

Same, same or different? Is trauma-informed sentencing a form of therapeutic jurisprudence?

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Abstract

The fundamental purposes of therapeutic jurisprudence and "trauma-informed" criminal justice practices are similar: to recognise the importance of therapeutic (trauma-informed) interactions in promoting recovery and desistance from crime, while also avoiding anti-therapeutic outcomes caused by interactions with the criminal justice system. This paper examines the similarities and differences between therapeutic jurisprudence in sentencing and trauma-informed sentencing to explore whether trauma-informed sentencing should be regarded as a form of therapeutic jurisprudence. While therapeutic jurisprudence, as a legal construct, gives a high priority to working within the existing law to achieve therapeutic outcomes, a trauma-informed approach, emerging as it has from social science and allied health origins, may challenge the veracity and efficacy of current laws, and focus instead on how law reform could achieve more therapeutic outcomes.

1. Introduction

While therapeutic jurisprudence (TJ) emerged from legal scholarship and "trauma-informed practice" grew from the work of health and social science practitioners, both concepts support the fundamental idea (however conceptualised) that law is a "social force" which should avoid practices that result in trauma

or anti-therapeutic impacts. Fundamentally, TJ aims to enhance mental health and emotional wellbeing through legal processes and outcomes. Trauma-informed sentencing works to ensure that legal processes and sentencing sanctions recognise the presence of trauma in the lives of people who offend and its relevance to criminal behaviour and sentencing. In considering how TJ and trauma-informed sentencing relate to each other, it quickly becomes apparent that both concepts are disadvantaged by a lack of clarity in their meaning and scope. Using Australian examples, this paper examines the underlying principles of each model and considers how both TJ and trauma-informed practice may influence sentencing processes and outcomes to determine whether trauma-informed sentencing is merely an example of TJ in practice or whether it is something different.

2. What is therapeutic jurisprudence?

In 1987, David Wexler first introduced the idea of "juridical psychotherapy", later re-naming it "therapeutic jurisprudence" in 1990. [1] TJ proposes that the law (i.e., legislation, legal rules, legal procedures, and legal roles) has the capacity to cause therapeutic and anti-therapeutic consequences for individuals. [2] TJ uses behavioural science "to reform law to promote therapeutic, or mitigate anti-therapeutic, consequences of law and policy". [3] "Therapeutic" is broadly defined as aiming to enhance mental health and emotional wellbeing. [4] Re-traumatisation by the criminal justice system is a key example of an anti-therapeutic consequence. Wexler and his colleague, Bruce Winnick suggested that the law should aim to be therapeutic in as much as it can be within the confines of legal rules and precedent. [5] The majority of examples of TJ in practice relate to the administration of current laws. TJ may be achieved through amendments to legal processes, such as changing the layout of the courtroom to make it less intimidating. [6] TJ in practice may also relate to changes in legal roles, for example, by educating workers to promote more informed and effective interactions with defendants or establishing prolonged and direct relationships between judges and defendants. [7] Less commonly, applied examples of TJ can be found in the reform of existing laws, such as through specific amendments to legislation to promote more therapeutic outcomes. [8]

2.1. How can TJ principles be applied to sentencing?

Evidence shows that there is confusion about what constitutes TJ in sentencing. [9] Given that TJ exists in a range of guises, as a theory, [10] a philosophy, [11] a lens, [12] a paradigm, [13] a "method of thinking", [14] "a field of inquiry [or] research agenda", [15] this lack of clarity is not surprising. TJ may influence sentencing across a continuum: from court processes to court outcomes as per Figure 1; and from incidental and inadvertent [16] applications to intentional recognition of TJ principles in practice. Inadvertent TJ may occur when a judge has a dialogue with a defendant, using respectful and appropriate language to ensure they understand the sentence implications. Intentional TJ in sentencing may be achieved when judges give greater weight to sentencing purposes likely to promote therapeutic outcomes, particularly community safety through rehabilitation [17] and restitution, rather than general deterrence or denunciation.

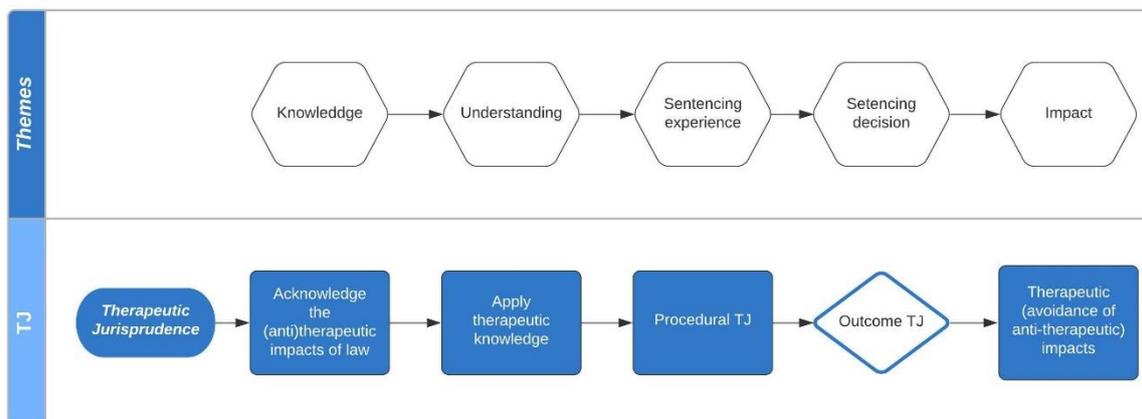


Figure 1: Applied therapeutic jurisprudence in sentencing

Critics of TJ argue that it remains aspirational; too vague in its meaning of "therapeutic", [18] and too subjective. Arguably, if "procedural TJ" merely requires ethical practice, this is already embedded in codes of conduct and practice guidelines and should be readily found in all mainstream courts. For example, in Australia, the *Guide to Judicial Conduct* requires that judicial officers act with integrity, in an independent and impartial manner. [19] However, a commitment to "outcome TJ" is likely to influence the sentencing sanction imposed. In practice, "outcome TJ" requires sentencing judges take into account individual

sentencing factors embedded in legislation, [20] and give greater weight to "personal circumstances and vulnerability of any victim of the offence" [21] as well as the defendant's "general background...and mental condition (including any cognitive impairment)". [22] It follows that merely avoiding re-traumatisation is not enough to show TJ in sentencing has been achieved. If TJ in sentencing is based on the idea that the criminal justice system should go beyond ethical practice to actively promote therapeutic outcomes through the implementation of evidence-based interventions, then this is where trauma-informed practice becomes relevant.

3. What is trauma and why is it relevant in sentencing?

3.1. The challenge of defining trauma and complex trauma

To be "trauma-informed" is to have "an understanding of trauma and an awareness of the impact it can have across settings, services, and populations". [23] To operationalise such an approach, it is necessary to understand what "trauma" is, yet there is no universally accepted definition or conceptualisation of trauma. [24] In fact, "[i]t remains contentious among mental health professionals as to whether 'trauma' relates to a single event or series of events, an environment, to the process of experiencing the event or environment, or to the psychological, emotional, and somatic effects of that experience". [25] Accepting that trauma is the impact of a traumatic stressor, trauma is relevant in sentencing as it helps to understand how specific offending behaviour affects victims of crime [26] as well as how a defendant's trauma history influences their criminal behaviour. [27]

The mainstream criminal courts tend to take a "traditional approach" when considering trauma, [28] relying on a clinical definition. Expert evidence from psychiatrists and forensic or clinical psychologists who make diagnoses based on the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) advise the courts that trauma is the impact of "[e]xposure to actual or threatened death, serious injury, or sexual violence". [29] In the diagnostic criteria for

Posttraumatic Stress Disorder (PTSD), the DSM-5 requires exposure to a single, highly traumatic event, such as war, being kidnapped or taken hostage, a terrorist attack, torture, natural or human-made disasters and severe motor vehicle accidents. [30] A diagnosis of PTSD also requires certain trauma responses such as flashbacks, hypervigilance, negative emotions, and avoidance of certain triggers. [31] Courts typically use the evidence of experts to demonstrate when trauma is present in the life of a defendant and how trauma may be relevant to their criminality, criminal responsibility, and capacity.

The DSM-5 has been criticised for not comprehensively recognising the range and impact of trauma. [32] Many psychiatrists, [33] as well as psychologists, [34] social workers and counsellors with frontline experience have identified the importance of responding to the subjective impact of ongoing, interpersonal trauma—particularly domestic/family abuse and chronic child abuse and neglect. This trauma-informed work has led to a broader understanding of trauma than the clinical model where:

"trauma is viewed not as a single discrete event but rather as a defining and organizing experience that forms the core of an individual's identity... The impact of trauma is thus felt throughout an individual's life in areas of functioning that may seem quite far removed from the abuse, as well as in areas that are more obviously connected to the trauma." [35]

This definition goes beyond the DSM-5 criteria for PTSD, recognising that individuals may experience lingering trauma-related distress or dysfunction in unique and individualised ways. This is the understanding of trauma that trauma-informed work is based upon.

Practitioners who advocate for trauma-informed practice (across all sectors) emphasise the potentially devastating impact of "complex trauma", that is: exposure to repeated, chronic or prolonged traumatic events particularly experiences that occur in childhood. [36] Sheryl Kubiak and colleagues highlight that "interpersonal victimization is thought to inflict greater psychological harm than random or accidental events such as natural disasters". [37] Traumatic childhood experiences that may lead to complex trauma are known as adverse childhood

experiences (ACEs) and include factors relating to child abuse and neglect as well as parental issues such as mental health and substance abuse, family violence and incarceration. [38] Responses to ACEs are individualised and depending on issues such as external supports and resilience. For people exposed to chronic ACEs, the effects are often cumulative and may result in "disturbances predominantly in affective and interpersonal self-regulatory capacities such as difficulties with anxious arousal, anger management, dissociative symptoms, and aggressive or socially avoidant behaviors". [39]

Evidence suggests that the impact of complex trauma, particularly from traumatic events in childhood, is often enduring, affecting behaviour, emotions, and cognition into adulthood. [40] These far-reaching effects may include brain structure abnormalities which in turn undermine brain functioning, resulting in poor emotional regulation, limited impulse control as well as hypervigilance and aggression. [41] Traumatic experiences can also negatively affect social functioning, through unstable attachment and dysfunctional interpersonal relationships. [42]

It is not a leap of the imagination to recognise that someone with difficulties managing anxiety, anger and aggression may behave in way that society perceives as criminal. This is relevant to sentencing purposes such that rehabilitation, rather than specific deterrence, may better achieve community safety. [43] In terms of individual factors relevant to sentencing, the impact of trauma may have a bearing on a defendant's physical and mental health, [44] as well as their prospects for rehabilitation. [45] It follows then that, in a criminal justice context, the significance of trauma is not in the nature of the specific traumatic event itself, but rather lies in the recognition of the psychological, cognitive, and behavioural impact of traumatic events on the person. To be trauma-informed is to understand the ongoing, and complex effects of traumatic events on an individual's ability to function and interact with the world around them.

3.2. Trauma and the risk of crime

The nature of the relationship between the impact of complex trauma and criminality is widely accepted and yet not well understood. It is likely that the relationship between trauma and

crime is indirect; mediated or moderated by other factors. [46] In the UK, Australia and other jurisdictions such as Canada, the US and NZ, risk of offending is most often measured using specialised risk assessment tools that focus on static and dynamic factors that are criminogenic (i.e. known to cause crime) such as: antisocial personality; antisocial attitudes, values and beliefs; antisocial friends and family; substance abuse; relationship problems; low levels of education; high unemployment; and criminal history. [47] In cases where trauma exposure occurs prior to the emergence of risk factors such as substance abuse or antisocial attitudes, trauma may have been causative of those factors rather than the criminal behaviour itself. [48] People with trauma histories, particularly ACEs, are more likely than the general population to have risk factors in their lives: they often disengage from school at a young age, have been exposed to household substance abuse and family violence, lack effective interpersonal skills, as well as experiencing their own early onset substance abuse and antisocial attitudes and behaviour. [49]

Much of the trauma-informed work with people who offend has focused on trauma in the lives of women [50] and youth [51] who have offended. Nevertheless trauma, particularly compounded developmental trauma, has been found to be predictive of youth offending [52] and adult offending in both males and females. [53] Exposure to four or more ACEs has been correlated with more significant offending behaviour, [54] including earlier onset (youth) offending and chronic criminal behaviour. [55] Collectively research highlights the impact that ongoing childhood physical abuse, neglect and family disruption has on later criminal justice system engagement. [56] Psychologist, Terrie Moffitt, proposed that children exposed to developmental trauma were more likely to be "life-course persistent offenders" (i.e., individuals who continue to offend into adulthood) than "adolescence-limited offenders" who grow out of their youth offending. [57] As such, often youth justice systems focus on diverting children and young people [58] away from formal justice processes and custodial sanctions through treatment [59] and other evidence-based intervention programs with the hope that they will desist from crime. Not surprisingly, once young people continue their criminal behaviour into adulthood, court sympathy for chronic trauma may begin to wane, with trauma histories often regarded as an

aggravating (rather than mitigating) factor associated with a poor likelihood of rehabilitation and requiring more severe sanctions to promote community safety. [60]

Given that trauma is predictive of criminal behaviour, ideal crime prevention strategies would involve early intervention strategies aimed at resolving the impacts of ACEs and complex trauma before the effects become entrenched and compounded by further re-traumatising experiences. However, for many adults who offend, the opportunity for early intervention has been lost. Instead, trauma-informed practices at the sentencing stage may help promote community safety through the imposition of sanctions that can assist in the resolution of underlying trauma associated with risk of future offending.

4. Trauma-informed sentencing

4.1. What is "trauma-informed care and practice"?

Principles of trauma-informed practice are core to the victims' rights movement which emerged in the 1970s and 1980s, partially in response to increased awareness of post-traumatic issues faced by Vietnam War veterans and the need to support women escaping from domestic violence and abuse. The literature indicates that the use of the term "trauma-informed" began around 2000, [61] at the same time as the broad and devastating impact of ACEs on health and wellbeing was recognised. [62] Since then, trauma-informed care and practice has continued to be refined, particularly by mental health and substance abuse professionals. [63] Work from the US, [64] UK, [65] and Australia [66] has established common values that underpin trauma-informed principles of practice (although the actual number of principles may vary from five to eight). Blue Knot, a not-for-profit organisation in Australia that supports adult survivors of child sexual abuse, refers to "five foundational principles" of trauma informed care, [67] drawing from the work of Roger Fallot and Maxine Harris. [68] These are: safety, trustworthiness, choice, collaboration, and empowerment. Each principle is outlined in more detail below.

"Safety" aims to provide effective and consistent physical and emotional safety to service users when they access services. The principle of safety ensures service users feel welcome, included,

and heard by the service provider. Safety is also achieved through the education of users and workers regarding client rights, feedback processes, as well as protective policies and practices. [69] “Trustworthiness” and transparency refer to the establishment of mutually understood, clear and consistent expectations and boundaries, such that a relationship of trust may be built between the service provider and the service user. [70] “Choice” involves providing service users with control regarding their service preferences, through information, options, and an awareness of users' rights and responsibilities. [71] “Collaboration” requires that service users are provided the opportunity to participate in the planning and shared decision-making around activities and settings related to service provision. [72] “Empowerment” aims to promote skills-development of service users, through a strengths-based approach; and recognise the importance of individual characteristics, such as culture, history, and gender, when designing an effective service to promote change and recovery. [73]

In applying trauma-informed principles to practice, a trauma-informed service is required to recognise, understand, and minimise the long-term impacts of trauma. [74] This has been articulated as four key steps by the US's Substance Abuse and Mental Health Services Administration (SAMHSA), as per Figure 2. [75] Namely, a service must first realise what trauma is and the potential impacts of traumatic events. The service must recognise the specific impacts trauma has had on the individual accessing the service. Using the principles of practice, the service must respond appropriately to the individual's unique experience of trauma, ensuring that in the process of providing services to the individual, the service resists re-traumatisation through insensitive or inappropriate responses. [76]

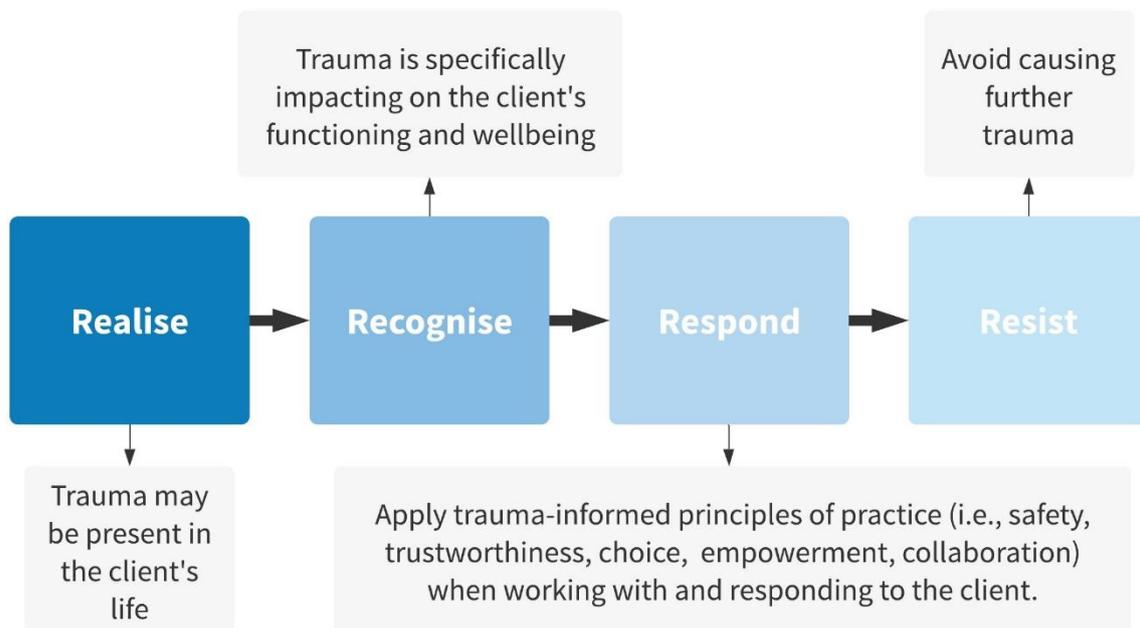


Figure 2: Elements of trauma-informed practice

It is relatively easy to see how such an approach could be applied by drug and alcohol services that take a harm-reduction approach, or a domestic abuse support service driven by feminist ideology. However, it may be more difficult to consider how to reconcile defendant empowerment, collaboration, and choice, while also achieving key criminal justice legislative obligations such as recognition of victims' rights and deterrence. Yet this is precisely what trauma-informed sentencing aims to achieve. More than a decade after trauma-informed approaches were embraced by health and social service agencies, trauma-informed practice in the criminal justice system, including trauma-informed sentencing, is emerging. [\[77\]](#)

4.2. What is trauma-informed sentencing?

When SAMHSA's trauma-informed framework is applied to sentencing, it becomes apparent that, like TJ, trauma-informed sentencing exists on a continuum. As can be seen in Figure 3, the court may become "trauma-informed" through the realisation and recognition of trauma by acknowledging the presence (and relevance) of trauma in the lives of people who offender generally, and specifically in the life of the defendant. [\[78\]](#) The court may also recognise the importance of avoiding re-traumatisation through justice processes and outcomes. [\[79\]](#) In

trauma-informed sentencing, court responses and sentencing decisions are informed by trauma research and evidence. [80] For example, the research and evidence might influence how a defendant's trauma history is relevant to community safety, as either a mitigating factor (i.e., may be considered by the judge and lead to a lower than usual sentence) or an aggravating factor (i.e., resulting in a more severe sentence). [81] Finally, the sanction imposed is "trauma-informed" when it is selected with the intention of resolving trauma while also avoiding re-traumatisation, and ultimately increasing community safety through rehabilitation. [82]

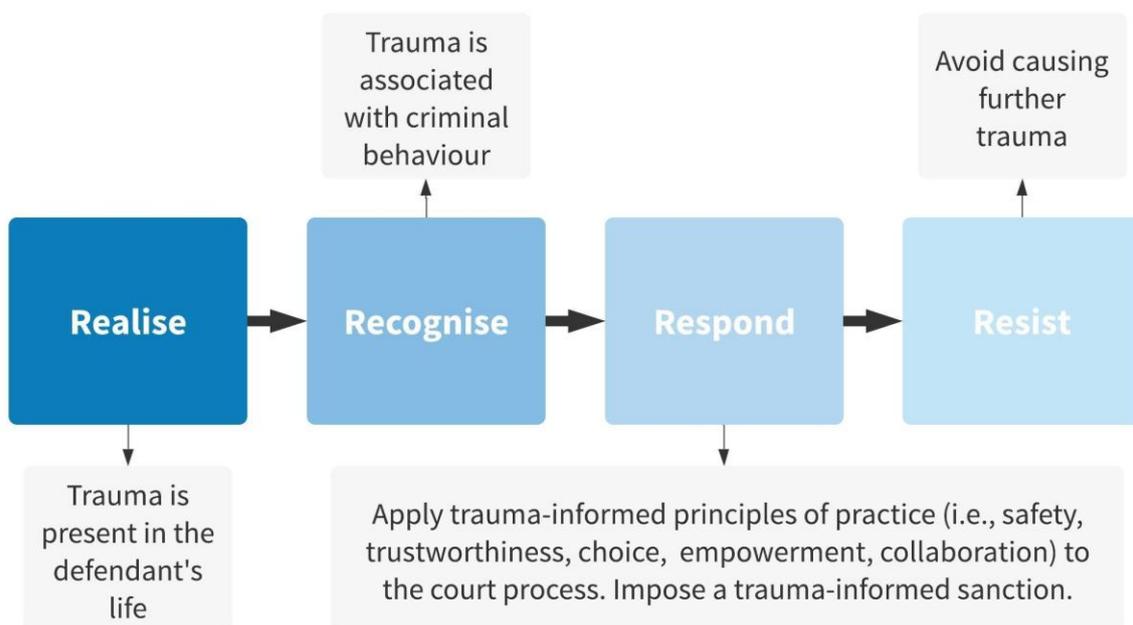


Figure 3: Elements of trauma-informed sentencing

4.2.1. Trauma-informed sentencing in mainstream South Australian courts

Drawing from a sample of recent sentencing remarks from South Australian courts, [83] it is possible to identify examples of trauma-informed sentencing (i.e. judges recognised and responded to trauma and resisted re-traumatisation). In half the sample of sentencing remarks, judges realised the presence of traumatic stressors in the lives of defendants. [84] When trauma was realised, judges acknowledged a diversity of traumatic events in defendants' lives, including chronic and repeated child abuse and neglect; parental incarceration, substance abuse,

mental health issues and violence; war and displacement; and death, grief and loss issues. Often trauma in the lives of defendants was compounded as is shown in the following examples:

"You were taken into welfare care from when you were three because of your father's violence towards your mother. You yourself suffered physical violence whilst you were in care, although not sexual abuse. You ran away from your carers when you were 13." [85]

"Tragically, during a weekend visit with your father as a young boy, you came home and found that your father, who was suffering undiagnosed schizophrenia, was unconscious, having slit his wrists. You continue to endure the trauma of having found your father in that condition." [86]

"You were born in the south of Sudan. You witnessed many atrocities as a child. You became separated from your parents and two of your brothers when you were about seven years old. You have not seen them since. You were in a refugee camp in Kenya with your other two siblings until you were 15 and you all came to Australia in 2008..." [87]

"Your biological father died in a car accident when you were nine months old... Your childhood was not easy. Your mother and her new partner were both alcoholics and would regularly get into alcohol-fuelled arguments. Their relationship was often violent and you can remember your mother suffering serious injuries at the hand of her partner. They were both neglectful of and violent towards you and your siblings and, as a result, your youngest brother and sister were taken into care... Your counsel submitted that the most significant and traumatic event was the death of your son Daniel from SIDS when he was four months old." [88]

Within the sample, even when judicial officers realised trauma was present in the lives of defendants, judges were unlikely to recognise a link between trauma histories and criminogenic risks or criminal behaviour, [89] or consider it important to resist re-traumatisation when sanctioning a defendant. [90] Other sentencing factors, such as the seriousness of the offending, had a greater bearing on sanction selection than a defendant's trauma background. [91] The following example demonstrates that

judges' recognition of defendant trauma did not always result in a trauma-informed sentencing response.

In sentencing *CMA*, [\[92\]](#) Judge E recognised that the defendant's:

"... personal circumstances are very tragic...Up until 2014, your life was without blemish...Your mother passed away in 2014 from a brain aneurysm. Your father passed away in November 2015. You were an orphan at age 20 years. You were responsible, in part, for the care of your two younger siblings. In 2014, one of those siblings was diagnosed with non-Hodgkins lymphoma and is now, fortunately, in remission."

In *R v CMA*, the 24-year-old female defendant was guilty of breaching a bond (relating to methamphetamine trafficking) and driving offences. She was also pregnant. Her defence counsel "submitted that [the judge] fashion a penalty whereby [she be] released now, or soon, with a long bond, to allow [her] to have the baby in the community and then care for the child in a drug free nurturing environment". [\[93\]](#) Judge E instead stated:

"Your conduct does not give me any confidence that you are committed to meaningful change or that you will not re-offend. Your circumstances are unusual but not, in my view, special or sufficiently special to justify excusing your breach. There are no proper grounds for excusing the breach." [\[94\]](#)

The judge sentenced the defendant to imprisonment with a non-parole period of 12 months. As her baby was due to be born while she was incarcerated and there are no mother-baby facilities in the Adelaide Women's Prison, the defendant would have been separated from her baby, who would have been cared for in the community. This decision is likely to lead to re-traumatisation as the defendant has pre-existing grief and loss issues, had previously miscarried a baby and the separation of mother and baby is likely to interrupt the development of healthy attachment for the baby. As the father of the baby was pro-social and the defendant had not used illicit drugs since becoming aware of her pregnancy, it appeared to be an optimal time to seek to work with the defendant to promote desistance from crime through rehabilitation. Trauma-informed sanctions could have been imposed by the court to promote "recovery, self-efficacy and healing". [\[95\]](#) In this case, if the judge's sanction been trauma-

informed, he might have instead imposed a sentence of home detention with trauma and grief counselling, pre-natal supports, and substance abuse counselling to work to promote better outcomes for the defendant, her child and ideally the community as well.

Conversely, in sentencing BKH, [\[96\]](#) Judge F noted that:

"You were subject to abuse as a child and first became involved in offending in your mid teens. I note your traumatic circumstances when you were aged 12. I note you were using cannabis and started to abuse alcohol. You had two children with a different partner. Drugs were a feature of that relationship, as was violence..." [\[97\]](#)

BKH, a 23-year-old woman, pleaded guilty to trafficking methamphetamine and breach of bond. BKH, like CMA, was pregnant, in a stable relationship and, when she found out she was pregnant, "began to address [her] dysfunctional behaviours, and address rehabilitation". She ceased her illicit drug use, regained custody of her children, had stable housing and was engaging well with supervision. In *R v BKH*, the judge concluded that "(d)espite the court having exercised considerable leniency to you in the past, there is on this occasion good reason to suspend the sentence". The judge suspended the two-year four-month 25-day sentence and imposed a \$500 bond. In sentencing, the judge responded directly to the defendant, commending her progress, and highlighting the negative impact that imprisonment would have on her and her children. Judge F stated:

"...it's to your very great credit that you have embraced rehabilitation since earlier [this] year. Just remember that if you use drugs again or offend you will have put all of that hard work to waste: you will be back where you started, you will be back in court. You don't want that, no-one in this room wants that, certainly your children don't want that. Make sure you comply with the terms of that bond. Make sure there is no further offending. Good luck."

This is an example of a trauma-informed response. The judge trusted and empowered the defendant to continue her rehabilitative progress in the community. Judge F avoided re-traumatisation of both the defendant and the defendant's

children. In imposing a trauma-informed sanction, greater weight was given to community safety [98] through rehabilitation, rather than retribution or general deterrence.

5. Trauma-informed sentencing as a form of therapeutic jurisprudence

Drawing from these Australian examples, it is possible to explore whether trauma-informed sentencing is merely TJ in practice or whether it is something different. Like TJ, trauma-informed sentencing models have holistic goals, but the application of their underlying principles may be partial or complete along a continuum of practice. Although developed in parallel, the concepts of TJ and trauma-informed sentencing do cross over. For example, as outlined in Figure 4, responding to trauma could be regarded as an example of procedural TJ, by applying the principles of practice in the court setting (namely: safety, trustworthiness, choice, collaboration, and empowerment). How the courts respond in terms of sanction and whether the courts avoid re-traumatisation relate directly to the outcome TJ by actively promoting therapeutic impacts and avoiding anti-therapeutic impacts caused by the law. In this way, trauma-informed sentencing could be considered to be a form of TJ in sentencing.

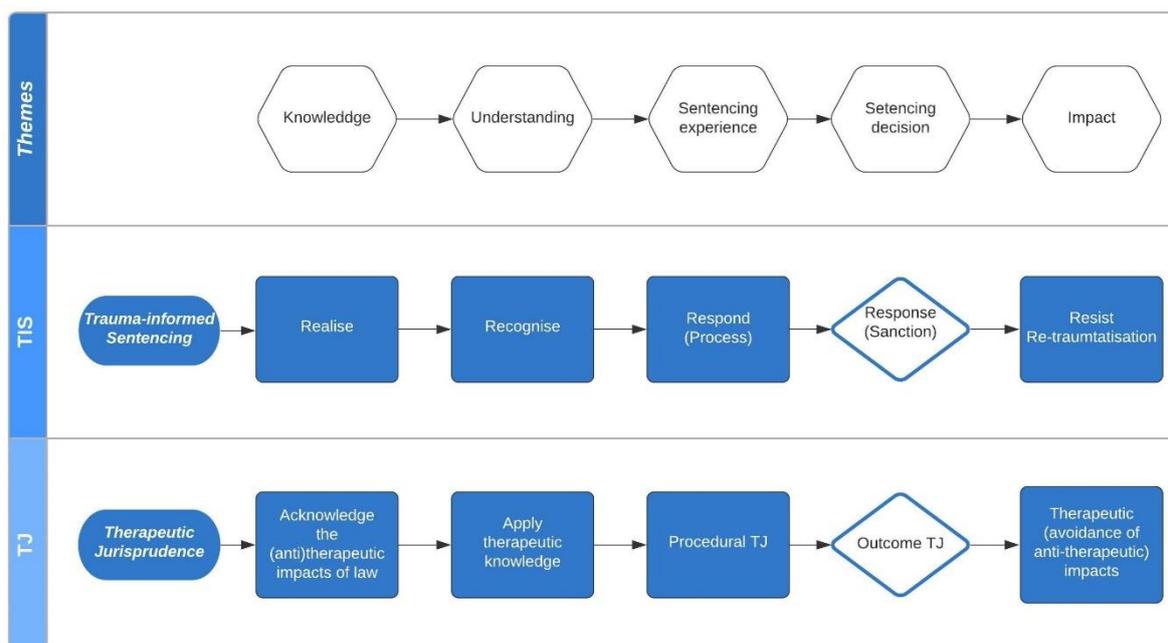


Figure 4: The overlap between principles of TJ and trauma-informed sentencing

While trauma-informed sentencing may be regarded as an example of TJ, not all models of TJ in sentencing are examples of trauma-informed sentencing. For example, Judge Ian Dearden, of the District Court of Queensland, states he achieves TJ in sentencing: by addressing the defendant respectfully and directly; separating the defendant from his or her behaviour; using plain English and explaining the ideas of choice and free will. [99] This approach is entry-level TJ, merely reflect good practice in ensuring defendants have participatory rights in the court process. Dearden also notes:

"Many of the defendants who appear in my court have difficult, challenging and at times, utterly tragic upbringings. Where appropriate, I say to such defendants that it is my belief that none of us get a choice about the cards we are dealt growing up. Some people clearly get dealt a great hand of cards and some get dealt an awful hand. I explain though that from the point in time that I sentence them, they have choices. The past cannot be changed, but the future can be, and the defendant, like everybody else, has an opportunity (which may well be limited for some time) to make choices about how they intend to live their life in the future." [100]

Judge Dearden's personal interactions with defendants-and more generally, any respectful and inclusive practices in court-reflect basic principles of TJ by minimising ways in which the legal system causes anti-therapeutic outcomes, however they do not reflect trauma-informed sentencing. This is because embedding fundamental TJ principles in court *procedures* does not guarantee therapeutic *outcomes*. In this case, Judge Dearden assumes that people with trauma histories have the same intellectual and psychological capacity as people who are not traumatised. Structural and functional neurological trauma research [101] shows that this is not always the case. To be trauma-informed, the justice system must be aware of both the specific needs of users and consumers of its services and agencies as well as how to systemically respond appropriately to vulnerable people. As a result, Judge Dearden's approach may reflect base-level TJ principles but is not trauma-informed.

Further research regarding TJ in sentencing has focused on therapeutic discussions, rather than therapeutic outcomes *per se*. Jordan Tutton, in his analysis of the sentencing remarks of 59 cases in South Australia, focused on three questions as a measure of TJ in sentencing:

"1. Does the judge recognise at least one underlying problem in the offender's life?"

2. Does the judge explicitly acknowledge efforts at rehabilitation?"

3. Does the judge explicitly and positively encourage the offender to engage with treatment or supports?" [\[102\]](#)

Tutton's interpretation of TJ in sentencing has moved beyond ethical behaviour to acknowledge therapeutic and anti-therapeutic impacts of the law by focusing on the realisation and recognition of "problems in the offender's life" which include but are not limited to trauma; the offender's efforts at rehabilitation; and the judge taking a strengths-based approach when interacting with the offender. While this interpretation of TJ identifies the importance of therapeutic procedures, such as respectful interactions in court and the acknowledgement of risks and protective factors, Tutton's model is silent on (anti)therapeutic outcomes. So, for example, Tutton's approach will not identify cases where judges defer sentencing sanctions by using a "Griffith's Remand" [\[103\]](#) with the intention of maximising therapeutic outcomes and avoiding the anti-therapeutic impact of prison. Tutton's approach will also overlook cases where judges use alternative sanctions such as suspended sentences and home detention to avoid anti-therapeutic outcomes and promote access to supports services, maintain the family unit, and allow for other community-based protective factors such as employment and stable accommodation. Furthermore, by focusing on "effort" in rehabilitation rather than successful rehabilitation through the mitigation of risk, there is no guarantee of achieving either therapeutic or trauma-informed outcomes.

These examples indicate that even the research relating to TJ in sentencing and trauma-informed sentencing has been relatively narrow in its interpretation. Work regarding trauma-informed

sentencing of youth in the US, [104] while highlighting the importance of trauma-informed sentencing, failed to acknowledge that traumatised young people who offend often mature to become traumatised adults who offend. Therefore, when Gene Griffin and Sarah Sallen acknowledge that "... courts should consider child trauma as a factor in sentencing", [105] and that such trauma "persists over time", [106] they overlooked the need to acknowledge unresolved trauma in the lives of adult defendants who often also have psychological, emotional and physiological damage from child trauma histories. In this way, even when trauma-informed principles have been holistically applied to the sentencing of a specific population, trauma-informed advocates may lack the vision to recognise the value in a universal application to a broader population, as advocated for by Stephanie Covington and her colleagues. [107]

5.1. Is trauma-informed sentencing a radical offshoot of TJ?

Trauma-informed sentencing could be regarded as an adopted child of TJ, emerging as it has from a family of allied-health and welfare professionals and sitting at the more "disruptive" [108] end of the TJ continuum. It shares a common ethos with TJ to promote wellbeing and avoid further harm as a result of criminal justice system engagement. However, while TJ aims to achieve therapeutic outcomes within the current legal framework (e.g., case law precedent, legislation, legal procedures), trauma-informed sentencing seeks to promote environments of wellbeing and recovery which, while enabling legal concepts such as the sentencing purposes of community safety and rehabilitation, may challenge other elements of the law (in its broadest sense). As highlighted by Max Henshaw and colleagues:

"TJ proponents also regularly qualify that therapeutic interests should not conflict with due process and other key justice principles. Indeed TJ maintains that therapeutic advances are not designed to inappropriately or recklessly undermine these principles and does not assume that "wellbeing promotion" should be the law's highest calling." [109]

Trauma-informed approaches are more likely to see the law as part of the problem rather than part of the solution; as a priority

issue to be improved through reforms and practice change to promote wellbeing. Unlike TJ which has law as its focus, trauma-informed approaches are person-centric, advocating for positive outcomes for the individual. Trauma-informed practice can also lead to better outcomes for the community in terms of reducing future crime by promoting functional change and desistance. In this way, TJ and trauma-informed sentencing models are very different.

6. Conclusion

In some ways, trauma-informed sentencing and TJ are the same. They share the same goals. Even with different origins, when trauma-informed principles (originating from the work of medical and allied-health practitioners) are applied to sentencing and compared to the TJ model of legal practitioners, together they seek to achieve therapeutic outcomes. Both aim to promote wellbeing and avoid re-traumatisation and anti-therapeutic outcomes through the recognition and acknowledgement that the law can impact on an individual's wellbeing, in both positive and negative ways. As such, trauma-informed sentencing may be considered an example of TJ in practice. Both approaches recognise that therapeutic (trauma-informed) outcomes can be achieved while also promoting community safety and wellbeing through-and in addition to-a reduction in crime. However, there are conceptual challenges in definitively stating that trauma-informed sentencing is a form of TJ, given that practitioners, scholars, and champions have varied views as to their definitions, their scope as well as practical implementation. Once applied to sentencing, both TJ and trauma-informed practices exist across a continuum, depending on factors such as the judicial officer and the stage at which the principles are applied to the sentencing process. Yet, TJ in sentencing is not always informed by trauma. While a trauma-informed approach keeps the person firmly in the centre of decision-making, TJ gives greatest regard to the law and works within existing legal restrictions to achieve therapeutic processes and outcomes. In any case, whether framed as trauma-informed or TJ, sentencing decisions that seek to promote the wellbeing of defendants, particularly those with trauma histories, can assist in achieving better sentencing outcomes in terms of increased community safety and decreased recidivism through recovery and desistance.

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[12] Stobbs, Bartels and Vols (n 2) 18.

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[72] *ibid.*

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[74] Kubiak, Covington and Hillier (n 23) 92.

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[76] Covington (n 65); Substance Abuse and Mental Health Services Administration (n 61).

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[79] Substance Abuse and Mental Health Services Administration (n 61). Interestingly, Griffin and Sallen discuss avoiding re-traumatisation post-sentencing, but not during the sentencing experience itself. This is a significant oversight given sentencing can be a highly traumatic experience for some defendants.

[80] Griffin and Sallen (n 51) 20.

[81] *ibid.*, 62; Griffin and Sallen (n 51) 20.

[82] Griffin and Sallen (n 51) 17, 21. See also: Fergus MacNeill and others, 'How and why people stop offending: Discovering desistance' (2012) 15 *IRISS Insights* 1.

[83] Specifically, 448 sentencing remarks published between 1 May 2019 and 30 November 2019; accessed from Courts Administration Authority 'Sentencing Remarks' (2019) <<http://www.courts.sa.gov.au/SentencingRemarks/Pages/default.aspx>>.

[84] n=233 (52%).

[85] Judge A in *R v RP* (SA District Court, 27 May 2019). Note I have deidentified the judges and defendants in the sentencing remarks.

[86] Judge B in *R v KJD* (SA Supreme Court, 25 June 2019).

[87] Judge C in *R v WMD* (SA District Court, 30 May 2019).

[88] Judge D in *R v BSC* (SA District Court, 22 August 2019).

[89] In 109 cases (46.8% of cases where judges realised defendant trauma was present).

[90] In 69 cases (29.6% of cases where judges realised defendant trauma was present).

[91] See *Sentencing Act 2017* (SA) s 11 for a list of individual sentencing factors that a court must consider in determining a sentence.

[92] SA District Court, 31 May 2019.

[93] *ibid.*

[94] *Ibid* (Judge E).

[95] Antonia Quadara and Cathryn Hunter, *Principles of Trauma-informed approaches to child sexual abuse: A discussion paper* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016).

[96] Judge F in *R v BKH* (SA District Court, 5 August 2019).

[\[97\]](#) *ibid.*

[\[98\]](#) Under South Australian legislation, community safety is the primary purpose and paramount consideration in sentencing. See *Sentencing Act 2017* (SA) s 9.

[\[99\]](#) Dearden (n 9).

[\[100\]](#) *ibid.*, 8.

[\[101\]](#) van der Kolk (n 40).

[\[102\]](#) Tutton (n 9) 163.

[\[103\]](#) A common law power in Australia that originated from Barwick CJ in *Griffiths v R* (1977) 137 CLR 293, 305 (para 35). A Griffith's Remand allows for a sentence to be deferred and ultimately set aside in cases where offenders engage with treatment to address a risk factor such as a mental health or drug abuse issue.

[\[104\]](#) Griffin and Sallen (n 51).

[\[105\]](#) *ibid.*, 1.

[\[106\]](#) *ibid.*, 14 quoting Carly B Dierhising and others, 'Trauma histories among justice-involved youth: findings from the National Child Traumatic Stress Network' (2013) 4(1) *European Journal of Psychotraumatology* 1, 9.

[\[107\]](#) Kubiak, Covington and Hillier (n 23).

[\[108\]](#) Nigel Stobbs (n 10) 33.

[\[109\]](#) Max Henshaw, Lorana Bartels and Anthony Hopkins, 'Set up to fail? Examining Australian parole compliance laws through a therapeutic jurisprudence lens' (2018) 45(1) *University of Western Australia Law Review* 107, 116.