

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Responding to the Problem of Recidivist  
Drink Drivers**

ISSUES PAPER NO 23

MAY 2017



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## Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Associate Professor Terese Henning of the University of Tasmania (appointed by the Vice-Chancellor of the University of Tasmania). The members of the Board of the Institute are: Associate Professor Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Simon Overland (appointed by the Attorney-General), Dr Jeremy Prichard (appointed by the Council of the University), Craig Mackie (appointed by the Tasmanian Bar Association), Rohan Foon (appointed by the Law Society) Ann Hughes (appointed as community representative), Kim Baumeler (appointed at the invitation of the Board)..

## How to Respond

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to answer any or all of those questions in their submissions.**

There are a number of ways to respond:

- **By filling in the Submission Template**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted. The Submission Template can be accessed at the Institute's webpage <<http://www.utas.edu.au/law-reform/>>.

- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response – you may choose to answer, all, some, or none of them. Please explain the reasons for your views as fully as possible.

Submissions may be published on the Institute's website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published or you wish it to be anonymous, please tell us and the Institute will respect that wish.

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Electronic submissions should be emailed to: [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

Submissions in paper form should be posted to:

Tasmania Law Reform Institute  
Private Bag 89  
Hobart, TAS 7001

Inquires should be directed to Ms Kira White on the above contacts, or by telephoning (03) 6226 2069.

**CLOSING DATE FOR RESPONSES: 17 August 2017**

The Institute welcomes your response to any individual question or to all questions contained within this Issues Paper. A full list of the consultation questions is contained below with page references for questions that relate to different parts of the Issues Paper.

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## Part 1

# Introduction

## 1.1 Background to this Issues Paper

1.1.1 The first Tasmanian Road Safety Strategy was released in 2002 in the context of the alarming statistic that almost 5000 people were killed or seriously injured on Tasmanian roads between 1996 and 2006.<sup>1</sup> While a shared responsibility approach to driver behaviour (with drivers, regulators, road designers and managers involved in safer transportation planning) has seen an improvement in road crash statistics on serious injuries and deaths, the issue of recidivist drink driving has become a focus of academic and policy interest. A number of Australian and overseas studies have indicated that a minority of recidivist drink drivers account for a significant proportion of drink driving crashes.<sup>2</sup> As set out at [1.2.5], 2014 Tasmanian data confirm that alcohol continues to be a factor in a significant proportion of serious casualties (10%) and crashes resulting in death (11%). The role of alcohol as a major cause of health and social harms including the involvement of alcohol in road traffic accidents has been recognised in the national policy addressing alcohol, tobacco and other drugs and is clearly articulated in the National Drug Strategy 2011–2015.<sup>3</sup> From a public health perspective, risky drinking behaviour was recognised as a challenge that still exists and was identified as a drug specific priority.<sup>4</sup> Clearly, repeat drink driving is a crucial aspect of risky drinking behaviour; one that has a profound consequence for public safety and warrants considerable attention from a health and law enforcement perspective.

1.1.2 As recognised by Bartkowiak-Théron and Henning, the complex problem of recidivist drink driving is not new and ‘its persistence indicates ongoing failures in addressing a problem that has wide ranging social and economic consequences both at the individual and broader societal level in terms of well-being and safety’.<sup>5</sup> Many legislative, education and law enforcement initiatives have been implemented in Tasmania to address the issue of drink driving. These have included the introduction of random breath testing and the lowering of the legal limit of permitted alcohol concentration in the blood.<sup>6</sup> The detection of unlicensed drivers has been enhanced by the introduction of automatic number plate recognition technology, which allows police to identify vehicles where the driver is recorded as being disqualified from driving. Parliament has also sought to deter repeat offenders by the use of increased penalties for drink driving offences, the introduction of an education program (the Sober Driver program) and the use of alcohol ignition interlock devices. However, as Richardson notes, ‘[t]hese approaches alone, while necessary, do not appear to be effective for a

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<sup>1</sup> Department of Infrastructure, Energy and Resources, *Our Safety, Our Future: Tasmanian Road Safety Strategy 2007-16* (2006) 4.

<sup>2</sup> E Richardson, ‘A Driving While Intoxicated/Suspended Court List for Victoria’ (Australian Centre for Justice Innovation, Monash University, Background Paper, 2013) 5.

<sup>3</sup> Australian Government, *The National Drug Strategy 2010-2015* <<http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/nds20102015~nds20102015-about>>.

<sup>4</sup> Ibid.

<sup>5</sup> I Bartkowiak-Théron and T Henning, ‘Therapeutic Justice and Recidivist Drink Drivers: Irreconcilable and Compatible Issues?’ *Tiles Briefing Papers*, Tasmania (2016) 1.

<sup>6</sup> Ibid 2.

group of core drink driving offenders who continue to reoffend'.<sup>7</sup> This is illustrated by a case reported in *The Examiner*, where an offender was convicted of his fifth drink driving offence in five years and sentenced to a partly suspended sentence of four months imprisonment with two months suspended.<sup>8</sup> While there is general community awareness of the unacceptability of drink driving and the risks it poses, for a cohort of offenders, there is a lack of awareness about the risk to public safety. Some offenders have expressed the view that drink driving is 'just a traffic offence'.<sup>9</sup> Concerns about the revolving door relating to repeat drink driving have been expressed by Tasmanian magistrates who have stressed that the escalation of penalties is ineffective as a response to these offenders and have highlighted the limitations of conventional court practices for these offenders.<sup>10</sup>

1.1.3 In light of these concerns, in September 2013, the Tasmanian Institute of Law Enforcement Studies (TILES) and the University of Tasmania's Faculty of Law organised an international workshop intended to map pathways in addressing the issue of recidivist drink drivers. One of the main issues identified by key stakeholders was the poor fit of some criminal justice responses to instances of repeat drink driving. Given that the circumstances of drink driving range from social drinking and ill-advised behaviour to the profound problem of alcohol addiction, stakeholders expressed the view that any solution to such a multifaceted problem needs to be sufficiently flexible to meet a wide spectrum of needs and circumstances. Stakeholders highlighted that the progressively harsher criminal justice response (such as increased penalties and mandatory penalties) does not appear to be effective for a cohort of recidivist drink drivers and expressed the view that these offenders should be considered as offenders with chronic health issues that require a more therapeutic response.<sup>11</sup>

1.1.4 As a consequence, the Tasmania Law Reform Institute (TLRI) obtained funding from the Solicitor's Guarantee Fund to examine:

- The adequacy of the current sentencing regime for drink driving offences;
- The application of non-traditional criminal justice responses to the problem of recidivist drink drivers;
- National and international research literature on non-traditional approaches adopted elsewhere;
- Whether a therapeutic jurisprudential approach might be appropriate in the context of recidivist drink driving; and
- Which approach offers the best model for achieving behavioural and attitudinal change in the recidivist drink driver.

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<sup>7</sup> Richardson, above n 2, 3.

<sup>8</sup> C Tang, 'Five-Time Drink-Driver Jailed', *The Examiner* (Launceston) 25 November 2015 <<http://www.examiner.com.au/story/3519146/five-time-drink-driver-jailed/>>.

<sup>9</sup> See discussion at [2.2.3] in relation to drink driver attitudes.

<sup>10</sup> M Hill, 'Driving While Intoxicated (DWI) Courts: A Vital Part in the Battle to End Recidivist Drink Driving' (Paper presented at Alcohol, Tobacco and other Drugs Council of Tasmania (ATDC) Conference Vision and Values – Setting the Scene for the Future, Hobart, 7–8 May 2014). See also Bartkowiak-Théron and Henning, above n 5.

<sup>11</sup> J Costello, 'A Problem Oriented Court for Recidivist Drink Drivers – Providing a Foundation' (Paper presented at TILES Recidivist Drink Driving Workshop, Tasmania, September 2013); G Waters, 'One Size Does Not Fit All: Substance Impaired Driving Presentation' (Paper presented at TILES Recidivist Drink Driving Workshop, Tasmania, September 2013). See also Bartkowiak-Théron and Henning, above n 5.

The TLRI and TILES also applied for a grant from the Motor Accident Insurance Board (MAIB) Injury Prevention and Management Foundation to construct a profile of recidivist drink driving offenders in Tasmania through an examination of records held by the Magistrates Court, Community Corrections and Tasmania Police. A profile of recidivist drink drivers did not previously exist in Tasmania and the study aimed to describe the socio-demographic and criminal history characteristics of offenders who have been convicted in the Magistrates Court for multiple drink driving offences. This profile has been used to inform the discussion in this Issues Paper.

1.1.5 This Paper considers options for reform that may improve the effectiveness of the criminal justice response to drink drivers by exploring sentencing options that are more likely to influence offenders' perceptions of the risks represented by their behaviour and bring about lasting attitudinal change. In accordance with the philosophy of therapeutic jurisprudence, some new initiatives have looked at creating specialist problem oriented courts for recidivist drink drivers. This Issues Paper examines the literature on the need for an interactive, actively interventionist approach to the problem of recidivist drink driving, one that enables on-going assessment and supervised treatment of the offender as well as recognition of the specific criminogenic needs of individual offenders. It considers best practice models from national and international jurisdictions. Its analysis is informed by an empirical study, described above, which constructed a profile of Tasmanian recidivist drink drivers. The Issues Paper will be used to seek feedback from local stakeholders and the community to determine how these approaches might be tailored to local needs and limitations, including legislative and resource strictures.<sup>12</sup> The Paper sets out 26 questions that will inform the Institute's assessment of the appropriateness of a therapeutic/problem focused response to repeat drink driving (including the need for a drink driving list pilot) in Tasmania and also to guide any model presented in the Final Report that seeks to address this significant issue.

## 1.2 The drink driving problem

1.2.1 Data provide an indication of the prevalence of drink driving in Tasmania. In 2015–16, Tasmania Police conducted a total of 469 610 random breath tests, with 2319 drivers found to be over the prescribed blood alcohol limit. This meant that of the drivers tested, 99.5% complied with the alcohol limit,<sup>13</sup> which is consistent with previous years.<sup>14</sup> In Tasmania, in the period 2010–11 to 29 June 2015, 9386 offenders were convicted of exceeding the legal blood alcohol limit. However, these data are likely to be an underestimate of the extent of drink driving in the community as they do not include drivers who drink drive but are not detected by the police, and self-reports indicate that a greater proportion of drivers report driving while under the influence of alcohol. The National Drug Strategy Household Survey conducted in 2013 indicates that 12.2% of recent drinkers reported driving a vehicle while under the influence of alcohol in the previous 12 months.<sup>15</sup> In the Tasmanian context, Matthews and Bruno report that 7% of drinkers self-reported driving under the influence in

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<sup>12</sup> Inter-Agency Working Group on Drugs, Tasmanian Government, *Tasmanian Alcohol Action Framework 2010-2015* (2014) 38.

<sup>13</sup> Tasmania Police, *Annual Report 2015-16*, 28.

<sup>14</sup> The percentages for previous years are: 99.5% in 2012–13, 99.4% in 2011–12 and 99.3% in 2010–11 (data from relevant annual reports). Data from earlier years are not comparable as a different reporting system was used, see Tasmania Police, *Annual Report 2010-11*, 32.

<sup>15</sup> Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2013* <<http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs-2013/ch4/>>.

2012.<sup>16</sup> Queensland research examining self-reported drink driving found that 45.2% of respondents reported drink driving at least once in the six month period before the survey.<sup>17</sup> Other Australian research has found an even higher level of driving following the consumption of alcohol with a survey of drivers conducted by Owens and Boorman finding that 58% of participants reported driving when they believed that they may have been over the legal limit, with 64% of those respondents indicating that the most recent occasion occurred within the last 12 months.<sup>18</sup> In contrast, only 14% of participants indicated that they had ever been caught and penalised for drink driving.<sup>19</sup> In view of the disparity between drink driving convictions and self-reports of drink driving, it has been suggested that it is more appropriate to describe first time offenders as ‘first time apprehended’ rather than ‘first time drink drivers’ given that most have previously engaged in drink driving.<sup>20</sup>

1.2.2 In Tasmania, information from Tasmania Police and the Magistrates Court provides an insight into the number of drivers who are repeat drink drivers. While data available from the Magistrates Court do not allow an analysis of all sentences imposed on repeat drink drivers,<sup>21</sup> it is possible to examine the number of offenders who have further charges of the same type lodged against them within two years of their conviction. As shown in Table 1-1, preliminary results from the Magistrates Court database shows that for offenders whose matter was finalised in 2011–12, 8% of those convicted of driving a motor vehicle while exceeding the prescribed alcohol limit had new similar proceedings lodged within two years and 12% were convicted of driving without a licence with alcohol in their body.

**Table 1-1: Drink driving offenders from 2011–12 who had further charges of the same type lodged within two years of conviction, Magistrates Court Tasmania<sup>22</sup>**

Section	Yes	No	Total	% Yes
Section 6(1) – Drive a motor vehicle while exceeding prescribed alcohol limit	157	1901	2058	8%
Section 6(2) – Driver not holding Aust driver lic, foreign drive lic, internat driv permit with alcohol in body	71	597	668	12%
Section 4 – Drive whilst under the influence of alcohol or a drug	0	91	91	0%
Section 4(a) – Drive a vehicle under the influence of intoxicating liquor	0	49	49	0%
Total	301	3046	3347	10%

<sup>16</sup> Cited in R Bruno and A Peacock, ‘Alcohol, the Brain and Drink-Driving: Behavioural and Psychological Perspectives’ 4 <[http://www.utas.edu.au/\\_data/assets/pdf\\_file/0005/427775/R\\_Bruno\\_A\\_Peacock\\_alcohol\\_the\\_brain\\_drink\\_driving.pdf](http://www.utas.edu.au/_data/assets/pdf_file/0005/427775/R_Bruno_A_Peacock_alcohol_the_brain_drink_driving.pdf)>.

<sup>17</sup> B Watson and J Freeman, ‘Perceptions and Experiences of Random Breath Testing in Queensland and the Self-Reported Deterrent Impact on Drunk Driving’ (2007) 8 *Traffic Injury Prevention* 11, 14.

<sup>18</sup> K Owens and M Boorman (2011), ‘Evaluating the Deterrent Effect of Random Breath Testing (RBT) and Random Drug Testing (RDT): The Driver’s Perspective’ (Monograph Series No 41, National Drug Law Enforcement Research Fund, 2011) 34.

<sup>19</sup> Ibid 38.

<sup>20</sup> H Wilson, M Sheehan and G Palk, ‘A Follow Up Sample of First Rime Drink Driving Offenders: How Many Drink Drive Post Offence?’ (20<sup>th</sup> International Council on Alcohol, Drugs and Traffic Safety Conference, Brisbane, 2013) 2 citing H Wilson, M Sheehan and G Palk, ‘Who are the Real ‘First Offenders?’ (19<sup>th</sup> International Council on Alcohol, Drugs and Traffic Safety Conference, Oslo, 2010).

<sup>21</sup> This is discussed further at [3.3].

<sup>22</sup> Note that: (1) this provides information about new charges lodged, not finalised; (2) the offender may not necessarily be found guilty of the new charges; (3) the ‘same type’ means the same Australia and New Zealand Standard Offence Classification (ANZSOC) code (in ANZSOC s 6(1), 6(2) and 6A(1) are all coded as 1431 and s 4, 4(a) and 4(b) are 0411). This means that the offences of drive while exceeding prescribed alcohol limit and drive while under the influence of alcohol/intoxicating liquor would not appear as a match, Information provided by Betty Evans, email 2 February 2016.

1.2.3 Table 1-2 shows that nearly 25% of offenders in Tasmania have been charged more than once with drink driving in the period 2006–15.

**Table 1-2: Proportion of Drink Driving Offenders by number of offences, 2006–15<sup>23</sup>**

Number of Offences	% of Total
1	76.9%
2	17.1%
3	4.2%
4	1.2%
5	0.4%
6	0.1%
7 and over	0.1%

1.2.4 Research conducted elsewhere also suggests that a ‘small segment of the drinking and driving population ... drink heavily on a frequent or episodic basis and drive with very high BACs’.<sup>24</sup> In NSW, research conducted in 2009 found that 15.5% of drink drivers returned to court for another drink-driving offence within five years.<sup>25</sup> Victorian data from 2009 show that, overall, 28% of offenders convicted of drink driving were repeat offenders, with repeat offenders accounting for 39% of offenders convicted of driving with a high range blood alcohol level (.15 and over).<sup>26</sup> Other Victorian research indicates that between 1988 and 2000, the percentage of drink driving offenders who were repeat offenders ranged from 19.2% to 30.2%.<sup>27</sup> In a 2014 examination of effective drink driving prevention and enforcement strategies, Terer and Brown state that research ‘shows between 20 and 30 percent of drink drivers reoffend’.<sup>28</sup> In the United States, ‘conviction rates suggest that approximately 30% of DWI offenders are recidivists’<sup>29</sup> and in New Zealand, data indicate that there was a reconviction rate of 36% over the period 1999 to 2008.<sup>30</sup> Self-report studies also highlight the extent of recidivism, with a Queensland study finding that around 80% of offenders who had been convicted for the first time of drink driving admitted to engaging in drink driving in the six months prior to the conviction<sup>31</sup> and 27% admitted to engaging in drink driving in the six months after conviction.<sup>32</sup>

<sup>23</sup> Information provided by Ken Hart, 5 February 2016. Offences include, *Road Safety (Alcohol and Drugs) Act 1970* (Tas) ss 4, 4(a), 6(1) and 6(2).

<sup>24</sup> J Fell, ‘Update: Repeat DWI Offenders Involved in Fatal Crashes in 2010’ (2014) 15 *Traffic Injury Prevention* 431, 431.

<sup>25</sup> L Trimboli and N Smith, ‘Drink-driving and Recidivism in NSW’ (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 135, NSW Bureau of Crime Statistics and Research, 2009).

<sup>26</sup> M Boorman, ‘The Drink and Drug Driving Enforcement Link to Public Health (First International Conference on Law Enforcement and Public Health, Melbourne, 11–14 November 2012).

<sup>27</sup> Sentencing Advisory Council, Victoria (VSAC), *Maximum Penalty for Repeat Drink Driving*, Report, 2005, 12.

<sup>28</sup> K Terer and R Brown, ‘Effective Drink Driving Prevention and Enforcement Strategies: Approaches to Improving Practice’ (Trends and Issues in Crime and Criminal Justice No 472, Australian Institute of Criminology, 2014) 1.

<sup>29</sup> J Mullen et al, ‘Treatment Needs of Driving While Intoxicated Offenders: The Need for Multimodal Approach to Treatment’ (2015) 16 *Traffic Injury Prevention* 637, 637 citing NHTSA, *Traffic Safety Facts: DWI Recidivism in the United States: An Examination of State Level Driver Data and the Effect of Look-back Periods on Recidivism Prevalence* (2014).

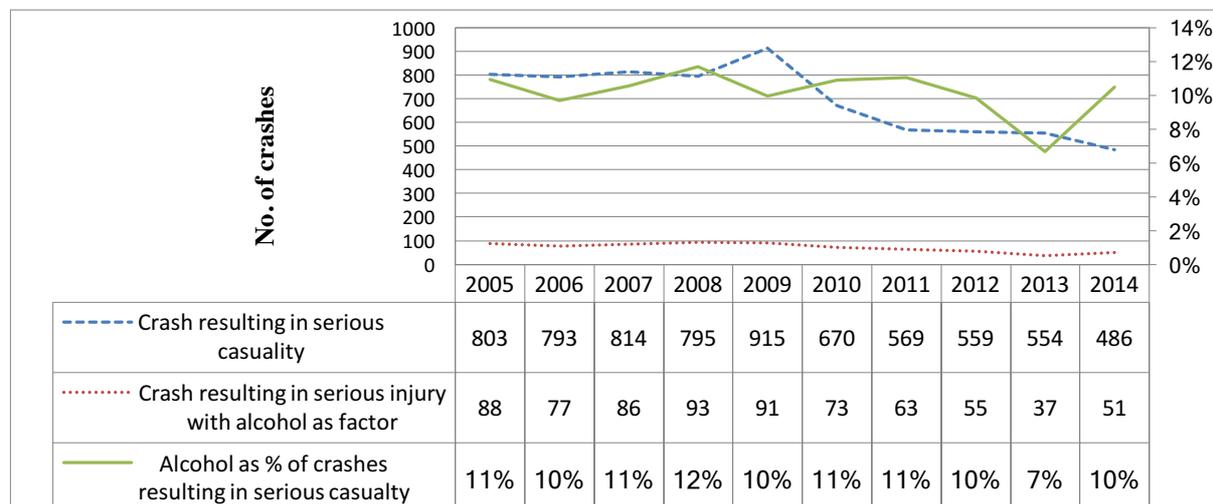
<sup>30</sup> A Dawber and T Dawber, ‘The One for the Road Group Programme for Repeat Drink/Drugged Drivers’ (20<sup>th</sup> International Council on Alcohol, Drugs and Traffic Safety Conference, Brisbane, 2013) 2.

<sup>31</sup> H Wilson, *Reducing Recidivism by First Time Drink Drivers* (PhD Thesis, Queensland University of Technology, 2015) 186.

<sup>32</sup> Wilson, Sheehan and Palk, above n 20, 5.

1.2.5 As shown in Figure 1-1, there has been a reduction over time in the number of crashes on Tasmanian roads resulting in death or serious injury.<sup>33</sup> This trend has been identified over several decades and has been attributed to ‘law enforcement measures such as random breath testing, lowering the legal limit of alcohol concentration in the blood, the compulsory wearing of seat belts, and the installation of speed cameras, as well as safer cars and better roads’.<sup>34</sup> However, alcohol still contributes to an unacceptable proportion of deaths and serious injuries. In Australia, drink driving has been identified as a factor in 25% of crashes resulting in death.<sup>35</sup> In Tasmania, while the proportion of crashes where alcohol has been identified as a factor where death or serious injury (serious casualty) has been caused is lower (10% in 2014), the rate remained fairly consistent between 2005–14.<sup>36</sup> This is consistent with the trends in other jurisdictions, where the percentage of fatally injured motorists with a blood alcohol concentration in excess of the legal limit has plateaued since the 1990s.<sup>37</sup> This is a concern as research demonstrates that there is a clear relationship between blood alcohol concentration and crash risk, ‘with a crash risk of a driver with a BAC of 0.10g/100ml being almost five times the risk of a driver with no alcohol in their system, and the crash risk of driver with a BAC of 0.15g/100 ml being 22 times that of a driver with no alcohol at all in their system’.<sup>38</sup>

**Figure 1-1: Crashes, Tasmania, 2005–14**



Source: Department of State Growth, Crash Data Manager

<sup>33</sup> This is consistent with Australian data that show a decrease in the number of deaths per 100 000 persons, as well as per 10 000 registered vehicles, see A McKenzie, *Drinking, Driving and Tragedy: An Options Paper for a New Approach to Drink Driving* (University of Tasmania with the Magistrates Court of Tasmania, 2013) 10–11.

<sup>34</sup> K Warner, ‘Sentencing Review 2012–2013’ (2013) 37 *Criminal Law Journal* 390, 397. See S Briscoe, ‘The Impact of Increased Drink-driving Penalties on Recidivism Rates in NSW’ (National Drug Research Institute, Alcohol Studies Bulletin No 5, 2004) 1.

<sup>35</sup> Richardson, above n 2, 5 citing Transport Accident Commission, *Drink Driving Statistics* (Australian Transport Council, 2011).

<sup>36</sup> By way of background to the concept of crash factors, reporting police officers allocate one or more ‘crash factors’ to each crash. These are effectively a police officer’s best attempt (usually at the scene of the crash) to classify what factor or combination of factors has caused the crash. There are currently 24 defined crash factors of which alcohol is one. In addition, it should be noted that in the case of a multi-vehicle crash, the data are presented in terms of the crash as a whole and are not specific to each road-user, which means that in a crash resulting in serious causality, it is not possible to identify whether the driver under the effect of alcohol was seriously injured or killed some other person involved in the crash: Information provided by Simon Buddle, Crash Data Manager, Department of State Growth, email to Rebecca Bradfield, 14 September 2009.

<sup>37</sup> I Faulks, J Irwin and K Stewart, ‘Drink Driving and Australian Alcohol Policy Development in 2010’ (TRB Committee on Alcohol, Other Drugs, and Transportation, 2011) 7; Fell, above n 24, 431.

<sup>38</sup> Wilson, above n 31, 11–12 citing Compton 2012.

1.2.6 There is no research conducted in the Tasmanian context that has specifically examined the contribution of repeat drink drivers to crashes that result in fatalities and serious injuries. Research conducted by the Tasmanian Sentencing Advisory Council (TSAC) examined sentences imposed for driving offences where death or injury was caused and noted that many offenders convicted of manslaughter, dangerous driving causing death and dangerous driving causing grievous harm had a pattern of risky driving including speeding, driving whilst disqualified, driving under the influence of drugs and/or exceeding the permitted blood alcohol concentration.<sup>39</sup> This research did not examine the contribution of repeat drink drivers to crashes more generally. However, research conducted in other jurisdictions suggests that recidivist drink drivers are responsible for a disproportionate number of such crashes.<sup>40</sup> Research also suggests that a proportion of disqualified drivers continue to drink drive during periods of licence disqualification, and that there is an over-representation of disqualified drivers in serious crashes.<sup>41</sup> The study conducted by the TLRI/TILES found that a large proportion of repeat drink drivers who were sentenced to a custodial sentence were driving while disqualified or unlicensed and also had prior convictions for driving while unlicensed/disqualified. This is discussed further at [2.3]. Research has also found that the highest rate of drink driving offences and drink driving crashes was during the period between being detected by police and the commencement of the licence ban.<sup>42</sup> This suggests that, for these offenders, even detection was not a deterrent and highlights the intractable nature of the problem for some drink drivers.

## 1.3 Overview of the Issues Paper

1.3.1 Part 2 provides an overview of past research that has examined characteristics of drink drivers and factors relevant to the risk of re-offending. It then sets out the findings of the TLRI/TILES study that constructed a profile of recidivist drink driving offenders in Tasmania through an examination of records held by the Magistrates Court, Community Corrections and Tasmania Police.

1.3.2 Part 3 sets out the current sentencing regime for repeat drinking driving offences. It considers the sentencing powers for drink driving offences and current sentencing patterns for drink driving offences in Tasmania.

<sup>39</sup> Sentencing Advisory Council, Tasmania (TSAC), *Sentencing of Driving Offences that Result in Death or Injury: Final Report 8* (forthcoming).

<sup>40</sup> A Watson et al, 'The Impact of Safety Measures on the Re-offence and Crash Rates of Drink-driving Offenders in Victoria' (2015 Australasian Road Safety Conference, Gold Coast, 14–16 October 2015); Terer and Brown above n 28, 1 citing J Freeman and P Lioussis, 'Drink Driving Rehabilitation Programs and Alcohol Ignition Interlocks: Is There a Need for More Research?' (2002) *Road and Transport* 4, 3; M Henderson, 'Defining the Problem and Tasks of the Summit', *Drink Driving Recidivism Summit* (Australian Advisory Committee on Road Trauma, 1996); M Longo, C Hunter and R Loan, 'South Australian Drivers Involved in Non-fatal Crashes: How Many are Drink Driving Recidivists?', *Drink Driving Recidivism Summit* (Australian Advisory Committee on Road Trauma, 1996); G Ryan et al, 'Repeat Drink Driving Offenders in Western Australia, 1984-1994', *Drink Driving Recidivism Summit* (Australian Advisory Committee on Road Trauma, 1996). See also M Sheehan et al, 'Drink Driver Rehabilitation and Education in Victoria (RACV Research Report 05/01, 2005) 10; A Dawber and T Dawber, 'The One for the Road Group Programme for Repeat Drink/Drugged Drivers' (Conference Proceedings, 20<sup>th</sup> International Council on Alcohol, Drugs and Traffic Safety Conference, Brisbane, 2013) 1; Ministry of Transport, New Zealand, *High-risk Drivers in Fatal and Serious Crashes*, (2012) 3, 12–14 <<http://www.transport.govt.nz/assets/Import/Documents/High-risk-drivers-in-fatal-and-serious-crashes-2006-2010.pdf>>; Office of Road Safety, Western Australia, *Drink Driving Fact Sheet* (2014) 1; R Elder et al, 'Effectiveness of Ignition Interlocks for Preventing Alcohol-Impaired Driving and Alcohol-Related Crashes: A Community Guide Systematic Review' (2011) 40 *American Journal of Preventative Medicine* 362, 362; Fell, above n 24, 421.

<sup>41</sup> Richardson, above n 2, 6.

<sup>42</sup> Filtness, Sheehan, Fleiter, Armstrong and Freeman, 'Options for Rehabilitation in Interlock Programs' (Austroads, 2015) cited in Watson et al, 'The Impact of Safety Measures on the Re-offence and Crash Rates of Drink-driving Offenders in Victoria' (Australasian Road Safety Conference, Gold Coast, 14–16 October 2015).

1.3.3 Part 4 examines the application of non-traditional criminal justice responses to the problem of recidivist drink drivers and provides an overview of national and international research literature on non-traditional approaches adopted in other jurisdictions.

1.3.4 Part 5 sets out the issues that need to be addressed in the development of a possible Driving While Intoxicated (DWI) court in Tasmania. It seeks feedback from the community on the desirability of establishing such court in Tasmania and in determining how such a court should operate.

## Part 2

# Characteristics of Recidivist Drink Driving Offenders

2.1.1 This Part provides an overview of past research that has examined characteristics of drink drivers and factors relevant to the risk of re-offending. It then sets out the findings of the TLRI/TILES study that constructed a profile of recidivist drink driving offenders in Tasmania through an examination of records held by the Magistrates Court, Community Corrections and Tasmania Police.

## 2.2 Previous research

2.2.1 A number of studies have examined the characteristics of drink driving offenders, including recidivist drink drivers. While there is ‘[n]o one factor [that] has been useful in explaining or predicting drink driving behaviour’, the ‘literature demonstrates [that] there are a number of characteristics that are more common in drink driving offender populations’.<sup>43</sup> Research has also found that there are differences in the characteristics of first time and repeat offenders.<sup>44</sup> An analysis of current research conducted in Australia in 2015, found that, while most drink driving offenders are male, once women have been convicted of a drink driving offence, the risk of re-conviction is similar to that for men.<sup>45</sup> The average age for first time drink drivers is around 30 and recidivists tend to be older.<sup>46</sup> First time offenders tend to be better educated, more likely to be employed and have a higher household income than repeat offenders.<sup>47</sup> Drink drivers are more likely to be single.<sup>48</sup> However, research also shows that there is significant divergence in attributes for recidivist drink drivers. For example, a New South Wales study found that a majority of repeat drink drivers were male, indigenous, below the age of 25 and lived in areas of high socio-economic disadvantage.<sup>49</sup> A Victorian study found that offenders who committed 10 or more offences were all male and ranged in age from 35–71.<sup>50</sup>

2.2.2 Research conducted in the United States has identified key risk factors that differentiate between first time offenders and repeat offenders. These are:

- having criminal associations at the time of their first Driving Under the Influence (DUI) arrest;
- earlier age of onset of substance use and criminal activity;
- earlier age at the time of the first DUI conviction;

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<sup>43</sup> Wilson, above n 31, 39.

<sup>44</sup> Watson et al, above n 40.

<sup>45</sup> Wilson, above n 31, 32–3.

<sup>46</sup> Ibid 33.

<sup>47</sup> Ibid 33. See Trimboli and Smith, above n 25.

<sup>48</sup> Wilson, above n 31, 33.

<sup>49</sup> Richardson, above n 2, 5.

<sup>50</sup> Ibid.

- having prior arrests for (a) summary alcohol or drug-related offences, (b) a misdemeanour offence, (c) a misdemeanour arrest for a crime against persons, or (d) prior moving violations (offences relating to driving a motor vehicle); and
- having a prior treatment episode or having been fired from a job or expelled from school because of drug or alcohol use.<sup>51</sup>

Repeat drink drivers have been found to have worse driving records and to be charged with more non-driving criminal offences than first-time offenders.<sup>52</sup> Repeat drink drivers have more extensive criminal histories (separate from drink driving and traffic offences) than other drink drivers.<sup>53</sup> They also have more extensive violent and property criminal histories than other drink drivers.<sup>54</sup> However, it has been suggested that blood alcohol concentration is not a reliable indicator on its own of alcohol-related problems, problem driving or alcohol abuse in terms of ‘reliably assessing the future risk or current needs of individuals who commit a DUI offence’.<sup>55</sup>

2.2.3 Research shows that there is a strong link between attitudinal factors and drink driving. Attitudes relating to drink driving have been found to predict drink driving at a community level.<sup>56</sup> Research examining the attitudes of drink driving offender samples has found that offenders are ‘more likely to think that the risks of drink driving [are] overrated and that everybody drinks once in a while’.<sup>57</sup> Attitudinal factors may also lead an offender to continue driving (and drink driving) during any disqualification period.<sup>58</sup> Tasmanian magistrates have indicated that some repeat drink drivers demonstrate a ‘too bad I got caught’ attitude and ‘do not necessarily think of the danger to themselves and others as a possible component of their behaviour’.<sup>59</sup> In addition, employment and social factors may motivate offenders to drive whilst disqualified.<sup>60</sup>

2.2.4 Research has shown that there is also a strong link between risky alcohol use and drink driving and that a key factor associated with recidivism is the extent of a person’s alcohol problem.<sup>61</sup> American research has found that there is a much higher rate of lifetime alcohol-use disorder in the drink driving population (85% female and 91% male) compared to a matched sample from the general population (22% and 44% respectively).<sup>62</sup> Recent research found that nearly all driving while

<sup>51</sup> K Dugosh, D Festinger and D Marlowe, ‘Moving Beyond BAC in DUI’ (2013) 12 *Criminology and Public Policy* 181, 186.

<sup>52</sup> N Bishop, ‘Predicting Rapid DUI Recidivism Using the Driver Risk Inventory on a State-Wide Sample of Floridian DUI Offenders’ (2011) 118 *Drug and Alcohol Dependence* 423, 423.

<sup>53</sup> M Hallstone, ‘The Criminal History of Repeat DUI Offenders’ (2013) 31 *Alcoholism Treatment Quarterly* 337, 342–3. This also reflects findings from research conducted in relation to high-range speeding offenders, where it was found that repeat high-range offenders are more likely to have committed a previous criminal offence compared to the other offenders or the once only low-range offenders. More than half of the repeat high-range speeding offenders had a criminal history (55.2%), compared to 21% of other offenders and 7% of once only low-range offenders: B Watson et al, ‘Profiling High-Range Speeding Offenders: Investigating Criminal History, Personal Characteristics, Traffic Offences, and Crash History’ (2015) 74 *Accident Analysis and Prevention* 87, 91.

<sup>54</sup> M Hallstone, ‘Types of Crimes Committed by Repeat DUI Offenders’ (2014) 27 *Criminal Justice Studies* 159, 166.

<sup>55</sup> Dugosh, Festinger and Marlowe, above n 51, 188.

<sup>56</sup> Wilson, above n 31, 35, citing Mackenzie, Watling and Leal (2014) and Freeman and Watson (2009).

<sup>57</sup> Ibid 36. See M Ferguson et al, ‘The Impact of the “Under the Limit” Drink Driving Rehabilitation Program on the Lifestyle and Behaviour of Offenders’ (Road Safety Research Report CR 187, 2001) 24–25.

<sup>58</sup> Wilson, above n 31, 36.

<sup>59</sup> Bartkowiak-Théron and Henning, above n 5, 6.

<sup>60</sup> S Lenton, J Fetherston and R Cercarelli, ‘Recidivist Drink Drivers’ Self-Reported Reasons for Driving Whilst Unlicensed – A Qualitative Analysis’ (2010) 42 *Accident Analysis and Prevention* 637, 639.

<sup>61</sup> Richardson, above n 2, 7; Wilson, above n 31, 36.

<sup>62</sup> Lapham et al, ‘Prevalence of Psychiatric Disorders Among Persons Convicted of Driving While Impaired’ (2001) 58 *Archives of General Psychiatry* 943, 943.

intoxicated offenders in the sample studied met the criteria for lifetime alcohol use disorder (96.6%) and a majority met the criteria for alcohol dependence (70.6%).<sup>63</sup> Other research has examined explanations for heavy and binge drinking and driving under the influence. It found that use of illicit drugs, alcohol dependence, drinking before three pm and drinking more than once daily predicted heavy binge drinking and driving and the number of self-reported drinking and driving episodes in the past year.<sup>64</sup> Research conducted in Western Australia found that over half of recidivist drink drivers in the sample were alcohol dependent (55%) and most (90%) scored as having a defined alcohol-related disorder.<sup>65</sup>

2.2.5 Research has also highlighted the co-morbidity of alcohol problems with other substance abuse issues and psychiatric disorders. American research published in 2015 found that, consistent with previous research, drink driving offenders ‘represent[ed] a clinical population with high level of unmet treatment needs beyond just their alcohol misuse’.<sup>66</sup> It found that a large proportion of offenders presented with ‘additional substance use disorders and psychiatric disorders’<sup>67</sup> with 50.4% having been diagnosed with a lifetime substance abuse disorder that included alcohol and other substance use disorders, and 26% having previously been diagnosed with a psychiatric disorder (not a substance use disorder).<sup>68</sup> This is consistent with broader research that found that ‘for drink drive offenders with alcohol-use disorders, 50% of women and 33% of men had at least one additional psychiatric disorder other than drug abuse or dependence’.<sup>69</sup> In addition, for drink driving offenders, 32% of females and 38% of male offenders had a drug use disorder compared to a matched sample from the general population (16% and 21% respectively).<sup>70</sup>

2.2.6 However, this research has also shown that recidivist drink drivers are not a homogenous group and that vulnerability profiles and offender characteristics are necessarily complex. As, Bartkowiak-Théron and Henning state:

[offender] profiles ... range from the terribly ill-skilled (some have said ‘moronic’) driver who doesn’t think a drinking session with mates put him over prescribed blood alcohol content levels, to the elderly lady who pretends that ‘she only had a light shandy after a win at the pokies’. There are those who deliberately choose to drive without a license (out of necessity or defiance) and the highly functioning alcohol addicts. There are also those who drink to forget, and in this case, a significant link to mental illness needs to be drawn between alcohol consumption and mental health. There are also those who drink to get drunk and reach the equivalent of a drug-induced high, in which case some extensive behavioural education and psychological follow up would be needed.<sup>71</sup>

This complexity suggests that responses need to be ‘tailored to the individual needs of each offender in terms of their offending behaviour, severity of alcohol abuse problems and psychiatric condition’.<sup>72</sup>

<sup>63</sup> Mullen et al, above n 29, 640.

<sup>64</sup> F Sloan, L Eldred and D Davis, ‘Addiction, Drinking Behaviour and Driving Under the Influence’ (2–14) 49 *Substance Use and Misuse* 661, 672.

<sup>65</sup> Lenton, Fetherston and Cercarelli, above n 60, 639.

<sup>66</sup> Mullen et al, above n 29, 641.

<sup>67</sup> Ibid. See also, J Freeman, J Maxwell and J Davey ‘Unraveling the Complexity of Driving While Intoxicated: A Study into the Prevalence of Psychiatric and Substance Abuse Comorbidity’ (2011) 43 *Accident Analysis and Prevention* 34.

<sup>68</sup> Mullen et al, above n 29, 641.

<sup>69</sup> Lapham et al, above n 62, 943.

<sup>70</sup> Ibid.

<sup>71</sup> Bartkowiak-Théron and Henning, above n 5, 5.

<sup>72</sup> Richardson, above n 2, 7.

## 2.3 TLRI/TILES study

2.3.1 The TLRI and TILES have constructed a profile of recidivist drink driving offenders in Tasmania through an examination of records held by the Tasmanian Magistrates Court, Tasmanian Community Corrections and Tasmania Police. A profile of recidivist drink drivers did not previously exist in Tasmania and this study aimed to describe the socio-demographic and criminal history characteristics of offenders who have been convicted in the Magistrates Court for multiple drink driving offences.

### *Methodology*

2.3.2 The data for this study were drawn from records held by the Tasmanian Magistrates Court, Tasmanian Community Corrections and Tasmania Police in relation to a sample of 72 offenders who were given custodial sentences in the period 2008–9 to 2013–14; either a partially suspended sentence or a determined term of imprisonment.<sup>73</sup> A search was conducted on the Criminal Registration Information Management & Enquiry System (CRIMES) to identify all drink drive offenders who had been given a custodial sentence in this period (n = 730), and the sample was intended to comprise 10% of these offenders (n = 73). However, the sample was reduced to 72 offenders due to the need to exclude one offender whose sentence was subsequently found not to have been imposed in the reference period. In this period, a total of 21 222 offenders were sentenced in the Magistrates Court for drink driving offences.

2.3.3 Individual court files were examined to obtain demographic and sentencing information about offenders. This information was supplemented by relevant offending histories obtained from Tasmania Police and pre-sentence reports prepared by Tasmania Community Corrections. Pre-sentence reports may have been prepared in relation to a prior offence, the index offence and/or a new offence. These reports also contain information about offenders' relevant family and social circumstances as well as health and substance use problems. For the 72 offenders included in the study, 50 pre-sentence reports were available (69.4%). In cases where pre-sentence reports were not available, audio files of the court proceedings in relation to passing sentence were listened to (where these were available and accessible).<sup>74</sup> These contained information that was relevant to the sentence imposed. Information was also obtained from Tasmanian Community Corrections in relation to whether the offender had previously taken part in the Sober Driver Program. Offenders were cross-referenced with the Mental Health Diversion List and information contained in CRIMES about those offenders who were eligible for Court Mandated Diversion for illicit drug use. Criminal records were obtained from Tasmania Police to determine the number of offenders in the study with prior offences and the nature of those offences.

2.3.4 Further information in relation to the methodology for the study is set out in Appendix B.

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<sup>73</sup> The identification of this cohort was based on the approach used for an earlier Tasmanian project to construct a profile of repeat drink drivers from files held in the Tasmanian Magistrates Court. This project was discontinued prior to completion. Further information in relation to the identification of the sample offenders is contained in Appendix B.

<sup>74</sup> A search was undertaken of audio files for matters heard in Hobart and Huonville courts (14 matters) and ten audio files were accessed. Audio files were not accessible from the Hobart registry for matters heard in other registries (11 matters).

## **Results**

2.3.5 Table 2-1 sets out the socio-demographic characteristics of the 72 offenders in the study. It also gives details about their index offences (such as blood alcohol concentrations and sentences), concurrent offending, driving status and prior offending. The results of the data analysis are also summarised below under three headings — socio-demographic characteristics, characteristics of the index offences and prior offending.

### **Socio-demographic characteristics**

- The majority of offenders were male (87.5%).
- Offenders were most commonly aged between 30 and 39 (30–34 (14%); 35–39 (13%)). However, there was no particular trend overall between younger and older recidivist drivers sentenced to imprisonment, with half of the offenders aged under 35 (50%) and half aged 35 and over (50%).
- Limited information was available about the current employment status of the offenders at the time of their index offences, but available information showed that there was no clear trend towards offenders being employed or unemployed.
- More offenders lived in postcodes within the highest two quartiles of socio-economic disadvantage (54.2%) than the lowest two quartiles of socio-economic disadvantage (45.8%) based on the Socio-economic Indexes for Areas (SEIFA) index. However, most offenders lived in postcodes within the second and third highest level of disadvantage (29.2% and 27.8% respectively).
- The marital status of 24 offenders was unknown but for those cases where it was known, the majority were married or in a de facto relationship (62.5%).
- Of those 46 offenders where information about alcohol abuse was disclosed, 39 were identified for alcohol abuse (84.8%).<sup>75</sup>
- Of those 43 offenders where information about substance abuse was disclosed, 32 were identified as using illicit substances and/or abuse of prescription medication (74.4%). The most commonly identified illicit substance was cannabis.
- Of those 44 offenders where such information was disclosed, 77.3% were identified as experiencing a mental illness, most commonly depression and anxiety. Other mental illnesses included Attention Deficit Disorder, Bipolar Disorder, Personality Disorder and Post-Traumatic Stress Disorder.<sup>76</sup>
- In the information collected from pre-sentence reports, the background of 14 offenders indicated childhood trauma or dysfunction (such as sexual abuse, family violence, abandonment by parents, alcoholic or drug addicted parents).

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<sup>75</sup> This information was obtained from pre-sentence reports (which were available for 50 offenders) and/or audio files of passing sentence.

<sup>76</sup> This information was obtained from pre-sentence reports (which were available for 50 offenders), audio files of passing sentence and/or from the cross-reference with the Magistrates Court Mental Health Diversion List.

### Characteristics of the index offences

- For the 72 offenders included in the study, there were 103 drink driving convictions. Two offenders were charged with three drink driving offences and 29 offenders were charged with two drink driving offences. Most of the offenders sentenced to a custodial sentence were convicted of offences that related to breaches of no alcohol requirements (94.4%).<sup>77</sup> This reflects their drink driving offending history — either their status as disqualified or unlicensed drivers or their number of prior convictions in a specified period.
- A majority of offenders had a blood alcohol reading of 0.1 or greater (69.5%) with 41.7% recording a high blood alcohol reading (0.15 or >) and 27.8% recording a mid-range blood alcohol reading (0.1 > but <0.15). Although, at the time of the index offence, most offenders were subject to a prior order or statutory requirement to have no alcohol in their body (94.4%), only six offenders (8.3%) had a blood alcohol reading of 0.05 or less.
- The majority of offenders were subject to a prior court order at the time of the index offence (62.5%) with the most common order being a licence disqualification or suspension.
- Nearly 70% of offenders were driving while unlicensed or disqualified/suspended.
- Over 90% of offenders (90.3%) were dealt with by the court for one or more other traffic offences at the time of the index offence. These commonly included a related drink driving offence, driving while suspended and driving while unlicensed. Other traffic offences included driving an unregistered vehicle, evading police, speeding, dangerous driving, failing to stop at a red light and motor vehicle stealing.
- Only 11.1% offenders were dealt with by the court for a concurrent offence other than a concurrent traffic offence. In these cases, the most common offence was providing a false name and address.
- The custodial sentences imposed (fixed imprisonment and partly suspended sentences) ranged from a sentence of less than three months to a sentence of between 18 months and less than 24 months. The most common sentence was a sentence of between three and less than six months (47.2%). Nearly all offenders were sentenced to a term of imprisonment of less than 12 months (93%).

### Prior Offending

- Where information about prior offending was known, the most common number of prior convictions for drink driving was three (24.3%), followed by four and six or more (18.6%). Nearly three-quarters of offenders had three or more convictions for drink driving (72.3%). Four offenders had eight prior convictions for drink driving and five had seven prior convictions for drink driving.
- Many of the offenders had prior convictions for driving while unlicensed/disqualified (87.1%), speeding (67.1%) or other traffic offences (94.3%).<sup>78</sup> Few offenders had prior convictions for drug driving (5.7%) or careless or negligent driving (8.6%).

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<sup>77</sup> The offenders were either unlicensed, disqualified, suspended, previously convicted of three or more offences within any 10-year period arising from at least three separate incidents, or in breach of the conditions of their licence.

<sup>78</sup> For example, driving an unregistered vehicle, driving a faulty vehicle, crossing double white lines.

- Many of the offenders had previously received a fully suspended sentence for a drink driving offence (61.3%) with approximately one in five offenders previously having received a partly suspended sentence (21%) and/or a fixed term of imprisonment (16.2%). Eighteen offenders had been imprisoned previously for a drink driving offence and 27 offenders had been imprisoned previously for any previous offence.
- In the five years prior to the index offence, nearly three out of four offenders had six or more prior convictions for any offence (72.3%).
- For the 70 offenders whose lifetime offending was known, 80% had prior convictions for dishonesty and property offences, 55.7% had prior convictions for violent offending (excluding domestic violence), 34.3% had prior convictions for drug offences and 24.3% had prior convictions for domestic violence. Very few offenders had prior convictions for firearms (10%) or sexual offences (1.4%).
- Only 21 of the 72 recidivist drink drivers included in this study had completed the Sober Driver Program (29.2%). Of those who did not complete the program, 15 offenders (20.8%) were assessed as eligible but did not commence, or commenced but did not complete the program.<sup>79</sup>

**Table 2-1: Characteristics of a sample of offenders sentenced to a custodial sentence for drink driving in the Magistrates Court, 2008-09 to 2013-14**

<i>Characteristic</i>	<i>No of cases</i>	<i>% of cases</i>
<b>Socio-demographic characteristics</b>		
<i>Sex</i>		
Male	63	87.5
Female	9	12.5
<i>Age</i>		
≤ 19	2	2.8
20 – 24	12	16.7
25 – 29	8	11.1
30 – 34	14	19.4
35 – 39	13	18.1
40 – 44	7	9.7
45 – 49	7	9.7
50 – 54	2	2.8
55 – 59	4	5.6
60 – 64	1	1.4
65≥	2	2.8
<i>Employment status</i>		
Yes	24	33.3
No	23	31.9
Unknown but unstable/infrequent employment	4	5.6
Unknown	21	29.2

<sup>79</sup> It is noted that two offenders who had not completed the program were waiting for a program placement.

<i>Marital status</i>		
Single	18	25.0
Married/de facto	30	41.7
Unknown	24	33.3
<i>SEIFA disadvantage index<sup>80</sup></i>		
Lowest level of disadvantage	18	25.0
Second lowest level of disadvantage	21	29.2
Third lowest level of disadvantage	20	27.8
Highest level of disadvantage	13	18.1
<i>History of alcohol abuse</i>		
Yes	39	54.2
No	7	9.7
Unknown	26	36.1
<i>History of substance (other than alcohol) abuse</i>		
Yes	32	44.4
No	11	15.3
Unknown	29	40.3
<i>History of mental illness</i>		
Yes	34	47.2
No	10	13.9
Unknown	28	38.9
<b>Characteristics of the offence</b>		
<i>Offence<sup>81</sup></i>		
Exceed 0.05	34	47.2
Breach no alcohol requirement, s 6(3)	44	61.1
Breach no alcohol requirement, s 6(4)	12	16.7
Drive under the influence	14	19.4
<i>Blood alcohol range</i>		
High	30	41.7
Medium	20	27.8
Low	15	20.8
Special	6	8.3
Unknown	1	1.4
<i>Range of principal penalty</i>		
<3 months	14	19.4
3 – < 6 months	34	47.2
6 – <12 months	19	26.4
12 – <18 months	4	5.6
18 – <24 months	1	1.4
<i>Concurrent traffic offence</i>		
0 concurrent offences	7	9.7

<sup>80</sup> This is the Socio-economic Indexes for Areas levels of disadvantage.

<sup>81</sup> It is noted that 29 offenders were charged with two or more drink driving offences in relation to the index offence.

1 or more concurrent offences	65	90.3
<i>Other concurrent offences (other than traffic offences)</i>		
0 concurrent offences	64	88.9
1 or more concurrent offences	8	11.1
<i>Driving status</i>		
Unlicensed/ Disqualified/suspended	50	69.4
<i>Prior court order</i>		
Yes	45	62.5
No	27	37.5
<b>Prior offending</b>		
<i>Total number of prior offences in 5 years (all offences types)</i>		
0 prior offences	0	0
1 prior offence	2	2.8
2 prior offences	5	6.9
3 prior offences	2	2.8
4 prior offences	7	9.7
5 prior offences	2	2.8
6 or more prior offences	52	72.2
Unknown	2	2.8
<i>Total number of prior drink driving offences in 5 years</i>		
0 prior offences	9	12.5
1 prior offence	25	34.7
2 prior offences	22	30.6
3 prior offences	11	15.3
4 prior offences	2	2.8
5 prior offences	1	1.4
Unknown	2	2.8
<i>Total number of prior drink driving offences</i>		
0 prior offences	1	1.4
1 prior offence	5	6.9
2 prior offences	12	16.7
3 prior offences	17	23.6
4 prior offences	13	18.1
5 prior offences	9	12.5
6 or more prior offences	13	18.1
Unknown	2	2.8
<i>Sober driver program completed</i>		
Yes	21	29.2
No	51	70.8
<i>Offenders who did not complete sober driver program (n = 51)</i>		
No contact with community correction <sup>82</sup>	12	16.7
Not assessed for program by community corrections	20	27.8

<sup>82</sup> This includes one offender who had not had contact with Community Corrections in the last 20 years prior to the reference period.

Assessed and not eligible	4	5.6
Eligible but not complete	15	20.8
<i>Prior penalties imposed for drink driving (n = 62):<sup>83</sup></i>		
Determined term imprisonment	10	16.2
Partly suspended sentence	13	21
Fully suspended sentence	38	61.3
<i>Prior driving offences (other than drink driving) (n= 70):<sup>84</sup></i>		
Speeding offences	47	67.1
Unlicensed/drive while disqualified offences	61	87.1
Drug driving offences	4	5.7
Careless driving, negligent driving offences	6	8.6
Other driving offence	66	94.3
<i>Prior offences (other than driving offences) (n= 70):<sup>85</sup></i>		
Violent offences (exclude domestic violence)	39	55.7
Domestic violence offence	17	24.3
Dishonesty or property offence	56	80.0
Drug offence	24	34.3
Firearms offence	7	10.0
Sexual offence	1	1.4

## Discussion

2.3.6 Consistent with previous research, a majority of the offenders in this study were male, and where the information was available, it disclosed that nearly 85% of offenders had a history of alcohol abuse, and nearly 75% had a history of problematic drug use. Many offenders (over 75%) were identified as having mental health issues. The majority of offenders had a blood alcohol reading for the index offence of 0.1 or greater and while most offenders were subject to a prior order or statutory requirement to have no alcohol in their bodies (94.4%), only five offenders (8.3%) had a blood alcohol reading under 0.05. This suggests that the index offence was not simply a matter of misjudgement. This is consistent with other research and with the observations of Richardson who noted that studies ‘suggest that repeat drink drivers could appropriately be described as a clinical population rather than a non-clinical population with long term problems requiring long term responses’.<sup>86</sup> This cohort of offenders had complex needs with cross-sectional vulnerabilities that were unlikely to be resolved without understanding those vulnerabilities and the use of targeted and individualised treatment.

2.3.7 Consistent with other research, an association was found in this study between drink driving and other illegal behaviour such as unlicensed driving or driving while suspended/disqualified.<sup>87</sup>

<sup>83</sup> There were two offenders for whom information about prior convictions was not available. There were also eight offenders for whom information about prior offending was available but information about penalty was not available so it was not possible to determine whether they had previously received a sentence of imprisonment or a suspended sentence. It is noted that offenders may have received more than one of these categories of penalty.

<sup>84</sup> There were two offenders for whom information about prior convictions was not available.

<sup>85</sup> There were two offenders for whom information about prior convictions was not available.

<sup>86</sup> Richardson, above n 2, 7.

<sup>87</sup> B Watson, *The Psychosocial Characteristics and On-road Behaviour of Unlicensed Drivers* (PhD Thesis, Queensland University of Technology, 2004).

Nearly 70% of the repeat drink drivers in this study were unlicensed or drove while suspended/disqualified at the time of the index offence. Further, 87.1% of the offenders had a prior conviction for driving while disqualified/unlicensed driving. Previous research has also found that many disqualified drivers continue to drive while disqualified,<sup>88</sup> and that some offenders continue to drive without a licence even after the period of disqualification as they do not reapply for a licence.<sup>89</sup>

2.3.8 Predictably, given that this cohort of offenders received a custodial sentence for the index offence, many of the offenders had several prior drink driving convictions. Nearly three quarters of offenders had three or more convictions for drink driving (72.3%) and many offenders had previously received a custodial sentence for drink driving. Where the information was known (n = 62), 61.3% of offenders had previously received a fully suspended sentence for a drink driving offence, with approximately one in five previously having received a partly suspended sentence (21%) and/or a fixed term of imprisonment (16.2%). In total, 18 offenders had previously been imprisoned for a drink driving offence. Further, although not designed as a study to examine breaches of suspended sentences, the prior conviction information revealed that of the 41 offenders who had previously been sentenced to at least one suspended sentence for drink driving, 28 had breached the order (68.3%).<sup>90</sup>

2.3.9 The study also provides an insight into the wider offending history of repeat drink drive offenders. All of the offenders had had at least one prior conviction for an offence other than a drink driving offence in the past five years. For the 70 offenders whose lifetime history of offending was known, 80% had prior convictions for dishonesty and property offences, 55.7% had prior convictions for violent offending (excluding domestic violence), 34.3% had prior convictions for drug offences and 24.3% had prior convictions for domestic violence. Previous studies have concluded that ‘among at least a portion of DUI recidivists, drinking and driving might be best viewed *as just one manifestation of a host of deviant behaviours*’.<sup>91</sup> Research has also found that DUI recidivists have ‘more extensive violent and property criminal histories than other drunk drivers’.<sup>92</sup> Accordingly, it has been suggested that re-offenders with a criminal history may need special attention in treatment programs as ‘they represent a more entrenched group (than offenders whose criminal history is limited to drink driving) who may be less responsive to traditional treatments’.<sup>93</sup>

There are limitations in the present study. In relation to the co-morbidity of offenders, information was limited to those cases where a pre-sentence report was available, matters where the audio files for the comments on passing sentence were available, offenders dealt with through the Mental Health Diversion List and/or information contained in CRIMES about those offenders who were eligible for Court Mandated Diversion for illicit drug use. This means that the sample size is relatively small. In addition, the methodology of the study did not allow for offenders’ attitudes to drink driving to be examined, or for comparisons to be made with other offender populations (such as first time drink drivers or repeat drink drivers who did not receive custodial sentences). This study also does not attempt to identify characteristics that may be used to predict recidivism. Instead, it provides information about the vulnerability profiles and offender characteristics of a group of convicted

<sup>88</sup> B Clark and I Bobevski, *Disqualified Drivers in Victoria: Literature Review and In-depth Focus Group Study* (Monash University Accident Research Centre, Report 272, 2008) x, xii; B Watson and A Nielson, *Submission to Travelsafe: Vehicle Impoundment for Drink Drivers* (Centre for Accident Research and Road Safety, 2006) 12.

<sup>89</sup> VSAC, above n 27, 32.

<sup>90</sup> All breaches identified were actions for breach brought by prosecution noted on an offender’s criminal history except where no action was brought (but could have been brought) in one case.

<sup>91</sup> Hallstone, above n 53, 344 (italics in original).

<sup>92</sup> Hallstone, above n 54, 166.

<sup>93</sup> Hallstone, above n 53, 344; T Nochajski et al, ‘The Effects of a Drinker-Driver Treatment Program: Does Criminal History Make a Difference?’ (1993) 20 *Criminal Justice and Behaviour* 174.

recidivist drivers in Tasmania in order to assist in the development of a more nuanced criminal justice response than currently exists for such offenders.

## Part 3

# The Current Sentencing Regime for Repeat Drink Driving Offences

This Part sets out the current sentencing regime for repeat drinking driving offences. It considers the sentencing powers for drink driving offences and current sentencing patterns for drink driving offences in Tasmania. The Magistrates Court sentencing data detailed here was obtained from the Tasmanian Sentencing Advisory Council's online sentencing database (SAC Stats), which contains data for the period 1 July 2010 to 29 June 2015. Unless otherwise specified, it provides information in relation to cases where a single sentence was imposed for the charge.<sup>94</sup> It excludes cases where a global sentence was imposed (a single sentence for several charges). It does not include offenders sentenced under the *Youth Justice Act 1997* (Tas), Supreme Court cases or most breaches of court orders or applications.<sup>95</sup>

This Part also considers the adequacy of the current sentencing regime for drink driving offences.

### 3.1 Drink driving offences

3.1.1 The *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(1) creates an offence of driving with a concentration of alcohol in a person's breath or blood greater than a concentration of 0.05 of a gram of alcohol in 210 litres of breath or a concentration of 0.05 of a gram of alcohol in 100 millilitres of blood (known as exceed .05). It is an offence for certain drivers to drive with any alcohol present in their body — this includes people without a driver's licence, learner drivers, provisional drivers, drivers of prescribed vehicles (for example public passenger vehicles), people convicted of serious traffic offences who have also been convicted of driving under the influence and those people driving with a restricted driver's licence.<sup>96</sup> In addition, certain repeat drink drivers must not drive with any alcohol in their body.<sup>97</sup> The *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 4 also creates a more serious offence of driving while under the influence of intoxicating liquor or a drug to the extent that he or she is incapable of having proper control of the vehicle.<sup>98</sup>

3.1.2 In the period 1 July 2010 to 29 June 2015, 9744 charges were dealt in the Magistrates Court in respect of 9386 cases where the offender was found guilty of exceeding .05 under the *Road Safety*

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<sup>94</sup> A case refers to a collection of one or more charges against a person finalised at one time. See TSAC, *SAC Stats Glossary*, <<http://www.sentencingcouncil.tas.gov.au/statistics/magistratescourt/glossary>>.

<sup>95</sup> See TSAC, <<http://www.sentencingcouncil.tas.gov.au/statistics>>.

<sup>96</sup> *Road Safety (Alcohol and Drugs) Act 1970* (Tas) ss 6(2)–(3).

<sup>97</sup> The *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(4) provides that the no alcohol rule applies if: '(a) the person has been convicted within any 10 year period of 3 or more offences under this Act arising from at least 3 separate incidents; and (b) at least one of those offences was committed on or after 12 December 1991; and (c) either – (i) less than 10 years has passed since the last of those convictions was recorded; or (ii) 10 or more years have passed since the last of those convictions was recorded and the person has not provided to the Registrar of Motor Vehicles the certificate of a medical practitioner or a prescribed person certifying that the person is not alcohol-dependent.'

<sup>98</sup> See Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) [14.525].

*(Alcohol and Drugs) Act 1970* (Tas) s 6(1).<sup>99</sup> In the same period, there were 3149 charges in respect of 2588 cases where the offender was found guilty of driving without a valid licence with alcohol in his or her body under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) ss 6(2) and 6(3)(a).<sup>100</sup> There were six charges in relation to five offenders where repeat offending was established for an offence against the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(4). There were 280 charges in respect of 254 offenders who were found guilty of driving under the influence of alcohol or drugs contrary to the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 4.<sup>101</sup> There were 176 charges in respect of 157 offenders who were found guilty of driving under the influence of intoxicating liquor contrary to the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 4(a).<sup>102</sup>

## 3.2 Sentencing powers for drink driving offences

3.2.1 Sentencing for drink driving is governed by the *Road Safety (Alcohol and Drugs) Act 1970* (Tas), the *Sentencing Act 1997* (Tas) and the common law.

3.2.2 The *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17 sets out specific penalties for drink driving offences, which include minimum and maximum fines, periods of disqualification and maximum terms of imprisonment (see tables 3-1 and 3-2). As a general rule, the court must impose:

- (a) at least the minimum fine or a term of imprisonment; and
- (b) must disqualify the person from driving for a period not less than the minimum period.<sup>103</sup>

However, the court can impose a lesser fine or period of disqualification if there are special circumstances.<sup>104</sup> Nevertheless, the court must, in exercising this discretion, impose a fine of some amount (unless imprisonment is imposed) and a period of disqualification. In contrast, the court has a discretion as to whether to impose a term of imprisonment not exceeding the maximum term provided.

3.2.3 The penalties imposed for drink driving aim to protect the public from the danger posed by addressing a number of sentencing aims — deterrence, rehabilitation and punishment. A fine is a punitive sanction aimed at deterring the public generally, as well as the individual offender from drinking and driving.<sup>105</sup> Similarly, disqualification is viewed as a ‘major deterrent to the great majority of drivers’<sup>106</sup> and it also provides community protection by ‘keeping potentially dangerous drivers off the road’.<sup>107</sup> However, the period of disqualification imposed should also be of a length that is not ‘so great as to offer little or no hope’ in order to encourage the rehabilitation of the offender.<sup>108</sup> In relation to persistent offending, courts have stressed the need to give sufficient weight to the principle of

<sup>99</sup> It is noted that there were an additional 2110 cases where the matter dealt with multiple charges (where global sentences were imposed).

<sup>100</sup> It is noted that there were an additional 1247 cases where the matter dealt with multiple charges (where global sentences were imposed).

<sup>101</sup> It is noted that there were an additional 218 cases where the matter dealt with multiple charges (where global sentences were imposed).

<sup>102</sup> It is noted that there were an additional 141 cases where the matter dealt with multiple charges (where global sentences were imposed).

<sup>103</sup> *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(3).

<sup>104</sup> *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(5). See *Harper v Cullen* (2002) 11 TAS R 211; *Bottomley v McDonald* (2002) TASSC 27 for a discussion of special circumstances. See also Warner, above n 98, [6.312].

<sup>105</sup> Warner, above n 98, [14.522].

<sup>106</sup> *Jarvis v Brown and McDonald* [1998] TASSC 120, 5 (Evans J).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

deterrence and that the imposition of a term of imprisonment should not be reserved for extraordinary cases.<sup>109</sup> In addition, imprisonment is intended to encourage the rehabilitation of the offender by providing a ‘shock [that] may prompt him [or her] to revise his [or her] lifestyle and abstain from drink driving’.<sup>110</sup>

3.2.4 Under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas), as shown in Table 3-1 and Table 3-2, a distinction is drawn between first and subsequent drink driving offences with more severe sanctions specified for repeat offences. The penalty for a repeat offender is double that for a first offender. A person is guilty of a subsequent offence if that person has previously been convicted of an offence contained in the Table in *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17.<sup>111</sup>

**Table 3-1: Penalties for first offence under the *Road Safety (Drug and Alcohol) Act 1970* (Tas), s 17**

Section of Act or offence	Concentration of alcohol in breath in grams per 210 litres of breath or in blood in grams per 100 millilitres of blood	Fine	Period of disqualification	Term of imprisonment
Section 6(2)	less than 0.05	Min 2 penalty units Max 10 penalty units	Min 3 months Max 12 months	3 months
Section 6(1)	0.05 or more but less than 0.1	Min 2 penalty units Max 10 penalty units	Min 3 months Max 12 months	3 months
	0.1 or more but less than 0.15	Min 4 penalty units Max 20 penalty units	Min 6 months Max 18 months	6 months
	0.15 or more	Min 5 penalty units Max 30 penalty units	Min 12 months Max 36 months	12 months
Section 4		Min 5 penalty units Max 30 penalty units	Min 12 months Max 36 months	12 months

**Table 3-2: Penalties for subsequent offence under the *Road Safety (Drug and Alcohol) Act 1970* (Tas), s 17**

Section of Act or offence	Concentration of alcohol in breath in grams per 210 litres of breath or in blood in grams per 100 millilitres of blood	Fine	Period of disqualification	Term of imprisonment
Section 6(2)	less than 0.05	Min 4 penalty units Max 20 penalty units	Min 6 months Max 24 months	6 months
Section 6(1)	0.05 or more but less than 0.1	Min 4 penalty units Max 20 penalty units	Min 6 months Max 24 months	6 months
	0.1 or more but less than 0.15	Min 8 penalty units Max 40 penalty units	Min 12 months Max 36 months	12 months
	0.15 or more	Min 10 penalty units Max 60 penalty units	Min 24 months Max 72 months	24 months
Section 4		Min 10 penalty units Max 60 penalty units	Min 24 months Max 72 months	24 months

At time of writing, one penalty unit is \$154.00.<sup>112</sup>

<sup>109</sup> *McDonald v Nilsson* [2009] TASSC 83, [14] (Crawford J).

<sup>110</sup> *Jarvis v Brown and McDonald* [1998] TASSC 120, 5 (Evans J).

<sup>111</sup> *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(1)(b). This includes driving under the influence, driving with excessive concentration of alcohol, driving with illicit drug present in blood, objecting to blood analysis and failure to comply with direction to have blood or breath test.

<sup>112</sup> See *Penalty Units and Other Penalties Act 1987* (Tas) s 4A(1).

3.2.5 In addition to the penalty provisions contained in the *Road Safety (Alcohol and Drugs) Act 1970* (Tas), the *Sentencing Act 1997* (Tas) s 7 sets out the range of sentencing options that are available to the courts in sentencing adult offenders (and young offenders sentenced as adults):

A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence —

- (a) record a conviction and order that the offender serve a term of imprisonment; or
- (ab) if the court is constituted by a magistrate, record a conviction and make a drug treatment order under Part 3A in respect of the offender; or
- (b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended; or
- (c) record a conviction and, if the offender has attained the age of 18 years and the offence is punishable by imprisonment, make a community service order in respect of the offender; or
- (d) with or without recording a conviction, make a probation order in respect of the offender if the offender has attained the age of 18 years; or
- (e) record a conviction and order the offender to pay a fine; or
- (ea) in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order; or
- (f) with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender; or
- (g) record a conviction and order the discharge of the offender; or
- (h) without recording a conviction, order the dismissal of the charge for the offence; or
- (i) impose any other sentence or make any order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.

3.2.6 In the context of drink driving, instead of imposing a term of immediate imprisonment to be fully served, the magistrate may impose a fully or partly suspended sentence of imprisonment.<sup>113</sup> A fully suspended sentence means that the whole sentence is not activated and the offender is immediately released into the community. A partly suspended sentence means that the offender spends a specified period of time in prison before being released into the community. Suspension is a means of achieving rehabilitative aims and the imposition of a sentence of imprisonment is said to have a symbolic effect of denouncing the crime, while its suspension acts as a specific deterrent for the offender, which is created by the threat of imprisonment (the ‘Sword of Damocles’ hanging over the offender’s head).<sup>114</sup> In its review of suspended sentences, TSAC found that exceeding the prescribed concentration of alcohol is one the top ten offences dealt with in the Magistrates Court for

<sup>113</sup> It is noted that the Tasmanian Government has indicated its intention to abolish suspended sentences and to replace them with ‘best practice sentencing options that provide an opportunity for rehabilitation and represent an appropriate response to the gravity of the crime committed’, Tasmanian Liberals, *Abolishing Suspended Sentences*, 2 <<https://www.tas.liberal.org.au/sites/default/files/policy/Abolishing%20suspended%20sentences.pdf>>. TSAC is currently undertaking a reference that examines the phasing out of suspended sentences in Tasmania and the introduction of a new intermediate sentencing order(s): see, TSAC, *Phasing out of Suspended Sentences*, Consultation Paper (2015); TSAC, *Phasing out of Suspended Sentences*, Final Report No 6 (2016).

<sup>114</sup> See Lorana Bartels, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania* (PhD thesis, University of Tasmania, 2008) [1.4.1]–[1.4.2].

which fully suspended sentences (9.1% of all fully suspended sentences imposed) or partly suspended sentences are imposed (6.2% of all partly suspended sentences imposed).<sup>115</sup>

3.2.7 The Court also has the power to impose a community service order or a probation order. However, there is no power for the court to impose a community service order instead of imprisonment or a fine.<sup>116</sup>

3.2.8 In addition, under s 8 of the *Sentencing Act 1997* (Tas), the court has the power to combine a number of sentencing orders, including a term of imprisonment, a community service order, a probation order (if a conviction is recorded) and a fine with a driving disqualification order.

3.2.9 The use of different sanctions for drink driving offences is set out at [3.3].

### 3.3 Sentencing for drink driving offences

#### *Sentencing statistics*

3.3.1 As shown in Figure 3-1, overwhelmingly, fines are the most common sanction imposed for exceed 0.5 (*Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(1)) or drive without valid licence with alcohol present in the body (*Road Safety (Alcohol and Drugs) Act 1970* (Tas) ss 6(2), 6(3)(a)). Although not shown in the data, offenders convicted of drink driving will also receive a licence disqualification under the mandatory provisions of the *Road Safety (Alcohol and Drugs) Act 1970* (Tas).<sup>117</sup> This is because the data are presented on the basis of the most serious penalty imposed and so do not include information about licence disqualification.

3.3.2 There was only limited use of other sentencing options for exceeding 0.5 (*Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(1)). In only 637 cases (out of 9386) was a custodial sentence imposed on offenders — either immediate imprisonment, or a partly or fully suspended sentence (6.8%). For 234 charges offenders received community service orders (2.5%) and for 30 charges offenders were sentenced to probation orders (0.3%). A custodial sentence was more commonly imposed for driving under the influence (*Road Safety (Alcohol and Drugs) Act 1970* (Tas) ss 4, 4(a)) and for driving with alcohol present for recidivist offenders (*Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(4)). However, it is not possible to isolate from the data the sentencing practice for repeat offenders (other than the six charges relating to the specific offence for repeat offenders convicted of three or more offences within any 10-year period, *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(4)), as the SAC-stats data do not distinguish between first and repeat offenders and neither do they specify the blood alcohol levels of offenders. The TLRI/TILES study detailed in Part 2 found that in the period 2008–09 to 2013–14, 730 custodial sentences were imposed (imprisonment or partially suspended sentence). In this period, 21 222 offenders were sentenced in the Magistrates Court for drink driving offences. This means that only a small proportion of offenders (3.4%) received a custodial sentence (either a partially suspended sentence or a determined term of imprisonment).

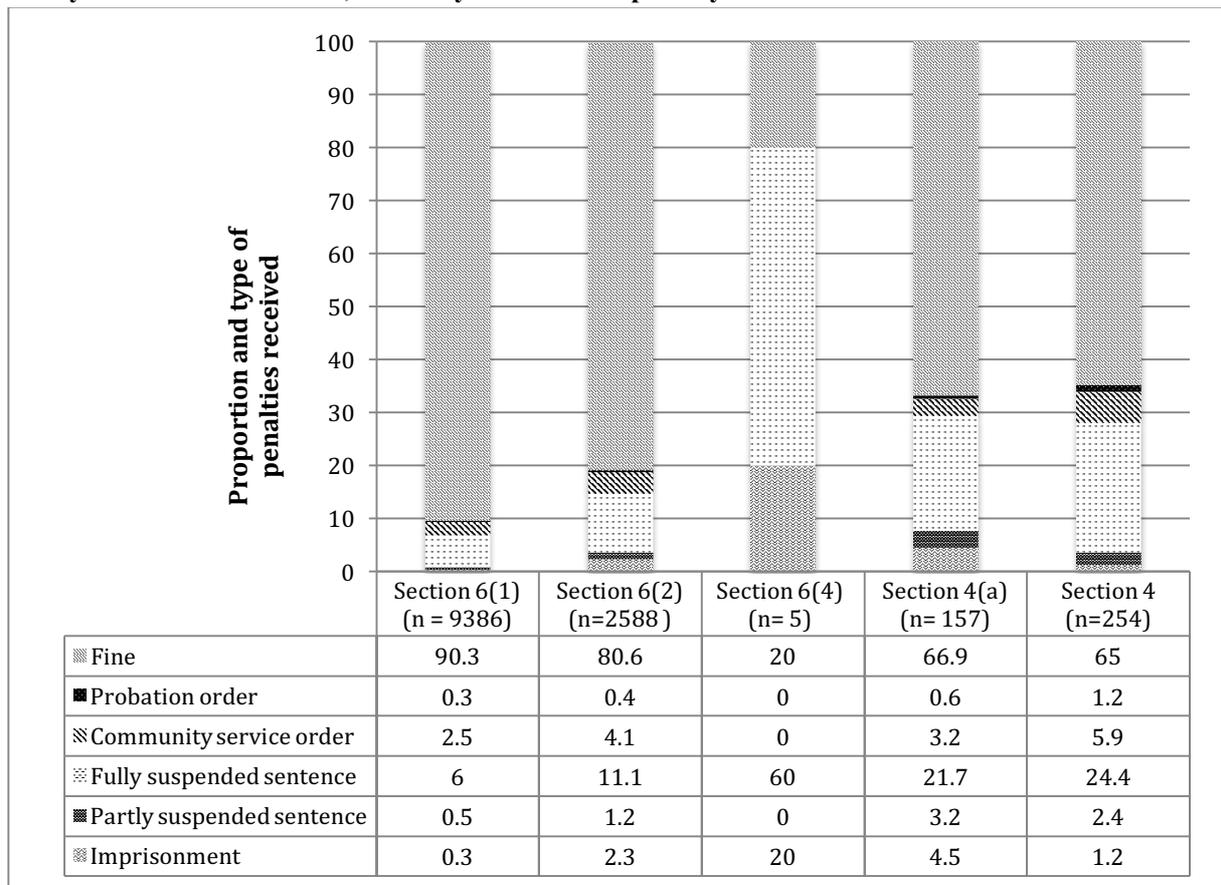
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<sup>115</sup> TSAC, above n 113, 17. This related to all offences for which sentences were imposed in the Magistrates Court in 2011–14 (n = 114 195).

<sup>116</sup> *Wilkie v Taylor* [2015] TASFC 7 (Blow CJ, Pearce J; Estcourt J dissenting).

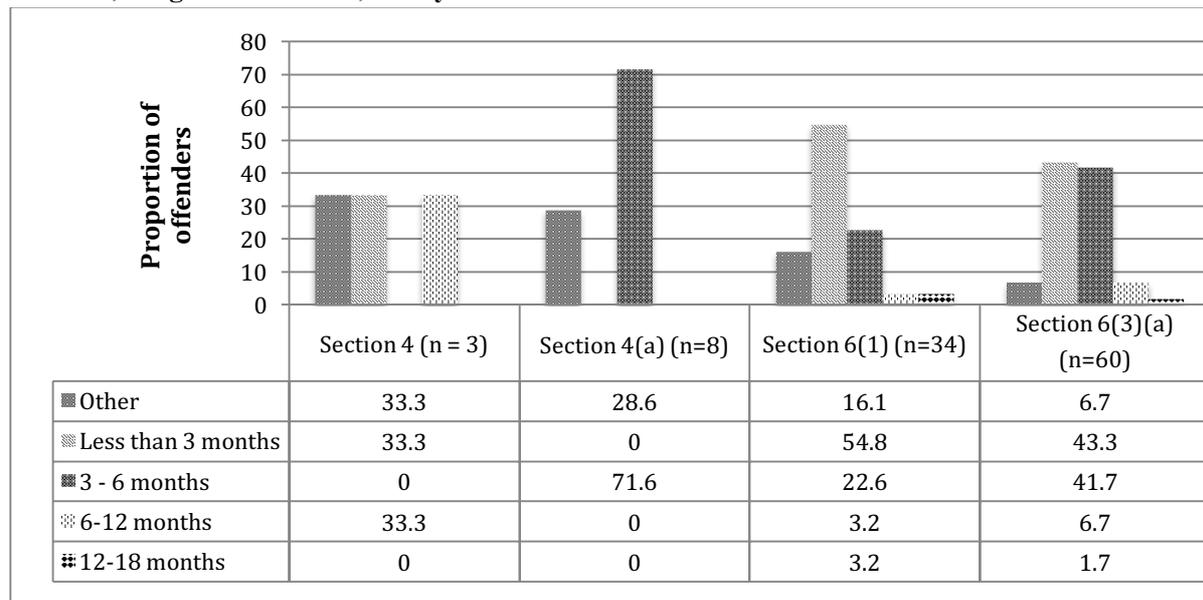
<sup>117</sup> See [3.1].

**Figure 3-1: Sentencing outcomes for drink driving offences proven in the Magistrates Court, 1 July 2010 – 29 June 2015, Cases by most severe penalty<sup>118</sup>**



3.3.3 Figure 3-2 sets out the length of imprisonment for offenders sentenced to actual imprisonment (without any portion suspended). It shows that the majority of offenders convicted of exceeding the blood alcohol limit received short sentences of imprisonment (less than three months or between three – six months).

<sup>118</sup> The figure does not show the 14 cases under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(1) where the offender received a licence disqualification as the most serious penalty because the court must also impose a fine; the three cases under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 4(3)(a) where the offender received a licence disqualification as the most serious penalty and the three cases where the offender received a nominal penalty.

**Figure 3-2: Length of imprisonment for immediate custodial sentences for drink driving offences, Magistrates Court, 1 July 2010 – 29 June 2015**

3.3.4 Magistrates Court data reported by then Chief Magistrate Hill show that 88.8% of drink drivers in prison had previously served a custodial sentence for a drink driving offence. Of offenders who received a custodial sentence between 2007–08 to 2012–13:

- 11.1% had previously received a fully suspended adult sentence;
- 44.4% had previously been sentenced to imprisonment with a partially suspended term;
- 44.4% had previously been sentenced to imprisonment for a determined term.<sup>119</sup>

Chief Magistrate Hill concluded that ‘drink drivers in prison are principally recidivist, “hard core” offenders (with a BAC in excess of 0.15)’.<sup>120</sup>

3.3.5 In relation to repeat drink drivers sentenced to a custodial sentence, the TLRI/TILES study similarly found that, where prior sentence information was available (n = 62), many of the offenders had previously received a fully suspended sentence for a drink driving offence (61.3%) with approximately one in five offenders previously having received a partly suspended sentence (21%) and/or a fixed term of imprisonment (16.2%). Eighteen offenders had previously been imprisoned for a drink driving offence and 27 offenders had previously been imprisoned for any previous offence.

### ***Drink driving rehabilitation programs – the ‘Sober Driver’ program***

3.3.6 In response to concerns about recidivist drink drivers, the ‘Sober Driver’ Program was instituted by Community Corrections in Tasmania in July 2008. This is a post-conviction education program, which magistrates may direct offenders to participate in as part of the sentences they impose. There is no explicit statutory basis for the sober driver program. Instead, the program can be imposed as a condition of a suspended sentence or as part of a probation order or a community service order.<sup>121</sup> Based on the information provided in the Department of Justice Annual Report, it is an

<sup>119</sup> Hill, above n 10, 10.

<sup>120</sup> Ibid.

<sup>121</sup> *Sentencing Act 1997* (Tas) ss 24(2), 28(g), 37(2)(a).

educational and skill based group program that targets adult offenders who are convicted of two or more drink driving offences within a five-year period.<sup>122</sup> The program was developed in NSW and is delivered over a nine-week period, consisting of one two-hour session per week. It is conducted by two trained facilitators and addresses issues associated with drink driving, including the consequences of drink driving, the effects of alcohol on driving, managing drinking situations, alternatives to drink driving and relapse prevention and stress management. A condensed version of the program has also been delivered.<sup>123</sup> The purpose of the program is to assist repeat offenders to separate drinking from driving.<sup>124</sup>

3.3.7 The Sober Driver Program requires a minimum of six participants to run, although there have been two programs conducted with five participants.<sup>125</sup> The maximum number of participants is 18. In order to participate, an offender must be both eligible (adult offenders with two or more drink driving offences in the last five years with sufficient time on their order to complete the program (three months or 22 hours) and suitable. Suitability is assessed based on factors that will affect participation (a responsivity assessment procedure) which include employment, available transport to attend sessions, mental health issues and literacy.<sup>126</sup>

3.3.8 Community Corrections receives a high number of offender referrals from the Magistrates Court, and there is a high demand for the Sober Driver Program. In 2014 and 2015, 1240 offenders were assessed as being eligible for the Sober Driver Program pre-sentence and 773 were found to be suitable for the program. This figure represents offenders who received a community-based order and were found suitable to participate in the Sober Driver Program post sentence. It does not indicate what proportion of these offenders commenced the program. They may have undertaken alternative interventions such as individual work with their supervising probation officer around decision making, alcohol use, and/or treatment for mental health issues.<sup>127</sup> Alternatively, offenders may have been placed on a waiting list for commencement. There are currently 40 offenders on the waiting list in the South, 17 in the North and nine in the North West.<sup>128</sup>

3.3.9 From its inception until 2014–15, 711 offenders have successfully completed the Sober Driver Program.<sup>129</sup> Table 3-3 shows the commencements and completions of offenders participating in the Sober Driver Program with completion rates increasing from 57% in 2008–09 to 84% in 2014–15. Community Corrections indicates that the increase in completion rates over this period could be attributed to several factors:

When the SDP was introduced to Community Corrections, the dedicated Programs Unit had not been formed, and the program was being delivered by Probation Officers ‘off the side of their desks’ while still maintaining high caseloads. With the introduction of a Programs Unit in April 2011, the facilitators were able to dedicate more time to following-up non-attendance,

<sup>122</sup> Department of Justice, Tasmania, *Annual Report 2014–15*, 63–64.

<sup>123</sup> *Ibid* 64.

<sup>124</sup> E Mazurski, D Withaneachi and S Kelly, ‘The NSW Sober Driver Program: Recidivism Rates and Program Parameters’ (Paper presented at the Australasian Road Safety Research, Policing and Education Conference, Perth, Western Australia, 2011).

<sup>125</sup> J Toohey, ‘Sobering Thoughts: An Examination of Tasmania’s Sober Driver Program’ (University of Tasmania, Field Project, 2012) 33 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2080695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2080695)>.

<sup>126</sup> *Ibid*.

<sup>127</sup> Information provided by Michelle Lowe, email 20 March 2017.

<sup>128</sup> It is noted that a program commenced in the South on 20 March 2017 and this intake will include up to 20 offenders, information provided by Michelle Lowe, email 20 March 2017.

<sup>129</sup> Information provided by Michelle Lowe 4 March 2016.

conducting catch-up sessions, and ensuring participants made it through all sessions of the program.

In 2011 a one off funding grant was provided by RACT to assist with the delivery of the SDP. This additional funding enabled Community Corrections to deliver after hours programs (payment of overtime to program facilitators), which made the program more accessible to offenders who may have previously missed program sessions due to employment.

Due to high referral numbers, particularly in the South, the primary delivery method for SDP is now the 3 day condensed program (delivered one full day per week over 3 weeks) rather than the extended 9 week program (2 hours per session, once per week for 9 weeks). This has also attributed to the higher retention rates, as the offenders need to remain engaged in the program for a shorter period of time.<sup>130</sup>

**Table 3-3: Commencements and completions of offenders participating in the Sober Driver Program per financial year**

Date	Offenders who started the program	Offenders who finished the program	Completion Rates
July 2008 – June 2009	33	19	57%
July 2009 – June 2010	70	47	67%
July 2010 – June 2011	114	88	77%
July 2011 – June 2012	89	79	88%
July 2012 – June 2013	171	143	83%
July 2013 – June 2014	174	136	78%
July 2014 – June 2015	237	199	84%
<b>Total</b>	<b>888</b>	<b>711</b>	<b>80%</b>

3.3.10 Of the 72 repeat drink drivers identified in the TLRI/TILES study, a majority of the offenders had not taken part in the Sober Driver Program (70.8%). Of those who did not complete the program, 15 offenders (20.8%) were assessed as eligible but did not commence or commenced and did not complete the program.<sup>131</sup>

3.3.11 There has been no evaluation of the Tasmanian program that has identified recidivism rates for those who complete the program compared to those who were not referred to the program or those who were assessed as eligible and suitable and did not complete the program. However, the New South Wales Sober Driver Program (on which the Tasmanian program is based) has been evaluated. It was found that the program is ‘an effective intervention, demonstrating greater reductions in recidivism when compared with legal sanctions alone’.<sup>132</sup>

## 3.4 Other strategies — Mandatory Alcohol Interlock Program

3.4.1 In recent years, a mandatory alcohol interlock program has been introduced in Tasmania ‘with the aim of reducing recidivism and promoting the rehabilitation of recidivist drink driving

<sup>130</sup> Information provided by Michelle Lowe, email 20 March 2017.

<sup>131</sup> It is noted that two offenders who had not completed the program were waiting for a program placement.

<sup>132</sup> K Mills et al, ‘An Outcome Evaluation of the New South Wales Sober Driver Programme: A Remedial Programme for Recidivist Drink Drivers’ (2008) 27 *Drug and Alcohol Review* 65, 65.

offenders'.<sup>133</sup> It also serves as a means of incapacitation, because it prevents drivers from operating vehicles under the influence of alcohol.<sup>134</sup> An alcohol ignition interlock is a 'breath-testing device that is connected to a vehicle's ignition and stops a driver starting a vehicle if they have been drinking alcohol'.<sup>135</sup> Unlike the approach in some other Australian jurisdictions,<sup>136</sup> the interlock program in Tasmania is not a sentencing option but is incorporated into the process of applying for a new licence after serving the period of court imposed disqualification.<sup>137</sup> The legislative framework is provided in the *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), Part 2 Division 3A. The program is administered by the Department of State Growth and applies to repeat drink drivers (offenders convicted of two or more drink driving offences in a five-year period), high level drink drivers (with blood alcohol concentrations of 0.15 or more) and offenders convicted of driving under the influence of liquor or failing to provide a breath/blood specimen for analysis. At the end of the period of licence disqualification, a person's licence will be issued with an 'I Condition' for a minimum period of 15 months, which requires that the person have an interlock device installed in the vehicle that they drive. The program comprises two stages: (1) a 'learning period' of 270 days (nine months), followed by; (2) a 'demonstration period' of a minimum of 180 days (six months). To complete the program, a person must have zero lockouts (that is, be alcohol free when driving and not prevented from driving by the interlocked device) in the last 180 days. An interlock costs between \$3000 to \$3500 (including installation, rental, servicing and removal costs) with holders of a Health Care Card being eligible for a discount of up to 35%.<sup>138</sup>

3.4.2 Since the introduction of Tasmania's mandatory alcohol interlock program, as at 6 April 2016, there have been 1301 interlocks imposed and 522 people have completed the program. There were 633 interlocks imposed for high level drink driving, 536 for repeat drink driving, 92 for driving under the influence and 33 for failing to provide a breath/blood specimen for analysis. There have been five people who have reoffended with a breathalyser offence after completing the program.<sup>139</sup>

<sup>133</sup> Bartkowiak-Théron and Henning, above n 5, 3.

<sup>134</sup> Elder et al, above n 40, 372.

<sup>135</sup> Department of State Growth Transport, Tasmania, *Tasmania's Mandatory Alcohol Interlock Program Frequently Asked Questions* <<http://www.transport.tas.gov.au/licensing/offences/interlocks/faq>>.

<sup>136</sup> See for example, New South Wales, where the magistrate must impose an order (subject to limited exceptions) for drivers convicted of certain high range, repeat or other serious drink driving offences, *Road Transport Act 2013* (NSW) s 210. See also Roads and Marine, NSW, *Alcohol Interlock Program: Guide for Magistrates, Legal Practitioners and Police Prosecutors* (2015). In the Northern Territory, a court may impose an alcohol ignition lock program on certain repeat drink driver offenders to be served at the end of the period of disqualification. The person can apply to have an interlock installed or can serve the alcohol ignition lock period as an additional period of disqualification, see Department of Transport, Northern Territory, *Alcohol ignition lock order* <<https://nt.gov.au/driving/driving-offences-and-penalties/alcohol-ignition-lock-order/introduction>>.

<sup>137</sup> In Victoria, re-licensing of repeat drink drivers and drivers with a blood alcohol concentration over 0.10 is managed by the Magistrates Court and the court must impose an interlock for repeat offenders. The court makes the order to remove the interlock, see Magistrates Court, Victoria, *Alcohol Interlocks FAQ* <<http://www.magistratescourt.vic.gov.au/howdoi/alcohol-interlocks-faq-0>>. In the ACT, a mandatory interlock is required if an offender is convicted of exceed 0.15 or has two or more drink driving offences in the past five years. The offender can apply to the Road Transport Authority after they have served at least half the period of disqualification. The offender also requires assessment from the Court Alcohol and Drug Assessment Services prior to sentencing, see Road Transport Authority, ACT, *ACT's Alcohol Ignition Interlock Program: Frequently Asked Questions* <[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/ACT\\_QA-interlocks\\_15\\_June.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/ACT_QA-interlocks_15_June.pdf)>. Mandatory alcohol interlocks are also required for re-licensing following the disqualification period for repeat drink drivers and drivers with a blood alcohol concentration at or over 0.15 in South Australia and Queensland. In these jurisdictions, the interlock scheme is managed by the Roads Department (or equivalent). In Western Australia, legislation has been passed that will create an alcohol interlock scheme that will apply to certain drink drivers including repeat drink drivers as part of the re-licensing process, see *Road Traffic Amendment (Alcohol Interlocks and Other Matters) Act 2015* (WA) (the relevant sections are yet to be proclaimed).

<sup>138</sup> Department of State Growth, above n 135.

<sup>139</sup> Information provided by Andrea Batchelor, Department of State Growth, Email 26 October 2016.

### 3.5 Adequacy of the current sentencing approach/options

3.5.1 Parliament has progressively introduced more severe penalties in response to drink driving offences and courts have stressed that the penalties imposed need to be sufficient to deter the offender (specific deterrence) as well as to deter other people (general deterrence) from driving motor vehicles while affected by alcohol. Courts also stress the need to impose harsh sanctions on repeat offenders to condemn their behaviour and to deter others.<sup>140</sup> As Warner has stated, '[s]tatements of judicial policy abound asserting that drink driving is a grave social evil carrying a substantial risk of causing death and serious injury and that accordingly there is a need for penalties which will deter the public as well as the individual offender from drinking and driving'.<sup>141</sup> However, it appears that traditional criminal justice responses, such as fines, imprisonment and disqualification, are not effective to deter some offenders from repeat offending. Further, research has generally shown that increasing the severity of traditional sentencing options has little or no impact on drink driving rates or recidivism rates for drink driving.<sup>142</sup> This leads to the criminal justice system operating as a revolving door for these offenders.<sup>143</sup> This was reflected in the study conducted by the TLRI/TILES.

3.5.2 In Tasmania, magistrates are forced, in part through limited sentencing options, to give custodial sentences to serious and recidivist offenders.<sup>144</sup> However, in relation to imprisonment, most studies show that this is an ineffective deterrent for repeat drink drivers.<sup>145</sup> This finding would appear to be reflected in the Tasmanian context, given that a majority of offenders in prison for drink driving offences had previously received a custodial sentence and many had already spent time in prison for drink driving. A report prepared for the Royal Automobile Club of Victoria identified the following limitations of imprisonment as a means of reducing offending for repeat offenders:

People in prison, who are often the most serious offenders, remain a group that are not specifically targeted by the current rehabilitation programs ... Prison programs for drink driving offenders are almost uniformly unsuccessful. This may in part reflect the fact that successful rehabilitation requires practice in life skills and lifestyle change and this is not available to a prison population. Hence, further research is required into the likely effectiveness of targeting serious drink driving offenders who are in prison, including the option of special post-release programs.<sup>146</sup>

3.5.3 Another explanation is that prison sentences are likely to be ineffective in changing drink driving behaviour given that most offenders receive a short sentence. This means that the period of imprisonment provides insufficient opportunity for participation in a rehabilitation program either in prison (due to the length of the sentence) or following release (given that short short-term prisoners

<sup>140</sup> See *McDonald v Nilsson* [2009] TASSC 83, [14] (Crawford CJ); *Barrett v Pearce* A6/1986, 4 (Neasey J); *Lusted v Kenway* [2008] TASSC 47, [41]–[42] (Porter J).

<sup>141</sup> Warner, above n 98, [14.522].

<sup>142</sup> Mullen et al, above n 29, 637 citing Friedman et al (1995), Ross and Klette (1995); Terer and Brown, above n 28, 5; R Homel, 'Penalties and the Drink-Driver: A Study of One Thousand Offenders' (1981) 14 *Australian and New Zealand Journal of Criminology* 225, 237. However, note S Briscoe, 'The Impact of Increased Drink-Driving Penalties on Recidivism Rates in NSW' (Alcohol Studies Bulletin No 5, NSW Bureau of Crime Statistics and Research, 2004) who found 'some evidence of beneficial effect' after penalties in NSW were increased but only for offenders who lived outside of the Sydney metropolitan area. For non-Sydney locations, 'the overall effect of the increased penalties on recidivism rates was relatively small, with the probability of a drink-driver reoffending being reduced by just three percentage points': at 8.

<sup>143</sup> Bartkowiak-Théron and Henning, above n 5, 2.

<sup>144</sup> Hill, above n 10.

<sup>145</sup> Terer and Brown, above n 28, 5.

<sup>146</sup> Royal Automobile Club of Victoria, *Drink Driver Rehabilitation and Education in Victoria* (Research Report, 2005) 20.

are released at the end of their prison term unconditionally).<sup>147</sup> In Tasmania, as shown in Figure 3-2 above, for the majority of drink drivers sentenced to imprisonment, the term is less than six months and very few offenders receive a sentence of imprisonment longer than 12 months. There is also little support in the literature for fines as a means of reducing recidivism for drink drivers.<sup>148</sup> Research conducted by the New South Wales Bureau of Crime Statistics using a sample of more than 12 000 cases found that ‘higher fines are not a specific deterrent to drink-driving’.<sup>149</sup>

3.5.4 In respect of traditional penalties (fines, imprisonment and licence suspension), research suggests that licence suspension ‘has provided the strongest and most consistent evidence of effectiveness in reducing recidivism’.<sup>150</sup> However, there are limitations in relying on disqualification periods for recidivist offenders because the ‘effectiveness of disqualification is dependent on whether it actually prevents drink drivers from driving’. Evidence shows that many recidivist drink drivers continue to drive without a licence and that they often continue to do so after they are eligible to regain their licence.<sup>151</sup> Repeat offenders may be less likely to be deterred by disqualification given that their ‘longer histories of punishment avoidance’ support their view that it is unlikely that they will be detected if they continue to drive (and drink drive).<sup>152</sup> In-depth interviews with offenders have found that ‘once suspended from driving for long periods ... the low risk of apprehension for driving without a licence combined with family and employment demands, inconvenience, and the sense that they won’t get their licence back in the foreseeable future, ... lead a significant number of suspended drivers to drive without a licence’.<sup>153</sup> Loss of licence can cause considerable financial difficulties for offenders and offenders may risk driving without a licence to avoid this problem. Employment and work related reasons have been found to be the most cited explanations why disqualified drivers continue to drive.<sup>154</sup> In addition, some offenders continue to drive without a licence even after the period of disqualification as they do not reapply for a licence.<sup>155</sup> For example, New Zealand research has found that ‘90% of those apprehended for driving whilst disqualified had their licence revoked as a result of driving under the influence’.<sup>156</sup> In Tasmania, in the period 1 July 2009 to 29 June 2015, there were 1261 cases where an offender was convicted in the Magistrates Court for driving while disqualified under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 19A(1).<sup>157</sup> This charge is used in preference to the charge of driving while disqualified contained in the *Vehicle and Traffic Act 1999* (Tas) s 13(1) (which is used for other types of disqualification) when an offender is disqualified

<sup>147</sup> Warner, above n 34, 397, 399.

<sup>148</sup> E Palmer et al, ‘The Effect on Reconviction of an Intervention for Drink-Driving Offenders in the Community’ (2012) 56 *International Journal of Offender Therapy and Comparative Criminology* 525, 526.

<sup>149</sup> D Weatherburn and S Moffatt, ‘The Specific Deterrent Effect of Higher Fines on Drink-Driving Offenders’ (2011) 51 *British Journal of Criminology* 789, 799.

<sup>150</sup> Elder et al, above n 40, 362. See also S Moffatt, ‘Sentencing Drink-Drivers: The Use of Dismissals and Conditional Discharges’ (2004) 81 *Crime and Justice Bulletin* 10 and Repeat Drink Driving Working Group (Western Australia), *Report of the Western Australian Drink Driving Working Group* (2003) 25 cited in VSAC, above n 27, 61; Trimboli and Smith, above n 25.

<sup>151</sup> Elder et al, above n 40, 362–3; T Brown et al, ‘Brief Motivational Interviewing for DWI Recidivists Who Abuse Alcohol and Are Not Participating in DWI Intervention: A Randomized Controlled Trial’ (2010) 34 *Alcoholism: Clinical and Experimental Research* 292; R Voas, A Tippetts and A McKnight ‘DUI Offenders Delay License Reinstatement: A Problem?’ (2010) 34 *Alcoholism: Clinical and Experimental Research* 1282; Mullen et al, above n 29, 637.

<sup>152</sup> Lenton, Fetherston and Cercarelli, above n 60, 637.

<sup>153</sup> Ibid 642. See also, Sheehan et al, above n 40, 4.

<sup>154</sup> VSAC, above n 27, 33; Lenton, Fetherston and Cercarelli, above n 60, 638.

<sup>155</sup> VSAC, above n 27, 32.

<sup>156</sup> Lenton, Fetherston and Cercarelli, above n 60, 637; L Bakker, S Hudson and T Ward, ‘Reducing Recidivism in Driving While Disqualified: A Treatment Evaluation’ (2000) *Criminal Justice and Behavior* 531, 532.

<sup>157</sup> It is noted that there were an additional 409 cases where an offender received a global sentence for multiple charges including driving while disqualified under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 19A(1).

due to drink driving and then is found driving.<sup>158</sup> In the same period, there were 775 cases where an offender was convicted for driving while disqualified under the *Vehicle and Traffic Act 1999* (Tas).<sup>159</sup>

3.5.5 Recognition of the limitations of traditional sanctions for repeat offenders has led to the introduction of drink driving rehabilitation programs in many jurisdictions, including in Tasmania. These rehabilitation programs aim to separate drinking from driving for offenders, as well as potentially to reduce the level of drinking of participants, through education and/or treatment.<sup>160</sup> The use of such programs is generally supported by research that suggests that combining rehabilitation with licence disqualification ‘has additive benefits and provides potential for achieving better outcomes’ than legal sanctions alone.<sup>161</sup> Evaluative studies conducted in NSW of the Sober Driver Program (on which the Tasmanian Sober Driver Program is modelled) found that offenders who completed the program were over ‘40% less likely to re-offend in the 2 years following program completion, than offenders who received sanctions alone’.<sup>162</sup> The review found that the recidivism rate for those who completed the Sober Driver Program (over a two-year follow up period) was 4.9% compared with 10.2% for the community control group who received legal sanctions only.<sup>163</sup> Subsequent evaluation of the NSW program has confirmed that rehabilitation programs can reduce recidivism, with offenders who participated being 44% less likely to reoffend than the comparison group.<sup>164</sup> This evaluation examined recidivism over five and a half years and found that the program effect was maintained over this period, with recidivism rates of 15% for the Sober Driver Program participants and about 20% of the comparison groups.<sup>165</sup> The Centre for Accident Research and Road Safety (CARRS) evaluated the Queensland ‘Under the Limit Program’ and found that ‘when using subsequent reconviction rates as the outcome measures the most promising impact comes from combining alcohol treatment with either licence restrictions or licence suspension’.<sup>166</sup>

3.5.6 In the Northern Territory, failure of imprisonment to provide an adequate response to the rehabilitation of drink drivers has been clearly recognised. In introducing changes to the *Sentencing Act* (NT) that would allow for drink drivers to participate in drink driver education courses, programs targeting road safety and alcohol rehabilitation as part of a community-based order or a community custody order, it was observed in the Second Reading Speech that:

approximately 25% of the prison population is made up of driving offenders who serve an average of 75 days. This provides limited opportunity to access treatment or training programs targeting alcohol misuse and bad driving behaviour. Driving offenders are almost always disqualified from obtaining a licence and, when released from prison, are placed at risk of quickly committing a further driving offence, particularly if they are placed in situations where there is no alternative for them but to drive while disqualified ... This further contributes to the revolving door of recidivism. What this cohort of offenders needs is intervention, supportive

<sup>158</sup> Information provided by Betty Evans, email 4 December 2015.

<sup>159</sup> It is noted that there were an additional 425 cases where an offender received a global sentence for multiple charges including driving while disqualified contained the *Vehicle and Traffic Act 1999* (Tas) s 13(1).

<sup>160</sup> Freeman and Lioassis, above n 40, 4.

<sup>161</sup> G Palk, M Sheehan and C Schonfeld, ‘Review of the Under the Limit Drink Driving Rehabilitation Program (Centre for Accident Research and Road Safety, 2006) 15; Mills et al, above n 132, 65.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid 72.

<sup>164</sup> Mazurski, Withaneachi and Kelly, above n 124, 8.

<sup>165</sup> Ibid 9.

<sup>166</sup> Palk, Sheehan and Schonfeld, above n 161, 27. See also Sheehan et al, *A Process and Outcome Evaluation of the Under the Limit (UTL) Therapeutic Drink Driving Program for Recidivist and High Range Offenders* (Centre for Accident Research and Road Safety, Queensland, 2012) 4.

training, and rehabilitation targeting their offending behaviour such as treatment for alcohol misuse.<sup>167</sup>

The aim is to divert this cohort from prison to appropriate residential treatment and training centres.<sup>168</sup>

3.5.7 It is recognised that drink driving rehabilitation programs are more effective than other sanctions, particularly if they are multimodal in nature and target high-risk offenders who show a voluntary interest.<sup>169</sup> Multimodal programs ‘include a combination of psychotherapy/counselling, education and probation supervision [and] have proven to be a more effective strategy than programs with a single or two mode focus’.<sup>170</sup> In other words, programs that offer a range of interventions (such as counselling, education, and supervision) that address individual needs and offer ‘wrap-around’ care are likely to be more successful in reducing drink driving. In particular, although it is difficult to disentangle the findings to determine which strategy is most effective, research suggests that ‘interventions that focus on treating ... alcohol use and/or take a psychoeducational approach to reduce drink-driving have shown a greater level of success in reducing DUI’.<sup>171</sup> A deficiency in the Tasmanian response is that the focus is on education in relation to drinking and driving and does not address treatment for alcohol abuse/dependence. A further deficiency is that education programs occur in isolation from on-going encouragement and supervision around alcohol use and driving. Accordingly, while accepting that education programs (such as the Sober Driver Program) are a significant component of the response to repeat drink driving and would be important as part of a suite of responses to repeat drink drivers, education programs alone are inadequate, as there is a need for a more holistic and multi-faceted approach to repeat drink driving.

3.5.8 In addition, research demonstrates that rehabilitation programs need to be targeted to meet the needs of the particular offender. There has been criticism of rehabilitation programs on the basis that they treat offenders as a homogeneous group, whereas drink drivers ‘may engage in drink driving for a number of reasons including lack of education, lack of skills to separate drinking and driving, and due to the existence of alcohol-related disorders’.<sup>172</sup> Consequently, it is argued that ‘the underlying causes of drink driving should be identified to inform the type of treatment that is more likely to be effective at addressing drink driving behaviour’.<sup>173</sup> It has also been argued that there is a failure to recognise that research findings about the characteristics of repeat drink drivers suggest that they ‘could appropriately be described as a clinical population rather than a non-clinical population with long term problems requiring long term responses’.<sup>174</sup> In terms of the cohort of offenders examined in the TLRI/TILES study, where the information was available, it disclosed that nearly 85% of offenders had a history of alcohol abuse, and nearly three quarters had a history of problematic drug use. Additionally, many offenders (over three-quarters) were identified as having mental health issues. This cohort of offenders has complex needs with cross-sectional vulnerabilities that are unlikely to be resolved without understanding how they influence offenders’ behaviour and in the absence of targeted and individualised treatment. The TLRI/TILES study also provides an insight into the failure of traditional criminal justice responses for these offenders. It shows that responses

<sup>167</sup> *Justice (Corrections) and Other Legislation Amendment Bill 2011* (NT) 3  
<[http://www.austlii.edu.au/au/legis/nt/bill\\_srs/jaolab2011508/](http://www.austlii.edu.au/au/legis/nt/bill_srs/jaolab2011508/)>.

<sup>168</sup> *Ibid.*

<sup>169</sup> Palk, Sheehan and Schonfeld, above n 161, 16.

<sup>170</sup> *Ibid* 15.

<sup>171</sup> Palmer et al, above n 148, 526.

<sup>172</sup> Terer and Brown, above n 28, 5.

<sup>173</sup> *Ibid.*

<sup>174</sup> Richardson, above n 2, 7 referring to Lapham, et al, above n 62.

directed only at drink driving are not likely to be effective because they do not address comorbidity or co-existing vulnerabilities likely to undermine drink driving responses.<sup>175</sup> Research has highlighted the complexity of providing treatment that takes account of such problems as ‘severe alcohol problems (abuse and dependence) and high rates of co-morbid psychiatric disorder; personality disorders and elevated hostility, aggression, and impulsiveness; and extensive criminal histories’.<sup>176</sup> Such problems are not currently addressed in the Sober Driver Program, which is a generic education program. Further, offenders who suffer these problems may not be eligible for the Sober Driver Program.<sup>177</sup>

3.5.9 The TLRI/TILES study also provides an insight into the wider offending history of repeat drink drive offenders. All of the offenders had at least one prior conviction for an offence other than a drink driving offence in the past five years. Lifetime offending histories of those for whom this information was available, disclosed that 80% of offenders had prior convictions for dishonesty and property offences, 55.7% had prior convictions for violent offending (excluding domestic violence), 34.3% of offenders had a prior conviction for a drug offence and 24.3% of offenders had prior convictions for domestic violence. As noted earlier, this paints a picture of drink driving among ‘a portion of DUI recidivists, ... *as just one manifestation of a host of deviant behaviours*’.<sup>178</sup> Research has also found that DUI recidivists had ‘more extensive violent and property criminal histories than other drunk drivers’.<sup>179</sup> Accordingly, it has been suggested that re-offenders with a criminal history may need special attention in treatment programs as ‘they represent a more entrenched group (than offenders whose criminal history is limited to drink driving) who may be less responsive to traditional treatments’.<sup>180</sup>

3.5.10 In addition, research suggests that attention needs to be paid to those who withdraw from rehabilitation programs (non-completers). In a study of the Drink-Impaired Drivers (DID) program in the English and Welsh Probation Service, it was found that, at the one year follow up, there was a zero reconviction rate for offenders who completed the DID program but that this was not significantly different to that of the comparison group (those who were not allocated to the DID program).<sup>181</sup> However, it was found that only 51% of participants completed the program and that program non-completers had the highest level of drink-drive reconvictions and were significantly more likely to be reconvicted than the completers and comparison groups.<sup>182</sup> This is consistent with research that evaluated the Queensland Under the Limit Program, which found that successful completers had an overall reduction of about 15% compared with controls, while unsuccessful completers had a re-offence rate that was estimated at 85% higher than controls.<sup>183</sup> The study found that program completion had a significant effect on reoffending for offenders with a high BAC who had prior drink driving offences, achieving a 55% reduction in recidivism rates compared to controls,

<sup>175</sup> Lapham et al, above n 62, 947; S Lapham, B Skipper and M Russell, ‘Lifetime Drinking Course of Driving-While-Impaired Offenders’ (2012) 107 *Addiction* 1947, 1947.

<sup>176</sup> Lenton, Fetherston and Cercarelli, above n 60, 638 (references omitted).

<sup>177</sup> Reasons for exclusion from Sober Driver Program include mental health issues: Information provided by Michelle Lowe, email 4 March 2016. It is noted that offenders with mental health issues or significant, untreated alcohol or drug abuse issues that would prevent them from engaging in a group treatment program may be referred to individual treatment with an external service prior to engagement: Information provided by Michelle Lowe, email 20 March 2017.

<sup>178</sup> Hallstone, above n 53, 344 (italics in original).

<sup>179</sup> Hallstone, above n 54, 166.

<sup>180</sup> Hallstone, above n 53, 344; Nochajski et al, above n 93.

<sup>181</sup> Palmer et al, above n 148, 532.

<sup>182</sup> *Ibid* 533.

<sup>183</sup> Palk, Sheehan and Schonfeld, above n 161, 45.

whereas first offenders with a BAC lower than 0.15/100 ml had much the same re-offence rates as similar controls.<sup>184</sup>

3.5.11 As detailed above, another recent response to recidivist drink drivers has been the introduction of alcohol interlock devices. There are different models for alcohol interlock regimes, including the requirement for mandatory interlock orders to be imposed at the sentencing stage,<sup>185</sup> discretionary interlock orders imposed at the sentencing stage<sup>186</sup> and mandatory interlock requirements for re-licensing administered either judicially<sup>187</sup> or administratively.<sup>188</sup> International research has shown that interlock devices are effective in reducing recidivism when the interlock is installed,<sup>189</sup> but there is limited evidence that the devices are effective in reducing recidivism once they are removed.<sup>190</sup> It has been argued that:

Unless interlocks are combined with interventions that address the underlying factors that contribute to recidivism — such as alcohol abuse and the lack of perceived alternatives to driving after drinking — it is likely that many users will continue to drive after drinking once the device is removed.<sup>191</sup>

This has been said to highlight the ‘importance of combining ignition interlocks with interventions that are more likely to foster long-term behavioural change such as rehabilitation programs’.<sup>192</sup>

Australian research, as with overseas research, has found that the driver interlock had a positive effect on drink driving offending for the interlock period.<sup>193</sup> However, (contrary to overseas research) this research also provided ‘some suggestion of long-term benefits of using interlocks with all repeat and first-time high range offenders’ beyond the interlock period.<sup>194</sup> This suggests that the driver alcohol interlock is ‘an effective safety intervention for reducing drink-driving rates for offenders’.<sup>195</sup> However, this needs to be balanced with a concern that use of mandatory interlocks on re-licensing could act as a disincentive to re-licensing and may increase the number of offenders who choose to drive without a licence, particularly in view of the financial burden of installing the interlock devices.<sup>196</sup> This emphasises the need to ‘keep offenders *within the system* that consists of formal laws and informal social controls, rather than applying penalties in ways that undermine adherence to the law and reinforce unlicensed driving’.<sup>197</sup>

3.5.12 Accordingly, given the limitations of the current approaches to the issue of recidivist drink driving, Bartkowiak-Théron and Henning have argued that ‘what is needed is a more interactive, actively interventionist approach, something that enables on-going assessment and supervised

<sup>184</sup> Ibid.

<sup>185</sup> This applies in New South Wales.

<sup>186</sup> This applies in New Zealand.

<sup>187</sup> This applies in Victoria.

<sup>188</sup> This applies in Tasmania, Queensland, South Australia, Australian Capital Territory and Western Australia.

<sup>189</sup> Lenton, Fetherston and Cercarelli, above n 60, 638. See also P Miller et al, ‘Effectiveness of Interventions for Convicted DUI Offenders in Reducing Recidivism: A Systematic Review of the Peer-Reviewed Scientific Literature’ (2015) 41 *American Journal of Drug and Alcohol Abuse* 16, 18.

<sup>190</sup> Elder et al, above n 40, 367–8. See also Miller et al, above n 189, 18.

<sup>191</sup> Elder et al, above n 40, 370.

<sup>192</sup> Terer and Brown, above n 28, 6.

<sup>193</sup> Watson et al, above n 40.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> VSAC, above n 27, 34; Sheehan et al, above n 40, vi.

<sup>197</sup> Lenton, Fetherston and Cercarelli, above n 60, 643 (emphasis in original).

treatment of the offender as well as recognition of the specific criminogenic needs of individual offenders'.<sup>198</sup> There is acceptance within the Tasmanian criminal justice system and among service providers that there are inadequacies in the current approach and that there needs to be a more integrative response that is comprehensive and multifaceted, and that encompasses intensive supervision, individual treatment, alcohol interlock devices and potentially imprisonment.<sup>199</sup> Possible approaches to developing a satisfactory solution to the complex issue of recidivist drink drivers are explored in parts 4 and 5.

**Question:**

1. Do you consider that there are limitations in the current responses to the problem of repeat drink driving? If so, please outline your concerns.

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<sup>198</sup> Bartkowiak-Théron and Henning, above n 5, 3.

<sup>199</sup> Richardson, above n 2, 12.

## Part 4

# Solution Oriented Responses to Repeat Drink Driving

In recognition of the limitations of traditional responses to repeat drink driving, some jurisdictions have adopted more innovative approaches. In accordance with the philosophy of therapeutic justice, new initiatives have included the creation of specialist problem-oriented courts or lists for recidivist drink drivers. Problem-solving courts may offer a solution to this endemic and complex problem in Tasmania. Indeed, one of the key action areas within Tasmania's Key Strategy 3 of the *Alcohol Action Framework* is to '[develop] an innovative problem-solving court and sentencing approaches to reduce the cycle of alcohol related offending behaviour and to address the challenges of repeat drink-driving offenders.'<sup>200</sup> Following the success of its three extant problem-solving courts, namely the Youth Court, the Court Mandated Drug Diversion program (for offending related to illicit drug use) and the Mental Health Diversion List, a possible solution may be to adopt a similar problem-solving approach to recidivist drink driving. However, the apparent convenience of this solution should not obscure the very real need to examine models in other jurisdictions before recommending a model to meet local requirements. Accordingly, this Part examines the application of non-traditional criminal justice responses to the problem of recidivist drink drivers and provides an overview of national and international research literature on non-traditional approaches adopted elsewhere.

## 4.1 Solution-oriented courts and therapeutic jurisprudence

4.1.1 Problem-solving or solution-oriented courts<sup>201</sup> have been developed over the past 30 years in response to a recognition that 'the adversarial nature of the traditional criminal justice model cannot effectively handle the complexity of certain human and social problems, where failing to deal with fundamental causes almost guarantees re-offending'.<sup>202</sup> Problem-oriented courts originally emerged in the United States with the creation of drug courts and have extended to different jurisdictions (driving while impaired courts, juvenile drug courts, mental health courts, family dependency treatment courts, domestic violence courts, community courts, veterans courts, unified family courts and tribal healing-to-wellness courts)<sup>203</sup> and to many countries (Australia, England, Canada, Scotland, Ireland, Wales, New Zealand, Brazil, Norway, Belgium, Guam, Mexico).<sup>204</sup> In 2011, in America, it was estimated that

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<sup>200</sup> Inter-Agency Working Group on Drugs, above n 12, 38.

<sup>201</sup> See M King et al, *Non-Adversarial Justice* (2<sup>nd</sup> ed, Federation Press, 2014) 155–6 for discussion of the nomenclature. There, it is observed that the 'original terminology of "problem-solving" courts reflected the idea that the courts should change their focus from individuals and their criminal conduct to offenders' problems and their solutions. ... In Australia, the term "problem-oriented" court came into use because it recognised that the complex and chronic problems that brought offenders before the courts were unlikely to be "solved" and that it was more realistic for the justice system to adopt an approach that signified the process rather than the hoped for outcome. ... More recently, King has proposed the term "solution-focused" in preference to either "problem-solving" or "problem-oriented", arguing that they did not sufficiently recognise the centrality of the offender's role in bringing about change'.

<sup>202</sup> Hill, above n 10.

<sup>203</sup> King et al, above n 201, 155.

<sup>204</sup> Hill, above n 10. This is not an exhaustive list.

there were 2560 drugs courts and 1220 other problem-solving courts.<sup>205</sup> In Australia, there are several problem-oriented courts including drug courts, community courts, family violence courts, mental health courts, special circumstances lists, and family drug treatment courts.<sup>206</sup> In Tasmania, as indicated, there are three well-developed problem-oriented courts already in operation: the Youth Court,<sup>207</sup> the Mental Health Diversion List<sup>208</sup> and the Court Mandated Drug Diversion program.<sup>209</sup> In addition, there is a family violence list run by the Magistrates Court in each of its registries.<sup>210</sup>

4.1.2 In contrast to traditional courts, problem-oriented courts adopt a case by case approach to offending and seek to involve a range of partners (both government and non-government) in tackling the root causes of deviant behaviour and then addressing them holistically. It is widely accepted that the concept of therapeutic jurisprudence (although developing separately) provides the philosophical basis for problem-oriented courts.<sup>211</sup> The concept of therapeutic jurisprudence has been summarised by Freiberg as follows:

an approach to the study of the law as a therapeutic agent, focusing upon the impact of the law on the emotional life and psychological well-being of not only offenders but of all of the participants in a justice system: judicial officers, victims, offenders, plaintiffs, defendants and others.<sup>212</sup>

The focus of problem-oriented courts on addressing the issues that underpin an individual's offending and rehabilitation reflects this 'therapeutic approach'. This approach recognises the multi-dimensional nature of offending, for example, by accepting that substance abuse is not only a justice problem but also a health problem. Its focus is on identifying what works in reducing and eliminating offending behaviour, while at the same time ensuring offenders take responsibility for their own behaviour. In doing so, it may focus on a multiplicity of issues including 'housing, education, employment, relationship, and personal effectiveness problems' so that rehabilitation might involve not only the 'promotion of law-abiding behaviour, but ... also ... the healing of mind, body, and relationships; the gaining of knowledge through education; and the development of vocational and other life skills'.<sup>213</sup> While problem-oriented courts (as with traditional criminal justice responses) seek to hold an offender accountable, there is a view that the system should do more than punish and that the system should also seek to prevent future harm.<sup>214</sup> This perspective recognises that for many recidivist offenders,

<sup>205</sup> P Hora, 'Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits' (2011) 2 *Chapman Journal of Criminal Justice* 1, 11.

<sup>206</sup> King et al, above n 201.

<sup>207</sup> For details, see V Stojcevski, *Hobart Specialised Youth Justice Court Pilot: Evaluation Report* (Magistrates Court of Tasmania, 2013).

<sup>208</sup> See Magistrates Court of Tasmania, *The Diversion List* <[http://www.magistratescourt.tas.gov.au/about\\_us/criminal\\_division/diversion\\_list](http://www.magistratescourt.tas.gov.au/about_us/criminal_division/diversion_list)>.

<sup>209</sup> See Magistrates Court of Tasmania, *Doing a Drug Treatment Order*, <[http://www.magistratescourt.tas.gov.au/about\\_us/criminal\\_division/drug\\_treatment\\_orders](http://www.magistratescourt.tas.gov.au/about_us/criminal_division/drug_treatment_orders)>.

<sup>210</sup> TSAC, *Sentencing of Adult Family Violence Offenders*, Final Report No 5 (2015) 49. The Council highlighted criticisms of the operation of the family violence list and made observations in relation to improving its operation: at 50–1.

<sup>211</sup> King et al, above n 201, 158; M King, *Solution-Focused Judging Bench Book* (Legal Services Board, 2009) 25; The Australasian Institute of Judicial Administration, *Problem-solving Courts* <<http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/problem-solving-courts?task=view&id=414>>; B Winick, 'Problem Solving Courts: Therapeutic Jurisprudence in Practice' in R Wiener and E Brank, *Problem Solving Courts* (Springer, 2013) 220.

<sup>212</sup> A Freiberg, 'Psychiatry, Psychology and Non-adversarial Justice: From Integration to Transformation' (2011) 18 *Psychiatry, Psychology and Law* 297, 300.

<sup>213</sup> M King, 'New Directions in the Courts' Response to Drug and Alcohol Related Legal Problems: Interdisciplinary Collaboration and Collaboration with Defendants' (2013) 6 *Phoenix Law Review* 917, 922–3.

<sup>214</sup> H Blagg, *Problem Oriented Courts* (Research paper prepared for the Law Reform Commission of Western Australia, 2008), 6 citing J Butts, 'Introduction: Problem-Solving Courts' (2001) 23 *Law and Policy* 121.

punishment alone is not an effective preventative against future offending or harm to the community. It fails to equip these offenders with the necessary self-management skills either to take responsibility for their offending behaviour or depart from it. What is needed to protect the community is a model geared to identifying what does work in this regard and then applying that knowledge effectively.

4.1.3 In 1997, as part of the development of problem-oriented courts, 10 key ingredients of a drug court were set out by the Drug Standards Committee of the United States National Association of Drug Court Professionals.<sup>215</sup> These are ‘internationally accepted as the hallmarks of drug courts’<sup>216</sup> and have provided the framework for drug courts and also other problem-solving courts.<sup>217</sup> These key components are as follows:

- Drug courts integrate alcohol and other drug treatment services with criminal justice system case processing;
- Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants’ due process rights;
- Eligible participants are identified early and promptly placed in the drug court program;
- Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services;
- Abstinence is promoted and monitored by frequent alcohol and other drug testing;
- A coordinated strategy governs drug court responses to participants’ compliance;
- Ongoing judicial interaction with each drug court participant is essential;
- Monitoring and evaluation measure the achievement of program goals and gauge effectiveness;
- Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations;
- Forging partnerships among drug courts, public agencies, and community-based organisations generates local support and enhances drug court program effectiveness.

Subsequent research has demonstrated that the success of drug courts reflects the extent to which the court adheres to these principles, with courts that ‘watered down or dropped core ingredients of the model [paying] dearly for their actions in terms of lower graduation rates, higher criminal recidivism, and lower cost savings’.<sup>218</sup>

4.1.4 Problem-oriented courts have different features and may operate on different models at different points in the justice process including at the pre-trial, pre-sentence or post-conviction sentencing stages. However, while the models differ between jurisdictions, King et al have identified seven common elements that are generally shared by problem-oriented courts:

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<sup>215</sup> Bureau of Justice Assistance, *Defining Drug Courts: The Key Components* (1997) <[http://www.ndci.org/sites/default/files/nadcp/Key\\_Components.pdf](http://www.ndci.org/sites/default/files/nadcp/Key_Components.pdf)>.

<sup>216</sup> King et al, above n 201, 161.

<sup>217</sup> National Association of Drug Court Professionals (NADCP), *Adult Drug Court Best Practice Standards: Volume I* (2013) 1.

<sup>218</sup> Ibid.

- **case outcomes:** reduced recidivism and improved health outcomes for offenders;
- **system change:** changes in the way that government responds to social problems such as addiction and mental illness;
- **judicial monitoring:** active judicial involvement over time to address the chronic problems faced by the offender and to facilitate changes in behaviour;
- **collaboration:** collaboration between courts and service providers, between professionals in different disciplines, with the offender, between government and non-government health and welfare sectors, and between lawyers and behavioural scientists;
- **interdisciplinary:** re-conceptualisation of the problem as extending beyond the law to behavioural sciences (cognitive psychology, psychiatry, clinical behavioural sciences, criminology, social work, nursing, neuropsychiatry);
- **non-traditional roles:** judges, defence and prosecution counsel adopt non-traditional roles with the process involving problem-solving dispute avoidance, therapeutic outcomes, collaborative process, people oriented, interest or needs based, emphasis on non-adjudication, judge as coach, forward looking, planning based, wide range of participants and stakeholders, interdependent, based on common sense, informal and effective;
- **service provision:** ‘comprehensive, multidisciplinary and integrated service programs’ to deal with the underlying problems that contribute to offending.<sup>219</sup>

## 4.2 Driving while intoxicated courts/lists

4.2.1 DWI courts/lists are an example of a problem-oriented court that has been developed in response to the problem of recidivist drink drivers. Typically, they incorporate the features of a problem-oriented court (as detailed at [4.1]). Existing DWI courts are based on the drug court model and involve treatment, supervision, testing for alcohol use, judicial monitoring and a system of incentives, threats and rewards.<sup>220</sup> The emphasis of a DWI court is on the accountability of the offender,<sup>221</sup> with the offender having a primary role as an agent of change. The aim of a DWI court is to facilitate the rehabilitation of the repeat offender by targeting the underlying causes of the drink driving behaviour and so protect the community by reducing recidivism.<sup>222</sup>

4.2.2 Advantages of DWI courts, as with problem-oriented courts generally, are that they are forward looking rather than backward looking, which means that the approach of the court is ‘geared towards encouraging positive future behaviour rather than simply punishing past actions’.<sup>223</sup> There is evidence that DWI courts are effective in this regard and meet their aim of facilitating rehabilitation and thereby improving community safety.<sup>224</sup> The courts are also said to have the ability to respond to complex social and legal problems by integrating responses to alcohol use, mental health and other issues that underpin offending behaviour.<sup>225</sup> In this regard, the aim of the court is not to ‘resolve

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<sup>219</sup> King et al, above n 201, 158–60.

<sup>220</sup> Richardson, above n 2, 13.

<sup>221</sup> D Wallace, ‘The Promise of DWI Court: What Does It Mean and Why Should Prosecutors Care?’ (2011) 2 *Chapman Journal of Criminal Justice* 101, 102.

<sup>222</sup> Richardson, above n 2, 14.

<sup>223</sup> Blagg, above n 214, 2.

<sup>224</sup> See [4.2.3].

<sup>225</sup> Blagg, above n 214, 2.

complex legal issues, but rather to bring the authority and machinery of the court to bear on a particular social problem or suite of problems'.<sup>226</sup> In this way, the court is able to operate as a 'hub for intervention rather than a simple delegator of tasks'.<sup>227</sup> This approach challenges the 'framework of silos [for example, that health deals with health, education deals with education etc] that prevent a constructive alignment of resources and problem-solving processes across agencies and areas'.<sup>228</sup>

4.2.3 There are, however, concerns that can be raised about DWI courts. These include:

- net widening — the intensive and intrusive nature of DWI and drug courts means that concerns have been raised about using the court as a means of offering help to an offender when in reality it imposes an intensified and punitive order.<sup>229</sup>
- diminution of resources available for those who wish to seek treatment voluntarily.<sup>230</sup>

It can also be argued that therapeutic responses do not reflect community expectations about punishment as they can be perceived as being 'soft on crime'.

There are also some suggestions that DWI courts are not effective in reducing drink driving.<sup>231</sup> However, other research has found that DWI courts result in lower recidivism rates than comparison groups.<sup>232</sup> Accordingly, Perry has suggested that the effectiveness of DWI courts remains uncertain.<sup>233</sup> Other research has highlighted the need to evaluate DWI programs in a more holistic manner and consider the benefits to offenders and the community that are gained through participation in the programs such as the transformative changes and the effect on diverse aspects of offenders' lives.<sup>234</sup>

In the United States, the National Centre for DWI Courts has developed 'The Ten Guiding Principles of DWI Courts', which indicate best practice. These are:

1. **Determining the population** — this is the process of 'identifying a subset of the DWI population for inclusion in the DWI court program'.<sup>235</sup> Elsewhere, this has included first-time offenders with high blood alcohol concentrations and/or repeat offenders with serious alcohol/drug dependences or addictions. In the Tasmanian context, it will be important to develop a target population in collaboration with community stakeholders; this is addressed further at [5.2].
2. **Perform a clinical competent objective assessment** — this should address a number of bio-psychosocial domains including alcohol use severity and drug involvement, the level of care

<sup>226</sup> Ibid 3.

<sup>227</sup> Ibid 7.

<sup>228</sup> Bartkowiak-Théron and Henning, above n 5, 8 citing I Bartkowiak-Théron and J Fleming, *Integration and Collaboration: Building Capacity and Engagement for the Provision of Criminal Justice Services to Tasmania's Mentally Ill* (TILES, 2011).

<sup>229</sup> See discussion in Blagg, above n 214, 21 in relation to drug courts generally.

<sup>230</sup> King et al, above n 201, 168.

<sup>231</sup> Palmer et al, above n 148, 526.

<sup>232</sup> Miller et al, above n 189, 29.

<sup>233</sup> A Perry, 'Sentencing and Deterrence' in D Weisburd, D Farrington and C Gill (eds), *What Works in Crime and Prevention and Rehabilitation: Lessons from Systematic Reviews* (Springer, 2016) 169, 189.

<sup>234</sup> B Liang, M Long and D Knottnerus, 'What Do Clients Achieve in Drug/DUI Court? Examining Intended and Unintended Outcomes' (2016) 37 *Justice System Journal* 272.

<sup>235</sup> National Center for DWI Courts (NCDC), *The Ten Guiding Principles of DWI Courts*, 3 <[http://www.dwicourts.org/sites/default/files/ncdc/Guiding\\_Principles\\_of\\_DWI\\_Court\\_0.pdf](http://www.dwicourts.org/sites/default/files/ncdc/Guiding_Principles_of_DWI_Court_0.pdf)>.

needed, medical and mental health status, extent and stability of social support systems, and individual motivation to change.<sup>236</sup>

**3. Develop a treatment plan** — this needs to be individualised based on identified clinical needs that address an offender’s multiple problem areas/comorbidity with ‘treatment programs and systems, ... [being] constructed with a variety of approaches that have proven to be effective’.<sup>237</sup> This plan needs to take account of an offender’s other drug dependency disorders and/or mental health issues.

**4. Supervise the offender** — to provide appropriate community protection, it is important for the offender to be monitored frequently by the court, community corrections and the treatment provider. This involves testing for drug and alcohol use but also close supervision by community corrections to develop knowledge about the life circumstances of the offender and to allow positive reinforcement and encouragement as well as surveillance.<sup>238</sup>

**5. Forge agency, organisation and community partnerships** — ‘a broad-based, multi-agency, and grassroots partnership’ is important to enhance the credibility of the court, to bolster support and maximise the resources that are available.<sup>239</sup>

**6. Take a judicial leadership role** — the magistrate is vital to the success of the DWI court and must possess leadership skills and be able to motivate team members and communicate and elicit support from the community.<sup>240</sup>

**7. Develop case management strategies** — this allows for a ‘co-ordinated team strategy and seamless collaboration across the treatment and justice systems’.<sup>241</sup> Case management involves: (1) assessment; (2) planning; (3) linking; (4) monitoring; and (5) advocacy.

**8. Address transportation issues** — by recognising that repeat drink drivers have previously lost their licence and many have solved their transportation problem by driving without a licence, a DWI court must assist an offender to develop other means to solve transportation issues.<sup>242</sup>

**9. Evaluate the program** — to document behavioural change and to map a program’s success or failure. This should aim to determine: (1) which types of clients have had the best outcomes; (2) which interventions produced the best outcomes; and (3) which interventions worked for which clients. It is necessary to evaluate short-term outcomes as well as longer-term outcomes.<sup>243</sup>

**10. Ensure a sustainable program** — this requires careful and strategic planning that considers structure and scale, organisation, participation and funding.<sup>244</sup> This could be supported by the implementation of a pilot DWI court or a blended drug court/DWI court involving in-built evaluation.

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<sup>236</sup> Ibid 7.

<sup>237</sup> Ibid 11.

<sup>238</sup> Ibid 16.

<sup>239</sup> Ibid 21.

<sup>240</sup> Ibid 27.

<sup>241</sup> Ibid 30.

<sup>242</sup> Ibid 34

<sup>243</sup> Ibid 37.

<sup>244</sup> Ibid 42.

4.2.4 The courts operate either as a stand-alone court or more commonly as a DWI/drug court hybrid.<sup>245</sup> In the United States, as of 30 June 2014, there were 690 DWI courts (242 designated DWI courts and 448 hybrid DWI/drug courts).<sup>246</sup> While a Drink Disqualified Driver list has been proposed in Victoria,<sup>247</sup> there are currently no specialist courts in Australia dedicated to addressing the problem of repeat drink drivers. However, the Drug Court in Victoria has jurisdiction to deal with driving offences. In New Zealand, an Alcohol and Other Drug Treatment (AODT) Court Pilot was established in 2010. Drink drivers are eligible if they are charged with a third or subsequent drink driving offence in an aggravated form, are assessed as alcohol or other drug dependent and have a high-risk of reoffending.<sup>248</sup> An Alcohol and Drug Treatment Court is being developed (with the assistance of a New Zealand judge) in Samoa.<sup>249</sup>

4.2.5 The approaches in other jurisdictions can be divided into two broad categories: first, those that operate as a post-plea, pre-sentence program (as in New Zealand) and second, those that operate as a post-conviction sentencing program (as is generally the case in the United States, with the Victorian Drug Court and as proposed for the Victorian Drink Disqualified Driver List.<sup>250</sup>)

### ***(1) Post-plea, pre-sentence (New Zealand model)***

4.2.6 One model for a DWI court is a court that operates after the offender has entered a plea of guilty but before sentence is imposed. The proceedings are adjourned and sentencing is deferred while the offender participates in the drug court program. This is the model adopted in New Zealand for the AODT Court Pilot which is based on the model recommended by the Law Commission of New Zealand.<sup>251</sup> The deferred sentencing model is the model adopted by several Australian drug courts<sup>252</sup> and in Canada.<sup>253</sup> This approach differs from the model that operates in Tasmania for the Mental Health and Cognitive Disability Diversion list. In the Diversion List there is no requirement for the offender to have entered a plea of guilty (although the objective facts cannot be contested).<sup>254</sup> However, there are similarities between the deferred sentencing model and the diversion model that operates in Tasmania given that both models are multi-disciplinary, informed by principles of therapeutic jurisprudence and utilise bail provisions as the mechanism to monitor an offender's compliance with the treatment program.<sup>255</sup> In both cases, the offender's progress while on the list and compliance with bail order conditions are relevant to the sentence that is finally imposed.<sup>256</sup>

<sup>245</sup> Richardson, above n 2, 13.

<sup>246</sup> NCDC, *The Bottom Line: Research Update on DWI Courts* (2015) 2.

<sup>247</sup> See Richardson, above n 2. VSAC also recommended the introduction of a specialist list for driving offences, including driving while intoxicated, see VSAC, *Driving While Disqualified or Suspended*, Report (2009) ix.

<sup>248</sup> See Appendix A.

<sup>249</sup> *Alcohol and Other Drug Treatment Court marks two years of a new approach*, (21 November 2014) Auckland District Law Society <<http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/11/21/alcohol-and-other-drug-treatment-court-marks-two-years-of-a-new-approach/>>.

<sup>250</sup> See Appendix A.

<sup>251</sup> Law Commission New Zealand, *Controlling and Regulating Drugs – A review of the Misuse of Drugs Act*, Final Report (2011) 341.

<sup>252</sup> This is the position in NSW, South Australia and Western Australia, see King et al, above n 201, 162–6.

<sup>253</sup> See K Hannah-Moffat and P Maurutto, 'Shifting and Targeted Forms of Penal Governance: Bail, Punishment and Specialised Courts' (2012) 16 *Theoretical Criminology* 206.

<sup>254</sup> Magistrates Court of Tasmania, above n 208. A pre-plea program for offenders with alcohol addiction issues is the Magistrates Early Referral into treatment (Alcohol) (MERIT) that operates in New South Wales.

<sup>255</sup> See E Newitt and V Stojcevski, *Mental Health Diversion List: Evaluation Report* (Magistrates Court of Tasmania, 2009) for a discussion of the operation of the mental health list.

<sup>256</sup> Ibid 13.

4.2.7 The New Zealand AODT Court Pilot was established in 2011 and sits in the Waitakere and Auckland District Courts. It caters for around 100 participants per year. General legislation and judicial discretion provide the legal foundation for its operation.<sup>257</sup> It aims to reduce reoffending, decrease alcohol and other drug (AOD) use and dependency, moderate the use of imprisonment, have a positive effect on offenders' health and rehabilitation, and be cost-effective.<sup>258</sup> The establishment of the AODT Court was informed by international research and best practice. It also incorporates components that are relevant and meaningful in the New Zealand context.<sup>259</sup> These include the ability of the courts to require an offender to attend 12 steps meetings such as Alcoholics Anonymous and Narcotics Anonymous.<sup>260</sup> The offender programs operate for 12 to 18 months (or longer if warranted) and following graduation, offenders are sentenced with the successful graduation taken into account in sentence determinations.<sup>261</sup> In January 2016, it was reported that the average time in the AODT Court was 19 months. In order to provide offenders with the support and oversight required on graduation, the default sentence imposed following graduation is a sentence of intensive supervision. This may involve ongoing judicial supervision and may be for a period of between 12 and 24 months.<sup>262</sup>

4.2.8 The program is directed at serious repeat drink drive offenders. Accordingly, eligibility requirements stipulate that only offenders who have been charged with their third or subsequent drink driving offence and are facing charges for which the sentencing starting point is imprisonment for a period of up to three years may participate in the program.<sup>263</sup> Additionally, their offending must be driven by AOD dependency and offenders must have a moderate-severe substance-related dependency (as per the Diagnostic and Statistical Manual of Mental Disorders Fourth edition), be, or be believed to be, using illicit drugs and/or misusing other psychoactive substances (including alcohol) that precipitate or perpetuate their offending, be at risk of harming themselves, their family and the community as a consequence of using AOD, and not have a serious medical or serious mental health condition that would prevent their participation in the AODT Court.<sup>264</sup> Offenders must consent to participate in the program. Data provided by the AODT indicate that as of 16 December 2013, there were 79 offenders accepted into program who had a high-risk of re-offending (80% of participants)<sup>265</sup> and 17 offenders accepted into the program who were not assessed as having a high-risk of re-offending but were facing charges of excess breath/blood alcohol (17% of participants).<sup>266</sup>

4.2.9 In terms of effectiveness, the AODT Court was evaluated after a year of operation (November 2012) and this review found that there had been no graduations for the program. However, this outcome was expected given the time at which review was undertaken and the requirement that

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<sup>257</sup> L Gregg and A Chetwin, *Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot* (Litmus, 2014) 1.

<sup>258</sup> Ministry of Justice, New Zealand, *Alcohol and Other Drug Treatment (AODT) Court Pilot*.

<sup>259</sup> Gregg and Chetwin, above n 257, 19.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid 24.

<sup>262</sup> Interview with Judge Lisa Tremewan, 'The Alcohol and Drug Treatment Court in New Zealand', *Radio New Zealand*, 29 January 2016. Initially, the use of a sentence of supervision was typically used but there has been a shift to intensive supervision (which involved judicial monitoring) on the basis that this provided better support on the transition from the AODT Court.

<sup>263</sup> Gregg and Chetwin, above n 257, 30–1; Ministry of Justice, New Zealand, *Alcohol and Other Drug Treatment Court Handbook* (2014) 27.

<sup>264</sup> Ibid 31.

<sup>265</sup> An assessment of high-risk of re-offending is not a requirement for offenders charged with drink driving offences, Ministry of Justice, New Zealand, above n 263, 27.

<sup>266</sup> Gregg and Chetwin, above n 257, 40. The need to have a high-risk of reoffending (using the Risk of re-conviction and Risk of re-imprisonment (ROCRol) score) does not apply to recidivist drink driving offences: at 36.

offenders complete all three phases of the AODT Court program.<sup>267</sup> The evaluation indicated that the first graduations were expected in March–April 2014.<sup>268</sup> In the same period, there had been 26 participants (26%) exit from the program.<sup>269</sup> However, the evaluation indicated that terminations were not unexpected given the high-risk and high-needs group targeted.<sup>270</sup> A subsequent evaluation reported that as at 28 April 2015, of the 205 cases accepted, there were 35 offenders who had graduated from the AODT Court.<sup>271</sup> There were 74 offenders who had been exited from the court.<sup>272</sup> In 2016, it was reported that 70 offenders had completed the program and none of these offenders had been returned to prison.<sup>273</sup> It was also reported that the program to date had resulted in a saving of \$5 500 000 in prison costs.<sup>274</sup>

## **(2) Post-conviction, sentencing option**

4.2.10 In the United States, DWI courts generally operate post-conviction, as a sentencing option.<sup>275</sup> This was also the model proposed for the Victorian Drink Disqualified Driver List and it is the model of the Victorian Drug Court, which also deals with offenders whose offending relates to alcohol dependency.<sup>276</sup> It is also the model adopted for the drug courts that operate in New South Wales and Tasmania and the former drug court in Queensland.<sup>277</sup> Some drug or DWI courts based on this model require the court to impose a sentence of imprisonment that is then not activated. This is the approach of the Victorian Drug Court and the Court Mandated Drug Diversion program in Tasmania.<sup>278</sup> According to this model, imprisonment is the ultimate sanction for non-compliance with the requirements of the program or reoffending so that the threat of activation of the sentence operates as a ‘stick’ to motivate the offender. Other models, such as that proposed for the Drink Disqualified Driver List in Victoria, operate as post-sentence programs based on community-based sanctions. In Victoria, the community correction order provisions of the *Sentencing Act 1991* (Vic) Part 3A are intended to provide the legislative basis for the program. As stipulated in Appendix A, such orders may include conditions like unpaid community work, supervision, non-association, residence restrictions, place or area exclusions, curfews, alcohol exclusions, treatment and rehabilitation and judicial monitoring.

4.2.11 The Victorian proposal for a Drink Disqualified Driver List recommends that orders endure for no more than two years. It is proposed that eligibility be restricted to ‘hardcore’ drink driving offenders, including repeat offenders or first time offenders with high or extreme BAC levels. The List would also deal with offenders convicted of driving whilst disqualified or suspended.<sup>279</sup> The proposed range of treatment and rehabilitation conditions that may attach to the community correction orders includes motivational enhancement therapy, cognitive-behaviour interventions, evidence-based

<sup>267</sup> Ibid 95. There are different expectations that attach to the three phases, see Ministry of Justice, New Zealand, 263, 16–18.

<sup>268</sup> Gregg and Chetwin, above n 257, 95.

<sup>269</sup> Ibid 96.

<sup>270</sup> Ibid 99.

<sup>271</sup> Gregg and Smith, above n 262, 101.

<sup>272</sup> Ibid 92.

<sup>273</sup> Interview with Judge Lisa Tremewan, ‘The Alcohol and Drug Treatment Court in New Zealand’, *Radio New Zealand*, 29 January 2016. It was reported that an evaluation of the AODT Court is currently underway.

<sup>274</sup> Ibid.

<sup>275</sup> Richardson, above n 2, 18.

<sup>276</sup> See Appendix A.

<sup>277</sup> See King et al, above n 201, 162–7.

<sup>278</sup> See *ibid*.

<sup>279</sup> Richardson, above n 2, 2013.

pharmacological treatments, continuing care/aftercare, relapse prevention training, specified participant competencies to be achieved at each phase of treatment and participation in an organised recovery support program (eg 12-step self help).<sup>280</sup> Judicial supervision is also a key feature of the proposed Drink Disqualified Driver List because it provides a means ‘for the magistrate to interact with the participants, engage them in their treatment plan, set goals for their recovery, listen to them and to encourage or motivate [them] to comply with the order’.<sup>281</sup> Rewards for progress and sanctions for non-compliance are also proposed.<sup>282</sup> The proposed model relies upon the Ten Guiding Principles for DWI courts developed in the United States.<sup>283</sup>

4.2.12 There is evidence from the United States that DWI courts that comply with the Guiding Principles are effective in reducing recidivism. In a meta-analysis conducted in 2012, it was concluded that DWI courts ‘reduced both DWI recidivism and general criminal recidivism by an average of more than 12 percent. The best DWI courts reduced recidivism by as much as 50 to 60 percent as compared to other sentencing options’.<sup>284</sup> Research examining offenders’ recidivism rates for at least four years after participation in the DWI program has shown that it has long-lasting effects.<sup>285</sup> There is also evidence to suggest that participation in a DWI court program reduces the incidence of car crashes and fatalities and makes it more likely that offenders will comply with court orders, probation directives and Department of Motor Vehicle requirements and regain their licences.<sup>286</sup> DWI courts are also considered to be a cost effective method of responding to drink driving<sup>287</sup> and are said to ‘have saved local communities nearly \$1500 (US) per participant within two years and more than \$5000 (US) per graduate.’<sup>288</sup> Other benefits, extending beyond reduced recidivism and cost savings, are ‘healthier families, better work productivity, fewer people on public assistance, fewer medical costs’.<sup>289</sup> Accordingly, in 2013, the National Transportation Safety Board in the United States ‘endorsed DWI Courts as a proven strategy for rehabilitating repeat driving while impaired ... offenders’.<sup>290</sup> However, while there are still concerns that there are a lack of high quality evaluations of DWI interventions, analysis suggests that ‘multi-component programs are more effective than those which target only one aspect of the issue’.<sup>291</sup>

### 4.3 South Dakota 24/7 program

4.3.1 Another approach to the problem of repeat drink drivers is the South Dakota 24/7 Sobriety Program. This is not a DWI court program and does not contain a treatment component. It is not informed by a therapeutic philosophy. Instead, it derives from the principle of deterrence based on the certainty and swiftness of punishment in response to repeat drink driving offending.<sup>292</sup> It is an

<sup>280</sup> Ibid 20. These are based on the *Ten Guiding Principles for DWI Courts*, Guiding Principle 3, see NCDC, above n 235.

<sup>281</sup> Richardson, above n 2, 21.

<sup>282</sup> Ibid.

<sup>283</sup> See [4.1.3].

<sup>284</sup> NCDC, above n 246, 2 citing Mitchell et al 2012.

<sup>285</sup> Ibid 3.

<sup>286</sup> Ibid 4.

<sup>287</sup> Ibid 5.

<sup>288</sup> Ibid 6.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid 1, citing National Transport Safety Board, *Reaching Zero: Actions to Eliminate Alcohol-Impaired Driving* (2013).

<sup>291</sup> Miller et al, above n 189, 27.

<sup>292</sup> Warner, above n 34, 403; P Larkin, ‘Swift, Certain, and Fair Punishment 24/7 Sobriety and Hope: Creative Approaches to Alcohol-and Illicit Drug-Using Offenders’ (2015) 105 *The Journal of Criminal Law and Criminology* 101, 128–9. It has now also been expanded to domestic violence and drug cases: at 130. A similar model operates in Hawaii with Hawaii’s Opportunity Probation with Enforcement (HOPE) Program, see discussion at 134–40.

approach that allows the court to make participation in the 24/7 Sobriety program a condition of pre-trial release, a suspended sentence, probation or parole and requires that an offender remain alcohol free and submit to daily alcohol testing — either by twice daily breath testing or electronic testing devices.<sup>293</sup> Failure of the test or failure to attend a test results in the imposition of a ‘swift and certain but moderate sanction’<sup>294</sup> known as ‘flash incarceration’ — usually 24 hours or 48 hours imprisonment for breach.<sup>295</sup> Offenders who fail to take a test for the first time are immediately incarcerated for 24 hours and then taken to court the next day for the program conditions to be reimposed.<sup>296</sup> The program focuses on abstinence rather than specifically on an offender’s separation of alcohol use from driving. An additional aspect of the program is that it allows for testing for illicit drugs and ignition interlock devices to be used.<sup>297</sup>

4.3.2 Analyses of the 24/7 Sobriety program show that the program has reduced recidivism for drink driving and domestic violence and there is evidence suggesting that it may have reduced the number of traffic crashes by men aged between 18 to 40 years.<sup>298</sup> Certainly, the program has been effective in reducing alcohol consumption during the monitoring period. During the period 2005 to 2010, program participants passed more than 99% of the scheduled breathalyser tests. However, the long-term effectiveness of the program as a deterrent after the monitoring period has finished is less certain.<sup>299</sup> In addition, the lack of any treatment component in the 24/7 program means that there is no capacity to address the underlying causes of the offender’s drinking, which limits its ability to bring about lasting behavioural change.<sup>300</sup> In the Tasmanian context, concerns have been expressed about the availability of custodial places for ‘flash incarceration’. Additionally, it may not be possible to institute the automatic incarceration component of the 24/7 Sobriety program in Tasmania. This is because automatic detention conflicts with the Australian common law principle that detention in the criminal justice arena can only be imposed by a court. Accordingly, to implement such a program in Tasmania, legislative changes to both Tasmanian sentencing and arrest laws would be required. Automatic incarceration may also infringe Australia’s human rights obligations in relation to the right to liberty.<sup>301</sup> It has been argued that unless the 24/7 program was reserved for serious and repeat offenders, the use of imprisonment as an automatic sanction is not proportionate and so is arbitrary and in breach of Article 9 of the *International Covenant on Civil and Political Rights*.<sup>302</sup> Despite these concerns, there are aspects of the 24/7 program that could be incorporated into the problem-oriented model developed in response to repeat drink drivers. In particular, for offenders who fail to comply

<sup>293</sup> Larkin, above n 292, 130–1.

<sup>294</sup> Ibid 131.

<sup>295</sup> Ibid.

<sup>296</sup> Warner, above n 34, 403.

<sup>297</sup> G Loundenberg et al, *South Dakota 24/7 Sobriety Program*, (Mountain Plains Evolution Supplemental Final Report, 2012) 5. See [5.7.9] for discussion of monitoring of alcohol use.

<sup>298</sup> B Kilmer et al, ‘Efficacy of Frequent Monitoring With Swift, Certain, and Modest Sanctions for Violations: Insights From South Dakota’s 24/7 Sobriety Project’ (2013) 103 *American Journal of Public Health* e37, e41.

<sup>299</sup> Mountains Plains Evaluation, *Analysis of 24/7 Sobriety Program SCRAM Participant DUI Offence Recidivism* (2013) which found that once the Secure Continuous Remote Monitor (SCRAM) device was removed ‘behaviour change is not sustained, as over time recidivism rates begin to approach or exceed the recidivism rates of controls’: at 12. Similarly, in a review conducted in Montana, it was observed that a focus for future research will be the long-term effects of the 24/7 program, see G Midgette and B Kilmer, ‘The Effect of Montana’s 24/7 Sobriety Program on DUI Re-arrest: Insights from a Natural Experiment with Limited Administrative Data (RAND Justice, Infrastructure, and Environment, 2015) 23.

<sup>300</sup> Warner, above n 34, 403.

<sup>301</sup> Ibid. Article 9 of the *International Covenant on Civil and Political Rights* provides that everyone has the right to liberty; that no-one shall be subjected to arbitrary arrest or detention; and that no-one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. This requirement has been interpreted to mean that detention must be proportionate, see J Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 132–4.

<sup>302</sup> Warner, above n 34, 403–4.

with non-alcohol consumption orders, brief custodial sanctions might be imposed or held in conditional abeyance as currently happens in the drug court. The problem with this approach is that it is a delayed response applied upon the offender's reappearance before the court. It therefore lacks the immediacy of punishment and may preclude the resulting deterrent features of the South Dakota 24/7 model.

## 4.4 HOPE project

4.4.1 The Hawaiian Opportunity Probation with Enforcement (HOPE) program also uses swift and certain but moderate sanctions as a means of responding to the issue of criminal offending involving alcohol and drug abuse. This program focuses on drug use and is not a drink driving specific program. Nevertheless, it is similar to the 24/7 Sobriety Program as it is underpinned by the idea that swift and certain punishment is a more effective deterrent than a potentially harsher penalty imposed at a future date.<sup>303</sup> It began in Hawaii and has expanded to many other jurisdictions in the United States.<sup>304</sup> The HOPE program operates as follows:

- offenders are given a warning hearing (in a group with other HOPE participants) and are then required to call a dedicated hotline daily to determine whether they are due for drug testing (offenders are given a colour code (eg red) and they call the hotline to determine if their colour has been selected for drug testing);
- offenders are initially tested at least weekly for drug use, moving to less frequent testing following compliance;
- offenders are swiftly arrested for failing to attend their probation appointment or drug test or returning a positive drug test and brought back before the court;
- *all* violations result in a short prison sentence, there being no discretion as to how probation or judicial officers may deal with violations; and
- drug treatment is reserved for offenders who request it or have multiple violations.<sup>305</sup>

4.4.2 Evaluations of the HOPE program suggest that during the period of monitoring, offenders have greater reductions in drug use and reoffending and fewer days in prison compared with control groups.<sup>306</sup> Again, as with the 24/7 Sobriety Program, the HOPE program does not attempt to address the underlying causes of drug use. Therefore, the HOPE program is open to criticism that its effectiveness may be limited to the period during which the offender is monitored and that it may not lead to long-term behavioural change.<sup>307</sup> There are also significant differences between the Australian and United States legal systems (such as the focus on judicial discretion and individualised justice in Australia) that raise real questions about adopting the US model and mean that, instead, any program based on the HOPE approach would need to be adapted to the Australian legal context.<sup>308</sup>

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<sup>303</sup> Larkin, above n 292.

<sup>304</sup> L Bartels, 'Swift and Certain Sanctions: Is it Time for Australia to Bring Some HOPE into the Criminal Justice System?' (2015) 39 *Criminal Law Journal* 53, 60.

<sup>305</sup> Ibid 65.

<sup>306</sup> Ibid 53.

<sup>307</sup> Ibid 63.

<sup>308</sup> Ibid 65.

## 4.5 A DWI court/list for Tasmania?

4.5.1 After reviewing the literature and approaches in other jurisdictions, there is evidence that indicates that well designed DWI courts/lists provide a promising alternative to traditional sentencing approaches. Accordingly, the Institute is seeking feedback from stakeholders and the broader community on the desirability of establishing such a court or list in Tasmania.

4.5.2 In order to determine the viability of a DWI court/list in Tasmania, a repeat drink driver court pilot might first be established. The New Zealand experience in developing an AODT Court has highlighted the benefit of having a pilot court established as a means to monitor and evaluate the operation of the AODT Court and to allow for flexibility while the roles and processes of the court evolve.<sup>309</sup> The pilot approach in New Zealand has also allowed for community feedback (as outlined at [5.9]) to be taken into account in the development of the court through the use of an advisory group and for community confidence in the effectiveness of the court to grow. The use of a pilot scheme has also been effective in the establishment of a Mental Health Diversion List in the Magistrates Court in Tasmania.<sup>310</sup>

### Questions:

2. Do you think that a DWI court/list should be established in Tasmania?
3. If you think that a DWI court/list should be established in Tasmania, do you think that a preliminary pilot DWI court/list would be an appropriate approach to the establishment of the court/list?

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<sup>309</sup> See Gregg and Chetwin, above n 257; Gregg and Smith, above n 262.

<sup>310</sup> M Hill, 'Developing Therapeutic Judging – The Tasmanian Experience' (Paper presented at Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, 4–7 May 2010).

## Part 5

# A Possible Model for Tasmania

As indicated, the TLRI is seeking feedback from stakeholders and the broader community on the desirability of establishing such a court in Tasmania and also in determining how that court should operate. In addition, the Institute is considering whether there are aspects of the 24/7 Sobriety Program and HOPE program that could be incorporated into the court's approach.

This Part sets out the issues that need to be addressed in the development of a possible DWI court in Tasmania (if one is to be established), including:

- (1) the structure of the DWI list;
- (2) the target offending cohort and eligibility criteria;
- (3) the conditions of DWI court orders;
- (4) the referral and assessment process;
- (5) the services that need to be available as part of treatment and rehabilitation;
- (6) program phases;
- (7) supervision and judicial monitoring;
- (8) evaluation;
- (9) resources and funding.

## 5.1 Structure of the DWI list

Based on experience in other jurisdictions, there are three models that could be adopted in incorporating a DWI court within the current criminal justice framework in Tasmania: (1) a pre-sentence program by way of adjournment and deferral of sentencing; (2) a post-sentence program by way of an unactivated term of imprisonment (either using the court mandated diversion structure or a stand-alone DWI structure); and/or (3) a post-sentence program by way of a condition attached to a community-based order.

### ***Pre-sentence diversion program***

5.1.1 This is the model used by the Mental Health and Cognitive Disability Diversion List in Tasmania and the Alcohol and Other Drugs Court in New Zealand. This approach would create a pre-sentence diversionary option utilising the provisions of the *Bail Act 1994* (Tas) to impose treatment conditions and to provide the framework for regular judicial monitoring, as well as the recently introduced s 7(eb) and Division 1 of Part 8 of the *Sentencing Act 1997* (Tas) to allow the court to

defer sentence.<sup>311</sup> After the court determined period of deferral, magistrates could then take into account the offender's progress in imposing a final sentence.

5.1.2 A pre-sentence model has the following advantages:

**Early opportunity for intervention/treatment** — Research suggests that the time of initial contact with the criminal justice system constitutes a 'crisis point' and presents an important opportunity for intervention as it can trigger an offender's motivation to change.<sup>312</sup>

**Deferral of sentencing is aligned with therapeutic approaches** — Deferral of sentencing for drink driving offenders allows the courts to adopt a problem-solving approach that addresses the underlying causes of the behaviour. In this regard, it would align with the approach adopted in the Mental Health and Cognitive Disability Diversion List, which is intended 'to deliver a more therapeutic response to the offending behaviour of defendants with mental health or cognitive disability issues'.<sup>313</sup>

**Greater incentive for compliance** — A pre-sentence approach has been argued to provide a more powerful incentive for offenders to complete the program.<sup>314</sup> The prospect of avoiding a custodial sentence is said to operate as a 'carrot' and is likely to allow an offender to have a greater sense of autonomy and develop more positive relationships with the court team.<sup>315</sup> Evaluations of drug court programs have found reasonably high dropout rates from the programs<sup>316</sup> and adopting a pre-sentence approach may improve retention rates. This concern influenced the decision to adopt a pre-sentence model for the New Zealand Alcohol and Other Drug Treatment Court Pilot.<sup>317</sup> Nevertheless, in an evaluation of the pilot scheme, it was observed that it was 'too early in the pilot to make a judgement on the termination rate' with early indications suggesting that a termination rate of 26% looked acceptable compared with international figures.<sup>318</sup> A subsequent evaluation found a termination rate of 36%, which was also said to be acceptable based on international comparison.<sup>319</sup>

**Greater flexibility in dealing with breaches** — A pre-sentence model has been considered to provide greater flexibility in dealing with breaches than a formal sentencing order given that if the conditions were part of a sentencing order 'there would be much greater pressure upon both probation officers and judges to respond to breaches of those conditions with formal sanctions'.<sup>320</sup> This is a significant consideration in a context of addiction where relapse has a level of inevitability.<sup>321</sup> It recognises that addiction is a chronic condition that usually responds to treatment only over time.

<sup>311</sup> These provisions were introduced by the *Sentencing Amendment Act 2016* (Tas). They allow a court to defer sentence (postpone sentencing) for a period of time so that an offender's capacity and prospects for rehabilitation can be assessed, so that the offender can demonstrate rehabilitation, or so that an offender can participate in a pre-sentence program, (*Sentencing Act 1997* (Tas) ss 7(eb), 57A(2)).

<sup>312</sup> Ministry of Justice, New Zealand, above n 263, 5.

<sup>313</sup> Magistrates Court, above n 208.

<sup>314</sup> Law Reform Commission of Western Australia (WALRC), *Court Intervention Programs*, Final Report, Project No 96 (2009) 27.

<sup>315</sup> Law Commission New Zealand, above n 251, 340.

<sup>316</sup> See WALRC, *Court Intervention Programs*, Consultation Paper, Project No 96 (2008); Gregg and Chetwin, above n 257, 96.

<sup>317</sup> Law Commission New Zealand, above n 251.

<sup>318</sup> Gregg and Chetwin, above n 257, 101.

<sup>319</sup> Gregg and Smith, above n 262, 93.

<sup>320</sup> Law Commission New Zealand, above n 251, 340.

<sup>321</sup> *Ibid* 320.

**Addresses concerns about undue leniency** — A pre-sentence model may more easily accommodate victim and community concerns about undue leniency, given that the offender has not yet been sentenced and it may be that victims and general members of the community would be more likely to accept a sentence imposed after the successful treatment of the offender rather than if a treatment program was imposed originally as part of the sentence, without proof of the offender's compliance.<sup>322</sup>

**No need for legislative reform** — A pre-sentence model can utilise the recently introduced provisions in the *Sentencing Act 1997* (Tas) regarding deferred sentences. The deferred sentence provisions allow the court to adjourn proceedings, grant bail under the *Bail Act 1994* (Tas) and defer sentencing.<sup>323</sup> A court may postpone the sentencing of an offender formally for one or more of the following purposes:

- to allow for the assessment of the offender's capacity, and prospects, for rehabilitation;
- to allow for the offender to demonstrate that the offender is being, or has been rehabilitated;
- to allow the offender to participate in a pre-sentence program.<sup>324</sup>

A pre-sentence program is defined as a program aimed at addressing the underlying causes of offending.<sup>325</sup> The court may defer sentences for a period of two years and may extend this period to up 30 months if it allows an offender to complete a program or if there are special circumstances.<sup>326</sup>

If the court adjourns proceedings, grants bail and defers the sentence pursuant to the *Sentencing Act 1997* (Tas) s 7(eb), the court may include bail conditions that it considers appropriate for these purposes. These include conditions that:

- allow for judicial monitoring by requiring that offender appear back before the court prior to the date of sentence to check the offender's compliance with bail conditions; and
- allow for conditions relevant to an offender's rehabilitation.<sup>327</sup>

Further, under the *Bail Act 1994* (Tas), bail can include any conditions that the judicial officer thinks are desirable (s 7(4)) including a condition that the person be assessed for suitability for an intervention program (s 7(5)(c)) and that a person undertake an intervention program (s 7(5)(d)). Intervention programs include supervised treatment, supervised rehabilitation, supervised behaviour management and/or supervised access to support services that are designed to address behaviour problems including alcohol abuse.<sup>328</sup>

This ability to use deferred sentencing and bail to impose treatment conditions may be advantageous as this can be done without legislative reform and avoids any community backlash that may be associated with the view that a problem-solving approach to drink driving is 'soft on crime'.<sup>329</sup> It also allows for the court to assess the extent of an offender's rehabilitative needs before sentence.

<sup>322</sup> Law Commission New Zealand, above n 251, 340.

<sup>323</sup> *Sentencing Act 1997* (Tas) s 7(eb).

<sup>324</sup> *Ibid* s 57A.

<sup>325</sup> *Ibid* s 4 (definition 'pre-sentence program').

<sup>326</sup> *Ibid* ss 7A, 57C(3).

<sup>327</sup> *Ibid* s 57B(2).

<sup>328</sup> *Bail Act 1994* (Tas) s 3.

<sup>329</sup> Bartkowiak-Théron and Henning, above n 5, 7.

However, these advantages must be off-set against the human rights and criminal justice implications of using deferred sentencing and bail in this way. As Bartkowiack-Théron and Henning note:

The essentially coercive nature of the program may mean it is not human rights compliant if it does not have specific legislative imprimatur. To conform to human rights principles, coercive state conduct that encroaches on individual liberties must be lawful and non-arbitrary, which means that it can only occur on grounds and in accordance with procedures established in law. A lack of a legislative base also raises concerns about the long-term sustainability of both the MHDL and any similarly based drink driving list. ... It effectively turns bail into a sentencing regime. Essentially this flouts the fundamental principles and freedoms that underpin bail — the right to liberty and the right to be presumed innocent until proven guilty. Further, if attached to bail, the program may not be able to achieve the degree of longevity for individual offender plans that overseas models suggest may be necessary to achieve rehabilitation.<sup>330</sup>

While there have been recent changes to the *Sentencing Act 1997* (Tas) that formally allow for the deferral of sentence, concerns may still exist in relation to the use of bail and deferred sentencing as the model for the DWI list (see [5.1.3]).

5.1.3 Concerns about the use of a pre-sentence program for drink drivers relate to:

**Harsher sentencing** — There is a risk that offenders who do not complete the program may receive a harsher sentence than they might otherwise have received because they have failed to comply with program directives. Further, as noted above, failure to comply with conditions of court orders (either bail or sentence conditions) is also an offence, subjecting the person to a risk of additional punishment for that offence. This creates a risk of over-punishment and net widening as an offender is required to comply with the conditions imposed and then because of their failure to complete the program, they would receive a sentence similar to what they would otherwise have received.<sup>331</sup>

**Inappropriate use of bail/criticisms of deferred sentencing** — In New Zealand, it has been reported that offenders who participate in the AODT Court undertake an intensive and onerous program that includes the requirement to undertake treatment (including residential treatment), courses and programs (such as parenting, anger management, literacy, driver safety, and/or moral reconnection therapy), voluntary community work and vocational training, attend recovery support such as Alcoholics Anonymous or Narcotics Anonymous, appear regularly in court and submit to regular and random drug and alcohol testing.<sup>332</sup> The innovative use of deferred sentencing and bail to impose onerous requirements (such as these) on the offender can be criticised on the basis that such conditions are more appropriately attached to a formal sentence of the court. This has been said to lengthen, intensify and layer punishment ‘in a manner that obscures penal and administrative boundaries’.<sup>333</sup> The imposition of onerous conditions as part of a deferral of sentence has been criticised on the basis that, in principle, such conditions should only ‘be part of a formal sentence’ of the court and not as a condition of a deferral of sentence, otherwise deferral becomes a ‘conditional non-sentence’.<sup>334</sup> This is said to blur the appropriate boundaries between guilt, conviction and

<sup>330</sup> Ibid.

<sup>331</sup> Law Commission New Zealand, above n 251, 340.

<sup>332</sup> Interview with Judge Lisa Tremewan, ‘The Alcohol and Drug Treatment Court in New Zealand’, *Radio New Zealand*, 29 January 2016.

<sup>333</sup> Hannah-Moffat and Maurutto, above n 253.

<sup>334</sup> A Freiberg and N Morgan, ‘Between Bail and Sentence: The Conflation of Dispositional Options’ (2004) 15 *Current Issues in Criminal Justice* 220, 230.

sentence as such an order has ‘all the hallmarks of a sentence’.<sup>335</sup> Accordingly, the use of deferred sentence and bail provisions in this way runs counter to fundamental principles, which stand in opposition to the use of bail conditions for sentencing purposes. It was for this reason that TSAC expressed the view that ‘if a court considers it necessary to impose conditions (other than bail conditions), then the court should proceed to impose sentence and not defer the sentence’.<sup>336</sup>

**Inability to impose short periods of imprisonment as a sanction under the bail/deferred sentence model** — An issue with using deferred sentencing and bail as the framework for a DWI list/court is that short periods of imprisonment are not able to be used as a sanction if an offender does not comply with the conditions of the order. Under the CMD model currently operating in Tasmania, there is provision for the offender to be required to serve a short period in prison (not less than one day and not more than seven days) if the offender has failed to comply with a condition of a drug treatment order, other than by committing an offence punishable by a term of imprisonment exceeding 12 months.<sup>337</sup> This is only available for offenders sentenced to a drug treatment order who are in breach of that order and does not operate for an offender with treatment conditions imposed as part of his or her bail conditions. Under the *Bail Act 1994* (Tas), it is an offence to contravene the conditions of bail and the offender may be sentenced to a fine and/or a term of imprisonment not exceeding 12 months.<sup>338</sup> Further, if an offender is in breach of bail conditions, then bail may be revoked and the offender may be required to remain in custody.<sup>339</sup> However, this does not readily permit a court to impose a short period of imprisonment as a sanction and then allow the offender to be released from custody and resume participation in treatment.

**Less transparency and certainty** — It can be argued that a pre-sentence model that uses deferred sentencing and bail has less transparency than a post-sentence model that would arguably be more transparent and subject to accepted sentencing principles (such as proportionality).<sup>340</sup> This lack of transparency could be overcome by the use of formal deferral of sentencing provisions. Further, transparency is increased in New Zealand by judges indicating at sentencing the sentence that the offender would have otherwise received without graduation from the AODT Court.<sup>341</sup> However, while greater transparency can be achieved, there are difficulties arising from the ongoing uncertainty for the offender about the ultimate resolution of his or her case. Unlike a post-sentence model where a sentence is imposed, the offender does not know the actual sentence that will be imposed at the end of the period of deferral.

### ***Post-conviction/ sentence***

5.1.4 This is the model used by the Court Mandated Diversion (CMD) Drug Treatment Order in Tasmania. It is also the model typically used in the United States and also the model proposed in Victoria. Options in Tasmania would be to introduce a process (pilot or final) based on the current model that operates for CMD and the Drug Court in Victoria (post-sentence by way of an unactivated term of imprisonment) and/or introduce a process (pilot or final) based on the proposed Victorian

<sup>335</sup> Ibid.

<sup>336</sup> TSAC, Final Report No 6 (2016), above n 113, 115.

<sup>337</sup> *Sentencing Act 1997* (Tas) s 27M. See [5.7.3].

<sup>338</sup> *Bail Act 1994* (Tas) s 9.

<sup>339</sup> *Bail Act 1994* (Tas) s 25.

<sup>340</sup> Law Commission New Zealand, above n 251, 340.

<sup>341</sup> Interview with Judge Lisa Tremewan, ‘The Alcohol and Drug Treatment Court in New Zealand’, *Radio New Zealand*, 29 January 2016.

Drink Driver Disqualified List (post-sentence by way of a condition attached to a community-based order).

5.1.5 Post-conviction problem-solving regimes have the following advantages:

**Appropriately reflects coercive nature of order** — Unlike the use of pre-sentence conditions to impose onerous conditions on an offender, the imposition of treatment and monitoring requirements as part of the final sentence reflects the traditional boundaries of guilt, conviction and sentence.

**Transparency** — There is greater transparency when the order operates as part of the final sentence imposed by the court and its use is also constrained by the principles of proportionality. Unlike the pre-sentence model, which may mean that the sentence finally imposed does not reflect the extent of the obligations actually imposed on an offender by the court, using a post-sentence model the recorded sentence will accurately reflect the offender's obligations matched to his or her offence.

**Aligns with recommendations of TSAC** — In its consideration of sentencing options to replace suspended sentences, TSAC has recommended the expansion of the CMD order to include alcohol as well as other drugs.<sup>342</sup> Currently, under s 7(ab) of the *Sentencing Act 1997* (Tas), a drug treatment order can be made under Part 3A of the Act in the Magistrates Court. Amendments to the *Sentencing Act 1997* (Tas) also allow the Supreme Court to impose a drug treatment order.<sup>343</sup> CMD was originally introduced in 2007 as an intensive intervention program aimed at addressing the cycle of drugs and crime for offenders with substance abuse issues.<sup>344</sup> There is provision for judicial monitoring over the period of the order and the court may vary the order based on the offender's progress, including adding or removing program conditions, varying conditions to adjust the frequency of treatment, the degree of supervision and the type or frequency of vocational, educational, employment or other programs that the offender must attend.<sup>345</sup> The court may reward an offender for compliance by varying or cancelling the order.<sup>346</sup> The authority of the court also facilitates access to services and treatment necessary to address the issues that contribute to an offender's criminal behaviour.<sup>347</sup> A CMD order has two components: (1) a custodial part; and (2) a treatment and supervision component. The court imposes the sentence of imprisonment it would have imposed were it not making the order, but the offender is not required to serve the custodial component of the order unless it is activated by contravention of the order.<sup>348</sup> The expansion of the CMD to include offenders whose offending was contributed to by alcohol use would empower courts to impose the order for drink drivers in circumstances where the court considers that imprisonment is appropriate. TSAC also recommended that CMD should be available where the court considers that a suspended sentence of imprisonment (as well as an actual sentence of imprisonment) is the appropriate sentence.<sup>349</sup>

TSAC has also recommended that a community correction order be introduced in Tasmania as a replacement for suspended sentences as well as probation and community service orders.<sup>350</sup> The order would sit below imprisonment and a CMD order and above a fine. The order would contain core

<sup>342</sup> TSAC, Final Report No 6 (2016), above n 113, Recommendation 6.

<sup>343</sup> *Sentencing Act 1997* (Tas) s 7(ab).

<sup>344</sup> Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion, 18 May 2015.

<sup>345</sup> See *Sentencing Act 1997* (Tas) s 27J.

<sup>346</sup> *Ibid* ss 27K, 27L.

<sup>347</sup> Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion, 18 May 2015.

<sup>348</sup> *Sentencing Act 1997* (Tas) s 27F.

<sup>349</sup> TSAC, Final Report No 6 (2016), above n 113, Recommendation 9.

<sup>350</sup> *Ibid* Recommendations 32–46.

conditions in relation to reporting to community corrections and reoffending and also allow the court to impose special conditions, including options in relation to assessment and treatment for alcohol dependency.<sup>351</sup> The court would also be able to impose judicial monitoring and alcohol exclusion conditions. Using these conditions, the community corrections order could provide the legislative framework for a DWI list to allow a problem-oriented response to repeat drink drivers. In this regard, it is noted that the order proposed by TSAC is similar to the community correction order that operates in Victoria and that the community correction order was the proposed legislative framework for the DWI court list in Victoria.<sup>352</sup>

**Provides the court with a hierarchy of sentencing options to address repeat drink driving** — If the recommendations of TSAC are adopted, the court will have a hierarchy of sentencing options to respond to the problem of repeat drink driving by allowing the court to impose a CMD order in relation to alcohol use and/or impose a community corrections order with judicial monitoring and treatment conditions. TSAC's view was that the CMD order may be an appropriate sanction for offenders who have previously been sentenced to a community correction order with treatment conditions relating to alcohol issues and who have re-offended or breached the order. The CMD provides a more severe penalty and the threat of imprisonment can be used as an incentive for compliance. Used in this way, a CMD order provides judges and magistrates with another option to punish and facilitate the rehabilitation of such offenders before the use of actual imprisonment. It allows for the court to impose swift and certain sanctions (based on the 24/7 Sobriety/HOPE program models)<sup>353</sup> for punishment but reserves this for the most serious cases and allows the court to combine sanctions with rewards, judicial monitoring, education and treatment. If the recommendations of TSAC are adopted, the court would also be able to combine a sentence of imprisonment of up to two years and a community correction order of up to three years, which may be appropriate for particularly serious offences.<sup>354</sup>

5.1.6 The following issues have been raised in relation to post-conviction problem-solving regimes:

**Lack of legislative framework** — in Tasmania, concerns have been expressed about the current lack of a legislative framework for a DWI court. The current CMD legislation only applies to illicit drugs and, therefore, not to alcohol.<sup>355</sup> There are limits on the ability to apply a solution-focused response to drink driving through the use of suspended sentences given that there is no capacity for judicial monitoring. There are also limitations on using the current community-based orders such as probation or community service orders as a vehicle to achieve a therapeutic approach because neither of these orders allows for judicial monitoring. This is a critical component of successful problem-solving approaches to sentencing.<sup>356</sup>

However, given the government's commitment to sentencing reform and the introduction of new sentencing options, the current lack of a legislative framework is not an insurmountable obstacle. The appropriate legislation to support a DWI court could be introduced at the time of these reforms. This could be achieved by expanding the CMD program to apply to alcohol (as suggested by TSAC) and so would provide a sentencing alternative for drink drive offenders or by creating a stand-alone

<sup>351</sup> Ibid Recommendations 39, 40.

<sup>352</sup> See Richardson, above n 2, 17.

<sup>353</sup> See [4.3], [4.4].

<sup>354</sup> TSAC, Final Report No 6 (2016), above n 113, Recommendation 47.

<sup>355</sup> *Sentencing Act 1997* (Tas) s 27B(1)(b)(i).

<sup>356</sup> Bartkowiak-Théron and Henning, above n 5, 7. See also [4.1.3], [4.1.4] for discussion of the importance of judicial monitoring.

framework directed solely at drink driving. In New Zealand, the Alcohol and Other Drugs Court Pilot operates for offenders whose offending is driven by alcohol and other drug dependency. An advantage of this approach is that it allows the court to address co-morbidity issues such as alcohol abuse and other substance abuse issues in a holistic way. However, as discussed at [4.2], many DWI courts that have developed as a therapeutic response to repeat drink driving, while based on the drug court model, are separate from the drug court. This may be appropriate in view of the different nature of the substances involved. Alcohol is not an illicit drug and drinking alcohol is not a crime, rather, some of the consequences of alcohol consumption are prohibited (for example, drink driving). Repeat drink drivers may be reluctant to be involved in the CMD program given they may not associate themselves with ‘drug users’ and so treatment and monitoring may need to be approached differently for drink driving.

It will also be necessary to revisit the relationship between the mandatory sentence requirements contained in the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(3) and the use of community-based sentencing options. As noted, it was stated in *Wilkie v Taylor*<sup>357</sup> that the court (subject to special circumstances) must impose the minimum fine or a period of imprisonment and must also impose the minimum period of disqualification. The court cannot impose a community service order instead of a fine or a period of imprisonment (although it is open to the court to impose a combination sentence). No issues arise in the case of CMD orders because the court imposes a sentence of imprisonment that is not activated. However, in the case of a community-based order (such as the community correction order), it will be necessary to amend the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) to allow the court to impose the order as an alternative to a fine and/or imprisonment.

**The use of a ‘suspended’ sentence** — If a term of imprisonment is imposed and then suspended or held in abeyance so that an offender can take part in the program, it is, in essence, a suspended sentence. The Law Commission of New Zealand considered that because suspended sentences had been abolished in that jurisdiction, there were unacceptable risks that the limited reintroduction of suspended sentences would create problems of net-widening, particularly given the number of participants who drop out and fail to complete the drug court program.<sup>358</sup>

Similarly, in Tasmania, the government has indicated its commitment to abolishing suspended sentences and TSAC has prepared a report that has outlined options to replace suspended sentences. However, in Tasmania, the approach of the drug court is different to that in New Zealand, given that the CMD order is already a sentencing option that is distinct from a suspended sentence.

**Relationship with support team and offender motivation** — It has been suggested that a pre-sentence model is preferable because it is more likely to encourage an offender to comply with the order as well as to develop positive relationships with the drug court team. The Law Commission of New Zealand expressed the view that if treatment conditions are imposed pre-sentence, the offender has greater incentive to comply as he or she is likely to feel that they have more influence over the eventual sentence and that this will build the relationship with the drug court team.<sup>359</sup> The Commission considered that the prospect of a more lenient sentence would be viewed by an offender as a ‘carrot’ and as a reward. In contrast, concern was expressed in relation to post-sentence requirements that offenders may view the threat of cancellation of the drug treatment order and the imposition of a substituted sentence as a ‘stick’ and that this may negatively impact on motivation and

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<sup>357</sup> [2015] TASFC 7.

<sup>358</sup> Law Commission New Zealand, above n 251, 337.

<sup>359</sup> Ibid 339–40.

may also may make it less likely that an offender will develop positive relationships with the court team.<sup>360</sup>

**Less flexibility** — It has been argued that there is less flexibility for judges in dealing with breaches of post-conviction sentences given the formal nature as sanctions.<sup>361</sup>

**Questions:**

4. If a problem-solving approach is adopted in Tasmania to recidivist drink-driving, should it apply pre-sentence or post-sentence?
5. If it applies post-sentence, should it rely on an unactivated sentence of imprisonment (as with CMD) or should the problem-solving approach operate by using conditions that can be attached to a community-based sentencing order (as with the Victorian model) or should both options be available?
6. If the order relies on an unactivated sentence of imprisonment, should the CMD order be expanded to allow for alcohol related offences (that is, should the DWI list be made part of the CMD order) or should a problem-solving approach to repeat drink-driving be established as a stand-alone DWI court/list (separate from CMD)?
7. Are there any issues you can foresee that arise from any of these approaches that will need to be addressed in the implementation of the model?

## 5.2 The target audience and eligibility criteria

5.2.1 As discussed at [4.2], the First Guiding Principle for DWI courts is to identify their target offending cohort. In the Tasmanian context, it will be important to develop a target population in collaboration with key stakeholders. This can be determined by considering factors associated with the defendant (risk level of offender, extent of substance abuse problem and criminal history), and the availability of community resources (treatment availability and supervision and alcohol testing capacity).<sup>362</sup> Considerable evidence of the socio-demographic and criminal history characteristics of repeat drink drivers in Tasmania is set out in the offender profile constructed by the TLRI/TILES study. As discussed, this study found that many offenders had a history of alcohol abuse and problematic drug use and co-existing mental health issues. It found that the majority of repeat offenders recorded a blood alcohol concentration of 0.1 or greater. In addition, the study showed the association between drink driving and other illegal driving behaviour such as unlicensed driving or driving while suspended/disqualified. Over an offender's lifetime, the study also found that over half of the research cohort had prior convictions for violent offending (excluding domestic violence) and nearly a quarter had a prior conviction for domestic violence.

5.2.2 In other jurisdictions, the target cohort has included first-time offenders with high blood alcohol concentrations (BAC over .15) and/or repeat offenders.<sup>363</sup> In Victoria, the target cohort is repeat drink drivers and offenders convicted of driving whilst disqualified, particularly in relation to

<sup>360</sup> Ibid 340.

<sup>361</sup> Ibid.

<sup>362</sup> Maryland Drug Courts, *Maryland's Guidelines for Planning and Implementing Adult DUI/DWI Treatment Court Programs* 8 <<http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll7/id/916/>>.

<sup>363</sup> Richardson, above n 2, 18.

alcohol.<sup>364</sup> These offenders are selected on the basis that their conduct is likely to have the most negative impact on the community,<sup>365</sup> and, in the case of repeat offenders, typically their offending behaviour is not addressed adequately by traditional criminal justice responses. In New Zealand, offenders are eligible if they are charged with offending that is being driven by AOD dependency, have a moderate-severe substance-related dependency and are charged with their third or subsequent drink driving offence.<sup>366</sup> The AODT Court targets offenders who are facing a term of imprisonment.<sup>367</sup> Offenders are not eligible if they are facing charges of serious violence, sexual offending or arson.<sup>368</sup> In New South Wales, the Sober Driver Program is available for the following categories of offenders:

- category 1 – offenders convicted of two or more drink driving offences within five years; or
- category 2 – offenders convicted of a single serious drink driving offence with no prior convictions and offenders who have been convicted of a repeat drink driving offence after more than five years and less than ten years from their initial offence. In addition, category 2 offenders must meet at least one of the following criteria: the offender admits or suggests that they regularly drink and drive without being detected by police; the offender’s pattern of alcohol consumption continues to place them at risk and/or the offender’s LSIR is \*24 or greater.<sup>369</sup>

5.2.3 The current criteria in Tasmania for the Sober Driver Program include a requirement that the offender has two or more drink driving offences in the last five years.<sup>370</sup>

5.2.4 Clear, written eligibility criteria for access to DWI court programs would need to be developed in Tasmania to ensure consistency in their application and to also reduce the risk of net widening.<sup>371</sup>

5.2.5 Feedback is, therefore, sought in relation to these criteria.

#### Questions:

##### Offence qualifiers/disqualifiers

8. What type and level of recidivism should eligibility criteria stipulate? Should first time offenders be included? In what circumstances?
9. In this regard, should there be minimum and/or maximum limits for the number of offences committed?
10. Should the DWI court’s jurisdiction include DWI-related death or serious personal injury cases?

<sup>364</sup> Information provided by Elisa Buggy, 13 January 2016.

<sup>365</sup> NCDC, above n 235, Guiding Principle 1.

<sup>366</sup> Ministry of Justice, New Zealand, above n 263, 27.

<sup>367</sup> Gregg and Smith, above n 262, 20.

<sup>368</sup> Ministry of Justice, New Zealand, above n 263, 5

<sup>369</sup> Department of Justice, *Compendium of Offender Behaviour Change Programs in New South Wales* (2016) 35. LSIR stands for Level of Service Inventory – Revised and is an assessment tool used to identify an offender’s needs and risks in terms of recidivism, see <<http://www.mhs.com/product.aspx?gr=saf&id=overview&prod=lsi-r>>.

<sup>370</sup> See [3.3.7].

<sup>371</sup> Maryland Drug Courts, above n 362, 9.

### **Offender characteristics**

11. What severity of alcohol abuse should be stipulated by the eligibility criteria?
12. Should offenders with co-morbidity issues such as illicit drug dependence or mental health problems be eligible to participate in DWI court programs?
13. Should offenders with any particular criminal history be excluded, such as offenders with prior convictions for crimes involving personal violence?

## **5.3 The conditions of the order**

5.3.1 In structuring the order, core and optional conditions will need to be made available to the court.

5.3.2 A wide range of optional or special conditions could potentially be available to the DWI court to allow it to tailor sentences to offenders' needs. They could include conditions concerning alcohol testing, submitting to detoxification or other treatment, attending vocational, educational, employment, rehabilitation or other programs, submitting to medical, psychiatric or psychological treatment, not associating with specified persons, residing at a nominated place and for a specified time, and any other order that the court thinks is appropriate to promote the offender's rehabilitation or protect the community. The court might also be able to impose restrictions on offenders' access to licensed premises. Relevant ancillary conditions would include not driving without a licence, attending the court when directed, complying with reporting requirements to court diversion officers/probation officers and case managers, complying with directions of the court as well as of case managers/ probation officers and court diversion officers. These conditions would need to be available either under CMD orders (if amended to include alcohol), as stand-alone orders for repeat drink drivers and/or under community correction orders (if introduced).

5.3.3 The New Zealand scheme, provides for different expectations at different phases of the program:

Phase One expectations include:

- engagement with a treatment readiness group if in custody;
- development of, and compliance with, a detailed treatment plan including a referral to any (medical or social) detoxification program as required; appropriate use of pharmacological support; and in all cases, use of a primary treatment program;
- engagement with 12-step meetings;
- regular and random testing (which continues throughout all phases) including the fitting of a Secure Continuous Remote Monitor (SCRAM) bracelet if directed;<sup>372</sup>
- regular reporting to the Case Manager and engagement with peer support workers as directed;
- fortnightly AODT Court appearances, or as determined by the AODT Court Judge.

<sup>372</sup> This is discussed further at [5.7].

Phase Two expectations include:

- attendance at, participation in, and completion of programs detailed in the treatment plan;
- continued engagement with 12-step meetings;
- continued regular and random testing (it may be that any SCRAM bracelet would be removed during this phase);
- identification of personal/educational/vocational goals with steps taken to pursue them (for example, driver safety and/or working towards obtaining a driver's licence, literacy programs);
- regular engagement with voluntary community work;
- rebuilding family bonds where possible (which may also be stated in phase one);
- regular reporting to the Case Manager and engagement with peer support workers as directed;
- three weekly AODT Court appearances, or as determined by the AODT Court Judge.

Phase Three expectations include:

- completion of all aspects of the treatment plan;
- continued engagement with 12-step meetings (which is likely to include having a home-group and a sponsor);
- continued regular and random testing (with removal of SCRAM bracelet if still in use);
- further advancement of personal/educational/vocational goals with completion of relevant programmes;
- obtaining a driver's licence where appropriate;
- regular and significant engagement with voluntary community work;
- restorative justice meetings at judge's direction;
- clarification of reparation payments to be ordered at sentencing;
- engagement in suitable paid work or study;
- continued rebuilding of family bonds where appropriate;
- reporting to the Case Manager as directed;
- four weekly AODT Court appearances, or as determined by the AODT Court Judge.<sup>373</sup>

5.3.4 While many of these requirements are relatively uncontroversial, an issue exists in relation to offenders' permission to consume alcohol. In the United States, there is a ban on the use of alcohol by offenders dealt with in DWI courts,<sup>374</sup> and offenders dealt with under the 24/7 Sobriety program

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<sup>373</sup> Ministry of Justice, New Zealand, above n 263, 16–18.

<sup>374</sup> NCDC, above n 235, Guiding Principle 4.

model and the HOPE program model.<sup>375</sup> Similarly, in New Zealand, participants are not able to consume alcohol whilst on the program and are tested for alcohol consumption. In these jurisdictions, the focus is on abstinence rather than merely divorcing drinking from driving. In contrast, in McKenzie's paper examining the options for recidivist drink drivers in Tasmania, it was suggested that any reform need not be directed towards stopping drinking altogether:

Not all drink drivers — even repeat offenders — may be suffering from alcohol addiction. Therefore, while assisting offenders to address their drinking and the choices they make when they are drunk, the program need not necessarily be focused on stopping drinking altogether. A more limited focus will be simpler to implement, less expensive, and appropriate for a wider range of offenders. ... As a consequence, any drink driving directed reform need not necessarily aim to cure alcohol addiction, and rather should aim to cease the combination of drinking and driving.<sup>376</sup>

While the TLRI acknowledges that there is a difference between alcohol addiction and alcohol abuse, this does not necessarily mean that an alcohol ban is inappropriate. It could be argued that an alcohol ban has a punitive component as well as a therapeutic role and may address community concerns about recidivist drink drivers (who previously may have been sent to prison) undertaking their sentence in the community and being allowed to drink. Further, it could be argued that the repeat offending demonstrates that the person has not been able to separate drinking from driving in the past and that a period of enforced abstinence may promote rehabilitation and ensure community protection. It may also provide health and social benefits for the individual offender if he or she is supported to address problematic alcohol use. Certainly, the offender profile constructed by the TLRI/TILES study clearly highlights the widespread existence of alcohol abuse by repeat drink drivers. In this context, it is noted that, in Tasmania, a court can already impose an alcohol ban on offenders sentenced to a drug treatment order as one of the conditions and this is monitored by Tasmania Police during curfew checks.

5.3.5 Accordingly, the TLRI specifically seeks feedback on whether the court should have a discretion to impose a ban on alcohol use, if appropriate, taking into account the vulnerabilities of the offender and the treatment requirements and/or the requirement of community protection. Alternatively, should such a ban be a mandatory condition of participation in DWI court programs? If the DWI court is structured using both the CMD order or a stand-alone drink-driving order and a community-based sanction (such as community correction order), an option may be to have a mandatory alcohol ban for the CMD participants and stand-alone drink-driving orders with an alcohol ban being available as an optional condition for the community correction order.

5.3.6 An additional issue relates to the monitoring of an alcohol ban. This is discussed at [5.7].

**Questions:**

14. Do you consider that an alcohol ban should be a mandatory condition for all offenders or for any particular type of order (for example, CMD/stand-alone drink driving orders)?
15. Alternatively, do you consider that the court should have a discretion to impose an order to ban alcohol use if appropriate taking into account the vulnerabilities of the offender and his or her treatment requirements?

<sup>375</sup> See [4.3], [4.4].

<sup>376</sup> McKenzie, above n 33, 19.

## 5.4 The referral and assessment process

5.4.1 Referrals to the DWI court might be made by the prosecution, defence, Tasmania Police or magistrates. Once a person has been referred to the list, an assessment needs to be made as to the offender's level of risk and the appropriate conditions to be imposed on the offender. Based on Guiding Principle 2, this assessment needs to address the following issues:

- alcohol use severity — this will allow an assessment to be made of the treatment needs of the offender and should allow for a measurement to be made of concrete behaviours relating to alcohol use (such as the number of days the person drank alcohol in the previous month or the amount the person typically consumes in a single sitting) as well as a global measurement of alcohol tolerance.
- drug involvement — this requirement recognises the co-morbid nature of drug and alcohol abuse.
- medical status — this allows co-morbid medical conditions like vitamin deficiencies, malnutrition and dementia to be identified and to inform decisions about the type of support to be provided during the withdrawal process for alcohol-dependent individuals.
- psychiatric status/mental health issues — this recognises the extent of co-morbid mental health issues and alcohol abuse.
- employment and financial status — this should screen for serious financial problems and allow a person to be referred to a more formal assessment of educational and vocational needs.
- family and social status — an appropriate assessment needs to screen for serious family and social conflicts, familial estrangement and interactions with alcohol-using peers or associates, which will allow the offender to be directed into appropriate counselling sessions.
- alcohol triggers and cognition — in order to allow for effective interventions, alcohol-related attitudes and stimuli need to be identified.
- self-efficacy and motivation for change.
- level of care placement.

5.4.2 Currently, the CMD program uses the Level of Service/Case Management Inventory (LS/CMI) risks/needs assessment tool. This provides an analysis of general criminogenic risk/needs factors including alcohol and drug use, criminal history, education/employment, family/marital, leisure/recreation, companions, pro-criminal attitude and anti-social patterns.<sup>377</sup> However, this is not a specific alcohol use assessment tool and accordingly, it is suggested that an appropriate alcohol specific tool should be used in addition to the LS/CMI tool.

### Questions:

16. Do you agree that referrals to the DWI court could come from the prosecution, defence, Tasmania Police or magistrates?
17. Do you have any observations or comments to make in relation to the assessment process for eligibility and/or the eligibility criteria?

<sup>377</sup> Information provided by Liz Moore, email 31 August 2015.

## 5.5 Services that need to be available as part of treatment and rehabilitation

5.5.1 Based on Guiding Principle 2, the type of interventions used need to be based on research that demonstrates the effectiveness of treatment practices and should form part of a comprehensive treatment plan for the particular offender. The types of services suggested by the Ten Guiding Principles include:

- motivational approaches — these focus on ways to engage substance users in considering, initiating, and continuing substance abuse treatment while at the same time, discontinuing their use of alcohol and other drugs.
- cognitive-behavioural therapy (CBT) — this has been recognised as a factor that is critical in reducing recidivism.
- pharmacological treatments — these include naltrexone and campral (acamprosate), which have both been demonstrated to be effective pharmacological treatments when used in conjunction with psychosocial therapies.
- aftercare — this is a significant predictor of long-term success and should involve at least monthly contacts, either in person or by telephone.
- 12-step self-help/manual aid approaches — these include alcoholics anonymous.

5.5.2 In New Zealand, interventions that AODT Court participants can access include:

- treatment-readiness sessions while on custodial remand;
- residential addictions treatment;
- intensive day programs;
- specialist drink driving programs; and
- other specialist AOD treatment and community-based support services.<sup>378</sup>

In addition, detoxification and pharmacotherapies are available as part of the program.<sup>379</sup>

5.5.3 In Tasmania, the Sober Driver Program, as discussed at [3.3.6], is a psycho-educational program. Other community-based services include Alcohol and Drug Services (counselling, detoxification and pharmacotherapy), Salvation Army programs (including the Day Program, the Bridge Program, the Residential Program, After Care and Outreach), City Mission (Missiondale, Serenity House), Holyoake (Gottwanna, Get Real (Youth) program), programs offered by Mental Health Services, Headspace/The Link, Anglicare, the Tasmanian Aboriginal Centre and local general practitioners who can develop mental health plans to assist with psychological counselling through services such as ForensiClinic. Services specific to the drink driving cohort include community-based alcoholics anonymous groups and alcohol counselling services provided through Anglicare.<sup>380</sup> The existence of community partnerships will be crucial for the success of the model adopted (however structured) to allow offenders to access the individualised treatment that is required.

<sup>378</sup> Ministry of Justice, New Zealand, above n 263, 10.

<sup>379</sup> Gregg and Smith, above n 262, 77.

<sup>380</sup> Information provided by Liz Moore, email 31 August 2015.

5.5.4 The Institute seeks feedback on whether service providers currently have programs that would be suitable for drink driving offenders. The Institute seeks feedback on the capacity of current treatment and support services in Tasmania to integrate and collaborate with a DWI court pilot. The Institute also acknowledges that there is a need to address the funding requirements created by any expansion in demand for community-based programs addressing the issue of alcohol abuse.

**Questions:**

18. What issues arise in making existing services available to recidivist drink drivers as part of any DWI court program?
19. Are there any gaps in treatment and rehabilitation services currently available for recidivist drink drivers?

## 5.6 Program phases

5.6.1 Based on the models of DWI courts in the United States and New Zealand and the model recommended for implementation in Victoria, an appropriate model for a DWI court is one that uses a staged program consisting of three intensive phases leading to graduation:

- Phase I — most intensive phase, which lasts three to six months;
- Phase II — Education Period, which lasts six to nine months;
- Phase III — Self-Motivation Phase, which lasts three to six months.<sup>381</sup>

This means that successful participation will typically be undertaken over 12 to 21 months. It is also recommended that there be an aftercare component of six months.

5.6.2 In New Zealand, identified advancement criteria allow an offender to advance a phrase in the program. These are:

Phase One:

- attendance and participation in agreed treatment programs;
- satisfactory attendance at other aspects of the treatment plan (for example, 12-step meetings, peer support group meetings);
- acknowledgement of the extent of the AOD dependency problem, and a demonstrated commitment to live an AOD free lifestyle;
- no unexcused absences from scheduled services or court-required appointments for at least 14 consecutive days; and
- a minimum of 30 consecutive days of demonstrated sobriety.

Phase Two

- progress with treatment plan;

<sup>381</sup> Richardson, above n 2, 21.

- satisfactory attendance at other aspects of the treatment plan (for example, 12-step meetings, peer support group meetings);
- progress with other courses or programs, including voluntary community work;
- evidence of continuing commitment to living an AOD free lifestyle;
- no unexcused absences from scheduled services or court-required appointments for at least 14 consecutive days; and
- a minimum of 60 consecutive days of demonstrated sobriety.

Phase Three:

- completion of treatment plan;
- satisfactory attendance at relapse prevention/recovery based supports (such as 12-step meetings, fellowships, and peer support group meetings);
- appropriate progress with other personal/educational/vocational goals;
- evidence of clear commitment to living an AOD free lifestyle;
- engagement in fulltime work or study or suitable community-based activity;
- no unexcused absences from scheduled services or court-required appointments for at least 14 consecutive days; and
- a minimum of 180 consecutive days of demonstrated sobriety.<sup>382</sup>

5.6.3 The phased approach recommended for DWI courts corresponds with the two-year time frame and the phased approach of the CMD order currently in place in Tasmania.<sup>383</sup>

**Question:**

20. Do you agree that a phased approach for participants engaging in a DWI list is desirable?

## 5.7 Supervision and judicial monitoring

5.7.1 The Ten Guiding Principles recommend that the DWI court team consist of a judicial officer, a prosecutor, a defence lawyer, a DWI court coordinator, a treatment provider, a probation officer and a law enforcement officer under the leadership of the judicial officer (Guiding Principle 6). The judicial officers must be experienced in handling drink driving matters, have a good understanding of addictions and a genuine interest in therapeutic jurisprudence. A written agreement should be signed by the team members in relation to information sharing and confidentiality. The protocols developed for the CMD order could be adapted for this purpose.

5.7.2 It is important that there is judicial monitoring of the offender as this is central to the problem-oriented approach where magistrates ‘interact with the participants, engage them in their treatment plan, set goals for their recovery, listen to them and ... encourage or motivate [them] to

<sup>382</sup> Ministry of Justice, New Zealand, above n 263, 16–18.

<sup>383</sup> See Magistrates Court of Tasmania, *Doing a Drug Treatment Order* <[http://www.magistratescourt.tas.gov.au/about\\_us/criminal\\_division/drug\\_treatment\\_orders](http://www.magistratescourt.tas.gov.au/about_us/criminal_division/drug_treatment_orders)>.

comply with the order'.<sup>384</sup> Participants should be seen regularly by the same judicial officers and, initially, appearances in court should be at least fortnightly. The Ten Guiding Principles stipulate that:

- the DWI court team should provide positive and negative reinforcement of conduct (whichever is appropriate) as soon as practical after it occurs;
- the DWI court magistrate, in consultation with the DWI court team, must provide evidence based incentives and sanctions to respond to participant conduct as soon as practicable after it occurs.<sup>385</sup>

This accords with understandings about the effectiveness of swift, certain and fair sanctions in modifying behaviour, which underpins programs such as the 24/7 Sobriety program and the HOPE program.

5.7.3 Under the current CMD order the following rewards and sanctions are used to encourage compliance with the order:

<b>Rewards</b>	<b>Sanctions</b>
Verbal praise/encouragement	Verbal warning
Removal of program conditions	Addition of program conditions
Variation of core or program conditions to reduce the frequency of treatment, the degree of supervision, the frequency of testing and the type or frequency of other programs	Variation of core or program conditions to increase the frequency of treatment, the degree of supervision, the frequency of testing and the type or frequency of other programs
Reduction of community work	Imposition or increase of community work
Reduction of the amount of imprisonment	Imposition of a period of imprisonment
Cancellation of the order	Cancellation of the order

If an offender has failed to comply with a condition of a drug treatment order, other than by committing an offence punishable by a term of imprisonment exceeding 12 months, the court may order that the custodial part of the drug treatment order is activated for a specified period of not less than one day and not more than seven days.<sup>386</sup> The offender will serve any activated period of imprisonment, once the period exceeds 13 days.<sup>387</sup> Transition through the stages of the program and the removal or reduction of curfew periods are other rewards that may be used for offenders.<sup>388</sup> If the CMD order is expanded to include alcohol bans, then these rewards and sanctions could be used for DWI offenders. However, in respect of a DWI model that uses a community-based order, it is not possible at the present time for periods of imprisonment to be used as a sanction given that such a power does not currently exist. However, the court could impose other sanctions and rewards by way of variation of the judicial monitoring condition or a variation of the order.

5.7.4 In New Zealand, incentives and sanctions used by the AODT include:

<sup>384</sup> Richardson, above n 2, 21.

<sup>385</sup> Ibid 23, summarising Guiding Principle 4.

<sup>386</sup> *Sentencing Act 1997* (Tas) s 27M.

<sup>387</sup> Ibid s 27N.

<sup>388</sup> Information provided by Tristan Bell, email 29 February 2016.

### Incentives

- verbal praise and recognition in court;
- being moved to the front of the daily 'list' in the AODT Court (A-team designation);
- formal recognition of consecutive negative AOD tests (30 days tag; 6, 9 and 12 month medals);
- formal recognition of attendance at 12-step meetings;
- formal recognition of progress with treatment/rehabilitation goals;
- graduating to the next phase with a certificate of progress;
- longer periods between court appearances;
- assistance with access to personal development, cultural, pro-social, educational or work-related opportunities not normally available or publically funded.

### Sanctions

- verbal correction in court;
- assignment to the end of the court list;
- production of a piece of work (ie written) focusing on the behaviour which led to the sanction;
- apologies (where appropriate) in writing or verbally;
- increased or longer attendance requirements at a suitable treatment agency;
- increased reporting to case manager;
- curfews;
- more regular appearance in AODT Court;
- more frequent random AOD tests;
- participation in services in and for the community;
- stand-down or short remand in custody where behaviours raise risk of reoffending or exit from AODT Court.<sup>389</sup>

5.7.5 Traditionally, the criminal justice system has relied on punishment of negative behaviour and has rarely used rewards and incentives to promote positive behaviour.<sup>390</sup> As noted, a feature of drug court and DWI models (and other problem-oriented courts) is the use of positive reinforcement of desirable behaviour as well as the use of punishment for negative behaviour. Immediate consequences for negative behaviour are important because this demonstrates to the offender and the community that offenders will be held accountable for their conduct.<sup>391</sup> However, in therapeutic models there is generally a clear focus on what is done well by an offender and this focus on success is reflected in the actual practice of the court and not merely set out in the policy documents. As noted in the Maryland Guidelines, 'DUI/DWI treatment courts should identify and incorporate the strengths and

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<sup>389</sup> Ministry of Justice, New Zealand, above n 263, 19.

<sup>390</sup> Maryland Drug Courts, above n 362, 11.

<sup>391</sup> Ibid 12.

past successes of the participants and build upon them. The program should constantly look for new ways to encourage participants to succeed'.<sup>392</sup> This is integral to the problem-oriented approach.

5.7.6 Other rewards and sanctions could be developed that are specifically targeted at drink driving offenders, such as granting or removing driving privileges. Clearly one of the biggest potential rewards that could be used to encourage compliance and rehabilitation is to provide an offender with a licence to drive. Accordingly, a preliminary question on which the TLRI is seeking feedback is whether an offender who makes progress in the order should be able to obtain a licence (perhaps limited) subject to an interlock condition. For example, on the grant of the licence following the disqualification period, the Registrar could issue a probationary licence that is subject to a zero alcohol requirement as well as a driver interlock condition.<sup>393</sup> This would provide a strong incentive for compliance with the order and encourage offenders to operate within the licencing system. It also reflects research findings, which have shown that interventions like interlocks are more effective if combined with interventions directed towards long-term behavioural change.<sup>394</sup> In this way, this approach addresses community safety issues in the short and longer term. It also allows for greater integration of the judicial and administrative responses to drink driving as occurs in some other jurisdictions.<sup>395</sup> However, it would require legislative amendment to permit the court to allow a person to drive a vehicle prior the mandatory period of disqualification required by drink driving.

5.7.7 Currently, in Tasmania, there are provisions in the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) that permit a court to allow a person to drive a vehicle prior to the mandatory minimum period of disqualification required by legislation for drink driving. These are:

- (1) Under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(5), the court can impose a period of disqualification or a fine less than the minimum period/amount in 'special circumstances'. This provides the court with a discretion to impose a shorter period of disqualification where special circumstances are found to exist.<sup>396</sup>
- (2) Under the *Vehicle and Traffic Act 1999* (Tas) s 8, the court has the power to issue restricted licences to offenders who have been disqualified from driving in cases of severe and unusual hardship where this is not contrary to the public interest.<sup>397</sup>

While neither of these options in their current form would allow the court to grant an offender a licence as a reward, both demonstrate an existing acceptance of limited exceptions to the mandatory legislative framework for drink driving offences and are approaches that could be built upon to allow the court to grant a conditional licence to offenders as part of the problem-solving approach. Such amendments should, of course, preserve the general deterrence of licence disqualification more generally, while allowing the court to respond to the limitations of the traditional criminal justice approach for recidivist drink drivers.

<sup>392</sup> Ibid 11.

<sup>393</sup> See *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas) regs 22(10), 24.

<sup>394</sup> See [3.5].

<sup>395</sup> See [3.4.1] for discussion of jurisdictions where a court can impose an interlock condition.

<sup>396</sup> Special circumstances mean that there must be something extraordinary, unusual or atypical in the circumstances of either the offender or the offence that makes the case clearly distinguishable from the general run of cases that Parliament had in mind when it provided for the penalty of disqualification, *Bottomly v McDonald* [2002] TASSC 27. See Warner, above n 98, [6.312].

<sup>397</sup> *Vehicle and Traffic Act 1999* (Tas) s 18(5)(a), (c). See also Warner, above n 98, [6.328]–[6.333].

5.7.8 In addition, it is necessary to provide for alcohol and drug testing of offenders who are dealt with by the DWI court if alcohol use is either banned on a mandatory basis for all participants or banned at the discretion of the court. Monitoring will be important for the credibility of the DWI court and creates ‘certainty’ of detection. In addition to operating as a deterrent to alcohol use, testing also provides incentives for offenders to complete DWI court programs as it creates the potential for them to see progress (a certain period with zero alcohol readings) and have that achievement recognised by the court. Interviews with participants in the AODT in New Zealand reported that testing helped motivate them to stay sober in the early stages of treatment while recording a negative result operated as an incentive to change.<sup>398</sup> Hobart Pathology currently conducts urinalyses on all CMD participants for a range of illicit substances in addition to analysis specifically to detect alcohol by request.<sup>399</sup> There is currently no funding provided specifically for alcohol testing in Tasmania.<sup>400</sup> Accordingly, funding would need to be provided for testing for alcohol to be included in a DWI court process. It will also be necessary to ensure that the procedure for alcohol testing implemented is appropriate and effective for drink drive offenders. Tasmania Police currently monitors compliance with any alcohol bans that may be imposed on offenders who are subject to a DTO by breath testing the offender when checking on compliance with curfews. However, there appear to be difficulties with this as a means of monitoring an alcohol ban placed on drink drivers.

5.7.9 Difficulties arise in relation to the practical ability to monitor alcohol use given that alcohol remains in the body for a relatively short period of time (compared with other drugs)<sup>401</sup> and this means that there will need to be more frequent testing than is required for offenders currently supervised under CMD orders. Possible models to achieve cost-effective testing include testing an offender two times a day, using a driver interlock device, or using random and unexpected testing, as suggested by Guiding Principle 4 (paydays, during football games, early in the morning, or two hours after the probation offender makes their last check at the offender’s house). It may be possible for an offender to be required to report daily for breath testing. In New Zealand, offenders are tested through SCRAM bracelets (which provide constant monitoring for alcohol) and random breath testing, which is conducted five times over a two week period.<sup>402</sup> There are only limited SCRAM bracelets available for use in New Zealand and so only selected offenders are monitored using these devices, with the removal of the device being a viewed as a sign of trust by the court and a reward.<sup>403</sup> In South Dakota, SCRAM bracelets were initially used to monitor offenders who were geographically remote from regular testing locations and now are used for a wide array of offenders.<sup>404</sup>

5.7.10 An issue that needs to be addressed in the testing and treatment regime is the issue of transportation (Guiding Principle 8). The requirement for an offender to travel to attend regular testing, treatment meetings, court appearances and work creates a difficulty given that the loss of a driver’s licence is a mandatory sanction for drink driving. It is important that the DWI court model makes it clear that the offender must not drive without a licence and that it encourages the offender to operate within the licensing system. While offenders need to be responsible for their own transport requirements, barriers to transportation need to be considered and the program should assist offenders in this regard by identifying available resources to address transport requirements. In rural areas, it

<sup>398</sup> Gregg and Chetwin, above n 257, 89.

<sup>399</sup> Information provided by Liz Moore, email 31 August 2015.

<sup>400</sup> Information provided by Michelle Lowe, email 20 March 2017.

<sup>401</sup> This concern was recognised by Gregg and Chetwin in their review of the AODT in New Zealand, see Gregg and Chetwin, above n 257, 88.

<sup>402</sup> Ministry of Justice, New Zealand, above n 263, 24.

<sup>403</sup> Gregg and Chetwin, above n 257, 90.

<sup>404</sup> Loundenberg et al, above n 297, 1.

may be necessary to develop program requirements that take into account transport limitations, such as bike loan schemes or travelling testing, education and counselling services.<sup>405</sup> As discussed, consideration should also be given to allowing the issue of a restricted licence/probationary licence with alcohol interlock requirements as part of the reward structure of the program.

**Questions:**

21. Should an offender who makes progress in complying with the order be able to obtain a driver's licence or a restricted licence subject to an interlock condition?
22. Do you have any other suggestions for sanctions/rewards that may be appropriately applied to offenders for compliance or non-compliance with the program?
23. How should an alcohol ban be monitored? For example, do you consider that the use of a Secure Continuous Remote Monitor (SCRAM) bracelet is desirable? Should random testing be utilised and if so, how frequently might this occur and/or in what circumstances? What problems do you foresee in relation to monitoring alcohol use and how might these problems be solved?

## 5.8 Evaluation

5.8.1 Evaluation of the operation of DWI courts is one of the Ten Guiding Principles. However, a frequent criticism of many reviews of DWI courts has been the failure to adopt scientifically rigorous research designs in evaluating the court.<sup>406</sup> The Maryland Guidelines suggest that several types of evaluation should be used, including:

- process evaluation — documenting how the DWI court is currently operating and comparing that with how it is meant to be operating;
- outcome evaluation — assessing the effect of the DWI court on the lives of participants after they have left the program, as compared with outcomes associated with more traditional criminal justice processing; focusing on a wide range of outcomes for participants (for example, abstinence, employment, family relationships), for the criminal justice system (recidivism, criminal case processing efficiency) and for the larger community;
- cost analysis — comparing costs and benefits to help determine whether the program warrants sustained or increased funding and considering how the DWI court compares with the costs of other sentencing options as well as other social costs.<sup>407</sup>

5.8.2 It is important that comprehensive evaluation is built into any model adopted in Tasmania to determine: (1) which offenders achieved the best outcomes; (2) which interventions produced the best outcomes; and (3) which interventions worked for which categories of offender. It is necessary to evaluate short-term outcomes as well as longer-term outcomes.<sup>408</sup> It is also necessary to ensure that an appropriate management information system is in place to allow for necessary data to be captured that enables evaluation/monitoring to take place.

<sup>405</sup> NCDC, above n 235, Guiding Principle 8.

<sup>406</sup> Miller et al, above n 189.

<sup>407</sup> Maryland Drug Courts, above n 362, 19.

<sup>408</sup> NCDC, above n 280, 37.

**Question:**

24. Do you agree that comprehensive evaluation needs to be built into any model adopted in Tasmania?

## 5.9 Sustainability, resources and funding

5.9.1 Secure, stable and dedicated funding has been identified as a critical need of DWI courts.<sup>409</sup> As Richardson has acknowledged in the Victorian context, it is necessary to identify ‘existing resources that would [be] available to the ... List through the Community Corrections Service, any geographical constraints for service provision and availability, and the associated costs of resources’.<sup>410</sup> Guiding Principle 10 (as discussed above) recommends that the sustainability of a DWI court depends on:

- strategic planning;
- written agreements with key stakeholders which provide operational stability, clear agreements, and interagency commitments;
- clearly identified program costs;
- a diversified funding plan; and
- regular evaluations of the effectiveness of the plan.<sup>411</sup>

5.9.2 A legislative base for the DWI list is also important for its long-term viability.

5.9.3 It is noted that in 2011, the New Zealand government committed to a \$10 million investment package for AOD assessments and interventions. This included the establishment of the AODT Court five-year pilot with funding of \$1.93 million, with additional funds provided from ‘proceeds of crime’ and the criminal justice initiative ‘Drivers of Crime’ program to ‘purchase’ extra treatment beds. There was an expectation that agencies would absorb additional operational costs.<sup>412</sup>

5.9.4 Community acceptance has also been identified as a crucial factor in the establishment and longevity of a DWI court, including recognition of the benefits of a problem-oriented approach.<sup>413</sup> This involves the engagement of the media, particularly ‘the engagement of journalists with crime journalism specialisation in educating and promoting attitudinal change within the community’.<sup>414</sup> In addition, it may be useful to incorporate a community advisory group as part of the process of developing the court/list. In New Zealand, the AODT Court is supported by a Community Advisory Group (CAG) that consists of various community representatives who meet regularly to provide practical support for the work of the court and also provide input to the court.<sup>415</sup> It consists of a member with community interests in AOD recovery, a road safety advocate, representation from the legal profession, from philanthropic organisations, treatment providers, professional, academic and

<sup>409</sup> Maryland Drug Courts, above n 362, 23.

<sup>410</sup> Richardson, above n 2, 25.

<sup>411</sup> Ibid 25, summarising the Ten Guiding Principles.

<sup>412</sup> Gregg and Chetwin, above n 257, 17.

<sup>413</sup> Bartkowiak-Théron and Henning, above n 5, 8.

<sup>414</sup> Ibid.

<sup>415</sup> Ministry of Justice, New Zealand, above n 263, 10.

business interests, the LGBTQQI community, representatives of different ethnic and cultural backgrounds as well as a representative of victim support.<sup>416</sup> The purposes of the Community Advisory Group are to:

- provide support and opportunities for the work of the AODT Court;
- provide a meaningful opportunity for the AODT Court to be informed by the input of the wider community; and
- play a role in informing the wider community about the purposes and processes of the AODT Court.<sup>417</sup>

In evaluations of the AODT Court, the CAG has been identified as playing ‘a key role in its ability to engage across the community and to build understanding about the AODT Court, in particular that it is not an easy option for offenders’.<sup>418</sup> It is involved in fundraising to fund incentives provided to participants (for example zoo passes, supermarket vouchers, driver licence fees), has used its own networks to find community work and housing for AODT Court participants and has a role in informing the public about the operation of the court.<sup>419</sup>

**Questions:**

25. Do you think that a community advisory group should be established as part of the process of developing any Tasmanian DWI list?
26. If so, which stakeholders do you think should be on the community advisory group?

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<sup>416</sup> Gregg and Smith, above n 262, 27. LGBTQQI stands for lesbian, gay, bisexual, transgender, queer, questioning and intersex.

<sup>417</sup> Ibid 30.

<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

## Appendix A: Survey of responses to drink driving

Jurisdiction	Program	Pre/post sentence	Main features	Evaluation	Legislation
Victoria	Drink Disqualified Driver List (proposed)	Post sentence	<p>≤ 2 years</p> <p>Uses community correction order which allows a court to include unpaid community work, treatment and rehabilitation, non-association, residence restrictions, supervision, place or areas exclusions, curfew, alcohol, exclusion, bond and judicial monitoring. Based in a Magistrates Court in regional Victoria.</p> <p>Can be combined with driver interlock device. This is a requirement for relicensing and for repeat drink drivers, this is managed by the court.</p>		<i>Sentencing Act 1991</i> (Vic) Part 3A
	Victorian Drug Court – Drug Treatment Order	Post sentence	<p>≤ 2 years</p> <p>Two parts: a treatment and supervision part and imprisonment part. Program conditions include substance testing, detoxification, educational/vocational/employment programs, health assessment, non-association, residence restrictions.</p> <p>Based at Dandenong Magistrates Court.</p>	<p>Court deals with around 60 offenders a year. Individuals completing a DTO are less likely to reoffend and experience higher levels of employment than those with similar criminal and AOD related circumstances.<sup>420</sup></p> <p>Significant improvements in the rate and severity of offending by the DVC cohort compared to counterparts in mainstream system.<sup>421</sup></p>	<i>Sentencing Act 1991</i> (Vic) Part 3 Subdivision (1C)
NSW	Drink Driver Education Program	Administrative requirement for re-licensing	<p>8 hours</p> <p>Independent of sentencing system but an administrative requirement prior to re-licensing for some offenders.</p>		

<sup>420</sup> Victorian Alcohol and Other Drug Association (VAADA), *Drug Court in Victoria: Evidence and Options*, Position Paper (2013) 2.

<sup>421</sup> KPMG, *Evaluation of the Drug Court of Victoria: Final Report* (2014) 4.

	Magistrates Early Referral into Treatment (MERIT – Alcohol)	Pre-plea	3 months Voluntary but court monitors progress through the use of bail conditions. Treatment that can include case management, psychological interventions, residential rehabilitation, referral to other services.	Reduce re-offending <sup>422</sup> Completers had substantially lower rates of re-offending than non-completers. There was also reduced psychological distress and improved physical and mental health. <sup>423</sup> High level of judicial satisfaction. <sup>424</sup> Funded under the National Health Care Agreement.	Local Court Practice Note Crim 1 <i>Bails Act 1978</i> (NSW) s 36A
	Traffic Offender Intervention Program	Post-conviction/pre-sentence Imposed as condition of s 11 adjournment (allows court to adjourn sentencing for up to 12 months so that offender can demonstrate rehabilitation)	Majority of participants are drink drivers but generally not high range offenders. <sup>425</sup> Purpose is to reduce reoffending by providing skills and information for offender to develop positive attitudes and safer behaviour when driving.	10.5% of offenders who took part in program committed a traffic offence in the 2 years following the commencement of the program (but did not compare with those who did not complete program or did not take part at all). <sup>426</sup>	<i>Criminal Procedure Regulation 2010</i> (NSW) Pt 8

<sup>422</sup> R L Lulham, 'The Magistrates Early Referral into Treatment Program: Impact of Program Participation on Re-offending by Defendants with a Drug Use Problem' (Crime and Justice Bulletin No 131, NSW Bureau of Crimes Statistics and Research, 2009) 8–9.

<sup>423</sup> M Howard and K Martire 'Magistrates Early Referral into Treatment: An Overview of the MERIT program as at June 2011' (Attorney-General and Justice, Crime Prevention Issues No 2, 2012); M Passey, et al, 'The Magistrates Early Referral into Treatment (MERIT) Pilot Program: Court Outcomes and Recidivism' (2007) 40 *Australian and New Zealand Journal of Criminology* 199.

<sup>424</sup> L Barnes and P Poletti, *MERIT: Magistrates Early Referral into Treatment Program – A Survey of Magistrates* (Judicial Commission of NSW, Monograph 24, 2004) 50.

<sup>425</sup> Attorney-General and Justice, NSW, *Traffic Offender Intervention Program 2009 – 2011* (Evaluation Report, 2013) 8.

<sup>426</sup> P Rourke and C Jones, 'Risk of Reconviction among Traffic Offenders Who Commence the Blacktown Traffic Offender Program' (NSW Bureau of Crime Statistics and Research, Bureau Brief No 81, 2012) 7.

	Sober Driver Program	Post sentence. Placed on a bond (good behaviour bond or suspended sentence) with condition that complete program	<p>Program for repeat drink drivers convicted of two or more offences within five years (category 1) or offenders who have been convicted of a single serious drink driving offence and offenders who have been convicted of a repeat drink driving offence after more than five years and less than 10 years (category 2). In addition, category 2 offenders, must meet at least one of the following criteria: the offender admits or suggests that they regularly drink and drive without being detected by police; the offender's pattern of alcohol consumption continues to place them at risk and/or the offender's LSIR is *24 or greater.<sup>427</sup></p> <p>Aim to reduce recidivism by assisting to separate drinking from driving.</p> <p>Delivered through Corrective Services.</p>	<p>Reduced rate of recidivism for those who participated compared to a comparison group who did not participate in the program.<sup>428</sup></p> <p>Repeat offenders who lose their licence though a major alcohol-related offence are subject to a mandatory alcohol interlock program. This is imposed by the magistrate. If an offender does not enter or complete the interlock, the disqualification is for at least five years.</p>	<p><i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 9, 12, Pt 8.</p> <p><i>Road Transport Act 2013</i> (NSW) s 209, 211.</p>
Queensland	Under the Limit (UTL)	Pre-conviction or post-sentence	<p>6-week program</p> <p>Imposed as part of probation order.</p> <p>Focuses on separation of drinking and driving and also aims to reduce alcohol consumption.</p> <p>If imposed as part of the sentence, the cost of the program is paid as part of or instead of a fine.</p>	<p>Reduce drink driving by 55% among high-risk serious offenders who complete the program.<sup>429</sup></p> <p>Significant reduction in drink driving re-offence rates for multiple offenders completing the program compared with a comparison sample.<sup>430</sup></p>	<p><i>Penalties and Sentences Act 1992</i> (Qld) Pt 5 Div 1 (Probation Orders)</p>

<sup>427</sup> Department of Justice, above n 369. LSIR is an assessment tool used to identify an offender's needs and risks in terms of recidivism.

<sup>428</sup> Mazurski, Withaneachi and Kelly, above n 124.

<sup>429</sup> V Siskind et al, *The Impact of the 'Under the Limit' Drink Driving Rehabilitation Program on Traffic Safety: An Outcome Evaluation of 'Under the Limit'* (Australian Bureau of Transport, Report CR 186, 2000).

<sup>430</sup> Sheehan et al, above n 166, 4.

ACT	Court Alcohol and Drug Assessment Service (CADAS)	Pre-sentencing and post-sentencing (can be a condition of a Good Behaviour Order)	<p>This can include counselling, residential rehab, pharmacotherapy, education, case management and supported accommodation. Also provides assessment and treatment for the Alcohol Interlock Program. Court must refer people to CADAS for assessment prior to sentencing if have been convicted of 2 or more alcohol-related disqualifying offences within the previous 5 years.<sup>431</sup></p> <p>There is mandatory alcohol interlock for repeat offenders, who can apply for a probationary licence with an interlock after serving at least one half the period of disqualification. An offender cannot obtain a probationary licence unless they have complied with treatment, referral or monitoring required by the court.</p>		<i>Crimes (Sentencing) Act 2005 (ACT) s 13 (Good Behaviour Orders)</i>
Western Australia			<p>Driver interlock commenced October 2016. Mandatory for some drink drive offenders, including repeat drink drivers (on re-licensing)</p>		
South Australia	UR Choice		<p>Mandatory for drivers aged 16 – 25 who have learner’s permit or provisional licence disqualified. Not drink driving specific. Mandatory for some drink drive offenders, including repeat drink drivers (on re-licensing).</p>		
Northern Territory	Back on Track Program	Pre-licence reinstatement requirement	<p>Also mandatory driver interlock for some drink drive offenders, including repeat drink drivers (on re-licensing)</p>	<p>Offenders with a BAC of .15% or more or multiple offences or had refused to supply a sample and had successfully completed the DDE course had a reoffending rate of 16%.<sup>432</sup></p>	

<sup>431</sup> Alcohol, Tobacco and Other Drug Association ACT, *Police and Court Drug Diversion Service (Alcohol and Drug Services, ACT Health)* <<http://directory.atoda.org.au/diversion-service-alcohol-and-drug-service/>>.

<sup>432</sup> B Dwyer and A Bolton, ‘Dying for a Drink: Drink Driver Education as Part of the Northern Territory’s Response to Road Crashes involving Alcohol’ (Paper presented at Road Safety Conference – Research, Policing and Education, Wellington, NZ, 1998).

New Zealand	Alcohol and Other Drugs Court (Pilot)	Post plea of guilty/pre-sentence (uses bail)	<p>Aims to reduce reoffending, reduce alcohol use, reduce the use of imprisonment, positively impact on the defendant's health and wellbeing and be cost-effective.</p> <p>Time period between 12 – 18 months.</p> <p>Successful graduation is a significant mitigating factor.</p> <p>Eligible if charged with third or subsequent drink drive offence in aggravated form, AOD dependency and high-risk of reoffending.<sup>433</sup></p> <p>Can also be issued with driver interlock licence sentence, a zero licence sentence or an indefinite disqualification.</p>		
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<sup>433</sup> See Gregg and Chetwin, above n 257.

## Appendix B: TLRI/TILES study

The data were collected from the Magistrates Court of Tasmania 2008–09 to 2013–14 for the following offences:

- Drive under the influence of alcohol, *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 4
- Drive a motor vehicle while exceeding the prescribed alcohol limit, *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(1)
- driver not holding a licence with alcohol in body, *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(2)
- convicted within any 10-year period of three or more offences under the Act arising from at least three separate occasions, *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(3)

In this period, there were 21 222 finalised defendants with 730 who received an immediate custodial sentence (either a partial sentence or a determined term of imprisonment). There were 393 offenders who received a partially suspended term and 337 who received a sentence of imprisonment with a determined term.

In the 730 instances where a custodial sentence was received, the sentences were as follows:

<i>Range of principal penalty</i>	<i>Imprisonment with partially suspended term</i>	<i>Imprisonment with determined term</i>
<b>&lt;3 months</b>	25	110
<b>3 – &lt; 6 months</b>	193	124
<b>6 – &lt;12 months</b>	147	71
<b>12 – &lt;18 months</b>	23	23
<b>18 – &lt;24 months</b>	3	7
<b>24≥</b>	2	2

This sample of offenders was intended to comprise 10% of drink drive offenders who were given a custodial sentence, either partially suspended or a determined term as identified from the CRIMES Department of Justice database. However, one of the cases included in the sample was sentenced in 2002 and was subsequently excluded from the study. This case involved a male, aged 40–44 who was sentenced in Hobart to imprisonment for  $\geq 24$  months.

Ten per cent of offenders were selected from each of the following sentence terms:

<b>Sentence terms</b>	<b>Number of offenders</b>
< 3 months	14
3 < 6 months	34
6 < 12 months	19
12 < 18 months	4
18 < 24 months	1

The sample was proportionally representative in terms of gender, age group and location:

**Gender:** Males = 63 Female = 9

**Location:** Hobart = 44  
Launceston = 17  
Devonport = 5  
Burnie = 2  
Other = 4 (Huonville, Smithton, St Helens, Wynyard)

**Age group:** 15–19 = 2  
20–24 = 12  
25–29 = 8  
30–34 = 14  
35–39 = 13  
40–44 = 7  
45–49 = 7  
50–54 = 2  
55–54 = 7  
65+ = 2