

SCOPING PAPER

Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change

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Introduction

The aim of this paper is to highlight how criminal courts in Australia have evolved over time, what forces have driven these modifications, and how these changes can inform the future of criminal courts in this country. As with other agencies of the criminal justice system, courts experience constant transformation, with the administration of justice at any given historical moment being dependent on the societal context. Ensuring that the courts remain in touch with developments in the community is important for maintaining public confidence in the administration of justice. (Doyle, 2001: 137).

While the general framework of the administration of criminal justice in Australia appears to have changed little in recent times (we still have police, courts and prisons), closer inspection reveals a constant reworking of the system. More specifically, Australian criminal courts have advanced toward a more therapeutic model of jurisprudence. Primarily, this may be observed in the establishment of court support services for witnesses, offenders and victims, and secondly, in shifts directed at treating the causes of crime through initiatives such as problem-solving courts (e.g. drug courts and domestic or family violence courts) and restorative justice enterprises.

Australian criminal courts operate within and are affected by wider societal forces. Examples include political, economic, cultural and intellectual forces which shape and guide responses to crime through our system of criminal justice. These factors cluster together to determine the way in which justice is achieved at any specific point in time. To complicate matters, court change further interacts with public perceptions of crime and punishment. The public wants to see the government doing something about crime; they want to be protected. In an effort to meet these demands, governments formulate and

implement policy to control crime. The broader societal context, however, determines what options are actually open to governments. A random event such as a mass murder, subsequent media coverage and public outrage is likely to result in calls for governments and courts to get tough on crime and put people in prison for longer. However, the maintenance of prisons is expensive and in times of fiscal concern the government's ability to respond to public demands could be curtailed. Under these circumstances, governments will need to legitimise their policy responses in line with public demand to ensure that any decisions that are made coincide with the broader social and economic climate (McGarrell & Castellano, 1991).

Theoretical themes underpinning the following discussion about the changing role of criminal courts in Australia will be linked to intellectual changes regarding justice administration, and societal shifts toward a market driven atmosphere in which managerial drives for savings, efficiency and consumer satisfaction are paramount. In Australia, these shifts have been vividly reflected in recent modifications to policing and corrections. Here, we have witnessed the opening of private prisons and the "transformation in public policing from a largely State-sponsored monopoly to a combination of private and State provision" (Davids & Hancock, 1998: 38). Indeed, much discussion and debate about how both policing and corrections have been affected by economic rationalism and the market driven atmosphere has taken place in Australia (see for example Harding, 1992; Harding, 1998; Harding, 1999; Hancock, 1998). Although managerial drives for savings, efficiency and consumer satisfaction have been alluded to by some in relation to criminal courts in Australia (see for example, Mason, 1994; Freiberg, 1995; Willis: 2000; Zdenkowski, 2000; Doyle, 2001) and overseas (see Morgan, & Clarkson, 1995; Raine & Wilson, 1996; James and Raine, 1998; Rottman & Casey, 2000; Nolan, 2001; Raine, 2001) this debate is not as extensive as the one taking place around policing and corrections. By focussing on the changing role of criminal courts in Australia, this report will a) provide insight into a subject that has been relatively

unexplored, b) challenge government, policy makers, criminal justice personnel and the general public to consider more closely positives and negatives of the changes taking place in our criminal courts and, c) pin point areas in which future court research is needed.

Criminal Courts in Australia

The role of the criminal court is to determine guilt or innocence of those accused of infringing the criminal law and to impose sanctions in accordance with sentencing law and practice. The Australian court system is predominantly adversarial in nature. Adversarial justice systems involve competition between opposing parties and it is a judge's responsibility to ensure that the competition is carried out in accordance with substantive and procedural laws.

Under this system, judges do not have an investigative role, they do not call or examine witnesses, their function is that of umpire, spelling out what evidence is admissible or inadmissible, ruling as to the interpretation of the law, explaining the issues involved to the jury whose members then decide the facts and give a verdict (Australian Law Reform Commission, 1999). Once guilt has been determined, it is the judge's task to sentence the offender according to sentencing legislation and practices.

Adversarial systems of justice contrast with inquisitorial systems, which are dominated by the judge's central responsibility to find the truth. Judges working under this system are essentially additional investigators. They ask most of the questions and establish the facts. In practice this could mean fixing the order in which evidence is taken and examined or they may call additional witnesses, request that further investigations be done, and that other evidence be produced (Kadish, 1983: 541, Reichel, 1999: 143-144).

In Australia, offences tried in adult criminal courts are classified as summary, indictable, or as indictable offences that are triable summarily. More serious

crimes are generally tried on indictment in Australia's intermediate courts (District or County courts) or Supreme Courts, while summary trials are conducted before the lower courts (Local Courts, Magistrates' Courts or Courts of Petty Session) (Willis, 2000: 137; Crawford, 1993: 101). Before the 1980's, only a small number of indictable offences were capable of being tried summarily but this has been changing. For example, Willis (2000: 143-144) notes that in Australia's two most populous States (New South Wales and Victoria), the summary jurisdiction for many indictable property offences has increased substantially in recent years. He concludes "the transfer of cases from the higher courts to summary courts is likely to continue. The process has been occurring for some time with little protest". As will be discussed in some detail later, Australia has also in recent years begun experimenting with problem-solving courts including drug and domestic (family) violence courts.

Sentencing judges must take into account a diverse number of considerations including retribution, denunciation, incapacitation, deterrence, rehabilitation and restitution (Ashworth, 1995: 57-81). Retribution is punishment-focussed and requires that the seriousness of an offence be replied to by the State's imposition of a punishment proportional to the criminal harm caused. Denunciation is also proportional, with harsher penalties being used to publicly condemn less acceptable forms of behaviour; punishment in this case operates to reinforce societal norms. Incapacitation ensures that offenders are incapable of offending again for set period of time. This principle operates under the proviso of public protection and crime prevention (Ashworth, 1995: 67-68). As far as deterrence is concerned the hope is that future levels of offending will reduce if fear of the consequences can be instilled in both the individual offender and society at large. Rehabilitative sentencing aims to reduce future crime by changing the behaviour, attitudes, or skills of the offender. Rehabilitation assumes that offending has specific causes and the focus is on identifying and remedying these factors. Restitution, developing from an increased focus on the rights and needs of victims, is a more recent sentencing aim (Ashworth, 1995: 73-74). This

principle requires the offender to put right the wrong done and usually takes the form of monetary payment and/or apology. Reparation places the victim at the centre of the sentencing process rather than the offender or society and is the sentencing principle underlying the notion of restorative justice (discussed in detail later). Some of these sentencing aims are exclusive, some overlapping, some incompatible and the weight given to each by sentencing judges will inevitably change at least in the context of Australia's traditional court system (Samuels, 1987: 66, Kapardis, 1987: 20).

Challenges and Change - Australia's Criminal Courts

Failure to Reduce Crime

Since the 1980's, Australia's criminal justice system (of which the courts constitute one part) has come under increasing scrutiny for failing to resolve, or indeed to reduce, the perceived problem of crime. The supposed escalation of crime, and in particular, violent offending, has been used by politicians as a political platform (see Carr & Chikarovski, 1999; Lee, 1999; Hogg & Brown, 1998), by the media to sell news (Victorian Community Council Against Violence, 1991; Osborne & Kidd-Hewitt, 1995; Teece & Makkai; 2000 Cowdery, 2001), and is raising fear amongst the general public (Pinkerton-James, 1992; Grabosky, 1995; Carcach & Mukherjee, 1999; Healey, 2001: 6 & 12).

Official statistics only provide minimal support for the view that crime has increased substantially – crime rates remain fairly stable with increases in some areas offset by decreases in others. For example, between 1998 and 1999 the number of assaults in Australia rose by 2.1%, theft (other), murder increased by 20% (the major cause of this was two mass murders), kidnapping and abduction increased by 8.2% but sexual assault decreased by 8.1%, unlawful entry by 4.3% and motor vehicle theft by 1.3% (Healey, 2001: 1-3). By the year 2000, murder

rates and kidnapping/abduction had dropped by 12% but this was counter-balanced by increasing rates of sexual assault (11%), other theft (10%), unlawful entry (5.1%) and motor vehicle theft (7.4%) (Australian Bureau of Statistics, 2002a).

In a study of homicide in Australia between 1915 and 1994, Indermaur (1996:1) concludes, “trend data on violence do not paint a picture of significant growth”. This suggests that the assumption of a generalised and uniform increase in crime, particularly violent crime, may not be sustainable (also see Hogg & Brown, 1998; Goldsmith, 1996).

Obviously, drawing definitive conclusions from official crime statistics may be problematic because they only give measures of reported crime. Surveys of crime victims can tap into levels of crime that go unreported. In Australia, the Australian Bureau of Statistics conducted crime victim surveys in 1975, 1983, 1993 and 1998 (Australian Institute of Criminology, 2001: 5). Similar to official crime statistics, self report figures show relative stability in crime rates with increases in some areas offset by decreases in others (see Chappell & Wilson, 1994). For example, between 1993 and 1998 the crime victim surveys conducted by Australian Bureau of Statistics (2002b) showed that the “prevalence of victimisation for offences was similar”.

Inadequate Resources

However, if the public remain fearful of victimisation, crime will continue to be a problem and Australia’s criminal justice system, including our courts, will be questioned. Increasing pressure from a number of different quarters to do something about crime has forced governmental hands. As we enter the 21st Century popular catch phrases within the court setting include: getting tough on crime, truth in sentencing, mandatory sentencing regimes, life for life, the war on drugs, three strikes and you’re out, one strike and you’re in. In recent times, calls

for offenders, (particularly those found guilty of violent crime) to receive harsher penalties have been powerful. Getting tough on crime has resulted in courts sentencing more offenders to longer terms of imprisonment - the result of which is a worldwide bourgeoning of prison populations (Home Office, 2002).¹ In Australia, between 1982 and 1998 it is estimated that the number of prison inmates rose by 102% (Carcach & Grant, 1999: 1). In relation to violent offenders, a report by the Australian Crime Research Centre (2002: 9-10) concludes that “sentencing of violent offenders is becoming tougher”. More specifically, the researchers show that a) the number of violent offenders in Australia’s prisons is increasing, b) there is evidence of a trend towards increased use of custodial sentences and decreased use of non-custodial sentences for violent offenders, c) there has been an increase in the median actual estimated sentence lengths for violent offenders.

All Australian criminal justice services have been affected by the increasing pressure to deal with crime. In our courts, caseloads are increasing and judges are being placed under mounting pressure to finalise cases quickly to reduce court delays (see Brennan, 2000; Mahoney, 1996).

At the same time as calls to get tough on crime are being voiced and courts are meting out harsher penalties, there have also been moves toward therapeutic jurisprudence (e.g. problem-solving courts, restorative justice initiatives) – developments that are more rehabilitative in nature. This apparent contradiction in court change is particularly interesting and this report aims to tease out and make some sense of this paradox.

The political, economic and social landscape

As concerns about crime have risen in Australia, our traditional adversarial court system has come under increasing attack for letting many guilty people go free

¹ Of course the issue of prison numbers is only relevant to courts in so far as they are responsible for sentencing.

for not stemming the tide of the apparent crime wave via sound sentencing practices, and for not recognising the needs of certain groups of people involved in the court process (e.g. indigenous offenders, non-English speaking peoples, women, victims, witnesses) (Brennan, 2000: 15).

These views are both fuelled and intertwined with changes in the political climate since 1980. Before then Australia was internationally recognised as a model of social democracy, widely seen as boasting a strong egalitarian ethos and was broadly defined as a welfare-based society. Once the Hawke-Keating Government came into power this social democratic ideology came under threat and Australia's societal landscape began shifting toward a more market driven society. Hogg and Brown (1998: 142) describe this as follows:

The Hawke-Keating Governments, like their conservative counterparts in Britain and the USA and Labour Governments in New Zealand, presided over a dramatic reshaping of the Australian political, economic and social order. This involved dismantling many of the institutions and assumptions of the liberal social democratic settlement that has underpinned Australian politics since early this century.

This political, economic and subsequent social transformation was continued by successive governments and Australian infrastructure and culture changed. The new political paradigm became one of minimal State intervention and the government's role becoming more managerial in nature. This new managerial project was introduced into the public sector where a variety of techniques (generally borrowed from the private sector) aimed at cost efficiency and service effectiveness were implemented (Hogg and Brown (1998).

Cost, Efficiency, Managerialism and Consumerism

Australia's criminal courts were primed for the government's managerial project because of rising public dissatisfaction and the high costs that courts incurred. As noted, there has been a good deal of public criticism about the criminal courts

being unable to get at the underlying problem of crime (Doyle, 2001: 140). Further to this, Australian court expenditure during the 1980's was considered to costly. Research commissioned by the government in found substantial increases in "money expenditure, real expenditure, real per capita expenditure and expenditure relative to total public outlay and national output, i.e. the national resources devoted to courts have increased absolutely and relatively" (Barnard and Withers, 1989: v). The drive for cost efficiency has slowly been changing the landscape of Australia's criminal courts. Court processing and sentencing have both been affected.

Measures to decrease excessive delays in court processing have been undertaken to increase efficiency and reduce expenditure. For example, diversion including the use of infringement notices has been introduced to reduce summary court workloads and costs. This has been somewhat offset by the now substantial number of indictable offences being processed through Australia's summary courts, a move aimed at reducing long and costly higher court processing. Other initiatives include sentencing discounts for guilty pleas, setting up pre-trial hearings to clearly define the issues in dispute and moves (such as those seen in the implementation of drug courts) to encourage judges to take more control over the trial process (see Willis, 2000). These changes pose a direct challenge to the traditional adversarial approach. In the case of drug courts for example (discussed in detail later), judges take on the role of trial manager - a practice that is more in line with the hands-on inquisitorial approach to justice.

The current climate of managerialism and with it consumerist sentiment has further enabled the public to make increasing demands of the court. In this context the notion of the public as court consumers or users of a service might appear minimal when the core service is being provided under conditions of State coercion (James & Raine, 1998:70-71). However, the court's role is being judged increasingly in terms of service quality and its responsiveness to the

needs and expectations of those involved in the proceedings as well as the wider community.

Many courts are now taking the needs of their consumers seriously. Provisions have been made to provide more information for those attending court, better court buildings have been designed and built, better facilities are being provided and more training for front line staff is taking place (see Attorney General's Advisory Committee, 1986; Sallmann, 1994).

Concern over providing a better service for court consumers is reflected in the establishment of bodies such as the Australian Institute of Judicial Administration (AIJA) and the more recent establishment of a Judicial College in Victoria. The AIJA is a research and educational institute funded by the Attorneys-General Department. The principle objectives of the AIJA include "research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems". The AIJA has over 1000 members including judges, court administrators and lawyers. Areas of research and educational training include, cultural awareness, gender awareness and case management (Australian Institute of Judicial Administration, 2002).

In 2001, the Victorian Attorney-General announced the establishment of the Judicial College of Victoria. This college is responsible for the development, continuing education and training of Victoria's judges. Comments made by the Attorney General when announcing the opening of the college reflect the managerial and consumerist themes highlighted in this paper and include:

A Judicial college would play a vital role in the professional development of Victoria's judicial officers, and could focus on skills such as judgement writing and trial management.

It would also assist the judiciary to remain in step with the community on non-legal issues, such as issues relating to minority groups...

A college of this kind would support efficient court management at a time when demands on courts are increasing.

Technological advances have further been useful in the drive toward better service provision for all court consumers. Facilities in the new Intelligent Court in Western Australia for example, have been designed to “meet the needs of the judiciary, legal professionals, jurors, witnesses, victims and interested members of the community”. These initiatives have been taken to make the process of attending court less unpleasant for all those involved by designing the court in such a way as to minimise potential confrontation between victims, witnesses and defendants. Remote security rooms for example, are linked to the main courtroom by closed circuit television to allow privacy and greater security for vulnerable witnesses (Western Australia Ministry of Justice, 2000).

Western Australia’s Intelligent Courtroom developed as part of “The Ministry of Justice’s commitment to customer service which has been the driving force behind the development of these technologically advanced courtrooms which save time, money and resources”. Video links, for example, have allowed all court proceedings to be conducted from another city, another State or another country. The court can collect evidence from experts and witnesses, conduct conferences and sentence offenders who are thousands of miles away – saving the State and the community money and time (Western Australia Department of Justice, 2000)

Computer technology has further enabled Australian courts to become more efficient and consumer friendly. In some cases on-line judicial support systems for consumers is now provided. See for example websites for the Supreme Court of Western Australia (<http://www.supremecourt.wa.gov.au>), the Federal Court (<http://www.fedcourt.gov.au>), Queensland’s Courts (<http://www.courts.qld.gov.au/>) and the County Court in Victoria

(<http://www.countycourt.vic.gov.au>). In some instances judges are also provided with on line information services. As case in point is New South Wales where a computerised sentencing information system has been implemented to provide judges with legal, factual and statistical data that might better inform their sentencing decisions. The purpose of the system is to achieve consistency in sentencing throughout the jurisdiction and thus satisfy consumer concerns regarding inconsistent sentencing practice (Potas et.al. 2000: 99). Computer-based management techniques have also been introduced to decrease processing delays and obtain optimum levels of efficiency for the least possible cost (see Lane, 1993).

Right-Based Organisations

Right-based organisations have been critical of courts' inability to recognise the needs of specific court consumer groups (i.e. indigenous peoples, victims). Fuelled by the managerial market driven rhetoric, rights-based organisations have played a key role in trying to ensure that the rights of particular groups are considered. Court support and advisory services have been set up to provide for the needs of people from non-English speaking backgrounds, victims and witnesses (Dixon, 1997; Commonwealth of Australia, 1996; Mugford, 1987). The push for victims' rights has been particularly strong (see Israel, 1999). Calls from victims to have their interests acknowledged has lead to initiatives at two levels: support services and procedural rights within the court. Victim support services including witness assistance, information, referral services and compensation have recently been introduced as a result of rising victim protest. Procedural initiatives enacted include, the right to be consulted about sentencing outcomes (Zdenkowski, 2000: 168-169), and moves toward victim-focussed restorative justice (discussed in detail later).

Problems faced by indigenous peoples in the criminal justice system have also been brought into stark focus since the *Royal Commission into Aboriginal Deaths in Custody* with a number of changes to court practices being proposed

and implemented as a result. These include cross-cultural training for court personal, use of interpreters and the establishment of aboriginal legal services (see Australian Law Reform Commission, 1994: 141-142). Moves toward using customary law and restorative justice to better serve indigenous clientele are also being debated (Mugford, 1997; Sarre, 1997).

Summary

Over recent years Australia's courts have come under pressure to change in line with social, economic and political sentiment. Drivers behind this push for criminal court adaptation have included governmental (and thus criminal court) failure to 'deal' with crime and thus reduce offending rates, managerialist drives for savings and efficiency and calls from certain court consumer groups for their needs to be recognised and a better court 'service' to be provided. As a result of these pressures, Australia's criminal courts have started to change.

In addition to the political, economic and social landscape, changing intellectual paradigms are also having a substantial impact on Australian criminal court practice. Shifts in intellectual paradigms are interconnected with changes in the broader social structure – they not only provide philosophical legitimacy to criminal court change but also a practical way in which this change can take place. These intellectual drivers behind criminal court change are considered in the next part of this report.

Therapeutic Jurisprudence

Origins

As already noted, initial responses to the increasing fear of crime have been to get tough. It would seem that retribution, denunciation, incapacitation and deterrence rather than rehabilitation have dominated criminal justice discourse in recent years. Intellectually, this get-tough attitude can be linked to the

criminologist Robert Martinson's revelation in the 1974 that; when it comes to rehabilitation, nothing works (Sarre, 2001: 38). Before Martinson, rehabilitation was widely accepted as the primary goal of criminal justice. In the early 1950's the dominance of rehabilitation led to the creation of many treatment programs that were aimed at addressing offenders needs. However, by the 1970's when Martinson's published his research findings, the rehabilitative ideal was essentially debunked, and as societal fear of crime increased, punitive responses to crime were popularised (Gebelein, 2000). These trends are still evident in criminal justice today, but alongside this, a new paradigm has emerged labelled therapeutic jurisprudence.

As court case loads continue to rise, prison populations burgeon, court consumers start making increasing demands on the court, public disenchantment with the criminal justice system cements, fear of crime rises and so to do criminal court costs, it has become clear that traditional methods of justice are not leading anywhere productive. Thus, the stage has been set for a criminal justice innovation - for a new way of doing justice.

Principles

As an intellectual standpoint, Philip Rieff's *The Triumph of the Therapeutic* written in 1966 spearheaded the therapeutic jurisprudence movement (Nolan, 2001: 47). However, it was not until the 1990's, through the work of Wexler and Winick, that the idea really caught on (see Whitley, 1993; Wexler, 1992; Wexler, 1993a; Wexler, 1993b; Stole, Wexler & Winick, 2001). Therapeutic jurisprudence is defined as:

the study of the role of the law as a therapeutic agent. This approach suggests that the law itself can function as a therapist. Legal rules, legal procedures, and the roles of legal actors, principally lawyers and judges, may be viewed as social forces that can produce therapeutic or anti-therapeutic consequences. The prescriptive focus of therapeutic jurisprudence is that, within the important limits set by principles of justice, the law ought to be designed to service more effectively as a therapeutic agent (Wexler, 1993b: 280).

The fundamental principle underlying therapeutic jurisprudence is the selection of a therapeutic option – an option that promotes well-being for all (Rottman & Casey, 2000: 2). Therapeutic jurisprudence in the context of the court may thus emphasise therapeutic aims but this is not necessarily to the detriment of other aims or approaches. Wexler and Winick portray “therapeutic jurisprudence as only one of the several valid ways to analyse legal problems. They emphasise that “therapeutic values, while significant, generally should supplement, rather than dominant, values produced by other approaches” (Whitley, 1993: 304).

Therapeutic jurisprudence is in part a return to the old rehabilitative ideals that were ridiculed in the 1970’s. However, this new rehabilitation is perhaps more sophisticated, and as will be demonstrated shortly, it also appeases advocates of the get tough on crime stance. After the initial shock of Martinson’s nothing works conclusion, social researchers in the 1980’s started to conduct research into rehabilitation again. They found that a) treatment could work as long as it was sustained and intensive, b) the key variable in treatment was the length of stay, and c) the outcomes of compulsory and voluntary treatment did not differ significantly (Makkai, 1998: 2). Most importantly, researchers discovered that specialised treatment for certain groups of offenders (e.g. drug offender, perpetrators of domestic violence) could be effective in reducing offending.

Practice

Therapeutic jurisprudence provides judicial guidance, and in practice, it shifts courts from adversarialism to problem solving. In Australia, therapeutic jurisprudence can be seen operating on a continuum from initiatives such as pre-sentencing reports and victim-impact statements through to the establishment of fully-fledged problem-solving courts and restorative justice systems.

Pre-Sentence Reports

Probation officers at the request of a judge compile pre-sentence reports after an offender has been convicted but before sentencing has taken place. A judge may request a probation officer to report to the court on the social circumstances, and (where appropriate) the personal history and personal characteristics, of the offender, and to give advice about sentencing alternatives. While this type of information may also be conveyed by prosecutors, defence council and offenders, pre-sentence reports are unique because they are construed as an independent and authoritative source of information provided by therapeutic experts (Wilkie, 1993: 8-9). There are generally two distinct types of pre-sentence report available to judges: detailed written reports or shorter written or verbal reports (Judicial Commission of New South Wales, 1995: 2). The more comprehensive written reports invariably follow a fixed format and usually include discussion or notes under the following topic headings:

- Family background
- Employment and Finances
- Health (mental and physical)
- Factors relating to the current offence
- Prior criminal history
- Responses to previous sentences
- Sentencing recommendations (including suitability and availability of custodial vs. non-custodial sentencing options).

The pre-sentence report is compiled after interviewing an offender but in addition to this, a probation officer may seek information about the offender from other sources. These other sources may include: family members (i.e.

spouses, ex-spouses, siblings, children, parents), health professionals (i.e. counsellors, psychologists, psychiatrists, general practitioners, drug rehabilitation staff), other criminal justice personnel, criminal justice records, employers, teachers, pastors and budget advisors.

Alongside the political and social climate in general, intellectual shifts toward rehabilitative therapeutic ideals can in part account for the use of pre-sentence reports in sentencing. Arguably, pre-sentence reports are a tool that judges can use to ensure consistent sentencing practices and generally enable better court service to be provided to all court consumers. Theoretically, they are a way of helping judges make more informed, efficient and thus better sentencing decisions. Evaluations of pre-sentence reports in Australia reveal that judicial officers generally believe that pre-sentence reports do assist them when making sentencing decisions (see for example the Victorian Sentencing Committee, 1988; The Western Australian Department of Corrective Services, 1991; Judicial Commission of New South Wales, 1995).²

Problem Solving Courts

At the other end of the therapeutic continuum, problem-solving courts have, in recent times, begun operating worldwide. These courts epitomise therapeutic jurisprudence in action, go by many names and takes many forms including: drug courts, domestic (family) violence courts, mental health courts and community courts. The United States of America has been a world leader in these new justice experiments and Australia has not been far behind.

The United States headed the procession in 1989 by introducing the first drug court in Dade County Florida. Since then over 600 drug courts have started or are at the planning or implementation stage throughout the United States (Center for Court Innovation, 2002). In addition, by the end of the year 2000, eleven

² Counsel in making submissions on sentence in the past usually supplied the information now provided in pre-sentence reports.

community courts were operating across the United States with an additional six due to open (Lee, 2000: 1), domestic violence courts have been established in Florida and New York, a mental health court began running in Florida and a Homeless court has begun official operations in California (Center for Court Innovation, 2002). In Australia, drug courts have been established in New South Wales, Queensland, South Australia and Western Australia (Freiburg, 2001: 4). Domestic (family) violence courts are also operating in South Australia (Courts Administration Authority South Australia, 2002) and Western Australia (Western Australia Department of Justice, 2002b).

Although problem-solving courts and the therapeutic paradigm underlying them are still in a transitional phase of development, a number of common elements can be identified. Berman and Feinblatt (2001: 131-132) summarise these as follows:

- *Case Outcomes:* Problem-Solving courts seek to achieve tangible outcomes for victims, for offenders and for society. These include reductions in recidivism, reduced stays in foster care for children, increased sobriety for addicts, and healthier communities.
- *System Change:* In addition to re-examining individual case outcomes, problem-solving courts also seek to re-engineer how government systems respond to problems like addiction, mental illness and family violence. They promote reform outside of the courthouse as well as within.
- *Judicial Monitoring:* Problem-solving courts rely upon the active use of judicial authority to solve problems and to change the behaviour of litigants. Instead of passing off cases – to other judges, to probation departments, to community-based treatment programs – judges at problem-solving courts stay involved with each case even after adjudication.

- *Collaboration*: Problem-solving courts employ a collaborative approach, relying on both the government and non-profit partners (i.e. criminal justice agencies, social service providers, community groups, and others) to help achieve their goals.
- *Non-Traditional Roles*: Some problem-solving courts have altered the dynamics of the courtroom, including, at times, certain features of the adversarial process. Problem-solving courts often engage judges in unfamiliar roles as well, asking them to convene meetings or broker relationships with community groups or social service providers.

A more specific understanding of how problem-solving courts operate can be achieved by taking a brief look at the operation of drug and domestic (family) violence courts. It will be recalled that both courts are currently operating in Australia.

Drug Courts

Australian drug courts provide an “intensively supervised treatment program for drug-dependent offenders, aiming to assist such offenders to overcome their drug dependence and criminal offending” (Briscoe & Coumarelos, 2000: 1). The theoretical underpinnings of therapeutic jurisprudence can be seen clearly in the philosophies underpinning drug court practice which is described as “a new direction within the criminal justice system”. Here prosecution and defence lawyers co-operate in a non-adversarial climate and there is “close working relationship between treatment providers, law enforcement agencies and the court. A consensus approach is possible because all those connected with the court share the goal of achieving the rehabilitation of drug dependent offenders” (Murrell, 1999: 11). Thus, for example, the New South Wales Drug court identifies the following key components of its system:

- Treatment is integrated into the criminal justice system
- Prosecution and defence lawyers work together as part of a drug court team
- Participants have access to a continuum of quality treatment and rehabilitation services which meet their health needs.
- There is ongoing judicial supervision and regular judicial interaction with each participant.
- Networks are forged between other drug courts, public bodies, treatment providers and the community
(Murrell, 1999: 4).

Domestic (Family) Violence Courts

Similar components and therapeutic problem solving philosophies underlie operations in Australia's domestic (family) violence courts. Both the South Australian and Western Australian Domestic (Family) Violence Court are inter-agency and community initiatives aimed at reducing the incidences of violence in families by integrating treatment into the court process. Offenders undergo intensive treatment and on going monitoring. For example, in South Australia perpetrators are often required to attend a 12 week 'Stopping Violence' Group. Victims are also supported throughout the process as their well-being and safety is paramount (see Courts Administration Authority South Australia, 2002, Department of Justice, 2002b).

Restorative Justice

Bourgeoning prison populations and challenges to the courts ability to deal adequately with court consumers' rights (particular victims and indigenous offenders) has resulted in what is described as the restorative justice movement for criminal justice reform (Strang, 2000: 22). Restorative justice has emerged over the last decade as a possible and indeed feasible, alternative to traditional forms of justice. Like problem-solving courts, restorative justice practice has been described as therapeutic jurisprudence in action being orientated around problem solving (Rottman & Cassey, 2000: 1).

Restorative justice can be broadly defined as “a method of responding to crime that includes the key parties to the dispute (that is, victim and offender) with the aim of repairing the harm” (Daly, 2000: 167). To repair this harm, restorative justice practice often requires offenders to make reparation for wrong doing to the victim and/or the wider community. The restorative justice process is subsequently victim and community focussed. It is an initiative that is meant to belong to the community rather than exclusively to the government (White & Haines, 2000: 180). As Crawford (2000: 300) states “restorative justice recognises that crime is more than an offence against the State: it looks at the impact on victims and others involved (family and kinship) and how communities can help”. In doing so, the ultimate aim of restorative justice is to increase informal social control within the family and wider community and thus reduce rates of offending. The potential for using restorative justice to recreate an extended community support network has been described as “powerful and promising” (Levine, 2000: 554). By writing restorative justice into statute, the law may act to strengthen families, communities and enhance people's sense of participation, and control over their lives - the law in this case is thus used as a therapeutic agent (Levine, 2000: 554).

Restorative justice theoretically embraces community diversity and difference (e.g. being made up of differing ethnic groups). In doing so, and unlike Australia's traditional court system, restorative justice presents as a viable way of addressing different community needs. Victim's rights groups and calls from the public to recognise the specific needs of indigenous consumers of justice can subsequently be appeased by the popularisation of restorative justice.

However, in Australia, as is the case in many other western nations, initial moves towards ensuring that victims had rights in the criminal court process came in the form of victim-impact statements. This was followed by the implementation of restorative justice conferencing in many Australian juvenile justice systems.

Victim-Impact Statements

Like the pre-sentence report in relation to the problem-solving court, the victim-impact statement reflects the less radical end of the restorative justice spectrum. Criticism of the Australian criminal courts ability, or lack thereof, to recognise the needs of victims as legitimate court consumers allowed victim impact statements to be introduced. These statements provide victims with a "mechanism for presenting the way in which the crime has affected them, and their concerns or wishes regarding the crime and the disposition of the offender" (Erez, 1991: 2). The victim impact statement is a written statement made by the primary victim of a violent offence. It outlines the personal harm (physical or psychological) suffered and the losses incurred as a result of the offence (see Erez, Roeger, O'Connell, 1996; Lawlink, 2002b).

Theoretically, the act of submitting a victim impact statement to the court is seen to have a range of benefits for victims including "therapeutic aspects and empowerment through participation in the criminal justice process" and the belief that statements might assist victims to gain compensation/restitution for

the harm done to them (Erez, Roeger, O'Connell, 1996: 216). In this regard, victim impact statements could be seen as a positive step towards the recognition of victims' rights as court consumers. However, whether or not these statements are achieving their aims is debatable. Evaluations of the utility of the victim impact statement as a vehicle for presenting victim harm to court are at best reserved. For example, conclusions drawn from evaluations of victim impact statements in South Australia suggest that the system may not go far enough in "entrenching the victim's place in the sentencing process even though the victim impact statement seems to have symbolised greater recognition of this place" (Erez, Roeger, O'Connell, 1996: 216). With this being the case, the next logical step toward victim rights appears in the form of a fully-fledged restorative justice system.

Restorative justice, like the problem-solving court has in recent years become popular. Various countries throughout the world including: United Kingdom, United States, various European jurisdictions, Canada, New Zealand and Australia have implemented some form of restorative justice initiative (see Miers, 2001; Miers et.al, 2001). At present, all States in Australia have some type of restorative justice program in operation. The majority of these programs are used to deal with young offenders who have committed petty offences (Strang, 2001).

Conferencing

In practice, restorative justice in action takes many forms including mediation, sentencing circles and conferencing groups. Each of these restorative justice practices may have a slightly different focus but all are characterised by dialogue and negotiations among parties with community members who take a more active role in the justice proceedings. In Australia, conferencing has been adopted by various jurisdictions (see Strang, 2000: 25). While between conference form does vary (see Daly, 2001: 3) they usually involve a young offender (who has admitted to the offence) and their supporters (often a parent or

guardian), the victim and their supporters, a police officer and a conference convenor. It should be noted however that adult conferencing does take place in the ACT, Western Australia and Queensland (see Strang, 2000: 25).

At a restorative justice conference all the parties come together to talk about the offence and its impact. Theoretically these discussions take place in the context of compassion and understanding. During the conference, the young offender is given the opportunity to talk about the circumstances associated with the offence and why they became involved in it. The young offenders' parents and/or supporters discuss how the offence has impacted on them, so to does the victim who may ask the offender why they were victimised and whether they can insure that such behaviour will not happen again. The police officer may provide offence details and outline what will happen in the future if offending occurs again. After talking about the offence and its impact, the conference then moves to a discussion of the outcome (or agreement or undertaking) that the young offender is expected to complete. Sanctions or reparations could comprise of verbal or written apologies, paying some form of monetary compensation, working for the victim, doing other community work and attending counselling sessions (Daly, 2001: 2).

Summary

Shifts in Australia toward problem solving courts and restorative justice cannot be isolated from the social context of the day. These justice innovations did not develop in a vacuum but are directly linked to a culmination of the social, economic, political and intellectual pressures. In other words, problem-solving and restoration are responses to today's realities; they are developments that are unique to this historical time period.

Over the past few years the failings of traditional court systems have come to the fore. Problem-solving courts and restorative justice enterprises provide a way to

restore public faith in the court system and thus the government's ability to deal with the crime problem. For example, one American drug court judge said that the drug court is "one program that promises to help re-engage public trust in the judiciary... as a "powerful and innovative way to rebuild a community's faith in its courts and criminal justice system" (Nolan, 2001: 58) through their potential ability to reduce crime. In addition, problem-solving courts and restorative justice fit nicely with the political project of managerialism and its drive for savings, efficiency and consumer satisfaction.

Initial results from drug court evaluations show that participant satisfaction is high and there is strong support for their effectiveness (Lawlink NSW, 2002a). The notable benefits include reductions in re-offending, re-arrests, drug related crime, substance abuse and general betterment in participants' health, well-being and social functioning. If these initial evaluations are correct, problem-solving courts may well produce significant benefits including cost savings to the community and improved effectiveness in the legal system (Western Australia Department of Justice, 2002a). In terms of fiscal savings, a cost-benefit analysis from a Miami drug court indicates that for every 1\$ US dollar spent on drug courts approximately \$7 US dollars is saved elsewhere in the criminal justice system (Makkai, 1998: 4). Similarly, in Australia, it has been noted "drug courts will more than pay their way in terms of long-term reduction in financial and other costs to the community" (Department of Justice, 2002a). A recent evaluation of the New South Wales drug court found that "the cost per day of an individual placed on the Drug Court Program (\$143.87) was slightly less than the cost per day for offenders placed in the control group and sanctioned by conventional means (\$151.72)" (Lawlink NSW, 2002a). Furthermore, cost-effectiveness in the long-term looks promising. In New South Wales, "larger differences between the alternatives in terms of cost-effectiveness of reducing the rate of offending" were found in their evaluation of drug courts. It cost an additional "\$19 000 for each possess/use opiates offences averted than it cost using the Drug Court Program" (Lawlink, 2002a).

It is also important to note that problem-solving courts are not considered a soft option when it comes to dealing with crime. Problem-solving courts make greater demands on offenders than traditional courts do. For example, offenders under the drug court schemes are usually placed under sustained, closely monitored court jurisdiction for around 12-24 months and in this time will undergo intensive treatment regimes. This degree of control is far greater than would be the case under the conventional court where at the most, only a short term of imprisonment would be imposed (Makkai, 1998: 3). In the drug court, judges receive on-going reports about offenders' treatment progress and drug test results. These intense levels of control found in the new problem-solving courts appease those advocates who want to get tough on crime. In addition, their therapeutic philosophy appeals to those with rehabilitative ideals.

Restorative justice can also be aligned with the State's managerial project and desire for fiscal savings. Restorative justice could be viewed as a form of criminal justice privatisation. The State is essentially withdrawing from the process of justice and in doing so, the responsibility for getting justice done is being placed back in the hands of the community (Morris & Maxwell, 2000: 207-208). Shifts in Australian political ideology from a welfare to market based paradigm subsequently marry with restorative justice principles. In addition, cost-Benefit analyses from Canada and New Zealand show that restorative justice schemes could be more cost effective than traditional court responses to crime. From Canada, a Native Counselling Services of Alberta (2001: 4-5) report estimates that for every dollar the Provisional Government has spent on one particular restorative justice program, it would have had to spend \$3.75 for pre-incarceration costs, prison and probation costs. For every dollar the Federal Government has spent on this specific restorative justice initiative, it would have had to spend between \$2.46 and \$12.15 on incarceration and parole costs. Similarly in New Zealand, Maxwell, Morris and Anderson's (2000: 7) analyses of two restorative justice programs yielded further evidence of fiscal savings.

They estimate that per 100 people these projects saved the government between \$27, 811 and \$168, 259 New Zealand dollars. That restorative justice will further result in economies to the public purse – be it by “reducing imprisonment rates, reducing offending rates, encouraging desistance from crime and, hence, reducing the cost of criminal justice more broadly or by re-energizing ... society’s own mechanisms of social control and conflict management” (Crawford, 2000: 300) – increases the chance of continuing governmental support.

Simultaneously, of course, restorative justice initiatives also address the hitherto unmet needs of certain court consumer groups – together this creates a viable and acceptable alternative to traditional justice on all sides of the equation (Crawford, 2000: 301). The Australian public is very satisfied with moves toward restorative justice. It appeals to people who want to get tough on crime because offenders are not seen to be getting away with it, they are required to take responsibility for their actions and make adequate amends that address victims’ needs. It also appeals to those who feel that traditional court systems simply stigmatise offenders and make them worse (Strang, 2000: 31).

Evaluation - Problem Solving Courts and Restorative Justice

Initial evaluative outcomes of problem-solving courts and restorative justice seem positive. In particular, there is evidence to suggest that both initiatives may result in reduced costs to the community both in fiscal and social terms. However, restorative justice programs and problem-solving courts are still quite new, so the number of evaluations and their scope remain small.

Systematic Evaluation

Restorative Justice

In an overview of restorative justice programs in Australia conducted by Strang (2001) it was found that: one evaluation had been conducted in New South

Wales, three in Victoria, two in South Australia, two in Queensland, two in Western Australia, one in Tasmania, one (in progress) in the Northern Territory, and one in the Australia Capital Territory (ACT). Some of these evaluations were considered extensive (e.g. ACT) in that outcomes for those in the traditional justice system were compared with outcomes for restorative justice participants. Other evaluations however, were minimal in scope (i.e. focussed on process but not outcomes, e.g. New South Wales) and failed to compare restorative justice outcomes with those in the mainstream court.

Problem-Solving Courts

Australia has drug courts operating in New South Wales, Queensland, South Australia and Western Australia and domestic (family) violence courts in South and Western Australia, but basic commentary let alone systematic evaluation is scant.

The New South Wales Bureau of Crime and Statistics Research (see the Australian Institute of Criminology's website) has released a number of evaluative reports on drug court operations and the first evaluation of the Queensland drug court is due for release later this year (Makkai & Veraar, 2002). To the author's knowledge, these evaluations and the subsequent reports produced, represent the extent of what we know about the operation of problem-solving courts in Australia.

Further Criticism

Minimal evaluation means that we can not conclude, with relative confidence, that problem solving courts and restorative justice enterprises are 'better' than Australia's traditional court system. Furthermore, both the problem-solving court, particularly the drug court, and restorative justice conferencing present us with a number of unique problems that should be kept in mind when deciding whether or not Australia's move down the therapeutic jurisprudence track should be encouraged. Criticisms of the drug court, for example, are found at two

levels: overly harsh sanctioning and violation of individual rights. Concerns regarding Restorative justice appear in the potential for: net widening, inadequate protection of individual rights in the context of informal judicial processing, conferences being coercive, conflictual and intimidating (Strang, 2001: 38). The centrality of community to restorative justice and with it the potential for State withdrawal from justice, could also be problematic (Crawford, 2000: 302).

It should be noted that as far as the author can ascertain, no commentary or research exists in Australia with regard to the domestic (family) violence court. As a result, the following discussion only highlights concerns relating to drug court and restorative justice operation. It should be noted that research which considers the operation of domestic (family) violence courts in Australia could be an important avenue for future investigation.

Problem-Solving (Drug) Courts

The first concern regarding the drug courts has already been alluded to and relates to them making more demands on offenders than traditional courts do. In Queensland for example, the drug court imposes a rigorous regime on participating offenders. As is the case with the majority³ of Australian drug courts, legislation does not say how long a participant will be involved in the drug court program. This essentially means that the regime is a form of indeterminate sentence. However, process estimates for Queensland are between 12 and 18 months – here the drug court program takes place in three stages. In the first stage of the program (approximately three months in length), offenders must attend court weekly, visit with their case manager twice weekly, be subjected to twice weekly urine or other drug testing, must fully participate in a number of core (e.g. substance abuse education, cognitive skills development, anger management) and elective (e.g. good parenting practices and relationships,

³ Victoria has written into legislation that the drug court program must finish after 24 months (Makkai & Veraar, 2002 - awaiting release)

domestic violence) treatment programs. In addition, offenders must end all criminal associations. In the second stage (approximately three to six months) of treatment, offenders continue to attend court and receive drug testing on a weekly (reducing) basis, have weekly contact with their case manager, fully participate in core, elective and health (e.g. detoxification, methadone maintenance, live-in rehabilitation / residential treatment) treatment and perform community service as directed. In the final stage of the program (approximately three to six months), offenders attend court and are tested for drugs on a monthly basis, they receive fortnightly case manager contact, continue full participation in treatment (core and elective), health and life skills (e.g. cooking healthy meals, budgeting) programs and perform community service as directed.

Further sanctions may be imposed for non-compliance and could include: the imposition of a monetary penalty, an increase frequency of drug testing, an increase in the level of supervision, a change in the nature of programs attending, an increase in the frequency with which the offender must attend courses of treatment, the imposition of a term of imprisonment for up to 14 days for failure to comply with an order, an increase in the amount of community service the offender must perform.

The Queensland Drug Court may also require participants to reflect on the consequences of their acts in other ways. For example, the drug court judge may ask a participant to research and write an essay on a topic such as: the harmful effects of drug use, steps that can be taken to avoid the temptation of drugs, why I self destruct. Throughout the court process, participants must also keep a progress journal. This journal is handed to the bench during reviews (Department of Justice and Attorney General, 2002).

It is vital to remember that Australia's drug courts tend to deal almost exclusively with the most serious of offences/offenders. One of the general drug court eligibility criteria is that a potential participant would normally have been

sent to prison. This is in stark contrast to drug courts in the United States where less serious drug offending is dealt with (Makkai and Veraar, 2002). With this being the case, it is possible that Australia will avoid criticism of overly harsh sanctioning through the drug courts. However, the indeterminacy of sentence length in the Australian drug courts, and the tough regime imposed on participants, could still result in accusations of harshness.

A second concern raised with regard to drug courts relates to the possible violation of individual rights. It is argued that for drug court participants the presumption of innocence is effectively forgone (see Nolan, 2001: 198-199). In New South Wales and Queensland for example, a guilty plea must be entered before an offender is eligible to enter into a drug court program (Department of Justice and Attorney General, 2002; Lawlink 2002c). Another criticism is that participation in the drug courts must be voluntary. However, the volunteerism becomes questionable when influenced by considerable State coercion. In Queensland for example, the offender must choose between imprisonment and treatment in the drug court.

In sum, it is possible that the ideals behind therapeutic jurisprudence when actioned via the problem solving courts may simply be harsher punishment dressed up as rehabilitation - participation is of an indeterminate length, involves close judicial monitoring and individual rights could be threatened albeit 'voluntarily' (Nolan, 2001: 202).

Restorative Justice

Restorative justice has been criticised for net widening – “namely, extending the client reach of the justice system by increasing the overall proportion to population (system-insertable and ‘others’) subject to some form of system control” (Blomberg, 2002). It is argued that restorative justice has the potential to widen the net of control by dealing with trivial offences that would previously have been ignored or for which offenders would have been diverted out of the

justice system (Strang, 2001: 5). The types of juvenile crime dealt with in Australia via restorative conferencing are generally of a less serious nature. In South Australia for example, conferencing is available to juveniles “who commit a ‘minor’ crime’. In New South Wales, those eligible for conferencing are “young people who commit summary offences or indictable offences which can be dealt with summarily.” However, in Victoria, restorative justice is “not used in trivial or minor matters” (Strang, 2001).

Similar to the drug court, there is concern over the protection of individual rights in the restorative justice process. The informal nature of restorative justice, it is argued, could increase the potential for offenders’ rights of due process to be violated. For example, the voluntary nature of restorative justice is questionable (Strang, 2001: 35). As is the case with the drug courts, young offenders involved in restorative justice programs are required to admit their guilt. Once again, voluntary participation in the context of a coercive environment such as that found in criminal justice could be problematic because offenders may admit to crimes under the guise of sentencing leniency.

Offenders who volunteer to participate in a restorative justice program could also be those who are least in need of restoration – those who are already the most integrated into the community. By contrast, those with the most tenuous community relations and who, for whatever reason, do not have social networks of trust and mutuality could be less likely to volunteer (Crawford, 2000: 293-294).

Lack of appeal mechanisms regarding outcome severity, is a further concern and similar to the drug court, some evidence suggests that for offenders restorative justice is “unduly intrusive” and has the potential to “impose harsher outcomes than would be meted out in court” (Strang, 2000: 38). For victims there is a chance of being “re-victimised by taking part in conferences, leaving them more fearful or anxious than before” (Strang, 2001: 35).

Another argument is that restorative justice could potentially harbour problems at the broader social structural level in two ways (Crawford, 2000: 302). Firstly, State withdrawal and community induction into judicial processing via restorative justice could be problematic in that communities are marked by different mobilisation capabilities. The reality, quite simply, is that some communities have more resources than others and are thus better able to aid the restorative justice process. Secondly, there are reservations about why someone would welcome restoration, or reintegrated in a community that has abused, marginalised or merely not valued them? Many offenders live on the margins of society and their experiences are often that of an outsider with little connection to the mainstream. Such feelings, for example, may account for why restorative justice evaluations in South Australia are finding that: a much higher proportion of indigenous offenders either did not attend or did not agree to an outcome at restorative justice conferences (Strang, 2001: 14). Any further move toward restorative justice, should thus be tempered with care to ensure that increased community responsibility does not result in the further perpetuation of exclusionary social practice from which State responsibility can be removed.

Summary

Problem-solving courts and restorative justice fit with Australia's current political, economic and social agenda. Most importantly, it would appear that these initiatives are fiscally viable both in the short-term and long-term with the potential for crime to be reduced. However, evaluation has only been minimal, and serious consideration needs to be given to whether the supposed benefits (which we need further evidence of) actually outweigh the potential pitfalls. While being alienated with popular political rhetoric and community sentiment can provide a rationale for doing justice differently it does not necessarily constitute a good reason to continue down this track. Criminal justice fads and fashions come and go, often at the expense of dealing with the real issues that underlie crime (e.g. economic marginalisation, racism,

unemployment). Current changes in Australia's criminal courts are somewhat concerning when issues relating to the violation of offenders' rights, reduced government responsibility, increased community responsibility, harsher treatment and potential re-victimisation have been raised.

Where to From Here

The criminal courts in Australia have changed since the 1980's when the question of court consumers' needs and rights and the culture of consumerism and service provision, encroached on the criminal justice system. This paper has provided an over view of this change and has highlighted the underlying political, economic, social and intellectual forces behind criminal court modification. Given this overview, one would be justified in asking how these changes might impact on Australia's courts in the future?

Although future modifications to court and criminal justice policy are difficult to predict, it is clear that shifts in Australia's criminal courts have only just begun and will continue down the same track for some time. For example, the United States of America provides a good illustration of this genesis. Here, as already noted, over 600 drug courts are now in operation. In addition, there is a growing number of community, domestic (family) violence, mental health and homelessness courts. The drug court movement has also been gaining momentum throughout the world. Drug courts have recently opened in the United Kingdom and Canada. The European Union is also considering alternatives to imprisonment for people convicted of drug offences (Canadian Center on Substance Abuse, 2002).

Western nations are similarly affected by market driven considerations aimed at fiscal savings, efficiency, and consumer satisfaction. In terms of the problem solving court, it seems logical therefore that Australia will continue to follow current trends particularly America's movement toward the extension and diversification of problem-solving courts. Drug courts are already operating in

four Australian states and two domestic (family) violence courts are also being used. It is probable that the remaining states and territories could introduce both types of problem-solving courts.

In addition, the idea of community courts being established for indigenous peoples is also being debated in Australia. Such courts would involve fusing traditional indigenous justice and mainstream justice (Eggleston, 1976). In Queensland a number of indigenous community justice groups have been piloted and while not fully fledged community courts *per se* their role includes: addressing issues relating to law and order in a way that the aboriginal community understands is right and more in accordance with its own customs and advising magistrates and judges about punishment and sanctions in line with these traditional custom (Brimrose & Adams, 1995). In part, the establishment of these community justice groups reflects a general shift toward recognising the differential needs of aboriginal peoples as a court consumer group. However, there are inherent difficulties in balancing two different cultural views of justice and a resolution of this issue will be required if aboriginal community courts are to develop.

Current drives toward restorative justice are also likely to remain popular. Calls from victims, indigenous peoples, women and other groups to have their interests protected in the process of doing justice are unlikely to wane. The victim's rights movement is particularly powerful and as long as restorative justice can be aligned with westernised market-driven rhetoric, it will continue to thrive. In Australia at present, restorative justice is mainly a juvenile justice initiative but as noted previously, some states and territories have already moved toward implementing it at the adult level. There is a possibility therefore that restorative justice could be extended to adult offenders throughout Australia.

However, the diversity of interests, conflicting motivations and subsequent tensions between those from which restorative justice draws support could

impede further development of restorative justice in Australia. As Crawford (2000: 298) notes “the divergent nature of interests and groups promoting restorative justice has resulted in initiatives meaning different things to different people. On one level, this has allowed the restorative justice movement to gain support from diverse sources and to fit into the prevailing political rhetoric at given moments. Still, it also means that specific initiatives can be, and have been, pulled in different, and often competing directions as they try to meet the multiple aims and objectives and to satisfy the divergent demands of the different constituencies. In attempting (or claiming) to ‘do too much’, the danger is the restorative justice initiatives can end up falling short on a number of fronts”. Whether or not Australia can balance these tensions adequately in the future remains to be seen.

Finally, it should be noted that despite the popularisation of problem solving courts and restorative justice, it is unlikely that Australia will witness the complete demise of the traditional court system. This is demonstrated in the following quote from the 1994 Australian Minister of Corrections in a discussion with the press regarding moves toward restorative and problem solving justice in Victoria, he notes:

We remain committed to our adversarial system of justice but believe that some of the benefits of a restorative, or problem-solving, approach to justice can be successfully grafted on to the current system.
(Cited in Evans, 1994: 469).

The reality is that not all offenders can be or should be dealt with outside the traditional court context. Court responses based on therapeutic jurisprudence require a degree of commitment from offenders who wish to change and the reality is that not all offenders want to end their criminal lifestyle. Our traditional court system has existed for so long because despite its failings, it does fulfil multiple purposes. It could be argued that there are people out there who are dangerous, who do require punishment and from whom the public must

be protected. The reality therefore, is that not all offenders can be dealt with adequately through a problem-solving court or restorative justice initiative, so it seems likely that traditional courts are here to stay. While the new ways of doing justice discussed in this report are popular and could be extended somewhat, it is predicted that they will remain more of an adjunct to the traditional system rather than actually becoming the system itself.

It is also possible that rising societal dissatisfaction with Australia's mainstream judiciary could result in the further implementation of court controls. We have witnessed the introduction of sentencing guidelines, the setting of maximum penalties and mandatory sentencing – moves that arguably reflect “a significant loss of confidence in the Court system by the public and politicians” (Freiberg, 2000: 26). Whether Australia continues to restrict traditional court decision-making remains to be seen. All that seems certain at this point is that traditional courts, alongside problem-solving courts and restorative justice enterprises will remain a characteristic of the Australian court landscape for some time.

The Agenda For Future Research

Despite reservations, problem-solving courts and restorative justice enterprises will, arguably, remain high on the criminal justice reform agenda for some time to come. Of course given potential pit falls, it will be important that these moves are tempered with caution and that on-going evaluative monitoring take place. Such a call for evaluation is likely to be welcomed by policy makers who, in line with managerialist rhetoric, are now more than ever required to produce evidence based policy for government to ensure appropriate resource allocation.

If Australia continues to go down the restorative justice road, a strong and ongoing research presence will be needed to monitor the effectiveness of restorative justice. Whether restorative justice is ‘better’ than our traditional justice system will need to be established. Comparative research is the key here. Researchers will need to ask, on a regular basis: 1) whether restorative justice

reduces recidivism, 2) whether it increases participants (victims, offenders, families) and community satisfaction with the justice process and, 3) whether it costs more or less than traditional justice in both fiscal and social terms.

Similar research initiatives will also be needed to monitor Australia's problem-solving courts. Before contemplating the further establishment of these courts, it will be vital that further commentary and evaluation be undertaken on pre-existing initiatives to engender more informed debate in the future. More specifically, it will again be essential to establish the economic and social benefits of the problem solving court compared to the traditional court.

In sum, possible avenues for future research might include:

- Nation-wide evaluations comparing restorative justice processes and outcomes with those in the traditional court system.
- Nation-wide evaluations comparing drug court processes and outcomes with those in the traditional court system.
- Analyses of domestic (family) violence courts in Australia - research could occur at three stages:
 - Stage one - an initial project aimed at providing a purely descriptive analyses of domestic (family) violence courts operation in Australia i.e. history behind the development of the court, every day court operation, statistics on offenders who are dealt with via this system, sentencing outcomes for those involved in the program.
 - Stage two –evaluation to ascertain how satisfied participants, victims and judicial personal are with the domestic (family) court process and outcomes.

- Stage three – comparative evaluation to ascertain how domestic (family) violence court processes and outcomes compare to those in the traditional court system.

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