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# **Innovative Approaches to Justice: The NJC Experience**

## **Introduction**

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# Module 1 Introduction

## Background Materials

### *The Neighbourhood Justice Centre*

The [Neighbourhood Justice Centre](#) (the 'NJC'), Australia's first community justice centre, includes a multi-jurisdictional court that, in its criminal jurisdiction, uses problem-solving approaches to address the underlying causes of offending and to tackle social and other disadvantage. Cases from across the City of Yarra are heard at the NJC in its capacity as a Magistrates' Court, Children's Court and Victims of Crime Assistance Tribunal and as part of the Victorian Civil and Administrative Appeals Tribunal (VCAT). In criminal matters, a person must reside in the City of Yarra, be an Aboriginal with a close connection to the City of Yarra or be a homeless person for their matter to fall within the jurisdiction of the NJC. Magistrate David Fanning has presided at the NJC since its commencement in 2007.

The NJC accommodates local onsite treatment and service providers and functions as a meeting place for numerous community groups. While the NJC has jurisdiction in the Magistrates' Court to hear civil disputes, the court is very rarely, if ever, required to exercise or sit in that jurisdiction. Instead civil matters arise in the jurisdiction of VCAT and in the residential tenancy list and civil claims list.<sup>1</sup> Mediation services also operate at the NJC as part of the wider approach to integrated services and community justice. The Centre has a strong commitment to engagement with the local community.

The NJC is broadly modelled on the [Red Hook Community Justice Center](#) in Brooklyn, New York, and the [Midtown Community Court](#), New York, two well-established community courts operating in the United States of America. Community courts have spread across the United States; for example, 49 such courts operate in the State of Maryland, which has roughly the same population as Victoria.<sup>2</sup> A community court has also commenced in North Liverpool, England. A community court is based in the community it serves, with treatment and social support service providers co-located in the one building. Like other community justice centres, the NJC takes a collaborative approach to cases. The collaborative team approach has similarities with the approach in other problem-solving courts, such as the Drug Court at the Dandenong Magistrates' Court or the Assessment and Referral Court List. The NJC

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<sup>1</sup> NJC/Police Data.

<sup>2</sup> R. M. Bell, 'The Maryland Judiciary In Pursuit of Justice' (2013) 52(2) *The Judges' Journal* 26.

magistrate works closely with a team of police prosecutors, defence lawyers, Community Corrections officers, the Neighbourhood Justice Officer and clinicians or workers in the Client Services team. These team members are generally assigned to or based at the NJC for extended period of time and help to provide continuity.

The Neighbourhood Justice Officer is a court officer who coordinates the Problem Solving Process, an innovative court-based program developed at the NJC. This voluntary process is available to persons appearing before the court who have complex problems that underlie their offending behaviour. It involves a facilitated group meeting conducted outside the courtroom, whereby the person, family members and justice, health and community sector workers come together to discuss underlying issues and problems and collaboratively develop goals or outcomes relating to the person's situation.

The Client Services team provides onsite assessment and screening services, develops individual treatment plans and conducts counselling for people appearing before the court, including victims and witnesses as well as accused people. These services are also available to members of the community who are not involved in court matters.

A recidivism study conducted by the NJC in 2009–2011 highlighted the success of a community justice approach using timely therapeutic referrals and interventions, with findings that NJC offenders were 26 per cent less likely to reoffend and a reduced crime rate.<sup>3</sup> The crime rate in the City of Yarra has dropped 23 per cent overall since the NJC commenced in 2007 – the NJC has contributed to this decrease through crime prevention programs, community engagement and judicial monitoring of offenders.<sup>4</sup> Completion of Community Based Orders, which have subsequently been replaced by Community Correction Orders (CCOs), is also higher at the NJC, with a completion rate of 82 per cent in 2011 when compared with the statewide average of 72 per cent.<sup>5</sup> The NJC currently finalises more than 3500 cases per year, which is expected to further increase over time.<sup>6</sup> NJC clients who attend Client Services receive between 1 and 1.5 referrals per person.<sup>7</sup> Services provided included Alcohol and Other Drug Counselling, Casework/Counselling, Employment

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<sup>3</sup> Neighbourhood Justice Centre Information Pack. This evaluation shows an improvement in from the [evaluation](#) of the NJC in 2007–2009, which showed a reduction in reoffending by 7 per cent and were 14 per cent less likely to offend compared with offenders from other courts.

<sup>4</sup> NJC/Police Data.

<sup>5</sup> NJC/Police Data.

<sup>6</sup> NJC/Police Data.

<sup>7</sup> NJC/Police Data.

Support, Financial Counselling, Housing Support, Koori Justice Services and Mental Health Counselling as well as Victim Support services.<sup>8</sup>

Proportionally, numbers of people appearing before the NJC are sentenced to imprisonment, reflecting the seriousness of the offending coming before the NJC and the lesser amount of motor traffic offences and other lower-level offences heard, compared with other Magistrates' Courts. However, the NJC has a strong commitment to a community justice approach, which includes using problem-solving approaches to address the underlying causes of offending.

Moreover, users of the NJC reported very high levels of satisfaction with their experience at the NJC and higher levels of confidence in the justice system.

### ***This Project***

One of the [strategic goals](#) of the NJC is to 'strengthen the Neighbourhood Justice Centre Community justice model and facilitate the transfer of its practices to other courts and communities'. This Project seeks to achieve this goal by strengthening NJC research and practice development in collaboration with the Australian Centre for Court Innovation (ACJI), Monash University, to provide an online tool – INNOVATIVE APPROACHES TO JUSTICE: THE NJC EXPERIENCE – that shares judicial techniques used at the NJC and by other magistrates and facilitates their adaptation in other courts. It is hoped that this tool will inform future discussions about incorporating community justice, restorative justice, problem-solving and solution-focused approaches, procedural justice, therapeutic jurisprudence and pragmatic approaches to justice into other courts.

INNOVATIVE APPROACHES TO JUSTICE: THE NJC EXPERIENCE contains six modules:

- Module 1: Introduction
- Module 2: General Techniques Used in Court
- Module 3: Sentencing Approaches
- Module 4: Post-Sentence Judicial Monitoring
- Module 5: Issues and Options
- Module 6: Conclusion: Eight Key Messages

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<sup>8</sup> NJC/Police Data.

Each module contains a range of resources, including videos, written background materials and tip sheets. Through its use of multimedia, it is hoped that this tool will enable quicker access to materials for magistrates working in time-pressured situations.

As part of this Project, a panel discussion was held to discuss the different techniques and approaches presented in the Modules. Five magistrates kindly contributed their time and provided thoughtful and insightful discussion about the techniques they use in their courts that are underpinned by principles of procedural justice and therapeutic jurisprudence, although the magistrates involved do not always identify the techniques in this way. The panel discussion was filmed, and extracts are provided in the videos and written material in Modules 2, 3, 4 and 5. The panel participants were Deputy Chief Magistrate Jelena Popovic and Magistrates Cathy Lamble, Duncan Reynolds, Pauline Spencer and Sue Wakeling.

It is also hoped that this Project will be of interest to court administrators, academics and others members of the community. This tool will be the first of its kind in Australia and overseas, but it has been inspired by online resources created by the [Center for Court Innovation](#) in the United States, which has been a driver of innovative court practices in that country and to which the ACJI is closely aligned.

Elements of the NJC approach useful to other judicial officers include:

- ways to manage cases and extend problem-solving techniques that support individual empowerment and community development (Modules 2–4);
- promotion of constructive and purposeful interaction between the bench and offenders (Modules 2–4);
- improving liaison and engagement with service providers (Modules 2–5);
- maintaining judicial independence in a collaborative environment (Module 5); and
- the practical application of therapeutic jurisprudence, procedural justice and other relevant judicial techniques (Modules 2–4).

### ***Foundational Concepts***

The foundational concepts underpinning the NJC are:

- community justice
- therapeutic jurisprudence
- procedural justice

- restorative justice and
- problem-solving and solution-focused approaches to judging.
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The first step in this Project is to explore the key theoretical concepts that are said to underlie judicial practice at the NJC and other Magistrates' Courts and relate these to practice throughout the Modules. The magistrates who participated in the panel discussion conducted as part of the Project talked about the value of therapeutic justice practices, which for one magistrate led to increased job satisfaction, and for another caused her to say that she could not imagine doing her work without them. Several magistrates also expressed their satisfaction when seeing the great change in people who took part in programs such as the CREDIT Bail Support Program, Courts Integrated Services Program ('CISP'), deferred sentences and CCOs.

At the same time, this Project recognises and respects that some magistrates say they have always 'done' therapeutic jurisprudence but have not called it that and do not wish to do so. It is recognised that magistrates have a long history of taking pragmatic approaches to cases. Some magistrates will identify with therapeutic jurisprudence, and others will not. This Project does not suggest that it is necessary to subscribe to the particular theories to use the approaches outlined in the Modules. Rather, the approaches are presented as examples of practices that work at the NJC and in other Magistrates' Courts and that some magistrates may already use or wish to use in their own court. It is hoped that this Project will promote dialogue and reflection about these approaches or techniques.

The approaches to cases outlined in these Modules do not necessarily require additional resources in the community, although they require good understandings about available resources and the development of strong relationships with community treatment and service providers. Access to resources and follow-up with a person appearing before the

court are important because otherwise taking a particular approach in court with a person may not impact on future behaviour.

This Project does not seek to change the sentencing process that all magistrates are required to apply. However, in these Modules, a style or manner of sentencing is suggested that can be used within the required approach to sentencing and that research suggests may be better able to motivate people appearing before the court to change their behaviour. Many of the cases that appear before the NJC and other Magistrates' Courts involve people who have multiple and complex social and health needs. Drug and alcohol and mental health issues are common factors contributing to offending behaviour. Further, family violence and personal safety cases are a growing area and are difficult to deal with. The approaches highlighted in these Modules will not be appropriate for every case, but they might be considered more appropriate for cases in which the offences may not be perceived as serious but where the person committing them has complex social and health issues.

There has been a wealth of literature written about these foundational concepts, and it is not intended here to canvas it. If you are interested in further reading beyond the references provided in these Modules, visit the [Australasian Therapeutic Jurisprudence Clearinghouse](#) and the bibliography on the [International Network on Therapeutic Jurisprudence](#) website, as well as the [Center for Court Innovation](#) website.

### *Community Justice*

Karp and Clear<sup>9</sup> suggest that community justice can be identified by five core elements:

- Community justice operates at the neighbourhood level;
- Community justice is problem solving;
- Community justice decentralises authority and accountability;
- Community justice gives priority to a community's quality of life; and
- Community justice involves citizens in the justice process.<sup>10</sup>

The concept of 'community justice' is a complex one, and a definitive description has not been settled.<sup>11</sup> Berman and Fox have suggested that some of the different meanings of community justice include:

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<sup>9</sup> D. Karp and T. Clear, 'Community Justice: A Conceptual Framework' (2000) 2 *Criminal Justice* 323.

<sup>10</sup> D. Karp and T. Clear, 'Community Justice: A Conceptual Framework' (2000) 2 *Criminal Justice* 323 at 327.

- community justice as a ‘moral critique of the criminal justice system’ whereby the aim is to repair the damage by the current system, altering the balance of power between the criminal justice system and the community and empowering members of the community to participate more in the dispute resolution process;
- community justice as a set of tools used to break down barriers using a problem-solving model in order to address specific community problems; and
- community justice as a means by which members of the community become more engaged or involved in the criminal justice system and thereby public confidence in the criminal justice system is restored and participation in democracy is revived.<sup>12</sup>

In the context of the NJC, the concept of community justice that is most relevant is that realised through community courts, which are said to bring the concepts of ‘community’ and ‘partnership’ together,<sup>13</sup> that is, partnerships are formed between the community and the court to tackle crime. Generally, all community courts can be said to be community-focused and take a problem-solving approach to community problems.<sup>14</sup> It has been said that these courts ‘focus on improving conditions in whole neighborhoods, not only on addressing individual litigant needs’, and therefore they are accountable to their local community as well as being centred around community input.<sup>15</sup> ‘Effective communication as well as respectful and fair treatment of defendants’ are said to be important tenets of the community court model.<sup>16</sup>

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<sup>11</sup> G. Berman and A. Fox, ‘From the Margins to the Mainstream: Community Justice at the Crossroads’ (2001) 22(2) *The Justice System Journal* 189; M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-Adversarial Justice* (The Federation Press, Sydney, 2009).

<sup>12</sup> G. Berman and A. Fox, ‘From the Margins to the Mainstream: Community Justice at the Crossroads’ (2001) 22(2) *The Justice System Journal* 189 at 190–191; also discussed in M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-Adversarial Justice* (The Federation Press, Sydney, 2009), 158–159.

<sup>13</sup> J. Fagan and V. Malkin, ‘Theorizing Community Justice Through Community Courts’ (2003) 30 *Fordham Urban Law Journal* 897.

<sup>14</sup> J. Lang, *What is a Community Court? How the Model is Being Adapted Across the United States* (Center for Court Innovation, New York, 2011), available at <http://www.courtinnovation.org/sites/default/files/documents/What%20is%20a%20Community%20Court.pdf>.

<sup>15</sup> R. Porter, M. Rempel and A. Mansky, ‘What Makes a Court Problem-Solving? Universal Performance Indicators for Problem-Solving Justice’ (Center for Court Innovation, New York, 2010), vi, available at [http://www.courtinnovation.org/sites/default/files/What\\_Makes\\_A\\_Court\\_P\\_S.pdf](http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf).

<sup>16</sup> M. Somjen Frazer, ‘The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center’ (Center for Court Innovation, New York, 2006), available at [http://www.courtinnovation.org/sites/default/files/Procedural\\_Fairness.pdf](http://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf).

Community courts seek to address 'complex neighbourhood problems and build stronger communities'.<sup>17</sup> Murray has stated that '[n]eighbourhood justice projects are designed to empower and mobilise the local population and to appease community frustration with the "problem of crime"'.<sup>18</sup> In the development of community courts in the United States, the underlying aim was to develop a court that simultaneously showed people who committed low-level crime that there were consequences for their conduct and that there was help available to them to address the underlying causes of offending.<sup>19</sup>

In Victoria, Collingwood in the City of Yarra was selected as the site for Australia's first community court, as it is a locality with high levels of social disadvantage and areas of disorder. The local community was engaged at a very early stage of the development of the NJC and continues to be involved in the justice process through community participation in crime prevention initiatives.

### *Therapeutic Jurisprudence*

Wexler and Winick developed the concept of therapeutic jurisprudence in the 1980s, around the same time that problem-solving courts were developed, although the connection between the two concepts was not formally made until some 10 years after their conception.<sup>20</sup> Now, therapeutic jurisprudence (as well as restorative justice) is said to inform many problem-solving courts, Indigenous sentencing courts, and court diversion programs as well as sentencing practices in mainstream courts.<sup>21</sup> Therapeutic jurisprudence has been described by Wexler and Winick in the following way:

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or antitherapeutic

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<sup>17</sup> J. Lang, *What is a Community Court? How the Model is Being Adapted Across the United States* (Center for Court Innovation, New York, 2011), available at <http://www.courtinnovation.org/sites/default/files/documents/What%20is%20a%20Community%20Court.pdf>.

<sup>18</sup> S. Murray, 'Keeping it in the Neighbourhood? Neighbourhood Courts in the Australian Context' (2009) 35 *Monash University Law Review* 74 at 75.

<sup>19</sup> J. Feinblatt, 'The Short Answer: What Principles Guided the Creation of the Midtown Community Court' (Video resource) (Center for Court Innovation, New York), available at <http://www.courtinnovation.org/research/short-answer-what-principles-guided-creation-midtown-community-court>.

<sup>20</sup> See P. F. Hora, W. Schma and J. Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1998–1999) 74 *Notre Dame Law Review* 439.

<sup>21</sup> M. S. King, 'Therapeutic jurisprudence initiatives in Australia and New Zealand and the overseas experience' (2011) 21 *Journal of Judicial Administration* 19.

consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers and judges).<sup>22</sup>

Therapeutic jurisprudence does not seek to override the traditional aims of the criminal justice system, including punishment and protection of society; rather, it asks us to consider whether there are ways of applying the law or legal processes that are more likely to produce therapeutic outcomes while still observing other values, such as justice and due process.<sup>23</sup> The focus in therapeutic jurisprudence is on the wellbeing of those people involved in legal processes, and findings from the behavioural sciences are used to craft laws and legal processes that promote wellbeing.<sup>24</sup> The wellbeing of people who appear before the court can be aided by referring a party to health and support services and by using processes or communication styles that can be said to promote wellbeing.<sup>25</sup> In this way, a therapeutic jurisprudence approach promotes the resolution of the legal problem and a broader range of issues related to or underlying the legal problem, including drug addiction, mental health issues and domestic violence.<sup>26</sup> Paternalism and coercion are seen to be antithetical to therapeutic jurisprudence, and any attempt by judicial officers to promote wellbeing should encourage the self-determination of the person appearing before the court.<sup>27</sup>

A key principle discussed in these modules and discussed by Michael King in the *Solution-Focused Judging Bench Book* is the importance of engaging the person appearing before the court in the resolution process as an important and active partner.<sup>28</sup> This principle may involve providing the person with choices and the opportunity to express their views and

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<sup>22</sup> D. B. Wexler and B. J. Winick, *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, Durham, North Carolina, 1991), 8 (citations omitted).

<sup>23</sup> D. B. Wexler and B. J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, Durham, North Carolina, 1996).

<sup>24</sup> M. S. King, 'Therapeutic jurisprudence initiatives in Australia and New Zealand and the overseas experience' (2011) 21 *Journal of Judicial Administration* 19.

<sup>25</sup> M. S. King, 'Therapeutic jurisprudence initiatives in Australia and New Zealand and the overseas experience' (2011) 21 *Journal of Judicial Administration* 19.

<sup>26</sup> M. S. King, 'Therapeutic jurisprudence and criminal law practice: A judicial perspective' (2007) 31 *Criminal Law Journal* 12.

<sup>27</sup> M. S. King, 'Should problem-solving courts be solution-focused courts?' (2011) 80 *Revista Juridica Universidad de Puerto Rico* 1005.

<sup>28</sup> M. S. King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration and Legal Services Board of Victoria, Melbourne, 2009), available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

have those views taken into account and treating the person with respect at the same time.<sup>29</sup>

### *Restorative Justice*

Restorative justice has been described in the following way:

Restorative justice seeks the restoration of victims, offenders and communities primarily through mediated encounters between victims and offenders – and in some cases their supporters – where they discuss what happened, in relation to harmful behaviour, and why it happened, and determine what offenders will do to make amends.<sup>30</sup>

Another definition is:

a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future.<sup>31</sup>

One form of restorative justice practice that has been widely embraced in Australia and New Zealand is diversionary conferencing for juvenile offenders, which has been embedded in legislation in most Australian states and seeks to divert juvenile offenders out of the criminal justice system where possible.<sup>32</sup> Conferencing refers to the process whereby a ‘young offender (who has admitted to the offence), his or her supporters (often a parent or guardian), the victim, his or her supporters, a police officer, and the conference convenor (or coordinator) ... discuss the offence and its impact.’<sup>33</sup> This is not intended to be an adversarial process, rather one based on compassion and understanding.<sup>34</sup>

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<sup>29</sup> See M. S. King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration and Legal Services Board of Victoria, Melbourne, 2009), 26–29, available at <http://www.ajia.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

<sup>30</sup> M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 39. See also K. Daly and R. Immarigeon, ‘The past, present, and future of restorative justice: some critical reflections’ (1998) 1(1) *Contemporary Justice Review* 21–45 at 22, cited in K. Daly and H. Hayes, ‘Restorative Justice and Conferencing’ in A. Graycar and P. Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, Cambridge, UK, 2002), 294, where restorative justice is described in the following way: ‘... it emphasises the repair of harms and of ruptured social bonds resulting from crime; it focuses on the relationships between crime victims, offenders, and society; its practices will necessitate changes in how state officials work, both what they do and how they do it.’ The definition of restorative justice is a somewhat contested concept: see C. Cunneen and C. Hoyle, *Debating Restorative Justice* (Hart Publishing Ltd, Oxford, UK, 2010).

<sup>31</sup> T. Marshall, ‘The evolution of restorative justice in Britain’ (1996) 4(4) *European Journal on Criminal Policy Research* 21 at 37, cited in C. Cunneen and C. Hoyle, *Debating Restorative Justice* (Hart Publishing Ltd, Oxford, UK, 2010), 1.

<sup>32</sup> K. Daly and H. Hayes, ‘Restorative Justice and Conferencing’ in A. Graycar and P. Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, Cambridge, UK, 2002), 294

<sup>33</sup> K. Daly and H. Hayes, ‘Restorative Justice and Conferencing’ in A. Graycar and P. Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, Cambridge, UK,

Conferencing has been used in other contexts aside from the juvenile justice context. Other programs for adults based on restorative justice principles including circle sentencing in New South Wales<sup>35</sup> and victim–offender mediation, which operates in some states,<sup>36</sup> and other programs have been established.<sup>37</sup> Indigenous sentencing courts,<sup>38</sup> which are courts that have adopted informal, more culturally appropriate processes and practices for Indigenous Australian offenders, are also said to be underpinned in part by restorative justice.<sup>39</sup> Principles of restorative justice thus partly underpin the NJC’s Aboriginal Hearing Day, held for one day each month. The Problem Solving Process that operates at the NJC is another example of restorative justice at work.

### *Problem-Solving Judging*

Problem-solving courts (or problem-oriented courts as they are sometimes called in Australia), such as drug courts, mental health courts and community courts, seek to address the underlying cause or causes of offending. While all unique, involve a number of common features, including ‘a problem-solving focus; team approach to decision making; integration of social services; judicial supervision of the treatment process; direct interaction between defendants and the judge; community outreach; and a proactive role for the judge inside

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2002), 296. See Daly and Hayes for a detailed discussion of the conferencing process and the differences between practices and philosophies in the Australian states and New Zealand.

<sup>34</sup> K. Daly and H. Hayes, ‘Restorative Justice and Conferencing’ in A. Graycar and P. Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, Cambridge, UK, 2002), 296.

<sup>35</sup> M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 42.

<sup>36</sup> *Sentencing Act 1995* (WA), s 27. In the Australian Capital Territory, the *Crime (Restorative Justice) Act 2004* (ACT) applies to adults and juveniles but is currently only used in relation to juveniles; the New South Wales Corrections Department has a Restorative Justice Unit, available at <http://www.correctiveservices.nsw.gov.au/information/restorative-justice>; Queensland also has a victim-offender unit: see M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 43.

<sup>37</sup> In Victoria, the NJC operates restorative justice programs for adults: see M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 43.

<sup>38</sup> These courts operate in most Australian states and include the Nunga Court in South Australia, the Koori Court in Victoria, the Murri Court in Queensland, the Aboriginal Sentencing Court in Western Australia, the Community Court in the Northern Territory and the Ngambra Circle Court in the Australian Capital Territory: see M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 179–180.

<sup>39</sup> M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 178. These courts also have some problem-solving and therapeutic jurisprudence aspects. However, Marchetti and Daly suggest that these courts have their own unique jurisprudential qualities that cannot be incorporated under restorative justice or therapeutic jurisprudence principles: see E. Marchetti and K. Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model’ (2007) 29 *Sydney Law Review* 415, cited in M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 178.

and outside of the courtroom.<sup>40</sup> The common elements of problem-solving courts have also been articulated by Berman and Feinblatt and others as those involving re-defined goals and case outcomes, system change, judicial monitoring, collaboration and non-traditional roles.<sup>41</sup> Australian problem-solving courts have been modelled on problem-solving courts in the United States, with some differences in approach based on the local Australian legal accent and are said to be underpinned by therapeutic jurisprudence.<sup>42</sup>

The characteristics of the traditional court as opposed to a problem-solving court are compared in Table 1.1.<sup>43</sup>

**Table 1.1 Court Characteristics**

<b>Traditional process</b>	<b>Transformed process</b>
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case oriented	People oriented
Rights based	Interest or needs based
Emphasis on adjudication	Emphasis on non-adjudication and alternative dispute resolution
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent based	Planning based

<sup>40</sup> D. Farole, N. Puffett, M. Rempel and F. Byrne, 'Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts' (2005) 26(1) *The Justice System Journal* 59.

<sup>41</sup> G. Berman and J. Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23(2) *Law and Policy* 125; G. Berman and J. Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (The New Press, New York, 2005).

<sup>42</sup> J. L. Nolan, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press, Princeton, New Jersey, 2009).

<sup>43</sup> Warren 1998 cited in D. Rottman and P. Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) *National Institute of Justice Journal* 12 at 14 and M. S. King, A. Freiberg, B. Batagol and R. Hyams, *Non-adversarial justice* (The Federation Press, Sydney, 2009), 140.

Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Commonsensical
Formal	Informal
Efficient	Effective

In Table 1.1, the underlying elements in both the traditional and transformed process are shown. In practice, there may be considerable middle ground. For example, in Australia at least, in the problem-solving court context of the NJC, the judicial officer, for example, is better described as a facilitator rather than a coach.

A study<sup>44</sup> of judges in the United States highlighted the following ways in which problem-solving approaches to justice could be used in traditional courts by all judicial officers, including:

- taking a proactive approach to cases such as asking more questions, seeking additional information about each case and exploring a wider range of possible solutions;
- direct communication with the person appearing before the court in order to bring about positive behavioural change by exploring the needs of the person and motivating the person to engage with treatment;
- ongoing judicial supervision by bringing people back to court at regular intervals to improve accountability for some offenders;
- integration of Social Services – access to personnel who can coordinate service provision and perform a level of case management is important. This is commonly available in problem-solving courts but may be harder to achieve in traditional Magistrates’ Courts, depending on the court personnel available to do such work. In Victoria, Court Integrated Service Program (“CISP”) staff may be an option;
- using a team-based, non-adversarial approach, including case management meetings are an essential aspect of problem-solving courts that may be also be

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<sup>44</sup> D. Farole, N. Puffett, M. Rempel and F. Byrne, ‘Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts’ (2005) 26(1) *The Justice System Journal* 59.

possible on a more limited basis for traditional courts in some circumstances and settings;

- selecting particular case types that are more amenable for a problem-solving approach and certain stages such as bail and sentencing when problem-solving is appropriate and easy to implement. Appropriate case types could be those ‘in which the underlying problem can be resolved by court intervention, as well as situations in which a lack of appropriate services contributed’<sup>45</sup> to the offending behaviour.<sup>46</sup>

The aspects of problem-solving described above are evident in the approaches described in these Modules. It is apparent that there is considerable overlap between practices that can be seen as problem-solving or solution-focused judging, therapeutic jurisprudence and procedural justice.

### *Solution-Focused Judging*

King has suggested that a more appropriate description of the Australian approach is that of ‘solution-focused judging or solution-focused courts’.<sup>47</sup> Solution-focused judging centres on the courts ‘promoting participants’ ability to resolve their own problems albeit with resort to appropriate community support and treatment agencies where needed.’<sup>48</sup> Solution-focused judging involves the judicial officer or court performing the role of a facilitator of change in a person rather than being seen to be solving a person’s problems for them.<sup>49</sup> King has suggested that the latter approach has an underlying assumption that the person cannot solve his or her own problems and does not empower the person in the same way as a

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<sup>45</sup> D. Farole, N. Puffett, M. Rempel and F. Byrne, ‘Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts’ (2005) 26(1) *The Justice System Journal* 59 at 65.

<sup>46</sup> These bullet points summarise the findings in D. Farole, N. Puffett, M. Rempel and F. Byrne, ‘Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts’ (2005) 26(1) *The Justice System Journal* 59.

<sup>47</sup> M. S. King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration and Legal Services Board of Victoria, Melbourne, 2009), available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>; M. S. King, ‘Should problem-solving courts be solution-focused courts?’ (2011) 80 *Revista Juridica Universidad de Puerto Rico* 1005.

<sup>48</sup> M. S. King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration and Legal Services Board of Victoria, Melbourne, 2009), 4, available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

<sup>49</sup> M. S. King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration and Legal Services Board of Victoria, Melbourne, 2009), available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

solution-focused approach does.<sup>50</sup> Elements of a solution-focused approach are evident throughout these Modules.

King has highlighted in his work the distinction between intrinsic and extrinsic motivations to change. In solution-focused judging, where possible, the focus is to stimulate in the person appearing before the court an intrinsic motivation to change through the promotion of self-determination, self-efficacy, choice and active involvement in the decisions relating to their rehabilitation.<sup>51</sup> Choice in the context of problem-solving courts or diversion will include whether to participate in the program and might also include being given a choice of a range of rehabilitation programs to participate in.<sup>52</sup> These goals are balanced with other goals such as accountability of the accused person and other sentencing goals relevant to the individual case. In contrast, many problem-solving courts use extrinsic motivation through sanctions and rewards that seek to leverage judicial authority to change.<sup>53</sup>

At the NJC, a sanctions and rewards system is not used in the same way as might be used in a drug court setting; rather, the magistrate focuses primarily on positive behaviour exhibited by the accused person and uses techniques to promote intrinsic motivation within the person to engage with treatment and service providers and to take other positive steps themselves towards addressing the underlying causes of their offending behaviour.

### *Procedural Justice*

As these Modules explore, the NJC emphasises a procedural justice approach in all cases. Tom Tyler has suggested that judicial officers and courts should be interested in procedural justice because evidence shows that it encourages acceptance of decisions and positive views about the legal system.<sup>54</sup> Tyler's seminal research on procedural justice suggests that people are more likely to comply with the law and respect it and courts as a legitimate authority if they feel they are treated fairly, not because they fear punishment.<sup>55</sup> A willingness to accept decisions due to the fairness of procedures occurs irrespective of the

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<sup>50</sup> M. S. King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration and Legal Services Board of Victoria, Melbourne, 2009), available at <http://www.ajia.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

<sup>51</sup> M. S. King, 'Should problem-solving courts be solution-focused courts? (2011) 80 *Revista Juridica Universidad de Puerto Rico* 1005.

<sup>52</sup> M. S. King, 'Should problem-solving courts be solution-focused courts? (2011) 80 *Revista Juridica Universidad de Puerto Rico* 1005.

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<sup>54</sup> T. Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

<sup>55</sup> T. Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, New Jersey, 2006).

social and economic background of the people subject to the courts' decisions.<sup>56</sup> The key elements of procedural justice are said to be:

- voice: litigants are given the opportunity to tell their story in their own words;
- respect: litigants perceive that the judicial officer, lawyers and court staff treat them with dignity and respect;
- neutrality: litigants perceive that the decision-making process is unbiased and trustworthy;
- understanding: litigants understand their rights and the decisions that are made; and
- helpfulness: litigants perceive that court actors are interested in their personal situation to the extent that the law allows.<sup>57</sup>

These key elements are emphasised in these Modules in relation to accused people who appear before the courts, but they also apply to treatment and service providers whom the court may be seeking to involve in a case and gain their cooperation.<sup>58</sup> Judicial officers can play a role in ensuring that people appearing in court perceive that procedural justice is achieved through listening to people and treating them with dignity and respect, that is, through a positive judicial demeanour. As will be explored, judicial reviews or judicial case management provide a useful opportunity to maximise procedural justice.

The approaches discussed in these Modules are also closely aligned with procedural justice as well as therapeutic jurisprudence. Procedural justice and therapeutic jurisprudence are standalone concepts, but the relationship between the two sometimes becomes blurred and understandably so. Rottman has noted that 'the success of therapeutic jurisprudence as applied in court settings may owe as much to the process that is used as it owes to the content of specific therapeutic interventions.'<sup>59</sup> Therapeutic jurisprudence can be seen as an umbrella concept that captures the use of different techniques such as procedural justice, problem-solving justice and community justice. A judicial officer implementing the principles of procedural justice can be said to be applying both procedural justice or a therapeutic

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<sup>56</sup> T. Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

<sup>57</sup> G. Berman and E. Gold, 'Procedural Justice from the Bench: How Judges Can Improve the Effectiveness of Criminal Courts' (2012) 51(2) *Judges' Journal* 20, available at [http://www.courtinnovation.org/sites/default/files/documents/JJ\\_SP12\\_BermanGold.pdf](http://www.courtinnovation.org/sites/default/files/documents/JJ_SP12_BermanGold.pdf).

<sup>58</sup> T. Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

<sup>59</sup> D. B. Rottman, 'Does effective therapeutic jurisprudence require specialized courts (and do specialized courts require specialist judges)?' (2002) 37 (Spring) *Court Review* 22 at 25.

jurisprudence approach because the social science research suggests that applying the principles of procedural justice is likely to enhance the therapeutic impact of the law and legal processes and minimise the anti-therapeutic impacts of the law.

## Resources List

\*This is a very select bibliography. Further relevant reading references can be found at the Australasian Therapeutic Jurisprudence Clearinghouse and International Therapeutic Jurisprudence Network.

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### ***Websites***

[Australasian Therapeutic Jurisprudence Clearinghouse](#)

[Center for Court Innovation](#)

[International Network on Therapeutic Jurisprudence](#)