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Innovative Approaches to Justice: The NJC Experience

Post-Sentence Judicial Monitoring

October 2013



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<u>Published by</u>	<u>Australian Centre for Justice Innovation</u>
<u>Funded by</u>	<u>Neighbourhood Justice Centre and Australian Centre for Justice Innovation</u>
<u>Suggested citation</u>	<u>E Richardson, <i>Innovative Approaches to Justice: The NJC Experience – Module 4 Post-Sentence Judicial Monitoring Background Materials</i>. (Australian Centre for Justice Innovation, October 2013).</u>

Module 4 Post-Sentence Judicial Monitoring

Background Materials

Judicial Monitoring

The recent introduction of the community correction order (CCO) and the power to attach a condition for judicial monitoring to a CCO has extended the practice of judicial monitoring from problem-solving courts¹ into the mainstream Magistrates' and County Courts of Victoria. The NJC has used judicial monitoring for a number of years, and many other magistrates have been using judicial reviews informally through adjournments. Judicial monitoring in problem-solving courts is thought to be central to bringing about positive behavioural change in offenders by increasing the accountability of the offender and leveraging on the authority of the judicial officer. In solution-focused judging, judicial monitoring has a different focus – that of facilitating intrinsic or internal motivation in the offender, so that he or she is empowered to make behavioural changes him or herself. It is useful to consider the aims and effectiveness of judicial monitoring as well as the similarities and differences between judicial monitoring in a mainstream court and judicial monitoring in a problem-solving court.

Judicial supervision is thought to have an impact on reoffending and to cause other positive outcomes,² particularly for high-risk drug offenders, although the evidence is somewhat limited in this respect.³ King has suggested that, in relation to problem-solving courts, there is limited research about effective therapeutic or judicial practices, but that 'research suggests that it may be the positive, encouraging and supportive aspects of judicial interaction rather than a judicial resort to coercion that is most important in promoting behavioural change.'⁴ There is, however, research to suggest that the judicial officer in a mental health court 'holds a pivotal position in bringing about reduced recidivism by pursuing a procedural regimen that conveys legitimacy to participants and

¹ G. Berman and J. Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23(2) *Law and Policy* 125.

² C. Jones, 'Early-Phase Outcomes from a Randomized Trial of Intensive Judicial Supervision in an Australian Drug Court' (2013) 40(4) *Criminal Justice and Behavior* 453; D. Marlowe, D. Festinger, K. Dugosh, K. Benasutti, G. Fox and J. Croft, 'Adaptive Programming Improves Outcomes in Drug Court An Experimental Trial' (2012) 39(4) *Criminal Justice and Behavior* 514; D. Marlowe, D. Festinger and P. Lee, 'The Judge is a Key Component of Drug Court' (2004) 4(2) *Drug Court Review* 1; D. Marlowe, D. Festinger, P. Lee, M. Schepise, J. Hazzard, J. Merrill, F. Mulvaney and A. T. McLellan, 'Are Judicial Status Hearings a Key Component Of Drug Court? During Treatment Data From a Randomized Trial' (2003) 30(2) *Criminal Justice and Behavior* 141.

³ D. Marlowe, 'Judicial Supervision of Drug-Abusing Offenders' (2006) 38(3) *Journal of Psychoactive Drugs* 323.

⁴ M. S. King, 'Should problem-solving courts be solution-focused courts?' (2011) 80 *Revista Juridica Universidad de Puerto Rico* 1005 at 1029.

invites internalization of the law's norms.⁵ One study showed that mental health court participants hold strongly positive beliefs about the procedural justice received in the mental health court as well as the role of the judicial officer in establishing procedural justice.⁶ The elements of procedural justice in the study were the quality of interpersonal treatment of persons appearing before the court, the high levels of accountability and transparency of decision-making.⁷

There are a number of different purposes and approaches to judicial monitoring. King and Batagol have noted that the different styles or forms of judicial monitoring can range from a minimalist approach to a more interventionist approach.⁸ They suggest that the style used will depend on the purpose and context of the judicial monitoring, such as 'achieving enforcement, ensuring victim safety, promoting offender accountability and/or promoting offender motivation to engage in positive behavioural change while supporting them through the process'.⁹ It has been suggested by the Law Reform Commission of Western Australia that one purpose of judicial monitoring is to 'encourage compliance with the court's orders and to enable swift and effective responses to non-compliance or changes in the offender's circumstances.'¹⁰ Judicial officers have the authority to act more 'quickly, decisively [and] conclusively' than Community Correction officers or other agencies,¹¹ which provides a level of certainty of response for the person appearing before the court and is presumed to have a deterrent effect. Judicial monitoring can also assist Community Correction officers and other agencies in gaining compliance from the person with regard to the order. It also provides an opportunity for the judicial officer to speak directly to the person, ask them questions and give them an opportunity to have input into setting goals and strategies for their own rehabilitation.¹² Compliance with orders may be improved because the person is more likely to

⁵ H. Wales, V. Aldige Hiday and B. Ray, 'Procedural justice and the mental health court judge's role in reducing recidivism' (2010) 33 *International Journal of Law and Psychiatry* 265 at 265.

⁶ H. Wales, V. Aldige Hiday and B. Ray, 'Procedural justice and the mental health court judge's role in reducing recidivism' (2010) 33 *International Journal of Law and Psychiatry* 265 at 270.

⁷ H. Wales, V. Aldige Hiday and B. Ray, 'Procedural justice and the mental health court judge's role in reducing recidivism' (2010) 33 *International Journal of Law and Psychiatry* 265 at 265.

⁸ M. S. King and B. Batagol, 'Enforcer, manager or leader? The judicial role in family violence courts' (2010) 33 *International Journal of Law and Psychiatry* 406.

⁹ M. S. King and B. Batagol, 'Enforcer, manager or leader? The judicial role in family violence courts' (2010) 33 *International Journal of Law and Psychiatry* 406 at 406.

¹⁰ Law Reform Commission of Western Australia, *Court Intervention Programs* Final Report Project No 96 (Law Reform Commission of Western Australia, Perth, June 2009), 5.

¹¹ A. Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' in M. McMahon and D. B. Wexler (eds), *Therapeutic Jurisprudence: Law in Context, Vol 20 No 2* (Federation Press, Sydney, 2003), 12.

¹² Law Reform Commission of Western Australia, *Court Intervention Programs* Final Report Project No 96 (Law Reform Commission of Western Australia, Perth, June 2009).

understand the order, and increased judicial involvement increases respect for the authority of the court.¹³

However, as noted in Module 3 and is discussed further in this Module, the purpose of judicial monitoring at the NJC is not generally to monitor compliance. Rather, Magistrate Fanning uses judicial monitoring to focus on the positive steps a person has taken towards his or her rehabilitation, seeking to encourage and motivate the person to address the underlying causes of his or her offending and to engage with the treatment and rehabilitation aspects of the order. This does not mean that compliance with the order is avoided completely, but it is not a key focus of reviews, unless the person is not complying with basic aspects of the order that underpin the treatment and rehabilitative aspects of it. In Magistrate Fanning's view, focusing purely on compliance in judicial reviews has a punitive effect and is less likely to address the underlying causes of offending or have an impact on behaviour beyond the life of the order.

Sanctions and rewards, which are commonly used in drug courts, can be used as a behaviour modification tool in a mainstream court in judicial monitoring. However, this is likely to take the form of verbal encouragement or disapproval from the magistrate, variation of an order to decrease the number of judicial monitoring reviews where the offender is doing well or increasing the number of judicial monitoring reviews where the person is not doing well, or less or more frequent testing or attendance at counselling or treatment (if advice to the court suggests this is medically appropriate). These responses can serve as a form of positive or negative reinforcement. However, persistent non-compliance with the conditions of a CCO may result in the ultimate breach and revocation of the order.

Magistrate Fanning focuses primarily on the positive behaviour of the person, but will point out the negative aspects of behaviour with the person where necessary. Magistrate Fanning might lessen the requirements of the order but will not increase them. However, he will inform the person that Community Corrections may vary the order or consider breach action and advises the person accordingly.

Underpinning the concept of ordering a person into treatment and monitoring them on treatment programs is the idea that legally coerced or compulsory treatment is effective.¹⁴ The evidence, in relation to drug addiction at least, seems to suggest that these approaches may be effective, but the

¹³ Law Reform Commission of Western Australia, *Court Intervention Programs* Final Report Project No 96 (Law Reform Commission of Western Australia, Perth, June 2009).

¹⁴ Law Reform Commission of Western Australia, *Court Intervention Programs* Final Report Project No 96 (Law Reform Commission of Western Australia, Perth, June 2009).

results of research do vary.¹⁵ Legally coerced treatment (or quasi-compulsory treatment) is a familiar concept to many Australian criminal justice systems and underpins diversion programs, problem-solving courts and many other community-based sentencing options. In a pre-sentence framework, it is said that people are not forced into treatment but given a constrained choice whether or not to participate in the program to avoid a harsher sentence or at least have their performance on the program taken into account at sentencing. The distinction between these two options is arguably a fine one.

Under a CCO, treatment or rehabilitation, if attached as a condition to the order, becomes compulsory. The apparent success of drug courts in reducing recidivism in participants suggests that compulsory treatment may be effective, at least as one component of the problem-solving court approach.¹⁶ Further, regardless of questions of the effectiveness of compulsory treatment for drug or alcohol addiction, it appears to be acceptable practice in modern criminal justice systems. However, compulsory mental health treatment under the CCO may raise some ethical issues (and practical issues of monitoring compliance as noted by Deputy Chief Magistrate Jelena Popovic in Module 3). Notably, s 48D of the *Sentencing Act 1991* (Vic) does not limit the type of mental health assessment and treatment but includes psychological, neuropsychological, psychiatric or treatment in a hospital or residential facility. This would appear to include the use of medications.¹⁷ Legal coercion of mental health treatment in this context may not have the same safeguards as are incorporated into the mental health legislation that applies in the non-criminal context.

The NJC applies a collaborative team approach to criminal cases involving the designated magistrate, prosecutors, defence lawyers, clinicians and case workers attached to the court. This is a key aspect of problem-solving courts, and in relation to judicial monitoring under a CCO at the NJC, involves working with the Community Corrections worker assigned to the person on the CCO. The worker attends all judicial reviews and speaks to their report. Magistrate Fanning views judicial monitoring reviews at the NJC as an opportunity to develop relationships not only with the person appearing before the court but also with Community Corrections officers and treatment or other support

¹⁵ T. Seddon, 'Coerced Drug Treatment in the Criminal Justice System: Conceptual, Ethical and Criminological Issues' (2007) 7 *Criminology and Criminal Justice* 269; A. Birgden, 'A Compulsory Drug Treatment Program for Offenders in Australia: Therapeutic Jurisprudence Implications' (2008) 30 *Thomas Jefferson Law Review* 367.

¹⁶ A. Birgden, 'A Compulsory Drug Treatment Program for Offenders in Australia: Therapeutic Jurisprudence Implications' (2008) 30 *Thomas Jefferson Law Review* 367; M. Rempel, M. Green and D. Kralstein, 'The impact of adult drug courts on crime and incarceration: findings from a multi-site quasi-experimental design' (2012) 8 *Journal of Experimental Criminology* 165; D. Shaffer, 'Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review' (2011) 28(3) *Justice Quarterly* 493.

¹⁷ For discussion of legal and ethical issues of the use of psychotropic medications in mental health courts, see S. Hughes and T. Peak, 'A Critical Perspective on the Role of Psychotropic Medications in Mental Health Courts' (2013) 57(2) *American Behavioral Scientist* 244. This article includes suggestions about how to incorporate participant self-determination in a mental health court context.

workers who may attend these hearings. Magistrates in other Victorian Magistrates' Courts are less likely to have the Community Corrections worker attend the judicial monitoring review, but it is possible to seek to build over time a more collaborative approach with Community Corrections officers and other professionals who regularly appear before the court. Having an understanding of mental illness and drug or alcohol addiction is also likely to assist the magistrate when conducting judicial monitoring.

People who are appearing before the court may say things in judicial monitoring reviews that are self-incriminating. Participants in problem-solving court programs have a level of protection against self-incrimination if they disclose drug use or drug possession, but not for serious offences.¹⁸

Currently, there is no legislative protection built into the judicial monitoring review, and thus an explanation to the person on the CCO about being careful not to self-incriminate may be necessary. However, in Magistrate Fanning's view, in order to have an open and frank discussion with the offender, a level of tolerance by the judicial officer may be necessary for minor offences.

Where a judicial officer is more interventionist or proactive, philosophical issues are raised. Some judicial officers do not perceive their role as becoming involved in a sentence after it has been passed or being involved in assisting a person before sentence to access treatment or services. Deputy Chief Magistrate Popovic has suggested that taking a therapeutic jurisprudence approach to judging, including becoming more involved in monitoring offenders, requires a reconceptualisation of the judicial role to match the changing activities of judicial officers.¹⁹ The judicial officer becomes much more actively involved in trying to assist a person to change their offending behaviours.²⁰

King has suggested that the role of the judicial officer is a leadership one²¹ and one that requires emotional intelligence.²² Conducting judicial monitoring may require judicial officers to think about their interpersonal skills and listening skills, for example. These Modules may assist in this regard.

¹⁸ Law Reform Commission of Western Australia, *Court Intervention Programs* Final Report Project No 96 (Law Reform Commission of Western Australia, Perth, June 2009).

¹⁹ J Popovic, 'Judicial Officers – Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20(3) *Law in Context* 121.

²⁰ B. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055.

²¹ M. S. King, *Solution-Focused Judging Bench Book* (Melbourne: Australasian Institute of Judicial Administration and Legal Services Board of Victoria, 2009), 36–39, available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>; M. S. King, 'Problem-solving court judging, therapeutic jurisprudence and transformational leadership' (2008) 17 *Journal of Judicial Administration* 155.

²² M. S. King, 'Restorative Justice, Therapeutic Jurisprudence and The Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.

Other useful resources include Michael King's *Solution Focused Judging Benchbook* and the resources²³ listed in the Resources List of this Module.

Practical Issues

Judicial monitoring reviews are held at the NJC prior to the general court list commencing for the day or after lunch before the afternoon sitting. In Magistrate Fanning's experience, it is advisable to hold no more than two reviews at a time otherwise the court list may be affected. Two reviews are therefore held from 9.30 am and two reviews from 2 pm. Magistrate Sue Wakeling reported in the panel discussion that she also holds judicial monitoring reviews at 9.30 am and reads the report from Community Corrections before meeting with the person. As Magistrate Pauline Spencer has noted, there may be other times during the day that are less busy than others that might be suitable in which to schedule judicial reviews.²⁴

Magistrate Fanning conducts judicial monitoring for almost everyone who is on a CCO, which amounts to about eight to ten reviews each week. During the reviews held at the NJC, the person appearing before the court and the Community Corrections officer sit together at the bar table with Magistrate Fanning. Personal supporters such as family members who are present may be invited to sit at the bar table or in the courtroom behind the bar table. Judicial monitoring reviews are conducted in open court and recorded. However, Magistrate Fanning will ask other people attending court to leave the courtroom if necessary.

Magistrate Fanning believes that the optimum amount of time for an update or review is about five to seven minutes. This allows sufficient time to cover relevant issues. At the NJC, the first judicial monitoring review under a CCO is timed for ten weeks after sentence, which allows the person to settle into the order and commence any treatment or rehabilitation programs that may part of it. Subsequent reviews then occur every three months or sooner if a particular matter needs to be resolved. In other matters, Magistrate Fanning may extend the time between reviews or conduct a review at the end of the order.

At the NJC, many CCOs are eight to 12 months long with about 90 per cent of orders ten to 15 months long. If a person breaches the order, Magistrate Fanning does not continue conducting judicial reviews until non-compliance issues are resolved with Community Corrections.

²³ Including B. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055; M. D. Jones, 'Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners' (2012) 5 *Phoenix Law Review* 753; S. Goldberg, *Judging for the 21st Century: A Problem-solving Approach* (Canada: National Judicial Institute, 2005).

²⁴ P. Spencer, 'To dream the impossible dream? Therapeutic jurisprudence in mainstream courts' (2012) 22 *Journal of Judicial Administration* 85 at 92.

Conduct of Judicial Monitoring Reviews

At the commencement of the judicial monitoring review, Magistrate Fanning invites the Community Corrections officer or other personnel present to give a short report to the court, based on the written report the magistrate has before him or her. Magistrate Fanning sets the ambit of the review by saying 'I have read the report' and asking the Community Corrections officer to speak to their report. Occasionally, the person appearing before the court may want to dispute the content of the report, but generally will not do so if the Community Corrections officer is present at the judicial review. If the person does dispute the report, it is more easily resolved with the Community Corrections officer in attendance.

In Magistrate Fanning's experience, people who appear before the court may look for excuses for non-performance of a condition or a goal they have set with the court. The Community Corrections officer can provide an alternative voice in this situation, and disputation about an issue will often dissipate in the Community Corrections officer's presence. However, having the Community Corrections officer present may assist in relaxing the person appearing before the court, and the review is likely to proceed more smoothly. The review can serve to reinforce the relationship between the person appearing before the court and the Community Corrections officer.

While, at the NJC, the Community Corrections officer is always present in court, other courts do not necessarily have that benefit. Magistrate Fanning suggests that it is possible to do a review with a written report only and without the presence of the Community Corrections officer, but often these reviews may be less worthwhile and the discussion more limited. If the court or the magistrate can establish a system whereby the Community Corrections officer attends judicial reviews, the conduct of the reviews is greatly enhanced.

Magistrate Cathy Lamble, who has sat at the NJC on frequent occasions, expressed a preference for the way in which judicial monitoring reviews are conducted at the NJC – that is, in a quiet courtroom and sitting at the bar table – and noted that it is more difficult to conduct judicial monitoring in an open court. Magistrate Lamble's approach to judicial monitoring reviews is to read the report beforehand and acknowledge the progress identified in it as well as the negative aspects of it. She then talks to the person about ways in which those negative aspects might be addressed and how to ensure the positive aspects continue. Magistrate Lamble believes that judicial monitoring works best if conducted on a short-term basis rather than a long-term basis and is careful about the court maintaining a role in the life of the person for an excessive amount of time. The aim instead is for the court to maintain a role for a necessary or a purposeful amount of time, and Magistrate Lamble does not envisage holding judicial reviews until the end of an order.

The approach taken by Magistrate Wakeling to judicial reviews where a person is doing well is to discuss the person's rehabilitation and how the person is feeling. She encourages them and generally will not meet with them again. Magistrate Wakeling will say, 'This is great, you are doing what I asked you to and things seems to be going well. Congratulations. I expect you'll complete the order and you are on your way.' However, if the person is not progressing well, Magistrate Wakeling tries to identify the problem and provides some motivation. She warns the person that she will bring them back for further monitoring if she determines there is a purpose in doing so. If there is no sign that the person will be able to comply, Magistrate Wakeling then withdraws her involvement in judicial monitoring and advises the person that it is now up to Community Corrections to decide whether or not there has been a breach of the order.

Ambit and Goal Setting

Magistrate Fanning aims to address one or two main issues in each judicial review. He considers that it is not possible to cover every aspect of a person's life in a judicial review. In his view, it is important to keep reviews simple and not expect the person to have completed too many tasks or goals. When the person has not done well, Magistrate Fanning believes that lecturing the person is of limited value as people generally have a limited capacity to respond to or act upon such an approach.²⁵

Therefore, in a short review, Magistrate Fanning concentrates on only one or two main aspects of the person's rehabilitation, such as employment, training, health, family contact, drug treatment or mental health issues. Five to seven minutes are sufficient time in which to cover one or two topics well, and the person appearing before the court can go away with a clear idea of what they have agreed and committed to, in addition to what they may already be doing. Magistrate Fanning prepares for the judicial monitoring review by reading the report prepared by the Community Corrections officer beforehand and deciding the important issue to be discussed in the review.

King suggests that goal setting is a powerful tool in interaction with offenders that 'promote[s] self-determination, commitment and motivation for rehabilitation'.²⁶ At the first judicial review, a person can be asked to determine their goals while on the CCO and their strategies to attain those goals.²⁷ The Community Corrections officer can assist with implementing these goals, which can serve as a

²⁵ Pauline Spencer suggests that this may be counterproductive and build resistance to change: P. Spencer, 'To dream the impossible dream? Therapeutic jurisprudence in mainstream courts' (2012) 22 *Journal of Judicial Administration* 85.

²⁶ M. S. King, 'What Can Mainstream Courts Learn From Problem-Solving Courts?' (2007) 32(2) *Alternative Law Journal* 91 at 93.

²⁷ M. S. King, 'What Can Mainstream Courts Learn From Problem-Solving Courts?' (2007) 32(2) *Alternative Law Journal* 91.

framework for further judicial reviews. King suggests typical goals might ‘becoming drug-free, further education or training, obtaining employment, improving personal relationships and improving finances’.²⁸ Behavioural contracting is another approach involving setting agreed behavioural goals to which set rewards or sanctions may be attached.²⁹ Behavioural contracting is commonly used in drug courts and is discussed in more detail in Michael King’s [Solution-Focused Judging Bench Book](#).²⁹

Magistrate Pauline Spencer starts preparing for judicial monitoring reviews at the time of sentencing by using a free text section of the judicial monitoring screen in Courtlink to enter two to three goals that the person has prepared or said they wish to achieve while on the order. Magistrate Spencer informs the person that, at the judicial monitoring review, she wants to hear from them about how they are going against the goals. The goals are then contained in the order, and the Community Corrections officer can work with the person to prepare for the judicial monitoring session. An example might include a goal that the person works with Community Corrections to build victim empathy using the victim impact statements provided in the course of the plea, where permission has been attained from the victims through the prosecutor to use these. The person would then be required to discuss with the magistrate in the judicial monitoring review how the crime has impacted on the victims.

Communication

Initially, people appearing before the court at a judicial review may be nervous. Magistrate Fanning seeks to make the person to feel more comfortable by greeting them and asking after their wellbeing or asking about a family member. Magistrate Fanning gives the person his full attention, actively listening and observing their demeanour but does not generally take notes until after the person has left court. Asking questions clarifies any issues and reinforces that Magistrate Fanning has been listening and has understood what the person has said.³⁰

²⁸ M. S. King, ‘What Can Mainstream Courts Learn From Problem-Solving Courts?’ (2007) 32(2) *Alternative Law Journal* 91 at 93. See also Module 3 for Magistrates Connellan’s and Spencer’s Solution Focused Sentencing Process that may assist with goal setting and S. Goldberg, *Judging for the 21st Century: A Problem-solving Approach* (Canada: National Judicial Institute, 2005), 19–22.

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

²⁹ M. S. King, *Solution Focused Judging Bench Book* (Melbourne: Australasian Institute of Judicial Administration and Legal Services Board of Victoria, 2009), 170–171, available at <http://www.ajia.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

³⁰ See also M. S. King, ‘What Can Mainstream Courts Learn From Problem-Solving Courts?’ (2007) 32(2) *Alternative Law Journal* 91.

When asking the person appearing before the court to talk about his addiction or other issues, the purpose in Magistrate Fanning's view is not to counsel the person but to reinforce what has happened in the counselling they have received. The emphasis is on motivating the person, although some counselling techniques such as motivational interviewing might be used.

Suggestions from the therapeutic jurisprudence literature suggest that praise and constructive criticism can be used.³¹ Winick has suggested that the task is one of persuasion, not coercion.³² King suggests the following approach:

If the participant has made progress, the judicial officer will praise them. If there are problems, the judicial officer will ask the participant what has happened and express sympathy for their situation. The judicial officer may then ask the participant what they have done to resolve the matter and, if the strategy is sound, praise them for their initiative and support their ability to implement the strategy. If the strategy is problematic, the judicial officer may raise concerns and ask the participant for suggestions and/or offer suggestions for their consideration. The prosecutor and defence counsel may also contribute suggestions. The judicial officer will solicit the participant's commitment to implement an agreed strategy and mention that at the next court appearance the judicial officer will ask the participant about their progress.³³

The judicial officer can seek to reinforce, support and encourage what the person is doing with support workers and facilitate connections with other professions and services.³⁴ It has also been suggested that the 'gentle use of confrontation' by the judicial officer, when they have established trust with the person, can be motivational.³⁵ Thus it is not necessary for judicial officers to avoid any challenging or negative issues in a judicial monitoring review or focus only on positive aspects of the person's life. Magistrate Fanning suggests that discussing both negative and positive issues with the person will lead to a more open, meaningful dialogue that is more likely to address the underlying causes of offending.

As has been noted above, Magistrate Fanning does not monitor compliance with the CCO; rather, he reviews the person's progress with their rehabilitation. Therefore, a judicial review at the NJC does

³¹ S. Goldberg, *Judging for the 21st Century: A Problem-solving Approach* (Canada: National Judicial Institute, 2005).

³² B. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055 at 1078.

³³ M. S. King, 'What Can Mainstream Courts Learn From Problem-Solving Courts?' (2007) 32(2) *Alternative Law Journal* 91 at 91.

³⁴ For a discussion of techniques to enhance compliance with treatment, including a discussion of behavioural contracting, see B. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055 at 1082–1089 and M. S. King, *Solution Focused Judging Bench Book* (Melbourne: Australasian Institute of Judicial Administration and Legal Services Board of Victoria, 2009), Chapter 7, available at <http://www.ajia.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

³⁵ M. D. Jones, 'Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners' (2012) 5 *Phoenix Law Review* 753 at 769.

not involve a nuts and bolts discussion of the order, such as community work. Nonetheless, Magistrate Fanning suggests that the requirements of the order are not an area of complete non-discussion, and occasionally it may be relevant to discuss community work if it relates to a person's rehabilitation or progress. For example, a person may tell the court how much he or she has gained from the community work, and this discussion may lead to identifying that there is a need for further training, which Magistrate Fanning will ask the Community Corrections officer or other person to facilitate.

Consistency of Magistrate

It is desirable that the same magistrate conducts judicial monitoring reviews in relation to an order for a number of reasons, including ensuring:

- consistency in approach to the person appearing before the court;
- enhanced accountability – the accused person has to appear before the same magistrate who will have heard the same excuses previously; and
- a more efficient use of judicial time from the perspective of the judicial officer.

The magistrates who participated in the panel discussion viewed the role of the judicial officer as important in reinforcing the role of the Community Corrections officer. The involvement of the judicial officer was seen to be powerful in a way that the Community Corrections officer is not because they lack the authority of the court. As noted in Module 3, the judicial officer can also enhance accountability of Community Corrections to provide the services required under the order. Magistrate Spencer noted that many of the people who attend judicial monitoring reviews have never had awards or encouragement, and to receive approbation from the judicial officer when they are doing well can make all the difference in motivating the person to keep changing.

Resources List

Goldberg, S., *Judging for the 21st Century: A Problem-solving Approach* (Canada: National Judicial Institute, 2005).

Jones, M. D., 'Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners' (2012) 5 *Phoenix Law Review* 753.

King, M. S., *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>.

King, M. S. and Batagol, B., 'Enforcer, manager or leader? The judicial role in family violence courts' (2010) 33 *International Journal of Law and Psychiatry* 406.

King, M. S. and Wager, J., 'Therapeutic jurisprudence and problem-solving judicial case management' (2005) 15 *Journal of Judicial Administration* 28.

Rempel, M., Labriola, M. and Davis, R. C., 'Does Judicial Monitoring Deter Domestic Violence Recidivism? Results of a Quasi-Experimental Comparison in the Bronx' (2008) 14(2) *Violence Against Women* 185.

Spencer, P., 'To dream the impossible dream? Therapeutic jurisprudence in mainstream courts' (2012) 22 *Journal of Judicial Administration* 85.

Winick, B., 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055.

Winick, B. and Wexler, D. (eds), *Judging in a Therapeutic Key – Therapeutic Jurisprudence and the Courts* (Durham, North Carolina: Carolina Academic Press, 2003).