

## Therapeutic Justice and Recidivist Drink Drivers: irreconcilable or compatible issues?

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The Tasmanian Institute of Law Enforcement Studies (TILES) publishes regular Briefing Papers on topics related to the Institute's research program. Our eleventh Briefing Paper is prepared by Dr Isabelle Bartkowiak-Théron and Terese Henning and is an outcome from the successful Recidivist Drink Drivers and Therapeutic Justice workshop organized by TILES and the Faculty of Law at the University of Tasmania in conjunction with the Magistrates Court of Tasmania in 2013.

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### Introduction

The issue of recidivist drink driving is complex. It attracts the attention of police officers, court magistrates, policy makers and media commentators alike. The topic is not new, and its persistence indicates ongoing failures in addressing a problem that has wide ranging social and economic consequences both at the individual and broader societal level in terms of well-being and safety.

Many legislative, education and law enforcement initiatives implemented worldwide have attempted to address the issue without satisfactorily solving it. In accordance with the generic trend of therapeutic justice, some new initiatives have looked at creating specialist problem-solving courts for recidivist drink drivers. This form of problem-solving works on a case by case basis and seeks to involve a range of organisational partners (both government and non-government) in identifying the root causes of this form of deviant

behaviour and then addressing them holistically. The Hobart (Tasmania) Magistrates Courts is currently considering the implementation of such an approach, following the success of its three extant problem-solving courts, namely the Youth Court, the Court Mandated Diversion program (for issues of drug addiction) and its Mental Health Diversion List.

This briefing paper explores the possibility of such an initiative in Tasmania. It provides a critical appraisal of the various processes involved in the delivery of such a program, based on discussion and papers presented at an international two-day workshop held in Hobart in September 2013. The authors start by providing a brief background to the issue of recidivist drink driving, and existing approaches to the problem. They then explore current issues in addressing recidivist drink-driving as a new form of vulnerability, before analysing the complexity of adapting problem-solving, therapeutic justice models to existing legal frameworks intended to address multilayered, and sometimes pathological, vulnerabilities.

### Background

Road safety, despite being an issue on the political and policy agenda for many decades, only really came to the fore in Tasmania in 2000, with the release of the first Tasmanian Road Safety Strategy in 2002<sup>1</sup>. In light of almost 5000 people being killed or seriously injured on Tasmanian roads between 1996 and 2005<sup>1</sup>, with 9% of these involving drink driving, and 'young road users aged 16-25 years represent[ing] 41% of all serious casualties involving alcohol'<sup>1</sup>, the strategy started considering a shared responsibility approach to driver behaviour, with drivers, regulators, road designers and managers involved in safer transportation planning.

After the strategy was released, further data from the Department of Infrastructure, Energy and Resources (DIER) indicated that despite a downward trend in crash-related serious injuries between 2008-2012, out of all alcohol-related crashes occurring in Tasmania between 2008-2012, 19% resulted in serious injuries to the driver and/or passengers, and 4% in fatalities<sup>2</sup>. In 2012, 55 of 274 serious injuries and deaths (20.1%) on the roads were related to alcohol. Following a second action

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plan released by the DIER in 2010 calling for targeted actions<sup>3</sup>, a consolidated approach to drink driving and safer driver behaviour came to the fore of the political agenda. Reflecting on this matter, Chief Magistrate Michael Hill indicated that addressing the issue of drink driving, and particularly that of repeat drink driving:

is a question of resolve, and a question of will and a question of cooperation between various agencies and those in the community who can provide these sorts of programs. At the end of the day drink driving is a prevalent offence in our society about which I think we've done very little<sup>4</sup>.

The matter of *recidivist* drink driving in particular is a more recent focus of academic and policy interest. A number of Australian and overseas studies<sup>5</sup> have indicated that a minority of drink drivers account for a majority of drink driving accidents, with people already charged with drink driving reappearing before the courts within 5 years of being charged initially<sup>2,5,a</sup>. This documentation constitutes a good springboard to start considering solutions (which must include legislative and policy changes), and illustrates the institutional efforts that have already attempted to curb the trend of incidents on the road. However, consultation with magistrates in the Hobart Magistrates Court revealed several persistent issues in the current approach to drink driving. Subsequent sections of this paper outline them before reflecting on forthcoming solutions to these systemic issues.

In light of a rising concern amongst magistrates and police to reduce the revolving door relating to drink driving, the Tasmanian Institute of Law Enforcement Studies (TILES) and the University of Tasmania's Faculty of Law organised an international two-day workshop intended to map pathways in addressing the issue of recidivist drink driving. Speakers included prominent members of the criminal justice system, service providers, victims associations and Tasmanian government representatives, with members of the media attending the first day of the workshop<sup>11,b</sup>.

With a multidisciplinary panel of speakers, the workshop took a strong stance on defining and attempting to provide answers to an entrenched problem of society. Some prominent issues explored during the workshop were those relating to the poor fit of some measures with regard to repeat drink driving. As illustrated in the next section, there are currently a number of measures in place to address drink driving. The administrative or judicial nature of these measures however makes it sometimes impossible for these measures to be combined, even if a combination of these measures would be: (1) beneficial for the offender; (2) safer for the community; and (3) cost-saving for the Justice department. There are indeed several systemic issues that not only confuse the debate, but also prevent stakeholders from devising novel and proactive solutions to the problem.

The complexity of the drink driving phenomenon and the variety of offender profiles were also issues that attracted attention during the workshop. Given that the

circumstances of drink driving range from social drinking and ill-advised behaviour to the profound problem of alcohol addiction, any 'blanket' solution to such a multifaceted problem needs to be sufficiently flexible to meet a wide spectrum of needs and circumstances. Problem-solving courts seem to provide a convenient answer to such an endemic and complex problem. The apparent convenience of simply appending this problem area to the jurisdiction of existing Tasmanian problem solving courts should not be allowed to obscure the very real need to unpack overseas and interstate models before devising processes to meet local requirements.

## Current issues

The first wave of legal responses to drink driving in Tasmania, which attempted to change societal attitudes and behaviour, occurred in the 1970s. Its principal components were the introduction of random breath testing and the lowering of the legal limit of alcohol concentration in the blood. While these reforms contributed to a dramatic decrease in road fatalities, as detailed in the preceding pages, alcohol-related road accidents and fatalities have remained a concern as has recidivist drink driving.

Sentencing for drink driving is governed by the *Sentencing Act 1997*, the *Road Safety (Drug and Alcohol) Act 1970* (Tas) and the common law. The *Road Safety (Drug and Alcohol) Act 1970* (Tas) mandates specific penalties for drink driving, including mandatory minimum fines, mandatory minimum periods of disqualification and discretionary prison sentences. The most common penalties are fines coupled with licence disqualifications for the amounts and terms mandated by the legislation. Licence disqualification may not show up in the official statistics because it is an ancillary order.

Additionally, in recent years an Interlock Program has been introduced with the aim of reducing recidivism and promoting the rehabilitation of recidivist drink driving offenders. The legislative framework for the program is provided by the *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), Part 2, Division 3A. The Interlock Program applies to a person convicted of the following offences: drink driving where the recorded blood alcohol concentration was 0.15 or more; two or more drink driving offences in a five year period; driving under the influence of liquor; failing to provide a breath/blood specimen for analysis. Following the period of licence disqualification applying to convictions for any of these offences, an offender's new licence will have a condition attached requiring that he or she have an Interlock installed in his or her car for a period of 15 months. This period is called the 'I condition period'. The I condition period comprises two stages, a nine month initial 'learning period' followed by a six month 'demonstration period'. To complete the program the offender must record zero lockouts (that is, be alcohol free when driving and not prevented from driving by the interlock device) during the demonstration period. If an offender is 'locked out', due to having been found to have alcohol in his/her system at all during the demonstration period, that period will reset.

Other traditional options are available, including probation orders, community service orders and suspended sentences. Conditions might be attached to probation orders and suspended sentences, which could include attendance at a Sober Driving Program. The same outcome might be achieved by virtue of 28(g) of the *Sentencing Act 1997* (Tas) by imposing a community service order on the offender under s 7(c) of that Act<sup>c</sup>.

Research findings now clearly show that increasing the severity of traditional sentencing options has little or no impact on drink-driving rates or recidivism rates for drink driving<sup>7,12,13</sup>. For example, Interlock and education programs can be effective but their effect may dissipate over time. Offenders may avoid interlock programs because they are not part of the Tasmanian court sentencing regime (and only an administrative sanction). Research conducted by the Victorian Sentencing Advisory Council has revealed that many people decide not to undertake the process of obtaining a new licence after the disqualification period has expired but instead drive without a licence and accordingly without an interlock device<sup>14</sup>.

As the Chief Magistrate of Tasmania, Mr Michael Hill, noted at the workshop the limited, traditional sentencing options available to Tasmanian courts may mean that recidivist drink drivers are imprisoned when they would be better served by a therapeutic justice approach<sup>4</sup>. Mr Hill further stated that available sentencing options have limited impact on repeat offenders' perceptions of the risks resulting from their own behaviour and limited effectiveness in achieving attitudinal change. This means that, viewed in economic terms, these sentences are not cost effective in the recidivist drink-driving arena.

Moreover, the success of available sentences in reducing drink-driving recidivism is constrained by their rigidity and lack of specific focus on drink driving offences. Accordingly, it was generally recognised at the workshop that what is needed is a more interactive, actively interventionist approach, something that enables on-going assessment and supervised treatment of the offender as well as recognition of the specific criminogenic needs of individual offenders. Richardson advocates treating recidivist drink drivers as a clinical population with long-term problems<sup>5</sup>. This points to a problem solving, therapeutic approach. As Richardson states:

A new approach is required for hardcore drink drivers that incorporates the findings from the research that a tailored, multifaceted approach, that incorporates intensive supervision, alcohol interlock devices, individual treatment programs, and possibly short jail sentences may be the best option to reduce recidivism. A problem-oriented court is an intervention that offers the type of comprehensive program that is aimed at changing the long-term behavior of hardcore drink drivers, which the research suggests is required<sup>15</sup>.

## Problem solving courts and therapeutic justice

Therapeutic approaches to justice have been widely documented in the past 30 years as processes that would benefit vulnerable persons entering the justice process, especially as a consequence of the maladaptation of traditional sentencing to emerging trends in offending<sup>16,17</sup>. The complexity of some offenders' circumstances has justified a more sophisticated approach to people's offending or victimisation, with a view to addressing the root causes of social problems, as opposed to a surface response to crime<sup>18,d</sup>.

The driving force behind new approaches is that the criminal justice system as it presently operates ignores the social context in which crime and disorder occur and, in doing so, decontextualizes the offence and marginalizes various players ... the expected end result is that communities and individuals are empowered in dealing with their problems and in influencing the directions of the criminal justice process<sup>19</sup>.

Young people, indigenous people, people living with a mental illness and people with addictive behaviours have been the first ones to be provided with alternative modes of justice, with new, 'problem-solving courts' adapted to specific offender profiles<sup>17,19</sup>. The most well known example of these problem-solving courts are Youth Courts (and the juvenile justice system more generally), Koori Courts (and their derivatives), and Mental Health Courts (or in the case of Hobart, the Mental Health Diversion List). Drug Courts and Family Violence Courts are also prevalent examples of problem-solving courts<sup>17,19,20</sup>.

The Australian Institute of Judicial Administration ([www.aija.org.au](http://www.aija.org.au)) lists the key features distinguishing problem-solving courts from mainstream courts as follows:

- they seek to address all the underlying issues rather than simply focusing on the legal problem;
- judicial case management;
- a multi-disciplinary court team;
- a collaborative approach with participants;
- the involvement of government and community agencies in the development and running of the project; and
- the use of therapeutic legal processes by the court and team members.

Problem-solving courts are underpinned by the idea that the commission of a crime is only the conclusion of a long list of issues left unaddressed which affect one's behaviour. Crime is therefore a 'surface problem', which needs to be addressed at a deeper level in one's life. Hence problem-solving justice presents itself as a 'therapeutic approach' to the crime problem. It aims to

target offenders' and victims' circumstances holistically, with a primary focus on individuals' well-being<sup>17,21</sup>. In these circumstances, according to Wexler<sup>22</sup> therapeutic jurisprudence addresses the impact of the law and of the legal process on emotional and psychological well-being. In particular:

The problem-solving court approach focuses on defendants and litigants whose underlying medical and social problems (e.g., homelessness, mental illness, substance abuse) have contributed to recurring contacts with the justice system. The approach seeks to reduce recidivism and improve outcomes for individuals, families, and communities using methods that involve ongoing judicial leadership; the integration of treatment and/or social services with judicial case processing; close monitoring of and immediate response to behaviour; multidisciplinary involvement; and collaboration with community-based and government organizations<sup>23</sup>.

Nevertheless, the problem-specific approach to justice has its detractors. The idea of specialised courts for a targeted group of offenders in particular is supported by a large number of advocates, whilst at the same time meeting cautious critique by some justice specialists (see also Moore<sup>20</sup>). In the case of people living with a mental illness, Helen Syme (former Deputy Chief Magistrate in New South Wales), was 'wary of embracing the idea of a Mental Health Court due to the potential stigma that attaches to the offender by being dealt with by such a court<sup>5</sup>. Instead, and for the very purpose of secondary stigmatisation due to the court process, she suggested that all *generic* courts acquire the capacity and competence to deal with individuals with mental illness or intellectual disability and improved communication between courts, police, and government departments<sup>5,21</sup>.

### Clientele profiles and issues of recidivist drink driving vulnerability

The complexity of offender profiles warrants consideration. The implementation of new solutions to the issue of recidivist drink driving (which really constitutes an exemplar in what is now referred to as 'wicked issues'<sup>e</sup>) is admirable. The vulnerability characteristics of these offender(s) call for an analysis of who exactly attracts the attention of the criminal justice system and who would gain from a different judicial approach to their deviant behaviour<sup>24</sup>. Earlier studies into drink driving in Australia illustrate the societal nature of the problem<sup>5</sup>, and the difficulties in addressing the social context of alcohol use in Australia<sup>26,f</sup>.

What is of interest in the current approach to *recidivist* drink driving is the significant divergence in vulnerability attributes for *recidivist* drink drivers. Richardson<sup>5</sup> indicates that the majority of repeat drink drivers disqualified for one to six months in New South Wales are male, indigenous, below the age of 25, in a situation of economic disadvantage, and that 15.5% of drink drivers return to court within five years of another documented driving offence. In Victoria, another study showed that offenders

charged more than ten times with drink driving were aged between 35 and 71 years. Furthermore, Australian studies<sup>5</sup> indicate that even if charged and disqualified, individuals' circumstances or attitudes to justice lead them to defy their order and keep on driving.

The variety of profiles under consideration for a specialist drink-driving court (specialising in recidivism) is therefore wide-ranging, and a cursory glance at existing offender profiles indicates that an exhaustive typology would be if not impossible, at least extremely time consuming. Profiles will range from the terribly ill-skilled (some have said 'moronic') driver who doesn't think a drinking session with mates put him over prescribed blood alcohol content levels, to the elderly lady who pretends that 'she only had a light shandy after a win at the pokies'. There are those who deliberately choose to drive without a license (out of necessity or defiance) and the highly functioning alcohol addicts. There are also those who drink to forget, and in this case, a significant link to mental illness needs to be drawn between alcohol consumption and mental health. There are also those who drink *to get* drunk and reach the equivalent of a drug-induced 'high'<sup>9</sup>, in which case some extensive behavioural education and psychological follow up would be needed.

An element of *choice* or an inability to assess situations that lead to drinking and driving are the specific elements that also need consideration during case-by-case clinical assessments of a person's vulnerability. Interviews with magistrates before and discussions during the workshop indicate a disturbing pattern that some recidivist drink drivers do not necessarily think of danger to themselves and others as a possible component of their behaviour. Rather, they only see a fine or a license suspension as the 'only unfortunate outcome' of their drink driving (the 'too bad I got caught' attitude). This also reflects the worrying, yet undeniable fact that current answers to drink driving such as arrests and fines only uncover a small portion of all those who drink and drive.

Overall, the variety of vulnerability profiles and offender characteristics discussed at the workshop and unpacked in legal and criminological literature are something all criminal justice practitioners, including magistrates, police, correction officers and policy makers will have to keep in mind for the future. Problem-solving courts are comforting in the fact that they are currently one of the best pathways to analyse and provide solutions to what is arguably a multifaceted issue, with assuredly alcohol as only one compounding risk factor. Problem-solving courts have proven their worth in addressing cross-sectional vulnerabilities (with co-morbidity an issue often addressed in problem-solving court settings<sup>21</sup>), and in doing so not only in the most comprehensive way possible, with cost-benefits in mind<sup>20</sup>.

### Models currently discussed

Two models that are to hand in Tasmania that seem to offer the means to achieve the kind of interaction and behavioural and attitudinal change sought are the Court Mandated Diversion (CMD) program and the Mental Health Diversion List. Both these programs utilise all key components of therapeutic justice models including the

development of an individual treatment plans with service providers and criminal justice stakeholders; intensive treatment and supervision of offenders; frequent testing of offenders (in the CMD); ongoing judicial monitoring and the use of court-imposed incentives and sanctions. Their use of on-going *judicial* monitoring is regarded as one of the major incentives for and pre-conditions for achieving rehabilitation. This can only be achieved by the establishment of a court-based approach.

The question then is whether either of these models can be adapted to incorporate recidivist drink driving. Recommendations made in 2009 by the Victorian Sentencing Advisory Council suggest that there is much to be said for making such an attempt. The Council recommended that a specialist list be established in the Magistrates' Court to deal with cases of recidivist drink drivers for whom previous court orders had proved ineffective<sup>14</sup>.

There are, however, significant barriers to applying either model to recidivist drink drivers in Tasmania. While in Victoria a court list for repeat drink drivers framed according to therapeutic jurisprudence problem solving court models can be created under existing legislation and utilise existing infrastructure and programs, this is not necessarily the case in Tasmania. In Victoria, a problem solving approach for recidivist drink-drivers can be instituted using the community correction order as the sentencing mechanism. This sentencing option was enacted in 2012 to replace a number of different sentencing orders. Among the conditions that this sentencing option enables a court to impose is a condition for on-going monitoring and review by the court to ensure compliance with any other order the court has made. This provides the means to incorporate judicial oversight and review, a key component of the problem solving approach, into sentences imposed.

### Tasmanian Mental Health Diversion List

There is actually no legislative base for the Mental Health Diversion List (MHDL) in Tasmania. Instead this list utilises bail as the device for involving offenders in a treatment program. The offender's performance on the program is subsequently taken into account when the offender is finally sentenced. This model has the advantage that it can be applied to repeat drink drivers without the necessity for enacting or reforming legislation. It is thus immediately available and not subject to the 'slings and arrows' of outraged public or media response or to political resistance that might accompany an attempt to enact legislation to create a problem solving list for recidivist drink drivers. In attempting to enact such legislation a government risks voter backlash from electors who perceive such reform as being 'soft on crime'.

The lack of a legislative base, however, is problematic. The essentially coercive nature of the program may mean it is not human rights compliant if it does not have specific legislative imprimatur. To conform to human rights principles, coercive state conduct that encroaches on individual liberties must be lawful and non-arbitrary, which

means that it can only occur on grounds and in accordance with procedures established in law<sup>h</sup>. A lack of a legislative base also raises concerns about the long-term sustainability of both the MHDL and any similarly based drink driving list. Additionally there are implications that need to be thought through for a therapeutic problem-solving model of the current mandatory drink driving sentencing regime. For example, the existing mandatory sentencing regime for drink drivers may reduce opportunities for the provision of rehabilitation incentives which are embedded in problem solving models where reduced sentences can be progressively awarded for compliance with the court's orders as an incentive to reform.

The use of bail as the device for operating the model is also problematic. It effectively turns bail into a sentencing regime. Essentially this flouts the fundamental principles and freedoms that underpin bail – the right to liberty and the right to be presumed innocent until proven guilty. Further, if attached to bail, the program may not be able to achieve the degree of longevity for individual offender plans that overseas models suggest may be necessary to achieve rehabilitation. Finally the mental health diversion list offender programs target mental health issues not recidivist drink driving. Accordingly, they will necessarily have to be adapted if a drink driving list is to be incorporated into the MHDL, unless there is co-morbidity. Using sentencing vehicles like community service orders or probation is not an option, because neither currently contains the means to achieve the desirable judicial supervision that is a key component for success of problem solving approaches.

### Court Mandated Diversion (Drug Treatment Orders)

Legislative provision for Court Mandated Diversion (Drug Treatment Orders) is contained in the *Sentencing Act 1997* (Tas), Part 3A. However, this program is currently only available where there has been *illicit* drug use. Therefore, legislative change would be necessary to make this approach available for recidivist drink drivers. As noted above, there may be political and/or community resistance to this occurring as it might be interpreted as being 'soft on crime'. Even if legislative reform is achieved to incorporate recidivist drink driving into the CMD, adaptation of CMD programs may be necessary to make them suitable for recidivist drink drivers, particularly if their drink driving offending is not related to alcohol addiction.

There are also a considerable number of organisational collaborations at stake under the CMD model (particularly with health and community services). Offenders on drug treatment orders follow a strict regime of counselling, treatment, follow up and monitoring which require that significant support resources within and outside the court system are dedicated to the program. Any attempt at modelling a recidivist drink driver problem-solving court on the CMD structural framework would require the consideration of which assessment and support services are needed to cater for the vulnerabilities of recidivist drink drivers, and which partnerships to be brought into the fold.

## Conclusion: Issues to think through for Tasmania

Bearing these issues in mind, the Hobart workshop was concerned to devise a way forward for a therapeutic approach to recidivist drink driving, one that recognises that there may be barriers to adapting existing problem solving regimes to the needs of repeat drink drivers. The recommendations made acknowledged the need to devise a 'road map' for the establishment of a therapeutic model. One of the first tasks for completion posted on this 'road map' was the writing of a background paper to which key stakeholders agree and can subscribe as a basis for discussion with government and for promotion of a new agreed model with the community. The necessity for community acceptance was seen to be crucial to the establishment and longevity of a drink driving court. This is probably dependent upon media interest in and recognition of the benefits of a therapeutic approach in this area. This means that the engagement of journalists with crime journalism specialisation in educating and promoting attitudinal change within the community should be sought and encouraged.

The establishment of a small prototype court as an evaluative model was identified by workshop participants as a key mechanism for provoking media interest and achieving government and community understanding and approval. Once a drink driving court is established as a part of the court and justice landscape, its acceptance is more likely to follow. The ultimate aim is to achieve legislative imprimatur for a drink driving court because the coercive nature of the intervention, the human rights and sustainability issues noted above point to the necessity for it to have a legislated basis.

At both a theoretical and pragmatic level, cross-sectional vulnerability is probably the most pressing issue that governments and the judiciary need to consider. In saying this, contemporary debates are stuck in an unfortunate framework of silos that prevent a constructive alignment of resources and problem-solving process across agencies and areas altogether<sup>21</sup>. Briefly put, 'health deals with health matters', 'schools deal with education', etc. At a 2012 seminar on the implementation of the Australian Strategy against Binge Drinking, a representative of the federal government vehemently declared (after some much invited prompting) that 'there will be no health funding for law enforcement initiatives'. This was met with an acerbic critique by one of the authors of this paper, who was attending the seminar. Justice and policing in particular are two of the governments' portfolios that span multiple disciplines and specialties, with strong overlaps with health. Health practitioners and police officers often work together in the field or rely on each others' assessment of a situation<sup>29,30</sup>. Denying an individual's multi-layered circumstances, particularly the numerous, intertwined situations that may lead a person to drink and drive is not doing anyone any favours. Composite cases of comorbidity or trimorbidity are also more the rule than the exception<sup>31</sup>.

The Hobart Youth Court, MHDL and CMD are all therapeutic programs that exemplify how justice professionals currently assess cases from multiple specialisation perspectives (forensic mental health, drug services, police, corrections, legal defence, etc.). It is very likely, then, that a court specialising in the very problem of drink driving, or recidivist drink driving for that matter, will adopt the same administrative and management process as the others. A critical analysis of the current trend in the Hobart Magistrates Courts unveils an important pattern that is worth considering. First Chief Magistrate Michael Hill is adamant that the Magistrates Court in Hobart fundamentally tries to be a therapeutic one. The trends indicate that he is right.

In most situations, and when possible (i.e.: within the limits of the law), cases are diverted to a problem-solving pathway, with magistrates tapping into gravitating resources to bring the best solutions to the most difficult of cases. But with the very phenomenon of vulnerability now discussed in the most generic terms (that everyone is vulnerable, even temporarily<sup>24</sup>), then why make problem-solving courts 'a specialty'? There is an economic and efficiency risk in over-clustering specialty-courts for a very small number of defendants. The Hobart Magistrates Court is drafting itself a reputation of excellence *in being, fundamentally*, therapeutic. Such a progressive agenda need not be undermined by the modesty of its actors. Furthermore, over-clustering of the judicial process (i.e., one specialised court per vulnerability attribute) is unlikely to attract generous funding from the government, with ongoing requests for service rationalisation and evidence of efficacy and efficiencies.

We understand the current limitations to mainstreaming a therapeutic approach to all vulnerable offenders going through the Magistrates Court. Although the pathway may currently exist, it is extremely narrow and open to only a few travellers. There is a significant difference between the Court being 'fundamentally therapeutic' as a matter of principle, and actually having the capacity to sentence offenders to treatment options with a therapeutic court program. However, the MHDL has proven successful, although it runs without funding from the government. The CMD and the Youth Court have also always operated with limited funding, despite contributing to, in the case of the latter, a significant decrease in youth offending and incarceration between 2010 and 2013<sup>31</sup>. With several profiles of offenders treated according to the principles of therapeutic justice, and their vulnerabilities looked at with strong glass, the debate about whether to create a 'new' pathway for a 'new' profile of offenders seems superfluous. After all, with current processes arguably being already progressive, efficient and ethical, what the Court is currently looking at is something borrowed, something blue, for something not so new.

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## Notes

- <sup>a</sup> A 1988 American study indicated a 44% recidivism rate over 12.5 years<sup>6</sup>. See others<sup>2,7-10</sup>.
- <sup>b</sup> A full list of speakers, the workshop program, and some selected presentations can be found at <http://www.utas.edu.au/tiles/events/2013/september/recidivist-drink-drivers-and-therapeutic-justice-workshop>.
- <sup>c</sup> Section 28(g) of the *Sentencing Act 1997* (Tas), provides that it is a condition of a community service order that the offender attend educational and other programs as directed by a probation officer.
- <sup>d</sup> The criminal justice system was often criticised for only considering crime as a 'photographic snapshot' in one's life, as opposed to the various, complicated and often compounding, circumstances that would have led to the commission of an offense.
- <sup>e</sup> Complex social phenomena, such as ill health and well-being matters, anti-social behaviour and crime, are now widely accepted as crossing a range of disciplinary boundaries and spanning many areas of government and social life. Such problems are labelled 'wicked issues', where 'the problems and/or the solutions are either hard to define and/or not available or sub-optimal and often carry consequences that might lead to further problems'<sup>25</sup>. A wicked issue 'crosses international and national boundaries and involves multiple agencies and sectors at all levels of government'<sup>25</sup>.
- <sup>f</sup> Editorial limits prevent use to further develop on this particular point here. However, Flinders University's National Centre for Education and Training on Addiction (NCETA) dedicated three comprehensive reports on this topic<sup>26-28</sup>.
- <sup>g</sup> Roche et al.<sup>26</sup> have written extensively on the intricate cultural context in which alcohol is consumed.
- <sup>h</sup> Examples of procedures established in law can be seen in: Article 9.1 *International Covenant on Civil and Political Rights* and *Van Alphen v The Netherlands*.

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