ACHIEVING QUALITY OUTCOMES IN COMMUNITY TITLES DISPUTES: A THERAPEUTIC JURISPRUDENCE APPROACH†

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I INTRODUCTION

Queensland has had over 38 000 community titles schemes[1] established under the *Body Corporate and Community Management Act 1997* (Qld) ('the Act').[2] The Office of the Commissioner for Body Corporate and Community Management ('OCBCCM') is responsible for providing an education, information and dispute resolution service for owners of lots within these community titles schemes.

The vast majority of these community titles schemes provide residential accommodation in the form of apartments, townhouses, duplexes, freestanding houses, or a combination of these structures. The Act does not limit the purpose for which a particular community titles scheme is established and some business parks, shopping complexes, retirement villages, master-planned communities, hotels and mixed use developments are reliant on the community titles scheme structure. The common thread is a subdivision of land into at least two individual lots and a common property area.[3] The owners of individual lots in the scheme will own the common property as tenants in common[4] and will also collectively comprise the members of the body corporate,[5] that is, the legal entity responsible for the scheme.[6]

The benefits of purchasing a lot in a community titles scheme can typically be seen to include the security obtained by freehold ownership, the value for money and

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1 Known in other jurisdictions as strata schemes, condominiums, or commonhold developments.

2 Department of Justice and Attorney-General, Queensland Government, *Body Corporate — A Quick Guide to Community Living in Queensland* (The State of Queensland, 2001).

3 *Body Corporate and Community Management Act 1997* (Qld) s 10(4) ('*BCCM Act*').

4 Ibid s 35(1).

5 Known in other jurisdictions as owners' corporations, condominium corporations, residential associations and home owners associations.

6 *BCCM Act* ss 30–4 provide for the establishment of the body corporate and ss 94–7 provide for the body corporate's general functions and powers.

efficiencies resulting from the development of multiple lots together, the access to shared facilities that could not be built or maintained by individuals and even the opportunity to develop social relationships. Additional responsibilities of owning or occupying a lot in a community titles scheme relate to the need to comply with the community management statement,[7] including the by-laws, and with the various requirements of the Act and applicable regulation module. Naturally there will be conflict between persons associated with community titles schemes, potentially resulting in high monetary and emotional costs for the individuals concerned. The Act establishes dispute resolution processes for resolving most disputes that are internal to a community titles scheme.

This article combines academic and practitioner perspectives to explore the possibility of a therapeutic jurisprudence-influenced strategy aimed at improving the quality of outcomes from the legislated dispute resolution processes under the Act. The notion of a 'quality outcome' is based on the work of renowned dispute resolution practitioner and theoretician Robert Baruch Bush.[8] We use and adapt this classification to fit the legislative framework of the Act's dispute resolution procedures. In doing so we find that the provision of a 'quality' dispute resolution service will require strategies that promote behavioural change rather than just the traditional strategies for improving timeliness, success rates, satisfaction with the conciliation process and for reducing the number of orders overturned on appeal. The article examines the extent to which the multi-disciplinary field of therapeutic jurisprudence can provide valuable guiding principles to help dispute resolution practitioners facilitate the desired behavioural change. A therapeutic jurisprudence approach suggests strategies that could be adopted, at various points of contact between OCBCCM staff and disputants, to increase the chances of achieving the desired behavioural changes, minimise the anti-therapeutic impact of the dispute and contribute to a higher quality resolution of the dispute.

At the outset, we would emphasise two points. Firstly, we take the legislative framework as it is. Rather than suggesting how desired behavioural outcomes can be improved by legislative changes, we focus on actions that can be taken within the existing framework that should increase the likelihood of the desired behavioural changes occurring. Secondly, this article is prospective rather than forensic in nature. It focuses on the identification and facilitation of quality rather than the evaluation and measurement of quality in processes that have already occurred. As other academics have ably explained, evaluation of dispute resolution initiatives for promoting behavioural change is possible, but challenging.[9] However, the focus of our discussion is on how quality can be improved, not how

7 *BCCM Act* s 66 provides for the content of a community management statement and s 59 provides that it is binding upon owners of lots, occupiers of lots and occupiers of the common property.

8 Robert A Baruch Bush, 'Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' (1989) 66 *Denver University Law Review* 335.

9 See Lynne Roberts and David Indermaur, 'Key Challenges in Evaluating Therapeutic Jurisprudence Initiatives' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006). See also Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006); Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy, & Law* 193.

the improvement can be substantiated for the purpose of satisfying the inevitable political exigencies.

The structure of the article is as follows: Part II sets out the nature of community titles and the types of disputes that arise, as well as explaining the role of the Queensland OCBCCM in resolving disputes. Part III examines the notion of quality in dispute resolution systems and describes some quality objectives for systems designed to resolve community titles disputes. Part IV explains how therapeutic jurisprudence contributes theories and principles that can facilitate the behavioural outcomes that form part of the quality objectives. Finally, Part V focuses again on the specific context of body corporate dispute resolution in Queensland. It identifies areas in which there is scope for OCBCCM staff to adopt practices that are more likely to have a 'therapeutic' rather than 'anti-therapeutic' effect on process participants and that are therefore useful in terms of achieving the behavioural outcomes that form part of the quality objectives.

II THE COMMUNITY TITLES CONTEXT

The National Community Titles Institute summarises the social and economic significance of community titles schemes in the following terms:

> Approximately, three and a half million people live or work in more than 250,000 strata and community titles schemes around Australia. And, there are over 2,500 managers in Australia. No one knows the true value of strata and community title property but it exceeds $500 billion and it is estimated that more than $1 billion per year is collected and spent by strata and community title schemes around the country.[10]

Notwithstanding differences in terminology, the concepts underpinning such schemes and the relevant legislation bear strong similarities across most Australian jurisdictions and the main legislative requirements are broadly comparable.[11] Where this article deals with specific case studies or legislative provisions, we are focusing on the Queensland context, as this is the jurisdiction in which our research has been conducted. According to a number of commentators, the Queensland legislation 'is considered by many as a national leader in the establishment of effective yet flexible strata industry regulation.'[12] Regardless of the veracity of this claim, the Queensland context provides an insight into the dynamics of community titles disputes that will be of value to other jurisdictions, despite minor legislative differences.

10 National Community Titles Institute, *How Different Are We? State by State Comparison of Strata & Community Title Management* (National Community Titles Institute, 2008) 7.

11 Ibid.

12 Kimberly Everton-Moore et al, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 13 *Australian Property Law Journal* 1, 3.

A *An Overview of Community Titles Schemes*

As stated above, the common characteristics of all community titles schemes are a subdivision of land into at least two individual lots and a common property area.[13] For example, in a simple apartment building, the common property will typically include the outside walls of the building, the roof, the foundations and the land surrounding the building. Issues pertaining to the management of the scheme can be complex and vary greatly depending on the individual characteristics of the particular scheme. Schemes with residential units mixed with commercial lots are becoming more common, for example by having a residential tower including commercial lots on the ground floor.

The day-to-day operation of the scheme is managed by a committee, typically composed of up to seven volunteers elected by and from the lot owners. A body corporate manager, essentially a professional committee secretary, is also engaged to provide administrative assistance with the paperwork involved in calling meetings, maintaining records, preparing budgets and issuing levy statements. The manager carries out the administrative functions, but must act based on the decisions made by the body corporate. Service contractors can be engaged to carry out maintenance functions and letting agents can also be appointed by the body corporate to let premises on behalf of individual owners, in accordance with terms set out by the body corporate. The caretakers commonly encountered in large holiday buildings, while they might call themselves 'managers', are in legal terms both a service contractor and a letting agent and referred to as a caretaking service contractor.

Decisions of the body corporate are made by a vote at a committee meeting or at a general meeting. The types of decision that can be made at a committee meeting are limited by the legislation to more routine matters. The votes of the owners, in general meetings, are required to elect the committee members and to make decisions about less routine matters.

B *Disputes in Community Titles Schemes*

Disputes and litigation concerning housing combine two high-level stressors in people's lives. Guilding and Bradley observe that '[a]s people invest considerable financial, temporal and psychological resources in their homes, residential satisfaction plays a key part in an individual's overall quality of life.'[14] They have also shown that adaptation to life in a community titles scheme can be stressful.[15] The link between secure housing and mental health is well-acknowledged, as is

13 *BCCM Act* s 10(4).

14 Christopher Guilding and Graham Bradley, *Settling in to Strata Titled Housing: A Study of the Psychosocial Challenges Arising for a Move to Large Scheme Body Corporate Living* (Queensland Development Research Institute, 2008) 8.

15 Ibid 45.

the link between difficulties with housing and poor mental health outcomes.[16] Likewise, litigation is a stressful event that has far-reaching consequences for the wellbeing of participants, and, as Galanter observes, '[f]or plaintiffs and defendants alike, litigation proves a miserable, disruptive, painful experience. Few litigants have a good time or bask in the esteem of their fellows — indeed, they may be stigmatized.'[17] Psychologists have coined phrases such as 'litigation response syndrome' to describe the harmful effects of being involved in litigation[18] and the retelling of a stressful event itself causes stress.[19]

Community titled housing involves adjusting to a particular kind of lifestyle and also to a particularly detailed framework regulating many aspects of life and many different stakeholders in the scheme — in some situations as many as eleven types[20] — each with different and potentially conflicting interests. The different values and interests of different stakeholders can obviously lead to disputes. Confusion as to the requirements of the legislation and the roles of the different stakeholders can also cause disputes. For example, owners may act on a belief that the body corporate manager, acting as a professional committee secretary, has the authority to approve requests to change by-laws or make other changes to the common property. Common causes of conflict also include: when a body corporate wishes to enforce by-laws that have not previously been enforced, when the majority of a body corporate wants to make changes that will affect the quality of life of a minority of members, when repairs need to be made, or when occupiers clash with one another over alleged breaches of by-laws. A study by Guilding and Bradley revealed that those not on the body corporate committee often regarded the motives of those who were quite suspiciously and that committee members felt that non-committee members had unrealistic expectations of what the committee should achieve. Overall, the study found that 'the relationship between a strata title resident and his/her body corporate is pivotal in determining overall levels of residential satisfaction.'[21]

Underpinning most disputes is an essential tension found throughout society but which is particularly pronounced in community titles disputes — the tension between individual autonomy and liberty on the one hand and community rights and the smooth functioning of the group on the other. In few other places in society is this tension more acute — for example, the perception that individuals have a 'right' to have a pet needs to be balanced against the general perceptions of scheme members that pets may impair the enjoyment of other scheme members, harm

16 Gary W Evans, Nancy M Wells and Annie Moch, 'Housing and Mental Health: A Review of the Evidence and a Methodological and Conceptual Critique' (2003) 59 *Journal of Social Issues* 475.

17 Marc Galanter, 'The Day after the Litigation Explosion' (1986) 46 *Maryland Law Review* 3, 9.

18 Paul R Lees-Haley, 'Litigation Response Syndrome' (1988) 6 *American Journal of Forensic Psychology* 3.

19 M Napier, 'The Medical and Legal Trauma of Disasters' (1991) 59(3) *The Medico-Legal Journal* 157, 158; Larry J Cohen and Joyce H Vesper, 'Forensic Stress Disorder' (2001) 25 *Law and Psychology Review* 1, 4–5.

20 Christopher Guilding et al, *Investigation of the Multi-Titled Tourism Accommodation Sector in Australia: Legal Context and Stakeholder Views* (Co-operative Research Centre for Sustainable Tourism, 2006) 18.

21 Guilding and Bradley, above n 14, 42.

scheme property and potentially affect resale values.[22] Individuals in the scheme will have their own points of view, often deeply entrenched, that in a particular case an individual liberty should trump a community interest, or vice versa.

C *Dispute Resolution Procedures under the Body Corporate and Community Management Act 1997 (Qld)*

Queensland, like most other jurisdictions, has enacted legislation containing dispute resolution procedures designed to avoid the need for parties to bring their dispute to a court. Chapter 6 of the Act establishes specialist procedures for the resolution of disputes concerning owners and occupiers in community titles schemes and the way in which the scheme is managed. A typical dispute will only proceed to a binding adjudication if attempts at self-resolution and conciliation have been unsuccessful.

The Commissioner will ensure that all affected persons are invited to make written submissions regarding any application for resolution by the OCBCCM of a dispute. As all owners, and sometimes even all occupiers, may well be affected, there will often be a significant number of written submissions. The applicant then has an opportunity to respond in writing, as do other interested persons.

The role of the adjudicator is to investigate an application so as to determine the appropriateness of making an order. Investigations are normally in the form of written inquiries to relevant parties and may require the provision of an expert report. In some circumstances the adjudicator will hold a teleconference with the main parties or conduct a site visit in the presence of the main parties. Prior to making a determination, the adjudicator will endeavour to provide natural justice by ensuring that at least the main parties to the dispute have been provided with the results of any relevant investigations and been given an opportunity to respond. Finally, the adjudicator will provide written orders and written reasons for decision, which can be enforced via the magistrates' courts.

In Queensland, the OCBCCM estimates that 4685 of the 38 000 schemes in Queensland (around 12 per cent) filed disputes for resolution during the 1997–2009 period. On average, schemes that have filed disputes with the OCBCCM have had 2.2 applications per scheme and around 20 per cent of the OCBCCM's workload comes from approximately 145 heavily disputed schemes. The ten most heavily litigated schemes averaged 30.4 disputes per scheme between 1997 and 2009. While it is likely that a very large number of disputes never reach the OCBCCM, these statistics suggest that once a dispute reaches the OCBCCM, the scheme involved is likely to experience multiple disputes. This, anecdotally, seems to be because the initial dispute can cause the members of the scheme to become factionalised. For the 145 heavily disputed schemes, it seems that a highly conflictual and litigious culture emerges, as a result of which scheme members

22 See, eg, *Pivotal Point Residential* [2008] QBCCMCmr 55 (19 February 2008).

feel a sense of entitlement to have grievances arbitrated by a third party external to the dispute.

In terms of the cause of disputes, 2008–09 statistics from the OCBCCM reveal that the most frequent causes of applications relate to improvements made by owners (138 applications), followed by maintenance issues (122 applications) and by-laws concerning animals (110 applications). Other specific types of dispute that often occur involve by-laws concerning vehicles (40 applications), nuisance, harassment and noise complaints (61 applications) and disputes over financial management (53 applications).

According to its website, one of the three objectives of the OCBCCM is to provide 'a quality dispute resolution service which is timely and responsive.'[23] The next part of this article examines what it means to provide a quality dispute resolution service and then considers how therapeutic jurisprudence can be a useful lens through which choices can be made that can improve the quality of the process and its outcomes.

III DEFINING QUALITY DISPUTE RESOLUTION

Quality is of course a desirable attribute for a dispute resolution system and one to which the OCBCCM specifically aspires. However, the precise identification of the hallmarks of quality is a complex task in any dispute resolution. The following part of this article develops specific indicators of a quality dispute resolution process in the body corporate context, and in so doing, highlights how a therapeutic jurisprudence approach might assist in formulating quality benchmarks, particularly as they relate to perceptions of fairness by stakeholders.

Defining quality in dispute resolution is difficult. This is largely because the dispute resolution process must serve different functions for different stakeholders in many different contexts. Quality is relatively simple to assess in something with a simple function, such as a hammer or perhaps a lawn mowing service. In the dispute resolution context, it becomes difficult for people to clearly agree on when processes and outcomes attain quality as against when they do not. For example, quality is often correlated with the efficient disposition of a certain volume of cases, for a certain monetary value and within a certain period of time. However, it also involves reporting of subjective measures, such as participant perceptions of fairness and the gauging of public trust and confidence in the system.[24]

23 Department of Justice and Attorney-General, Government of Queensland, *The Commissioner's Office* (12 April 2011) Queensland Government <www.justice.qld.gov.au/justice-services/body-corporate-and-community-management/commissioners-office>.

24 See Australian Law Reform Commission, *Judicial and Case Management*, Adversarial Background Paper No 3 (1996).

A *Theoretical Approaches to Quality*

Numerous academics and practitioners have endeavoured to identify attributes relevant to assessing the quality of a dispute resolution service and an appropriate weighing of those attributes. For example, Tyler has explored the concept of quality by assessing the degree to which alternative dispute resolution programs achieve the objectives for which they were designed.[25] In his view, such an assessment involves 'a determination of the level of achievement against which alternative dispute resolution programs should be judged and an identification of the appropriate objectives against which to evaluate them.'[26]

Sourdin and Thorpe have examined participants' perceptions of dispute resolution processes in the area of consumer complaints and make the point that effectiveness in terms of objective measures, such as the number of cases resolved, does not necessarily correlate with the scheme being successful in an overall sense. An effective dispute resolution scheme will also be perceived as fair by those who have participated and will 'need to empower and educate consumers to resolve these disputes independently or to seek appropriate assistance when required.'[27]

Bush deals with the large range of understandings about what constitutes quality in dispute resolution and in doing so identifies two major concepts of quality — 'process-integrity' and 'goal furtherance'. The process-integrity concept of quality refers to the idea that '"quality" means fulfilment in practice of the inherent potential or form of the process in question ...'[28] Bush's second conception of quality, 'goal furtherance', uses the term quality

> to mean that a dispute resolution process, of whatever kind, serves by its operation or outcome to fulfill a private or social goal ... Here, "quality" means simply that the process furthers the achievement of the valued end...[29]

B *Deriving Indicators of Quality in the Community Titles Context*

Bush's approach reminds us that, in a community titles context, the attributes of a quality adjudicatory process will differ from the attributes of a quality conciliation process. For example, conciliation is designed to elicit disputant-led solutions that are consistent with the law, whereas adjudication is designed to give disputants a binding and enforceable decision. Bush's conception of quality as goal furtherance is perhaps even more helpful in deriving quality indicators in the

25 Tom R Tyler, 'The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities' (1988) 66 *Denver University Law Review* 419.

26 Ibid 419.

27 Tania Sourdin and Louise Thorpe, 'Consumer Perceptions of Dispute Resolution Processes' (2008) 15 *Competition and Consumer Law Journal* 337, 337.

28 Bush, above n 8, 338.

29 Ibid.

community titles context. The statutory framework for the OCBCCM's dispute settlement procedures means that the goals of the procedures can be identified by looking at the specific objectives set out in the Act, as well as its general legislative objectives, and by considering the policy context in which these objectives are implemented. Specific requirements of the Act are that conciliations be performed as quickly and with as little formality and technicality as possible, that adjudicator investigations be carried out as quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the application and that adjudicators observe natural justice when investigating an application.[30]

More generally, the Act states in section 2 that its primary objective is to 'provide for flexible and contemporary communally based arrangements for the use of freehold land', having regard to secondary objectives in section 4 that include:

- balancing 'the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes';
- ensuring 'accessibility to information about community titles scheme issues'; and
- providing 'an efficient and effective dispute resolution process'.

Specific objectives also apply to the different processes, as we will discuss further in the next part of this article, but the general objectives described above give rise to a number of clear quality indicators:

- *Procedural fairness:* Underpinning all dispute resolution processes are the statutory and common law imperatives of procedural fairness, including the accordance of natural justice.
- *Timely resolution:* It is clear from these objectives that a quality dispute resolution process must be efficient in terms of promptly offering conciliation and issuing orders.
- *Educative functions:* It also strongly suggests that the process should have an educative function, which assists community members in the self-management of the scheme. If there have been misinterpretations of the law, then this should be corrected in an appropriate way by the OCBCCM. Education can also extend to modelling, and in the process communicating, conflict resolution skills such as active listening and interest-based negotiation skills.
- *Promoting balance:* There are also strong statements in section 4 that a quality dispute resolution process needs to help disputants negotiate a balance between individual liberty and autonomy on the one hand and communal interests on the other. A quality dispute resolution process will help motivate necessary behavioural change in the disputants, to enable the scheme to find the balance between these rights. We explore this concept in further detail in section C below.

30 *BCCM Act* ss 252E, 269.

C *The Nexus between Quality and Therapeutic Jurisprudence*

As discussed above, empowerment of communities to self-manage and self-resolve disputes should be considered an important indicator of quality in a community titles dispute resolution scheme. We have referred also to the frequent need for behavioural change on the part of disputants in value conflicts, to allow them to move from entrenched positions.[31] A community with entrenched conflict and deteriorating personal relationships is less likely to competently take responsibility for self-management or easily self-resolve future conflicts.

The fact that OCBCCM statistics show that a disproportionately large number of dispute resolution applications are made by a small number of schemes, suggest that improvements could be made to current processes. It is also apparent from the statistics that most schemes, once they have made an application for dispute resolution, will need to make at least one further application in future. This high degree of 'recidivism' amongst a small number of high-conflict schemes suggests that greater emphasis could be placed upon facilitating behavioural change amongst disputants as part of the role of the OCBCCM. Assessing and minimising the impact of community titles disputes on the participants and promoting necessary behavioural change — the domain of therapeutic jurisprudence — would, in our opinion, contribute greatly to the overall quality of dispute resolution in the community titles context.

IV PRINCIPLES OF A THERAPEUTIC JURISPRUDENCE APPROACH

Part III identified the desirability of dispute resolution processes and outcomes that result in positive behavioural change. This part of the article proposes the adoption of a therapeutic jurisprudence approach to promote this positive change. Therapeutic jurisprudence is a philosophy of law which, according to its most simple construction, advocates 'law as therapy, as therapy through law.'[32] In reality, of course, the concept is more complex. One of the key founders of therapeutic jurisprudence, David Wexler, describes it as

> a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic

31 We believe it is a fair assumption that, had the parties easily been able to achieve behavioural change on their own, the dispute would not have progressed to the point of an application to the OCBCCM. Given the large number of schemes in Queensland, the statistics in Part II suggest that the vast majority of schemes seem able to resolve many of the disputes that arise from time to time. However, for those schemes that need assistance in dispute resolution, it is possible that utilisation of the OCBCCM dispute resolution process actually reduces the capacity for future self-management by the body corporate.

32 David B Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' in Lynda E Frost and Richard J Bonnie (eds), *The Evolution of Mental Health Law* (American Psychological Association, 2001) 279, 280.

> concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognised and systematically studied.[33]

Therapeutic jurisprudence is not a cohesive theory, nor does it pretend to constitute one. Instead, it is a way of examining the effects of law and its agents (including judges, lawyers and law enforcement officers) on the subjects of the law (citizens engaged with the legal system). As such, therapeutic jurisprudence creates an approach to law, or a lens through which to analyse and view actions within the legal system.

Wexler identifies four major lines of inquiry in the therapeutic jurisprudence movement — firstly the way in which the law itself can cause psychological harm; secondly, the way in which laws can themselves be therapeutic; thirdly, the way in which the legal system can operate therapeutically; and, finally, the way in which legal agents (lawyers and judicial officers) can facilitate therapeutic outcomes.[34] It is the latter which is the focus of this article. A survey of the literature reveals the following as common attributes of conducting law 'in a therapeutic key':

- *Allowing genuine opportunities for litigants to express themselves*: This goes beyond merely the 'right to be heard' that is considered a cornerstone of procedural fairness. It involves more than just allowing a disputant to 'put their case', as it includes explaining the emotional impact of the dispute upon them as an individual. Parties who feel that they have been victimised, particularly, need to be encouraged to engage with the process, as they may feel reluctant to state their views.[35]
- *Identifying 'deeper issues':* These issues may prevent some participants from properly engaging with the process.[36] A therapeutic jurisprudence approach requires awareness of issues such as mental illness or linguistic or cultural barriers and a capacity to refer onwards to appropriate support agencies.
- *Facilitating choice or perceptions of choice:* Allowing an individual to make their own choices has been shown to generally lead to more appropriate decisions, as compared to when options are imposed from outside, and to enhance commitment to those decisions.[37] Studies have shown that the perception of choice is valuable, even when the actual choices are constrained,[38] for example, by a legislative framework.

33 David Wexler, *Welcome* (27 July 2010) International Network on Therapeutic Jurisprudence <http://www.law.arizona.edu/depts/upr-intj/>.

34 David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990) 4–5.

35 Bruce Winick, 'Forward: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime' (2009) 33 *Nova Law Review* 535, 541–2.

36 See, eg, community titles disputes caused by hoarding — M Slatter, 'Treasures, Trash and Tenure: Hoarding and Housing Risk' (2007) 1 *People, Place & Policy Online* 28.

37 Bruce Winick, 'A Therapeutic Jurisprudence Approach to Dealing with Coercion in the Mental Health System' (2008) 15 *Psychiatry, Psychology and Law* 25, 26.

38 Sumner Sydeman et al, 'Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis' (1997) 3(1) *Psychology, Public Policy and Law* 207, 210–11.

- *Encouraging self-identified solutions:* Psychological studies have repeatedly shown that the self-definition of a goal or solution to a problem is a significant factor in determining whether the goal will eventually be reached.[39]
- *Invoking intrinsic rather than extrinsic motivations:* Winick notes that psychologists such as Deci and Kiesler have explored concepts of commitment and motivation and demonstrated how intrinsic motivation enhances confidence and personal commitment.[40]
- *Setting goals and breaking them down into easily-achievable steps*: Where goals can be reduced to manageable steps, the achievement of these smaller steps has been shown to enhance a person's self-perception and further encourage them to achieve the broader goal or goals.[41]
- *Acting in a polite and respectful manner*: This is more likely to result in the law being perceived as legitimate and to encourage the participants to engage with the process, as opposed to shaming or scolding,[42] which may produce responses of humiliation, anger and defiance.

Traditionally, the legal system has preferred 'blind justice' — justice meted out objectively, without fear or favour, regardless of identity, money, power, or weakness. This has resulted in a tendency to ignore the impact of dispute resolution procedures on the emotional life and the psychological wellbeing of the individuals concerned. Therapeutic jurisprudence focuses attention on this previously underappreciated aspect, humanising the law and concerning itself with the human, emotional and psychological side of law and the legal process. The conflict inherent in disputes such as those concerning community titles can increase the therapeutic or anti-therapeutic effect of interactions between the persons involved. Whenever legal agents exercise discretion or interact with the disputing parties, therapeutic jurisprudence is a reminder that it is important to consider the human side of the legal process in addition to considerations such as the correct application of legal principles and the most efficient utilisation of resources.

V APPLYING A THERAPEUTIC JURISPRUDENCE APPROACH IN THE BODY CORPORATE AND COMMUNITY MANAGEMENT ('BCCM') CONTEXT

We have proposed a framework of quality that includes the promotion of behavioural change and seeks to engage disputants in actively managing existing conflict and better managing future conflicts. We have also outlined how

39 Bruce Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1758–9.

40 Ibid 1761.

41 See Michael King, *Solution-Focused Judging Bench Book* (Australian Institute of Judicial Administration, 2009).

42 Lawrence Sherman, 'Reason for Emotion: Reinventing Justice with Theories, Innovations, and Research — The American Society of Criminology 2002 Presidential Address' (2003) 41 *Criminology* 1, 21.

therapeutic jurisprudence offers specific suggestions or approaches, based on research in the behavioural sciences, that can ultimately improve the quality of dispute resolution outcomes in the community titles context. While we recognise that many of the attributes of quality we have suggested are not easily measured, the principles on which therapeutic jurisprudence is based *have* been empirically tested and found effective. These principles will therefore be used as the basis for some suggestions as to ways in which staff can interact with disputants or exercise discretion to promote more effective dispute resolution outcomes. Where appropriate, case studies will highlight the potential for therapeutic or anti-therapeutic outcomes in relation to common situations faced by staff members.

In making these comments, we recognise that no single strategy will be applicable to all individuals. Some principles may be culturally specific, others better suited to different personality types and so on. Care also needs to be taken to ensure that therapeutic jurisprudence is not pursued in a paternalistic way, without having sufficient regard for the autonomy of the individuals involved.[43]

Finally, it is important to be pragmatic and realistic — therapeutic jurisprudence principles need to be applied in an efficient and effective manner in the OCBCCM context, in view of efficiency being a primary stated objective of the legislative regime. This is not to say that efficiency must trump therapeutic concerns, merely that the nature of the process is that a conciliation would ordinarily be expected to be completed within three hours and an adjudication process would ordinarily be expected to be completed primarily 'on the papers'. It would not be surprising if the application of therapeutic jurisprudence principles required some additional time and resources, in the same way that any attempts to improve quality of service require some additional effort. However, there is no reason to suggest that the OCBCCM situation should be fundamentally different from that of a variety of other courts and tribunals that have successfully incorporated therapeutic jurisprudence principles into their operating parameters.[44] Further, the high incidence of schemes returning for multiple applications indicates the potential for significant savings if improved dispute resolution outcomes increase the capability for self-management.

We therefore take the opportunity to provide some brief examples of situations in which training in or awareness of therapeutic jurisprudence principles might increase the likelihood of better dispute resolution outcomes.

A *Opportunities in Conciliation*

Conciliation lacks some of the transformative potential typically attributed to mediation, due primarily to the fact that conciliation operates within a fairly

43 Astrid Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' (2009) 78 *Revista Jurídica Universidad de Puerto Rico* 43, 53–4.

44 See, eg, the extensive work of Michael King on this topic, such as Michael King, 'Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts' (2008) 30 *Australian Bar Review* 201. See also Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2002) 20(2) *Law in Context* 121.

rigid statutory framework. In addition to facilitating communication between the parties, the conciliator is responsible for ensuring that any agreement reached accords with the provisions of the Act.

Conciliation can thus seem to run counter to principles of therapeutic benefit — the parties are often directed quite forcefully by the conciliator towards a decision that accords with the law, undermining the autonomy of the parties and their capacity to adopt their preferred solution. Complete autonomy is particularly problematic in a body corporate context as disputants might be able to quite happily agree on a way to resolve the dispute between themselves, but the proposed resolution may be in some way unworkable as against all scheme members, or inconsistent with the Act.[45] For example, two owners would not be permitted to resolve a dispute about someone parking in the other owner's spot by agreeing that the body corporate adopt a by-law permitting it to issue fines for any future breaches.[46] This lack of autonomy can be frustrating for disputants, particularly if they feel that their attempts at resolution are being stymied.

Despite the constraints of conciliation, the process still offers many of the therapeutic possibilities of mediation. While the literature assumes that parties seek maximum autonomy in the sense of controlling a dispute resolution process, some parties feel intimidated if required to set an agenda and make a decision to resolve the dispute.[47] A conciliator can explain the importance of the parties attempting to find their own solutions and encourage them to set the agenda themselves and work towards an appropriate resolution at their own pace. If the parties then make an informed choice to delegate some of those responsibilities to the conciliator, then this choice is equally an act of self-determination that can enhance a party's wellbeing.[48]

Parties can present with a raft of personal issues and there will often be insufficient time for all of these to be worked through in a conciliation. Time is typically short, particularly as it is frequently necessary for the conciliator to provide (and often repeat) extensive explanations of the regulatory requirements and the need for a conciliated outcome to accord with those requirements. However, conciliators report that private sessions can be used effectively to allow the parties to vent their emotions, without interrupting the flow of the main session. Individual conciliators may also choose to use active listening techniques and reframing to convey a version of the emotional content to the other party, without potentially inflammatory content, or, they can encourage the disputants themselves to reframe. For example, in a private session one disputant admitted — 'I hate the fucking bastard', to which the conciliator responded — 'I would like to let [the other disputant] know how you feel, but there is not much point in me simply relaying your hatred of him.' After some discussion, the disputant indicated that

45 Conciliated agreements are void to the extent of any inconsistency with the Act: *BCCM Act* s 242I(3).

46 The reason why this would not be a permissible outcome at conciliation is that the Act prohibits a scheme imposing fines for a breach of the scheme's by-laws.

47 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8 *Pepperdine Dispute Resolution Law Journal* 243, 260.

48 Ibid.

his real feeling was one of mistrust of the other party and a resolution was reached that involved an exchange of written communication.

Conciliators also have the advantage of specialist knowledge and experience in identifying realistic solutions to common community titles scheme issues. The conciliators can present parties with actual and perceived choices that are consistent with the legislation and the disputants can retain some autonomy by selecting from those limited and appropriate choices for resolution. For example, in disputes concerning floor noise, a conciliator can suggest that the owner choose between allowing access, arranging for an independent acoustic report himself, or bypassing the testing process and installing a suitable floor covering. Other examples relate to conciliators facilitating an appropriate result by bringing legislative provisions and potential solutions to the attention of a disputant and then much later in the conciliation referring back to the legislation, as if the person had always been aware of the requirements and possibly even as though they raised it themselves. In these types of examples, therapeutic jurisprudence principles highlight how important it is that the conciliator avoid imposing paternalistic solutions, instead facilitating an informed choice by the parties in dispute.

In general, the likelihood of the conciliated agreement being complied with will be increased if the parties have set the goals for the resolution of the conflict themselves, have had a genuine opportunity to explain the impact of the dispute upon them and have reached agreement based on informed choices. With the conciliator emphasising their role as mainly a facilitator, disputants who successfully resolve a dispute through conciliation can also acquire or improve their conflict resolution skills and knowledge of the regulatory aspects of their scheme.

B *Opportunities in Adjudication*

The legislation requires that adjudicators take an inquisitorial approach to a dispute and then finalise the dispute by issuing an order that is binding on the body corporate or relevant individuals. The process generally takes place 'on the papers' and there is no right to an oral hearing. This can be anti-therapeutic in that it risks disputants being alienated from the dispute because of the adjudicator's control of the process and the absence of a 'day in court' in which they can physically view their case being decided. However, it also provides significant opportunities for an adjudicator to probe the underlying causes of the conflict and act in a way that provides 'therapeutic' benefits to the disputants in the process.

For example, adjudicators can use investigations to engage disputants by inviting them to explain both their substantive position and the emotional impact of the dispute. Investigation can also assist to properly ventilate the legal case of a self-represented disputant, helping them feel that they have been properly heard. The investigatory role also provides opportunities for adjudicators to guide disputants towards self-resolution, for example by requesting expert reports and then allowing these reports to be considered in a general meeting. There is therefore

significant scope for adjudicators to improve the likelihood of high-quality outcomes if therapeutic jurisprudence principles are considered as part of the investigations and adjudicators refrain from a 'one size fits all' approach.

One recent case before an adjudicator involved a disputed entitlement to an area of common property claimed to be for the exclusive use by one party, with additional allegations of racism and harassment. The adjudicator formed a provisional view that the applicant had been aggressive to the respondent and had potentially made racist remarks. As the property scheme was a duplex, continued personal conflict was likely to result in deadlock on all future issues between the two owners. A resolution of the personal conflict would therefore be essential for the future self-management of the scheme. Accordingly, the adjudicator invited both owners to consider how the conflict may have affected their relationship and sense of wellbeing within the scheme and how each owner thought they might restore an appropriate working relationship. The responses received were insightful. The respondent provided a detailed response describing feelings of helplessness, disappointment and discomfort in her own home, as well as explicating her assumptions regarding the applicant's motivations for his behaviour. In contrast, the applicant's legal representatives provided a response only in relation to the exclusive use issue and stated that the questions the adjudicator had asked regarding the personal conflict were irrelevant to the resolution of the dispute.

As the adjudicator felt that at least one party was genuinely motivated to engage with the other party and resolve the conflict, he convened a teleconference. The teleconference provided a valuable opportunity for the applicant to be directly asked questions in the presence of his legal advisor. Discussions revealed that the applicant had not intended to be racist and the teleconference markedly improved the interpersonal relationship between the two disputants, to the point that future self-management of the scheme appeared feasible. This also appeared to increase the willingness of both parties to comply with orders proposed by the adjudicator in relation to the exclusive use issue.

Another area in which adjudicators can exercise discretion is in writing to the parties to invite their responses to the adjudicator's provisional views before making the formal written determination. This can be important as a means of engaging the parties in the process and avoiding the emotional consequences of parties receiving decisions 'out of the blue' some months after an application is lodged. It also avoids problems associated with parties misunderstanding issues in the absence of formal pleadings and parties expecting a favourable decision as a result of failing to take the opportunity to view the submissions made by other persons and thus being blissfully unaware of any evidence contrary to their position. Adjudicators can also increase the engagement of disputants with the process by being mindful of opportunities to communicate to the parties throughout the time that parties are waiting for their decision, for example by distributing relevant submissions and asking for responses to be provided.

In writing their reasons for a decision, the adjudicator has the opportunity to refer in a respectful way to the parties' allegations and submissions and to avoid

unproductive castigation of the parties. In one decision, a (perhaps justifiably) frustrated adjudicator castigated the applicants in the following terms:

> Certainly, the tone of the application was unnecessarily accusatory and the application contained much irrelevant material, and unsubstantiated allegations. ... [T]he Applicants are warned that if in any future application they resort to innuendo, hysteria and hearsay, and make unsubstantiated claims of collusion, bias, and un-stated breaches of the legislation ... it is highly likely that an application for costs would be considered in the event that their application is similarly dismissed.[49]

While the comment could well be designed to deter future unmeritorious applications, it is worth considering whether such castigatory language might instead provoke defiance from the 'scolded' party. Such an emotional response is hardly likely to reduce the level of conflict within the scheme, even if it results in the particular individuals refraining from again availing themselves of OCBCCM services.

Written reasons are an opportunity for the adjudicator to explain to the 'losing' party the reasons for the decision, and, if properly framed, can provide an opportunity for education and potential prevention of future disputes. A scheme's self-management capacity will be enhanced by a clearly written decision that identifies the rules of law, makes it clear how the community members are to comply with the order and sets clear precedents applicable to the community. Written communication can also be used to entrench disputants' commitment to promises made verbally in a teleconference and can reinforce the steps needed to reach goals set by the disputants. Finally, a written decision can also reframe the submissions of the parties, removing the inflammatory tone and content that is typically found in disputants' submissions. By including these reframed submissions in the reasons for decision, it is possible to improve the likelihood of members of the scheme understanding any fundamental value conflicts that are leading to disputes within the scheme. The principles of therapeutic jurisprudence indicate that this understanding of value conflicts is likely to lead to personal growth which results in the increased capabilities of the relevant individuals to resolve future conflicts.

C *Opportunities in Case Management*

The role of a case manager is to check that the application complies with the legislation, to determine whether self-resolution has been attempted to the extent required by the legislation and to make administrative arrangements for meetings and phone conferences.

Case managers face a number of challenges in assisting unrepresented parties to comply with legislative requirements and exercise discretion at a number of decision-making points in the dispute resolution process. The manner in which

49 *Runaway Royale* [2010] QBCCMCmr 149 (31 March 2010).

case managers discuss issues with parties to the dispute will also have a significant impact on whether disputants perceive the procedural aspects of the process to be positive or negative. Case managers also have the opportunity, as the first point of contact in a dispute, to assess the need for therapeutically oriented interventions. For example, where a scheme has a history of prior disputes, is deadlocked (particularly if it is a duplex with only two owners and both are at loggerheads) or if issues such as harassment, violence or intimidation are present.

Case managers can take care to frame requests for amendment of applications as an opportunity for applicants to remedy any deficiencies in the application, rather than as a requirement for the application to proceed further. In some cases it may be preferable that an application with poorly phrased grounds proceeds to investigation by an adjudicator, rather than forcing an applicant to make amendments. In other cases, it may be appropriate for a case manager to agree to hold the application in abeyance for some time while the applicant collects further information or attempts self-resolution.

Case managers often bear the brunt of challenging client behaviours. Where 'challenging' behaviour is actually the result of an impairment or illness, case managers could be provided with information that would allow them to offer the person the choice of seeking assistance from an external support agency. This assistance could be in relation to help with the dispute resolution process itself or with the actual issues that are the subject of the application. Alternatively, if an application is being brought against a person who suffers from an impairment or illness, then case managers constitute the 'front line' at which the applicant could be asked to consider whether the dispute resolution process provides the best opportunity for a resolution of the underlying issues, or whether another agency or strategy may be more effective.

VI CONCLUSION

Community titles schemes are an increasingly popular form of housing in Queensland and throughout Australia in general. The unique structures and obligations of community titles schemes and the varied interests of the numerous stakeholders will naturally produce conflict. The resolution of community titles disputes usually requires more than the resolution of the legal issues at hand — conflicts tend to be entrenched, as illustrated by the statistics of 'repeat players' within the OCBCCM's dispute resolution scheme.

The characteristics of and quality imperatives for community titles disputes very much suggest that applying a therapeutic jurisprudence lens to the OCBCCM dispute resolution process will result in higher quality outcomes that leave the individuals within schemes better able to deal with the internal conflicts that inevitably arise.

While the current scheme is generally well regarded by stakeholders, there is always potential for improvement. What this article suggests, in effect, is that

there is great scope for those who attempt to resolve such disputes to view the existing processes with the benefit of 'therapeutic jurisprudence spectacles', while still working within a detailed legislative regime.