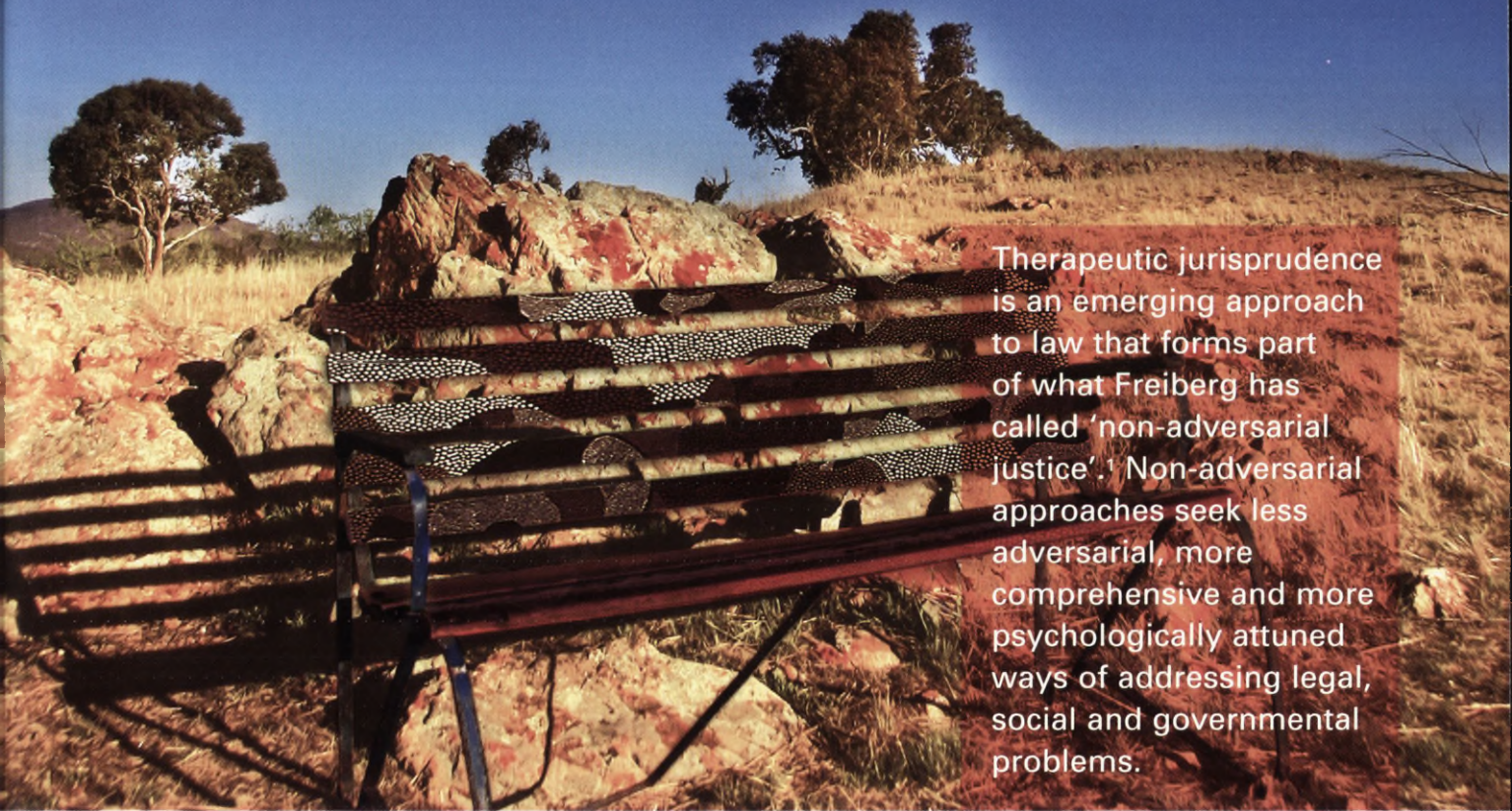


# Therapeutic jurisprudence, human rights and the Northern Territory emergency response

Michael S King and Rob Guthrie



Therapeutic jurisprudence is an emerging approach to law that forms part of what Freiberg has called 'non-adversarial justice'.<sup>1</sup> Non-adversarial approaches seek less adversarial, more comprehensive and more psychologically attuned ways of addressing legal, social and governmental problems.

**T**herapeutic jurisprudence examines the effect of the law, legal processes and legal actors – such as judges and lawyers – on the wellbeing of those influenced by the processes of the law and decisions made by those with formal legal power.<sup>2</sup> It asserts that wellbeing is a factor that should be taken into account in each legal context. Sometimes, wellbeing has to be subordinate to other legal concerns. For example, the individual wellbeing of a serious offender is given less weight when a court imprisons the offender to protect the public. But, in many cases, the application of the principles of therapeutic jurisprudence is consistent with and, indeed, can enhance other legal system values.

The most well-known application of therapeutic jurisprudence has been problem-solving courts, such as drug courts, but it is also applied to many other areas of the law,

including legislative schemes seeking to promote wellbeing.<sup>3</sup>

Therapeutic jurisprudence points out that the law often shares the aim of promoting positive behavioural change with the behavioural sciences and can learn from their findings. For example, therapeutic jurisprudence and behavioural sciences both emphasise the importance of self-determination in promoting positive behaviour. In doing so, they follow the contributions of scholars in the fields of law, politics, philosophy, economics, education and spirituality, who see it as essential to the promotion of wellbeing.<sup>4</sup> A common strategy in health, for instance, is to include the patient in consultations aimed at developing a health plan. This allows the patient to obtain an explanation of the options and contribute to the overall plan.

Self-determination enhances motivation and internal mechanisms that promote successful action.<sup>5</sup> On the other >>

hand, coercion and paternalism tend to inhibit those mechanisms and to promote resistance to change.<sup>6</sup>

Self-determination is important not only to individuals' wellbeing, but to that of collectives.<sup>7</sup> At an international level, it is seen to have an important role in determining political status and in promoting economic, social and cultural development. Self-development is a human right upheld by international instruments such as the United Nations Declaration of the Rights of Indigenous Peoples (for example, preamble and Article 3); the United Nations International Covenant on Economic, Social and Cultural Rights (Article 1.1); and the United Nations Charter (Article 1.2). While self-determination in the last two instruments is expressed as a collective right, in the Declaration of the Rights of Indigenous Peoples, it is expressed as an individual and collective right.

Procedural justice is also an important source for therapeutic jurisprudence. Research has found that interaction with legal authorities can affect self-esteem and respect for authorities and the law.<sup>8</sup> Procedural justice principles include authorities listening to those within their jurisdiction (voice), taking what they say into account in decision-making (validation), and treating them with respect. Where authorities follow procedural justice principles, the outcomes can be significant; for example, one study has found that when family violence perpetrators were accorded procedural justice by the police, the subsequent rate of family violence was less than when they were not.<sup>9</sup> In practice, this means that where parties are able to contribute to a process, the outcomes are more likely to last.

### THE NORTHERN TERRITORY (NT) EMERGENCY RESPONSE

The *Little Children Are Sacred* report (the report) was the final report of an inquiry into child sexual abuse in Aboriginal communities in the NT. In its processes and recommendations, it took a therapeutic approach. The report stated that the inquiry 'collected information by listening, learning and drawing on existing knowledge'.<sup>10</sup> There was wide consultation with the people and communities affected. They were given voice and validation, and treated with respect. The report sought to promote Aboriginal communities' self-determination by recommending their involvement in designing initiatives to address child sexual abuse and its underlying issues, and by stating that a collaborative effort is vital to success.<sup>11</sup> The report prompted considerable debate and government agitation and stirred the Howard federal coalition government into a frenzy of action.

The Howard government's response stands in stark contrast to the report's approach. For example, it did not consult with the Aboriginal communities and people affected when deciding what action to take. A number of commentators have criticised this approach.<sup>12</sup> However, Magistrate Sue Gordon, chairperson of the National Emergency Taskforce appointed to oversee the emergency response, told the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the emergency response

that there had already been enough consultation and that swift action was needed to address the crisis.<sup>13</sup> Yet, the report stated, 'There is nothing new or extraordinary in the allegations of sexual abuse of Aboriginal people in the NT. What is new, perhaps, is the publicity given to them and the raising of awareness of the wider community of the issue.'<sup>14</sup> Although prompt action was needed to address child abuse, it is questionable whether the desire for speed should have excluded consultation, collaboration and empowerment.

On the face of it, the emergency response was arguably therapeutic in its intent. For example, s5 of the *Northern Territory National Emergency Response Act 2007* (the Act) states that its objective was to improve the wellbeing of certain communities in the NT. However, the means by which these objectives were implemented was arguably anti-therapeutic, especially the failure to involve Aboriginal people in decision-making concerning the nature of the emergency response or its implementation.

The anti-therapeutic approach to implementing the emergency response is evident in a number of areas.

The Act confers significant powers on the government, including the power to compulsorily acquire land occupied by communities, to grant leases of that land back to communities, to dictate to communities how government-funded services are to be managed, to restrict alcohol in communities and to regulate community stores.

The associated *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007* also confers sweeping powers on the federal government to manage welfare payments to people in declared areas, including the power to quarantine a portion of those payments regardless of recipients' care responsibilities or proof of deficient parenting.<sup>15</sup> This practice has also been criticised for its discriminatory approach because, to date, only indigenous Australians have been affected by the 'voucher' system.

Compulsory child health examinations, increased measures to prevent access to pornography and increased police numbers were also strategies of the emergency response.<sup>16</sup> The very nature of these compulsory interventions conflicts with the stated object of the Act.

The message implicit in the legislation is that Aboriginal communities and their people are incapable of designing and implementing solutions to their problems – in contradiction to the findings of the report – and that governments need to take over that responsibility. As Sutton notes, it looks more to the colonial paternalistic past than to contemporary best practice.<sup>17</sup> Such policies do not promote respect for laws, legal processes and legal actors. They may even hinder the very object that the laws are intended to achieve.

### A THERAPEUTIC JURISPRUDENCE APPROACH

A collaborative approach to the legal framework and processes to address the problem of Aboriginal child sexual abuse in the NT would likely be more effective and therapeutic than the emergency response framework. It would give the communities ownership of the solution and promote individual and collective commitment to its implementation. A collaborative approach would involve

government listening to, respecting and working with the communities involved in formulating strategies to address the problem. It is in accord with best practice in addressing problems facing Aboriginal communities.<sup>18</sup>

A therapeutic approach would also involve Aboriginal communities and government in setting goals to be achieved through any intervention.<sup>19</sup> Goal-setting promotes higher performance by directing attention to goal-directed activities, energising people to greater effort, promoting persistence and 'leading to the arousal, discovery and/or use of task-relevant knowledge and strategies'.<sup>20</sup> The participation of government in the goal-setting exercise is important, given the commitment of taxpayer-funded resources to facilitate the project, and the need for accountability.

A therapeutic approach would also involve contracts between communities and government setting out the goals, strategies and targets, allocation of responsibility between government and communities and appropriate accountability and evaluation mechanisms. The use of contracts, perhaps together with legislation providing a mechanism for them to be established and officially approved, would demonstrate the government's respect for the communities, promote their human right to self-determination and for taking responsibility for solving their problems – a factor that Pearson sees as important in addressing dysfunction in Aboriginal communities.<sup>21</sup>

It may be argued that this approach would have been too time-consuming when urgent action was required to deal with the problem. However, targets could have been put in place to ensure the speedy attainment of agreements and the appropriate legislative framework. Even if a coercive or paternalistic approach was required to address a crisis, it did not justify its five-year duration, as set out in the Act. A therapeutic, human rights-based approach could have been (and still can be) developed to replace the coercive, paternalistic emergency response.

## CONCLUSION

The Howard government's response to the *Little Children Are Sacred* report prompts examination of the means by which governments set out to achieve apparently laudable aims by processes that are anti-therapeutic and, in some cases, in breach of human rights. For example, the failure to consult on the legislative changes represents a denial of the right to self-determination at its most basic. The targeted garnisheeing of social security payments represents a discriminatory application of policy, and the ability to compulsorily acquire land under the guise of implementing a program of wellbeing are inimical to the past three decades of progress in relation to native title. Clearly, the emergency response in the NT was prompted by perceptions that the issues required urgent action and that, in order to take the necessary steps, issues of process were of necessity cast aside.

Therapeutic approaches, by contrast, would draw attention to these issues of process because they fundamentally link process with positive and durable outcomes. They can potentially improve the effectiveness of the law and minimise

its anti-therapeutic effects and deserve more widespread use by government. ■

- Notes:** **1** A Freiberg, 'Non-Adversarial Approaches to Criminal Justice', (2007) 16 *Journal of Judicial Administration*, pp205-22. **2** D B Wexler and B J Winick (eds), *Law in A Therapeutic Key*, Carolina Academic Press, 1996, Durham. See the website of the International Network on Therapeutic Jurisprudence at <http://www.therapeuticjurisprudence.org> and the Australasian Therapeutic Jurisprudence Clearinghouse via a link at <http://www.aija.org.au>. **3** For example, King and Guthrie analysed the Western Australian statutory workers' compensation scheme from a therapeutic jurisprudence perspective to see whether its provisions promoted or hindered injured workers' rehabilitation: M S King and R Guthrie, 'Using Alternative Therapeutic Intervention Strategies to Reduce the Costs and Anti-Therapeutic Effects of Work Stress and Litigation', (2007) 17 *Journal of Judicial Administration*, pp30-45. **4** B J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review*, pp1705-77; M S King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?', (2007) 32 *Alternative Law Journal*, pp91-5. **5** Winick, n4. **6** As the liberal philosopher, John Stuart Mill, points out, acting contrary to one's belief can be damaging psychologically and promote inertia, while self-determined action engages the faculties necessary to achieve it. J S Mill, *On Liberty*, Ticknor and Fields, 1863, Boston, p113. **7** J S Cooper, 'State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law', (1999) 17 *Behavioral Sciences and the Law*, pp607-43 at p610. **8** T Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings', in Wexler and Winick, n2. **9** R Paternoster, R Bachman, R Brame and LW Sherman, 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault', (1997) 31 *Law and Society Review*, pp163-204. **10** Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred' Summary Report*, 2007, Northern Territory Government. **11** *Ibid*, pp7 and 13 (the report). **12** The Senate Standing Committee on Legal and Constitutional Affairs, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and *Four Related Bills Concerning the Northern Territory National Emergency Response*, 2007 (the inquiry); H Nancarrow, 'The Emergency Response to Family Violence in the Northern Territory: Where's the Evidence?' (2007) 7(1) *Indigenous Law Bulletin*, pp14-16; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission, pp211-12. **13** The inquiry, n12, pp10-11. **14** The report, n11, p5. **15** J Sutton, 'Emergency Welfare Reforms: A Mirror to the Past?', (2008) 33 *Alternative Law Journal*, pp27-30. **16** J Howard, 'To Stabilise and Protect – Little Children Are Sacred', *The Sydney Papers*, Autumn 2007, pp69-76. **17** Sutton, n15, p30. **18** *Social Justice Report 2007*, n12, p19. **19** Goal-setting, providing a vision, is a part of transformational leadership, which promotes higher performance in government, business and educational contexts. M S King, 'Problem-solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership', (2008) 17 *Journal of Judicial Administration*, pp155-77. **20** E A Locke and G P Latham, 'Building A Practically Useful Theory of Goal-setting and Task Motivation', (2002) 57 *American Psychologist*, pp705-11 at pp706-7. **21** N Pearson, *Our Right to Take Responsibility*, Noel Pearson and Associates, 2000, Cairns.

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