Court Process and Therapeutic Jurisprudence: Have We Thrown The Baby Out With The Bathwater?

Jelena Popovic

Therapeutic jurisprudence practices have been in operation in Victorian Magistrates Courts for some years now. While such processes aim to promote offender rehabilitation the question arises as to whether they are also consistent with fundamental values of our justice system such as open justice and the principles of natural justice that ensure a fair hearing. This paper examines the Victorian experience in the specialised lists, namely the Street Sex Worker List and the Special Circumstances List (for fine defaulters with mental impairment) and the Drug Court and Koori Court which are illustrative of this point. The paper reports on research from the US Mental Health Courts which also looks at process.

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent tribunal established by law (United Nations International Covenant on Civil and Political Rights, article 14).

King (2003a) has previously written about the importance of court processes in relation to the wellbeing of participants. I do not intend to repeat the observations that he made, with the exception of the highly pertinent penultimate paragraph of the article:

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 (at 175).

A survey conducted in the United States during the months of March, April and May 2000 concluded that a modest majority of court users believe that the courts always or usually use fair procedures (Rottman & Hansen, 2000). The survey also found that a solid majority of the public backs new court and judicial roles associated with problem solving and treatment, and the
strongest support came from African-Americans and Latinos, groups that normally see the system as less fair than do the white population (at 2-3).

In the excitement to ‘progress’ the practice of therapeutic jurisprudence in our courts of summary jurisdiction, an excitement which has spread from the magistrates to the politicians and public servants (Hulls, 2004), attention must be paid to basic principles of justice to ensure the rights of court participants are not eroded and to ensure that therapeutic jurisprudence practitioners are not brought into disrepute.

It has been argued that the new processes that accompany therapeutic jurisprudence innovations throughout the courts have been designed to give participants a voice where there previously was not one, and to make the proceedings more relevant and comprehensible to the individual. The famous table from the article Reengineering the Court Process sets out the differences between new court processes and old court processes (Casey & Rottman 1999; Freiberg 2001; Warren, 1998). These aims are laudable and are to be aspired to by all who serve in the courts, whatever their status and in whatever capacity.

I argue that any departures from procedures to be adopted by courts must be to enhance the rights of defendants and must not result in their diminution. The overarching principles of open justice and natural justice ought not be sacrificed in our keenness for reform. I certainly don’t wish to be seen as advocating against the implementation of fairer and better ways of administering criminal justice. However, I am conscious that in my own practice of therapeutic jurisprudence, I have to a large extent abandoned the ‘arms length’ approach (and the protection it offers). I query whether this is in fact a good thing.

At the time of writing this article, I have been hearing a case involving a woman who I suspect has a mental illness. Her behaviour is most problematic and she is causing mayhem in her community. Her legal representation has been, to my subjective analysis poor. Her lawyers do not appear to have made any attempt to identify, let alone address, the issues. Have I acted appropriately by contacting the prison psychiatrist directly by email and setting out my concerns? At the next hearing of the matter, I will announce publicly that I contacted the psychiatrist – but I will not reveal the full detail of my correspondence. Since I am purging my sins, I need to confess that prior to arriving at a decision in relation to whether or not I should grant bail in this case, I spoke with two psychiatrists on the telephone. Neither of them told me what decision to make, but both assisted me to work through the issues and to make a decision based on better information. When I returned to the bench to continue with the hearing, I advised the parties that I had been discussing the matter with psychiatric professionals, but did not reveal what I discussed or what information I received.

I have no doubt that the quality of my decision making was enhanced by the enquiries I made, but I equally sure that I have impinged on the defendant’s,
legal practitioners’ and community’s ‘right to know’. And, notwithstanding that I have considered the error of my ways, confronted with the same situation again, I would probably approach the matter in exactly the same way.

It would be misleading to imply that all judges are unanimous in the adoption of therapeutic jurisprudence principles and practice. Following an extensive literature search, I have been able to locate only two articles by a judge opposing therapeutic jurisprudence, and one article by an academic and psychologist negatively commenting on therapeutic jurisprudence as practised in mental health courts.

The latter is an article written by John Petrila (1993) in response to a collection of essays collected by Winick and Wexler (1991) entitled “A Review of Essays in Therapeutic Jurisprudence”. The points made by Petrila relate to the therapeutic assumptions made by the authors, with particular reference to mental health professionals, rather than being a critique of the judicial role in therapeutic jurisprudence.

The two articles opposing therapeutic jurisprudence from a judge’s perspective are written by Judge Morris B. Hoffman, County Court Denver Colorado. The first is a lengthy (46 close typed A4 pages with 332 footnotes over 10 additional pages) analysis that takes a historical view of drug usage and drug laws and makes a number of colourful points, some of the more interesting being:

The scandal of America’s drug courts is that we have rushed headlong into them – driven by politics, judicial pop-psychopharmacology, fuzzy headed notions about “restorative justice” and “therapeutic jurisprudence”, and the bureaucrat’s universal fear of being the last on the block to have the latest administrative gimmick.

I am well aware that in many other non-drug criminal contexts it is common for even the most reluctant judges to sprinkle some social tinkering in with our traditional judicial actions. I admit that I have succumbed to the lure of regularly imposing as conditions of felony probation such requirements as finishing school, getting a Graduate Equivalency Diploma, getting a job, or even alas, completing a drug treatment program. The judicial temptation to intrude into the private lives of litigants is not limited to the criminal law [His Honour cites examples in relation to divorcing parents attending parenting classes].

In a jurisprudential context, these battles are part of a larger war about so-called “restorative justice” and “therapeutic jurisprudence”. These ideas emanate from the proposition that the judiciary can be a powerful force for social change, not just in the traditional way of applying law in individual cases, or even by pushing the existing law to new enlightened boundaries, but by
actively intervening in the day to day lives of litigants in an infinite variety of non-traditional ways. ... If they are intended to free judges not only from the constraints of the separation-of-powers doctrine but even from the limits of our own expertise, they are dangerous ideas indeed. I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to “do good” rather than to apply the law (Hoffman, 2000 at 1440).

Judge Hoffman (2002) has written a more recent but equally colourful and scathing article with the colourful title: ‘Therapeutic Jurisprudence, Neo-rehabilitationism, and Judicial Collectivism: the Least Dangerous Court Becomes the Most Dangerous’. His Honour appears to be warning us that there are ‘judicial reds under the beds’.

**Principle of Open Justice**

The principle of open justice is at the cornerstone of our justice system. It is almost trite to refer to the authorities: “it is not merely of some importance but it is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done” (Lord Hewitt, R v Sussex Justices; Ex Parte McCarthy [1924]1KB 256).

The Chief Justice of New South Wales, Chief Justice Spigelman (2000) has said: “The principle of open justice, should be understood as so fundamental an axiom of Australian law, as to be of constitutional significance”.

A number of reasons for the necessity of open justice have been posited in the reported cases and writings on the subject: it 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 discussion 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 (Russell v Russell (1976) 134 CLR 495 ) and it promotes the appropriate conduct of legal representatives (Spigelman, 2000 at 295).

I raise the issue of the application of the principle of open justice at a conference on therapeutic jurisprudence because it is easy to fall into the trap of sidestepping open justice in favour of practices designed to expedite hearings and make them more therapeutic for the participants.

**Processes That Impinge on Open Justice: Drug Courts**

In this paper, I will point to two examples of programs whose processes ignore the principle of open justice. The first relates to an aspect of drug court hearings. Early drug court models from the United States featured case
conferences conducted in camera between the presiding judicial officer, prosecutor, defence counsel and support workers but in the absence of the defendant.

In September 2001, my colleague Brian Barrow and I visited all the drug courts in their various guises operating throughout Australia and reported on our visits (Barrow & Popovic 2001). All drug courts adopted the case conference procedure. South Australia initially trialed a process whereby defendants were present at the case conference but changed the process as it was deemed unworkable to have the defendant present. When Victoria’s drug court was established in 2002, in line with the practice throughout the US and the rest of Australia, it also included in its process an in camera conference in the absence of the defendant.

The legislation that provides for a drug court in Victoria is found in sections 18X to 18ZS of the Sentencing Act 1991 and section 4A of the Magistrates’ Court Act. The legislation is silent as to the conduct of ‘case conferences’. However, pursuant to section 4A(5) of the Magistrates’ Court Act, the Drug Court:

must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the Sentencing Act 1991 and the proper consideration of the matters before the Court permit.

Several articles have been written about the dichotomies faced by lawyers participating in drug courts apropos their roles and I do not intend to revisit the various viewpoints (Kaye, 1998; Cooper, 1999).

I have conducted a literature search to establish whether or not anything has been written to support the need for closed court case conferences. Interestingly, I was unsuccessful in locating any explanatory material. In fact, most literature does not set out what the process for individual courts is. For example, the manual prepared for the South Australian Drug Court is silent as to case conferences.1 The manual includes a document entitled “Information for Defendants” which does not mention case conferences.

The Perth Drug Court holds its case conferences in closed session, with persons other than members of the court team only admitted with leave of the magistrate. Judge Julie Wager (2002), in an article directed towards the need for a legislative base for the Perth Drug Court, alluded to the difficulties of this procedure when she was the Drug Court Magistrate:

Defence lawyers in the Drug Court must...balance their professional obligations with their obligation to the Drug Court team. To have a continuing relationship with a Drug Court lawyer, the participant is requested to sign a waiver so that the lawyer may provide full and frank information to the Team. On many occasions the lawyer is forced to withdraw from team
discussions because of concerns in relation to the professional obligation. This means that either the Team cannot operate or the lawyer must rely on a waiver signed by a client who is told: “If this waiver is not signed you probably cannot take part in the Drug Court”. Clearly this raises questions of the voluntariness of the decision to waive solicitor/client privilege.

The Drug Court Operating Manual for the Dandenong Drug Court in Victoria also sets out a procedure for case conferences. Although it does not specify that case conferences are to be held in camera, at section 2.6, it sets out who may attend. It provides that “under no circumstances is the participant to be present at the conference”. There is no explanation of the basis of case conferences or of the need for them to be conducted in the absence of the defendant.

In terms of the openness of the respective processes, a significant divergence exits between the approach of drug courts and the Koori Court, a court that uses processes that are more therapeutic for Indigenous offenders and the Indigenous community (Harris, this volume). Every facet of the Koori Court is held in public; nothing occurs behind closed doors or in secret. Even the sentencing discussions between the elders and the magistrate are held openly at the table in the courtroom. All persons in the courtroom, whether or not they are directly linked to the matter before the court, have the opportunity to listen and if they desire, to be heard. The process is unimpeachable.

Processes That Impinge on Open Justice: Court Diversion Programs

The second example I shall refer to in relation to court programs whose processes impinge on the principle of open justice is court diversion. The Magistrates’ Court of Victoria operates a Criminal Justice Diversion Program that is aimed at diverting persons who have not previously been before the courts from having a court outcome for an offence recorded against them. The statutory basis for this program is section 128A of the Magistrates’ Court Act. The Court Diversion Program has few strictures and its processes are extremely flexible. In fact, each magistrate who deals with diversion matters has their own procedural approach.

The eligibility criteria for diversion are quite wide. Any offence triable summarily but which does not carry with it a mandatory sentence can be the subject of a diversion hearing but the offender must admit the facts (which must readily be able to be proved) and the court must consider that a diversion “is appropriate in all the circumstances”.

The scheme is that any person can initiate a diversion, but that it must be consented to by the prosecution and deemed a matter appropriate for diversion by the presiding magistrate. The approval of the victim is also sought. Information is gathered about the offence and the offender, and a proposal is put before the magistrate. Usually, the magistrate peruses the
papers in chambers, and then conducts the diversion hearing in the designated hearing room. The degree of formality depends on the practice of the individual magistrate. My practice is that I sit at the bar table directly opposite the offender. The hearing room is open to the public, but the public and press are not encouraged to attend. The proceedings are taped. The magistrate discusses the matter with the offender, and announces the proposed manner in which the diversion is to be undertaken and completed.

Diversion plans are individually devised to take into account the particularities of the case and the offender. The conditions usually include such requirements of letters of apology to the victims, letters of gratitude to the informant, contribution to a nominated charity. In the case of a traffic matter, a condition to attend a Road Trauma Awareness course or Defensive Driving course may be included. In the case of a drug possession charge, drug treatment and counselling may be a condition. The plan is then explained to the offender by a Diversion Co-ordinator, and upon satisfactory completion of the conditions, the matter is struck out. In the event that the conditions are not completed, the matter is remitted to the usual court process.

My concern is that the process lacks transparency. There is no right of appeal from a decision of either the court or the prosecution not to accede to a request for Diversion. There is no requirement to give reasons. There is no right to be heard in relation to a refusal. These matters are currently the subject of review.

The Need for Formality and Flexibility in Court Proceedings

I advance three reasons for the need for some formality in court proceedings. Firstly, some degree of formality does emphasise the solemnity and seriousness of what is occurring. Secondly, a degree of formality assists with the predictability of the proceedings so that persons appearing both as counsel and as defendants know what to expect and are not taken by surprise.

Thirdly, one of the concerns I have had from time to time is that persons who participate in a court process which is informal may in fact gain the impression that they are being treated as ‘second class citizens’ and that ‘Rolls Royce’ courts are only for the toffs. For example, I have noticed from time to time legal practitioners appear to ‘dress down’ when representing some client groups. I’m sure that the lawyers are well-meaning, (I have heard it expressed by lawyers that they think their casual attire puts their client’s at ease), but in fact, their causal dress could be construed as patronising. All defendants are entitled to the best possible representation and to be represented by advocates who look the part.

Flexible court processes can, in my view, lead to enhanced justice delivery by providing defendants with a voice, improving the comprehension of what is
happening in and because of the proceedings by those affected by them, extended participation and involvement. Providing better informed, more realistic and therapeutically beneficial outcomes and providing ownership of the problems and issues which emerge during the hearing. Many of the benefits of the flexible approach in courts and the need for procedural fairness are referred to by King (2003a).

**New Court Processes in Victoria**

Victoria, through the Magistrates’ Court, has adopted a problem solving approach to dealing with a number of criminal matters (as well as other types of matters such as family violence) coming before the courts.

**The Response of the Attorney General**

A clear commitment has been given by the Parliament of Victoria to the jurisprudential principles distilled from therapeutic jurisprudence practice in the courts and problem solving approaches. In May 2004, the Attorney General for Victoria, Rob Hulls (2004), launched his vision for the provision of justice in State of Victoria for the next 10 years. The Justice Statement aims to address “initiatives to modernise the justice system and ensure it remains flexible and responsive to change” and “strong measures to safeguard the rights of those who are most vulnerable” (p 61).

The Magistrates’ Court of Victoria has been an innovator in terms of taking a fresh approach to rehabilitation and reduction of future offending for many years. The Justice Statement is a move towards a ‘whole of government’ approach to many of the social issues which impact on the justice system. The Justice Statement provides an excellent opportunity for Courts, government departments and agencies as well as non-government agencies to broaden their knowledge of each others’ functions and duties and work more collaboratively and efficiently together.

In relation to problem solving approaches, the Justice Statement provides:

The problem-solving court is the most common model that has been developed to address defendants with specific needs. Problem-solving courts have evolved in response to particular issues faced by the courts, such as repeat offending caused by drug dependency or mental illness.

The key characteristics are:

- They seek to address the causative factors associated with the offending behaviour and thereby reduce recidivism.

- They make active use of judicial authority to change the behaviour of litigants. Judicial officers usually remain engaged in the case to monitor
progress and compliance with orders, and dispense sanctions and rewards for breaches and achievements.

- They adopt a collaborative approach, drawing on the skills and resources of different agencies to address the problem.

- The dynamics of the courtroom are changed from the traditional, adversarial process of assertion and denial to the sharing of information and plans to address the defendant’s behaviour. For this reason, these courts are often only accessible to those who are willing to plead guilty. Judicial officers in problem solving courts engage in dialogue with the offender and other members of the interdisciplinary court team. The offender is part of the interaction rather than an observer speaking through their lawyer (Hulls 2004 at 61).

The Approach of the Magistrates’ Court

Principally, the approach taken by the Magistrates’ Court of Victoria in the past decade is that individuals who present to the court with a need which is apparent to their lawyer, court staff, the police or magistrate, for some form of intervention by the court do not fit into a “one size fits all” model. Interventions can occur at various times in a person’s life, as a response to a vast array of behaviours, and at various times through the criminal justice or court process. The seriousness of the offence with which an offender has been charged is not the predominant indicator as to whether or not Court Support Services are needed.

The Victorian experience, which has led up to the emergence of these more individually oriented approaches by magistrates, is encapsulated in the following paragraph:

They (problem solving or specialist courts) represent a move away from a narrow focus on the individual and their criminal conduct to a focus on the offender’s problems and the possible solutions. Their attempt to deal with problems which may have contributed to an offender’s criminal behaviour reflects a realisation by courts and legislators that social problems may require social rather than legal solutions or a combination of both legal and social solutions.\(^2\)

One of the significant impetuses for magistrates to practice problem solving interventions is the prevention of the recurrence of the behaviour where possible, or a diminution of the frequency or seriousness of offending.

Courts throughout Australia have developed their own approaches to problem-solving, such as the Diversion Court in South Australia, the Mental Health Court in Queensland and the various drug courts. These approaches are now accepted as being entirely appropriate to modern courts. It could even be said that they constitute the new orthodoxy in court approaches -
Magistrates in Victoria would consider they could not properly discharge their judicial duties without Court Support Services.

It has become a truism that the vast majority of persons coming before the Magistrates’ Court present with social, medical, mental health, or problem behaviour (eg personality disorder, gambling, illicit drug use) issues. In many instances, persons present with multiple problems. In essence, the work the Magistrates' Court has done in this area is to arm magistrates with the best possible advice to assist in appropriate decision making. On some occasions, an individual's ‘problems’, such as homelessness or substance abuse may be highlighted and a program be put in place to assist with those specific issues.

The emerging philosophy is that if a person's behaviour is leading them to court, with the consequent harm to the individual and the community that accompanies the problem behaviour, then an intervention by the court may be appropriate.

As stated by Professor Freiberg (2003 at 9):

The concept of the 'problem-oriented' court is still emerging. There is as yet, no generally accepted terminology. In the United States, the phrase 'problem-solving seems to be preferred over the terms 'problem-oriented' or 'specialised' courts, though little seems to turn on these distinctions at this stage.

The Magistrates’ Court agrees that:

Problem solving courts emphasise traditional due process protections during the adjudication phase of a case and the achievement of tangible, constructive outcomes post-adjudication. In doing so, problem solving courts have sought to balance fairness and effectiveness - the protection of individual rights and the preservation of public order (Mendelle, 2004).

The Magistrates' Court considers problem-solving processes to be an effective approach to achieve appropriate sentencing outcomes by bringing to bear a less adversarial and more managed or supervised sentencing solutions. The decisions incorporate inputs and solutions focussed around individual problems. The Magistrates' Court is seeking to extend the application of problem solving approaches beyond sentencing to pre-sentence interventions and other areas of the courts work, such as Victims of Crime, Crimes Family Violence and Family Law.

The Court sees the implementation of specialist problem solving lists (in contradistinction to stand-alone courts) as an effective, accessible and cost efficient innovation. The Magistrates’ Court has been advocating the implementation of a specialist list to meet the justice needs of mentally
impaired. A specialist list has commenced at Shepparton Magistrates' Court and is being mooted at Bendigo.

Currently, two specialist 'problem-solving' lists operate at Melbourne Magistrates' Court: the Enforcement Review Program (also known as the Special Circumstances List) and the Tuesday afternoon list.\(^5\)

**Enforcement Review Program**

This list arose as the result of a collaboration with the Sheriff's Office as a response to the incarceration for fine default of persons suffering from significant mental or physical impairment (for the purposes of this list, a “special circumstance”). The list is in great demand and cases were initially listed for one morning a month, then two mornings a month and are now listed for two full days a month.

If a carer or treatment provider has identified a client with special circumstances, an application for revocation of fines supported by medical evidence, needs to be forwarded to the Enforcement Review Program officer. The application for revocation of fines can be in a letter format and must outline the general circumstances of the client. Medical evidence is also required from the client's treating doctor or psychiatrist, which should explain things such as the nature of the condition (diagnosis), the current treatment and how the client is now dealing with the illness (is the condition under control?).

The application for revocation of fines, medical evidence and any letters of support the third party applicant wishes to attach to the application needs to be forwarded to the Enforcement Review Program officer for determination. That officer will link the outstanding fines the client has at enforcement stage and collate a file with a print out of their outstanding fines. The application, once prepared, will then be forwarded to the Procedure for Enforcement of Infringement Notice court registrars for determination.\(^3\)

If the case is heard in open court, the magistrate will take into consideration the special circumstances of the client. The usual outcome on resentence is a short undertaking to be of good behaviour (the Victorian equivalent of a good behaviour bond) or a finding of guilt but dismissal of the charge (section 76, Sentencing Act 1991).

Through the Enforcement Review Program, the court has seen that the court process has a significant impact on the participants. The participants in the program are generally persons with a form of mental impairment. The format of the Enforcement Review Program court proceedings has empowered the participants to take a role in their court case. The participants have taken the proceedings extremely seriously.

One of the surprising results has been that the services for the mentally impaired have become involved in the process and have taken ownership of
some of the issues. Previously, it was very difficult to get service providers for the mentally impaired, such as case workers, treating professionals, outreach workers, to attend court. It has been the court’s experience that not only do the service providers attend at court, they also provide important details to the court via court reports.

The participants in the program have been taking their undertakings to the court very seriously, and have been continuing the treatment as ordered in the adjourned undertakings. Although there is no data to support this contention, anecdotally it has been the court’s experience that people with special circumstances are attending at court in this specialised list because they are aware that they will receive the appropriate type of hearing and the appropriate disposition.

Another unexpected offshoot of the Enforcement Review Program is the role played by the prosecutors from the various agencies. They have adopted a consensual approach, often applying to withdraw charges (such as those under section 76 of the Melbourne Citylink Act 1995 which calls for the mandatory imposition of costs of $40 on each charge found proven) and have from time to time assisted in the problem-solving process by making common-sense suggestions to prevent offenders being charged in the future.

**Tuesday Afternoon List**

This is a list dealing with street sex workers charged with prostitution offences and takes place on the first Tuesday afternoon of each month. It too came about through collaboration with community groups. No additional funding was required for the Court to run this program. The list simply fits into the normal listing process by having an afternoon a month set aside for the hearing of these particular cases.

The user-friendly aspects of the list, namely that it takes place at 2:00 pm in a separate Court, are contributing to the increasing numbers of women answering their charges. The setting aside of a list at a particular time on particular dates also means that service providers are able to attend to provide specialist services as required.

At a planning meeting held prior to the commencement of the list, the stakeholders reached agreement on a number of matters. Firstly, Melbourne Magistrates’ Court will dedicate one regular afternoon per month for hearing of non-violent street sex work and related (i.e. drug use/possession) police charges. Secondly, St Kilda Police would receive training and information in relation to the program. Thirdly, St Kilda police will implement protocols whereby all people charged with street sex work and related offences are summoned or bailed to appear on this regular court date and time. Fourthly, that a protocol would be implemented by St Kilda police that at the time of detection, street sex workers would be provided with information in relation to health services, support services, welfare services and drug programs.
Fifthly, in cases deemed appropriate by the informant, St Kilda Police would implement a protocol in conjunction with the Court Referred Evaluation Drug Treatment (CREDIT) program which would include a bail condition is fixed in the following terms: “That the defendant arrange to attend the CREDIT program for assessment at Melbourne Magistrates’ Court”. A clinician with Court Referred Evaluation Drug Treatment will be available at court to conduct screening interview for the program.

It was also agreed that a Drug Outreach Lawyer from St Kilda Legal Service and duty solicitors from Victorian Legal Aid will be in attendance at court to represent defendants and that health and community workers would be rostered at court from a range of organisations and would be working collaboratively.

During the planning phases, it was also intended that health and community workers would access a number of support services as required by individual defendants, such as housing and emergency accommodation, Centrelink, drug and alcohol programs, health services and material aid.

The advantages of this list are seen to be early intervention by agencies and support services leading to a reduction in harm, both to the sex workers and the wider community and at the same time offending issues are being addressed leading to a reduction in recidivism. Street sex workers will have access to immediate assessment for the Court Referred Evaluation Drug Treatment program and be linked into drug treatment services and monitored by the Court.

Further, street sex workers are more likely attend court because afternoon court is more accessible to street sex workers who generally work until the early hours of the morning and they will have an existing relationship with Drug Outreach Lawyer and greater confidence in being supported at court by lawyer they already know.

In addition, magistrates are more able to attempt to address issues behind the offending behaviour of street sex workers by tailoring their sentencing decisions to the particular needs of defendants, such as, imposing good behaviour bonds conditional on access of treatment/support, deferred sentences, community based orders etc. In the absence of an appearance by defendants, Magistrates currently have few options but to impose fines or order a term of imprisonment.

Finally, as a result of the operation of this list, fewer bench warrants are issued, saving court time, and considerably reducing the demands placed on police executing warrants and watch-house/Custody Centre beds. The benefits to street sex workers of not having warrants executed against them is that there is less disruption to their lives and less likelihood of them losing personal items and accommodation due to incarceration.
Due to the specialisation involved in these lists, the processes have had the added effect of achieving a degree of cultural change. For example, public transport organisations are now meeting with community groups to consider alternative approaches to issuing fines with respect to persons with special circumstances. Importantly, prosecuting agencies have embraced the concepts espoused in the Enforcement Review Program and are driving cultural change within their organisations.

The experience of these lists is that treating professionals can make a significant contribution to their court issues and outcomes with the support of the court; a non-adversarial approach is highly effective; there is a genuine shifting of responsibility for inappropriate or unlawful behaviour through these processes whereby the community and the individual are given a sense of ownership of the issues; and individuals generally respond much more favourably to a process which treats them with dignity and accords them a voice.

**Other Observations Concerning Process**

The importance of process must not be underestimated. It is highlighted in the following passage:

> Participants’ perceptions of whether the court process was ‘fair’ was shaped to a significant degree by the extent to which they were able to tell their story and be listened to by their legal representative and the judicial officer.

> ‘The Magistrate didn’t understand what was going on at that time in my life at all. I didn’t get a chance to say what I wanted to say. The Magistrate just told me to sit down, and the barrister didn’t say everything that I wanted him to.’

As the above quote attests, many homeless people feel that they do not have the opportunity to tell their story to the court. Many focus group participants felt that their legal representative did not represent them in a way that informed the court of the full nature and extent of their circumstances.

Participants who appeared on the Enforcement Review Program list at the Melbourne Magistrates’ Court and in the Koori Court had a much more positive perception of the court process, as the following case studies illustrate.

> James, a homeless man with over $10,000 worth of unpaid fines, appeared on the Special Circumstances List at the Melbourne Magistrates’ Court. James was able to speak directly to the Magistrate on the Special
Circumstances List about the positive changes that had occurred in his life since the time of his offences, and he felt that the progress that he was making was taken into consideration by the Court.

George, an Indigenous Australian homeless man, who has had significant contact with the court system over a number of years, spoke very highly of his experience in the Koori Court as compared with the mainstream Magistrates’ Court. He said: ‘In a normal court room, a Magistrates’ Court, I get nervous. I think I’m going to get locked up and I stress out real bad ... and there’s all these charges and I don’t even know where they’re coming from. When I’m in the Koori court I feel really comfortable ‘cos I’ve got my Elders there and family.’

Another participant had a similarly positive experience in court as a result of a judicial officer taking the time to engage with her directly. Although she initially found it confronting to speak directly with the magistrate, it ultimately increased her perception of the fairness of the court process (Midgley 2004, p 25).

In the United States, in the context of Mental Health Courts, the evaluation in relation to the Broward Mental Health Court made some interesting findings about process. It examined ‘perceived procedural justice’ between the Mental Health Court and a comparison, being a run of the mill misdemeanour court. It found the following (the respondents having responded to a 7 point scale, with 1 representing ‘not at all’, 4 representing ‘somewhat’ and 7 representing ‘definitely’).

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<td>hear about your personal and legal situation</td>
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It is patently obvious that in therapeutic jurisprudence practising courts, the hearings themselves are far more personal, intensive and detailed and take up greater court time.). Although there are some regional Australian therapeutic jurisprudence based programs that have been set up with minimal resources (King, 2003b), courts operating under a therapeutic jurisprudence
model are generally costly to run and administer (Harris, unpublished at 115). The therapeutic jurisprudence approach necessitates more court appearances than traditional court hearings due to the “judicial supervision component”. Extra adjournments necessarily mean more costs - costs associated with counsel and also with court time. Further, the courts require support in terms of additional court staff, corrections staff, treatment and clinical advisers, case managers and the costs associated with treatment and housing programs.

At the Koori Court at Shepparton, 4 relatively straight-forward cases were observed. These cases would have taken approximately 30 minutes in total to complete in the ordinary Mention List of the Court. One participant had been charged with driving offences, including driving whilst disqualified for the second time (which necessitates a term of imprisonment of at least one month being imposed - however - a community based disposition such as a Intensive Corrections Order or a suspended sentence can be imposed in lieu of a term of imprisonment to be served). Had the matter been dealt with in the Mention List, it would have taken no more than 10 minutes to complete. The hearing took in excess of 45 minutes while:

• everyone around the table and in the court room was introduced to the defendant and his partner by the Magistrate,

• the Magistrate paid her respects to the traditional custodians of the land and to the respected elder who was assisting her as well as two other elders who were attending the court as observers,

• the summary of allegations and prior convictions read,

• the defendant’s counsel made a plea in mitigation,

• the Magistrate, respected elder, prosecutor, Aboriginal Justice Officer, Community Corrections officer, defendant and his partner conducted a lengthy, interactive conversation (incidentally, this part of the proceedings was the lengthiest and the most engrossing),

• the magistrate imposed and explained the disposition and asked if anyone in the courtroom they wished to say further.

The hearing was not “time efficient” – however, it was a therapeutic triumph in that it was very moving and personal to the defendant and his partner and appeared to imbue the defendant with hope and to motivate him towards long-term change (Popovic, 2003).

Petrila (1993, 2002), a leader in the design, implementation and evaluation of the Broward Mental Health Court, has urged caution with respect to therapeutic jurisprudence and problem solving approaches for many years. In his evaluation of the Broward Mental Health Court, Petrila (2002) commented:
Some have argued that the informality of the MHC and the lack of adversarial process results in a diminution of individual rights that need to be preserved in the criminal courts. This argument is not dissimilar to arguments over the role of counsel and courts in civil commitment, in which there has been significant debate over whether legal rights are adequately respected. Advocates for treatment courts assume that traditional legal process impedes access to treatment, and argue that breaking the cycle of arrest, release from jail, and rearrest without community treatment warrants a more explicitly therapeutic approach by the courts. Others believe an insistence on individual rights is critical to the integrity of any criminal court process and point to the fact that certain rights, for example, the right to speedy trial, are given up as part of entering the mental health court. This issue too will be the subject of further debate.

**Conclusion**

Judicial practitioners of therapeutic jurisprudence still have some way to go in ascertaining the appropriate parameters of court processes. We must strive to ensure that we are not trampling over the rights of court users while maintaining a flexibility and practicality that have been lacking in traditional court processes. We must ensure that our processes are beyond reproach and that the processes we adopt cannot be criticised by those who don’t, (or don’t wish to), understand our rationale.

As the Koori Court demonstrates, problem solving court approaches are not dichotomous with traditional notions of open courts and natural justice. They can in fact build on those important tenets. The experience we gain with problem solving approaches continues to evolve. It is timely that we revisit some of the processes we have implemented and taken for granted as being necessary to give effect to the practice of therapeutic jurisprudence.

**Notes**

1. Prepared by the Justice Strategy Unit, Justice Portfolio Services Division, Department of Justice, South Australia, April 2000.

2. This is a modification of a paragraph from an article Freiberg (2001, at 9). The quote has been slightly modified to better express the court’s view.

3. PERIN Court (Procedure for Enforcement of Infringement Penalties) is an off-shoot of the Magistrates’ Court of Victoria. It performs the administrative functions required in order to enforce fine default. The scheme is set out in Schedule 7 to the Magistrates’ Court Act (Vic) 1989.
4. For further information about this program, see Condon & Marinakis (2003), the Magistrates Court of Victoria, Annual Report, 1 July 2003 to 30 June 2004 and the Magistrates’ Court of Victoria’s website: www.magistratescourt.vic.gov.au.