

Inquiry into Crime in the Community: Victims, Offenders, and Fear of Crime: Submission on the Application of a Therapeutic and Holistic Approach in Sentencing

This submission is concerned with paragraph (g) of the terms of reference and in particular the potential for the greater use of therapeutic jurisprudence in sentencing and the need for a more holistic approach to offenders. Results to date suggest that such an approach promotes reduced offending and improves the wellbeing of participants. This submission does not discount the need for sentences of incarceration for serious offending but suggests that in the pursuit of reduced offending it is appropriate to explore the value of other sentencing options such as those involving a therapeutic, holistic and innovative approach.

Sentencing: Principles and Practice

It is fundamental that a court must consider the following factors in sentencing: deterrence, retribution, incapacitation and rehabilitation. A sentence in a particular case will incorporate one or more of these factors according to the peculiar circumstances of that case. Both rehabilitation and deterrence have implicit assumptions about human nature that mould their practical application.¹ In general, rehabilitation assumes that there is individual dysfunction that needs to be addressed in order to ensure that a person is law-abiding. Deterrence involves the imposition of punishment on the utilitarian assumption that an offender and potential offenders, being rational creatures, will seek to avoid the imposition of punishment by obeying the law.

Yet decision-making does not depend on thought processes alone; it is influenced by the way in which people perceive and interpret the world around them and by emotional balance. If a person's thinking, perceptual ability and emotional balance are disturbed then an appeal to reason and utilitarian principles may be of little use in preventing offending. Often an offender's functioning is compromised by the use of illicit drugs.

¹ M S King, "Deterrence, Rehabilitation and Human Nature: The Need for a Holistic Approach to Offenders". 24 *Criminal Law Journal* 335.

The theoretical limitations of deterrence theory are reflected in the limited results its practical application produces. In terms of deterrence, the ultimate sentencing alternative for a court is imprisonment. Yet research suggests that imprisonment is an extremely limited tool in reducing offending. In 1988, the Australian Law Reform Commission commented that: “The accumulated evidence of nearly two centuries, however, shows that prison fails to achieve any of these objectives [incapacitation, rehabilitation and deterrence] on a widespread and consistent basis. In practice, the function of prison today is largely punishment”.² Thus Canadian research suggests that increasing prison terms does not reduce recidivism.³ Indeed, the study found there was a correlation of a slight increase in recidivism with increased prison time. As the Committee has noted in its inquiry information 58.4% of prisoners incarcerated in Australia have had a known previous period of adult incarceration.⁴ There is US evidence that putting more people in prison may reduce serious crime rates but the cost implications of such a policy are prohibitive and as Weatherburn points out it is not clear how far that research is applicable to other countries.⁵

McGuire concluded that “large-scale criminological data, based on official crime statistics, fail to support the expectation that the sentencing of courts has a discernible impact on individuals, in accordance with what would be predicted by deterrence theory”.⁶

As to rehabilitation, a court can resort to community supervision style orders with program and work requirements. The Canadian research cited suggests that community supervision is a better context than a prison to promote reduced offending. In the 1970s the principle of rehabilitation came under attack by those claiming that “nothing works”.⁷ More recent research discounts such a view, indicating that appropriately targeted programs can have an effect in reducing recidivism. While on

² Australian Law Reform Commission, *Sentencing*, Report no 44, 1988, para 48.

³ P Gendreau and C Goggin, *The Effects of Prison Sentences on Recidivism*. Solicitor-General, Canada User Report: 1999-3. Available at: <http://www.sgc.gc.ca/Epub/CORR/e199912/e199912.htm>.

⁴ Australian Bureau of Statistics (2002) *Prisoners in Australia*. Catalogue No. 4570.0, Canberra.

⁵ D Weatherburn, (2002) “Does Australia have a Law and Order Problem?” Lecture delivered at the University of New South Wales on 21 May 2002. Available at <http://www.arts.unsw.edu.au/ssp/don.weatherburn.html>

⁶ J McGuire, “Can the Criminal Law Ever be Therapeutic?” (2000) 18 *Behavioral Sciences and the Law* 413.

⁷ R Martinson, “What Works? Questions and Answers About Prison Reform”. (1975) 35 *The Public Interest* 22.

average rehabilitation programs reduce recidivism by 10%, appropriately targeted programs such as cognitive behavioural therapy can reduce recidivism by 25-30%.⁸

While a reduction in offending is important, it has been suggested that rehabilitation should be more than the absence of offending but the ability to live a constructive and fulfilling life in the community.⁹ In a sense, the two may be regarded as two sides of the one coin: if a person has the inner resources and personal qualities that enables him or her to lead a constructive and fulfilling life in the community then offending will not occur. As such, the criminal justice system needs to address multiple domains of a person's life to promote that goal.

Given the limitations in both deterrence and rehabilitation to date in reducing offending it is appropriate that the community explore alternatives in dealing with offenders, including alternatives at the sentencing and pre-sentencing stages. Some alternatives currently being explored by courts in Australia use the principles of therapeutic jurisprudence.

One application of therapeutic jurisprudence is the supervision of offenders by the court while they undergo rehabilitation programs. It is applied in some drug courts in Australia and in a project currently being applied in Geraldton, Western Australia called the "Geraldton Alternative Sentencing Regime" (GASR).¹⁰

Such an approach offers advantages such as:

1. According to therapeutic jurisprudence, the interest that a person in authority such as a judicial officer shows in an offender can have an effect in promoting the offender's well-being thereby their rehabilitation.
2. Breach action for non-compliance is likely to be more immediate in such a regime than under community supervision orders.

⁸ P Gendreau and C Goggin, "Principles of Effective Correctional Programming" (1996) 8 *Forum on Corrections Research* 38.

⁹ King, op cit n. 1.

¹⁰ M S King, "Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush" (in press) *Criminal Law Journal*; Geraldton Children's Court and Court of Petty Sessions. (in press). *Geraldton Alternative Sentencing Regime: First Year Self-Evaluation*. Some of the results of the project are referred to in this submission. The self-evaluation is due for publication at the end of August 2002.

3. The use of the multi-disciplinary team that often supports such an approach can offer a wide range of rehabilitation programs. Also the ongoing interest such a team has in the offenders may also have a therapeutic effect.
4. It can be applied in metropolitan and regional courts and in relation to a broad range of offences and offenders.
5. It brings together government and community agencies to work together to address the problem of offending.
6. There is some research that suggests that a therapeutic approach applied to criminal justice can promote increased well-being and reduced offending.¹¹

While there are a growing number of courts applying a therapeutic approach, this submission uses the example of GASR to illustrate how such a court operates and the potential that it offers in reducing offending and in promoting the well-being of offenders..

Therapeutic Jurisprudence

Therapeutic jurisprudence is a way of looking at the law and legal processes.¹² It asserts that legal processes, including court processes, can promote or inhibit the physical and psychological well-being of those participating in them. First applied to mental health law by David Wexler and Bruce Winick in the 1980s, therapeutic jurisprudence has since been applied to a broad range of law-related areas including criminal law, family law, child welfare law, family violence and international law. It has become a fundamental principle underlying the use of drug courts.¹³

¹¹ K Freeman, *New South Wales Drug Court Evaluation: Interim Report on Health and Well-being of Participants* (NSW Bureau of Crime Statistics and Research, 2002). Available at <http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/114textlink>; B Lind, D Weatherburn, S Chen, M Shanahan, E Lancsar, M Haas and R De Abreu Lourenco, *New South Wales Drug Court Evaluation: Cost Effectiveness*. (NSW Bureau of Crime Statistics and Research, 2002). Available at: <http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/115textlink>; S Belenko, *Research on Drug Courts: A Critical Review 2001 Update* (The National Center on Addiction and Substance Abuse at Columbia University 2001)

¹² For a general introduction to therapeutic jurisprudence see the web site of the international network on therapeutic jurisprudence at <http://www.law.arizona.edu/depts/upr-intj/>; see also D Wexler and B Winnick (eds), *Law in a Therapeutic Key* (Carolina Academic Press, Durham, 1996); D Stolle, D Wexler and B Winick (eds), *Practicing Therapeutic Jurisprudence* (Carolina Academic Press, Durham, 2000).

¹³ J Nolan Jr, *Reinventing Justice. The American Drug Court Movement*. (Princeton University Press, Princeton, 2001); P Hora, W Schma and J Rosenthal, "Therapeutic Jurisprudence and the Drug Court Treatment Movement: Revolutionising the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 *Notre Dame LR* 449.

In applying a therapeutic jurisprudential approach to criminal justice a principal focus is discovering those processes that promote the well-being of defendants so as to reduce their offending. As many offenders coming before a court have significant dysfunction in one or more areas of their life, the promotion of psychological and physical well-being is an important aspect of preventing further offending.

Court processes used to date include regular review of offenders by the court to promote compliance with rehabilitation programs; the interaction between judicial officer and defendant in a positive manner so as to promote self-esteem and other aspects of well-being; the use of applause and rewards such as reduced court appearances to recognise progress made; and defendants entering into behavioural contracts with the court.

In GASR, each of these methods are used to promote the well-being of offenders appearing before it. The attached article explains more fully the essential aspects of GASR.¹⁴ However, in each track of GASR there is a degree of supervision by the court and an interaction between the magistrate and the defendant. Each defendant in the Court Supervision Regime (CSR) and since mid June in the Brief Intervention Regime (BIR) has been required to enter into a contract with the court to participate in the rehabilitation programs and to comply with program conditions. These contracts are required pursuant to conditions of bail undertakings under the Bail Act 1982 (WA).

Exit surveys completed by CSR participants post sentence after graduating from the program suggest that the interaction of the magistrate with the defendant can have a positive effect on well-being. All those surveyed found the role of the magistrate to be very helpful. Here are some of their comments:

“Encouraging, understanding, does not look down on you...”

“He was/is the most help, motivation and inspiration. He is very caring and supportive”

“He was very nice, didn’t criticise me and helped with my self-esteem”

¹⁴ M S King, “Therapeutic Jurisprudence in Regional WA: The Geraldton Alternative Sentencing Regime”. (2002). 29 *Brief* 22.

The process of the court encouraging participation in programs can also positively impact the well-being of defendants: “my eating disorder is now a lot better by the helpful pressure I was under by the court”.

In taking a therapeutic approach, GASR also seeks to encourage individual responsibility for rehabilitation by obtaining an offender’s input into their offending-related needs and the programs they need to do. Behavioural contracts accord respect to participants by seeing them to be responsible individuals and encourages them to act for their rehabilitation.

Holistic Approach

The idea of rehabilitation that GASR encapsulates is that stated above: not only should it mean the absence of offending but the ability to lead a constructive and fulfilling life. Hence, it seeks to address all offending related needs at once. Following input from the participant, a program agenda is designed in accord with this approach. A participant may be involved in a range of programs including substance abuse programs, vocational guidance, financial planning, anger management, stress reduction, psychological counselling, medical treatment and programs run by the local sexual assault referral centre. Results reviewed below suggest that GASR does have a holistic effect in promoting the well-being of offenders.

Innovation

GASR seeks to be innovative by using rehabilitation programs with a sound empirical basis that may not have been used in criminal justice in Australia previously. One such program that has become an important component of the GASR treatment agenda provided to participants is the stress reduction and self-development technique Transcendental Meditation (TM). Research on the use of that technique in the criminal justice system in the United States has found decreased recidivism, improved psychological development and decreased substance abuse and hostility in meditating offenders.¹⁵ In relation to juvenile offenders, it has also been found to promote decreased anxiety, positive change (as measured by parents and participants),

¹⁵ For a review of the research, see: M Dillbeck and A Abrams, “The Application of the Transcendental Meditation Program to Corrections”. (1987) 11 *International Journal of Comparative and Applied Criminal Justice* 111; see also King, op cit n 1.

decreased court problems, increased happiness and enhanced self-regard and self-actualisation.¹⁶

The rationale behind using TM in offender rehabilitation is that there is evidence that stress contribute to substance abuse and offending and that TM is highly effective in eliminating stress and promoting psychological development.¹⁷

There is growing evidence that psychosocial stress adversely effects the functioning of mind and body leading to a range of psychological and health related disorders. Some theorists have suggested that stress disturbs the neurophysiology and that some people resort to the use of alcohol, tobacco or illicit drugs as a coping mechanism.¹⁸ Stress has also been linked to criminal behaviour. Many offenders coming before courts have a history of high levels of stress in their lives, including childhood abuse, poor socio-economic circumstances, family breakdown, loss of employment, financial failure and so on. For aboriginal offenders there can be a history of intergenerational family dysfunction and related sources of stress.

There are a variety of practices going by the name of meditation available today. There are also a growing number of approaches to stress reduction and stress management. Research has found a nine-fold difference between meditation and other stress reduction techniques in relation to health-related outcomes.¹⁹

TM has been used in GASR by reason of the research showing it is several times more effective in reducing substance abuse and anxiety and in promoting self-actualisation than other approaches²⁰ and also by reason of the research showing that the practice has been found to reduce recidivism by over 40%.

¹⁶ JP Childs, "The Use of the Transcendental Meditation Program as a Therapy with Juvenile Offenders". (1973) *Dissertation Abstracts International* 34/08-A.

¹⁷ King, op cit n 1.

¹⁸ K Walton and D Levitsky, "A Neuroendocrine Mechanism for the Reduction of Drug Use and Addictions by Transcendental Meditation" in D O'Connell and C Alexander (eds), *Self Recovery*. (Haworth Press, New York, 1994) p 89.

¹⁹ D Orme-Johnson and K Walton, "All Approaches to Preventing or Reversing Effects of Stress are not the Same". (1998) *12 American Journal of Health Promotion* 297

²⁰ C Alexander, P Robinson and M Rainforth, "Treating and Preventing Alcohol, Nicotine, and Drug Abuse through Transcendental Meditation" in O'Connell and Alexander, op cit n 18, p 13. This is a meta-analysis which included 19 studies on TM and substance abuse with a total of 4,524 subjects of whom 3,249 practised TM and the rest were controls; K Eppley, A Abrams and J Shear, "Differential

TM is a simple, natural mental technique practised for twenty minutes twice a day sitting easily with the eyes closed. It requires no change in lifestyle or beliefs. It is easy to learn and practice and has had a high level of acceptance amongst GASR participants. All of the CSR graduates have described TM as being very helpful for them.

Research has demonstrated that during the practice of TM, one experiences a state where the mind is perfectly alert while the body is deeply rested. The characteristics of this state such as reduced heart and respiration rates, decreased plasma lactate, decreased cortisol and improved neurophysiology are the opposite to those of highly stressed states.²¹

To date 35 participants and 10 community corrections and juvenile justice officers have been instructed in the TM technique. Participants include both adult and juvenile offenders and 16 are aboriginal. Initially funding was provided through private donations made through a foundation but more recently a state government grant was made through Safer WA for the teaching of TM to 30 offenders and 11 program officers. The Safer WA funding has almost been exhausted and GASR is currently searching for further funding to allow this aspect of the program to continue.

Here are some experiences of GASR participants with TM:

“The meditation is taking care of my anxiety therefore control of my drinking”.

“Relaxed me, my temper became more controllable”.

“An absolute life changing experience I would recommend be implemented in all Australian prisons”.

“I became more relaxed, more aware of other people’s feelings and it helped me with my drug habit”.

Effects of Relaxation Techniques on Trait Anxiety: A Meta-Analysis”. (1989) 45 *Journal of Clinical Psychology* 957; C Alexander, M Rainforth and P Gelderloos, “Transcendental Meditation, Self-Actualization and Psychological Health: A Conceptual Overview and Statistical Meta-Analysis”. (1991) 6 *Journal of Social Behavior and Personality* 189.

²¹ For a review of the research on the psycho-physiological characteristics of TM, see: R Jevning, R.Wallace and M Biedebach, “The Physiology of Meditation: A Review. A Wakeful Hypometabolic Integrated Response”. (1992) 16 *Neuroscience and Biobehavioural Reviews* 415.

As a side benefit, the practice of the TM technique may also produce long term health related benefits for GASR participants. For example, the urban aboriginal population has a far higher risk of heart disease than the general population. The practice of TM has been found to alleviate major risk factors for heart disease such as hypertension, smoking and cholesterol and to lower hospitalisation rates.²²

Results of GASR

The evaluation of the BIR is in progress as at the date of this submission. Participants in the CSR have included aboriginal and non-aboriginal people and both adults and juveniles. Some were told that they would be imprisoned if they did not enter or complete the program as their offending was serious. The CSR has dealt with offenders before the court for offences of dishonesty, drug offences, offences of violence (including domestic violence) and some traffic offences.

All of the CSR graduates to date reported that either their drug usage (alcohol and illicit drugs) had ceased or decreased. One also reported stopping smoking. All reported that their physical and mental health was improved or much improved. All also indicated that problems with anxiety and depression and their motivation to stop offending had improved or was much improved.

As at 29 July 2002, 9 participants have graduated from the CSR, 3 have been removed and placed in custody in relation to new charges, 3 have arrest warrants outstanding, 1 applied for and was granted permission to leave the program shortly after commencement and 7 are progressing through the program. None of the CSR graduates have appeared before the court since graduation for offences allegedly committed since they graduated from the program.

²² RH Schneider, F Stagers, CN Alexander et al, "A Randomised Controlled Trial of Stress Reduction for Hypertension in Older African Americans". (1995) 26 *Hypertension* 820; A Royer, "The Role of the Transcendental Meditation Technique in Promoting Smoking Cessation: A Longitudinal Study" (1994) 11 *Alcohol Treatment Quarterly* 221; MJ Cooper, "A Relaxation Technique in the Management of Hypercholesterolaemia" (1979) 5 *Journal of Human Stress* 24.; DW Orme-Johnson, "Medical Care Utilisation and the Transcendental Meditation Program". (1987) 49 *Psychosomatic Medicine* 493; for a review see: MS King, T Carr and C D'Cruz, "Transcendental Meditation, Hypertension and Heart Disease". (2002) 31 *Australian Family Physician* 164.

Graduates were also asked whether, given the choice again, they would prefer to be sentenced straight away or participate in the CSR. All those surveyed chose the latter. Here are some of their reasons:

“Because I benefited from it, learnt more about drugs and realised the effects that they had and my eating disorder is now a lot better by the helpful pressure I was under by the court”.

“It assesses the causes of offending and works on eliminating them, instead of treating/punishing symptoms of social and/or family problems”.

“Because I am confident that this program has helped me. 12 years of courts and police never did, in four and a half months on this program there has been big and positive changes to my life”.

In relation to the effect of participating in GASR, an aboriginal graduate commented:

“Thank you for the chance of attending the programme, very much help when I was in misery. Now I see the light again. The best thing that happened for me!”

Another participant commented: “If this program can’t help you, nothing will”.

Some of the results suggest profound life change has occurred through participation in GASR. Here are two examples:

1. A young woman appeared in Children’s Court on charges of possession of cannabis with intent to sell or supply and possession of cannabis, ecstasy, amphetamine, cocaine and a smoking implement. She had had anorexia nervosa for the previous two years and had turned to the use of cannabis to promote her appetite. At the end of her time in the CSR she was back to eating three meals a day, had put on weight and had stopped using drugs. She has since won a competition that could lead to career prospects.
2. The aboriginal girl who was a ward of the state and had a history of robbery, aggravated burglary and assault and who in the previous calendar year served a term of detention. She had been uncooperative and abusive. She had been admitted to the CSR after pleading guilty to a stealing offence while on a juvenile intensive supervision order with detention. During her 4 month period in the CSR her progress was significant. She attended TM and substance abuse counselling. Although she committed three shoplifting offences during one

day while on the program, compared to her previous history, this was relatively minor. As to the shoplifting, she was deeply remorseful, later apologised to the complainants and completed all community work hours ordered in relation to the offences in a week. During her time on the CSR she became polite and cooperative with juvenile justice officers, the court and treatment agencies. Her prospects are good.

It is desirable that there be quantitative longitudinal evaluation of GASR. A lack of resources to date has prevented that from happening. Still, the qualitative results suggest that the CSR has significant and positive effects on various aspects of the participants' lives and promotes decreased offending.

Conclusion

The application of therapeutic jurisprudence in sentencing offers the potential for reduced offending and the promotion of the well-being of offenders. GASR, a project that applies therapeutic jurisprudence, has been able to begin with a minimal commitment of additional resources due to the goodwill and commitment of local government and community agencies in Geraldton. Still, its maintenance and development requires further resources. But the results to date suggest that the money would be well spent.

Therapeutic court-based options should be encouraged as a means of promoting reduced offending. The framework used by GASR and by some drug courts has potentially a wider application in the rehabilitation of offenders.

The criminal justice system also needs to be open to innovation, even when that innovation may come from what may be perceived to be an unusual source. Although there is sound research supporting the application of TM to offender rehabilitation it has not been applied in a systematic program in offender rehabilitation in Australia before. However, given the results reported by GASR participants from practising TM, the technique appears to have general application to offender rehabilitation in both community and institutional settings.

A therapeutic approach such as is taken in GASR offers the potential for reduced impact on the criminal justice budget through reduced offending and increased well-being of offenders. The health-related benefits reported by GASR participants suggest that as a side-benefit it may also positively impact the health budget from decreased use of public health facilities.

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29 July 2002.