

## Therapeutic jurisprudence – moving forward

26 JUN 2015 — BY DR WARREN BROOKBANKS LLD, PROFESSOR OF LAW, THE UNIVERSITY OF AUCKLAND

In September this year, Auckland University will be hosting the 4th International Therapeutic



Jurisprudence Conference, following the theme of “Weaving strands: Raranga nga whenua”. This is intended to signify the “unique interlacing of cultural, legal, psychological and social practice and philosophy in Aotearoa New Zealand to the international concept of therapeutic jurisprudence”.

The conference will be held at the University of Auckland Business School on 3 and 4 September 2015. It is not, however, the first time that therapeutic jurisprudence has been showcased in New Zealand. In 2000, the Australian and New Zealand Association of Psychiatry, Psychology and Law held a conference which included a keynote address given by the late Professor Bruce Winick who,

with Professor David Wexler, was one of the two co-founders of the therapeutic jurisprudence movement. The address was entitled “Therapeutic Jurisprudence – Past, Present and Future”.

At that point in time, the movement’s past was short, its present emergent and its future profoundly unknown – at least as far as New Zealand was concerned.

It is an understatement to say that things have changed in New Zealand in the 15 years since that conference was held. Although the therapeutic jurisprudence movement lost a towering figure with Professor Winick’s untimely death in 2010, initiatives in recent years, both in New Zealand and abroad, are testimony to the pulling power of an idea whose time has clearly come.

It is true to say that therapeutic jurisprudence now has a global reach that has taken it well beyond the foundational role, conceived by its founders, as a means of exploring the intersection of law with the mental health system and its principal professional disciplines, namely, psychiatry and psychology. This curiosity led Professors Winick and Wexler to examine, more generally, the extent to which substantive rules, legal procedures, and the roles of lawyers and judges may produce therapeutic or antitherapeutic consequences.

The rest, as they say, is history. It is, nonetheless, useful to recap on what therapeutic jurisprudence is, and to offer a brief perspective on how it is currently being applied, both in New Zealand and abroad. It has been described by Professor Wexler as the “study of the role of the law as a therapeutic agent” and a means of focusing on the impact of the law on emotional life and on psychological well-being.

Since the law may be characterised as a type of therapist, or, at least, as a therapeutic agent, Professor Wexler describes the task of therapeutic jurisprudence as being to identify, and to examine empirically, relationships between legal arrangements and therapeutic outcomes. Other commentators have observed that therapeutic jurisprudence is “both a practical attempt to describe and improve processes that are already happening in courts and legal practice, and also a normative agenda, that is, an effort to prescribe what ought to happen” (see N Stobbs, “How to do therapeutic jurisprudence research” (link at end of article)).

As such, therapeutic jurisprudence may be used as a specific method for designing or reforming new laws or new legal practices. When applied to its most visible manifestation, namely, problem-solving, or solution-focused, courts, therapeutic jurisprudence offers procedural guidelines, “protocols and techniques for making the justice system more effective in quite specific ways” (N Stobbs). The successful establishment in Auckland of the Alcohol and Other Drug Treatment Court (AODTC) pilot in November 2012, aimed at reducing offending, drug and alcohol dependency and the use of imprisonment, while positively impacting offenders’ health and wellbeing, is eloquent testimony to the power of therapeutic jurisprudence in operation.

An important feature of therapeutic jurisprudence is that its applications are interdisciplinary, drawing on social science to inform research to influence more effective outcomes. More recently, various agencies have begun to use evidence-based approaches, employing rigorous research, to discover what works in criminal justice, youth justice and services for victims of crime.

In both the USA and Canada, recent research in the domain of sentencing has looked at evidence-based practice as a means of reducing recidivism in order to increase public safety. Research conducted in other jurisdictions has shown that properly designed and implemented mental health courts, not yet a feature of the New Zealand judicial landscape, are able to cost-effectively and safely reduce recidivism, while at the same time improving the health and psychosocial functioning of mentally impaired offenders (see M Edgely, “Why do mental health courts work? A confluence of treatment, support & adroit judicial supervision” (2014) 37 *International Journal of Law and Psychiatry* 572-580).

Recent discourse around therapeutic jurisprudence has begun to explore how evidence-based problem-solving can be employed in mainstream court settings. The hope is that the insights forged in specialised solution-focused courts might devolve into a broader base of offenders, and ultimately into the wider community.

In the foreword to WJ Brookbanks’ (ed) *Therapeutic Jurisprudence – New Zealand Perspectives* (forthcoming, Thomson Reuters), Professor Wexler explains his “wine and bottle” metaphor as a means of examining the law and its administration. According to this approach, the law itself – legal landscape and structures – is the “bottle”, and the roles, behaviours, practices and techniques used by legal actors are the “wine” or liquid. The “wine and bottle”

methodology has recently been applied to assess and evaluate sentencing practice in the state of Victoria (see P Spencer, “From Alternative to the New Normal – Therapeutic Jurisprudence in the Mainstream” (2014) 39: 4 Alt LJ 222).

In a blog posting, it has been suggested, applying the “wine and bottle” model, that mandatory sentencing laws may create a therapeutic jurisprudence-unfriendly “bottle” because the inflexible nature of such laws does not allow for a lot of therapeutic jurisprudence “wine” to be poured in (see “Mandatory sentencing – a TJ unfriendly bottle?” (link at end of article)).

In the last two decades, courts in the US and in a growing number of other jurisdictions have come to rely on therapeutic jurisprudence to help in tackling many complex and challenging social problems. Therapeutic jurisprudence has been described as a “procedural jaws of life”, creating a “corridor and procedural space for courts to engage in actionable problem-solving, in whatever context, to provide a chance to connect to real solutions which fundamentally entail assumption of personal responsibility and transformative life changes”. Above all, it is suggested that therapeutic jurisprudence “has the potential to offer victims a meaningful opportunity for court participation, engagement and process for healing” (see Ginger Lerner-Wren, “The Hidden Power of Courts that Heal” (link at end of article)).

Some of these themes (and many others) will be explored at the forthcoming therapeutic jurisprudence conference. While the conference will provide an invaluable opportunity for networking for people involved in various therapeutic jurisprudence-related projects, it signifies, for the purposes of New Zealand law and practice, that the concept of therapeutic jurisprudence has come of age and is fit for purpose as a methodology for bringing about humane and efficacious change in a range of legal institutions and procedures.

Useful links:

- [N Stobbs, “How to do therapeutic jurisprudence research”](#)
- [“Mandatory sentencing – a TJ unfriendly bottle?”](#)
- [Ginger Lerner-Wren, “The Hidden Power of Courts that Heal”](#)