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INNOVATIONS IN THE COURT SYSTEM

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INNOVATIONS IN THE COURT SYSTEM

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INTRODUCTION

Like any other social system the courts system has evolved in response to a changing social, economic and political environment. The legal system is not immune to change, though it is sometimes not as responsive as some outside it would prefer. In the civil jurisdiction, case-management concepts have transformed court operations. In criminal courts, list management, sentence indication, specialisation, diversion, CCTV and other processes and technologies have altered the ways in which courts operate. This paper focuses on one aspect of court innovation, the development of problem-oriented courts in Australia.

Three years ago, the term 'problem-solving' or problem-oriented' court was almost unknown in this country, although it had been developing rapidly in the United States (Freiberg 2001). The concept of therapeutic jurisprudence is still in its infancy in this country, although like that of problem solving courts, it appears to be flourishing (Freiberg 2003).

It is hard to believe that it is only five years since the first drug court opened in Sydney in 1999. Now we have drug courts in every state except Tasmania. Specialist courts such as domestic violence courts operate in South Australia, Western Australia and soon, in Victoria. Indigenous courts or jurisdictions, or forms of circle sentencing, have come into operation in South Australia, Queensland, Western Australia and Victoria. Proposals have been floated for specialist sex courts or lists, community courts, teen courts, homelessness courts and others. In 2003, the South Australian Diversion Court, which deals with offenders with mental illness, won the Australian Institute of Judicial Administration's award for excellence and in 2004, the same state's Youth Court's family conference team won the award for its work with restorative justice conferences in juvenile justice.

Clearly, something is happening in, and possibly to, the court system. Some of these innovations have been have been developed by the courts themselves and some are driven by governments. In Victoria, the government has endorsed and promoted problem-solving courts in its far-reaching Justice Statement (Victoria 2004). In November 2004, the Western Australian Attorney-General, Jim McGinty referred the issue of 'the

principles, practices and procedures' relating to problem-oriented courts to its Law Reform Commission. Among the issues that the Commission is required to examine are the relationship between such courts and case management and the manner in which these courts fit within the traditional court model.

The issue of the relationship between these forms of court innovation and the criminal justice system lies at the core of the debate about the nature, and future, of problem-oriented courts. In the United States, California alone has 250 problem-oriented courts of various forms and in some jurisdictions, the question being posed is not whether problem solving courts should exist, but rather how the traditional courts can incorporate the practices and philosophies underlying problem-oriented courts?

In a recent overview of problem-solving courts in the United States and Australia, Phelan observed that they (Phelan 2003:89)

> represent more than just structural or process changes. They challenge the nature of courts and represent something of a revolution in the way in which courts might operation in modern, democratic societies.

This paper examines some recent developments in problem-oriented and specialist courts in Australia and asks whether, and if so how, they could be expanded.

CONCEPTUAL /TERMINOLOGICAL ISSUES

The variety of courts which have emerged in Australia has revealed that there is no single template or model upon which these have or can be built. While they share certain features, they differ in their legal bases and philosophies. Even similar courts, such as drug courts, vary significantly across the country. There is an even wider variety between different types of courts.

In analysing the courts, it is first necessary to distinguish between specialist courts and problem-oriented courts. A specialist court can be regarded as a court with limited or exclusive jurisdiction in a field of law presided over by a judicial officer with experience and expertise in that field. The advantages of specialisation include improved judicial decision-making through the use of judicial expertise, more efficient court processes because of judges' and counsels' familiarity with the subject matter and reduced backlogs in the generalist courts. The sexual offences court discussed below is an example of a court along these lines.

Specialist courts are not necessarily problem-solving courts. The Children's Court is a specialist court, having a jurisdiction limited by the age of the offender, but it does not necessarily adopt a problem-solving approach. The phrase 'problem-oriented' or 'problem-solving' court is not yet a term of art. Berman and Feinblatt, two of the pioneers of these courts at the Center for Court Innovation in New York have defined a problem-solving court as one which seeks 'to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities' (Berman and Feinblatt 2001). The distinctive features of such courts are: (derived from Berman 2004; Forole et al 2004):

- An approach by the judicial officer which moves away from the immediate questions of guilt or innocence towards broader issues of improvements in the

health and well-being of the offender, of public safety and amenity more broadly and of the social and communal problems which may be conducive to criminal behaviour;

- On-going judicial supervision: the court is required to monitor the progress of the offender and the orders made by requiring the offender to report back to the court as directed by the court;
- Integration of service provision: the court, and the court building, can provide a focus for the provision of social, welfare and health services and can co-ordinate their delivery in particular cases. However, courts do not deliver these services, nor are they budget holders for them;
- Direct engagement with defendants: though not negating or denying the role of the prosecution and defence, judicial officers can talk directly to defendants as part of the process of making the court more meaningful for participants and exploiting the powerful role of the court as enforcer/mentor/supervisor;
- A non-adversarial approach: most problem-oriented courts require a plea of guilty or, if they are pre-plea, an acknowledgment of guilt. They seek improved outcomes by encouraging all participants, including legal counsel, to resolve cases and issues by collaboration rather than confrontation.

Thus, while a problem-oriented court can be conceived of as a specialised court, not every specialised court is a problem-oriented court. Though specialised courts may be distinguished by their procedures or the expertise of the presiding officers, unless they adopt the features outlined above (judicial supervision or control, inter-sectoral collaboration and the like), they cannot be regarded as problem-oriented courts (Freiberg 2001).

In the main, problem-oriented courts focus on the individual. Though broad economic or social factors may be the root causes of poverty, addiction or homelessness, the courts seek primarily to address the defendant's immediate problems, and only secondarily, the wider socio-political structures. Though change to the immediate community is envisaged as part of some courts, such as the community court, implicit in the approach is the assumption that the processes of identifying and treating or dealing with the 'problem' will remove of ameliorate the proximate causes of the offending behaviour and therefore reduce crime (Phelan 2003:110). These assumptions are important as they can determine the form of the court processes and the interventions it employs. These issues emerge most starkly in the development of family or domestic violence courts where views as to the causes of violence and the appropriate responses can differ widely. Some of the debates are empirical, others ideological.

The development of these courts has taken place in the context of broader, but related changes in the criminal justice system which may be court-based or court-related, but which do not focus on the courts themselves. These have generally been known as 'diversion' schemes and there is a deal of confusion about the relationship between problem-oriented courts and diversion programs.

There are many *court-related* innovations which fall within the rubric of 'diversion' in Australia and elsewhere. Many operate in the drug offence area. They may involve a case

coming before a court following an arrest or even a plea of guilty, but a referral away from the court to other agencies without direct court supervision in the interim. For example, bail schemes such as MERIT in New South Wales and CREDIT in Victoria, deferred sentencing options, legislative adjournments subject to diversion programs (Vic, s.128A *Magistrates' Court Act*) and, more recently, criminal justice intervention orders in NSW and pre-sentence orders in Western Australia (Freiberg and Morgan 2004). These orders allow a court release an offender on bail, or to adjourn sentence following a finding of guilt for various periods on condition that the offender addresses his or her criminal behaviour in the meantime. They are similar to community based sentences, but are not formally considered as a final disposition of the case. Most of these involve offenders being referred to programs by the court, but do not involve the court as a central player (Bull 2003).

In Victoria, court-related diversion schemes are well developed. For example, the Magistrates' Court has a Disability co-ordinator to deal with the needs of people with a disability, a Juvenile Justice Adult Court and Advice Support Service which targets offenders aged between 17 and 21 years and a bail advocacy program which assists defendants in accessing support services while on bail. In 2003, the Diversion Scheme was placed on a statutory footing (*Magistrates' Court Act* 1989, s.128A) and now, rather than being founded on the bail power, it is a formal condition of a magistrate's power to adjourn the hearing of the case.

The term 'diversion' is itself problematic, because it assumes that there is a proper and pre-ordained path for a dispute leading to the court from which any other process is a derogation. Problem-oriented courts and similar courts are not diversionary in the sense that they may be perfectly appropriate mechanisms for resolving disputes or dealing with problems that should not be dealt with anywhere else in the criminal justice system. Schemes which start and possibly end in the courts also might not be considered diversionary if there are other appropriate means of dealing with the case.

Other forms of court-related innovations must also be distinguished from diversionary programs or problem solving courts. One such is the innovation which falls under the banner of restorative justice. Over recent years dominant, court-based paradigm which has focused upon the offender and ignored the victim has been called into question by advocates of a new paradigm variously called 'restorative', 'transformative', participatory or 'reintegrative' justice, which is based on the principle that justice requires a response to crime which balances the needs of victims, offenders and citizens in general, all of whom must be involved in the sentencing process. In some jurisdictions, restorative justice conferences are annexed to courts and may be taken into account in the formal sentence process. In others, the processes are completely separate.

The term 'restorative justice' is often used in relation to community courts, but tends to refer to the idea of 'restoration' or 'reparation' made to the community through the sanction of community work, such as the cleaning of graffiti. In these cases, the community is regarded as the victim of the crime (Phelan 2003:111).

There are a number of other variations in the problem-solving court models. Some are established under their own statute, some are based on bail powers, some are formal and others are informal divisions of existing courts, some have dedicated staff while in others staff are rotated.

In 2001, I briefly surveyed the development of problem-oriented courts in Australia (Freiberg 2001). The following section provides an up-date of the development of these and other courts, after which I will examine the possible future for these courts and the court system more generally.

PROBLEM-ORIENTED COURTS

Drug Courts

Australia has six drug courts which operate in New South Wales (1999), Queensland (2000), South Australia (2000) and Western Australia (2001) and Victoria (2002). The Northern Territory announced its intention to open a drug court in 2003 but it has not yet been established. Two specialist youth drug courts have also been established in New South Wales (NSW) and Western Australia (WA).

Three of the Australian jurisdictions have provided their drug courts with a separate legislative foundation, one as a special Act effectively establishing the drug court as a separate entity, (*Drug Court Act* 1999 (NSW)) and two as sentencing dispositions available in special divisions of the Magistrates' Court (*Drug Rehabilitation (Court Diversion) Act* 2000 (Qld); *Sentencing Act* 1991 (Vic) as amended by the *Sentencing (Amendment) Act* 2002). South Australia operates under its general bail legislation (*Bail Act* 1985 (SA)), which provides judicial officers with wide discretion in dealing with offenders brought before the courts. Western Australia has been primarily a bail based scheme but in 2003 Parliament passed the *Sentencing Legislation (Amendment and Repeal) Act* 2003 which creates a Pre-Sentence Order' which can be used by the Drug Court.

All of the drug court programs were introduced on a pilot basis, their continuation being subject to satisfactory evaluation.

The New South Wales Drug court was evaluated by Lind et al . The study found that 43% of those who entered the drug court program were terminated for further offences or for non-compliance with program conditions (Lind et al 2002: 63). However, in relation to recidivism, the study also found that treated subjects took longer to commit a range of offences than the control group and their offending rate was also lower (Lind et al 2002: vii). The evaluation also found significant decreases in drug use during the supervision period and this was maintained for some period of time (Freeman 2002: 22). The health and well-being of participants in the program were significantly improved. Overall, the evaluation found that the average cost for drug court participants was slightly less than for a comparable group who were not put on the program but sent to prison instead (Lind et al 2002).

In Queensland, the evaluation of the pilot phase found that during that period 555 people were referred for assessment to the drug court. In all 97 refused to participate and 129 were ineligible. There were 65 people who were still in the assessment phase, 34 of whom had failed to appear and had outstanding arrest warrants. Intensive drug rehabilitation orders (IDRO) were issued to 264 people. Of these people 1 had withdrawn, 113 had their orders terminated and 23 people had failed to report and had outstanding arrest warrants. There were 83 active participants and 44 graduates (Makkai

& Veraar 2003). By the end of September 2003, after the cut off date for the evaluation, 70 people had graduated from the program.

The evaluation concluded that the people who completed the drug court program had reduced recidivism compared with those who were terminated and those who received custodial sentences. Most of those who complete the program do not re-offend and those who do re-offend take longer to do so compared to the other groups. Overall when looking at pre- and post-program offending reductions are greatest for those who graduate from the drug court (Makkai & Veraar 2003).

The evaluators note that those terminated from the program re-offend sooner than either graduates or those in the comparison groups. The evaluators suggest that risk assessment tools could be developed to identify these people most at risk of being terminated from the program early. This assessment could then be used to recommend that those most at risk be supervised more intensely or perhaps not referred in the first place.

The evaluation of the Perth Drug Court Pilot was completed in 2003, examining the furst two years of the court. In the two year period 729 offenders were referred to the program, of which nearly half were not accepted for the program. Of those on the program, over half completed. The more intensive the program, the higher the failure rate. There was no significant difference in recidivism rates between those on the program and those in comparison groups, though the evaluators recommended that further and better studies be made of this. The cost of the program was around $3 million over and above the cost of the normal running of the court, but it was considered that the new costs were offset by reduction in prison and detention costs. Overall, however, the study concluded that the court provided a useful and innovative means of providing community based interventions for drug offenders (Crime Research Centre 2003).

The evaluation of Victoria's drug court, now in operation for two and a half years, has not yet been published.

Mental Health court

Although the United States has rapidly developed mental health courts over the past decade, they have not grown as quickly in Australia, certainly not as rapidly as the drug courts.

South Australia's program, the Magistrates' Court Diversion Program commenced in Adelaide in 1999 to deal with mentally disordered or intellectually disabled offenders and has now been operating for four years (Dusmohamed and Burvill 2003). The aim of the court is to identify offenders with impaired mental or intellectual functioning early in the criminal justice process and provide speedy interventions which may address their offending behaviour. The interventions last between four to six months. The offences dealt with fall within the jurisdiction of the Magistrates' Court and a plea must be entered or an indication given that the charges will not be contested.

The same magistrate hears all cases referred to the program, which has staff employed who manage the program, provide assessments, liaise with service providers and provide an interface between them and the courts. The court does not provide health services directly.

Defendants who are accepted into the program have their cases adjourned by the magistrate, who monitors their progress through regular reviews. The outcome of the process is a final determination of the hearing which may result in withdrawal of the charges or the imposition of a sentence.

The program moved beyond its pilot phase and now operates in seven courts in South Australia, where courts may sit on a weekly, fortnightly or monthly basis.

Hunter & McCrostie's process evaluation (2001) found that after two years the program was operating as intended. An outcome evaluation in 2004 (Skrzypiec, Wundersitz and McCrostie 2004) was not able to prove that the program reduced offending but it appeared that it was having some positive effect, particularly during the program phase.

The Victorian Public Advocate, Mr Julian Gardner has suggested that the idea of a mental health or mental impairment court should be considered for Victoria to deal with alleged minor offenders diagnosed with mental illnesses, personality disorders, acquired brain injury and some neurological disorders (Shiel 2004; Zammit 2004).

Community court

In 1993 the Midtown Community Court was established in New York City to deal with low level offenders convicted of offences such as prostitution, shoplifting, illegal vending and the like, in recognition of the fact that these highly recidivist offenders often suffer from substance abuse, physical and mental health problems and homelessness.

These courts differ from traditional American misdemeanour courts in that they attempt to bring together community organisations, local residents, merchants and other groups concerned with the amenity of their area, both in the organisation of the court (such as advisory boards, community mediation, and victim-offender mediation panels) and the provision of services.

A few years later a 'Community Justice Center' was established in Red Hook, Brooklyn, a poor and run-down neighbourhood, to deal with problems such as drugs, domestic violence and low level criminal cases and civil disputes such as those between landlords and tenants. The court, which sits in the Center and is presided over by a single judge, is part of a wider variety of welfare and counselling services, mediation and crime prevention programs.

Community courts primarily use sanctions such as community service but provide housing and other social services, health care, drug treatment and job placement or training services in or near the court complex. The court acts not just as a welfare broker, but uses the criminal process to emphasise the seriousness of the sanctioning process in an attempt to engender a sense of accountability or responsibility in offenders. The problem-oriented features which community courts contain include an enhanced and on-going judicial role in relation to the defendant, the use by the court of extensive personal background information relating to the offender, the employment by the court of resource co-ordinators who bring together and manage the legal and other services required to implement the sentence and the location of treatment and other providers in the court precinct to provide immediate assistance (Freiberg 2001).

These courts are only partly problem solving but they are not 'therapeutic', in that while they provide social and other types of support, they do not have the features of court

supervision or long term interventions. However, they provide a range of services such as short treatment readiness programs, health education and links with social services.

In October 2004, the Victorian Department of Justice convened a seminar in Melbourne, led by two staff of the Center for Court Innovation in New York, to discuss the concept of a Community Justice Centre. The idea mooted for Victoria was that

> It would allow a neighbourhood focus to justice to be applied in a local area which, in terms of its demographics and crime statistics, demonstrates the need for it. It would aim to make a difference in the local community, improving public safety and bolstering public confidence in justice. The types of offences which could be dealt with by the Community Justice Centre would be those lower level civil and criminal offences normally dealt with by the Magistrates' Court. This approach would allow a greater degree of case management to be applied than is normally the case in the courts and an integrated response to cases where legal issues and social justice problems were inextricably combined. The rationale of the Community Justice Centre would be similar to that of the problem solving courts of the Magistrates' Court (eg Koori Court; Drug Court), in that it would respond to the revolving door nature of crime and punishment by addressing the issues that lead to anti-social behaviour. However, it would do this in the context of the neighbourhood in which the person resides and be multi-dimensional in its operation (Victoria, Department of Justice, 2004).

No community court has yet been established in Australia. Phelan (2004:15) has questioned whether the notion of community courts ought to be adopted in Australia, given the differences between our urban environments, court systems, social service delivery and the operation of the criminal justice system, which is far more penal in the United States than it is in Australia.

Indigenous courts

Special courts or jurisdictions for Aboriginal offenders have existed at various times in Australia's history primarily as vehicles of colonial control (Harris 2004:27). The first indigenous court of the modern kind was established in 1999 in South Australia under Magistrate Chris Vass (South Australia, Magistrates Court). They have emerged partly as a response to the over-representation of indigenous people in the criminal justice system, partly because of the findings of the Royal Commission into Aboriginal Deaths in Custody and partly because of a recognition that the traditional adversarial system, both in structure, style and service delivery, is not appropriate to indigenous offenders (Marchetti and Daly 2004; Briggs and Auty 2003).

The courts are not problem-solving courts in the sense described above: rather than can be conceived of as a specialist court with some problem-solving and therapeutic overtones. The key features are participation, co-ordination of service delivery and community involvement.

Most jurisdiction have established a form of indigenous court. The variety of ithese courts has been summarised by Marchetti and Daly (2004) and presented in the attached table.

Their common features are that the offender must be indigenous and have entered a guilty plea and they are heard in the court of summary jurisdiction. The special aspect of this court is that while the magistrate remains the sentencing authority, he or she is assisted or advised by one or more respected persons from the offender's community. Courts often have indigenous court workers to assist them in the preparation of the case, in sentence planning and in the post-sentence process (Marchetti and Daly 2004). However, courts vary in relation to whether they operate in urban, rural or remote areas and the nature of indigenous participation.

In all jurisdictions but Victoria (*Magistrates' Court (Koori Court) Act* 2002 (Vic), s.4D), indigenous courts do not operate under special legislation. The Victorian legislation requires the court to exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of other laws will allow, to ensure that the proceedings are comprehensible to the defendants, their families and any members of the Aboriginal community who are present in court. It also allows the court to receive evidence from a wide variety of sources. In the period October 2002 to August 2003, the Victorian Koori courts dealt with 167 offenders.

Circle Sentencing is drawn from a Canadian rather than an American model. A Circle Sentencing Court was set up in Nowra in NSW in 2002. Unlike other indigenous courts, it doe not sit in a normal court room but in a place appropriate to the community.

> Participants sit in a circle, which has four community elders, the magistrate, the offender, the offender's support people, the Aboriginal Project Officer, the victim and their supporters, the defence counsel and the police prosecutor. The court is closed, and permission from the magistrate is required before observers can watch the proceedings by sitting outside the circle. The magistrate prepares a document, which describes the offence and relevant information about the offender's background. The text is elaborated orally by all participants in court, including the offender. Circle members discuss what would be an appropriate sentence plan for the offender. It reconvenes after a few months to assess the offender's progress (Potas et al 2003). The court typically considers just one offender, and convenes fortnightly. (Marchetti and Daly 2004:4).

The volume of cases heard in circle courts is not great. There are plans to operate two more courts in Walgett and Brewarrina in New South Wales. A circle court has been established in Yandeyarra in the Pilbara area of Western Australia. In the ACT, the Ngambra Circle Sentencing Option is being trialled from May 2004 for six months. Though there have been calls for the establishment of an Indigenous court in Darwin, this has not yet occurred (Tamiano 2004).

One derivative of Indigenous Courts has been the development, or proposed development, of Youth Indigenous courts in South Australia (Port Augusta, July 2004), Queensland (Brisbane, March 2004) and Victoria (Minister for Community Services 2004), in order to make Youth Court proceedings more relevant to young offenders.

Whether Indigenous courts of the type described above represent a move beyond Western incorporation of some aspects of indigenous justice, both in process and substance, remains to be seen. Harris has argued that the introduction of these courts might give rise

to greater recognition of Aboriginal customary law in the criminal justice system (Harris 2004:38).

Domestic violence court

Domestic violence courts are not as 'therapeutic' in design and orientation as are the drug and mental health courts. They are 'therapeutic' in the sense that they seek to deal with an offender's problems, voluntarily or otherwise, and provide support for victims but they do not seek to 'heal' families and the interventions are not relationship based. Rather they are intended to hold perpetrators accountable for their actions.

The courts have developed because of the perceived failure of the traditional court system to deal with family violence and the high recidivism rates of offenders. Australian domestic violence courts have drawn their inspiration from models in the United States and Canada.

Amongst the first courts in Australia to develop a family violence jurisdiction was the Magistrates' Court in Elizabeth in South Australia in 1997. In 1999 the model was extended to the Adelaide Magistrate's Court. A division of the court is designated as a Family Violence Court which deals with all matters relating to application for restraining orders and domestic violence related offending. Offenders charged with criminal offences are placed on bail for assessment of suitability into violence interventions programs and that bail can be extended for three months to enable them to participate in such programs. Failure to participate in the program results in the criminal proceedings resuming before the court and the evidence s that nearly half of the men referred for assessment to the violence intervention program to not participate in the program, but once in the program completion rates are high (Central Violence Intervention Program 2003:9).

Support services to the court are provided by the Central Violence Intervention Program, whose team includes a coordinator, a court women's worker, two men's workers and a children's worker. The program is part of a collaborative enterprise between the courts, the Department of Correctional Services, The Department of Human Services, the Salvation Army and the South Australian Police.

In the financial year 2002-2003 148 men were referred to the program for assessment, while 61 participated in assessment interviews and group work program (Central Violence Intervention Program 2003). This was an increase from 111 in 2001-2002. About 40% of referrals are from the Family Violence Court, but the program accepts referrals from other agencies and government departments. A very small number of referrals come from the Drug Court and the Magistrates' Diversion Court. The Court receives progress reports from the CVIP on the men's participation and progress in the program.

Originally, one magistrate was dedicated to the Family Violence Court, but recently the court decided to rotate the task among a group of four magistrates. This represents a move away from the original idea of a problem-oriented court which required a degree of specialisation and continuity.

Also in 1999 the Joondalup Family Violence Court Pilot Project was set up in Western Australia with the aims of reducing the incidence of family violence in the district, supporting victims in the criminal justice system and improving the system's response to

family violence. The court deals with family violence matters and primarily uses its bail and sentencing powers to deal with offenders. The programs are normally provided while the offender is on bail, for up to six months, and progress on the program is taken into account on sentence (Kirk and Culyer 2002).

Services are provided for victims. The court is a collaboration between the Department of Justice, the Western Australia Police, the Department of Family and Children's Services and a women's refuge (Western Australia, Department of Justice 2002).

In the period between 1 February 2000 and 1 October 2001 the Court dealt with 867 restraining order applications. 241 defendants appeared in the court (an average of around 12 matters per month). The court is not a post-plea court and contested cases came before it. These are then dealt with by the normal processes. Around one quarter of cases were contested. Of the convicted offenders, 48 offenders were referred to programmatic intervention. As of 2002, there was no evidence as to whether the recidivism rates of those who attended the programs was lower than for those who did not, or others who appeared in other courts.

The Court was evaluated in 2002 by the Department of Justice. Despite the fact that the evaluation found, that there was no evidence of better re-offending outcomes, a higher breach rate on supervised orders and no evidence of better health outcomes for victims, it was recommended that the court continue and be used as a model for other courts in Western Australia. The conclusion was that the court can affect both victims and perpetrators and that the use of case-management techniques for the supervision of offenders was a positive outcome, as well the inter-agency approach.

Victoria has had specialised lists for family violence cases in the Magistrates' Court for some time. However, in November 2002, and again in June 2004, the Victorian government announced the establishment of a new division of the Magistrates' Court to be known as the Domestic Violence Court. Two courts will operate in Heidelberg and Ballarat and will have the power to hear civil and criminal matters relating to domestic violence as well as Victim of Crime Assistance Tribunal Applications in order to provide a 'one stop shop' for such cases. The court will be presided over by specialist magistrates and will have the support of services relating to crisis intervention, counselling and victim support. Staff will provide referrals to legal services, housing and community care and Commonwealth social security agencies.

The court will be empowered to direct accused perpetrators to attend a Family Violence Court Intervention Program. The government has committed $5.2 million per year over four years to establish this pilot program. The Intervention program is funded separately at $1.645 million (over four years).

In October 2004 the New South Wales government announced that it will trial two new domestic violence courts, one in Dubbo and one in Campbelltown. These courts are intended to be 'tougher' on offenders by requiring offenders to complete mandatory programs, speeding up the criminal process and requiring the perpetrators to find alternative accommodation, rather than the victim.

Unlike drug courts, there are few outcome evaluations of domestic violence courts and little is known about what works and what does not in terms of the reduction of family violence (Ostrom 2003:105).

Sexual offences court

In 2003 the New South Wales government established pilot specialist court to deal specifically with child sexual assault cases. The court has the status of a District court. What distinguishes this court from the normal criminal court is that the court has facilities for CCTV, special pre-trial hearings, child friendly facilities and judicial officers, prosecutors and court staff selected because of their interest and training in child development (Victoria, Law Reform Commission 2004: 178). The pilot is still under evaluation.

The Victorian Law Reform Commission, in its Interim Report on Sexual Offences raised the possibility of developing a special court for trying summary and indictable sexual offences. It would be distinguished by having a specialist judicial officer presiding with expertise in the substantive law and rules of evidence applicable to sexual offences cases, better case management of complainants and a better environment in which such cases could be heard. The Commission also considered, in the alternative, whether both the Magistrates' Court and the County Court could establish specialist lists under the supervision of judicial offices with an interest in these areas. There was little support in the County Court for either model and it opposed specialisation in principle. The Magistrates' Court set up a pilot specialist list for committals in child sexual assault cases in January 2004 and favours a specialist sexual offences list The Commission's preference was for a specialist list in the Magistrates' Court for summary offences and committal in sexual offences matters involving children and complainants with a cognitive impairment (Victoria, Law Reform Commission 2004: Chapter 3).

Homelessness court

In June 2004, the Victorian Public Interest Law Clearing House Homeless Person's Legal Clinic published a discussion paper broaching the concept of a Homeless Persons' Court for Victoria (PILCH 2004).

Having identified the homeless as a specific social group in need, the Discussion Paper suggests that the Magistrate's Court might consider a specialist court or list which would use the authority of the court to 'administer a range of sentences that address the offender's homelessness' (PILCH 2004:10) and provide an environment that encouraged homeless people to attend court. Such a court or list might be more flexible in its use of sentencing options, or might use new options, and would co-ordinate a range of programs which would deal with offenders health and economic problems and provide education, skills and counselling programs.

Teen Courts

The concept of 'teen courts', which has developed over the past two decades in the United States, has not yet taken hold in Australia, though the idea has been mooted in Western Australia, but without much enthusiasm (Omaji nd). A teen court is a diversion program, rather than a formal court, under which young offenders with no, or limited prior criminal history, are brought before their peers in a mock court format to face

‘charges’ relating to their criminal behaviour. Their peers perform the roles of prosecution, defence and jury and decide the outcome of the case. The offender must admit guilt before attending the court and must agree in advance to abide by the decision and the court. Failure to do so will see the case returned to a formal juvenile court. There are over 670 teen courts in the United States (Butts and Buck 2000:1).

These courts are regarded as therapeutic in that offenders are more likely to take responsibility for their actions, more likely to have rehabilitative outcomes, more likely to be regarded as fair and more participatory. Victim participation is possible, but not a normal part of the process (Shiff and Wexler 1996).

Teen courts may not yet have found favour because of the many youth justice and diversionary options which are available to the police and courts in this country and the development of restorative justice options which may have crowded out other innovations, although the concepts are different.

EXPANDING OR IMPLEMENTING PROBLEM-ORIENTED JUSTICE

There have been many innovations in the court system over the past five years. Some of the courts are now out of their pilot stages and are flying independently. They have overcome the initial scepticism and teething problems that always attend new programs. Despite some public and political criticisms, most have survived past the embryonic stage into that of what I would term ‘mature infancy’. Together with the development of the theory of therapeutic jurisprudence, they have presented governments and courts with fresh perspectives and approaches to long-standing social and legal problems.

They are still small scale and generally resource intensive. Although some have been evaluated, the evaluations have not been fully satisfactory because the time scales have been short and the sample sizes small. The effects of programs on recidivism have been minimal if not non-existent, though performance of offenders during the program has been better. Alternatively, the argument might be made that if the offenders were in custody, society would be equally protected. Other common findings are that the courts and their associated programs result in better health and well-being outcomes, that better working relationships have been established between courts, law enforcement, corrections, government agencies and social service providers. Interventions tend to occur earlier and more intensively and the social and economic conditions of offenders improves as more services are provided. Courts have been made aware, or if aware, have been able to respond to the medical and social context of crime. The most powerful finding from the various studies is that they have delivered more procedural justice to the participants, who feel that they have been listened to and that the process is relatively fair. That is no small gain (Bull 2003).

However, the broader questions still remain to be answered (Berman 2004:6-7). Do the problem-solving courts solve the problems they purport to identify? Are they cost-effective? How satisfied are the offenders and the people working in the system? Has public confidence in the criminal justice system improved in the areas in which the courts operate?

The immediate question for policy makers is where to go now? There are two mechanisms by which problem-oriented justice can be further developed, if that is what is

decided. The first is to create more specialised courts: either to encompass more problems or to provide more courts in places that they do not currently operate. The second is to insert or integrate a problem-solving orientation into the mainstream criminal justice system.

The problem with the first approach is that it maintains the distinction between 'normal' courts and these other courts. It leaves the traditional courts unchanged and therefore does not challenge the underlying premise of the validity or usefulness of adversarial justice. Secondly, it is expensive to attempt to reproduce 'full service' courts in every region for every purpose. Thirdly, it marginalises those involved in problem-solving courts and leaves them open to the criticism that they are too specialised or too 'problem-specific'.

The second approach, which is to generalise the elements of the problem-oriented approach, is that which is being developed by the Center for Court Innovation in New York (Berman 2004). Its current focus is to explore whether it is possible to 'uncouple problem-solving' from specialization?' (Berman 2004:2). Drawing from its own experience and research it identifies a number of problems. The first, not surprisingly, is the issue of resources. Problem-oriented courts require specialised staff, money and access to medical, social and other services. The second, problem is philosophical (Berman 2004:3). Problem-oriented courts challenge the traditional approaches of the courts, which are amongst the most traditional of our social institutions. Adversarial theory is deeply embedded in the teaching and practice of the law, albeit that most legal practice takes place away from the court room and even where litigation occurs, most cases are settled out of court. Mediation and negotiation are almost mandated in many jurisdictions before a case can get to trial. In the criminal jurisdiction, most cases revolve around sentencing issues rather than questions of guilt or innocence. Thirdly, judicial leaders have yet to embrace this approach, though in some states of Australia, heads of courts of summary jurisdictions are particularly open to innovative ideas.

However, research with judges through focus groups found that they were open to a number of ideas as to how the principles and practices of problem-oriented courts may be applied more broadly (Forole et al 2004). They included

- Adoption of a problem-solving approach to cases so that the court was aware of the offender's particular problems and could craft more creative and personalised sanctions;
- Increased interaction with the defendant, though this could create problems for counsel who feared that their clients might incriminate themselves.
- On-going judicial supervision in cases where dispositional decisions could be conditionally adjourned or deferred.
- Increased use of social services, even where they are not directly available to the court, reflected in an increasing propensity to use treatment oriented sanctions.

Some courts were seen as being more appropriate for the adoption of some of these techniques, such as the juvenile and family courts. In relation to the former, many Australian juvenile courts increasingly use restorative justice programs and recently, in Victoria, a Panel appointed to consult on child protection (Kirby, Freiberg and Ward

2004) recommended that the Children's Court should move away from an adversarial paradigm and experiment with a more problem-oriented approach. Some of the features of the approach suggested for adoption included (Kirby et al 2004:46):

> non-adversarialism, access to services, ongoing judicial supervision (or at least a form of case management), more direct interaction between the court and the parties and inter-agency co-operation. Judge Jennifer Coate, President of the Melbourne Children's Court, and Magistrate Greg Levine indicated that they would welcome mechanisms whereby the court could have direct access to services and agencies for the parties appearing before the Court, an approach which appears to be working well in some courts abroad. In some circumstances the court would welcome having a supervisory role over their orders and the conditions attached as a closer form of accountability. Presently, supervision may be undertaken by the Secretary, but not by the court.

The Victorian government has proceeded further than most in developing a policy in relation to problem-solving courts. The Attorney-General's Justice Statement commits the government to work with the Magistrates' Court in developing a policy framework for expanding problem-solving court (Victoria 2004:61). It has already established a small unit with the Courts Services Branch to develop and implement its policies. The expansion will take place by expanding the number of courts across the state and possibly to the higher courts. Victoria's approach is to (Victoria 2004:61):

- Develop a spectrum of responses from the intensive, differentiated court approach to support services provided to mainstream court lists
- Identifying common methodologies while retaining the flexibility to provide services specific to a particular type of problem, for example, homelessness.
- Identifying the most effective interventions and the point at which they should be made.
- Establishing proper accountability frameworks that clearly identify the goals for the programs and who is responsible for their achievement.
- Identifying the degree of legislative support required for problem-solving approaches, and
- Providing an implementation strategy that provides appropriate training for those involved in these initiatives and a change program that integrates them in to the mainstream operation of the Magistrates' Court.

The Justice Statement articulates four principles that should guide the development of the framework

- Co-operative practices: co-operation with service providers, with the courts in imposing sentences, with police, corrections and human services agencies.
- Policy consistency: consistency with overall strategies, for example with Aboriginal Justice and health strategies, with crime prevention and correctional strategies now in place.

- Minimum necessary intervention: applying the principle of parsimony, using appropriate (or alternative or diversionary) options or interventions.
- Responsive procedures: emphasises procedural justice and the importance of fair and participatory processes. Built on foundations of therapeutic jurisprudence.

Strategically, the Victorian Justice Statement regards the problem-oriented courts as an addition to its strategies to reduce crime and provide a fairer and more sensible approach to the problems faced by the disadvantaged and marginalised in the community. It sensibly sees the courts as only one of a range of responses to crime and justice, and one which will not provide a magic bullet to solve most of society's ills (Phelan 2004:9).

The United States is further advanced in the development of problem-solving courts. Its Center for Court Innovation is a model of a public-private partnership in policy development and service delivery. It could profitably be emulated in this country as a collaboration between courts, government, the private and community sectors and universities. In his most recent reflection on the way forward, the Centre's Director Greg Berman has suggested six 'strategic investments' that advocates of problem-solving courts can make in promoting legal and cultural change (Berman 2004:4):

- Information: to provide advice about how courts operate and how a problem-solving approach might improve courts' performance;
- Education/training: of court staff, both judicial officers and other staff about the history, theory and practice of problem-solving courts;
- Incentives: given by government agencies to courts which wish to adopt this approach;
- On-going research and development: into the achievement and failures of problem-oriented courts and into the operation of the court system more broadly, in order to institutionalise innovation;
- Legal curriculum: to provide law students with an understanding of such courts and encourage them to learn more about them and practice in their jurisdiction.
- Communication: to make more people aware of the courts and their role.

Together with the type of policy work undertaken by the Victorian government, this agenda for action can provide the foundation for more and better innovations in the court system.

REFERENCES

Berman, G. (2004) *The Hardest Sell? Problem-Solving Justice and the Challenges of Statewide Implementation*, Center for Court Innovation, New York.

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

Briggs, D. and Auty, K. (2003) Koori Court Victoria – Magistrates' (Koori Court) Act 2002, Unpublished paper delivered at ANZSOC Conference, Sydney.

Bull, M. (2003) *Just Treatment: A Review of International Programs for the Diversion of Drug Related Offenders from the Criminal Justice System*, School of Justice Studies, QUT.

Butts, J.A. and Buck, J. (2000) *Teen Courts: A Focus on Research*, Washington, Office of Juvenile Justice and Delinquency Prevention.

Central Violence Intervention Program (2003) *Information Bulletin No. 4: Data for the Period 1 July 2002 – 30 June 2003*, Adelaide.

Crime Research Centre, University of Western Australia (2003) *Evaluation of the Perth Drug Court Pilot Project*, Perth, Department of Justice.

Drug Court of New South Wales, 2000, *Drug Court of New South Wales Review Committee Report*, Sydney.

Dusmohamed, S. and Burvill, M. (2003) 'Development of a Specialist Sentencing Court in South Australia', 106 *Canberra Bulletin of Public Administration* 41-44.

Forole, D.J., Puffett, N., Rempel, M. and Byrne, F. (2004) *Can Innovation be Institutionalized? Problem-Solving in Mainstream Courts* Center for Court Innovation, New York.

Freeman, K., 2002, *New South Wales Drug Court Evaluation: Health, Well-Being and Participant Satisfaction*, Sydney: New South Wales Bureau of Crime Statistics and Research.

Freeman, K., Karski, R.L., and Doak, P. (2000) *New South Wales Drug Court Evaluation: Program and Participant Profiles*, *Crime and Justice Bulletin* No. 50. Sydney: New South Wales Bureau of Crime Statistics and Research.

Freiberg, A. (2000) 'Australian Drug Courts', 24 *Criminal Law Journal* 213-235.

Freiberg, A. (2001) 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' 11 *Journal of Judicial Administration* 8 – 27.

Freiberg, A. (2001a) *Sentencing Review: Drug Courts and Related Sentencing Options*, Department of Justice, Melbourne, Victoria, 1 – 48.

Freiberg, A. (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism? 20(2) *Law in Context* 1-18.

Freiberg, A. and Morgan, N. (2004) 'Between Bail and Sentence: The Conflation of Dispositional Options', 15(3) *Current Issues in Criminal Justice* 220-236.

Harris, M. (2004) 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' 16(1) *Current Issues in Criminal Justice* 26-41.

Hunter, N. and McCrostie, H. (2001) *Magistrates' Court Diversion Program: Overview of Key Data Findings*, Information Bulletin No. 20, Adelaide, Office of Crime Statistics and Research.

Kirby, P., Freiberg, A. and Ward, L. (2004) *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project*, Department of Human Services, Melbourne, 1-85.

Kirk, T. and Culyer, B. (2002) *A Strategy for Intervention in the Area of Family Violence*, Paper presented at the Probation and Community Corrections: Making the Community Safer Conference, Australian Institute of Criminology, Perth.

Lind, B., et. al, (2002) *New South Wales Drug Court Evaluation: Cost-Effectiveness*, Sydney: New South Wales Bureau of Crime Statistics and Research.

Makkai, T. (2002) 'The Emergence of Drug Treatment Courts in Australia', 37 *Journal of Substance Misuse and Use* 1567-1594.

Makkai, T. and Veraar, K., (2003) *Final Report on the South East Queensland Drug Court*, Australian Institute of Criminology Technical and Background Paper Series, No. 6, Australian Institute of Criminology, Canberra.

Makkai, T., (1998) 'Drug Courts: Issues and Prospects' *Trends & Issues in Crime and Criminal Justice,* No. 95, Canberra: Australian Institute of Criminology.

Marchetti, E. and Daly, K. (2004) *Indigenous Courts and Justice Practices in Australia*, Trends and Issues in Criminal Justice No. 277, Australian Institute of Criminology, Canberra.

Omaji, P. (nd) *Making Room in the Inn: Teen Courts in Australia's Juvenile Justice System*, www.angelfire.com/biz/nationalteencourts/SpeechOmaji080899.html (accessed 18 November 2004).

Ostrom, B.J. (2003) 'Domestic Violence Courts' 3(1) *Criminology and Public Policy* 105-108.

Phelan, A. (2003-4) 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia, Parts I-III', 13 *Journal of Judicial Administration* 98-130; 137-181; 244-258.

PILCH (2004) *A Homeless Person's Court for Victoria?,* Melbourne, PILCH.

Potas, I., Smart, J., Brignell, G., Thomas, B. and Lawrie, r. (2003) *Circle Sentencing in New South Wales: A Review and Evaluation*, Sydney, Judicial Commission of NSW.

Shiel, F. (2004) 'Call for Court for Mentally Impaired', *The Age*, 15 March.

Shiff, A.R. and Wexler, D.B. (1996) 'Teen Court: A Therapeutic Jurisprudence Perspective', *Criminal Law Bulletin* 342-357.

Skrzypiec, G., Wundersitz, J. and McCrostie, H. (2004) *Magistrates' Court Diversion Program: An Analysis of Post-Program Offending*, Adelaide, Office of Crime Statistics and Research.

South Australia, Magistrates Court, (2004) *Aboriginal Court Days*, http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html (accessed 18 November 2004).

Tamiano, D. (2004) ‘Koori Court in Darwin?, *Koori Mail*, 21 April.
Taplin, S., 2002, *The New South Wales Drug Court Evaluation: A Process Evaluation*, Sydney: New South Wales Bureau of Crime Statistics and Research.
Victoria, Attorney-General (2004) *Attorney-General's Justice Statement: New Directions for the Victoria Justice System 2004-2014*, Melbourne, Department of Justice.
Victoria, Department of Justice (2004) *Neighbourhood Justice Centres – The Victorian Concept*, Unpublished paper, October.
Victoria, Law Reform Commission (2004) *Final Report, Sexual Offences*, Melbourne, Law Reform Commission.
Victoria, Minister for Community Services, (2004) *Media Release: Australia's First Children's Court for Koories*, March 4.
Western Australia, Department of Justice, Court Services Division (2002) *Joondalup Family Violence Court*, Perth, Department of Justice, www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%253B/justicecontent.extranet.justice.wa.gov.au/content/files/family_violence_court_final_report_part1.pdf+joondalup+family+violence+court&hl=en&ie=UTF-8
Zammit, A. (2004) *Mental Impairment and the Criminal Justice System*, Melbourne, Office of the Public Advocate.