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At the Cutting Edge: Therapeutic Jurisprudence

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This conference paper was originally published as:
Malcolm, T. K. (2005). At the Cutting Edge: Therapeutic Jurisprudence. *Magistrates Court Conference*.

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Perth Drug Court and Geraldton Magistrates Court

6 May 2005

At the Cutting Edge: Therapeutic Jurisprudence

By the Hon David K Malcolm AC
Chief Justice of Western Australia

Mercure Hotel
10 Irwin Street
Perth, Western Australia

His Worship Mr Steven Heath, Chief Magistrate of Western Australia

His Worship Ron Cahill, Chief Magistrate of ACT

Magistrate Dr Michael King

Deputy Chief Magistrate Libby Woods, Western Australia (Drug Court)

Her Honour Judge Julie Wager

Distinguished Guests

Ladies and Gentlemen

I am very pleased to have been invited to open this extremely significant Conference. On behalf of the Perth Drug Court and Geraldton Magistrates Court, I welcome all Magistrates, judicial officers and other legal professionals from across the nation. It is thoroughly gratifying to participate in a Conference involving reform of the judiciary by adopting a multi-disciplinary approach to addressing not only the issue upon which an accused appears before the court, but also tackles the harder underlying issues at the root of the problem. I am pleased to observe that not only is Australia a trend-setter in the practice of therapeutic jurisprudence, but Western Australian initiatives have received worldwide recognition – hence the title of this Conference – our Magistrates are "at the Cutting Edge".

In the last decade or so, a series of specialised or problem-solving Courts or court processes have evolved in Australia. These courts are based upon the principles of therapeutic jurisprudence which regard the law, court procedures and rules, as a social force whose goal is to produce therapeutic consequences to the participants in the legal proceedings and to society at large. Taking a holistic approach to an offender and the offenders problematic history is not an altogether new concept, as this is

usually taken into account during sentencing. The ideal of tailoring sentences and having options available for treatment of an underlying problem however is one which marks a departure from simply imposing a sanction by way of sentence. This can only improve the state of our criminal justice system. In my experience, one can often feel hamstrung when dealing with offenders whose life has been ravaged by drug abuse, but will appear before the Court as an accused, most often on charges of assault, burglary or in some cases what might be an armed robbery on the lower end of the scale. If we as a community wait to provide assistance to individuals until they offend and are imprisoned, I would suggest, it is frequently too late for both the community and the offender.

There is little doubt that drugs and alcohol continue to play a significant role in crime. In a Western Australian context, the Select Committee on Crime Prevention *Discussion Paper* released in 1998, after reviewing a range of academic literature, acknowledged that there has long been a strong association between alcohol consumption and hooliganism, vandalism and violent crime[1]. The Committee also acknowledged a submission from the Western Australian Police Service that drug dependence also continues to be closely associated with "acquisitive crime" such as armed robbery and burglary[2].

Research conducted in the United Kingdom, United States and Australia throughout the 1970's and 1980's has also demonstrated a link between drug use and serious criminal offences, with a disturbing trend

[1] Western Australia Select Committee on Crime Prevention, *Discussion Paper: Making Western Australia Safer*, (1998), p. 19

away from property offences to offences against the person where there was direct financial gain to be made. The same results showed a close link between drug use and criminality[3]. The link is however extremely complex. Considerable doubt has been expressed over which is the cause and which is the effect. The Select Committee noted that while the link remains complex, a substantial body of research suggests that a high proportion of alcohol and other drug users will come into contact with the criminal justice system[4].

This is clearly the case in respect those who have committed the offence of armed robbery. Recent crime statistics show that individual offences and individual offenders have at least doubled during the past ten years. This trend was also noted during my predecessor's reign, where Burt CJ[5] noted in *R v Peterson*[6] in 1984 that in the 20 years from 1964 the number of offences of armed robbery dealt with by the Supreme Court increased from 2 in 1964 to 36 in 1982. To illustrate this point, in the course of my reasons in *Taylor v R*[7] in 1998, an appeal dealing with an offence of armed robbery, I said:

> *"In times past banks and building societies were prime targets of armed robberies. In recent years many other businesses have become targets including pharmacies, service stations, delicatessens and other service outlets, particularly those which remain open at*

2 *Ibid*
3 Wardlaw G., *Drug Use and Crime*, (Australian Institute of Criminology; Canberra, 1978)
4 Select Committee, *op cit*, p. 19; See also for example Jarvis G. & Parker H., "Young
5 Ibid at 331-332
6 [1984] WAR 329
7 unrep; CCA; Malcolm CJ, Pidgeon and Ipp JJ; Library No. 980152; 6 April 1998

night. There are many instances of multiple offences, some by persons in company. A disturbingly high proportion of these offences are being committed by young offenders to obtain drugs or money to buy drugs. Many of the offenders are drug addicts."

In that matter, the offender had committed two armed robberies at pharmacies. The offender did not demand cash but asked for prescription painkillers and other drugs. He was armed with a blood filled syringe.

At present, relatively few resources are directed toward dealing with the causes of crime. The focus of our criminal justice system remains largely fixed on punishment and retribution. In part, this reflects the prevailing community attitudes. In a survey of Perth residents conducted in 1989 showed a wide difference of public opinion concerning the primary purpose of sentencing. Retribution was identified by 28.3%, incapacitation by 21.6%, rehabilitation by 22.5% and deterrence by 27.5%. 2.2% answered "Don't know". At present, there is no current study regarding the community's considered opinion on the effectiveness of the prison system, apart from the sensationalised commercial television polls that one sees in response to a report of an horrific crime. There can be no doubt, however, that the incidence of crime in our community, for which there is no lack of statistical and anecdotal evidence, is a matter of great public concern.

Public perception of crime and sentencing is an important issue, and plays a significant role in shaping our justice and penalty policies. Justice must be done, but justice must also be seen to be done. Government

spending policies are often shaped by public perception, which is commonly affected by media coverage. Too frequently, the Government is swayed by the perception that criminals are "getting off" lightly, and quick-fixes such as the Mandatory Sentencing laws are introduced without serious consideration as to the effect of these laws and what the real root cause of the problem actually is. This encourages further spending in the areas of punishment and retribution, which whilst good in the short-term for the public face of justice, does little to address the core issues of drugs, abuse and potential for reform.

In 2004, a public survey was conducted[8] relating to the public perception of crime trends in Western Australia. The result was similar to comparable surveys taken all over the world, insomuch that the respondents had a proclivity to see crime as increasing where this was actually not the case. For example in regards to one particular statistical component, more than 80% of respondents were incorrect in their judgment about the trend in vehicle crime theft, which has actually been decreasing and has been an area of significant focus in terms of reducing its prevalence in the last five years. It is commonplace that public confidence in our criminal justice system is greatly affected by the media – it is hoped that negative portrayals of salacious incidents would be balanced with objective information to place the crime in its context. The issue that raises most concern, and which has been proved in recent British research, is that when people who mistakenly think that crime has risen conclude that our criminal justice system is failing. The Government must assist us in

addressing these issues in the public eye, but we must also encourage exposure of the judicial response to crime via sentencing, in the innovative design and successful implementation of therapeutic jurisprudence which has proved effective.

Calls for retribution and deterrence go beyond that which can be reasonably achieved by the criminal justice system. While deterrence remains an important aspect in fixing sentences, the traditional sentencing process has been shown to be inadequate to deal with broader attempts to modify human behaviour.

There is a general consensus that the public want to feel secure. How that translates into correctional policies is difficult. The community is entitled to feel secure and to see that an offender gets his or her 'just deserts'. Essentially that is the task of the judiciary in sentencing offenders. It is essential that those who commit crimes are punished and are seen to be punished. Doubtless there are some cases in which the offender should be imprisoned and never released. Locking up and throwing away the key is not, however, a universal solution appropriate to all cases of serious crime. Mandatory minimum terms of imprisonment are not the answer, except where life imprisonment is justified. We must not forget that there are significant social and economic dividends in rehabilitating offenders and addressing recidivism. It is a difficult balance to strike.

[8] Indermaur D and Weatherburn D "Public perceptions of crime trends in NSW and WA" *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No. 80 March* (2004)

In years gone by, the Supreme Court did possess extensive powers to make directions to direct that alcohol or drug dependent offenders undertake treatment. Those directions, however, can only be imposed as conditions in the context of a non-custodial sentence. For example, s. 66 of the *Sentencing Act 1995* (WA) deals with Community Based Orders. The section sets out the purpose of the introduction of what are called "programme requirements" into a Community Based Order. Sub-section (1) provides that:

> *"The purpose of a programme requirement is —*
>
> *(a) to allow for any personal factors which contributed to the offender's criminal behaviour to be assessed; and*
>
> *(b) to provide an opportunity for the offender to recognize, to take steps to control and, if necessary, to receive appropriate treatment for those factors."*

The section specifically provides for the Court making a Community Based Order to order that the offender must obey the orders of a Community Corrections Officer with regard to *inter alia*:

> *(a) undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment;*
>
> *(b) undergoing assessment and, if necessary, appropriate treatment in relation to the abuse of alcohol, drugs or other substances;*

Similar provisions apply in relation to the imposition of an Intensive Supervision Order.

In 2000, I noted the restrictions and limitations we faced within the then current structure. During a presentation I made to the WA Network of Alcohol and other Drug Agencies General Meeting, I lamented the fact that:

> *"While assessment and treatment may be made available to offenders who are not in custody, once an offender is imprisoned, such assessment and treatment are much more difficult to obtain. A Court sentencing an offender cannot make orders about these matters. The Court can only make recommendations. In my opinion, while the community's interest in punishment must be acknowledged, the present lack of facilities for inmates dealing with alcohol and drug dependence issues is entirely contrary to the community's interest in reducing or eliminating the possibility that an inmate will re-offend on his or her release. There are, at present, no appropriate facilities for the secure treatment of drug addicts sentenced to a period of imprisonment. The need for a secure facility is paramount...[I]n short, unless we as a community can settle upon an alternative method of addressing crime, and the rehabilitation of offenders, Western Australia may see an increase in the number of alcohol and other drug dependent offenders coming before the Courts. In my view, it is important that we develop a greater*

understanding of the causes of crime and the purposes of punishment."[9]

Again, this was recognised by my predecessor, when Burt CJ said in *Peterson*:

> *"It seems to be assumed, although I have considerable reservations about the assumption, that when an offence becomes prevalent the public demand retribution and they see increased punishment as being the sure way of reducing the number of such offences and even of persuading persons not to commit them at all. If that be the case then I would say, and say with great respect, that the expectation exceeds the capacity of the criminal law as an instrument controlling human behaviour. That is not to say that the idea of deterrence is to be abandoned. It is and it remains an important, and some may say the most important, idea reflected in punishment particularly for offences such as robbery. But it is to say that criminal behaviour is very much the product of factors, and many factors, both personal and social, which are beyond the reach of any court and which have operated and which will continue to operate to produce anti-social behaviour. The need for punishment must be accepted, but it must be accepted with a full appreciation of its limitations."*[10]

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9 Malcolm CJ "Drug and Alcohol Dependant Offenders in the Justice System: Understanding Cause and Effect" (2000) as presented as the keynote address at the 14th Mandurah Addiction Symposium, unpublished

10 *Op cit* at 332

Today, as we are all now aware, Perth's own specialist problem-solving jurisdiction, the Drug Court has been operating since 2000. This was only a year after the establishment of the first Australian Drug Court in New South Wales, and in the same year drug courts were also introduced in South Australia and Queensland. The Perth Drug Court Pilot Project aimed to reduce the recidivism and drug dependence levels of offenders and provide a more cost-effective approach to dealing with these offenders. The Courts' focus is on the rehabilitation of the offender. A mandatory treatment programme for the offender's substance abuse is established and monitored by the Court, rather than a community corrections officer. This programme takes the place of a term of imprisonment or other sanction. Violation of the programme will generally bring the imposition of imprisonment or fine. Given the status of juveniles as a prime target for early reform, it is invaluable that we have a Drug Court wing of the Children's Court. The Drug Court in the Children's Court not only addresses the drug problem, but also family issues, education, training, employment or any other matters that are impacting adversely on the offender's life.

Although it is statistically difficult to gauge the effect of the court of the state of recidivism of the offenders, given the short period of time available for recidivism analysis, some immediate results are encouraging. Offenders who completed the Drug Court Regime had lower recidivism rates than those who terminated their Regime or were not accepted into a Drug Court program. Further, the median time for rearrest for Drug Court participants was three times longer than for those who terminated their

Regime or were not accepted into a Drug Court program. Evidence also points to the fact that the Drug Court reduces the number of offenders with substance abuse problems who are being imprisoned[11]. The intensive treatment provided to a participant is hoped to have a longer term effect reducing the likelihood of future imprisonment. The Pilot phase has now concluded, and I look forward to the permanent establishment of the Court within our criminal justice system. There seems to be room for the adoption of similar measures in the Magistrates' Court, the District Court and the Supreme Court. Many offences of armed robbery coming before the Supreme Court by young drug addicts would benefit greatly from reference to the kind of regime adopted in the Drug Court. Judge Julie Wager will comment on her unique experience later in the day.

Many of you will be aware that the first Drug Courts were established in the United States[12]. Thanks to the tireless work of the leading scholars in this field - US law professors David Wexler and Bruce Winick – the concept of therapeutic jurisprudence is cemented in the US legal system, and has extended as far as applying to the appellate arena[13]. Studies suggest that the Courts, lawyers and judiciary are often aware of opportunities to examine process-driven solutions, and in the theoretical environment, all parties should be conscious of the effect their actions are having in the overall context of the conflict. One possible benefit of therapeutic jurisprudence being applied at the appellate level is that the

[11] Crime Research Centre for the Department of Justice *Evaluation of the Perth Drug Court Pilot Project, Final Report* (2003) May, University of Western Australia

[12] Makkai T., "Drug Courts: Issues and Prospects", (1998) No. 95 Australian Institute of Criminology, *Trends & Issues in Criminal Justice*, p. 3

[13] Wexler, D. "Therapeutic Jurisprudence in the Appellate Arena" (2000) V.24 No.2 *Seattle University Law Review* p.217

outcome need not become part of the case law that applies to similar cases. Most importantly, mediation "allows personal healing and the development of positive, achievable values".[14]

Drug courts and domestic violence courts are both examples of problem-solving courts. Therapeutic jurisprudence on occasion has been referred to as a "close cousin [of the problem-solving court] rather than [an] identical twin". I am pleased to embrace the notion that Australia, and in particular Western Australia, is a leader and at the forefront of innovation with respect to introducing the concepts of therapeutic jurisprudence within its jurisdictions. There is a strong focus on magistrates' courts, not just in central districts but also in regional areas, in the application of therapeutic jurisprudence principles in dealing with indigenous affairs. The development in magistrates' courts is appropriate in that most people appearing in a court appear before a magistrate. Processes are less formal than in a superior court and therefore more adaptable to a therapeutic approach. The day-to-day work of a magistrates' court brings them into contact with the social problems that contribute to offending and other legal problems.

In its application in Australia, therapeutic jurisprudence involves courts focusing less on their coercive powers than on their standing and authority in the community. The court will use the authority of the court to motivate litigants, principally offenders, to address not only the legal problem at hand, but also the underlying social problems that are at the root

[14] McGee, L. "Therapeutic Jurisprudence and the Appellate Courts: Possibilities" (2000) V.24 No.2 *Seattle University Law Review* p.477

of the problem. In many cases this requires courts to take a multi-disciplinary approach, engaging with justice system professionals and specialised treatment and support agencies. The wide range of professional represented at this Conference reflects this development.

Therapeutic jurisprudence involves all facets of the court system. It involves lawyers taking a broader approach to their role in and outside the court. The best outcome for a client may not be an acquittal on a technical legal point, but recognition of an ongoing drug problem that causes chronic offending which needs to be addressed as a priority. It raises issues regarding the approach lawyers take in engaging with their clients and with the court.

Apart from the Perth Drug Court, much innovative work is being done in courts in regional Australia. The Koori Court in Shepparton Victoria, the Yandeyarra Circle Court and Wiluna Court are examples of where court procedures have been established which take into account culture and background of those mainly appearing before them, namely Aboriginals and their indigenous culture. The work of Magistrate King and the Geraldton Court has received worldwide recognition, particularly in the Therapeutic Jurisprudence-trendsetting nations of Canada and the United States of America[15]. Geraldton has taken an 'across the board' approach to therapeutic jurisprudence, applying it in three specific programs in sentencing, restraining order applications and in care and protection applications as well as in its coronial work. Magistrate King,

who has been a pioneer in this field in Western Australia, will expound on these areas during the Conference.

Further, I note that in November 2004, the Western Australian Country Magistrates took the symbolic initiative to pass a unanimous resolution, adopting therapeutic jurisprudence and agreeing to apply it in their courts. This is the first such resolution by a body of Australian judicial officers.

That similar developments are simultaneously occurring in almost all of the States and Territories of Australia is rare in our history, and provides an excellent opportunity to compare and contrast the successes and shortcomings of each of the related courts involved. It is extremely fortunate that we have representatives from all the relevant jurisdictions at this Conference to provide a forum for discussion and reflection.

In proposing alternative methods of dealing with offenders, I am not suggesting that we adopt a more lenient approach to those offenders who have committed serious crimes while under the influence of drugs, or in order to support a drug habit. The community's need to feel secure extends to methods of ensuring that offenders, once released, are unlikely to commit another crime. An acceptance of this position must also encompass an acceptance that alternative forms of dealing with the causes of crime achieve these ends much more effectively than the imposition of a term of imprisonment.

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[15] Wexler, D "Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore" (2004) *2004 Trends Report* http://www.ncsconline.org/WC/Publications/KIS_SePro_Trends04.pdf

As I noted in my 2004 Annual Review[16], there is a great need for the courts applying therapeutic jurisprudence to continue their vital role in the court system. To this end, they require resources and funding. It has been noted that it is easy for regional court projects to fall below the radar in terms of recognition. I also look forward to reviewing the recommendations of the Western Australian Law Reform Commission's findings, due in December 2005, regarding the benefits of utilising problem-solving courts and associated judicial case management. In the meantime, Conferences such as this and the continued work and reports of the regional Magistrates can only help in promoting the work of those courts that regularly apply therapeutic jurisprudence. I believe that these Courts and jurisdictions need expose their work to further media coverage, so as to highlight the positive results of their work within the community. This, I hope, will undoubtedly improve the public image of the criminal justice system. The fact that our justice system is addressing the underlying problems associated with crime is a positive step in the right direction and worthy of the support, not only of the Government, but also of our community at large.

I have much pleasure in declaring this significant Conference open.

16 Malcolm CJ, 2004Annual Review of Western Australian Courts (Perth: Supreme Court of Western Australia 2005), 36. Available at: http://www.supremecourt.wa.gov.au/publications/pdf/annual_review_2004.pdf