself and my children but I wish I could forget the comments which I try so hard not to believe, the ‘you’re not good enough, you’re a reject, no-one will ever want

⁵⁴¹ Victorian Law Reform Commission, above n 462, 35.

⁵⁴² Ibid.

⁵⁴³ Access Economics, above n 455.

you' remarks. It's so much easier to dodge a fist than to erase your memory blank.⁵⁴⁴

In addition to the physical and psychological impact of intimate partner violence, victims of such abuse may remain at a financial disadvantage in the long term following separation for a number of reasons: they may have had limited access to and knowledge of family assets during the relationship; they may have separated taking little property with them; they may not have pursued a property settlement or obtained one that did not take into account valuable assets, such as the partner's superannuation; and difficulties in re-establishing a career or building a new one.⁵⁴⁵

Supporting Victims

Over the last two decades, the justice system and the community generally have implemented reforms to provide greater support and protection for victims of intimate partner violence. They include the introduction of more user-friendly processes to obtain intervention orders; the more pro-active involvement of the police in responding to victims' complaints, prosecuting perpetrators and in some jurisdictions applying for intervention orders for the protection of victims; and the use of family violence courts to facilitate the granting of intervention orders and the promotion of victim safety and perpetrators addressing the causes of their violent behaviour.

Family violence support organisations, including women's refuges, continue to play an essential role in supporting women who have been subjected to intimate partner violence.⁵⁴⁶

There is growing recognition of the importance of empowering and supporting women in dealing with the aftermath of violence. While intimate partner violence commonly involves the control and manipulation of victims, it does not mean that women are deprived of the ability to make sound decisions concerning their welfare and that of their children, based on considering all the relevant factors. Thus it is stressed that in providing support services to victims, victims should be listened to and empowered to make decisions concerning their own wellbeing. Principles of voice, validation and respect that are valued in procedural justice also have a place in this context. Pressure should not be put on a victim to make a decision – such as staying with or leaving a perpetrator.⁵⁴⁷

Programs have been developed to support victims to work through the consequences of family violence. For example, one program offers individual counselling and attendance at a support group; provides victims with information, particularly information concerning their safety and the availability of intervention orders; stresses that women are not responsible for perpetrators' violent acts; explores different aspects of the relationship with the victim; works

⁵⁴⁴ Evans, above n 461, 14.

⁵⁴⁵ Evans, above n 461.

⁵⁴⁶ Victorian Law Reform Commission, above n 462.

⁵⁴⁷ E. Shaw, A. Bouris and S. Pyne, "A Comprehensive Approach: The Family Safety Model with Domestic Violence", in Breckinridge and Laing (eds.), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (Allen & Unwin, 1999) 238.

through the effects of abuse; and explores implications of a temporary or permanent separation.⁵⁴⁸

Treatment Programs for Perpetrators

In many cases, a particular understanding as to why perpetrators have committed violent acts in families influences the approach taken to address their problem. However, this knowledge also raises some challenges. An understanding that perpetrators suffer from some underlying pathology can lead to the suggestion that their behaviour is beyond their control. Additionally, the issue of treatment becomes problematic if the pathology is a personality disorder or a similar condition in that it is seen to be largely untreatable. However, as noted above, the most compelling explanation for family violence is multi-factorial, with a number of social, environmental and personal factors affecting the perpetrator's cognitive and affective processes, but leaving him with the ability to choose his behaviour. The focus of the main approaches to assisting perpetrators to cease their abuse is on addressing cognitive and behavioural factors.

The main therapy approaches used to treat perpetrators of family violence are:

- **Cognitive behavioural therapy.**⁵⁴⁹ The understanding is that perpetrators have learnt wrong patterns of thinking concerning how to deal with particular situations and how to act within the family structure. They are called "cognitive distortions". Cognitive behaviour approaches endeavour to confront perpetrators concerning their wrong thinking – such as attributing blame for the violence to the victim – and to re-educate them concerning proper patterns of thinking. There is research finding that cognitive behavioural approaches have been effective in particular studies, but it has been difficult to generalise these results due to methodological problems.⁵⁵⁰
- **Feminist approaches** similarly seek to re-educate perpetrators concerning gender issues and appropriate forms of thinking and behaviour between people of different genders.⁵⁵¹ They also seek to confront perpetrators concerning their cognitive distortions, such as those concerning gender issues and the attributing of blame to the victim. Feminist approaches need to be used with care, less the power and control dynamics criticised as inimical to proper gender relations be replicated in treatment of perpetrators. Although feminist approaches are very influential and widely used in relation to family violence policy and perpetrator programs, they have been criticised as having high drop-out rates.⁵⁵² A confrontational style may be inimical to perpetrator change.⁵⁵³ Approaches where men are able to speak about their experience may work better than confrontation and educational approaches.⁵⁵⁴

⁵⁴⁸ Ibid.

⁵⁴⁹ Milner and Myers, above n 530, ch 4.

⁵⁵⁰ Ibid 78-80.

⁵⁵¹ Ibid ch 5.

⁵⁵² Ibid 101.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

- **Solution Based Brief Therapy** does not seek to confront offenders concerning their cognitive distortions.⁵⁵⁵ It sees such an approach to be counter-productive and possibly promoting resistance to developing a change-oriented relationship with the therapist. It does not offer an explanation as to the cause of violence as it does not see it to be useful in determining a person's capacity to change. Instead, it recognises that perpetrators are not violent all the time. It helps perpetrators to recall times when they were not violent when they could have been and to identify strategies that they used to avoid violence. This approach helps perpetrators to build on strengths and apply them more broadly so that they avoid violent behaviour in the future. It has been used with victims and perpetrators of family violence.⁵⁵⁶ Although early research as to its effectiveness in this context is encouraging,⁵⁵⁷ more research is needed concerning its use more broadly in dealing with family violence.
- **Narrative approaches** see the problem as the problem, not the person as the problem.⁵⁵⁸ This therapy model sees individual behaviour as influenced by particular stories or narratives the individual holds concerning himself. It sees individuals as having the capacity to change by changing the narratives or adopting new narratives. Therapy is directed at identifying the story or stories that relate to problematic behaviour and their relevant elements, determining exceptions when the story did not apply and working with the person to see if a new story can be written concerning his behaviour. Narrative approaches have only just begun to be used in relation to violent offenders, though it has shown to be valuable in other areas.⁵⁵⁹

While there is some evidence that perpetrator programs produce some positive results,⁵⁶⁰ the justice system response has to some degree reflected scepticism as to whether they are effective. For example, in the United States the focus in domestic violence courts is often keeping track of offenders to ensure they do not commit further violent acts rather than in helping to motivate offenders to rehabilitate.⁵⁶¹

⁵⁵⁵ For a summary of solution-focused brief therapy, see: King and Batagol, above n 3.

⁵⁵⁶ M. Y. Lee, J. Sebold and A. Uken, *Solution-Focused Treatment of Domestic Violence Offenders: Accountability for Change* (Oxford University Press, 2003); M. Y. Lee, A. Uken and J. Sebold, "Accountability for Change: Solution-Focused Treatment with Domestic Violence Offenders" (2004) 85 *Family and Society* 463; M. Y. Lee, A. Uken and J. Sebold, "Role of Self-Determined Goals in Predicting Recidivism in Domestic Violence Offenders" (2007) 17 *Research in Social Work Practice* 30; J. Milner and T. Singleton, "Domestic Violence: Solution-Focused Practice with Men and Women Who Are Violent" (2008) 30 *Journal of Family Therapy* 29. See also: King and Batagol, above n 3.

⁵⁵⁷ See the studies referred to in the preceding footnote.

⁵⁵⁸ Milner and Myers, above n 530, 163. They provide a summary of narrative therapy in Chapter 8.

⁵⁵⁹ Ibid.

⁵⁶⁰ MacLeod et al, above n 55.

⁵⁶¹ See King and Batagol, above n 3.

Intimate Partner Violence and the Justice System

As noted above, previously the justice system was reluctant to be involved in relation to intimate partner violence. Although that situation has moved significantly in the last 10 years towards a more proactive approach to addressing family violence – reflecting an increasing acceptance of family violence as a social rather than a private problem – there are still problematic aspects of the justice system’s response.

Prosecutions

The more proactive approach to family violence means that police have been more willing to investigate and lay charges against perpetrators. However, the number of charges arising from reports of family violence remain comparatively low – 17.7% in Victoria in 2004-2005,⁵⁶² for instance.

Women may continue to be reluctant to report incidents of family violence to the police for fear they will not be treated fairly – such as women working in the sex industry and ex-prisoners.⁵⁶³ Some may also not wish to see the perpetrator fined or imprisoned – especially when it will adversely affect the family financially – or fear how the perpetrator will act towards them.⁵⁶⁴

The possibility of securing a conviction can be particularly problematic if the victim does not cooperate with the police or give supporting evidence in court. Often the victim can provide the only eyewitness evidence as to the violence. If she does not appear in court at trial, the court can issue a warrant for her arrest or adjourn the trial to allow the police time to find her. If she appears at trial and gives contrary evidence, the prosecution can apply to have her declared a hostile witness and cross-examine her. However, both responses may well further traumatise the victim. Police may be reluctant to prosecute if the possibility of securing a conviction is remote or if they (and the victim) genuinely believe that preferring charges is too heavy-handed.⁵⁶⁵ Both police and the courts can be frustrated in situations where a victim continually returns to a violent partner.⁵⁶⁶ This can be a cause of scepticism on their part concerning the seriousness of the violence.

Perpetrators Use of the Justice System to Harass and Manipulate Victims

Some perpetrators use justice system processes as a means of abuse, control and revenge. For example, in one case a perpetrator made 29 applications to the Family Court in three years, threatening to “drag her into court every day of the week until he got what he wanted”.⁵⁶⁷ Some perpetrators also make threatening gestures to victims at court, or stalk, obstruct, assault and verbally abuse victims

⁵⁶² Victorian Law Reform Commission, above n 462, 56-57.

⁵⁶³ *Ibid.*

⁵⁶⁴ Alexander, above n 523, 32-33.

⁵⁶⁵ Victorian Law Reform Commission, above n 462, 33.

⁵⁶⁶ *Ibid.* 35.

⁵⁶⁷ M. Kaye, J. Stubbs and J. Tolmie, "Domestic Violence and Child Contact Arrangements" (2003) 17 *Australian Journal of Family Law* 93.

at or after court or tailgate them on their way home.⁵⁶⁸ Such forms of abuse can also be committed during negotiations between parties or in connection with counselling sessions. Some victims have been concerned that inadequate measures were taken in relation to their safety at family and Magistrates' Court hearings.⁵⁶⁹ Some also have been subjected to undue pressure from perpetrators to agree to contact arrangements that are unsafe for them and the children of the relationship.⁵⁷⁰

Intervention Orders and Injunctions

In Australia, the [Family Law Act 1975 \(Cth\)](#) empowers courts exercising jurisdiction under the Act to grant an injunction for the personal protection of a party to a marriage. There is no equivalent provision in family law proceedings in relation to unmarried couples, except in Western Australia where s 236 of the [Family Court Act 1997 \(WA\)](#) empowers the court to grant an injunction for the personal protection of a party to a de facto relationship.

There are distinct disadvantages of an injunction for a victim of interpersonal violence. The enforcement of the injunction is generally left to the victim who has to apply to have the perpetrator dealt with by the court for breaching the injunction. This can be a slow and expensive procedure. The police are generally less aware of the nature and effect of family law injunctions than apprehended violence orders, restraining orders or intervention orders under state legislation (hereafter collectively called "intervention orders"). As a result, an immediate arrest is more likely to take place for breach of a state intervention order than an injunction. Police will generally respond quickly to complaints concerning breaches of an intervention order and to prosecute offenders for breaches. This relieves the victim of expense and the responsibility of proving a breach to a court.

Generally most victims of intimate partner violence who seek the protection of the courts will seek a state based intervention order. If there are outstanding issues concerning children and/or property they may also commence family law proceedings. This in itself can be problematic for victims in that it multiplies the number of court processes and increases the opportunities for perpetrators to interact with victims.

Problems have also arisen in relation to the operation of intervention orders where family law orders exist. For example, some magistrates have been reluctant to deal with applications for intervention orders when family law proceedings are pending.⁵⁷¹ Others have been hesitant to exercise powers under the [Family Law Act 1975 \(Cth\)](#) (for example, s 68T) to vary contact orders where necessary where an intervention order is made – even though the legislative provisions aim to promote the protection of parties and children from acts of family violence.⁵⁷² In part this disinclination may be due some magistrates' lack

⁵⁶⁸ Ibid 105-106.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid 102.

⁵⁷¹ Kaye et al, above n 567, 98-99.

⁵⁷² Ibid.

of familiarity with family law, family violence and related matters. Inconsistencies between wording of family law orders and intervention orders have made it difficult for parties to ascertain their obligations and for police to determine whether there has been a breach of an intervention order.⁵⁷³

In some cases protection orders will not protect the victim from further abuse – such as where the perpetrator is familiar with the legal system, has no respect for the law, or is emotionally disturbed and/or volatile.⁵⁷⁴ Hiding away from the perpetrator or moving from the area may be the only protection realistically available for the victim.⁵⁷⁵ Additionally, some victims are reluctant to apply for an intervention order. The police or court system may have treated them insensitively when they previously sought help; past intervention orders may have been ineffective; they may not feel comfortable in telling their traumatic story to a court; or they may fear that the order may be a trigger for an escalation of the violence.

The Nature and Effects of Other Forms of Family Violence

Child Abuse

Child abuse can comprise physical and sexual acts, psychological abuse and neglect.

It is often associated with other dysfunction in the family.

Child abuse causes negative changes in the abused child's brain functioning and long-term adverse consequences for his health, behaviour, education, relationships and quality of life.

Child abuse has been defined as “an act by parents, caregivers, other adults or older adolescents that endangers a child or young person’s physical or emotional health or development”.⁵⁷⁶ A single act or multiple acts over time can constitute such abuse. As the definition implies, abuse incorporates more than acts of physical violence. It includes acts that inflict physical harm, sexual abuse, psychological abuse (rejecting, isolating, terrorising, ignoring or corrupting) and neglect.⁵⁷⁷ Questions of definition and cultural differences can mean that in some cases there is dispute as to

whether a particular act constitutes child abuse. Thus, there are cultural differences as to whether corporal punishment of children is permissible and if so, to what extent.

Child abuse is commonly associated with other forms of dysfunction in the family. A study in Victoria found that parents in cases of substantiated child

⁵⁷³ Ibid.

⁵⁷⁴ Alexander, above n 523, 91.

⁵⁷⁵ Ibid.

⁵⁷⁶ N. Richardson, *What Is Child Abuse?* (Australian Institute of Family Studies, 2004), at <<http://www.aifs.gov.au/nch/pubs/sheets/rs6/rs6.html>> viewed 10 May 2009.

⁵⁷⁷ Ibid.

abuse had at least one other issue such as domestic violence, substance abuse or a psychiatric disability.⁵⁷⁸

Child abuse can have wide-ranging and often interconnected adverse effects on the physical, psychological and social functioning of victims. Emotional abuse and neglect can lead to significant behavioural and developmental problems.⁵⁷⁹ Sexual abuse can also produce wide ranging dysfunction. Adults who were abused as children can experience problems such as: adjustment problems (males), anxiety, binge eating in women, bipolar disorder, depression, marital conflict and breakdown, maternal functioning problems, panic disorder, premenstrual stress, post-traumatic stress disorder, sexual dysfunction, substance abuse and suicide or suicide attempts.⁵⁸⁰ Child abuse victims use medical services and have surgery more often than non-abused children. Those victims who experienced more than four or more types of adverse childhood incidents have an increased risk of conditions such as ischemic heart disease, cancer, stroke, diabetes, hepatitis and skeletal fractures.⁵⁸¹ The literature concerning the effects of child sexual abuse is reviewed in greater detail in the Australasian Institute of Judicial Administration's Bench Book for Children Giving Evidence in Australian Courts.⁵⁸²

Research suggests that the many adverse physical, psychological and social effects of child abuse may be caused by the extreme stress resulting from abuse inhibiting the functioning of neural networks and neuroendocrine systems.⁵⁸³ The higher the exposure to abuse has been found to substantially increase the risk of panic reactions, depressed affect, anxiety, hallucinations, sleep disturbance, severe obesity, substance abuse, early intercourse, promiscuity, sexual dissatisfaction, impaired memory of childhood, higher perceived stress, difficulty controlling anger and perpetrating intimate partner violence as adults. Recent research has cast further light on the mechanisms by which child abuse produces life-long problems for victims in multiple life domains.⁵⁸⁴ It has found that child abuse alters DNA expression in victims, specifically in relation to the gene in the brain associated with the ability to respond to stress.

Society's response to the problem of child abuse is largely the involvement of child protection authorities and the police and courts. However, given the rise in

⁵⁷⁸ Department of Human Services Community Care Division, *An Integrated Strategy for Child Protection and Placement Services* (2002), at <http://www.cyf.vic.gov.au/policy-planning-funding/library/publications/integrated_strategy> viewed 10 May 2009, 26.

⁵⁷⁹ B. Egeland, "Taking Stock: Childhood Emotional Maltreatment and Developmental Psychopathology" (2009) 33 *Child Abuse & Neglect* 22.

⁵⁸⁰ C. F. Johnson, "Child Sexual Abuse" (2004) 364 *The Lancet* 462; M. Purvis and A. Joyce, "Child Sexual Abuse Is a Global Health Problem: Where Is Australia?" (2005) 12 *Psychiatry, Psychology and Law* 334.

⁵⁸¹ K. Kendall-Tackett, "The Health Effects of Childhood Abuse: Four Pathways by Which Abuse Can Influence Health" (2002) 26 *Child Abuse & Neglect* 715.

⁵⁸² Australasian Institute of Judicial Administration, above n 460.

⁵⁸³ R. F. Anda, V. J. Felitti, J. D. Bremner, J. D. Walker, C. Whitfield, B. D. Perry, S. R. Dube and W. H. Giles, "The Enduring Effects of Abuse and Related Adverse Experiences in Childhood" (2006) *European Archives of Psychiatry and Clinical Neuroscience* 174.

⁵⁸⁴ P. O. McGowan, A. Sasaki, A. C. D'Alessio, S. Dymov, B. Labonté, M. Szyf, G. Turecki and M. J. Meaney, "Epigenetic Regulation of the Glucocorticoid Receptor in Human Brain Associates with Childhood Abuse" (2009) 12 *Nature Neuroscience* 342.

notifications of child abuse and the numbers of children in out of home care, some commentators have questioned whether the present approach is sustainable.⁵⁸⁵ They have called for child abuse to be treated as a public health problem with an emphasis on identifying population risk factors and implementing appropriate prevention programs; assisting families at risk and providing them with specialist child health, mental health, domestic violence and substance abuse treatment services; and the use of extreme measures such as the removal of children from their families in only the most high risk cases.⁵⁸⁶

Sibling Abuse

Sibling abuse is often hidden, but can have significant adverse effects on victim's lives.

It is often associated with other forms of dysfunction within the family.

The sibling relationship is one of the closest of human relationships. It can profoundly affect a child's development – in positive or negative ways, depending on the nature of the relationship.⁵⁸⁷

Sibling abuse usually takes place in dysfunctional families and in the

context of maladaptive parental behaviour.⁵⁸⁸ In particular, "when the family structure supports power imbalances, rigid gender roles, differential treatment of siblings, and lack of parental supervision, there is an increased risk for sibling abuse".⁵⁸⁹ Sibling abuse can take various forms: the infliction of physical harm, psychological abuse (ridicule, belittling, the destruction of pets and property etc) and inappropriate sexual behaviour (intercourse, advances, sexual leers and so on).⁵⁹⁰ The latter does not include innocent actions motivated by curiosity that is developmentally appropriate.

Sibling abuse is often hidden due to the private nature of families and community acceptance that it is natural that there should be fights amongst siblings in families.⁵⁹¹ Parents usually do not have access to guidelines to enable them to know when actions go beyond usual sibling differences to become acts of abuse.⁵⁹² The shame, humiliation and guilt suffered by victims, and the victims' desire that the perpetrator not be subjected to justice system penalties may mean that the victim does not disclose the abuse to others. Serious acts of harm can therefore go unnoticed.

Sibling abuse can produce long-term adverse consequences for both victims and perpetrators. It can, of course, have significant psychological implications in

⁵⁸⁵ M. O'Donnell, D. Scott and F. Stanley, "Child Abuse and Neglect - Is It Time for a Public Health Approach" (2008) 32 *Australian and New Zealand Journal of Public Health* 325.

⁵⁸⁶ Ibid.

⁵⁸⁷ Kiselica and Morrill-Richards, above n 512, 149.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid 148.

⁵⁹⁰ Kiselica and Morrill-Richards, above n 512.

⁵⁹¹ B. H. Frazier and K. C. Hayes, *Selected Resources on Sibling Abuse: An Annotated Bibliography for Researchers, Educators and Consumers* (University of Maryland, 1994), at <<http://www.cyfernet.org/research/sibabuse.html>> viewed 2 February 2009.

⁵⁹² Ibid.

conjunction with the physiological harm. Women remembering painful physical or emotional abuse at the hands of siblings while they were children have been found to be more likely than men to suffer depression, anxiety and low self-esteem.⁵⁹³ Male victims have been found to be more likely to suffer low self-esteem.⁵⁹⁴ Victims are likely to be less trusting of others and experience relationship problems, and suffer substance abuse and eating disorders.⁵⁹⁵ Psychological abuse can also lead to conduct disorders, neurotic disorders, a lag in development and an increased incidence of suicide.⁵⁹⁶ Victims of sibling sexual abuse are likely to have relationship problems in the future, having learnt to associate victimisation with sexual behaviour.⁵⁹⁷ Victims of sibling physical abuse have a greater incidence of exposure to violence later in life, such as in dating relationships. Perpetrators of psychological abuse upon their siblings can also suffer diminished self-esteem as adults.⁵⁹⁸

Elder Abuse

Elder abuse differs in its dynamics and incidence from intimate partner violence.

It is most often associated with dysfunctional families or those under stress.

It has significant and adverse emotional, health, social and quality of life consequences for victims.

As with other forms of family abuse, there have been varying definitions of elder abuse, with violence being only one form of it. Elder abuse has been defined as “the wilful or unintentional harm caused to a senior by another person or persons with whom they have a relationship implying trust”.⁵⁹⁹ Elder abuse can be committed by a family member of the victim, but also can occur in other situations of trust – such as

where a caregiver, volunteer worker, neighbour or fellow patient commit the abuse.

Definitions of harm in the concept of elder abuse generally encompass the infliction of physical pain or injury or the use of physical coercion; psychological abuse, such as inflicting mental anguish, shame or feelings of fear or powerlessness; neglect; financial abuse, such as misuse of the elderly person’s financial resources or forcing the person to change his will; and sexual abuse.⁶⁰⁰ New Zealand and Australian research suggests that psychological abuse is the

⁵⁹³ Frazier and Hayes, above n 591.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

⁵⁹⁶ Kiselica and Morrill-Richards, above n 512, 149.

⁵⁹⁷ Ibid 150.

⁵⁹⁸ Ibid.

⁵⁹⁹ Office of Seniors Interests, Western Australia, quoted in: E. Helmes and M. Cuevas, "Perceptions of Elder Abuse among Australian Older Adults and General Practitioners" (2007) 26 *Australasian Journal on Ageing* 120, 121.

⁶⁰⁰ Helmes and Cuevas, above n 599.

most common form of elder abuse, followed by financial abuse, then physical abuse and then neglect.⁶⁰¹

Elder abuse can happen due to a variety of circumstances. It may occur in families under stress; families with a past history of abuse; families that are isolated and that do not have adequate social supports; where a carer has financial problems; in response to difficulties caused by role reversal (e.g., the daughter now becoming her mother's carer); and where there is a lack of support for a carer.⁶⁰²

There are significant differences between elder abuse and intimate partner violence.⁶⁰³ Unlike intimate partner violence, elder abuse is not characterised by any substantial difference in rates of abuse between women and men – both women and men can abuse and also be victims of elder abuse. However, older women tend to be more at risk of being abused. Further, the dynamics of power is often different. Although an elderly person may be physically and psychologically vulnerable, the perpetrator can be economically and emotionally dependent on the elderly person.⁶⁰⁴

Comijs and colleagues have found that most victims of elder abuse feel anger, disappointment or grief following abuse. Some also experience fear.⁶⁰⁵ Research has found that victims of elder abuse suffer a lower sense of mastery, negative perception of self-efficacy and a passive reaction pattern.⁶⁰⁶ Elder abuse can also result in victims experiencing depression.⁶⁰⁷ Victims can suffer financial loss, physical harm and adverse effects on living arrangements, social support and family relationships.⁶⁰⁸ There is evidence that victims may suffer higher rates of mortality.⁶⁰⁹ Social support has been found to be important in helping victims to address the effects of abuse.⁶¹⁰

It has been suggested that elder abuse has received little attention in Australia until comparatively recently due to the covert nature of the problem; ageism –

⁶⁰¹ Lievore and Mayhew, above n 469, 50; S. Kurrle and G. Naughtin, "An Overview of Elder Abuse and Neglect in Australia" (2008) 20 *Journal of Elder Abuse and Neglect* 108, 113.

⁶⁰² K. Glasgow and J. L. Fanslow, *Family Violence Intervention Guidelines: Elder Abuse and Neglect* (Ministry of Health, Wellington, 2006), at <<http://www.moh.govt.nz/moh.nsf/indexmh/family-violence-guidelines-elder-abuse-neglect>> viewed 17 July 2009, 13.

⁶⁰³ P. Fallon, *Elder Abuse and/or Neglect: Literature Review* (Ministry of Social Development, at <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/literature-reviews/elder-abuse-neglect/index.html>> viewed 10 May 2009.

⁶⁰⁴ Ibid.

⁶⁰⁵ H. C. Comijs, A. M. Pot, J. H. Smit, L. M. Bouter and C. Jonker, "Elder Abuse in the Community: Prevalence and Consequences" (1998) 46 *Journal of the American Geriatrics Society* 885.

⁶⁰⁶ H. Comijs, B. Penninx, K. Knipscheer and W. van Tilburg, "Psychological Distress in Victims of Elder Mistreatment: The Effects of Social Support and Coping" (1999) 54 *Journals of Gerontology Series B: Psychological Sciences and Social Sciences* 240.

⁶⁰⁷ K. Pillemer and D. Prescott, "Psychological Effects of Elder Abuse: A Research Note" (1989) 1 *Journal of Elder Abuse & Neglect* 65.

⁶⁰⁸ Comijs et al, above n 605; Glasgow and Fanslow, above n 602; M. Lachs and K. Pillemer, "Elder Abuse" 364 *The Lancet* 1263.

⁶⁰⁹ M. S. Lachs, C. S. Williams, S. O'Brien, K. A. Pillemer and M. E. Charlson, "The Mortality of Elder Mistreatment" (1998) 280 *Journal of the American Medical Association* 428.

⁶¹⁰ Comijs et al, above n 606.

seniors being seen as a less important group due to their lack of economical productivity; and a reluctance to engage scarce community resources on yet another social problem.⁶¹¹

Children's Violence Towards Parents

Child – particularly adolescent – abuse towards parents can take the form of physical violence, destruction of property and manipulative behaviour. It may also be accompanied by violence towards siblings.

A multi-factorial account of its dynamics offers the most promising means of explaining its causes.

Much of the literature on violence in the relationship between parents and children focuses on the subject of child abuse. However, in some situations children can be violent towards their parents – and not only in the context of elder abuse. A growing body of literature is emerging on the nature and prevalence of adolescent violence against parents.⁶¹²

As with other forms of violence in the family, increasingly children's violence against parents is seen as a subset of a wider concept – parental abuse. Parental abuse not only includes acts of violence, but also psychological abuse (e.g., intimidating behaviour); emotional abuse (e.g., playing mind games with malicious intent or the use of manipulative threats such as of running away or of committing suicide); and financial abuse (e.g., stealing parents' property, destruction of property and incurring debts which the parents must cover).⁶¹³ Mothers and other female carers are most likely to be victims of this form of abuse, with sons the most common perpetrators.⁶¹⁴ Taking into account other forms of parental abuse, daughters are violent as much as are sons.⁶¹⁵

In considering why parental abuse occurs, some commentators analyse it from the perspective of youth offending, and others from a family violence perspective.⁶¹⁶ An approach that takes into account a multiplicity of factors – biological, social and psychological factors; risk factors for youth offending; and aspects of youth culture – may offer the most complete means of accounting for the diverse incidents of parental abuse. There are a number of explanations for parental abuse identified. Often perpetrators have been victims of abuse or witnessed violence in the family.⁶¹⁷ Perpetrators also often abuse their siblings.⁶¹⁸ It may be that “in addition to trauma, children [who witness family

⁶¹¹ Ibid 120.

⁶¹² See, for example: Bobic, above n 515; Stewart et al, above n 515; Y. Crichton-Hill, N. Evans and L. Meadows, "Adolescent Violence Towards Parents" (2006) 4 *Te Awatea Review* 21.

⁶¹³ Bobic, above n 515, 2.

⁶¹⁴ Ibid 5.

⁶¹⁵ Ibid.

⁶¹⁶ Stewart et al, above n 515, 203.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid 21.

violence] may face ‘behavioural, emotional, physical and cognitive functioning, attitudes and long-term developmental problems’.”⁶¹⁹

Responses to parental abuse include programs that take a comprehensive approach including educational, therapeutic and legal/social components.⁶²⁰ Addressing the family dynamics is seen as important,⁶²¹ thus family therapy is often used.⁶²² Narrative therapy is also commonly used in addressing parental abuse.⁶²³ Some also see addressing social norms concerning the acceptability of violence – as portrayed in the media, for example – as important in addressing the problem of parental abuse.⁶²⁴ It has been suggested that power and gender are present in the dynamics of parental abuse, with the perpetrator exercising power over the victim by way of violence or otherwise.⁶²⁵ This is considered to be a product of the patriarchal social structure where the use of violence is seen to be an acceptable mechanism of control.⁶²⁶

There is a need for the development of more support services for families suffering from parental abuse and from other forms of abuse.⁶²⁷ There is also a need for further research in Australia, New Zealand and beyond into the prevalence, nature, dynamics, effects and appropriate treatments for victims and perpetrators – in Australia and New Zealand and internationally.

Conclusion

Family violence is a significant problem in Australia, New Zealand and internationally. It takes varying forms depending on the nature of the relationship between victim and perpetrator. Personal and social factors can contribute to the nature and incidence of violence. All forms of family violence can have long lasting adverse effects on a victim’s quality of life. Family violence can also produce adverse consequences for perpetrators.

A lack of understanding as to the nature and prevalence of family violence – including the myth that family violence is a private matter rather than a social problem – have meant that there has been inadequate social and justice system responses to addressing the problem. Increased understanding of the nature and effect of family violence has led to a more proactive response by society and the justice system, involving a no tolerance policy, increased enforcement, the creation of family violence courts, better support for victims and the use of court orders and policing designed to protect victims.

⁶¹⁹ Bobic, above n 515, 7.

⁶²⁰ Bobic, above n 515.

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ Ibid.

⁶²⁴ Ibid 8.

⁶²⁵ Stewart et al, above n 515, 204-205.

⁶²⁶ Ibid.

⁶²⁷ Stewart et al, above n 515.

Chapter 5: Judicial Communication Skills

Michael King

By engaging in dialogue with participants, judicial officers can assist participants to acquire a clearer understanding of their thoughts, feelings and motivation in relation to their legal problem and its underlying issues, and to harness participants' problem-solving skills to address them.

The use of appropriate manner of speech, body language, language selection and listening skills is important in the solution-focused judging process.

*Conversation is a meeting of minds with different memories and habits. When minds meet, they don't just exchange facts: they transform them, reshape them, draw different implications from them, engage in new trains of thought. Conversation doesn't just reshuffle the cards: it creates new cards.*⁶²⁸

According to Brownell, communication is a “dynamic, reciprocal process” that is “effective to the extent that the meaning the listener receives is the one the speaker intended”.⁶²⁹ Solution-focused judging involves a particular form of communication: a dialogue between judicial officers and participants that aims to promote particular common goals – in most cases involving the rehabilitation of the participant. Most interaction between a judicial officer and a party before a court – particularly a defendant in criminal proceedings – is principally one-way. It mainly involves the judicial officer delivering judgment or sentence and/or telling a participant what she should or should not be doing.⁶³⁰ However, in solution-focused judging, the judicial officer deliberately seeks to promote two-way communication, a dialogue helpful to both judicial officer and participant. Egan suggests that a true, helpful dialogue consists of turn taking, connecting, mutual influencing and co-creating outcomes.⁶³¹ The qualities of dynamism and reciprocity are also important aspects of this process. These elements are also essential in a solution-focused approach to judging.

⁶²⁸ T. Zeldin, *Conversation* (Hidden Spring, 2000), 14.

⁶²⁹ J. Brownell, *Building Active Listening Skills* (Prentice-Hall, 1986), 5.

⁶³⁰ It will not be entirely one way. Even when the judicial officer is delivering sentence or judgment the defendant may well be communicating a message to the judicial officer through body language. It may be a message such as relief, gratitude, disagreement, distrust, desolation, disgust, anger, embarrassment, shame or anxiety.

⁶³¹ G. Egan, *The Skilled Helper* (Thomson, 8th edn, 2007), 72.

Turn taking means the judicial officer gives the participants the space, encouragement and support to communicate what they wish to say about their thoughts, feelings, behaviour and what is happening in their lives – including participation in the court program. It is an acknowledgement that both judicial officer and participant can learn from each other.⁶³² The judicial officer can gain greater insight into the participant; her strengths, weaknesses and challenges and how participants in her position cope. As we will see, participants can also develop that insight and also learn more about the support of the judicial officer and court team.

In communication there should be a connection between what each party to the dialogue says and what the other party has said.⁶³³ Applying this principle, the judicial officer demonstrates that she has been listening to what the participant has said and, where appropriate, asks follow up questions for the purposes of clarification as to what the participant has said or to develop the conversation further.

Mutual influencing means that both participant and judicial officer are open to the ideas and suggestions of the other. For the judicial officer, it means being vigilant to ensure that preconceptions and stereotypes concerning the participant do not influence how communication from a participant is evaluated. It means demonstrating that in a solution-focused approach to judging, participants may well be a source of wise and creative ideas as to how problems can be addressed.

Co-creating outcomes means that the participant has a genuine role in determining what is to result from the dialogue with the judicial officer. It is related to the concept of mutual influencing. Co-creating means that each party influences the other in the process of reaching a mutually agreeable outcome. This is not an outcome that is coerced; it is not unilaterally imposed by the judicial officer on the participant. Collaborative problem-solving techniques and goal setting exercises discussed elsewhere in this bench book are examples of processes that co-create outcomes (see Chapter 7).

To promote a therapeutic dialogue encompassing these features, it is important that a judicial officer must be motivated to do so. Motivation brings with it inspiration and commitment⁶³⁴ to adapt to the needs of the circumstances, to learn new techniques, apply new strategies, be open to new ideas and to take an interest in participants. Participants perceive a judicial officer's motivation in the manner in which she speaks, her body language and her response to participants.

Adler and Proctor describe two aspects of commitment to effective communication: commitment to the person and commitment to the message. Commitment to the message means knowing what one is talking about, caring

⁶³² Ibid.

⁶³³ Ibid.

⁶³⁴ R. B. Adler and R. F. Proctor, *Looking out, Looking In* (Thomson, 12th edn, 2007), 32.

about what one says and being sincere.⁶³⁵ In respect of commitment to the person Adler and Proctor have stated:

Concern for the person is revealed in a variety of ways: a desire to spend time with him or her instead of rushing, a willingness to listen carefully instead of doing all the talking, the use of language that makes sense to the other person, and openness to change after hearing the other person's ideas.⁶³⁶

These aspects of commitment are vital to a solution-focused therapeutic dialogue.

Good communication in this context also requires cognitive complexity – the ability to view an issue from a number of different angles.⁶³⁷ Techniques of listening and self-monitoring described in this chapter can promote cognitive complexity. They can assist in preventing a misunderstanding occurring – either from the judicial officer's perspective, the participant's perspective or both – that may hinder the communication and problem-solving process.

Self-monitoring is also regarded as an important aspect of communication. It means being aware of the effect of one's communication – verbal and non-verbal (body language) – on others.⁶³⁸ Self-monitoring is arguably also an essential aspect of judicial communication in solution-focused judging and in judging generally. In a courtroom it means seeing how participants and court professionals react to the approach one takes in communicating and in applying specific solution-focused approaches. It involves recognising strengths and weaknesses in one's approach and in assessing whether there needs to be a modification in one's approach or the use of another strategy. Naturally, the process of self-monitoring should be applied with discrimination. Too much self-monitoring diverts one from the important task at hand – communication and solution-focused judging – and too little deprives one of the opportunity to learn and to refine one's judging techniques.

Factors that Affect a Participant's Ability to Communicate

The judicial officer's attitude towards the participant and the participant's cultural background, prior contact with court, experience of court, cognitive skills and health issues will affect the participant's ability to communicate in court.

Personal factors can affect a participant's ability to communicate with a judicial officer. Participants are often highly stressed when they come to court – even if they have significant prior contact with the justice system. They may be anxious about their situation and about what is going to happen to them. They may also have an underlying anxiety problem that is

aggravated by exposure to stress, such as that caused by attending court. Anxiety can compromise motivation and cognitive functioning, adversely affecting memory, the ability to express one's thoughts and feelings clearly and language

⁶³⁵ Ibid 33.

⁶³⁶ Ibid.

⁶³⁷ Ibid 32.

⁶³⁸ Ibid.

skills. Participants may have other underlying mental health issues, such as depression, which adversely affect their cognitive and communication skills. Some of the problems and issues described in the chapters on substance abuse, mental health and family violence (see Chapter 2, Chapter 3 and Chapter 4 respectively) may affect a participant's ability to communicate. For example, particularly in a drug court, a participant may still be affected by illicit substances when he comes before a judicial officer.

Personality factors and other individual differences may also affect communication. Some defendants are naturally shy and do not speak much even in the most supportive of social environments. Some do not have the experience, skills or inclination to communicate in a public forum.

Cultural differences are another major source of communication issues. For example, a lack of English language skills and differing communication and other cultural mores can affect a participant's ability to communicate and a judicial officer's ability to interpret what is being said. These issues are addressed elsewhere and will not be covered in this bench book. A series of bench books are available to assist judicial officers in relation to court communication issues relating to Australian Indigenous people, people from other cultures and people with other issues that may affect equal access to justice.⁶³⁹

While most participants will become more comfortable speaking with a judicial officer in court over time and will be better able to communicate due to repeated experience, there are likely to be occasions when that ability is temporarily compromised due to illness, a relapse and consequent anxiety or another traumatic life event. Judicial officers need to be sensitive to these situations when they arise and be patient and interact with participants in a way that promotes understanding and respect. Finally, and most importantly, the response of the person to whom speech is directed – whether and how they are listening – will affect the speaker's ability to communicate. Issues concerning the listening response are considered in Chapter 6.

⁶³⁹ See, for example: S. Fryer-Smith, *Aboriginal Bench Book for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd edn, 2008), at <http://www.ajia.org.au/index.php?option=com_content&task=view&id=436&Itemid=165> viewed 10 May 2009; Judicial Commission of NSW, *Equality before the Law Bench Book* (2006), at <<http://www.judcom.nsw.gov.au/publications/benchbks/equality>> viewed 10 May 2009; Supreme Court of Queensland, *Equal Treatment Bench Book* (Supreme Court of Queensland Library, 2005), at <http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf> viewed 10 May 2009.

Promoting Dialogue

A judicial officer can use questions, statements, requests, single words or non-verbal prompts to promote dialogue with participants.

The judicial officer should take care in framing questions and other responses to avoid anti-therapeutic effects.

There are a number of strategies that a judicial officer can use to promote a constructive dialogue with participants: questions, statements, requests, single words and non-verbal prompts.⁶⁴⁰ These techniques can be used to elicit further information, promote greater clarity of thought from participants, challenge participants to re-evaluate their situations, and promote a therapeutic dialogue between participants and judicial officers. They

can be employed as strategies in collaborative problem-solving and as a way of promoting a participant's progress through the relevant problem-solving court program.⁶⁴¹

Questions are a means of directing, facilitating or controlling the flow of communication. In a courtroom they can be a mechanism for exerting power and control. Counsel and judicial officers can control to a significant degree what witnesses say by the wording and manner of questioning. No doubt this is most often for bona fide purposes – such as ensuring that irrelevant, unreliable, tainted and unduly prejudicial evidence is excluded or for testing the credibility of a witness. However, in extreme cases – such as in the oppressive and inappropriate questioning of child complainants – it can be anti-therapeutic and vitiate the evidence-taking process.⁶⁴²

It is important that judicial officers are sensitive to the effect that their questions may have in terms of any therapeutic rapport they wish to develop with participants and what information they wish to elicit from an actual or potential participant in a problem-solving court program. For therapeutic purposes, questions that make a participant comfortable and open to sharing her thoughts, feelings and experiences are ideal. The emphasis is less on control of what is said and more on promoting the flow of communication. While lawyers' questioning of a witness often limits the freedom the witness has to say what he wants, questioning for therapeutic purposes returns a substantial degree of self-determination, control and voice to the participant.

The form of question is important. Lawyers use leading questions in cross-examination to control the content and meaning of what is presented and to elicit a response favourable to their client's case. In therapeutic legal communication outside the context of examining a witness, leading questions should have limited use. They can be used to reflect back to a participant what she has already said for the purposes of confirming the participant's evidence

⁶⁴⁰ Egan, above n 631, 122-124.

⁶⁴¹ See generally: Egan, above n 631.

⁶⁴² King, above n 79.

and/or to demonstrate that the judicial officer is listening, but leading questions are not the best means of promoting open communication with the participant.

Open questions – “How are you?”, “What has been happening since you were last in court?”, “How have you been coping?”, “What have you been doing to prevent relapse since you used?”, “How has this helped?” – are the ideal way to encourage participants to communicate freely with judicial officers. By using “what” and “how” questions, the judicial officer gives participants opportunities to explain the matters of concern to them to the extent they feel comfortable. Although “what” and “how” questions are useful, care should be taken in using “why” questions – such as “Why did you do it?” or “Why did you use?”. “Why” questions can make the recipient defensive and less open to communication as they can be perceived as being a demand for an explanation.⁶⁴³ The use of “how” or “what” questions are a less confronting way of eliciting the reasons why an event occurred and, if used with appropriate tone of voice and body language, can demonstrate a caring interest in the other’s wellbeing.⁶⁴⁴ For instance, questions such as – “How did it happen?” and “What were your reasons for using?”.

It is generally better to begin the dialogue between judicial officer and participant with open questions concerning the participant’s wellbeing and what has been happening in the participant’s life before raising any issues of recent non-compliance. This enables any further questioning concerning the non-compliance to be placed in a broader context where there may well be both positive and negative aspects. Such an approach also demonstrates the judicial officer’s interest in the overall wellbeing of the participant, rather than sole concern as to whether the participant has complied with program requirements. Going straight to the issue of non-compliance may give inordinate focus to one or two incidents in what is otherwise a creditable performance by the participant.

In asking questions, it is easier for participants if each issue is dealt with in turn, rather than jumping back and forward between topics. As noted, a participant’s cognitive and communication skills may be adversely affected by the courtroom experience and jumping between topics adds a further challenge to her cognitive processes. Thus ideally the questioner should focus on one issue systematically and comprehensively before moving on to the next area. Judicial officers also need to be sensitive to the nature and number of questions asked. The information sought by a question needs to be relevant to the task at hand, namely the development of a rapport between judicial officer and participant and facilitating the participant’s progress through the problem-solving court program. Participants may feel like they are being grilled if they are asked too many questions.

Another method of effectively using questions to enhance communication is to simply ask the participant for further information. Care must be taken as to the manner in which the request is conveyed so that it does not appear to be a

⁶⁴³ J. Stewart, K. E. Zediker and S. Witteborn, "Empathic and Dialogic Listening", in Stewart (ed.), *Bridges Not Walls* (McGraw Hill, 2006) 219, 223.

⁶⁴⁴ Ibid.

demand or an order.⁶⁴⁵ If a judicial officer needs more detail of a participant's relapse prevention plan, for example, the judicial officer could say: "Would you please tell me more about your relapse prevention plan". Even a single word or phrase uttered at an appropriate moment in the dialogue between participant and judicial officer can be effective in moving the dialogue further – such as repeating a word or phrase just uttered by a participant. For example:

- Participant: I used ice on Friday. It wasn't good. I've been thinking about what I need to do.
- Magistrate: What you need to do?
- Participant: What I need to do to stop using.

Making a statement to a participant – commonly in the form of saying that the judicial officer does not follow what has been said – is a means of having the participant elaborate on what she has said. An example of such a statement is: "I am not clear about what brought about your relapse". This approach has the advantage of making participants responsible "without accusing them of failing to cough up the truth".⁶⁴⁶ Other verbal prompts include: "Yes", "Go on", "Okay" and "Uh-huh".⁶⁴⁷ Nonverbal prompts in a courtroom setting can be more challenging given where participants and the judicial officer are normally positioned. Perhaps the most suitable nonverbal prompt is nodding while the participant is talking.

Other Responses to Participants

Asking questions, paraphrasing, supporting, analysing, advising in an empowering way and judging are responses judicial officers can use according to the situation.

One of the most significant responses that a judicial officer can make to a participant is to listen and to demonstrate that he is listening with an ethic of care. We discuss the importance of listening and techniques of active listening in the next chapter (Chapter 6).

Adler and Proctor suggest the following are means of responding to what has been said by another person:⁶⁴⁸

- Asking questions.
- Paraphrasing what the participant has said.
- Supporting.
- Analysing.
- Advising.
- Judging.

Each of these responses can be used in solution-focused judging. We have discussed the use of questions as verbal prompts in the previous section.

⁶⁴⁵ Egan, above n 631, 123.

⁶⁴⁶ Ibid.

⁶⁴⁷ However, overuse of these words may hinder communication with participants. See the example given in the discussion of experiences of those appearing before a mental health tribunal in Chapter 3, above n 443 and associated text.

⁶⁴⁸ This discussion draws from Adler and Proctor, above n 634, 248-263.

Paraphrasing

Paraphrasing is when a listener uses *his own words* to repeat back to others what they have said. It is used to clarify what has been said and to demonstrate that the listener has been listening. An example of paraphrasing is: “You feel down because you used yesterday, is that right?”. It is a technique that is used in active listening. It can demonstrate that a listener cares about what the other person thinks and feels. It can also help the other person to clarify her thoughts and feelings, to express them and to experience a catharsis.⁶⁴⁹ However, if paraphrasing is used excessively in a dialogue, it may appear artificial and strained. It is important to make the paraphrase as close to what the other person has said as possible, but if it is not accurate, the person has the opportunity to correct the paraphrase.⁶⁵⁰

Supporting

Supporting is acknowledging and identifying with a person’s situation. Adler and Proctor have developed the following list of ways of supporting, to which I have added solution-focused judging examples:

- Empathising (“I understand why you would be upset about using”).
- Agreement (“You did the right thing by telling me you used yesterday”).
- Offers to help (“How about we reschedule your next court appearance so you can attend your son’s graduation?”).
- Praise (“You did a fantastic job in staying off drugs for three months!”).
- Reassurance (“Given your enthusiasm, commitment and excellent relapse prevention plan, I think you will achieve your goal of staying off drugs”).⁶⁵¹

Supporting does not involve discounting a person’s situation or how they feel about it. It is not about offering “cold comfort” – sentiments such as “it’s not that bad” or “it will be better tomorrow”. As noted in the listening chapter (Chapter 6), these responses are likely to stifle dialogue. Moreover, attributing blame to a participant or saying things will be better tomorrow is unlikely to make participants feel better or more motivated to deal with the underlying problems that have caused their present difficulty. Similarly, if a participant attacks the court program as the cause of her woes, a vigorous defence of the court by the judicial officer is likely to divert the hearing from the importance of recognising the participant’s feelings and situation and engaging the participant in problem-solving. In such a circumstance, it may be best to take an empathetic approach.

Analysing

Analysing is one of the prime functions of a judicial officer. One analyses to determine the issues in dispute and to apply the law to the facts of a case. However, a judicial officer needs to take care in using analysis in taking a solution-focused approach. At times it is inevitable – such as when the judicial officer has to determine if a person should be terminated from a program or

⁶⁴⁹ Ibid 251.

⁶⁵⁰ Ibid 253.

⁶⁵¹ Ibid 254.

sanctions applied to him. However, the judicial officer should be more circumspect in offering her analysis of a participant's situation as a means of promoting resolution of a participant's problems, particularly given that the authority of the judicial officer means that her analysis may be given more weight than that of others. A judicial officer's analysis of the personal situation of a participant may be wrong – due to insufficient or inaccurate material before the court or a misunderstanding of that material. Even if it is correct, it may arouse a participant's defensiveness as it could be construed as the judicial officer asserting she is a better authority on the participant's situation than the participant.

Adler and Proctor offer the following suggestions for those considering analysis as a response that may be usefully applied in the solution-focused judicial context:

- Offer the analysis or interpretation in tentative rather than absolute terms (“Perhaps the reason is...”).
- The analysis should have a reasonable chance of being correct.
- The analysis should only be offered when the person is likely to be open to it.
- The motive to offer the analysis should only be to assist the others in resolving their problems.⁶⁵²

Advising

Courts are not normally in the business of giving advice. They are concerned with determining the facts of a case, ascertaining the relevant law and applying the law to the facts to reach a legal outcome. A court giving advice to a party is potentially problematic in our adversarial system, where judicial officers are meant to be impartial. Even in the collaborative processes involved in problem-solving courts, the judicial role should not change to one of principal adviser.

The term “problem-solving court” implies that it is the court that solves participants' problems. Yet a therapeutic jurisprudence approach suggests a problem-solving court should be empowering participants to solve their own problems, both during the court program and beyond – albeit with the support of the court team and associated agencies while on the program and by reference to support networks and agencies in society where needed following program completion.

A judging approach that involves the judicial officer continually advising a participant about how to resolve problems arising in his life does not promote a participant's self-sufficiency in resolving problems. The authority of the judicial officer may well mean that her advice is considered more authoritative than the participant's own ideas about how to resolve his problems. This approach also derogates from the responsibility of the participant to resolve his problems. Thus if a judicial officer gives advice, the participant acts on it and his situation gets worse, the participant may well blame it on the judicial officer. If this

⁶⁵² Ibid 258.

happens, the ability of a participant to remain in the program may be compromised.

If a judicial officer, lawyer or other team member is to suggest a proposed course of action, it is best to do so tentatively rather than on an absolute basis. For example: “What if you were to...What do you think about that?” or “How about if we...?”. The onus is then on the participant and/or team members to talk through the pros and cons of the proposal and reach a consensus decision. This is an indirect and less risky method of giving advice. In taking this approach, it is important that the advice is accurate, that the participant is open to accepting it and that the advice is given in a caring manner.⁶⁵³ It is also less likely in these circumstances that the participant will blame the judicial officer if the suggestion is acted on and the results are less than the participant expected.

Judging

Adler and Proctor use “judging” to mean a response that is a comment on the quality of a person’s thoughts or behaviour – generally identifying deficiencies in them.⁶⁵⁴ If one were to judge a person’s behaviour favourably, it would provide the basis for a supportive response. Of course, assessing the quality of behaviour is an integral part of the work of courts – a criminal court will commonly denounce the behaviour of offenders when sentencing them, a civil court may assess whether a defendant’s behaviour was negligent, and so on.

Judicial officers taking a solution-focused approach will use analysis and judging – whether favourable or unfavourable – in their response to matters such as determining whether a person is admitted to or terminated from a program or whether sanctions should be applied for breach of program conditions. This approach may well only be applied after other responses have been used – such as the expression of empathy.

Being critical of a participant in open court can potentially be counterproductive in that it may provoke the participant’s defensive mechanisms and/or feelings of shame and humiliation leading the participant to be less open to change – and change, movement forward through the stages of change is what a court is interested in promoting.⁶⁵⁵ Even constructive criticism can be difficult for a participant to take, particularly when rendered in a public forum such as a court. This does not mean that a judicial officer should condone unacceptable behaviour and fail to hold participants accountable. Where there are deficiencies in a participant’s performance, a response that is more sophisticated than simply being critical in a destructive manner or offering constructive criticism may well be needed. Thus, instead of openly confronting a participant, the judicial officer may ask a participant to evaluate his own conduct. For instance: “What do you think about not attending counselling over the last week?” or “How does your drug use fit in with the goal you set about being drug free?”. In most cases this should be enough to elicit a response from the participant acknowledging that

⁶⁵³ Ibid 258-259.

⁶⁵⁴ Ibid 259.

⁶⁵⁵ Indeed, proponents of restorative justice assert that court appearances can be stigmatic for offenders. For a discussion of restorative justice, see: King et al, above n 27, ch 3.

the behaviour was not ideal – with which the judicial officer can agree. This then becomes the basis for the next step in solution-focused judging: helping participants to identify solutions.

Speech and the Use of Language

The use of some words – such as “you” and “why” – may be problematic in some situations.

Judicial officers should be sensitive to the possible effects of their language selection.

Basic techniques for effectively communicating in court apply equally to problem-solving court programs. These techniques include: articulating words properly, speaking clearly, using a proper tone of voice and a suitable pace of delivery for the circumstances, speaking in a volume that is not too loud or too soft, directing one’s body and eyes in the

direction of the person or people to whom one is speaking, taking note of body language and adjusting speech patterns according to the needs of the listener. All of these principles are important in promoting effective communication of the judicial officer’s message to the intended recipient. There are also important differences between communicating when taking a solution-focused approach to judging and communication in conventional judging.

In a conventional court process, much of the dialogue is between legal professionals – lawyers and judicial officers. In a problem-solving court process, participants play a more active and significant role. While lawyers’ and judicial officers’ use of legal technical language may well be appropriate in a conventional court process, as far as possible it should be avoided when taking a solution-focused approach if communication is to be promoted. Here language should be simple – but not overly so, lest it be perceived as condescending – and direct.

The selection of words and how concepts are expressed can be significant. Judicial officers and lawyers need to be careful in the way they express themselves in court. For example, assume a judicial officer says to a participant: “It is great that you stayed off drugs since your last appearance, but you missed an appointment with your counsellor”. Staying off drugs is a significant achievement for someone recovering from substance abuse and it is right for a judicial officer to praise the participant. However, the judicial officer has unjustifiably belittled the participant’s achievement and this is likely to have an immediate negative effect on the participant’s mood. The use of “but” in a sentence qualifies and detracts from what has gone before.⁶⁵⁶ The achievement and the missed appointment are two separate matters and should be dealt with as such.

When participants are in breach of program conditions, naturally judicial officers will wish to hear from them about what has happened and, where possible, engage in a problem-solving exercise to prevent further breaches. The judicial officer will want the participant to assume responsibility for the breach, but she

⁶⁵⁶ Adler and Proctor, above n 634, 176.

will also wish to engage with the participant. Using the “you” word may be problematic. For example, the question “How come you didn’t attend the appointment?” attributes responsibility but may well place a participant on the defensive in communication when the judicial officer wishes to promote open communication to problem solve. The participant may feel that implicit in the question is the judicial officer’s belief that the participant is to blame. As we have noted, “why” is similarly problematic in these circumstances – as in “Why didn’t you attend the appointment on 2 May?”. If a judicial officer persistently takes this approach over a number of court appearances, the participant may well feel intimidated about court appearances and be reluctant to fully engage with the judicial officer. This would not fit well with an approach in which the judicial officer has positive expectations about a participant’s behaviour.

An alternative approach would be for the judicial officer to be more neutral and open. For example: “I have been told about a missed counselling appointment on 2 May. What happened?”. Unlike the former approach, the question does not carry with it the innuendo that the participant was at fault and leaves open other possibilities – such as where the counsellor or the participant was ill or the participant had been given the wrong appointment time. It also places on the participant the responsibility to account for the missed appointment. It is consistent with having a positive expectation concerning the participant’s attitude and behaviour in relation to the court program. On the other hand, there will often be occasions where it is important to use the “you” word, especially where the judicial officer wishes to receive input from a participant or to involve the participant in decision-making. For example, “How do you think we should deal with this matter?” or “What action are you taking to prevent relapse?”. In these contexts, using “you” is still empowering for participants.

Problem-solving courts involve a collaborative approach to problem-solving. Statements or questions involving “we” can be used to promote the sense of collaboration and, for participants, the sense that they are not alone but are supported by the court team. After all, helping participants to resolve their problems may not only involve their development of individual self-help strategies, but also the court team providing them with support, such as by way of additional court appearances for a short period, a change of counselling or other treatment programs or increased counselling appointments. As a result, a judicial officer could say to a participant and, if appropriate, to other members of the court team: “How should we deal with this problem?” or “What do you think we should do?”.

Humorous language may be appropriate in court situations. It is, after all, a normal part of human interaction. It can lighten spirits – which may be needed if the court environment becomes tense and sombre – and place a situation into a more human perspective. However, care should be taken that the use of humour is not at the expense of the participant or other people involved in the court program. Sometimes participants may be humorous while engaging with the court – sometimes in a self-deprecating way – as a means of dealing with their own difficult situation.

Conclusion

Dialogue between judicial officers and participants is a vital means by which the court can promote participant motivation to engage in the court program. It is a form of communication that differs significantly from that used in conventional court processes in the closeness of the rapport that is sought to be developed between judicial officer and participant and the communication techniques used in judging.

Listening skills are an important aspect of promoting dialogue. However, along with active listening, judicial officers' usage of verbal and non-verbal cues can also encourage participants to speak frankly with them and promote a therapeutic dialogue. In addition, judicial officers need to be sensitive concerning their selection of language in formulating their response to what participants say to them. Insensitive responses may frustrate the therapeutic intent of dialogue in solution-focused judging.

Chapter 6: Judicial Listening Skills

Michael King

Listening is an important aspect of problem-solving judging and of judging generally.

Judicial listening is as important as judicial speech and judicial writing.

Active listening techniques can help judicial officers to engage in therapeutic communication with participants that promotes participants' trust in the court and their compliance with court programs.

Some forms of behaviour and some environments inhibit the listening process and should be avoided.

What is said in court has been a prime focus in the work of judicial officers, lawyers, legal academics and other legal professionals. Speech is a mechanism for the exercise of influence and power in court, such as where lawyers endeavour to persuade a court by skilful argument or a judge or magistrate delivers a judgment, sentence or ruling. This dominance of speech in the legal professional context is also reflected in its importance as a conveyer of power and influence in the wider community – in education, business, politics, community organisations and families.⁶⁵⁷

Research suggests that listening also plays a vital role in court and other legal processes. Procedural justice research emphasises that satisfaction with legal authorities is promoted when litigants or other members of the public who encounter legal authorities not only feel that they have been able to tell their story to a court or other legal authority, but that the authority has taken their story into account in reaching a decision and has treated them with respect.⁶⁵⁸ Taking their story into account requires the legal authority to have listened to the other party and understood what he was saying before formulating the oral or written judgment.

Much has been written and said about techniques of advocacy and judgment preparation. Less attention has been paid in the law to listening as a skill in judging and legal practice. Essentially it has been assumed that listening is a natural talent that all possess. In part this assumption has arisen due to equating

⁶⁵⁷ M. Burley-Allen, *Listening: The Forgotten Skill* (John Wiley & Sons, 1982), 40.

⁶⁵⁸ Winick, above n 3; T. R. Tyler, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings" (1992-1993) *46 SMU Law Review* 433.

listening with the physiological process of hearing the sounds of what is spoken – an assumption that has been widely held in the community.

Arguably at the basis of all other legal communication skills – such as advocacy and the delivery of judgments – therapeutic judging, legal practice and indeed communication skills generally, is the ability to listen. As Hargie and Dickson have noted:

To ask the right questions, be assertive, give appropriate rewards, employ apposite self-disclosure, negotiate effectively, open and close interactions, and so on, you must engage in concerted listening. As aptly expressed by Robbins and Hunsaker...‘if you aren’t an effective listener, you’re going to have consistent trouble developing all the other interpersonal skills’.⁶⁵⁹

How to define listening is the subject of ongoing debate in the communications literature.⁶⁶⁰ Some theorists have focused on listening in terms of the *receipt* and processing of aural information.⁶⁶¹ Other theorists consider listening to be a cognitive process whereby the mind *understands* and processes aural information, just as seeing is the processing and interpreting of visual information. From this perspective, one does not need to learn to *hear*, but one needs to learn to *listen*.⁶⁶² A growing body of theorists assert that listening should be considered as a part of interactive behaviour between people.⁶⁶³ For example, it is suggested that listening is “the process whereby one person pays careful overt and covert attention to, and attempts to assimilate, understand, and retain, the verbal and nonverbal signals being emitted by another”.⁶⁶⁴ It is in this broader context that judicial officers, lawyers, other justice system professionals and people involved in court proceedings speak, listen and otherwise interact with each other.

The Purposes of Listening

Listening has multiple purposes: monitoring, understanding, evaluating, appreciating, relating and “dialogic”.

Relational or empathetic listening is an important part of solution-focused judging.

Listening has different purposes: discriminative or monitoring; understanding, evaluating, appreciating, relating or empathising; and “dialogic”.⁶⁶⁵ Examples of monitoring include police monitoring prisoners in police custody to ensure none have escaped and that there is no self-harm, or medical staff monitoring

patients in a hospital for health purposes. Listening for understanding is exemplified by students attending a lecture to gain knowledge. Listening for

⁶⁵⁹ O. Hargie and D. Dickson, *Skilled Interpersonal Communication: Research, Theory and Practice* (Routledge, 2003), 170.

⁶⁶⁰ R. Bostrom, "Memory, Cognitive Processing and the Function of "Listening" a Reply to Thomas and Levine" (1996) 23 *Human Communication Research* 298, 302.

⁶⁶¹ Hargie and Dickson, above n 659, 171.

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid* 172.

⁶⁶⁵ *Ibid* 176.

evaluation involves critically examining the content of what is being said. Attending an opera to enjoy the performance is an example of listening for appreciation. Listening to empathise and to relate is not confined to family, friendly or intimate relationships. It is increasingly acknowledged that the values associated with relational listening are important in diverse relationships, including doctor and patient, teacher and student and employer and employee.⁶⁶⁶ These values are also important in the relationship between lawyer and client and between judicial officers and those who come to court as litigant, witness, counsel or justice system personnel. "Dialogic" listening aims to promote the interests of the parties involved in the process. The objective is for all parties to be involved in speaking and listening with a purpose of pursuing common goals, such as reaching a mutually agreeable outcome in a negotiation.⁶⁶⁷

Evaluation has traditionally been the prime purpose of a judicial officer listening in court. Certainly when a judicial officer listens in court, she is interested in comprehending what is said, but it is for the purpose of evaluating evidence and submissions as to fact and law so as to reach a decision concerning the merits of a case. Where the judicial officer takes a therapeutic and/or solution-focused approach, relational listening is most likely involved. For example, the judicial officer engages in empathetic listening when hearing applications for a defendant to enter a court rehabilitation program; when asking defendants to explain the nature of their problems, how they arose and what they intend to do about them; and when asking participants to explain what happened when they have relapsed or otherwise breached program conditions. However, even in a problem-solving court program, the judicial officer does not abandon the evaluative function of listening. For example, the judicial officer must determine whether it is appropriate for a participant to enter a court program, to be given a further chance after breaching program conditions or to be removed from the program. In such cases, the judicial officer has the challenge of evaluating and also of promoting empathy through the process – a sudden withdrawal of an empathetic attitude by a judicial officer may suggest to the participant that the judicial officer has prejudged the case and may compromise the rapport between judicial officer and the participant in the event that a second chance is granted.

Generally, there are differences in the ways people approach the listening task. People may have different orientation to listening due to habits developed over a lifetime.⁶⁶⁸ For example, some may be oriented to receiving the affective content of what is said, some to the factual content, some to short communication and some to clear, efficient information directed at action. Personality may also have a bearing on listening behaviour.⁶⁶⁹ In a legal context such as a court, the listening process may be affected by the physical, emotional and cognitive states of the parties; the physical environment of the courtroom, for example, the parties' cultural and familial backgrounds; power differentials between the

⁶⁶⁶ King, above n 3; W. J. Brookbanks, "Narrative Medical Competence and Therapeutic Jurisprudence: Moving Towards a Synthesis" (2003) 20 *Law in Context* 74.

⁶⁶⁷ Hargie and Dickson, above n 659, 176.

⁶⁶⁸ A. Wolvin and C. G. Coakley, *Listening* (McGraw-Hill, 5th edn, 1996), 141.

⁶⁶⁹ Wolvin and Coakley, above n 668.

parties; the manner of the speaker's delivery; the subject matter discussed; and the listener's orientation to listening and listening skills.

It is increasingly recognised that listening is a skill that can be taught and that can be used to promote more effective communication between people.⁶⁷⁰ As Wolvin and Coakley have observed:

...a listener can overcome any negative, deterring influence by systematically employing...listening strategies in...communication. The listener who strives to know and to motivate himself or herself, to listen actively, and to send appropriate feedback can become a more effective listening communicator.⁶⁷¹

Listening is a skill that all judicial officers and lawyers should develop. It is particularly important for those judicial officers and lawyers who seek to apply therapeutic jurisprudence and to take a solution-focused approach in their respective roles. For example, to promote the therapeutic value of self-determination requires the judicial officer to seek the offender's views on the formulation of a rehabilitation plan and to listen to the expression of those views.

Processes and Stages of Relational Listening

Relational or empathetic listening means taking into account cognitive, affective and behavioural factors associated with communication.

Halone and Pecchioni's study of relational listening suggests factors that are important in diverse contexts in which people interact in society. They found that a number of cognitive, affective and behavioural factors are involved in listening. Cognitive processes relate to paying attention, comprehending, seeing the speaker's point-of view and evaluating and assimilating what is being said.⁶⁷² Affective factors are that the listener cares, empathises with the speaker where appropriate, is sympathetic to what is going on and listens "with the heart".⁶⁷³ Behavioural factors comprise verbal, non-verbal and interactive factors, such as knowing when to listen, when to talk, when to offer advice (or not), when to problem solve (or not); making appropriate eye contact; giving appropriate signs of listening (e.g., nods of the head); and demonstrating interest, compassion and concern.⁶⁷⁴

Listening can be considered in terms of pre-interaction, interaction and post-interaction stages.⁶⁷⁵ According to Halone and Pecchioni, in the lead up to interaction, people value others to the interaction being willing to listen, making a conscious effort to do so, hearing what is said, being open-minded about the subject and being able to put their own thoughts aside while listening to each

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid 141.

⁶⁷² K. K. Halone and L. L. Pecchioni, "Relational Listening: A Grounded Theoretical Model" (2001) 14 *Communication Reports* 59.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

⁶⁷⁵ Ibid 65.

other.⁶⁷⁶ As to the interaction phase, Halone and Pecchioni note the importance of knowing “when to participate, when to be involved, and when to respond”.⁶⁷⁷ Allowing others to talk freely, not interrupting, responding to verbal and non-verbal cues and providing feedback where appropriate are also essential elements of the relational listening process. After the interaction has ended, those who were involved expect each other to remember what has been said and to act on it.

For the judicial officer, note-taking is a commonly used technique to promote remembering. Communication literature also advocates the use of this technique.⁶⁷⁸ Judicial officers need to be careful that note-taking does not detract from their interaction with participants. Having one’s attention on a court file for too long may create the impression that the judicial officer is not giving the participant his full attention. It could be that note taking is limited to periods when a participant finishes talking or it is done in stages with the agreement of the participant.

The judicial officer can demonstrate remembering in future interactions with the participant by referring back to what the participant has told her previously. She can also act upon what has been discussed by, for example, giving the reward for compliance as promised in an earlier interaction.

The Benefits of a Judicial Officer Listening

Through listening, the judicial officer takes in information necessary for the evaluative and decision-making processes.

A judicial officer listening can also help the speaker clarify thoughts and feelings and problem solve as well as validate the speaker as an individual.

It may almost be considered to be trite to consider why a judicial officer should listen as it is self-evidently the case that if a judicial officer does not listen, he cannot gain a full understanding of the evidence and make proper decisions in a case. There are three purposes of listening involved here: the receipt of information, understanding what is being said and critically evaluating what has

been said. It is these dimensions of listening that have mostly attracted legal interest. Appeals have often focused on judicial mistakes in hearing, understanding and/or evaluating the evidence in a case. For example, the High Court of Australia recently considered judicial attention and listening in the context of a judge who fell asleep during a trial.⁶⁷⁹

A problem-solving court judicial officer, through the process of listening to a participant, receives important information that provides the basis for the development of a rapport between judicial officer and participant by virtue of which the judicial officer can promote the participant’s rehabilitation. For

⁶⁷⁶ Halone and Pecchioni, above n 672.

⁶⁷⁷ Ibid 63.

⁶⁷⁸ Hargie and Dickson, above n 659.

⁶⁷⁹ *Cesan v The Queen; Mas Rivadavia v The Queen* [2008] HCA 52.

example, the judicial officer can refer to information received on one occasion – such as the illness of the participant’s mother – on another occasion – by inquiring after the health of the participant’s mother, for example. If a participant has mentioned a short- or long-term life goal on a previous occasion, then the judicial officer can refer to it on a subsequent occasion when the goal has been achieved and can praise the participant and support his self-efficacy in being able to set and achieve goals.

If the listening process is compromised – the judicial officer may not receive an accurate understanding of a participant’s situation, for example – misunderstanding may produce embarrassment in future communication between the judicial officer and the participant in court. However, these misunderstandings can be corrected and the risk of their occurrence does not diminish the many gains to be had by listening intently to participants.

There are other benefits of a judicial officer listening – benefits associated with the promotion of community trust in the justice system and with the promotion of justice system goals such as offender rehabilitation. The judicial officer listening is an essential part of the process of validating the party or witness as a citizen worthy of respect, of validating her self-concept. This has been noted by procedural justice research as important for achieving litigant respect for the court system.⁶⁸⁰ For many offenders, the attention from a judicial officer – such as that commonly seen in therapeutic jurisprudence based problem-solving court programs – may be the first time that any authority figure has taken a positive interest in them and been prepared to take the time and adopt the attitude needed to listen to them. The quality of that attention will depend to a large degree on the judicial officer taking an active interest in what the offender has to say about a range of issues including how he got to be involved in the matter that has brought him to court, how he thinks he can address underlying problems and the challenges that may arise on his road to rehabilitation.

The process of a judicial officer listening to court participants may be therapeutic for the participants in other ways. For example, program participants may be unclear in their thinking and not in touch with their feelings about a particular event such as a relapse or the reason for their offending. The process of a person talking about what has happened to them may help them to be clearer in their minds as to why it happened, how they feel about it and what must be done to make things right. As Rogers has observed:

When I have been listened to and when I have been heard, I am able to re-perceive my world in a new way and to go on. It is astonishing how elements that seem insoluble become soluble when someone listens, how confusions that seem irremediable turn into relatively clear flowing streams when one is heard.⁶⁸¹

According to Rogers, listening at a deep level can promote other benefits for the speaker, such as a sense of freedom and release, being open to share more about her life and being more open to change.⁶⁸²

⁶⁸⁰ Tyler, above n 658; Winick, above n 3.

⁶⁸¹ Rogers, above n 14, 12.

⁶⁸² Ibid 10.

Impairment of the Listening Process in Court

The listening process can be impaired by the judicial officer's cognitive processes, speech and behaviour and by factors associated with the courtroom.

If a judicial officer is perceived to be not listening, then a participant may think that the judicial officer is not interested in her and the solution-focused process may be hindered.

A solution-focused judicial officer's attention to the listening process is not only important for promoting positive effects but also for minimising or avoiding negative effects. Where someone takes the risk of sharing personally sensitive information with another and that other does not listen, the result can be deflating for the person who divulged.⁶⁸³ Where it is a judicial officer who has not listened, the potential is that the participant's trust in the judicial officer and the court program may be damaged.

The process of listening in court can be impaired in a number of ways, including:

1. The listener's failure to pay attention.⁶⁸⁴
2. The listener's inability to understand the words or expressions used.⁶⁸⁵
3. The listener holding on to expectations about what the speaker is going to say and not actually listening to what is being said.⁶⁸⁶
4. The listener twisting some aspect of what is said to suit the listener's purpose, such as where the listener has a preconception of whom the speaker is and misinterprets what is said to fit that conception⁶⁸⁷. For example a person may consider the other as a drug addict, believe that drug addicts are unreliable and perceive what that person says in that light.⁶⁸⁸
5. The listener may not receive the message communicated due to misinterpreting what is said in light of the listener's beliefs, attitudes to life and life experience.
6. The court environment or process may not be conducive to listening.
7. The listener's body language or mannerisms may suggest to the speaker that the listener is not receptive to the message being conveyed.
8. Blocking tactics.
9. Interruption.

There is an internal conversation that we have when going through all life experiences – a stream of thoughts, memories, perceptions and feelings. For lawyers and judicial officers in particular, given the nature of the work they do, this may well include spontaneous thoughts concerning the evaluation of what someone is saying. While this is natural, it is best that the attention be on the participant when the participant is talking. For busy judicial officers, it is

⁶⁸³ Ibid 14.

⁶⁸⁴ Ibid 13; Hargie and Dickson, above n 659, 189.

⁶⁸⁵ Rogers, above n 14, 13.

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid.

tempting to follow the more widespread community practice of “multi-tasking”; referring to a court report or other document while listening to a speaker or referring back to one’s notes is a common practice. However, doing these many tasks at once divide’s the judicial officer’s attention.

Attention may also be distracted due to other factors, such as fatigue, boredom, the speaker’s particular mannerisms or appearance or the listener’s preoccupation with personal issues such as a recent emotionally disturbing event or a future event, such as an up-coming case, personal event or meeting. A judicial officer may also be preoccupied by the pressures of a busy list and the desire to hurry through matters as quickly as possible.⁶⁸⁹ Further, judicial officers may unwittingly “tune out” if they consider what others are saying to be irrelevant.⁶⁹⁰ Full attention may also be diverted if the listener is evaluating or formulating a response to something that the speaker has said – focussing on the meaning of one part of the conversation may prevent the listener from grasping the full import of something that follows.

The courtroom itself might detract from the listening process. The environment of a court is not always conducive to listening. Particularly with a busy court, there may be others talking in the court at the same time as the participant, movement of people into and around the court and other sources of distraction. Further, poor acoustics in the courtroom may make it difficult to hear others and inhibit the listening process. A court may be under pressure to deal with a large number of cases and the time available to listen to a participant may be limited. A large courtroom with significant distance between the judicial officer and the participant may not be conducive to empathetic speaking and listening. If the courtroom is too hot or too cold, this also provides a distraction to effective listening.

A lack of full attention risks a failure to appreciate the significance of the different nuances of what is being said – the particular words chosen, underlying meanings and avoidance of words or topics– and how it is being said – the tone of voice, emphasis on particular words and the body language of the speaker. The risk is that the listener may not fully appreciate what is being communicated. There is another significant risk: the judicial officer may well be unable to properly respond to the participant by reason of not taking in the full message. The participant is then likely to conclude that the judicial officer has not been listening. This can have a devastating effect on the faith the participant has in the judicial officer as a person in authority who cares and is willing to take the time to listen to the participant.

As far as possible it is better to avoid evaluating what a participant has said until he has finished conveying his message to the court. If there are lengthy matters to consider, then at the start the judicial officer can ask the participant if he minds whether the judicial officer takes notes while the participant is speaking or whether there may be pauses in the conversation so notes can be taken. The judicial officer can emphasise the value of what the participant is saying as the

⁶⁸⁹ Freckelton, above n 440, 47.

⁶⁹⁰ Brownell, above n 629, 33.

reason for note-taking. At the end of the participant's message the judicial officer can evaluate what is said and formulate a response.

A failure to understand may occur for reasons other than a failure to properly listen. This may occur where the speaker uses colloquialisms – such as “street talk” – that are not familiar to the listener. Difficulty in understanding what another person is saying is particularly common where the speaker and listener come from different cultural backgrounds. The tragic involvement of Aboriginal people in the justice system over many years has been typified by a failure of the justice system to fully listen to Aboriginals due to ignorance of cultural practices concerning communication. More recently judicial officers have been trained in cultural communication issues and bench books have been produced that address court communication issues in relation to Aboriginal people and those from other cultures.⁶⁹¹

Factors 3, 4 and 5 – holding expectations concerning what is going to be said, misinterpreting what is said and twisting the meaning of what is said according to one's outlook on life or beliefs – can effectively be considered to be forms of prejudging. As Hargie and Dickson have stated, we “are all affected by previous experiences, attitudes, values and feelings, and these in turn influence our mental set for any given situation”.⁶⁹² As to expectations concerning what is to be said, for example, discussions are held and decisions are made at drug court case management meetings that may affect how the judicial officer and other team members perceive participants' conduct in court and how their matters are determined. Unless judicial officers and team members are vigilant in avoiding this prejudgment, it may affect the manner in which they subsequently listen to participants and thereby hinder the communication process.

An example of how the fourth factor can arise in a court is the common example of a participant becoming well known to a judicial officer, lawyers, community corrections officers and other justice system personnel through regular appearances in court. Through such appearances, justice system personnel can develop a concept of what kind of person a defendant is – such as a ‘hopeless addict’ or a ‘recalcitrant recidivist’ – and filter what the participant says accordingly. Judicial officers and team members need to be open to new input from participants and not be overly influenced by past history in the process of listening to them. Conversely, participants who are progressing well through problem-solving court programs may arouse the teams' hopes, expectations and even regard for them. This has the potential to act as a filter whereby what is said by a participant is seen in a more positive light than it should be.

It has been suggested that nonverbal behaviours regulate “conversations, communicate emotions, modify verbal messages, provide important messages about the helping relationship, give insights into self-perceptions, and provide clues that clients (or counsellors) are not saying what they are thinking”.⁶⁹³ Proponents of good listening suggest that an open and relaxed body posture tells

⁶⁹¹ See, for example: Judicial Commission of NSW, above n 639; Supreme Court of Queensland, above n 639; Fryer-Smith S, above n 639.

⁶⁹² Hargie and Dickson, above n 659, 190.

⁶⁹³ Egan, above n 631, 74.

the speaker that the listener is receptive to what the speaker is saying.⁶⁹⁴ Commonly when one attends a court one cannot see the full body posture of the judicial officer due to the bench hiding all but the upper portion of the judicial officer's body. Nevertheless, the judicial officer's posture is important. If the judge or magistrate leans back on the chair and/or pushes it away from the bench or looks away too often while a party is talking, it may send a message that the judicial officer is uninterested or is endeavouring to create further distance from the speaker. Crossing one's arms is a defensive posture and may be interpreted as being closed to the message being conveyed. Yawning, rubbing the eyes and engaging in other activities are examples of body language that suggest disinterest in what the person has to say. On the other hand, leaning slightly forward conveys a message that a person is receptive and interested in what the speaker has to say.⁶⁹⁵ Turning one's chair to directly face the speaker also suggests receptivity. Nodding to acknowledge that the person is listening is another positive use of body language. Looking in the direction of the person speaking also is important in promoting a sense of openness to receive information from the speaker.⁶⁹⁶ Looking the speaker in the eyes is a more complex issue. While in western culture, looking someone in the eye when speaking with them is regarded as a sign of attentiveness, interest and respect, other cultures may see it differently – for example, as conveying a lack of respect. For example, avoidance of direct eye contact is regarded as a sign of respect in indigenous Australian cultures.⁶⁹⁷ Sensitivity to the cultural mores of the person coming before the court is needed to demonstrate receptivity and at the same time to promote respect for the person.

In determining appropriate eye contact and body language, sensitivity to the personal situation of the person speaking is important. In a criminal case, an offender may avoid direct eye contact due to factors such as shame, embarrassment, fear, low self-esteem or being overawed by the situation. Endeavouring to promote eye-to-eye contact in such a situation may hinder the development of a rapport between judicial officer and participant that would enable the participant to feel comfortable to disclose sensitive information to the judicial officer. However, the use of other sensitive listening strategies – such as leaning forward, turning the chair towards the participant and nodding at appropriate intervals – and other therapeutic strategies will still be appropriate.

Facial expressions reflect the feelings of the listener and can encourage or hinder the speaker's communication. A relaxed facial expression and a smile from a judicial officer will show receptivity and encourage a person to speak; a stern expression or one conveying anger, ridicule or exasperation is likely to have the opposite effect.⁶⁹⁸ While it is important to be sensitive as to facial expressions in communication, it is also important that they are genuine. In a problem-solving court program, a lack of genuineness on the part of the judicial officer, lawyers and other professionals undermines the message that the court team is interested in what participants have to say and wish to engage with and to

⁶⁹⁴ R. Nelson-Jones, *Basic Counselling Skills* (Sage, 2nd edn, 2008), 50.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ Egan, above n 631, 76.

⁶⁹⁷ Fryer-Smith, above n 639, [5.3].

⁶⁹⁸ *Ibid.* 51.

support them in their rehabilitation. Clearly a judicial officer who is to ask a program participant who has relapsed why it happened or to engage with a participant who has had a sudden death in the family must demonstrate sensitivity to the participant's situation in the use of appropriate facial expressions, other body language, tone of voice and in the way in which dialogue takes place. Further, as the mood of the conversation changes in interaction with participants in court, facial expressions need to change accordingly. If this happens, then a message is conveyed to participants that the court is genuinely interested in them.

"Blocking" takes place when a listener says things that stop the speaker from continuing to speak or from speaking about his preferred topic. While these tactics can be done with the intent to divert the speaker or terminate the conversation, it is possible to block another person without that intent but with the same effect. For example, it is common to reassure people by saying "You'll be alright" or "Don't worry about it", but if these sentiments are expressed before the speaker has finished saying what he had intended to say, it may have the effect of suggesting that the speaker's feelings are unimportant. Other blocking tactics include: rejecting the speaker's topic; responding to part of what is being said while ignoring other aspects; saying that the listener (or speaker) is not knowledgeable in relation to the topic; shifting the topic; referring the speaker to someone else to talk with about the situation; deferring the communication to a later date; and pre-empting the communication by saying, for example, that there is no time to talk about the situation now.⁶⁹⁹

Courts sometimes use a number of these tactics, but most often with the best of intentions – a busy court has to organise how much time to spend on each case in a day. At times, the interests of some litigants may surpass the interests of others. Judicial officers need to be mindful as to the effect these tactics may have and, if using them, do so in a manner that is sensitive to the needs of the parties. For example, in adjourning a case rather than continuing to listen to a participant, the court could acknowledge the importance of what the participant has to say and advise the participant that the adjournment is to allow the participant to speak fully at a later time.

A topic raised by a defendant may well be something that is better dealt with by a professional other than the judicial officer. However, judicial officers taking a therapeutic or solution-focused approach will, if possible, take a reasonable time to listen the participant – rather than cutting the participant short. Ideally the judicial officer should hear the participant in full, acknowledge what she has said, note the participant's concerns and then ask the participant whether she has considered raising the matter with another professional.

Judicial officers and lawyers are used to being able to exert some degree of influence as to what is being said and how it is said in a courtroom. The rules concerning the specific order in which parties present their cases and the giving of evidence in response to questioning according to rules of evidence are ways in which the law can to a significant degree control what is being said. Lawyers and

⁶⁹⁹ Hargie and Dickson, above n 659, 191.

judicial officers are used to interrupting witnesses on grounds of relevancy and other grounds of admissibility. However, if lawyers or judicial officers are aiming for a therapeutic form of communication, then they are best advised to refrain from acting upon their professional tendency to interrupt a speaker as far as possible.

Interrupting a speaker can break her line of thought and inhibit the smooth communication of what she is thinking and feeling. For those who do not feel comfortable about communicating about sensitive material in a public forum such as a court, the effect of interrupting can be more pronounced. Sometimes a judicial officer requires clarification or further information as to what has been said by a participant in a problem-solving court program. It may be best to make a note of any questions and raise them once the person has finished speaking rather than interrupting him. Interruption may, however, be needed in some situations. If a participant engages in a protracted monologue then the judicial officer will need to intervene. The solution-focused judicial approach occurs in the context of a dynamic and empathetic interaction between judicial officer and participant. A courteous way of interrupting and getting the dialogue back on track would be to say to the participant: "You've made several points. I want to make sure that I've understood them...".⁷⁰⁰

Active Listening

Active listening means attending to all of what a person is communicating – factual and affective content – and showing to the speaker that one is listening.

Active listening can help a judicial officer to develop a rapport with participants and promote therapeutic communication.

The communication literature distinguishes between passive and active listening. In passive listening, the hearing, understanding, evaluating and assimilating of what is being said is done without any outer sign to show it is taking place. In active listening, the listener provides verbal and non-verbal clues that the listener is attentive, that the information being conveyed is being received, understood and processed,

that the listener is alert to the feelings that are being conveyed by the speaker and that the listener feels and demonstrates empathy for the speaker. It means laying "aside your own views and values in order to enter another's world without prejudice".⁷⁰¹

The purpose of active listening differs from the kind of listening normally undertaken in a conventional courtroom. Rogers and Farson have noted that in a

⁷⁰⁰ Egan, above n 631, 96.

⁷⁰¹ Rogers, above n 14, 143.

traditional court setting:

The lawyer, for example, when questioning a witness, listens for contradictions, irrelevancies, errors and weaknesses...The lawyer usually is not listening in order to help the witness adjust or cooperate or produce.⁷⁰²

Active listening, on the other hand, is employed to help the speaker:

It is called "active" because the learner has a definite responsibility. He does not passively absorb the words which are spoken to him. He actively tries to grasp the facts and feelings in what he hears, and he tries, by his listening to help the speaker work out his own problems.⁷⁰³

Egan has observed that: "[p]eople want more than physical presence in human communication; they want the other person to be present psychologically, socially and emotionally".⁷⁰⁴ That is, simply hearing the words is not enough; speakers want listeners to receive the different dimensions of the message they are seeking to convey.

Active listening by judicial officers and lawyers – particularly in problem-solving court programs – and active listening generally⁷⁰⁵ does not mean that court appearances or contact with clients become grievance sessions. Rather it means enabling participants to feel able to talk about whatever is happening in their lives that is occupying their thoughts – good, bad or neutral.

Rogers and Farson suggest that for effective communication – including active listening – to occur, the atmosphere must be non-threatening, non-moralising, non-critical and non-evaluative.⁷⁰⁶ Only then will people feel comfortable and free to be open in their communication. A court cannot of course ignore its evaluative role, but it need not pursue this role while engaging in therapeutic communication; it can defer the evaluative function until later.

For many defendants, the atmosphere of a court and the position of a judicial officer are threatening.⁷⁰⁷ After all, courts are where sentences involving punishment have been imposed upon them by judicial officers and where they have been subject to moralising, evaluation and criticism in the delivery of prosecution submissions and sentencing remarks that denounce them, their behaviour or a combination of both. Defendants may also have been subject to these forms of communication from family members before attending court. The perceived threat the court poses, its role in evaluating participants and the delivery of criticism within it cannot be entirely avoided even in a therapeutic jurisprudence based problem-solving court program. In whatever court model is adopted, participants generally face adverse consequences – evaluation, criticism and a material penalty such as a prison term – in the event of significant non-compliance with the court program or order. However, steps can be taken to

⁷⁰² C. B. Rogers and R. E. Farson, "Active Listening", in Newman, Danziger and Cohen (eds.), *Communication in Business Today* (Houghton Mifflin, 1987) 589.

⁷⁰³ Ibid.

⁷⁰⁴ Egan, above n 631, 79.

⁷⁰⁵ Rogers and Farson, above n 702, 590.

⁷⁰⁶ Ibid 591.

⁷⁰⁷ V. McNaughton, "Active Listening: Applying Mediation Skills in the Courtroom" (1999) 38 *Judges Journal* 23, 24.

reduce these adverse factors that can inhibit active listening and communication generally.

The attitude of the judicial officer (and court team members) is important:

Until we can demonstrate a spirit which genuinely respects the potential worth of the individual, which considers his sights and trusts his capacity for self-direction, we cannot begin to be effective listeners.⁷⁰⁸

...

As we have noted, showing a genuine interest in the welfare of participants is an important means of validating them as worthwhile citizens – which procedural justice sees to be important in promoting their respect for the court. Showing a genuine interest in a person is a vital aspect of active listening.⁷⁰⁹

The judicial officer also needs to listen for the whole message being conveyed. This will include participants' experiences in life – such as what has led them to come to court or what has happened since their last court appearance – and their thoughts, feelings and behaviour.⁷¹⁰ Participants may also communicate beliefs, values, attitudes and plans for the future.⁷¹¹ Each of these – or a combination of them – may give some valuable insight into their situations.

Listening only for factual content means listening to only part of what is being said. Ignoring affective content deprives one of important evidence as to participants' experiences, how they are progressing and whether there are problems that need to be addressed. It may also lead to a distorted understanding as to what is being said. A participant saying that she attended counselling yesterday in an up-beat tone of voice is different from her saying it in a despondent tone of voice. Thus, taking in the whole message also means being mindful about how the message is conveyed – tone of voice, manner of delivery and body language – such as posture, facial expressions and hand movements.⁷¹²

Further, the judicial officer should listen for strengths, weaknesses and problems. This becomes the basis for judicial engagement with participants. Evidence of strengths gives the judicial officer the chance to praise the participant for achievement while evidence of less serious problems means that the judicial officer will engage in a problem-solving exercise with participants. Serious problems may require a more drastic response. Even the participants' problems may evince their strengths, which should be acknowledged by judicial officers. An example is where a participant relapses and uses amphetamines on one discrete occasion instead of his previous binge usage.

The judicial officer should be aware of any internal filters through which the participant's message is being interpreted.⁷¹³ Our perceptions, beliefs, thoughts and feelings (cognitions) can affect how we interpret information received from the outside. Our cognitions are influenced by past experiences. An emotionally

⁷⁰⁸ Rogers and Farson, above n 702, 590.

⁷⁰⁹ Ibid 589.

⁷¹⁰ Egan, above n 631, 81.

⁷¹¹ Ibid.

⁷¹² Rogers and Farson, above n 702, 593.

⁷¹³ Winick, above n 3, 1069-1070.

traumatic experience in the past – such as a family member’s victimisation or involvement with illicit drugs – can affect how we think and feel about such matters today. This internal response is natural and is not to be denied, but an awareness of it can help prevent distorting what a participant is trying to convey.⁷¹⁴

Active listening also means outwardly demonstrating that the listener is fully attending to the speaker. We considered some of the ways in which we can demonstrate listening earlier in this chapter. Active listening also means attending to the speaker’s pace and manner of communication. Some people speak faster than others. Nerves may make some people speak faster or in a halting manner. Some people may need silence during the conversation to collect themselves, reflect on what they have said, remember experiences, gain greater clarity about their thoughts and feelings and consider what they are to say next.⁷¹⁵ Therapeutic listening requires being sensitive to the speaker’s needs for such silence. There is, of course, a distinction between silence for the purposes of reflection and silence because the speaker has finished speaking. If the judicial officer has any doubt about whether the participant has paused to reflect or has said all he wishes to say, the judicial officer could ask the participant whether he wishes to say anything further and/or to have more time. A busy list may require the judicial officer to stand a matter down to allow a participant further time to consider her situation and to address the court again at a later time. That is better than hurrying participants to say what they want to say. After all, part of the therapeutic influence of judging in a problem-solving court is the judicial officer taking time to listen to participants.

Conclusion

Listening is an important skill in solution-focused judging and in judging generally. This chapter has described a number of techniques that judicial officers can use to promote a more empathetic, therapeutic interaction with participants in problem-solving court programs. In applying these skills, it is important to note that communication and empathetic listening is not conducted according to a fixed formula. Interpersonal communication varies according to the circumstances and the personalities, backgrounds and needs of the people involved. People may well vary in what they value in empathetic communication.⁷¹⁶ It is therefore important that judicial officers be sensitive to the individual situation of the participant and what he is saying and to the uniqueness of the interaction between the bench and each participant.

⁷¹⁴ Ibid.

⁷¹⁵ Wolvin and Coakley, above n 668, 272.

⁷¹⁶ S. Myers, "Empathetic Listening: Reports on the Experience of Being Heard" (2000) 40 *Journal of Humanistic Psychology* 148.

Chapter 7: Processes and Strategies

Michael King

Knowledge of the processes involved in deliberate behavioural change and of solution-focused judicial processes generally can assist judicial officers to formulate appropriate judging strategies according to the needs of each case.

As well as sound interaction and listening skills, judicial officers can use strategies described in this chapter to promote participant compliance with program conditions, engage participants in problem-solving and support participants through the change process. These strategies include having high expectations; supporting self-efficacy, goal and strategy setting; “behavioural contracts”; persuasion techniques; and motivational interviewing processes.

In taking a solution-focused approach, judicial officers should, as far as possible, avoid a confrontational, paternalistic or coercive approach.

The first part of this chapter explores processes essential to the work of problem-solving courts: behavioural change and fundamental aspects of judging in a problem-solving court program (see Processes). The second part describes specific solution-focused judging strategies (see Strategies for Judging in a Problem-Solving Court Program). Solution-focused judging is not formulaic. There are some basic principles – such as voice, validation and respect and promoting self-determination that underlie many of the strategies – but the use of any particular strategy depends on the circumstances of the case. Thus, the latter part should be considered as a repertoire of strategies for solution-focused judicial officers to draw from to assist them in their work.

Processes

The Process of Behavioural Change

Behavioural change is natural. It occurs with or without assistance.

Deliberate behavioural change requires more than the exercise of will – it involves cognitive, affective, decision-making and behavioural processes and environmental support.

The Transtheoretical Stages of Change Model (TTM) is a useful framework for understanding change processes, stages and promotion.

With knowledge of the TTM and a particular participant's stage in the change process, judicial officers can take a more effective approach to judging in relation to the participant.

Both mainstream courts and problem-solving courts are concerned with promoting behavioural change. Mainstream courts sentencing in criminal cases aim, amongst other things, to promote desistance from criminal conduct. Courts exercising civil or family law jurisdiction endeavour to promote behavioural change through the use of injunctions and penalties. In some civil cases, exemplary damages can be used to punish a defendant for his misconduct and to discourage the defendant from engaging in similar conduct in the future.

Problem-solving courts and judicial officers taking a solution-focused approach in general lists focus on promoting behavioural change by addressing underlying issues. The law does not have a monopoly in terms of its interest in behavioural change in these circumstances. It can learn from the behavioural sciences. This part gives a basic overview of principles associated with behavioural change from a behavioural science perspective. It cannot hope to be comprehensive. It relies primarily on the transtheoretical stages of change model that is used widely in understanding and promoting change, primarily in the area of substance abuse.

Behavioural change is a natural phenomenon. In the area of substance abuse there is evidence that it happens without any formal intervention in many cases. This is commonly known as "spontaneous remission".⁷¹⁷ It is important, therefore, to acknowledge that the work of treatment programs and problem-solving courts is "facilitating what is a natural process of change".⁷¹⁸ It is also important to note that behavioural change is a more sophisticated concept than the simplistic view that has been sometimes offered in courts that it is just a

⁷¹⁷ L. C. Sobell, T. P. Ellingstad and M. B. Sobell, "Natural Recovery from Alcohol and Drug Problems: Methodological Review of the Research with Suggestions for Future Directions" (2000) 95 *Addiction* 749.

⁷¹⁸ Miller and Rollnick, above n 12, 4.

matter of an offender exercising his willpower to stop the undesirable behaviour.⁷¹⁹

A life crisis is often the spur for behavioural change. It can often lead to people reflecting on the causes of the crisis and on what needs to be done to resolve it. That can often lead to action and a decision to engage in behavioural change. For some, being charged with a criminal offence and having to attend court is such a crisis. Often offenders appearing in court will have already initiated change since being charged, such as those who have commenced substance abuse counselling. Courts can play a significant role in facilitating the positive life change needed for the comprehensive resolution of legal problems including addressing the personal or other problems underlying them.

The Transtheoretical Stages of Change Model (TTM) endeavours to provide a comprehensive description of the stages, processes and environment in which deliberate change takes place – with or without therapy.⁷²⁰ It describes the thought processes that lead to the decision to change and the action processes needed to begin, maintain and complete the change process. The origin of the TTM was:

a comparative analysis of leading theories of psychotherapy and behaviour change. The goal was a systematic integration of a field that had fragmented into more than 300 theories of psychotherapy.⁷²¹

The stages of change identified by the TTM are:

1. **Pre-contemplation.** Here the person does not think there is a problem or if he does, he has no intention of doing anything about it.
2. **Contemplation.** The person recognises the existence of a problem and is considering whether to take action to address it.
3. **Preparation.** The person has decided to take action to address the problem and is planning to initiate action in the near future.
4. **Action.** The person is engaging in action to address the problem – such as substance abuse counselling, exercise programs etc.
5. **Maintenance.** The person has progressed in addressing the problem and is taking action to prevent and/or recover from relapse.⁷²²

According to the TTM, behavioural change does not necessarily involve a linear progression from one stage to the next – although it can do so. Prochaska,

⁷¹⁹ King, above n 66, 99.

⁷²⁰ Prochaska, above n 296; J. O. Prochaska and C. C. DiClemente, "Transtheoretical Therapy: Toward a More Integrative Model of Change" (1982) 19 *Psychotherapy: Theory, Research and Practice* 276; J. O. Prochaska and C. C. DiClemente, "Stages and Processes of Self-Change of Smoking: Toward an Integrative Model of Change" (1983) 51 *Journal of Consulting and Clinical Psychology* 390; J. O. Prochaska, W. F. Velicer, J. R. Rossi, M. G. Goldstein, B. H. Marcus, W. Radkowski, C. Fiore, L. L. Harlow, C. A. Redding, D. Rosenbloom and S. R. Rossi, "Stages of Change and Decisional Balance for 12 Problem Behaviours" (1994) 13 *Health Psychology* 39.

⁷²¹ J. O. Prochaska and W. F. Velicer, "The Transtheoretical Model of Health Behaviour Change" (1997) 12 *American Journal of Health Promotion* 38.

⁷²² Prochaska, DiClemente and Norcross, above n 296.

DiClemente and Norcross describe the behavioural change process as a spiral, with people circling between the stages.⁷²³

Relapse is regarded as a natural part of the process.⁷²⁴ It is not regarded as failure. As DiClemente has observed:

No matter how it is defined, relapse is an integral part of human intentional behavioural change. Human behaviour change requires a learning paradigm, and we do not learn ordinarily without trial and error...most learning is like learning to ride a bicycle: often falling over in our first trials, then gaining small successes and some confidence about our abilities.⁷²⁵

Relapse can occur for a number of reasons – for example, the person may not have been able to deal with a strong craving or may have had doubts about continuing on the path of change.⁷²⁶ Drug courts commonly recognise relapse as a natural part of the change process. For example, a study of Scottish drug courts suggested that a critical time where relapse is more likely occur for participants in those courts is between 4-6 months into the program.⁷²⁷

If a person relapses in the action or maintenance stage, it can mean going back to the pre-contemplation, contemplation or preparation stages. However, it does not mean that all gains will be lost. Typically, having gone through the stages before, people will have gained knowledge and strategies to help them address their situation in future attempts.

People may also appear to be resistant to change and to acknowledging their situation.⁷²⁸ It can be tempting to label such people as “being in denial”. Walters and colleagues have suggested that one possible explanation for this reluctance is that people facing significant change are in cognitive conflict between wanting to do something and knowing that they should not do it. In such a state when “subject to opposing motives of great strength it is difficult to know one’s own mind, let alone behave with any consistency”.⁷²⁹ This is an example of what Festinger called “cognitive dissonance”.⁷³⁰

In addition to the stages of change in the TTM model, there are also 10 processes of change. The first five processes of change are experiential and the remainder are behavioural. The following list sets out the processes of change, each with an

⁷²³ Ibid.

⁷²⁴ C. C. DiClemente, *Addiction and Change* (The Guilford Press, 2003), 181-185.

⁷²⁵ Ibid 182.

⁷²⁶ Ibid.

⁷²⁷ S. Eley, K. Gallop, G. McIvor, K. Morgan and R. Yates, *Drug Treatment and Testing Orders: Evaluation of the Scottish Pilots* (Scottish Executive Central Research Unit, 2002), at <<http://www.scotland.gov.uk/Resource/Doc/46997/0030591.pdf>> viewed 10 May 2009, [6.64].

⁷²⁸ S. Walters, F. Rotgers, B. Saunders, C. Wilkinson and T. Towers, "Theoretical Perspectives on Motivation and Addictive Behaviour", in Rotgers, Morgenstern and Walters (eds.), *Treating Substance Abuse: Theory and Technique* (The Guilford Press, 2nd edn, 2003).

⁷²⁹ Ibid 291, quoting Jim Orford.

⁷³⁰ L. Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press, 1957).

example:⁷³¹

1. **Consciousness raising.**
The individual is given and retains awareness of information of how to address the problematic behaviour.
2. **Dramatic Relief** (emotional response).
The individual reacts emotionally to warnings about substance abuse.
3. **Environmental Re-evaluation.**
The individual considers the effect of his behaviour on other people.
4. **Social Liberation.**
The individual finds social support for behavioural change.
5. **Self Revaluation.**
The individual feels disappointed in continuing to use drugs.
6. **Stimulus Control.**
The individual removes smoking implements from her house.
7. **Helping Relationship.**
The individual's partner listens when he wishes to speak about his drug use.
8. **Counter-Conditioning.**
When the individual feels stressed, she meditates instead of using drugs.
9. **Reinforcement Management.**
The individual gives herself a treat if she goes for two weeks without using.
10. **Self Liberation.**
The individual has committed to not use drugs.

Different processes of change are more important at each stage of change. For pre-contemplation and contemplation, consciousness raising, dramatic relief and environmental revaluation are emphasised. Moving between contemplation and preparation involves self-revaluation. For progression between preparation and action, self-liberation – belief in one's autonomy to change – is vital. In addition, in the action stage people engage in behavioural processes that prevent relapse, such as counter-conditioning and stimulus control. Further, strategies commenced in the action stage continue in the maintenance stage. There is an:

assessment of the conditions under which a person was likely to relapse and development of alternative responses for coping with such conditions without resorting to self-defeating defences and pathological responses.⁷³²

The person senses that they are growing into the person he wishes to be.⁷³³

⁷³¹ Prochaska, DiClemente and Norcross, above n 296; DiClemente, above n 724, 32-36.

⁷³² Prochaska, DiClemente and Norcross, above n 296, 1109.

⁷³³ Ibid.

The TTM has a series of measures designed to detect an individual's movement from one stage to another. They include decisional balance – the person's weighing of the pros and cons of change; self-efficacy/temptation – the person's belief in her ability to effect change or her ability to deal with temptation; and the target behaviour – engagement in the desired behaviour, such as living a drug-free lifestyle.⁷³⁴ Measures in relation to temptation are cravings, emotional distress and positive social situations.

People come into a problem-solving court at different stages of change. Most commonly they will be at the contemplation, preparation or action stages. Less commonly they will be at the maintenance stage, in that the intense supervision of a problem-solving court program is not normally for individuals who have addressed their addictions. If participants are at the pre-contemplation stage then they may not be ready for a solution-focused approach. More work may need to be done with these participants – such as using the strategies of motivational interviewing – before a problem-solving court program can be used.

Strategies can be used to assist participants to move from one stage of behavioural change to another. Techniques of motivational interviewing, discussed below, are often used in this context.⁷³⁵ It is important to note that strategies that are useful at one stage of change may be of little use at another. For example, pre-contemplators and contemplators are not ready to consider action steps. Those in the maintenance stage do not need to consider the pros and cons of change because they already have a strong commitment to it. If, however, they relapse and return to the stage of pre-contemplation or contemplation, then strategies that are useful at those stages will again become relevant.

The following quote provides a useful summary of key aspects of deliberate behavioural change and, it is suggested, is applicable to problem-solving courts:

1. An individual's desire to achieve an outcome, his or her confidence that it can be achieved, and the perception that his or her new behaviour is freely chosen seem to be the optimal conditions for behaviour change.
2. Often the things that we assume would be motivating to individuals simply aren't. Thus, motivation is a process of finding out what things are reinforcing to a particular individual, as well as what plan will be acceptable for attaining them.
3. Not all moments are created equal. There seem to be "teachable" windows where people are more receptive to feedback from their environment and more interested in finding out new behaviours.
4. In addictions treatment, the qualities of the interaction between therapist and client can have a large impact on client motivation. Radical change sometimes happens as a result of relatively modest efforts.⁷³⁶

⁷³⁴ Prochaska, DiClemente and Norcross, above n 296; Prochaska and Velicer, above n 721.

⁷³⁵ For a description of how motivational interviewing techniques can be used to promote progress through the stages of change, see: A. Birgden, "Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counselling" (2002) 38 *Criminal Law Bulletin* 225.

⁷³⁶ Walters et al, above n 728, 293.

The Stages of Solution-Focused Judging

Solution-focused judging involves developing a rapport with participants until they finish participation in the program.

The judicial officer should use skills that promote participant trust in the judicial officer, including communication and listening skills and skills that promote participant self-determination, problem solving and self-efficacy.

Judging in a solution-focused manner involves a more personal approach. The aim is to develop a rapport between judicial officers and participants whereby the judicial officer can use a range of therapeutic judging strategies to support and encourage participants through the change process. The judicial officer takes an interest in participants – their thoughts, feelings, dreams, goals; what is happening in their lives; and their strengths and weaknesses. In interacting with participants, the judicial officer is mindful of avoiding language and forms of interaction that demean or depersonalise the participant. The judicial officer avoids using labels – such as “addict” or “offender” – stereotypes, and processes that demean and depersonalise participants. The judicial officer addresses participants in the same respectful way as she would other people in the community – such as “Ms Jones” or “Mr Smith”.

The relationship between judicial officer and participant does not develop overnight, neither does it continue indefinitely – participants graduate or are terminated from the program. One can usefully analyse the relationship between judicial officer and participant in terms of three stages: introduction, development and conclusion.⁷³⁷ Each of these stages has a different purpose, but will often use similar processes – such as promoting self-determination, voice validation and respect, and use of strategies from motivational interviewing and other solution-focused judging strategies. The stages are more prominent and extensive in a problem-solving court program where the participant is subject to regular judicial monitoring over a long period. The stages will be present in a far more attenuated form in a program of short duration and/or with limited judicial monitoring.

The first stage of the relationship between judicial officer and participant involves the judicial officer taking steps to develop a rapport with the participant. In approaching this task, the judicial officer should bear in mind that participants who have not been in a problem-solving court before may well have a deep-seated distrust of courts and other legal authorities due to past negative experiences with them. Participants may be anxious, fearful and uncertain as to what to expect – even if they have received information concerning the process before their court appearances. Participants may also have emotionally sensitive

⁷³⁷ King, above n 3.

issues based on past traumas that might influence the development of relationships. As King has noted:

It is unrealistic to expect that participants will open up from the start in a public forum, such as a court, to a judicial officer who is a complete stranger – although some might do so. It is also unrealistic to expect that participants will trust the process and the court team right from the start. Trust must be earned – as acknowledged in transformational leadership theory.⁷³⁸

Communication in therapeutic judging cannot be forced. It should be applied patiently and sensitively according to the participant's needs. A good way to begin a dialogue with a participant on a first appearance in a problem-solving court program or where such a program is being considered, is to ask general questions about the participant's problems – why they have arisen, what the participant thinks she needs to do to address them and what she would like to do while in the program. In addition, the judicial officer could identify the steps already taken by the participant to address the problem and, where appropriate, praise the participant for them.

In taking this approach, the judicial officer should use basic techniques of active listening and communication discussed in the chapters on these topics in this bench book (see Chapter 5 and Chapter 6). For example, the judicial officer showing a participant that he is listening and understands what the participant has to say, and acknowledging the participant's feelings concerning her situation. Measures such as these are important for building the participant's trust in the judicial officer and in demonstrating an ethic of care. Given the program may be foreign to the participant, it is natural that her answers may be short or devoid of substantial content to begin with, but that will typically change as the participant's trust in the judicial officer grows. With the growth in trust will come the alleviation of concerns about the court and its motives and a greater willingness to share personal information⁷³⁹ – even information that would be seen in mainstream court processes as against one's interest, such as an admission of using illicit drugs – and to seek the judicial officer's assistance. This openness of communication between judicial officer and participant gives participants the opportunity to work through problems with the support of the court team.

The judicial officer could use follow-up questions to seek further information where needed. However, the judicial officer needs to be sensitive concerning whether the participant is ready to speak further on the topic. In some cases, it may be better to leave further questioning to another day.

The judicial officer can use the different strategies described in the next section of this chapter to promote the participant's respect for and trust in the judicial officer and the participant's compliance with the program (see

Strategies for Judging in a Problem-Solving Court Program). Using strategies that promote the participant's self-determination and self-efficacy and that demonstrate the court's positive expectations that the participant will succeed

⁷³⁸ Ibid.

⁷³⁹ Ibid. This has also been the experience in Scotland: McIvor, above 129, 38.

are important for this process. Strategies such as goal setting provide the judicial officer with insight into the participant and the basis for ongoing expression of interest in what is happening in the participant's life.

On regular court appearances for the purposes of review, the judicial officer can demonstrate an interest in the participant by asking about current personal issues of concern – such as how the participant likes his new job, how a particular family celebration went or how renewed contact with his children is progressing. Notes made by the judicial officer concerning information provided on earlier court appearances – goals and strategies, court reports and submissions by counsel – are good sources of information to use as the basis of asking questions of participants. The style of questioning is dealt with in greater depth in the chapter on speech and judicial interaction (see Chapter 5). As well as demonstrating interest in participants at court appearances, the judicial officer will also engage in problem-solving with them where problems have arisen and praise participants and support their self-efficacy where there have been steps of progress.

The final stage of the judicial relationship with participants is completion of the program. The participant graduates, any outstanding sentencing is dealt with and the participant completes his interaction with the court. Many problem-solving courts have graduation ceremonies either in court or as a separate event. Graduation ceremonies celebrate the significant achievement of participants in completing the court program and addressing their offending related problems. Graduation ceremonies are a further method of supporting participants' self-efficacy and of inspiring the graduating participants and other participants to higher levels of achievement. Judicial officers, community corrections officers, the prosecutor and defence counsel often all speak on such occasions, acknowledging the effort made by participants and their achievements. If possible and appropriate according to the statutory scheme, the judicial officer should also promote a smooth supportive transition for the participant from the court program to the community by ensuring that appropriate support structures are put in place.

A participant's time in the program and rapport with the judicial officer can also end through being terminated from the program for significant breach of program conditions. Termination is dealt with in the next section.

Dealing with Problems

Problems should be seen as a challenge along the way to permanent behavioural change.

The approach to addressing participants' problems should, as far as possible, not be coercive, but rather inclusive, creative and directed at finding solutions.

Where the problem is so serious that termination is required, the court should, in giving reasons, also refer to participants' progress and support their self-efficacy in building on their progress to resolve their problems.

Judicial officers should display active listening and empathy when interacting with participants while promoting the development of solutions.

Few participants proceed through problem-solving court programs without encountering problems. Difficulties may crop up in many situations – such as a family crisis, job loss, inability to apply protective strategies, or a regression to earlier stages of change. In considering problems as they arise, it is important for judicial officers to be mindful that such issues are a natural part of the change process. Each person going through the stages of change has his own unique circumstances and path to tread. No two situations are exactly the same.

Conventional courts commonly take an overtly coercive approach to non-compliance with a court – such as ordering defendants to participate in programs or remanding them in custody – or by applying significant pressure on them in court. Some problem-solving courts also take this approach. However, as has been noted earlier in this bench book, coercive and paternalistic strategies may produce the opposite effect to that intended – promoting increased resistance to change. As noted in our discussion of motivational interviewing below, a confrontational approach may promote increased resistance and even contribute to an escalation of the participant's problem. A more creative approach to problem-solving is needed.⁷⁴⁰

Drawing on the strategies described later in this chapter and on the communication techniques in the listening and speaking with participants chapters (Chapter 5 and Chapter 6), it is suggested that the following are general strategies judicial officers should take in dealing with problems as they arise:

- Where the issue of a problem with a participant's performance is raised in court, the judicial officer should ask the participant, in a non-confrontational way, what happened and why.

⁷⁴⁰ King and Batagol, above n 3.

- At each stage leading up to a decision being made, the judicial officer should listen to the participant and, in a non-judgmental, non-critical way, and without blaming the participant, demonstrate an understanding of the participant's situation and feelings about it (i.e., express empathy).
- The judicial officer should ask the participant what should be done to address the problem.
- If the matter is so serious as to warrant possible termination from the program, the judicial officer should also hear from prosecution and defence counsel and from any officer assigned to support the participant through the program.
- The judicial officer could ask the participant if there is anything more the participant wishes to say.
- If a decision is made to terminate the participant from the program, it is important that the judicial officer, in giving reasons for termination, acknowledges what the participant has said and why the judicial officer is not following any alternative course of action proposed by the participant.
 - So as to promote the participant's continued engagement in positive behavioural change, the judicial officer should acknowledge any progress the participant has made, any goals achieved and any evidence of self-efficacy.
 - The judicial officer could also present an expectation that in the future the participant will build on progress made and that termination need only be a temporary interruption in the participant's progress.
 - Where possible, if the judicial officer is sentencing the participant upon termination, the judicial officer should consider reducing the length of any prison term imposed to take into account any progress the participant made while on the program.
- Where termination is not appropriate, the judicial officer should engage the participant and the team in a collaborative problem-solving exercise and, where appropriate, have the participant formulate a relapse prevention plan. The judicial officer could ask the participant to formulate the sanctions and rewards to be attached to the plan.
 - If the plan is to be implemented, the judicial officer should encourage the participant and support the participant's self-efficacy in implementing the plan.
- In addressing the situation of a participant's problematic performance, the judicial officer should be mindful of where the participant is at in terms of the stages of change and the range of strategies available in solution-focused judging – including increasing the frequency of review

hearings in the short term following the breach in order to monitor and support the implementation of any relapse prevention strategy.

- If sanctions must be imposed for breach of program conditions, then they should be imposed after the empathetic listening and problem-solving process has taken place.⁷⁴¹ The emphasis should be on facilitating participants to gain greater insight into their problems and the formulation of solutions.

It is also important to be aware that participants may well be despondent about relapsing or breaching program conditions. They may consider themselves to be failures. These negative feelings may inhibit a participant's self-efficacy, particularly relating to her ability to take remedial action and to continue in and to complete the court program. King and Batagol have suggested that a technique used in Solution Based Brief Therapy may be useful in addressing this problem:

Use of the scaling technique – if 0 is where you were when you came to court for these offences and 10 is having achieved your goal of being violence-free, where are you today? – can show to the participant that he has made progress despite his problems and help address feelings of being a failure.⁷⁴²

The judicial officer can also refer to the participants' past successes as evidence that they can work through their problems.

Strategies for Judging in a Problem-Solving Court Program

Having Positive Expectations of Participants

There is evidence that the expectation that those in authority have in relation to those under their jurisdiction affects the latter's' performance.

Low performance levels of repeat offenders may be due in part to the courts' and justice system's low expectations of them.

If a solution-focused judicial officer has high but not unrealistic expectations of participants and uses strategies demonstrating those expectations, it is likely to enhance the participant's performance in the court program.

The expectations that people in authority have of people subject to their authority have a significant effect on the latter's performance. This is recognised in various settings in the community, including in business and in education. Having high expectations is an important component of idealised influence – an

⁷⁴¹ See the discussion of the use of sanctions and judging style in the section on transformational leadership and judging in Chapter 1.

⁷⁴² King and Batagol, above n 3.

aspect of transformational leadership – which aims to promote performance above normal expectation. Research in the fields of education and business has found that positive teacher and manager expectation promotes student and employee performance respectively. For example, Kieran and Gold found that where a teacher was told that students – randomly assigned by researchers – were “intellectual bloomers”, they improved significantly on a measure of intelligence as compared to a control group. This was attributed to the teacher’s enhanced expectation of these students and the way in which that belief affected the teacher’s interaction with the students. No other factor could account for the improvement.⁷⁴³ Thus, it appears that the level of expectation that a person in authority has of others affects the way the former interacts with the latter. Having high expectations may mean more positive interaction and a willingness to do more to promote the development of those under the supervision of the authority figure.

Society and its authority figures – often including authority figures in an offender’s own family – will commonly have had low expectations of offenders coming to court. For routine/repeat offenders, the court may well be a revolving door. Such offenders may have dysfunction in diverse areas of their lives, including substance abuse, unemployment, relationship issues, mental health issues and housing problems. As a result, such individuals are likely to have a low self-concept, low self-efficacy and limited expectations concerning their future, which the judicial process and other aspects of the justice system may have helped to perpetuate. Labelling theory has emphasised the effect that society and its institutions can have in reinforcing criminal conduct through the use of negative labels concerning people who have committed criminal acts.⁷⁴⁴

Having high but not unrealistic expectations of participants should be an important part of the solution-focused judicial officer’s mindset and approach to judging.⁷⁴⁵ King has given an example of how a judicial officer can take this approach when accepting a participant into a problem-solving court program:

Hence, when a judicial officer accepts a person into the court program he or she could confidently express an expectation of the person completing the program. So that it does not appear to be shallow, the court should refer to supporting evidence, such as the person’s attitudinal change, past history of desistance, family or social supports, engagement in treatment and any other positive factors.⁷⁴⁶

Having high expectations of participants also means using other strategies that display the judicial officer’s confidence in each participant’s ability – such as actively listening to the participant, including the participant in decision making (such as using the goals and strategies exercise, discussed below), collaborative

⁷⁴³ N. M. Kieran and M. A. Gold, "Pygmalion in Work Organisations: A Meta-Analysis" (2000) 21 *Journal of Organisational Behaviour* 913. See also: D. B. McNatt, "Ancient Pygmalion Joins Contemporary Management: A Meta-Analysis of the Result" (2000) 85 *Journal of Applied Psychology* 31.

⁷⁴⁴ J. R. Lilly, F. T. Cullen and R. A. Ball, *Criminological Theory: Context and Consequences* (Sage, 1995), ch 5; S. Maruna, T. P. LeBel, N. Mitchell and M. Naples, "Pygmalion in the Reintegration Process: Desistance from Crime through the Looking Glass" (2004) 10 *Psychology, Crime and Law* 271.

⁷⁴⁵ King, above n 3.

⁷⁴⁶ *Ibid* 163.

problem-solving, promoting self-efficacy and using motivational interviewing rather than coercive methods. The remaining sections of this chapter – and indeed the listening and communication chapters of the bench book (Chapter 5 and Chapter 6) – are effectively strategies for the judicial officer to use to help participants live up to the high expectations that the judicial officer has that participants will be able to fulfil their goals.

The communication of expectations and the use of strategies should be realistic in the sense that they are suitable to the personal situation of the participant at the time. What may be appropriate for a participant who has moved through a difficult situation and is now progressing smoothly, may be inappropriate for a person who has experienced a sudden traumatic event. To communicate high expectations in the latter situation may be insensitive and burdensome for the participant.

Supporting Self-Efficacy

Self-efficacy is the belief in one's ability to function well.

Self-efficacy is important in offender rehabilitation and other areas of life.

As far as possible, solution-focused judicial officers should use strategies that promote participant self-efficacy.

Self-efficacy is the belief in one's ability to function competently.⁷⁴⁷ According to Bandura, "efficacy involves a generative capability in which cognitive, social and behavioral subskills must be organized into integrated courses of action to serve innumerable purposes".⁷⁴⁸ While self-concept relates to the overall image that one has of oneself and self-esteem is the worth one attributes to oneself, self-efficacy relates to belief in one's ability to perform.⁷⁴⁹

There is a large body of research that has found that across a broad range of work environments, self-efficacy is significantly related to motivation and performance levels.⁷⁵⁰ This is not surprising in that unless one has "the core belief that one has the power to produce the desired effects...one has little incentive to act or to persevere in the face of difficulties".⁷⁵¹ Further, self-efficacy is linked to the ability to use opportunities available in the environment – those with high self-efficacy perceive more opportunities and less of threats in the environment whereas those with low self-efficacy see more threats and fewer opportunities.⁷⁵²

⁷⁴⁷ A. Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* (Prentice Hall, 1986).

⁷⁴⁸ Ibid 391.

⁷⁴⁹ Ibid 409-410.

⁷⁵⁰ A. Bandura and E. A. Locke, "Negative Self-Efficacy and Goal Effects Revisited" (2003) 88 *Journal of Applied Psychology* 87; A. D. Stajkovic and F. Luthans, "Self-Efficacy and Work-Related Performance: A Meta-Analysis" (1998) 124 *Psychological Bulletin* 240.

⁷⁵¹ Ibid.

⁷⁵² N. Krueger and P. R. Dickson, "How Believing in Ourselves Increases Risk Taking: Perceived Self-Efficacy and Opportunity Recognition" (1994) 25 *Decision Sciences* 385.

People with high self-efficacy perceive challenges as an incentive to action and greater achievement and set stimulating challenges for themselves.⁷⁵³ They visualise possible success situations to guide their actions. They approach their tasks with serenity.⁷⁵⁴ However, those who have doubts about their efficacy undermine performances by dwelling on things that can go wrong.⁷⁵⁵ They may experience stress, anxiety, depression and a more limited approach to problem-solving.⁷⁵⁶ Those with high self-efficacy are likely to persist in the face of challenges; those with low self-efficacy are likely to give up.⁷⁵⁷

Self-efficacy is shaped by a number of factors: personal experience, modelling, social persuasion and emotional and physiological states.⁷⁵⁸ As to personal experience, repeated failure at a task decreases self-efficacy and the converse is true. Modelling – the teaching and example set by others – can increase a person’s self-efficacy. Social persuasions – positive or negative – can shape self-efficacy. In addition, the physical and emotional experience a person has while thinking about undertaking a task can affect his beliefs concerning self-efficacy. Thus, fear and negative thoughts can lower self-efficacy.⁷⁵⁹

Self-efficacy is a critical factor in offender rehabilitation. For many offenders coming into the justice system, their personal experiences have promoted low self-efficacy – such as beliefs that they are unable to live without resort to substance use. Further, the justice system has helped to reinforce their beliefs that they are not capable of overcoming their problems or of leading constructive lives in their community. Repeatedly coming back to court for offending behaviour in itself can reinforce low self-efficacy of offenders. Judicial officers have at times contributed to this reinforcement by making remarks from the bench to the effect that particular offenders are incorrigible or even failures as human beings.⁷⁶⁰

In taking a solution-focused approach, judicial officers should promote participant self-efficacy. In order to satisfactorily complete the court program, participants need to have the belief that they have the ability to do so. In addition, ideally during the program participants will have acquired self-efficacy in relation to their ability to live a healthy, constructive and law-abiding life and to have the skills to deal with life problems effectively after graduation from the program. After all, the court would not want a situation where participants’ efficacy and perception of efficacy is dependent on the support of the court and its programs.

The processes that can affect self-efficacy discussed above provide guidance as to how a court can help promote participants’ self-efficacy. The court can help participants create a situation where they experience mastery of particular tasks

⁷⁵³ Bandura, above n 258.

⁷⁵⁴ F. Pajares, *Overview of Social Cognitive Theory and of Self-Efficacy* (2002), at <<http://www.emory.edu/EDUCATION/mfp/eff.html>> viewed 10 May 2009.

⁷⁵⁵ Ibid.

⁷⁵⁶ Pajares, above n 754.

⁷⁵⁷ Ibid.

⁷⁵⁸ Bandura, above n 258; Pajares, above n 754.

⁷⁵⁹ Ibid.

⁷⁶⁰ See, for example: *Were v Police* [2003] SASC 116.

and thus progressively strengthen their belief in their ability to perform well on specific tasks and generally. The goal setting exercise described below can be used for this purpose. Participants set goals they wish to achieve and by achieving them, support the development of their self-efficacy. Small steps along the way – such as going between court appearances drug free, attending all court appointments, completing a course, re-establishing contact with children – show increasing mastery of particular tasks and can help to promote self-efficacy.

The judicial officer taking a solution-focused approach can promote participants' self-efficacy by engaging in persuasion. Simply telling a participant that he can do it is not enough. Judicial officers base what they say on evidence – and participants, the legal profession and the public expect them to do so. Participants dwelling on their own shortcomings may doubt the validity of a judicial officer saying simply “you can do it”. It is suggested that there will almost always be evidence from participants' backgrounds and present situations that demonstrate an ability to handle problems and to do well in their lives. Participants do not generally offend all the time. There are times that they are able to deal with problematic situations effectively and those when they are not. The following are possible sources of evidence to support a participant's self-efficacy in addressing problems and leading a constructive life:

- Many offenders will take steps to address their problem between arrest and their first appearance in court.
- Presentence, psychological and other reports for the court often give examples where a person has been able to deal with a challenge positively.
- Submissions made by counsel can often provide evidence of self-efficacy.
- The achievement of goals following the goals and strategies exercise discussed below.
- Earlier periods on the court program – before the present problem arose – where the participant was doing well.

Referring to factors such as these can persuade participants to continue in the program and thereby enhance their self-efficacy. In addition to matters personal to the participant, the court can also refer participants to the fact that the court program is about people, in similar situations to them, working through their own problems and moving on with their lives. Having participants in court seeing how other participants deal with their problems and progress can promote increased awareness that the court does provide a supportive environment for participants to meet challenges and to grow as individuals.

Goal Setting

Goal setting promotes performance in diverse areas of life.

Judicial officers can use participant goal setting to promote participant motivation, self-efficacy and performance.

Goal setting is an important technique to use in problem-solving programs by reason of its potential to promote greater compliance with program conditions.⁷⁶¹ It is used extensively beyond the context of problem-solving courts – in health, business, and government settings – as it has been found to promote performance,

including productivity.⁷⁶² Of importance to the work of problem-solving courts is the finding that urging people to do their best has been found to be less effective in promoting high performance than setting specific, difficult goals.⁷⁶³ Thus, judicial officers need to do more than simply exhort participants to stay out of trouble if their actions are to be effective in promoting rehabilitation.

Goals are intimately related to performance through four mechanisms:⁷⁶⁴

1. They focus attention and effort on activities directed to achieving the goal and away from irrelevant activities.
2. They are energising – the higher the goal, the more energy put in to try to achieve it.
3. They promote persistence.
4. An indirect effect on performance comes from goals “leading to the arousal, discovery and/or use of task-relevant knowledge and strategies”.⁷⁶⁵

Arguably each of these mechanisms is important for success in a problem-solving court program.

In a problem-solving court, participants can be asked to set goals that they would like to achieve during their time in the court program. They also can set longer-term goals if they wish to commence work on them while on the program, with a view to completing them after graduating from the program. While some goals will specifically relate to the resolution of problems that have caused them to come before a court – such as substance abuse and family violence – others may concern the resolution of related issues. For example, addressing substance abuse may require a participant to deal with unresolved trauma from the past through participation in an appropriate counselling program. Participants can also be asked to set broader goals relating to their ability to lead constructive, happy and law-abiding lives in the community. These goals generally relate to building life skills, undergoing education and training programs, securing employment, finding proper accommodation, building social networks, restoring

⁷⁶¹ Winick, above n 3, 1085.

⁷⁶² E. A. Locke and G. P. Latham, "Building a Practically Useful Theory of Goal Setting and Task Motivation: A 35-Year Odyssey" (2002) 57 *American Psychologist* 705.

⁷⁶³ Ibid 706.

⁷⁶⁴ Ibid 706-707.

⁷⁶⁵ Ibid 707.

relationships with children and other family members and addressing health issues.

One way of helping participants to envision goals is to use a technique from solution-focused therapy.⁷⁶⁶ A judicial officer (or lawyer or community corrections officer) could ask participants to describe what is happening in their lives if tomorrow or six months in the future the problem has been solved and to state the ways in which that situation would be different from the present. This process can help participants to identify areas for improvement in their lives. Having participants set these broader goals reflects a broad rather than a narrow concept of rehabilitation, consistent with the approach of many problem-solving courts. These courts do not focus on the narrow legal issue – such as what sentence to impose upon an offender – but instead seek to address why a person offended. Likewise, rehabilitation in this context is seen as more than the absence of offending, but rather the ability to lead a constructive, happy and law-abiding life in the community.⁷⁶⁷

This approach also recognises that the term “rehabilitation”, like the term “recovery” in health settings can imply a return to a previous state – a state that existed before the offending began.⁷⁶⁸ However, the state before the offending began may well be undesirable and have had within it the seeds of offending-related behaviour. Rather than backward looking, this approach to rehabilitation looks to supporting participants to build better lives for themselves. It is also consistent with the “good lives theory of rehabilitation”.⁷⁶⁹ According to this theory, instead of just managing the risk of participants offending, rehabilitation should aim to promote a good life for them. A good life is the unique combination of physiological (e.g., health and healthy living), psychological (e.g., autonomy) and social (e.g., interpersonal relationships) needed to promote a happy and fulfilling life in the community. The attainment of these good life attributes depends on internal – skills, competencies, values, attitudes and beliefs – and external – e.g., education and social support – conditions. According to the good lives theory of rehabilitation, rehabilitation involves identifying the participant’s unique “good life” goods – the participant’s needs in terms of internal skills and external conditions and the promotion of strengths and the addressing of weaknesses in these areas.⁷⁷⁰

It is preferable that participants set approach rather than avoidance goals. Avoidance goals have a negative focus: the avoidance of something, such as undesirable forms of behaviour. Approach goals have a positive focus: the

⁷⁶⁶ Clark, above n 3, 54; S. de Shazer and Y. Dolan, *More Than Miracles: The State of the Art of Solution-Focused Brief Therapy* (The Haworth Press, 2007).

⁷⁶⁷ King, above n 74; M. S. King and S. Ford, "Exploring the Scope of Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime" (2006) 1 *eLaw: Murdoch University Electronic Journal of Law, Special Series* 9, at <<https://elaw.murdoch.edu.au>> viewed 10 May 2009.

⁷⁶⁸ M. D. Clark, "The Juvenile Drug Court Judge and Lawyer: Four Common Mistakes in Treating Drug Court Adolescents" (2000) 51 *Juvenile and Family Court Journal* 37, 41.

⁷⁶⁹ T. Ward and C. Stewart, "Criminogenic Needs and Human Needs: A Theoretical Model" (2003) 9 *Psychology, Crime and Law* 125.

⁷⁷⁰ Ibid; A. Birgden, "Therapeutic Jurisprudence And "Good Lives": A Rehabilitation Framework for Corrections" (2002) 37 *Australian Psychologist* 180.

attainment of something.⁷⁷¹ Research suggests that avoidance goals, unlike approach goals, are associated with negative emotional states including depression, low job satisfaction, negative social outcomes, and low perceptions of optimism, self-esteem, competence, autonomy and control.⁷⁷² Moreover, avoidance goals give little indication to the person about what is required to achieve the goals. In contrast, approach goals often contain information within their formulation that assists in their achievement. For example, in a family violence context, it is better for a participant to have the approach goal of “I will love, respect and protect my wife” rather than the avoidance goal of “I will not hit or abuse my wife”. Avoiding hitting the wife is implicit in the goal of loving, respecting and protecting her.

Participants can also be asked to specify strategies they will implement to attain each of their stated goals. Having strategies helps provide a practical means for participants to work towards achieving the goals. It also provides the court team with the necessary knowledge to support the implementation of the different strategies. According to Locke and Latham, goal commitment can be promoted by “leaders communicating an inspiring vision and behaving supportively”.⁷⁷³ The inspiring vision that a judicial officer can promote is that the court program provides a supportive environment where people with offending-related problems can promote positive change in their lives. The use of strategies that are respectful of participants, promote their involvement, that are stimulating to heart and mind (such as goal setting), that demonstrate positive and high expectations of participants and that celebrate participants’ achievements help promote this vision.⁷⁷⁴

Having participants set goals and strategies offers the following benefits:

- The goal of resolving participants’ offending-related problems – such as substance abuse, gambling or domestic violence – is given a broader context and a particular personal meaning for participants: their ability to live happy, constructive and law-abiding lives.
- Participants are given the opportunity to tap into their goals and dreams, and to explore what motivates, challenges and makes them happy.
- The judicial officer and the court team gain insight into participants, providing the basis for communication and connection with them at a more profound level and the ability to offer suitable recommendations concerning the implementation of their goals and strategies.
- Participants can formulate a positive, achievable vision for themselves.
- It allows the judicial officer, exercising authority on the community’s behalf to say to participants, that:

promoting their vision is in harmony with the mission of the court and the wider community and that there is support at hand for the implementation of that vision. It becomes a shared vision. The problem-

⁷⁷¹ A. J. Elliot and R. Friedman, "Approach-Avoidance: A Central Characteristic of Personal Goals", in Little, Salmela-Aro and Phillips (eds.), *Personal Project Pursuit: Goals, Action, and Human Flourishing* (Lawrence Erlbaum, 2007) 97.

⁷⁷² Ibid 97.

⁷⁷³ Locke and Latham, above n 762, 707.

⁷⁷⁴ King, above n 3.

solving court's vision then becomes facilitating participants' formulation of their vision for healing and leading a constructive and law-abiding life and supporting the implementation of a plan to achieve it.⁷⁷⁵

- It promotes participants' self-efficacy.
- It promotes participants' trust in the court, in turn repaying the court's trust in them.⁷⁷⁶
- It trains participants in an important life skill: the setting of goals and the implementation of appropriate strategies to promote achievement in life.

Behavioural Contracts

Behavioural contracts are an important tool to promote participants' self-determination and compliance with the court program.

They can include goals and strategies that serve as reference points concerning compliance and participant achievement.

Behavioural contracts are widely used in psychological and physical health settings, education, business and families to promote improved behaviour. In health settings, they are used to promote patient compliance with treatment.⁷⁷⁷ They set out agreed behavioural goals and action necessary to achieve the goals. Behavioural contracts may involve obligations on one or more

party. Thus, a parent may enter into a behavioural contract with a child whereby if the child adopts a particular behaviour pattern, the parent will provide additional privileges or give the child an agreed item.

The use of behavioural contracts is a strategy suggested by therapeutic jurisprudence.⁷⁷⁸ They are used in drug courts and in a number of other contexts in the legal system. Properly done, they have a number of benefits, including:

- The setting out of specific behavioural goals helps promote improvement in behaviour.
- The parties have a reference point that clearly records what is to be done by each party.
- The court can demonstrate respect for the participant as an individual worthy of contracting with the court.
- The court can demonstrate trust in the participant as someone who is able to live up to her obligations under a contract, thereby promoting the participant's self-efficacy.
- The behavioural contract can be referred to in problem-solving.
- When particular goals are fulfilled under the behavioural contract, the court can refer back to the contract and praise the participant for fulfilling his obligations.

⁷⁷⁵ Ibid 167.

⁷⁷⁶ Ibid.

⁷⁷⁷ Winick, above n 3, 1084-1088; D. B. Wexler, "Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"" (Spring 2001) 38 *Court Review* 18, at <<http://www.law.arizona.edu/depts/upr-intj/robres.pdf>> viewed 10 May 2009.

⁷⁷⁸ Wexler, above n 777; Winick, above n 3.

Behavioural contracts can also set out particular rewards to be given upon achievement of goals and any sanctions to be applied for non-compliance.

As with all contracts between parties, in behavioural contracting it is important that each party understands what they are agreeing to. To avoid uncertainty, it is suggested that before participants enter into any agreement with the court, the judicial officer should ask participants to explain their understanding of their obligations under the contract and the consequences for breaching those obligations. The judicial officer explaining the terms of the contract and asking participants whether they understand is not the preferred approach as it does not explore the nature of participants' understanding and the possible differences in meaning that the judicial officer and participant may hold regarding expressions used in the behavioural contract. Further, it replicates coercive and paternalistic processes commonly used by courts in the adversarial mode of telling people what they need to do. If there is any difference in understanding between participants and the judicial officer, the judicial officer should explore the differences with participants to see if they can be resolved.

Under contract law, for a contract to be enforceable each party must have entered into it voluntarily. If the latter is not the case, then the "contract" becomes another form of coercion. Similarly, participants should have an active role in determining the terms of the contract. This does not mean that the participants can ignore standard terms of the program – just as consumers generally cannot ignore standard terms of trade in a business. After all, problem-solving court programs have particular conditions of entry and as to how they operate. However, within the contours of the program, participants should have a significant degree of input into how a behavioural contract is to be formulated. Indeed, negotiation in formulating behavioural contracts can "provide an important opportunity for minimising feelings of coercion that might undermine compliance and successful performance".⁷⁷⁹

Behavioural contracts are often used at the commencement of a court program. They are in writing and a copy is commonly provided to the participant. However, behavioural contracting can also be undertaken as part of the judicial supervision process – particularly when issues of relapse and non-compliance arise. In such cases, the contract may be oral. Here the judicial officer needs to make notes concerning the contract's terms. The use of behavioural contracts in dealing with relapse and non-compliance is considered further in the section on dealing with problems above.

⁷⁷⁹ Winick, above n 3, 1086.

Persuasion

While persuasion is the advocate's tool in mainstream court processes, in problem-solving courts judicial officers can use a different form of persuasion to promote participant compliance.

Persuasion should be used sensitively, mindful of the cognitive and affective processes involved.

Persuasion is one of the key processes that occur in courts. Parties, in person and/or through their lawyer, endeavour to persuade a judicial officer (and other parties) that their cases are of legal merit and worthy of an appropriate remedy. Persuasion in this context is normally primarily directed at how a court should

determine a case. The judicial officer is not usually involved in endeavouring to persuade another about the merits of a particular position. While a judicial officer may certainly put a particular proposition to a party, this is done in the course of argument for the purposes of testing the strength of the proposition. In some cases judicial remarks – such as remarks in a judgment or in sentencing – may involve suggesting behavioural change in relation to a party to a case.

Persuasion is not only important in the adversarial court context. Winick has pointed out that persuasion is also an effective tool in problem-solving judging.⁷⁸⁰ However, persuasion here is mainly directed at how a participant should behave – what programs the participant should attend, how often he should participate in urinalysis, how the participant should behave to prevent relapse, and so on. Winick has also observed that: “[p]ersuasion not coercion, should be the hallmark of judge-offender interactions in problem-solving court contexts”.⁷⁸¹ Indeed, there is evidence that using positive techniques of persuasion may well be more effective in promoting compliance than resorts to threats or fear.⁷⁸² While any agreed outcome may be put in the form of a behavioural contract or court order, the process by which the agreement or order is reached ideally should be by way of consent.

Persuasion in solution-focused judging works two ways. First, the judicial officer must still be open to persuasion (including by the participant) concerning a particular course that a case is to take. The judicial officer must also be involved in using persuasion to move the case forward where particular problems or obstacles have arisen. Participants often have keen insight into their problems and what they need to do and what resources they need in so doing. The solution they have in mind may be more appropriate than other options or be something that can be done along with other options. A judicial officer being open to persuasion in this context affords the participant self-determination and respect – as well as other aspects of procedural justice. It also demonstrates the court's trust in the participant.

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid 1078.

⁷⁸² E. L. Fink, D. A. Caid, S. A. Kaplowitz, C. Sungeun, M. A. Van Dyke and M. A. Jeong-Nam, "The Semantics of Social Influence: Threats Vs. Persuasion" (2003) 70 *Communication Monographs* 295.

According to O'Keefe, there are two aspects of persuasion:

One is the task of identifying the current obstacles to agreement or compliance, that is, the bases of the audience's resistance to the advocated action or viewpoint. The other is the task of constructing effective messages aimed at removing or minimising such obstacles.⁷⁸³

Compliance is, of course, a critical issue for problem-solving courts and programs. Identifying the reason for non-compliance in a particular case is important. O'Keefe has pointed out that a person may have the requisite desire to attain a particular goal and yet have acted inconsistently with achievement of the goal or lack the attitude necessary to accomplish it.⁷⁸⁴ For example, in the problem-solving court context, a participant may wish to address his substance abuse, but experience a relapse; or the participant may have no desire to address her substance abuse. If the participant does not have the requisite attitude, then use of motivational interviewing – described below in the next section – may assist. Compliance is dealt with more fully in the section on dealing with problems above.

O'Keefe has identified three general guidelines for constructing effective messages to meet objections or obstacles to agreement:⁷⁸⁵

1. The response to the objection will be more persuasive if it refutes the opposing argument rather than ignoring it or acknowledging it without responding to it.
2. The message should be clear and specific about the course of conduct that is being advocated.
3. There should be adequate follow-up.

To this list could be added the suggestion made by Winick that the information be personal to the participant. This can make the arguments for and against a course of conduct more concrete and relevant to the participant, and therefore more persuasive.⁷⁸⁶

In relation to the first guideline suggested by O'Keefe, it is important in the court context that the process of refutation is done respectfully and with care and consideration to the participant. Robust argument is a feature of court advocacy between lawyers and the bench. Participants with underlying issues such as substance abuse and mental health problems may well experience as deflating a forceful argument refuting their position. The court should acknowledge the participant's argument and reasons. Instead of presenting the court's alternative as a final order, the judicial officer should ask the participant for her opinion concerning the alternative course of conduct and provide the participant with the supporting reasons for the order as suggested by the court. At the same time,

⁷⁸³ D. J. O'Keefe, "Persuasion", in Hargie (ed.), *The Handbook of Communication Skills* (Routledge, 3rd edn, 2006) 323.

⁷⁸⁴ Ibid.

⁷⁸⁵ Ibid 333-334.

⁷⁸⁶ Winick, above n 3, 1079.

it is important that the participant is made aware of all the relevant information that may affect her decision.⁷⁸⁷

O’Keefe has observed that even when persuasion is effective, the person persuaded may well feel regret concerning his change of mind.⁷⁸⁸ Regret may then lead to a change of mind back to the original position. O’Keefe has therefore suggested proper follow up to address this issue. If a problem-solving court has had a situation where it has persuaded a participant to engage in a different course of action than one that the participant has proposed, the participant should return to court for review shortly thereafter and/or other support mechanisms be put in place – such as a meeting with the participant’s community corrections officer – so that issues of regret and further support can be addressed.

In considering the use of persuasion as a tool, it is also important to bear in mind the importance of promoting participants’ self-determination. As noted earlier, this means having trust in the participant’s ability to formulate and pursue rehabilitation plans, problem solve where necessary and follow program conditions. A judicial officer’s overuse of persuasion – endeavouring to persuade a participant to a course of action that is against the participant’s expressed views – is inconsistent with an approach that seeks to promote self-determination and may retard the participant’s self-efficacy. It may detract from the participant’s “sense of ownership of his or her plan for change”.⁷⁸⁹ A judicial officer should therefore use persuasion only when needed and in a manner sensitive to issues of self-determination and self-efficacy.

Motivational Interviewing

Motivational interviewing is a way of facilitating and supporting people’s motivation to engage and maintain behavioural change.

Its five main principles are: express empathy, develop discrepancy, avoid argumentation, roll with resistance and support self-efficacy.

Motivational interviewing can be used to support a person’s progress through the stages of change identified by the TTM.

Judicial officers should avoid a confrontational approach.

Motivational interviewing can provide guidance to judicial officers as to what strategies to avoid and what to use in interacting with participants, particularly those resistant to or having problems with the change process.

Motivational interviewing helps people to acknowledge and do something about

⁷⁸⁷ O’Keefe, above n 783.

⁷⁸⁸ Ibid.

⁷⁸⁹ Walters et al, above n 728, 287.

their problems.⁷⁹⁰ It is often used where a person is ambivalent about change. It has been described as “not a technique, but more a style, a facilitative way of being with people. A style that is centred around avoiding resistance, resolving ambivalence and inducing change.”⁷⁹¹ Motivational interviewing has been influenced by the TTM in its development.⁷⁹²

Motivational interviewing is, in part, based on the view that “people are motivated by the desire for growth and self-direction and are continually striving for the actualisation of their potential”.⁷⁹³ It aims to facilitate people to assume responsibility for initiating and continuing with the change process. It endeavours to elicit talk about change from people and have them elucidate their reasons for why change should happen instead of imposing upon them reasons why others think they should change.⁷⁹⁴

There is evidence that motivational interviewing is effective in addressing a range of issues such as substance abuse problems and health care non-compliance.⁷⁹⁵ Motivational interviewing has been found to be more effective than a professional simply giving advice in promoting compliance in health settings.⁷⁹⁶ The mechanisms by which motivational interviewing works is a matter of continuing research. There is some evidence that it may strengthen not only motivation but also commitment to change.⁷⁹⁷ There is also evidence that motivational interviewing promotes treatment engagement and retention.⁷⁹⁸ One study found that the positive effect of motivational interviewing did not vary according to what kind of professional used it – doctor, counsellor or other health professional.⁷⁹⁹ This suggests that different professionals can use motivational interviewing provided they are properly trained in its principles.

Judicial officers taking a solution-focused approach can apply motivational interviewing processes, particularly where participants demonstrate ambivalence to change – such as when remedial action is needed to address relapse but the participant is not motivated to act.⁸⁰⁰ Given that motivational interviewing principles and practices can readily be applied even in short interactions, they can be adapted for use in judicial processes. Motivational

⁷⁹⁰ Miller and Rollnick, above n 12.

⁷⁹¹ E. A. Fabiano and F. J. Porporino, *Cognitive Motivational Tools for Negotiating Behaviour Change* (T3 Associates, 2000), [8-2].

⁷⁹² C. C. DiClemente and M. M. Velasquez, "Motivational Interviewing and the Stages of Change", in Miller and Rollnick (eds.), *Motivational Interviewing: Preparing People for Change* (The Guilford Press, 2nd edn, 2002) 201.

⁷⁹³ Miller and Rollnick, above n 12, 289.

⁷⁹⁴ *Ibid* 76-78.

⁷⁹⁵ B. L. Burke, C. W. Dunn, D. C. Atkins and J. S. Phelps, "The Emerging Evidence Base for Motivational Interviewing: A Meta-Analysis" (2004) 18 *Journal of Cognitive Psychotherapy* 309; J. Hettema, J. Steele and W. R. Miller, "Motivational Interviewing" (2005) 1 *Annual Review of Clinical Psychology* 91; S. Rubak, A. Sandbæk, T. Lauritzen and B. Christensen, "Motivational Interviewing: A Systematic Review and Meta-Analysis" (2005) 55 *British Journal of General Practice* 305.

⁷⁹⁶ Rubak et al, above n 795.

⁷⁹⁷ Hettema et al, above n 795, 107.

⁷⁹⁸ *Ibid*.

⁷⁹⁹ Rubak et al, above n 795.

⁸⁰⁰ The judicial use of motivational interviewing was suggested by Winick (see: above n 3).

interviewing also provides useful guidance in relation to judicial processes that may well be counter-productive to addressing a participant's reluctance to be involved in change. Motivational interviewing requires judicial officers to take a different approach than the conventional judging approach of giving orders and advising people what they should be doing if they are to avoid an adverse response from the court, as is often done in sentencing.

The five aspects of motivational interviewing are:⁸⁰¹

1. **Express empathy.** This requires actively listening to the person, demonstrating that one is listening by reflecting back key aspects of what the person has said and acknowledging fully the content and associated feelings that the person may have concerning his situation. The expression of empathy requires placing one's self in the situation of the other and endeavouring to perceive the situation from her viewpoint, in contrast to sympathy, which relates to one's own feelings about the other's situation. These aspects of listening and empathy are considered in more detail in the chapter on listening (see Chapter 6).
2. **Develop discrepancy.** The approach here is to facilitate the person thinking about the possibility of change by developing a discrepancy or dissonance between their goals and their behaviour. If the goal setting exercise has already been done, then this provides a useful tool for a judicial officer to develop discrepancy. For instance: "The first goal you set for yourself when you entered the program was to lead a healthy, drug-free life. How does your taking of amphetamines in the last week fit with that?". The person is encouraged to develop arguments for change and to consider the consequences of the different options available.
3. **Avoid argumentation.** Where there is ambivalence about change, engaging in argument is unlikely to be productive. It may provoke defensiveness and lead to a situation where the person is less open to change.
4. **Roll with resistance.** In mainstream courts, resistance to court orders or what a judicial officer says is regarded seriously and often dealt with coercively. For professionals involved in health disciplines associated with behavioural change, resistance is regarded as a natural part of the change process:

Resistance is a key to successful treatment if you can recognise it for what it is: an opportunity...Resistance is often the life of the play. It is the twist that adds drama and excitement to the plot. Viewing resistance as a perverse character flaw is a sad mistake. Resistance lies at the very heart of human change.⁸⁰²

If a person displays resistance, it may be due to the objective of change being presented too forcefully. Meeting resistance with coercion or paternalism is likely to promote further resistance. Indeed, the cause of the resistance may be due to the person feeling that they no longer have control over the situation and therefore reacting to assert their

⁸⁰¹ Miller and Rollnick, above n 12, ch 4.

⁸⁰² Ibid 109-110.

freedom.⁸⁰³

Confronting participants may aggravate their problems. For example, a study involving problem drinkers attending therapy found that where therapists used a confrontational approach, the more the clients resisted and the more the clients continued to abuse alcohol one year after the study began. Resistance included being argumentative and changing the subject.⁸⁰⁴ It is unlikely that a judicial officer's use of confrontational tactics would be any more successful than that of therapists. Indeed, confrontation is a technique more commonly applied in an adversarial process – and then most often by counsel – than one suited to a collaborative problem-solving process.

Motivational interviewing suggests a number of ways to deal with resistance. It emphasises that the person resisting is an important source of solutions. One method of handling resistance is to simply reflect back to the person the person's thoughts – and, in some cases, reflecting back earlier doubts raised by the person on other occasions.⁸⁰⁵ As noted by Rogers, simply listening to a person empathetically allows him to clarify his thoughts and feelings and may enable him to arrive at a solution for himself.⁸⁰⁶ Another method is to reframe – to acknowledge that what a person has said is valid, but then to offer a new interpretation of the facts.⁸⁰⁷

A variation of these approaches is to “agree with a twist”. That is, the judicial officer would listen to and acknowledge what the person says (reflecting what the person thinks and feels), and then reframe the situation with a view to influencing the person's thoughts in the direction of change.⁸⁰⁸

Shifting focus is also an approach to deal with resistance.⁸⁰⁹ For example, in a problem-solving court program a participant may doubt his ability to complete the 12 month program. After acknowledging the participant's concerns, the judicial officer could then direct the dialogue to a level that the participant is likely to find less intimidating and more manageable – such as taking it one step at a time and discussing what the participant needs to do before the next court appearance.

5. **Promote self-efficacy.** This refers to the person's belief in the possibility of change. It is recognising the person as an important source of change and approaches to promote it. Promoting self-efficacy is a key aspect of therapeutic judging in problem-solving courts and was discussed in detail

⁸⁰³ Ibid 106.

⁸⁰⁴ W. R. Miller, G. Benefield and J. S. Tonigan, "Enhancing Motivation for Change in Problem Drinking: A Controlled Comparison of Two Therapist Styles" (1993) 61 *Journal of Consulting and Clinical Psychology* 294.

⁸⁰⁵ Miller and Rollnick, above n 12.

⁸⁰⁶ See the discussion on the benefits of listening in Chapter 6.

⁸⁰⁷ Miller and Rollnick, above n 12, 103.

⁸⁰⁸ Ibid 105.

⁸⁰⁹ Ibid 102.

above.

There is another aspect of resistance that has been stressed in the context of family violence courts in particular: cognitive distortions. While the term “cognitive distortion” has a particular meaning in the therapy context in which it developed, in the context of the criminal justice system it has come to mean “attitudes and beliefs which offenders use to deny, minimise, rationalise and justify their behaviour”.⁸¹⁰ It has been suggested that courts should confront perpetrators who “deny, minimise, rationalise and justify” their violent and/or abusive behaviour.⁸¹¹ To some degree the justice system can counter such cognitive distortions by a pro-prosecution policy with adequate resources for police to investigate and prosecute family violence related offences and for courts to treat family violence as a serious offence when sentencing. However, where a perpetrator denies the seriousness of family violence or minimises his culpability while engaged in a family violence court program, the question arises as to how the judicial officer should respond. Clearly the court cannot be seen to condone such behaviours or attitudes by not responding. Yet a confrontational approach may make matters worse. Indeed, it has been suggested that the cognitive distortion involved in perpetrator denial of responsibility may be a mechanism for protection of self.⁸¹² It may be preferable to leave the issue of addressing underlying cognitive distortions to counselling – if the counsellor considers cognitive distortions need to be addressed – where the matter can be addressed more sensitively and in a more supportive environment than a public courtroom. If a perpetrator is already in a defensive mode, a confrontational approach in court is unlikely to change that mode or the cognitive distortion. In such circumstances, the judicial officer may be best advised to ask the participant why she is in court. After all, the participant is charged with (and pleaded guilty to) family violence related offences and is appearing in a family violence court – which should give some indication to her as to how the court and community views family violence. Alternatively the judicial officer could refer the participant to past statements the participant has made concerning her desire to change the behaviour or goals that the participant has set that are inconsistent with her expressed cognitive distortion, and ask the perpetrator to comment on how the two fit (or do not fit) together.

Motivational interviewing is often used to assist people to move from one TTM stage of change the next.⁸¹³ Its usefulness may be in helping people to engage in the experiential and behavioural processes necessary for progression between stages of change.⁸¹⁴ Indeed, motivation is seen to be important not only in commencing behavioural change – in moving between pre-contemplation, contemplation, preparation and action – but progressing through to its completion – moving from action to maintenance to the completion of behavioural change, where one behaviour has been entirely substituted for

⁸¹⁰ S. Maruna and R. E. Mann, "A Fundamental Attribution Error? Rethinking Cognitive Distortion" (2006) 11 *Legal and Criminal Psychology* 155, 159.

⁸¹¹ For a more thorough review of the issues, see: King and Batagol, above n 3.

⁸¹² *Ibid.*

⁸¹³ DiClemente and Velasquez, above n 792.

⁸¹⁴ *Ibid* 214.

another.⁸¹⁵

People in the state of pre-contemplation may be rebellious, resigned, reluctant or rationalising.⁸¹⁶ In the case of rebellion, DiClemente and Velasquez have suggested that allowing people to express their feelings and giving them options for consideration allows them to deal with issues surrounding a perceived surrendering of control over their situation.⁸¹⁷ Those resigned to being unable to overcome their problem, need the promotion of hope and confidence and ways of exploring barriers to change. DiClemente and Velasquez have further proposed it is better not to engage rationalisers in a debate about the merits of change as they have already formulated their argument, which is their defensive mechanism.⁸¹⁸ It is better to listen to and empathise with them and to encourage them to consider the advantages of their present behaviour before moving on to invite them to consider the opposing arguments. This may result in the decisional balance shifting in favour of behavioural change. Similarly, reluctance can be addressed by encouraging the person to consider arguments for and against change.⁸¹⁹

Contemplators are aware of their problem and may have a wealth of information about how to address it,⁸²⁰ but they may be far from making a commitment to implementing change. Motivational interviewing strategies are directed at helping contemplators tip the decisional balance in favour of change.⁸²¹ In the preparation stage, an assessment is made of the strength of commitment and assistance is given to help the person to formulate a plan for change.⁸²² Motivational interviewing can also assist in the action stage through empathetic listening – particularly where a person expresses some residual doubts about change – and by supporting the person’s self-efficacy in implementing change.⁸²³ In maintenance, motivational interviewing applies strategies that support the person’s motivation to maintain change.⁸²⁴

The Use of Praise

In appropriate cases, a judicial officer can use praise to recognise participant achievements, and to promote motivation, self-efficacy and self-concept.

Problem-solving court judicial officers commonly praise participants for good performance in relation to some aspect of their program. It can be concerning participants’ good work in preparing an impressive set of goals and strategies; some new insight the participant has presented to the court concerning his situation; an innovative solution to address a challenge that the participant is facing; the achievement of a goal; or

⁸¹⁵ Ibid 202.

⁸¹⁶ Ibid.

⁸¹⁷ Ibid.

⁸¹⁸ Ibid.

⁸¹⁹ Ibid.

⁸²⁰ Ibid

⁸²¹ Ibid.

⁸²² Ibid.

⁸²³ Ibid.

⁸²⁴ Ibid.

graduation from the program. Makkai and Braithwaite suggest that praise can have “cognitive effects on individuals through nurturing law-abiding identities, building cognitive commitments to try harder, encouraging individuals who face adversity not to give up...and nurturing belief in oneself”.⁸²⁵ Thus praise serves a role in promoting the development of a new identity for participants, supporting motivation and increasing self-efficacy.

On the one hand, participants need to know that they deserve praise in a particular situation, otherwise the praise may be regarded as gratuitous. Further praise in this context provides feedback as to what the person is doing right. On the other hand, it has been questioned whether linking praise to specific acts could be seen to be an extrinsic reward for specific action and not have the desired nurturing quality. Braithwaite and Braithwaite have commented:

So when a child shows a kindness to his sister, better to say ‘you are a kind brother’ than ‘that was a kind thing you did’...(P)raise that is tied to specific acts risks counter productivity if it is seen as an extrinsic reward, if it nurtures a calculative approach to performances that cannot be constantly monitored...Praising virtues of a person rather than just their acts...nourishes a positive identity.⁸²⁶

Perhaps where there has been a significant achievement, if one was to seek to apply both these principles, one would praise the person’s abilities and virtues rather than just the achievement. For example, the judicial officer could say things such as:

- “Your rehabilitation plan is comprehensive. It shows good insight, careful planning and problem-solving ability on your part.”
- “Congratulations on your new job! You thought about what you wanted, prepared the application carefully and went to the interview well prepared.”
- “You are someone who can set and achieve important goals. You stopped using, attended all appointments and went to see a careers guidance counsellor on your own initiative. You have made some important steps towards graduating from the program.”

Depending on the court, the program and the nature of the participant’s achievement, the judicial officer could invite those in the courtroom to give the participant a round of applause where such praise is warranted. However, before the judicial officer praises the participant for an achievement, it would be useful to ask the participant to describe what happened and how she achieved the particular goal (if that is not already known to the judicial officer). This exercise will facilitate the participant to reflect on the skills she used to achieve the goal, and allow the judicial officer to praise the method used – the participant’s demonstration of particular skills or virtues – and the outcome. Thus, the participant gains both internal and external reinforcement concerning his self-efficacy.

⁸²⁵ Quoted in Maruna and LeBel, above n 3, 101.

⁸²⁶ Ibid 101.

Graduation Ceremonies

Graduation ceremonies are a special occasion where the court recognises and celebrates graduating participants' rehabilitation; supports their self-concept, self-efficacy and motivation; and inspires other participants to greater achievement.

Graduation ceremonies are an important aspect of drug courts and some other problem-solving court programs. In some cases, the graduation takes place as a formal court process in conjunction with sentencing. In other cases, there is a special ceremony held outside the normal court list and sometimes in a non-court venue that is closer in process to a graduation in an educational setting.

Before entering the court program, the sentencing process may have been deferred or attendance in the court program may have been required as a condition of sentence, depending on the court program. In any event, the conviction process in court will have identified the participant as an offender/criminal. Labelling theory has highlighted the risk that labelling offenders reinforces their criminogenic tendencies. In normal criminal justice system processes, the involvement of the court commonly ends when the sentence is pronounced (and any appeal against the judgment or sentence is concluded). Problem-solving courts have the unique opportunity of being involved at the completion of a court order by a participant. Graduation ceremonies may be seen to be a process of progressive de-labelling, culminating in the graduation ceremony where the court pronounces that participants have completed their obligations and are now able to continue to rebuild their lives as worthwhile citizens. At a graduation, the “desisting person’s change in behaviour is recognised by others and reflected back to him” – a process that Maruna and colleagues have suggested is important for offender rehabilitation.⁸²⁷ Through the graduation ceremony, the court – an authority representing the community – that once denounced the participant’s behaviour is instead praising the participant’s behaviour.

Graduation is the court’s, the court team’s and the community’s recognition of the achievements of those graduating from the program. A graduation ceremony is an opportunity for the court to support participants’ motivation, improved self-concept and self-efficacy as they leave the support of the court program and venture out into the community. It also demonstrates the court’s caring approach: that the participants and their achievements are valued. Further, graduation ceremonies give the court the opportunity to demonstrate to other participants, prospective participants, participants’ families and the community that this court program provides an environment where people can and do make significant positive life changes. While some continuing participants will have seen others being terminated from the program for various reasons, by seeing participants graduating, they can also see that for those who have the right attitude and who approach their task diligently, there are significant rewards. This may help to inspire their own efforts.

⁸²⁷ Maruna et al, above 744, 274.

Storytelling has been seen to be an important technique in some approaches to leadership.⁸²⁸ Stories can be used to inspire others. Problem-solving court programs can be a source of stories of participants overcoming significant challenges to complete the program. In appropriate situations such stories can be used – minus the names – to inspire participants in the future. However, it is best that they be used alongside strategies that specifically address the individual participants’ needs and that strengthen the participants’ motivation and self-efficacy. By so doing, the story becomes more relevant and inspiring.

Finally, the graduation of each participant who completes the program is a validation of the work of the court program and the court team. It provides personal and professional satisfaction for those involved in assisting participants through the court process and the challenges involved in addressing significant dysfunction to reach the stage of graduation. It is a time of celebration for the team and other participants as well as for graduating participants and their families.

Conclusion

Judicial officers taking a problem-solving approach can be more effective in their judging if they understand the nature, principles and processes involved in behavioural change and use strategies that uphold the change process. What strategy is applied in a particular case depends on the circumstances of the participant and the unique combination of cognitive, affective, motivational and environmental factors that affect the change process.

⁸²⁸ King, above n 3, 172.

Chapter 8: Solution-Focused Judging in Mainstream Courts

Michael King

General therapeutic principles associated with solution-focused judging have broad application in judging generally – such as promoting voice, validation and respect.

A more comprehensive solution-focused approach involving judicial supervision may be appropriate in contexts outside designated problem-solving courts where there are underlying issues associated with the legal problem.

Statute law or the absence of the necessary resources may prevent a more comprehensive approach from being taken.

There are challenges to applying a solution-focused approach to judging outside the context of a dedicated problem-solving court. The principal challenge is having the resources to conduct the various programs necessary to support the solution-focused judging approach. Problem-solving judging is simply one element in problem-solving court programs – other aspects include a multi-disciplinary court team and appropriate treatment and support programs for participants. Typically drug courts and other problem-solving programs are set up with dedicated court teams and professional staff to provide treatment programs, or with the availability of treatment in community treatment facilities. In Australia, government funding underpins these resources.

In some cases a problem-solving approach has been possible in the absence of dedicated government resources. For example, the Geraldton Magistrates' Court established the Geraldton Alternative Sentencing Regime, which took a problem-solving approach across a broad range of offending related problems, including illicit substance abuse, alcohol abuse, solvent abuse, domestic violence and gambling without additional resources.⁸²⁹ The Geraldton Magistrates' Court was able to do so by working with other government agencies and community support and treatment organisations, which agreed to provide the necessary support and treatment services. In some cases, those organisations sought additional funding through their own channels.

In areas where courts are able to work directly with community and other government organisations, it may therefore be possible to establish a dedicated problem-solving court program with the assistance of those organisations. In

⁸²⁹ King and Ford, above n 767.

other cases, an expansion of a problem-solving role may well require the agreement of the executive and the commitment of additional government resources to fund the program.

A further challenge is adequate judicial time to conduct a problem-solving court program. These programs require additional court appearances, more time spent on each case to engage in the necessary judicial interaction with participants and greater levels of judicial expertise to apply solution-focused approaches. Such judicial resources are not always available. One way of dealing with the matter is for the judicial officer to have a dedicated list to deal with cases needing a more intensive solution-focused approach and to limit the number of cases that can be dealt with at any one time.

Where the establishment of a problem-solving court program is not possible, it is still possible to apply some of the aspects of solution-focused judging, depending on the context. Indeed, the underlying philosophy of solution-focused judging – therapeutic jurisprudence – can be applied in judging in any context. Arguably, some aspects of a therapeutic jurisprudence approach to judging should be applied in any court context. Thus, factors also emphasised as important by procedural justice – giving parties’ voice, validation and respect – are important elements of day-to-day judging. Goal setting would generally only be used where the aim is to promote positive behavioural change or to promote other goals common to the parties. Praise is only relevant where a party has achieved something worthwhile.

This chapter gives examples of where a problem-solving approach closer to the problem-solving court model can be used – in the areas of child welfare and in the coroners’ court – to illustrate the diversity of contexts where such an approach may be useful. It also gives examples of where therapeutic jurisprudence may be applied in judging in other contexts – in sentencing, diversion programs and judgment drafting and delivery.

Child Welfare

A problem-solving court approach has been used successfully in child welfare proceedings in the United States to assist parents address their substance abuse and related problems and reduce the number of children in state care.

This approach has only been used in one Australian court and then only on a limited basis.

New York developed a special type of drug court to assist parents with substance abuse problems who were unable to properly care for their children. It was in direct response to a crack (cocaine) epidemic that had led to a significant increase in child welfare applications, recognition of a gap in welfare services and an increase in the

number of children being taken into state care.⁸³⁰ Factors that contributed to the problem were court delays, the absence of means of holding parents accountable

⁸³⁰ J. S. Kaye, "Changing Courts in Changing Times" (1997) 48 *Hastings Law Journal* 851, 861-862; R. V. Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court* (Centre

for attending treatment programs and a lack of information as to specific cases from the responsible government agency. New York Chief Judge Judith Kaye asked the Center for Court Innovation to develop a court program to address this problem. The result was the Manhattan Family Treatment Court, which began operation in March, 1998.⁸³¹

The Manhattan Family Treatment Court is rehabilitation-focused rather than fact-finding, so parents must admit to neglect to be eligible for participation in the program. The court uses judicial supervision including therapeutic interaction with participants and participant engagement in a range of treatment programs. Judicial praise and encouragement, applause and graduation ceremonies are also features of the program. The website of the [Center for Court Innovation](#) reported that:

Between March 1998 and August 2005, the Court worked with 778 clients and 1,329 children. Three hundred and fifteen clients successfully completed their court-ordered treatment, demonstrated abstinence for a significant period of time, demonstrated good parenting abilities and provided safe and stable homes for their children. Following the lead of Manhattan Family Treatment Court, a total of 48 Family Treatment Courts have opened in New York State and an additional 14 are in planning stages.⁸³²

The use of a problem-solving judicial approach to child welfare cases has only been used to a limited degree in Australia. The Children's Court at Geraldton, Western Australia had a pilot program, called the "Family Care Program" that took a problem-solving approach to dealing with applications for care and protection.⁸³³ The project was developed through collaboration between the court, the local Department for Community Development office and the local Aboriginal Legal Service office – Aboriginal families being disproportionately represented in care and protection applications in Geraldton – with later involvement of the Geraldton Community Legal Centre. The project was launched in November 2003 by the then Minister for Community Development and the then President of the Children's Court.

According to the Practice Direction of the Family Care Program, its purpose was:

To provide a therapeutic judicial regime whereby parents who are parties to Care and Protection Applications may address the various factors bearing on their parenting ability in relation to the children the subject of the application by participating in a holistic rehabilitation regime under the guidance of a court management team.⁸³⁴

for Court Innovation, 2000), at
<http://www.courtinnovation.org/uploads/documents/fixing_families.pdf> viewed 10 May 2009.

⁸³¹ Wolf, above n 830.

⁸³² Center for Court Innovation, *Manhattan Family Treatment Court* (2009), at
<<http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPage&PageID=598¤tTopTier2=true>> viewed 8 August 2009.

⁸³³ M. S. King and C. L. Tatasciore, "Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications" (2006) 1 *eLaw: Murdoch University Electronic Journal of Law, Special Series* 78, at
<<https://elaw.murdoch.edu.au>> viewed 10 May 2009.

⁸³⁴ Geraldton Children's Court, *Family Care Program Practice Direction* (7 March 2003).

A matter could be referred to the Family Care Program when a care and protection application came before the court on the application of any party or at the suggestion of the court.⁸³⁵ The matter would then be adjourned for assessment as to suitability and the preparation of a program agenda. The family would be involved in setting goals to be achieved while in the program that would be included in the program agenda. If the children involved were old enough, they also would be involved in the process of formulating the program agenda. The agenda would set out the programs that would be used in promoting program goals – including substance abuse treatment, parenting programs, relationship planning and accommodation support. When the matter came back before the court, the court would provide input into the program agenda and ask for the response of the parties. If satisfactory, the court would approve the program agenda.

The court conducted review hearings in such cases at regular intervals throughout the program applying therapeutic jurisprudence based problem-solving judging principles, including promoting the voice, validation, respect and self-determination of participants, collaborative problem-solving and the use of praise and encouragement. If the caregivers completed the program, then the department withdrew the care and protection application. In default, the department was at liberty to ask the court to list the care and protection application for a hearing at which orders would be sought concerning the care and placement of the children.⁸³⁶

King and Tatasciore noted a case in which the use of the program had a successful outcome, with the department withdrawing its care and protection application.⁸³⁷ However, the project was on such a small scale that firm conclusions concerning its process cannot be made. Given that the general approach was similar to successful family drug treatment courts in the United States, it is reasonable to conclude that a problem-solving approach offers promise in promoting a more comprehensive resolution of care and protection applications, but definitive research is needed.

⁸³⁵ A description of the process is set out in King and Tatasciore, above n 833.

⁸³⁶ King and Tatasciore, above n 833.

⁸³⁷ Ibid.

Coroners' Courts

Coroners' courts are intimately concerned with matters affecting the wellbeing of deceased persons' families; with those who may be the subject of adverse comment; and with public health and safety issues.

Therapeutic judging principles, more collaborative decision making processes, judicial case management, more support for families and ADR processes may promote coronial functions.

Coroners' courts work in an area intimately related to a prime concern of therapeutic jurisprudence – wellbeing. Obviously the family of the deceased are undergoing the grieving process at the time of the coronial investigation. However the wellbeing of others is also of concern – such as the extended social network and workmates of the deceased and also those who are at risk of an adverse finding being made against them by the coroner. As to the latter, these include

medical personnel associated with a death allegedly due to mistreatment, other drivers in motor vehicle accidents and workmates and employers in the case of workplace deaths. Further, coroners also inquire into health and safety implications of a death and make recommendations concerning the promotion of community wellbeing.

There is increasing recognition of the relevance of therapeutic jurisprudence in minimising negative effects on wellbeing of coronial processes and in helping to promote positive effects.⁸³⁸ This is due in part to an acknowledgement that previously some coronial processes – including delay in resolving a matter, a failure to keep the family informed, a lack of proper preparation of the family for the inquest process and the confronting nature of evidence at an inquest – have adversely affected the psychological wellbeing of families.⁸³⁹ It is also due to the increased acceptance of the value of therapeutic jurisprudence in guiding judging processes generally.

⁸³⁸ I. Freckelton, "Death Investigation, the Coroner and Therapeutic Jurisprudence" (2007) 15 *Journal of Law and Medicine* 242; I. Freckelton, "New Directions in Coronial Law Reform" (2008) 11 *Otago Law Review* 565; I. R. Freckelton and D. Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, 2006); M. S. King, "Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model" (2008) 16 *Journal of Law and Medicine* 442; G. Took and G. Johnstone, *Therapeutic Jurisprudence in the State Coroner's Office* (State Coroner's Office, Victoria, unpublished paper, May 2007).

⁸³⁹ There is research that demonstrates the adverse effects such coronial processes may have on families. See: L. Biddle, "Public Hazards or Private Tragedies? An Exploratory Study of the Effect of Coroners' Procedures on Those Bereaved by Suicide" (2003) 56 *Social Science & Medicine* 1033; D. Harwood, K. Hawton, T. Hope and R. Jacoby, "The Grief Experiences and Needs of Bereaved Relatives and Friends of Older People Dying through Suicide: A Descriptive and Case-Controlled Study" (2002) 72 *Journal of Affective Disorders* 185; Victorian Parliament Law Reform Committee, *Coroners Act 1985, Final Report, Parliamentary Paper No. 229 of Session 2003-06* (Government Printer, Melbourne, September 2006), at <http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Coroners%20Act/final%20report.pdf> viewed 18 July 2009.

The following passage summarises recent work on the application of therapeutic jurisprudence to coronial work:

Took and Johnstone suggested that therapeutic principles such as party participation in the process, collaboration, timely provision of information to the parties and problem-solving can be incorporated into the work of coroners' courts. Freckelton suggested the potential application of therapeutic jurisprudence in coronial court work – particularly in the form of more sensitive decision writing by coroners, appropriate opportunity for the family to express their distress and grievances in the process, clear communication between the court and the family during the process, the provision of appropriate counselling and support for the family throughout the process and better accountability mechanisms in relation to the implementation of coroners' recommendations relating to public health and safety.

Freckelton also stressed the need for a balance between “rigorous, evidence-based decision-making (such as by coroners) and the achievement of collateral health oriented objectives”. Therapeutic jurisprudence recognises that therapeutic values do not outweigh procedural fairness requirements and may not outweigh other legal system values. This principle is particularly important in coronial work where the interests of a number of parties may need to be accommodated. Therapeutic concerns must therefore be balanced along with procedural fairness.

Freckelton and Ranson have proposed more sensitive use of evidence that may be distressing to bereaved families at inquests and having the family decide how the dead person is to be referred to in the coronial process.

In 2007 the then Victorian State Coroner Graeme Johnstone made practical suggestions concerning adding “the human dimension” to the coroner's work, including enhancing information provision processes to the family, having a case manager for each case, minimising case delays, sensitive communication from the coroner's office, early intervention processes for the family and using less formal processes at inquests.⁸⁴⁰

It has been suggested that an approach applying solution-focused judging, therapeutic jurisprudence, restorative justice and mediation could be applied in coroners' courts.⁸⁴¹ Essentially this would involve an assessment of the case at the initial stage to see whether an inquest is likely. Those cases that are unlikely to proceed to an inquest would be allocated to the general track, while those requiring an inquest would be allocated to the complex track. Cases allocated to each track would have a support officer assigned to keep the family informed as to the progress of the case, to refer them to appropriate counselling and support agencies when needed, to prepare them for what to expect in relation to the inquest and to be present with them at the inquest if the family so require.⁸⁴² Cases allocated to the complex track would involve ongoing case management meetings from an early stage in the proceedings – generally within weeks of the post mortem report becoming available. A coroner not assigned to conduct the inquest, family representatives and their legal advisors, counsel assisting and

⁸⁴⁰ King, above n 838, 445-446. The articles and papers referred to in the quotation are set out in n 838 above, with the exception of the last paper referred to, which is: G. Johnstone, "Adding the Human Dimension: The Future and a Therapeutic Approach to the Independent Work of the Coroner", paper presented at *The Asia-Pacific Coroners Society Conference*, Hobart, 31 November-2 December 2007.

⁸⁴¹ King, above n 838.

⁸⁴² Ibid.

other relevant professionals would be present. Case management meetings would be held on a regular basis up until shortly before the inquest, if the matter could not be dealt with by other means beforehand.

Case management meetings would aim to determine possible matters to be decided at an early stage; give directions concerning further matters to be investigated; explore whether there are points of agreement between the parties; consider whether mediation could help determine matters at issue; and give other procedural directions – such as the allocation of a date for the inquest, giving directions concerning expert evidence or special witnesses and so on.

This approach to coronial court practice also proposes giving all families involved in a case the opportunity to address the coroner about the effect of the death on them.⁸⁴³ This is to recognise that the public interest in determining the cause of death and the making of recommendations concerning health and safety also includes acknowledging, where appropriate, the loss that the death has caused to family and the community. The form of the statement – whether written or oral and if oral, whether in a courtroom or in a less formal venue – would be at the family’s choosing.

Some aspects of these proposed amendments to coronial court practice would require additional resources being made available to the court – for example in providing support officers for families. Others could be implemented in existing court operations – such as applying voice, validation and respect in judging and in case managing more complex coronial cases.

Diversion

Court diversion programs seek to facilitate defendants with less entrenched problems to address underlying issues and thus prevent future offending.

The therapeutic, problem-solving judicial strategies that promote participant engagement with the program and commitment to rehabilitation should be used in connection with court diversion programs, but cannot be on the same scale as in problem-solving courts.

Diversion programs are a common feature of magistrates’ courts today. Depending on the state or territory, they bear names such as Court Referral for Drug Intervention and Treatment (CREDIT), Magistrates Early Referral into Treatment (MERIT), Presentence Opportunity Program (POP), Court Alcohol and Drug Assessment Service (CADAS), Supervised Treatment Intervention Regime (STIR) and Court Assessment and Referral Drug Scheme (CARDS).

They involve a court adjourning a matter to enable a defendant to

participate in a treatment program. Typically they are used in cases where a person has a substance abuse problem, the offending is not serious and the defendant has not had extensive prior contact with the justice system. Unlike problem-solving court programs like drug courts, diversion programs do not use

⁸⁴³ Ibid.

an interdisciplinary case management team or the extensive supervision of participants through frequent judicial review. However, in some cases courts will set one or more review hearings during the diversion period. Nevertheless, therapeutic judging strategies that are used in problem-solving courts can also be used in relation to diversion programs.⁸⁴⁴ For example:

- The magistrate could use the communication strategies described in this bench book to promote a dialogue with a defendant to demonstrate the magistrate's interest in the defendant's situation and the defendant's views as to what needs to be done to address the problems that brought the defendant to court. The following passage describes how this dialogue could take place:

But after hearing from counsel, the judicial officer may ask the accused whether he or she wishes to add anything. The contents of the response may then provide the basis for exploring causal factors and a strategy the person wishes to use to address these factors. If the answer was simply "no", then the judicial officer would need to ask open questions such as "Why did you break the law", "You have told me you have a problem with amphetamines, what do you intend to do about it", and/or "If I adjourn this case, what would you propose to do in the adjournment period?" Here the judging strategy would be to listen, to demonstrate that the judicial officer has listened, to express empathy, to motivate the person to consider a rehabilitation strategy, to support that process and not to impose the judicial officer's interpretation on the defendant's situation.⁸⁴⁵

- The magistrate could ask the participant to set goals for her time on the program and ask the participant to describe strategies that she would use to achieve the goals.
- The magistrate could use review hearings not only to ascertain participants' progress, but also to encourage and praise participants where appropriate; to note the achievement of any of the participants' goals or significant progress towards the attainment of those goals; to reinforce the participants' self-efficacy; and to engage in the solution-focused strategies suggested in this bench book to address problems in performance, such as collective problem-solving and having defendants develop relapse prevention plans.
- Where solution-focused strategies are needed, the court may wish to schedule a further review hearing a short period after the problem-solving hearing to ascertain progress and to support the defendant's implementation of the plan.
- If the participant successfully completes the diversion program, then the court should congratulate the participant and acknowledge the different aspects of the defendant's achievement and link them to any relevant goals that he set earlier in the diversion program, reinforcing the

⁸⁴⁴ The use of therapeutic jurisprudence and problem solving techniques in judging in relation to diversion programs is described in King, above n 66.

⁸⁴⁵ King, above n 66, 102.

participant's ability to achieve goals that he has set for himself.

- If the situation arises where the magistrate must terminate the participant's participation in the program for non-compliance, then the court in sentencing should acknowledge any steps of progress made by the defendant and recognise them as a demonstration of the defendant's ability to progress in the direction of addressing his problems. The court could express the hope that the defendant will engage further in behavioural change. In some cases, it may still be possible for the court to impose a sentence where further positive behavioural change may be supported – such as a community based order or a similar order – where there is evidence that the defendant is open to such an approach.
- At each stage the particular listening and other communication strategies described in this bench book would assist the magistrate in taking a therapeutic, problem-solving approach.

Therapeutic judging strategies can help to promote participant motivation to implement positive behavioural change strategies and to address challenges as they arise. They are a means of promoting the purpose of diversion programs – which is to promote the resolution of less entrenched underlying issues in less serious offenders.

Certainly magistrates' courts are high volume courts and the time that magistrates have to deal with each case is often limited. However, these strategies can be tailored to fit in with the needs of a particular court list. Moreover, a court could schedule a short list on a regular basis to hear diversion matters to ensure that other lists are not compromised.

Sentencing

The communication strategies and, depending on the case, some of the solution-focused judging techniques can be adapted for use in sentencing in general lists.

The use of therapeutic judging techniques to promote a more comprehensive approach to addressing offending and its underlying issues is not confined to problem-solving courts, coroners' courts or to courts' placement of defendants in diversion programs. These techniques can be adapted for use in general sentencing cases, depending on the circumstances.

It is common for a court in sentencing to comment on the effect of the offending on the victim and, if a victim impact statement has been produced to the court or if the victim has given evidence at trial, to refer directly to what the victim has said concerning the matter. The court also comments on what a defendant has said about the offending. The court acknowledges the significance of what both have said. By doing so, the court is not only giving reasons for the sentence and demonstrating that it has taken into account all relevant matters, but also according procedural justice, voice, validation and respect to victim and

defendant. By taking this approach, the court promotes respect for its processes and orders.

There may also be other occasions where the judicious use of sentencing remarks can have a therapeutic effect. For example, offenders with little contact with the justice system may be so overwhelmed by guilt and remorse that their ability to lead a constructive and happy life in the community is adversely affected. Such offenders may well require professional assistance to address these issues. However, it may also be appropriate for the judicial officer to comment about the remorse shown by the offender and to note that once the court sentence has been satisfied, the offender has repaid her debt to society and is entitled to move on with her life.⁸⁴⁶

The goals and strategies exercise can also be used in the form of a rehabilitation plan. Wexler has suggested that a judge could enter into dialogue with an offender to encourage her to identify the causes of offending and to formulate a rehabilitation plan to address the causes.⁸⁴⁷ This approach has several advantages over the court simply telling the defendant in sentencing remarks: “these are the causes of your offending on the evidence and you are to do the following things as part of this sentence (e.g., program, community work and other requirements)”. First, the dialogue process may promote greater awareness in the defendant as to the cause of offending.⁸⁴⁸ Second, where a defendant has a part in formulating the court order, he is more likely to have motivation and an internal commitment to carrying out the order. Moreover, where it is linked to the personal goals of the participant, the effect is likely to be further enhanced if it then draws upon sources of internal motivation within the defendant. On the other hand, where a court simply imposes an order on the defendant, the defendant may experience the process and order as alienating and have little commitment to implement it.

Where the court has the power, it could set review hearings to ascertain the defendant’s progress, engage in problem-solving with the defendant where necessary and praise and encourage the defendant for progress made. These processes are described in detail in the processes and strategies chapter above.

While a more comprehensive solution-focused approach is best suited to cases where there are underlying issues contributing to offending that place the defendant at increased risk of further offending, general principles of therapeutic communication between the judicial officer and the defendant are applicable in every case.

⁸⁴⁶ Ibid 101.

⁸⁴⁷ Wexler, above n 777.

⁸⁴⁸ The insight promoting aspect of dialogue was discussed in the chapters on listening and communication (Chapter 5 and Chapter 6).

Judgments

Principles of therapeutic jurisprudence can assist judicial officers to formulate judgments in a way that promotes respect for the court and that does not aggravate underlying tensions between the parties.

The handing down of judgments is a vital part of a court's function. It involves delivering the court's decision in a case, giving reasons – albeit brief at times – for the decision and making orders consequent upon the judgment. In some cases, oral reasons are delivered *ex tempore* or after an adjournment. In other cases a written

judgment is delivered. In the vast majority of magistrates' courts cases, oral reasons are given.

The reasons for the decision primarily set out the findings of fact, the determination of the applicable law and the application of the law to the facts. This allows each party to see what the basis of the court's decision was and to consider whether further action is needed – complying with the judgment (or not) or appealing against the decision to a higher court, where available. In the case of an appeal court, the reasons for decision may explain to the lower court where an error has been made and provide guidance to courts hearing similar cases in the future.

Des Rosiers has suggested that judgments, properly expressed, can also assist parties to make the necessary adjustments in their situations that must occur to give effect to the judgment:

The decision could be said to be a "letter to the loser", designed to explain why he or she lost but also to help the acceptance of the reality and the recognition that a transition must occur.⁸⁴⁹

She notes that in the case of ongoing relationships, "the parties' relationship does not end with the decision but instead evolves in light of it".⁸⁵⁰

Procedural justice principles of voice, validation and respect are important in writing "a letter to the loser". That is, a judgment should acknowledge what each party has told the court and the arguments they have expressed. It would also be useful to acknowledge any concerns that have been expressed by the parties. Although these concerns may not be strictly relevant to the decision according to law, they may well be relevant to how a party may feel about the case and any decision made by the court. In delivering reasons for a decision, the court should also acknowledge that those concerns, although important to the party, cannot affect the decision according to law.

Another important principle in handing down judgment is to avoid destroying a party. While a party may have lacked credibility in giving evidence and aspects of their behaviour may have been reprehensible, the judgment should be concerned with dealing with these aspects in particular without delivering

⁸⁴⁹ Des Rosiers, above n 80, 56.

⁸⁵⁰ Ibid.

judgment on the party as a person. Even in criminal cases, the court is concerned with making orders consequent on particular behaviour of the person rather than passing judgment on their life as a whole.⁸⁵¹ Everyone has strengths and weaknesses. For example, offenders do not offend all of the time and even when they do offend, their lives at the time may well also have examples of laudable acts.

A judgment that destroys a person may also have the effect of destroying their faith in the justice system and their respect for the law.⁸⁵² It may interfere with a fundamental purpose of a judgment – to resolve a legal dispute between people or, in the criminal sphere, to promote offender rehabilitation and prevent further offending. There is a significant risk that where a judge says that a defendant is a hopeless drunk or otherwise doubts his ability to rehabilitate that it will have a labelling effect – that is, it will reinforce the defendant’s low self-concept and self-efficacy.⁸⁵³ Certainly a judge may decide that greater weight must be given to deterrence and punishment than rehabilitation, but it does not promote any useful purpose for society to then denigrate the participant and his prospects of rehabilitation.

Where there is or needs to be an ongoing relationship between the parties, an anti-therapeutic judgment may well enhance tensions between the parties that could create further legal problems. The obvious example is a family law case where separated parents need to be on good speaking terms for the sake of the children. While a court must decide the preferred living arrangements for children in the event of separation, a judgment that condemns a person or the person as a parent may have the effect of hindering the relationship, particularly given that parties in such circumstances are already emotionally vulnerable. There are other examples as well: family members in the case of a dispute over a will, members of a club or other community organisation, business relationships and so on. Des Rosiers has suggested that in the case of an ongoing relationship between the parties, it is particularly important for a court to encourage and promote parties resolving their differences in a non-abusive and respectful manner.⁸⁵⁴

A therapeutic approach to delivering judgments would acknowledge the subtle nuances, complexities and sensitivities involved. It would avoid condemning any party and instead focus on resolving the factual and legal issues before the court. While a court may be critical of the actions of a party or need to express a preference as to care arrangements and parenting preferences when making an order concerning children in family law cases, the court needs to be careful to ensure that the way in which these views are expressed does not aggravate a

⁸⁵¹ An extreme example of a court taking the opposite approach is *Were v Police* [2003] SASC 116. In that case, an appeal judge described a magistrate’s remarks to a defendant, which included expressions such as “You’re a druggie and you’ll die in the gutter” and “It’s your choice to be a junkie and die in the gutter. No one gives a shit, but you’re going to kill that woman who is your mother, damn you to death”, as having a “corrosive effect upon public confidence in the functioning of the courts” ([15]).

⁸⁵² *Were v Police* [2003] SASC 116, [15].

⁸⁵³ See: Having Positive Expectations of Participants in Chapter 7.

⁸⁵⁴ Des Rosiers, above n 80, 56.

situation. Such a judgment would be framed in language and tone that is respectful to the parties involved. It would be mindful of the possible effect of the judgment on the parties and on the wider community. This is not to say that such matters would affect the decision according to law, only to say that they should affect how a judgment is expressed.

Where a court delivers a written judgment there is time for reflection and redrafting before the judgment is handed down. In the case of oral decisions, there is often little time for reflection and the demands of a heavy list require speed, accuracy and succinctness. Still, with attention to values of voice, validation, respect and a comprehensive resolution of a dispute, a court can deliver oral reasons that have a therapeutic effect and that avoid possible negative side-effects of the decision.

These principles concerning the therapeutic effect of judgments are as applicable to appeal courts as they are to courts at first instance. For appeal courts, there is an additional consideration: the effect of the decisions on the judicial officer whose decision is the subject of the appeal. The former President of the New South Wales Court of Appeal referred to tensions between appeal courts and courts the subject of their decisions that arguably arose from overly strong language in appeal judgments directed at the original decision-maker.⁸⁵⁵

One of the functions of appeal courts is to educate lower courts concerning proper procedures in appropriate cases.⁸⁵⁶ Lower courts benefit from the guidance offered by higher courts. It is hardly a sound educational strategy to offend the person one intends to teach. Indeed, such an approach may have the opposite effect to that intended. It is not easy at times for a person to acknowledge his mistake and to learn from it – judicial officers included. Being humiliated in a public forum is unlikely to promote receptivity to such learning.⁸⁵⁷ A better approach would be for the appeal court to acknowledge the circumstances of the court, the judicial officer and the case – such as demands of time due to the urgency of the case or the pressures of a busy list, the conceptual difficulty of the case, the lack of access to authorities (as may be the case for remote courts) – express empathy for the situation of the judicial officer concerned, note aspects of the judgment where the judicial officer has taken the correct approach and use carefully crafted language point out any errors.⁸⁵⁸

Conclusion

This chapter has given examples of where solution-focused judging techniques can be used outside the context of a problem-solving court. Some of the judging approaches used in problem-solving courts have general application. Procedural justice principles such as promoting voice, validation and respect and communication techniques involving active listening and the proper use of speech in court have general application to judging.

⁸⁵⁵ K. Mason, "Throwing Stones: Cost/Benefit Analysis of Judges Being Offensive to Each Other" (2008) 82 *Australian Law Journal* 260.

⁸⁵⁶ King, above n 80.

⁸⁵⁷ Ibid.

⁸⁵⁸ Ibid.

We have also explored examples where a full, solution-focused approach could be used outside the criminal sphere normally the province of problem-solving courts in Australia and New Zealand. A problem-solving approach has been used in child welfare proceedings in the United States and briefly in the Geraldton Children's Court in Western Australia. It also has potential application in coronial proceedings.

Time and resources are naturally issues that a court must consider in embarking on more comprehensive approaches to problem-solving processes. However, the prospect of promoting justice system goals and providing better outcomes for parties to court processes is attractive and deserving of consideration. In some cases, collaboration between a court and the local community can lead to the establishment of a problem-solving court program. As in all court developments, judicial officers need to be mindful as to the effect of statute law and the common law in determining whether a particular approach is appropriate.

Chapter 9: Challenges in Solution-Focused Judging

Michael King

By reason of the unique nature of solution-focused judging, there will be professional and personal challenges in adopting this approach, many of which will differ from those experienced in a conventional approach to judging.

At the same time, solution-focused judging offers opportunities for job satisfaction not available to those taking a conventional judging approach.

Judicial officers presiding in a problem-solving court or taking a solution-focused approach in a mainstream list use strategies that not only seek to address the participant's problem as defined by legal analysis, but also to address underlying issues such as substance abuse, family violence, and mental health issues. These judicial officers are called to exercise a broad range of intrapersonal and interpersonal skills not usually exercised in mainstream judging. They are asked to take a therapeutic approach. However, they must also consider other values reflecting the court's role in the wider community – such as accountability of participants, integrity of the program and compliance with the law. The nature of this form of judging not only raises significant challenges for judicial officers but also important opportunities to help make a difference in participants' lives. The result is that judicial officers gain more from their work.

Professional Challenges in Solution-Focused Judging

Judging in a problem-solving court program involves taking into account considerations such as promoting participants' positive behavioural change, participant accountability, program integrity, collaborative decision-making and compliance with statute and the common law.

Mostly these principles will be in harmony, but when they conflict there will be some careful balancing of competing principles required.

Judicial officers presiding in a problem-solving court program need to consider a number of sometimes conflicting matters, principally:

1. **The legal framework under which the court program was established.** Some programs – such as drug courts in New South Wales, Queensland and Victoria – are constituted by legislation specifically designed for the purpose. Other programs have been created under legislation that came into existence well before problem-solving court programs were introduced. Underlying the legislative framework, general principles concerning bail, sentencing and procedural fairness under case law may also be relevant.

While case law provides extensive guidance as to how other aspects of court processes are to be conducted – such as bail hearings, trials and sentencing hearings – it does not provide extensive guidance as to the day to day judging processes in a problem-solving court program. However, some case law is starting to emerge in Australia in connection with drug courts. For example, Queensland’s Court of Appeal has approved a drug court magistrate praising a participant and wishing the participant well on graduation from the participant’s program.⁸⁵⁹

Further, the Supreme Court of South Australia decided that a drug court should accord procedural justice to participants.⁸⁶⁰ This includes giving participants adequate notice of matters to be decided and giving them the opportunity to address the court before any decisions are made. This is in accord with a therapeutic approach to judging in any event as giving participants voice is an essential principle of therapeutic jurisprudence and procedural justice.

2. **Promoting the rehabilitation of participants.** While some family violence courts, particularly in the United States, do not consider offender rehabilitation as part of their remit, there are others that do.⁸⁶¹ Certainly drug courts see promoting offender rehabilitation to be their core business. Mental health courts seek to promote participants’ engagement in treatment and the improvement of their mental health. Most courts valuing participant health and rehabilitation see therapeutic jurisprudence as a primary source of principles and practices of judging and lawyering. These principles guide how judicial officers decide cases.
3. **Accountability.** Participants are expected to follow program conditions. Courts should hold participants accountable for their actions throughout the program given the court team time and community resources that are devoted to assisting them. In addition, for many of these programs, participation is a means for participants to avoid more serious consequences such as an immediate term of imprisonment. Accountability becomes particularly important in such cases. The use of review hearings, a breach point system, the imposition of other sanctions and rewards and the option of terminating a person from the program are common accountability mechanisms in problem-solving court programs.

⁸⁵⁹ *R v Newman* [2008] QCA 147, [34]-[35].

⁸⁶⁰ *Crockford v Magistrates Court of South Australia* (2008) 100 SASR 195.

⁸⁶¹ King and Batagol, above n 3.

4. **Program Integrity.** The court must operate and be seen by participants and the wider community to be operating fairly according to sound principles; to use evidence-based approaches to rehabilitation; to be fair to each participant in promoting their rehabilitation; and to remove from the program those who significantly breach program conditions.
5. **Collective Decision-Making vs. Individual Decision-Making.** Many drug courts operate using a collaborative decision-making process of a multi-disciplinary court team. However, at times a judicial officer will need to make a decision individually after hearing from the parties involved. For example, in the Perth Drug Court a team meeting may decide one way in relation to how a matter is to proceed. The team may then in open court receive further evidence and submissions that seek to persuade the magistrate to proceed differently (such as in the case of applications for termination). In such cases, the judicial officer needs to be sensitive as to when collective decision making processes should be used and when the judicial officer should decide alone.

These principles can come into conflict in the process of judging in a problem-solving court program. For example, accountability requires a court to take appropriate action when a participant does not comply with a court program. A mainstream court often takes a punitive approach in dealing with non-compliance with program conditions – such as by cancelling a community based order and imposing imprisonment or by remanding a person in custody. In taking a therapeutic approach in a problem-solving court program, the judicial officer and the court team recognise that rehabilitation is not simply a matter of using one day and stopping the next. Rehabilitation takes time and relapse is a natural part of the process. The judicial officer must weigh what is a reasonable time to allow a participant to become drug free and/or to engage in the program along with the need to preserve accountability and the integrity of the court program. Sometimes the court cannot accommodate the prolonged time needed for rehabilitation in an individual case. It will therefore terminate the participant from the program as a result of the participant's chronic breaches of conditions and the inability of the court's processes – such as sanctions and rewards or other strategies – to promote compliance.

Sometimes the participant does not have the motivation to engage in positive behavioural change. Despite a number of chances offered to a participant to follow the program and multiple instances of non-compliance, the court will offer the participant a further chance to engage in the program.⁸⁶² Generally the judicial officer will tell such a participant that this is her "last chance" and/or that the judicial officer will "go out on a limb" for the participant to support the participant's self-efficacy – the participant's ability to succeed. In doing so, the judicial officer intends to help motivate the participant to further effort by demonstrating that the judicial officer is prepared to take a risk due to her trust in the participant's ability and motivation. Usually in such cases there has been something in the participant's past performance on the program or in the participant's background that is evidence of the participant's ability to succeed

⁸⁶² King, above n 3, 171.

that will lead the judicial officer to take this approach. However, if this approach is taken, it is important to ensure the participant has a sound relapse prevention plan and appropriate support.⁸⁶³ In some cases it can be most difficult to determine the appropriate course of action to take – giving a participant a further chance or removing the participant from the program.

There may also be exceptional cases where the court, as a last resort, overrides the approach of promoting self-determination and takes coercive and paternalistic action to deal with an immediate crisis. King has described one such example from a case before him as Perth Drug Court Magistrate:

A young woman under a presentence order supervised by the court had relapsed and resumed using amphetamines. Her living circumstances and lifestyle were chaotic. She was approaching her breach point limit – in the Perth Drug Court, breach points are imposed for breaching program conditions and attaining the breach point limit leads to a remand in custody and an application for termination from the program. She assured the court that she could stop using and presented a relapse prevention plan to the court that appeared sound and that involved her remaining in the community receiving treatment and support.

The magistrate asked the participant whether, given the severe problems she was experiencing in the community, it would be preferable that she attend residential treatment after a short remand in custody until a bed was available. The participant assured the magistrate that she could implement her rehabilitation plan. The magistrate had to balance whether to remand her in custody to consider residential treatment or to promote her self-determination and trust in the court by allowing her to implement the plan. The magistrate chose the latter and reinforced the participant's self-efficacy.

A short time later the participant reached her breach point limit. She pleaded with the court for a chance to continue to engage in rehabilitation in the community but the court remanded her in custody – despite her vocal protests when being led away by court security staff. On her next appearance she thanked the magistrate for remanding her in custody, having come to the realisation that she needed residential treatment before being returned to the community. Rather than terminating her from the program and imprisoning her, the magistrate decided to give her a final chance – which involved completing a residential treatment program. Subsequently, she completed community residential treatment, stopped using drugs, began to re-establish her life in the community and graduated from the Perth Drug Court.⁸⁶⁴

Where a solution-focused judicial officer takes a paternalistic or coercive approach, it is important that she give reasons for and carefully explain to the participant why the judicial officer is, in this exceptional instance, overriding the participant's wishes. The judicial officer should also, as far as possible, support the positive attributes of the participant and indicate that there will be a return to the previous approach once the order has been executed. The judicial officer should also return to using processes that promote self-determination and participation as soon as possible.

There can be potential conflicts between the processes used in a problem-solving court and principles of natural justice or due process. For example, drug courts

⁸⁶³ See: Chapter 7.

⁸⁶⁴ King, above n 3, 171.

commonly have team meetings comprising the magistrate, prosecutor, defence counsel, community corrections officer and other team members. The team discusses each case in the absence of the participant and behind closed doors. The conduct of case management meetings in the absence of participants has been the subject of concern expressed by some Australian magistrates.⁸⁶⁵ The concerns relate to the principle of open justice and the procedural justice rights of participants. Popovic has raised concerns that having case management meetings in private breaches the principle of open justice – that justice must not only be done but be seen to be done. In case management meetings, key decisions concerning what is to happen in a drug court case are made without public scrutiny. Popovic has summarised the benefits of open justice as follows:

[I]t tends to encourage witnesses as to the seriousness of the proceedings; it promotes the veracity of evidence; it may elicit unexpected depositions from people in the audience; it promotes public discourse in relation to judicial proceedings; it promotes the integrity of judges; it promotes and maintains public confidence in the judicial process; it ensures fair outcomes arrived at by fair procedures; it distinguishes judicial activities from those of administrative officials.⁸⁶⁶

It is only case management meetings that are conducted in closed session, not drug court hearings themselves, but if the real decision-making is made behind doors, the objection still remains.

The High Court of Australia has acknowledged that in some cases it may be desirable (and not objectionable) to sit in closed court for a variety of purposes, such as “the need to maintain secrecy or confidentiality, or the interests of privacy or delicacy” and that it may involve only part of the proceedings.⁸⁶⁷ It is suggested that in drug court cases the interests of confidentiality to promote frank discussion amongst team members and to address issues that may be of a delicate nature concerning the participant may require this part of the proceedings – the case management meeting – to be conducted in private. In any event, safeguards can be put in place to protect the integrity of the process. These are discussed below.

The conduct of any court-related process in the absence of a party generally offends basic common law and statutory principles concerning a fair hearing – a party is entitled to be present and to participate in the proceedings. The party is able to hear submissions made against his interest and to introduce evidence and make submissions in reply. Even though the participant’s counsel may be present, there is no mechanism for counsel to seek instructions as the case proceeds in the case management meeting. Further, as we have seen in our discussion of procedural justice principles in Chapter 1, a failure to follow such principles may promote a party’s disrespect for a court and its orders. Not involving participants in decision-making also violates a cardinal rule of

⁸⁶⁵ See, for example: Cannon, above n 108, 129-130; J. Popovic, "Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby out with the Bathwater?" (2006) 1 *eLaw: Murdoch University Electronic Journal of Law* 60, at <<https://elaw.murdoch.edu.au>> viewed 3 April 2009.

⁸⁶⁶ Popovic, above n 865, 63.

⁸⁶⁷ *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

therapeutic judging: as far as possible, promote self-determination.⁸⁶⁸ Yet drug courts consider there are good reasons for holding case management meetings in the absence of participants:

primarily to promote frank discussion amongst team members concerning the progress of the participant and to protect the participant from being exposed to remarks that may be hurtful or otherwise hinder their recovery.⁸⁶⁹

While there is certainly the hint of paternalism in such an approach, it is accurate to state that some participants in a problem-solving court program – particularly a drug court – may be vulnerable and not able to handle frank comments about their attitude and shortcomings. The risk is that they may revert to substance use or other dysfunctional behaviour as a coping mechanism.

Problem-solving court team meetings can be held in the absence of participants for therapeutic purposes while preserving participants' rights if the following safeguards apply:

1. The participant's counsel is present at all times in the case management meeting when the participant's case is discussed.
2. As far as possible, case management meetings remain focused on raising issues and identifying possible courses of action concerning a participant's case, recognising that in some cases the meeting may not have up-to-date information from the participant.
3. Any decision made at the case management meeting being considered a proposal, not a final determination. The decision should be open to review in the light of new evidence or submissions from the participant.
4. The participant being at liberty to introduce evidence and make submissions in open court before the judicial officer concerning matters discussed or decisions made in case management meetings.
5. Other members of the case management team being able to make further submissions or produce evidence in response.
6. The judicial officer being open to revisiting the decision made in a case management meeting if the evidence and submissions justify it.

Cannon has similarly suggested that a judicial officer could explain to the participant what took place in a case management meeting when the case comes before the judicial officer in court.⁸⁷⁰

There are challenges in addressing the tensions between the different values that judicial officers must promote while presiding in a problem-solving court. Sometimes there will be a delicate balance between values that have come into conflict. Where there are issues concerning compliance with common law principles or statutory provisions, there may need to be careful thought as to how to promote other values (such as therapeutic values) in a way that is consistent with the law. As noted in the processes and strategies chapter above there may also be significant emotional demands on the judicial officer and court team, particularly where a long-standing participant must be terminated from

⁸⁶⁸ See: Chapter 1.

⁸⁶⁹ King et al, above n 27, ch 14.

⁸⁷⁰ Cannon, above n 108, 130.

the program for breach. However, for much of the time in presiding in these courts, the values will be in harmony with each other. That is, promoting positive behavioural change, accountability, program integrity, collaborative decision-making and compliance with statute law and common law will, in most cases, point the judicial officer in the same direction.

Personal Challenges in Solution-focused Judging

Therapeutic judging is rewarding, but can be stressful. Stress can cause burnout, compassion fatigue and vicarious traumatisation.

Judicial officers can prevent the development of stress-related disorders through a positive attitude to work, development of judging skills and resources and the adoption of a healthy lifestyle.

Courts should provide a supportive work environment and ongoing professional development and support services for judicial officers to minimise the effects of stress and to help those who develop stress-related disorders.

While judging in a problem-solving court is particularly rewarding and can be a source of judicial satisfaction in that one often sees participants overcome significant dysfunction to rebuild their lives, it can also be the source of significant stress.⁸⁷¹ Job challenges can be motivating. However, if the pressures are too great, physical and psychological dysfunction can result. Legal professionals such as judicial officers and lawyers are not immune from stress. Indeed, the characteristics of their roles can be the source of considerable stress. There has been some scepticism about the nature and effects of judicial stress from the judiciary,⁸⁷² but research is emerging that suggests it is an important factor that deserves further exploration.⁸⁷³

The literature on stress in the workplace has developed a number of ways of categorising the effects of excessive stress on health and wellbeing, including interrelated concepts such as “burnout”, “vicarious traumatisation” and “compassion fatigue”. Burnout has been defined as “a psychological syndrome in response to chronic interpersonal stressors on the job”.⁸⁷⁴ It is conceptualised in terms of three aspects: “overwhelming exhaustion, feelings of cynicism and detachment from the job, and a sense of ineffectiveness and lack of accomplishment”.⁸⁷⁵ Exhaustion is associated with the stress involved in the condition and the depletion of emotional and physical resources; cynicism

⁸⁷¹ As to judicial satisfaction in problem-solving judging, see: Hora and Chase, above n 33; Chase and Hora, above n 33.

⁸⁷² See, for example: J. B. Thomas, "Get up Off the Ground" (1997) 71 *Australian Law Journal* 785.

⁸⁷³ P. G. Jaffe, C. V. Crooks, B. L. Dunford-Jackson and M. Town, "Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice" (2003) 54 *Juvenile and Family Court Journal* 1.

⁸⁷⁴ C. Maslach, W. B. Schaufeli and M. P. Leiter, "Job Burnout" (2001) 52 *Annual Review of Psychology* 397, 399.

⁸⁷⁵ *Ibid.*

colours one's relationships with others, typified by a tendency to be negative, overly detached or callous; and the final aspect relates to a decline in work productivity.⁸⁷⁶ Burnout is a process and its symptoms develop over time.⁸⁷⁷ According to Milne and Pearlman, vicarious traumatisation is where professionals – such as therapists working with victims – are exposed to victims' traumatic memories and thereafter experience resultant changes in their own psychological functioning – such as in their memory imaging systems and the beliefs, assumptions and expectations they have about themselves.⁸⁷⁸ Those subject to vicarious traumatisation can experience a range of symptoms such as the recurrence of disturbing mental images, intense negative feelings, and sleep disruption.

Figley has suggested there is a “cost to caring”:⁸⁷⁹

The very act of being compassionate and empathic extracts a cost under most circumstances. In our effort to view the world from the perspective of the suffering we suffer. The meaning of compassion is to bear suffering. Compassion fatigue, like any other kind of fatigue, reduces our capacity or our interest in bearing the suffering of others.⁸⁸⁰

Symptoms of compassion fatigue include avoiding thoughts and situations that remind one of another person's traumatic event; the experience of hyperarousal symptoms including hypervigilance, concentration problems, sleep disturbances, high startle response and feelings of agitation or irritability; decreased interest in activities that previously brought pleasure; and diminished affect.⁸⁸¹ Compassion fatigue has been found to affect a wide range of professionals, including therapists, nurses, doctors and emergency workers.⁸⁸² It can also affect members of the judiciary and lawyers. Compassion fatigue can develop more rapidly than burnout, emerging suddenly with little warning.⁸⁸³

Compared with other professions, there has been little research on the effects of stress on the judiciary. There is evidence that judges experience stress in their work.⁸⁸⁴ For example, an exploratory study by Jaffe and colleagues of 105 judges found that 63% reported one or more symptoms consistent with vicarious trauma experienced in their work.⁸⁸⁵ In another study, judges reported moderate stress following presiding in trials of crimes involving children and sexual and

⁸⁷⁶ Ibid.

⁸⁷⁷ C. R. Figley, "Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview", in Figley (ed.), *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized* (Brunner/Mazel, 1995) 1, 11.

⁸⁷⁸ L. Milne and L. A. Pearlman, "Vicarious Traumatisation: A Framework for Understanding the Traumatic Effects of Working with Victims" (1990) 3 *Journal of Traumatic Stress* 131.

⁸⁷⁹ Figley, above n 877, 1.

⁸⁸⁰ C. R. Figley, "Compassion Fatigue: Psychotherapists' Chronic Lack of Self-Care" (2002) 58 *Journal of Clinical Psychology* 1433, 1434.

⁸⁸¹ M. Salston and C. R. Figley, "Secondary Traumatic Stress Effects of Working with Survivors of Criminal Victimization" (2003) 16 *Journal of Traumatic Stress* 167, 169.

⁸⁸² Figley, above n 880; Salston and Figley, above n 881.

⁸⁸³ Figley, above n 877, 12.

⁸⁸⁴ For a review of the limited research available, see: J. Chamberlain and M. K. Miller, "Stress in the Courtroom: Call for Research" (2008) 15 *Psychiatry, Psychology and Law* 237.

⁸⁸⁵ Jaffe et al, above n 873.

violent offences.⁸⁸⁶ Given these results and the aspects of judicial work shared with other caring professions – exposure to accounts of traumatic events and traumatised people and the exercise of an ethic of care – not only should further research on judicial stress be undertaken, but also both individual judicial officers and courts need to take active steps to address the issue. This is particularly important for judicial officers taking a therapeutic or solution-focused approach.

Therapeutic judging often requires the judicial officer to take on a more interventionist and caring role in court. Yet such a role is a significant change from the usual role of a magistrate or judge. As Justice Kirby has pointed out: “[a]n element of distance and remove are a usual part of the judicial life after our tradition”; judicial officers’ conduct must be “unobtrusive and acceptable”.⁸⁸⁷ While Justice Kirby was talking of the judicial life generally, his comments apply equally to the judicial role in court: distant, removed, impartial, attentive, and not involved unless called upon by a party – generally through counsel – or where particular circumstances of a case require it. The attitude of distance and remove to a degree acts as a shield against the trauma and suffering of those coming before the court. Admittedly, that attitude is not a complete defence against the stress of exposure to the trauma of another. Judging with distance and remove does not mean ignorance of the feelings of those involved, but it also does not involve taking active steps to explore those issues in an empathetic manner.

Judging in a therapeutic manner requires the judicial officer to maintain independence and impartiality and to undertake a facilitative role in court, assisting the parties to reach a resolution of their problems in a more therapeutic manner. That may involve parties addressing painful underlying issues. As therapeutic judging means that the judicial officer is sensitive to the feelings of the parties and takes a caring, empathetic approach, it follows that the judicial officer will be more exposed to trauma and suffering expressed by the parties than judging in the traditional manner with distance and remove. It can be particularly challenging at times when a judicial officer must make a difficult decision, such as overriding a participant’s preferred course of action or terminating him from the program:

For the judicial officer (and the court team generally) it can be particularly challenging emotionally where, for example, months into a program, after the court team has developed a close working relationship with the participant and has seen the participant progress despite significant personal issues and challenges, the participant commits a breach that must result in the participant’s termination from the program and imprisonment. The relationship between the participant and the judicial officer and court team comes to a swift end.⁸⁸⁸

⁸⁸⁶ M. K. Miller, E. Greene, H. Dietrich, J. Chamberlain and J. A. Singer, "How Emotion Affects the Trial Process" (2008) 92 *Judicature* 56, 63.

⁸⁸⁷ M. Kirby, "Judicial Stress", speech delivered to the *Annual Conference of the Local Courts of NSW*, 2 June 1995, at <<http://www.lawfoundation.net.au/ljf/app/&id=E812A4B4C60E3A26CA2571A8002344A5>> viewed 18 July 2009. See also: M. Kirby, "Judicial Stress - an Update" (1997) 71 *Australian Law Journal* 774.

⁸⁸⁸ King, above n 3, 171.

Indeed, the process of empathising is seen in the literature on compassion fatigue as a means by which trauma can be experienced.⁸⁸⁹ Further, if a professional has experienced trauma in her own life, being exposed to the trauma of those the professional is assisting may awaken disturbing thoughts and feelings associated with that past trauma.⁸⁹⁰

Problem-solving courts and the concept of therapeutic jurisprudence are relatively new phenomena. Therapeutic jurisprudence involves applying principles from the behavioural sciences in judging. Yet few judicial officers and lawyers today will have been trained in this approach. Their mindset, their approach to practice and the almost instinctive way in which they react to legal problems and to court processes have been formed through education and practice in the traditional adversarial approach to justice, with its independent, distant and reserved judiciary. To change this well established mindset and approach to legal practice and judging can be demanding. To consistently apply therapeutic principles in court in place of less therapeutic principles can also be demanding. While adapting to this new style of judging is often professionally rewarding, it can also be a source of stress. A possible additional source of stress is where judicial officers are meant to adapt to this more proactive role without adequate training in its principles and practices.

For judicial officers presiding in a problem-solving court, the possibility of compassion fatigue or vicarious traumatisation and the demands of adapting to the new judging role is in addition to other causes of judicial stress including having to deal with high workloads, judicial isolation, coping with a rapidly changing legislative landscape, adapting to new technology, adapting to changing social values and limited ability to receive constructive feedback about their work.⁸⁹¹ Whether professionals adequately cope with compassion fatigue depends on factors such as approach to self-care, previous unresolved trauma, a lack of satisfaction for the work and refusal to control work stressors.⁸⁹² Problem-solving judges have been found to have high levels of job satisfaction. That should be a protective factor against compassion fatigue.⁸⁹³

Radey and Figley, writing in the context of compassion fatigue amongst social workers, suggested that three interrelated techniques could help minimise compassion fatigue and promote “compassion satisfaction”: maintaining a positive attitude towards clients; developing inner resources relating to helping skills and dealing with compassion fatigue; and “increasing self-care that comes from finding inspiration and happiness in life”.⁸⁹⁴ These principles can be adapted to the work of judicial officers, particularly judicial officers taking a therapeutic approach. Optimism that fuels a positive attitude can be found in the improvements in the lives of participants – even in many of those who must be terminated from the program. The development of resources in solution-focused

⁸⁸⁹ Figley, above n 877, 15.

⁸⁹⁰ Ibid 16.

⁸⁹¹ Kirby (1995), above n 887.

⁸⁹² M. Radey and C. R. Figley, "The Social Psychology of Compassion" (2007) 35 *Clinical Social Work Journal* 207.

⁸⁹³ Hora and Chase, above n 33.

⁸⁹⁴ Radey and Figley, above n 892, 211-212.

judging requires keeping up to date with developments in the field through participation at conferences and training programs and reading new publications in the area.

Judicial officers presiding in therapeutic court programs typically are dealing with participants with profound imbalance in their lives. They seek to exercise an ethic of care in their approach to judging involving these individuals. To protect against the stress involved in such work it is important that judicial officers exercise an ethic of care towards themselves and maintain proper balance in their own lives – attending to positive activities and attitudes that promote their physical and psychological wellbeing and enjoyment of life. A good diet, adequate sleep, regular exercise, avoiding tobacco use, drinking the recommended amount of water each day, avoiding excessive consumption of alcohol and caffeine and a proper balance between work and recreational activities are important. Justice Kirby observed that judicial officers have begun engaging in stress reduction activities such as yoga, listening to music, physical exercise and other recreational activities.⁸⁹⁵ He also noted that some are practising the stress-reduction and self-development technique, Transcendental Meditation®.⁸⁹⁶

A common misconception is that there is a general “relaxation response” that can be activated in mind and body through a wide range of techniques. However, the evidence does not support the contention that there is a general “relaxation response”.⁸⁹⁷ Stress reduction techniques vary significantly in their effects on mind, body and behaviour; evidence supporting the use of one technique cannot be used to support the use of another technique.⁸⁹⁸ When considering using a stress reduction technique, consideration should be given as to the evidence supporting the practice of that technique.

Courts can also act to minimise stress and the potential for compassion fatigue in solution-focused judicial officers in its approach to judicial rosters. Giving solution-focused judges “time out” in a general court list is one option. For example, the Perth Drug Court has one magistrate dedicated to the court fulltime but every four to six weeks, the Deputy Chief Magistrate of Western Australia presides in that court for a week while the Drug Court Magistrate is rostered in another list or conducts a circuit. The close liaison between the two magistrates ensures that continuity is maintained and that participants do not suffer by having a judicial officer come in “cold”.

It has been suggested that courts should have a wellness initiative to prevent and to address stress-related problems, including judicial mentoring to new judges

⁸⁹⁵ Kirby (1995), above n 887.

⁸⁹⁶ Ibid.

⁸⁹⁷ R. J. Davidson and G. E. Schwartz, "Psychobiology of Relaxation and Related States", in Mostofski (ed.), *Behavioural Modification and Control of Physiological Activity* (Prentice Hall, 1976) 399; P. M. Lehrer, R. Carr, D. Sargunraj and R. L. Woolfolk, "Stress Management Techniques: Are They All Equivalent, or Do They Have Specific Effects?" (1994) 19 *Applied Psychophysiology and Biofeedback* 353; D. W. Orme-Johnson and K. G. Walton, "All Approaches to Preventing or Reversing the Effects of Stress Are Not the Same" (1998) 12 *American Journal of Health Promotion* 297.

⁸⁹⁸ Ibid.

and those experiencing problems, and access to a range of support services.⁸⁹⁹ Providing access to continuing professional development programs and promoting a cordial working environment are additional strategies to minimise stress and promote wellbeing. A cordial work environment includes the ability of judicial officers to talk with each other about challenges and the ability for the judicial officer and court team (as appropriate) to engage in debriefing after particularly difficult periods dealing with challenging lists. Of course, this approach to judicial wellness should not be confined to those taking a solution-focused approach; it should be an initiative applied by all courts.

Conclusion

Solution-focused judging requires the use of a broader range of skills than in conventional approaches to judging. The ethic of care required by therapeutic jurisprudence and transformational leadership in judging requires the ability to not only exercise analytic skills and knowledge of the law, but also to communicate effectively with participants, to be aware of factual and affective dimensions of communication, and to exercise skills that promote inclusive problem-solving and participants' motivation, self-determination and self-efficacy. Despite or perhaps by reason of the personal and professional challenges arising from problem-solving judging, this form of judging offers the potential for greater work satisfaction by judicial officers.

⁸⁹⁹ I. M. Zimmerman, "Helping Judges in Distress" (2006) 90 *Judicature* 10. On judicial mentoring, see: B. Teague, "Towards Better Judicial Mentoring, Report to the Winston Churchill Memorial Trust of Australia" (2009), at <http://churchilltrust.encode.net.au/res/File/Fellow_Reports/Teague%20Bernard%202008.pdf> viewed 10 May 2009.

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