

Reflections from the 'double figures' milestone: A decade of Therapeutic Jurisprudence in Tasmania



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Tasmanian Institute of Law Enforcement Studies (TILES)

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Note from the Editor

This contribution to the therapeutic jurisprudence (TJ)¹ discourse is made by two frontline practitioners² with 'skin in the game' through diverse experience of the criminal justice landscape. They share an understanding and vision of how the system can be reformed to achieve better outcomes for offenders, victims and the community.

This peer-reviewed report developed from a presentation given to the 2nd International Non Adversarial Justice conference in Sydney in April 2017 by Liz Moore and Magistrate Glenn Hay.

The intent of both the presentation and the report is to advance the notion identified by former University of Tasmania Criminology Lecturer Hannah Graham of 'pracademia' in which the fields of practice and academia benefit from the input of the other. In the authors' view, as for all researchers at TILES, collaboration with our academic colleagues in field such as Criminology, Law, Psychology and Social Work assists in improving the understanding of both practitioners and academics, and serves to enhance outcomes in both realms.

Michael and Liz's careers allow first-hand insight into practices within the Tasmanian criminal justice sentencing and corrections systems that have not been effective in reducing the harmful impact of crime within the community. Over ten years ago, then Deputy Chief Magistrate Hill wrote as an 'experienced and frustrated campaigner' of sharing 'the frustration of many at the sentencing court revolving door aspect and the waste of a lot of potentially productive lives' and of his ambition to find 'a better way to deal with some of the problems as I see them.'³

Dr Isabelle Bartkowiak-Théron, TILES Publications Co-Editor

¹ See International Network on Therapeutic Jurisprudence at www.law.arizona.edu/depts/upr-intj and Australasian TJ Clearinghouse via Quick Links at www.aija.org.au

² Except where otherwise stated, the opinions expressed throughout are those of the authors and do not necessarily represent the views of the Magistrates' Court of Tasmania or the Department of Justice.

³ MR Hill, (2006), 'Therapeutic Jurisprudence – Has it a place in Tasmania?' Paper presented to the 3rd International Conference on Therapeutic Jurisprudence, June 2006, Perth WA, p3. Available at www.aija.org.au/TherapJurisp06/FINALPROGRAM.pdf

Authors



Chief Magistrate Michael Hill (LLB) retired in 2015 after almost 45 years working in criminal justice in Tasmania, the last 30 of which he served as a Magistrate, Deputy Chief Magistrate (DCM) and Chief Magistrate (CM). He has pioneered alternative and solution focused dispute resolution in Tasmania, overseeing the establishment of the first Small Claims Court in 1985, the contest mention system of case management in the Magistrates' Court in 1996 and the introduction of the Mental Health Diversion List (MHDL) and of the Court Mandated Diversion program (CMD) (the Drug Court) in 2007.



Liz Moore (MA, LLB), a Court Diversion Officer (CDO) in the CMD program, has spent 25 years across custodial and community divisions of Corrective Services case managing offenders to address the issues underlying offending behaviour. She has visited drug courts and related services in twenty jurisdictions worldwide and her Master of Criminology and Corrections thesis (2012) examined measures of success in considering the impact of drug courts around the world. ⁴

Both share a passion to see criminal justice done better, with benefits flowing to consumers of justice, victims and family members of offenders as well as to the taxpaying public, which ultimately foots the bill for community safety in this context. They are both staunch advocates for the role of a TJ problem solving approach in contributing to improved outcomes in this industry. They offer this analysis of the Tasmanian situation from their own perspectives 'in the thick of it' in the hope that it will contribute to the debate and, hence, to ongoing reform of the system.

⁴ Moore, Liz (2012), *Measures of Success: Capturing the Impact of Drug Courts*, Master of Criminology and Corrections thesis published by the University of Tasmania, <http://eprints.utas.edu.au/20945/> Also available at <http://ssrn.com/abstract=2236482>.

Part I – Background and program description

Introduction

This report will examine from a frontline perspective the ten-year journey of the problem-solving courts in the Tasmanian jurisdiction, with particular reference to the Court Mandated Diversion program (CMD – the Drug Court). Part I will consider the place of therapeutic approaches within Tasmania’s history as a penal settlement. A brief explanation of problem-solving courts will lead to a description of the therapeutic courts operating in Tasmania today, and examination of prison statistics will validate the need for such courts. The development and progress of the current Drug Court (CMD) will be described in more detail, and some discussion of the program’s success and how that can be measured will follow.

A more detailed critical analysis of the Court Mandated Diversion Program (CMD) will follow in Part II and will include input from various stakeholders in the CMD program in the south of the State (judicial officers, prosecutors, defence lawyers, program and treatment staff). The framework of the Key Components for Adult Drug Courts⁵ will be used to identify how the courts have addressed the challenges of implementing therapeutic jurisprudence in Tasmania as well as aspects of the program that could be improved. Challenges for the future and priority areas for development and to target resources will be identified with reference to the Adult Drug Court Best Practice Standards⁶. The changing role of the judiciary will be considered in the context of how far TJ has come in Tasmania over the past decade, and other recent developments on the TJ horizon in Tasmania will be identified.

Historical context: a leap in time

Attempts to practice what we now call therapeutic jurisprudence (TJ) have a long history in Tasmania (formerly Van Diemen’s Land), which was established as a place of secondary punishment for the Australian penal colony in an attempt to ‘control the uncontrollable’⁷. ‘Mainland’ convicts who reoffended during their original sentences were sent to remote settlements on Sarah Island (The Macquarie Harbour Penal Settlement) (1822-1833) and at Port Arthur (1833-1877), both notorious for their severe punishment regimes. Writing nearly two decades after the Macquarie Harbour penal station had been abandoned, nineteenth-century historian John West described it as a place ‘associated exclusively with remembrance of inexpressible depravity, degradation and woe’, a nightmarish world where ‘man lost the

⁵ Drug Courts Program Office, US Dept of Justice, *Defining Drug Courts: The Key Components* (1997), available at www.nadcp.org/sites/default/files/nadcp/10%20Key%20Components.pdf

⁶ www.allrise.org/sites/default/files/nadc/AdultDrugCourtBestPracticeStandards.pdf & http://www.ndcrc.org/sites/default/files/adult_drug_court_best_practice_standards_volume_ii.pdf

⁷ Richard Davey (2007), *The Sarah Island Conspiracies*, published by the Round Earth Company, p vii.

aspect, and the heart, of man!⁸ However, these 'hell-holes' were also the sites of early attempts to consider the place of rehabilitation within the corrections system. Some of these attempts are today considered misguided and were demonstrably unsuccessful at the time, but they indicate a willingness to recognise the failings of a regime driven only by punishment and were a considered response to the fact that 'high levels of punishment experienced under sentence significantly increased the chances of reconviction.'⁹ Governor Arthur expressed the view that:

'In any case, deterrence is not the most important requirement for the reduction of crime. The roots of crime are poverty, wretchedness, unemployment and lack of education. By removing these, governments would do more to reduce crime than by creating severer punishment.'¹⁰

Further, in reference to the early probation system,

'Despite the array of sanctions, most masters stressed the importance of rewarding assigned convicts, especially those with valuable skills, above punishment. Punishment regimes were a minority experience.'¹¹

On Sarah Island, off the wilderness of Tasmania's west coast, the ruins of solitary confinement cells designed to encourage convicts' contemplation and reflection can still be seen today. As an alternative strategy to the lash, convicts were placed in complete isolation for extended periods of time in dark cells the size of a grave (three feet wide, six feet long and seven feet high) for the purpose of 'confining men in silence, darkness and isolation where they could contemplate their own mortality'.¹² 191 convicts were subject to this penalty over the 12 years the settlement operated,¹³ in contrast to a total of 1268 floggings administered over the life of the settlement.¹⁴ The results were clear and terrible – the men were driven mad by the isolation and the deprivation of sound and light, and analysis of the colonial records shows that 'exposure to solitary confinement is positively correlated with risk of future conviction'.¹⁵

⁸ Hamish Maxwell-Stewart (2008): *Closing Hell's Gates: The Death of a Convict Station*. Allen & Unwin, Crows Nest NSW, p 2.

⁹ Kippen, R. and Maxwell-Stewart, H. (2014), "What is a man that is a bolter to do? I would steal the Governor's axe rather than starve": Old lags and recidivism in the Tasmanian penal colony', in James Campbell and Vivien Miller (eds), *Transnational Penal Cultures*. Routledge, p 165.

¹⁰ Governor Arthur. Hamish Maxwell-Stewart (UTas) advises that the quote is likely from Governor Arthur's private papers of dispatches.

¹¹ Hamish Maxwell-Stewart (2017), "Convicts", in Alison Alexander, *Tasmanian History*, 1st edition (print). Hobart: Centre for Tasmanian Historical Studies, pp 415-420.

¹² Information provided by Kiah Davey, Manager/Director of the Round Earth Company, which runs tours on Sarah Island. Email (9/2/17) on file with author.

¹³ <http://iccs.arts.utas.edu.au/offences.html>

¹⁴ Maxwell-Stewart (2008), *ibid*, p95 / 109.

¹⁵ Email correspondence with Professor Hamish Maxwell-Stewart (14/2/17) on file with author. See also Kippen and Maxwell-Stewart (2014), *ibid*, p 181.



Remains of solitary confinement cells, Sarah Island, January 2017.

Evidence-based approaches then not being what they are today, this did not stop Governor Arthur from dramatically expanding the solitary confinement concept by implementing a 'model prison' at Port Arthur based on the British Pentonville 'panoptican' design, allowing for constant surveillance of convicts by soldiers.

The English prison reformer Jeremy Bentham designed a radical new Penitentiary at Pentonville in England, which he described as 'a machine for grinding rogues into honest men'. This became the model for Port Arthur. The cogs of this machine included discipline and punishment, religious and moral instruction, classification and separation, training and education. Many men were broken, but some left Port Arthur rehabilitated and skilled, some as blacksmiths, shoemakers or shipbuilders.¹⁶

The model, or Separate Prison, extended the idea of reforming convicts through isolation and contemplation. Twenty-three hours a day were spent alone in a cell where they ate, slept and worked, with just one hour a day allowed for exercise, alone in a high-walled yard. Even attending chapel was to be undertaken in silence and without communication with other convicts. Hoods were worn when in the company of others, and the chapel was designed with individual coffin-sized seating pods from which each convict could only see the preacher, and would, at least in theory, commune only with him and with God.

The evidence from Van Diemen's Land suggests that the use of corporal punishments such as flogging declined as an array of alternative punishments became available, and the treatment of convicts located at penal stations was generally characterised by incentives rather than punishments. For example, resort to solitary confinement increased dramatically over the course of the 1830s, partly due to the advocacy of humanitarians.¹⁷

¹⁶ Visitor Guide to Port Arthur Historic Site (2016), designed by Lynda Warner.

¹⁷ Penelope Edmonds and Hamish Maxwell-Stewart (2016), "The Whip Is a Very Contagious Kind of Thing": Flogging and humanitarian reform in penal Australia', *Journal of Colonialism and Colonial History*, Volume 17, No 1, Spring 2016, pp 11-12 of article.

In the end, the only way of making (Macquarie Harbour) work had been to seek the compliance of the convict population, striking off their irons and increasing their levels of incentive until the terrors of the place had been reduced to the point when it no longer functioned as a penal station proper.¹⁸

The model prison at Port Arthur was not successful in reforming the convicts' behaviour, but more commonly resulted in them losing their grip on sanity and being transferred to the nearby asylum. 'Over the course of the 1840s it became apparent that prisoners exposed to such measures experienced significantly elevated rates of mental illness (and) recent evidence suggests that exposure to solitary confinement shortened life expectancy'.¹⁹ Nevertheless, some of these practices, today seemingly sinister and barbaric, were premised by notions of reform and rehabilitation and were regarded as progressive at the time.

The success of the problem-solving courts movement: back to the current context

The problem-solving court movement represents a giant leap forwards from such punitive convict regimes. There is now a significant body of literature demonstrating the effectiveness of problem-solving courts around the world.²⁰ The development of non-adversarial procedures since the early 1990s has been in response to shifts in the intellectual paradigm concerning the functions of the criminal justice system in delivering therapeutic intervention. This has been accompanied by increasing public expectations of a more responsive and cost-effective system and a growing distaste for adversarial types of procedures.²¹ Thanks to the pioneering work of David Wexler²² and the late Bruce Winick²³ theories of therapeutic jurisprudence have broadened legal thought and approaches to accommodate ideas and practices from various disciplines that have been found to be more effective, productive and satisfying. As an example of the therapeutic application of the law, the research has consistently found that drug courts can reduce recidivism.²⁴ This has seen a shift in court process toward more alternative dispute resolution and avoidance through problem-solving, a

¹⁸ Maxwell-Stewart, H (2008), *ibid*, pp266-7.

¹⁹ Edmonds and Maxwell-Stewart (2016), *ibid*, p13 of article.

²⁰ See, for example, Douglas B Marlowe, 'Research Update on Adult Drug Courts', *Need to Know*, National Association of Drug Court Professionals, www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf and <http://nij.gov/topics/courts/drug-courts/madce.htm>

²¹ See King, M, Freiberg, A, Batagol, B and Hyams, R (2009) *Non-Adversarial Justice*. Sydney: The Federation Press.

²² Wexler, D (2011), 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part', Arizona Legal Studies Discussion Paper No 10-12, University of Arizona, <http://ssrn.com/abstract=1580129>, p33.

²³ Winick, B (2003), 'Therapeutic Jurisprudence and Problem Solving Courts', 30 *Fordham Urban Law Journal*, Fordham University School of Law, p1090.

²⁴ Carey SM, Mackin JR & Finigan MW (2012), *What works? The ten key components of drug court: Research-based best practices*, Drug Court Review, 8, pp6-42. See also, Edward J Latessa, Shelley J Listwan & Deborah Koetzle (2014), *What Works (and Doesn't) in Reducing Recidivism*, Routledge.

therapeutic rather than a legal outcome and a collaborative rather than an adversarial process.²⁵

More recent developments have seen the streamlining and systematising of practices by way of mechanisms such as the Key Components and the Best Practice Standards. In 2013 the (US) National Association of Drug Court Professionals released Volume 1 of the Adult Drug Court Best Practice Standards. In the ensuing two years, 20 out of 25 states responding to a national survey indicated they have adopted the Standards for purposes of credentialing, funding or training new and existing drug courts in their jurisdictions:

The parlance of the field is literally evolving as evidence-based terminology permeates Drug Court policies and procedures. Drug Court professionals now speak routinely about targeting high-risk and high-need participants (Standard I), ensuring equivalent access and services for members of historically disadvantaged groups (Standard II), enhancing perceptions of procedural fairness during court hearings (Standard III), distinguishing proximal from distal behavioural goals and responding to participant conduct accordingly (Standard IV), and delivering evidence-based treatments matched to participants' clinical needs and prognoses for success in treatment (Standard V).

Any concerns that the Standards might sit on a shelf and collect dust vanish rapidly. Drug Courts are changing their policies and procedures in accordance with scientific findings and improving their outcomes as a result.²⁶

In 2015 the NADCP released Volume 2 of the Adult Drug Court Best Practice Standards and noted that 'in the 26 years since the first Drug Court was founded, a vast body of research has proven not only that Drug Courts work, but also how they work and for whom. We now know how to structure and implement our Drug Courts to achieve the best outcomes with science guiding the hands of a compassionate and dedicated field of educated professionals, Drug Courts are poised to give hope and the gift of recovery to millions of deserving citizens, enhance public safety in our communities and make the best use of taxpayer dollars.'²⁷

Part II of this article will reflect on the performance of the Tasmanian drug courts against these standards and the Key Components to provide an indication of the development of this component of the therapeutic jurisdiction to date.

²⁵ For an extended discussion of this evolution, see Moore (2012), *ibid*, Chapters 2 & 3.

²⁶ Adult Drug Court Best Practice Standards, Volume II, p1.

www.allrise.org/sites/default/files/nadc/AdultDrugCourtBestPracticeStandards.pdf and

http://www.ndcrc.org/sites/default/files/adult_drug_court_best_practice_standards_volume_ii.pdf

²⁷ Carolyn Hardin, Interim CEO, NADCP, Adult Drug Court Best Practice Standards, Volume II, pvii.

http://www.ndcrc.org/sites/default/files/adult_drug_court_best_practice_standards_volume_ii.pdf

Therapeutic courts in Tasmania today

Therapeutic jurisprudence in Tasmania has certainly come a long way since convict times. However, there is more work to be done to increase the compliance of our programs with the Key Components and the Best Practice Standards. It is our vision that these documents will be used to guide the future directions of our therapeutic courts, thus allowing us to benefit from the extensive research that has already been undertaken by numerous dedicated professionals elsewhere. Resources need to be committed to undertake this exercise appropriately, and we hope that this article will suggest a pathway forwards and a starting point for consideration of issues raised by numerous stakeholders that could be addressed to improve the effectiveness of the local program and its compliance with best practice procedures.

The most recent Annual Report of the Magistrates' Court of Tasmania makes the following comments about the therapeutic jurisdiction:

The 'problem-solving' approach to justice requires courts to acknowledge that, rather than simply processing cases, the court system should be concerned with taking approaches in an attempt to address the problems that lead to a person's appearance in court, and work to change offender behaviour and improve public safety where appropriate.

Currently the Court takes this approach in the following areas:

- Court Mandated Drug Diversion (CMD) program;
- (Mental Health) Diversion List;
- Family Violence Lists;
- Youth Justice Special List.

The Court continues to work to improve collaboration between participants in these problem-solving justice approaches, learning from and building on what has been achieved over previous years.²⁸

²⁸ Magistrates' Court of Tasmania Annual Report 2015-16, available at <http://www.magistratescourt.tas.gov.au> Accessed March 2017.

Mental Health Diversion Lists

Tasmania operates a Mental Health Diversion List (MHDL)²⁹, which takes a therapeutic and solutions-focused approach to those with mental illness, intellectual disability or acquired brain injury (but not personality disorders) appearing before the lower (Magistrates) courts.

The List, commenced as a pilot in 2007, operates in an environment with no specific legislative framework, by using bail to defer sentences for up to six months (occasionally longer) in order to enable treatment to be undertaken and other relevant issues such as accommodation, occupation, education, recreation, relationships, transport, legal advice and community support to be addressed. Judicial review is generally provided monthly by the magistrate and progress is taken into account in sentencing. Two lists per month run in Hobart and Launceston, the larger centres of Tasmania, and one list per month in the regional cities of Burnie and Devonport. List sizes usually vary from six to 10, occasionally expanding to 16.



Mental Health Diversion List, March 2017.

Forensic Mental Health Services (part of the Department of Health and Human Services) supports the List through the provision of Court Liaison Officer (CLO) positions in the north and the south of the State, and case management is provided by Community and Forensic Mental Health Services (FMHS). Collaboration occurs between these services and the

²⁹ Details confirmed with Magistrate Glenn Hay and Marita O'Connell and Josh Santospirito, Court Liaison Officers, Department of Health and Human Services, March 2017. See also http://www.utas.edu.au/__data/assets/pdf_file/0004/293701/mhdl_report_6-Dec2011.pdf and http://www.magistratescourt.tas.gov.au/about_us/criminal_division/diversion_list

Magistrates' Court, Tasmania Police, the Legal Aid Commission and private defence lawyers. The MHDL has no specific legislation and no dedicated funding or infrastructure but the CLO role connects the clients to existing services and keeps the court informed of progress, which is taken into account in the sentencing process.

Despite the legislative and resourcing limitations, the Diversion List was recognised by the Australian Heads of Government and the Ministerial Council for Police and Emergency Management with the presentation of an Australian Crime and Violence Prevention Award in 2010.

Youth Court

The other therapeutic court in the Tasmanian legal landscape is the Youth Court³⁰, which operates in all (three) regions of the state and is guided by the *Youth Justice Act 1997*. A specialist list for complex matters requiring intensive court supervision and appropriate case management has operated since 2011. 1331 matters were lodged in the Youth Court in 2015-16. As in other states of Australia, the Youth Court takes a more therapeutic approach to young offenders through regular judicial intervention and referral to relevant services such as education and family support services.



Youth courts (not open to the public)

The Court is solution-focussed and uses a restorative justice framework to divert young people from the criminal justice system wherever possible. First names are used for those appearing before the Court, and they are usually invited to sit beside their Counsel in what is a closed court session.

³⁰ Details confirmed with Chief Magistrate Catherine Rheinberger (now Geason) and Grace Duggan, Youth Justice Worker, Dept of Health and Human Services, March 2017. See also https://stors.tas.gov.au/store/exlibris5/storage/1/2013/10/30/file_13/1230792.pdf

The Court is supported by Youth Justice and Child Safety Services from the Department of Health and Human Services (DHHS) and by a dedicated officer from the Education Department, in addition to Tasmania Police, the Legal Aid Commission and Save the Children, which provides a number of community-based program options for young people, both on bail (the Supporting Young People on Bail Program) and when transitioning out of detention. Formal (police) cautions and community conferencing, in which the multi-agency Early Intervention Unit brings young people together with the victims of their offending, operate to ensure that court appearances are reserved for those young people who commit the most serious offences.

The Tasmanian Government's Youth at Risk Strategy has identified 'action areas' to 'consider providing statutory basis to the specialised youth justice court' and to 'investigate the potential role of Youth Court Duty Officer positions to provide greater support for young people engaged in the Youth Justice Court.'³¹

Family Violence lists

Finally, Tasmania's courts have begun to venture down the therapeutic path in dealing with family violence offences³². To date, the extent of this journey has been to assign separate court lists to those appearing in respect of family violence offences, allowing for specialisation, at least to some extent, of magistrates, lawyers and police prosecutors dealing with these matters. Court responses and coordination with support agencies have improved under this model, first implemented in 2005. This administrative shift provides a greater degree of certainty to victims and offenders and limits the exposure of the matters to particular personnel, who can be trained in the specific skills required to manage the often-difficult dynamics of violent relationships.

In an unpublished paper written in December 2007, then Deputy Chief Magistrate Michael Hill noted that the Tasmanian courts:

Did not adopt the accepted model of problem solving courts from elsewhere in Australia and overseas. Family violence matters, although transferred into separate lists, were generally dealt with in the same way as other criminal matters. A problem solving court approach would have seen separate structures with the dedication of support officers for victim and defendant, dedicated prosecutors and specialised Counsel operating. Training would be provided for Magistrates who were interested in presiding over such matters in a dedicated court or courts. It has been said many times that to best utilise the problem

³¹ http://www.dhhs.tas.gov.au/youth/youth_justice/youth_at_risk (Actions #5 and #6).

³² Details confirmed with Amanda Johnson, Senior Consultant, Safe at Home Coordination Unit, Department of Justice, March 2017.

solving approach judicial officers who have an interest in the relevant subject matter ought be assigned to sit in them. This proposition appears to be beyond debate. It can therefore be argued that the TJ approach was not promoted in this area.³³

The family violence court lists are supported by the 'Safe at Home' collaboration between agencies including the Safe Families Coordination Unit, Justice, Health and Human Services, Tasmania Police, Victims' Assistance and the Legal Aid Commission. Courts can refer to appropriate intervention programs such as the Family Violence Offender Intervention Program,³⁴ run by Community Corrections for high-risk perpetrators who have been sentenced to a community-based order, or to Relationships Australia for low to medium risk perpetrators who may enter into an undertaking. Victims are supported through dedicated family violence Court Support and Liaison Officers who are employed by the Justice Department and sit within Victim Support Services. Defendants can be bailed to the Defendant Health Liaison Service (Department of Health and Human Services) for health and criminogenic needs assessment.

Attitudes about family violence can be slow to change, and the development of the family violence court lists is a step in the right direction towards addressing the prevalence of this problem within the community. A number of improvements to the justice system's response to family violence could be made, given appropriate resourcing and the requisite political will. Initial offences and breaches of court orders need to be responded to quickly and decisively, and such situations closely monitored where necessary.

Magistrate Glenn Hay comments that resources for initial family violence investigations (such as chest cameras for police) would expedite bail applications and the entering of pleas, save court time and improve victim impact.³⁵ The May 2017 State Budget included an allocation of \$3.4 million, to be delivered over four years, for all frontline police officers to be equipped with body-worn cameras. Inspector Rob Blackwood noted that 'research shows evidence obtained at the scene, including victim statements on video, can result in early guilty pleas and may not require the victim to attend court.'³⁶

There is scope for improved support for victims and families, who could be better accommodated by the court process through the provision of separate spaces to appear. The South Australian model is a national leader in addressing these issues. A more therapeutic model could enable courts to work with victims and family members to address the offending behaviour through appropriate programs where the intent of the partners is to remain

³³ MR Hill (2007), 'Therapeutic Jurisprudence Initiatives in the Magistrates Court of Tasmania', (unpublished), pp4-6. Copy on file with authors.

³⁴ <http://www.safeathome.tas.gov.au/offenders/fvoip>

³⁵ Personal interview, March 2017.

³⁶ Hobart Mercury, 16/5/17 (p5) and 17/5/17 (p4).

together. Given appropriate resourcing and support, these lists have the potential to develop into fully-fledged therapeutic courts with all the necessary infrastructure to address family violence offending within a therapeutic context.

Why do we need drug courts?

We note and endorse the following findings of the recently released report, *Australia's Criminal Justice Costs: An International Comparison*³⁷.

- The report, released by conservative think tank the Institute of Public Affairs (IPA) on 8 August 2017, concluded that despite spending an estimated \$16 billion a year on our criminal justice system, Australians feel less safe than the citizens of many comparable countries.
- Author Andrew Bushnell said his research indicated that Australian prisons, despite being the fourth most expensive among 29 OECD countries, were ineffective in correcting criminal behaviour. The Australian prison population of 36,000 is up 39% from a decade ago.
- The report advocates evidence-based reforms, including locking up only the most dangerous criminals and dealing with non-violent, low-risk offenders by way of home detention, community service, fines, and restitution orders.

A statistical snapshot of Corrections in Tasmania

The prison population in Tasmania has risen steadily over recent decades. From a daily average population of 442 in 2002-03, it rose to 534 in 2006-07, dropped to 474 in 2010-11³⁸ and rose again to 571 at June 2016.³⁹ Over the same period of time, the average cost of maintaining a prisoner per day rose from \$159 in 2002-03 to \$222 in 2007-07 and again to \$323 in 2010-11.⁴⁰ By 2015-16, this figure had reduced slightly to \$311.87 (as compared to a national average daily cost of \$209.96) (see table below).⁴¹

³⁷<http://www.abc.net.au/news/2017-08-08/australia-spending-more-on-prisons-than-other-oecd-countries/8784466>

³⁸ Figures cited by MR Hill (2007) from Department of Justice, Tasmania, Annual Report 2007-07, <http://stors.tas.gov.au/au-7-0023-00287>

³⁹ DOJ Annual Report 2015-16, *ibid*, p29.

⁴⁰ Figures cited by MR Hill (2007) from Department of Justice, Tasmania, Annual Report 2007-07, <http://stors.tas.gov.au/au-7-0023-00287>

⁴¹ Report on Government Services 2017, Volume C, Chapter 8, Productivity Commission website, www.pc.gov.au

Cost per prisoner/offender

Average net daily cost of providing corrective services per prisoner and per offender 2015-16 (\$). (Excluding capital costs, payroll tax, prisoner transport and prisoner health expenditure). Most recent data for this measure are comparable and complete, subject to caveats.

	Tas	Aust
Prisoner	311.87	209.96
Offender	13.19	21.45

The cost of imprisonment contrasts sharply with that of community based supervision, which cost a mere \$13.42 per head in 2014-15, and dropped to \$13.19 in 2015-16 (see tables above and below). The number of people subject to community supervision in Tasmania is over three times greater than the number of people held in custody.

Recurrent cost of community supervision

Data for previous years has been adjusted by the gross domestic product deflator to allow for inflation.

Measure	2014-15	2015-16
Net operating expenditure per offender per day (2015- 16 \$)	\$13.42	unknown
Average number of persons per day	1,983	1,916

Statistics also clearly indicate that the recidivism rate for prisoners is more than twice that for offenders subject to community supervision. The figures from the most recent Report on Government Services (RoGS) are provided below.^{42 43}

Prisoners released in 2012-13 who returned to corrective services with a new correctional sanction within two years.

Prisoners returning to	TAS	AUS
Prison	39.9%	44.3%
Corrective services	50.0%	51.1%

Offenders discharged from community corrections orders in 2012-13 who returned to corrective services with a new correctional sanction within two years.

Offenders returning to	TAS	AUS
Community corrections	19.8%	13.4%
Corrective services	23.6%	21.5%

Both the outright cost and the relative ineffectiveness of imprisonment in recidivism terms, to say nothing of the myriad of other harms caused by the imposition of a custodial sentence,

⁴² DOJ Annual Report 2015-16, *ibid*, p35.

⁴³ DOJ Annual Report 2015-16, *ibid*, p33.

are legitimate considerations in the debate on the availability of alternative sentencing options. This was recognised by the State Government in establishing the pilot Court Mandated Diversion (CMD) Program in 2007, when it was acknowledged that 'traditional sentencing approaches do not always assist in reducing the number of offenders with drug - use problems in our courts. We can see that new approaches should be trialled. ⁴⁴

Ten years of the Drug Court

The CMD program⁴⁵, also known as the drug or drug treatment court, celebrated its tenth anniversary in July 2017. The CMD is the most developed of Tasmania's adult therapeutic courts. The following historical summary has been provided by A/Team Leader Laura Blackwell, who has worked with the program since 2010:

There has been much change in the CMD program since it was first piloted in 2007. Initially, a client would be assessed by a report writer, case managed by a case worker from an external agency and attend sporadic court appearances with a CMD Court Officer who had little knowledge of their background or their overall progress on their Order. At this time, any magistrate could sentence to the CMD program, reviews were scheduled at the same time as other criminal matters and the representative from Police Prosecution was whoever was on the Court roster.

Over the years the CMD program, the Courts and Police Prosecution have worked collaboratively to change the structure and operation of the program to ensure the program's practice is more in line with the 12 Key Components. We now have a model with three designated CMD magistrates in the south who are specialists in the field of therapeutic jurisprudence, who facilitate fortnightly reviews and have designated court lists to deal specifically with CMD matters. The program also has designated police prosecutors who attend regular court appearances, weekly case review meetings with the CMD team and assist the program to supervise clients in the community by facilitating breath tests, curfew checks and saliva tests. Further, the program has changed the job description of a Court Diversion Officer (CDO) which means now the CDO completes the initial assessment of the client, case manages the client while they are on the Order and attends court appearances with them to report back

⁴⁴ Minister for Justice and Workplace Relations, Second Reading speech for the Sentencing Amendment Bill 2007 (No 31).

⁴⁵ http://www.magistratescourt.tas.gov.au/about_us/criminal_division/drug_treatment_orders and http://www.justice.tas.gov.au/__data/assets/pdf_file/0006/327345/Brochure_for_Participants-accessible.pdf

to the court on their progress. Ideally, the CDO who completes the assessment works with the client throughout their Order.

The 2015-16 Annual Report for the Department of Justice states the following:

The Court Mandated Diversion (CMD) Program for drug offenders is administered by Community Corrections. It is funded by the Australian Government Illicit Drug Diversion Initiative. Under The CMD, offenders with long histories of drug abuse, which is clearly linked to their offending behaviour, can be sentenced by a Magistrate to a Bail Diversion Order or Drug Treatment Order. The intensive intervention program aims to break the drug-crime cycle for high-risk offenders whose risk of re-offending is not addressed by incarceration alone.⁴⁶

The Annual Report provides the following statistics for the Drug Court program for 2015-16⁴⁷:

Court Mandated Diversion (CMD)

Drug treatment and bail diversion orders are imposed by the Magistrates Court and are supervised by Court Diversion Officers in the CMD program. 138 CMD assessment reports were completed this year, compared to 114 last year. CMD orders imposed:

Measure	2014-15	2015-16
Number of drug treatment orders imposed	39	66
Number of bail diversion orders imposed	13	43

In recent years, the resource allocation to the program has resulted in agreement to limit capacity (participant places) to 80 participants statewide; 40 in the South, 20 in the North and 20 in the Northwest of the state. Five of the state's 14 magistrates currently oversee CMD court lists, although all can refer offenders for assessment and into the lists. The program is governed by Part 3A of the *Sentencing Act 1997*, which was amended in February 2017 to enable the Supreme Court to also make referrals to the program.⁴⁸

The imposition of a Drug Treatment Order (DTO) is a sentencing option and an alternative to an actual sentence of imprisonment, so is aimed at those with serious drug addiction that is contributing to significant offending. The program features regular court reviews, typically fortnightly in Phase 1 (stabilisation) and monthly in Phases 2 (consolidation) and 3 (reintegration), although with flexibility for more frequent reviews if necessary. Regular case

⁴⁶ DOJ Annual Report 2015-16, p34. Accessed 22 April 2017 at http://www.justice.tas.gov.au/__data/assets/pdf_file/0004/356314/DoJ_Annual_Report_2015-2016_Corrections_Enforcement_Consumer_Protection.pdf

⁴⁷ DOJ Annual Report 2015-16, *ibid*, p36.

⁴⁸ *Sentencing Amendment Act 2016 and Sentencing Act 1997 – Part 3A – Drug Treatment Orders – (no 59 of 1997)*

management, drug and alcohol counselling and urinalysis occur throughout the program, more frequently in the early stages.

The CMD program is a collaborative effort between magistrates, defence lawyers (usually, but not always representing the Legal Aid Commission of Tasmania), Tasmania Police prosecutors and treatment staff from agencies such as the Salvation Army, coordinated by Court Diversion Officers who are employed by Community Corrections (Department of Justice).



Pre Court Conference, 2014 (Magistrate Hay).

Back in 2006, Michael Hill, then Deputy Chief Magistrate, outlined some of the barriers facing the development of TJ approaches in Tasmania at a time when he described the state as having 'our therapeutic jurisprudence training wheels on'.⁴⁹ These included a lack of official data to identify appropriate candidates; lack of relevant professional development for staff; lack of resources and referral agencies; and a lack consistency of magisterial practices.⁵⁰ This paper outlined what a mental health court, a family violence court and a drug court could look like in Tasmania, and was the prelude to the debate which saw the mental health diversion list and drug court pilot programs established in the State the following year.

At the end of 2007, DCM Hill wrote an article in which he sought to 'discuss and examine some developments in the Tasmanian Magistrates Courts in the area of Therapeutic Jurisprudence', noting that progress had suffered from a 'somewhat uncoordinated approach to planning and implementation'.⁵¹ With respect to the CMD program, he reported that 'anecdotal evidence suggests that some offenders are doing quite well on their programs in these early stages' but that 'demand for treatment programs has exceeded early estimates'.⁵² He observed that 'magisterial and prosecutorial approaches throughout the

⁴⁹ MR Hill (2006), *ibid*, p4.

⁵⁰ MR Hill (2006), *ibid*, pp 5-7.

⁵¹ MR Hill (2007), *ibid*, p1.

⁵² MR Hill (2007), *ibid*, p11.

State differ markedly leading to the observation of inconsistency and in some cases loss of opportunity for some offenders to access programs', and that 'the Tasmanian approach is not yet sufficiently developed to accommodate the effective use of case conferences that exemplifies 'best practice' in other jurisdictions'.⁵³

DCM Hill also referred to the Tasmanian practice at the time of not allocating dedicated CMD list time to particular magistrates, but rather allowing all magistrates to attempt to work in this way within general lists: 'It could be argued that the introduction of drug treatment orders without a major system restructure has advantages and disadvantages... a major rethink and restructure is needed to fully achieve the beneficial effects of the TJ approach.'⁵⁴ He noted the desirability of a non-adversarial structure, and that 'unfortunately current structures do not facilitate that atmosphere being created.' He concluded that 'reviews of Drug Courts and problem solving courts have been encouraging, however these courts share a number of features that are not yet present in the Tasmanian approach to TJ', and that 'early signs in some respects are encouraging and further research should continue on how best to meet these objectives in the Tasmanian context'.⁵⁵

In 2012 Michael Hill, by then Chief Magistrate, reflected on TJ developments in the state and raised some, by now, familiar concerns.⁵⁶ These included the lack of resources; the difficulty in obtaining and retaining properly qualified staff; the need for continued professional development for relevant staff (judicial, treatment, administration, prosecution and defence); the lack of residential rehabilitation; the need for urgent attention in the area of youth offending; the need for more appropriately qualified counsellors and drug clinicians; and the need for administrative support in the court system to ensure data collection processes are as good as they can be and to administer the list throughout the State. He commented that 'the restrictions on the number of participants are simply unacceptable from an access to justice perspective or from basic fairness'.⁵⁷

What has worked well? Reflection on case studies

Much progress has been made over the last decade in developing the therapeutic jurisdiction in Tasmania and examples of positive results abound.

⁵³ MR Hill (2007), *ibid*, p12.

⁵⁴ MR Hill (2007), *ibid*, p13.

⁵⁵ MR Hill (2007), *ibid*, pp13-14.

⁵⁶ MR Hill (2012), *ibid*, pp70-74.

⁵⁷ MR Hill (2012), *ibid*, p72.

Liz Moore's 2012 Master of Criminology and Corrections thesis examined drug courts around the world as well as analysing self-reported data from participants in the local program.⁵⁸ Her findings are broadly summarised as follows:

- Drug courts work, in terms of reductions in drug use and crime, and the improved global functioning of participants.
- Drug courts are intelligent and effective use of public money as long-term savings represent excellent value for taxpayer dollars.
- Good quality evaluation is essential.
- Investment in drug court programs must be sufficient to do the job properly.

The 2015-16 Annual Report of the Magistrates Court of Tasmania rather modestly claims that 'CMD has been successful in diverting a large group of offenders away from prison into community-based treatment and has had some positive impacts on delaying relapse or a return to crime'.⁵⁹ Anecdotally, there is much evidence of the lives of program participants being turned around from chaotic and pro-criminal to structured and pro-social during the course of serving their DTO sentences. Presentations of certificates to recognise drug-free day milestones, progressions to Phases 2 and 3 and graduations from the program are regular features of these courts.

Independent Barrister Caroline Graves has acted as Counsel in the therapeutic lists of the Hobart Magistrates Court since 2011. She has represented numerous long-term recidivist offenders whose offending relates directly to their drug addiction, and notes that a large cohort of her clients has complex co-morbid alcohol, drug and mental health conditions. She reports having:

'Seen clients graduate in this CMD program and change their lives radically after many years of using. They are able to write and express their feelings about their journey and their daily challenges, make their children and their wider families proud of them again and improve their health dramatically. Most of my clients who had an IV drug addiction have Hepatitis C or untreated cancers or complex health problems. As a result of their participation in the program, the mental and physical health of my clients improves. A good example of the success of the program is in the empirical journeys of the long-term criminal offenders and their real life diversion out of entrenched criminal lives towards pro-social lives,

⁵⁸ Moore, Liz (2012), *ibid*.

⁵⁹ Magistrates' Court of Tasmania Annual Report 2015-16, available at <http://www.magistratescourt.tas.gov.au> Accessed March 2017.

including many of these clients having their children who have been in care returned. Generally I have observed relationships with families have improved and a greater respect for authority and court processes is achieved as a result of the close relationship the client develops with the CMD workers and AOD Clinicians. Overall, it is personally greatly satisfying acting for clients in the CMD program and being part of the legal and therapeutic team and seeing the results which are often only achieved in this kind of forum. The relationship of Counsel / Client takes on other aspects such as mentor or almost a coach type role differing from the traditional criminal client / defence counsel role’.

It has been gratifying to witness lifestyle transformations such as those of participant Neville⁶⁰, who, at 42 years of age, had served 34 prison sentences prior to commencing the CMD program (for the third time) in 2014. During the course of his two year Order, he committed two minor traffic offences (both on a motorised pushbike), one burglary and one stealing – a dramatic reduction in the consistent pattern and frequency of his offending behaviour over the previous 30 years. He also undertook education courses, found employment, began repaying his court fines, completed medical treatment for cancer, Hepatitis B and Hepatitis C, obtained new dentures, substantially reduced his tobacco use, became engaged to his partner and had his child returned to him from State care. Importantly for him, he was able to spend his first (and second!) Christmas lunch in ten years with his family, rather than in custody. His Level of Service / Case Management Inventory (LS/CMI) score reduced from ‘Very High’ when he was assessed for the Order to ‘Medium’ when he graduated, with reductions noted across all the dynamic factors considered in the assessment (criminal history, for example, remains a static factor that cannot improve over time). He accumulated a total of over 500 hours of ‘life-work’ and 539 drug-free days, representing the longest periods of time he has been drug-free since the age of 13. This participant returned to custody in 2015 for three months for a driving offence and has not been active in the criminal justice system since that time.

Another participant, Kenneth, at 51 years of age, had served 13 prison terms prior to the imposition of a Drug Treatment Order. He achieved 574 consecutive drug-free days and remained offence-free during the course of the Order. Much of his offending history was driving-related, and he was able to work towards obtaining his first ever driving licence while subject to the program. He was also able to stabilise his mental health for the first time in many years, to the extent that community mental health treatment was withdrawn. He addressed other health issues such as diabetes and his dental health. He also undertook

⁶⁰ Participant names have been changed.

literacy, numeracy and computer courses. This participant's son had also been engaged in criminal activity, and his involvement with the Youth Court also ceased during the life of the Order. This previously fractured family was restored, and long-term accommodation was secured. This participant's LS/CMI score reduced from 'Very High' at assessment to 'Medium' at graduation, with reductions noted across all the dynamic risk factors.

These are but two examples demonstrating the breadth of change that can occur in the lives of participants who successfully engage in court mandated drug treatment. Improvements are regularly observed across a wide range of factors including drug use, criminal activity, accommodation, education, employment, volunteering, family relationships, parenting, recreation, companions, attitudes, health & well being, (weight gain, stable medication, dental treatment, reduced smoking, trauma recovery), finances (including fines repayment) and licence acquisition. In some courts, drug free days are counted and document the journey to abstinence. In some courts, participant insight is developed through regular journaling, shared directly with the magistrate. Life-work hours are credited for positive community engagement such as attending relevant programs (a minimum of 360 hours is required for graduation). Importantly, such improvements are regularly observed *even where orders are cancelled*.

Measuring partial progress is another difficult area for the program to address. Some participants make substantial progress in a number of respects before disengaging from the program and/or committing (a) new offence(s). One such participant, Simon, aged 23 when he commenced the Order, remained engaged in the program for one year before fully disengaging. He was eventually arrested and his DTO was cancelled. His original prison sentence (nine months) was imposed, less time served and nine weeks of 'compliance credit' for his program participation. During the year he actively participated in the program, this participant made significant changes to his formerly chaotic and dysfunctional lifestyle. He achieved stability in his opiate replacement treatment regime, he completed the assessment processes for residential rehabilitation, he began addressing the difficulties in his intimate relationship and gained some parenting skills, he attended various pro-social community-based programs and training sessions (including financial counselling, employment and the Police and Citizens Youth Club), he took steps to address his physical and dental health needs, he began paying his bills and he made some progress with respect to giving up smoking. He gained 25kg during the year, as a result of abstaining from illicit drug use for a total of 142 (non-consecutive) days, the longest time(s) he had been clean since the age of 12. He completed 103 life-work hours. He developed insight into his poor behavioural choices and was able to apologise for inappropriate behaviour to a prosecutor and a magistrate. He was honest about his illicit drug use on the vast majority of occasions. His offending reduced

dramatically during the time he was subject to the Order, and he took the highly unusual action of returning to his Court Diversion Officer property he had stolen to give to his children for Christmas.

That said, Simon was also sanctioned on many occasions for missing appointments, for failed drug tests and for being non-contactable. He was ultimately assessed as not being sufficiently treatment-ready to continue the program, partly attributable to his unresolved underlying trauma issues. A statistical assessment of his program participation would regard him as a failure, due to the cancellation of his Order. But such an analysis would fail to take account of the progress he did make, much of which was of considerable significance to him and his family and also represents clear risk reduction and therefore incremental improvements to community safety. Even after serving his custodial sentence, this participant is not likely to completely regress to the lifestyle he chose prior to his program engagement. How can such success be reflected? How is this measured against the cost of the program's investment, as well as the cost saving achieved by the reduction in the time he served in prison?

A further consideration is the social benefit to families, employers and the community of retaining citizens in the community instead of imprisoning them. Simon may not have reached the top of the mountain on this occasion, but he is unlikely to return to the starting point of his journey, and he may be able to build on his success and travel further down this road in the future.

Another participant, Darryl, who was sentenced to two cumulative Drug Treatment Orders, both of which were eventually cancelled, nevertheless achieved what he termed a 'massive' reduction in what had been an extremely high intake of numerous illicit drugs over some 30 years. At 51 years of age, he faced significant health challenges, including heart surgery, while on the program. Despite mental health challenges and difficulty conducting interpersonal relationships, he achieved stability in his health (including opioid replacement therapy) and accommodation, gained access to a range of community services and developed significant insight into his behaviour and circumstances. He reported that he felt the Order 'helped to keep (him) on track' and that the supervision and counselling 'helped (him) mentally'. This assisted him to begin to establish a pro-social outlook and lifestyle, demonstrated by the life-hours and community service hours he completed. He built a level of resilience through problem-solving skills, recovery techniques and relapse management strategies. These improvements did not ultimately prevent his Orders from being cancelled, but recognising the substantial progress he had made enabled him to return to custody with a positive approach and plans to seek counselling, to maintain his health and fitness and to

avoid prison politics and situations that would put him at risk of criminal behaviour. His final cancellation report notes that 'his level of vulnerability shows that he has used his time in custody to reflect on the actions that have led him to his current situation'. His illicit drug use reduced significantly to a 'sporadic' level, and his previously high rate of offending ceased for many months, notwithstanding the lapse that ultimately saw him return to custody.

The benefits to community safety from addressing illicit drug use and related crime are overwhelmingly clear. The examples of the post-treatment substantially reduced LS/CMI scores above demonstrate the dramatic and sustainable change that can be achieved and that translate to a huge positive impact on public safety. At its simplest, less crime means fewer victims, with subsequent benefits in lost work-time, medical expenses, property insurance claims and the trauma of victimisation.

What is obvious from the above case studies, and many examples, is the extent of savings to a range of public budgets that can be achieved by addressing the illicit drug use that underlies users' criminal activity. These savings are much more extensive than just the cost of imprisonment (dramatically more than the cost of community supervision programs), although this figure is substantial in itself. Cost savings extend to police and emergency services, public health, courts, family and child protection services, (fewer drug-exposed infants and reduced cost of care for abused children) youth justice services, social welfare, public housing and beyond. On the income side of the ledger, employability leads to receipts in taxation and fines repayment that contribute to the public coffers. In addition to the fiscal benefits, how do we calculate the social benefit of the improved community engagement witnessed when participants succeed on the program?

Analysis: how to report impact?

One of the difficulties in reporting success stories in this setting is the lack of a framework identifying measures of success and the limitations of current data reporting against it. Much information can be gathered anecdotally, but is not necessarily consistently and routinely collected. This task has simply not been made a priority within a small and busy program, focussed on the day-to-day delivery of services to offenders and the courts. Some project work in this area has begun but has not yet been sufficiently resourced to enable completion and implementation.

Determining measures of success is a debate within itself, and raises questions about what constitutes progress and how to consider and quantify the progress of participants, including those whose orders are ultimately cancelled. Recidivism data is traditionally regarded as determinative of success (or failure) of criminal justice programs, but interpreting it can also

be subject to shades of grey rather than black and white thinking. Does re-offending after a longer period of time than might otherwise be expected constitute success? Does committing less serious offences than in the past constitute success? For example, a participant in a Family Violence Offender Intervention Program who reported after a difficult weekend that although he had eventually succumbed and hit his partner, he was proud of the fact that he had refrained from hitting her on at least five occasions before that during the course of the weekend. He attributed his restraint to applying what he had learnt in the program, and he was certain that prior to engaging in the program he would have hit her much sooner and more often. How do we recognise this success, within the context of a new, and harmful, offence? Is it realistic to expect overnight success with respect to such ingrained and habitual behaviour? All learning and behaviour modification takes time, and the participants with whom we work in the drug court setting face significant challenges to making immediate changes in their lives. During a personal interview in 2012, Judge Mike Tynan from the Los Angeles Drug Court, a well-resourced program that pays dividends in terms of substantial cost savings and good (around 50%) graduation rates, recognised the complexities and high risk and needs of the drug court cohort in asking 'Why would we expect it to be cheap to fix this problem?' We understand the value of recognising the small steps along the way, acknowledging the positives in our daily interactions with participants in case management and Court. But how can and should the program measure and report on such progress in ways that are meaningful for those outside the program to understand and appreciate and, importantly, in the language understood by those who allocate funding?

In line with a more therapeutic and strengths-based approach, we believe that positive measures of success should be the focus for data collection, and ultimately, for the evaluation and promotion of the program. In addition to compliance measures (attendance at appointments, urinalysis etc.) and test results, these could include number of drug-free days, number of offence-free days, and number of hours spent in education, employment and/or other pro-social endeavours. This 'catch-all' category can be captured through the 'life work hours' currently calculated and reported to some Courts in some Progress Reports. However, practice in respect of crediting activities – both how much credit and for which activities – is not uniform across the state-wide program.

At present, the Level of Service / Case Management Inventory (LS/CMI) assessment tool is applied at the beginning and the end of each Drug Treatment Order and numerical data is centrally stored in the Offender Information System database. It should, therefore, be possible to extract a comparison of figures representing the risk profile of each participant before and after their exposure to the program. This data could be used to demonstrate the impact of program participation across a range of factors including criminal history, education

/ employment, family / marital, alcohol / drug problem, companions, leisure / recreational activities, pro-criminal attitude and anti-social pattern. Data could be analysed to provide a snapshot of individual progress, or aggregated to produce a summary of the impact of the program over a fixed period of time. However, it is noted that actuarial tools such as the LS/CMI are deficit-based by design, and identify risk-reductions in terms of criminogenic needs, rather than by providing a holistic assessment of individual progress. Exit interviews with program participants could provide more qualitative information to complement this data set.

Where to from here?

While Tasmania has made leaps and bounds along the TJ road over the past decade, there remains a long journey ahead. Our vision is that the program will ultimately be consistent with the Key Components and, ultimately, with the Best Practice Standards for Adult Drug Courts (see below).⁶¹ Using the Key Components framework and in the spirit of continuous improvement, we have consulted with magistrates, prosecutors, defence lawyers, treatment professionals and program staff currently engaged in the CMD program to compile a commentary on current practice and how it might be improved. We hope this will assist us to determine how much further we have to go on our TJ journey, what the road ahead from this milestone might look like and what challenges we might face as we travel onwards.

Part II details the findings of the consultative process against the Key Components and Best Practice Standards and examines some particular challenges for the program. This report concludes with consideration of other Tasmanian developments consistent with a TJ approach and a summary of the authors' perspective on priority areas for program development and the application of resourcing into the future.

⁶¹ www.allrise.org/sites/default/files/nadc/AdultDrugCourtBestPracticeStandards.pdf and http://www.ndcrc.org/sites/default/files/adult_drug_court_best_practice_standards_volume_ii.pdf



Graduation, 2014: seeking to break the multi-generational cycle of drug abuse and crime (CM Hill).

Part II – The TJ Journey Continues

This chapter collates data provided by various stakeholders within the CMD program (including magistrates, prosecutors, defence lawyers, treatment and program staff) who were asked to comment on how the program performs with respect to the Key Components for effective drug courts and to suggest improvements that could be made to current operations. The Adult Drug Court Best Practice Standards are considered within a discussion of future challenges for the program. Other local developments on the TJ horizon are identified and the paper concludes with the authors' assessment of priority areas for program development and the targeting of resources into the future.

The 12 Key Components for effective drug courts: practitioners' running commentary

Component 1: Drug Courts integrate alcohol and other drug treatment services with justice system case processing.

Deputy Chief Magistrate (DCM) Daly comments that 'it has been encouraging that for a decade there has been an enduring collaboration between the Court, the Department of Justice, Tasmania Police, Legal Aid Commission and private legal practitioners. In addition to this high degree of 'team engagement', a key benefit is the presence of each participant's Court Diversion Officer at each court session, speaking to their own report'.

A principal concern we raise with respect to the program is the limit to participant places made available by virtue of limited funding. A total of 80 participants statewide is a meagre proportion of offenders presenting to the courts with drug addiction underlying their criminal behaviour. A boost in program funding could allow for the expansion of eligibility and suitability criteria, enabling the program to address what experienced practitioners from all facets of the criminal justice industry confirm is a substantial currently unmet need. It is pleasing to see that \$2.4 million per annum in additional funding has been provided in the 2017-18 State budget for the implementation of a number of changes to sentencing legislation, including funding to enable the provision of Drug Treatment Orders in the Supreme Court. This additional funding will provide an extra 40 program places in the north and north west of the state.

Some administrative reforms could markedly improve the therapeutic impact of the court processes. These include listing each CMD court exclusively at a regular, predictable time (e.g. every second Thursday morning) and in the same courtroom, and ensuring consistent practice statewide in terms of how often court reviews are held. At present, the three southern CMD lists are held approximately fortnightly, whereas the north and northwestern

sittings are held at monthly, or longer, intervals. This inevitably results in inconsistencies in practice with respect to matters such as the imposition of sanctions and rewards.

Court Diversion Officer (CDO) Matt Davies believes the current system of 'seemingly random' periods of time between review appearances could be improved upon. 'At present our review periods range between 10 days and 30 days, and although these are extreme examples of the situation they do highlight the problem that we face. It would seem to be far more manageable and arguably therapeutic to have the appearances on the same day a fortnight apart. This would help to facilitate regular appointments for our clients with both our internal and external service providers. Having set days would assist in the long term planning of the management of orders.' CDO Davies also suggests that a single Court Clerk for the three southern CMD Courts could facilitate consistency and efficiency.

Legal Aid lawyer Pip Monk 'would like to see a program that was able to include persons who are earlier in their drug addiction, to try and stop the drug use escalating to the point that they are high end offenders who will be serving immediate imprisonment. A program somewhat similar to the Treatment Intervention Program in South Australia – shorter, with no requirement that prison is even close to being on the table. Almost something akin to the Mental Health Diversion List, where the requirements for admission are not necessarily legislated in the same way as a DTO participant. This would not replace the CMD program but work alongside it, to try and focus on early intervention'.

In the south of the State, the program is currently reviewing the Alcohol and Other Drug (AOD) Counsellor role to consider incorporating a clinical advisor component. This would require the involvement of the Counsellor in assessments and in the development of a clinical treatment plan which would be regularly reviewed. Counselling services have not been available to the program in the north and north west of the State, and it is hoped that recent additional funding will see these roles prioritised in the near future. Ideally, the program's AOD Counsellors around the State would work cooperatively to bring diverse professional perspectives to the management of clinical treatment plans.



Pre Court Conference 2014 (Magistrate Rheinberger).

Component 2: Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due process rights.

The program deals with numerous prosecutors and lawyers across the State. Consistency of practice would be facilitated by the designation of a smaller number of Tasmania Police prosecutors and Legal Aid defence lawyers to specialise in the drug court role. At present, the program in the south of the State regularly deals with at least four different prosecutors and up to 20 legal practitioners. The majority of private legal practitioners transfer their matters to the Legal Aid Commission in-house legal team after sentencing to a DTO. Given the current model of three CMD magistrates in the south of the state, the designation of one prosecutor and one public defence lawyer to each court would be an improvement on current practice. Staff turnover and competing court priorities do not always enable the same prosecutor and lawyer to be present at each court session, but a small team trained as specialist drug court (or, more broadly, as TJ or problem-solving court) practitioners would provide greater consistency, improved continuity and better understanding of the work of these courts.

Private defence lawyers (not employed by the Legal Aid Commission) are not supported by Legal Aid to continue to work with drug court clients beyond sentencing. This limits choice of counsel for participants and can contribute to inconsistency pre and post sentence when cases are transferred. Some private lawyers continue to represent their drug court clients on the program for up to two years pro bono. Although this argument may seem to conflict with the previous one, funding private lawyers to continue to represent their clients throughout the course of the DTO could ease the pressure on Legal Aid lawyers. The priority for program

participants is ongoing, consistent representation that can be prioritised by the practitioners. This is not always an easy task when paying matters compete with pro bono ones. It would also be facilitated by regular, predictable court sitting times.

Independent Barrister Caroline Graves observes that 'the main challenge for the independent lawyer working in these cases is the lack of legal aid for therapeutic courts. It is common to receive a one off 'in globo' payment for the program of approximately \$600 to act for the client over a one to two year period. Counsel then has to act pro bono on many occasions, therefore needing to give priority to other fully legally aided matters listed at the same time'.

Legal Aid Commission of Tasmania lawyer, Pip Monk, believes that 'the non-adversarial approach taken is appropriate and well managed across the three (southern) courts. Each Magistrate has a different approach to this less adversarial approach, for example, in two courts the defence lawyer will begin the proceedings and give a summary of the report to the presiding Magistrate, whereas in the third court the Magistrate doesn't usually require submissions from Counsel. In some courts, diaries and essays are used frequently whereas this isn't the case across the board. But each individual approach seems to work well for the participants in each of those courts'.

Police Prosecutor Olivia Ortuso believes that 'overall the program provides insight and monitoring of criminals like no other for police', although she notes that information sharing can be a problem as police are unable to disclose all intelligence to CMD. 'Intelligence is hard to use in reports as the Court likes evidence, but those that sell drugs are usually smart enough to not get caught (or caught that often)'.

Component 3: Eligible participants are identified early and promptly placed in the drug court program.

A principal concern in this regard is the limit on numbers that can currently access the CMD program. A maximum of 80 participants statewide does not allow for all eligible participants to be placed in the drug court program. The program around the state is regularly at, or over, 'cap' (capacity) and, particularly in the north and north-west of the State, regularly accepts and conducts new referrals in excess of the program's supervision capacity. Experienced Court Diversion Officers estimate that the unmet need of suitable and eligible candidates in these areas is 50 to 100% over the existing program limit. The recently allocated additional funding should serve to ameliorate this limitation.

Legislation may need to be amended in order to enable suitable candidates appearing in the Supreme Court and sentenced to longer than two years in custody (currently the upper limit for the imposition of a DTO) to be sentenced to the program. A recent referral was assessed

as suitable for the program but a DTO could not be imposed in lieu of the three year custodial sentence that was ultimately handed down.

Delays between referral to the program and treatment commencing can be lengthy. Initial referrals for assessment reports usually allow for a six-week adjournment (during which time many participants are held in custody). Additional staff could reduce this timeframe and speed up participants' access to treatment.

Many applicants are held in custody during the assessment phase. The ability to place participants in a residential treatment facility immediately on referral to the program has been shown in mainland and overseas jurisdictions to greatly improve outcomes. Custody is far from the ideal environment in which to commence comprehensive lifestyle modification.

Access to the program in Tasmania is limited to major centres around the State (Hobart, Launceston, Burnie and Devonport). Residents of more remote areas are disadvantaged in this respect. That said, the four centres that offer drug court programs cater for a significant proportion of the State's population, providing greater access to the program than in many mainland and overseas jurisdictions.



Graduation, 2015 (Deputy Chief Magistrate Daly).

Legal Aid lawyer Pip Monk does not agree that this Key Component is currently being met. 'The turnaround for reports is somewhat lengthy, and recently reports have not been provided until quite late due to staffing issues. This is not a fault of the program, but an issue relating to resources. In an ideal world, once guilty pleas are entered and the report is ordered, a shorter turnaround would be ideal. It would be useful also if the lawyer was provided with the report earlier, so that any issues identified relating to suitability (for example the accommodation issue that so often arises) could be addressed with the client with enough time for the client to make changes or enquiries, depending on the issue. Accepting that time and resources are very limited, perhaps a short term fix could be for any

major issues affecting eligibility or suitability to be disclosed as early as possible, without simply waiting for the report to be completed (as the reports are extremely in depth and clearly take a lot of time to prepare). For example, if a participant is not considered suitable for the program because of something insurmountable, it would be useful to know this as early as possible so the client could be advised ASAP'.

Component 4: Drug courts provide access to a continuum of alcohol, drug and other related treatment and rehabilitation services.

Legal Aid lawyer Pip Monk comments that 'the program works well in relation to case management and urinalysis and the relationships with case managers and participants seem to be appropriately managed'.

Courtney Punshon, a Case Manager from the Salvation Army Bridge Program, believes that Court Diversion Officers 'appear to work with clients holistically rather than with a sole focus on offending or addiction'. She adds that 'CMD works transparently with other service providers to benefit mutual clients and CDOs make themselves available to external service providers to work through client issues and concerns in a therapeutic and respectful way'.

In the south, the program employs a dedicated part-time Alcohol and Other Drug (AOD) Counsellor. Jann Smith, who makes the following comments: 'This role provides offenders with long-term counselling to support relapse prevention. In addition, by using a bio-psycho social approach to assessment and treatment planning, the needs of offenders can be addressed, either directly in counselling or through supported referrals to other health professionals. Many of the participants enter the program with a history of serious medical conditions, trauma or social disadvantage. For those who have had previous AOD treatment, this has not produced sustainable change in substance use and their multiple complex needs have remained. The development of a genuine therapeutic alliance takes time with this client group and the DTO provides a unique opportunity for highly effective counselling outcomes'.

The most significant issue for the program in this respect is the lack of residential rehabilitation beds for program participants. For perfectly sound reasons around managing group dynamics, the Hobart Salvation Army residential rehabilitation program ('The Bridge') limits numbers to two CMD participants. This is manifestly inadequate to meet the presenting need and is inconsistent with best practice standards for the drug court cohort. Gold standard programs commence all participants with 90 days of treatment in a residential facility! The CMD program has, in effect, been modified to accommodate the lack of available treatment beds by holding most potential participants in custody during the assessment process, and by not being able to consider residential rehabilitation for most candidates, even those already in the community.

For both the Salvation Army Bridge residential and day programs, waiting times are typically months (with ongoing use and offending during this time having implications for the eventual imposition of a DTO) and difficulties are regularly experienced in transferring participants directly from custody to the treatment facility. These matters are direct manifestations of inadequate funding and program policy and do not in any way reflect on the excellent collaborative relationships the CMD program enjoys with staff of The Bridge.

CDO Matt Shadwick comments that a major problem for CMD is 'a lack of appropriate residential treatment options, in particular for offenders wishing to transition directly from custody... current (Bridge) policy is that offenders need to be in the community to show commitment (to treatment) and to attend assessment appointments, which, for those who need it most, is often not realistic. A simple solution would be to have these programs more engaged with offenders while in custody, or for imprisonment not to result in the clients missing their place in the queue for the program and moving to the end of the waitlist.' A/TL Blackwell 'would like to see Salvation Army review their policies to accept CMD clients direct from custody to support them in their recovery'.

Other existing community-based treatment options remain inadequate to meet the needs of the CMD cohort and are not necessarily appropriate for this particular client group. Community Corrections has recently begun running regular in-house 'EQUIPS' programs (Explore, Question, Understand, Investigate, Practice), including one focussed on Addiction, which should help to meet the need. Program places have not always been available to CMD participants at the optimum treatment time. Flexibility is required in program delivery to enable participants to attend on evenings and weekends. Again, such limitations are imposed by funding restrictions, and CMD enjoys positive working relationships with our Community Corrections colleagues.

Pharmacotherapy services provided by the Alcohol and Drug Service (ADS) also suffer funding limitations that restrict the number of people that can be accepted into treatment programs. Treatment places for opiate replacement therapy are chronically limited, both at the central ADS facility and at community-based pharmacies. Correctional Primary Health Services has a policy of not placing any new admissions to custody onto opiate replacement therapy while in custody, due to the inability to manage these patients during custody and the lack of community placements available on release. It is acknowledged that only 5% of the prison population receives opiate replacement treatment, although it is estimated that 30% of the prison population is in need of this therapy. ⁶²

⁶² Presentation to Community Corrections staff by Dr Chris Wake and Clinical Nurse Consultant Co-Morbidity Peter Cairns, Correctional Primary Health Services, 19 May 2017.

Significant interruptions to treatment continuity are experienced when participants are sentenced to serve sanction days in custody (for a minimum of 14 days under the present legislation). Case management and counselling necessarily cease, along with participation in any community-based treatment programs. Pharmacotherapy is regularly interrupted and treatment regimes are altered to suit prison conditions. Lack of access to prison inmates frustrates communication and continuity of care, with regular delays of days or weeks before visits or phone calls with professional staff can occur. Corrective Services is currently undertaking a review of 'throughcare' and it is hoped that this process will identify and resolve some of the difficulties currently experienced within the Justice Department.

Courtney Punshon from the Salvation Army Bridge Program remarks that treatment orders for people whose substance of choice is (only) alcohol would be beneficial to the community. Currently, the CMD program only targets those whose illicit drug use contributes to their offending behaviour.

Tasmanian Aboriginal Community Legal Service (TACLS) lawyer Amanda Ripper notes that 'Whilst we acknowledge that poly-drug use is a significant problem for Aboriginal offenders, the misuse of alcohol continues to be a major problem and can be directly linked to involvement with police and the criminal justice system in many cases. In my experience, Aboriginal clients with alcohol related criminal offending are being dealt with – very successfully, under S 7 (eb) of the *Sentencing Act 1997* in the general list by some Magistrates and not in the CMD list as S27 B (1) (b) (i) of Part 3A requires a demonstrable history of illicit drug use'.



Presentation at graduation, 2015 (Magistrate Hay).

Component 5: Abstinence is monitored by frequent alcohol and other drug testing.

Although the program enjoys good relationships with pathology service providers around the State, limitations to the current (urinalysis) testing regime include cost, the availability of sufficient spaces in particular geographical areas, including at weekends, and delays in access to results (particularly for further analysis of samples to determine levels of illicit substances present).

Oral Fluid Tests can be administered by program staff and police (on request), but only provide an indication of use over a short window of time and do not carry sufficient evidentiary weight to be submitted to the court in the absence of confirmatory urinalysis.

Inconsistency is experienced in the police response to requests to test participants out-of-hours and in rapid response to intelligence. This factor would be ameliorated by more streamlined police involvement in the program and a single point of contact for CMD matters.

Police Prosecutor Olivia Ortuso comments that 'it would be handy if we had a better way of conducting curfew checks and the sharing of information with uniform officers'. In her view, CMD house visits at night conducted by Court Diversion Officers would prove 'very interesting'!

Component 6: A coordinated strategy governs drug court responses to participants' compliance.



A handshake on the way to serving sanction days in prison, 2014 (Magistrate Hay).

Over the life of the CMD program, significant variation has existed between courts around the State with respect to the imposition of sanctions and rewards. There is a need for professional development to achieve 'moderation' of practices for greater consistency. The

therapeutic value of sanctions and rewards is maximised when they are certain, swift and consistent. Building relationships with participants to ensure they understand and accept the sanctions / rewards regime is crucial to its success. A statewide meeting of Court Diversion Officers in May 2017 took the first steps towards addressing this issue, and it is intended that such meetings will continue to be held regularly.

There is currently a greater focus on sanctions than rewards, although a student intern project began to address this issue over summer 2017, and recent interdisciplinary professional development has seen a shift to the imposition of more creative sanctions, such as essay-writing, at least in the south of the State. CDO Shadwick's view is that 'CMD as currently constructed does not celebrate the small wins along the way well enough. There is far more focus on sanctions than on rewards. CMD never misses an opportunity to sanction, but will miss several opportunities to reward if there have been sanctions within the same review. This is not consistent with the evidence of what actually works (the 4:1 ratio of positive to negative feedback that evidence suggests is best practice).'

A/TL Laura Blackwell comments that 'at present the program has a number of ways to sanction / punish a client who breaches their Order (impose imprisonment days or community service hours, provide the client with homework (such as writing an essay about the breach), keeping a diary, directing the client to attend court weekly etc.) but, disappointingly, there are not as many options to reward the client for their compliance and achievements on their Order. At present, clients can be rewarded back sanction (imprisonment) days if they have days outstanding, or the client may progress from one phase of their Order to the next, but otherwise the only rewards we are able to use are a round of applause or verbal praise from the Magistrate. While these rewards are powerful and meaningful to the client, I would be supportive of seeing the implementation of alternative rewards, including bus tickets, reduction of Monetary Penalties Enforcement Service debts (court fines), vouchers for family activities, beauty vouchers (haircuts), abstinence / sobriety coins / keyrings etc'.

Legal Aid lawyer Pip Monk notes that 'the program is flexible enough without being too flexible – for example, in the right circumstances, the court will be convinced to keep someone on 13 sanction days and put them on a tight leash, where it would have been possible to sanction them by putting them in custody... this demonstrates that the court truly understands the therapeutic needs of the participants and respects the views of the CDOs'.

Ms Monk also questions 'whether there are enough rewards available to participants who are doing well on the program. Beyond receiving back sanction days, there isn't really anything to reward them with... I think it would be useful for there to be some consideration given to rewards'.

Component 7: Ongoing judicial intervention with each drug court participant is essential

Although regional differences result in inconsistencies in practice, the same magistrate generally reviews each participant in the CMD program around Tasmania on each occasion, providing for ongoing judicial intervention with each drug court participant. This is undoubtedly a strength of the program.



Graduation cake baked by Magistrate Rheinberger, 2016.

Legal Aid lawyer Pip Monk believes 'the level of judicial intervention is appropriate, and each Magistrate fosters their own relationships with the participants. For example, in one court which utilises the diary condition on a regular basis, the participants have a one to one / direct line of communication with the Magistrate that is not reviewed by the lawyer or the CDO. The Magistrate respects that the diary is a communication of this type, and gets to know the participant through this medium. The respect is still thoroughly maintained, but the unique relationship between participant and Magistrate is able to be developed'.

Component 8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

There is a need for better data collection and evaluation of measures of success. A project to address this has been underway for some time, but seems to have stalled due to not having been prioritised or adequately resourced by the Agency. This issue has recently been restored to the agenda of the statewide team meeting.

DCM Daly comments: 'We know that drug courts that monitor, independently evaluate and

make improvements to the program based on the feedback have significantly better outcomes. There has been no recent evaluation of how effectively the program is delivering treatment and supervision. This is a key failing. I have long thought that if we could agree to some of those practices that have been identified (after extensive research elsewhere) as 'best practices', implement them and have our processes independently evaluated against the Key Components, then we would be going a very long way indeed to better serving the community. There is no need to reinvent the evaluation wheel; there is a body of decades-old research conducted by, for example, NPC Research (one of the bodies which routinely evaluate drug courts in the USA) from which a framework could easily be developed'.

A/TL Blackwell notes that 'although the program has been in operation for ten years, there has been little research or data collection on the effectiveness of the program. I would perceive this to be a current weakness of the CMD program and an area that needs to be addressed as a matter of priority. Ideally I would like to see the Department work closely with UTAS (the University of Tasmania) to utilise students in the collection of data (retrospectively) to capture recidivism rates (while on and after the program), the type of offending being perpetrated before and after program intervention and current participants self-reports of areas of improvement in their lives. I would also like to see a more formal framework put in place to identify and measure success within the program, which can be utilised to obtain statistics moving into the future'.

Component 9: Continuing interdisciplinary education promotes effective drug court planning, implementation and operations.

There is a need for improved training and development for all parties across the statewide jurisdiction. American Judge Peggy Hora (Retired) has visited the jurisdiction on four occasions, each time sharing her vast knowledge and experience of drug courts in action. This has contributed to the incremental understanding of 'best practice' in the State. Training has otherwise been 'ad hoc' and rarely with an interdisciplinary and TJ focus. There is a need for collaboration and agreement between the Court and the other agencies as to how this Key Component is to be met. There is a need for a culture of continuous improvement in staff training and development, including for Supreme Court judges who, since February 2017, have been empowered to impose Drug Treatment Orders that would, in practice, be managed by the Magistrates Court. Only one referral for assessment has so far been completed, and that referral did not result in the imposition of a DTO. Three further referrals from the Supreme Court have recently been received in the south of the State.

DCM Daly observes that 'even within existing resources, I think we could improve the quality of ongoing professional development for all members of the team. It is time to give this

matter much greater priority. I note that with the expansion of the Victorian Drug Court into Melbourne, the Victorian government created the position of Education Program Manager – Drug Court. That role is to develop and deliver an education curriculum for Drug Court teams, including orientation and leadership training, foundational modules in knowledge-based topics (i.e. best practice in treatment of addiction, drug testing, case management, and motivational interviewing, etc.) That role also includes responsibility for the evaluation of the success of the education program’.

Component 10: Forging partnerships among drug courts, public agencies and community-based organisations generates local support and enhances drug court effectiveness



Toys donated for participant rewards, 2017.

It is acknowledged with gratitude that the program around Tasmania is well supported by a number of public and community agencies across sectors such as housing, health, education, employment and parenting support.

There is certainly room for improved community relationships and support from business. Planning is currently underway for a Community Advisory Committee to support the therapeutic courts and to play a role in community education, as well as to seek donations of suitable rewards to be presented to participants by the courts. Such a committee may be able to be pro-active in sharing the good news stories of the program, and thereby achieve a greater degree of ‘community buy-in’ to the program. Retired Chief Magistrate Michael Hill has agreed to return to the local TJ fold in the capacity of Chairman of this committee.

Close cooperation with the local university could reap considerable benefits for the program including further education for staff, research, program evaluation, assistance with grants applications and student placements. Staff contributions to relevant courses can inspire student interest in both research and employment in this field. There is room for improvement in nurturing a relationship between higher education institutions and the CMD program.



Flowers presented to participant's partner at graduation, 2014 (Chief Magistrate Hill).

Component 11: Ongoing case management should include the social support necessary to achieve social reintegration.

Legal Aid lawyer Pip Monk observes that 'the program does well with respect to integration with other services, for example the Bridge Program, LINC program (literacy) and first aid courses etc. It is important that the program facilitates these 'extra curricular' activities, and there seems to be a good network of programs and courses for participants to engage in these types of programs give the participants purpose and focus beyond the core components of the program'. The range of services provided around the State varies considerably, with fewer services generally available in regional areas.

A/TL Laura Blackwell believes that 'accommodation is a barrier for a number of people trying to access treatment with CMD. I would like to see housing services in the community work collaboratively with CMD to complete relevant assessments of potential CMD candidates while they are in custody, including assessments for men's and women's shelters and public housing (this is not the current practice)'.

CDO Karina Spruce describes the lack of drug and alcohol residential services as a difficult barrier to participation in the CMD program. She notes that 'a consistent frustration facing potential CMD participants and the CMD program is securing approved accommodation. This factor is exacerbated when a participant is in custody, with a lack of services and structures in place within the prison environment and a lack of viable housing options within the community leaving applicants who would otherwise be assessed as suitable for CMD unsuitable due to not having appropriate accommodation'.

Lawyer Pip Monk notes that she is 'often disheartened that the lack of accommodation can sometimes make a participant who is otherwise suitable for the program rendered unsuitable. Drug addicts have often burned bridges to family members and stability, and given they are also often in custody while being assessed, their hands can be tied in terms of accommodation options. I am aware that some participants are able to reside at (local mens' accommodation service) Bethlehem House, but there is an internal policy that there can only be two at a time. I would like to see this policy reviewed and not applied with rigidity, but further it would be useful for there to be more accommodation options available to CMD to pursue on behalf of clients who would otherwise be suitable for the program'.

The program has been limited by the absence of any dedicated State Government funding, having been entirely funded through the Illicit Drug Diversion Initiative of the Commonwealth (federal) Government's Department of Health and Aging for the first ten years of its operation. This has obvious implications for the extent to which funding has been available for additional program places and for services to provide to the participant cohort. It is hoped that the recent budget allocation will see an improvement in this regard.

Treatment programs could be made available during evenings and weekends without considerable additional expense. Case management should allow time for regular home visits and accompanied referrals to relevant local social services.



Donated graduation gifts presented by Magistrate Hay (2017).

Component 12: Programs should employ flexibility to address the needs of women, indigenous people and minority ethnic groups.

Indigenous offenders are disproportionately and unacceptably overrepresented in the criminal justice system across Australia. The final estimated resident Aboriginal and Torres Strait Islander population of Australia as at 30 June 2011 was 669,900 people, or 3% of the total Australian population (2% of the Australian population aged 18 years and over). In Tasmania, this figure is close to 5%.⁶³ At 30 June 2016, Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (27%) of the total Australian prisoner population.⁶⁴

In Tasmania at 30 June 2016, Aboriginal and Torres Strait Islanders comprised 16% (92 prisoners) of the adult prisoner population, as compared with 5% of the adult Tasmanian population. The Aboriginal and Torres Strait Islander age standardised imprisonment rate was four times the non-Indigenous age standardised imprisonment rate (523 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population compared to 151 prisoners per 100,000 adult non-Indigenous population).

The rate of Aboriginal and Torres Strait Islander prisoners in Tasmania was the lowest of all states and territories (569 prisoners per 100,000 Aboriginal and Torres Strait Islander adult

⁶³ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>

⁶⁴ www.abs.gov.au, 4517.0.Prisoners in Australia, 2016, Summary: Aboriginal and Torres Strait Islander Prisoner Characteristics <http://www.abs.gov.au/Aboriginal-and-Torres-Strait-Islander-Peoples>

population), with a national average of 2,346 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population.⁶⁵

These rates demonstrate a profound need for investment to prevent the entry of indigenous people into the correctional system as well as for the provision of appropriate services within the system. Although the CMD program caters for indigenous offenders, awareness of the needs of this group is typically diminished within the criminal justice system. In some cases, indigenous CMD participants have not been linked to relevant services as they have chosen not to identify as indigenous.

Lawyer for the Tasmanian Aboriginal Community Legal Service (TACLS) Amanda Ripper makes the following comments from her perspective representing indigenous participants in the therapeutic courts:

'Generally speaking, Aboriginal clients that have engaged with the CMD program benefit in several ways including, but not limited to, ceasing and or reducing criminal activity and ceasing and or reducing substance use – the desired outcomes, obviously. However, my observation is that often our clients have incredibly chaotic lives and dysfunctional personal relationships and generational contact with the criminal justice system and substance abuse. The lack of organisational skills, dysfunction and chaos in our clients' lives directly affects their ability to engage, not only to the satisfaction of CMD and the court, but also to prevent the best possible personal outcome. Whilst it may not be a role for the CMD program per se, my suggestion is that a personal mentoring role may assist some clients in their active and successful engagement with CMD and importantly, their lives generally. This holistic approach recognises that substance abuse issues are part of the overall problem but not the sole problem. Even in instances where clients have been exited from the CMD list, their limited ability to take responsibility for the actions leading to the cancellation of the CMD Order results in strong feelings of desperation and fear of not remaining part of the program and potentially returning to criminal offending and drug use at levels the same as or greater than prior to their engagement with CMD'.

With respect to women, the program and the courts could do much better in accommodating the needs of mothers with young or school-aged children. The standard afternoon court appearance time (2:15pm) makes it impossible for participants to collect children from school

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<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Tasmania~23>

on days they are required to attend afternoon court sessions. The court does not provide any childcare or services for parents with young children who accompany them to court.

Women are often traumatised by family violence and there are no specific services addressing these trauma symptoms as barriers to compliance. While the proportion of female CMD participants is probably consistent with the proportion of female offenders, the special needs attaching to this cohort are not necessarily routinely recognised or addressed by the program.



Phase 2 progression, 2015 (DCM Daly).

Challenges for the future and priority areas for development and resources

Best Practice

We need to improve the program's fidelity to the Key Components and, ultimately, to the Best Practice Standards (below), in order to ensure robust compliance and effectiveness that will improve trust between stakeholders and reduce resistance to therapeutic courts from 'law and order' proponents. The development of a Best Practice Model for the CMD program has been underway since late 2015. This task has not been sufficiently resourced or prioritised to enable it to be completed and implemented. In our view, this endeavour should be given the highest priority and should incorporate both the Key Components and the Best Practice Standards. It is clear that many of the issues raised above by the various practitioners are inconsistent with the ideal model represented by the Key Components and the Standards. In our view, this provides the opportunity to take the next step in progressing the development of the program locally, and we warmly encourage an evidence-based approach to 'continuous improvement', while recognising that much progress has been made in developing the therapeutic courts over recent years.

DCM Daly notes that 'the development of a best practice model would have many advantages, including the increased development and application of expertise within the drug court team. There are presently no Court resources devoted to the project and, because of the greater priority demanded by other work, the project competes poorly for attention. Because the scope of the project necessarily includes magistrates, court diversion officers, police and defence counsel, the assistance of a project officer is probably necessary if such a resource is to be successfully developed'.

Below is a discussion of how to address current drug court best practice standards in Tasmania.⁶⁶ In the manner of the above running commentary of key components for effective drug courts, we address each standard.

Standard 1: Target population

Eligibility and exclusion criteria for the Drug Court are predicated on empirical evidence indicating which types of offenders can be treated safely and effectively in Drug Courts. Candidates are evaluated for admission to the Drug Court using evidence-based assessment tools and procedures.

It would be a useful exercise to investigate assessment outcomes across the State to determine if similar decisions are made with respect to accepting or refusing applicants into treatment, and whether these decisions are made for the same reasons. Use of the Level of Service / Case Management Inventory (LS/CMI) assessment tool is standard practice. Recent Supreme Court assessments have identified the imposition of a custodial penalty in excess of two years as an eligibility barrier for legislative reasons.

Standard 2: Historically disadvantaged groups

Citizens who have historically experienced sustained discrimination or reduced social opportunities because of their race, ethnicity, gender, sexual orientation, sexual identity, physical or mental disability, religion, or socioeconomic status receive the same opportunities as other citizens to participate and succeed in the Drug Court.

It would be interesting to undertake an analysis of the breakdown of the numbers of program participants across these categories and by comparison with the general population and the offender population. While, of course, none of these factors are barriers to program participation per se, the comments from the Aboriginal Community Legal Service lawyer above suggest that systemic disadvantage particularly impacts her clients' ability to comply with program conditions. It is possible that a more sophisticated form of hidden discrimination may operate to inadvertently reduce the level of participation of some disadvantaged groups in the program.

⁶⁶ www.allrise.org/sites/default/files/nadc/AdultDrugCourtBestPracticeStandards.pdf (Vol 1) and [adult_drug_court_best_practice_standards_volume_ii_0.pdf](http://www.allrise.org/sites/default/files/nadc/AdultDrugCourtBestPracticeStandards_Volume_II_0.pdf) (Vol 2)

Standard 3: Roles and Responsibilities of the judge

The Drug Court judge stays abreast of current law and research on best practices in Drug Courts, participates regularly in team meetings, interacts frequently and respectfully with participants, and gives due consideration to the input of other team members.

The role and courtroom practices of the five CMD Magistrates vary to some extent across the State. There has been limited opportunity for professional development to moderate practices and ensure consistency. The north and north western magistrates are relatively isolated from their therapeutic counterparts in the south. As all CMD Magistrates spend only a minority of their working week engaged in CMD work, attendance at team meetings is impractical. Program staff across the State express confidence in the therapeutic approaches employed by all the CMD judicial officers.

Standard 4: Incentives, sanctions, and therapeutic adjustments

Consequences for participants' behaviour are predictable, fair, consistent, and administered in accordance with evidence-based principles of effective behaviour modification.

Although some guidelines have been developed in relation to the imposition of sanction days, this aspect of the program requires further development. As suggested by a number of comments above, there is room for improvement with respect to incentives and rewards. The application of sanctions and rewards is an area in which considerable variation across the State is evident.

Standard 5: Substance abuse treatment

Participants receive substance abuse treatment based on a standardized assessment of their treatment needs. Substance abuse treatment is not provided to reward desired behaviours, punish infractions, or serve other non-clinically indicated goals. Treatment providers are trained and supervised to deliver a continuum of evidence-based interventions that are documented in treatment manuals.

The availability of counselling services is not consistent across the State. While the south has the advantage of regular high quality in-house therapeutic intervention for every participant, the north and north west programs rely on the availability of external community-based services.

Standard 6: Complementary treatment and social services

Participants receive complementary treatment and social services for conditions that co-occur with substance abuse and are likely to interfere with their compliance in Drug Court, increase criminal recidivism, or diminish treatment gains.

The implementation of this standard is impacted by the availability of suitable local services. There is a distinct lack of safe, stable and drug-free accommodation to promote and support treatment (there are no housing services specifically available to or prioritised for CMD participants). There is limited available community mental health treatment, family

counselling and parenting programs. There is scope for access to better community treatment for anxiety, anger, trauma and other negative emotions. Treatment staff are not necessarily trained in trauma-informed care. Cooperation with employment authorities can assist to reduce job-search requirements during the early phases of drug treatment orders, but this can vary across the State. The availability of offender-specific programs through Community Corrections is increasing, and the program has strong links to TasTAFE and the LINC statewide for access to literacy and educational opportunities.

Standard 7: Drug and alcohol testing

Drug and alcohol testing provides an accurate, timely, and comprehensive assessment of unauthorized substance use throughout participants' enrolment in the Drug Court.

As drug testing services are provided by the same agency across the State, there is a high degree of consistency in the provision of results to case managers. The service is of a high standard in terms of speed and accuracy. Delays are often experienced in accessing results of further (Gas Chromatography / Mass Spectrometry) analysis of samples, which can delay decision-making in the courtroom. Limitations to the testing regime are imposed by cost, the availability of sufficient spaces in particular areas and at weekends.

Standard 8: Multidisciplinary team

A dedicated multidisciplinary team of professionals manages the day-to-day operations of the Drug Court, including reviewing participant progress during pre-court staff meetings and status hearings, contributing observations and recommendations within team members' respective areas of expertise, and delivering or overseeing the delivery of legal, treatment and supervision services.

The collaboration between legal, program, treatment and prosecution staff is a strength of the Hobart program. All members of the wider team participate in pre-court conferences on a regular basis, and program and prosecution staff meet weekly to review all upcoming cases, with treatment staff attending at least fortnightly.

Standard 9: Census and caseloads

The Drug Court serves as many eligible individuals as practicable while maintaining continuous fidelity to best practice standards.

The Hobart program has had more success than its north and north-western counterparts in limiting participant numbers to the agreed 'cap' (capacity) figure for each region, which was imposed in recognition of the need to maintain fidelity to best practice rather than accept a limitless number of participants and thereby compromise the standard of their supervision and treatment. Recent additional State Government funding will support additional program staff in order that the demand for additional places will be able to be better accommodated while maintaining fidelity to best practice and without placing staff under undue pressure.

Standard 10: Monitoring and evaluation

The Drug Court routinely monitors its adherence to best practice standards and employs scientifically valid and reliable procedures to evaluate its effectiveness.

This is an area in which the program has been deficient to date, and is, in our view, a high priority for future action. It is our hope that this article will prompt further action in this respect and perhaps indicate a method by which such evaluation could be undertaken. An assessment of current practices statewide against the Key Components and the Best Practice Standards could assist in refining the Best Practice Model that has been under development for some time.

In our assessment of the program's current operation, and endorsed by many of the comments from practitioners above, comprehensive compliance with best practice guidelines appears to be lacking and is a high priority. We have confidence in the practitioners working in the program, and there should be nothing to fear from careful and considered assessment of current practice against best practice standards in order to improve statewide consistency and, ultimately, the outcomes of the program. The following recommendations, in the areas of powers, areas of specialisation, culture and leadership, and remit, are made to further current practice and in light of the previous discussion of components and practice standards.

Additional powers

The program would be improved by some legislative amendments, such as to enable arrest warrants to be issued for non-compliance (rather than only for failure to attend court) and to reduce the number of sanction days required before custody can be imposed (currently 14, whereas best practice would suggest a maximum of five or six days). DCM Daly agrees that 'the program – and the safety of the community – would be improved if the court had additional powers to remand offenders in custody where it appears likely they will not comply with the conditions of the Drug Treatment Order. At present, there is no such power'.

A/TL Laura Blackwell adds that she 'would like to see the legislation reviewed and potentially amended to make the program more accessible to people appearing in the Supreme Court and to change the Court's power in relation to activating sanction days. At present, the two year anniversary rule contained in the legislation means a person cannot be sentenced to the program if they are likely to be sentenced to a custodial sentence in excess of two years, restricting a number of people in the Supreme Court from accessing treatment with the program. Also, at present, the Court is unable to activate sanction days until a participant has accumulated in excess of 14 sanction days, meaning the penalty for breaching the Order is not immediate. I would like to see the legislation amended to allow magistrates to activate sanction days at their own discretion, meaning in appropriate cases sanction days could be activated immediately'.

Specialisation

There is in Tasmania no dedicated single drug court judicial officer or designated TJ friendly courtroom. Drug court lists are currently overseen by three magistrates in the south of the State and one each in the north and north-west, each of whom employs individual practices with respect to seating within the courtroom and which participants may be present during pre-Court conferences. The geography of each courtroom is different and, in the south of the State, the same courtroom is not always used even for each magistrate's regular list. The allocation of courtrooms requires juggling various competing needs (such as courtroom size and access to custody), but a designated therapeutic courtroom for all the problem-solving courts would encourage the development of a therapeutic culture. Seating arrangements, furniture and wall decor in such a courtroom could be more appropriate and conducive to the problem-solving approach. For example, rewards, such as a 'fish bowl' or a shelf of toys, could be more visible, and appropriate artwork could be installed.

In the south of the State, where three magistrates oversee and review drug court lists, three separate lists occur approximately each fortnight, with efficiency and consistency implications that impact court and program staff, prosecutors and lawyers. Ideally, problem-solving courts would always be given dedicated court time without any overlap from the general list, but, in practice, listing does not always allow for this. Five CMD Magistrates statewide necessarily results in the benefits and disadvantages of five approaches, the benefits including the involvement of a substantial proportion of the lower court magistrates in TJ work, and the disadvantages including regional differences and inconsistencies in practices, for example with respect to the frequency of reviews, the imposition of sanctions and rewards and the conduct of pre-court conferences. The personal characteristics of judicial officers are highly relevant to their uptake of TJ courts and their effectiveness in this field. Perhaps it is time for Tasmania to consider single judicial officers for each of the therapeutic court lists, at least in each end of the State. Different models for problem-solving magistrates to operate statewide could be considered, and would obviously have flow-on impacts for court staff, lawyers and other stakeholders.

DCM Daly comments that 'while the thinking behind a single judicial officer approach to the therapeutic jurisdictions reignites into an age-old 'specialisation' debate within courts, my view is that the present regime of dedicated magistrates works very well. Having a small but significant cohort of allocated magistrates working in the therapeutic jurisdictions promotes sustainability and provides an environment of collegial support and advice. A single-magistrate model would result in that person being effectively isolated. It would also result in the reduction of advocacy for and expertise within the therapeutic jurisdictions'.

Another way to consider the fragmentation described above, is to reflect that, rather than

contributing to a watering-down of the therapeutic approach, it could instead be seen as a broadening of exposure to it. With numerous magistrates practicing in the various therapeutic courts across the State, the breadth of opportunities for all practitioners to apply TJ within the jurisdiction is considerable. Combined with the fact that both the Chief Magistrate and Deputy Chief Magistrate are strongly supportive of TJ and actively involved as judicial officers within therapeutic courts, Tasmania is well placed to be a leader in the development of therapeutic courts.

Perhaps what is needed in the Tasmanian context is not necessarily a single judicial officer for the drug court, but rather strengthening of the therapeutic culture to surround and support both the program and the other therapeutic courts. An acknowledgment that there is room for improvement and a willingness and ability to make time to engage in this conversation with all the relevant parties is certainly a good place to start. Police Prosecutor Olivia Ortuso observes that 'the program runs well but with some inconsistencies between magistrates, and there is always room for improvement!'

Therapeutic culture and leadership

The development of a comprehensive therapeutic culture across the State is impeded by the fragmentation of the program across courts, across the State and between the courts and the other agencies involved (including Community Corrections, Health and Human Services, Youth Justice, Police Prosecution and Legal Aid). The range of generalist prosecutors and defence lawyers with involvement in the program exacerbates this situation, both for practical reasons of efficiency and because they find themselves regularly alternating between the adversarial and therapeutic jurisdictions, with obvious implications for courtroom practice. A degree of specialisation would make it easier to build relationships and provide appropriate professional development opportunities to a small(er) number of practitioners with an interest in this field.

Legal Aid lawyer Pip Monk takes the view that 'there should be one police prosecutor responsible for all of the courts, or one prosecutor per court. Having one prosecutor for each court at a minimum provides consistency for those participants in that court, and allows the participant to develop a relationship of sorts with a prosecutor who they would in the past have viewed perhaps as an adversary. It means that the prosecutor knows the file well, and is able to properly represent the public interest because of their knowledge of the program and the individual participants'.

The program within Community Corrections has itself suffered from ongoing instability. As noted by Moore in 2014, 'a high turnover of staff and managers has characterised the program since its inception as a pilot in 2008, and reduces the capacity for effective

teamwork, continuity of practice, stability and program development'.⁶⁷ For example, five different staff will have undertaken the southern Team Leader role during a two-year period between 2015 and 2017 alone. This situation also has implications for professional development, staff retention and relationships with stakeholders. Courtney Punshon, from the Salvation Army Bridge program, notes that 'the appointment of one experienced Team Leader for the service would benefit the effectiveness of the team as well as make it easier for external services to have a point of contact for any concerns or issues regarding the program or a particular client'.

Best practice is enhanced by well-trained and appropriate practitioners remaining in all the significant team roles (judicial officer, prosecutor, lawyer, AOD Counsellor and program officer (CDO)) for extended periods of time (at least two years), in order that a genuine therapeutic culture can develop within the team. There is a need for leadership, resources, direction and development of the therapeutic courts within the current process-oriented and risk-averse environment. There is a need for better liaison between the program, sitting within Community Corrections, and the courts. Strengthening these linkages would provide clarity around responsibility for such matters as interdisciplinary training and program development and would help to grow a stronger therapeutic culture from what is currently something of a piecemeal approach.

As was noted in the most recent Annual Report of the Magistrates' Court, 'a specialised statewide approach should be underpinned by the effectiveness of the therapeutic philosophy rather than being process and budget driven' . . . (the offender) numbers represent a tiny proportion of the overall court lists (over 30,000 matters per year).⁶⁸ The strategic plan of the Tasmanian Magistrates Court addresses the therapeutic courts under Goal 3: 'Promote the Court's role in the community', Strategy (c): 'In partnership with others, develop innovative court-based diversion programs to prevent re-offending'.⁶⁹ The key performance indicator for this strategy is 'the percentage and number of participants in diversion programs'. This goal provides a mandate for the development of the therapeutic courts, which must now be met with an appropriate allocation of resources to enable this important work to be prioritised and undertaken. This includes funds to extend the program's availability to more participants as well as resources for necessary social support and to enable appropriate program development to occur.

⁶⁷ Moore, Liz (2014) '*International Best Practice in Drug Courts*', published in 7 Arizona Summit Law Review, Spring 2014, p503. Available at <http://ssrn.com/abstract=2315921>

⁶⁸ Magistrates' Court of Tasmania Annual Report 2015-16. Available at <http://www.magistratescourt.tas.gov.au> Accessed March 2017.

⁶⁹ http://www.magistratescourt.tas.gov.au/__data/assets/word_doc/0006/346641/SP_Final_2_July-1.docx

The changing role of the judiciary

The demands on judicial officers in therapeutic courts are quite different to those of the adversarial system in which the function is primarily one of adjudication and sentence disposition. Training in addiction, motivational interviewing, therapeutic interventions and the judicious use of empathy is a far cry from traditional legal education. Research and experience suggest that the appointment of effective judicial officers to these roles requires that they understand and are comfortable in them and have a long-term commitment to a therapeutic approach.

The 'power base' of therapeutic courts can be expanded by the expression of political priorities and by experienced judicial officers discussing this work whenever opportunities arise. This requires a degree of passion, boldness and confidence to lead and contribute to community debate, attributes not necessarily associated with appointments to the judiciary in this country. Judicial leadership can be powerful in demonstrating a robust vision of the effectiveness of problem-solving courts.

The current Protocols for Judicial Appointments ⁷⁰ indicate that a suitable candidate should be:

- an experienced legal practitioner with a high record of professional achievement coupled with a knowledge and understanding of the law consistent with judicial office;
- an excellent conceptual and analytical thinker, displaying independence and clarity of thought;
- an effective oral and verbal communicator in dealing with legal professionals, litigants and witnesses and able to explain technical issues to non-specialists;
- highly organised, able to demonstrate or develop sound court management skills and work well under pressure;
- capable of making fair, balanced and consistent decisions according to law without undue delay;
- a person of maturity, discretion, patience and integrity who inspires respect and confidence;
- committed to the proper administration of justice and continuous improvement in court practice, working collegiately with judicial colleagues and effectively with court officers to those ends.

⁷⁰ http://www.justice.tas.gov.au/about/policies/protocol_for_judicial_appointments



Chief Magistrate Geason presenting donated gifts to a participant on the birth of his twins, March 2017

Perhaps it is time to consider adding a criterion relating to knowledge of and commitment to the principles of therapeutic jurisprudence and problem solving justice to the selection criteria for judicial appointments in Tasmania. This would shadow an increasing recognition of the TJ approach within the law and criminology faculties at the University of Tasmania over recent years.

Conclusion

It is gratifying to note that there has been some TJ progress in Tasmania in recent years and that some further developments in this field are on the horizon. It must be acknowledged that responsibility for this evolution rests largely with Vanessa Goodwin, the Attorney General and Minister for Justice of the State until a recently diagnosed tragic health condition forced her premature resignation from the portfolio at just 48 years of age.

- ✓ The final report of the Tasmanian Sentencing Advisory Council in March 2016 supported the extension of drug courts and more community based alternatives to custodial and suspended sentences.
- ✓ Legislation was proclaimed to enable Drug Treatment Orders to be made in the Supreme Court from February 2017. One Assessment Report has been provided to date, and that matter did not result in the imposition of a DTO. Three further referrals have been received to date.
- ✓ Legislative provision for deferred sentencing also commenced in February 2017. Amendments to the *Bail Act* allow for magistrates to review defendants' participation in rehabilitation programs for up to six months, and to take their progress into account for sentencing purposes.
- ✓ Although there is nothing definitive as yet, consideration is being given to the appropriateness of extending future treatment orders to include alcohol as well as illicit drugs.

- ✓ The Tasmanian Law Reform Institute (TLRI) and Tasmanian Institute of Law Enforcement Studies (TILES) have recently conducted a study and drafted a Consultation Paper *Responding to the Problem of Recidivist Drink Drivers*, including consideration of a Recidivist Drink Driver therapeutic court list. The idea of a specialist problem-solving court for persistent drink driving offenders was flagged in Michael Hill's 2012 paper, in which he observed that 'in a place the size of Tasmania I would have thought we could achieve some good results with the right approach'.⁷¹

The report was launched in May 2017, and public feedback sought on the 'non-traditional court model that, if adopted, would be the first of its type in Australia. Former Chief Magistrate Michael Hill, who was part of a reference group that guided researchers, said repeat offenders often had a range of issues that needed addressing, including mental health problems, domestic violence, financial issues or drug abuse. He said the court would address these underlying causes and develop a tailored program of treatment'.⁷²

- ✓ At the Second International Conference on Non Adversarial Justice held in Sydney in April 2017,⁷³ Tasmania was represented at a national meeting of therapeutic court practitioners to progress discussion about forming an Australasian drug court association or 'community of practice'.

In our assessment of the state of therapeutic jurisprudence in Tasmania against the three-phase drug court model, it can be considered to have fulfilled the requirements of the first 'stabilisation' phase. Considerable progress has been made and the fundamental requirements for an effective and sustainable outcome are in place. This is a reflection of much good work undertaken by numerous stakeholders across the public and community sectors over the past decade. The next requirement is for the second 'consolidation' phase of the program to occur – to link together and 'systematise' the various components and develop relationships to build a truly therapeutic culture, supporting a range of court-based therapeutic programs around the State, operating consistently with best practice standards as determined by the best contemporary evidence.

There is, in our view, a need for 'upstream thinking' with respect to criminal justice policy and drug law reform. Senior Sergeant Chris Allen of Queensland Police describes his frustration at 'the futility of mowing the lawn'⁷⁴ in describing police responses to offenders that fail to address the underlying issues that contribute to the commission of crime. We share a similar frustration with practices that see the revolving door of criminal justice continue to spin, and, along with that frustration, we share an appetite for change.

⁷¹ MR Hill (2012), *ibid*, p73.

⁷² Hobart Mercury, 18 May 2017, p5.

⁷³ <http://www.naj2017.com>

⁷⁴ Snr Sgt Chris Allen, Queensland Police, *Conversations with Richard Fidler*, podcast broadcast on ABC Radio National 15/2/17.

The advancement of therapeutic court programs obviously depends on adequate financial investment and also on the leadership and energy to pioneer new and different ways of work. A comparison of the development of problem-solving courts internationally reveals an important difference between an American disposition characterised by enthusiasm, boldness and pragmatism and the contrasting penchant of other countries (England, Scotland, Ireland, Canada and Australia) towards moderation, deliberation and restraint.⁷⁵ As Moore observed in 2014, 'the sort of dynamic and creative problem-solving approaches in various successful programs around the world are not well served by the risk-averse and process-oriented public service machine in which the (Tasmanian) program is currently embedded. That is notwithstanding the independence of the judiciary and the combined blessings of a progressive Chief Magistrate and CMD Magistrates who are competent, intelligent, professional and constructive in their approach and committed to the concept of therapeutic jurisprudence'.⁷⁶

We recognise that the pace of change is slow within inherently conservative organisations such as the Court and the Department of Justice. However, programs such as CMD can make meaningful and significant contributions both socially and economically and we encourage political, judicial and departmental leaders to provide both practical resources and a supportive culture to enable such programs to thrive and to continuously improve.

In our opinion, the program should be known by a title that accurately represents its function, that is, as a bona fide drug court. The unwieldy and unclear term 'Court Mandated Diversion' does little to assist understanding of the program and, as recently pointed out by Professor Arie Freiberg, the program is a sentencing option in its own right and not merely diversion from another sentence. As such, the term may diminish both understanding and the perceived significance of the sentence.⁷⁷

In our submission, further investment is required in order to realise the extensive savings that can flow from taking a problem-solving approach to crime. A limit of 80 drug court places statewide and no dedicated state government investment in either the drug court or the mental health court programs for a ten year period is an inadequate gesture of support, which fails to recognise the importance and the impact of the work done in these programs. Money invested wisely on an effective therapeutic division of the Magistrates Court is money that could be saved across a range of public budgets including police, emergency services, courts, prisons, public health and child protection. If such a division of the court can assist to

⁷⁵ James L Nolan Jr (2011), *The International Problem-Solving Court Movement: A Comparative Perspective*, 37 Monash University Law Review, 259, 261.

⁷⁶ Moore, Liz (2014), *ibid*, p504.

⁷⁷ Comment made in presentation by Professor Arie Freiberg at the Non Adversarial Justice conference, Sydney, April 2017.

turn lives around to the extent that participants transition from welfare to work, not only does the social health of the community improve through the global functioning of more of its citizens, but the economic benefits from increased taxation, fines repayment and a reduction in the payment of social security benefits will also be considerable. Subject to careful consideration of the available evidence, governments should be confident to engage in long-term thinking that will serve the community beyond the short-term populist political electoral cycle.

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