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New Directions in the Courts' Response to Drug and Alcohol Related Legal Problems: Interdisciplinary Collaboration

Dr Michael S King*

Collaboration in addressing offending-related substance use problems can be considered, amongst other things, in the sense of collaboration between professionals from multiple disciplines and as collaboration with offenders with substance use problems to address their problems. Collaboration between professionals recognises that such offenders commonly have interrelated problems in areas such as health, housing, relationships and employment and that they need to be addressed to promote rehabilitation. Collaboration with offenders recognises the importance of autonomy and that positive behavioural change requires offenders to undergo internal as well as external change processes. Where possible, courts and rehabilitation professionals should support these processes. Hitherto collaboration has been largely foreign to court processes. However, consistent with the judicial function, judges and magistrates can play an important role by using these forms of collaboration in appropriate cases to promote the rehabilitation of offenders with substance use problems.

Substance use by offenders is one of the issues that criminal courts have had to deal with on a daily basis for many years. This is an international issue. For example, research has found that over 40% of police detainees in both the United States and Australia used cannabis.¹ Opiate use by detainees has been reported as being higher in Australia than in the United States but cocaine use is substantially higher amongst US detainees than Australian detainees. Research has found that two thirds of Australian police detainees tested positive to at least

* Magistrate, Magistrates Court of Western Australia; Adjunct Senior Lecturer, Faculty of Law, Monash University. Paper presented to the 'Making it Happen: Improving Services Through Collaboration' conference, Perth, Western Australia, 6-8 August 2012.

¹ Sweeney J and Payne J, *Drug Use among Police Detainees: A Comparative Analysis of DUMA and the US Arrestee Drug Abuse Monitoring Program* (Australian Institute of Criminology, 2012).

one drug, which did not include alcohol.² In another study almost half of police detainees in Australia attributed their offending to the use of alcohol or illicit drugs.³

Over recent decades courts have responded to this chronic problem through the use of innovative approaches such as drug courts, court diversion programs and the use of more creative processes in mainstream court lists. They have also taken a similar approach in dealing with mental health, family violence and other offending-related problems. At the same time, therapeutic jurisprudence has given these court processes a theoretical basis and proposed strategies that judges, magistrates, lawyers and other justice system professionals can use when taking these approaches.⁴

I argue that collaboration has been one of the most significant features of this development. The development of collaboration in court processes may be seen in two respects – collaboration between the court and justice system professionals and professionals from other disciplines, such as health and collaboration between the court or court team and offenders participating in court programs.

The thesis of my paper is that:

1. Collaboration between professionals and collaboration between professionals and those with problems associated with substance use – or other offending related problems, including mental health issues and family violence – are important aspects of addressing these problems. In

² Gaffney A, Jones W, Sweeney J and Payne J, *Drug Use Monitoring in Australia: 2008 Annual Report on Drug Use Among Police Detainees* (Australian Institute of Criminology, 2010); Sweeney J and Payne J, *Drug Use Monitoring in Australia: 2009-2010 Report on Drug Use Among Police Detainees* (Australian Institute of Criminology, 2012)

³ Payne J and Gaffney A, *How Much Crime is Drug or Alcohol Related? Self-reported Attributions of Police Detainees* (Australian Institute of Criminology 2012).

⁴ Hora PF, Schma, WG, and Rosenthal JTA, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439; Winick BJ, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055; Winick BJ and Wexler DB (eds) *Judging in a Therapeutic Key* (Carolina Academic Press, 2003); King MS, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009), <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

this paper I consider these two aspects of collaboration from the perspective of the courts.

2. Although collaboration has commonly been seen to be foreign to the functioning of courts, it need not be inconsistent with their function.
3. Courts can play and are playing an important role in addressing substance use, mental health issues, family violence and other problems of offenders.
4. Current and emerging court processes designed to address substance use related offending can be seen as either collaboration with other professionals or as collaborative with offenders with substance use related problems or both.
5. The ongoing development of therapeutic jurisprudence, which informs this development, is the product of the collaboration between behavioural scientists and legal academics, judicial officers, lawyers and other justice system professionals.

Collaboration and the Role of Courts

Before considering the nature of collaboration in the context of courts, I need to discuss how courts function. My discussion is confined to courts applying the common law. Traditionally, courts have been passive institutions. I acknowledge that courts of some jurisdictions are more interventionist than others – for example, courts in the United States are more interventionist than courts in Australia. However, commonly courts in the common law world are reactive and passive rather than proactive and interventionist.

In criminal cases, a court only becomes involved when a charge is laid before it. Courts are not engaged in primary prevention – this is the role of the legislature, executive and community. The court's role has traditionally been limited to receiving a guilty plea, or in the case of a not guilty plea, to determining the facts, determining the relevant law and applying the law to the facts to reach an outcome – guilt or innocence. In the case of a guilty plea or guilty verdict the court considers and imposes a sentence. With appropriate adjustments, this has also generally been the courts' approach in dealing with other legal problems such as those arising in civil cases.

In criminal cases, the presentation of the facts and law is largely in the hands of the prosecution and defence lawyers and the judge or magistrate sits and takes in this presentation, only becoming involved where there is a contest in relation to the evidence, process or law. An accused person may have little involvement in the process at all. If the accused pleads guilty to a serious charge, then it is likely that defence counsel will do all the rest of the talking to the court on behalf of the defence.

The way in which the proceedings take place in court is adversarial. The parties are pitted against each other. Prosecutors attempt to secure convictions upon a fair presentation of the evidence and legal issues. Defence counsel are likely to be zealous advocates, actively pursuing every issue of fact or law that may assist their clients' case and secure an acquittal or, in the case of a conviction, the most lenient sentence possible. Collaboration between the parties is very limited.

Although the court receives evidence through the parties and their lawyers and considers their written and/or oral submissions, it is the court that makes the decision. A court judgement is not the product of collaborative decision-making. The decision-making is taken out of the hands of the parties and placed in the hands of the court. The court makes an order and the parties must obey it. A sentence orders that an offender be imprisoned, pay some money to the court, perform unpaid work, undergo rehabilitation programs or be subject to another disposition. The order is coercive in that enforcement processes can be used to ensure it is carried out.

A court is also limited in terms of the kind of issues that it can deal with. In criminal cases it determines guilt or innocence and, where there is a conviction, an appropriate sentence. Problematic substance use as a contributor to criminal behaviour is taken into account in determining guilt in some cases and certainly taken into account in determining sentence.

However, until recently, judges and magistrates have seen their powers to address problematic substance use, mental health problems, homelessness, unemployment and other factors contributing to offending behaviour to be

limited and in any event, they have thought that addressing these issues was the province of other professionals

In the case of *R v Peterson*, the then Chief Justice of Western Australia, Sir Francis Burt stated 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”.⁵

Certainly courts have used and continue to use sentences that seek to promote offender rehabilitation such as orders requiring offenders to be supervised in the community while they undergo treatment programs. However, this has involved courts passing on the problem for others to solve. An offender is sentenced, sent on his way and, with some limited exceptions, does not come back to court unless the offender breaches the court order or commits further offences. Until recently the thought that the processes courts use, the way in which judges and magistrates interact with offenders and collaboration between courts and other professionals could be a part of the solution was not properly considered.

In summary, then, the traditional way in which courts have operated is reactive, uninvolved, confined in their focus and area of operation, principally adversarial, largely not involving accused people in the process, almost entirely non-collaborative and coercive.

Two developments from the 1980s have heralded a change in approach of a growing number of courts in addressing problematic substance use related offending:

1. The emergence of drug courts, mental health courts, family violence courts, community courts and similar courts, courts that seek to be an active part of the solution of problems that have contributed to offending behaviour.⁶ In these courts, cases are adjourned while participants undergo programs to address their underlying issues. The use of reviews

⁵ *R v Peterson* [1984] WAR 329, 332.

⁶ See generally: King M, Freiberg A, Batagol B and Hyams R, *Non-Adversarial Justice* (The Federation Press, 2009) ch 9.

by the court provides the opportunity to support the process of positive behavioural change. While there are differences between individual courts, typically there are more reviews in a drug court than in a family violence court. The court's role remains reactive – dealing with cases that come before it rather than seeking them out – but it is one that engages more completely with the problems and with those involved in their resolution.

2. The development of therapeutic jurisprudence, which has provided a theoretical foundation for these courts. The scope of therapeutic jurisprudence or “TJ” is far broader than these courts, being the study of how the law, legal processes and legal actors affect the wellbeing of those involved, be they victim, offender, civil or family litigant, witness, juror, community corrections officer, judicial support officer, lawyer or judicial officer.⁷ TJ has become a vehicle whereby ideas and practices from the behavioural sciences can be used to inform the development of laws and legal processes. Drug courts, mental health courts and the like have been one of the prime areas whereby legal processes have been informed by findings from the behavioural sciences. In a sense, this is collaboration between the disciplines of the behavioural sciences and the discipline of law. Indeed, the development of TJ principles and TJ practices for lawyers, judges, magistrates and other justice system professionals has been the product of the work of behavioural scientists such as psychologists and social workers as well as judges, magistrates and lawyers.

These specialist courts emerged because it was recognised that the conventional approach of courts simply processing a case as fast as possible, dispatching an offender on her way and moving on to the next case was an ineffective way of

⁷ Wexler DB, *Therapeutic jurisprudence* (Carolina Academic Press, 1990); Wexler DB and Winick BJ (eds) *Law in a Therapeutic Key* (Carolina Academic Press, 1996); Winick BJ, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy and Law* 184; Wexler, DB *Therapeutic Jurisprudence: An Overview*. (2000) 17 *Thomas M Cooley Law Review* 125.

addressing substance use problems, and other offending related problems, in many cases.⁸

The old approach to court practice missed the opportunity for the court to play an important role in assisting offenders with substance use related problems to address these problems. As Birgden points out, coming to court may be a “teachable moment” for an offender.⁹ Being in a life crisis – such as being arrested, charged and appearing in court – can mean that a person is more amenable to considering and implementing strategies to promote positive behavioural change.¹⁰

TJ points out that how the court responds to this teachable moment can help the person make the most of the opportunity or it could make the possibility of change much more difficult.¹¹ Drug courts, family violence courts, mental health courts and other courts applying therapeutic jurisprudence seek to make the most of this teachable moment by using processes that support the change process. TJ has assisted courts and lawyers by suggesting strategies whereby they can make the most of teachable moments. Conversely, much in the conventional approach to dealing with these cases arguably hindered the possibility of change.

The development of these specialist courts was also due to the recognition that problematic substance use seen by the courts is multi-dimensional – it is not only a justice problem, it is also a health problem. It may also involve housing, education, employment, relationship and personal effectiveness problems. By personal effectiveness problems I mean problems affecting the ability to manage personal finances, to maintain a household, to apply for a job and the like. Offender rehabilitation may therefore not only involve the promotion of law-abiding behaviour but also the healing of mind, body and relationships, the gaining of knowledge through education and the development of vocational and other life skills. The involvement of professionals from each of these areas is now

⁸ See generally, King et al, above n 6.

⁹ Birgden A, 'Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling' (2002) 38 *Criminal Law Bulletin* 225, 227.

¹⁰ *Ibid.*

¹¹ *Ibid.*

seen to be important in addressing problematic substance use and other offending related problems.

This approach is now being applied in courts in a number of contexts:

1. In drug courts and some other specialist courts there is the involvement of an interdisciplinary team in managing the progress of participants in the court program. An interdisciplinary team may also have been involved in developing the court program and be involved in its management. In these courts there is more direct interaction between the judge or magistrate, other legal professionals and professionals from other disciplines involved in the program. The processes used are collaborative in nature.
2. There are court diversion programs where the court adjourns a case so that multiple needs of offenders are met, including substance use related programs. Victoria's Courts Integrated Services Program, which operates in the Magistrates Court of Victoria in several locations, is an example of this approach.¹² Here there is no direct collaboration between the court and the professionals from other disciplines in the manner of a drug court. The court adjourns a case while an offender undergoes a range of programs to address their needs. The program can address substance use, mental health, housing and social and economic issues. A caseworker is responsible for the initial assessment of an offender, development of a case plan and referral to the relevant agencies. The matter comes back to court and the court can take into account the offender's performance in the program in determining sentence.
3. In my work as the magistrate for the East Kimberley I have often adjourned cases from other parts of the region to the Wyndham Magistrates Court while offenders reside in the residential rehabilitation facility operated by Ngnowar Aerwah Aboriginal Corporation located just

¹² Ross S, *Evaluation of the Court Integrated Services Program Final Report* (The University of Melbourne, 2009), http://www.justice.vic.gov.au/resources/9931fe61-ca5e-4c54-a118-597fe9a7363c/cisp_evaluation_report.pdf.

outside of Wyndham. It arranges transport for offenders to court and provide reports to me as to the progress of the offenders during the course of their program. I agreed to their request to include particular conditions in the bail of offenders who go to their facility: to obey the lawful directions of staff and to participate fully in the program.

These are examples where, to varying degrees, the court involves other agencies and professionals in the resolution of issues underlying the legal problem before the court. In some cases there is intense and direct collaboration between the court and other professionals; in others, there is the court's coordinated referral of offenders before the court to other professionals; and in others there is a collaboration to facilitate the court's referral of participants to a particular program and the court's willingness to listen to and address agencies' requirements.

Collaboration with Offenders with Substance Use Problems

I now turn to consider the issue of collaborating with those who engage in problematic substance use in order to empower them to address their problems. I argue this kind of approach is justified by a court, in appropriate cases, for two reasons: firstly there should be limits to the use of coercive powers within the legal system given that, as far as is possible in the circumstances of the case and the law, a court should respect the autonomy of those coming before it. Secondly, it aligns with key findings from the behavioural science literature as to how the process of positive behavioural change happens. There is of course some overlap between these two reasons in that there are significant links between personal autonomy and the mechanics of behavioural change.

Autonomy is the ability to make decisions concerning one's physical, psychological, relational and social wellbeing.¹³ It is based on the idea that humans are moral, self-governing individuals capable of making decisions to advance their personal wellbeing. When people make and act on decisions

¹³ See generally: Winick BJ, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705; Schopp RF, 'Therapeutic Jurisprudence and Conflicts among Values in Mental Health Law' (1993) 11 *Behavioral Sciences and the Law* 31.

concerning their own wellbeing their actions may be seen to be them bringing to reality their own concept of a good life and a reaffirmation of themselves as worthwhile individuals. The risk of imposing decisions upon individuals concerning their wellbeing is that they experience it as alienating and as a discrediting of self.¹⁴

Schopp points out that autonomy comprises a set of virtues: 'self-reflection, direction, reliance, and control; moral authenticity and independence; and responsibility for self.'¹⁵ He also observes that autonomy requires certain capacities: 'the psychological capacities such as consciousness, understanding, and reasoning used in critical self-reflection, deliberation, and decision-making'¹⁶

Autonomy is treasured by political writers such as Locke, Mill, Jefferson, Bentham and others.¹⁷ It is valued by indigenous communities and political, religious and spiritual groups.¹⁸ It underlies the concept of patient-centred care in the health sciences and the patient's right to choose.¹⁹ Autonomy has been justified as being a quality inherent in human nature – a natural law or natural rights justification – or on the basis that it promotes the greatest good for individuals and the community generally – a consequentialist justification.²⁰

Many parts of the law are based in part on the concept of autonomy – such as contracts – including the contract of marriage; torts such as negligence and trespass; and the criminal law. For example, where a person has been coerced to enter into a contract or to commit an offence they have a defence at law.

Constitutions and international human rights instruments enshrine the concept of autonomy. For example, the *Universal Declaration of Human Rights*, amongst other things, values and enshrines the quality of individual liberty and lists

¹⁴ Winick, above n 13.

¹⁵ Schopp, above n 13, 35.

¹⁶ Schopp, above n 13, 35.

¹⁷ Winick, above n 13.

¹⁸ King MS, 'What can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91.

¹⁹ Schopp, above n 13; Winick, above n 13.

²⁰ Winick, above n 13, 1712-1715.

freedoms over various domains of life as basic human rights. Increasingly, human rights thought influences a broad range of disciplines and areas of life. For example, scholars have suggested that human rights – including the underlying value of autonomy – should inform correctional practice and forensic psychology, noting the key connection between autonomy and personal wellbeing.²¹

The value of autonomy is regarded as significant by therapeutic jurisprudence. As Winick observes:

Therapeutic jurisprudence therefore does not embrace a conception of “therapeutic” that is tied to notions of paternalism. To the contrary, the thrust of much of the existing therapeutic jurisprudence work is that the individual's own views concerning his or her health and how best to achieve it should generally be honoured.²²

Despite the value placed on autonomy, it should not be regarded as paramount. Even human rights instruments that promote autonomy in the rights they protect recognise that rights can be limited for legitimate purposes. For example, the *Universal Declaration of Human Rights*, article 29(2) provides that rights and liberties can be limited by law for the purpose of securing the rights and freedoms of other people or for moral, public order or general welfare purposes. In a similar vein, therapeutic jurisprudence does not assert that therapeutic values should be paramount.²³ It acknowledges that the therapeutic may have to be subordinated to other justice system values, depending on the circumstances.

The law grapples with issues of autonomy on a daily basis. Often it must balance the value of autonomy with other justice system values. In some cases, individual autonomy must be limited to some degree for the sake of other values. For example, when a court imprisons an offender, it significantly limits the offender's

²¹ Ward T and Birgden A, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628; Birgden A and Perlin ML, "'Tolling for the Luckless, the Abandoned and Forsaken": Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists' (2008) 13 *Legal and Criminological Psychology* 231.

²² Winick, above n 7, 192.

²³ Wexler & Winick, above n 7.

autonomy by limiting their personal liberty. It does so for the sake of other community values –the public order values of punishment of offender, protection of the community and deterring offending. Of course the court may also impose penalties that limit personal autonomy to a far lesser degree, such as by the imposition of community work.

Another example of a balancing of values is that when a Western Australian court finds an accused person unfit to plead and unlikely to be so within 6 months, then under the *Criminal Law (Mentally Impaired Accused) Act 1996*, it must decide whether to order the indefinite detention of the accused or his unconditional discharge. In such cases, the court is concerned, amongst other things, with the person’s capacity to exercise autonomy.

When courts and lawyers are involved in processes involving the promotion of the wellbeing of people coming before it – including those with problems associated with substance use, it is important that they respect participants’ autonomy. As drug courts, mental health courts, community courts and the like commonly offer potential participants the choice whether to enter their programs, then autonomy is being respected. However, it should not stop there; the court and the court team should continue to respect participant autonomy as far as possible throughout the court program. If a person is capable of making the significant choice as to whether to enter a court program, then they should also be capable of exercising autonomy during the court program.

I acknowledge that the choice for offenders regarding entering a court program may be extremely limited as the alternative may be imprisonment, however, as Winick notes, it is the choices made by the offenders that has placed them in this situation.²⁴

Judicial officers and lawyers working in these programs should be mindful of the principles emphasised by Winick in this passage:

...problem solving court judges must understand that although they can assist people to solve their problems, they cannot solve them. The

²⁴ Winick, above n 4, 1073-1074.

individual must confront and solve her own problem and assume the primary responsibility for doing so. The judge can help the individual realize this, and, together with treatment staff, can help the individual to identify and build upon her own strengths and use them effectively in the collaborative effort of solving the problem.²⁵

Respect for autonomy does not require the court or court team to hand over the decision-making concerning what is to be done to promote wellbeing entirely to the program participant, nor does it prevent the court from determining program conditions. As the participant has breached the criminal law, the community, court and court team have a legitimate interest in what is to be done to promote the participant's rehabilitation.

How then are individual autonomy and the wider community and justice system values to be accommodated by a court? Collaboration between the court or court team and participants in court programs is a means of respecting the wider community interests, the autonomy of participants and their engagement in positive behavioural change important for their wellbeing. It can be achieved through the use of processes such as active listening, respectful dialogue, the expression of empathy where appropriate, joint participation in problem solving and decision-making and formulating common goals.²⁶ Naturally there are limits to the extent to which such processes can be used. For example, if a participant commits a significant violation of program rules by committing a serious offence, persistently fails to participate in agreed treatment programs or persistently fails to make efforts to reduce her substance use, a court will move back to an adversarial mode of dealing with the situation.

Individuals are central to the process of their own behavioural change. Some are able to replace problematic behaviour – whether it involves substance use, offending or something else – with healthy behaviour through their own efforts.²⁷ The literature on natural or self-change in relation to substance use and

²⁵ Winick, above n 4, 1067-1068.

²⁶ Winick and Wexler, above n 4; Winick, above n 4; King, above n 4.

²⁷ Arguably, no one changes entirely by herself, as there are always supportive social environmental influences of varying degrees.

the desistance literature in criminology supports this contention.²⁸ Other people accomplish behavioural change with the aid of treatment and other supports.

Whether it is by themselves or with treatment and social supports, the individual is actively involved in bringing about change. DiClemente has pointed out that behavioural change requires people to undertake certain internal and external processes:

Substance users have to become *concerned* about the need to change, become *convinced* that the benefits of change outweigh the costs provoking a decision to change, *create* and *commit* to a viable and effective plan of action, *carry out* the plan by taking the actions needed to make the change, and *consolidate* the change into a lifestyle that can sustain the change.²⁹

This is, of course, a concise summary of the transtheoretical stages of change model, which is highly influential amongst professionals committed to helping people with problematic substance use engage in positive behavioural change.³⁰ Increasingly judicial officers who are committed to applying therapeutic jurisprudence are becoming familiar with this theory.

DiClemente has also pointed out that even with external supports such as treatment there will be an interaction between self-change processes and the processes of change promoted by treatment.³¹

My experience as a magistrate and before that as a lawyer practising in the criminal courts is that self-change is a process that is often seen by the courts, albeit most often in its early stages.³² For example, a number of people coming to court to be sentenced for an offence will already have engaged in action directed

²⁸ DiClemente CC, 'Natural Change and the Troublesome use of Substances: A Life Course Perspective' in Miller WR and Carroll KM (eds) *Rethinking Substance Abuse: What the Science Shows and What We Should do about It* (The Guilford Press, 2006); Farrall S, *Rethinking What Works with Offenders: Probation, Social Context and Desistance from Crime* (Willan, 2002).

²⁹ DiClemente, above n 28, 82.

³⁰ Prochaska JO, DiClemente CC and Norcross JC, 'In Search of How People Change: Applications to Addictive Behaviors' 47 (1992) *American Psychologist* 1102.

³¹ DiClemente, above n 28.

³² Unfortunately courts also often see offenders who are in the state of pre-contemplation, who do not acknowledge the existence of significant problems that have contributed to their offending and which places them at risk of further offending behaviour.

at resolving their underlying issues such as problematic substance use, with or without professional help. That is, they are already in the action stage of change. Some people will have engaged in counselling and made significant progress; others may have just started the process; yet others will have made a decision to change but need the support to implement that decision.

Therapeutic jurisprudence suggests that, as far as is possible given the diverse justice system values that a court must uphold, courts should promote or at the least not hinder offenders' internal and external mechanisms of change.³³ Of course at times a court must imprison someone, but it can be done in a way that is sensitive to change mechanisms.

Unfortunately courts have used and in some cases continue to use processes that inhibit the individual pursuing change or from continuing with change processes they have already begun. Adversarialism, not involving a principal player – the offender – in the court process and removing decision-making power from him are hardly the ingredients that uphold an individual's pursuit of positive behavioural change.

Just ordering the person to engage in rehabilitation also is problematic for it can undermine individual autonomy. Therapeutic jurisprudence has also questioned whether such an approach may inhibit the change process.³⁴ Further, insensitive court processes and inappropriate sentencing remarks have also had the tendency to inhibit the change process. Some judicial officers continue to denounce the offender rather than the behaviour for which she is being sentenced. Labelling someone as beyond rehabilitation or a disgrace to the human race is likely to undermine the individual's self-efficacy, the individual's confidence in her ability to change.³⁵ Arguably this is not and should not be part of the sentencing process.

³³ Winick and Wexler, above n 4; King, above n 4.

³⁴ Winick, above n 4, 1067-1068.

³⁵ For a discussion on self-efficacy and judging, see Winick, above n 4; and King, above n 4, ch 7.

How then, does a court use more collaborative rather than processes with offenders? Therapeutic jurisprudence suggests a number of strategies, including giving offenders choice whether to engage in rehabilitation programs; encouraging them to develop a rehabilitation plan setting out their goals and strategies; entering into a dialogue with offenders to encourage them to develop solutions when problems arise in their performance under a court program; having positive but realistic expectations concerning offenders' performance; respectful dialogue between the court and participants during review hearings; the court supporting participant self-efficacy; and judges and magistrates using persuasion, motivational interviewing and similar processes rather than simply ordering offenders to do something.³⁶ The approach of the Perth Drug Court is also instructive. It has a range of treatment programs available for participants. The Perth Drug Court's Court Assessment and Treatment Service officers and the court team work closely with participants in determining the appropriate course of treatment for them. Participants' input is valued.

These processes are collaborative in that they respect the autonomy of the offender, they respect the offender's ability to make positive decisions and implement change and they acknowledge the value of inclusion and dialogue and of the court treating the offender with respect. Of course this approach must be tailored according to the needs of the situation. An individual's capacity to be autonomous may be significantly impaired. For example, asking a person with severe substance use problems, who struggles even with living from day to day, to set long-term goals may well be unrealistic. Such an individual may not be able to see much beyond the week ahead. But this does not justify denying the person autonomy. Small steps may be needed in such situations – the setting of goals only for the week ahead – with larger steps attempted once the offender has made progress. That is, processes affirming autonomy of participants should be crafted according to the situation of the participant and the case before the court.

Drug courts, mental health courts, family violence courts and the like provide an obvious forum for the use of such strategies. To a significant degree they can also

³⁶ Winick and Wexler, above n 4; Winick, above n 4; King, above n 4.

be used in connection with court diversion programs that I have mentioned. Increasingly judges and magistrates are using some of these techniques in mainstream court processes.

Conclusion

Collaboration between professionals is integral to the comprehensive resolution of substance use problems, particularly in the context of the court system. It is justified on the basis that often there are multiple dimensions of wellbeing involved in the rehabilitation of a person with substance use problems.

Collaboration between professionals and offenders to develop and implement solutions to the offender's problems is also important for the rehabilitation process.³⁷ A judicial officer taking such an approach is using solution-focused judging.³⁸ It is justified on the basis that the wellbeing and human rights value of autonomy of the person with the substance use problem should be respected. This approach also has the advantage of adding another source of potentially creative and effective strategies for change to the team – the person with the substance use problem. Naturally the use of such processes must be consistent with other justice system values and with the ethical and professional duties of the judicial officers and lawyers involved in them.³⁹

Therapeutic jurisprudence provides a theoretical justification for the use of collaborative processes by courts and lawyers and, drawing on findings from the behavioural sciences, suggests strategies that courts, lawyers and other justice system professionals can use to promote offender rehabilitation and other justice related wellness outcomes.

The following passage about drug courts from Judge Klein, who was involved in developing the first drug court in Miami, can equally apply to therapeutic

³⁷ King, above n 4; King MS, 'Should Problem Solving Courts be Solution Focused Courts?' (2011) 80 *Revista Juridica Universidad de Puerto Rico* 1005; King MS, 'Therapeutic Jurisprudence's Challenge to the Judiciary' (2011) 1 *Alaska Journal of Dispute Resolution* 1.

³⁸ King above n 4; King, above n 37.

³⁹ King MS, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133.

jurisprudence initiatives within the criminal courts, including their use of collaborative processes:

First of all – what we are doing is a statement of our belief in the redemption of human beings. It is pronouncement from those in authority to some of our least powerful and most ignored citizens, that we care about you and want to reach out and help you. Your lives and wellbeing are important to us. The truth of the matter is that this may be the first time in the lives of many of these people that someone is actually listening to them – hearing what they are saying and telling them that we care about them and what happens to them is important. You know, there is a mathematical equation that for every action there is an opposite and equal reaction - I believe this is true also in human affairs. We tell them we care about them and they begin to feel worthwhile. Some pretty important people (judges, lawyers, and others in authority) are telling them “We don’t want you to fail:” they begin to believe they can transcend.⁴⁰

⁴⁰ Klein H, Untitled presentation to the National Association of Drug Court Professionals Conference, Nashville, June 1, 2012.