

# KEEPING IT IN THE NEIGHBOURHOOD? NEIGHBOURHOOD COURTS IN THE AUSTRALIAN CONTEXT

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*The first Neighbourhood Justice Centre has recently been set up in Australia and forms part of a worldwide neighbourhood justice movement which focuses upon local justice solutions. These models are based around community courts operating as part of broader justice initiatives which reposition the relationship between the community and the justice system. This article explores the drivers of neighbourhood court solutions and systemic issues which may impact upon the success of these community court models.*

## I INTRODUCTION

Communities are frequently searching for better ways to deliver 'justice'. They seek methods which operate more efficiently, set right any harm done and, ideally, dissuade repeat offenders. The challenge is to find solutions which are workable and affordable whilst providing favourable and demonstrable outcomes. It is therefore interesting that in our increasingly globalised world one emerging approach has been a shift towards 'local justice' solutions. In recent years this 'local' movement has seen the development of neighbourhood courts or justice centres which reposition the relationship between the community and the justice system. Within this neighbourhood movement, the court can form part of a broader community justice hub with a focus outside of purely curial or legal outcomes.<sup>1</sup>

Moving beyond operating as alternative dispute resolution-style centres,<sup>2</sup> these neighbourhood solutions first began to emerge in the United States<sup>3</sup> and have been described as:

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1 John Feinblatt and Greg Berman, 'Community Courts: A Brief Primer' (2001) 49 *United States Attorneys' Bulletin* 33, 36.

2 Sally Merry and Neal Milner (eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (1993); Edith Primm, 'The Neighborhood Justice Center Movement' (1992) 81 *Kentucky Law Journal* 1067; Jill Rayburn, 'Neighborhood Justice Centers: Community Use of ADR – Does It Really Work?' (1996) 26 *University of Memphis Law Review* 1197.

3 Adriaan Lanni, 'The Future of Community Justice' (2005) 40 *Harvard Civil Rights – Civil Liberties Law Review* 359; Robert Wolf, 'Community Justice Around the Globe: An International Overview' (2006) 22 *Crime & Justice International* 4; Judith Kaye, 'Delivering Justice Today: A Problem-Solving Approach' (2004) 22 *Yale Law and Policy Review* 125, 132; Leena Kurki, 'Restorative and Community Justice in the United States' (2000) 27 *Crime & Justice* 235, 258–9; Dana Kralstein, *Community Court Research – A Literature Review* (2005); Eric Lee, *Community Courts – An Evolving Model* (2000); Greg Berman and Aubrey Fox, 'From the Benches and Trenches – Justice in Red Hook' (2005) 26 *Justice System Journal* 77; John Feinblatt, Greg Berman and Michele Sviridoff, *Neighborhood Justice – Lessons from the Midtown Community Court* (1998).

designed both to help defendants solve the problems that underlie their criminal behavior and to hold them accountable for the specific incidents that brought them to court; they consult with local stakeholders to set and accomplish priorities; they are proactive in preventing crime rather than merely responding once crime has occurred; they bring criminal justice agencies (courts, prosecutors, defense attorneys, and police) into close coordination to address community issues; and they strive to create an atmosphere which is conducive to engaging communities, defendants, and other litigants.<sup>4</sup>

Neighbourhood justice projects are designed to empower and mobilise the local population and to appease community frustration with the 'problem of crime'.<sup>5</sup> They have been said to derive from 'both the external pressures coming from citizens who want a more accessible and effective legal form, and by internal pressure and dissatisfaction'<sup>6</sup> with existing justice models. The movement is therefore centred around engaging the public in finding justice solutions which operate within, and with the help of, the broader community network.<sup>7</sup>

The movement can be traced back to the Midtown Community Court, which was first set up in Manhattan in 1993. The aim was to address the swell of petty street crime by tackling it from the bottom up.<sup>8</sup> Fundamental to the growth of new justice initiatives was the founding, in 1996, of the Center for Court Innovation in New York.<sup>9</sup> The Red Hook Community Justice Center is a good case in point which, flowing from a school principal's murder in a local drug dispute, was opened in Brooklyn in 2000 with the aid of the Center.<sup>10</sup> Although, to an extent, each court develops out of its own social and temporal context, the Center for Court Innovation's research and educative functions have been vital in promoting community court justice models internationally. Prototypes such as the Midtown Community Court and Red Hook Community Justice Center have gone on to become models for community initiatives worldwide. They have been followed by similar centres in countries such as the United Kingdom, South Africa, the Netherlands and Canada,<sup>11</sup> and more recently, in Australia with the setting up of

4 M Somjen Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness* (2006) 4.

5 Ibid.

6 Jeffrey Fagan and Victoria Malkin, 'Theorizing Community Justice Through Community Courts' (2003) 30 *Fordham Urban Law Journal* 897, 902.

7 For a good discussion of the role of collaboration by justice agencies: see David Rottman, Pamela Casey and Hillery Efkekan, *Court and Community Collaboration: Ends and Means – A Discussion Paper* (1998) <[http://www.ncsconline.org/wc/publications/Res\\_CtComm\\_CFCEnds&MeansPub.pdf](http://www.ncsconline.org/wc/publications/Res_CtComm_CFCEnds&MeansPub.pdf)> at 22 April 2009 (cited with permission of the authors). See also Arie Freiberg, 'Innovations in the Court System' (Paper presented at the Crime in Australia: International Connections, Australian Institute of Criminology International Conference, Melbourne, 29–30 November 2004) 7.

8 Feinblatt, Berman and Sviridoff, above n 3, 2. For a good discussion of the history of the Court see also Andrew Phelan, 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia: Part II' (2004) 13 *Journal of Judicial Administration* 137.

9 Center for Court Innovation, *A Decade of Change – The First 10 Years of the Center for Court Innovation* (2006) 21.

10 Berman and Fox, above n 3, 78. See also *ibid* 4.

11 Wolf, above n 3, 4.

the country's first Neighbourhood Justice Centre ('NJC') pilot project in Victoria. Further, the Law Reform Commission in Western Australia has recently called for submissions on whether a similar pilot should be introduced in Western Australia.<sup>12</sup>

This paper does not intend to evaluate the success of the first NJC in Australia. The pilot is still to run its course and the NJC is the subject of an extended evaluation process. Rather, it intends to unravel the drivers of neighbourhood court solutions in Australia and overseas and to address the systemic questions they prompt. The paper's primary focus is upon the role of the court within the neighbourhood justice model. However, it should be acknowledged that centres like the NJC play a broader community-centred role, which moves well beyond the functions exercised by its court facility. Section II of the paper will outline the Victorian NJC model. Section III focuses upon the motivations for community court models. The final section, Section IV, considers factors which may impact upon the success of these court projects, such as the degree to which they are perceived as legitimate by the community. The paper argues that the distinct strengths of the neighbourhood model may bring about some unique challenges for the local justice enterprise.

## II THE VICTORIAN NJC MODEL

### A *Spreading the Word – the Victorian Community Justice Experiment*

The Red Hook Community Justice Center has played a significant role in the Victorian experience. The Victorian Attorney-General, Rob Hulls, and the Secretary of the Department of Justice, Penny Armytage, visited the Center in Red Hook and this was followed by a community court forum attended by staff from the Center for Court Innovation.<sup>13</sup> This led in 2007 to the establishment of the first Victorian NJC. This development was consistent with earlier justice initiatives and the State's wider focus upon community engagement. Alternative justice models such as the Dandenong Drug Court had been operating in Victoria since 2002 and problem-solving approaches had been promoted by the Drug Court's inaugural judicial officer, Deputy Chief Magistrate Brian Barrow.<sup>14</sup> It is

12 Law Reform Commission of Western Australia, *Court Intervention Programs – Consultation Paper* (2008) 175–6.

13 Wolf, above n 3, 17; Attorney-General (Vic), 'Innovative Community Approach to Justice Considered' (Press Release, 20 October 2004) <[http://www.legislation.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/35504bc71d3adebcca256cfc0082c2b8/e179060ce0fa05c7ca256f3400120791!OpenDocument](http://www.legislation.vic.gov.au/domino/Web_Notes/newmedia.nsf/35504bc71d3adebcca256cfc0082c2b8/e179060ce0fa05c7ca256f3400120791!OpenDocument)> at 22 April 2009.

14 Attorney-General (Vic), 'Brian Barrow to Head Victoria's First Drug Court' (Press Release, 3 April 2002) <[http://www.dpc.vic.gov.au/domino/Web\\_Notes/MediaRelArc02.nsf/4d9fa39283ff510d4a256b36001bd4e0/120a84667e04498e4a256b900081b8f5!OpenDocument](http://www.dpc.vic.gov.au/domino/Web_Notes/MediaRelArc02.nsf/4d9fa39283ff510d4a256b36001bd4e0/120a84667e04498e4a256b900081b8f5!OpenDocument)> at 22 April 2009. See also Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8.

also consistent with broader interest in less-adversarial, problem-oriented<sup>15</sup> and experimental justice initiatives around Australia in recent years including Drug Courts, Family Violence Courts and Indigenous Courts and sentencing circles.<sup>16</sup> Typically, these models reshape the way judicial officers engage with court participants and embrace procedures, which favour greater judicial engagement with parties.

The Victorian NJC has been set up as a three-year trial within the City of Yarra, close to the inner city of Melbourne. Like its overseas counterparts, the NJC seeks to transform the traditional court into a justice centre which is a part of the local community.<sup>17</sup> It works closely with the community to provide 'community education, crime prevention activities, community mediation programs, and a restorative justice program in addition to serving as a venue'<sup>18</sup> for court matters. The Victorian Attorney-General has referred to the NJC Court as 'far more proactive' than traditional courts as it 'seek[s] to address the underlying causes of offending through the use of a new screening, assessment and case-management mode'.<sup>19</sup>

The NJC accommodates a hub of community agencies as well as community corrections staff and a court facility. These community agencies include Legal Aid, a community legal service, Victoria Police, mediation, counselling and referral services. Services such as mediation can help community members to resolve disputes at early stages and therefore aid in the prevention of crime. Much of the referral and case management workload of the NJC is managed by the Screening, Assessment and Referral Team ('SART') assisted by the Neighbourhood Justice Centre Officer, who aids with community referral.<sup>20</sup> The NJC has also established links with the service providers that cover areas such as housing and mental health within the community.

The NJC aims to improve the delivery of justice, to involve the local community, to target the prevention of crime and to make the City of Yarra safer.<sup>21</sup> Solving problems rather than just addressing their consequences is a key part of the NJC's role. The focus is very much on embedding justice outcomes within the community using local partnerships rather than operating as part of an external system within local boundaries. For example, the NJC has participated in projects with community partners to involve local youth in making a Justice Mural for

15 Note the Law Reform Commission of Western Australia's preference, in their current inquiry, for the adoption of the slightly broader term 'court intervention programs': see Law Reform Commission of Western Australia, above n 12.

16 See, eg, Freiberg, 'Innovations in the Court System', above n 7; Harry Blagg, *Problem-Oriented Courts – A Research Paper Prepared for the Law Reform Commission of Western Australia*, Project 96 (2008).

17 See also Blagg, above n 16, 19; Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (Paper presented at the 10th International Criminal Law Congress, Perth, 21 October 2006).

18 Department of Justice, *Attorney-General's Justice Statement 2: The Next Chapter* (2008) 48; Neighbourhood Justice Centre Project Team, *The Neighbourhood Justice Centre – Community Justice in Action in Victoria* (2007) 12. For a general discussion see Kathy Douglas, 'Steering Through Troubled Waters' (2007) 81(5) *Law Institute Journal* 30; Kathy Douglas, 'Therapeutic Jurisprudence, Restorative Justice and the Law' (2007) 32 *Alternative Law Journal* 107.

19 Wolf, above n 3, 18.

20 Neighbourhood Justice Centre Project Team, above n 18, 19.

21 *Ibid* 9.

the Centre, to develop community members' life skills and to provide, for safety reasons, payphones inside housing estate buildings.<sup>22</sup> As identified by Fagan and Malkin, such endeavours 'create legal institutions that bring citizens closer to legal processes' and develop 'mutual accountability between courts and community'.<sup>23</sup>

The community-centred nature of the Victorian model is reflected in the open-style renovation of the NJC building<sup>24</sup> to house the various support services, facilities and meeting spaces and allow community artwork to be displayed.<sup>25</sup> On a visit to the NJC building, the NJC Court lobby area had a kiosk, which provided complimentary tea and coffee; there was also a large adjoining balcony, which permitted visitors to smoke.

The NJC has been accompanied by the creation of the Victorian Neighbourhood Justice Division. This Division was set up under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* ('*NJC Act*') and allows the NJC Court to tap into a broad civil and criminal jurisdictional base through the amendments that the *NJC Act* made to a number of Victorian statutes.<sup>26</sup> This allows the Magistrate at the NJC Court to hear matters that would normally come before the Magistrates' Court, Children's Court, Victims of Crime Assistance Tribunal as well as the Victorian Civil and Administrative Tribunal. The Division is assigned the task of 'simplifying access to the justice system and applying therapeutic and restorative approaches in the administration of justice'.<sup>27</sup> It is also required to operate 'with as little formality and technicality, and with as much expedition'<sup>28</sup> as can be permitted. In line with the NJC's goal of working with local citizens and facilitating access to justice, the *NJC Act* also requires that court proceedings be run in such a way as to be 'comprehensible to the parties'.<sup>29</sup>

## B Therapeutic and Restorative Frameworks

The NJC Court is designed to operate in a less adversarial manner and in line with the principles of therapeutic and restorative justice.<sup>30</sup> Knowledge of these approaches is also taken into account when selecting the Magistrate for the NJC Court.<sup>31</sup>

22 Personal communication with NJC staff (October 2008), copy on file with the author.

23 Fagan and Malkin, above n 6, 898.

24 Attorney-General (Vic), 'Neighbourhood Justice Centre for Collingwood' (Press Release, 22 August 2005) <[http://www.dtf.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b47e3113aa73c87aaca25706900187a9f!OpenDocument](http://www.dtf.vic.gov.au/domino/Web_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b47e3113aa73c87aaca25706900187a9f!OpenDocument)> at 22 April 2009.

25 Personal communication with NJC staff (October 2008), copy on file with the author; ABC Radio National, 'One-Stop Legal Shop', *The Law Report*, 3 April 2007 <<http://www.abc.net.au/rn/lawreport/stories/2007/1887103.htm>> at 22 April 2009.

26 For ease of reference the article will refer to the *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* although the provisions of this Act have amended the *Magistrates' Court Act 1989 (Vic)*, the *Children and Young Persons Act 1989 (Vic)* and the *Children, Youth and Families Act 2005 (Vic)*.

27 *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* s 1.

28 *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* ss 4, 8, 13.

29 *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* s 4.

30 *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* s 1. See also Douglas, 'Therapeutic Jurisprudence, Restorative Justice and the Law', above n 18, 107.

31 *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* s 8.

Therapeutic jurisprudence puts the spotlight on individual ‘wellbeing’ and how it fares within the legal domain.<sup>32</sup> In so doing, it is often conceptualised as facilitating an ‘ethic of care’ which looks for opportunities to aid, or at least to minimise damage to, the welfare of those who come into contact with the legal system.<sup>33</sup> By drawing upon the contribution of the social sciences, it strives to harness the curative potential of the legal system while not at the same time undermining other legal interests.<sup>34</sup>

Therapeutic jurisprudence can, to an extent, be traced to some of the ideas flowing from the American legal realists (or, some may argue, sociological jurists)<sup>35</sup> of the first half of the 20<sup>th</sup> century. This is because the therapeutic jurisprudential approach, like that of legal realism, unites an interest in policy, social context, and the contribution of other disciplines such as the social sciences.<sup>36</sup> Indeed, the influence of the realists has been noted by therapeutic jurisprudence scholars who have identified a resonance with realist adherents, such as Llewellyn and Holmes, and the earlier writings of Pound.<sup>37</sup> In embracing therapeutic jurisprudence, the neighbourhood justice movement has inherited some of these theoretical underpinnings. The emphasis of neighbourhood courts on the ‘local’ also seems consistent with Llewellyn’s interest in ‘community’. Llewellyn emphasised that ‘there can be no broad talk of “law” nor of “the community”’; but that it is

32 See generally Bruce Winick and David Wexler (eds), *Judging in a Therapeutic Key – Therapeutic Jurisprudence and the Courts* (2003) 7; David Wexler and Bruce Winick (eds), *Law in a Therapeutic Key – Developments in Therapeutic Jurisprudence* (1996); Michael King, ‘Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education’ (2006) 15 *Journal of Judicial Administration* 129; Warren Brookbanks, ‘Therapeutic Jurisprudence: Conceiving an Ethical Framework’ (2001) 8 *Journal of Law and Medicine* 328.

33 Brookbanks, above n 32, 328; Bruce Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (2003) 30 *Fordham Urban Law Journal* 1055, 1063; Michael King, ‘Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities’ (2003) 28 *Alternative Law Journal* 172; Michael King, ‘Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective’ (2007) 31 *Criminal Law Journal* 12, 13; Michael King, ‘The Therapeutic Dimension of Judging: The Example of Sentencing’ (2006) 16 *Journal of Judicial Administration* 92, 104. Note also the recent article by Freckelton addressing some of the critiques of therapeutic jurisprudence such as what amounts to a ‘therapeutic’ outcome: Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575. See also Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 *Psychology, Public Policy, and Law* 193.

34 Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’, above n 33, 1063; Bruce Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy and Law* 184, 185; William Schma et al, ‘Therapeutic Jurisprudence: Using the Law to Improve the Public’s Health’ (2005) 33 *Journal of Law, Medicine and Ethics* 59, 60; Warren Brookbanks, ‘Therapeutic Jurisprudence: Implications for Judging’ [2003] *New Zealand Law Journal* 463, 464.

35 Scholars such as Karl Llewellyn sought, in the face of some opposition, to bring together the proponents of the realist school. See, eg, Edward White, ‘From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America’ (1972) 58 *Virginia Law Review* 999, 1017 where White notes that Jerome Frank was also a keen advocate of the school.

36 See, eg, Karl Llewellyn, *Jurisprudence – Realism in Theory and Practice* (1962); Karl Llewellyn, ‘The Normative, the Legal and the Law-Jobs: The Problem of the Juristic Method’ (1940) 49 *Yale Law Journal* 1355; Roscoe Pound, ‘The Scope and Purpose of Sociological Jurisprudence’ (1912) 25 *Harvard Law Review* 489, 513.

37 David Finkelman and Thomas Grisso, ‘Therapeutic Jurisprudence: From Idea to Application’ in David Wexler and Bruce Winick (eds), *Law in a Therapeutic Key – Developments in Therapeutic Jurisprudence* (1996) 588–91.

a question of reaching the particular part of the community relevant to some particular part of law'.<sup>38</sup>

As a result of the *NJC Act* embracing therapeutic jurisprudence, a judicial officer is likely to look for opportunities to bring about more positive outcomes for litigants. This could take a variety of forms. For example, therapeutic processes such as the adoption of an empathic<sup>39</sup> 'bench-side manner'<sup>40</sup> build upon procedural justice research, which suggests that litigants may experience greater satisfaction with curial processes in which they feel respected, validated, and properly heard.<sup>41</sup> Therapeutic approaches are therefore likely to encourage judicial officers to fashion their approach to suit the needs of each litigant, to the extent that this is possible. By listening to and involving the litigant in the court process there is a greater likelihood of trust and rapport developing between the judicial officer and the defendant. It can facilitate a collaborative and productive relationship, which encourages discussion and self-reflection about the defendant's personal circumstances that have brought them to court.<sup>42</sup> This may in turn strengthen the viability of the court's legal solutions.<sup>43</sup> In the context of the NJC Court, this supportive relationship may then aid mechanisms such as allowing a defendant to access support services such as alcohol and drug counselling by deferring their sentence.<sup>44</sup> When the case returns to the NJC Court, the judicial officer can be informed of and commend any progress that the defendant has made before the appropriate penalty is determined.

The NJC judicial officer is also able to recommend therapeutic mechanisms such as problem-solving meetings. These extra-curial meetings give the Neighbourhood Justice Officer the opportunity, in the absence of the judicial officer, to meet with the defendant and other relevant agencies or parties to discuss difficulties that the defendant is having and what strategies can be put in place before reporting back to the judicial officer.<sup>45</sup> These meetings have the potential to enhance therapeutic and procedural justice outcomes as they focus upon allowing the defendant to express their needs and participate in the problem-solving process.

38 Llewellyn, *Jurisprudence – Realism in Theory and Practice*, above n 36, 67–8.

39 Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', above n 33, 1069.

40 Ibid.

41 Tom Tyler, *Why People Obey the Law* (1990) 6, 108, 138; Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', above n 33, 1068, 1088–9; King, 'The Therapeutic Dimension of Judging: The Example of Sentencing', above n 33, 95–8; Michael King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91, 92.

42 David Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"' (2001) 38 *Court Review* 18, 20. See also Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', above n 33, 1078–80 on the preference for judicial 'persuasion' over 'coercion'.

43 Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', above n 33, 1071; King, 'Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective', above n 33, 13.

44 See, eg, insertion of s 4Q(3) into the *Magistrates' Court Act 1989* (Vic) by *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4. See also King, 'Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective', above n 33, 14; King, 'The Therapeutic Dimension of Judging: The Example of Sentencing', above n 33, 102–3. See also ABC Radio National, above n 25.

45 Neighbourhood Justice Centre Project Team, above n 18, 15; Law Reform Commission of Western Australia, above n 12, 172.

The *NJC Act* requires that therapeutic jurisprudence be applied alongside restorative approaches. Restorative justice values the rebuilding of relationships and community.<sup>46</sup> Lanni indicates that '[m]ost restorative justice advocates share the central precept that criminal adjudication should permit all those affected by a crime to collectively decide how to respond'.<sup>47</sup> This means that restorative processes involve the offender as well as the victim of an offence. Braithwaite explains that restorative justice 'means restoring victims ... as well as restoring offenders and restoring community [through] restor[ing] harmony based on a feeling that justice has been done'.<sup>48</sup> In describing the philosophy of the similarly styled Midtown Community Court in New York, Chief Justice Kaye has commented that:

The punishment, in effect, restores the community that has suffered injury. Most of the projects are designed to be visible, whether it is removing graffiti, cleaning subway stations, or planting trees. This sends a message not only to defendants, who learn that even minor offenses do harm that must be repaired, but also to the community, which sees its justice system at work. Justice is neither remote nor abstract.<sup>49</sup>

It therefore emphasises the need to preserve social bonds while also acknowledging the harm that has been done.<sup>50</sup>

The extent to which restorative processes are perceived as operating within the NJC Court depends on how broad a definition of restorative justice is adopted.<sup>51</sup> The difficulty lies in finding consensus as to what amounts to a 'restorative justice' process. Of particular relevance in the NJC context is whether restorative justice proponents favour a narrow meaning of 'victim' rather than one which includes the community more generally.<sup>52</sup> It also depends on whether they define 'restorative' to include potentially 'retributive'<sup>53</sup> in-court mechanisms

46 See generally Freiberg, 'Non-Adversarial Approaches to Criminal Justice', above n 17, 214; John Braithwaite, *Restorative Justice and Responsive Regulation* (2002); Heather Strang and John Braithwaite (eds), *Restorative Justice and Civil Society* (2001); Eugene McLaughlin et al (eds), *Restorative Justice – Critical Issues* (2003).

47 Lanni, above n 3, 376.

48 John Braithwaite, 'Restorative Justice and a Better Future' in McLaughlin et al, above n 46, 56–7.

49 Kaye, above n 3, 133.

50 Brenda Morrison and Eliza Ahmed, 'Restorative Justice and Civil Society: Emerging Practice, Theory, and Evidence' (2006) 62 *Journal of Social Issues* 209, 210.

51 The author would like to acknowledge helpful comments by the anonymous referee in relation to this issue. See Kathleen Daly and Hennessey Hayes, 'Restorative Justice and Conferencing in Australia' (2001) 186 *Trends & Issues in Crime and Criminal Justice* 1, 1–2; Kathleen Daly, 'Restorative Justice: The Real Story' in McLaughlin et al, above n 46, 196–7; Joanna Shapland, 'Restorative Justice and Criminal Justice: Just Responses to Crime?' in Andrew von Hirsch and Julian Roberts (eds), *Restorative Justice & Criminal Justice – Competing or Reconcilable Paradigms* (2003) 195, 196–7; Louise Bassett, *Restorative Justice – Background and Discussion Paper* (Victorian Department of Justice, 2007) 2.

52 Fagan and Malkin, above n 6, 906 discuss whether, within the community court context, 'the victim' can in fact 'be the entire community'.

53 Daly and Hayes, above n 51, 2; Daly, above n 51, 197–8.



such as victim impact statements<sup>54</sup> and sentencing.<sup>55</sup> If these broader conceptualisations are adopted, the ‘restorative’ label could be applied to NJC Court processes such as the Magistrate deciding to hear from the victim of an offence<sup>56</sup> or invoke an order of community service.<sup>57</sup> NJC processes, which are arguably (less controversially) restorative in nature, include out-of-court mediation or conferencing between victims and offenders.<sup>58</sup> Conferencing of juvenile offenders can occur within the Children’s Court jurisdiction of the NJC Court and operates as a ‘voluntary pre-sentence diversionary intervention’<sup>59</sup> for all stakeholders to gather to try to undo the damage caused by a crime. Such restorative mechanisms can be facilitated through court processes such as court diversion or a deferral of sentencing.<sup>60</sup>

These guiding principles of therapeutic jurisprudence and restorative justice can typically shape neighbourhood courts in at least three key ways. Firstly, they enable neighbourhood courts to potentially experiment with less traditional curial methods to try to bring about more desirable legal outcomes. Secondly, neighbourhood courts are single-minded in their desire to attract judicial officers and community agencies that are able to serve the community and command its respect. The way the judicial officer interacts with defendants and develops supportive relationships becomes very important in this process as the dynamic between the bench and the community is reconceptualised. Thirdly, therapeutic jurisprudence and restorative justice can facilitate more problem-oriented and interdisciplinary approaches. In so doing, the neighbourhood courts are able to draw upon the support of the agencies linked with the court allowing it to undertake a broader policy role.

54 For a good critique of the breadth of restorative processes see Andrew Ashworth, ‘Is Restorative Justice the Way Forward for Criminal Justice?’ in McLaughlin et al, above n 46, 164–5. See also Barbara Hudson, ‘Victims and Offenders’ in von Hirsch and Roberts, above n 51, 177, 180; Samantha Jeffries, *Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change* (2002) 22 <<http://www.criminologyresearchcouncil.gov.au/reports/2002-jeffries.pdf>> at 22 April 2009.

55 Megan Stephens, ‘Lessons from the Front Lines in Canada’s Restorative Justice Experiment: The Experience of Sentencing Judges’ (2007) 33 *Queen’s Law Journal* 19, 22; Shapland, above n 51, 195, 201.

56 See, eg, insertion of s 4Q(2)(f) into the *Magistrates’ Court Act 1989* (Vic) by *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4.

57 Shapland, above n 51, 195, 200.

58 For example, the Law Reform Commission of Western Australia, above n 12, 172 refers to the NJC Restorative Justice Project which is designed to bring young offenders and victims of offences to the discussion table.

59 Bassett, above n 51, 3, 5.

60 See, eg, insertion of s 4Q(3) into the *Magistrates’ Court Act 1989* (Vic) by *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4 which allows the deferral of sentencing even if the offender is over the age of 25 and therefore outside the deferral range under the *Sentencing Act 1991* (Vic). See also Bassett, above n 51, 7–8.

### III MOTIVATIONS FOR NEIGHBOURHOOD COURTS

#### A *Harnessing the Local – Potential Advantages of Neighbourhood Courts*

Neighbourhood justice solutions have been said to flow from the perceived ‘crisis of legitimacy’<sup>61</sup> within the wider legal system and are designed to take a more contextually-determined community approach which can respond to the changing justice requirements of each locale. Conceptualising and positioning justice management and resolution within neighbourhoods and through community partnerships has a number of benefits. Although, to some extent these will depend on the particular community context, some general motivations for courts pursuing local solutions are set out below.

##### 1 *Local Knowledge*

Community courts enable court administrators to know the geographical area that they are dealing with through wider justice partnerships and information sharing.<sup>62</sup> With the NJC Court this is facilitated by its positioning within the NJC complex which accommodates a number of related justice agencies and community services. The knowledge these courts acquire can relate both to the types of crimes and legal issues that arise as well as to the composition of the local community and service providers. Local mischief such as graffiti, littering or vandalism are therefore easier to target and can be punished with tailored penalties such as local community service orders.<sup>63</sup> For instance, the Liverpool Community Justice Centre in the United Kingdom allows the judicial officer to issue a ‘conditional caution’.<sup>64</sup> This can end a case at the pre-trial stage if a defendant successfully complies with a caution requirement that may include ‘paying someone back, doing community service or writing a letter of apology’.<sup>65</sup>

In crafting justice solutions, whether short or long term, success is therefore more likely when the needs and limitations and power dynamics of the particular community can be taken into consideration. This local element means that neighbourhood court planners need to remain wary of replicating other court models in toto. This was exemplified in the experience of the Harlem Community Justice Center’s project director who explained that:

Our assumption when we started planning a community court in Harlem was that we’d adopt the model of the Midtown Community Court ... but the more we talked to people the more we discovered folks weren’t really talking about graffiti, public urination, turnstile-jumping the way

61 Fagan and Malkin, above n 6, 901.

62 Ibid 898.

63 Ibid 909–10.

64 Wolf, above n 3, 11.

65 Ibid.

they were in Midtown just a few miles away. ... They were interested in the impact drugs were having on young people, and housing issues, like landlord-tenant problems and the lack of affordable housing.<sup>66</sup>

## 2 Keeping It Neighbourly

Neighbourhood justice centres can allow the community to be involved in justice solutions.<sup>67</sup> They can also come to fill a key educative role. Judicial officers, business owners, schools, citizens and police can work together to reduce instances of crime and bring about local solutions through such mechanisms as community mediation.<sup>68</sup> The NJC has formed a local committee to facilitate communication with the residents and businesses within the City of Yarra and some members even assisted in the selection of the Court's first Magistrate.<sup>69</sup> Lanni, in writing of community court models, outlines that:

In keeping with the desire to foster citizen participation and to restore the community that is victimized by quality of life offenses, community service takes the form of local projects suggested by citizen groups. Offenders may be dispatched, for example, to remove graffiti or to beautify a public park. The local community may also play a part in the sanctioning process by participating in community impact panels.<sup>70</sup>

The community courts also strive to attract the involvement of a range of citizens. For instance, in the Hatfield Community Court in Pretoria, South Africa, young people are encouraged to participate in weekend mock trial events designed to educate the younger population and expose them to the Court's work.<sup>71</sup> Similarly, Red Hook also operates a Red Hook Youth Court run by youths in the community.<sup>72</sup> As Fagan has noted, the key is the centring of community relationships and partnerships when '[w]hat citizens do affects the courts, what courts do affects the citizens, what the citizens do affects the service providers, et cetera, et cetera'.<sup>73</sup>

In recent years there has also been a move towards implementing the community court model in multi-neighbourhood environments. For example, the Hartford Community Court operates with a number of 'problem-solving

66 Robert Wolf, *Defining the Problem – Using Data to Plan a Community Justice Project* (Centre for Court Innovation, New York, 1999) 1 quoting Rodney Sprauve.

67 Fagan and Malkin, above n 6, 905; Feinblatt, Berman and Sviridoff, above n 3, 8; Jeff Fagan in Michael Rempel et al, 'What Works and What Does Not – Symposium' (2002) 29 *Fordham Urban Law Journal* 1929, 1938.

68 See, eg, Neighbourhood Justice Centre Project Team, above n 18, 22.

69 Ibid 6.

70 Lanni, above n 3, 374. But see criticism of these types of models in Morris Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2063, 2091–2.

71 Wolf, 'Community Justice Around the Globe: An International Overview', above n 3, 6–7.

72 Phelan, above n 8, 178–9.

73 Fagan in Rempel et al, above n 67, 1937.

committees' based around different local districts which then feed into the Court's centralised committee.<sup>74</sup>

### 3 *Holistic Service Provision*

As well as facilitating crime prevention and community education initiatives, there is the potential for greater control and supervision of offenders both in terms of ongoing monitoring, corrections and in providing support services such as counselling or drug and/or alcohol treatment. A broader range of sentencing options is also often available in this setting and this can facilitate more creative and interdisciplinary solutions. For example, the Magistrate within the NJC Court has wider sentence deferral options available than under the *Sentencing Act 1991* (Vic) and can receive evidence or a report relating to the defendant from the Neighbourhood Justice Officer, a community service provider or any other appropriate person.<sup>75</sup>

Such justice centres have the potential to deal with a person's problems or needs more holistically.<sup>76</sup> The court is in a position to utilise the community-based hub that a neighbourhood centre can provide to link offenders into agencies or referring bodies, involve offenders in therapeutic decisions and to 'pus[h] for the mobilization of social services under the auspices of the court'.<sup>77</sup> As discussed above, the goals of therapeutic jurisprudence are connected with this type of holistic approach. It also means that, although sometimes the subject of criticism,<sup>78</sup> judicial officers operating within these frameworks have the resources and support to focus on the causes of a defendant's problems and can tap into creative ways to address these collaboratively.

### 4 *Judicial Trust and Stability*

The neighbourhood court model can facilitate greater continuity in dealings with court personnel.<sup>79</sup> A litigant can therefore appear before and be monitored by the same judicial officer throughout a matter. This can provide a degree of consistency in approach, speed up court processes, and may allow a more trusting relationship to develop between the judicial officer and a litigant. To the extent that mutual respect builds throughout the proceedings, more therapeutic outcomes

74 Robert Weidner, *Hartford Community Court – Origins, Expectations and Implementation* (1999) 7.

75 See, eg, insertion of s 4Q into the *Magistrates' Court Act 1989* (Vic) by *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4.

76 Fagan and Malkin, above n 6, 906.

77 Ibid 902.

78 See, eg, John Petrila, 'A Review of Essays in Therapeutic Jurisprudence' (1993) 10 *New York Law School Journal of Human Rights* 877; David Wexler and Bruce Winick, 'Patients, Professionals and the Path of Therapeutic Jurisprudence: A Response to Petrila' (1993) 10 *New York Law School Journal of Human Rights* 907; Hoffman, above n 70, 2091–2; Samuel Brakel, 'Searching for the Therapy in Therapeutic Jurisprudence' (2007) 33 *New England Journal on Criminal and Civil Confinement* 456.

79 Neighbourhood Justice Centre Project Team, above n 18, 12; Feinblatt, Berman and Sviridoff, above n 3, 7.

can ideally be facilitated. Within the context of the Liverpool Community Justice Centre, Justice Fletcher has indicated that:

It's the continued involvement with the judge which is really making a difference. ... When I don't speak to their lawyer and just speak to them, you see a look of surprise. I think the vast majority [of defendants] have found it useful because they can tell me what's on their minds and I find it more useful than finding out what their lawyer thinks is going on.<sup>80</sup>

Judicial officers in these roles, however, must at the same time manage any due process concerns that are raised in the community court context as a result of these interactions.<sup>81</sup> For example, the *NJC Act* specifically provides that sentencing is not to 'affect[t] the requirement to observe the rules of natural justice'.<sup>82</sup>

## 5 Community Integration

Judicial officers become a more integrated part of the community through the model's local underpinnings and community partnerships. This interaction allows justice solutions to be more targeted and, at times, preventative. Fagan and Malkin have commented, that in this guise, 'the judicial branch ... becomes an activist pressing for social transformation and neighborhood healing'.<sup>83</sup> The community grounding of the neighbourhood model can build citizens' confidence in justice personnel as well as bolstering the goal of improving justice outcomes at the local level. Judicial officers in this role can come to know the community in a way not normally possible in traditional court settings. For example, Fletcher J has indicated in the Liverpool context that:

I go for a walk in my civvies, and I have come across all kinds of people from lots of different backgrounds. They have all been very open with me and ready to tell me what they think, which is great because it gives me an even better feel for the community.<sup>84</sup>

Justice personnel are therefore better able to liaise with stakeholders and engage with the public as a result of its community-centred justice model.

80 Wolf, 'Community Justice Around the Globe: An International Overview', above n 3, 11.

81 Timothy Casey, 'When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy' (2004) 57 *Southern Methodist University Law Review* 1459, 1497–9; Michael Dorf and Jeffrey Fagan, 'Problem Solving Courts: From Innovation to Institutionalization' (2003) 40 *American Criminal Law Review* 1501, 1510–1; Schma et al, above n 34, 61; Jelena Popovic, 'Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?' (2007) 1 *E Law – Murdoch University Electronic Journal of Law* 60 <[https://elaw.murdoch.edu.au/issues/special/court\\_process.pdf](https://elaw.murdoch.edu.au/issues/special/court_process.pdf)> at 22 April 2009.

82 See, eg, insertion of s 4Q(4) into the *Magistrates' Court Act 1989* (Vic) by *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4.

83 Fagan and Malkin, above n 6, 902–3.

84 Wolf, 'Community Justice Around the Globe: An International Overview', above n 3, 11.

## B Conclusion

The ability to harness benefits such as these has given impetus to the neighbourhood justice movement. The community serves as a fulcrum for a neighbourhood court and the local positioning can potentially make the court more accepted by the neighbourhood and more responsive to its needs.

## IV HURDLES IN THE NEIGHBOURHOOD COURT CONTEXT

### A Factoring in Success – the Role of Legitimacy

The partnerships that neighbourhood courts cultivate and the trusting relationships they develop with the local community are fundamental to the establishment of their legitimacy and authority within a district.<sup>85</sup> It is this legitimacy which becomes a likely key determinant in the success and community acceptance of a neighbourhood court and the wider community justice model of which it forms part.

The perceived legitimacy of legal actors or institutions is a critical aspect of the literature on procedural justice.<sup>86</sup> Procedural justice suggests that individuals who are more involved in, and have respect for, justice processes will look upon such processes more favourably and comply with the law to a greater extent.<sup>87</sup> In cultivating legitimacy, the focus is therefore less upon the end result but rather on the procedural steps which led up to it.<sup>88</sup> Procedural justice theory would therefore suggest that the ways that neighbourhood courts and centres as a whole interact and engage with communities is likely to influence the way the courts are perceived by the public. This research also indicates that legitimacy is enmeshed with the need for individuals to genuinely believe that an institution's 'interests' are aligned with their own.<sup>89</sup> This would suggest that, even during a project's infancy, community initiatives need to have grassroots support and extensive local consultation.<sup>90</sup>

85 Fagan and Malkin, above n 6, 910.

86 Tyler, above n 41; Tom Tyler (ed), *Procedural Justice – Volume 1* (2005); Tom Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform' (1997) 45 *American Journal of Comparative Law* 871. For a discussion of the literature on legitimacy, see Tom Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law' (2003) 30 *Crime & Justice* 283, 307–10.

87 Tyler, *Why People Obey the Law*, above n 41, 64. Note also Tyler's observation at 103 that 'judgments of procedural justice influence judgments about the legitimacy of legal authorities, which in turn influence behavioural compliance with the law'. See also Fagan and Malkin, above n 6, 899; Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law', above n 86, 313.

88 Roger Warren, 'Public Trust and Procedural Justice' (2000) 37 *Court Review* 12, 13; Tyler, *Why People Obey the Law*, above n 41, 101–8. See also King, 'Applying Therapeutic Jurisprudence from the Bench', above n 33, 173–4.

89 Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law', above n 86, 310.

90 In the US context, see, eg, Wolf, *Defining the Problem – Using Data to Plan a Community Justice Project*, above n 66, 41.

Although further research is required in order to assess the role of legitimacy in the neighbourhood court context and how it can be heightened in the local environs,<sup>91</sup> the following factors are likely to feed into its realisation.

## 1 *Community Responsiveness*

An important starting point is understanding the dynamics inherent within community justice partnerships. By making the court one aspect of an integrated community meeting place, the court becomes less foreign and a local 'resident' in its own right. Although not easy to quantify, evaluations of US community courts have suggested that such courts are generally viewed quite favourably by citizens<sup>92</sup> and appear fairer.<sup>93</sup> Potentially, the community is given a more active role in moulding the operation of the local justice model and in synchronising its priorities accordingly. This may strengthen the community's sense of ownership of the facility provided that the participation is adequately reflective of the cross-section of interests it represents.<sup>94</sup> For example, the interplay with the community has been central to the Red Hook Community Justice Center's promotion of its own legitimacy.<sup>95</sup> This is facilitated by judicial officers who are able to actively engage and meet with the community outside the traditional court model. The Center is therefore more able to respond to the needs of its community networks and develop a "real perception" of accountability.<sup>96</sup> Fagan has outlined the importance of such courts being a 'social institution that is grounded in that community'<sup>97</sup> as:

It can build legitimacy because of the accretion of positive experiences of individuals who go through the court and who use the building. ... [T]his is communicated to the community at large through both the direct experience of the citizens in the court and also by some vicarious knowledge that they get because their neighbors are having contact with the court and going through the court. ... All of these mechanisms are pathways to legitimacy, and we think that legitimacy is ultimately what is going to leverage the court into social control.<sup>98</sup>

91 Fagan and Malkin, above n 6, 904. Cf Lanni, above n 3, 390 where Lanni identifies that the focus of community courts upon more trivial crime may weaken this potential.

92 Dana Kralstein, *Community Court Research – A Literature Review* (2005) 3; Berman and Fox, above n 3, 88 indicate that a 2001 survey of the Red Hook Community Justice Center produced a 68 per cent approval rating; Feinblatt, Berman and Sviridoff, above n 3, 5–6.

93 Frazer, above n 4.

94 Lanni, above n 3, 380–1. See also, Barbara Yngvesson, 'Inventing Law in Local Settings: Rethinking Popular Legal Culture' (1989) 98 *Yale Law Journal* 1689.

95 Berman and Fox, above n 3, 79.

96 Phelan, above n 8, 177.

97 Fagan in Rempel et al, above n 67, 1939.

98 *Ibid* 1939–40.

## 2 Effect on Crime

In addition, it is likely that community support for the neighbourhood models will be affected by the degree to which they are seen to have a positive effect on crime. Part of the challenge is ensuring that crime prevention activities are developed and that sentencing mechanisms, which embrace therapeutic and restorative approaches, are not seen as inadequate or as ‘soft on crime’.<sup>99</sup> Magistrate Fanning at the NJC Court has indicated that:

It’s really a misnomer and quite false to say that it’s soft on crime. In fact, I have the same dispositions and the same approach to sentencing overall as any other court does. So it’s not a case where people who need to go to prison would [not] be imprisoned. It’s obviously not the first option, but it’s part of the repertoire, part of the sentencing options that are available. But really, the emphasis here is to try and redress those underlying causes rather than simply delivering a sentence from on high, be it a fine, or imprisonment term, but rather, as I say, to deal with those underlying causes to try and redress those underlying causes. But it’s not a soft option, and it’s not an option that excludes imprisonment in appropriate cases.<sup>100</sup>

## 3 Local Positioning

In considering the perception of the community court as a legitimate institution, Fagan has also referred to the importance of local positioning.<sup>101</sup> In recent years, there has been mounting and multidisciplinary scholarship on particular spaces becoming rich sources of cultural and social understanding.<sup>102</sup> Similarly, the value that the legal sphere is beginning to place in ‘neighbourhood’ or ‘community’ justice has been characterised as concentrating on ‘local space in defining the types of problems that present themselves for socio-legal solution’.<sup>103</sup> Fagan and Malkin have indicated that in the types of districts adopting neighbourhood court models there is often a ‘low rating by citizens of the legitimacy of law and legal institutions’.<sup>104</sup> Arguably, the precise positioning of the facility is likely to form a significant part of the consultation process when its location may, for example, impact on the degree to which the project is embraced by the community and perceived as legitimate. For instance, in documenting the history of the Red Hook consultation process, Berman and Fox state that the site chosen, an unoccupied school, had:

99 Arie Freiberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ (2002) 20(2) *Law in Context* 6, 19. See also Feinblatt and Berman, above n 1, 37; Fagan in Rempel et al, above n 67, 1940.

100 ABC Radio National, above n 25.

101 Fagan in Rempel et al, above n 67, 1939–40. See also US Department of Justice, *Overcoming Obstacles to Community Courts – A Summary of Workshop Proceedings* (1998) 5 <[http://www.courtinnovation.org/\\_uploads/documents/overcomingobstacles.pdf](http://www.courtinnovation.org/_uploads/documents/overcomingobstacles.pdf)> at 22 April 2009.

102 See, eg, Eric Hirsch and Michael O’Hanlon, *The Anthropology of Landscape: Perspectives on Place and Space* (1995); Doreen Massey, *Space, Place and Gender* (1994); Setha Low and Denise Lawrence-Zuniga (eds), *The Anthropology of Space and Place – Locating Culture* (2003).

103 Fagan and Malkin, above n 6, 898.

104 Ibid 899.



a number of important symbolic meanings. The school had once been a valuable community resource, but now stood as a symbol of Red Hook's woes: vacant, boarded up, and full of broken windows. Just as important, the former school was located in neutral territory, in between the public-housing development and Red Hook's waterfront. ... In symbolic terms, this meant that the Justice Center could not be claimed by one community faction over another.<sup>105</sup>

The Red Hook school had been attended by many community residents and had associations with a local parish which also made the site more acceptable as the home of the new court.<sup>106</sup> It also demonstrated that the court was to take a new approach and rather than using an old court building it would choose a community site which showed 'a willingness ... to move out from behind existing boundaries and into communities'.<sup>107</sup> This suggests that the 'place' that a neighbourhood court fills both physically and emotionally within the community is therefore likely to impact on the degree to which a community engages with and embraces the court project.

No doubt future evaluations of the Victorian NJC will provide some evidence of how the new initiative has been perceived by the local community in the City of Yarra and the role that legitimacy has played.<sup>108</sup> Certainly, for the Red Hook Community Justice Center, it has been noted that:

The Justice Center enjoys a strong comparative advantage in procedural justice – justice as felt and experienced – over the large, fractured, and impersonalized centralized courts, and reaps yet another quantum of legitimacy. The partnership with community and solving local problems of crime and disorder also is an engine of legitimacy. ... Residents are most likely to comply in this arrangement when they see the Court as a legitimate institution that works for the good of the community, not simply as a structure to repair problems of inefficiency in the court system.<sup>109</sup>

## **B Every Silver Lining Has a Cloud?**

In assessing the contribution of community justice initiatives, it is to be expected that some challenges may flow from what also come to constitute some of the unique strengths of the community court enterprise. Some of these possible challenges are explored below. Clearly, the degree to which these are pertinent to a neighbourhood court will depend upon the circumstances of each justice environment. Arguably, if applicable, some challenges may even provide an

105 Berman and Fox, above n 3, 80.

106 Phelan, above n 8, 171.

107 Ibid 172.

108 Neighbourhood Justice Centre Project Team, above n 18, 4.

109 Fagan and Malkin, above n 6, 950–1.

opportunity to collaborate with the community to discuss solutions and instil a degree of community ‘ownership’ over them.<sup>110</sup>

## 1 *Fuzzy Boundaries?*

From a budgetary and definitional point of view, it can be difficult to compartmentalise communities, particularly when people and their legal disputes are not always centred around the ‘local’. The definition of ‘local’ can itself prove problematic. Yngvesson has noted that in the community board context, ‘[t]he words *neighborhood*, *locality*, and *community* are used interchangeably and capture some of the slippage between topography and moral order’.<sup>111</sup>

If neighbourhood courts can only operate within particular districts or street boundaries, a court’s territorial jurisdiction may need to be carefully thought out. For example, the NJC Court has addressed this by casting the net of its criminal jurisdiction to apply to a person who ‘resides in the municipal district’, a ‘homeless person’ who committed the offence within the district or is deemed under the *Act* to be ‘living in the ‘municipal district’, or ‘an Aborigine with a close connection to the municipal district’ who ‘is alleged to have committed the offence in that district’.<sup>112</sup> Definitional issues will no doubt present themselves if an individual wishes to challenge the jurisdictional scope of the court. This could involve a challenge to the neighbourhood court’s right to hear a charge against an individual or to the court’s refusal to hear a criminal charge.

To the extent that jurisdiction depends on the location of crime, localising crime within a particular boundary is not always easy and can sometimes have much wider repercussions. For example, as Lanni notes:

It is difficult, if not impossible ... to define the ‘local community’ in such a way that does not exclude individuals and communities affected by any given crime. In metropolitan areas, it is not unusual for individuals to live, work and play in several different geographical areas ... A related criticism is that decentralization of criminal justice policies is inappropriate because crime in one ‘community’ is likely to affect other communities.<sup>113</sup>

## 2 *Setting and Meeting Expectations?*

Communities need to appreciate that there may be limitations on a neighbourhood centre’s ability to deliver justice and that not all expectations can necessarily be realised. Part of the process of collaboration will involve an alignment of expectations and priorities.

110 Ibid 907.

111 Barbara Yngvesson, ‘Local People, Local Problems, and Neighborhood Justice: The Discourse of “Community” in San Francisco Community Boards’ in Merry and Milner (eds), above n 2, 382 (emphasis in the original).

112 *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4. See also Law Reform Commission of Western Australia, above n 12, 175.

113 Lanni, above n 3, 391–2.

One of the most obvious constraints is likely to be fiscal. Clearly, the extent to which strict budgets are introduced will restrict the number of residents that the centres can assist and over what timeframe. Additionally, neighbourhood centres are likely to be subject to performance indicators and evaluations before financial resources become more readily available. This is likely to shape the types of justice projects which can be undertaken as part of the community model and may require more experimental projects to be put on hold.

Temporal limits may also inhibit community court projects. Trial periods may mean that administrators will need to focus on community projects which are able to be quickly set up and which are likely to produce outcomes which can be evaluated in the short to medium term.

Further, legislative frameworks may prescribe the jurisdictional limits of a neighbourhood court's role in spite of the community's preferences for the types of matters which should be heard. Accordingly, the *NJC Act* amends s 40 of the *Magistrates' Court Act 1989* (Vic) so that the Neighbourhood Justice Division cannot deal with committal proceedings for indictable offences or prescribed sexual offences. Similarly, Fagan and Malkin have commented in the US context that 'even if residents asked for marijuana to be legalized, the Court could not change its legal mandate'.<sup>114</sup> These obstacles may be the cause of frustration within communities which feel that centres should be highly 'tweakable' to that particular locality's jurisdictional needs.

Expectations may also be set by particular personalities who operate within neighbourhood courts. This is particularly the case with community court judicial officers. Often, one judicial officer may work with the court for a number of years and may bring his or her own experience, skills and perspective to the court. A community's involvement with that judicial officer is one of the unique benefits of the community court model. However, it may prove problematic when there is a change on the bench.<sup>115</sup> Inevitably, a replacement of judicial personnel may mean that some projects or procedures fall away and that the court must adjust to a new range of skills and ideas.<sup>116</sup> A change in a community court judicial officer therefore needs to be tightly managed to ensure that the court's momentum or community relationships are not seriously affected.

### **3 Pockets of Participation?**

Another potential problem to be managed by neighbourhood justice centres is participation being confined to select pockets of the community. To build and retain a legitimate role within the district it is important that there be a breadth in

<sup>114</sup> Fagan and Malkin, above n 6, 924.

<sup>115</sup> See David Rottman, 'Does Effective Therapeutic Jurisprudence Require Specialized Courts (and do Specialized Courts Imply Specialist Judges)?' (2002) 37 *Court Review* 22, 24; Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates' Court: Some Issues of Practice and Principle' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Papers from the Third International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 129, 133.

<sup>116</sup> King, 'The Therapeutic Dimension of Judging: The Example of Sentencing', above n 33, 104.

community networks, volunteers and contributors. There is the potential for this to be jeopardised if justice projects become captured by particular community interests or business groups who may not speak for the neighbourhood as a whole.<sup>117</sup>

In the Red Hook context, Fagan and Malkin have outlined that the level of community engagement and involvement in forms of 'social control' has been weakened by 'strong deficits of social capital, social cohesion, and collective efficacy'.<sup>118</sup> The authors indicate that the fragile nature of the 'community' may undermine the locals' expectations of the court and their belief in the genuineness of the community networking exercise.<sup>119</sup>

Participation concerns are, however, not confined to citizens. Lanni has indicated that 'over-reliance on experts' can also emerge and have similarly detrimental effects.<sup>120</sup> This professional dependence may come to sever the strong community ties and networks fundamental to the neighbourhood justice model.

#### **4 Unlocking the Judicial Role?**

Neighbourhood courts need to ensure that their legitimacy is not undermined or threatened by criticisms of unconventional judicial practices. Judicial officers may, for example, be condemned for appearing to be paternalistic, biased or for jeopardising principles such as procedural fairness. Although such reproaches are not confined to the community court movement,<sup>121</sup> the courts need to anticipate and address criticisms of this nature in their adoption of therapeutic, restorative and problem-oriented processes.<sup>122</sup> This is particularly important in neighbourhood courts which operate around one judicial member who can wield considerable influence over the direction that the court takes and the sense of legitimacy that is created.

For example, Feinblatt and Berman have explained that in the Midtown Community Court, supervision of community relationships is allocated to non-judicial staff to ensure that judicial independence is not threatened by a judicial officer juggling this role alongside their court functions.<sup>123</sup> However, the authors exhort that:

Judges must struggle to identify which forms of interaction with community residents are acceptable and which are not and clearly communicate their expectations to the local community. They must also think hard about

117 See, eg, discussion in Lanni, above n 3, 380–2; Fagan and Malkin, above n 6, 947.

118 Fagan and Malkin, above n 6, 950.

119 Ibid.

120 Lanni, above n 3, 382.

121 See, eg, Morris Hoffman, 'Commentary: The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437; Casey, above n 81.

122 See, eg, Brookbanks, 'Therapeutic Jurisprudence: Implications for Judging', above n 34, 466; King, 'Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective', above n 33, 17; Fagan in Rempel et al, above n 67, 1940.

123 Feinblatt and Berman, above n 1, 36. See also Magistrate Fanning's comments on ABC Radio, above n 25.

what types of information regarding community problems or concerns should be taken into consideration in deciding individual cases.<sup>124</sup>

## **5 The Next Playing Field?**

A further issue may be the consequences that community courts pose for the wider legal system. One example may be the complications which may flow from the heightening of justice expectations. In being aware of neighbourhood justice courts, might expectations be raised for the way that the wider justice system operates or should operate? May citizens come to reconceptualise the normative role of the courts? Might these expectations be applied to superior courts or courts in different districts which adopt measures foreign to the community court model? In such cases, is there the potential for community courts to undermine the public's confidence in the broader justice system?

One response to this may be that neighbourhood courts generally make it clear to citizens that they operate within unique parameters and are able to harness the benefits of operating at the local level. Another retort might be that the court system as a whole is beginning to adopt more alternative and less formalistic methods. This may mean that the differences in style between courts are beginning to reduce as the courts embrace new ways of conceptualising judicial roles. Further research may also find that enhancing the public's confidence in legal institutions at the local level has flow-on effects for the justice system even beyond the neighbourhood boundary.

Clearly, such consequences need to be fleshed out through further investigation. However, if retaining citizens' belief in the legitimacy of the courts is the goal, it may be necessary to consider these issues more fully as we begin to assess the impact of the neighbourhood court movement.

## **V CONCLUSION**

Neighbourhood courts hold much promise. The community justice model allows for mutually negotiated and holistic approaches to justice. It has the potential to inculcate a greater sense of ownership and legitimacy at the grassroots level and to carve out new spaces for courts to operate within an extensive community web.

To some degree, however, the distinctive features of neighbourhood justice models may also pose challenges to their operation. These may stem from the responsibility they vest in the neighbourhood court judicial officer, from the partnerships that the courts and justice centres develop with local residents or from their projects fuelling unrealistic community expectations. These challenges, along with the need to adequately define what it means to operate at the 'local'

124 Feinblatt and Berman, above n 1, 36.

level, may weaken public legitimacy and confidence in the neighbourhood court model if it becomes apparent that such hurdles cannot be surmounted.

Fittingly, Fagan and Malkin have claimed that ‘these new courts take on a huge responsibility’.<sup>125</sup> In Australia, it is a responsibility which will no doubt be analysed with much interest as the Victorian NJC project progresses. Presumably, its evaluations are likely to bear upon whether we will see a burgeoning of neighbourhood courts over the next few decades and, if so, the form these courts and broader community justice centres will take.

125 Fagan and Malkin, above n 6, 948.