

Therapy and Justice Belong Together

ARIE FREIBERG

Emeritus Professor of Law, Monash University

Dr BECKY BATAGOL

Senior Lecturer in Law, Monash University

Both Co-Authors *Non-Adversarial Justice*, 2nd ed, 2014

The Australian [published an opinion piece](#) in which Jennifer Oriel argued that that ‘activist judges’ are usurping the role of parliament in promoting non-adversarial justice, therapeutic jurisprudence and restorative justice. The piece is a fine example of post-truth journalism. It is replete with errors, devoid of empirical evidence for its assertions and draws unjustifiable conclusions from tenuous assumptions.

The truth is that in Victoria, and in a number of other jurisdictions, drug courts, mental health courts, Aboriginal courts and family violence courts have all been established under the authority of statutes passed by their legislatures. Our liberal democracies have made laws which judicial officers are duly following.

Dr Oriel’s article demonstrates how easy it is easy to misunderstand the concepts of therapeutic jurisprudence, restorative justice and non-adversarial justice. As they are important aspects of our justice system, it is worth explaining what these ideas and practices do –and do not– involve.

In the context of repeated calls tougher law and order policy following the [Bourke Street tragedy](#) and the [juvenile justice ‘crisis’ in Victoria](#), there is a need to set out the evidence showing how [therapeutic justice is the solution, not the cause of criminal activity](#).

Therapeutic Jurisprudence, Restorative Justice and Non-Adversarial Justice: What are they?

[Therapeutic jurisprudence](#), or ‘TJ’, as it is commonly known, asks us to consider the [emotional and psychological welfare](#) of those who come into contact with the justice system. At a minimum, it seeks to reduce the psychological harm inflicted upon victims, offenders, parties to civil disputes, witnesses and legal professionals in the legal system.

One of the criticisms Dr Oriel made of TJ was that it requires judges to transform court practice ‘from black letter law to therapy culture.’ This is not correct. David Wexler and Bruce Winnick, have been clear since they began writing about TJ in the US in the 1980s that under TJ, [therapeutic goals should never trump other goals of the legal system](#) such as justice and due process. Rather than undermining law and the legal system, TJ [brings to the table issues that previously have gone unnoticed](#).

[Restorative justice](#) processes in the criminal justice system usually involve facilitated meetings between victims and offenders to discuss a particular offence, why it happened, the impact of the harmful behaviour, and any reparations the offender can make. Restorative justice conferences are considered a way of giving a real voice to victims, who are not a formal party to the criminal process. One account of why restorative justice processes prevent crime more effectively than retributive practices, known as [reintegrative shaming](#), is that the discussion of the consequences of the crime by victims (or consequences for the offender's family) structures shame into the conference. The Australian Capital Territory has recently become the first jurisdiction in Australia [to legislate for restorative justice as an option for victims](#) of a broad range of criminal offences.

Non-adversarial justice is an umbrella term [we coined](#) for a constellation of theories and practices used across the civil and criminal justice systems which have in common a tendency towards prevention rather than post-conflict solutions, cooperation rather than conflict and problem solving rather than solely dispute resolution. Therapeutic jurisprudence and restorative justice are examples of non-adversarial justice, as are [mediation](#) and other forms of [Alternative Dispute Resolution](#) and [preventive law](#). In the US, Susan Daicoff has termed a similar collection of processes and ideas [comprehensive law](#).

How integrated are Therapeutic Jurisprudence, Restorative Justice and Non-Adversarial Justice in the Legal system?

Therapeutic jurisprudence, alongside other non-adversarial approaches such as restorative justice, have entered the lexicon of government policy as well as [statutes](#) and [caselaw](#), and have begun to generate change in courts in a number of jurisdictions worldwide. One of the key ways that TJ has been put into practice in Australia is through and [problem-oriented](#) or [solution-focussed courts](#) which aim to address the causes of criminal behaviour. Victoria's [Neighbourhood Justice Centre](#) (about to celebrate its 10th birthday), [the family violence courts or divisions](#) and [drug courts](#) that exist in most Australian states, the [Nunga Courts](#) in South Australia, the [Koori Courts](#) of Victoria and the [Murri Court](#) of Queensland are all examples of problem-oriented courts in Australia

Therapeutic jurisprudence, restorative justice and non-adversarial justice emerged as a result of the endemic failures of the criminal justice in [responding to drug and alcohol related crime](#), [mentally disordered and intellectually disabled offenders](#), high rates of Indigenous over-representation in the [courts](#) and [prisons](#), [repeat family violence offenders](#), [repeat drink drivers](#) and other problematic offender groups that make up the bulk of offenders brought before the courts. Both judges and legislatures have recognised this and responded with creative, positive and evidence-based policies.

Traditional, retributively-based criminal justice has not disappeared. It still represents mainstream justice in Australia and elsewhere, particularly in the higher courts that deal with the most serious crimes.

Placing the responsibility for the impending anarchic society at the feet of therapeutic jurisprudence is simplistic and misleading, just as misleading as characterising problem-oriented courts as emotive and akin to TV reality shows. This has never been the case in Australia. [Australian judges are not therapists, nor should they be](#). However, they are aware, through their daily practice, of the [reasons why many offenders keep reappearing before them](#) and why [traditional criminal justice means have failed](#) and giving them [the power to link health and social services to sentencing processes](#) is an [important step forward in dealing with the underlying causes of crime](#). This is not radical, subversive or emotive: it is a clear, rational and sensible response to social problems that express themselves as criminal behaviour.

Evidence-Based Practice

Evidence-based practice is central to the establishment and continuation of most non-adversarial court practices in Australia. Dr Orieli claims that ‘enthusiasm for therapeutic approaches to law is rarely checked by independent research’. To the contrary, drug courts in [this country](#) and in the [United States](#), and the [Neighbourhood Justice Centre in Victoria](#), have been subject to multiple independent evaluations almost all of which have found them to be at least as effective, if not more so, than imprisonment, and for at least the same cost. The [CREDIT bail support program](#) in Victoria has also been [evaluated](#) and found to provide a positive return on investment in terms of decreased recidivism and improved health and social outcomes.

Literature on the relationship between imprisonment and deterrence which consistently shows that [not only is imprisonment not a deterrent, it is criminogenic](#). Imprisonment does work to incapacitate offenders, but at a significant cost.

The ultimate aim of the criminal justice system is to protect society and protection can be achieved in many ways: good policing, effective bail laws, well-resourced prosecution and legal aid bodies, well-informed courts and sentencing policies that can balance all of the aims of sentencing: just punishment, deterrence, rehabilitation, denunciation and community protection.

Yes, we should leave therapy to the therapists, but perhaps we should also acknowledge that therapists have a role to play in helping us to achieve justice.