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## APPLYING THERAPEUTIC JURISPRUDENCE PRINCIPLES IN SENTENCING: COURTS, CORRECTIONS AND BEYOND

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## Applying therapeutic jurisprudence principles in sentencing: Courts, corrections and beyond

Therapeutic jurisprudence aims to maximise therapeutic effects of the law and minimise anti-therapeutic consequences of the law. In Victoria, there has been substantial activity around problem solving approaches in courts and offender rehabilitation in corrections. The *Attorney-General's Justice Statement 2004–2014* provides an overarching policy framework for problem solving initiatives in the courts. In the Magistrates' Court, a continuum of approaches ranging from specialist courts (Drug Court and Koori Courts) to specialist lists (Family Violence Courts) to specialist programs attached to various courts have been developed. The *Corrections Long Term Management Strategy 2001–2005* provides a plan to reduce imprisonment rates by 600 prisoners less than the predicted trend. Part of the Strategy has been to develop a rehabilitation framework for higher risk offenders with targeted assessment, treatment and management. Beyond courts and corrections, balancing of individual defendant/offender autonomy with community protection is required. Applying therapeutic jurisprudence principles to courts and corrections will be considered in the Victorian context.

### Introduction

In the context of sentencing principles, the following paper will provide an overview of current policy initiatives in Victoria, demonstrate the application of therapeutic jurisprudence principles to reducing re-offending in corrections and sentencing of sex offenders in court, and discuss the possibility of applying therapeutic jurisprudence principles consistently across the criminal justice system.

In the criminal justice system there is a fine line between treatment and punishment (Miller, 2004). In both sentencing of defendants and rehabilitation of offenders, deprivation of liberty is justified in terms of protection of the community. According to Slobogin and Fondacaro (2000) deprivation of liberty can be managed in three ways. The *punishment model* sanctions blameworthy behaviour or exact retribution to punish individuals who have caused harm. Punishment as retribution does not reduce re-offending. The *prevention model* deters or restrains to prevent or minimise future harm.

Prevention includes deterrence and incapacitation, which do not reduce re-offending, and rehabilitation which has a focus on community protection rather than individual offender autonomy. The *protection model* ensures that rights and privileges are exercised autonomously to ensure decision making capacity. Protection alone will not reduce re-offending, but should be included in any rehabilitation program. While the criminal justice system is mostly aligned with punishment, it also incorporates elements of prevention and protection (Birgden, 2004b).

The *Sentencing Act 1991* (Vic) accommodates both punitive and rehabilitative objectives within one sentencing structure. Section 5(1) of the Act defines the five principles of sentencing as: (a) just punishment, (b) deterrence of the defendant and others from committing similar offences, (c) the establishment of conditions for the rehabilitation of the defendant; (d) denunciation of the defendant's conduct, and (e) the protection of the community from the defendant.

## **Victorian policy**

Current Victorian State Government policy initiatives include problem solving approaches in court guided by the *Attorney-General's Justice Statement 2001–2014* and offender rehabilitation in corrections guided by the *Corrections Long Term Management Strategy 2001–2005*.

The *Attorney-General's Justice Statement 2001–2014* establishes directions for reform including sentencing in general and defendants in particular. Modernising justice focuses on values of fairness, accessibility, equality and effectiveness, as applied within the current social context. In terms of sentencing, modernising justice recognises changes in the contemporary sentencing environment (particularly the number of drug-affected defendants) and increases the ability of the courts to individualise sentencing. Protecting rights and addressing disadvantage ensures that human rights are valued and protected, and inequality and disadvantage are addressed. In terms of defendants, a framework for problem solving approaches in the Magistrates' Court will be implemented to address the underlying causes of offending for those who are over-represented in the criminal justice system. In addition, there will be a multidisciplinary approach to defendants with mental impairment, drug dependence and/or homelessness who are caught up in the cycle of offending.

Freiberg (2004) has proposed two possible directions for problem-oriented approaches in the courts. One approach is to create more specialist courts and the other approach is to integrate problem solving into mainstream courts. In Australia, New Zealand and Canada there has been a move toward broad-based reform, rather than specific problem solving courts (Wexler, 2005). In Victoria the approach has been broad-based and included court-based services (for disadvantaged defendants), specialist lists (for applicants of intervention orders or sex workers) and problem solving courts (for Indigenous or drug-related defendants).

The *Corrections Long Term Management Strategy 2001–2005* establishes a two-pronged approach; providing a stronger community correctional service for those on community dispositions and preventing offenders returning to prison through adequate pre- and post-release support. Evidence-based rehabilitation programs are provided in both prison and the community to reduce the likelihood of re-offending.

## **Therapeutic jurisprudence**

Therapeutic jurisprudence is an interdisciplinary endeavour which encompasses law, psychology, psychiatry, criminology, criminal justice, public health, and philosophy. Therapeutic jurisprudence is a legal theory that utilises social science knowledge to determine ways in which existing laws and law reform can enhance well-being. The values of therapeutic jurisprudence complement current policy development in courts and corrections in Victoria.

Therapeutic jurisprudence maximises the overarching aims of the law— individual autonomy and community protection are never to be trumped by therapeutic considerations (Winick, 1992). That is, therapeutic jurisprudence does not support a

therapeutic state. This view has implications for how offenders are engaged in rehabilitation, in terms of maximising autonomous decision-making.

In relation to sentencing, therapeutic jurisprudence has three lines of enquiry (Wexler, 1990):

1. Whether the impact of the law can be therapeutic or anti-therapeutic;
2. Whether legal rules, procedures and roles have an impact on well-being; and
3. Whether legal actors harness the law to be therapeutic and increase well-being.

Rather than focus on therapeutic jurisprudence principles in courts, the paper will demonstrate how therapeutic principles have been practically applied in the Victorian correctional system.

### **Therapeutic jurisprudence and offender rehabilitation**

Five principles can underpin therapeutic jurisprudence in relation to offender rehabilitation (Birgden, 2002b):

1. The way the law is implemented can increase/decrease/have a neutral effect on well-being;
2. The law should capitalise on the moment that offenders are brought before it to trigger a pro-social lifestyle;
3. The law should be a multidisciplinary endeavour with psychology and law cooperating to enhance well-being;
4. The law balances community protection (justice principles) against individual needs (therapeutic principles); and
5. Therapeutic jurisprudence is normative with implicit value judgements. When values conflict, therapeutic jurisprudence “sets the stage for their sharp articulation” (Wexler & Winick, 1996, p. xvii).

As previously outlined, the *Corrections Long Term Management Strategy 2001–2005* has a focus on reducing re-offending. Reduced re-offending requires the appropriate assessment, treatment, and management of offenders, based on principles of rehabilitation. The most popular approach to rehabilitation at present is the risk-need model based on “what works” research (see Andrews, 1995; Andrews & Bonta, 1998; McGuire & Priestley, 1995; Losel, 1995).

#### *Assessment*

The risk principle states that offenders at higher risk of re-offending should be targeted with more intensive services while low risk offenders require less services. Underpinning this principle is the *risk-need approach* developed in Canada. The aim is to prevent re-offending, which has a focus on community protection and offender risk management (based on justice principles). In Victoria, a statistically based tool has been developed to assess the risk of re-offending for sentenced offenders.

#### *Treatment*

The risk principle indicates risk of re-offending but does not indicate what to do about it. The need principle is about what is required in order to reduce the likelihood of re-offending. Over the past decade, research has shown that rehabilitation programs need to target the offending behaviour directly (eg, drug treatment programs need to target

criminogenic needs such as drug dependence, poor impulse control, a criminal lifestyle, and anti-social rationalisations). Also, it is not useful to teach an offender vocational skills if they are released from prison and cannot find employment. Therefore, vocational skills training has to be directly linked to obtaining employment.

The most popular treatment model is also based on the risk-need approach. The model describes *criminogenic needs* (or dynamic risk factors) which are empirically based beliefs, attitudes, or behaviours supporting offending. However this risk-need approach has been criticised by Ward and Stewart (2003) for being too focused on risk management and community protection at the expense of individual autonomy. Rather, a holistic approach to changing an offender's behaviour is required. An alternative rehabilitation approach has been proposed by Ward and Stewart. The *good lives model* extends the risk-need approach to include a focus on the offender's strengths and interests. The aim of the good lives model is to increase individual offender well-being and skills to address problem areas and overcome obstacles to leading "a good life". Unlike the risk-need approach, the good lives model is based on therapeutic principles and includes concerns about autonomous decision-making.

Therefore, the good lives model and therapeutic jurisprudence are well aligned; both are humanistic theories and both are concerned with increasing offender well-being. For this reason, the good lives model of offender rehabilitation may also be a more palatable approach to problem solving courts than the risk-need approach.

### *Management*

A third principle is that rehabilitation programs need to respond appropriately to offender needs. Responsivity is both internal and external. Internal responsivity is the individual offender characteristics such as levels of motivation, learning style, culture, and gender. External responsivity includes staff characteristics and the environment (community setting versus prison). The successful implementation of rehabilitation programs rely upon the support and skills of correctional staff. In Victoria a treatment readiness assessment tool is being developed between Corrections Victoria and a university consortium based on the good lives model (see Ward, Day, Howells & Birgden, 2004). The assessment tool will determine what needs to be changed in the individual and/or the environment to better engage the offender in programs (ie, the tool addresses both internal and external responsivity).

Generally, responsivity has been sorely neglected principle on an international basis. Rehabilitation within the risk-need approach and good lives model has been focused on the delivery of psychological services to individual offenders. Therefore, both models fail to articulate the role of the broader criminal justice system in rehabilitation, particularly the relationship between offenders and staff. Using a therapeutic jurisprudence analysis, the five principles described previously allowed for improved management of offenders in the Victorian correctional system. As in problem solving courts where the role of legal actors can be used to provide persuasive authority, in corrections the role of correctional officers as facilitators of behaviour change was enhanced.

An organisational change management strategy was developed to assist corrections to move toward a rehabilitative focus (see Birgden, 2004a). The training strategy with correctional staff focussed on:

1. Addressing underlying ethical values and behaviours conducive to a rehabilitative environment, using a dramatherapist;
2. Providing skills training in motivational interviewing techniques to engage offenders in programs (matched to offender treatment readiness); and
3. Establishing coaching and mentoring to maintain staff skills in effective offender management.

### **Therapeutic jurisprudence, sentencing, and offender rehabilitation**

A therapeutic jurisprudence analysis will now consider the current anti-therapeutic effects of sentencing (see Birgden, 2004b for more detail). Again, sentencing laws *per se* do not reduce re-offending, and intensified criminal sanctioning and deterrence can even increase re-offending. Therapeutic jurisprudence is concerned with the therapeutic and anti-therapeutic effects of law, legal system, and legal roles. Therapeutic jurisprudence states that these elements should be therapeutic (or at least neutral) rather than anti-therapeutic.

#### *The law*

In Australia, registration laws are being created. Such laws are aimed at community protection. The following media release was released in Victoria in March 2005:

Tough new legislation allowing dangerous child sex offenders to be tracked long after they have been released from gaol ... the new laws gives the Adult Parole Board power to place limits on where serial sex offenders can live and work ... and prohibit them from having contact with children for the rest of their lives ... new laws complement the Government's existing Sex Offender Register, which bans offenders from working with children and requires them to give police their address, employment details and any travel plans.

However, from the perspective of well-being in individual offenders, these laws may be anti-therapeutic. Such laws do not provide incentives for sex offenders to engage in treatment in the community, or allow offenders to demonstrate a pro-social lifestyle for earlier deregistration. Anti-therapeutic laws to manage serious sex offenders results in rehabilitation being subordinate to punishment.

A therapeutic solution might be “rehabilitation without incrimination” which protects against future prosecution, protects against probation revocations, and provides treatment without the offender accepting responsibility (Kaden, 1999). As it is, there is not a clear correlation between whether an offender accepts responsibility and whether an offender re-offends (despite offender “remorse” being a sentencing consideration).

In addition, Glaser (2003) argues that sex offender treatment providers are practicing in an ethical vacuum in terms of legal principles that limit punishment. Glaser sets standards for clinicians such as procedural fairness in taking the sex offender's point of view into consideration, amount and type of treatment proportionate to the seriousness of the offence, and applying the “least restrictive alternative”. This approach should also

consider the risk of re-offending (ie, lower risk offenders require less restrictive options).

### *Legal System*

The legal system itself may need to be reviewed and reformed. This is the practice of therapeutic jurisprudence at an organisational level where new procedures, sentencing options, and interagency cooperation occur.

The anti-therapeutic effects of a “guilty” plea mean that the true extent of offending is unknown and the impact on victims/survivors is unknown. The anti-therapeutic effects of a “not guilty” plea is that the offence is trivialised and there is no responsibility-taking. In treatment the sex offender may not be protected if s/he discloses information in treatment (and so offender protection is subverted). In terms of the law, clinicians need to understand the plea procedure and therefore the extent of responsibility-taking in sex offenders.

There are a number of therapeutic alternatives available. Bail or deferred sentencing allows for assessment and treatment (eg, problem solving courts). If a sex offender pleads “guilty”, s/he can still state on oath how the offence was committed and the likely impact on the victim/survivor. Clear sentencing comments by the judge/magistrate allow clinicians to address offender minimisation and denial. Choice should be offered such as treatment in prison or the community, but without improper inducement otherwise it becomes “benevolent coercion” as described by Winick (2003). An additional increment to sentence includes high risk sex offenders being provided parole periods and low risk offenders being diverted into the community. These recommended procedures are individualised and persuasive rather than coercive. Such procedural changes to the legal system can provide invaluable assistance to clinicians in providing treatment to sentenced sex offenders.

### *Legal roles*

The roles and behaviors of legal actors can be therapeutic or anti-therapeutic. Legal practitioners have a powerful influence on offender decision making, contemplation of change, and compliance to orders. A confrontational approach confirms to offenders that they have no control over their behaviour while a motivational approach allows offenders to make decisions and take responsibility (ie, autonomous decision-making). While legal practitioners are not responsible for delivering treatment (McGuire, 2003), they can harness psychological principles regarding behaviour change (as the role of correctional staff was harnessed in the Victorian correctional system).

Sex offenders harbor cognitive distortions that justify sexual offending and such thinking can be challenged by legal actors. There are two anti-therapeutic ways defence lawyers may respond (Birgden, 2002a). One approach is challenge the defendant, particularly if s/he pleads “not guilty”. This is a traditional approach (the lawyer as expert) which rejects the offender’s position and emphasise negative aspects of behaviour. This heavy handed approach is more likely to increase offender resistance. Another approach is to not challenge the defendant, particularly if s/he pleads “guilty”. This is a client-centred approach (the lawyer as facilitator) which accepts the offender’s position and does not challenge the behaviour. This hands off approach does not encourage responsibility-taking.

Legal actors can respond in therapeutic ways. As previously stated, motivational interaction approaches have been developed for correctional staff in Victoria. In this way, staff use short, sharp motivational strategies to engage offenders in behaviour change whenever the opportunity arises. Strategies to increase offender compliance include mildly challenging counter-arguments, behaviour contracting, being a persuasive messenger, and providing choice. Thinking that justifies offending can be challenged by increasing offender awareness regarding offence details, assisting offenders to take responsibility, and encouraging engagement in treatment.

Motivational interviewing techniques use a particular style of questioning that encourages thinking in the offender about behavior change. Motivational interviewing is based on five principles (Miller & Rollnick, 2002):

1. Express empathy—establish rapport through reflective listening, rephrasing client statements, and using a problem-solving approach.
2. Develop discrepancy—motivate change by highlighting differences between present behaviour and future goals, and current consequences and what the offender wants to achieve.
3. Avoid argumentation—arguments are counterproductive, labelling is unnecessary, and resistance is a signal to change strategies.
4. Roll with resistance—the offender is a valuable resource in finding solutions to problems and new perspectives can be invited but not imposed.
5. Support self-efficacy—belief in the possibility of change is an important motivator, the offender is responsible for choosing from a range of options, and if s/he feels that intentions to change can be translated into action, the offender is more likely to have a good outcome and so experience mastery.

Legal practitioners (lawyers, judiciary, parole board members) could also be trained in motivational interviewing approaches (matched to offender treatment readiness) to engage defendants in court, and assist future therapeutic endeavours by clinicians in corrections. Birgden (2002a) provides examples of motivational questions being applied by a defence lawyer to a defendant charged with sexual offences.

### **Therapeutic jurisprudence and the criminal justice system**

Building upon the therapeutic jurisprudence analysis above, the following table demonstrates a psycholegal approach to defendants/offenders in which community protection and individual autonomy are balanced (Birgden, 2004b).

Individual Autonomy			
	<i>Therapeutic Laws</i>	<i>Therapeutic legal systems</i>	<i>Therapeutic roles</i>
<i>Therapeutic assessment</i>	Therapeutically oriented pleas	Responsive to risk and need	Cognitive restructuring to trigger change
<i>Therapeutic treatment</i>	Ethical treatment	Individualised approaches	Motivational techniques to support change
<i>Therapeutic management</i>	Regular review hearings	Supported reintegration	Motivational techniques to maintain change
Community Protection			

### *Therapeutic laws*

Therapeutic laws include pleas, treatment, and review hearings. In terms of encouraging therapeutic pleas, both legal and correctional practitioners need to actively engage the defendant in the development of a rehabilitation plan put before the court. Where possible, choice should be offered (eg, between treatment techniques or treatment providers), and friends and family should be included. In terms of ethical treatment offenders should be forewarned not to disclose details of undetected offences to avoid breaches of confidentiality. For the offender who continues to minimise the offense, focus can be on managing external conditions (eg, developing appropriate friendships). For the offender who withdraws consent to participate in treatment, legal consequences should not occur. In terms of regular review meetings throughout the sentence and upon release, both legal and correctional practitioners are to engage the offender. If due for release, the parole board (or reentry court as in the United States) should consider re-assessment of criminogenic needs (or dynamic risk factors)

### *Therapeutic legal systems*

A therapeutic legal system includes responsivity to risk and need, individualised approaches, and supported community reintegration. In terms of risk and need, correctional staff need to assess offenders at court and develop a rehabilitation plan based on risk and need. The court should understand and explain to the offender the outcome of the assessment. For the low risk sex offender, the court may still request a plan because low base rates effect prediction and public perceptions need to be managed. The plan must be least intrusive of the offender's rights and focus on external conditions (eg, access to meaningful employment and avoidance of high risk situations). For the high risk offender, a more detailed plan is required. In terms of individualised approaches, high risk sex offenders require more intensive treatment and risk is a dynamic process requiring an individualised approach. Adjustments to any rehabilitation plan developed in court are to be made together with the offender. Choice about treatment should be provided (eg, a unit-based setting or a therapeutic community) and in which order needs can best be met (eg, literacy classes before treatment). Treatment should include the full range of services available to reduce reoffence and increase offender capabilities (ie, not only psychological interventions). In terms of supported reintegration, the opportunity for the offender to be released from the stigma of the original conviction should be provided. Pre- and post-release support by agencies and supervision by specialist community corrections officers of high risk offenders is crucial. If the offender has chosen not to undergo treatment, hearings throughout the sentence can respond to assessed change readiness to encourage contemplation of change. If the untreated offender is released, external conditions for supervision can be applied.

### *Therapeutic roles*

Therapeutic roles include cognitive restructuring, motivational techniques to support change, and motivational techniques to maintain change. In terms of cognitive restructuring, legal practitioners can encourage the sex offender to think about his or her offending differently and contemplate change. In terms of supporting change, correctional staff should actively engage the sex offender in treatment using motivational interactions. The style of delivery of rehabilitation programs should be

motivational rather than confrontational (eg, commencing treatment with a life story rather than immediately challenging cognitive distortions). For the offender who refuses treatment, a motivational module that encourages the development of a plan for a fulfilling life can be provided. Again, the plea that had been provided to the court is important for clinicians to consider. In terms of maintaining change, hearings regarding release into the community should be motivational rather than confrontational, motivational interviewing techniques by supervising correctional officers serve to maintain changes made after treatment, and treating the offender respectfully will avoid a backward slide in optimism in change (and so avoid undermining treatment gains).

## Conclusion

The paper has proposed a psycholegal approach to defendants/offenders. The effort to balance community protection against individual autonomy in offender rehabilitation is assisted by therapeutic jurisprudence. Therapeutic jurisprudence is beginning to underpin current government policy and initiatives in the Victorian criminal justice system.

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