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The Establishment of a Drug Court Pilot in Tasmania

Research Paper No. 2

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Contents

Director's Foreword

This paper on drug courts is the Tasmania Law Reform Institute's second research paper. As part of the response to drug-related crime, drug courts have now been established in all states of Australia, except Tasmania. The drug court project was undertaken to assess whether a drug court pilot was appropriate in this State. As originally conceived, it was envisaged that the project outcomes would include an issues paper followed by consultation with stakeholders and the public, and then a final report. In August 2005, an application was made for funding from the Law Foundation of Tasmania to help support the project. This was successful and Victor Stojcevski was employed by the Institute to work on the project. The sub-committee formed to assist with the project held meetings in March, May and June 2006. After the project had begun, it became apparent that the State government had renewed its interest in the possibility of some kind of drug court pilot or court mandated drug treatment program because federal government funding for such an initiative was forthcoming. Because it appeared that there was no room for changing the model which the federal government had agreed to fund, it was decided that Victor's work should be published as a stand-alone research paper. Research papers provide background information relevant to particular or emerging areas of law reform, but are not intended to reflect the Institute's views and do not contain policy recommendations. A two-year trial of the Tasmanian court mandated drug diversion program was announced by the Attorney-General in September 2006.

This paper brings together statistical and other material about drug use, the rationales behind and the characteristics of drug courts in other jurisdictions and information about the level and type of drug services available in Tasmania. I believe that this research paper will inform the implementation of the State government's court mandated drug diversion program and provide background and context to an understanding of the appropriate response to drug-related crime in Tasmania in the short and longer term. The paper contains much valuable information. The first part provides a synthesis of the available data on illicit drug use in Tasmania and the links between drug use and crime. For those readers who wish to understand what a drug court is, part 3 and part 3.4, in particular, should be referred to. For those unclear about where a drug court fits in a drug-related crime strategy, part 4.2 clarifies the difference between drug courts and court mandated drug diversion schemes. In the context of the State government's proposed project, understanding this difference is vital. Part 5 provides an overview of the drug treatment facilities that are currently available in Tasmania and suggests what treatment facilities would be needed to support a drug court. There is much else that is valuable in this paper, including an overview of drug policy in part 2 and data on magistrates' use of drug assessment and treatment conditions in probation orders in part 4.3. The paper concludes with a persuasive argument for a comprehensive drug-related crime strategy which embraces a drug court as well as diversion strategies for less serious offenders. In other words, it suggests that the government may need to go further than a court mandated drug diversion project. The Institute would like to thank Victor Stojcevski for his work on this paper on behalf of the Institute. Because this is a research paper and not a final report, any recommendations remain those of the author rather than the Institute.

Professor Kate Warner
Director
Tasmania Law Reform Institute

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

To find out more about the Institute or obtain further copies of this research paper please visit our website: www.law.utas.edu.au/reform

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I would also like to acknowledge and thank the drug court sub-committee for their efforts in overseeing the project and providing advice and feedback on the paper. My thanks go out to Mr Jack Johnston (Deputy Commissioner of Police), Deputy Chief Magistrate Michael Hill, Professor Rob White (School of Sociology, University of Tasmania), Associate Professor Roberta Julian (Tasmanian Institute of Law Enforcement Studies, University of Tasmania), Craig Mackie (who initially proposed this project to the Institute), Dr Vanessa Goodwin, and Dr John Crawshaw (Director, Statewide Specialist Services, DHHS).

During the course of the project I gained valuable assistance from Raimondo Bruno (School of Psychology, University of Tasmania), Emma McCoy and Sylvia Engels (Alcohol and Drug Service) and David Clements (Alcohol, Tobacco and other Drugs Council of Tasmania Inc). Victorian drug court magistrate Margaret Harding also provided me with valuable insights into the operation of drug courts. I also wish to recognise the assistance of Jonathon Rees (Department of Justice), Colin Baldwin (Department of Justice), Jason Payne (Australian Institute of Criminology) and Stephen Biggs (Tasmania Police) for providing me with data and information that was not publicly available at the time of writing.

I wish to thank Philippa Dixon and Bruce Newey for their assistance in the preparation of this paper and Dr Lisa Fletcher for suggesting the term 'peri-legal'. Professor Kate Warner provided invaluable support, advice and assistance throughout the course of the project.

Lastly, the views and opinions expressed in this research paper belong wholly to me. Any faults, errors or inaccuracies presented in the paper, therefore, also belong to me.

Abbreviations

ADS	Alcohol and Drug Service
AIC	Australian Institute of Criminology
ANCD	Australian National Council on Drugs
AOD	Alcohol and other drug
AODTS	Alcohol and other drug treatment services
COAG	Council of Australian Governments
CREDIT	Court Referral and Evaluation into Treatment
DHHS	Department of Health and Human Services
DTO	Drug treatment order
DUCO	Drug Use Careers of Offenders
DUMA	Drug Use Monitoring in Australia
ERD	Ecstasy and related drug(s)
GHB	Gamma-hydroxy-butyrate
IAWGD	Inter Agency Working Group on Drugs
IDRO	Intensive drug rehabilitation order
IDDI	Illicit Drug Diversion Initiative
IDRS	Illicit Drug Reporting System
IDU	Injecting drug user(s)
IGCD	Inter-Governmental Committee on Drugs
KE	Key expert(s)
MCDS	Ministerial Council on Drug Strategy
MERIT	Magistrates Early Referral into Treatment
NDARC	National Drug and Alcohol Research Centre
NDS	National Drug Strategy
NIDS	National Illicit Drug Strategy
NGO	Non-government organisation
NMDS	National Minimum Data Set
PDI	Party Drugs Initiative
REU	Regular ecstasy sser(s)
TDS	Tasmanian Drug Strategy
UNODC	United Nations Office on Drugs and Crime

Part 1

Introduction

1.1 Aims of the Project

1.1.1 This project aims to:

1. Assess the need for a drug court pilot in Tasmania based on the statistical evidence about illicit drug use and the extent of drug-related crime;
2. Examine and review the current criminal justice responses available in Tasmania for dealing with offenders with drug problems, including the support services currently in place for dealing with such offenders;
3. Survey the various drug court models that have been established in other Australian jurisdictions;
4. Analyse the outcomes of these drug court initiatives;
5. Examine the capacity of current treatment and support services in Tasmania to integrate and collaborate with a drug court pilot; and
6. Assess the benefits and appropriateness of a drug court for Tasmania.

1.1.2 The Tasmanian government currently employs a Police Diversion Program to divert small-scale illicit drug users (e.g. minor cannabis offenders) away from the criminal justice system and has recently announced a court mandated diversion program for drug offenders to be launched next year.[1] These diversion programs are, however, fundamentally different to the established drug court models that operate in other Australian jurisdictions. The concept of diversion, which encompasses both police (or point-of-detection) programs and court (mandated) referral-into-treatment programs (such as CREDIT in Victoria), is based on a principle of 'diverting drug dependent offenders away from any contact, or deeper contact, with the criminal justice system.'[2] Proponents of drug diversion argue that it is far better to deal with certain classes of offenders in a therapeutic rather than punitive way. Consequently, under such programs illicit drug users are diverted directly into courses of treatment or education.

1.1.3 The relationship between diversion programs and drug courts is confusing and problematic.[3] While drug courts may be considered to be diversionary in the sense that they aim to divert offenders from a prison sentence and drug use, they are quite distinct from other diversionary approaches, like court

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1 Steven Kons, MHA, Attorney-General, "Court mandated drug diversion program" (Media Release, 28 September 2006).

2 David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15 *Current Issues in Criminal Justice* 136, 138.

3 Arie Freiberg, 'Problem-oriented Courts: An update' (2005) 14 *Journal of Judicial Administration* 196, 198-9.

referral-into-treatment programs or the 'court mandated' program that has been announced for Tasmania. This latter sort of 'court-related' diversion program usually involves a referral away from the court to other agencies without direct court supervision in the interim, while for drug courts the court and its supervision and control of treatment are central. In other words, the role of the court is fundamental: drug offenders are not diverted away from the court but into a court that employs a unique philosophy.

1.1.4 The differences between pre-adjudicative diversion programs (such as police and 'court-related' diversion programs) and drug courts will become increasingly apparent during the course of this paper. At this stage, however, it is sufficient to say that drug courts represent a dramatic shift in the way some jurisdictions respond to the criminal behaviour of drug-addicted defendants. The drug court models seen in Australia and overseas offer a new alternative to the unproductive and costly cycle of addiction, crime and incarceration that has come to characterise much of the contemporary criminal justice system.

1.1.5 As the nature and extent of drug-related crime in Tasmania is rather uncertain, the project will also study the available data sources in order to map, as far as possible, the size and shape of drug-related crime. Significantly, the project aims to gather and consolidate coherently the information about illicit drug treatment infrastructure of Tasmania and concludes with my views as to the appropriateness of a drug court pilot in this State.

1.2 The Size and Shape of Illicit Drug Use in Tasmania

1.2.1 The nature of drug use and drug-related crime in Tasmania is rather different to that of other Australian jurisdictions. As the statistical nature of the evidence related to illicit drug use and drug-related crime is of a different order we will look at each data set separately.

Illicit Drug Use in Tasmania

1.2.2 Mapping the size of the drug 'problem' in Tasmania is controversial. The conventional view is that Tasmania is too small to have a serious illicit drug problem and its geography separates it from the dangerous heroin and cocaine markets on the mainland. While drug use in Tasmania is different from that in other Australian jurisdictions, significant data collections indicate that, despite its size and uniqueness, Tasmania suffers from widespread licit and illicit drug usage, and that drug use is linked to crime.

The National Drug Strategy Household Survey

1.2.3 The National Drug Strategy Household Survey conducted by the Australian Institute of Health and Welfare provides a general picture of the extent of drug use in Tasmania in epidemiological terms. The State and Territory supplement report presents summary statistics on patterns of drug use in each jurisdiction.[4] The results of the 2004 survey are the eighth of a series that commenced in 1985. The survey involved almost 29,000 Australians aged 14 years and over and provides profiles of tobacco, alcohol and illicit drug use (including non-medical use of pharmaceuticals) and policy support in each of the States and Territories. Some of the key findings specific to Tasmania for the year 2004 include:

[4] Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: State and Territory supplement* (2005).

- 15.4 % of the Tasmanian population recorded recent[5] illicit drug use, higher than the proportions in both New South Wales and Victoria;
- more than 1 person in 100 used the following illicit drugs recently: marijuana/cannabis (approx. 11), pain-killers/analgesics used for non-medical purposes (approx. 4), methamphetamine (approx. 2), and ecstasy (approx. 2);
- Tasmania recorded the second-highest proportion of persons within the States and Territories recently using pain-killers/analgesics for non-medical purposes (3.9%);
- 40.1% of the total Tasmanian population are found to be at risk or high-risk of alcohol-related harm in the short-term, which is the second-highest of all States and Territories and 4.7% above the national average; and
- 48.6% of the Tasmanian male population are found to be at risk or high-risk of alcohol-related harm in the short-term, which is the second highest of all States and Territories and 8.3% above the national average.[6]

1.2.4 Two reliable conclusions can reasonably be drawn from the National Drug Strategy Household Survey:

1. comparatively speaking, the recent use of illicit drugs in Tasmania is not insubstantial and there is an illicit drug using culture of consequence in the State, particularly in relation to cannabis, methamphetamines and ecstasy; and
2. harmful alcohol consumption is a major issue for Tasmania, particularly for the male population.

1.2.5 While this data is currently the best available, and indeed the only data that measures prevalence of illegal drug use across the general community, there are some limitations to this study. One of the limitations is that it uses a relatively small Tasmanian sample. Only 1,208 people from Tasmania are sampled for it, consequently, in terms of illicit drug use, it means that we are estimating population usage levels from around 150 people recorded as using any illicit drug in the past 12 months, and just a handful of people using drugs 'harder' than cannabis. Further, the methodology of the study (drop and collect, telephone) is also biased against people with chaotic or drug-dependent lifestyles, causing under-reporting of illicit drug use. Finally, given the very nature of illegality, the extent of usage of illegal drugs is difficult to measure because people who use illegal drugs, especially hard or injectable drugs, are often not readily identifiable or are often unable or unwilling to participate in surveys. It is likely, therefore, that the figures presented in the study underestimate the extent of drug use.[7]

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[5] Used in the past 12 months.

[6] It is also worth noting that Tasmania records comparatively liberal attitudes in terms of policy support for reform of illicit drug measures:
- It recorded the second-highest proportion of persons within the States and Territories supporting a change of legislation permitting the use of marijuana for medical purposes (70.6%) and a clinical trial for people to use marijuana to treat medical conditions (77.9%) and
- It recorded the second-highest proportion of persons within the States and Territories supporting needle and syringe programs (58.2%) and regulated injecting rooms (44%), but comparatively low policy support for a trial of prescribed heroin (24.6%) and rapid detoxification therapy (69.1%).

[7] My thanks to Raimondo Bruno for his advice on this matter.

The Illicit Drug Reporting System and the Party Drugs Initiative

1.2.6 The findings of the national survey are complemented by the Tasmanian findings from the Illicit Drug Reporting System (IDRS) and the Party Drugs Initiative (PDI). These studies also provide a very useful, albeit partial, index of local illicit substance use. The IDRS is Australia's national illicit drug monitoring system and is conducted each year in every State and Territory by participating research institutions throughout the country. The National Drug and Alcohol Research Centre (NDARC) coordinates the reporting system.[8] The PDI is also a national study coordinated by NDARC to monitor ecstasy and related drugs (ERD) markets in Australia. It is a companion project to the IDRS that looks specifically at ERD, which are defined as a range of drugs including ecstasy, methamphetamine, cocaine, GHB and ketamine.[9]

1.2.7 It is important to point out that both these studies acknowledge that they give a somewhat biased picture of local substance use as they adopt a methodology that relies on interviewing regular and frequent injecting drug users (IDU). As the populations used in these studies are quite limited and as the studies are designed primarily to act as an early warning indicator of the availability and use of illicit drugs, the implications to be drawn from the data require careful consideration. Furthermore, the Tasmanian study is essentially a Hobart analysis as the IDU participants are drawn from the south of the State. There has been little specific research examining patterns of drug use within Launceston and the Northwest coast.[10]

1.2.8 *Tasmanian Drug Trends 2005,*[11] like previous findings from the IDRS, relies heavily on a survey of 100 people that regularly inject illicit drugs and a survey of 33 professionals or 'key experts' (KE) working with substance-using populations. The interview data is complemented and validated by a range of drug use indicator data drawn from both health and law enforcement sectors. The injecting habits of the Hobart IDU sample are summarised in the following way:

> The majority of participants (62%) were injecting a few times per week, but not every day, with 30% injecting at least once per day. In a slight change from previous Tasmanian IDU samples, where opiates were the predominant drug of choice (70% in 2004), just over half (54%) of the current cohort reported an opiate as their drug of choice. Similarly, while in previous years, opioids were predominantly reported as the drug most commonly injected by IDU participants (69% in 2004), in the current cohort there was a relatively equal proportion nominating opioids (51%) and methamphetamine (47%) as the drug most commonly injected in the month prior to interview.[12]

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8 The Australian Government Department of Health and Ageing and the National Drug Law Enforcement Research Fund finances the Illicit Drug Reporting System (IDRS). The IDRS monitors the price, purity, availability and patterns of use of the main illicit drugs, as well as acting as an early warning system for emerging trends in illicit drug markets.

9 The Australian Government Department of Health and Ageing funds the PDI.

10 In 2003, the School of Pharmacy at the University of Tasmania compiled a report on illicit drug use in Tasmania, specifically relating to injecting drug use: *Injecting Drug Use in Tasmania*. This report was jointly funded through Alcohol and Drug Service and Public Health, both units within the State Department of Health and Human Services. The report was compiled from three key sources of information: the Hobart-based Illicit Drug Reporting System (IDRS: Bruno & McLean, 2004); the National Drug Strategy Household Survey (Australian Institute of Health and Welfare, 2002); and data from clients of non-pharmacy Needle Availability Program outlets. Additionally, the document included the first report of information from an extension of the IDRS methodology into the North and Northwest of the state. The report, therefore, represents the first study of injecting drug use among individuals in Launceston and Devonport. The report is yet to have been released publicly.

11 Raimondo Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS) (NDARC Technical Report No. 245)* (2006). See also Raimondo Bruno, *Tasmanian Drug Trends 2004: Findings from the Illicit Drug Reporting System (IDRS) (NDARC Technical Report No. 215)* (2005).

12 Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)* above n 11, x.

1.2.9 It is worth noting that the rate of IDU injecting 'a few times per week, but not every day,' increased nearly 10% over the period 2004 to 2005 (from 53% to 62% of the current sample).

1.2.10 *Tasmanian Drug Trends 2005* delivers the following findings on the use of illicit drugs.

- Cannabis remains the most widely used illicit drug in Tasmania:[13] it continues to be used almost ubiquitously by the IDU sample, 'with 87% using the drug in the preceding six months, and the majority of these individuals using the drug daily.'[14]
- Tasmania is experiencing increased availability of methamphetamine in the State and increased prevalence of use of the drug in all three presentations: powder, 'base'/'paste' and crystal meth. As the report notes, 'there have been indications of increasing use of methamphetamine both amongst recent IDRS cohorts and amongst clients of the State's Needle Availability Program, with Tasmania Police also reporting an increase in identification of local clandestine methamphetamine laboratories (although remaining small in number), and an increase in the number of arrests and weight of seizures relating to methamphetamine in 2004/05 compared to 2003/04.'[15] Aside from being more prevalent and readily available, methamphetamines are also changing the local drug culture: the drug is increasingly being used amongst different demographic groups not normally associated with methamphetamine usage. Teenagers, young females and previous predominant consumers of opioids are turning more and more to methamphetamines. Against such a background, the report notes 'concern about the limited range of treatment options available'[16] for methamphetamine users within the State.
- Despite its preference as a drug of choice, the traditional low availability and prevalence of use of heroin in Tasmania has continued in 2005.
- The availability and use of cocaine continues to be very low, at least within the Hobart IDU population.
- The widespread injection of benzodiazepines is a stable feature of Tasmania's illicit drug market with use amongst local IDU consumers at a level relatively high in comparison to other Australian jurisdictions and continuing to increase. Local demand for benzodiazepines also appears to be increasing. Serious psychological and physical harms, including overdose, are associated with benzodiazepine injection, particularly when benzodiazepines are simultaneously combined with other opioids.[17]
- The illicit use of diverted methadone appears to be decreasing. Illicit methadone has become more difficult to access over the last three years.[18] Rather than the market being characterised chiefly by doctor shopping from consumers, it is reported that the market functions on the basis of standing arrangements between persons on methadone maintenance programs and their friends or other persons. In such arrangements, methadone is diverted as a result of threatening or aggressive behaviour from others.

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13 See Australian Institute of Health and Welfare, above n 4, 7.
14 Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, xii.
15 Ibid.
16 Ibid.
17 Ibid xiv-xv.
18 Ibid xiii.

- The frequency of use of morphine amongst the Hobart IDU cohort has been steadily declining over time as consumers continue to demonstrate an emerging preference for methamphetamine and other types of pharmaceutical opiates, rather than morphine.[19]

1.2.11 The most recent instalment of the IDRS confirms that cannabis remains the most dominant illicit drug used in Tasmania and that methamphetamine has a strong profile in the State's illicit drug culture. The IDRS reports that the past four years have provided strong evidence that use and availability of methamphetamine is substantially increasing. Continuing a trend noted since 2001, increasing numbers of IDU are shifting from being predominant users of opioids to being predominant users of methamphetamine.

1.2.12 These results are further borne out by *Tasmanian Trends in Ecstasy and Related Drug Markets 2005*.[20] This report outlines the findings from the third year of the PDI study in Tasmania.[21] The demographic characteristics of regular ecstasy users (REU) differ from that of IDU that are represented in the IDRS. The one hundred REU who were interviewed for the 2005 study were generally well educated and either employed on a full-time or part-time/casual basis or were currently engaged in full-time study. Generally most were not in drug treatment or in legal trouble. The authors of the report found that:

> While the participants were selected on the basis of ecstasy use, and over half nominated ecstasy as their drug of choice, polydrug use was the norm among the REU interviewed … Recent use of alcohol, cannabis, tobacco, and methamphetamine powder was common, and one-fifth had recently used methamphetamine base, benzodiazepines, and cocaine.[22]

1.2.13 The report determines that the indications of an expanding ecstasy market in 2004 had appeared to tighten in 2005. That is, between 2004 and 2005 there was a slight increase in price and a decrease in purity and availability of ecstasy.[23] Nevertheless, ecstasy was still considered 'easy' or 'very easy' to obtain. Ecstasy is typically used at music-related venues including dance parties, nightclubs and live music events, but it is also increasingly being used at a range of other locations including private parties and private residences. The report finds that the use of ecstasy 'has become more "mainstream" or "socially acceptable", with a broadening demographic of people consuming the drug locally, including younger and older people.'[24] The 2005 report also observes that a key feature of previous studies continues to be reinforced: the proportion of the REU sample reporting coincident ecstasy and binge alcohol use continues to be high (78%) and increasing.

1.2.14 Notably, use of methamphetamine was common among the group of REU sampled in 2005. The report found that '(a) large majority of REUs had ever used some form of methamphetamine and three quarters had used some form of methamphetamine in the preceding six months.' REUs reported that methamphetamine powder was 'easy' or 'very easy' to obtain (confirming the findings from the IDRS), but unlike the IDU sample, reported that methamphetamine base and crystal methamphetamine were more difficult to obtain.[25]

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19 Ibid.

20 Alison Matthews and Raimondo Bruno, *Tasmanian Trends in Ecstasy and Related Drug Markets 2005: Findings from the Party Drug Initiative (NDARC Technical Report No. 251)* (2006).

21 See also Alison Matthews and Raimondo Bruno, *Tasmanian Trends in Ecstasy and Related Drug Markets 2004: Findings from the Party Drug Initiative (NDARC Technical Report No. 225)* (2005) and Raimondo Bruno and Stuart McLean, *Tasmanian Party Drugs Trends 2003: Findings from the Party Drug Initiative (NDARC Technical Report No.186)* (2004).

22 Alison Matthews and Raimondo Bruno, above n 20, ix.

23 Ibid x.

24 Ibid.

25 Ibid xi-xii.

1.2.15 The results from the IDRS and PDI in 2005 confirm that the Tasmanian illicit drug use culture is substantially different from that of other jurisdictions. That has historically been the case. One of the major differences relates to higher patterns of illicit use of pharmaceutical products in Tasmania rather than substances such as heroin or cocaine, due principally to the low local availability of these drugs. There are also specific harms and dangers related to the injection of pharmaceuticals that are less common in other jurisdictions. Also, while methamphetamine use in Tasmania is comparatively smaller than in other jurisdictions, the trends in these studies indicate that the local methamphetamine market and local patterns of methamphetamine use are expanding. Accordingly, publicly funded harm minimisation, drug education or drug diversion programs need to be tailored to the particular needs and types of substances used or emerging within the State.

Specific Harms Associated with Illicit Drug Use

1.2.16 There are a range of harms associated with the level of drug use reported in Tasmania, including harms resulting from injection-related problems and the sharing of injection equipment. For the purpose of this paper, however, I will focus on fatal and non-fatal overdoses and mental health comorbidity as reported by the IDRS.

Non-Fatal and Fatal Overdoses

1.2.17 According to *Tasmanian Drug Trends 2005*, overdose rates in recent years amongst the Tasmanian drug users interviewed in the IDRS are comparable to those reported in other jurisdictions.[26]

1.2.18 In 2004, there was a comparable rate of recent experience of non-fatal opioid overdose in the local sample in comparison with the national IDRS IDU cohort, despite the predominant local use of pharmaceutical opioids where the dosage is known (which may protect against accidental administration of too large a dose). However, 'the proportion of the local sample reporting having ever overdosed (33% in 2005; 46% in 2004) and the proportion that reported experiencing an overdose in the preceding year (6% in 2005; 11% in 2004) have both declined in comparison to the 2004 study, and returned to levels similar to those reported in the 2002 and 2003 sample.'[27]

1.2.19 Against a general national trend towards an increasing population rate of opioid-related fatalities, the number of opioid overdose deaths in Tasmania among those aged 15-44 years noted by the State Coroner's Office has remained quite small over the past fifteen years and appeared to decline in 2003. In 2003, four deaths from an opioid overdose occurred in Tasmania. While this figure is quite small (rendering trend analysis quite difficult) and less than half that seen in the previous year, in trend terms, when the rate of deaths per million population are considered, it becomes clear that there has been an increase in rates of fatal opioid overdoses over time in Tasmania, from less than 10 deaths per million population prior to 1990 to over 30 deaths per million population in recent years (1998, 2000-2002).[28]

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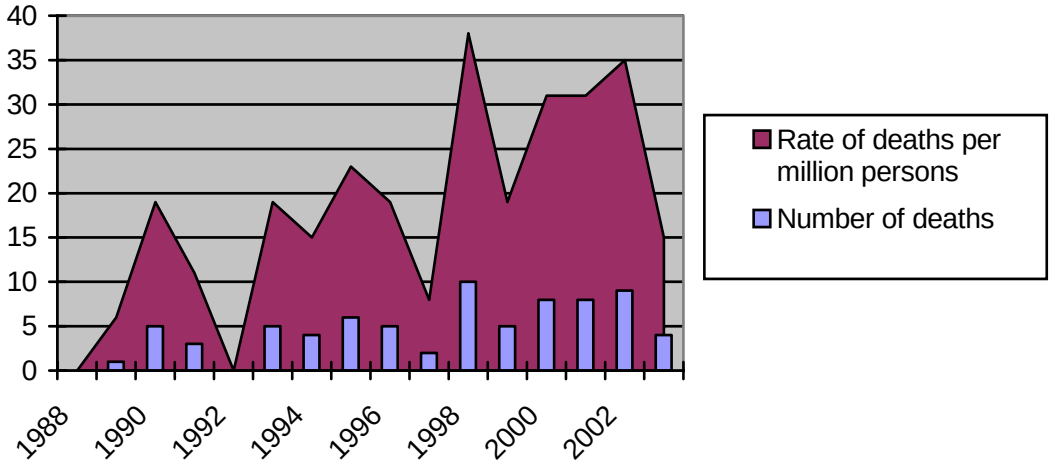
[26] Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, 148.
[27] Ibid 149.
[28] Ibid 150.

Figure 1: Number of opioid overdose deaths among those aged 15-44 years, 1988-2003



Source: Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, 151.

1.2.20 Bruno states that despite the decline in fatal opioid overdoses in 2003 'it is not possible to determine whether this represents an early trend towards a reduced rate of overdose or an unusual year against the general trend towards an increasing population rate of such overdoses (such as was the case in 1997 and 1999).'[29]

Illicit Drug Use and Mental Health Comorbidity

1.2.21 The IDRS reports that a high proportion of IDU reported recently presenting (that is, in the six months prior to interview) to services for mental health concerns. This finding adds to the substantial body of evidence identifying increased rates of mental health concerns among those who use illicit drugs.

1.2.22 In 2005, more than two-fifths (43%) of the Tasmanian IDU sample reported recently attending a health professional for mental health concerns, up from 28% in 2003. The individuals mostly presented to a general practitioner for assistance (36%) rather than a dedicated mental health professional (21%). Despite the likelihood that self-reported rates of experience of mental health issues under represent the true extent of these issues, this rate of presentations is substantially greater than that seen in the general population. Among the IDU, 76% of those who had sought treatment (n=33) sought it for depression and 63% of those who had sought treatment sought it for anxiety/panic (n=33). These have remained the predominant issues in each of the IDRS cohorts, just as they are in the general population.

1.2.23 While there was a slight decline in the proportion of the IDU cohort reporting experiencing depression from 2004 to 2005 (98%, n=43 in 2004; 76%, n=33 in 2005), consistent with an increasing use of methamphetamine over time, the proportions self-reporting experiencing anxiety or anxiety-related issues has increased (with 16%, n=4 of those seeking mental health treatment in 2002 reporting problems with anxiety, and 12%, n=3 panic; rising to 63%, n=27 reporting anxiety and 14%, n=6 panic in 2005).[30]

[29] Ibid.
[30] Ibid 159-60.

1.2.24 The relationship between mental health and drug use is clearly an area of concern for health authorities. Simultaneous drug treatment and mental health treatment may need to become a more prominent feature of the health and justice system's response to illicit drug use.

1.2.25 The relationship between certain types of illicit drugs and verbal (threatening, shouting, abuse) and physical (shoving, hitting, fighting) aggression as shown in the IDRS also causes concern, especially given the increasing prevalence of methamphetamine. In the 2005 IDRS study, two-fifths (39%) of the IDU cohort reported that they had become verbally aggressive while under the influence of drugs and one-third (31%) reported becoming verbally aggressive during withdrawal from drugs in the preceding six months. In keeping with the higher levels of methamphetamine use amongst the 2005 cohort, verbal aggression was most commonly associated with methamphetamine (n=19, 49% of those reporting verbal aggression under the influence and n=21, 68% reporting verbal aggression during withdrawal).

1.2.26 Smaller proportions of the sample reported that they had become *physically* aggressive under the influence (18%) or during withdrawal (15%) in the preceding six months. Again, the physical aggression was most often associated with methamphetamine use (n=9, 50% becoming aggressive under the influence and n=11, 73% reporting physical aggression during withdrawal from methamphetamine use). Alcohol and benzodiazepines were other drugs strongly reported to be associated with verbal and physical aggression.[31]

1.3 The Drugs/Crime Nexus

1.3.1 The connection between drug use and crime, and particularly whether and to what extent criminal behaviour can be attributed to the use of drugs, is fundamental to the issue of how crime prevention strategies, such as drug courts and drug diversion programs, target and manage drug users who come into contact with the criminal justice system. Illegal drug use is commonly regarded as a significant factor in offending behaviour, but the complexities of the nexus and the interrelationship between drugs and crime is quite multifaceted. Makkai and Payne summarise the contemporary research and debate:

> Australian and international criminological research on the links between drugs and crime have both consistently reported three empirical findings:
>
> - most offenders (who come to the attention of the criminal justice system) have used illegal drugs;
> - minor offending precedes drug use; and
> - offenders who are drug users are more likely to report higher rates of offending.
>
> While there is consensus in the literature that indicates the existence of a relationship between drugs and crime, the nature of this relationship remains highly contested.[32]

1.3.2 Debates continue as to whether the link between drugs and crime is causal. Criminologists usually explain the connection between drugs and crime by reference to one of three basic explanatory models:[33]

- Enslavement model — substance use leads to crime because of the pharmacological properties of drugs or need to acquire money to pay for drugs or violence associated with the drug trade;

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[31] Ibid 160-61.

[32] Toni Makkai and Jason Payne, 'Key Findings from the Drug Use Careers of Offenders (DUCO) Study' (2003) 267 *Trends & Issues in Crime and Criminal Justice* 1, 1.

[33] Toni Makkai and Jason Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders (Research and Public Policy Series No. 52)* (2003) 11. See also Holly Johnson, 'Key findings from the Drug Use Careers of Female Offenders Study' (2004) 289 *Trends & Issues in Crime and Criminal Justice* 1, 1-2.

- Escalation (or intensification) model — crime leads to substance use because those who are engaged in an active criminal lifestyle in which drugs are readily available (that is, drug use and criminal activity coexist as part of a generally deviant lifestyle) use drugs to enhance or increase both their capacity and need to commit crime; and
- Criminal career (or criminogenic) model — substance use and crime are not causally related but are both the result of a third factor, such as childhood abuse, early school failure, family characteristics, neighbourhood disorganisation or other pre-existing delinquent lifestyle.

1.3.3 This sort of modelling, while helpful, tends to simplify the causal relationship between drug use and crime. These models are being currently reconceptualised in the light of recent research evidence that has emerged from the Drug Use Careers of Offenders (DUCO) project conducted by the Australian Institute of Criminology (AIC).[34]

1.3.4 Before we examine some of the key findings from the study, it is worth pointing out that property crime in Australia has often drawn special attention in terms of its relationship to illegal drugs. Australia has one of the highest rates of property crime in the industrialised world.[35] Property crimes[36] that are 'acquisitive' in nature, such as unlawful entry with intent, motor vehicle theft, receiving and stealing, are most often associated with illegal drug use.[37] Previous studies of the illegal drug–property crime relationship in Australia have found that:

> - property offenders are more likely to test positive to illegal drugs particularly opiates … ;
> - drug using property offenders have higher rates of criminal activity … ;
> - violent property offenders report using drugs (usually amphetamines) to provide 'dutch' courage to commit their crimes … ; and
> - the level of offending varies according to the type of drug on which the offender is dependent ...[38]

1.3.5 While drug use, drug addiction and the frequency of drug use have all been identified as factors that are important predictors of property offending and offending more generally,[39] it must be remembered that other lifestyle factors influence criminal behaviour and subsequent criminal careers. It is widely accepted, for instance, that there is a high correlation between some forms of violence, such as assault, and alcohol use and that alcohol is a causal factor in violent behaviour.[40] Other factors like education level,

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34 The project is funded under the National Illicit Drugs Strategy (NIDS).

35 Makkai and Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders,* above n 33, 9.

36 The category 'property crime' usually includes such offences as break and enter (including residential and non-residential), motor vehicle theft, stealing, arson, malicious damage and fraud.

37 Makkai and Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders,* above n 33, 9.

38 Ibid 13.

39 In Makkai and Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders,* above n 33, 6 the authors report that 'Australian research on illegal drugs and crime has found that:

- some offenders attribute their own offending to drugs … ;
- offenders are more likely to report criminal activity prior to any involvement in drug use … ; and
- offenders are more likely to report a younger age of onset into drug use than either injecting drug users or the general population ...'

Some international research has also provided strong evidence that offending rates fluctuate according to levels of drug use and cannabis use preceded other illegal drug use.

40 Ibid 14-17.

employment, history of juvenile delinquency, family instability, exposure to motivated offenders and marriage and family ties have also been found to influence criminal behaviours and careers.[41]

The Drug Use Careers of Offenders (DUCO) Project

1.3.6 Knowledge about the relationship of drug use and crime has increased considerably as a result of the DUCO project. The primary focus of the project was incarcerated male offenders and the links to illegal drug use. Surveys of adult incarcerated females[42] and male and female juveniles in detention[43] have recently been added to the multi-year DUCO research project. While there are a number of methodological limitations to the DUCO study,[44] the research represents a significant improvement in the evidence around the issue of the nexus between drug use and crime.

1.3.7 The male offenders study involved a survey of 2,135 adults incarcerated in prisons in Queensland, Western Australia, Tasmania, and the Northern Territory in mid-2001. The study is based on self-reported responses that retrospectively recall the criminal and drug using histories of offenders. As Makkai and Payne explain, there are important public policy issues associated with this research, including:[45]

- if certain drugs are causally associated with offending then identifying the pathways into drug use is important for crime prevention and intervention programs; and
- understanding when these transitions occur can facilitate improved risk assessments for diverting potential offenders away from a criminal career.

1.3.8 By examining the drug use careers of the most chronic and serious offenders who have come to the attention of police, court and corrections, the DUCO project also serves to map the transition from occasional illegal drug use to regular illegal drug use, and the progression from 'softer' drugs (like cannabis) to 'harder' drugs.

1.3.9 The male DUCO study found that 62% of all offenders reported regular illegal drug use in the six months prior to their most recent arrest. Offenders most reported regular use of cannabis (53%), amphetamine (31%), heroin (21%) and cocaine (7%). Thirty-five per cent of all offenders reported regular use of two or more of the above illegal drugs in the six months prior to their most recent arrest.[46] Makkai and Payne describe the drug using career of the typical incarcerated male in the following manner:

> The drug using career for the DUCO male sample almost invariably commenced with the experimentation of cannabis, followed by amphetamines, heroin and cocaine. The time delay between first cannabis use and the other three drug types was approximately three years. In most cases where persistent cannabis use was evident, regular use also commenced prior to

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41 Ibid 10.

42 See Holly Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders (Research and Public Policy Series, No. 63)* (2004); Johnson, 'Key findings from the Drug Use Careers of Female Offenders Study', above n 33 and Katie Willis and Catherine Rushforth, 'The Female Criminal: An Overview of Women's Drug Use and Offending Behaviour' (2003) 264 *Trends & Issues in Crime and Criminal Justice* 1.

43 See Jeremy Prichard and Jason Payne, *Alcohol, Drugs and Crime: A Study of Juveniles in Detention (Research and Public Policy Series, No. 67)* (2005) and Jeremy Prichard and Jason Payne, 'Key findings from the Drug Use Careers of Juvenile Offenders Study' (2005) 304 *Trends & Issues in Crime and Criminal Justice* 1. See also Judy Putt, Jason Payne and Lee Milner, 'Indigenous Male Offending and Substance Abuse' (2005) 293 *Trends & Issues in Crime and Criminal Justice* 1.

44 Makkai and Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders,* above n 33, 163-170.

45 Ibid 7.

46 Ibid xv-xvi.

> experimentation with other illegal drugs. The average interval between experimentation and persistence for offenders who escalated to regular use was approximately 18 months for each of the four main drug types.[47]

1.3.10 They isolate a trend in which 'offenders who were more active in the criminal market, who had greater contact with the criminal justice system, and who reported more frequent use of illegal drugs were those more likely to have commenced offending prior to illegal drug use.'[48] The data suggests that drug use and crime are related primarily to the extent that both behaviours form part of a general deviant lifestyle, that is, it appears that drug use serves to escalate an already active criminal lifestyle, as in the escalation model.

1.3.11 The other key findings emerging from the male study include:[49]

- 39% of all offenders causally attributed the current most serious offence for which they were incarcerated to alcohol and/or illegal drugs — 18% to illegal drugs, 9% to alcohol and 12% to both;[50]
- 52% of the total sample reported addiction to alcohol or illegal drugs during the six months prior to the most recent arrest — 32% to illegal drugs only, 11% to alcohol, and 9% to both;
- 62% of the total sample reported being intoxicated at the time of their most serious offence — 24% were high on illicit drugs, 21% on alcohol and 17% on both;
- of those who reported drug use, 51% attributed all or most of their criminal offending to illegal drugs and alcohol;
- regular amphetamine users were more likely to be engaged in violent offending such as physical assault and were significantly more likely to act impulsively; and
- regardless of drug type, *addicted* offenders reported more frequent property offending.

DUCO: The Tasmanian Sample

1.3.12 As part of its multi-jurisdictional study of 2,135 offenders, the AIC provided Corrective Services Tasmania with a confidential report of the Tasmanian sample used in the male offenders study.[51] Over 150 inmates were surveyed in Tasmania in early 2001. The Tasmania-specific report found that four in five (79.3%) inmates had used at least one illicit drug. On average, 3.9 illicit drugs were used at least once per inmate. More than one-third of inmates (35.1%) thought they were addicted to at least one illicit drug immediately prior to their arrest/incarceration. It was estimated that almost half of Tasmanian inmates (49.4%) used drugs on a 'high frequency' basis. Inmates who were illicit drug users immediately prior to arrest/incarceration spent, on average, $1,244.76 per week on illicit drugs.[52] Inmates who used drugs

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47 Makkai and Payne, 'Key Findings from the Drug Use Careers of Offenders (DUCO) Study', above n 32, 5.

48 Ibid 6.

49 Makkai and Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders,* above n 33, xv-xviii.

50 In the Drug Use Career of Female Offenders Study, 41% of all female offenders causally attributed their offending to their drug and alcohol abuse – 31% to illegal drugs, 9% to alcohol and 1% to both. See Johnson, 'Key findings from the Drug Use Careers of Female Offenders Study', above n 33, 5.

51 The DUCO female study (comprising 470 women incarcerated in six jurisdictions) and the DUCO juvenile study (comprising 371 young offenders incarcerated in juvenile detention centres across Australia) both sampled the relevant Tasmanian incarcerated populations. Unlike for the males, however, there were no independent state reports produced for the female or juvenile studies.

52 Paul Williams, Leesa Morris and Catherine Rushforth, *Drug Use Careers of Offenders (DUCO): Tasmania Sample* (Confidential Report to Corrective Services Tasmania) (2003) 6.

reported that they obtained the extra money for the purchase of drugs from illegal activities: inmates mostly obtained income from stolen property (one in eight), cash thefts (one in seven), and the sale of illicit drugs (one in 10).

1.3.13 Almost one-third of Tasmanian inmates (32.4%) had used illicit drugs prior to or concurrent with commencing offending, and four in five (80.0%) who were regular offenders had used illicit drugs prior to or concurrent with commencing regular offending. One in 10 of all Tasmanian inmates (11.2%) were regular illicit drug users prior to or concurrent with commencing their offending, and more than half of regular offenders (58.2%) were regular illicit drug users prior to or concurrent with commencing regular offending. The time it took for regular illicit drug users to turn to offending, or regular offending was extremely brief: it took 0.5 years for regular illicit drug users to commence any offending, and 1.2 years for regular illicit drug users to commence regular offending.[53] The report concludes 'that about one-third of the total Tasmanian sample had used drugs regularly and were regular offenders.'[54]

1.3.14 Almost half the Tasmanian inmates (48.1%) had received some form of alcohol and other drug treatment in their lifetime; one in five (19.0%) had received some form of custodial treatment; and 13.3% had received treatment during their present incarceration. Significantly, of those inmates who had received treatment during their present incarceration, three-quarters (76.5%) thought the treatment had helped them.[55]

1.3.15 The main findings in the Tasmanian sample on the extent to which illicit drug use causes or contributes to criminal careers are quite stark. The authors of the report found that:

> illicit drug use was endemic in the inmate population. Three in four Tasmanian inmates had used cannabis, almost three in 10 had used heroin, almost one in five had used cocaine, and more than one in two had used amphetamines. They had commenced using these drugs, on average, at just over 16 years of age (cannabis), 20.1 years (heroin), 21.0 years (cocaine) and 19.1 years (amphetamines). Smaller proportions were regular users of these drugs (one in two—cannabis; one in 10—heroin; one in 50—cocaine; one in five—amphetamines).[56]

1.3.16 The report also found that about two-fifths (39%) of all Tasmanian inmates reported that the main reason for committing the most serious offence for which they were currently incarcerated was drug-related.[57] The Tasmanian figures that flowed into the greater DUCO sample revealed that the Tasmanian-specific results were generally consistent with the national findings:[58]

- other Australian inmates (that is, QLD, WA and NT) were a little more likely (41.3%) than Tasmanian inmates (39.1%) to report drug-related reasons for offending;
- Tasmanian inmates were a little more likely (15.5%) than other Australian inmates (12.0%) to report they were under the influence of drugs at the time of their offence; and
- Tasmanian inmates were more than twice as likely (16.8%) than other Australian inmates (7.2%) to report that they needed money for drugs.

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53 Ibid 7.
54 Ibid 8.
55 Ibid.
56 Ibid.
57 Ibid 9.
58 Ibid 66.

When Tasmanian inmates were asked what impact drugs had on their lifetime offending histories, 29.1% of the sample reported that drugs played a major part (13.5%) or were totally responsible (15.6%) for their offending career.[59]

1.3.17 The local and national DUCO studies suggest that significant numbers of Tasmanians engaged in a criminal lifestyle use illicit drugs. Cannabis continues to be the most commonly used illicit drug. Tasmania experiences higher than average levels of alcohol consumption (and associated high-risk alcohol-related harm) and is also experiencing increased prevalence of use of methamphetamine. The use of these drugs is linked to criminal behaviour. The greater DUCO study found that methamphetamine or alcohol users were more likely to attribute offending to psychopharmacological factors that imply that individuals commit the crime because of the short- or long-term effects of the drugs themselves. The general picture about the relationship between illicit drug use and crime that appears in the local and national studies of the drug using careers of male offenders is also borne out by the data on drugs and crime presented by other sources, as discussed below.

1.4 Drugs and Crime: Data from *Tasmanian Drug Trends 2005* and Police Sources

1.4.1 *Tasmanian Drug Trends 2005* canvasses the extent of criminal and police activity reported by the IDU sample of 100 in southern Tasmania[60] and confirms that there is a strong association between illicit injecting drug use and criminality. According to the IDRS, just over one-half (53%) of the local IDU respondents reported involvement in some type of criminal activity in the preceding month, a level comparable to that reported in the national IDU sample (46%, total sample size 943). After increasing more than 10% from 52% in 2003 to 63% in 2004, the proportion of cohort reporting recent[61] involvement in crime decreased 10% in 2005. The most commonly reported crimes amongst the local cohort were dealing of drugs (33%) and property crime (31%). These proportions are generally consistent with the reported recent criminal activity in previous years: drug dealing (32% in 2003, 43% in 2004) and property crime (22% in 2003, 34% in 2004). The reported level of property crime continues a steadily escalating trend of such involvement across the local samples (from 18% in 2000, 28% in 2002 and 31% in the current study). Relatively few respondents reported recent involvement in fraud (6%) or violent crime (10%). Bruno, points out, however, that self-reported involvement in violent crimes 'have risen from 5% of the cohort in 2003 and 2004 to 10% in 2005; and reported prior-year arrest rates have similarly increased in this time (5% in 2003, 9% in 2004 and 11% in 2005).'[62] Also, five key experts (n = 32) noted recent increases in violence and aggression amongst the IDU groups they were familiar with in recent months. For example, 'one of the ambulance officers interviewed noted an increase in violent incidents, particularly in relation to methamphetamine intoxication, in the preceding six months.'[63]

1.4.2 There are some interesting differences between the reporting of criminal activity and reporting of arrest. Almost half (47%) of the local IDU respondents had been arrested in the previous twelve months (compared to 53% who reported involvement in some type of criminal activity in the preceding month). More strikingly, however, the most common ground for arrest was not drug dealing (the most commonly reported crime in the local cohort), but property crime (16%). Smaller proportions of the IDU sample

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59 Ibid 9.

60 Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS),* above n 11, 162-64.

61 In the month prior to interview.

62 Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS),* above n 11, 162.

63 Ibid 163.

reported being arrested for violent crime (11%), driving offences 11%) or possession (5%). In fact, in 2005 only two people reported being arrested for dealing in the year prior to interview despite the predominance of dealing as the preferred criminal activity. As the table below illustrates, the proportions of the IDRS IDU sample reporting arrests for property crime has consistently remained larger (from 16% in 2000 to 29% in 2004) than arrests for drug dealing. This means that the drug users that constitute the IDU sample in Tasmania are generally much more likely to be arrested for property crime than they are for dealing or trafficking.

Table 1: Reported criminal activity among IDU (n=100)

Activity	2000 IDRS %	2001 IDRS %	2002 IDRS %	2003 IDRS %	2004 IDRS %	2005 IDRS %
Crime (% in last month)						
Dealing	49	41	34	32	43	33
Property crime	18	23	28	22	34	31
Violent crime	10	4	6	5	5	10
Fraud	5	4	2	6	7	6
Any crime	**64**	**56**	**50**	**52**	**63**	**53**
Arrested last 12 months (%)	**43**	**41**	**41**	**46**	**51**	**47**
Arrested for property crime	16	13	25	21	29	16
Arrested for use/possession	9	1	9	2	9	5
Arrested for violent crime	6	9	14	5	9	11
Arrested for fraud	2	0	0	3	2	1
Arrested for dealing/trafficking	1	2	1	0	1	2
Arrested for driving offence	*	4	5	2	6	11

Source: Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, 162. *Note: Data was not gathered for this item in the 2000 IDRS study.

Arrest Data from Tasmania Police

1.4.3 Drug–related arrest data from Tasmania Police highlights some of the trends in illicit drug usage reported by the IDU sample but fails to communicate how fully drug dependent offenders are involved in crimes other than drug crimes to support their dependency/addiction. There is no police data in Tasmania, for example, for property offences or violent offences or other types of offences committed under the influence of either illicit or licit drugs (although there is data for drugs/drinking and driving offences).

1.4.4 As the table below illustrates, between 1996/97 and 2004/05 there has been a trend in increasing arrests for methamphetamine-related offences: peaking at 89 in 2001/02, dipping to 39 in 2003/04 but rising again in the last recorded financial year. Despite the rise in the number of methamphetamine-related arrests, cannabis-related arrests continue to far outnumber all other drug-related arrests. Between 1999/2000 and 2004/05, arrests for cannabis-related offences have doubled (from 736 in 1999/2000 to 1474 in 2004/05 after peaking to 1830 in 2002/03).[64] Bruno explains 'that much of this increase may simply reflect the increase in utilisation of "official" cautions and diversions by Tasmania Police (which are included in these statistics) over "unofficial" warnings, which would not be recorded in these statistics

[64] Ibid 166.

in preceding years.'[65] The number of cautions and diversions issued by Tasmania Police under the Police Diversion Program will be examined a little later.

Table 2: Number of arrests (including cautions and diversions) for cannabis, methamphetamine, opioid and cocaine-related offences in Tasmania, 1995/96-2004/05

Type of offence	**1996/ 97**	**1997/ 98**	**1998/ 99**	**1999/ 00**	**2000/ 01**	**2001/ 02**	**2002/ 03**	**2003/ 04**	**2004/ 05**
Cannabis	1079	1196	736	799	1050	1540	1830	1638	1474
Methamphetamine	20	15	7	28	70	89	66	39	72
Opioids	28	16	25	9	9	34	9	10	16
Cocaine	0	0	0	0	4	1	0	0	0

Source: Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, 166. Note: 2001/02 data is provisional and is based on data provided to State Intelligence Services, which may differ from official statistics and counting rules used by the Australian Crime Commission (formerly Australian Bureau of Criminal Intelligence).

1.4.5 Statewide arrest data becomes more informative if it is separated into drug-related offences that can be classified as consumer offences, that is, offences relating to the possession and use of illicit drugs or provider offences, that is, offences relating to supplying, selling and trafficking illicit drugs. The table below indicates the proportion of arrests for offences relating to the possession or use of illicit drugs (consumer offences) as opposed to supply-type (provider) offences. Since 2001/02 there appears to have been a rise in the proportion of consumer arrests for both cannabis and opioids, with these proportions reaching 92% for cannabis and 100% for opioids in 2003/04. In 2004/05, approximately 8 out of every 10 people arrested and prosecuted for a cannabis offence or an opioid offence in that year was predominantly a consumer (possessing and using) rather than selling or trafficking drugs. Arrests for methamphetamine have varied over time but have tended to be less heavily weighted towards consumer arrests relative to the pattern for cannabis and opioids since 1997/98, which is probably more reflective of Tasmania Police's focus toward suppliers of this drug.[66]

Table 3: Consumer arrests (including cautions and diversions) for cannabis, methamphetamine and opioid-related offences as a proportion of all drug-related arrests in Tasmania 1996/97-2003/04

% consumer offences									
Drug Type	**1996/ 97**	**1997/ 98**	**1998/ 99**	**1999/ 00**	**2000/ 01**	**2001/ 02**	**2002/ 03**	**2003/ 04**	**2004/ 05**
Cannabis	49	76	93	88	96	72	90	92	82
Methamphetamine	90	100	86	71	86	79	63	79	61
Opioids	86	94	96	78	89	68	88	100	81

Source: Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, 167. Note: 2001/02 data is provisional and is based on data provided to State Intelligence Services, which may differ from official statistics and counting rules used by the Australian Crime Commission (formerly Australian Bureau of Criminal Intelligence).

[65] Ibid.
[66] Ibid 167.

1.5 Conclusion

1.5.1 Substance abuse is a significant problem affecting Tasmanian individuals, families, communities and the agencies that serve them. The illicit drug trends reported in Tasmania over the recent past indicate that illicit drug culture is a permanent feature of the Tasmanian community, and that certain drugs, like methamphetamines and illicitly used pharmaceuticals, present serious and unique challenges for the health and legal systems in the State.

1.5.2 While the causal nexus between substance abuse and crime will no doubt continue to be further investigated, there is a significant body of evidence at this stage demonstrating that substance abuse, addiction or intoxication are major problems for many people coming into the justice system. Authoritative studies have shown that more than one-third of police detainees[67] and more than one-third of incarcerated offenders consider that their offending is explained at least in part by their use of drugs. Regular drug users and people suffering drug addiction are heavily represented in the criminal justice system, both in terms of arrests[68] and incarcerations.

1.5.3 In response to the problems of illicit substance abuse, alternative methods to conventional court practices and sentencing are beginning to change the international and national criminal justice landscape.

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[67] See Carmen Schulte, Jenny Mouzos and Toni Makkai, *Drug Use Monitoring in Australia: 2004 Annual Report on Drug Use Among Police Detainees (Research and Public Policy Series, No. 65)* (2005). In numbers similar to the DUCO study (39% of all offenders werte found to causally attribute the offences for which they were incarcerated to alcohol and/or illegal drugs), the Drug Use Monitoring in Australia (DUMA) project found that 37% of detainees considered that their offending was explained at least in part by their use of drugs.

[68] According to the DUMA study, 71% of detainees had sought to obtain drugs in the 30 days prior to their arrest. Police detainees who were found to be dependent on drugs or who tested positive to heroin or methamphetamine had the highest average number of arrests in the preceding 12 months. These figures were obtained from Michael King, 'Challenges Facing Australian Court Drug Diversion Initiatives', (Paper presented at the Court Drug Diversion Initiatives Conference, Brisbane, 25 May 2006), 1.

Part 2

National Drug Policy and the Tasmanian Context

2.1 A Brief History of Drug Policy in Australia

2.1.1 The history of modern Australian drug policy begins, arguably, with the 1977 report of the Senate Standing Committee on Social Welfare (the 'Baume Report').[69] This report contended, *inter alia*, that total elimination of drug abuse was unlikely to occur in modern society. Since the report prevailing drug policy in Australia has been guided by a philosophy of 'harm minimisation', that is, an approach oriented towards minimising the harmful effects of drug use on Australians and in Australian society. Harm minimisation is an approach that 'aims to reduce the adverse health, social, and economic consequences of alcohol and other drugs by minimising or limiting the harms and hazards of drug use for both the community and the individual, without necessarily eliminating use.'[70]

2.1.2 The National Drug Strategy (NDS) commenced in 1985 following a special Premiers' conference. Between 1985 and 1992 the strategy framework for cooperation between the Commonwealth and States and Territories was titled the National Campaign Against Drug Abuse (NCADA); between 1993 and 1997 it was called the National Drug Strategy; and subsequent to 1997 it has been known as the National Drug Strategic Framework.[71] The current adaptation, *The National Drug Strategy: Australia's Integrated Framework 2004-2009*,[72] continues to uphold the harm minimisation principle but also strengthens the national collaborative approach to minimising the harmful effects of drug use in a federal framework. The present strategy is described as a 'cooperative venture between Australian, State and Territory Governments and the non-government sector.'[73] It represents a policy framework that provides a coordinated, integrated approach to the prevention and reduction of the harms caused by drugs in the Australian community. Harm minimisation does not condone drug use. It is an approach that focuses on prevention of uptake of harmful drug use and improvements of health, social and economic outcomes for both the community and the individuals burdened by drug abuse. The National Drug Strategic Framework guides governments and non-government organisations in the development and delivery of drug strategies, programs and initiatives for the prevention and reduction of harmful drug use.

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[69] See Wendy Loxley et al, *The Prevention of Substance Use, Risk and Harm in Australia: A Review of the Evidence* (2004) 3.

[70] Ibid 224 quoting from Department of Health Housing Local Government and Community Services (Cth), *National Drug Strategic Plan 1993–97* (1993).

[71] Paul Williams, *Progress of the National Drug Strategy: Key National Indicators* (1997).

[72] Ministerial Council on Drug Strategy, *The National Drug Strategy: Australia's Integrated Framework 2004-2009* (2004).

[73] Department of Health and Ageing, National Drug Strategy <http://www.nationaldrugstrategy.gov.au> at 31 October 2006.

2.1.3 The present National Drug Strategy regards harm minimisation as encompassing:

- supply reduction strategies to disrupt the production and supply of illicit drugs, and the control and regulation of licit substances;
- demand reduction strategies to prevent the uptake of harmful drug use, including abstinence orientated strategies and treatment to reduce drug use; and
- harm reduction strategies to reduce drug-related harm to individuals and communities.[74]

The priority areas identified for future action by the NDS are:

- prevention;
- reduction of supply;
- reduction of drug use and related harms;
- improved access to quality treatment;
- development of the workforce, organisations and systems;
- strengthened partnerships;
- implementation of the National Drug Strategy Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003–2006; and
- identification and response to emerging trends.[75]

A Change of Emphasis

2.1.4 Prior to 1996 the emphasis of the 'harm minimisation' philosophy was health-related activities, such as prevention, education and drug treatment coordinated by the Commonwealth Department of Health and Ageing at the federal level. In 1996, however, 'the Prime Minister directed that Commonwealth money for the NDS be split equally between "law enforcement" and "education/treatment and prevention."'[76] The effect of this change of emphasis was the announcement in 1997 by the federal government of a *National Illicit Drug Strategy 'Tough on Drugs'* initiative that signaled a dual approach to law enforcement and harm minimisation in the area of illicit drugs. Since its launch the Commonwealth has allocated over $1 billion to the National Illicit Drug Strategy (NIDS), which sits alongside the National Alcohol Strategy, National Tobacco Strategy, National Indigenous Drug Strategy and National School Drug Education Strategy in forming the National Drug Strategy.

2.1.5 NIDS aims to combat illicit drug use through a sharper focus on reducing the supply of drugs and on reducing demand. Initiatives funded under this scheme include diversion programs, treatment and prevention, training, monitoring and evaluation, research and measures to intercept more illicit drugs at the border and within Australia.[77] The funding for these initiatives is administered by agencies within the Health and Justice and Customs portfolios.

2.1.6 While on the face of it the harm minimisation approach and the law enforcement or 'tough on drugs' approach may be considered at odds with each other, the Ministerial Council on Drug Strategy

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[74] Ministerial Council on Drug Strategy, above n 72, 2.
[75] Ibid 11.
[76] Toni Makkai, 'The Emergence of Drug Treatment Courts in Australia' (2002) 37 *Journal of Substance Misuse and Use* 1567, 1574.
[77] Loxley et al, above n 69, 3.

(MCDS) as the peak national policy and decision-making body on licit and illicit drugs, regards the approaches as complementary or at least as non-mutually exclusive. The MCDS is constituted by the Australian and State and Territory Ministers of Health and Law Enforcement and includes the Commonwealth Minister responsible for Education.[78] It is supported in its role and functions by the:

- Inter-Governmental Committee on Drugs (IGCD), comprising both health and law enforcement officials from all jurisdictions, and
- Australian National Council on Drugs (ANCD), comprising a cross-section of interests and expertise.

2.1.7 The IGCD is principally and primarily responsible for the provision of advice to the MCDS while the ANCD provides independent, strategic advice on priorities for policy development. The Commonwealth Department of Health and Ageing administers the NDS on behalf of the MCDS.

Diversion

2.1.8 Diversion programs in Australia have been supported strongly by the NIDS. In their most basic forms diversion programs aim to divert illicit drug users away from the criminal justice system and into education or assessment, with a view to treatment. There is a train of thought, however, that diversion programs should also be considered as diverting people away from illicit drug use.

2.1.9 The Council of Australian Governments (COAG) agreed in 1999 to a 'Diversion Initiative' that tied federal funding for diversion programs to State co-operation. COAG agreed to work together to put in place a nationally consistent approach to diversion of drug offenders by police to compulsory assessment. Under the Illicit Drug Diversion Initiative (IDDI), police and courts operating in State jurisdictions were to be given the authority to divert drug users into education or treatment. Phase one of IDDI (1/7/99-30/06/03) involved a Commonwealth allocation of $111 million and phase two (1/7/03-30/06/07) involves an allocation of $215 to the Diversion Initiative. Toni Makkai explains the funding methodology:

> For States to access this pot of Federal money, they were required to submit proposals on what programs would be implemented, where they fitted within the overall framework of the National Illicit Drug Strategy, and how they conformed to the principles articulated in the Council of Australian Governments (COAG) Communiqué. The Ministerial Council on Drug Strategy (MCDS) was tasked with developing a nationally consistent approach to diversion and announced 19 national principles that would underlie the national framework in June 2000. As a result, a plethora of illicit drug user offender diversionary programs were proposed and funded. The nature of diversionary programs varied from jurisdiction to jurisdiction but at their core was diversion of drug using offenders out of the criminal justice system to either treatment or education.[79]

2.1.10 The first agreement under the COAG Communiqué occurred between Tasmania and the Commonwealth when in March 2000 Tasmania became the first State to implement a diversion program

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[78] The objectives of the MCDS are to:
- Provide a mechanism for regular consultation between Australian Government, State and Territory health and law enforcement Ministers on programs and policies in relation to licit and illicit drugs in Australia;
- Promote a consistent and coordinated national approach to policy development and implementation in relation to all drugs issues; and
- Consider matters submitted to the Council, through individual Council members, by the Inter-Governmental Committee on Drugs (IGCD).

[79] Makkai, above n 76, 1574.

within the framework of IDDI. Agreements with other jurisdictions on the implementation of the IDDI followed. Generally, the implementation of IDDI programs across the country excluded the establishment and development of drug treatment courts.[80]

2.1.11 The early agreement between Tasmania and the Commonwealth under the COAG Communiqué may have hampered the development of a drug treatment court in this State. The concentration of effort and resources on the implementation of a diversion program consistent with IDDI may have deflected thinking away from the debates and experimentation about drug courts that was happening in other jurisdictions at the time.

2.1.12 Emphasising early intervention and prevention, IDDI now comprises a range of programs aimed at diverting first-time or minor offenders away from the criminal justice system or drug using offenders from deeper involvement in the criminal justice system. Drug diversion allows the police to divert drug offenders caught using or possessing small quantities of illicit drugs to health providers for education, counselling or appropriate treatment. It enables offenders to consider the legal and health consequences of using illicit drugs and may prevent certain offenders from gaining a criminal record. IDDI also aims to prevent a new generation of drug users committing drug-related crime from emerging in Australia, therefore leading to safer environments for all Australians.

2.2 Current Drug Policy in Tasmania

2.2.1 Consistent with the directions of both the NDS and the NIDS, Tasmania's drug policy is also underpinned by a harm minimisation approach directed at reducing the supply, demand and harm associated with drug use.

The Tasmanian Drug Strategy (TDS) 2005-2009

2.2.2 The recently released TDS[81] aims to:

- provide the foundation for future responses to the NDS, focusing on priorities specific to Tasmania;
- articulate a whole-of-government approach to issues arising from the licit and illicit use of drugs;
- guide and align timely effort by individual agencies and organisations to prevent or delay the onset of licit and illicit drug use and to reduce the harmful effects of drug use;
- foster and promote an integrated approach through collaborative effort and the development of links and partnerships between the diverse range of stakeholders involved in the management of drug-related issues;
- promote harm minimisation as an approach to improving the health and wellbeing of individuals, families and communities and to minimising the harm arising from the use of drugs; and

[80] Ibid 1575. As Makkai notes, the exception to the general rule was in New South Wales, where the Youth Drug Treatment Court, but not the adult drug treatment court, was included for federal funding under the Illicit Drug Diversion Initiative framework.

[81] Tasmanian Government, *Tasmanian Drug Strategy 2005-09* (2005).

- build the capacity of the alcohol and other drugs sector to provide health promotion, and prevention, intervention and treatment services.

The strategy identifies three priority areas each with their own set of objectives:

1) Community safety;
2) Prevention and reduction; and
3) Improved access to quality treatment.

In response to these priority areas, the TDS allocates 'three strategic initiatives' to be promulgated:

1) Alcohol Action Plan;
2) Tasmanian Tobacco Action Plan; and
3) Plans targeting the use of illicit drugs (including a Psychostimulants Action Plan focused on responding to amphetamine-type stimulants such as ecstasy).

2.2.3 The strategy mandates that any plans targeting licit or illicit drug use be framed in the context of a harm minimisation philosophy and practice. Other key principles that ought to form the basis of any plan of action are:

- partnerships and collaborative effort;
- building capacity in the community and the alcohol and other drugs sector;
- prevention and early intervention are critical in responding to drug use;
- equity of access to evidence-based service delivery; and
- research, data collection and evaluation.

2.2.4 The TDS recognises that tobacco and alcohol are the most widely used drugs in Tasmania, and cause significantly more harm than other types of drugs, including cannabis, which ranks third behind tobacco and alcohol use.[82] It also recognises that Tasmanian drug use is unique in character and has consistently differed from drug use in other States. The TDS advances that plans focusing on the prevention or reduction of cannabis, amphetamines and diverted methadone, as well as the misuse of pharmaceuticals, ought to be developed and implemented. Relying on evidence gathered by the Australian Institute of Health and Welfare and the NDARC, the strategy highlights alcohol, cannabis, ecstasy and other psychostimulants and methamphetamines as drugs that are used heavily in Tasmania. The strategy confirms that the Tasmanian ecstasy market is expanding and that risky behaviours, such as driving while under the influence of a drug, continue to increase. It notes that the rates of injection of methadone syrup and illicit physeptone in Tasmania are the highest in the country and that Tasmania records a relatively high level of benzodiazepine injection when compared to other States.[83]

2.2.5 The key government agencies involved in the prevention or reduction of illicit drug use in Tasmania are the Department of Health and Human Services (DHHS), Department of Police and Emergency Management, the Department of Justice and Department of Education. The TDS also sets in

[82] Ibid 20.
[83] Ibid 21-22.

place a platform for partnership and cooperation between government, non-government and local government agencies. The Strategy invites individual agencies and organisations, such as Tasmania Police, the Alcohol and Drug Service (ADS) or non-government organisations, to develop local Action Plans which may be informed by and which link to the TDS.

2.2.6 The Inter Agency Working Group on Drugs (IAWGD) is the key coordinating and policy-making body on drug policy and drug-related issues in Tasmania. Its functions, *inter alia*, are to:

- oversee the implementation of the TDS;
- oversee the development and implementation of associated harm reduction drug strategies; and
- monitor and report on the implementation, progress and impacts of such strategies.

2.2.7 A key feature of the TDS's response to illicit drugs is the Police Diversion Program. The program operates within the terms of the nationally sanctioned IDDI framework. Since 2000, the Department of Police and Emergency Management and DHHS have implemented it jointly.

2.3 Police Diversion Program

2.3.1 The Police Diversion Program allows for police to divert people found using or possessing small quantities of illicit drugs away from the judicial system into health assessment and treatment. Essentially a police cautioning program,[84] it consists of three levels of diversion:

- **1st Level Diversion — Cannabis Caution**

  The Police may issue a Caution to a person found using or in possession of cannabis for the first time. A Caution provides a warning of the legal consequences of using cannabis and information about services that can provide help. Nothing else happens to that person unless they re-offend.

- **2nd Level Diversion — Brief Intervention**

  For persons found a second time using or possessing cannabis, the Police will issue that person with a Drug Diversion Notice. The person will be required to attend a brief intervention with an approved alcohol and drug worker. If they fail to attend the brief intervention the individual is prosecuted for the drug offence. Again, there is no criminal conviction: if they fail to attend the brief intervention, however, the person will be prosecuted for the drug offence.

[84] Before the agreement that led to Police Diversion Program, Tasmania Police introduced independently in July 1998 a Cannabis Cautioning Program that gave police officers the discretion to caution first-time minor cannabis offenders. Following a successful trial of the program, the eligibility criteria for cautioning were expanded to include consideration of non-first time offenders. See Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, above n 11, 165.

- **3rd Level Diversion — Assessment and Treatment**

  For persons found a third time using or possessing cannabis or using or possessing small quantities of any other illicit drug such as amphetamine, heroin or ecstasy, the Police can either charge that person or issue them with a Drug Diversion Notice. This level of Diversion requires that the person attend an assessment and one or more follow up appointments for counselling or other treatment as agreed with the approved alcohol and drug worker. Charges are not pursued providing attendance and compliance with the requirements of treatment as assessed.[85]

2.3.2 Persons receiving a second or third level Diversion Notice must contact the Alcohol and Drug Service (ADS) within three days. Police retain discretionary powers at all times and can charge rather than 'divert' a person, depending on the circumstances of the offence. Police determine whether an adult or young person is eligible according to factors that include:

- admission of the evidence;
- amount of evidence;
- whether the offender has been convicted of crimes or offences in the past;
- whether the offence involved violence;
- quantity of drugs involved; and
- other circumstances of the offence.

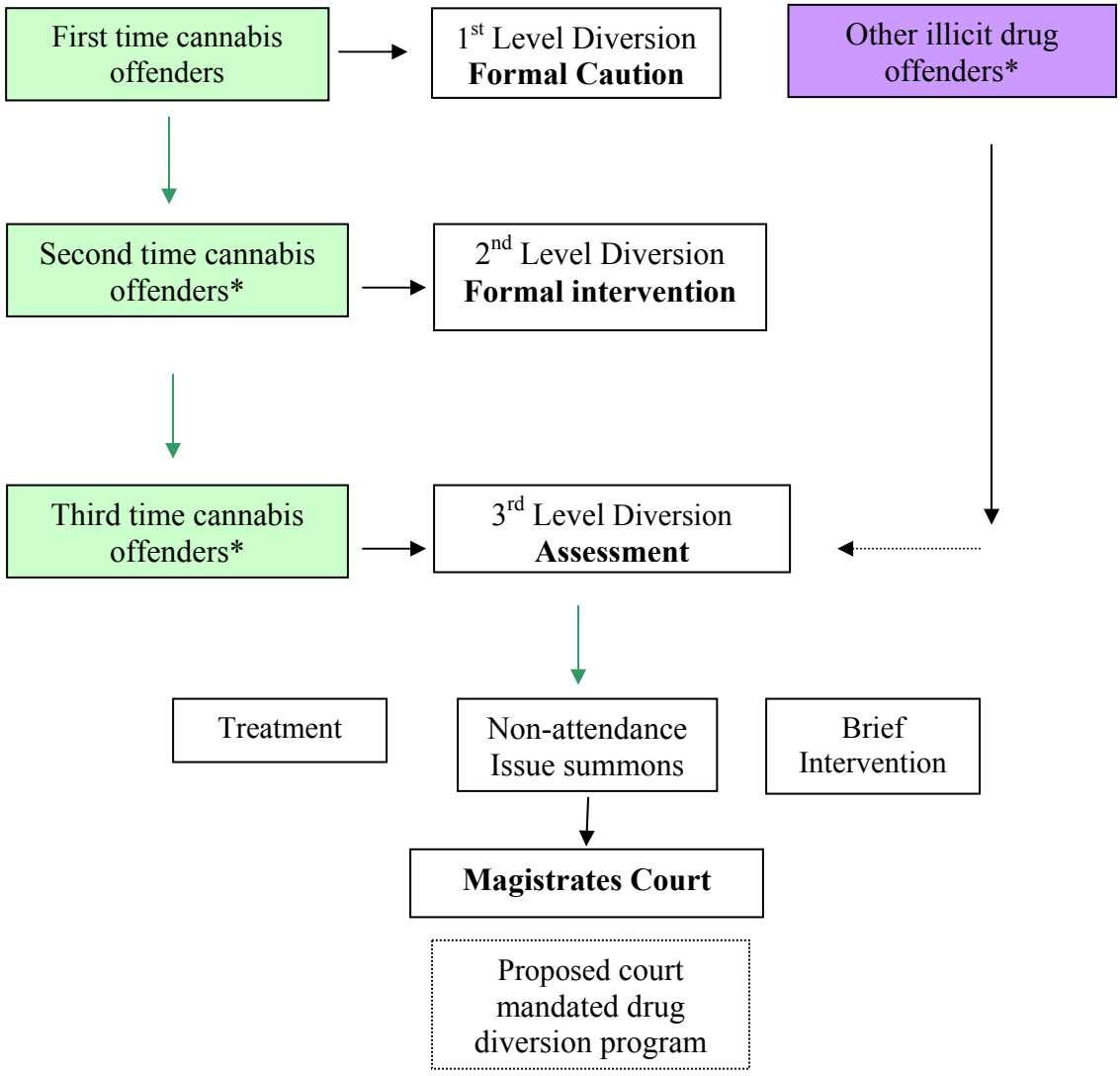
2.3.3 Individuals can ask for but not demand a diversion. If the offender is under 18 years of age, a parent, guardian or responsible adult must be present when the caution or diversion is issued by an authorised police officer. For the purposes of the program, illicit drugs include substances such as cannabis, amphetamines, heroin and ecstasy and also include prescription drugs such as methadone or morphine, and benzodiazepines held without a valid prescription.

2.3.4 Tasmania's pre-court illicit drug diversion scheme is captured neatly by this flow diagram produced below by the Tasmanian Institute of Law Enforcement Studies.[86] Offenders who fail to comply with the diversion process are issued with a summons and processed through the court system.

[85] Department of Health and Human Services, *Drug Diversion* <http://www.dhhs.tas.gov.au/services/view.php?id=936> at 15 August 2005.

[86] Thanks to Roberta Julian and Marnie Bower for allowing me to reproduce this flow diagram.

Figure 2: Pre-court Police Diversion Program



* Offenders only eligible for second/third cautions if they have not received one in the last 10 years.

2.3.5 The Police Diversion Program allows police to express a preference to educate or counsel illicit drug users through diversion if the situation so warrants. This early intervention approach complements a law enforcement posture that predominantly targets providers thorough intelligence gathering and covert operations.

2.3.6 The Police Diversion Program appears to be well supported by police. Nearly six thousand offenders (5849) had been diverted under the program from the period July 2000 to the end of June 2005. More than 1000 diversions have been made per annum in each of the past three recorded financial years (Table 4). Not surprisingly, the majority of these diversions involved cautions or counselling for minor cannabis use offences. Generally, around three quarters of all diversions are a first level diversion. The total number of persons diverted to health intervention (second- and third-level diversions) Statewide has increased progressively from 163 in July 2000-June 2001 to 418 in the last recorded financial year. As the Police Diversion Program is a progressive scheme for certain cannabis offenders, that is, offenders will

graduate to second- and third-level diversions over time, it is anticipated that the numbers of second- and third-level diversions will continue to increase.

2.3.7 Notably, however, over the five-year period since its introduction there has been a dramatic reduction in the number of people who have complied with a Drug Diversion Notice to attend some form of health intervention, assessment or treatment. It appears that many offenders are failing to comply with a Drug Diversion Notice and consequently failing to receive the appropriate intervention and treatment. Over the last three recorded financial years, just over half of the second- and third-level drug diversions issued by Tasmania Police were complied with, meaning that around half of the offenders potentially diverted to health interventions were instead prosecuted or await being prosecuted for the drug offence(s).

Table 4: Drug diversions or cautions issued by Tasmania Police 2000-2005

	Jul 2000 – Jun 2001	**Jul 2001 – Jun 2002**	**Jul 2002 – Jun 2003**	**Jul 2003 – Jun 2004**	**Jul 2004 – Jun 2005**
Number of 1st Level Diversions (Cannabis Caution)	584	820	919	1158	930
Number of 2nd Level Diversions (Brief Intervention)	101	128	203	286	296
Number of 3rd Level Diversions (Treatment)	62	42	97	101	122
Total number of cautions/diversions Statewide	**747**	**990**	**1219**	**1545**	**1348**
Cannabis Cautions as a proportion of all cautions/diversion	78%	83%	75%	75%	69%
Total number diverted to health intervention Statewide	163	170	300	387	418
Number diverted to health interventions that complied with the request	160 (or 98%)	127 (or 75%)	166 (or 55%)	209 (or 54%)	229 (or 55%)

Source: Tasmania Police.

Part 3

Drug Courts in Australia

3.1 Overview

3.1.1 Tasmania is the only State in Australia yet to pilot or establish a drug court within its jurisdiction. The first Australian drug court was established in New South Wales in 1999. Drug courts were established in South Australia, Western Australia and Queensland in 2000. Victoria implemented its drug court regime in 2002.[87]

3.1.2 The relatively sudden and swift emergence of drug courts in Australia reflects a zeitgeist in which modern Australian governments are endeavouring to break the cycle of drugs and crime (and imprisonment). Indermaur and Roberts locate the emergence of Australian drug courts in the context of contemporary public and fiscal policy. They argue that the introduction of drug courts in Australia 'was the result of a push by policy makers and bureaucrats to provide appropriate treatment options in addressing the drug crime problem. Many of the drug courts were also introduced or at least "sold", as a cost cutting measure aimed at reducing the number of offenders being sent to prison.'[88]

3.1.3 Drug courts emerged in Australia roughly a decade after their establishment in the United States. Freiberg has observed that American drug courts were originally developed as a means of preventing local courts from being overwhelmed by drug cases. The impetus for their establishment, therefore, was pressure from the judiciary: their rationale was as much administrative as ideological.[89] From their beginnings in the US, they have sprung up in Canada, Ireland, Scotland and England. In the US, they are now a regular feature of the criminal justice system: 'By January 2005 there were 1,262 fully operational drug courts in 50 states in the United States with a further 575 in the planning stages.'[90]

3.1.4 Australian drug courts differ widely in terms of their formation, location in the justice system, targeting of offenders (minor and serious) and substances (illicit drugs and alcohol), eligibility criteria, procedures and manner in which they were implemented. Despite the diversity, however, Australian drug courts share the common purpose of diverting illicit drug dependent offenders away from incarceration and into treatment programs for their addiction. After defining the key distinguishing features of a drug court and clarifying its rationale, the drug courts in each Australian jurisdiction will be compared and contrasted.

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87 David Indermaur and Lynne Roberts, 'Finding Alternatives to Imprisonment: Drug Courts in Australia' (2005) 86 *Reform* 28, 28.

88 Ibid.

89 Arie Freiberg, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 220.

90 Indermaur and Roberts, above n 87, 28 referring to the United States Government Accountability Office, *Adult Drug Courts: Evidence indicates recidivism reduction and mixed results for other outcomes* (2005).

3.2 What is a Drug Court?

3.2.1 A drug court is usually defined as a court, or a division of a court, which is responsible for sentencing and supervising the treatment of offenders with drug problems, who have committed an offence under the influence of drugs or to support a drug habit.[91] Drug courts combine close judicial supervision with drug treatment and in so doing offer a new alternative to the unproductive and costly cycle of addiction, crime and incarceration.[92] Drug courts have both criminal justice and therapeutic aims. They aim to.[93]

- reduce the level of drug-related criminal activity;
- reduce offending behaviour;
- reduce imprisonment rates;
- reduce the cost to the system through reducing the burden on police, the courts and the correctional system;
- eliminate, decrease or manage illicit drug usage while offenders are participating in the treatment provided;
- reduce the rate and number of drug relapses; and
- provide a range of life skills to offenders that come within their purview in order that offenders' overall health and social functioning may be improved.

By focusing on the rehabilitation of offenders from drug or alcohol addiction and by bringing stability to offenders' chaotic lifestyles and reintegrating them into the community, drug courts also seek to ultimately protect the community in the long term.

3.2.2 As the aims of drug court are different to those of conventional courts, their success is 'measured not by how quickly they process cases, how many convictions they produce, or how much jail time defendants receive, but on achieving tangible impacts – less drug use and crime, gains in employment and education, improved mental and physical health, and cost savings from diverting offenders away from jail and prison.'[94]

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91 The National Association of Drug Court Professionals in the United States provides the following definition of 'drug court': 'A drug court is a court specifically designated to administer cases referred for judicially supervised drug treatment and rehabilitation within jurisdictions.' See Freiberg, above n 89, 214.

92 Amanda B Cissner and Michael Rempel, *The State of Drug Court Research: Moving Beyond 'Do They Work?'* (2005) 1.

93 Freiberg, above n 89, 214.

94 Cissner and Rempel, above n 92, 1.

3.2.3 Drug courts are characterised chiefly by their integration of drug treatment services within a criminal justice case processing system. This integration takes place by the use of:

- judicial supervision of structured community-based treatments;
- early identification of defendants in need of treatment and referral to treatment as soon as possible after arrest;
- regular status hearings before a judicial officer to monitor treatment progress and program compliance;
- a system of graduated sanctions and rewards designed to increase defendant accountability;
- abstinence monitored by frequent drug testing; and
- a non-adversarial approach to case resolution.

While their processes, structures and organisation may vary, a drug court is a court essentially designated to deal with a specified class of offenders in a manner that integrates treatment into criminal case processing.

3.3 How do Drug Courts Differ from Traditional Courts?

3.3.1 Drug courts are also defined through their difference to conventional or traditional courts. The enhanced role of the magistrate/judge is just one key difference drug courts have from traditional courts. Instead of handing over cases — to other judges, to probation departments, to community- or government-based treatment programs — drug court magistrates stay involved with each case throughout the treatment process. As Freiberg points out, 'supervision, programs and treatment are concentrated in one court under a single judge.'[95]

3.3.2 Drug courts abandon the traditional adversarial approach of the court system. In his *Drug Courts and Related Sentencing Options* Discussion Paper, Freiberg reproduces[96] a concise summary of the differences between traditional courts and drug or other 'problem-oriented' courts:

[95] Freiberg, above n 89, 214.

[96] Arie Freiberg, *Sentencing Review: Drug Courts and Related Sentencing Options* (2001) 6-7. The table first appeared in R.K. Warren, *Reengineering the Court Process* (1998) and was subsequently cited in D. Rottman and P. Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) 240 *National Institute of Justice Journal* 12, 14.

Traditional Court Process	Transformed Drug Court Process
Dispute resolution	Problem solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case oriented	People oriented
Rights based	Interest or needs based
Emphasis based on adjudication	Emphasis placed on non-adjudication and alternative dispute resolution
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent based	Planning based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

3.3.3 Drug courts transform the way courts traditionally deal with drug-abusing offender criminal casework. The traditional process is adversarial, primarily legalistic, and emphasises the efficient but backward-looking adjudication of claims, rights and responsibilities and involves few participants and stakeholders. The transformed process of drug courts is collaborative, primarily therapeutic and needs-based and emphasises forward-looking, post-adjudication problem solving and dispute avoidance, with a wide range of participants and stakeholders. It is aimed at efficient case processing and effective case outcomes to reduce or stop criminal recidivism and drug abuse.

3.3.4 Drug courts aim to achieve practical outcomes for victims (friends and family of the offender), offenders (victims in another light) and the community. Moreover, drug courts also seek to 're-engineer' how the criminal justice system or the health system or the systems of social value respond to the problems of drug addiction. As Freiberg says, they promote system change 'outside the court house as well as within.'[97] A key method of promoting system change is the development of a genuinely collaborative partnership between the justice and health care systems in their approach to solving the drug addiction(s) of offenders. As well as relying on traditional court players, such as the magistrate and lawyers, the drug court equally relies upon alcohol and drug workers, medical specialists, psychologists, social workers and others. Criminal justice agencies, health care providers, social service providers,

[97] Freiberg, above n 96, 6.

community groups and their representatives work as a team to achieve drug court outcomes. The opposition between, and the traditional roles of, prosecution and defence are broken down to foster interdisciplinary education of the entire drug court team. The drug court magistrate leads the team by brokering and managing the relationships of the various drug court players.

3.3.5 Therefore, although referral to treatment (such as in the case of parole or community–based sentencing) has long been part of the way traditional courts in many Australian jurisdictions have dealt with drug offenders, the multidisciplinary, therapeutic and intensive way drug courts aim to deal with the drug-dependent offender throughout the assessment and treatment program is new and unique for the Australian legal system.

'Problem-Oriented' Courts and Therapeutic Jurisprudence

3.3.6 According to Freiberg, a leading proponent of innovative court reform, drug courts 'are one manifestation of an emerging judicial phenomenon which has become known as "problem-solving" or "problem-oriented" courts.'[98] These types of specialised courts, which include mental health courts and domestic violence courts as well as drug courts, aim to treat offenders as well as protect the community. They have a broader focus than traditional courts and are more willing to employ skills and knowledge from other disciplines, such as social work, criminology, psychology and psychiatry:

> They represent a move away from a focus on individuals and their criminal conduct to offenders' problems and their solutions. Their attempt to deal with the problems which may have contributed to an offender's criminal behaviour reflects a realisation by courts and legislators that social problems may require social, rather than legal solutions.[99]

3.3.7 Drug courts, like other 'problem-oriented' courts, emerged because substantial evidence had shown that tougher prison sentences imposed by traditional courts were not the solution for increased drug taking, crime and recidivism. Such behaviour was caused by underlying physical, psychological, social or economic circumstances, and it is more efficacious and arguably more economic to deal with such underlying causes rather than continually add drug-dependent offenders to burgeoning prison populations. The litany of failings and lapses of the traditional court system are outlined by Freiberg:

> Drug courts have emerged, in part, because the 'traditional' court system, having been confronted by the growing drug problem for the best part of three decades has failed, primarily because it refuses to recognise drug and alcohol addiction as being something other than a form of willful self-indulgence. It has failed because when it has identified a problem, it has acted slowly, often too late and has not provided adequate resources for treatment. It has been unable to recognise that with this group of offenders, a continuum of supervision or intervention is required from pre-trial, to court, to prison and then parole, or community-based orders. When treatment or other forms of intervention have been made available, it has been unable to maintain adequate supervision of offenders during the period of treatment, nor, indeed, to provide, or arrange for the provision of, other needed services such as housing, primary health care, financial support or employment opportunities. It has also failed because it could not accept constant relapse and recidivism as a normal part of the support process.[100]

To varying degrees, the drug court addresses and fixes these failings. It acts as a positive circuit breaker to the dreadful cycle of drugs and crime but also attempts, by aiming to reduce drug-related crime, to be more socially relevant than traditional courts.

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[98] Ibid 5.
[99] Ibid.
[100] Ibid.

3.3.8 Freiberg links the popularity of drug courts in the United States and more recently in Australia to,

> the renaissance of rehabilitation, the search for alternative forms of justice, the acceptance by judges of their managerial role and development of a 'problem-solving' orientation by police, courts and other agencies. The development and growing acceptance of the concept of 'therapeutic jurisprudence' has assisted, and in some cases underpinned, the growth of problem-oriented courts.[101]

3.3.9 The concept of therapeutic jurisprudence, first articulated in the late 1980s by Wexler and Winick in the context of mental health law,[102] is an emerging theory of justice in Australia. According to the International Network of Therapeutic Jurisprudence:

> Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is 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 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.[103]

3.3.10 Winick describes therapeutic jurisprudence as a study of the law's healing potential.[104] In the context of changes to court systems, therapeutic jurisprudence seeks to increase the therapeutic consequences of law and diminish the counter-therapeutic consequences of law. According to Freiberg, therapeutic jurisprudence intersects with the idea of a drug court at three levels:

> At the individual case level it looks for 'therapeutic moments', those times when criminal justice interventions can be effective. It also examines the nature of the interaction between individuals, the dynamics of the courtroom and the way in which legal and personal responsibility is accepted. At the court level, it sees the creation of a separate, specialised court based on immediate intervention, non-adversarial adjudication, hands-on judicial involvement and treatment programs with clear rules and structured goals as therapeutic imperatives. At the policy level it looks to the rules of plea-bargaining, evidence and substantive law to support the offender's recovery.[105]

Although it was first expressed and developed in the context of mental health law, therapeutic jurisprudence is presently a very compelling theory that now provides strong rationales and foundations for changes in court systems and processes.

3.4 The Ten Key Components of a Drug Court

3.4.1 The United States National Association of Drug Court Professionals identified ten key components for a successful drug court. According to the US Office of Justice Programs, this formula was designed to establish practical benchmarks 'for developing effective drug courts in vastly different jurisdictions and to provide a structure for conducting research and evaluation for program

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[101] Ibid 7.

[102] Ibid. See David B Wexler and Bruce .J Winick, "The Potential of Therapeutic Jurisprudence: A New Approach in Psychology and the Law" in J R P Ogloff (ed.), *Law and Psychology: The Broadening of the Discipline* (1992).

[103] David B Wexler, International Network of Therapeutic Jurisprudence <http://www.law.arizona.edu/depts/upr-intj/> at.11 September 2006.

[104] Bruce .J Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri at Kansas City Law Review* 33. See also Bruce .J Winick, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' (2002) 18 *Touro Law Review* 479.

[105] Freiberg, above n 96, 8.

accountability.'[106] Fox and Wolf, however, note that the components 'are intended only to be "inspirational" and not a "certification or regulatory checklist."'[107] Nevertheless, the key components have helped guide the development of drug courts firstly in America, later in Australia, and, through the United Nations Office on Drugs and Crime, in other parts of the world.

3.4.2 The components identified as essential features of a drug court are:

1) Integration of drug treatment services within a criminal justice case processing system;
2) Use of a non-adversarial approach to case resolution, while prosecution and defence counsel protect participant's due process rights;
3) Dominant and ongoing interaction of the drug court judge/magistrate with the offender;
4) Early identification of eligible participants who are promptly placed into the drug court program;
5) Access to a continuum of alcohol and drug treatment and supervision programs, including provision of related services such as housing, primary health care and financial support;
6) Monitoring of abstinence by frequent substance abuse testing;
7) A coordinated strategy of positive and negative reinforcement techniques to govern drug court responses to participants' compliance;
8) Employment of a system of monitoring and evaluation to measure the achievement of program goals and its overall effectiveness;
9) Continuing interdisciplinary education to promote effective planning, implementation and operation; and
10) Partnerships with public agencies and community-based organisations to generate local support and enhance drug court effectiveness.

3.4.3 In order to establish a drug court in Tasmania 'these basic and widely accepted elements of the courts process cannot be significantly diminished.'[108] Regardless of whether a drug court is established by legislation (as is the case in New South Wales and Victoria) or administrative direction (as is the case in South Australia and Western Australia), a separate court with a presiding judicial officer designated to deal with the specified class of drug dependent offenders must not derogate significantly from these components if it is to be recognised as a drug court.

1) **Integration of drug treatment services within a criminal justice case processing system –** Typically drug treatment services operate outside the criminal justice system. The services operate in a health care framework and while they may service clients who may be involved in crime or may even be defending a charge, a client's relationship to the criminal justice system is not a main concern. Additionally, people desiring treatment or therapy for their addiction typically participate in programs on a voluntary basis. The advent of drug courts has depended on and brought about a more integrated partnership between the justice system and the health care system. Drug treatment services are invited into the courtroom to assist the court with their deliberations and judgments. Progress in drug treatment affects clients' relationship to the justice and corrections system. Fundamentally, treatment is compulsory so the court must rely on a range of drug treatment services being available to provide

[106] Office of Justice Programs, *Defining Drug Courts: The Key Components* (1997).
[107] Aubrey Fox and Robert V Wolf, *The Future of Drug Courts: How States are Mainstreaming the Drug Court Model* (2004) 14.
[108] Freiberg, above n 96, 9.

individual and tailored drug treatment over an extended period. Without integration, the drug court is unable to supervise and manage effectively a defendant's course through treatment.

2) **Use of a non-adversarial approach to case resolution, while prosecution and defence counsel protect participant's due process rights –** In those states that have developed a drug court the police prosecutor and usually the state-based legal aid body have provided dedicated lawyers to work within the court. The prosecution and defence lawyers relieve themselves of their traditional adversarial roles and adopt roles that facilitate, within the bounds of the law, the drug court participants' graduation through the treatment program. McGlone describes the non-adversarial approach: 'Counsel on either end of the bar table are required to work together so that the judge or magistrate presiding is fully briefed as to the situation of a given defendant and may work towards their wellbeing. Defence counsel steps back, rarely getting between the judge and the offender. The prosecution adopts a conciliatory position.'[109] As both prosecution and defence lawyers are engaged in unfamiliar roles, they (along with the other drug court officials) often require training from the outset as to their changed roles.

3) **Dominant and ongoing interaction of the drug court judge/magistrate with the offender –** According to Freiberg, the role of the magistrate/judge is the lynchpin for drug courts to produce their desired outcomes. He says, 'the element of judicial supervision is crucial:'[110] the status and authority of the presiding judicial officer (magistrate or judge) is critical to changing the behaviour of the drug offenders. The first generation of drug courts in Australia has generally been staffed by dedicated and committed magistrates and judges with an active interest in the establishment and success of the courts. These magistrates/judges have often relinquished their other sitting roles to work full-time in the drug court. Their charismatic personalities and their willingness to interact frequently and directly with the defendant are significant factors in the success of drug courts. The management of this often intense relationship is central to the defendant successfully graduating in the program. The close supervision, management, encouragement and leadership of the drug court magistrate are pivotal to the success of the program.

   In an effort to reduce the burden on a single judge and the associated risks of burn out, Queensland has developed a group of twelve trained drug court magistrates to sit at the five drug courts operating within that jurisdiction. The large number allows leave, illness and other demands to be accommodated. These magistrates have undertaken training to develop their abilities and capacities as drug court magistrates.

4) **Early identification of eligible participants who are promptly placed into the drug court program –** In an ideal drug court model an arrested offender considered eligible for drug court would be brought before the court within the shortest period of time in order to take advantage of what Freiberg calls, 'the therapeutic moment that the legal intervention creates.'[111] In South Australia and Western Australia different models have been established to identify and screen cases suitable for drug court. The former is police-based, that is, a police officer (the Officer-in-Charge of the station) can identify an arrested person who meets the eligibility criteria as a candidate for a drug court program and remand that person to appear there as early as possible. Under this model, formal assessment is delayed until the person appears before the court. In Western Australia, a centralised court assessment and referral service has been established to identify and screen arrested persons based on a clinical assessment model. After this preliminary assessment, the drug court decides the pathway that is most suitable for the defendant (drug diversion, drug court, referral to ordinary courts for ordinary sentencing or transfer to County Court for more serious cases). Depending on the model

[109] Daniel McGlone, 'Drug Courts – A Departure from Adversarial Justice' (2003) 28 *Alternative Law Journal* 136, 138.
[110] Freiberg, above n 96, 9.
[111] Freiberg, above n 96, 17.

adopted and subject to there being clear eligibility criteria (in the legislation), early and objective identification and assessment of defendants remanded in custody or placed on bail can be performed by the police, corrective services or health authorities (or a combination of these). Also most drug court models allow for identification and referral to the drug court by other Magistrates Courts or higher courts.

5) **Access to a continuum of alcohol and drug treatment and supervision programs, including provision of related services such as housing, primary health care and financial support –** Before admitting a defendant to a drug treatment program, the magistrate/judge must be satisfied that there are facilities and resources available to supervise and control the defendant's participation in the treatment program. Most of Australia's drug court regimes have adopted phased programs that require the participant to progress from one phase to another over the course of one year or longer. Typically, the treatment programs involve:

    a) Initiation and stabilisation – usually involves weekly reports to the court;
    b) Consolidation and early re-integration – usually involves weekly contact with a probation officer and fortnightly reports to the court; and
    c) Re-integration – usually involves fortnightly contact with probation officer and monthly reports to the court.[112]

    The level of supervision decreases with each phase and an offender can proceed and regress through the stages depending on their level of achievement. While the broad three-staged treatment approach is fairly consistent from jurisdiction to jurisdiction, drug courts emphasise the development of tailored treatment programs that address the rehabilitation and lifestyle needs of the particular offender. The provision of a comprehensive drug treatment and supervision program enables a court to apply specific and diverse treatment options to an individual that appears before it.

6) **Monitoring of abstinence by frequent substance abuse testing –** As part of the treatment program, offenders must not use any illegal drug and not use any non-prescribed drug except in accordance with the directions of the court. Urine testing, especially random testing, is a key component of treatment programs. It is currently the most objective and efficient means to measure compliance with the abstinence conditions laid down by the court. Freiberg explains the significance of testing in the following manner: 'testing has an important role in clinical management, as a marker of clinical stability, as a tool for the therapist in advocating for or against the client and as a means of determining the client's honesty.'[113] During the early stages of a program urinalysis can occur three times a week but usually reduces to two times a week in the later stages. Standards Australia provides guidelines for laboratories undertaking urinalysis. AS/NZS 4308, last updated in 2001, has been designed for the analysis of urine for the five major abused drug groups — cannabis, cocaine, amphetamine types, opiates and benzodiazepines.[114]

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[112] Arie Freiberg, 'Drug Courts: Sentencing responses to Drug Use and Drug-related Crime' (2002) 27 *Alternative Law Journal* 282, 284.

[113] Ibid 285.

[114] Standards Australia is currently redeveloping the standards on the detection of drugs in urine. Draft Standard DR 06557 - Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (Part 1: Collection, on-site screening, storage, handling and dispatch), Draft Standard DR 06558 - Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (Part 2: Laboratory screening procedures) and Draft Standard DR 06559 - Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (Part 3: Laboratory confirmatory procedures) have been issued recently for public comment and are now available at http://www.sai-global.com/shop/Script/AboutSWatch.asp

7) **A coordinated strategy of positive and negative reinforcement techniques to govern drug court responses to participants' compliance –** A distinguishing feature of drug court programs is the application of a range of rewards or sanctions by the court while the defendant is undertaking the treatment program. According to Freiberg,

> one of the major differences between drug courts and the normal sentencing courts is the ability of the drug court to vary or adjust the sentence whilst it is in operation in response to the offender's progress on the treatment program. Because the programs are court based, these variations can be simple, frequent, quick and direct.[115]

Basically, rewards or sanctions are simply variations in the conditions of the order in a direction of less or more severity. Common rewards include a decrease in the amount of any monetary sanctions, decrease in the frequency of drug testing, decrease in the level of supervision, a change in the course of treatment, decreased frequency of attendance at a course of treatment and other privileges agreed to by the magistrate. Common sanctions include withdrawal of stated privileges, monetary penalties, an increase in the frequency of drug testing, an increase in the level of supervision, a change in the course of treatment, increased frequency of attendance at a course of treatment and imprisonment for usually up to 14 days for each failure to comply with the conditions of the order. Rewards or sanctions may be applied for by the corrective services officer or the defendant, or may be initiated by the magistrate. Positive and negative reinforcements need to be applied quickly, consistently, and publicly (that is, in the courtroom) in order to achieve their purpose.

8) **Employment of a system of monitoring and evaluation to measure the achievement of program goals and its overall effectiveness –** All of the drug court programs that have been introduced in Australia have from their inception been subject to evaluation. The evaluations have incorporated effectiveness assessments, process evaluations and cost-benefit analyses. While these evaluations have generally produced positive conclusions about the efficacy of drug court programs, the evaluations have varied widely in terms of their research rigour and have been generally weak methodologically. Successful evaluations require: clear and detailed description of aims, methods, processes and outcomes, statistically meaningful and adequate sample sizes, prospective and randomised designs, reliable and valid self-reports and measures, strategies to maximise retention of the sample, adequate follow-up periods and an affordable budget from the outset. Control groups and comparison groups need to be truly comparable, randomly selected and allocated. A methodologically rigorous and independent monitoring and evaluation of drug court program outcomes and processes ought to be a key feature of any proposed drug court regime. Such a feature enables drug court program structures to be adapted or modified during the course of its operation in order to meet identified shortcomings.

9) **Continuing interdisciplinary education to promote effective planning, implementation and operation –** The notion of a drug court team is central to the new court. The team is composed of legal, health, law enforcement and correctional professionals, all of whom work regularly with the magistrate/judge to keep the court functioning. Despite the conflicting interests that may arise within it, the group works together 'to help determine eligibility, to deal with legal or logistical matters, such as outstanding charges, to monitor the offender's progress, to formulate treatment plans and services, to recommend program conditions or changes to them, to advise on changes to program phases and on rewards and sanctions (including prison) and to advise on whether or not the program should be terminated for success or lack of it.'[116] These teams are often brought together before the actual opening of the court to share their knowledges and practices and develop the interdisciplinary synergy required of the drug court. The shared education and development enables coordinated strategic responses to program compliance and non-compliance by all the disciplines involved (police,

[115] Freiberg, above n 112, 284.
[116] Ibid.

prosecution, defence, probation, treatment, social workers, magistrate). Members of the court team who are not health care professionals develop a good working knowledge and understanding of addiction and recovery issues.

10) **Partnerships with public agencies and community-based organisations to generate local support and enhance drug court effectiveness –** Drug courts require a sophisticated infrastructure of government- and community-based organisations around them in order to work effectively. The United Nations Office on Drugs and Crime (UNODC) considers the close partnership between the justice and (public and community-based) treatment systems as arguably the most important feature of drug courts. The integration of these systems in the context of the drug court enables not only the therapeutic case management on which the court relies, but fosters local community support for the court and its broader goals. Before a defendant is ordered into a drug treatment program, the magistrate must be satisfied that there are public and community-based facilities available to supervise, control and support the rehabilitation of the defendant. Drug courts are unable to achieve their outcomes if they are controlled by one public agency only. In Queensland seven government departments (including justice and health) have formed a partnership with non-government organisations and community stakeholders to deliver and operate drug courts in that jurisdiction.

3.4.4 The ten key components of a drug court model outlined above have helped to guide drug courts in America initially and later in Australia. Research into what works and what does not in a drug court setting has brought these key components into sharper focus. For instance, ongoing judicial interaction rather than interaction with social workers has been shown to be more effective for high-risk offenders than low-risk offenders.[117] Findings such as these have implications for the establishment of drug courts in regional areas with smaller populations. Some courts are unable to harness the resources necessary to adopt all the components either because of funding shortfalls or a lack of access to treatment providers. The issue, therefore, becomes which components are truly essential for reducing the level of drug-related criminal activity, reducing offending behaviour, and reducing imprisonment rates. Is reduced adversarialism essential to the model in a small jurisdiction, for example? As Fox and Wolf remark, the drug court movement may have more to 'fear from excessive fidelity to the model'[118] than selective departures from it.

3.5 Australian Drug Courts: A State-by-State Snapshot

3.5.1 Drug courts in Australia have experienced a steady growth. It is rare that an idea coming out of the court system has caught and spread so quickly, especially an idea that reaches beyond the law to so many different fields. The recent development of the courts in Australia has required both enthusiasm and patience from all branches of government and professionals in the fields of law, law enforcement, health care and social science. The courts have survived criticism from opponents, tight budgets and independent evaluations. It appears as if drug courts are here to stay. They have been embraced as an effective and appropriate way to deal with drug abusing offenders.

3.5.2 While the underlying objectives, operating principles and core characteristics of Australian drug courts are fairly similar, their formation process differed across jurisdiction. Their procedures, priorities and means of achieving them also differ.

[117] Fox and Wolf, above n 107, 47.
[118] Ibid.

3.5.3 Although there is no single model for a drug court, the two basic options that operate in Australian jurisdictions can be described as pre-adjudicative (i.e. deferred prosecution) or post-adjudicative (i.e. deferred or suspended sentencing following a plea or finding of guilt).[119] According to the pre-adjudicative model, compliance with the drug treatment program is obtained via bail conditions. For example, the South Australian drug court operates under general bail legislation (*Bail Act 1985* (SA)), which provides judicial officers with wide discretion in dealing with offenders brought before the courts. Western Australia has adopted a three-tiered scheme some of which is based on the *Bail Act 1982* (WA) and some of which is based on pre-sentence orders created by the *Sentencing Legislation (Amendment and Repeal) Act 2003* (WA).[120] New South Wales, Queensland and Victoria, on the other hand, have adopted post-adjudicative models meaning that drug treatment is based on post-conviction sentencing orders. All of the Australian drug courts are to varying degrees separate and identifiable divisions or parts of the existing court structure within each jurisdiction. For example, the New South Wales drug court, established by the *Drug Court Act 1998* (NSW), is a completely separate entity exercising both local and district court jurisdiction. Conversely, the South Australian drug court is less a separate court and more a system of special sittings of the Magistrates Court with a magistrate dedicated to the program.

3.5.4 The various Australian drug court models have been extensively summarised.[121] Rather than go over well-travelled ground, this paper will provide a State-by-State snapshot of the drug courts in the five States. This snapshot of the drug court models will gesture to the key features and processes that may be adapted in order to establish a drug court pilot suitable for Tasmania.

New South Wales

3.5.5 The New South Wales drug court was established by the *Drug Court Act 1998* (NSW) and exercises both local and district court jurisdiction. Eligible defendants are referred from other courts within the catchment area.[122] Acceptance into the program results in a custodial remand for detoxification and assessment. This takes up to two weeks and each participant leaves with an individual treatment plan.

3.5.6 After the assessment the defendant is required to plead guilty and is given a suspended sentence. Successful completion of the three phase treatment program can take up to 12 months. The court can impose a series of sanctions or privileges during that time and attendance at court is usually reduced over the course of the program. If the program is not completed successfully the participant returns to court and may be re-sentenced. The NSW drug court targets serious offenders with many program participants entering the program from prison and returning to prison if unsuccessful in the program. In its initial phase, retention rates were low and more than 60% of participants were terminated from the program within the first year of treatment (10 graduates in the first 17 months).[123]

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[119] Freiberg, above n 112, 284.

[120] Freiberg, above n 3, 199. Freiberg says that pre-sentence orders 'allow a court to release an offender on bail, or to adjourn sentence allowing a finding of guilt for various periods on condition that the offender addresses her or his criminal behaviour in the meantime.'

[121] See Freiberg, above n 89; Freiberg, above n 96; Indermaur and Roberts, above n 2; and Indermaur and Roberts, above n 87.

[122] Additionally, NSW Magistrates can place defendants whose offending may not be as significant as those entering the Drug Court and are likely to be granted bail, into the Magistrates Early Referral into Treatment (MERIT) program. MERIT involves completing compulsory treatment as a condition of bail.

[123] Indermaur and Roberts, above n 87, 28 citing figures from Karen Freeman, 'Evaluating Australia's First Drug Court: Research Challenges' (Paper presented at Evaluation in Crime and Justice Conference, Canberra, 2003)

3.5.7 Indermaur and Roberts observe that the 'NSW Bureau of Crime Statistics and Research conducted rigourous process and outcome evaluations based on a randomised control group design.'[124] They summarise the main findings of these evaluations in the following manner:

> Drug court offenders took significantly longer to re-offend (drug and shop stealing offences) and had lower drug offending rates than the control group. Treatment costs were lower than imprisonment costs and positive benefits for participants included improvements in health and wellbeing.[125]

Since 2000 New South Wales has also operated a Youth Drug and Alcohol Court (YDAC), which functions under the control of the Children's Court.[126]

Queensland

3.5.8 Five drug courts (operating in the Magistrates Courts at Beenleigh, Ipswich and Southport (south east Queensland) and Cairns and Townsville (north Queensland)) were established in Queensland as a pilot project under the *Drug Rehabilitation (Court Diversion) Act* 2000 (Qld). Further legislation[127] was passed in 2006 to make the drug court a permanent sentencing option for participating courts. The Act and regulations[128] limit the number of people who can enter the system from each court each year.

3.5.9 To be eligible to be heard by the court, defendants must be adults, dependent on illicit drugs and this dependency must be a contributing factor to their offending. They must be likely to be sentenced to prison, not subject to a pending violent or sexual offence charge, live within the prescribed areas and plead guilty.

3.5.10 Participants receive an intensive drug rehabilitation order (IDRO), as a form of suspended sentence, which includes treatment by a team of specialists, drug testing and court supervision. These orders generally run from between 12 to 18 months. During that time the participant may receive added privileges or sanctions. Successful completion is taken into account when final sentencing is conducted at the end of the order.

3.5.11 Both the south east Queensland and north Queensland drug courts have been externally evaluated.[129] According to Indermaur and Roberts, the

> evaluation of the South East Queensland Drug Court reported no significant differences in recidivism rates (as measured by convictions) between the treatment and comparison groups as a whole, although program graduates had lower recidivism rates and longer times to re-offend.[130]

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[124] Ibid 29. See Karen Freeman, 'New South Wales Drug Court Evaluation: Interim Report on Health and Well-Being of Participants' (2001) *Crime and Justice Bulletin* 53; Karen Freeman, *The New South Wales Drug Court Evaluation: Health, Well-Being and Participant Satisfaction* (2002); Stephanie Taplin, *The New South Wales Drug Court Evaluation: A Process Evaluation* (2002); and Bronwyn Lind et al, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (2002). All of these reports are available at http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_pub_dtoh#drug_court

[125] Ibid.

[126] See http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_index. An evaluation review of the YDAC – Terry Eardley et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* (2004) – also appears on this website.

[127] *Drug Legislation Amendment Act 2006* (Qld).

[128] *Drug Rehabilitation (Court Diversion) Regulations 2000* (Qld).

[129] See Toni Makkai and Keenan Veraar, *Final Report on the South East Queensland Drug Court* (2003) and Jason Payne, *Final Report of the North Queensland Drug Court* (2005).

[130] Indermaur and Roberts, above n 87, 29.

3.5.12 Seventy people had graduated from the south east Queensland drug court by the cut-off date of the evaluation (September 2003).[131]

South Australia

3.5.13 South Australia's drug court operates in the Adelaide Magistrates Court. It targets adults dependent on illicit drugs who live within the Adelaide metropolitan area and who have committed offences that would likely attract a term of imprisonment. The participants do not have to be charged with a drug offence but their offending must have resulted from their drug addiction. The South Australian program is open to both offenders who have a current dependency on illicit drugs or offenders who have had a previous dependency which is not current due to an involuntary or forced abstinence; but who have a high probability of returning to drug use. Participants must plead guilty both to the most serious and bulk of offences with which they have been charged.

3.5.14 The court builds on the broad remand provisions available in South Australia which allow a deferral of sentence for a period up to 12 months. The drug court program, characterised as an 'intervention program' within the legislation,[132] is post-plea but pre-adjudicative. Those accepted into the 'intervention program' are given an individual treatment plan, which can include electronically monitored home detention bail, random but regular urinalysis, withdrawal management, pharmacological treatment and vocational training. Breaches of these bail (intervention program) conditions, further use of drugs or re-offending may lead to sanctions, expulsion from the program or if necessary, imprisonment. Successful completion of the program – which typically lasts for up to twelve months – will be taken into consideration at sentencing.

3.5.15 While not a comprehensive evaluation of the South Australian drug court, the study into the offending profiles of drug court program completers undertaken by the South Australia Office of Crime Statistics and Research was able to draw some positive conclusions.[133] It found that 10 of 43 people who completed the drug court program (or 23.3%) were not charged with any offence in the 'free time' following program completion and that, of those who continued to offend post-program (33), the majority were charged with fewer and/or less serious offences in the post-program period than in the pre-program period.[134]

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[131] Freiberg, above n 3, 201.

[132] Section 3 of the *Bail Act 1985* (SA) defines an 'intervention program' as 'a program that provides—

(a) supervised treatment; or
(b) supervised rehabilitation; or
(c) supervised behaviour management; or
(d) supervised access to support services; or
(e) a combination of any one or more of the above,

designed to address behavioural problems (including problem gambling), substance abuse or mental impairment.'

[133] Elissa Corlett, Grace Skrzypiec and Nichole Hunter, *Offending Profiles of SA Drug Court Pilot Program 'Completers'* (2005).

[134] Ibid 4.

Western Australia

3.5.16 In Western Australia, the drug court operates in the Perth Magistrates Court, the Perth Children's Court and the Perth District Court. The Magistrates Court drug court is supported by the *Magistrates Court Act 2004* (WA), which enables the Chief Magistrate to establish divisions within the court to deal with specific classes of cases or offenders, such as drug cases or family violence cases.

3.5.17 The *Sentencing Legislation (Amendment and Repeal) Act 2003* (WA) allows a magistrate to make pre-sentence orders of up to two years upon a finding of guilt with the condition that relevant offending behaviour is addressed.[135] Following a plea of guilty, defendants are placed within one of three regimes depending on their level of previous offending and the type of drug involved. The 'Brief Intervention Regime' is a pre-sentence option for second or third time cannabis offenders and involves three sessions of drug education. The 'Supervised Treatment Intervention Regime' (STIR) is for minor to mid-range offenders who are required to undertake case managed treatment before sentencing. The 'Drug Court Regime' (DCR) is for serious drug dependent offenders and consists of more intensive treatment and judicial case management. Juvenile offenders with drug abuse problems can access DCR via a special sitting of the Children's Court.

3.5.18 The Perth drug court pilot program was evaluated in 2003 by the Crime Research Centre based at the University of Western Australia. The evaluation 'found no significant differences between the recidivism rates of offenders placed on the drug court program and comparison groups.'[136] It also found that the costs of the drug court compared to the orthodox sentencing approach were roughly the same. Any establishment costs associated with the court were 'largely offset by reductions in prison and detention costs for offenders.'[137] Despite not demonstrating a distinct crime reduction effect, the study found that the court was widely supported across the community and concluded that overall the court provided a useful and innovative means of providing community-based interventions for drug offenders.[138]

Victoria

3.5.19 The Victorian drug court arose out of the review of Victoria's sentencing laws conducted by Frieberg in 2001-02. In August 2001, the *Drug Courts and Related Sentencing Options* discussion paper[139] was released then subsequently acted upon by the Attorney-General. The *Sentencing (Amendment) Act 2002* (Vic) was introduced establishing a drug court division of the Magistrates Court and creating the drug treatment order (DTO) as a sentencing order within the terms of the *Sentencing Act 1991* (Vic). The Victorian drug court pilot was completed in June 2005 and ongoing funding has been committed to continue the initiative.

3.5.20 The drug court is located in Dandenong and services defendants within a specific geographical catchment area.[140] Only adult defendants who are addicted to illicit drugs (or alcohol), likely to be imprisoned for a drug-related offence and prepared to plead guilty are eligible. If they are willing to enter the program, they are placed on a DTO, which may run for up to two years.

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[135] Indermaur and Roberts, above n 87, 29.
[136] Ibid.
[137] Ibid.
[138] Freiberg, above n 3, 202.
[139] Freiberg, above n 96.
[140] Other Magistrates Courts in Victoria can place defendants within the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program. The 12 week program provides assessment, treatment and support for defendants on bail.

3.5.21 DTOs have two components; a custodial sentence and a treatment and supervision component. Failure to complete the latter component renders the participant liable for the first component.

3.5.22 The Victorian drug court was the subject of a multi-faceted evaluation,[141] the key findings of which appear below:[142]

- During time spent out of custody in the study period (i.e. 'free' days), members of the treatment group (drug treatment order participants) committed offences at a lower rate (4.49 offences per 365 free days) than the comparison group (5.80). In other words, when the 'opportunity' factor is taken into account, the drug court is having a greater effect on reducing offending rates compared to the alternative of incarceration.
- Drug court graduates re-offended at 32% of the rate of the comparison group who had been in prison — a 68% reduction in re-offending among graduates.
- The analysis of costs and effectiveness (as measured by recidivism rates) of the court indicates that, when operating at a 'steady state' level (commensurate with a 95% participation rate), the court is both less costly and more effective than the alternative of incarceration.

The benefit-cost analysis indicates that the drug court program appears to be having a positive impact and as greater participant graduation leads to an accumulation of graduates re-integrated into the community, the benefits of the program will increase.

Comparison of the Eligibility Criteria of Drug Courts in Australian Jurisdictions

3.5.23 While Australian drug courts vary in terms of their location and targeting of offenders and substances, there is significant similarity in terms of the eligibility criteria for drug dependent offenders to enter a drug court treatment program. The table below, adapted from one produced by the Australian Institute of Criminology,[143] outlines the eligibility criteria in each of the Australian jurisdictions and other key differences and similarities in Australian drug courts.

[141] Turning Point Alcohol & Drug Centre and Health Outcomes International independently evaluated the Drug Court pilot in December 2004. The Department of Justice also commissioned Acumen Alliance to complete a 'Benefit and Cost Analysis of the Drug Court program'.

[142] Department of Justice (Victoria), *The Drug Court - An Evaluation of the Victorian Pilot Program*, (2006) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Courts/Victorian+Courts/JUSTICE+-+The+Drug+Court+-+An+Evaluation+of+the+Victorian+Pilot+Program+%28PDF%29>.

[143] See Australian Institute of Criminology, *Comparison of Drug Courts in Australian Jurisdictions*, Australian Responses to Illicit Drugs: Drug Courts <http://www.aic.gov.au/research/drugs/responses/drug_courts.html> at 11 April 2005 and Indermaur and Roberts, above n 2, 145.

Table 5: Comparing Drug Courts

	NSW	QLD	SA	VIC	WA
Date started	1999	2000	2000	2002	2000
Length of pilot	2+	2+	3+	3	2+
Legislative base	yes	yes	no	yes	partial
Locations	1	5	3	1	3
Limit on number of participants	no	yes	no	no	no
Initial establishment budget $millions/yrs	13.5/2	6.3/2.5	NA	NA	5.5/4
Evaluations	yes	yes	yes	yes	yes
Eligibility					
Juveniles	no*	no	no	no	yes
Likely to be imprisoned	yes	yes	no	yes	no
Plea of guilty	yes	yes	yes	yes	yes
Dependent illicit drug use	yes	yes	yes	yes	yes
Resides in catchment area	yes	yes	yes	yes	not stated
Referred from other court	yes	no	yes	yes	no
Willingness to participate	yes	yes	yes	yes	yes
Previous criminal record	yes	yes	yes (no previous violent offences)	yes (not on parole or other community -based sentence)	yes
Only drug offences	no	no	no	no	no
Any pending offence	yes	yes	yes	yes	yes
Alcohol excluded	yes	no	yes	no	yes
Pending violent offences	no	no	no	no	not stated (violent offenders eligible for referral to the court)
Pending sex offences	no	no	no	no	not stated
Mental illness	no	not stated	not stated	not stated	not stated
Currently in gaol	no	no	not stated	no	no

* A Youth Drug and Alcohol Court operates in New South Wales for juveniles.

3.5.24 All of the drug courts, therefore, restrict who may be eligible for a hearing and treatment by the court. In order to qualify, an offender must be an adult who:

- has drug dependence as a contributing factor to their offending;
- normally would be sent to prison;
- lives within a prescribed area;
- is willing to be assessed for rehabilitation; and
- has no prior history or violent or sexual offending.[144]

3.5.25 Makkai explains the exclusion of violent offenders in the following manner:

> Firstly, governments have been concerned about community perceptions, and sentiment, that violent offenders be sent to prison.
> Second, many treatment agencies are reluctant to take particular kinds of offenders, for example, arsonists, which could result in a potential law suit for the treatment provider.
> Third, courts and police are reluctant to send violent offenders to a program that can result in the offender being 'at large' in the community.[145]

3.5.26 The focus of these courts is treatment. They are not designed to be forums in which offenders contest the charges that are brought against them. Accordingly, in order to enter into a drug court program, the offender must plead, or indicate that they intend to plead, guilty. While this may appear unfair and contrary to accepted practice, it means that, in Freiberg's words, 'the court's resources are not diverted from its main task of supervision and treatment.'[146] Contests as to guilt or innocence can still take place in other, including referring, courts. This allows the offender's rights to challenge the nature, number and seriousness of the charges they are facing to be preserved.

3.5.27 An important eligibility criterion is the likelihood of imprisonment. Australian drug courts, unlike the courts in the US, tend to focus on what Makkai calls the 'hard end of offenders': those with a long history of offending, including property offending.[147] She says that focus is influenced by three reasons:

> The first is that drug treatment courts are seen as the 'last' option before incarceration in a range of diversionary strategies. The second reason is undoubtedly the costs associated with the establishment and maintenance of the drug treatment court. A third reason is the desire to reduce any likely impact of net widening through police prosecuting drug offenders who should be dealt with via less costly diversionary schemes.[148]

3.5.28 This focus on difficult or serious cases is supported by evidence concerning which categories of offenders are most likely to benefit from drug court intervention. Research studies are beginning to indicate that the following offenders perform better in drug court than conventional court:

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[144] Makkai, above n 76, 1582.
[145] Ibid.
[146] Freiberg, above n 112, 283.
[147] Makkai, above n 76, 1582.
[148] Ibid.

- 'high risk' offenders (i.e. those with previous failed treatment and other risk factors such as personality disorders);
- those facing greater legal consequences for failing drug court; and
- (regular) drug offenders.[149]

Cissner and Rempel observe, 'courts accepting participants over whom they can exercise more legal coercion stand to produce better outcomes.'[150]

3.5.29 Victoria is the only Australian jurisdiction that targets alcohol as well as illicit drugs in its eligibility criteria for drug court (although in Queensland alcohol is not explicitly excluded).

3.6 International Support for Drug Courts

3.6.1 The United Nations Office on Drugs and Crime (UNODC) has also contributed to the growing movement in support of court directed treatment and rehabilitation programs. In 1999 UNODC initiated an Expert Working Group on Drug Treatment Courts. It considered drug courts to be a very effective element of an overall package of responses to drug abusing offenders. This working group prepared a report and guide on how best to establish and implement drug treatment courts. UNODC's Legal Advisory Programme has provided technical assistance to help plan, establish and operate courts in Jamaica, Mauritius, Canada and Scotland. The expert working group formulated 12 key principles for drug courts[151] that mirror substantially the ten key components developed by the United States National Association of Drug Court Professionals.[152] Of greater significance, however, the group identified the following twelve success factors for drug courts:[153]

1) Effective judicial leadership of the multidisciplinary drug court program team;

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[149] Cissner and Rempel, above n 92, 14.

[150] Ibid 15.

[151] The twelve key principles for court-directed treatment and rehabilitation programs in Drug Courts as identified by the United Nations Office on Drugs and Crime Expert Working Group are:
1. Integrated justice/health care system processing of common casework;
2. Non-adversarial approach to case problem-solving by the judge, prosecutor and defence;
3. Prompt and objective identification and program placement of eligible offenders;
4. Access by participants to a broad continuum of treatment and rehabilitation services;
5. Objective monitoring of participants' compliance through substance abuse testing;
6. Coordinated strategic response to program compliance and non-compliance by all disciplines involved (police, prosecution, probation, treatment, social workers, court);
7. Ongoing direct judicial interaction with participants;
8. Program performance monitoring and evaluation (of both process and impact);
9. Ongoing inter-disciplinary education of the entire Drug Court team;
10. Partnerships for program effectiveness and local community support;
11. Ongoing case management including social re-integration support; and
12. Adjustable program content for groups with special needs (e.g., mental disorders).

[152] See above Part 3.4..

[153] United Nations Office on Drugs and Crime, *UNODC's Expert Working Group on Drug Treatment Courts -- Success Factors and Best Practice* <http://www.unodc.org/unodc/en/legal_advisory_courts.html> at 14 March 2006.

2) Strong interdisciplinary collaboration of judge and team members while each also maintains their respective professional independence;

3) Good knowledge and understanding of addiction and recovery by members of the court team who are not health care professionals;

4) Operational manual to ensure consistency of approach and ongoing program efficiency;

5) Clear eligibility criteria and objective eligibility screening of potential participant offenders;

6) Detailed assessment of each potential participant offender;

7) Fully informed and documented consent of each participant offender (after receiving legal advice) prior to program participation;

8) Speedy referral of participating offenders to treatment and rehabilitation;

9) Swift, certain and consistent sanctions for program non-compliance but with rewards for program compliance;

10) Ongoing program evaluation and willingness to tailor program structure to meet identified shortcomings;

11) Sufficient, sustained and dedicated program funding; and

12) Changes in underlying substantive and procedural law if necessary or appropriate.

3.6.2 According to the UNODC, successful drug courts require a close partnership between the justice and healthcare systems. That partnership jointly determines the appropriate level of treatment and the level of court-based monitoring of program participants through ongoing case management, regular court appearances, incentives to reward progress and sanctions to correct non-compliance. The partnership also regulates the mandatory drug testing designed to reinforce monitoring and strengthen participant accountability.

3.6.3 UNODC is confident that drug courts work. It supports the view that evaluations undertaken across many jurisdictions demonstrate consistently that drug courts effectively reduce recidivism and the underlying addiction problems of drug-abusing offenders. UNODC argues that the evaluations show higher non-recidivism and retention in treatment rates than alternatives, whether traditional treatment or prison.

Part 4

The Development of a Drug Court Pilot in Tasmania

4.1 A Specifically Designated Court

4.1.1 Modern Australian drug courts represent a unique philosophy and practice. The legislation under which some of these courts are established specifically articulates some of the philosophical and practical aims of drug courts. For example, section 3 of the *Drug Court Act 1998* (NSW)[154] states:

> (1) The objects of this Act are:
>
> (a) to reduce the drug dependency of eligible persons and eligible convicted offenders, and
>
> (b) to promote the re-integration of such drug dependent persons into the community, and
>
> (c) to reduce the need for such drug dependent persons to resort to criminal activity to support their drug dependencies.
>
> (2) This Act achieves its objects in relation to eligible persons by establishing a scheme under which drug dependent persons who are charged with criminal offences can be diverted into programs designed to eliminate, or at least reduce, their dependency on drugs.
>
> (2A) This Act achieves its objects in relation to eligible convicted offenders by establishing a scheme for compulsory drug treatment and rehabilitation for certain drug dependent persons.
>
> (3) Reducing a person's dependency on drugs should reduce the person's need to resort to criminal activity to support that dependency and should also increase the person's ability to function as a law-abiding citizen.

4.1.2 By focusing on the rehabilitation of offenders from drug (or alcohol) addiction these courts seek to reintegrate offenders into the community and ultimately protect the community. Drug courts aim to improve community safety by reducing crime associated with illicit drug use and reducing recidivist behaviour.

4.1.3 Tasmania is in an excellent position to learn from the drug court models present in other jurisdictions and combine the best features of the existing drug court treatment programs for the development of its own scheme. Any proposed scheme, however, must not simply conflate the idea of a court that regularly deals with drug issues – the current situation – with a court that is specifically designed and equipped to deal with drug-dependent offenders. The distinction is significant. According to Freiberg, a designated drug court must have the following features:

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[154] See also ss 3(1) and 3(2) of the *Drug Rehabilitation (Court Diversion) Act 1999* (Qld) and s 18X(1) of the *Sentencing Act 1991* (Vic).

- Appointment of judicial officers to sit in the jurisdiction on an ongoing basis rather than rotation;
- Judicial officers dealing with individual cases must retain supervision and control of them during the currency of the case;
- Judicial officers appointed with particular interest/skill/qualification/aptitude/personality and commitment to the concept of a drug court;
- Judicial officers who work with a specifically appointed multidisciplinary team that includes legal practitioners, drug clinicians and treatment agencies; and
- Provision of special services to support the work of the court.[155]

4.1.4 A drug court could sit in Tasmania on a part-time basis, for example, three days a week, with the judicial officer resuming normal duties for the remainder of the week. A drug court must have the powers, facilities, resources and procedures to implement the necessary supervision, treatment and support.

4.1.5 A drug court manifests a strong commitment to dealing with drug use and drug-related crime. The development of such a court enables Tasmania to offer a variety of responses to offenders who are drug dependent. The drug court program focuses on repeat offenders, primarily property offenders, whose activity is driven largely by their drug dependence. It is able to complement the Police Diversion Program that focuses mainly on minor drug offenders or first-time offenders. It is vital that diversionary schemes not be constrained to dealing with people on drug charges or first-time offenders only. The Police Diversion Program is effective but limited in terms of its scope and possible effects. Additional and more sophisticated approaches to drug–crime diversion in Tasmania ought to be seen through a lens of the continuum of responses to the drugs/crime nexus.

4.2 Clarifying where Drug Courts Sit as Diversionary Measures

4.2.1 It is helpful to consider Australian methods of drug–crime diversion as consisting of five key approaches. Although the concept of drug diversion has been around for decades,[156] funding committed under the Council of Australian Governments Illicit Drug Diversion Initiative, has seen improved efforts being applied to 'diverting drug dependent offenders away from any contact, or deeper contact, with the criminal justice system.'[157] According to the Australian Institute of Criminology (AIC), the five key approaches represent a continuum of opportunities for diverting offenders from the criminal justice system or minimising their progress through the system. They also represent opportunities for diverting illicit substance users from regular illicit drug use and into treatment. At its most basic level, therefore, drug diversion provides an opportunity for people with drug problems to address their drug use and make positive changes to their drug using behaviour. Within the five broad strategies of drug–crime diversion identified by the AIC, there are a very large number of possible interventions and each intervention can be implemented in different ways and in different combinations. The AIC summarises the five key approaches to diversion in the following manner:[158]

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[155] Freiberg, above n 96, 13.
[156] See Indermaur and Roberts, above n 2 and King, above n 68.
[157] Indermaur and Roberts, above n 2, 138.
[158] Australian Institute of Criminology, 'Australian approaches to drug-crime diversion' (6 May 2004) 23 *AICrime Reduction Matters* <http://www.aic.gov.au/publications/crm/crm023.pdf> at 14 March 2006. See also C Spooner,

1. **Pre-arrest** – i.e. when an offence is first detected, prior to a charge being laid. Diversionary measures here can include *police discretion* (e.g. offence detected but no action taken); an *infringement notice* (e.g. fine but no record); *informal warning* (no record); *formal caution* (verbal warning with record kept, but no further action); and *caution plus intervention* (i.e. warning and record, plus information or referral to an intervention program). Tasmania's Police Diversion Program fits into this category.

2. **Pre-trial** – i.e. when a charge is made but before the matter is heard at court. Measures can include *treatment as a bail condition* (e.g. the implications of the defendants' compliance or non-compliance with drug treatment are considered at the trial); *conferencing*; and *prosecutor discretion* (e.g. treatment offered as alternative to proceeding with prosecution). MERIT and CREDIT, which we shall examine in greater detail below, fit into this category.

3. **Pre-sentence** – i.e. after conviction but before sentencing. Includes measures such as *delay of sentence* where the offender may be assessed or treated. The process can include sanctions for non-compliance and incentives such as no conviction recorded.

4. **Post-conviction/sentence** – i.e. as a part of sentencing. Diversionary measures here include *drug courts* (i.e. judicially supervised or enforced treatment programs); *suspended sentences* of imprisonment requiring compliance with specific conditions (e.g. participation in treatment, abstinence from drugs, avoidance of specific associates, etc.); and *non-custodial sentences* involving a supervised order, probation or bond requiring participation in treatment as part of a sentence. The court powers under s 37(2) of the Tasmanian *Sentencing Act 1997* (Tas) fit into the final component of this category, as we shall see later.

5. **Pre-release** – i.e. prior to release from detention or gaol on parole. Options include *transfer to drug treatment* (e.g. while still in custody, being transferred to a secure residential treatment program which is supervised 24 hour a day) and *early release to treatment* that enables an inmate being released early from detention into a structured, supervised treatment program.

W Hall and R Mattick, 'An Overview of Diversion Strategies for Australian Drug-related Offenders' (2001) 20 *Drug and Alcohol Review* 281.

Pre-trial or Court-related Diversion

4.2.2 In terms of their goals, philosophies and procedures, drug courts (as problem-oriented courts) are quite dissimilar to court-related drug diversion schemes. These schemes, which have also emerged strongly over the last decade in response to IDDI, include a courtroom element but the court is not central to the drug treatment and intervention as it is in drug courts. Consequently, drug diversion schemes based around bail conditions, such as MERIT in New South Wales and CREDIT in Victoria, are criminal justice interventions that may be best described as 'court-based' or 'court-related'.[159] Freiberg notes that there is some confusion about the relationship between problem-oriented courts and court-related drug diversion programs.[160] Significantly, court-related drug diversion schemes like the MERIT (Magistrates Early Referral Into Treatment) Program and CREDIT (Court Referral and Evaluation Into Treatment) Program generally do not envisage the court providing direct, tailored and ongoing supervision for the defendant. Rather, these diversion schemes involve a case coming quickly before a court following an arrest or perhaps a plea of guilty, and the court referring the defendant away to other agencies during the bail period. In many cases there is little or no involvement by the court in ongoing case management of the person. The best-known examples of these schemes are MERIT[161] and CREDIT.[162]

4.2.3 Both MERIT and CREDIT are located at the Magistrates Court level and allow adult defendants with drug problems to work towards rehabilitation as part of the bail process. The programs are aimed at defendants arrested for non-violent offences who have a demonstrable illicit drug problem, who are at risk of committing further offences whilst on bail, who would normally be released on bail, and/or are suitable for drug treatment. Referral to MERIT/CREDIT can be made via a Magistrate, police, legal representative, court nominee, family or the defendant him or herself. Violent offenders, offenders charged with sexual offences and offenders charged with serious crimes are normally ineligible for such schemes.

4.2.4 Before entering these court-related diversion schemes the prospective participant must give their consent to be involved in a drug treatment program. As these schemes take place at the pre-trial phase, agreement to become involved in diversion is not considered an admission of guilt for the offence(s). The approval to participate in the program comes from the Magistrate. After an assessment by a drug clinician, a supervised drug treatment program is developed to meet the defendant's individual needs. Importantly, the legal basis for the treatment is the court's ruling that that the defendant's involvement in MERIT or CREDIT is a condition of their bail. It has been observed that these diversion schemes operate somewhere between bail and sentence.[163] Court-related diversion schemes re-think the original purposes of bail, the length of bail and the conditions

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[159] Freiberg, above n 3, 198. See also King, above n 68 who refers to these schemes as 'court diversion programs': 'Court diversion programs generally involve adjourning cases involving less serious offenders with less entrenched substance abuse problems while the person undergoes treatment through a drug treatment agency.'

[160] Freiberg, above n 3, 198.

[161] In NSW, funding for the MERIT program stems from an Illicit Drug Diversion Initiative (IDDI) Funding Agreement entered into by the Commonwealth and NSW Governments. MERIT is seen to complement the (Adult) NSW Drug Court and the Youth Alcohol and Drug Court. Unlike the drug court programs, the defendant is not required to enter a plea of guilty in order to participate in the MERIT program. MERIT originally started as a trial program in two NSW Local Courts. Following the success of these trials, the program was rolled-out across NSW.

[162] In Victoria, the CREDIT program was established in 1998. In 2004 CREDIT merged with the Bail Support Program, an initiative aimed at enhancing the likelihood of a defendant being granted bail and successfully completing the bail period.

[163] Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: The Conflation of Dispositional Options' (2004) 15 *Current Issues in Criminal Justice* 220.

normally attached to a bail order to cater for defendants with drug dependency issues. The problem of conflating the dispositional options of bail and sentence is remarked upon by Freiberg:

> The primary purpose of bail is to ensure that the alleged offender appears before the court to answer the charges made against him or her. In theory, bail is not, and should not be, a dispositional option which presupposes a finding of guilt or which operates in fact to ensure that such a finding of guilt is never made. Though the aims of a pre-court diversion scheme may be laudable, the means by which diversion may be achieved should be commensurate with the purposes of the law which is used to implement those aims.[164]

4.2.5 As part of these pre-trial or court-related diversion schemes, the defendant is case-managed by corrective services (rather than a court) throughout their treatment program whilst on bail. Participants are interviewed by assessors (drug clinicians) to determine the nature of their drug problem(s) and the type of treatment that is available and suitable for them. During the bail period, participants:

- undertake their drug treatment program as agreed with the caseworker and approved by the Magistrate;
- abide by all conditions of bail and their undertakings under the diversion program;
- receive support and guidance from their caseworker; and
- may appear before a Magistrate to provide updates on their treatment progress.

4.2.6 If any conditions or undertakings are not complied with during the bail period, it is initially the caseworker that attempts to resolve and rectify the problems. If unable to resolve the problems, the court will be notified and hear the circumstances surrounding the non-compliance with the undertakings or bail conditions. Magistrates also receive regular reports of the participants' progress. The MERIT and CREDIT programs typically last three to four months, reflecting the average Local Court/Magistrates Court bail period.

4.2.7 Contestable court matters are usually adjourned while the defendant completes the program. The final hearing and sentence usually coincides with the completion of the treatment program, enabling the Magistrate to consider the defendant's progress in treatment as part of final sentencing. At this hearing, the Magistrate hearing the case is provided with a report from the caseworker and other relevant people. The report gives information on the participant's drug treatment and provides recommendations for any further treatment. A detailed aftercare program is formulated to assist participants to further their drug rehabilitation if possible. Failure to respond positively to the drug treatment program will not be dealt with by punitive measures. If convicted of the offence(s) as charged, the final sentence will relate to that offence only, and not to any failure to respond to treatment.

4.2.8 South Australia, Western Australia and Queensland also operate similar court-related drug diversion initiatives that complement the operations of both pre-arrest programs and drug courts in those jurisdictions. The Court Referral & Assessment Drug Scheme (CARDS) (SA), Pre-sentence Opportunity Program (POP) (WA) and the Queensland Magistrates Early Referral into Treatment (QMERIT) program also aim to help suitably motivated drug offenders to overcome their problematic drug use and end their associated criminal behaviour through court enforced and supervised treatment programs based around bail.

[164] Freiberg, above n 89, 229.

4.2.9 While there are some differences in the eligibility requirements, legislative bases, program requirements, scope and management of the various court-related diversion programs identified above, the programs are broadly comparable and evidence suggests they clearly work for some classes of defendants. Interestingly, these sorts of drug diversion schemes operate in the context of a more or less comprehensive state-based diversion programs that operate on a continuum of less serious offences/drugs to more serious offences/drugs. In other words, these pre-trial court-related diversion schemes complement other diversionary programs such as pre-arrest programs (such as the Police Diversion Program in Tasmania) and post-sentence programs, such as drug courts.

4.2.10 It is important to bear in mind, therefore, that court-related diversion schemes are unable to take the place of, and achieve the outcomes that, drug courts have been shown to achieve. Crucially, unlike drug courts, the MERIT- and CREDIT-type programs present treatment for drug problems in a manner that is essentially unconnected and independent from the functioning of the court. Court-related schemes involve defendants being referred to programs by the courts but do not involve the court as a central player in the ongoing treatment program. Consequently, the goals of court-related diversion programs are narrower than drug courts. These programs aim for the:

- successful completion of bail by defendants who would otherwise be remanded in custody;
- successful placement of defendants in drug treatment/rehabilitative programs; and
- long-term reduction in involvement of defendants in the criminal justice system.

4.2.11 On the other hand, and as we have noted previously, the aims of drug courts are both more ambitious and expansive. Drug courts aim to improve community safety and reintegrate offenders back into the community.

4.2.12 There are other key differences between drug courts as problem-oriented courts and court-related drug diversion schemes. Some of the key features of a drug court that are not present in court-related diversion schemes are the:

- dominant and continuing role of a dedicated drug court magistrate;
- frequent contacts with the court;
- frequent substance abuse testing;
- system of graduated sanctions and incentives;
- implementation of a multidisciplinary team approach with specific roles for defence counsel, prosecution, corrections and health professionals; and
- designation of a court for dealing with the specified class of offenders.

4.2.13 Also, drug court programs envisage treatment durations of somewhere between twelve and twenty-four months and accept relapse as a common feature of the programs. On the other hand, the required treatment time for pre-trial diversion schemes of the nature of CREDIT and MERIT is approximately eight to twelve weeks and the schemes envisage only between four and eight counselling sessions as part of the treatment program. These schemes also target less serious offenders — participants would normally expect to receive a fine or community-based order — while drug courts target 'hard end' offenders, that is, more serious offenders who are likely to incur gaol sentences of at least one year. Finally, court-related diversion schemes do not fundamentally alter the relations between the defendant and the criminal justice system. Laws do not need to change, magistrates need not alter their judicial approach, and courtroom procedures do not need to dramatically change. Drug courts, however, do fundamentally alter the relations between the defendant and the criminal justice system. For the drug-dependent defendant encountering a drug court for a first time, it is unlike any other court they would have experienced.

Table 6: Comparing Diversion Interventions

Feature	Drug Courts	Court-related diversion
Target Group	Serious offenders likely to be imprisoned	Less Serious offenders
Legislative basis	Generally yes	Generally no
Required Treatment time	1-2 years	8-12 weeks
Guilty plea required	Yes	No
Willingness to participate	Yes	Yes
Court	Magistrates and above	Magistrates
Specialist Magistrate	Yes	No
Sanctions/Incentives	Yes	No
Program requirements	Tailored program that may include residential rehab, cognitive behaviour therapy, pharmacotherapy, individual counselling and so on.	Assessment and 4-8 counselling sessions

4.2.14 In most cases, court-based diversion programs and their treatment components have been funded through the Australian government as part of the Council of Australian Governments' Illicit Drug Diversion Initiative (IDDI). As noted, this initiative is part of a national approach to the prevention of and early intervention in illicit drug use. The Tasmanian government has recently announced that it has received funding under the Commonwealth IDDI to implement a two-year pilot program for the diversion of suitable offenders to programs that combine assessment, case management and treatment for the offending behaviour and substance abuse. The court diversion program will aim to provide treatment for eligible offenders whose drug abuse causes their offending behaviour. While the details about the 'court mandated drug diversion program' are yet to be released, the program appears to more closely resemble a MERIT- or CREDIT-type pre-trial, court-related diversion scheme rather than a drug court. Accordingly, it is likely to involve the referral of less serious offenders with less entrenched substance abuse problems to drug treatment agencies. There is also likely to be little or minimal involvement by the court in ongoing case management of the offender. There are no indications currently that new legislation will be adopted to accommodate the imminent court mandated drug diversion program.

4.3 Current Sentencing Options for Drug Dependent Offenders

4.3.1 It can be argued that Tasmania has been comparatively slow in developing court-based innovations to drug-related crime because the relevant legislation inhibits or restricts such innovation. The Tasmanian *Sentencing Act 1997* does not provide magistrates or judges with the powers to order judicially-supervised, therapeutically-oriented, integrated drug or alcohol treatment and supervision. Although the purposes of the Act are broad, the actual sentencing options for 'hard end' drug dependent offenders or recidivist drug dependent offenders are rather limited. The purposes of the Act, as set out in section 3, are to:

> (a) amend and consolidate the State's sentencing law; and
>
> (b) promote the protection of the community as a primary consideration in sentencing offenders; and
>
> (c) promote consistency in the sentencing of offenders; and
>
> (d) establish fair procedures for –
>
> (i) imposing sentences on offenders generally; and
>
> (ii) imposing sentences on offenders in special cases; and
>
> (iii) dealing with offenders who breach the conditions of sentences; and
>
> (e) help prevent crime and promote respect for the law by allowing courts to –
>
> (i) impose sentences aimed at deterring offenders and other persons from committing offences; and
>
> (ii) impose sentences aimed at the rehabilitation of offenders; and
>
> (iii) impose sentences that denounce the conduct of offenders; and
>
> (f) promote public understanding of sentencing practices and procedures; and
>
> (g) set out the objectives of sentencing and related orders; and
>
> (h) recognise the interests of victims of offences.

4.3.2 It is arguable that at least ss 3(b), 3(d)(ii), 3(e)(i) and 3(e)(ii) are consistent with the aims of a drug court to improve community safety. Although the Act provides room for the establishment of 'fair procedures' for 'imposing sentences on offenders in special cases', the legislation fails to recognise that drug dependent offenders are a 'special case' requiring a specific sort of rehabilitation.

4.3.3 Under section 7 of the Act, the types of sentencing orders that Tasmanian courts currently have the power to impose are:

- a term of imprisonment; or
- a term of imprisonment, either wholly or partly suspended; or
- a community service order; or
- a probation order (with or without recording a conviction); or
- an order to pay a fine; or

- in the case of a family violence offence, a rehabilitation program order (with or without recording a conviction);[165] or
- an order to adjourn the proceedings for a period not exceeding 60 months and release the offender (with or without recording a conviction) on the offender giving an undertaking with conditions attached; or
- an order recording a conviction and the discharge of the offender.

The court also has the power to sentence an offender to any combination of orders that the court is authorised to impose.

4.3.4 In relation to drug treatment specifically, a court has the power to impose a 'special condition' on a probation order that may include the offender undergoing 'assessment and treatment for alcohol or drug dependency as directed by a probation officer' (*Sentencing Act 1997* (Tas) s 37(2)). This falls considerably short of ongoing judicial monitoring and supervision of intensive drug treatment (as per a drug court model) and furthermore the assessment, treatment or testing is subject to the direction of a probation officer rather than a court.

4.3.5 The relevant sections of the legislation merit some close analysis:

> 37 (2) A probation order may also include any or all of the following special conditions:
>
> (a) the offender must attend educational and other programs as directed by the court or a probation officer;
>
> (b) the offender must undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer;
>
> (c) the offender must submit to testing for alcohol or drug use as directed by a probation officer.

4.3.6 Advice from the office of Community Corrections indicates that when the court imposes this special condition for assessment and/or treatment and/or testing in a probation order, the role of the probation officer is to assess a range of factors that may influence whether a referral is made with the offender's consent or whether a formal direction is given. Probation officers use motivational techniques to assist offenders in recognising the need for intervention in order to reduce their risk of offending and thereby endeavour to encourage referrals with consent. This alleviates the need for a formal direction, which Community Corrections experience has shown to be counterproductive for unmotivated offenders. On that basis, it is rare to direct an offender pursuant to s 37(2) without first utilising motivational techniques. A senior probation officer observed that 'motivational techniques are used – should this fail and the client's risk of re-offending is significant, then a formal direction could be considered in line with case management.'[166]

4.3.7 Also, irrespective of whether or not a court has provided an order with s 37(2) special conditions attached, probation officers have a limited power to formally direct drug assessment and/or treatment and/or testing under section 37(1)(f) of the *Sentencing Act 1997* (Tas), which provides that 'during the period of probation the offender must comply with reasonable and lawful directions given by a probation

[165] Following the passage of the *Family Violence Act 2004* (Tas), courts have been granted the power, in the case of a family violence offence, to impose 'rehabilitation program orders' under s 7(ea). The incidence of 'rehabilitation program orders' and the effect of their implementation have yet to be fully understood.

[166] Email from Colin Baldwin to Victor Stojcevski, 9 August 2006.

officer.' A probation officer cannot issue directions requiring a person subject to a probation order undergo treatment with respect to behavioural problems that have no direct relationship to the criminal activity for which they were convicted, as to do so would be considered unreasonable and an unlawful exercise of the power granted by s 37(1)(f). A direction will only be 'reasonable and lawful' if the particular problem has contributed to the commission of the offence in a real or substantial sense.

4.3.8 The legislative powers, therefore, for ordering drug assessment and/or treatment and/or testing can be described as somewhat thin. As explained above, probation orders given by a court that include drug assessment and/or treatment and/or testing are not necessarily implemented in the form of a formal direction and probation officers may direct formal and specific assessments/treatments in ways unknown to a court. Furthermore, data systems are not currently set up to collect and record reliably special conditions of probation orders and/or the ratio of such orders compared to formal directions issued by probation officers.

4.3.9 Despite the obvious lack of explicit powers to integrate ongoing judicially-supervised alcohol and drug treatment into the dispositions granted by magistrates, they have shown some willingness to work within existing sentencing powers and use the 'special conditions' provision of s 37(2) to order drug assessment and/or treatment and/or testing when giving a probation order.

4.3.10 Over the period July 2003 to April 2006, a total of 1367 defendants received a sentence including a probation order from the Magistrates Court. (In many cases, defendants who receive a probation order also have other sentencing orders imposed upon them, such as a term of imprisonment or a suspended sentence). Approximately one third of those probation orders given by magistrates included an alcohol or drug assessment and treatment condition. However, as probation officers do not necessarily execute these 'special conditions', it is difficult to comment definitively on how many of the 455 'special condition' orders given between July 2003 to April 2006 actually involved drug assessment and/or treatment. There is a statistical gap, in other words, between the enunciation of the sentence and the execution of the sentence. Moreover, there is currently no information system in place in Tasmania that tracks a defendant after they have had an alcohol and drug assessment condition imposed by a court. There is no data with respect to which agency executed the assessment and/or treatment, the lengths of treatment, the success rates of such 'special conditions' and breach rates. The lack of data about the effectiveness of 'special condition' probation orders, however, appears not to have discouraged their continual application by courts in recent times.

Table 7: Magistrates Court defendants whose sentence includes a probation order

Financial Year	*No alcohol or drug assessment and treatment condition*	*Alcohol or drug assessment and treatment condition imposed*	*Total probation orders imposed*
2003-04	313	129 (or 29%)	442
2004-05	306	172 (or 36%)	478
2005 to April 06	293	154 (or 34%)	447
Grand Total	**912**	**455 (or 33%)**	**1367**

Source: Tasmanian Department of Justice

4.3.11 The table below shows the types of principal offence for which probation orders with the alcohol or drug assessment and/or treatment condition imposed is given. In cases where a probation order is given,

a 'special condition' is most likely to be imposed for defendants whose principal offence is in the class of acts intending to cause injury (20.4%), but it is also often imposed on defendants whose principal offence is a road traffic or motor vehicle offence (19.1%), theft (18.5%), burglary/break and enter class offence (14.5%), or an illicit drug offence (6.4%).

Table 8: Magistrates Court defendants whose sentence includes a probation order by principal offence

Principal Offence	*No alcohol or drug assessment and treatment condition*	*Alcohol or drug assessment and treatment condition imposed*	*Total probation orders imposed*
Acts intended to cause injury	197	93	290
Sexual assault and related offences	9	3	12
Dangerous or negligent acts endangering persons	31	18	49
Robbery, extortion and related offences		1	1
Unlawful entry with intent/burglary, break and enter	127	66	193
Theft and related offences	168	84	252
Deception and related offences	57	14	71
Illicit drug offences	39	29	68
Weapons and explosives offences	13	9	22
Property damage and environmental pollution	44	9	53
Public order offences	32	13	45
Road traffic and motor vehicle regulatory offences	145	87	232
Offences against justice procedures, government security and government operations	46	29	75
Miscellaneous offences	4		4
Grand Total	**912**	**455**	**1367**

Source: Tasmanian Department of Justice

4.3.12 A break down by age group shows that alcohol or drug assessment and/or treatment conditions imposed as part of probation orders are less likely to be used for younger offenders (that is, those aged less than 25) and more likely to be used for offenders in the 25-29, 30-34, 35-39 and 40-44 year age groups.

Table 9: Magistrates Court defendants whose sentence includes a probation order age group

Age Group	*No alcohol or drug assessment and treatment condition*	*Alcohol or drug assessment and treatment condition imposed*	*Total probation orders imposed*
under 17	100%	0%	1
17 - 19	76%	247%	197
20 - 24	68%	32%	409
25 - 29	63%	37%	275
30 - 34	63%	37%	185
35 - 39	65%	35%	128
40 - 44	55%	45%	71
45 - 49	66%	34%	47
50 - 54	81%	19%	26
55 - 59	68%	32%	22
65 and over	50%	50%	4
Unknown	100%	0%	2

Source: Tasmanian Department of Justice

4.3.13 These statistics reveal a desire on the part of magistrates (the Magistrates Court imposes around 90% of all probation orders in Tasmania) to invoke drug treatment as part of their sentencing method, but the lack of explicit powers in the legislation and the lack of a system of ongoing checks and supervision means that the therapeutic interventions currently at the disposal of magistrates are limited and haphazard.

4.3.14 While the sentencing powers conferred by the *Sentencing Act 1997* (Tas) are rather broad, they are also to some extent vague, conventional and given in a judicial environment not conducive to problem-oriented and therapeutic case outcomes. This may lead to significant variation between magistrates in their use of s 37(2) 'special conditions.' Without specific and express sentencing powers and problem-oriented court processes and infrastructure, it is difficult to imagine judicial officers imposing drug treatment as a special condition of probation orders in significant numbers. The sentencing legislation is simply insufficient to enable and facilitate drug treatment as a serious and credible sentencing option for the courts.

4.3.15 If a drug court model is considered appropriate for Tasmania, the lack of guidance in the legislation could be best addressed by specific and express changes to sentencing legislation as seen in Victoria and Queensland. In these jurisdictions a new form of post-conviction sentencing for drug dependent offenders was introduced. Alternatively, if the executive government sought to institute a drug court model and policy based on the powers in the current sentencing legislation, special procedures, facilities and resources would need to support the existing legislation in order for a drug court to be possible. The review of drug court models in other Australian jurisdictions indicates that the introduction of new sentencing legislation is a much simpler, transparent and effective means of introducing a drug court into a jurisdiction.

4.4 Sentencing Powers in Aid of a Drug Court

4.4.1 Following the examples set in Queensland with its intensive drug rehabilitation order (IDRO)[167] and Victoria with its drug treatment order (DTO),[168] there appears to be considerable merit in creating specific sentencing dispositions available in special divisions of the Magistrates Courts. In jurisdictions like New South Wales and Western Australia, the drug court orders take the form of deferred sentences or suspended sentences.[169] In Queensland and Victoria, however, the orders are in fact executed sentences with rigorous treatment and supervision conditions for a period of up to eighteen months for an IDRO and two years for a DTO.

4.4.2 In Victoria, for example, a DTO consists of two parts, namely, a custodial part and a treatment and supervision part. The custodial sentence (a term of imprisonment up to two years) is suspended or 'unactivated' to allow for the treatment of the offender. The treatment and supervision of the offender will involve both core conditions and optional program conditions being imposed that are intended to address the offender's drug and alcohol dependency. The core conditions of a DTO will typically entail that the offender:

- not commit, whether in or outside Victoria, another offence punishable on conviction by imprisonment during the currency of the order;
- attend the drug court when required by the court to do so;
- report to a specified Community Corrections Centre or other specified place within two clear working days after the order is made;
- report to and accept visits from a member of the drug court team or a specified community corrections officer;
- undergo treatment for drug and alcohol dependency as specified in the order;
- give notice of any change of address at least two clear working days before the change to a member of the drug court team;
- not leave Victoria without the permission of the drug court or a specified community corrections officer; and
- obey all lawful instructions from the drug court and the specified community corrections officer.

4.4.3 In addition to these core conditions, the DTO must include one or more of the following program conditions, namely that the offender must:

- submit to drug or alcohol testing as specified in the order;
- submit to detoxification or other treatment as specified in the order;
- attend vocational, educational, employment or other programs as specified in the order;

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[167] *Drug Rehabilitation (Court Diversion) Act* 2000 (Qld) s 19(e)

[168] *Sentencing Act 1991* (Vic) s 18Z, amended by *Sentencing (Amendment) Act 2002* (Vic).

[169] See Sentencing Advisory Council (Victoria), *Suspended Sentences: Interim report* (2005) and Sentencing Advisory Council (Victoria), *Suspended Sentences Final report – Part 1* (2006) for the difficulties associated with suspended sentences.

- submit to medical, psychiatric or psychological treatment as specified in the order; must not associate with specified persons;
- reside at a specified place for a specified period; and
- do or not do anything else that the court considers necessary or appropriate concerning:
  – the offender's drug or alcohol dependency; or
  – the personal factors that the drug court considers contributed to the offender's criminal behaviour.

4.4.4 Offenders must comply with all core conditions and program conditions attached to the order. Court variations to the conditions of the DTO may occur during review hearings and require the offender to consent to the variations. The offender and the prosecutor may also apply to vary the order. Breaches of the order would be treated in the same way as breaches of other orders under the *Sentencing Act 1991* (Vic), with the drug court itself determining the consequences of the breach.

4.4.5 The major benefit of the Victorian and Queensland models is that they provide a clear statutory basis for the specific sentencing dispositions. These sentencing options are only available to specially designated drug courts which can provide the range of support services which the drug court treatment order requires. These sentencing dispositions are not available to the mainstream Magistrates Courts in the respective jurisdictions. In both Victoria and Queensland the dispositional options available to the respective drug courts are based on a finding of guilt. The finding of guilt enables the court to use its sentencing power to intervene dramatically into the lives of offenders. Accordingly, only the drug courts have the proper facilities, resources and procedure to implement the order and the associated supervision, treatment and support. The use of such specific sentencing powers distinguishes these courts from both other drug court models and other court-related diversionary options.

Drug Court Sentencing and Proportionality

4.4.6 In terms of its seriousness as a sentencing option, drug court treatment orders in Victoria rank below imprisonment but above a community service order. Unlike a community service order and probation order, however, the offender is under the direct control of the court. As mentioned, to qualify for a drug court treatment program in all Australian jurisdictions the offender must be likely to be imprisoned for their offence. Drug courts aim to divert offenders who are likely to be sentenced to prison into non-custodial rehabilitative sentences. While it is recognised that imprisonment is a sentence of last resort under the common law,[170] drug courts and their proponents must also give special heed to the legal principle of proportionality. Drug court treatment orders and similar orders imposing drug treatment or supervision are required to be proportionate to the nature and seriousness of the offence for which the offender is legally culpable. Freiberg explains the problem confronting the court:

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[170] Freiberg, above n 89, 229. In *Freeman v Harris* [1980] VR 267 at 281, Murphy J stated:

> In my view it would be quite wrong for a sentencing tribunal to impose a sentence of imprisonment upon an offender which is dictated not merely by the gravity or heinousness of the crimes committed; but by the tribunal's desire to cure the offender of some disease such as drug addiction … In sentencing, the punishment in the particular case should be proportionate to the offence. It is not open to the court to punish an offender more, because he is ill, and because it is considered to be for his own benefit to try to cure him. The gravity of the offence must be the first and paramount consideration.

See also John J Costanzo, 'Proportionality and the Effectiveness of the Queensland Drug Courts' (Paper presented at the 22nd AIJA Annual Conference ("Proportionality – cost-effective justice?"), Sydney, 18 September 2004) <http://www.aija.org.au/ac04/papers/Costanzo.pdf >.

> The principle of proportionality holds that the sentence imposed should never exceed that which can be justified as appropriate or proportionate to the gravity of the wrongdoing and degree of responsibility of the offender for it. The principle applies equally to treatment-based sanctions so that, unless permitted by statute, a sentence may not be extended beyond that which is proportionate to the gravity of the offence for the purpose of medical, psychiatric or other treatment. Consent does not exempt the court from the operation of the principle. What that means is that a drug court judge cannot inflate a sentence which would otherwise be appropriate in order to bring an offender under their jurisdiction, no matter how beneficial the court considers that the treatment regime may be for the offender.[171]

The principle of proportionality safeguards against an artificial escalation of sentence.

4.4.7 The principle of proportionality, however, also needs to be considered in the context of the treatment and supervision conditions that a drug court may order. A recurring criticism of drug courts is that they are too tough on defendants. Addicted offenders are subjected to a level of coercion and control beyond that which most offenders are normally subjected to. By imposing such intensive conditions or requirements on defendants, drug courts set up participants for failure and, consequently, expose them to more prison time than if they had gone through the conventional process. By virtue of drug court a defendant may spend longer in a rehabilitation program (up to two years, for example) than the time in which a whole sentence could be served or longer than the time by which he or she could be released (on parole, or after remissions). Additionally, while undertaking the program a defendant may receive sanctions for breaches of the conditions of the order. Some breaches are punishable by imprisonment. Former Queensland drug court magistrate, John Costanzo, addresses how the principle of proportionality specifically affects a drug court:

> A defendant who might expect to serve 'only' 3 - 6 months imprisonment compared to anything from 9 months to 2 years on a Drug Court Program could, in the eyes of some, be considered to be sentenced out of proportion to the crimes committed. Meanwhile he or she can then face up to 14 days imprisonment for any one breach of the order while undertaking the rehabilitation program. Then there is no guarantee it will all come off the final sentence.[172]

4.4.8 This broader conceptualisation of proportionality needs to safeguard against the rehabilitative appeal that longer periods of coerced treatment may lead to successful treatment. As Freiberg cautions, '[l]onger sentences of treatment may well be better for offenders but may not be proportionate to their offence nor particularly appealing to them.'[173]

Appeal Rights in a Drug Court

4.4.9 A second issue concerning sentencing in a drug court is that of the appeal rights held by a defendant. A right of appeal against sentence is a basic human right and is fundamental to the criminal justice system. However, most drug courts in Australia offer no right of appeal against the decisions made by the court, including the decision not to accept an offender into the program, the original sentence imposed by the court, the conditions of drug treatment imposed, termination of the program or any sanctions or rewards imposed by the court. For example, s 11(2) of the *Drug Court Act 1998* (NSW) provides that: 'No appeal lies against the Drug Court's termination of a drug offender's program.'

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[171] Freiberg, above n 89, 229.
[172] Costanzo, above n 170.
[173] Freiberg, above n 89, 230.

4.4.10 Similarly, s 42 of the *Drug Rehabilitation (Court Diversion) Act 1999* (Qld) states that:

> (1) An appeal does not lie against –
>
> (a) an initial sentence; or
>
> (b) a decision to do or not to do any of the following –
>
> (i) remand a person to appear before a pilot program magistrate;
>
> (ii) make an intensive drug rehabilitation order for a person;
>
> (iii) amend an intensive drug rehabilitation order or terminate a rehabilitation program for an offender;
>
> (iv) give a reward to or impose a sanction on an offender.

4.4.11 While some decisions made by the Victorian drug court are appellable,[174] the inclination to waive appeal rights in the context of a drug court requires strong justification. Some level of appeal rights ought to be included in any newly established drug court pilot, because even in cases where a defendant consents to enter a program, such consent is not wholly free, given the alternatives available to a defendant.[175]

4.4.12 A defendant's ability to consent freely to a drug court sentencing option that is viewed as 'humane, therapeutic and rehabilitative' may be 'less real than apparent' and needs to be framed by the context a defendant finds him or herself in:

> When faced by an interventionist judge or magistrate leaning over the bench with the offer of a drug treatment program, a defendant may feel compelled to accept. One only needs to consider the disparity of the power relationship here: a disparity that can only be exacerbated in situations where the defendant is in custody and the offer involves a promise of release.[176]

4.5 More Lessons from Australian Drug Courts

4.5.1 A drug court is much more than a slightly improved version of existing court processes. Drug courts activate new justice processes and resource intensive supervision and treatment for offenders who have committed serious offences and are facing sentences of imprisonment. As we have noted, these courts are concerned primarily with sentencing and treatment rather than disputes as to guilt or innocence on various charges. The sentencing dispositions available to the courts, however, are only part of a much greater integrated treatment paradigm that impacts both on justice processes and health processes. Before we examine how treatment programs located outside the court are essential to a drug court model, it is useful to consider some of the hazards in establishing and implementing drug court operations.

4.5.2 Makkai identified three main 'implementation hiccups'[177] that have beset the establishment of drug courts in Australia. First, Australian drug courts have tended to have difficulty developing the sophisticated case management systems that are vital to the proper management, monitoring and evaluation of cases. According to Makkai, this 'problem highlights a perennial problem in program delivery – how to get practitioners to see data collection as an important activity in their busy schedule.'[178]

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[174] *Sentencing Act 1991*(Vic) s 18ZR.
[175] Freiberg, above n 89, 230.
[176] McGlone, above n 109, 139.
[177] Makkai, above n 76, 1583.
[178] Ibid.

Thorough databases need to be created and maintained to ensure that the offender groups planned to be targeted for drug court programs are in fact targeted. The lack of a central body in Australia coordinating and determining court and program standards means that drug courts will develop haphazardly and unevenly. Second, several problems have arisen in the context of random urine testing – an essential feature in the operation of drug courts. Without clear urinalysis procedures, problems related to the financing of the tests and the dissemination of the results to the court will continue to be experienced. The third major issue identified by Makkai relates to the fact that drug courts have targeted the most difficult end of the offender population. Indermaur and Roberts observe, 'more intensive engagement with this group multiplies the opportunities for tension and failure. The level of input required from justice and treatment agencies was perhaps not appreciated before the programs began and have generally led to lower numbers of offenders being processed than planned.'[179]

4.5.3 The danger of net widening is also considered to be a major risk for Australian drug courts. The issue of net widening rests on whether drug courts really do divert offenders away from the criminal justice system or 'simply add levels of complexity and supervision, fostering the growth of the criminal justice system.'[180] While net widening is particularly relevant to minor offenders who would have previously had no or limited contact with the justice system but who are now captured by diversionary measures (like pre-arrest diversion programs), it is also relevant to drug court programs which provider 'denser nets' (increased intensity of intervention) for offenders.[181] Indermaur and Roberts warn that there may be a temptation 'to reach into the vast supply of "needy" cases to provide help rather than use the drug court as an alternative to custody.'[182] Other implementation problems that have been identified during the emergence of Australian drug courts include:

- potential conflicts of interest for legal aid lawyers (the defence counsel most often used);
- absence of social workers on drug court teams;
- lack of training for the team in alcohol and drug issues;
- problems with information sharing;
- conflicts between treatment and legal issues;
- high cost of program non-compliance;
- lack of a culture of effective inter-agency collaboration;
- lower than expected referral rates;
- screening of referrals;
- loss of judicial impartiality when magistrates act as specialised service brokers in a drug court;
- blurred demarcation lines between the judiciary and the executive levels of government when courts are involved with treatment provision; and
- drug court clients getting access to treatment services before non-offenders.[183]

[179] Indermaur and Roberts, above n 2, 145.
[180] Ibid 139.
[181] Ibid.
[182] Ibid 144.
[183] See ibid 140 and Freiberg, above n 96, 23.

4.5.4 Some of the most serious criticism and debate about drug courts has related to the courts being seen as selecting 'deserving' cases or likeable clients for treatment programs and courts taking treatment places away from non-offenders. These two implementation issues will be focused on in turn.

4.5.5 The need for a model to identify and screen cases suitable for drug court is regarded as one of the ten key components of the court. Measuring the risk and need of any potential drug court participant will enable the most appropriate cases to be treated by a drug court and accordingly increase the court's chances of success. Indermaur and Roberts suggest that 'an effective "triage" approach that rejects both those likely to fail and those that need little help'[184] could be achieved through the development of a tailored diagnostic tool. This sort of approach is already taking place in Tasmania. In the wake of the *Family Violence Act 2004* (Tas), Community Corrections introduced Family Violence Offender Intervention Program assessments that covered not only family violence issues but also substance abuse issues. The program uses two diagnostic tools — Alcohol Use Disorders Identification Test (AUDIT) and Drug Abuse Screening Test (DAST) — to assess an offender's level of drug use and whether s/he ought to be recommended for further clinical assessment with Alcohol and Drug Service. Regardless of the type of drug being abused, drug court evaluations in Australia support the idea of screening mechanisms to select not just 'deserving' cases but those individuals of highest risk who are also likely to benefit from treatment.

4.5.6 The issue of treatment equity or drug court clients getting access to treatment services through court before non-offenders is answerable. Makkai notes that in 'establishing drug treatment courts, State governments expanded treatment places to account for this new demand. It is naive to assume that this expansion would have occurred without the implementation of drug treatment courts—more than likely governments would have spent the money elsewhere.'[185] In other words, drug treatment courts create more treatment places for substance users rather than take treatment places away from people who really want treatment. Makkai notes that the criticism about treatment equity rests on an 'underlying prejudice' — 'offenders don't deserve access to treatment.'[186] However, courts and the criminal justice system more generally have for decades 'corrected' (with state funds) the criminal behaviour of offenders through custodial and non-custodial rehabilitation programs. Drug courts are distinctive and innovative because they emphasise rehabilitation through intensive and supervised treatment and 'recognise, for the first time, that offenders have a right to treatment.'[187] An offender may elect not to exercise such an entitlement as participation in a drug court programs is 'theoretically voluntary,' but the choice to participate does not diminish the rights of non-offenders to also voluntarily participate in treatment programs. Moreover, any analysis of this issue also needs to take account of what is currently available and accessible in the area of substance abuse treatment in Tasmania. The alcohol and drug treatment sector is limited in terms of what is available and to whom it is accessible but drug courts represent an opportunity to expand the sector rather than narrow it, because of the mounting evidence that drug court schemes work in reducing drug use and recidivism amongst participants.

4.5.7 Also, the courts represent an opportunity for greater public scrutiny of *all* alcohol and drug treatment services. Greater levels of public scrutiny of drug court clients will provide an incentive for improvement across all treatment services, regardless of whether they accept drug court clients or not. Both non-offenders and offenders will benefit from the extra care and professionalism that will be brought into the drug treatment sector if drug courts were to create more treatment places for substance users. The current infrastructure and capacity of drug treatment services will be examined in detail in the next section.

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[184] Indermaur and Roberts, above n 2, 150.
[185] Makkai, above n 76, 1585.
[186] Ibid.
[187] Ibid.

4.5.8 Despite the range of implementation problems referred to above, the following statement by Freiberg is apt in the Tasmanian context: 'there appears to be enough evidence from the world to warrant the experimental establishment of a form of drug court.'[188] In his discussion paper that acted as a precursor to the establishment of a drug court in Victoria, Freiberg also commented that for any jurisdiction intending to pilot a drug court the 'challenge is to create a coherent criminal response to drug offending which is appropriate for [the] jurisdiction and which reflects the history and practices of criminal justice and health agencies in the State.'[189] The establishment of a court that is specifically designed and equipped to deal with drug issues ought to be considered as enhancing rather than replacing or displacing other diversionary initiatives or sentencing options currently in place. A drug court should be considered as one part of a coherent criminal justice response to serious drug offenders. This view is consistent with the 'best practice' principle that there should be a range of diversionary programs and associated services accessible to all offenders, not just first-time or minor offenders. Drug courts will not always be the best or only diversionary response available but it may be the most suitable for a class of serious offenders with real rehabilitation prospects.

4.5.9 If Tasmania elects to establish a drug court based on the models in place in Victoria or Queensland, two major legislative enactments or amendments will need to occur. The first is the creation of a specific sentencing order for drug court offenders. The existing framework of sentencing powers operating under the *Sentencing Act 1997* (Tas) would require the establishment of a new disposition for offenders that come before a drug court. To adopt a drug court model in the vein of Victoria or Queensland, the *Magistrates Court Act 1987* (Tas) will also need changing. The Act would require the recognition of a drug court 'jurisdiction' and the conduct of that jurisdiction within a division of the court. Regulations could be enacted to deal with matters of detail.

[188] Freiberg, above n 96, 23.
[189] Freiberg, above n 96, 9.

Part 5

Drug Courts: Facilities and Resources

5.1 Legal Infrastructure

5.1.1 As demonstrated in the other Australian jurisdictions (except NSW) it is not necessary to establish, through legislation, a completely separate court to administer sentencing orders aimed at intensive drug treatment and supervision. However, like the other jurisdictions, it is important for functional and symbolic reasons to create a distinct and specialised division of a court, which can be described and understood as a 'drug court'. The Magistrates Court of Tasmania could, on the direction of the government, employ a drug court subject to s 3B of the *Magistrates Court Act 1987* (Tas) and such a court could be based in one or more locations throughout the State. In other words, Tasmania has the judicial system and the legal infrastructure in which a drug court could be established. Most importantly, it has magistrates whose judicial authority enables them to hear and determine matters in a drug court according to a drug court philosophy. Freiberg declares that the chief obstacle for drug courts has not been legal resources: 'Legal infrastructure, then, has not, in theory, been the problem in dealing with drug-related crime. Legal philosophy and sentencing jurisprudence, however, may be.'[190]

5.1.2 At one level, therefore, part of the resources – physical, human, legal and judicial– are already present but at another level, considerable economic resources are required to establish a drug court with all the features necessary for its successful deployment. As Freiberg has commented, 'no amount of legislative reform will be effective without the resources necessary to support the dispositions or programs,[191] which give reality to the sentencing dispositions made by the court. Evidence from other Australian and international jurisdictions suggests that drug courts can be expensive to establish and maintain because serious financial commitments need to be made to the alcohol and drug sector outside of the court. That is, a peri-legal infrastructure needs to be resourced appropriately outside the court to enable the drug court to meet its objective of providing intensive supervision and treatment programs to drug-dependent offenders.

5.2 Peri-legal Infrastructure

5.2.1 The term 'peri-legal' infrastructure describes the community and health resources and infrastructure around or near the drug court that support the operation of the court: multi-disciplinary alcohol and drug centres, clinical services, social support services, residential services, detox facilities and more. This sort of infrastructure is a major feature in the establishment of any drug diversion strategy within a jurisdiction and, as I shall discuss later, is a major source of concern in Tasmania.

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[190] Freiberg, above n 89, 218.
[191] Freiberg, above n 96, 10.

5.2.2 Drug courts are distinguishable from traditional courts because they emphasise problem solving and dispute avoidance collaboratively with a wide range of participants and stakeholders. Moreover, as Freiberg has said, drug courts also seek to 're-engineer' how the criminal justice system, health system and systems of social value respond to the problems of drug addiction. As Freiberg says, for drug courts to be successful they have to promote system change 'outside the court house as well as within.'[192] The key method of promoting system change outside the court house is the development of a genuinely collaborative approach to solving the drug addiction(s) of offenders.

5.2.3 Partnerships between the justice and (government and community) health care systems are central to the peri-legal approach of drug courts in other jurisdictions. As well as relying on traditional court players, such as the magistrate and lawyers, a drug court equally relies upon alcohol and drug workers, medical specialists, psychologists, social workers and others. The partnership between the justice and health care systems and the relationship of the drug court to these systems are important factors in the operation of a drug court. Different relations and implications flow from whether the management of the drug court and the associated treatments occurs within a justice or health paradigm. Should a drug court offering therapeutically-oriented drug or alcohol treatment have a role in the sort of treatments available? If so, what sort of role should they have? According to Freiberg, '[e]xperience elsewhere in Australia indicates that it is highly desirable for the drug court to have a high degree of control of the ability to contract out or refer to services.'[193] The courts must have confidence in the treatment programs into which they order offenders.

5.3 Drug Court Control over Treatment Services: Operational Models

5.3.1 The level of control drug courts have over treatment services, the proximity of the court to treatment services and the relationship of the court to the central managing agency within the wider government sector are different in each of the Australian jurisdictions that operate a drug court. The three operational models outlined below indicate some of these differences between the levels of drug court control.

5.3.2 Victoria provides an excellent case study of how a drug court retains an interest in treatment. The initial assessment or screening to confirm that an offender's drug or alcohol abuse is a significant causal factor in their current and prior offending is performed by a corrections officer in Victoria. Using clinical criteria, the assessment determines immediate intervention or support requirements and identifies areas where further reports are needed. The assessment also provides an opportunity for the offender to be provided with detailed information as to the expectations and requirements of a drug treatment program. If eligible for a drug court treatment program, the court's clinical advisers will liaise with the treatment services about the available programs and purchase appropriate services to progress the clients (offenders) through drug court. As the Victorian drug court is based in Dandenong, two government-funded agencies in the Dandenong region provide the bulk of the required treatment and counselling. Occasionally, treatment from other government-funded agencies may be provided to drug court clients. Private general practitioners normally provide illicit drug-related pharmacotherapy, prescribing of other medications and medical treatment. As part of this model, the drug court has a high degree of control over the treatment aspect of the program because the court's two clinical advisers coordinate that aspect. No treatment agencies are on the drug court team, but the drug court magistrate, program manager and clinical advisers

[192] Ibid 6.
[193] Ibid 20.

work closely with the agencies; the clinical advisers have ongoing contact with all the treatment providers as part of ongoing monitoring and case planning. In Victoria, therefore, the drug court is very involved in both supervision and treatment aspects, and this occurs under the umbrella of Department of Justice management.

5.3.3 Western Australia presents a slightly different model of control and management. A member of the centralised Court Assessment & Treatment Service (CATS) performs the initial assessment for the Perth drug court. If eligible for a drug court treatment program, the offender is referred to the most appropriate approved treatment agency, treated and progressed through the drug court by the court and CATS team. The CATS team that monitor the drug court clients belong to the Department of Corrective Services. The treatment component of the Perth drug court, however, is provided through the Drug and Alcohol Office (DAO), which is situated in the health department. The DAO contract manages the government and non-government treatment providers across the State, thereby providing the treatment elements of the drug court scheme. The DAO manages directly the WA Diversion Program that includes both police (point-of-detection) and court-based diversion programs. By directly and indirectly managing the government and non-government alcohol and drug treatment providers across the State, the DAO is able to develop uniform and state-wide service guidelines for the approved treatment providers. These requirements constitute a minimum service standard for all WA diversion programs, including the drug court.

5.3.4 In Queensland, the situation is slightly different again. Queensland Health makes all health-related assessments and recommendations to the magistrate via the drug court team. A health assessor from Queensland Health sits on the drug court team. The Department of Corrective Services has the case management role and Queensland Health has the therapeutic management role, both under the direction of the drug court magistrate. The Department of Justice and Attorney General is formally responsible for Queensland's drug courts, but at an operational level it sits outside the drug court team and the treatment side of things. A detailed and comprehensive *Joint Practice and Procedures* manual defines operationally the positions and relationships of all the government and non-government agencies involved in the delivery of the drug court program in Queensland.

5.3.5 The relationship between treatment agencies and drug courts does have a material effect on the issue of who provides drug and alcohol assessment and treatment services and the way drug court cases are managed. For example, in some jurisdictions individual treatment services have refused to accept persons on court-ordered drug treatment because they believe the best treatment results come when a person enters a program voluntarily. Some services have refused to be part of an integrated sentencing and treatment scheme because they have ethical problems with the roles required of them by a drug court. They and their workers consider their primary role to be to serve the best interests of the client, and often the interests of the client and the court may conflict.

5.3.6 Social workers, drug and alcohol workers, clinicians, therapists and others responsible for the administration of supervision and treatment of an offender may be reluctant to report breaches of drug treatment orders if such breaches are likely to lead to sanctions, such as imprisonment, being imposed. They may also be reluctant to provide personal information to the court if they regard the information as confidential and likely to impact adversely on their client. In New South Wales and Queensland, this sort of clash between judicial and health care paradigms has been circumvented in the relevant legislation governing the operation of the respective drug courts. Provisions in the relevant legislation place a duty on those administering drug treatment programs, or providing services to them, to promptly notify the drug court of any failure by the offender to comply with the program.[194]

[194] See *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) s 39 and *Drug Court Act 1998* (NSW) s 31.

5.3.7 The nature of the relationship between the health care system and the justice system needs to be carefully considered, as any perceived or real tensions between the systems on the issue of a drug court will impact on the operation and success of the court. While effective case management in the context of a drug court will necessarily require effective teamwork, regular case conferencing and an offender-centred approach, the philosophy and framework that drives drug court case management — health-focused, justice-focused or any combination thereof — will to some extent determine the level of control a drug court will have over treatment provision. The level of control exerted will affect the nature of the relationship between the client and the court and the client and the treatment providers.

5.4 Alcohol and Drug Sector Infrastructure of Tasmania

5.4.1 Drug and alcohol treatment in Tasmania is essentially composed of:

1. the government-managed Alcohol and Drug Service (ADS), and
2. a small collection of non-government organisations (NGOs) funded by the government to provide agreed services.

5.4.2 The Tasmanian ADS has an overall coordination role for drug and alcohol treatment in the State. It operates government alcohol and drug treatment programs and, through the instrument of service agreements, provides for the operation of particular non-government programs.

The Alcohol and Drug Service

5.4.3 The ADS has three primary locations — Hobart, Launceston and Ulverstone. It also provides services from various community settings and provides outreach programs to rural Tasmania. Its primary role is the provision of certain specialist alcohol and drug treatment services provided by the State. These include:

- alcohol and drug assessments;
- community-based counselling;
- psychological counselling;
- detoxification;
- therapeutic group work;
- methadone and other pharmacotherapy programs;
- treatment and brief education responses to police diversion; and
- professional consultations to other service providers.

The ADS is the key agency providing first contact assessment and treatment for the Police Diversion Program funded under the IDDI. Based upon that first contact assessment, ADS will either directly provide treatment or make a referral to the appropriate funded non-government treatment service.

5.4.4 Despite this principal role, however, ADS should not be understood as providing a centralised assessment and referral facility for all offenders entering some form of treatment, including offenders ordered into drug assessment and/or treatment and/or testing by probation officers under ss 37(2) or 37(1)(f) of the *Sentencing Act 1997* (Tas). Courts and probation officers that periodically may order alcohol and drug assessments as part of the sentence of an offender will tend to organise the assessments locally, and this may or may not involve ADS undertaking the initial assessment for the court or the probation officer. As we have already discussed, it is up to individual probation officers to organise or facilitate a referral for drug and alcohol assessment and/or treatment. Probation officers are under no obligation to have the assessment and/or treatment provided by the State-managed ADS. The ADS is commonly used by Community Corrections for assessments in the area of community treatment options, but the Salvation Army Bridge Program (Hobart) and the Missiondale Recovery Centre (Launceston) are generally used for assessments in the context of residential programs.

5.4.5 Similarly, Community Corrections will use ADS, Bridge Program or Missiondale for the purposes of providing drug treatment depending on the nature of the case. The Link Youth Health Service and Holyoake have also provided assessments and treatments for Community Corrections clients from time to time.

5.4.6 In terms of case management, therefore, the primary treatment and case-management role will be undertaken by the most appropriate service or the service of first presentation dependent upon the nature of the issues and the treatment service(s) required.

Non-government Organisations

5.4.7 The ADS also contract manages service agreements with the alcohol and drug treatment services provided by the non-government sector. NGOs that are funded currently by ADS to provide direct drug and alcohol treatment services (excluding treatment for smoking cessation) are:

- Link Youth Health Service (Hobart) – provides an alcohol and drug service for young people.
- Holyoake (Hobart) – provides treatment as well as therapy-based programs for individuals and groups.
- Launceston City Mission – operates a treatment facility near Evandale where clients can voluntarily admit themselves.
- Burnie Youth Alcohol & Drug Service – this service offers counselling on alcohol and drug issues.
- Devonport Youth and Family Focus – provides accommodation and drug support services.
- Salvation Army – operates 'The Bridge' program, which is a residential drug and alcohol program in which program participants can stay in residential treatment for up to 16 weeks.[195]
- Community Connections (Burnie) – offers treatment, counselling and related support to any person experiencing problems associated with substance use, aged between 10-30 years and their significant others.

[195] The Bridge also offers an outreach service that operates from both Launceston (Northern Tasmania) and Hobart (Southern Tasmania) that provides support and counselling to people who are unable or choose not to enter a residential program and would like support dealing with their or a family member's addictive behaviour.

5.4.8 Individuals may access these non-government services directly, or may be referred to these organisations by government or non-government bodies. For example, depending on the circumstances of the case, ADS may either provide a client with direct access to the treatment the State provides or refer a client to other, more appropriate non-government organisations.

5.4.9 The organisations listed above provide treatment services funded under specific government programs, like the IDDI or the NDS grants program. Services provided under these programs are regulated by service agreements negotiated between the individual service and ADS. However, NGOs also provide alcohol and drug treatment services outside the ambit of the IDDI and NDS and outside of agreements they may have with ADS. Other State or Commonwealth agencies that fund drug and alcohol treatment programs outside and separate to IDDI and the NDS may have distinct service agreements with the relevant NGOs. For example, the Commonwealth Departments of Family, Community Services and Indigenous Affairs and Health and Ageing and other services within the Tasmanian Departments of Health and Human Services and Justice also fund NGOs to provide services with a drug and alcohol focus. At any one time, therefore, a NGO providing alcohol and drug treatment services in Tasmania may be subject to several service agreement with government funding agencies and, in connection with the relevant funding agency, is responsible for the management and administration of the services provided. Due to the multiple funding arrangements that characterise the alcohol and drug service sector, and multiple reporting requirements there are also multiple reporting/data systems that defy consistent and easy analysis.

5.5 Drug Treatment Capacity in Tasmania

5.5.1 Providing a picture of the actual number, nature and capacity of Alcohol and Other Drug (AOD) treatment services around Tasmania is a difficult task primarily because the data sources relating to both government and non-government services are variable and unreliable. In 2005 the Australian National Council on Drugs produced a research paper, *Mapping National Drug Treatment Capacity,*[196] which collected data from all Australian jurisdictions. The research paper had two components: a mapping exercise, and a commentary on the results. The information presented in my paper about drug treatment capacity in Tasmania draws heavily from this national study.

5.5.2 The national study commented that providing a comprehensive picture of drug treatment capacity is very complex and the current data available from both government and non-government sectors is often in short supply, dated or ambiguous in its implications. Further, the rate of change in the AOD treatment field militates against the reliability of the data. According to the study, the personnel, range of services, and the existence or location of AOD services changes constantly. The range of treatment services differs markedly from one year to the next and dramatically over the course of three or four years. As new AOD services come into operation, others cease to exist, or operate in a different manner. The national study recommended the introduction of a common and reliable approach for keeping the list of agencies and their capacities up-to-date.

5.5.3 Another significant problem about mapping the capacity and, in turn, the potential effectiveness of the AOD treatment services, is the lack of information about: treatment models or approaches; proportion of services catering for specific sub-populations or specific substances; the longevity of funding; waiting times; and staffing profiles and qualifications. Such information about treatment services is not consistently collected and as a result is neither readily available nor reliable.

[196] Siggins Miller, *Mapping National Drug Treatment Capacity: A Report prepared for the Australian National Council on Drugs* (2005).

5.5.4 Based on the national study and a recent survey[197] of alcohol and drug agencies, Tasmania possesses 17 services providing alcohol and drug treatment: 4 government services (including Risdon Prison), 12 non-government organisations and one private provider.[198] No data on individual methadone prescribers was presented to the national study from the Tasmanian jurisdiction. The categories of service provided by these agencies are listed in the table below. The description of the categories is that used by the Australian Institute of Health and Welfare in their compilation of the 'Alcohol and Other Drug Treatment Services — National Minimum Data Set' collection.[199]

Table 10: Categories of Alcohol and Drug Service provided in Tasmania

Tasmania (17 services) – Residential services are shaded	**No.**	**Total**
Detoxification – refers to any form of withdrawal management, including medicated and non-medicated, in any delivery setting. The term 'detoxification' is used where a pharmacotherapy is used solely for withdrawal.	2 5	**7**
Rehabilitation – refers to an intensive treatment program that integrates a range of services and therapeutic activities that may include counselling, behavioural treatment approaches, recreational activities, social and community living skills, group work and relapse prevention. Rehabilitation treatment can provide a high level of support (i.e. up to 24 hours a day) and tends towards a medium to longer-term duration. Rehabilitation activities can occur in residential or non-residential settings.	2 3	**5**
Pharmacotherapy – refers to pharmacotherapies that include those used as maintenance therapies (e.g., Naltrexone, Buprenorphine and specialist methadone treatment).	1 3	**4**
Counselling – refers to any method of individual or group counseling directed towards identified problems with alcohol and/or other drug use or dependency. This definition excludes counselling activity that is part of a rehabilitation program as defined above.	4 11	**15**
Support – refers to support and case management offered to clients (e.g., treatment provided through youth alcohol and drug outreach services). This category only applies where support and case management treatment is recorded as individual client data and the treatment activity is not included in any other category.	2 8	**10**
Information – refers to when there is no treatment provided to the client other than information and education. It is noted that, in general, service contacts would include a component of information and education.	2 6	**8**
Assessment – refers to when there is no treatment provided to the client other than assessment. It is noted that, in general, service contacts would include an assessment component.	4 10	**14**
Other	0 10	**10**

[197] My thanks to Emma McCoy, Alcohol and Drug Service, and David Clements, Alcohol, Tobacco and other Drugs Council of Tasmania Inc. for their assistance in compiling a recent list of alcohol and drug agencies in the state.

[198] The national study counted twenty ADS offices in the state. For the purposes of this paper I have calculated 3 ADS services (Ulverstone, Launceston and Hobart) as ADS services provided in Burnie, Devonport, King Island, etc. and counted by the national study are limited outreach services that do not have a permanent full-time presence in these locations. See Appendix 1 for more information about ADS services provided from community settings.

[199] The Alcohol and Other Drug Treatment Services National Minimum Data Set (AODTS-NMDS) is a nationally agreed set of common data items collected by government funded service providers of clients of alcohol and other drug treatment services.

5.5.5 As the table demonstrates, the main categories of alcohol and drug service provided by government funded service providers in Tasmania are counselling, assessment and support services. Detoxification, rehabilitation and pharmacotherapy services are less prevalent. The ADS operates a detoxification facility in the south (St John's Park, New Town). The facility provides a residential withdrawal management program for the whole State. It is a 10 bed, 24-hour, 365 day per year facility. The Salvation Army Bridge Program in Hobart also runs a non-government residential detox unit.

5.5.6 The most common form of treatment available in Tasmania is counselling: 4 agencies (1 government (Risdon prison), 2 NGOs and 1 private) providing residential counselling and 11 agencies (3 government, 7 NGOs and 1 private) providing non-residential counselling. There are two NGO-run residential rehabilitation programs in the State, 1 in the north and 1 in the south. The only facility providing residential pharmacotherapy in Tasmania is the Hobart Clinic in Rokeby, which services private patients only, but ADS provides non-residential pharmacotherapy out of its three principal Tasmanian facilities. Residential drug and alcohol assessments are provided by 3 NGOs and the Risdon prison, but each of the government's principal ADS offices and an additional 6 NGOs and the Hobart Clinic also provide non-residential assessments. Appendix 1 provides a thorough list of the seventeen Tasmanian Alcohol and Drug Services and the categories of service they provide.

Alcohol and Other Drug Treatment Services in Tasmania, 2004-05

5.5.7 The Australian Institute of Health and Welfare collects limited data from AOD treatment services and publishes annually information on Alcohol and Other Drug Treatment Services in Tasmania – Findings from the National Minimum Data Set (NMDS). The statistical figures presented below are drawn exclusively from the latest (2004-05) data set on Tasmanian alcohol and other drug treatment services (AODTS).[200]

5.5.8 Contrary to my estimation of 17 services providing face-to-face alcohol and drug treatment services, it found that from the period 1 July 2004 to 30 June 2005, 12 government-funded alcohol and other drug treatment agencies provided 1,921 'closed treatment episodes'[201] in Tasmania. Eight of the agencies that provided data on closed treatment episodes were NGOs (compared to my estimated 12 that provide such services in the State). Fifty-two per cent of all treatment episodes in Tasmania involved clients who were self-referred, followed by referrals from police diversions (14%) and general practitioners or other medical specialists (10%).

5.5.9 Alcohol and cannabis were the most common 'principal drugs of concern,'[202] each accounting for 31% of closed treatment episodes in Tasmania. Nicotine was the next most common principal drug of concern (17%), followed by amphetamines (10%) and opioids (9%, with morphine accounting for 6%). Although, alcohol and cannabis were also the most common principal drugs of concern nationally (37% and 23% respectively), the Tasmanian reporting of cannabis as the principal drug of concern was higher that the national figure (31% compared to 23%). Males in the NMDS in Tasmania reported cannabis as

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[200] Australian Institute of Health and Welfare, *Alcohol and Other Drug Treatment Services in Tasmania 2004-05: Findings from the National Minimum Data Set (NMDS)* (2006). The briefing is accessible at <http://www.aihw.gov.au/publications/index.cfm/title/10335>.

[201] 'Closed treatment episodes' refer to a period of contact, with defined start and end dates, between a client and a treatment agency. A closed treatment episode may be for a specific treatment, such as information and education only, that is not part of a larger treatment plan; or it may be for a specific treatment, such as withdrawal management (detoxification), that is part of a long-term treatment plan.

[202] 'Principal drug of concern' refers to the main substance that the client states led them to seek treatment from the alcohol and other drug treatment agency.

their principal drug of concern in greater numbers than their national counterparts. For closed treatment episodes in Tasmania, there were a higher proportion of male clients reporting cannabis as the principal drug of concern than at the national level (34% males in Tasmania and 24% males nationally).

5.5.10 The Tasmanian reporting of amphetamines as the principal drug of concern was roughly equivalent to the national figure (10% compared to 11%). Nicotine is represented more heavily as a principal drug of concern in Tasmania than nationally: nicotine accounted for only 2% of all closed treatment episodes nationally while it accounted for 17% in Tasmania.

5.5.11 Of all closed treatment episodes in Tasmania, counselling was far and away the most common 'main treatment type'[203] provided (63%), followed by information and education only (13%) and assessment only (8%). Nationally, counselling was also the most common treatment provided (40%) but not to the extent it was provided in Tasmania. Withdrawal management (detoxification) (18%) and assessment only (12%) were used in much greater proportions nationally than in Tasmania. Withdrawal management (detoxification) was the main treatment used in Tasmania in only 3% of closed treatment episodes. The predominance of counselling as the 'main treatment type' suggests that Tasmania suffers from a lack of alternative and complementary treatment types. Greater proportions of withdrawal management (detoxification), rehabilitation, support and case management only, assessment only, and pharmacotherapy treatments are provided nationally than in Tasmania. Conversely, Tasmania provides greater levels of counselling and information and education only, the latter intervention not necessarily requiring health expertise.

5.5.12 In closed treatment episodes where alcohol and amphetamines were the principal drugs of concern, counselling accounted for the highest proportion of main treatment type (64% each). In closed treatment episodes where cannabis was the principal drug of concern, information and education only accounted for the highest proportion of main treatment type (47%), followed by counselling (43%).

5.5.13 In Tasmania over the period 2004-05, the median number of days for a treatment episode was 22. Heroin (57), followed by nicotine (50), ecstasy (36) and amphetamines (25) were the drugs that recorded the highest median number of treatment days for a treatment episode. The main treatment type with the highest median number of treatment days per episode was rehabilitation (53), followed by counselling (29) and support and case management only (17). The median number of treatment days (22) needs to be considered in the light of the typical duration of drug treatment when ordered by a drug court. Drug courts ordinarily order offenders to undertake treatment programs for over a year and, in the case of Victoria, for up to two years.

5.5.14 The data suggests that alcohol and drug services are better suited to brief interventions (such as counselling, information and education only) that involve less face-to-face treatment, have a strongly educational focus and place more emphasis on self-management. In contrast, drug court programs require long-term treatments often involving highly structured programs of counselling and support services, designed to make changes in the drug user's lifestyle and facilitate long-term recovery. There is no indication from the NMDS that alcohol and drug treatment agencies in Tasmania are able to accommodate on a regular basis long-term treatment episodes for clients that last over a year.

5.5.15 About two-thirds (67%) of all closed treatment episodes in Tasmania occurred at a non-residential treatment facility, and a further 25% in an outreach setting (comparing to only 7% that occurred in an outreach setting nationally). The most common reason for the cessation of a client's treatment in Tasmania was that the treatment had been completed (41%), followed by the client ceasing to participate without notice to the treatment agency (22%).

[203] 'Main treatment type' refers to the principal activity, as judged by the treatment provider, which is necessary for completing the treatment plan for the principal drug of concern.

5.5.16 As part of this National Minimum Data Set, only two of the twelve alcohol and drug agencies surveyed supplied drug diversion data. The figures referred to above, therefore, include services provided under the National Illicit Drug Strategy, such as the Police Diversion Program.

Information and Data Deficits

5.5.17 Aside from the broad categorisation of services and the NMDS collection, there is generally not a lot of publicly available information regarding the treatment approaches or modes used by government-operated or government-funded drug and alcohol agencies. There is considerable confusion about the sort of treatment interventions that are delivered and the appropriate Statewide mixture of those interventions. Which sorts of treatment modalities are most prevalent in the State and where do gaps in treatment modalities exist? Which sort of interventions are most effective and which ought to be publicly supported? Are different approaches/interventions more cost-effective and more suited to the specific needs of individual defendants or groups of defendants than others? Are some types of services more suited to meeting the specific needs of defendants ordered into a treatment program by a drug court than others?

5.5.18 The lack of reliable information and definitive data relating to AODTS capacity prompted the national report prepared for the ANCD to conclude, 'no one is in a position at this moment to say with any authority whether the extent and nature of resource allocation in the sector is appropriate.' [204] The national report was of the view that Australian governments should seek to develop jointly an integrated systems approach for meeting the multiple needs of drug users in their area. It said that governments must move away from viewing AODTS as a series of separate services. Drug users in all local areas, whether entering drug treatment voluntarily or through the mechanism of a court order, should have access to a full range of integrated services and a full range of treatment modalities. Services should also have explicit links to other health, social care and criminal justice services. The report strongly recommended developing an approach similar to the *Models of Care* approach developed in the United Kingdom by the National Health Service.[205] Under the *Models of Care* framework, services for drug users are grouped into four broad tiers and drug users are ensured access to the full range of tiers 1 to 4 services:

- Tier 1 — Non-substance misuse specific services requiring interface with drug and alcohol treatment.
- Tier 2 — Open access drug and alcohol treatment services.
- Tier 3 — Structured community-based drug treatment services.
- Tier 4 — Residential services for drug and alcohol users.[206]

5.5.19 In addition to a full range of tiers 1 to 4 services, users should also have access to a full range of evidence-based treatment modalities within these tiers which include open access services, advice and information services, needle exchange facilities, care planned counselling, structured day programs, community prescribing, inpatient drug use treatment, and residential rehabilitation. Users should receive an agreed written care plan, which is subject to regular review with a care coordinator. Within this framework, users may receive treatment from a range of professionals and from more than one service at

[204] Siggins Miller, above n 196, xxii.
[205] Ibid. See Recommendation 5 at 74.
[206] Ibid 61-3. See generally National Treatment Agency for Substance Abuse (NTA). *Models of Care for the Treatment of Adult drug Misusers* (2002).

the same time or consecutively. The aim of the *Models of Care* initiative is to ensure one coherent service system and a consistent standard of service delivery of specialist drug and alcohol services to those who need them most.

5.5.20 Reflecting the national picture, the Tasmanian alcohol and drug sector generally represents more an assortment of separate services rather than a coherent and integrated service sector. Also like the national scene, a major problem confronting the local government and non-government alcohol and drug sector is the lack of reliable data relating to the performance and effectiveness of the services. The primary local data collection system that services are required to input client data into is known as ADIMS (Alcohol & Drug Information Management System). However, this system (consistent with the NMDS) only measures 'closed treatment episodes' and not the proportion of closures as a percentage of the entire population that enters into treatment programs. Consequently, it does not measure success rates. It provides no information about those people who fail to complete their programs and, importantly, why they failed to complete their programs. While ADIMS collects data on the 'principal drug problem' of those who complete, it is unable to tell us about other drugs of concern that individuals may be dependent on. This is a serious deficiency, as research evidence indicates that most drug users are polydrug users. The system also fails to calculate what percentage of drug treatment undertaken by ADS or by non-government service providers is afforded to clients who enter the programs voluntarily and how much is done under compulsion, that is, by virtue of a probation order under s 37(2) or a 'reasonable and lawful direction given by a probation officer' under s 37(1)(f) of the *Sentencing Act 1997* (Tas). Individual services may record that a client has been referred to them from a court or a probation officer on the individual's client file, but this information is not collected and aggregated in a centralised database. Other relevant data such as health and well-being data, client satisfaction data, criminal justice records, and post-program data may or may not be collected by the services. Accordingly, there is no capability to collect, arrange, accumulate and report on such data from a central administration point.

5.5.21 The alcohol and drug service sector presents a very complex and confusing state of affairs with multiple agencies providing similar and different services to various groups in the community usually based on unclear criteria. There is no reliable way of telling how many people are engaged in a drug and alcohol treatment program at any one time, where they are based at one time, how they got there and what sort of treatment mode they are engaged in.

Minimum Qualifications for Alcohol and Drug Treatment Workers

5.5.22 A major issue of concern and a source of considerable tension in other jurisdictions is the professional accreditation standards of persons working in the drug and alcohol service sector. While it is common for alcohol and drug treatment providers to operate according to an agreed set of minimum service standards, Victoria, New South Wales and Queensland are actively considering whether the service agreements between the non-government alcohol and drug services and the relevant government authority ought to be extended to include minimum qualifications and accreditations for the service providers and the people they employ. The pressure for greater transparency amongst non-government service providers has emerged because of the risks associated with coerced drug treatment. The governments (and drug courts) that purchase or contract treatment places for defendants must be assured that the treatment they are directing a defendant into is of a sufficiently high standard. They must be confident in the expertise, experience and skills they are subjecting a defendant to and must restrict as far as possible the risks that may befall a defendant from inappropriate or improper treatment. A move to set professional accreditation standards for service providers and their staff in Tasmania is likely to cause considerable unrest. NGOs in Tasmania are generally underdeveloped and generally do not have access to the range of qualified health professionals that other jurisdictions have access to.

5.5.23 The skill and expertise capacity of government and non-government service providers also raises the issue of training. If Tasmania is to embark on a drug court regime (or an alternative diversion scheme with long term treatment elements), service providers will be required to undertake considerable training and development before they are in a position to accept drug court clients. The sort of training that both government and non-government service providers may require is training regarding:

- drug court (or alternative diversion) program specifications, including relevant legislation and regulations;
- meaning and effect of key manuals and/or policies;
- administrative processes and/or reporting requirements;
- participant rights and obligations; and
- data collection and storage.

5.6 An Illicit Drug Treatment Sector that Requires Development

5.6.1 The limited data collections available, together with anecdotal reports, suggest that Tasmania has an uneven, underdeveloped and insufficiently funded alcohol and drug treatment service sector. The case is even worse for the illicit drug treatment service sector specifically, because alcohol and nicotine treatment constitute large parts of the overall sector. The sector, composed of both government-administered agencies and government-funded NGOs, currently fails to present an integrated and comprehensive systems approach able to meet the multiple needs of illicit drug users.

5.6.2 Unlike the situation in larger jurisdictions, which were able to provide a reasonably expansive drug treatment and supervision program at the time of drug court establishment, the size and relatively homogeneous nature of Tasmania's drug treatment service sector presents problems for the establishment of such a court locally. By relatively homogeneous, I mean that the majority of drug treatment and alcohol services in Tasmania are clearly better suited to treating alcoholism and nicotine addiction.[207] Since counselling has been shown as highly effective in the treatment of these licit drug addictions, counselling predictably is also the prime treatment modality used by treatment agencies. Overall, the sector can be characterised by its focus on licit drugs and the marginal position of illicit drug treatment and illicit drug treatment modalities.

5.6.3 Seventeen agencies have been identified as providing face-to-face specialist treatment for alcohol and other drug problems, which constitutes approximately 2% of the entire population of treatment agencies in the country. The sector struggles to recruit and retain clinically trained specialists able to administer medically-supervised detox or provide psychological treatment to people with illicit drug problems. There is a lack of multidisciplinary health and community support and quality short- and long-term residential services. The undersized and underdeveloped nature of the illicit drug treatment sector will pose difficulties for the establishment of a drug treatment court in this State. It is arguable that the sector may not have the capacity to coordinate a large volume of mandated drug treatment and supervision programs emanating from a drug court.

[207] See Australian Institute of Health and Welfare, above n 200 and F Shand and R Mattick, *Census of Clients of Treatment Service Agencies (COTSA) 2001* (2002).

5.6.4 The provision of adequate resources to ensure sufficient treatment places are available is fundamental to a drug court. Single, one-dimensional treatment intervention is unsuitable for drug court clients, especially given the complex factors that underlie illicit drug use. A number of integrated treatment options ranging from counselling to detoxification to maintenance approaches (Methadone, Naltrexone, Buprenorphine) to behavioural modification will need to be made available. Related to the provision of more treatment options is the provision of other wider support services to assist drug court participants in their daily lives. Unless developed appreciably, the illicit drug treatment sector will struggle to provide and maintain proficient and assured ongoing treatment services to difficult and complex drug court clients.

5.6.5 As we have seen, successful drug court programs also rest on a close partnership being developed between the justice and health systems, drug treatment being a sub-system of the latter. During the piloting of drug courts in other Australian jurisdictions, efforts were made to forge genuine and effective partnerships between the justice and treatment systems to deliver appropriate and tailored services to drug court clients. Similar efforts will need to take place in Tasmania to create an appropriate environment for the establishment of drug court treatment programs.

5.6.6 It is arguable that the primary challenge for the establishment of a drug court pilot in Tasmania is not so much the legal and institutional arrangements of the court itself (although this challenge is significant) but the peri-legal requirements for the court. That is, the multidisciplinary government and non-government treatment resources and infrastructure around or near the court that support the operations of the court, including clinical services, social support services, residential services, detox facilities and more. The currently available government- and community-managed drug treatment infrastructure is insufficiently resourced to provide the high level, long-term, intensive and integrated case management required by a drug court. Before a drug court can be piloted in Tasmania, the justice sector (and the wider community) need to be assured that the drug court program participants will be placed in sufficient high quality and effective treatment programs.

Part 6

Conclusion

6.1 The Benefits of a Drug Court

6.1.1 There are three main areas of benefit generally associated with drug courts: reduction in recidivism, cost savings in the criminal justice system and wider societal benefits. [208]

6.1.2 While most of the evaluation data on drug court benefits derive from the US and is not readily transferable to Australian conditions, recent Australian evaluation studies of drug courts piloted in other jurisdictions (particularly those in New South Wales, South Australia and Victoria) reveal that rates of offending for drug court participants decrease, even if participants had not successfully completed or 'graduated' from a treatment program. A related benefit is a reduction in drug usage by participants in the drug court program.

6.1.3 It is generally accepted that running a drug court program is cheaper than incarcerating the targeted offenders. It has also been argued that the reduction of stress on the prison service may lead to the more efficient use of prison space and probationary services, which, in turn, frees up resources which can be directed to offenders who are in greater need or who present a greater public safety risk. Additionally, cost savings spread through the justice system. Savings have been reported in prosecution and law enforcements functions, particularly in regard to court appearance costs.[209] In her study of other jurisdictions with a drug court, Swain noted that '[a]ll sectors of the justice system have … noted "cost avoidance" results from the reduced recidivism of drug court participants and graduates.'[210] Drug courts represent an opportunity to present non-violent offenders with a criminal justice response that is cheaper and better than gaol. Freiberg has noted, however, that potential and long term cost savings do not come without a significant injection of funds at the start: 'The reality is that to be effective and to obtain the claimed savings, considerable investment is needed to fund the courts, the treatment services and the evaluations.'[211]

6.1.4 Treatment services have traditionally not been high on governments' priorities and this has lead to inadequate funding of treatment programs. If drug courts are to achieve their potential benefits, then the inadequate funding for illicit drug treatment must be overcome with courts providing access to treatment that may include education and vocational training, social and welfare services as well as health and housing provision.

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[208] McGlone, above n 109, 138.
[209] Ibid.
[210] Ibid quoting Marie Swain, *The Illicit Drug Problem: Drug courts and other alternative approaches* (1999) 35.
[211] Freiberg, above n 89, 233.

6.1.5 The wider societal benefits that former Queensland drug court magistrate John Costanzo identified with drug courts include:

- babies born drug free;
- less ambulance call outs for overdosing;
- impact on insurance premiums;
- impact of lessening case loads in the District Court;
- generational and familial change such as children not following parents into a life of drugs and crime;
- community service hours;
- payment of housing debts;
- attainment of higher levels of education; and
- gaining employment and paying taxes.[212]

6.1.6 Despite some of the methodological problems that have hampered drug court evaluations in Australia and overseas, there is a growing body of persuasive evidence that, while not conclusive, suggests consistently and strongly that drug courts produce both crime reduction benefits and wider social benefits: 'We know that drug courts outperform virtually all other strategies that have been attempted for drug-involved offenders.'[213]

6.2 A Drug Court To Scale

6.2.1 An individual drug court cannot open without the support of a variety of players from different agencies (government, courts, law enforcement, corrections, public and non-government health authorities). Establishing a drug court in a specific restrictive locale (as has occurred in other Australian jurisdictions) is a difficult exercise but building a Statewide drug court system is even more difficult. The size of Tasmania, however, presents both opportunities and problems for the establishment of a drug court pilot. It is small enough to manage its unique licit and illicit drug culture creatively. For example, it is small enough to set up a court to service the whole State, including rural and regional drug dependent offenders, rather than particular locales, and a court may also be able to focus on particular illicit drugs on the rise, such as methamphetamine. A single court constituted by a dedicated magistrate/judge (or a few magistrates) is also better able to provide and maintain control and continuity over treatment and service delivery, and better able to coordinate and cooperate with health agencies. On the negative side of the ledger, the perceived size of the drug problem in the State allows opponents to argue that Tasmania is too small to warrant a move to a new type of court. It can also be argued that the underdeveloped capacity of the drug and alcohol service sector also militates against a drug court performing efficiently and effectively.

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[212] Costanzo, above n 170.

[213] Cissner and Rempel, above n 92, 15 quoting D B Marlowe, D S DeMatteo and D S Festinger, 'A Sober Assessment of Drug Courts' (2003) 16 *Federal Sentencing Reporter* 153.

6.2.2 Drug courts are not confined to large jurisdictions, nor are they confined to cities and jurisdictions with dramatic and endemic drug problems. Whether characterised as a pre-trial/pre-plea, pre-trial/post-plea or post-conviction option, drug courts have been shown to play a vital role in modern criminal justice responses to the drugs/crime nexus, whatever the size of the jurisdiction. National and State-based data collections indicate that Tasmania does have a significant illicit drug using culture, particularly with respect to high rates of cannabis use, higher than average rates of risky alcohol consumption, higher than average injection rates of pharmaceuticals and increased prevalence of methamphetamines and ecstasy. Tasmania cannot consider itself immune from prevalent illicit drug use or the criminal behaviours that can be attributed to illicit drug use.

6.2.3 Jurisdictions experiencing drug problems need to consider not so much whether or not a drug court is appropriate, but rather which drug court components are essential to a model they consider most appropriate for their jurisdiction. In some of the most recent literature on drug courts, the research has moved beyond whether drug courts work or not.[214] Rather, the research is concerned with the difficulty of 'going to scale' with a drug court. That is, what are the key ingredients that are necessary for a drug court to be established in a jurisdiction regardless of its size or the nature and depth of its drug problem? What will make a drug court work in Tasmania? How can drug court features and innovations from larger scale jurisdictions, like NSW and Victoria, be transferred to smaller scale jurisdictions, like Tasmania? The critical question in the contemporary debate, therefore, is not whether to support drug courts, but how to create a drug court system in Tasmania that fits the size and scale of the drug problem in the State, is cost-effective, sustainable and can reach all potentially eligible offenders.

6.2.4 Fortunately, a number of valuable lessons have been learnt from other Australian and international jurisdictions which enable the establishment and growth of a drug court 'to scale' in Tasmania to take place in a more knowledgeable and considered way. These lessons include:[215]

- **Building infrastructure** – Physical and intellectual resources need to be developed in order to support the drug court. These resources – more heterogeneous treatment agencies, best practice standards, management information systems, screening and assessment tools, research capacity – can assist the drug court to achieve its goals but also contribute to new thinking about how drug courts can improve and how the rehabilitation of offenders can also improve.
- **Providing Training and Technical Assistance** – At the outset and regularly during the life of a drug court, funding needs to be provided for the training of the drug court team and the people outside the court that support the team (like treatment agencies, law enforcement agencies, other judges, other correction officers and other lawyers). Ongoing training and technical assistance can provide the support and guidance needed for a drug court to prosper.
- **Using Legislation** – Legislatures can strongly affirm the value of drug courts by using legislation to create new and specific sentencing orders targeted at drug court offenders, or new statewide authorities to oversee drug court development and operation. The use of legislation also allows courts to be more transparent in their processes, not just for the public but also for offenders.
- **Setting Benchmarks** – By promoting new benchmarks of success, government and court leaders will change thinking about the role of the courts. New measures such as the number of offenders referred to drug treatment, compliance and re-arrest rates will focus attention on crime prevention and rehabilitation. To survive over time, drug courts will have to collect reliable, standardised information about drug court impacts.

[214] See generally Fox and Wolf, above n 107 and Cissner and Rempel, above n 92.
[215] Fox and Wolf, above n 107, 45-46.

6.2.5 The single most important factor in the creation and development of a drug court, however, according to Fox and Wolf, is leadership. In each court they studied – and at each stage of its development – drug courts have 'relied on the energy, enthusiasm and creativity of a small group of leaders.'[216] Leadership can come from a variety of places and not just the judiciary. The executive and legislative branches of government have been important in advancing drug courts and leadership from the State's treatment agencies can also be a decisive factor. Once a court is established, the leaders of the court need to continually send messages to the court staff, drug and alcohol treatment staff and the public that the court is worth the effort.

6.2.6 In a small jurisdiction like Tasmania, the idea of a drug court and its operation may need to be tweaked because of the scale of the drug using environment, funding issues or the nature of the treatment service sector. Drug courts have come to occupy a certain position and function that is attractive to societies and legal cultures. They are just one part of the legal framework, however:

> In each jurisdiction, the powers of a drug court, its target groups and levels of intervention will be dependent on what other options are available to police and courts from the time of arrest through to sentence. The courts represent only one tool in the state's repertoire of responses to what appears to be an intractable social and legal problem.[217]

6.2.7 If it moves towards a drug court, Tasmania will need to decide which components are essential to a drug court and which are not, and which components reflect the different patterns of drug use and crime in Tasmania. In addition, it may need to explore whether new components are necessary to enable a drug court in Tasmania to 'go to scale'. The implementation of a drug court or court-related diversion scheme in Tasmania should be careful to not compromise or peel away the rights the offender would normally enjoy as part of the criminal justice process. If it embarks upon the establishment of a drug court, the fundamental issue for Tasmania will be balancing the desire for flexibility and innovation with the need to protect the integrity of proven and objective drug court practice.

6.3 Towards a Comprehensive Diversion Strategy

6.3.1 It has never been the intention of this paper to design a unique drug court model that best suits the needs of the Tasmanian community, legal system and service providers. Rather, my aim has been to provide the background information, policy arguments and the evidence surrounding the continued emergence of drug courts in Australia. It has been recognised Tasmania has stood apart from this trend, lacking both a drug court and some form of court or court-related drug diversion program.[218] The recent announcement by the government that it intends to introduce a court mandated drug diversion program in 2007 will address a major gap in the drug diversion options available in Tasmania. People who will be eligible for 'referral into treatment' under this program are offenders who have to have a history of illicit drug use and who plead or are found guilty of a 'summary drug offence, a related indictable or summary non-violent property offence including crimes of dishonesty, or a family violence offence.'[219] On the face of it, the program appears to be a pre-trial, court-related drug diversion program, resembling MERIT or CREDIT programs in other States, and consequently, the court may have little or no involvement in ongoing case management of the person.

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[216] Ibid 44.
[217] Freiberg, above n 112, 285.
[218] See Freiberg, above n 3, 196 and King, above n 68, 2.
[219] Kons, above n 1.

6.3.2 The new court mandated drug diversion program will complement the Police Diversion Program (point-of-detection program) that targets drug offenders detected in possession of minor quantities of illicit drugs. The new program, however, may not be suitable for more serious 'hard end' offenders who are likely to incur prison sentences of at least one year. Such offenders require more intense programs over longer periods, with ongoing judicial case management, residential and/or community-based treatment, urinalysis, the use of penalties (including incarceration) and behavioural contracts.

6.3.3 Tasmania has failed to consider the development of a more or less comprehensive State-based diversion strategy that operates on a continuum of less serious offences/drugs to more serious offences/drugs. Until recently, it had concentrated its energy and resources on the pre-arrest Police Diversion Program and had been left behind by other Australian States in its court-based innovations to drug-related crime. The forthcoming court mandated drug diversion programs will provide a timely intervention into the cycle of drug-related crime in Tasmania, but without a drug court (or post-release diversion initiative for that matter) the diversion strategy in Tasmania is incomplete. An incomplete diversion strategy means that the benefits that flow from the programs will be limited.

6.3.4 Drug courts, court-related drug diversion schemes or pre-arrest programs should not and cannot work effectively in isolation. They must be part of a larger framework or plan by which the government aims to counter the criminal effects of drug dependence. Freiberg encapsulates the challenge confronting Tasmania:

> If drug courts are to deal with only a small proportion of eligible cases, it is imperative that sufficient and effective services be provided to those who are placed on pre-trial diversion schemes, those who are eligible for, and receive, community-based orders, those who are not diverted and sentenced to prison and those who are released from prison on parole.[220]

6.3.5 The addition of the court mandated drug diversion program to the Police Diversion Program will assist in diverting a significant group of drug-related offenders away from deeper contact with the court process. It also has the potential to restrict the size of the clientele who would be eligible for a drug treatment court to those offenders engaged in significant property or other offending, who have committed a serious offence under the influence of drugs or to support a drug habit. Tasmania must ensure that there is a range of diversion programs accessible to different types of offenders and that appropriate follow up services are also available.

6.3.6 Although drug courts have now become a regular part of the criminal justice system in Australia, a watchful and cautious approach to the introduction of a drug court in Tasmania is required. Like other Australian jurisdictions, Tasmania should establish a pilot program with appropriately allocated resources. A Tasmanian pilot will benefit from the fact that other jurisdictions have taught us valuable lessons about their drug court programs, but only the development of a unique and locally-responsive pilot will determine whether a drug court in Tasmania can deliver the crime reduction and wider social benefits that have been delivered across Australia and internationally. It should be mandatory that the pilot program be evaluated after three years by an independent team that has expertise in criminal justice and drug treatment issues. According to Makkai, evaluation is critical not only for judging whether a pilot program ought to become a permanent sentencing option, but also to improve continuously the operation of the program:

> On face value, drug courts are likely to produce more positive results than the existing arrangements but any pilot projects or experiments need very careful and thorough evaluation so we can pursue the positives and exclude the negatives.[221]

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[220] Freiberg, above n 89, 234.

[221] Toni Makkai, 'Drug Courts: Issues and Prospects' (1998) 95 *Trends & Issues in Crime and Criminal Justice* 1, 8.

6.3.7 Tasmanian offenders who commit crimes under the influence of drugs or to support a drug habit are disadvantaged in terms of their access to supervised treatment and rehabilitation when compared to similar offenders in other Australian States. Drug using offenders who commit crimes for which they are likely to be imprisoned in Tasmania lack the sentencing and treatment options currently available in other States for offenders with similar drug using and offending profiles. Drug courts are not soft on drugs or crime. Rather, they are a legal and policy innovation that provides offenders with intensive and challenging solutions to their drug problems. Drug courts have been described as 'smarter' on crime and 'tough' on the causes of crime. By focusing on the drugs that lead to crime, such as methamphetamines, cannabis, misused pharmaceuticals, diverted methadone and even alcohol, the courts offer solutions to the cycle of drug use, crime, imprisonment and re-offending. There are strong arguments for believing that a drug court, as described in this paper, represents a vital part of a modern, comprehensive and effective drug diversion strategy. It offers offenders who commit crimes under the influence of drugs real solutions to their problems and the cycle of drug-related crime in Tasmanian society.

APPENDIX 1

Tasmanian Alcohol and Drug Agencies By Category of Service

	Detoxification		Counselling		Rehabilitation		Support		Information		Assessment		Pharmacother -apy	
	R	N	R	N	R	N	R	N	R	N	R	N	R	N
Government agencies														
1. ADS South, Hobart, St Johns Ave, New Town 7008 Limited services also provided at: • ADS South Bridgewater/Brighton, 27 Green Point Rd, Brighton 7030 • ADS South Huon Valley, 5 Sale St, Huonville 7109 • ADS South Kingston, 29 John St, Kingston 7050 • ADS South New Norfolk, Richmond St, New Norfolk 7140 • ADS South Sorell, 5 Cole St, Sorell 7172 • ADS South Tasman Peninsula, Main Rd, Nubeena 7184	●	●		●		●		●				●		●
2. ADS North, Launceston, 13 Mulgrave St, Launceston 7250 Limited services also provided at: • Campbell Town Health and Community Service, 70 High Street, Campbell Town 7210 • Beaconsfield District Health Service, 15-19 Bolton Street, Beaconsfield 7270		●		●		●		●				●		●
3. ADS North West, Ulverstone, 11 Grove St, Ulverstone 7315 Limited services also provided at: • ADS North West Burnie, 11 Jones St, Burnie 7320 • ADS North West Devonport, 81a Gunn St, Devonport 7310 • ADS North West King Island, Currie, King Island 7256 • ADS North West Queenstown, McNamara St, Queenstown 7467 • ADS North West Rosebery, Hospital Rd, Rosebery 7470 • ADS North West Smithton, Brittons Rd, Smithton 7330 • ADS North West Wynyard, 39 Hogg St, Wynyard 7325 • ADS North West Zeehan, Main St, Zeehan 7469		●		●				●				●		●
4. Risdon Prison, East Derwent Hwy, Risdon 7016			●						●		●			

	Detoxification		Counselling		Rehabilitation		Support		Information		Assessment		Pharmacotherapy	
	R	N	R	N	R	N	R	N	R	N	R	N	R	N
Non-government organisations														
5. Anglicare A&D Services, 2 Terry St, Glenorchy 7010				●								●		
6. Burnie Sobering Up Unit, City Mission, 354 Bass Hwy, Sulphur Creek 7316			●				●				●			
7. Burnie Youth A&D Service, 2 Spring St, Burnie 7320				●										
8. Drug Education Network Hobart, 2 Midwood St, New Town 7008										●				
9. Drug Education Network Launceston, 34 Paterson St, Launceston 7250										●				
10. Drug Education Network, Wynyard, 33 Goldie St, Wynyard 7325				●				●		●				
11. Holyoake, 127 Davey St, Hobart 7000				●				●		●		●		
12. Launceston City Mission, Missiondale Recovery Centre, 75 Leylands Rd, Evandale 7212					●				●		●			
13. Link Youth Health Service, 57 Liverpool St, Hobart 7000				●				●				●		
14. Pulse Youth Health Centre, Cr Brisbane & Wellington Sts, Hobart 7000				●				●		●		●		
15. Salvation Army Bridge Program Hobart Rehabilitation Unit, Creek Rd, New Town 7008	●		●		●		●				●	●		
16. Youth and Family Focus, Devonport, 81 Oldaker St, Devonport 7310		●		●				●		●		●		
Private														
17. Hobart Clinic, 31 Chipmans Rd, Rokeby 7019		●	●	●		●						●	●	
Totals	**2**	**5**	**4**	**11**	**2**	**3**	**2**	**8**	**2**	**6**	**4**	**10**	**1**	**3**
	7		**15**		**5**		**10**		**8**		**14**		**4**	

R – Residential N – Non-residential

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