

THERAPY AND THE LAW

Competing Interests or a Healthy Combination?

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This paper outlines the Queensland Drug Court model; discusses the writer's experiences of the challenges for offenders and team members alike in this evolving jurisdiction and demonstrates that the successes of the Drug Court must serve as encouragement for all of those involved in this cutting-edge justice to continue to strive to achieve the significant benefits to our community as a whole.

INTRODUCTION

Therapeutic jurisprudence is the term used to describe an approach to the law that considers legal processes and procedures as having "an impact on the physical and psychological wellbeing of the participants."¹

Whilst it is commonly associated with drug courts that seek to promote offender rehabilitation through judicial case management and a drug treatment regime;² it has also been used widely in other specialist problem-solving courts, for example, domestic violence courts, juvenile courts, mental health courts, indigenous courts and even some civil courts.

Therapeutic jurisprudence practices have been used in courts in the United States with great success since the early 1980s and as a result of the demonstration of the positive effects of this alternative approach to mainstream judicial practices upon offenders and the community as a whole, the movement towards its adoption in other countries has grown.

Courts in most of the Australian States have embraced this approach to judicial practice as it proposes a broadening of the role of the judge, which has traditionally been limited to fact-finding and law applying. "Therapeutic jurisprudence asks why the judicial role should not extend to the search for solutions to an individual's cycle of offending. This is a perspective that deserves to be taken very seriously by the judiciary".³

My observation is that it is being taken seriously by courts throughout Australia. A national conference took place in Perth, Western Australia in May 2005 – "At the Cutting Edge – Therapeutic Jurisprudence" at which were present judicial officers, lawyers, allied health workers and other social justice workers from all over the

country, all of whom were involved in problem-solving courts, some of whom were leading the way in implementing innovative court processes and treatment regimes.

The title for that conference was and remains an apt one. The therapeutic jurisprudential approach has only gained wider acceptance in this country in the last 10 years. It is an evolving jurisdiction in which evaluations of the outcomes are on-going and as the need for change is demonstrated, we must move to alter our practices in line with demonstrated successes or otherwise.

My own experience since being appointed as a Magistrate in 1998 is that it is not uncommon that dysfunction or disadvantage in one or more aspects of life is a feature of offenders appearing before the courts, particularly repeat offenders. A failure to resolve the dysfunction, discontinue the problem or remove the disadvantage; whether it be substance abuse issues, psychological/psychiatric problems, illiteracy, unemployment, family/relationship difficulties or trauma/abuse/grief/loss; places the offender at a greater risk of re-offending.

Queensland has embraced the notion of therapeutic jurisprudence and there exist a number of specialist courts applying these principles as a result, for example, the Special Circumstances Court in Brisbane, the Alcohol Diversion Program for Indigenous persons in Cairns and the Murri Courts in Brisbane, Rockhampton, Townsville and Mount Isa. There are plans also to have a specialist domestic violence court which will also adopt therapeutic jurisprudence practices.

The Court which I wish to focus on in this paper is no doubt a court of which you have heard something, and in relation to which you will hear more – the Queensland Drug Court. It has risen to the challenge of finding solutions to the serious drug problems faced by large numbers of offenders in our community.

BACKGROUND

Drug Courts in Queensland commenced with the introduction of the *Drug Rehabilitation (Court Diversion) Act* 2000 which authorised the operation of Pilot Program Drug Courts (Drug Courts) in each of three Magistrates Courts within the Brisbane Area (Beenleigh, Ipswich and Southport). Those courts commenced accepting referrals in June 2000.

The Pilot Program Drug Courts were then further extended by the introduction of the Drug Rehabilitation (North Queensland Court Diversion Initiative) Amendment Act 2002 to include the Magistrates Courts in each of Townsville and Cairns. These Pilot Program Drug Courts (Drug Courts) commenced accepting referrals in November 2002.

I was appointed a Pilot Program Drug Court Magistrate at the commencement of the Drug Court in Cairns in 2002 and continued in that role until August 2005. I was

responsible for the court supervision of offenders otherwise on a rehabilitation and treatment program supervised in the community by officers of the Department of Corrective Services and Queensland Health.

As a result of the release of findings of evaluations of the Queensland Drug Courts undertaken by the Australian Institute of Criminology,⁴ the Queensland government announced in August 2005 that the Queensland Drug Courts would lose their pilot status to become permanently operating Drug Courts, albeit still limited to the districts of Beenleigh, Ipswich, Southport, Townsville and Cairns.

The necessary amending legislation, the *Drug Legislation Amendment Act 2006* was assented to on 15 March 2006 and took effect on 3 July 2006. Since that time, the relevant legislation will be cited as the *Drug Court Act 2000* ("the Act").

OBJECTS OF THE LEGISLATION

The objects of the Act are to -

- (a) reduce the level of drug dependency in the community and the drug dependency of eligible persons; and
- (b) reduce the level of criminal activity associated with drug dependency; and
- (c) reduce the health risks associated with drug dependency of eligible persons; and
- (d) promote the rehabilitation of eligible persons and their re-integration into the community; and
- (e) to reduce pressure on resources in the court and prison systems.⁵

THE QUEENSLAND MODEL

In order to meet the objects of the legislation, the Queensland model of the Drug Court provides for an integrated approach, with the Drug Court Magistrate forming part of a larger team, which also includes a representative from each of the:-

- (a) Queensland Police Service
- (b) Corrective Services Department
- (c) Queensland Health Department; and,
- (d) Legal Aid Office (Queensland).

An adult defendant is eligible for referral by a Magistrate to a Drug Court if, amongst other criteria,

- (a) the person pleads guilty or indicates a plea of guilty to relevant offences
- (b) the Magistrate is satisfied that the person may be drug dependent and that the dependency contributed to the person committing the offence/s; and
- (c) the person would, if convicted of the offence/s, be sentenced to imprisonment.⁶

The Magistrate may then refer the person for an indicative assessment by an appropriate qualified health professional of Queensland Health and adjourn the proceedings to enable that to occur, either remanding the person in custody or releasing the person on bail to then appear before a Drug Court Magistrate.⁷

The health assessment of the defendant is then undertaken to determine the level of any drug dependency and a copy of that indicative assessment report is provided to the Drug Court Magistrate.⁸ The prosecutor and the person's legal representative may make submissions about whether the proceedings should continue in the Drug Court or the matter should be dealt with by a Magistrates court.⁹

If the Drug Court Magistrate decides that the matter should continue in the Drug Court, he/she adjourns the proceedings to require that the Chief Executive of the Department of Corrective Services prepare and submit to the Drug Court Magistrate a report that contains an assessment of the defendant's suitability for and willingness to comply with an Intensive Drug Rehabilitation Order (IDRO) and if the person is suitable, a proposed rehabilitation program.¹⁰

The pre-sentence report may or may not include a psychiatric/psychological/medical assessment. In the majority of cases such additional reports have only been sought at this preliminary stage where a mental health history/issue is suspected. This flows from the requirements of the Act that a Drug Court Magistrate be satisfied that the offender is not suffering from any mental condition that could prevent the offender's active participation in a rehabilitation program.¹¹

These assessments/reports and the accompanying rehabilitation plan are considered by the Drug Court magistrate in determining the suitability of a defendant for, and the making of an IDRO at a sentencing hearing which occurs usually within four (4) to six (6) weeks from initial referral by a Magistrate to the Drug Court.

At the sentencing hearing, the team members fulfil their traditional functions. The prosecutor will read out the facts relevant to each of the offences before the Drug Court and provide the Drug Court Magistrate with the defendant's criminal and traffic history. The prosecutor will also make submissions as to the appropriate sentence to be imposed.

The officer from the Department of Corrective Services will tender the pre-sentence report. The Queensland Health representative will tender the health assessment report and each will make any further relevant submissions.

The Legal Aid representative will make submissions as legal advocate for the defendant in mitigation of penalty and as to sentence.

If the Drug Court Magistrate is satisfied, having regard to all of the reports and submissions, that the defendant is an eligible person; that there are facilities available to supervise and control the offender's participation in a rehabilitation program; and there are reasonable prospects the offender would satisfactorily comply with an IDRO, the *Drug Court Act 2000* authorises a Drug Court Magistrate to make an IDRO.¹²

The IDRO contains an initial sentence of imprisonment (which is wholly suspended during the operation of the IDRO), requirements of the order¹³ and a rehabilitation program.¹⁴ A sample rehabilitation plan is attached – see Annexure A.

The IDRO therefore operates as a post-sentencing disposition, and is clearly designed to apply to the more serious offenders/offending. It remains in force for as long as the offender participates in the rehabilitation program.

The participant is supervised on the rehabilitation program by the Department of Corrective Services who; - provide the participant with a case manager; conduct Treatment Team meetings with Queensland Health, the participant and other relevant agencies/counsellors to monitor the offender's program; and undertake the random urinalysis, the only objective means by which the Court can determine whether or not the participant continues to use illicit drugs.

Once a participant is subject to an IDRO, the participant also appears before the Drug Court Magistrate regularly for review. Immediately prior to each review, the Drug Court Magistrate receives reports from each of Queensland Health and the Department of Corrective Services and, together with the prosecutor and the legal representative, the team meets in camera in the absence of the participant to discuss the participant's progress.

During this process of team meetings and reviews, the traditional roles of prosecutor and legal representative are suspended and all team members participate in the meeting to discuss the granting of a reward to the participant¹⁵ if they have been progressing well or to submit as to a sanction if they have breached the IDRO.¹⁶

After the meetings in camera in relation to all participants scheduled for review, the court is opened and each participant appears before the Drug Court Magistrate in the presence of the team members to discuss with the Drug Court Magistrate their performance on the order over the period since the last review.

All participants are required to present a journal or diary in relation to their activities/thoughts/feelings/attitudes/experiences and other information relevant to their rehabilitation since their last review. The Drug Court Magistrate engages with the participant in relation to these and other issues relevant to their performance on the order; enables the participant an opportunity to elaborate further or respond to issues in relation to reward or sanction and then proceeds to determine any such reward or sanction.

The IDRO comprises three phases through which the participants progress over the period of the order. The first phase focuses on the participant remaining crime and drug –free for a significant period. The second phase focuses on the participant stabilising on the order and committing to the Drug Court process. The third phase is the phase in which it is expected that participants will have obtained employment or undertaken training preparatory to employment; worked towards or be reunited with family; formed a support network within the community and be using it.

To move between phases, the participant must remain crime and drug-free for a continuous period of approximately 12 weeks. Participants are monitored in relation to their drug use by random urinalysis which forms a core part of the IDRO and in relation to which participants are tested at least 5 times a fortnight in Phase one; at least 3 times a fortnight in Phase 2 and at least once a fortnight in Phase 3.

A Drug Court Magistrate is empowered to terminate the IDRO prior to completion if satisfied that there are no reasonable prospects of the participant satisfactorily completing the program (the power of termination is automatically invoked upon successful completion of the IDRO). In each case, the initial sentence is set aside, the IDRO terminated and a final sentence imposed. If the participant has successfully completed the IDRO, the final sentence will, in the majority of cases, be a community based order. It has certainly never been a term of actual imprisonment. Otherwise, the participant will be ordered to serve a period of imprisonment taking into account the participant's performance on the order to that date.

CHALLENGES

The modified and reduced legal protections for the offender.

1. When making any of the many and far-reaching decisions required of the Drug Court Magistrate, including decisions as to a person's eligibility for an IDRO; whether they are satisfactorily complying with the IDRO; whether they require detoxification (resulting in possible incarceration for that purpose); the imposition or otherwise of a sanction, the magistrate need only be satisfied to the civil standard of proof, that is "on the balance of probabilities".¹⁷ This is a much lesser standard of proof, and therefore much easier to satisfy, than that of proof beyond a reasonable doubt as required in the state criminal courts prior to the imposition of any penalty.

2. The rules of evidence do not apply.¹⁸
3. The first opportunity for a participant to raise a factual defence to an alleged breach of the IDRO following legal advice is during the court review when the Drug Court Magistrate speaks directly with the participant. As indicated earlier, this court review takes place after a private meeting of all team members, including the magistrate, at which time team members make submissions in relation to the participant's conduct and recommendations as to any proposed sanction/s. In the state criminal courts, the judicial officer is never privy to, or involved in discussions in the absence of a defendant; opinion evidence of the kind concerned is inadmissible and a defendant has a right to see and hear the entirety of the proceedings against him/her.

Conflict in Roles/Relationships - Issues of Confidentiality

- (a) The role of the legal representative is a changing role. The legal representative only has an adversarial role, on behalf of the participant, during the referral and assessment phases (to argue their clients' eligibility for an IDRO) and upon initial and final sentencing (in making submissions as to penalty, restitution and compensation). Otherwise, they participate in a forum where, despite the fact that participants could be facing custodial sanctions for breaches, there is no place for "zealous advocacy" on the part of the legal representative, as formal adversarial and evidentiary rules do not apply and the legal representative's role is limited to that of an equal team member.
- (b) There is potential for a blurring of roles within each of the Corrective Services and Queensland Health teams. For example, it has occurred that the Department of Corrective Services team member at the court-ordered review of a participant is also that participant's case manager. It is also not uncommon for the Queensland Health team member appearing at the court-ordered review of a participant to be that participant's counsellor or program facilitator. This is purely a resource/funding issue but it nonetheless means that confidentiality of client information and objectivity in relation to its use in team meetings is potentially problematic. In the mainstream criminal courts and indeed in the civil courts, it is a rare occurrence for a therapy/treatment provider for a defendant on a continuing basis to be requested to undertake an independent clinical assessment for consideration by the court.

If we accept that confidentiality plays a major role in a therapeutic relationship and that *"Breaking confidentiality is a necessary evil that is, at the very least, a hindrance to the development of a therapeutic relationship and, in some cases, destructively anti-therapeutic,"*¹⁹ these limits to confidentiality need to be explored with, explained to and accepted by participants.

- (c) There is potential also for the blurring of boundaries between treatment and punishment given the consideration that is and must be given to the individual differences of and between participants, including an individual's progress on the IDRO as discussed during the private team meetings. This has led to some disparity of sanctions imposed on different participants for similar breaches and a resultant stress experienced by those participants who perceive that the disparities are the result of either prejudice or inconsistency on the part of the court. In the mainstream criminal courts, the defendant has the opportunity in sentencing to address the comparative sentencing options, notice of which is always provided to, if not already known by, the defendant.
- (d) Participants are also required to adopt specific attitudes, values, and behaviours determined largely by the team and in relation to which their life experiences have ill-equipped them. In the mainstream criminal courts, a defendant's standard of behaviour is governed simply by the legality or illegality of their conduct and views of morality, trust and honesty are likewise restricted to those governed by legislation.

A defendant's legal protections in the normal course of the criminal justice process, together with "core judicial values- certainty, reliability, impartiality and fairness- have been safeguarded over many generations largely through a reliance on tradition and precedent."²⁰ The evolving nature of the drug courts means that there is no such richness of history and experience upon which to draw. We must charge ourselves with the responsibility therefore to ensure that therapeutic considerations do not override long-standing freedoms and rights.

BENEFITS

The qualities required for judicial officers adopting a therapeutic jurisprudence approach are different from those required of more traditional judges. Judicial officers employing a therapeutic jurisprudence approach should be more active, collaborative, less formal, more attuned to direct communication with litigants, more attuned to the personal circumstances of individuals who appear before them and more positive in their interactions with them.²¹ Warren (1998) ²² provides a pithy description of the differences between traditional and problem-solving courts. It is an apt means by which to illustrate the qualities in which therapeutic jurisprudence judicial officers and traditional judges differ in the discharge of their duties.²³.

RESULTS

The benefits of a therapeutic jurisprudence model adopted by the Queensland Drug Court are evident in the results achieved to date.

1. 236 people have graduated.

2. The initial sentences avoided by the 236 Graduates entering the program totals in excess of 250 prisoner years of jail costs. Since the program has now been running for (almost) 6 years, the program represents diversion of 40 prisoners from jail; or in other terms, the replacement of a 40 bed prison farm facility with a community based supervision option with excellent rehabilitation programs.
3. As at mid 2006, only 9% of the graduates have been incarcerated. In contrast, the percentage of incarcerated offenders who have NOT participated in the drug court and who return to gaol after release is approximately 60% for males and about 50% for females.

Such results translate to significant benefits to the community also by reason of:

1. Improved health of participants.
2. Reduced reliance on the health system and other community services.
3. Improved relationships of participants with family and community.
4. Reduced offending within the community.
5. Reduced reliance on policing services.
6. Reduced property damage/loss/insecurity to property owners.
7. Better-educated community members.
8. Reduced reliance upon unemployment/other government benefits.
9. Reduced spending required for prisons.
10. Reduced family/community dysfunction.
11. Improved relationships with family and community.
12. Increased participation in community life.

The Government has clearly understood these far-reaching benefits to both individuals and the broader community and it is for all of us to support and encourage the continued expansion of the Drug Court program and to appreciate the extensive, enthusiastic adoption of therapeutic jurisprudence practices by the many persons/organisations/agencies engaged in the process to the benefit of us all.

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ENDNOTES

¹ Dr. Michael King – Applying therapeutic jurisprudence from the Bench – Challenges and opportunities. *Alternative Law Journal* 2004 at page 172

² International Network on Therapeutic Jurisprudence <http://www.therapeuticjurisprudence.org> at 6 August 2003. Per Michael King “Applying therapeutic jurisprudence from the Bench.

³ Jelena Popovic “Complementing Conventional Law and Changing the Culture of the Judiciary” *Therapeutic Jurisprudence : Marilyn McMahon and David Wexler The Federation Press Volume 20 Number 2.*

⁴ Makkai & Veraar. *Australian Institute of Criminology* June 2003 and September 2005.

⁵ S.3 Drug Court Act 2000.

⁶ S.6 Drug Court Act 2000.

⁷ S.12B Drug Court Act 2000

⁸ Ss.12B and 12C Drug Court Act 2000.

⁹ S.12B Drug Court Act 2000

¹⁰ S.16 Drug Court Act 2000.

¹¹ S.19 (f) Drug Court Act 2000.

¹² S. 19 Drug Court Act 2000

¹³ Ss.22 and 23 Drug Court Act 2000.

¹⁴ S. 20 Drug Court Act 2000

¹⁵ S.31 Drug Court Act 2000. This category includes the giving of privileges; a decrease in the amount of any monetary penalty payable; a decrease in the frequency of drug testing; a decrease in the level of supervision; a change in the nature of programs or treatment; a decrease in the frequency of attendance at programs; a decrease in the amount of community service to be performed; a decrease in the frequency of attendance before the court.

¹⁶ S.32 Drug Court Act 2000.

¹⁷ Ss. 19, 21, 31, 32 (1), s.34 (1) (e).35A (3) Drug Court Act 2000.

¹⁸ S.12D(3) Drug Court Act 2000.

¹⁹ Glaser, Bill “Therapeutic Jurisprudence: an Ethical Paradigm for Therapists in Sex Offender Treatment Programs, *Western Criminology Review* 4(2) 2003 page 143 at page 144.

²⁰ Winick, Bruce J and Wexler, David.B “Judging in a Therapeutic Key-Therapeutic Jurisprudence and the Courts” *Carolina Academic Press* at page 81.

²¹ Jelena Popovic “Complementing Conventional Law and Changing the Culture of the Judiciary”- *Therapeutic Jurisprudence Marilyn McMahon and David Wexler* page 121 at page 128.

²² *Re-Engineering the Court Process*, 1998 cited in Rottman and Casey (1999b:14) and also cited in Freiberg (2001-02). Jelena Popovic “Complementing Conventional Law and Changing the Culture of the Judiciary” – *Therapeutic Jurisprudence : Marilyn McMahon and David Wexler* page 121 at page 128.

²³ Jelena Popovic “Complementing Conventional Law and Changing the Culture of the Judiciary” – *Therapeutic Jurisprudence Marilyn McMahon and David Wexler* page 121 at 128.

ANNEXURE A

Part C: The Rehabilitation Program

Participant Name: **Phase:**

The participant must:

1. Not use any illegal drug.
2. Not use any non-prescribed drug.
3. Not use any prescribed drug except in accordance with the directions of the prescribing health care professional and in consultation with an authorised corrective services officer.
4. Reside at, unless otherwise authorised by the Court and/or an authorised corrective services officer, and advise of any change of circumstance at this residence.
5. Comply with any Accommodation Agreement required as a condition of gaining access to the Accommodation Support Program as recommended by an authorized corrective services officer.
6. Comply with a curfew; that is, remain at the above address at all times between the hours of p.m. anda.m., unless attending or traveling directly to and from a Drug Court appointment or medical appointment or unless prior approval is obtained from an authorised corrective services officer or the Court.
7. Attend and complete the drug rehabilitation program at and comply with all rules, directions and requirements of that rehabilitation centre.
8. Attend weekly/fortnightly/other drug counseling at ATODS/other service, unless and until otherwise directed by the Court or an authorised corrective services officer.
9. Continue to participate in the Opioid Treatment program as advised by the Opioid Treatment clinic and as directed by an authorised corrective services officer.
10. Report weekly/fortnightly/other to an authorised corrective services officer between the hours of 9 a.m. and 4 p.m. at, or as directed.
11. Receive visits from an authorised corrective services officer between the hours of 8 a.m. and 6 p.m., as arranged.
12. Report at least for drug testing (plus any random tests) to an authorised corrective services officer as and when directed.

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13. Attend vocational, education and employment courses or any other appointment as required by an authorised corrective services officer, including;
 14. Submit to medical, psychiatric or psychological appointments for assessment or treatment as and when directed by an authorised services officer, including:-
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/and, as part of the medical, psychiatric or psychological treatment, the offender is required to remain at, for (e.g.: days, weeks).
 15. Attend the Drug Court at on the of each at 10.30 am unless otherwise directed by the Court or an authorised corrective services officer.
 16. Present a weekly journal detailing current participation in the Drug Court program.
 17. Have no contact, directly or indirectly with
 18. Comply with your restitution repayment agreement as negotiated with an authorised corrective services officer.
 19. Attend and complete such Community Service as per your Work Instruction and as directed by an authorised corrective services officer.

A Pilot Program Magistrate may, at any time and if satisfied no other suitable facilities are immediately available, commit the offender to a correctional centre for up to seven days at a time if, in the Magistrate's opinion, the committal is necessary to facilitate –

- a) the offender's detoxification; or
- b) assessment of the offender's participation in the program.