

How Justice 'Gets Done': Politics, Managerialism, Consumerism, and Therapeutic Jurisprudence

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Introduction

Since the 1980s, Australia's criminal justice system (of which the courts and their sentencing function are part) has come under increasing scrutiny for failing to resolve, or indeed to reduce, the perceived problem of crime. The supposed escalation of crime is raising public fears and these concerns are commonly used as a political platform (see Carcach & Mukherjee 1999; Carr & Chikarovski 1999; Lee 1999; Hogg & Brown 1998, Grabosky 1995; Pinkerton-James 1992). However, official statistics on offences reported to police do not sustain the view that crime has increased substantially. Reported crime rates remain fairly stable with increases in some areas offset by decreases in others (see Table 1). Obviously, drawing conclusions from police reported crime statistics is problematic because the measure given is of reported crime only. Surveys of crime victims on the other hand can tap into unreported crime levels. In Australia, the Australian Bureau of Statistics conducts crime victim surveys on a regular basis. The most recent surveys were conducted in, 1993, 1998 and 2002. Figures for these years support police reported crime statistics and show relative stability in victimisation rates at least since the 1990s (Australian Bureau of Statistics 2003a).

Nevertheless, if the public remain fearful of victimisation, crime will continue to be a problem and Australia's criminal justice system, including our courts, will be questioned. Increasing pressure from a number of different quarters throughout Australia to do something about crime has forced government hands. There have been strong calls from the public and politicians for offenders to receive harsher penalties especially in cases of violence. 'Getting tough on crime' has resulted in courts for example sentencing more offenders to longer terms of imprisonment. The result has been a steady increase in prisoner numbers and imprisonment rates throughout Australia (see Figure 1). Between 1994 and 2002, there was a 28.4 percent increase in Australian prison inmate numbers.

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Table 1: Reported Crime by Year (Rate Per 100 000 Persons)

	1997	1998	1999	2000	2001	2002
Murder/Manslaughter	4	5	4	3	4	4
Assault	669	709	705	737	783	810
Sexual Assault	76	78	74	82	86	91
Kidnapping/abduction	3	4	4	4	4	4
Robbery	115	127	119	122	137	106
Blackmail/extortion	2	2	1	1	2	2
Unlawful Entry	1775	2324	2192	2281	2247	2001
Motor Vehicle Theft	704	702	685	726	722	575
Other Theft	2856	3015	3218	3523	3608	3448

(Source: Australian Bureau of Statistics, 2003b)

Figure 1: Prisoners in Australia, Number and Rate per 100,000 by Year

(Source: Australian Bureau of Statistics)



In relation to violent offenders, a report by the Australian Crime Research Centre (2002:9-10) concludes that 'sentencing of violent offenders is becoming tougher'. More specifically, the researchers show that a) the number of violent offenders in Australia's prisons is increasing, b) there is evidence of a trend towards increased use of custodial sentences and decreased use of non-custodial sentences for violent offenders and, c) there has been an increase in the median sentence lengths for violent offenders.

At the same time as calls to 'get tough' on crime are being voiced and courts are meting out harsher sentences, there have also been moves toward therapeutic jurisprudence

including the trialling and implementation of problem-solving courts, like drug courts, and restorative justice initiatives. Possible reasons for this seemingly adverse development ('getting tough' vs 'getting therapeutic') are explored in this paper by examining changes in justice administration thought, and societal shifts toward an atmosphere in which managerial drives for savings, efficiency and consumer satisfaction are paramount. In Australia, these shifts have been accompanied by the introduction of market relations to policing and corrections. Here, we have witnessed the opening of private prisons and the 'transformation in public policing from a largely State-sponsored monopoly to a combination of private and State provision' (Davids & Hancock 1998:38). Indeed, much discussion and debate about how both policing and corrections have been affected by economic rationalism and the market has taken place in Australia (see for example Harding 1999; Hancock 1998; Harding 1998; Harding 1992). Although managerial drives for savings, efficiency and consumer satisfaction have been alluded to by some in relation to sentencing and criminal courts in Australia this debate is not as extensive as the one taking place around policing and corrections (see for example, Raine 2001; Nolan 2001; Rottman & Casey 2000; Doyle 2001; Zdenkowski 2000; Willis 2000; James & Raine 1998; Raine & Wilson 1996; Freiberg 1995; Morgan & Clarkson 1995; Mason 1994).

This increasing managerialism in the criminal justice system has taken place against a background of changing societal landscapes. Hogg and Brown (1994:142) describe it thus:

The Hawke-Keating Governments, like their conservative counterparts in Britain and the USA and Labour Governments in New Zealand, presided over a dramatic reshaping of the Australian political, economic and social order. This involved dismantling many of the institutions and assumptions of the liberal social democratic settlement that have underpinned Australian politics since early this century.

This political, economic and social transformation was continued by successive governments and Australian infrastructure and culture changed. The new political paradigm became one of minimal State intervention and the government's role becoming more managerial in nature. This new 'managerial project' was introduced into the public sector where a variety of techniques (generally borrowed from the private sector) aimed at cost efficiency and service effectiveness were implemented (Hogg & Brown 1998).

The Changing Landscape of Criminal Courts

Australia's traditional court and sentencing practices were primed for the government's 'managerial project' because of rising public dissatisfaction with, a) the perceived ineffectiveness of the criminal courts to get at the underlying problem of crime (as noted previously) and, b) the high costs the courts incurred (Doyle 2001:140). With regard to the latter, Australian court expenditure during the 1980s was considered too costly. Research commissioned by the government during this time found substantial increases in 'money expenditure, real expenditure, real per capita expenditure and expenditure relative to total public outlay and national output, i.e. the national resources devoted to courts have increased absolutely and relatively' (Barnard & Withers 1989:v). The drive to reduce costs and increase efficiency has slowly been changing the landscape of Australia's criminal courts.

Measures to decrease excessive delays in court processing have been undertaken to increase efficiency and reduce expenditure. For example, diversion including the use of infringement notices has been introduced to reduce summary court workloads and costs. This has been somewhat offset by the now substantial number of indictable offences being processed through Australia's summary courts, a move aimed at reducing long and costly

higher court processing. Other initiatives include sentencing discounts for guilty pleas, setting up pre-trial hearings to define clearly the issues in dispute and moves (such as those seen in the implementation of drug courts) to encourage judges to take more control over the trial process (see Willis 2000). These changes pose a direct challenge to the traditional adversarial approach. In the case of drug courts, for example, judges take on the role of trial manager - a practice that is more in line with the hands-on inquisitorial approach to justice. This will be discussed in detail below.

Furthermore, rights-based organisations have been critical of courts' inability to recognise the needs of specific court 'consumer' groups (i.e. Indigenous people, victims). Fuelled by the managerial market-driven rhetoric, rights-based organisations have played a key role in trying to ensure that the rights of particular court 'users' are considered. Court support and advisory services have been set up to provide for the needs of people from non-English speaking backgrounds, victims and witnesses (Dixon 1997; Commonwealth of Australia 1996; Mugford 1987). The push for victims' rights has been particularly strong (see Israel 1999). Calls from victims to have their interests acknowledged have led to initiatives at two levels: support services and procedural rights within the court. Victim support services including witness assistance, information, referral services and compensation have been introduced as a result of rising victim protest. Enacted procedural initiatives include, the right to be consulted about sentencing outcomes (Zdenkowski 2000:168-169), and moves toward victim-focused restorative justice (discussed in detail later).

Problems faced by Indigenous people in the criminal justice system have also been brought into focus since the *Royal Commission into Aboriginal Deaths in Custody*, with a number of changes to court practices being proposed and implemented as a result. These include cross-cultural training for court personnel, use of interpreters, the establishment of Aboriginal legal services, the use of restorative justice to serve Indigenous clientele better, the opening of Aboriginal Courts (Murri Court Queensland, Nunga Court South Australia, Koori Court Victoria), the piloting of circle sentencing in New South Wales and the establishment of Community Justice Groups in Queensland (Law Link New South Wales 2003; Queensland Courts 2003; Mugford 1997, Sarre 1997; Australian Law Reform Commission 1994).

Changing Theory

In addition to the societal landscape, changing theoretical paradigms are also impacting on Australian criminal courts and sentencing practices. Shifts in these paradigms are interconnected with changes in the broader social structure; they provide both the philosophical legitimacy for court change and a practical way to achieve it.

As already noted, the initial response to increased fear of crime was to 'get tough' and as such, we can say that retribution, denunciation, incapacitation and deterrence rather than rehabilitation have dominated criminal justice discourse in recent years. Theoretically, this get-tough attitude can be linked to the criminologist Robert Martinson's revelation in 1974 that; when it comes to rehabilitation, nothing works (Sarre 2001:38). Before Martinson, rehabilitation was widely accepted as the primary goal of criminal justice. In the early 1950s the dominance of rehabilitation led to the creation of many treatment programs that were aimed at addressing offenders' needs. However, by the 1970s when Martinson published his research findings, the rehabilitative ideal was essentially debunked, and as societal fear increased, punitive responses to crime were popularised (Gebelein 2000). These trends are

still evident in criminal justice today, but alongside this, a new paradigm has emerged, that has been labelled therapeutic jurisprudence.

As a theoretical standpoint, Philip Rieff's *The Triumph of the Therapeutic*, written in 1966, spearheaded the therapeutic jurisprudence movement (Nolan 2001:47). It was not until the 1990s, however, through the work of Wexler and Winick, that the idea became popularised (see Stole, Wexler & Winick 2001; Wexler 1993a; Wexler 1993b; Whitley 1993; Wexler 1992). Therapeutic jurisprudence is defined as:

the study of the role of the law as a therapeutic agent. This approach suggests that the law itself can function as a therapist. Legal rules, legal procedures, and the roles of legal actors, principally lawyers and judges, may be viewed as social forces that can produce therapeutic or anti-therapeutic consequences. The prescriptive focus of therapeutic jurisprudence is that, within the important limits set by principles of justice, the law ought to be designed to service more effectively as a therapeutic agent (Wexler 1993b:280).

The fundamental principle underlying therapeutic jurisprudence is the selection of a therapeutic option that promotes well-being for all (Rottman & Casey 2000:2). Therapeutic jurisprudence in the context of the court may thus emphasise therapeutic aims but this is not necessarily to the detriment of other aims or approaches. Wexler and Winick portray 'therapeutic jurisprudence as only one of the several valid ways to analyse legal problems' (Whitley 1993:304). They emphasise that 'therapeutic values, while significant, generally should supplement, rather than dominant, values produced by other approaches' (Whitley 1993:304). Therapeutic jurisprudence is in part a return to the old rehabilitative ideals that were ridiculed in the 1970s. As will be demonstrated shortly, however, this new rehabilitation is perhaps more sophisticated and appeases advocates of the 'get tough' on crime stance.

After the initial shock of Martinson's 'nothing works' conclusion, social researchers in the 1980s again started to conduct research into rehabilitation. They found that: a) treatment could work as long as it was sustained and intensive, b) the key variable in treatment was the length of stay, and c) the outcomes of compulsory and voluntary treatment did not differ significantly (Makkai 1998:2). Most importantly, researchers discovered that specialised treatment for certain groups of offenders (e.g. drug offenders, perpetrators of domestic violence) could be effective in reducing offending.

Therapeutic jurisprudence provides judicial guidance, and in practice, it shifts courts from adversarialism to problem solving. In Australia, therapeutic jurisprudence can be seen operating through to the establishment of problem-solving courts and restorative justice systems.

Problem-Solving Courts

Problem-solving courts have, in recent times, been established worldwide. These courts epitomise therapeutic jurisprudence in action, go by many names and take many forms including: drug courts, domestic (family) violence courts, mental health courts and community courts. The United States of America has been a world leader in these new justice experiments and Australia has not been far behind.

The United States headed the procession in 1989 by introducing the first drug court in Dade County Florida. Since then over 600 drug courts have started or are at the planning or implementation stage throughout the United States (Center for Court Innovation 2002). In addition, by the end of the year 2000, eleven community courts were operating across the United States with an additional six due to open (Lee 2000:1). Domestic violence courts

have been established in Florida and New York, a mental health court has begun running in Florida and a Homeless court has begun official operation in California (Center for Court Innovation 2002). In Australia, drug courts have been established in New South Wales, Queensland, South Australia and Western Australia. Domestic (family) violence courts operate in South Australia, Western Australia and Victoria and Mental Health Courts in South Australia and Queensland. In a more recent development, New South Wales announced the piloting of a Child Sex Offences Court in March 2003 (Cossins 2003; Rodger 2003).

Although problem-solving courts and the therapeutic paradigm underlying them are still in a transitional phase of development, a number of common elements can be identified. Problem-solving courts seek to achieve tangible outcomes for victims, offenders and society (e.g. reduce recidivism, increased sobriety and, as a result, healthier communities) by promoting reform outside of the courthouse as well as within. Judicial authority is actively used to solve problems and change the behaviour of litigants. Instead of passing off cases to other judges, to probation departments and/or to community-based treatment programs, problem-solving judges stay involved with each case even after adjudication and employ a collaborative approach, relying on both the government and non-profit partners (i.e. criminal justice agencies, social service providers, community groups, and others) to help achieve their goals. The result is a change to courtroom dynamics including, at times, certain features of the adversarial process. For example, judges in problem-solving courts convene meetings and broker relationships with community groups and/or social service providers (Berman & Feinblatt 2001:131-132).

A more specific understanding of how problem-solving courts operate can be achieved by taking a brief look at the operation of drug courts currently operating in Australia.

Australian drug courts provide an 'intensively supervised treatment program for drug-dependent offenders, aiming to assist such offenders to overcome their drug dependence and criminal offending' (Briscoe & Coumarelos 2000:1). The theoretical underpinnings of therapeutic jurisprudence can be seen clearly in the philosophies underpinning drug court practice which is described as 'a new direction within the criminal justice system'. Here prosecution and defence lawyers co-operate in a non-adversarial climate and there is a 'close working relationship between treatment providers, law enforcement agencies and the court. A consensus approach is possible because all those connected with the court share the goal of achieving the rehabilitation of drug dependent offenders' (Murrell 1999:11). Thus, for example, Murrell (1999:4) notes that the New South Wales Drug court identifies the following key components of its system:

- Treatment is integrated into the criminal justice system.
- Prosecution and defence lawyers work together as part of a drug court team.
- Participants have access to a continuum of quality treatment and rehabilitation services which meet their health needs.
- There is ongoing judicial supervision and regular judicial interaction with each participant.
- Networks are forged between other drug courts, public bodies, treatment providers and the community.

Initial results from drug court evaluations show that participant satisfaction is high and there is strong support for their effectiveness. The notable benefits include reductions in re-

offending, re-arrests, drug related crime, substance abuse and general betterment in participants' health, well-being and social functioning (Makkai & Veraar 2003; Lawlink NSW 2002a). If these initial evaluations are correct, problem-solving courts may well produce significant benefits including cost savings to the community and improved effectiveness in the legal system (Western Australia Department of Justice 2002a). These new courts thus fit with the idea of the managerial project being both cost efficient and service effective.

In terms of fiscal savings, it has been noted that 'drug courts will more than pay their way in terms of long-term reduction in financial and other costs to the community' (Western Australia Department of Justice 2002). A recent evaluation of the New South Wales drug court found that 'the cost per day of an individual placed on the Drug Court Program (\$143.87) was slightly less than the cost per day for offenders placed in the control group and sanctioned by conventional means (\$151.72)' (Lawlink NSW 2002a). Furthermore, cost-effectiveness in the long-term looks promising. In New South Wales, 'larger differences between the alternatives in terms of cost-effectiveness of reducing the rate of offending' were found in their evaluation of drug courts. It cost an additional '\$19 000 for each possess/use opiates offence averted using conventional sanctions than it cost using the Drug Court Program' (Lawlink NSW 2002a).

It is also important to note that problem-solving courts are not considered a soft option when it comes to dealing with crime. Problem-solving courts make greater demands on offenders than do traditional courts. For example, offenders under the drug court schemes are usually placed under sustained, closely monitored court jurisdiction for around 12 to 24 months and in this time will undergo intensive treatment regimes. This degree of control is far greater than would be the case under the conventional court where at the most, only a short term of imprisonment would be imposed (Makkai 1998:3). In the drug court, judges receive on-going reports about offenders' treatment progress and drug test results. These intense levels of control found in the new problem-solving courts appease those advocates who want to get tough on crime. In addition, their therapeutic philosophy appeals to those with rehabilitative ideals.

However, problem-solving courts present us with a number of unique problems. Criticisms of the drug court, for example, are found at two levels: overly harsh sanctioning and violation of individual rights.

First, it is argued that drug courts make more demands on offenders than traditional courts. In Queensland for example, the drug court imposes a rigorous regime on participating offenders. They offenders attend court weekly, visit with case managers weekly to fortnightly, are drug tested regularly, must participate in a number of health and life treatment programs (such as methadone maintenance, live-in rehabilitation treatment, budgeting, cooking courses), and perform community service. Further sanctions may then be imposed for non-compliance and could include the imposition of a monetary penalty, community service order or imprisonment term. As is the case with the majority¹ of Australian drug courts, Queensland legislation does not define how long a participant will be involved in the drug court program. This essentially means that the regime is a form of indeterminate sentence. However, process estimates for Queensland are between 12 and 18 months.

1 Victoria has written into legislation that the drug court program must finish after 24 months (Makkai and Veraar, 2002 - awaiting release).

It is vital to remember that Australia's drug courts tend to deal almost exclusively with the most serious of drug offences/offenders. One of the general drug court eligibility criteria is that a potential participant would normally have been sent to prison. This is in stark contrast to drug courts in the United States where less serious drug offending is dealt with (Makkai & Veraar 2002). With this being the case, it is possible that Australia will avoid criticism of overly harsh sanctioning through the drug courts. However, the indeterminacy of sentence length in the Australian drug courts, and the tough regime imposed on participants, could still result in accusations of harshness.

A second concern raised with regard to drug courts relates to the possible violation of individual rights. It is argued that for drug court participants the presumption of innocence is effectively forgone (see Nolan 2001:198-199). In New South Wales and Queensland, for example, a guilty plea must be made before an offender is eligible to enter into a drug court program (Queensland Department of Justice and Attorney General 2002; Lawlink NSW 2002b).

Another criticism is that participation in the drug courts must be voluntary. However, the volunteerism becomes questionable when influenced by considerable State coercion. In Queensland, for example, the offender must choose between imprisonment and treatment in the drug court.

In sum, it is possible that the ideals behind therapeutic jurisprudence when actioned via the problem solving courts may simply be harsher punishment dressed up as rehabilitation because participation is of an indeterminate length, involves close judicial monitoring and individual rights could be threatened albeit 'voluntarily' (Nolan 2001:202).

Restorative Justice

Increasing prison populations and challenges to the courts' ability to deal adequately with court consumers' rights (particularly those of victims and Indigenous offenders) have resulted in what is described as the restorative justice movement for criminal justice reform (Strang 2000:22). Restorative justice has emerged over the last decade as a possible and indeed feasible, alternative to traditional forms of justice. Like problem-solving courts, restorative justice practice has been described as therapeutic jurisprudence in action being orientated around problem solving (Rottman & Cassey 2000:1).

Restorative justice can be broadly defined as 'a method of responding to crime that includes the key parties to the dispute (that is, victim and offender) with the aim of repairing the harm' (Daly 2000:167). To repair this harm, restorative justice practice often requires offenders to make reparation for wrongdoing to the victim and/or the wider community. The restorative justice process is subsequently victim and community focused. It is an initiative that is meant to belong to the community rather than exclusively to the government (White & Haines 2000:180). As Crawford (2000:300) states 'restorative justice recognises that crime is more than an offence against the State; it looks at the impact on victims and others involved (family and kinship) and how communities can help'. In doing so, the ultimate aim of restorative justice is to increase informal social control within the family and wider community and thus reduce rates of offending. The potential for using restorative justice to recreate an extended community support network has been described as 'powerful and promising' (Levine 2000:554). By writing restorative justice into statute, the law may act to strengthen families, communities and enhance people's sense of participation, and control over their lives — the law in this case is thus used as a therapeutic agent (Levine 2000:554).

Restorative justice theoretically embraces community diversity and difference. In doing so, it presents a viable way of addressing different community needs in a culturally diverse society. Victim's rights groups and calls from the public to recognise the specific needs of Indigenous consumers of justice can subsequently be appeased by the popularisation of restorative justice. At present, all States in Australia have some type of restorative justice program in operation. The majority of these programs are used to deal with young offenders who have committed petty offences, and take the form of restorative justice conferencing (Strang 2001). While the form does vary between conferences, (see Daly 2001:3), they usually involve a young offender (who has admitted to the offence) and their supporters (often a parent or guardian), the victim and their supporters, a police officer and a conference convenor.²

At a restorative justice conference all the parties come together to talk about the offence and its impact. Theoretically these discussions take place in the context of compassion and understanding. An agreement, or undertaking which the young offender is expected to complete, is developed at the conference: for instance verbal or written apologies, paying some form of monetary compensation, working for the victim, doing other community work and/or attending counselling sessions (Daly 2001:2).

Restorative justice could be viewed as a form of justice privatisation because the State partially withdraws from the process and more responsibility is placed in the hands of the community (Morris & Maxwell 2000:207-208). Shifts in Australian political ideology from welfare to market-based paradigm subsequently marry with restorative justice principles. In addition, cost-benefit analyses from Canada and New Zealand show that restorative justice schemes could be more cost-effective than traditional court responses to crime.³ From Canada, a Native Counselling Services of Alberta (2001:4-5) report estimates that for every dollar the Provisional Government has spent on one particular restorative justice program, it would have had to spend CAN\$3.75 for pre-incarceration costs, prison and probation costs. In New Zealand, Maxwell, Morris and Anderson's (2000:7) analyses of two restorative justice programs yielded further evidence of fiscal savings. They estimate that per 100 people these projects saved the government between NZ\$27, 811 and NZ\$168, 259.

Obviously, reducing expenditure will ensure restorative justice receives governmental support (Crawford 2000:300). Simultaneously, of course, restorative justice initiatives also appear to address the hitherto unmet needs of certain court 'consumer' groups. Together this creates a viable and acceptable alternative to traditional justice on all sides of the equation (Crawford 2000:301). There is good community support for restorative justice (Strang 2000; Sherman, Strang, Woods 2000). It appeases those who want to get tough on crime because offenders are not seen to be getting away with it, they are required to take responsibility for their actions and make adequate amends that address victims' needs. It also appeals to those who feel that traditional court systems simply stigmatise offenders and makes them worse (Strang 2000:31).

As with the problem-solving court, however, there are uncertainties about restorative justice. More specifically, there is concern over the potential for net widening, inadequate protection of individual rights in the context of informal judicial processing, and conferences being coercive, conflictual and intimidating (Strang 2001:38). The centrality of community to restorative justice, and with it the potential for State withdrawal from justice, could also be problematic (Crawford 2000:302).

2 It should be noted, however, that adult conferencing does take place in the ACT, Western Australia and Queensland (see Strang, 2000: 25).

3 To date, there have been no published cost-benefit analyses of restorative justice in Australia.

Restorative justice has been criticised for net widening, 'namely, extending the client reach of the justice system by increasing the overall proportion to population (system-insertable and "others") subject to some form of system control' (Blomberg 2002). This type of justice potentially widens the net of control by dealing with trivial offences that would previously have been ignored or for which offenders would have been diverted out of the justice system: that is, the types of juvenile crime dealt with in Australia through restorative conferencing are generally, but not always, of a less serious nature (Strang 2001:5).

As with the drug court, there is concern over the protection of individual rights in the restorative justice process. The informal nature of restorative justice, it is argued, could increase the potential for offenders' rights of due process to be violated. For example, the voluntary nature of restorative justice is questionable (Strang 2001:35). As is the case with the drug courts, young offenders involved in restorative justice programs are required to admit their guilt. Once again, voluntary participation in the context of a coercive environment such as that found in the criminal justice arena could be problematic because offenders may admit to crimes under the guise of sentencing leniency.

Offenders who volunteer to participate in a restorative justice program could also be those who are least in need of restoration, those who are already the most integrated into the community. By contrast, those with the most tenuous community relations and who, for whatever reason, do not have social networks of trust and mutuality could be less likely to volunteer (Crawford 2000:293-294).

Lack of appeal mechanisms regarding outcome severity is a further concern and similarly to the drug court, some evidence suggests that for offenders restorative justice is 'unduly intrusive' and has the potential to 'impose harsher outcomes than would be meted out in court' (Strang 2000:38). For victims there is a chance of being 're-victimised by taking part in conferences, leaving them more fearful or anxious than before' (Strang 2001:35).

Another argument is that restorative justice could potentially harbour problems at the broader social structural level in two ways (Crawford 2000:302). First, State withdrawal and community induction into judicial processing via restorative justice could be problematic in that communities are marked by different mobilisation capabilities. The reality, quite simply, is that some communities have more resources than others and are thus better able to aid the restorative justice process. Second, there are reservations about why someone would welcome restoration, or reintegration into a community that has abused or marginalised them. Many offenders live on the margins of society and their experiences are often that of an outsider with little connection to the mainstream. Such feelings, for example, may account for why restorative justice evaluations in South Australia are finding that a much higher proportion of Indigenous offenders either did not attend or did not agree to an outcome at restorative justice conferences (Strang 2001:14). Any further move toward restorative justice should thus be tempered with care to ensure that increased community responsibility does not result in the further perpetuation of exclusionary social practice from which State responsibility can be removed.

Conclusion

Problem-solving courts and restorative justice fit with Australia's current political, economic and social agenda for cost efficiency and service effectiveness. Both of these 'new' justice initiatives appear fiscally viable in the short and long-term and may quell

consumer (public) dissatisfaction with our more 'traditional' court processes. However, serious consideration needs to be given to whether the supposed benefits (for which further evidence is necessary) actually outweigh the potential pitfalls. While being aligned with popular political rhetoric and community sentiment can provide a rationale for doing justice differently, it does not necessarily constitute a good reason to continue down this track. Criminal justice fads and fashions come and go, often at the expense of dealing with the real issues that underlie crime (such as economic marginalisation, racism, unemployment). Current challenges to the adversarial sentencing practices that are traditionally the domain of Australia's criminal courts are of concern in relation to the violation of offenders' rights, reduced government responsibility, increased community responsibility, harsher treatment and potential re-victimisation.

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