
Judging, judicial values and judicial conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts

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Principles guiding judicial conduct generally, such as those in the Guide to Judicial Conduct, are influenced by the concept of an adversarial trial. Here the judicial officer is a neutral, largely uninvolved umpire seeking to ensure the fairness of a process mainly conducted by the parties. However, judging in problem-solving courts and in Indigenous sentencing courts generally requires an involved judicial officer, some collaborative processes, and increased interaction between the judicial officer, participants, court team members and community members. Judging in these contexts is often informed by therapeutic jurisprudence principles. This article argues that, properly done, judging in these courts and applying therapeutic jurisprudence in judging in mainstream lists does not violate the judicial function or judicial values of independence, impartiality and integrity. It also argues that an ethic of care should not only underlie these newer forms of judging but also all other forms of judging. It suggests that problematic situations concerning proper judicial conduct in and out of court may be addressed through the application of these judicial values.

Indigenous sentencing courts and problem-solving courts such as drug courts, mental health courts, family violence courts and community courts have a unique role in the legal system of Australia and in a number of other countries. These courts have used processes that promote goals far broader than the handing down of a judgment or the imposition of a sentence resulting from the determination of the facts and the application of the relevant law to the facts.

Indigenous sentencing courts seek to promote a broad range of goals such as providing a more meaningful justice system experience for Indigenous defendants, directly involving members of the Indigenous community as participants and decision-makers in the court process and addressing the deeper causes of Indigenous offending. In general terms, problem-solving courts endeavour to address underlying issues relating to legal problems through the use of an interdisciplinary approach and, in many cases, judicial supervision, so as to promote a more comprehensive resolution of the problems. Some judicial officers are also applying principles of judging in problem-solving courts in mainstream lists.

With these new processes come new forms of judging and advocacy and the application of interpersonal and intrapersonal skills that historically have not normally been associated with the judiciary or the legal profession. Arguably, judging in these contexts requires the judicial officer to be mindful of the effect of the processes they use on the wellbeing of those involved. This is the province of an emerging area of law called therapeutic jurisprudence, which studies the effect of the law and legal processes on the wellbeing of those affected by them.¹

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¹ Wexler DB and Winick BJ (eds), *Law in a Therapeutic Key* (Carolina Academic Press, 1996). For Australian and New Zealand resources on therapeutic jurisprudence, see the Australasian Therapeutic Jurisprudence Clearinghouse via a link at <http://www.aija.org.au> viewed 14 December 2009. For international resources on therapeutic jurisprudence, see the International Network on Therapeutic Jurisprudence at: <http://www.law.arizona.edu/depts/upr-intj> viewed 14 December 2009.

In addition, the novel situations faced by judicial officers when judging in these courts or in certain situations when interacting with others outside court raises issues concerning what values underlie these forms of judging, whether the processes are consistent with the judicial function and how to resolve particular challenges without compromising judicial values or the goals of these programs.

Some critics, particularly those based in the United States, suggest that problem-solving courts compromise the judicial function. A principal criticism is that problem-solving court judges are trespassing into the province of the Executive.² While this criticism has arisen in the context of the United States judiciary, which is more intrusive in its approach to the activities of the Executive and community organisations than the Australian judiciary, it is important that the criticism relating to the function of the judiciary is properly addressed.

This article argues that the core judicial function need not be compromised when judging in a problem-solving court or in an Indigenous sentencing court or when applying therapeutic jurisprudence principles in a mainstream court. Moreover, it argues that key judicial values of independence, impartiality and integrity need not be compromised when judging in these courts. Finally it argues that the focus of these court processes on wellbeing illustrates the importance of an ethic of care as a value in judging not only in problem-solving courts and Indigenous sentencing courts but also in all other forms of judging.

The first part of the article considers the essential elements of judging in problem-solving courts and Indigenous sentencing courts and in applying therapeutic principles in general lists in the light of the main aspects of the judicial function. The second part of the article examines the values underlying judging and, in particular, the values that underlie judging in problem-solving courts and Indigenous sentencing courts and in applying therapeutic principles in judging in mainstream courts. The third part of the article gives examples of ethical challenges that can arise from judging in these contexts and suggests how, through the application of judicial values, judicial officers can address these challenges.

CHANGING JUDICIAL ROLES

The emergence of problem-solving courts and Indigenous sentencing courts has required judicial officers presiding in these courts to adjust to new ways of functioning. In general terms judging in these courts involves the use of less adversarial and more collaborative processes; the recognition that the court process itself can be an important means of contributing to addressing underlying issues through the respectful and inclusive manner in which a participant's case is addressed; and the greater use of judicial interpersonal skills to facilitate the process than has been traditionally the case in mainstream courts.

At first glance, these courts appear to depart from core aspects of the judicial function of resolving legal problems by a determination of the facts and the applicable law and the application of the law to the facts to reach a judgment. However, it is argued toward the end of this part of the article that, instead, problem-solving courts and Indigenous sentencing courts enhance the fact-finding and decision-making processes.

Problem-solving courts

The term "problem-solving court" is an umbrella term used to describe specialist courts or lists that seek to address the underlying issues connected with a legal problem through the use of some or all of processes such as judicial supervision of participants, a multidisciplinary team, collaborative decision-making processes and the support of community agencies. These courts emerged in the United States, not as a coordinated response by the legislature or Executive, but largely as a response

² See eg Hoffman MB, "The Drug Court Scandal" (1999-2000) 78 NCL Rev 1439 at 1479; Hoffman MB, "Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous" (2001-2002) 29 Ford Urban LJ 2063 at 2072.

by individual judges.³ Faced with increasing court lists, the phenomenon of the court as a “revolving door” for many criminal defendants and the courts increasingly being seen as a dumping ground for social problems, these judges have sought to use creative means to address these problems.

The first drug court was established in Dade County, Miami in 1989. According to the United States Office of National Drug Control Policy, there are now more than 2,140 drug courts in operation in that country and another 284 drug courts are being planned or developed.⁴ Following the establishment of drug courts, the problem-solving approach in United States courts has extended to other forms of legal problems and underlying issues. Problem-solving courts include various kinds of drug courts – adult, juvenile, family dependency (child welfare), tribal, veterans and campus drug courts – family violence courts, mental health courts, re-entry courts and community courts.

A growing number of jurisdictions around the world have established problem-solving courts, including Australia, Canada, Scotland, England, Ireland, New Zealand and Brazil. Australian problem-solving court programs have largely been the product of the involvement of the Executive – and in some cases the legislature as well – with some local judicial initiatives. In Australia there are drug courts in New South Wales, Queensland, Western Australia, South Australia and Victoria. Several jurisdictions have family violence courts.⁵ Some have special mental health lists in magistrate’s courts. Victoria has the only community court in Australia – the Collingwood Neighbourhood Justice Centre. Australian problem-solving courts have been established almost entirely in the criminal jurisdiction – although a project in Geraldton, Western Australia did use a problem-solving court approach in child welfare proceedings.⁶

Berman and Feinblatt assert that the following are the “hallmarks of problem-solving justice”:⁷

1. Redefining goals. The court is concerned not simply with the legal outcome and the proper process for reaching that outcome but with broader outcomes directed at resolving issues underlying the legal problem – such as substance abuse, homelessness, unemployment, mental health issues and the like.
2. Making the most of judicial authority. Judicial authority is seen to be an effective means of promoting compliance with court orders: “Put simply, they [participants in a drug court program] are more likely to show up, to keep clean and sober, and to stay out of trouble when a judge is checking up on them (as opposed to a probation or parole officer or a counsellor)”.⁸
3. Putting problems in context. Judicial officers and lawyers involved in these courts try to view the legal problem in a broader context rather than as isolated issues. Thus they may also examine the health, social, economic and relational aspects of the problem that has brought a person to court.
4. Forming creative partnerships. Problem-solving courts often develop partnerships with local treatment and community agencies to support the work of the court. Thus a drug court may have strong working connections with residential and non-residential drug treatment services, health agencies, community support agencies and urine testing laboratories.
5. Rethinking traditional roles. Rather than working in a purely adversarial way, in a drug court the prosecution and the defence may be working collaboratively as members of a team to promote common goals such as the rehabilitation of the participant. Instead of being the uninvolved arbiter, the judicial officer is actively involved in interacting with participants as part of the supervision process, and in interacting with the court team and community agencies.

³ Berman G and Feinblatt J, *Good Courts: The Case for Problem-Solving Justice* (The New Press, 2005), p 38.

⁴ Office of National Drug Control Policy, *Drug Courts*, <http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html> viewed 26 October 2009.

⁵ For a more thorough review of problem-solving court programs in Australia, see: King M, Freiberg A, Batagol B and Hyams R, *Non-Adversarial Justice* (Federation Press, 2009), Ch 9.

⁶ King MS and Tataschiere CL, “Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications” (2006) 1 *eLaw: Murdoch University Electronic Journal of Law, Special Series* 78, <http://www.elaw.murdoch.edu.au> viewed 10 May 2009.

⁷ Berman and Feinblatt, n 3, pp 34-38.

⁸ Berman and Feinblatt, n 3, p 35.

There is no single approach to judging in problem-solving courts. To a significant degree judging in these courts has been determined by the objects of the individual court program and the preference of the relevant judicial officer. For example, family violence courts in the United States have largely been seen to be directed towards the protection of victims rather than the rehabilitation of perpetrators.⁹ One approach to judicial supervision is to have perpetrators come back to court regularly so that the judicial officer can keep an eye on them to ensure they have not been violent.¹⁰ The assumption about the perpetrator is that they are liable to be violent unless the court keeps them in check.¹¹

On the other hand, other United States family violence courts use similar processes to drug courts to engage with the perpetrator to help support their motivation to change and to engage in appropriate treatment and support programs.¹² In Australia, although the paramount goal of family violence courts is the protection of the victim, most court programs also see their goals as including promoting the rehabilitation of perpetrators.

As part of judicial supervision, drug courts use a system of sanctions and rewards – a carrot and stick approach – to encourage participants to comply with the court program and to abstain from substance abuse.¹³ Sanctions may include increased frequency of urine testing, court appearances or counselling sessions or short periods of incarceration. Rewards may include decreased frequency of urine testing, court appearances and counselling sessions and gift vouchers. Praise, applause in court and graduation to the next phase of the program are also given as rewards. Upon successful completion of the court program there is a graduation ceremony where the participant receives a graduation certificate.

Drug court review hearings are likely to involve a more extensive engagement by the judicial officer with the participant than occurs in mainstream courts. Commonly the judicial officer takes an interest in the participant, asking about how different aspects of his or her life are progressing – work, family, education, health and so on. The judicial officer gives praise where warranted and offers encouragement when it is needed. The judicial officer also deals with program breaches, imposing sanctions where appropriate or terminating participants from the program in the case of the most serious breaches.

Some judicial officers have begun to apply strategies used in problem-solving courts – particularly those associated with therapeutic jurisprudence – in mainstream courts.¹⁴ For example, the various diversion programs operating in magistrates courts throughout Australia provide the opportunity for greater interaction between the magistrate and defendant and for the magistrate to review a defendant's progress. However, in such cases review hearings are less frequent than for drug courts and there is less likely to be a multidisciplinary team that supports the court process.

Nolan points out that although problem-solving courts originated in the United States, when they are used in other countries a model of the problem-solving court is adapted to meet local needs. For example, as compared to the United States, in Australia and Canada there is a greater appreciation and application of therapeutic jurisprudence in problem-solving court programs and also a greater

⁹ King M and Batagol B, "Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts" (forthcoming) *International Journal of Law and Psychiatry*.

¹⁰ King and Batagol, n 9.

¹¹ King and Batagol, n 9.

¹² King and Batagol, n 9. See also: Fritzler RB and Simon LMJ, "Creating a Domestic Violence Court: Combat in the Trenches" (2000) 37(1) *Court Review* 28, <http://www.aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9FritzlerSimon.pdf> viewed 19 June 2009.

¹³ King MS, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009), pp 32-33, <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf> viewed 25 November 2009.

¹⁴ Examples of how such an approach can be taken in mainstream courts are discussed more extensively in King, n 13, Ch 8.

willingness to reflect critically on its use.¹⁵ This is illustrated in recent developments in judging in problem-solving courts and in seeking to apply therapeutic jurisprudence principles more widely in mainstream courts.

In Australia there is a move away from the rhetoric of problem-solving towards a concept of solution-focused judging.¹⁶ The move is on conceptual and practical levels. Conceptually, it arises from dissatisfaction with the notion of problem-solving courts – that it is the courts that solve the underlying problems associated with offending or other legal problems. The concept of courts as institutions that solve offenders' problems or the problems of parents who are parties to child welfare proceedings is contained in the United States literature concerning these types of courts and in the formulation of the principles that underlie their functioning.¹⁷ For example, the ten essential components of drug courts are about things that happen to participants or about matters in which they are not directly involved, but they are not about actively involving participants in contributing to decisions that concern their rehabilitation and wellbeing.¹⁸ Arguably, an exception is mental health courts.¹⁹

Solution-focused judging is based on the premise that participants in problem-solving court programs and parties in other proceedings should be key players in the formulation and implementation of plans to address their underlying issues and associated legal problems. It notes that participants are often engaged in applying strategies to address these issues before entering court programs, during the court program and afterwards.²⁰ Court programs, like other treatment interventions, are time-limited interventions to promote positive behavioural change.²¹

In solution-focused judging:

The court is more a facilitator and a change agent than an institution that makes the change. The court sees participants as being able to engage in the natural change process themselves, with the support of the judicial officer and the court team. Indeed, the fact that much positive behavioural change in individuals with problems occurs without the intervention of authorities or treatment agencies supports the proposition that change is natural.²²

Following the therapeutic jurisprudence principle that self-determination is generally more effective in promoting positive behavioural change than coercion or paternalism,²³ the court uses strategies to actively involve participants in formulating and implementing a rehabilitation plan and in addressing problems.²⁴ Although individual judicial officers may well implement this approach within problem-solving courts, the conceptual framework and general approach of these courts needs to change from problem-solving to solution-focused.

A growing body of literature explains the differences between these forms of judging and the mainstream approach to judging. The former have been thought of as a form of leadership.²⁵ When the principles of therapeutic jurisprudence are applied in judging it has been thought of as transformational leadership, a form of leadership used in diverse areas of society that has been found

¹⁵ Nolan JL, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press, 2009), p 95.

¹⁶ King, n 13, p 3.

¹⁷ Examples are discussed in King MS, "Should Problem-Solving Courts be Solution-Oriented Courts?", paper presented to the 31st Congress of the International Academy of Law and Mental Health, New York, 28 June – 4 July 2009.

¹⁸ King, n 17.

¹⁹ King, n 17.

²⁰ King, n 17.

²¹ King, n 17.

²² King, n 13, p 4.

²³ Winick BJ, "On Autonomy: Legal and Psychological Perspectives" (1992) 37 Vill LR 1705.

²⁴ This approach is described more extensively in King, n 13.

²⁵ King MS, "Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership" (2008) 17 JJA 155.

to be effective in promoting higher levels of performance and increased satisfaction in tasks undertaken.²⁶ Some have compared this judicial approach to coaching²⁷ – arguably itself a form of leadership.

Popovic conceives of the differences between the mainstream judging approach with problem-solving, therapeutic jurisprudence approaches in terms of the following contrasting emphases:²⁸

- dispassionate – not concerned with the individual as a person but as a party v interested in litigant's welfare;
- impersonal – the person is a party in a case v personal, direct engagement with the participant;
- use of legal technical language v use of language parties understand;
- limited communication v open communication;
- communication and eye contact with counsel v direct communication with participant;
- impervious to nuance v attentiveness to special needs and circumstances of party;
- formal hearing v use of more inclusive and less formal processes;
- judicial officer decides v more collaborative approach to decision-making;
- omnipotent v empowering others;
- punitive v positive and affirming of others;
- never make deals with parties v sanctions and rewards;
- inert and uninvolved v proactive, involved in problem-solving;
- relies on legal authorities and counsel for information v refers to other experts and disciplines for additional information.

In summary, judging in problem-solving courts and taking a solution-focused approach to judging in mainstream courts requires the judicial officer to take a more comprehensive approach to the legal problem and the party before the court; to work with other professionals and parties to promote the resolution of underlying issues; to be more actively involved than is common in other forms of judging; and to apply therapeutic skills directed at promoting positive behavioural change in participants.

Indigenous sentencing courts

While problem-solving courts emerged due to the need for a new approach by courts to address underlying issues relating to certain legal problems, Indigenous sentencing courts were introduced as a result of the needs of the Indigenous community and the problematic nature of justice system responses. Indigenous sentencing courts emerged as a result of the growing overrepresentation of Indigenous people in the criminal justice system; the recognition that existing justice system processes were ineffective in preventing crime or in promoting the rehabilitation of Indigenous offenders; and the realisation that justice system processes in many cases were culturally inappropriate.²⁹ It has also been suggested that these courts are a means of addressing key recommendations of the Royal Commission into Aboriginal Deaths in Custody relating to these issues and that the courts could complement Aboriginal Justice Agreements established in various jurisdictions.³⁰

Although over the years there have been various approaches by individual judicial officers to using processes that are more culturally sensitive to the needs of Indigenous peoples, the first

²⁶ King, n 25.

²⁷ Town M, "Coaches, Judges Have Much in Common" *Honolulu Advertiser*, 1 May 2006, <http://www.thehonoluluadvertiser.com/article/2006/May/01/op/FP605010303.html/?print+on> viewed 16 December 2006.

²⁸ Popovic J, "Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary" (2002) 20 *Law in Context* 121 at 129.

²⁹ Briggs D and Auty K, *Koori Court Victoria – Magistrates Court (Koori Court) Act 2002*, <http://www.isrcl.org/Papers/2004/Briggs.pdf> viewed 21 October 2009; Potas I, Smart J, Brignell G, Thomas B and Lawrie R, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales, 2003), p 1; Law Reform Commission of Western Australia, *Aboriginal Customary Laws Discussion Paper* (LRCWA, 2005), <http://www.lrc.justice.wa.gov.au/094p.html> viewed 21 October 2009.

³⁰ Marchetti E and Daly K, "Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model" (2007) 29 *Syd LR* 415 at 422.

recognised Indigenous sentencing court in Australia was the Nunga Court established in South Australia in June 1999.³¹ Since then Indigenous sentencing courts have been established in most States and Territories.

While legislation or practice directions relating to Australian Indigenous sentencing courts set out the specific aims of individual courts, in general the aims of these courts are to:³²

- involve Indigenous people in the sentencing process
- increase the confidence of Indigenous people in the sentencing process
- reduce the barriers between the courts and Indigenous people
- provide culturally appropriate and effective sentencing options
- rehabilitate offenders and give them the opportunity to make amends to the community
- provide offenders with support services that will assist them to overcome their offending behaviour
- provide support to victims of crime and enhance the rights and place of victims in the sentencing process
- make the community, families and the offender more accountable
- deter crime in the Indigenous community generally
- reduce recidivism
- provide judicial officers with an awareness of the social context of the offender and the offending
- reduce the rate of imprisonment of Indigenous offenders, though still imposing appropriate sentences
- decrease the number of deaths in custody
- increase the rate of appearances in court
- increase the compliance rate with community-based orders.

Indigenous court processes

There are diverse Indigenous sentencing courts operating in Australia. However, there are some features common to most models:³³

1. A less formal and more culturally sensitive venue for the court hearing. Elders or Respected Persons are directly involved in the court process.³⁴ Where a courtroom is used, the participants – including the judicial officer, prosecutor, counsel, the defendant and the Elders or Respected Persons – sit around the bar table. In some cases the court convenes in a venue away from the courthouse, one that is seen to be more accommodating for the parties involved. Indigenous artwork may be on the walls of the courtroom or other venue. However, in some Murri courts in Queensland, Elders sit on the bench alongside the magistrate.³⁵
2. Less formal procedure and more open communication. There is less stress on the role of the legal professionals involved; language usage is less formal and legal jargon avoided; and more open communication is encouraged.
3. Resource intensive. Considerably more time is taken for an Indigenous sentencing court case than a mainstream court would take in dealing with a similar case. There may be increased focus and effort on the parties present endeavouring to address underlying issues relating to the problem. There may also be dedicated Indigenous case workers and other staff involved.
4. Almost all Indigenous sentencing courts have been established in magistrate's courts. A Koori court operates in the Children's Court at Melbourne and also a pilot Koori court operates in the County Court of Victoria.

Some Indigenous sentencing courts also have collaborative decision-making processes – involving the Elders or Respected Persons and the magistrate or all participants in the court process, depending on the particular court model.

³¹ Potas et al, n 29, p 3.

³² King et al, n 5, pp 180-181.

³³ Law Reform Commission of Western Australia, n 29, pp 152-153.

³⁴ The term "Elder" is used in Circle Sentencing Courts in New South Wales. In Victoria the *Magistrates Court Act 1989* (s 4G) uses the term "Aboriginal elder or respected person".

³⁵ Personal communication with Magistrate Annette Hennessy, 29 October 2009.

It is not possible to cover all of the different models of Indigenous sentencing courts in this article. By way of illustration, the article briefly discusses a Murri court, circle sentencing in New South Wales and Koori courts in Victoria.

There are several models of Murri courts operating in Queensland.³⁶ In Rockhampton, when a case is adjourned to be dealt with in the Murri Court the defendant is interviewed by both corrections and a local Justice Group for the purpose of preparing reports for the magistrate to assist in sentencing. The Justice Group comprises members of the local Indigenous community. When the matter comes back to court prior to the court hearing the Justice Group and Elder will speak with the defendant prior to court. When the matter is dealt with in court, the Elder – who sits on the bench with the magistrate – will engage with the defendant prior to sentencing and may admonish the defendant for his offending. The Elder is not involved in decision-making concerning sentencing but may make recommendations concerning the terms of any order placing the defendant under supervision in the community.

In New South Wales, circle sentencing has been the preferred model. Its use in that State has been influenced by the procedures and practises of circle sentencing programs in Canada.³⁷ Potas et al outline the procedures for circle sentencing in New South Wales:³⁸

1. The magistrate welcomes all participants to the circle and formally opens proceedings.
2. Participants introduce themselves, explain who they are, their relationship with the defendant or victim, or their interest in the offence.
3. The magistrate explains the role of the circle, that it is a court and functions as a court.
4. The magistrate explains methods of proceeding in circle, circle guidelines and the rules of conduct within the circle, then outlines the facts.
5. The defendant will make comments regarding the offence and his or her commitment to rehabilitation. The solicitor for the defendant may outline any mitigating features.
6. The victim or a representative of the victim may make a statement regarding the impact of the offence.
7. Circle discussion: the prosecutor, offender, victim and community representatives are all provided with an opportunity to speak. The discussion can cover the offence, its impact on the victim and community, what needs to be done to right the wrong (what sentence should be imposed), and what support may be available for the defendant and victim. The circle should try to achieve a consensus on the outcome. During this time the magistrate outlines the available sentencing alternatives, because crucially, sentencing must fit within acceptable sentencing policies.
8. The magistrate provides a summary of the circle discussion and decisions reached.
9. The magistrate determines sentence, handing down the order of the court.
10. A date for review is set.
11. Closing remarks, magistrate formally closes the circle.

For circle sentencing, the removal of the trappings of the Western justice system is important – both in terms of the layout of the room and in terms of the processes that are used – because: “The system is entrenched with proprieties, rules and regulations that have always signified for Aboriginal people, their powerlessness and the power of white men over them”.³⁹ Even the absence of a desk or table separating the parties is seen as important: “A circle of people without a barrier between them broke down boundaries that have existed for over two hundred years”.⁴⁰

³⁶ The description of the Murri Court that follows is drawn from a personal communication with Magistrate Annette Hennessy, 29 October 2009.

³⁷ A description of an early circle sentencing process in Canada is contained in *R v Moses* (1992) 71 CCC (3d) 347. See also McNamara L, “The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines” (2000) 18 *Windsor Yearbook of Access to Justice* 60.

³⁸ Potas et al, n 29, pp 7-8.

³⁹ Dick D, “Circle Sentencing of Aboriginal Offenders – Victims Have a Say” paper presented to the Innovation – Promising Practices for Victims and Witnesses in the Criminal Justice System seminar, Australian Capital Territory, 23 October 2003, <http://www.victimsupport.act.gov.au/res/File/Doug%20Dick.pdf> viewed 22 October 2009.

⁴⁰ Dick, n 39.

Key aspects that distinguish circle sentencing from other projects such as the Koori court include the endeavour to promote consensus among circle members and the active promotion of the participation of victims in the process. In the case of both circle sentencing and Koori courts the magistrate retains the final sentencing discretion mainly to ensure that the sentence imposed is within the appropriate sentencing range.

The first Koori court was established at Shepparton, Victoria in 2002. Since then Koori courts have been established in magistrate's courts in other locations and in other court jurisdictions. The procedure for Koori court cases is as follows:⁴¹ After the magistrate and Elders or Respected Persons have entered the courtroom and greeted the other people present, the first case is called by the court clerk. There is usually one female Elder or Respected Person and one male Elder or Respected Person present. Seated around the bar table are the magistrate, Elders or Respected Persons, prosecutor, corrections officer, defence lawyer, defendant, defendant's partner or family, Aboriginal Justice Officer and the court clerk. Other family and/or community members may be present in the body of the court. Parties present identify themselves.

The magistrate asks the defendant whether he or she realises that the matter has been listed before the court as a plea of guilty. If the defendant agrees then the magistrate acknowledges country and pays respects to the traditional owners. The prosecutor reads a summary of the facts and the defendant's criminal record is produced to the court. The defence lawyer advises the court of the defendant's situation. The magistrate and/or Elders or Respected Persons may ask questions during the address by counsel. The Aboriginal Justice Officer will speak about his or her own inquiries into the defendant's situation and draw upon local health and community workers present for their input. The officer may also invite family to speak. The Elders or Respected Persons will also be invited to speak. Following the Elders or Respected Persons speaking, other community and family members present will also be asked to speak.

The defendant is then given the opportunity of responding to what has been said by the Elders or Respected Persons, family and community. The defendant may demonstrate remorse by saying so or by being silent and by body language that indicates remorse. The defendant may also give indications of respect for the Elders or Respected Persons and community. The magistrate and Elders or Respected Persons then confer openly and audibly about sentencing considerations. In some cases the matter will be adjourned to obtain further reports or to enable the defendant to be connected to appropriate treatment and support services. If a sentence is imposed on the day, the magistrate will explain the penalty to the defendant.

The role of the judicial officer

In Indigenous sentencing courts using collaborative processes, the active participation and contribution of all of those people present who wish to participate in the Indigenous sentencing court process is seen to be an essential part of the process and necessary to promote the goals of these courts, such as: Indigenous community and defendant participation; more meaningful court processes for Indigenous people; promoting greater respect for the court process; providing judicial officers with more information about defendants; and increasing awareness of and respect for Indigenous culture by non-Indigenous participants in the process. Indeed, Dr Kate Auty, when she was Magistrate of the Shepparton Koori Court described the process as a "sentencing conversation".⁴² Even in those courts where the collaborative processes are less extensive, the participation of Elders or Respected Persons and defendants is regarded as important.

⁴¹ The account of Koori court processes is largely drawn from: Briggs and Auty, n 29 and Auty K, "We Teach All Hearts to Break but Can we Mend Them?" (2006) 1 *elaw*, *Murdoch University Electronic Journal of Law Special Series* 101, http://www.elaw.murdoch.edu.au/archives/issues/special/we_teach.pdf viewed 22 October 2009 and from information provided by Deputy Chief Magistrate Popovic.

⁴² Harris M, "A Sentencing Conversation" *Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (Courts and Programs Unit, Department of Justice, Victoria, 2006) p 14, http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebb369085925f87/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf viewed 22 October 2009.

The sentencing conversation is “geared to hearing the stories of the other”.⁴³ Instead of the sentencing process being the production of evidence and the delivery of submissions by counsel followed by a sentencing decision of the judicial officer, a broader range of people are involved in having a say in the process leading up to and determining the appropriate sentence. For this to occur, the venue and court process must be suitable.

Dr Auty describes the nature of the sentencing conversation as follows:

The dialogue promoted around an oval table in the courtroom ... is open and continuous and based on mutual respect. The usual linear progression of a court hearing – plea, summary of facts, finding, mitigation, sentence – is persistently ruptured by this simple effort at incorporation. The proceedings are continuously, but nevertheless respectfully, interrupted by voices from the floor and the table. Again, there are no wrong questions and no wrong answers. The proceedings loop and re- and disconnect. The simplest observation is attended. Every effort is made not to cut people off when speaking. Sentencing, whilst retained as a function of the magistrate, is a part of this conversation. Respect ground[s] the creation of the place, the voice and the “attentive ear”.⁴⁴

The sentencing conversation must also be sensitive to the needs of the individual case and the parties involved. There may be the need for communication between particular parties – such as family members and the defendant – or the need for silence, such as when the defendant requires time to consider what has been said.⁴⁵ Communication may occur through Indigenous participants’ – particularly the Elders’ or Respected Persons’ – use of body language that is a part of Indigenous culture, conveying more powerful meaning than the spoken word could in such circumstances.⁴⁶

The conversational and decision-making dynamic shifts through the use of this process: the Elders or Respected Persons and community members are accorded respect and an important role in the conversation. This is important not only for the individual case before the court but in promoting trust of the Indigenous community and the wider community in the integrity of the justice system personnel and the court process. The defendant is included in the process of resolving the aftermath of the offence and in determining what steps are to be taken to prevent further offending. The role of the legal professionals in the process is not as prominent.

The judicial officer continues to have an important role in the process. Not only does the judicial officer determine in many cases whether a case is referred to an Indigenous sentencing court, he or she also ensures that the sentence imposed is justified at law. In some courts, it is still the judicial officer who alone determines the sentence to be imposed on a defendant. In all Indigenous sentencing courts the judicial officer has the vital role of protecting the integrity of the court process.

However, in the sentencing conversation, it is the human qualities of the judicial officer that are important: “In Circle Court the Magistrate takes on the appearance of a person rather than a figurehead who will pass sentence”.⁴⁷ In a Canadian case, Judge Dutil described the role of a judge in circle sentencing as “that of a discreet facilitator, who must allow participants to express themselves”.⁴⁸ Magistrate Dick elaborates on the judicial role in these courts:

Whilst Circle Court is in progress, the Magistrate must at times act as a facilitator, negotiation broker, be the focal point of law and the final word on it. The Magistrate should comprehensively explain to each participant the purpose of the Court and the roles of individuals. Importantly, the Magistrate should actively and unmistakably illustrate a willingness to share in the sentence decision-making process.⁴⁹

⁴³ Auty, n 41 at 106.

⁴⁴ Auty, n 41 at 120.

⁴⁵ Auty, n 41 at 120.

⁴⁶ Auty, n 41 at 118-119.

⁴⁷ Dick DR, “Circle Sentencing of Aboriginal Offenders”, paper presented to the Sentencing: Principles, Perspectives and Possibilities conference, Canberra, 10-12 February 2006, <http://www.law.anu.edu.au/nissl/Dick.pdf> viewed 23 October 2009.

⁴⁸ *R v Naappaluk* 1993 CarswellQue 1025 at [31].

⁴⁹ Dick, n 47.

Particularly in circle sentencing and Koori courts the judicial officer needs to be sensitive to the emotional dimensions of what is being discussed and to the needs of those present to speak and be listened to or alternatively for their silence to be respected. The judicial officer also needs to be vigilant to ensure that the process is not used for the pursuit of a particular agenda that some of those present may have, an agenda that is inconsistent with the goals of the court process. Essentially the judicial officer is the integrating element, promoting the conversation and preserving the integrity of the process.

The judicial officer also serves as a role model for other justice system professionals engaged in the process by facilitating input from the Elders or Respected Persons, the victim, community members, family, the defendant and the justice system professionals and actively listening to them. The judicial officer ensures that justice system officials present participate in the conversation and that the nature and manner of the contribution is in harmony with the goals of the court process. The judicial officer ensures that all of these people are allowed to speak in a respectful manner and that the conversation is fair for all.

Indigenous sentencing courts require a judicial officer to facilitate the use of more culturally sensitive processes – including promoting the active involvement of Elders or Respected Persons and defendants and, in some cases, other community members in the process. Being vigilant to particular cultural sensitivities is important – such as where it would be inappropriate for an Elder or Respected Person of one gender to interact with a defendant of the other gender. It requires more culturally-aware judicial officers who have the interpersonal and intrapersonal skills needed to promote the respectful dialogue that is an essential aspect of these courts.

Revisiting the conventional concept of judging

At first glance, the broader approach to judging that takes place in Indigenous sentencing courts and in problem-solving courts seems to be at odds with the conventional, narrower concept of judging that is associated with mainstream courts. The conventional concept of a judicial officer is that of an arbiter of disputes, whether between citizens or between citizens and the state. The judicial officer interprets and applies the law to the facts which he or she has determined from the evidence before the court. French CJ has described the role as follows:

The core function of judges in court is to decide disputes or controversies by finding out the facts of the case and applying the law to those facts. A simple logical model for this kind of decision-making has the following elements:

1. The judge identifies the applicable rules of law.
2. The judge, after hearing evidence, decides the facts of the case.
3. The judge then applies the relevant rule of law to the facts of the case to reach a conclusion about the rights and liabilities of the parties to the dispute or controversy.⁵⁰

However, the role of the judicial officer as arbiter is not lost by virtue of the fact that a judicial officer engages in an Indigenous sentencing court or problem-solving court or takes a solution-focused approach to judging in a mainstream court. It may be argued that the process of Indigenous sentencing courts is designed to obtain all of the facts relevant to sentencing – facts which may not otherwise be available to the court if mainstream processes were used. Indigenous sentencing courts facilitate this happening through processes that enable people who can provide vital evidence to do so in a respectful and culturally meaningful way. While more inclusive decision-making processes may be used in Indigenous sentencing courts than in mainstream courts, ultimately the judicial officer retains the duty of imposing a sentence within the boundaries of the law.

As noted above, there is significant variation in court processes between problem-solving courts. However, processes such as the use of a multidisciplinary case management team and the greater involvement of the participant in communicating with the judicial officer in many of these programs

⁵⁰ French RS, "In Praise of Unelected Judges", paper delivered to the John Curtin Institute of Public Policy, Public Policy Forum, Perth, 1 July 2009, <http://www.hcourt.gov.au/speeches/frenchcj/frenchcj01July09.pdf> viewed 23 October 2009.

enhance the court's fact-finding role. As with Indigenous sentencing courts, these processes give judicial officers access to information that may not be available to them in a conventional court process.

The decision-making role of the court can also be enhanced by processes used in problem-solving courts. For example, in the Perth Drug Court, the magistrate determines who is admitted to the court for assessment and who is removed from the program for breach.⁵¹ During the course of the program the decision-making process is more collaborative: decisions concerning what is to happen in relation to the ongoing participation of each individual are made collectively by the court team with significant input from the participant. As far as possible, participant self-determination is promoted but ultimately it is subject to the decision-making power of the magistrate. Taking this collaborative approach gives participants a sense of ownership of the decision and promotes internal commitment to following it.⁵²

However, there is also an additional element to problem-solving courts and, in some cases, Indigenous sentencing court cases: some degree of ongoing supervision of participants. The cases are adjourned and participants come back to court on a regular basis so that the judicial officer can ascertain whether they have complied with court orders and to take remedial action where needed. The process of adjourning cases to see whether there has been compliance with court orders is not without precedent. It happens in case management processes in civil and family law – although it is directed more towards the cost-effective and speedy resolution of cases than the systematic addressing of all underlying issues.⁵³

There are common features to judging in Indigenous sentencing courts and in many problem-solving courts and in taking a solution-focused approach to judging in mainstream courts that have not commonly been seen to be essential in mainstream judging:

1. Each seeks to promote greater respect for the law by using processes appropriate for the parties and the resolution of the dispute.
2. In each of these approaches to judging, there is an endeavour to promote greater participation in the fact-finding and decision-making process.
3. Each seeks to promote a more comprehensive resolution of the legal problem by addressing underlying issues.
4. Each takes a broader view of defendants, seeing them in terms of their personal, family, economic and social context.
5. Each requires the judicial officer to exercise interpersonal skills such as promoting the involvement of parties and other relevant people and agencies in the processes of fact-finding and decision-making, actively listening to them, appreciating and respecting the emotional and other psychological dimensions of the process, expressing empathy where appropriate and acting as a role model for other justice personnel involved in the process.

In process and outcome, these approaches to judging endeavour to promote values associated with wellbeing – such as respect for the justice system, respect for cultural values and participant healing or rehabilitation. From the perspective of therapeutic jurisprudence, these forms of judging are using methods that are therapeutic for those taking part in them.

Therapeutic jurisprudence studies the effect of laws, legal processes and legal system officials – such as judicial officers and lawyers – on the wellbeing of those involved.⁵⁴ It does not suggest that therapeutic values should outweigh other values, only that they be taken into account in determining appropriate laws and legal processes to be used in particular cases.⁵⁵ It uses findings from the behavioural sciences to suggest law reform that helps minimise negative effects of the law and legal

⁵¹ King MS, "Perth Drug Court Practice" (2006) 33 *Brief* 27.

⁵² The value of promoting participant self-determination in court processes is discussed in greater depth in King, n 13 and in the discussion of therapeutic jurisprudence below.

⁵³ King et al, n 5, pp 224-225.

⁵⁴ Wexler DB, "Therapeutic Jurisprudence: An Overview" (2000) 17 *TM Cooley Law Review* 125.

⁵⁵ Wexler, n 54.

processes on wellbeing and to promote positive effects on wellbeing consistent with justice system goals. For example, in the judicial sphere, among other things, it has suggested judicial communication strategies – including active listening strategies – and processes that uphold parties' positive behavioural change (where needed) and respect for the court to be used in promoting the goals of judging in diverse contexts.⁵⁶

Therapeutic values are also relevant to litigant respect for the judicial process. Procedural justice research has found that not only are court outcomes important for litigants but also the processes used by courts in reaching those outcomes.⁵⁷ Values that litigants respect in court include neutrality of the judicial officer; but also, more importantly, participation – being treated with respect and the trustworthiness of the judicial officer. Participation means being able to tell one's story to a legal authority who listens and takes what is said into account and/or being involved in shared decision-making.⁵⁸ Respect is being treated with politeness and consideration. Trust is built on evidence that "the authorities with whom they are dealing are concerned about their welfare and want to treat them fairly".⁵⁹ The judicial officer's facilitation of participation, treating people with respect and giving clear reasons for decision promotes trust.⁶⁰

Though acknowledging the value of procedural justice, therapeutic jurisprudence has also stressed that other therapeutic values should be incorporated into the judicial process and other legal processes where consistent with other justice system values.⁶¹ For example, relying on behavioural science evidence and other findings, it suggests that processes that are coercive and/or paternalistic are likely to promote resistance to, rather than compliance with, court processes – particularly those directed at promoting positive behavioural change.⁶² It suggests that, as far as possible, judicial officers should involve parties in decision-making processes as a means of promoting their internal commitment to respect and implement decisions.⁶³ The degree to which this principle can be applied in court will vary according to the nature of the court process. In problem-solving courts and in solution-focused judging it can take the form of giving defendants a choice about whether they enter the court program, and involving them in the formulation of a rehabilitation plan.

In relation to the significance of therapeutic jurisprudence to Indigenous sentencing courts, these observations of Dr Auty concerning the Koori Court at Shepparton are instructive:

Notwithstanding that the bulk of the work involving Aboriginal people in the courts was in the criminal cases list the court provided a therapeutic springboard for the beginnings of blending cultures in an ethic of care instead of the hardened, unforgiving and relentless pursuit of fault.⁶⁴

In suggesting these developments engender therapeutic jurisprudence plainly I am suggesting that this jurisprudence is a broad church, porous and sometimes surprising or paradoxical – like a freshwater Aboriginal well hidden by rushes in a salt lake. Therapeutic interaction in such a populous multi-layered atmosphere may be many things to many people ... To be therapeutic is to engage in "the art of healing" (Everyman's Dictionary) as an extension of living lives in a world of uncertainties, complexity

⁵⁶ Winick BJ and Wexler DB (eds), *Judging in a Therapeutic Key* (Carolina Academic Press, 2003); King, n 13.

⁵⁷ Tyler T, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings" (1992-1993) 46 *SMU Law Review* 433; Winick and Wexler, n 56; King MS, "Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities" (2003) 28(4) *Alt LJ* 172. The significance of procedural justice for judging can also be seen in the fact that *Court Review*, published by the American Judges Association, devoted a special double issue (Vol 44(1/2), 2007-2008) to procedural fairness, which included a white paper on the subject: <http://www.aja.ncsc.dni.us/courtrev/cr44-1/CR44-1-2.pdf> viewed 2 November 2009.

⁵⁸ Tyler, n 57 at 439-440.

⁵⁹ Tyler, n 57 at 441.

⁶⁰ Tyler, n 57 at 441.

⁶¹ Wexler DB, "Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence" (2007-2008) 44(1/2) *Court Review* 78.

⁶² Winick, n 23; Winick BJ, "Therapeutic Jurisprudence and Problem Solving Courts" (2003) 30 *Ford Urb LJ* 1055.

⁶³ Winick, n 23 and n 62; Winick and Wexler, n 56 and King, n 13.

⁶⁴ Auty, n 41 at 106.

and struggle. I suggest that in these terms the Shepparton Koori Court exemplifies many of the tenets of therapeutic jurisprudence even though it has never sought the label.⁶⁵

Since the seminal article by Hora, Schma and Rosenthal in 1999,⁶⁶ therapeutic jurisprudence has been seen to be the underlying philosophy of drug courts. It has also been seen to be the guiding philosophy behind mental health courts and to be relevant to the work of other problem-solving courts such as family violence courts and community courts.⁶⁷ It also informs solution-focused judging.⁶⁸

Judging in Indigenous sentencing courts and problem-solving courts and taking a solution-focused approach to judging in mainstream courts generally takes a broader, more inclusive approach to fact-finding and decision-making. But as French CJ cautions, these approaches to judging should not depart from the core function of judging:

Specialist courts or divisions of courts have been established to deal with persons caught up in issues of substance abuse and family violence. These initiatives recognise that an holistic approach and, in some cases, ongoing supervision by the court is necessary in order to provide a framework within which underlying problems can properly be resolved. Such initiatives are positive and have generally been well received ... however, it is important to bear in mind in the design of institutional arrangements in these cases that the judicial function is not confused with the provision of services by the executive branch of government. That having been said, cooperative approaches may yield positive results.⁶⁹

The fact that appropriately designed and applied judicial processes can have a therapeutic effect on participants and that a particular court program – such as a drug court or mental health court – has specific justice system objectives relating to wellbeing, does not justify the judicial officer straying into areas that are properly the therapeutic province of other professionals. As King et al observe, the practices of some drug court judges in the United States – such as having group sessions with participants and roaming the court like daytime television talkshow hosts – would be regarded as not within the proper judicial function in Australia⁷⁰ and, arguably, a number of other common law jurisdictions.

On the other hand, they argue that the judicial supervision of participants in problem-solving courts would come within the judicial sphere as being analogous to case management by judicial officers in civil and family law cases but with a focus directed at resolving underlying issues and thereby more comprehensively resolving the legal problem before the court.⁷¹ There the Executive and community agencies – not the court – provide support and treatment services while the court has a supervisory role over the participants.

Problem-solving courts are cooperative efforts between the court, the community and the Executive. Indigenous courts involve cooperative efforts between the local Indigenous community, the court and justice system professionals and other agencies. In each case, it is important that each does not impinge upon the proper province of the others. Indeed, it may be argued that it is the court's respect for the proper role of the others that promotes a therapeutic effect – including mutual respect – for all concerned.

In summary, the conventional role of the judicial officer as arbiter is not abandoned in the case of judging in Indigenous sentencing courts and problem-solving courts and in taking a solution-focused approach to judging in other contexts. It is simply that the unique fact-finding and decision-making processes that are used in these situations are designed to promote more comprehensive and

⁶⁵ Auty, n 41 at 106-107.

⁶⁶ Hora P, Schma W and Rosenthal J, "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 DLR 439.

⁶⁷ Winick, n 62; Winick and Wexler, n 56; Fritzier and Simon, n 12; and Schneider RD, Bloom H and Heerma M, *Mental Health Courts: Decriminalising the Mentally Ill* (Irwin Law, 2007), pp 39-65.

⁶⁸ King, n 13 and n 17.

⁶⁹ French RS, "The State of the Australian Judicature", speech delivered to the 36th Australian Legal Convention, Perth, 18 September 2009, <http://www.hcourt.gov.au/speeches/frenchcj/frenchcj18sep09.pdf> viewed 26 October 2009.

⁷⁰ King et al, n 5, p 226.

⁷¹ These issues are considered at greater length in King et al, n 5, pp 221-227.

therapeutic outcomes. That having been said, it is important that judicial officers presiding in these courts do not depart from the core aspects of the judicial function in pursuing therapeutic goals related to justice system objectives.

JUDICIAL VALUES

Fundamentally, ideal judicial conduct in any setting is based on a set of values. These values should govern judicial conduct in the performance of the judicial function in connection with court, in other activities by the judicial officer in public and in the private life of the judicial officer.

There have been different formulations of judicial values in common law jurisdictions around the world. YK Sabharwal, when Chief Justice of India, in a speech on the canons of judicial ethics, spoke of a range of judicial values including being faithful to the constitution, just, even-handed, consistent, morally right, fair and impartial, exact, merciful, decisive, upright and resolute, humane, considerate, polite, temperate and open-minded and leading a life open to probity.⁷² Other formulations of judicial conduct guidelines or codes include other values. For example, the American Bar Association's *Model Code of Judicial Conduct 2007* (ABA Model Code)⁷³ and the Canadian Judicial Council's *Ethical Principles for Judges* (the Canadian Principles)⁷⁴ emphasise diligence. The ABA Model Code also includes competence and the Canadian Principles include equality under the law.⁷⁵

However, judicial values most commonly recognised in these codes or guides are independence, impartiality and integrity. For example, the *Guide to Judicial Conduct* (the Australian Guide) emphasises independence, impartiality and "integrity and personal behaviour".⁷⁶ The Australian Guide was produced for the Australian Council of Chief Justices to provide "practical guidance to members of the Australian judiciary at all levels".⁷⁷ As recognised by the Australian Guide, these values can overlap in the work of the judicial officer.

The Australian Guide also refers to other principles guiding judicial conduct but appears to see them as subsets of the three basic principles of independence, impartiality and integrity and personal behaviour. These principles are:

- Intellectual honesty;
- Respect for the law and observance of the law ...;
- Prudent management of financial affairs;
- Diligence and care in the discharge of judicial duties; and
- Discretion in personal relationships, social contacts and activities.⁷⁸

This section considers the values of judicial independence, impartiality and integrity in the light of problem-solving courts, Indigenous sentencing courts and judging in a solution-focused manner in mainstream courts. Given the focus of these courts on different aspects of the wellbeing of those involved in the processes, such as defendants – including the effect of the actions of the judicial officer on wellbeing – this article argues that an ethic of care should be exercised by judicial officers presiding in these courts. However, an ethic of care is not only important in the case of judging in these courts, it is a value that should be an integral part of all forms of judging.

⁷² Sabharwal YK, "Canons of Judicial Ethics", speech delivered as part of the MC Setalvad Memorial Lecture Series, 4 March 2006, <http://www.supremecourtindia.nic.in/speeches/speech2006.htm> viewed 3 August 2009.

⁷³ American Bar Association (ABA), *Model Code of Judicial Conduct 2007* (ABA, 2007), Canon 2, http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf viewed 25 November 2009.

⁷⁴ Canadian Judicial Council (CJC), *Ethical Principles for Judges* (CJC, 1998), http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf viewed 25 November 2009.

⁷⁵ ABA, n 73, Canon 2; CJC, n 74, p 23.

⁷⁶ *Guide to Judicial Conduct* (2nd ed, Australasian Institute of Judicial Administration, 2007), p 3.

⁷⁷ *Guide to Judicial Conduct*, n 76, p 1.

⁷⁸ *Guide to Judicial Conduct*, n 76, pp 6-7.

This development in judicial ethics also reflects a growing recognition in other areas of the law that an ethic of care is important. For example, it has been suggested that an ethic of care approach is one of the main approaches to legal practice.⁷⁹

Independence

Independence relates to the constitutional situation of the judiciary and to the approach and actions of individual members of the judiciary.⁸⁰ The principle of the separation of powers – valued in democracies around the world – requires the separation of the judiciary from the influence of the executive and legislative branches of government so as to maintain the integrity of government.

In Australia, the separation of powers is embodied in the Commonwealth *Constitution*. The High Court has held that non-judicial functions cannot be conferred upon a court without contravening Ch III of the *Constitution*: *R v Kirby; Ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254. The principle applies to State courts exercising federal jurisdiction: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

The importance of judicial independence to the maintenance of the rule of law and a free society is acknowledged by the *Beijing Statement of the Independence of the Judiciary in the LAWASIA Region* (the Beijing Statement), Art 4, which states: “The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law”.⁸¹

On an individual level, judges must be and be seen to be independent of the influence of the executive and legislative branches of government. Being independent of outside influence is also an aspect of impartiality and goes to the integrity and character of the judicial officer.

However, the value of independence goes both ways: not only must judicial officers be free of the influence of the executive and legislative branches of government, they must also respect the integrity and function of those branches of government. This principle also appears in the Beijing Statement, Art 5: “It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary”.

What is seen to be necessary to secure judicial independence varies to some degree between societies and may vary within a society at different points in its history. As Gleeson CJ observed:

The Commonwealth provides no single model of personal or institutional arrangements for judicial independence. Constitutional and legislative choices are influenced by history, local conditions, and political realities, as much as by legal theory.⁸²

Commonly, factors such as freedom from external influence in judicial decision-making, freedom from external influence in the administration of the courts, security of tenure and financial security for judges are seen to be important for the maintenance of judicial independence.⁸³

The theory and practice of judging in a problem-solving court or an Indigenous sentencing court and applying therapeutic jurisprudence principles in judging in a general list respects the principle of judicial independence. As argued in the previous section, the cooperative nature of the work of problem-solving courts, Indigenous sentencing courts and judging in a solution-focused manner does not of itself lead to the judicial officer straying from the proper exercise of judicial function. Properly done, this form of judging does not compromise the principle of judicial independence.

⁷⁹ Parker C and Evans A, *Inside Lawyers Ethics* (Cambridge University Press, 2007), Ch 2.

⁸⁰ *Guide to Judicial Conduct*, n 76, pp 5-6.

⁸¹ The 1997 revision of the statement is available at: <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html> viewed 22 November 2009.

⁸² Gleeson M, “The Right to an Independent Judiciary”, address to the 14th Commonwealth Law Conference London, September 2005, http://www.hcourt.gov.au/speeches/cj/cj_sept05.html viewed 19 November 2009.

⁸³ Gleeson, n 82.

The final section of the paper provides examples where the principle of judicial independence could be compromised by a judicial officer improperly seeking to take a therapeutic approach. As will be noted from the examples, the area where violation of the principle of judicial independence is most likely to occur in relation to judging in a problem-solving court or Indigenous sentencing court is where judicial officers step into areas connected with determining service provision – a matter that is the function of the Executive.

Impartiality

Thomas explains the basis of the judicial value of impartiality as follows:

The philosophical basis of judicial ethics is most succinctly found in the judicial oath by which judges swear or affirm to act “without fear or favour, affection or illwill”. This is a strong promise of impartiality. The oath also contains a promise to “do justice according to law” which is a clear requirement that the judge is to apply the law rather than follow personal inclination or preference.⁸⁴

The concept of a judicial officer as the impartial and largely uninvolved arbiter of adversarial proceedings to determine the facts, law and appropriate application of the law to the facts to reach a legal decision in a case continues to exert considerable influence on conceptions of the proper conduct of judicial officers. This can be seen in the Australian Guide where the discussion of judicial conduct is largely concerned with proper practice at trial. It equates the judicial value of impartiality with, among other things, the judicial officer seeking to “avoid stepping into the arena”.⁸⁵

Chapter 4 of the Australian Guide also stresses moderation in judicial involvement in the proceedings:

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the proper level of such intervention is moderation. A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.⁸⁶

Yet the work of many judicial officers – including those presiding in problem-solving courts and Indigenous sentencing courts – is mainly in court processes other than adversarial trials. To the criticism that the Guide “is not capable of reflecting differences in the principles that might apply in judicial officers working in different jurisdictions”, Chief Justice Doyle responds that:

I would have thought that while one would not expect written guidelines to descend to the level of detail required to spell out all of these differences, the guidelines would acknowledge, when appropriate, that such differences might exist.⁸⁷

Certainly the Guide does not purport to be exhaustive or prescriptive but in order to be of use as a guide to judicial officers, its content needs to provide some general assistance for the “members of the Australian judiciary at all levels”.⁸⁸ Arguably, the Guide’s emphasis on minimal judicial involvement as important in preserving impartiality ignores the vital role more significant judicial involvement plays in a range of court processes.

Depending on the jurisdiction, judicial officers may conduct a wide range of functions in court of which an adversarial trial may be one. Some court processes may be adversarial in nature – as in adult sentencing hearings or contested applications for bail – where judicial intervention may be limited. Other functions of some judicial officers may not be adversarial or have only limited adversarial attributes. For example, coroners perform an inquisitorial rather than an adversarial function. Children’s courts use processes that try to promote the welfare of children. Courts exercising family law jurisdiction are using less adversarial processes to minimise the negative impact of the legal

⁸⁴ Thomas J, *Judicial Ethics in Australia* (3rd ed, LexisNexis Butterworths, 2009), p 10.

⁸⁵ *Guide to Judicial Conduct*, n 76, p 3.

⁸⁶ *Guide to Judicial Conduct*, n 76, p 17.

⁸⁷ Doyle J, “Judicial Standards: Contemporary Constraints on Judges – The Australian Experience” (2001) 75 ALJ 96 at 102.

⁸⁸ *Guide to Judicial Conduct*, n 76, p 1.

process on the wellbeing of the parties.⁸⁹ In each of these cases there is often a more actively involved judicial officer seeking to promote a more satisfactory resolution for the parties and the community.

Perhaps the most striking situation where active judicial involvement in proceedings is recognised as essential is in problem-solving courts and arguably also in the diversion programs operating out of magistrates courts around Australia. These court processes seek therapeutic outcomes: assisting participants to address underlying issues that have led to their legal problem – in most cases, offending behaviour.⁹⁰ Participants undergo a range of treatment and community support programs. They appear in court regularly for review – less frequently in court diversion programs but intensely in the early stages of a drug court program.

Ideally the review process is not simply a two-minute appearance to see that the participant is complying and then adjourning the case to another date if he is, or imprisoning him in the event of non-compliance. The judicial officer is expected to engage with the participant, demonstrate a genuine concern for him or her, ascertain how he or she is progressing and determine whether there are any problems in his or her performance on the program. The judicial officer is expected to engage the participant and court team in problem-solving in the event that the participant is experiencing problems that do not merit immediate termination from the program. The judicial officer is expected to be skilled in applying therapeutic jurisprudence principles in taking this approach to judging. Proper judicial conduct in this context requires skilled involvement, not an avoidance of involvement by the judicial officer in the proceedings.

Certainly judicial involvement in court proceedings is relevant to the ideal of judicial impartiality. But giving undue emphasis to the quantum of judicial intervention in considering impartiality is to ignore the multiplicity of situations where judicial involvement is needed. Although excessive judicial involvement in any proceeding has the potential to not only raise issues as to impartiality but to compromise the very purpose of the proceedings, it is the nature of the particular proceedings and the nature of the involvement that are important in considering whether impartiality and other judicial values have been affected.

Thus a judicial officer in a problem-solving court who, in dealing with a problem with a participant's performance in the program, dominated the discussion in court uncompromisingly taking the prosecution position and presumptively dismissing the participant's attempts to present her proposed solution to the court would frustrate the therapeutic purpose of the proceedings – empowering participants to rehabilitate – as well as raising concerns regarding impartiality. On the other hand, if the same judicial officer engaged the participant in a discussion as to why the problem happened, offered comments for the participant to consider, asked the prosecution and defence counsel as to their views and explored different aspects of the situation with them, there would be extensive judicial involvement while promoting the therapeutic aim of the court without compromising judicial impartiality.

Nevertheless, it is important for judicial officers presiding in problem-solving courts or Indigenous sentencing courts and those taking a solution-focused approach in mainstream courts to be sensitive to the risk that their interaction in court may be perceived to display a lack of neutrality. Taking a therapeutic approach to judging does not require overindulging a participant in relation to their attempts at rehabilitation, nor does it require an approach that is unduly sceptical or harsh concerning a participant's explanation as to their relapse.

To a significant degree the problem concerning perceived violation of neutrality in judicial interaction in court may be prevented by the judicial officer being mindful not only of the therapeutic goals of a court program but also of other values underlying these programs, such as defendant accountability, program integrity, collaborative decision-making (where relevant) and the need to uphold statute and common law principles. These values are discussed further below.

⁸⁹ Bryant D and Faulks J, "The 'Helping Court' Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia" (2007) 17 JJA 93; King et al, n 5, Ch 7.

⁹⁰ King et al, n 5, Ch 9.

It has been asserted that some other aspects of problem-solving courts may raise issues concerning judicial impartiality – such as the awarding of rewards and sanctions and the greater involvement of the judicial officer in community planning.⁹¹ As to the former, if specific criteria are laid down by the rules relating to a court program concerning the use of rewards and sanctions and the judicial officer applies those rules dispassionately then there should be little cause for concern.

In terms of judicial involvement in planning, this most commonly relates to matters concerning the court program or associated matters. It is appropriate for a judicial officer to provide input into matters concerning the court and its program given the unique position the judicial officer holds in such programs. Commonly, judicial officers presiding in these courts are seen to be their leaders for their court and for the particular issue – such as substance abuse or family violence – that the court program seeks to address. Just as heads of jurisdiction are properly involved in planning as part of the administration of their courts, so judicial officers presiding in problem-solving courts should be able to provide input into planning for their courts.

Integrity

The Macquarie Dictionary (2nd revision) defines integrity as “soundness of moral principle and character; uprightness; honesty”. The Canadian Principles formulate the value of integrity in judging as follows:

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.
2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.⁹²

Integrity relates to all three areas where proper standards of judicial conduct are thought to be desirable: the performance of the judicial function; other activities in the public eye; and the judicial officer’s private life.

For example, the guide relating to conduct of tribunal members in Australia lists integrity as one of its values of good conduct and lists the following as principles relating to integrity:

- (a) A tribunal member should act honestly and truthfully in the performance of their tribunal responsibilities.
- (b) A tribunal member should not knowingly take advantage of, or benefit from, information not generally available to the public obtained in the course of the performance of their tribunal responsibilities.
- (c) A tribunal member should not use their position as a member to improperly obtain, or seek to obtain, benefits, preferential treatment or advantage for the member or for any other person or body.
- (d) A tribunal member should be scrupulous in the use of tribunal resources.
- (e) In private life, a tribunal member should behave in a way that upholds the integrity and good reputation of the tribunal.⁹³

These are standards that apply to all members of the judiciary. Again, integrity interfaces with independence and impartiality in that soundness of moral principle and character in a judicial officer requires working according to the values that office requires.

An ethic of care

Literature concerning Indigenous sentencing courts and problem-solving courts refers to their approach in terms of an “ethic of care”, an approach that is mindful of the effect of judicial action on the wellbeing of those taking part in or otherwise affected by judicial processes.⁹⁴ This is also an area

⁹¹ Bartels L, *Challenges in Mainstreaming Specialty Courts* (Australian Institute of Criminology, 2009), p 4.

⁹² CJC, n 74, 13.

⁹³ Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (ARC, 2001), p 23, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_A_Guide_to_Standards_Of_Conduct viewed 5 August 2009.

⁹⁴ Auty, n 64 and associated text; Warren RK, “Public Trust and Procedural Justice” (2000) 37(3) *Court Review* 12 at 15.

of application of therapeutic jurisprudence. In suggesting there should be a judicial ethic of care, there is no suggestion that judicial officers become social workers, only that as people in authority who exercise power over citizens there is need for judicial officers to take the wellbeing of those people into account in determining how they conduct court processes and in how they render their decisions.

Although the Australian Guide does refer to “[d]iligence and care in the discharge of judicial duties”⁹⁵ as being important, it does not make explicit the need for an ethic of care. In the context, “diligence and care” could simply mean properly attending to the principles of common law, statute and court procedure in the conduct of court hearings and the delivery of sound judgments in a timely manner.

Therapeutic jurisprudence is an important guide to judicial conduct in problem-solving courts, Indigenous sentencing courts and diversion programs. Moreover, a growing number of judicial officers are applying its principles in general lists.⁹⁶ Therapeutic jurisprudence is not referred to in the Australian Guide, yet some of its key principles are implicit in some of the suggested guidelines. These guidelines are directed at preventing judicial conduct that may cause hurt to others. For example, the guide refers to the “need to protect a party or witness from any display of racial, sexual or religious bias or prejudice”.⁹⁷ Under the heading “Critical comments”, the Guide emphasises that “particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function” including taking care about what a judicial officer says about parties or third parties in judgments or sentencing remarks.⁹⁸

It is suggested that guidelines for judicial conduct should more broadly recognise the effect that judicial conduct can have on parties, witnesses, jurors, counsel, families and support networks of those involved in litigation and on the community generally. The hurt that a judicial officer can cause in court proceedings not only arises from injudicious comments but also from other problems with communication such as a failure to listen or to demonstrate listening and inappropriate body language and from other sources such as the manner in which the judicial officer conducts the proceedings.⁹⁹ Inappropriate body language can demonstrate a lack of interest in or disdain for what someone is saying. Inappropriate court processes may speedily bring a legal determination of an action but leave parties dissatisfied with the process and the outcome. A failure of a judicial officer to intervene in the case of the inappropriate cross-examination of a vulnerable complainant may contribute to the complainant’s further traumatisation and a lowering of public confidence in the justice system.¹⁰⁰

Moreover, through the use of proper forms of communication and court processes, judicial officers can actually promote party and community respect for the judicial officer and the court system and other justice values such as offender rehabilitation and the more comprehensive resolution of legal problems. As was noted above, trust, which has been found by procedural justice research to be an important aspect of promoting participant respect for the court and its orders, is based on evidence that “the authorities with whom they are dealing are concerned about their welfare and want to treat them fairly”.¹⁰¹

Thus guidelines for judicial conduct should include a guideline to the following effect: “Judicial officers should be mindful of the effects of their conduct on those involved in or affected by the court proceedings. Where possible under the law, they should endeavour to use processes that minimise negative effects on wellbeing and that promote positive effects on wellbeing that are related to court functions such as respect for the law and the comprehensive resolution of the legal problems involved in court proceedings”. In other words, judicial officers should exercise an ethic of care towards all

⁹⁵ *Guide to Judicial Conduct*, n 76, p 7.

⁹⁶ King, n 13, Ch 8.

⁹⁷ *Guide to Judicial Conduct*, n 76, p 17.

⁹⁸ *Guide to Judicial Conduct*, n 76, p 19.

⁹⁹ For a discussion of judicial listening and other judicial communication skills, see: King, n 13, Chs 5 and 6.

¹⁰⁰ King MS, “Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial” (2008) 32 CLJ 303.

¹⁰¹ Tyler, n 57 at 441.

those who take part in court proceedings over which they preside.¹⁰² Such a guideline not only recognises the importance of judicial conduct in a problem-solving court and in an Indigenous sentencing court in promoting the resolution of underlying issues and the legal problem itself, it also stresses the wider significance of wellbeing for judging generally.

What is required to fulfil the ethic of care will vary according to the judicial context. For example, in a trial it “involves treating those who come to assist the court in whatever capacity – such as party, witness, juror, counsel or court staff ... with understanding for their situation and with respect”.¹⁰³ That should be the basic minimum of the content of the ethic of care in judging.

At times the circumstances will demand more from the judicial officer in terms of exercising an ethic of care. For example, in trials of child sexual assault related charges, a judicial officer can demonstrate an ethic of care towards child complainants giving evidence through the use of child-friendly processes, such as the use of pre-recorded evidence with the child giving evidence from a remote room by video link; settling the child before questioning begins; adjourning proceedings at appropriate intervals during questioning to give the child a break; using questions and language appropriate for the child’s developmental level; disallowing improper questioning of children by counsel; demonstrating an interest in what the child says in the witness box; and by discounting myths concerning children and their ability to recall matters and tell the truth in court.¹⁰⁴

In an inquest, an ethic of care will require the coroner to be sensitive to the effect of inquest processes on the family and others affected by the decision. It may require the coroner to adjourn the inquest at difficult times during the evidence to give the family a break or allowing a witness some space to speak about the effect of the death upon them.

The exercise of an ethic of care has unique significance for judicial officers presiding in problem-solving courts and Indigenous sentencing courts and for those who seek to take a solution-focused approach to judging. In the case of Indigenous sentencing courts, the judicial officer needs to take particular care to preserve the integrity of the process, promoting the input from those involved – Elders or Respected Persons, defendants and others – and the respectful interaction between them. In the case of circle sentencing and Koori Courts, injudicious involvement of the judicial officer could hinder the process of dialogue that promotes the steps towards collective resolution of the problem before the court. An ethic of care in these contexts requires a knowledge and understanding of cultural sensitivities.

Warren has noted that problem-solving courts “seek to introduce an ‘ethic of care’ into court processes and to generally refocus on the qualities of respect, participation, and trustworthiness often cited by litigants and the general public”.¹⁰⁵ In these courts the reliance is on the authority of the judicial officer to promote participants’ motivation to change. Arguably the judicial officer’s interest in and ongoing interaction with participants is crucial to this process.

The introduction of these processes has required judicial officers to adapt to a different way of judging. Legislation and court rules governing these court processes generally provide little guidance as to how the judicial officer is to interact with participants. Traditional legal education, judicial education and the legal literature has not provided guidance to judging in a therapeutic manner – though some judicial officers have at times certainly taken a therapeutic approach.

Judging in a therapeutic manner should, as with other forms of judging, be based upon proper principles rather than the unfettered discretion of the judicial officer if its therapeutic and other justice system goals are to be promoted. Literature suggesting proper principles to be applied in judging in problem-solving courts and in taking a solution-based approach to judicial conduct in mainstream courts based on evidence from procedural justice research and the behavioural sciences is

¹⁰² King et al, n 5, p 212.

¹⁰³ King, n 100, p 312.

¹⁰⁴ King, n 100; Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (AIJA, 2009), pp 85-87.

¹⁰⁵ Warren, n 94 at 15.

emerging.¹⁰⁶ It is suggested that an ethic of care requires that therapeutic judging should be guided by the evidence-based principles explained in this literature and subject to applicable statute and common law.

An ethic of care for judicial officers is not in conflict with other judicial values – such as independence, impartiality and integrity. Rather, applying an ethic of care would heighten a judicial officer's awareness of the importance of these values. Indeed, these values are not only important for the fairness of the judicial process, but also for participant wellbeing. As procedural justice research has shown, participants see impartiality as an important contributing factor towards their satisfaction with the process.¹⁰⁷ Similarly, violation of other judicial values such as independence and integrity can also adversely affect the wellbeing of the parties involved – litigants are unlikely to appreciate a government department's interference in a court process directed at dispute resolution or a court proceeding conducted by a judicial officer who is drunk.

Even though the judicial values of independence, impartiality and integrity have wellbeing implications, this does not obviate the need for an ethic of care as a separate judicial value. The wellbeing implications of judicial values have not been fully applied in judging previously. Further, there are wellbeing implications of judging that do not explicitly arise from issues concerning independence, impartiality or integrity.

In summary, the principal values that inform judicial conduct are independence, impartiality and integrity. Within these categories there are arguably other values – for example, diligence could be considered an aspect of integrity. Given that judicial officers act in positions of authority on behalf of the community, they can potentially affect the wellbeing of those coming before them and the trust these people have in the justice system. It is therefore suggested that an ethic of care should also inform judicial conduct in every context.

SOME ETHICAL CHALLENGES IN JUDGING IN INDIGENOUS SENTENCING COURTS AND PROBLEM-SOLVING COURTS

The different ways in which problem-solving courts and Indigenous sentencing courts operate have led to judicial officers encountering unique situations in and out of court that present ethical challenges. This section of the article explores key examples of these ethical challenges. It suggests that these ethical challenges can be met through an application of the judicial values discussed in the previous section. In most cases it is through the interplay of several judicial values – including an ethic of care – that produces outcomes consistent with the promotion of the judicial function and other justice system values. This section also illustrates that it is not only the judicial officer's actual compliance with these values that is important but also their perceived compliance with them.

Interaction outside the courtroom

A number of situations concerning Indigenous sentencing courts and problem-solving courts may arise where there is interaction outside the courtroom between the judicial officer and other professionals and participants involved in the court process. In many of these situations interaction is unavoidable. Yet the fact of interaction raises the possibility of a perception that matters have been discussed between the judicial officer that relate directly to a case before the court. A perception of a lack of impartiality and a lack of fairness of the hearing may arise in the minds of those who are involved in the proceedings but not parties to this particular interaction. If in fact such a discussion has occurred there will be an additional issue as to the fairness of the hearing in that information provided in that context may be untested, the parties may not have the opportunity to respond to it and the fact-finding and decision-making process of the court may therefore be compromised.

In an Indigenous sentencing court there is likely to be interaction between the judicial officer and the Elders or Respected Persons before court begins. Indeed, having a cordial relationship with the

¹⁰⁶ See, for example: Winick, n 62; Winick and Wexler, n 56; King, n 13; and the Australasian Therapeutic Jurisprudence Clearinghouse via a link at <http://www.aija.org.au> viewed 14 December 2009.

¹⁰⁷ Tyler, n 57.

Elders or Respected Persons is likely to enhance the court process.¹⁰⁸ They may have a coffee or a cup of tea together. In these interactions the judicial officer should avoid discussing cases before the court that day and should politely steer the conversation in another direction. One judicial officer advised the writer that on one such occasion an Elder had raised the matter of a close family member who was to appear before the court in the near future in relation to a criminal charge. Naturally the judicial officer politely advised the Elder that this was not a matter he could discuss.

At times, problem-solving court judicial officers may visit treatment or community agencies. There is the scope for interaction with participants in problem-solving court participants at these venues. For example, the writer visited several treatment agencies while Perth Drug Court Magistrate and encountered a number of participants in the court program during such visits. To avoid interaction would send a message of disinterest in what the participant was doing and possibly have an anti-therapeutic effect. On the other hand, the judicial officer speaking with the participants could well have a positive effect as it would demonstrate the judicial officer's ongoing interest in their wellbeing. To avoid issues of unfairness it is preferable that any such interactions occur in the presence of members of the court team – that is, there be a team visit to these venues – and that conversation is limited to issues about participants' current wellbeing and the activities in which he or she is engaged at the treatment centre. It is suggested that this approach also be taken in relation to interaction with defendants participating in an Indigenous sentencing court program who may be encountered during visits to community agencies.

If the judicial officer encounters a participant in court programs while in the community generally it would be preferable simply to exchange greetings, inquire about the participant's welfare and then politely advise the participant that it would be best that any further conversation take place at the next court appearance. The judicial officer should later inform members of the court team of such encounters so that the lines of communication remain open and trust is preserved between team members.

Visits by judicial officers to community agencies and their interaction with their staff at other venues raises additional issues. While it is important for judicial officers in Indigenous sentencing courts and problem-solving courts to interact with community agencies in order to promote greater mutual respect and understanding, and the more effective addressing of court program participants' problems, the judicial officer must ensure that his or her own neutrality is not compromised. The judicial officer should avoid getting involved in an agency's internal politics or organisational issues.

The judicial officer should have a cordial engagement with staff but it should not extend to familiarity. Court proceedings may require the judicial officer to make a determination or make comments that directly concern the relevant agency – such as where a problem has arisen in relation to a particular participant's treatment or care where the agency has been involved. That may prove difficult where the relationship between the judicial officer and the agency has become unduly close. The result may be the compromising of the relationship between the agency and the court.

The content of proceedings and the sentencing decision

In Indigenous sentencing courts – particularly in circle sentencing and Koori courts – there is often a wide-ranging discussion not only about the nature of the offences before the court and their effects on victims but also about the background of the defendant. The discussion can sometimes reveal matters that would not normally be admissible in a sentencing hearing in a mainstream court.¹⁰⁹ For example, where the case involves intimate partner violence, the discussion could uncover incidents of alleged intimate partner violence that have not been proven in court. The fact that this can happen in an Indigenous sentencing court does not diminish the value of its processes – indeed, it may allow the court to assist the defendant to address the issues underlying offending in a more profound and complete way.

However, there are legal safeguards that the judicial officer should put in place to protect the integrity of the process and its fairness for the defendant. In such cases the judicial officer needs to

¹⁰⁸ Email communication from Deputy Chief Magistrate Andrew Cannon on 16 October 2009.

¹⁰⁹ Telephone conversation with Magistrate Doug Dick on 3 November 2009.

ensure that the sentence imposed remains within the proper sentencing range when not taking into account the matters not proven in court. In processes where the defendant is able to refuse to accept the sentence imposed by the circle, the case will come back to the mainstream court process for the matter to be dealt with in the usual way. In these cases, if the judicial officer who presided at the sentencing circle also is presiding in court, he or she should ask the parties if there is any objection to the judicial officer conducting the sentencing hearing. If there is, the matter should be referred to another judicial officer for sentencing. If there is no objection then the judicial officer needs to deliver clear reasons concerning the facts and background material that inform the sentencing decision and make clear that the unproven matters have been disregarded.¹¹⁰

Issues concerning Elders or Respected Persons

As can be seen from the discussion in the first part of this article, Elders or Respected Persons play a crucial role in Indigenous sentencing courts. It is important that only people who are respected in the Indigenous community as Elders or Respected Persons, and who are otherwise suitable, fulfil this role in an Indigenous sentencing court. There also needs to be sensitivity concerning which Elders or Respected Persons are involved in particular cases.

The involvement of judicial officers in determining who are to be Elders or Respected Persons raises issues concerning the independence and impartiality of the judiciary. While it is common for heads of jurisdiction to be involved to some degree in the appointment of new judges and magistrates – whether by way of consultation or being a member of a selection panel – Elders or Respected Persons are not judicial officers. It is not proper for judicial officers to be involved in decisions concerning the appointment to such positions, positions that have status both in court and in the community and, in the case of some Elders or Respected Persons, remuneration – albeit that the level of remuneration may be nominal only.

The involvement of judicial officers in selecting Elders or Respected Persons is especially problematic in areas where there is conflict in the local Indigenous community. The judicial officer would not wish to be seen to be taking sides. Even where there is no conflict at the time of appointment of Elders or Respected Persons, if conflict in that community occurs after the judicial officer has been involved in the appointment process concerning Elders or Respected Persons then the same problem may arise.

At times Elders or Respected Persons will have come from a background that has similarities to the situation of defendants appearing before the court. That in itself is not a hindrance to the process but rather may enable the Elder or Respected Person and the court to gain a deeper insight into a defendant's situation.

However, there have been cases where an Elder or Respected Person who has been actively involved in an Indigenous court in an area has been charged with an offence and required to appear before the same magistrate who presides in Indigenous sentencing courts.¹¹¹ In such circumstances, when an Elder or Respected Person appears in court to answer a charge the judicial officer should inform the court of the situation and ask whether any party objects to the judicial officer hearing the matter. If there is an objection, then the judicial officer should decline to hear the matter and refer it to a colleague for disposition.

There have also been situations where some of the Elders have been in conflict, being opposing parties to proceedings before a court. The court thus needs to be aware of the particular situation of Elders or Respected Persons, especially in relation to which Elders or Respected Persons should sit together in court. However, ideally an Aboriginal Court Officer determines which Elders or Respected Persons sit in relation to a case after considering a number of factors such as availability of Elders or Respected Persons and the relationship (if any) of victim and defendant to the Elders or Respected Persons who are available and the relationship of the Elders or Respected Persons to each other.

¹¹⁰ Telephone conversation with Magistrate Doug Dick on 3 November 2009.

¹¹¹ Telephone conversation with Magistrate Doug Dick on 3 November 2009.

Some jurisdictions acknowledge that ethical principles should guide the conduct of Elders or Respected Persons in relation to their participation in Indigenous sentencing court processes. For example, Victoria has developed a code of conduct for Elders or Respected Persons who work in Koori courts.¹¹² That code promotes values that are also that of the judiciary – independence, integrity and impartiality. Arguably such codes should also promote an ethic of care to be exercised by Elders and Respected Persons.

The limits of therapeutic judging

Judicial officers presiding in problem-solving courts and Indigenous sentencing courts and those taking a solution-focused approach to judging in mainstream courts can have a therapeutic effect on participants through the positive forms of interaction they have with participants – in particular by promoting their voice and validation, by treating them with respect and by promoting their active participation in decision-making and in addressing problems when they arise.¹¹³ Judicial officers can also help facilitate their participation in treatment and support services through appropriate orders.

As illustrated by therapeutic jurisprudence, principles and practices that have been found to promote participant compliance with treatment and the behavioural change process may usefully inform the approach judicial officers take in interacting with participants.

However, the fact of judicial officers taking a therapeutic role does not entitle them to depart from the core function of judging and to stray into areas that are the province of the Executive or community groups. It does not entitle them to transgress the constitutional principle of separation of powers. It does not entitle them to engage in activities that are beyond their professional expertise. It does not entitle them to be treatment providers.

For example, for a judicial officer to direct what form of treatment – such as a particular form of counselling – that a treatment agency was to give to a participant would go beyond the judicial function. Similarly, a judicial officer cannot direct the Executive to provide resources to a court program.¹¹⁴ Both actions would transgress Ch III of the *Constitution* by the judicial officer venturing into the service area, which is properly a function of the Executive. In any event, judicial officers are not properly trained to assess what form of treatment is appropriate for a participant. A courtroom is not the proper place for this assessment. The appropriate professionals and participants working together choose the appropriate treatment after undertaking a proper assessment process. A judicial officer interfering in this decision arguably could create an anti-therapeutic effect – the participant's and service provider's resentment at the interference as well as the provision of a form of treatment that does not best meet the participant's needs.

Where a participant raises his or her dissatisfaction with a particular form of treatment with the judicial officer, the judicial officer should acknowledge the participant's concerns and ask for a response from the community corrections officer or other appropriate officer. Participants are likely to have differing needs and outlooks and some forms of treatment may not work well with them. It may be that alternative treatment can be arranged if appropriate.

The question of where treatment should be undertaken is often a proper concern of the judicial officer. For example, a participant with a significant amphetamine problem may not have the proper social supports to be able to refrain from drug use and successfully engage in treatment in the community and may be better off in residential treatment. Further, the court will be concerned that participants engage in treatments in recognised agencies that can meet the court program requirements. The writer, while Perth Drug Court Magistrate, declined to allow participants to attend a treatment agency where there had been a history of improper supervision of participants and participants' ongoing use of illicit drugs at that agency's facilities.

¹¹² Harris, n 42, pp 152-153.

¹¹³ Winick and Wexler, n 56; King, n 13.

¹¹⁴ Cannon A, "Therapeutic Jurisprudence in Courts: Some Issues of Practice and Principle" (2007) 16 JJA 256 at 261. But a judicial officer presiding in a problem-solving or Indigenous sentencing court can make representations to the Executive for the provision of resources. It is for the Executive to determine the merits of such representations in the light of competing claims on the government purse.

A therapeutic approach to judging does not mean that other considerations are ignored in the process.¹¹⁵ All forms of judging should be conducted within constitutional limits and the confines of statutes and the common law. In therapeutic court programs that promote addressing underlying issues relating to the legal problem before the court, the judicial officer also must be mindful of the need to hold participants accountable for their actions, to protect team members and to promote the integrity of the program.¹¹⁶

In these programs, although the judicial officer must take into consideration the fact that relapse – particularly in relation to substance abuse – is accepted in health as a natural part of the positive behavioural change process, he or she also must be careful to ensure those who do not maintain a genuine commitment to change are terminated from the program and they are sentenced or their cases otherwise disposed of according to law. In any event, other values such as accountability and program integrity should not be regarded as inconsistent with taking a therapeutic approach.

Indeed, it may be argued that holding participants accountable and promoting program integrity produces therapeutic effects for the individuals concerned and other participants. A person who is not held properly accountable for their actions is not likely to learn from their mistakes and to engage in the positive behavioural change process.

Case management meetings

Case management meetings are a feature of some problem-solving court programs such as drug courts and have been used in the general problem-solving court program, the Geraldton Alternative Sentencing Regime. Generally they involve members of the case management team – often including the judicial officer – meeting prior to court to discuss the progress of each case that is to come before the court. They are usually held in the absence of the participant and behind closed doors. The conduct of case management meetings in this manner has attracted the concern of some judicial officers.¹¹⁷

The situation of case management meetings raises concerns regarding offending justice system values as well as competing ethic of care concerns. In relation to justice system values, the integrity of the judicial function and the integrity of counsel are said to be promoted by open justice.¹¹⁸ Open justice also is one feature that distinguishes judicial from administrative functions.¹¹⁹ Judicial officers and lawyers are less likely to stray from proper process when they are subject to public scrutiny.¹²⁰ The fairness of the process is therefore promoted. Further, the public are also able better able to engage in an informed discussion as to justice system issues when court processes are conducted in public; and there may be unexpected depositions relevant to the case from those in the public gallery.¹²¹

In addition, there is the issue of the participant not being present when important decisions are being made concerning his or her case. While it may be argued that the participant's interests are protected by the presence of his or her counsel at the case management meeting, questions may arise as to whether the court is really impartial if it does not give the participant the chance to be present and to contribute to the decision-making.

This last point also has ethic of care or therapeutic implications in that it raises issues of paternalism and coercion. As noted in the second part of this article, therapeutic jurisprudence relies on behavioural science findings that involving people in decision-making in matters concerning their welfare is more likely to promote their commitment to implementing the decision, whereas

¹¹⁵ King, n 13, pp 198-199.

¹¹⁶ King, n 13, pp 198-199.

¹¹⁷ See, for example: Cannon, n 114 at 256-257; and Popovic J, "Court Process and Therapeutic Jurisprudence: Have we Thrown the Baby out with the Bathwater?" (2006) 1 *E-Law – Murdoch University Electronic Journal of Law* 60 at 63-64.

¹¹⁸ Cannon, n 114; Popovic, n 117 at 63.

¹¹⁹ Popovic, n 117 at 63.

¹²⁰ Cannon, n 114; Popovic, n 117.

¹²¹ Popovic, n 117.

paternalism and coercion tend to promote resistance to change. Not involving participants in the decision-making processes risks the negative consequences of coercion.

On the other hand, participants in drug courts – particularly in the early stages of their participation – can be vulnerable. Case management meetings can involve frank exchanges as to the level of a participant's commitment to the program and deficiencies in their performance. When exposed to criticism, the risk is that those with substance abuse problems may react to the stress involved by resorting to licit or illicit drug abuse. That is a reason justifying the conduct of these meetings behind close doors and in the absence of the participant – court processes should, as far as possible, prevent rather than precipitate a relapse.

It is suggested that the following approach to case conferences suggested by King et al is an appropriate means of addressing the competing concerns associated with case management meetings:

It could be argued that, given the benevolent purpose of case management meetings and the presence of counsel at meetings, and if final decisions are made in open court after an airing of arguments for and against a disputed course of action and without the process simply being a rubber stamp for what has happened in a case management meeting, that procedural fairness will not have been violated. In the absence of these factors, there is a real risk that case management meetings will violate rules of procedural fairness.¹²²

This part of the article has illustrated the diverse challenges facing judicial officers presiding in Indigenous sentencing courts and problem-solving courts and those who seek to take a solution-focused approach to judging in mainstream courts. In addressing these concerns, the judicial officer must consider not only issues concerning the goals of the court but the nature of the judicial function and the associated values of independence, impartiality, integrity and an ethic of care.

CONCLUSION

The concept of the largely uninvolved judge presiding in an adversarial trial designed to reach a legal judgment concerning the issues in dispute has continued to influence formulations of judicial values and their application in determining ethical judicial conduct both inside and outside the courtroom. Yet much judicial work is conducted outside the context of an adversarial trial. Some judicial officers – coroners – work mainly in an inquisitorial setting, albeit with some adversarial aspects.

The introduction of problem-solving courts and Indigenous sentencing courts has increased the number of contexts in which judges and magistrates work that are significantly different from a purely adversarial trial setting. Indeed, both forms of judging involve more collaborative processes directed at broader outcomes than simply arriving at a judgment. A key outcome sought by both forms of judging and by judicial officers taking a solution-focused approach to judging is the addressing of underlying issues surrounding the legal problem before the court. Judicial officers working in this way use processes designed to promote participant wellbeing. In other words, they apply an ethic of care.

Yet a judicial ethic of care should not be confined to those judging in Indigenous sentencing courts or problem-solving courts. Given the potential effect that judicial processes can have on litigants and other people involved, it is important that all judicial officers are, consistent with statute and the common law, sensitive to the effects of what they do or say on those affected. Certainly the content of the ethic of care will vary according to the judicial context.

Judging in Indigenous sentencing courts and problem-solving courts and taking a solution-focused approach to judging in mainstream courts does not thereby compromise the judicial function. However, the way in which judicial officers act in these contexts should be guided by the judicial values of independence, impartiality, integrity and an ethic of care.

¹²² King et al, n 5, p 226.