Solution-focused court programs for mentally impaired offenders: What works?

Michelle Edgely

Solution-focused courts for mentally impaired offenders have proliferated in the United States and Australia. A growing body of research shows that these courts can indeed succeed in reducing recidivism among mentally impaired offenders, at least in the short term. But the evaluative research does not reveal which elements of solution-focused courts are responsible for achieving that effect. This article discusses the research into “what works” with mentally impaired offenders in the solution-focused context. It is argued that, with growing pressure on resources and the move to mainstream solution-focused approaches in courts, it is important to understand which features are efficacious, so that evidence-based practices can be implemented. Various aspects of solution-focused programs are examined, including the efficacy of competing rehabilitative models, voluntary participation by offenders (as leveraged by the prospect of a reduced sentence), the role of the judicial officer, rewards and sanctions, multidisciplinary collaboration, and the provision of services. Finally, this article considers which mentally impaired offenders are most likely to benefit from a solution-focused approach.

INTRODUCTION

Throughout the English-speaking world, courts that apply solution-focused approaches to targeted groups of offenders have proliferated. In the United States and Australia, solution-focused courts based on the principles of therapeutic jurisprudence multiplied even before evidence emerged to support their efficacy. In 2010, Richard Schneider counted more than 250 courts or specialised court lists in the United States dealing specifically with mentally impaired offenders. In Australia, solution-focused courts for the sentencing of mentally impaired offenders are found in three of the country’s eight jurisdictions, with more in the planning stages.

Therapeutic jurisprudence has been defined as the study of the law’s therapeutic and anti-therapeutic effects. Using the tools of the behavioural sciences, therapeutic jurisprudence aims to change legal processes in ways that improve the psychological functioning and emotional wellbeing of those affected by courts’ processes. The term “solution-focused” is used to describe special courts or court case lists that, in the context of criminal caseloads, apply therapeutic jurisprudence by aiming to

treat the underlying causes of offending. A number of goals are articulated in the literature: to reduce reoffending; to halt the further penetration of minor offenders into the criminal justice system; to divert offenders from imprisonment; to assist offenders to establish links to treatment and other services; and to assist them to become healthier, law-abiding, productive members of the community.

To the extent that these goals can be achieved, community safety and amenity is enhanced. And, to the extent that offenders are diverted from imprisonment, the community enjoys a net saving in costs to the criminal justice system.

This article discusses those aspects of solution-focused courts for mentally impaired offenders that are considered instrumental to their effectiveness in reducing recidivism. Despite a global abundance of solution-focused programs dealing with mentally impaired offenders, many commentators believe that there have been too few evaluations, and the evaluations that have been conducted have been compromised by methodological inadequacies. The body of evaluative research is, moreover, notable for the virtual absence of longitudinal studies.

Despite those shortcomings, there is now a body of evaluative research featuring a range of methodologies. Collectively, these evaluations enliven confidence that solution-focused court lists can (at least in the short term) achieve: reduced levels of recidivism; diversion of offenders from imprisonment without compromising community safety; and improved health and quality-of-life


In the United States, the term “problem-solving” seems to be the preferred term. The United States Conference of Chief Justices and Conference of State Court Administrators resolved in 2000 that the terminology “problem-solving” be adopted: Conference of Chief Justices and Conference of State Court Administrators, CCJ Resolution 22 COSCA Resolution 4: In Support of Problem-Solving Courts (2000), Resolution 1, http://cosca.nscs.dni.us/Resolutions/CourtAdmin/resolutionproblemsolvingcts.html viewed 1 October 2011. In California, the term “collaborative justice courts” is used: Porter R, Rempel M and Mansky A, “What Makes a Court Problem-Solving?” (Center for Court Innovation, 2010) p 12, http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf viewed 8 May 2012. In the United States, courts that apply problem-solving techniques to mentally impaired offenders are known as mental health courts (MHCs). In Australia, the term “solution-focused” is gaining currency because “problem-solving” might indicate that the court, and not the participant, is responsible for solving the participant’s problems, and because the term “problem-solving” suggests hubris on the part of the court: King (2009), n 3, pp 3-4; Freiberg A, “Problem-Oriented Courts: Innovative Solutions to Intractable Problems” (2001) 11 JJA 8 at 25, en 5.


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outcomes for mentally impaired offenders. Following an evaluation, however, the underlying mechanisms responsible for achieving positive outcomes are not necessarily clear. Even if it can be established that a program is successful, it is not always possible to identify which element, or combination of elements, is responsible for the positive effects.

A number of judicial officers have called for therapeutic jurisprudence to be mainstreamed. If therapeutic jurisprudence is to usefully underwrite a solution-focused approach in mainstream courts in relation to mentally impaired offenders, courts will need to identify which elements are causative of the desired outcomes. In other words, courts and criminal justice policy-makers will need to understand “what works” and perhaps also “why it works”. Certainly, there is a need for further research into this question, but some efforts have already been made by researchers to identify the operative elements. This article discusses those elements most frequently identified as critical to the successful deployment of a solution-focused approach for this cohort of offenders. It is argued that, while more research is necessary, some tentative conclusions can be drawn about which of the functional elements of solution-focused courts engender success with mentally impaired offenders.

WHAT WORKS? (AND WHY)

In the 1970s, Martinson conducted what was then the largest ever meta-analysis of offender rehabilitation studies. Famously, Martinson’s disheartening conclusion was that “nothing works”. He reported that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”. Presciently, Martinson speculated that the flaw in programs of the time was that they were based on a theory of criminality as a “disease”, the cure for which could be forced onto unwilling offenders.

The following sections discuss “what works”. In considering the “what works” research, one important limitation will be borne in mind: that is, the studies deal with heterogeneous groups of participants who do not necessarily share the same range of mental impairments or offending profiles. Therefore, generalisability cannot be assumed. Additionally, there is considerable variation among jurisdictions in relation to the availability and quality of resources.

Scientifically sound models of offender rehabilitation

Forensic psychology has come a long way in recent decades, but Martinson’s study (and the “nothing works” movement it spawned) is a cogent reminder that rehabilitative initiatives must be based on more than good intentions and expert intuition. Experts now agree that rehabilitative programs can indeed reduce recidivism, but the programs must be founded on rigorously tested models of offender rehabilitation.

11 Porter, Rempel and Mansky, n 5, p 12; Day and Lim, n 8, p 2.
14 Martinson R, “What Works? – Questions and Answers About Prison Reform” (1974) 35 Public Interest 22 at 25, 49. It should be noted that Martinson’s study was not specific to mentally impaired offenders.
15 Martinson, n 14 at 49.
16 Hartford, Carey and Mendonca, n 13 at 203.
Since Martinson’s study, offender rehabilitation programs have become increasingly sophisticated and evidence-based. But according to some scientists, criminal justice programs designed for mentally impaired offenders are still too few, conceptually under-developed, poorly implemented and generally under-evaluated. Blackburn considered that there were too few methodologically sound studies of community-based programs for mentally impaired offenders to allow for proper meta-analysis. However, he did review the findings of two types of studies: the first were mental health focused programs (psychopathological programs), which sought to reduce recidivism primarily by controlling psychiatric symptoms and reducing psychological distress; the second were multidisciplinary programs, which emphasised both mental health treatment and psychosocial interventions directed at crimogenic factors. Blackburn found that the psychopathological programs were correlated with both improved clinical and recidivism outcomes. Despite this finding, Blackburn cautions against programs that disregard crimogenic variables. He argues that, although psychiatric symptoms are correlated with offending, they are not usually causative. Blackburn’s conclusions on multidisciplinary programs (which treat both mental health problems and crimogenic factors) were more favourable. Blackburn concluded that recidivism, and especially violent recidivism, can be significantly reduced by programs which feature conditional release, intensive case management, housing support, vocational assistance and a range of social supports, provided they are delivered along with clinical treatment. Blackburn agrees with Martinson that the crime-as-disease model of rehabilitation is flawed, but he warns against abandoning treatment. While insufficient on its own, mental health treatment must be seen as an important adjunct to crimogenic programs.

Skeem agrees that programs for mentally impaired offenders need to focus on crimogenic factors as well as mental health. Skeem’s more recent study directly compared the recidivism-reduction outcomes of psychopathological programs with those of multidisciplinary programs. Skeem found that, although some psychopathological programs could claim small anti-recidivism effects, the evidence base was mixed and weak. The recidivism outcomes were better and the evidence-base was stronger for the multidisciplinary psychosocial criminal justice programs.

Two theoretical models seem to dominate the current discourse on offender rehabilitation. The first is known as Risk-Needs-Responsivity and the second is known as the Good Lives Model. Neither model was specifically developed for mentally impaired offenders. Both models stipulate that the offender be individually assessed so that an intervention plan can be customised according to that individual’s requirements. A short description of both models follows.

The Risk-Needs-Responsivity model of offender rehabilitation is probably the most commonly utilised model of offender rehabilitation and it has a proven track record of achieving “significant

19 Blackburn, n 18 at 300-301.
20 Blackburn, n 18 at 306.
21 Blackburn, n 18 at 307; Thomas, n 17, p 36.
22 Skeem, Manchuk and Peterson, n 17 at 121.
23 Skeem, Manchuk and Peterson, n 17 at 111-112. For example, two mental health programs considered were (inter alia) FACT (Forensic Assertive Community Treatment) and FICM (Forensic Intensive Case Management).
24 Skeem, Manchuk and Peterson, n 17 at 114; Thomas, n 17, p 54.
26 Morgan et al, n 18 at 3.
27 Morgan et al, n 18 at 2; Blackburn, n 18 at 306, Birgden, n 17 at 183; Thomas, n 17, p 64.
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reductions in recidivism. The Risk Principle requires that the level of program intensity be matched to the offender’s individually assessed risk of reoffending. The Needs Principle requires that the program target the offender’s crimogenic needs, i.e., those needs that are functionally related to the offending behaviour. The Responsivity Principle requires that the style and mode of intervention be matched to the offender’s cognitive abilities, personality and learning style. Bonta, one of the creators of the Risk-Needs-Responsivity model, has argued that the predictors of general and violent recidivism are the same for both mentally impaired and unimpaired offenders and that clinical variables are poor predictors of long-term recidivism. Bonta’s take-home message is that generalist programs for offenders can be applied to mentally impaired offenders and any emphasis on treatment to help reduce the long-term risk of reoffending is not warranted by the evidence. Instead, in his view, the focus should be squarely on the crimogenic factors.

A competing model is the Good Lives Model of offender rehabilitation, which takes a holistic approach to rehabilitation. A fulsome discussion of the theory underlying the Good Lives Model is beyond the scope of this article, but, to encapsulate, the model posits that there are a determinate range of universal and all-encompassing human needs domains termed “primary goods”. Primary goods can be material or psychological and all meaningful human action is directed at their achievement. People commit offences when their strategies for achieving primary goods are flawed in some way. In practice, this means that the Good Lives Model first identifies each individual offender’s internal and external obstacles that prevent him or her from leading a good life. Then, it focuses on helping the offender develop the necessary skills, attitudes and behaviours so that he or she can develop a more fulfilling life, according to his or her own strengths, needs and preferences. The Good Lives Model attends to the crimogenic factors that Risk-Needs-Responsivity also addresses, but the former goes much further. The Good Lives Model can be contrasted with Risk-Needs-Responsivity because it focuses on reinforcing and developing the offender’s positive strengths. The holistic focus helps to forge a stronger therapeutic alliance, which in turn promotes motivation and facilitates enhanced receptivity to interventions directed at crimogenic factors.

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poor self-esteem and psychological distress are not classified as crimogenic factors, they could impede an offender’s meaningful participation in rehabilitative interventions.41

Programs developed under Risk-Needs-Responsivity and the Good Lives Model will feature many of the same interventions.42 Indeed, it has been argued that, in practice, insufficient attention has been paid to the Risk-Needs-Responsivity model’s Responsivity Principle and much (but not all) of what the Good Lives Model prescribes should be dealt with as part of the Responsivity elements of a Risk-Needs-Responsivity program.43

Ironically, programs based on the Good Lives Model enjoy the support of many therapeutic jurisprudence practitioners and academics.44 The irony arises because empirical support for the model remains sparse. Moreover, given the scarcity of resources, one might expect a preference for models that focus attention on crimogenic factors.45 Some have even warned that there is a risk that the Good Lives Model might actually increase recidivism.46 But the Good Lives Model is a natural fit with the therapeutic jurisprudence framework because of the latter’s overarching concern that the law aim to enhance wellbeing, and because of the model’s normative claim to provide an ethic of care for offenders alongside balancing community interests.47

Regardless of the theoretical model used to develop the program, there seems to be agreement that programs should be evidence-based.48 Australia’s National Justice Chief Executive Officers’ Group and the Victorian Department of Justice collaborated to produce a comprehensive set of guidelines for best practice for diversion programs for mentally impaired offenders.49 The guidelines assert that a recovery-oriented model is essential. In this context, recovery is defined as a “process of changing one’s attitudes, values, feelings, goals, skills and roles [involving] the development of new meaning and purpose and a satisfying, hopeful and contributing life”.50 To be effective, the guidelines stress that programs should be holistic; should incorporate effective mental health treatments; and should offer integrated mental health and substance abuse services, housing stabilisation and vocational services. Programs should be responsive not only to crimogenic factors, but to protective factors, which buttress against illness or abstinence relapse. Despite its limited evidence base, the guidelines recommend the Good Lives Model of offender rehabilitation.51

Voluntary but “leveraged” participation
An old adage posits that people will only change if they want to change. Personal motivation is thus considered by many to be a critical factor underpinning rehabilitation. Even so, long-term behavioural change requires more than simple willpower.52 A key norm of therapeutic jurisprudence involves

41 Birgden, n 17 at 181; Blackburn, n 18 at 301; cf Ogloff and Davis, n 17 at 236.
42 Andrews, Bonta and Wormith, n 25 at 740.
43 Ogloff and Davis, n 17 at 237. Ogloff and Davis note that, as the criminal justice and corrections systems are not even meeting the mental health needs of offenders with serious mental illnesses, they have poor prospects of meeting unrealised needs among the offender population at large for general psychological wellbeing: at 237.
44 King (2009), n 3, p 168; Thomas, n 17, p 36; Courts and Programs Development Unit (Dept of Justice Vic), n 6, p 32.
45 Ogloff and Davis, n 17 at 237.
46 Andrews, Bonta and Wormith, n 25 at 740-741; Ogloff and Davis, n 17 at 237.
47 Birgden, n 17 at 182, 183.
48 Birgden, n 17 at 180; Thomas, n 17, p 63; Ogloff and Davis, n 17 at 230; Skeem, Manchuk and Peterson, n 17 at 121.
49 Thomas, n 17.
50 Thomas, n 17, p 36.
52 King (2009), n 3, pp 152-153; Warren, n 51, p 47.
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respect for offenders, which entails providing them with a voluntary choice regarding participation.53 Birgden argues that there is therapeutic value in choice; when people make a choice, they are more likely to personally commit to a goal.54 And it is recognised that coercive and paternalistic strategies can backfire, promoting resistance to change.55 Consistent with recognised best practice,56 all solution-focused court programs require that the offender give informed consent to participate in the program.57

On the other hand, “leverage” is also considered to be critical to programmatic success. Leverage refers to the more severely punitive sentence that the offender would be facing if not for meaningful engagement in the solution-focused court program.58 Critics have called into question the voluntariness of participation on the basis that the threat of mainstream sentencing is coercive.59 And in some solution-focused courts, the decision to participate might coincide with an offender’s heightened stress, especially if the offender has been in custody and/or has been untreated, which further challenges claims that participation decisions are voluntary.60 A question therefore arises as to whether leverage indeed assists motivation or is coercive, and how this aspect of programs impacts on rehabilitative outcomes.61

Martin conducted a meta-analysis of 25 studies designed to test the efficacy of particular features of rehabilitative programs for mentally impaired offenders. He categorised programs as being voluntary, somewhat voluntary or involuntary. The “somewhat voluntary” category included programs offered by solution-focused courts that gave offenders a choice between participation in the program or the usual mainstream case processing. Martin found that involuntary programs had no significant effect on recidivism. He surmised that the offender’s perception of coercion might impede the development of a therapeutic alliance between offender and treatment provider.62 Interestingly, the programs that had the strongest effect on recidivism were not the voluntary programs, but the “somewhat voluntary” programs. Martin cautions that the finding cannot support an unqualified claim that leveraged voluntarism reduces recidivism, because those who volunteer might be at a lower risk of recidivism.63 However, Martin’s findings do mirror the findings of researchers looking at voluntariness and leverage in drug courts, that greater leverage was positively correlated with higher


54 Birgden, n 17 at 182, 183.

55 King (2009), n 3, pp 160.


57 Slinger and Roesch, n 8 at 261; Redlich, n 53 at 605, 608.

58 Porter, Rempel and Mansky, n 5, p 43.

59 Slinger and Roesch, n 8 at 261.


61 Redlich, n 53 at 610.


63 Martin, n 62 at 12. Other studies have found that offenders who opt in to a mental health court program tended to be facing more severe charges, have more severe mental health problems and less severe substance abuse problems than offenders who opt for traditional case processing: Trupin E and Richards H, “Seattle’s Mental Health Courts: Early Indicators of Effectiveness” (2003) 26(1) Int’l J Law & Psychiatry 33 at 41.
Participants in solution-focused programs have told researchers that they needed the threat of imprisonment or some lessening of sentence severity to coalesce their motivation. Young and Belenko argue that this sort of leveraged voluntariness (or soft coercion) is effective in motivating offenders because it is not unlike other forms of extrinsic pressure (eg from family or employers) that can enhance motivation and induce behavioural change. The legal pressure can be viewed as a precursor to internalising the desire to commit to transformational change. Birgden and Ward explain that the psychological turmoil created by the stress of facing criminal charges and appearing in court create a therapeutic moment which can be seized by a solution-focused court to galvanise the offender’s latent desire to change his or her life.

The role of the judicial officer

The judicial officer sits at the heart of the solution-focused approach. This is what makes the solution-focused court unique as a rehabilitative process. Subject to legislation or court rules, the magistrate makes the final decision about entrance to the program or termination from it, oversees the collaborative work of the court team and, of course, makes the final sentencing decisions. But the primary site for the exercise of judicial solution-focused techniques is during regular review hearings. These are designed to check on the offender’s attendance at treatment appointments and compliance with the conditions of the program, and they have an important risk management and accountability function. The purpose is also to monitor the offender’s progress and, if necessary, to adjust the intervention plan. More fundamentally, from a therapeutic jurisprudential perspective, the magistrate’s role in these hearings is to implement solution-focused techniques and to forge a therapeutic alliance with the offender. This requires that the judicial officer establish a rapport with the offender fostered by a genuine ethic of care for his or her welfare. Care is demonstrated to the offender by treating him or her with respect, acceptance, and even warmth – the same qualities that therapists use with their clients to develop trust. These qualities cannot be easily or convincingly faked. They are characterised by the use of active listening, expressions of sympathy, and avoiding paternalistic speech. From an observational standpoint, the most visible difference of hearings in solution-focused courts is the direct two-way dialogue between the judicial officer and the offender fostered by a genuine ethic of care for his or her welfare.

References


65 Young and Belenko, p 53 at 299.


67 Young and Belenko, p 53 at 299.


70 Thompson, Osher and Tomasini-Joshi, n 56, p 8.


73 Frailing, n 72 at 213; King (2009), n 3, p 29.

which bypasses the defence lawyer altogether (if one is present). The judicial officer encourages the offender to open up and communicate, not only about participation in the program, but about how he or she feels about that participation and other things that are happening in his or her life. The offender is provided with an active voice, encouraged not only to narrate events and feelings, but also to actively contribute to the dynamic, collaborative process of developing appropriate interventions. Michael King, possibly Australia’s foremost proponent and practitioner of therapeutic jurisprudence, argues that the importance of empathy in this process cannot be overstated. Like a coach, the judicial officer is applying motivational psychology – he or she must at all times be acutely conscious of the psychological dynamic and the philosophy underlying the court’s program.

To achieve the desired therapeutic environment takes a very different skill set from traditional judging. It requires advanced interpersonal and intrapersonal skills. Duffy describes this “key competency” as emotional intelligence. It encompasses both cognitive and affective components. The judicial officer needs to be able to read the offender and respond in the moment in a way that can reassure, build confidence, encourage and motivate. King argues that research supports the contentions that the style of judging used and the nature of the relationship between the judicial officer and the offender have a significant effect on outcomes. This is why, in King’s view, it is important that the judicial style used be evidence-based.

It is vital to the success of solution-focused programs that judicial officers have a solid understanding of the psychology of behavioural change. There are numerous studies that confirm that there are a common and finite set of stages that people move through as they change habituated patterns of behaviour (regardless of whether that change is self-activated or supported by therapy). One very well accepted theory, known as Transtheoretical Stages of Change, describes five non-linear stages that people move through as they undertake significant life changes: pre-contemplation, contemplation, preparation, action and maintenance. These are non-linear stages, meaning that people who are attempting to change will spiral through these stages; relapse is a normal part of recovery, but a backward step doesn’t mean that all gains are lost. The Stages of Change theory is important because numerous studies have shown that different intervention strategies are required for each stage. And, because the stages are non-linear, those involved in tailoring interventions must be alert to movements between stages.

One of the tools judicial officers can use to assess a defendant’s stage of readiness for change is motivational interviewing. Motivational interviewing can feel unnatural for judicial officers because it is so contrary to traditional modes of judicial communication, especially with offenders. Research

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76 Frailing, n 72 at 207.
77 King (2009), n 3, pp 38, 122.
78 King (2009), n 3, p 91; Duffy, n 74 at 398.
79 King (2009), n 3, pp 5, 36; Trupin et al, n 69, p 18.
80 King (2009), n 3, p 42; Duffy, n 74 at 424.
81 Duffy, n 74 at 399.
82 Duffy, n 74 at 399; King (2009), n 3, p 42.
83 King (2009), n 3, pp 32, 33. Cf Frailing, who argues that, while the contention that it is the relationship between judicial officer and offender which promotes rehabilitation seems legitimate, causal evidence remains unavailable. The causative element could just as readily be the services, the frequency of monitoring, rewards and sanctions used to support compliance or some combination of all these elements: Frailing, n 72 at 213.
85 Prochaska, DiClemente and Norcross, n 84 at 1103-1105; Birgden, n 17 at 184; Dear, n 74 at 155-156; King (2009), n 3, pp 153-155; Warren, n 51, pp 47-48.
86 Prochaska, DiClemente and Norcross, n 84 at 1104-1105.
87 Prochaska, DiClemente and Norcross, n 84 at 1106, 1110.
88 King (2009), n 3, p 156; Dear, n 74 at 157.
shows that motivation can be undermined by communication techniques such as ordering, threatening, warning, lecturing, preaching, criticising, blaming, shaming and even sympathising. By contrast, motivational interviewing requires techniques such as empathetic or reflective listening; respectfully pointing out inconsistencies between the offender’s statements and the offender’s actual behaviour; affirming positive behaviour; eliciting self-motivating statements; and supporting self-efficacy.90

Various explanations are proffered as to how the judicial role can effect positive change in the offender’s life. Some writers suggest that procedural justice is a key factor.90 Tyler has studied the psychological impact on disputants of various civil and criminal dispute resolution procedures. Surprisingly, he discovered that substantive outcomes – including the quantum of monetary awards; the duration of disposition processes; the cost of those processes; and, in the criminal context, even the duration of sentences of imprisonment – are poorly correlated with psychological impact.91 Instead, people are predominantly influenced by their perceptions of procedural justice, ie the fairness of the process.92 Tyler distils four fundamental constituents of procedural justice: neutrality, participation, dignity and trustworthiness.93 Neutrality refers to freedom from bias or preconceptions. Participation refers to the capacity to be heard and to have one’s views taken into account in decision-making or being able to contribute directly to the decision-making process. Dignity involves being treated with respect and being affirmed in one’s status as a human being and a citizen. Trustworthiness refers, not to honesty (which in King’s view, is assumed of judicial officers), but to whether the judicial officer is perceived to be sincerely concerned about the subject’s welfare and committed to treating the subject fairly.94 Assessment of trustworthiness, therefore, involves an attribution of motivation, which in turn depends on: whether the subject is treated with dignity and respect; whether she is given adequate opportunity to participate and be heard; and whether judicial officers are prepared to explain their decisions.95 In other words, these factors are mutually supportive and inter-dependent.

Research supports Tyler’s view that procedural justice is a key determinant of offender satisfaction with the solution-focused court process,96 but offender satisfaction does not equate to programmatic success.97 Evidence of a causal relationship between procedural justice and positive outcomes remains elusive.98 Tyler theorises that the importance of procedural fairness lies in the prestige, authority and status of judicial officers. Being treated with procedural fairness by a judicial officer enhances the subject’s self-worth, which engenders reciprocal respect, which in turn enhances the legitimacy of the substantive decision and the law in general, and increases the subject’s willingness to abide by the court’s orders.99 The judicial office is important in this function. The judge or magistrate is a societally respected authority figure – many offenders might never have had a

90 Warren, n 51, p 46.
92 Tyler, n 91, pp 6, 7; King (2009), n 3, p 29; Freiberg, n 90 at 15; Rottman, n 90 at 26.
93 Tyler, n 91, p 9.
94 King (2009), n 3, p 29; Tyler, n 91, pp 9-10.
95 Tyler, n 91, p 11.
97 Walsh, n 96, p 63.
98 Poythress et al, n 96 at 531.
99 Tyler, n 9, pp 7, 12-13.
positive experience with authority figures; they might never have had any authority figure take a personal interest in their welfare. Once a relationship is established, the desire to please the judicial officer or avoid disappointing him or her can therefore be a powerful motivating force.100

Duffy provides a related explanation of how the judicial officer is able to facilitate rehabilitation.101 The “Pygmalion effect” is a psychological phenomenon based on the notion that a person will adjust their thinking and behaviour to align with the expectations of a respected authority figure. Duffy argues that this is a species of psychological “self-fulfilling prophecy”, where an authority figure’s expectations of a target are transferred to and internalised by that target. Through the use of behavioural contracting and goal-setting processes, the judicial officer can make known his or her lofty expectations of the target. The use of emotionally intelligent interaction with the target, together with warranted praise in recognition of achievements and effort, can boost self-esteem and have cognitive effects on the target by fostering the development of a law-abiding identity and nurturing a commitment to try harder.102 According to Duffy, the research suggests that the lower the self-efficacy of an individual, the greater the Pygmalion effect is likely to be. Judicial officers must also be conscious of the Pygmalion effect’s counterpart, the “Golem effect”, which can undercut the efforts of even the most well-intended judicial officers. The Golem effect arises when an authority figure sets the bar too low and transfers modest expectations to the target, affirming his or her low self-esteem. The result can be low levels of performance.103 The challenge for solution-focused judicial officers is to read each individual offender, set demanding but achievable goals and convey high expectations, but without setting the offender up to fail.104

Another psychological explanation of the rehabilitative mechanism deployed by judicial officers in solution-focused courts is drawn from the theory of transformational leadership. This theory emerged from psychological research in the fields of business and education and underpins a model for the use of idealised influence to promote enhanced levels of performance.105 According to this theory, leaders are able to motivate and inspire followers by communicating an attractive vision of the future, creating goals based on challenging expectations that followers want to meet and demonstrating commitment to that vision and those goals. The transformational leader will also promote enthusiasm, expand followers’ capabilities through intellectual stimulation, and give individualised consideration to the follower with coaching, support, and mentoring, as needed. King argues that many of these techniques of transformational leadership are employed when solution-focused judicial officers apply therapeutic jurisprudence in their courts.106 In King’s view, although research has not yet tested the efficacy of transformational leadership in this context, the theory could be of value in designing psychologically coherent solution-focused programs. For example, a transformational leadership approach aims to maximise empowerment of subjects, suggesting that, if used in the solution-focused court context, offenders should be directly (albeit collaboratively) engaged in designing interventions.107

The overlap among these psychological explanations – Stages of Change, procedural justice, the Pygmalion effect and transformational leadership – lies in the tools that they employ: respect,
empowerment, positive reinforcement and individualised treatment. Each depends on the relationship that a judicial officer can forge with each individual offender. This is why, despite some ambiguity in the evidence, proponents insist that solution-focused techniques work more effectively when the offender is monitored by the same judicial officer throughout his or her time on the program. That consistency is important from both the judicial and offender perspectives. Consistency allows the judicial officer to get to know the offender, so that he or she will be better able to judge what type of cognitive and affective tactics will be effective in particular contexts. And for mentally impaired offenders, it is clinically important to maintain continuity of the significant personnel involved in their treatment and rehabilitation. Continuity creates an opportunity to build mutually trusting therapeutic relationships, which foster the development of confidence and social skills, which can later be generalised to community settings.

Rewards and sanctions

As mentioned above, part of the judicial officer’s function during review hearings is to monitor the offender’s compliance with the conditions of the program. Many solution-focused courts, and especially drug courts, use a graduated system of rewards and sanctions to motivate compliance. Rewards are used to acknowledge general progress or milestone achievements or for completion of a distinct phase of the program. Rewards might consist of special praise from the judicial officer, certificates, public recognition (eg applause from the court and all in the public gallery), shopping or movie vouchers, decreased frequency of hearings, and lifting restrictions (if any) on the offender’s activities. Sanctions are used for non-compliance, including for conduct that, although uncharged, would constitute an offence. Sanctions might include admonitions, warnings, and increased frequency of hearings or extra reporting to court personnel. In most United States programs that accept felons, jail-days are also used as sanctions.

The rationale for having a system of graduated sanctions is to enable the court to respond to non-compliance in a way that is fair to the offender and promotes rehabilitation. Experts advise that, while infractions should never be ignored, sanctions are not intended to be punitive. Recovery, especially from substance abuse, is a dynamic process. Relapses are to be expected and are not necessarily indicative of intransigence or rehabilitative incapacity. The United States Bureau of Justice Assistance’s oft-cited ten Essential Elements of a Mental Health Court stipulates that a system of rewards and sanctions be part of the program’s design. The Australian-produced Guidelines for Best Practice echoes that advice. Both documents insist that sanctions should be applied cautiously and only following input from clinicians. Indeed, a system of rewards and sanctions is considered to be so fundamental, that it has become a part of the very definition of solution-focused mental health courts.
The use of sanctions as a way to respond to episodes of non-compliance among mentally impaired offenders is controversial. Porter argues that for some seriously mentally impaired offenders, simply showing up at court on the right date is a “huge success”.121 For minor infractions, sanctions are potentially counter-productive.122 Some experts argue that there is the potential for sanctions to have clinical implications, so they should be used with caution and only with advice from clinical experts.123 Breaching behaviour might be causally related to the offender’s mental condition or to side effects of medication, which complicates the issue still further.124 King argues that an approach based on transformational leadership would eschew the use of rewards and sanctions because these are external means of promoting motivation. Transformational leadership aims to motivate instead through the use of idealised influence, inspirational motivation, intellectual stimulation and individualised consideration.125 In the United States, where some mental health courts sanction with jail-days, experts warn that imprisonment carries a significant risk of deterioration of an offender’s mental and emotional states, threatening the reversal of any rehabilitative progress.126

To date, there have been no studies that test the effectiveness of schemes of rewards and sanctions in solution-focused courts that deal with mentally impaired offenders.127 It is difficult to envisage how the use of substantive sanctions coheres with the Good Lives Model of rehabilitation, discussed above. There have been a number of studies in the United States which have measured the use of sanctions, and especially the use of jail-days. Although the majority of mental health courts in these studies used jail-days to sanction non-compliant offenders, none did so frequently.128 Analysis showed that the use of jail-days as sanctions in mental health courts was positively correlated with the percentage of felons in the program and the frequency of hearings.129 Perhaps under these circumstances, it is unsurprising that many mental health courts try to avoid the use of sanctions, preferring instead to view non-compliance as an indication that the offender’s intervention plan needs revising.130 That has been the preferred approach in Australia’s solution-focused court programs for mentally impaired offenders.131

Collaboration and a non-adversarial court culture

Another factor considered to be critical to the success of solution-focused courts is that the efforts of the court are conducted as a collaborative, multidisciplinary endeavour.132 Solution-focused courts that deal with mentally impaired offenders sit at the crossroads of the criminal justice and mental health and human services systems. So, to be effective, collaboration, coordination and communication is essential.133 Although there is considerable variation among jurisdictions, a dedicated court team

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121 Porter, Rempel and Mansky, n 5, p 23.
122 Redlich et al, n 115 at 535.
123 Thomas, n 17, p 65; Thompson, Osher and Tomasini-Joshi, n 56, p 9.
124 Denckla and Berman, n 66, p 22; Almquist and Dodd, n 9, p 18.
125 King (2009), n 3, pp 38-39. Moreover, a scheme of rewards and sanctions is a tool of “transactional leadership”. Research (in non-court contexts) has demonstrated that transformational leadership is more effective in promoting satisfaction, motivation and enhanced performance than transactional leadership: p 39.
126 Almquist and Dodd, n 9, p 18; Thompson, Osher and Tomasini-Joshi, n 56, p 9; Denckla and Berman, n 66, p 22.
127 Almquist and Dodd, n 9, p 18; Frailing, n 115 at 156.
128 Redlich et al, n 115 at 535; Almquist and Dodd, n 9, p 17; Frailing, n 115 at 155.
129 Frailing, n 115 at 155.
130 Thompson, Osher and Tomasini-Joshi, n 56, p 9; Fisler, n 71 at 598.
132 Almquist and Dodd, n 9, p 5; Thompson, Osher and Tomasini-Joshi, n 56, p viii; Thomas, n 17, p 34; King (2009), n 3, p 42.
133 Thomas, n 17, p 34; Thompson, Osher and Tomasini-Joshi, n 56, p 1.
usually comprises one or more judicial officers, prosecutors, duty lawyers, court officers, psychologists who act as clinical advisors and, sometimes, probation officers.134

A court officer or clinical advisor will usually conduct screenings of defendants to assess eligibility; refer defendants for treatment and services; follow up with clinicians and service providers to assess compliance; and draft reports for the court.135 In some cases, the court officer and clinical advisor roles extend beyond liaison to case management. It is not unusual with mentally impaired offenders for the court officer roles to extend to helping offenders fill out government forms, making service-delivery appointments and providing transport to those appointments.136

The team’s clinical advisor brings important expertise to the table, even though he or she is not directly involved in treatment. A bare diagnosis has limited utility for planning rehabilitative interventions because offenders often have multiple diagnoses that coexist with psychological and social dysfunctions. The clinician can therefore encourage evidence-based practice and recommend and subsequently evaluate appropriate intervention elements.137

However, much of the important work of the court is team-based. The design of each offender’s individualised intervention plan should be a team effort, utilising the expertise of the team’s psychologist, but also having regard to public safety and the offender’s legal rights. Regular team meetings facilitate this process and allow sharing of knowledge about the multiple dimensions of each offender’s life.138

To be effective, team members must be prepared to depart from the strictures of their traditional roles.139 This requires that institutional and disciplinary barriers be transgressed and adversarialism eschewed.140 Prosecutors need to moderate their erstwhile goal of pursuing the maximum permissible penalty. Defence lawyers must reconceptualise the best interests of their client, as something beyond achieving the de minimis sentence. All members of the court team are engaged in helping offenders to construct a better life and all share, together with the offenders, collective responsibility for success or failure.141

Services

Another collaborative process is at work in solution-focused courts, and that involves collaboration between the court and its treatment and service provider partners. Courts are not equipped for providing treatment and social services, so solution-focused courts, in anticipation of offenders’ needs, establish partnership relationships with various external agencies to broker a range of services.142 Apart from treatment for offenders’ mental health problems, solution-focused courts offer a range of services, which might include counselling, cognitive behavioural therapy, substance abuse treatment, crisis intervention, housing support, specialist vocational training, supported employment and liaison with welfare agencies.143 Substance abuse treatment services for mentally impaired offenders should be integrated with mental health treatment, because a significant proportion of mentally impaired offenders have comorbid substance use disorders, and this group has the highest treatment

134 Thompson, Osher and Tomasini-Joshi, n 56, p 8; Trupin et al, n 69, p 8.
135 Thompson, Osher and Tomasini-Joshi, n 56, p 8.
137 Childs and Brinded, n 111 at 231-232.
138 Thompson, Osher and Tomasini-Joshi, n 56, p 6; Porter, Rempel and Mansky, n 5, p 37; King (2009), n 3, pp 41-42.
139 Porter, Rempel and Mansky, n 5, p 22; Trupin et al, n 69, p 18.
140 Thompson, Osher and Tomasini-Joshi, n 56, p viii.
141 Trupin et al, n 69, p 18.
142 Thomas, n 17, p 36; Thompson, Osher and Tomasini-Joshi, n 56, p 6.
143 Thompson, Osher and Tomasini-Joshi, n 56, p 6; Thomas, n 17, p 56.
non-compliance and rehabilitative failure rates. Mentally impaired offenders are also much more likely than unimpaired offenders to suffer homelessness, yet stable housing is another issue vitally related to program compliance and rehabilitative success. Unemployment is another crimogenic factor that disproportionately besets the mentally impaired. A number of studies support the efficacy of specialist vocational training and supported employment programs. Indeed, even boredom is known to contribute to offending (and especially drug offending), so anything that keeps offenders busy is likely to help. These services, integrated substance abuse treatment, housing and employment programs, should not be seen as supplements, but part of the core tools of an effective holistic program.

The provision of high quality services is integral to the effectiveness of solution-focused court programs. Service-providers are not merely an endpoint for referral, but should be active partners with the court. This means that they should be involved from the ground up in policy and program development to ensure that the court and its crucial stakeholders are working from a shared understanding of the court’s goals and its underlying philosophy.

**Offender profiles**

Another aspect of the “what works” question is “with whom”. From a resource allocation perspective, it is important to ensure that interventions are delivered to those who will benefit most. Additionally, intervening with low-risk offenders can, counter-intuitively perhaps, amplify the risk of recidivism. So, while defining the target population is an important policy question, the issue should be resolved in accordance with the evidence base. Currently, all solution-focused courts for mentally impaired offenders in Australia have jurisdictional restrictions, excluding offenders who have committed serious or violent offences. When solution-focused courts first emerged, serious offenders were excluded because the programs were untested, so public safety was properly the paramount concern.

In the United States, after evaluative research began to reveal that the solution-focused approach could indeed reduce recidivism among mentally impaired offenders, policy-makers expanded eligibility to include felons and, sometimes, offenders charged with serious felonies, including violent offences. Research in these “second-generation” mental health courts shows that the...
solution-focused approach can be effectively used on select serious and violent offenders without compromising public safety.\textsuperscript{158} One multi-site study of seven jail diversion programs for mentally impaired offenders in the United States found that there were no statistically significant differences on outcomes for violent offenders, compared with non-violent offenders.\textsuperscript{159} Other studies have shown that mentally impaired felons can achieve better outcomes in solution-focused court programs than equivalently impaired misdemeanants, in terms of program completion, length of time in treatment, and lower levels of recidivism while under court supervision.\textsuperscript{160}

A range of reasons are proposed as to why more serious offenders achieve better results in solution-focused programs. First, the stakes are higher for more serious offenders. The likelihood of actual jail time, and the prospect of a longer sentence than a minor offence would attract, leverages the offenders’ motivation to succeed.\textsuperscript{161} Second, effective mental health treatments and crimogenic interventions take time to achieve results.\textsuperscript{162} As a general rule with mentally impaired offenders, the longer the program runs, the better the results. Fisler claims that research proves that programs need to run for at least six to nine months, but other experts say that a year should be the minimum, with longer if feasible.\textsuperscript{163} A study of eight United States court programs by Griffin and colleagues showed that they ranged in duration from a minimum of one year to a maximum of five years.\textsuperscript{164} Research shows that even offenders support a lengthier period of program participation than the alternative period of imprisonment would have been.\textsuperscript{165} Many offenders who have completed solution-focused programs recognise (with the benefit of hindsight) how little insight they had into their own symptoms and need for treatment.\textsuperscript{166} Resistance to treatment by mentally impaired offenders is often characterised as perversity or intransigence, but could indicate anosognosia. This neurological condition is characterised by an individual’s incapacity to recognise that they are ill, with the result that they will resist, refuse or sabotage treatment.\textsuperscript{167} Several studies have shown that over 50% of people with serious mental illness are unaware that they have any illness.\textsuperscript{168}

There are other reasons to support the extension of eligibility to more serious offenders that cohere with Australia’s traditional sentencing jurisprudence. Violent behaviour by the mentally ill can often be indirectly attributed to mental illness, even when the relationship is not directly causal.\textsuperscript{169} The result is reduced culpability, calling for a lower proportionate sentence than the conduct would
otherwise warrant. Moreover, because participation in a solution-focused court program is (arguably) less onerous than imprisonment, a longer period of participation than imprisonment would presumably be appropriate and supported by authority. In any event, appeals are unlikely on the offender’s side because participation is voluntary, and on the prosecution side because participation decisions are collaborative.

Australia’s National Justice Chief Executive Officers’ Group supports careful expansion of eligibility criteria to make solution-focused programs available to more serious offenders, including violent offenders, provided that program models can maintain an “acceptable degree of accountability for criminal behaviour” and not detract from public safety. It is worth recognising that this is, essentially, a political decision. The decision to exclude serious or violent offenders from solution-focused jail-diversion programs is not based on empirical evidence.

**CONCLUSION**

This article has discussed “what works” for solution-focused courts dealing with mentally impaired offenders. It has been argued that the features that are considered integral to reducing rehabilitation among this cohort of offenders are:

- the use of a holistic, evidence-based program of rehabilitation that provides mental health treatment as well as addressing the offender’s crimogenic and psychosocial needs;
- the offender’s voluntary participation in the program, but with motivation leveraged by the threat of a relatively (but proportionately) severe sentence;
- regular review hearings conducted by the same judicial officer who will apply the techniques of therapeutic jurisprudence informed by important psychological doctrines including Stages of Change theory and motivational interviewing;
- the use of an appropriate scheme of rewards and sanctions to recognise achievement and penalise non-compliance, but sanctions should be used carefully, with regard to the potential for adverse psychological impact;
- interventions informed by a multidisciplinary, team-based process, which ensures that decisions reflect evidence-based psychological practice as well as the offender’s rights and community interests;
- partnerships formed between the court and service providers to ensure mutuality of goals and effective communication; and
- finally, eligibility criteria for mentally impaired offenders reflecting the evidence base, which shows that more serious offenders, including violent offenders, can benefit from solution-focused programs.

In a perfect world, perhaps a well-resourced solution-focused court could be available to all mentally impaired offenders who would benefit. In the meantime, it remains to be seen whether mainstream courts can implement some or all of the efficacious solution-focused elements in relation to their caseload of mentally impaired offenders.

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171 See: R v Verdis (2007) 169 A Crim R 581 at 589; R v Smith (1987) 44 SASR 587 at 589; R v Jiminez [1999] NSWCCA 7 at [32]. The applicable principle is that if a sentence is more onerous because of an offender’s health problem, it should be subject to a shorter term. Arguably, because this is a feature of proportionality, the converse would apply in this context. This principle is not applied evenly in all Australian jurisdictions: Edgely M, “Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency” (2009) 16(2) PPL 240 at 252.

172 King et al, n 8, p 226; Duffy, n 74 at 417.


174 Thomas, n 17, p 50.

175 Naples and Steadman, n 158 at 138.