

**Review of the  
Compulsory Drug Treatment Program  
and the Compulsory Drug Treatment  
Correctional Centre pursuant to the  
*Crimes (Administration of Sentences)*  
Act 1999**

**Corrective Services NSW  
Department of Attorney General  
and Justice  
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## Executive Summary

The compulsory drug treatment program was established under the *Compulsory Drug Treatment Correctional Centre Act 2004* (the Act), which introduced Part 2A of the *Drug Court Act 1998* and Part 4A of the *Crimes (Administration of Sentences) Act 1999*. The Act received assent on 6 July 2004 and commenced on 21 July 2006.

The Compulsory Drug Treatment Correctional Centre (CDTCC) was proclaimed as a correctional centre on 9 June 2006 and opened on 23 August 2006. It is located in the Sydney suburb of Parklea, on self-contained premises within Parklea Correctional Complex. (The privately operated Parklea Correctional Centre is also within Parklea Correctional Complex, in separate premises.)

The objects of compulsory drug treatment are set out in section 106B of the *Crimes (Administration of Sentences) Act 1999* as follows:

- (a) *to provide a comprehensive program of compulsory treatment and rehabilitation under judicial supervision for drug dependent persons who repeatedly resort to criminal activity to support that dependency, and*
- (b) *to effectively treat those persons for drug dependency, eliminating their illicit drug use while in the program and reducing the likelihood of relapse on release, and*
- (c) *to promote the re-integration of those persons into the community, and*
- (d) *to prevent and reduce crime by reducing those persons' need to resort to criminal activity to support their dependency.*

It is the conclusion of the Review that the policy and objectives of the Act remain valid. The Review makes 12 recommendations that aim to clarify the original policy intention of certain legislative provisions and extend the Compulsory Drug Treatment Program to a greater number of eligible and suitable participants.

## Recommendations

**Recommendation 1:** The legislation be amended to provide that an offender's compulsory drug treatment order may be revoked if, in the opinion of the Drug Court following advice by the Director of the CDTCC, the offender is unlikely to make further progress in the offender's compulsory drug treatment order.

**Recommendation 2:** The legislation be amended to provide that the Director of the CDTCC may direct that an offender regress to an earlier Stage of compulsory drug treatment detention for a period not exceeding 3 months if satisfied that the offender has failed to comply in a serious respect with any condition of the offender's compulsory drug treatment personal plan. The Director must notify the Drug Court of any such regression direction within 7 days. An offender who is subject to a regression direction may, within 14 days of the direction, apply to the Drug Court to confirm, revoke or amend that direction.

**Recommendation 3:** The legislation be amended to provide that the requirement to consider an offender's release on parole be suspended whilst the offender is subject to a compulsory drug treatment order. Transitional provisions should be included to facilitate expedited parole consideration for those offenders whose Compulsory Drug Treatment Order (CDTO) is revoked within 60 days of their parole eligibility date or after their parole eligibility date has passed.

**Recommendation 4:** The legislation be amended to provide that for a compulsory drug treatment order, a person is an eligible convicted offender if the person is convicted of an offence, other than an ineligible offence, and at the time the person was sentenced the unexpired non-parole period was no less than 18 months and the unexpired head sentence was no more than 6 years.

**Recommendation 5:** The legislation be amended to: remove the recidivism criteria from the definition of "eligible convicted offender" in section 5A of the *Drug Court Act 1998*; and, provide that when assessing an offender's suitability to serve a sentence by way of compulsory drug treatment detention, the multi-disciplinary team is to have regard to whether the offender has a history of prior criminal offending which is related to long-term drug dependency and associated lifestyle.

**Recommendation 6:** The legislation be amended to remove the word "administrative" from section 29(2)(a) of the *Drug Court Act 1998*.

**Recommendation 7:** The legislation be amended to provide section 106W of the *Crimes (Administration of Sentences) Act 1999* requires a court to refer to the Drug Court any sentence that will be served concurrently or partially concurrently with a sentence in relation to which a CDTO is in place, regardless of when the sentence was imposed..

**Recommendation 8:** The guidelines for personal plan development be amended to include the provision of information to participants regarding the availability of a restorative justice program in addition to a personal plan.

**Recommendation 9:** Amend the legislation to provide that (i) the State Parole Authority is a referring court in respect of persons who are serving a sentence that has previously been the subject of a compulsory drug treatment order which has expired under section 106E(b) of the *Crimes (Administration of Sentences) Act 1999*, for the purpose of section 18B(1) of the *Drug Court Act 1998*; (ii) section 5A of the *Drug Court Act 1998* provides a less restrictive definition of "eligible convicted offender" applicable to such persons; and (iii) if the State Parole Authority refers a person to the Drug Court under this provision, the Drug Court may re-instate the person's previous compulsory drug treatment order or make a new compulsory drug treatment order, but

only after the Drug Court has considered the circumstances of the revocation of the person's parole order (including any charges or convictions for offences committed by the person whilst on parole).

**Recommendation 10:** Amend the legislation to remove reference to "any offence involving the use of a firearm" from the definition of an eligible convicted offender, and instead require that (i) a person is not an eligible convicted offender if the offence for which the person is referred to the Drug Court for assessment involved the use of a firearm; and (ii) when the multi-disciplinary team is assessing whether an offender is a suitable person to serve a sentence by way of compulsory drug treatment detention, the multi-disciplinary team is to have regard to the offender's history of committing offences involving weapons or violence.

**Recommendation 11:** The Government monitor the rate of utilisation of the compulsory drug treatment program in terms of its capacity, and consider the introduction of compulsory drug treatment detention as a pre-release program for eligible and suitable offenders.

**Recommendation 12:** Any future review or evaluation of the compulsory drug treatment program should include an examination of the reduction in drug usage achieved by the program, in determining the extent to which the objectives of the compulsory drug treatment program have been met.

# 1. Introduction

A compulsory drug treatment program, involving compulsory drug treatment detention with additional funding of \$6 million from 2005 to 2007, was first proposed in *A new way to break the drug-crime cycle – Labor's Compulsory Drug Treatment Plan*, in 2003.

The proposal was connected to *Securing a Better Future*, “a \$223 million commitment to continue the successful Drug Summit Programs”, and *Targeting Repeat Offenders*, “a \$39.6 million plan to reduce re-offending.”

The NSW Compulsory Drug Treatment Program is the first (and so far the only) program of its kind in Australia. It is one of a range of measures that include prevention, treatment, education and criminal sanctions introduced by the former Government following the Drug Summit held in May 1999, which brought together experts and lay people from the fields of drug treatment, education, and the community.

Although the Drug Summit recommended a Drug Offenders Compulsory Treatment Pilot Scheme, the Compulsory Drug Treatment Program (CDTP) is far more comprehensive than the scheme envisaged by the Drug Summit.

Compulsory drug treatment detention was introduced by the *Compulsory Drug Treatment Correctional Centre Act 2004*, which commenced on 21 July 2006. This Act introduced Part 2A of the *Drug Court Act 1998* and Part 4A of the *Crimes (Administration of Sentences) Act 1999*. The *Compulsory Drug Treatment Correctional Centre Act 2004* received bipartisan Parliamentary support<sup>1</sup>, with the then Opposition arguing that it did not go far enough in eliminating drugs from correctional centres and promoting drug rehabilitation of repeat offenders.

Minor amendments to the enabling legislation have been made by the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004*, the *Crimes and Courts Legislation Amendment Act 2005*, and the *Courts Legislation Further Amendment Act 2006*.

The CDTCC was established at a capital cost of \$3.5 million, and has operated since its inception in re-furnished premises within Parklea Correctional Complex in the Sydney suburb of Parklea. It was proclaimed as a correctional centre on 9 June 2006 and opened on 23 August 2006.

Corrective Services NSW (CSNSW) is responsible for the management, security and rehabilitation services at the CDTCC, while the Justice and Forensic Mental Health Network is responsible for the health care of inmate participants. CSNSW and the Justice and Forensic Mental Health Network are jointly responsible for program management, while CDTCC management and CSNSW Community Offender Services are jointly responsible for supervision of participants in the community.

The CDTCC is a minimum security correctional centre providing accommodation for 70 participants, programs rooms, clinical facilities, and a dental clinic. It is discrete

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<sup>1</sup> Hansard, Legislative Council 1 and 2 June 2004; Legislative Assembly 23 June 2004.

from Parklea Correctional Centre but close enough to enable swift transfer of a recalcitrant participant from the CDTCC to a maximum security section within Parklea Correctional Centre (to be held in separate custody until reviewed by the Drug Court).

The target group for the program is up to 100 male offenders<sup>2</sup> with long-term drug addiction who have committed multiple criminal offences over a long period to support their addiction, and who have either failed or never accessed drug treatment. Sex offenders, drug traffickers and those who have committed serious violent crimes are excluded.

The program is linked to the NSW Drug Court at Parramatta. Offenders are referred from District and Local Courts in Sydney<sup>3</sup>. The CDTCC at Parklea is reasonably close to Parramatta and within the catchment area of Parramatta Drug Court.

Courts prescribed as referring courts have a statutory duty<sup>4</sup> when sentencing a person to imprisonment to ascertain whether there are grounds on which the Drug Court might find the person eligible for compulsory drug treatment and if so, to refer the person to the Drug Court to determine whether the person should be the subject of a compulsory drug treatment order. If the person is assessed as suitable by a multi-disciplinary team<sup>5</sup>, the Drug Court orders the offender undergo compulsory drug treatment. There is no right of appeal (by either the Crown or the offender) against the imposition of a compulsory drug treatment order. The practical effect of the making of a CDTO is that the offender is required to serve their sentence (including imprisonment) by way of a CTDO.

The CDTP is a treatment and rehabilitation program of judicial care, stabilisation, case management, educational and vocational support, and rehabilitation and supervision, intended to manage offender risk and meet offender need. Each participant has a structured individual personal plan that is closely monitored by CDTCC staff and the Drug Court and revised where necessary.

The aims of the comprehensive drug treatment and rehabilitation program are to reduce drug use, reduce re-offending, promote community re-integration and provide judicial oversight.

The CDTP is conducted in three custodial stages and two community-based stages<sup>6</sup>:

- (1) closed detention within the CDTCC,
- (2) semi-open detention involving detention within the CDTCC and access to specified programs in the community,
- (3) community custody (residing under supervision in the community),

<sup>2</sup> The CDTCC has 70 beds. At 22 April 2013, there were 23 participants in Stage 1, 13 participants in Stage 2 and 6 participants in Stage 3.

<sup>3</sup> "Referring courts" are prescribed by clause 9 *Drug Court Regulation 2010* (and prior to 1 September 2010 by clause 7A of the *Drug Court Regulation 2005*)

<sup>4</sup> Section 18B *Drug Court Act 1998*

<sup>5</sup> Comprising the Director of the CDTCC or their delegate, a probation and parole officer, and a representative of Justice Health – section 18A *Drug Court Act 1998*

<sup>6</sup> Note that the *CAS Act* only provides for 3 custodial stages (s. 106D), and that a CDTO expires when the offender is released on parole (s. 106E), however a full appreciation of compulsory drug treatment detention requires the consideration of parole and other community-based case management issues.

(4) parole, and

(5) voluntary post-sentence case management in the community.

Participants advance from one custodial stage to the next depending on their progress, and may be regressed back to an earlier custodial stage by the Drug Court for breaches of the program. At present, however, there is no provision for re-entry to the program if a participant's parole is revoked.

The program includes a scheme of rewards and sanctions. Rewards for compliance with a personal plan include conferring privileges, a decrease in supervision and drug testing frequency; whilst sanctions for breach of a personal plan include withdrawing privileges, an increased level of management in custody, tougher community supervision and an increase in drug testing frequency.

Random drug tests, periodic drug tests and targeted drug tests occur frequently during all stages of the program. Stage 1 participants are tested at least twice per week, while Stage 2 and 3 participants are tested at least three times per week.

There are no contact visits during Stage 1 of the program, though contact visits are available in Stage 2 in addition to earned social leave permits to visit family. There are stringent search and security procedures at the CDTCC which, combined with the high frequency of drug testing, make it likely that any drug use will be detected. As of October 2012, over 35,000 tests had been conducted, with only 1.56% returning positive results for illicit drug use.



## 2. Methodology of the Review

### 2.1 Terms of reference for the Review

Section 106Z of the *Crimes (Administration of Sentences) Act 1999* provides:

- (1) *The Minister is to arrange for a review to be conducted of:*
  - (a) *the compulsory drug treatment program, established under Part 2A of the Drug Court Act 1998 and this Part, during the first four years of the program's operation, and*
  - (b) *the provisions of the Drug Court Act 1998 and this Act relating to the compulsory drug treatment program and of any regulations made for the purposes of those provisions,*

*in order to ascertain whether any of those provisions (or any other provisions of any other Act or regulations) should be amended.*
- (2) *...*
- (3) *The Minister is to cause a report of the outcome of the review to be tabled in each House of Parliament as soon as practicable after its completion.*

In reviewing "the compulsory drug treatment program" as required by section 106Z, terms of reference were established by reference to the objects of compulsory drug treatment, which are set out in section 106B of the *Crimes (Administration of Sentences) Act 1999*:

*The objects of compulsory drug treatment are:*

- (a) *to provide a comprehensive program of compulsory treatment and rehabilitation under judicial supervision for drug dependent persons who repeatedly resort to criminal activity to support that dependency, and*
- (b) *to effectively treat those persons for drug dependency, eliminating their illicit drug use while in the program and reducing the likelihood of relapse on release, and*
- (c) *to promote the re-integration of those persons into the community, and*
- (d) *to prevent and reduce crime by reducing those persons' need to resort to criminal activity to support their dependency.*

### 2.2 Conduct of the Review

The Review was initially conducted on behalf of the former Minister for Corrective Services and the former Attorney General by the Corporate Legislation and Parliamentary Support Unit, Corrective Services NSW, in conjunction with Criminal Law Review, Department of Attorney General and Justice. Following the change of Government, the Review was completed by these Units on behalf of the Attorney General and Minister for Justice.

Consultation was conducted in relation to the operation of the Act and whether the policy objectives remain valid. Corrective Services NSW sent out consultation letters for this Review to key stakeholders in early June 2010, and inserted

advertisements in the "Government Notices" sections of the *Sydney Morning Herald*, *The Daily Telegraph* and *Koori Mail* on 2 June 2010.

Written submissions to the Review were invited, particularly with respect to the objects of compulsory drug treatment and whether the policy objectives of the *Compulsory Drug Treatment Correctional Centre Act 2004*, as reflected in the compulsory drug treatment provisions of the *Drug Court Act 1998* and the *Crimes (Administration of Sentences) Act 1999*, remain valid.

The consultation letters and advertisements made it clear that the Review was not intended to be a major study of drug treatment programs or imprisonment generally; that it was to be a review of the compulsory drug treatment legislation rather than individual cases, but that efficiency issues associated with the administrative functions of the compulsory drug treatment program may be considered as part of the Review.

A list of responses received is provided at Appendix 1. Not all responses were in the form of a formal submission. Comments on some submissions were sought from the Drug Court and senior officers of CSNSW. The Corporate Legislation and Parliamentary Support Unit of CSNSW prepared this report, which is the result of the review process and takes into account the responses received.

The Review has also considered the conclusions of the *Evaluation of the Compulsory Drug Treatment Program*<sup>7</sup> conducted by the Bureau of Crime Statistics and Research (BOCSAR).

An early confidential draft of the Review was circulated to agencies represented on the CDTCC Implementation Taskforce. Comments made by agencies in response to this draft have been included in the Review where appropriate.

## 2.3 Abbreviations used in this Review

The following abbreviations are used throughout this Review:

<b>ADHC:</b>	Ageing, Disability and Home Care (Department of Human Services)
<b>AOD:</b>	Alcohol and Other Drug
<b>ARC:</b>	Australian Research Council
<b>BOCSAR:</b>	Bureau of Crime Statistics and Research
<b>CAS Act:</b>	<i>Crimes (Administration of Sentences) Act 1999</i>
<b>CAS Regulation:</b>	<i>Crimes (Administration of Sentences) Regulation 2008</i>
<b>CDT:</b>	Compulsory drug treatment
<b>CDTCC:</b>	Compulsory Drug Treatment Correctional Centre
<b>CDTO:</b>	Compulsory drug treatment order
<b>CDTP:</b>	Compulsory drug treatment program
<b>COS:</b>	Community Offender Services, Corrective Services NSW
<b>CSNSW:</b>	Corrective Services NSW
<b>DAGJ:</b>	Department of Attorney General and Justice
<b>ODPP:</b>	Office of the Director of Public Prosecutions
<b>OTP:</b>	Opioid Treatment Program

<sup>7</sup> Joula Dekker, Kate O'Brien and Nadine Smith; NSW Bureau of Crime Statistics and Research 2010

**SORC:** Serious Offenders Review Council  
**SPA:** State Parole Authority

### 3. Discussion of Submissions

#### 3.1 Submissions Received

The following persons and bodies advised that they either had no submissions to make or that they supported the legislation and did not have any substantive recommendations for amendment:

- Mrs Kay Valder (Official Visitor, CDTCC)
- The Crime and Justice Reform Committee
- New South Wales Police Force
- The Community Relations Commission
- Australian Institute of Criminology
- NSW Bar Association
- Sentencing Council of NSW

The following persons and organisations made submissions with substantive recommendations for consideration<sup>8</sup>:

- Dr Astrid Birgden, Director, CDTCC
- His Honour Judge Dive, Senior Judge of the Drug Court of NSW ("Judge Dive")
- Mr N. R. Cowdery QC, Director of Public Prosecutions
- National Drug and Alcohol Research Centre
- Mr Tim Wilson (Chaplain, CDTCC)
- Corrective Services NSW
- Australian Law Reform Commission
- Royal Australasian College of Physicians
- Human Services Aboriginal Affairs NSW
- Human Services Ageing, Disability and Home Care
- NSW Health
- Staff, CDTCC
- Program participants, CDTCC
- His Honour Judge Nicholson, District Court of NSW

#### 3.2 Dr Astrid Birgden, Director CDTCC<sup>9</sup>

Dr Birgden arranged for both staff and participants at the CDTCC to contribute feedback to the Review, following a PowerPoint presentation she had developed to guide discussion. In her submission she referred to views and proposals arising from that feedback, along with her own professional opinions.

##### 3.2.1 Eligibility and suitability for a CDTO

Noting that at July 2010, 247 referrals had been made and of these a total of 106 (43%) offenders were found ineligible (n=71) or unsuitable (n=35), Dr Birgden did not believe the eligibility or suitability criteria needed to be restricted further<sup>10</sup>.

<sup>8</sup> This list is compiled by reference to agency titles at the time submissions were lodged. Current Department and agency names are provided in the discussion of each agency's submission.

<sup>9</sup> Dr Birgden resigned as Director of the CDTCC in December 2010.

Dr Birgden also noted that there is no apparent correlation between the nature of the offence, institutional behaviour within the CDTCC, and the likelihood of an offender being revoked or regressed (although this has not yet been empirically tested). Likewise, she noted no apparent correlation between an E classification<sup>11</sup> and escape from the CDTCC<sup>12</sup>, and submitted that a previous escape does not need to be a criterion for unsuitability.

Dr Birgden was concerned that in 4 years, the CDTCC has never been at 100% capacity as a result of the 43% rejection rate<sup>13</sup>.

## Discussion

The BOCSAR Evaluation reported<sup>14</sup>: "On average, the 95 participants of the CDTP who were administered a baseline interview had 3.5 sentences referred to the Drug Court to be considered for a CDTO (range: 1-16 sentences) and an average of five charges related to these sentences (range: 1-35 charges)."

The issue of previous convictions in the eligibility criteria is discussed in relation to the submission of Judge Dive at 3.3.4 below.

### 3.2.2 The compulsory nature of a CDTO

Dr Birgden noted that compulsory treatment, with no option of consent or appeal, is a potential human rights violation; however, under the present legislation this is balanced by the incentive of accelerated release into the community (which, she noted, the BOCSAR Evaluation described as 'powerful'). She submitted that this incentive ought to remain.

Dr Birgden said that from an offender's rights perspective, however, informed choice that recognises autonomy and dignity is preferable. In this respect, she noted the suggestion from CDTCC participants that choice be provided at the Drug Court *before* receiving a CDTO; but once sentenced to detention at the CDTCC, participation in the program of drug treatment and rehabilitation be compulsory; and stated "I would be more comfortable with this approach." Dr Birgden suggested that a legislative provision based on section 7A (2) (e) of the *Drug Court Act 1998*<sup>15</sup> may be appropriate in this respect.

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<sup>10</sup> The BOCSAR Evaluation found a similar rejection rate: of 198 referrals between 1 August 2006 and 31 July 2009, 89 (45%) were found ineligible or unsuitable while 109 were made subject to CDTOs.

<sup>11</sup> Cl. 24 *Crimes (Administration of Sentences) Regulation 2008*: an inmate who has committed an escape offence and, in the opinion of the Commissioner, represents a special risk to security.

<sup>12</sup> At the time of lodging her submission, there had been 4 escapes from the CDTCC involving 7 inmates and 4 instances of failing to return from unescorted leave since its opening in August 2006. Subsequently, 3 Stage 1 participants escaped from the CDTCC on 20 March 2011 and a further 2 Stage 1 participants escaped on 1 January 2012.

<sup>13</sup> Subsequent analysis by CSNSW shows that since commencement of the CDTP, there is a definite seasonal component to the number of CDTOs issued by the Drug Court: October to March is the busiest period for writing suitability assessment reports

<sup>14</sup> Page 18

<sup>15</sup> "(2) The Drug Court may deal with a person under this section in relation to an offence if, and only if, it is satisfied ..... (e) that the person accepts the conditions imposed by this Act and the conditions that the Drug Court proposes to impose on the person (whether immediately or at some later date) as a consequence of his or her conviction and sentence under this section,"

## Discussion

The BOCSAR Evaluation noted<sup>16</sup>: “The orders are compulsory because neither the Crown nor the offender can object to, or appeal, the imposition of a CDTO.” There is also no appeal against a decision to revoke a CDTO. However, as noted by Judge Dive in the *Judicial Officers Bulletin*<sup>17</sup>, while no appeal lies against the revocation of a CDTO, it is unclear whether an appeal does lie against any decision of the Drug Court *not* to revoke a CDTO – “something both the Crown and the offender may wish to achieve.”

As also noted by Judge Dive in his submission<sup>18</sup>, compulsion has effectively been a non-issue throughout the program; but if the program was voluntary, offenders who are both eligible and suitable may make a poor decision and decline a referral without fully appreciating the program's benefits.

Professor Wayne Hall<sup>19</sup> in his paper *Legally Coerced Addiction Treatment for Drug Addicted Offenders: Ethical and Policy Issues*<sup>20</sup> said: “The major correctional justification for providing coerced addiction treatment is that it will reduce drug dependent offenders’ drug use and recidivism after release from prison. The case is especially compelling for heroin dependent offenders who are very likely to relapse to heroin use on release... A 1986 World Health Organisation consensus view was that legally coerced addiction treatment was legally and ethically justified if (1) the rights of the individuals were protected by ‘due process’, and (2) if effective and humane treatment was provided.” This Review is not aware of any concerns regarding the CDTP and CDTCC meeting those requirements.

Professor Hall also said in his paper: “The effective and ethical use of coerced drug treatment requires a shared understanding of goals of treatment and a clear statement of the roles and responsibilities of correctional and treatment staff for monitoring and reporting upon an offender’s progress in drug treatment.” The feedback from CDTCC staff reported by Dr Birgden (at 3.12 below), and the participation of correctional and treatment staff in the CDTCC Implementation Taskforce, is testimony to the existence of such an understanding.

It is not proposed that any amendment be made to the compulsory imposition of the program on eligible and suitable offenders at this time.

### 3.2.3 Revocation from the CDTP

Dr Birgden also supported the proposal from both staff and participants that a person should be able to be revoked from the program “by mutual agreement”. At present, section 106Q(1)(a) of the *CAS Act* provides that the Drug Court may revoke a CDTO for (i) failure to comply, (ii) that failure is of a serious nature, and (iii) the

<sup>16</sup> Page 3

<sup>17</sup> August 2006, Volume 18, No 7

<sup>18</sup> See 3.3.1 below

<sup>19</sup> NHMRC Australia Fellow, University of Queensland Centre for Clinical Research

<sup>20</sup> Presented at BOCSAR Seminar 14 July 2010

person is unlikely to progress further in their CDTP or is an unacceptable risk of re-offending or is a risk to self and others. Dr Birgden stated that “This means that on the rare occasions a participant wishes to leave the program, he has to threaten or enact violence”. She submits that being unlikely to progress further in their CDTP should be able to stand alone as a basis for revocation without that failure being of a serious nature; however, she supported the participants’ suggestion that a request by mutual agreement should have a one-week cooling off period to counteract impulsive decision-making by the participant.

## Discussion

The BOCSAR Evaluation reported<sup>21</sup> that 26 participants were revoked from the program, from 109 who entered the program during the Evaluation period: 12 from Stage 1, 10 from Stage 2 and 4 from Stage 3. It gave no break-up of reasons for these revocations, though it reported that 22 of these participants had progressed to Stage 2 at least once, and 6 had progressed to Stage 3 at least once<sup>22</sup>.

In commenting for the purposes of this Review, Luke Grant, then Assistant Commissioner Offender Services and Programs, CSNSW, advised that there have been no instances of assaults on staff or other participants in order for a participant to bring about his revocation from the program. There have, however, been isolated incidents of participants threatening such behaviour in order to manipulate their revocation from the program.

Mr Grant advised that attempted manipulation by inmates is not unusual in the correctional system, and regularly occurs as inmates seek a particular placement or privilege or to prevent a particular placement or consequence. CSNSW has policies in place to recognise and deal with attempted manipulation, and senior correctional managers are experienced in doing so. The overriding experience of CSNSW is that allowing inmates to manipulate any aspect of the correctional system only leads to further manipulation attempts, and compromises the security and safety of the correctional system.

It would defeat the compulsory nature of the CDTP if participants were provided with a mechanism to opt out of it; and this Review does not support the proposal from staff and participants that would permit revocation by mutual agreement. Nevertheless, there should be a less stringent mechanism than currently provided by section 106Q(1)(a) of the CAS Act.

If participants have a perception that actual or threatened violence is needed to bring about revocation, then the revocation test is too high. There should be a mechanism for revocation from the program based solely on whether, in the opinion of the treating professionals, the participant is unlikely to proceed further in their CDTP.

The intense personal plan management of a CDTP participant should enable their case management team to identify whether they are unlikely to proceed any further

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<sup>21</sup> Page 20

<sup>22</sup> CSNSW advised that “the majority of participants (who are revoked) are revoked for rule-breaking and threatening behaviour rather than drug use *per se*”. CSNSW subsequently advised that as of 31 March 2012, there had been 84 revocations from 191 CDTOs issued.

in their CDTP, and if so, to bring it to the Director's attention for consideration of revocation action.

Section 106Q(1)(d) of the CAS Act provides that a CDTO may be revoked "for any other reason the Drug Court sees fit." Arguably, inclusion of this sub-section in the legislation provides the Drug Court with a wide discretion to revoke a person's program for reasons other than those specifically provided in sub-sections (a) to (c), such as where the person is unlikely to progress further. It is unclear, however, whether the legislature intended to provide such a wide discretionary basis for revocation, given the very stringent requirements for revocation otherwise imposed by the section. Notwithstanding that there may be a discretion available to the Drug Court, given the significance of a decision to revoke a CDTO and the stringent conditions otherwise imposed on that decision, this Review considers it appropriate to provide an additional test for revocation in section 106Q.

This Review supports an amendment, that would allow a participant to be revoked from the program if, in the opinion of the Drug Court following advice by the Director the person is unlikely to progress further in their CDTP, having regard to their progress to date. This would remove the nexus between "a serious failure to comply" and "a serious risk to self or others" in section 106Q(1)(a) of the CAS Act.

Participants will still have a clear incentive to make the best possible effort to complete the CDTP, namely subsequent parole consideration. Section 106Q(2) of the CAS Act requires the State Parole Authority (Parole Authority) to have regard to the circumstances which led to the revocation of a CDTO when considering parole for an offender whose CDTO has been revoked.

Judge Dive notes that whilst it would be undesirable for participants to be able to "opt out" of the program, it is contrary to much of the work done at the CDTCC and at the Drug Court for this initiative to rest solely in the management of the CDTCC, as much work is done in trying to empower participants to take responsibility for their own lives and decisions. Judge Dive said "In practical terms, I think that there is room for the recommendation to reflect the reality that a participant may, very sensibly, recognise that they should no longer be in the program and that management, and ultimately the Drug Court, agrees with that opinion."

The Review's Recommendation will provide the Director of the CDTCC with the capacity to form an opinion regarding the participant's progress, however, it is not prescriptive as to how the formation of that opinion is to be prompted.

**Recommendation 1: The legislation be amended to provide that an offender's compulsory drug treatment order may be revoked if, in the opinion of the Drug Court following advice by the Director of the CDTCC, the offender is unlikely to make further progress in the offender's compulsory drug treatment order.**

### 3.2.4 Reports and documents

Dr Birgden submitted that generally there is no issue with the form of documentation relating to personal plans and reports of regression, progression and revocation, but that the administrative burden to both the Drug Court and CDTCC staff is high, since 60% of participants regress and progress and 25% are ultimately revoked along the



way. She suggested that the Director should be provided with the capacity to regress a participant for no longer than 3 months and to notify the Drug Court via email rather than by providing a report<sup>23</sup>, subject to the participant having the option of requesting a regression report be provided to the Drug Court for decision to either confirm, revoke or amend the Director's regression decision<sup>24</sup>. A variation to the participant's personal plan would still be provided to the Drug Court for endorsement when the participant later re-progresses.

## Discussion

Judge Dive submitted that "Experience shows that, in many instances regression is an obvious and necessary response to a breach of the program, and the participant does not dispute it in any way. Yet a great deal of administrative effort is required to prepare reports and for the Drug Court to consider those reports. I would support an amendment whereby the Director could regress a participant, subject to the legislation providing an opportunity for the participant to seek a swift review of that decision by the Drug Court."

This Review supports Dr Birgden's proposal.

**Recommendation 2: The legislation be amended to provide that the Director of the CDTCC may direct that an offender regress to an earlier Stage of compulsory drug treatment detention for a period not exceeding 3 months if satisfied that the offender has failed to comply in a serious respect with any condition of the offender's compulsory drug treatment personal plan. The Director must notify the Drug Court of any regression direction within 7 days. An offender who is subject to a regression direction may, within 14 days of the direction, apply to the Drug Court to confirm, revoke or amend that direction.**

### 3.2.5 Sanctions and rewards

Dr Birgden submitted that the system of sanctions and rewards has been carefully designed based on empirical evidence: rather than managing behaviour by withdrawing privileges for minor violations, additional small rewards are provided for pro-social (or community-standard) behaviour. She advised that the CDTCC has had a rewards-to-sanctions ratio of 4:1 and immediate feedback regarding compliant and non-compliant behaviour, and "this system appears to be working well."

Dr Birgden noted that at times, both staff and participants have suggested a "one/three strikes and you're out" policy; however, she rejected this approach because:

- it is a punishment/deterrence approach which has no scientific evidence of reducing re-offending;
- drug use is a chronic relapsing condition which can take years to overcome, so drug use may be expected to recur to some degree;
- drug treatment and rehabilitation requires an individualised treatment approach, but such blanket punishment rules are not individualised; and
- this approach, as a criminal justice strategy, has failed in the USA.

<sup>23</sup> Requiring amendment of section 106M

<sup>24</sup> Similar to the provisions of section 106P(5) when the Commissioner makes a regression or removal order in special circumstances.

## Discussion

Section 106J of the *CAS Act* includes the conferral of privileges as a reward, while section 106I of the Act includes the withdrawal of privileges as a sanction. The operation of the rewards and sanctions system is administrative; and the 4:1 ratio of rewards to sanctions is an indicator of the success of the program in encouraging the adoption of positive behaviour (which is itself a rehabilitation indicator).

It is not proposed that any amendment be made to the sanctions and rewards provisions of the legislation at this time.

### 3.3 His Honour Judge Dive, Senior Judge, Drug Court of NSW

Judge Dive commented that the Drug Court remained impressed by the results being achieved by the CDTP, and is committed to supporting the program in future years. He also noted that “The program has attracted international interest and recognition, and is quite clearly supported by the judiciary of NSW as a program which seeks to achieve rehabilitation during an inevitable gaol sentence.”

Judge Dive noted that the Drug Court’s involvement with the CDTP has increased in recent times “not just through an increasing workload, but due to a growing recognition of the importance of the program in the development of government and corrections policy, given the clear need in NSW (and beyond) to find new long-term answers to the failed policy of simply incapacitating offenders who commit crimes due to their addiction to drugs.”

#### 3.3.1 The compulsory nature of the CDTP

Judge Dive submitted that the CDTP should retain its compulsory aspect “despite the question of compulsion having effectively been a non-issue throughout the program.” He stated that if the program was voluntary, offenders who are both eligible and suitable may make a poor decision and decline a referral without fully appreciating the benefits the CDTP can provide. He also noted that many participants have attended somewhat reluctantly, only to embrace the program once exposed to it and being involved in its positive aspects.

As noted at 3.2.2 above, it is not proposed that any amendment be made to the compulsory imposition of the program on eligible and suitable offenders at this time.

#### 3.3.2 Revoking the original parole order

Judge Dive submitted that “during the currency of this program, emphasis on eligibility for parole, and the date upon which the offender is (or was) eligible for parole has been reduced.” He advised that the Drug Court published “*Policy 14: Parole for participants of the Compulsory Drug Treatment Correctional Centre*”, which sets out the Court’s expectations as to “complying with, and indeed embracing, a CDTO instead of awaiting parole.” This Policy forms Appendix 2 of this Review.

Judge Dive advised “It has become quite clear that participants need to forget their parole date and concentrate on succeeding in their new CDTO instead, and the

policy sets out the court's expectations. Recent experience is that participants both understand and have accepted the reduced importance of their parole date."

Judge Dive submitted that "The legislation automatically revokes the parole eligibility date for those with sentences of three years or less, but not for those whose sentence is over three years. If that distinction is removed, all participants would have equal CDTOs, and all would have the same incentive to pursue success on their CDTF. On the making of a CDTO in the court room, the Drug Court could inform, both orally and in writing, the offender about the new order and that it replaces any parole determination previously made at the sentencing court."

## **Discussion**

The BOCSAR Evaluation reported<sup>25</sup> that 26 participants had exited the program by being released to parole during their CDTO: 12 from Stage 2 (semi-open detention), and 14 from Stage 3 (community custody). This group represented 48.1% of 54 participants who were no longer on the program at the time data collection for the Evaluation ceased, the remainder consisting of 26 participants (48.1%) who had been revoked and 2 participants (3.7%) who had died<sup>26</sup>.

### ***Participants with sentences of 3 years or less***

In relation to persons serving sentences of 3 years imprisonment or less, the sentencing court makes a parole *order* at the time of imposing the sentence *directing* the release of the offender on parole at the end of the non-parole period<sup>27</sup>. An offender subject to such an order is automatically entitled to be released at the expiration of their non-parole period, provided he or she is not subject to any other unexpired fixed term(s) or non-parole period(s)<sup>28</sup>.

Section 18G(b) of the *Drug Court Act 1998* provides that a CDTO revokes such parole orders: "A compulsory drug treatment order has the effect of ... (b) revoking any parole order made under section 50 of the *Crimes (Sentencing Procedure) Act 1999* in relation to the offender, ...". The effect of this section is that there is no longer an entitlement to release on parole on the expiration of the non-parole period specified by the sentencing court.

### ***Participants with sentences of more than three years***

No provision equivalent to section 18G(b) was necessary for participants serving sentences of more than three years imprisonment, because such offenders are not released to parole automatically on their eligibility date. The question of parole for these offenders is determined by the Parole Authority, and many are not released when eligible for parole at the expiration of their non-parole period<sup>29</sup>. In the usual course, the Parole Authority will consider an offender's release to parole at least

<sup>25</sup> Page 20

<sup>26</sup> CSNSW advises that as of 31 March 2012, 51 participants had exited the program by being released to parole and 4 had exited by way of expired sentences, together representing 39.0% of 142 total ex-participants.

<sup>27</sup> Section 50(1) *Crimes (Sentencing Procedure) Act 1999*

<sup>28</sup> Sections 126 & 158 *CAS Act*

<sup>29</sup> In 2010, the State Parole Authority ordered parole for 948 offenders and refused parole to 600 offenders, while in 2009 it ordered parole for 924 offenders and refused parole to 676 offenders: SPA Annual Report 2010, pages 13, 15.

sixty days prior to the expiration of the non-parole period, as required by section 137 of the *CAS Act*<sup>30</sup>. The CDTCC legislation does not remove the obligation for parole consideration contained in section 137, even when a person is subject to a CDTO.

The Drug Court, in acting as the Parole Authority for offenders serving compulsory drug treatment detention<sup>31</sup>, therefore must *consider* a participant's release to parole at least 60 days before the date on which their non-parole period expires<sup>32</sup>; it is not obliged to release the offender, but may do so if it is satisfied that the release of the offender is in the public interest, after considering numerous factors prescribed by legislation<sup>33</sup>. Whether a court-based parole order is revoked or whether the Drug Court acts as the Parole Authority for participants serving sentences greater than three years, the end result is the same: the participant is only released when the Drug Court determines that release is appropriate, and so orders.

Retaining the requirement to consider parole for CDTO offenders serving sentences of more than three years imprisonment, ignored an endemic inmate trait, namely the possessive regard which participants may have for their parole. The existence of a requirement to consider parole for these offenders creates a perception that they still have a "parole date", unlike those serving sentences of three years or less. This perception remains even though a significant number of these offenders are refused parole once they have completed the non-parole period of their sentence. Nevertheless, the visibility of a "parole date" for one group of participants, and its absence for another group, creates an anomaly in the way that participants approach their CDTO, as submitted by Judge Dive.

Amending the legislation to ensure that all offenders are treated consistently with regard to parole is desirable. This can be achieved by providing that the making of a CDTO suspends the requirement to consider the offender's release to parole under section 137 of the *CAS Act*. This amendment would bring the treatment of those serving sentences of more than three years into line with those serving sentences of three years or less, where a CDTO already has the effect of revoking the order for automatic release. A "non-parole period" would still exist for all offenders, but an offender subject to a CDTO would not have an order for automatic release or a requirement for their release on parole to be considered in the lead-up to their parole eligibility date. This outcome could be achieved through amendment to section 18G of the *Drug Court Act 1998*.

Such a change should alleviate the concerns raised by Judge Dive. The Review supports this change.

As the amendment will only suspend the requirement to consider parole while the CDTO is in force, should the CDTO later be revoked that requirement will be reinstated. If the offender has not reached the end of their original non-parole period and has more than 60 days remaining before their parole eligibility date, parole will be considered in the usual manner provided for under section 137.

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<sup>30</sup> Or, in the case of serious offenders, section 143 of the *CAS Act*. The definition of 'serious offender' would likely preclude eligibility for the CDTP in any event.

<sup>31</sup> Section 106T *CAS Act*

<sup>32</sup> Section 137(1) *CAS Act*

<sup>33</sup> Section 135(2) *CAS Act*

However, a formal mechanism will be required for those offenders whose CDTO is revoked within 60 days of their parole eligibility date or after their parole eligibility date has passed to place their matters before the Parole Authority. An addition to the “manifest injustice” provisions of clause 233 of the *CAS Regulation* / section 137B of the *CAS Act* could provide this mechanism.

**Recommendation 3: The legislation be amended to provide that the requirement to consider an offender’s release on parole be suspended whilst the offender is subject to a compulsory drug treatment order. Transitional provisions should be included to facilitate expedited parole consideration for those offenders whose CDTO is revoked within 60 days of their parole eligibility date or after their parole eligibility date has passed.**

### 3.3.3 Eligibility – length of sentence

Judge Dive submitted that the upper limit of sentences which are eligible for the program could be determined by the total term rather than the outstanding non-parole period, which he argues, would remove an occasional unnecessary barrier to eligibility and would logically fit in with his submission above (at 3.3.2) regarding “the increasing lack of relevance of the specified non-parole period.” Judge Dive suggests a total term of six years as the new upper limit, retaining the current minimum of 18 months non-parole period at the time of sentence.

Judge Dive also submitted that an existing situation of ineligibility which “cannot have been intended by the legislation” should be rectified. He said “An otherwise suitable offender may not be eligible for a CDTO because he is currently serving a different short sentence that is not a sentence that can be the subject of a CDTO. For example, the offender may have been sentenced in the Local Court to a fixed term of imprisonment of eight months, a sentence which is wholly concurrent with a longer (eligible) sentence imposed in the District Court. That eight month sentence cannot be the subject of a CDTO, and cannot be added to the CDTO under section 106W of the *CAS Act*, as the CDTO is not yet in force.”

## Discussion

Section 5A of the *Drug Court Act 1998* provides:

(1) *A person is an eligible convicted offender if:*

- (a) *the person is convicted of an offence, other than an offence referred to in subsection (2), and*
- (b) *the person has been sentenced to a term of imprisonment for the offence to be served by way of full-time detention and the unexpired non-parole period in relation to that sentence is:*
  - (i) *at the time the Drug Court is determining whether to make a compulsory drug treatment order with respect to the person—a period of no more than 3 years, and*
  - (ii) *at the time that the sentence was imposed—a period of at least 18 months, and*
- (c) ....

Judge Dive's proposal would retain the second limb but replace the existing non-parole period upper limit with a new upper limit being a head sentence of six years.

The BOCSAR Evaluation reported<sup>34</sup>: "The average length of the non-parole period for CDTOs during the study period was 20.5 months (range = 6-35 months). Thirty-eight per cent had orders that were less than 18 months<sup>35</sup>, 36 per cent had orders that were between 18 and 24 months inclusive, and 25 per cent had orders over 24 months long."

Section 106D of the *CAS Act* provides for 3 Stages of compulsory drug treatment *detention*<sup>36</sup>, and defines those Stages as closed detention (Stage 1), semi-open detention (Stage 2) and community custody (Stage 3). It does not allocate set periods for each Stage; however, the requirements of each Stage realistically require a minimum of 6 months to achieve. Lowering the minimum non-parole period from its current level of 18 months remaining from time of sentence will result in a lower rate of program completion, as participants will not have sufficient time to complete the first three Stages and still allow sufficient time on parole to complete Stage 4.

The original intention of the sentence parameters (3 year maximum remaining non-parole period from the time of Drug Court determination, 18 months minimum remaining non-parole period at time of sentence) appears to have been to enable participants to complete Stages 1 to 3 of the CDTP during the non-parole period, and then progress to Stage 4 during the parole period – assuming 6 months spent on each Stage. This thinking appears to be supported in *A new way to break the drug-crime cycle – Labor's Compulsory Drug Treatment Plan*, which proposed<sup>37</sup>: "Each stage will be for a minimum of six months, and a maximum of 12 months. The total time on the program must not be less than 18 months."

In the Second Reading Speech to the *Compulsory Drug Treatment Correctional Centre Bill 2004*, the Hon. John Della Bosca MLC said: "The offender's sentence must be long enough for an 18 month to 3 year compulsory drug treatment program."

The placement of Stage 3 (treatment in a community based setting) during the non-parole period provides a strong incentive for participants to comply with their program, complete Stages 1 and 2 and therefore achieve "release" from gaol earlier than they otherwise would, whilst the placement of Stage 4 in the parole period gives legal status to their continued case management<sup>38</sup> and supervision<sup>39</sup>.

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<sup>34</sup> Page 19

<sup>35</sup> BOCSAR Evaluation footnote: "CDTOs of less than 18 months can arise because of the need for eligibility and suitability assessments to be made before a CDTO can be made."

<sup>36</sup> Stage 4 (parole) and Stage 5 (voluntary post-sentence case management in the community) are post-detention stages not prescribed by the *CAS Act*

<sup>37</sup> Page 6

<sup>38</sup> Clause 241(1) *Crimes (Administration of Sentences) Regulation 2008*: "The Commissioner may require a case plan to be prepared in relation to any offender or class of offenders, and may adopt any case plan so prepared."

<sup>39</sup> Note, however, the BOCSAR Evaluation Report: 12 participants were released to parole during Stage 2, and 14 participants were released to parole during Stage 3.

It is noted that the CDTCC staff and participants both queried whether the current 18 months minimum non-parole period is long enough (see 3.12.1 and 3.13.1 below), while Justice Health suggested that it be reduced (see 3.11.1 below).

A balance needs to be struck between maximising the opportunity of an offender to undertake the CDTP, and ensuring that those who are accepted onto the program have sufficient time in which to complete Stages 1 to 3 of the program. There is no "perfect" timeframe that would allow all eligible offenders the "right" amount of time, since that time depends on the individual circumstances of each participant. The present provision appears to strike the best possible balance.

The nature of drug dependence must also be recognised. In commenting for the purpose of this Review, Sue Henry-Edwards, Principal Adviser Alcohol and Other Drugs (AOD) / Health Promotion (HP), CSNSW, said: "Drug dependence is a long term chronic relapsing condition and most people require multiple attempts to cease use of the drug on which they are dependent, and to remain abstinent from that drug. Relapse is a normal and expected part of the recovery process. Evidence suggests that those dependent on nicotine require 12 to 14 attempts before they can successfully maintain smoking cessation, while those dependent on illicit drugs require at least 6 attempts on average." Participants completing a "linear" progression through all stages of the CDTP will be a small minority of all accepted participants.

Accordingly, the Review does not support reducing the minimum non-parole period from its current 18 months.

The BOCSAR Evaluation reported<sup>40</sup> that 14 participants were released to parole from Stage 3, while 12 participants were released from Stage 2<sup>41</sup>. It did not report on any participants in Stage 4, mentioning<sup>42</sup> that "It was beyond the scope of the study to investigate the impact of Stages 4 and 5<sup>43</sup>."

It is unclear how many participants were released to parole *after completing* Stage 3, and how many were released *during* Stage 3 because of the imminent expiry of their sentence. Logic would suggest, however, that all those released from Stage 2 were released as a result of the imminent expiry of their sentence (and the need for a transition period of parole supervision) rather than as a result of completing Stages 1-3 of the program<sup>44</sup>.

Using the total sentence as an upper limit on eligibility could result in more participants being released to parole *after completing all earlier stages of the program*, rather than because they ran out of time to complete Stages 1-3 during their sentence. It may also result in participants being released to parole significantly earlier than they would have been if they had not been subject to a

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<sup>40</sup> Page 20

<sup>41</sup> CSNSW advised that six participants eligible for parole have requested that they remain on Stage 3.

<sup>42</sup> Page vii

<sup>43</sup> Stage 5 is voluntary post-sentence case management in the community.

<sup>44</sup> Note that section 106Q(1)(b) provides that the Drug Court may revoke an offender's CDTO if the non-parole period for an offender's sentence has expired or is about to expire and the offender is serving his or her sentence in Stage 1 or Stage 2.

CDTO; however, if they are released significantly earlier, it is because they have achieved significant success in their program, and hence their rehabilitation.

Given that the CDTP has never been at 100% capacity in the five years of its operation<sup>45</sup>, an increase in the upper limit of sentence as recommended by Judge Dive could result in more participants having the opportunity to complete Stages 1 to 3 of the program before being released to parole, and still have sufficient time on parole to benefit from the full term of Stage 4. For this reason, Judge Dive's recommendation is supported.

It should also be acknowledged that this proposed change in maximum sentence length could lead to some offenders who have engaged in more serious<sup>46</sup> or extensive criminality being eligible for the CDTP. There will also be potential for a participant to spend longer than three years in the program, as a result of being progressed and regressed multiple times.

Judge Dive's proposal will also simplify the eligibility criteria by providing the same time point for determining both the minimum and maximum terms. Currently, the minimum unexpired non-parole period dates from the time of sentence, while the maximum unexpired portion of the sentence dates from the time the Drug Court makes its determination.

The *Courts Legislation Further Amendment Act 2006* introduced the requirement to date the minimum term from the date of sentence<sup>47</sup> (it had originally been from the date of the Drug Court determination); and the reasons for this change remain valid. It is therefore proposed that, for simplicity, the maximum term of sentence should also date from time of sentence. This change would also have the added benefit of addressing the issue of referral delay addressed at 3.4.1 below.

**Recommendation 4: The legislation be amended to provide that for a compulsory drug treatment order, a person is an eligible convicted offender if the person is convicted of an offence, other than an ineligible offence, and at the time the person was sentenced the unexpired non-parole period was no less than 18 months and the unexpired head sentence was no more than 6 years.**

Judge Dive's submission regarding the removal of ineligibility caused by a concurrent ineligible short sentence imposed by the Local Court is similar to a proposal made by the then Director of Public Prosecutions Mr N. R. Cowdery QC, which is discussed at 3.4.2 below.

### 3.3.4 Eligibility - the recidivism criteria

Judge Dive states in his submission: "Amongst other criteria, an offender must have been convicted of at least two offences in the last five years. I understand that this provision was included in the legislation to justify the compulsory treatment of

<sup>45</sup> See Submission of Dr Birgden at 3.2.1

<sup>46</sup> Though the statutory exclusions provided by section 5A(2) of the *Drug Court Act 1998* will still exclude offenders convicted of sexual offences and serious violent offences – subject to amendments proposed in Recommendation 9

<sup>47</sup> See discussion at 3.4.1 below



reluctant participants. Four years of experience now shows that reluctance has not been an issue. There have only been two occasions in those years of a participant resisting the making of a CDTO<sup>48</sup>."

Judge Dive also noted that "The current provisions have excluded otherwise eligible offenders, no doubt unintentionally"; and cited the example of offenders who ask for matters to be taken into account<sup>49</sup> on a "Form 1", being excluded because having matters included on a Form 1 means there has been no conviction for those matters, contributing to those offenders having insufficient convictions to be eligible. "Similarly, there may be arguments as to whether orders made in the Children's Court count towards the recidivism criteria, especially if no specific conviction order was made in the Children's Court."

Judge Dive submitted: "Consideration should be given to removing the recidivism requirement altogether, and leaving the question as to suitability to the assessment of the multi-disciplinary team, which is going to provide more relevant and accurate assessments than the fact of two prior convictions. After all, if the offender has received a long gaol term for a crime which was related to his long-term drug dependency and associated lifestyle<sup>50</sup>, the number of times he has been caught and convicted is less relevant than the in-depth assessment by the multi-disciplinary team. Experience tells us, in any event, this group of potential participants is probably committing crimes each day."

Judge Dive advised of one applicant who missed out by one week. The applicant was sentenced in the District Court on 30 March 2010, and the second conviction on which he would rely involved him being sentenced on 23 March 2005.

## Discussion

One of the statutory objects of compulsory drug treatment is to provide rehabilitation for drug dependent persons who "...repeatedly resort to criminal activity to support that dependency".<sup>51</sup> Further, the original policy proposal for the CDTCC referred several times to offenders who have "committed multiple criminal offences over a long period" and "who have been gaoled previously on multiple occasions (and) have constantly been before the courts".

It is clear that recidivist offenders are the intended target for compulsory drug treatment and any reforms to the eligibility criteria will need to ensure that this intent is met.

When the *Compulsory Drug Treatment Correctional Centre Act 2004* commenced, the eligibility criteria included a requirement that the offender had to have been convicted of at least *three* other offences in the previous five years before being sentenced<sup>52</sup>. The *Courts Legislation Further Amendment Act 2006* reduced this

<sup>48</sup> "In one case, tragically, it was because the offender's father was already a participant. In the second case, through no fault of the offender, his file was not received from the sentencing court for many months, by which time he had settled into a young offenders program at Oberon Correctional Centre."

<sup>49</sup> Under Division 3 of Part 3 *Crimes (Sentencing Procedure) Act 1999*

<sup>50</sup> Section 5A(1)(e) *Drug Court Act 1998*

<sup>51</sup> Section 106B of the *CAS Act*

<sup>52</sup> Section 5A(1)(c) *Drug Court Act 1998*.

requirement to at least *two* other convictions in the previous five years before sentence.

In the Second Reading Speech to the Amendment Bill on 24 May 2006, the Parliamentary Secretary Mr Newell MP said:

*"Item [2] of Schedule 2 will adjust the recidivism criteria of eligible offenders from three prior convictions in the past five years to two prior convictions. This will mean that offenders on the program will have committed a total of three offences in a five year period. The program will remain consistent with the Government's commitment for the program to target recidivist offenders."*

Whilst the Second Reading Speech did not expressly state that the purpose of the amendment was to increase the pool of eligible offenders, that was necessarily the effect of the amendment, since there are more offenders with at least two convictions than with at least three convictions in a given period. The amendment was not opposed by the (then) Opposition<sup>53</sup>.

Removing the "recidivism criteria", as submitted by Judge Dive, would extend the inferred purpose of the 2006 amendment. It would make the program available to a wider pool of participants whose criminality is related to long-term drug dependency and associated lifestyle<sup>54</sup>.

The matter of *Paton [2007] NSWDRGC 2*<sup>55</sup>, provides an example of the barriers to entry which the current recidivism criteria can create. In that matter, the court had to consider whether the applicant was eligible for a CDTO in circumstances where he had been subject to a "finding of guilt" but not a conviction in the Children's Court, in relation to a firearms offence. The Drug Court found that this was not a conviction for the purposes of section 5A of the *Drug Court Act 1998*, noting that at the time the offender was dealt with (1984), criminal proceedings against children and young persons were governed by the (now repealed) *Child Welfare Act 1939* which provided<sup>56</sup> that "The words 'conviction', 'sentence' and 'imprisonment' shall cease to be used in relation to children and young persons, and any reference in any enactment to a person convicted, a conviction, a sentence or imprisonment shall, in the case of a child or young person, be construed as a reference to a person found guilty of an offence, a finding of guilt, an order made upon such a finding or detention as the case may be."

The judgment continued: "So not only was no conviction recorded against young Mr Paton, the recording of a conviction was not a possible outcome of the proceedings... The current law, provided in the *Children (Criminal Proceedings) Act 1987*, only allows convictions to be recorded against young persons of or over 16 years of age, but prohibits the recording of convictions against children under 16."

As the term "conviction" is not defined for the purposes of the eligibility criteria, the court has had to interpret it strictly i.e. only referring to matters where a conviction was recorded. One way to address Judge Dive's concern, while retaining the recidivism criteria, would be to define "conviction" more broadly to include outcomes such as: findings of guilt without a conviction being recorded; orders made by the

<sup>53</sup> Hansard: Legislative Assembly 6 June 2006; Legislative Council 8 June 2006

<sup>54</sup> Section 5A(1)(e) *Drug Court Act 1998*

<sup>55</sup> Available at [http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll\\_caselaw.nsf/pages/cl\\_drug\\_court](http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_drug_court)

<sup>56</sup> section 128

Children's Court; and, matters taken into account in connection with a guilty plea. There is precedent for defining "conviction" to capture non-conviction outcomes in the *Bail Act 1978*, the *Criminal Records Act 1991*, the *Victims Support and Rehabilitation Act 1996* and the *Commission for Children and Young People Act 1998*.

However, even if the definition was broadened, eligibility would still depend on the offender having had at least two such convictions in the preceding five year period. This remains a highly arbitrary requirement which may exclude otherwise appropriate offenders from the CDTP. For example, an offender may not have had any convictions in the preceding five years as they have been in custody serving lengthy sentences for earlier offences. Alternatively, a drug-dependent offender may have committed a number of offences within the preceding five year period but no convictions have been recorded as the matters were not detected. Such offenders would be ineligible for the CDTP under the present criteria. As Judge Dive has noted, relying on a specific number of convictions in a fixed period to indicate recidivism may not reflect the realities of a drug dependent lifestyle.

Judge Dive proposed that instead of determining eligibility on the basis of the existing recidivism criteria, past criminal offending (whether convictions or otherwise) should be a factor to be considered by the multi-disciplinary team in the suitability assessment process. There would be no specific number or frequency of prior convictions required before a person could be assessed as suitable. This proposal would ensure that the integrity of the assessment process is not complicated by semantic distinctions between convictions, findings, orders and matters taken into account. Further, it would result in significantly greater flexibility in determining whether or not a person is eligible and suitable for a CDTO.

There is precedent for the type of reform proposed by Judge Dive. As originally passed, section 5A(2)(d) of the *Drug Court Act 1998* provided that an offender was not eligible for the CDTP if they had been convicted of ... (d) any offence that, in the opinion of the Drug Court, involves serious violence...". The *Courts Legislation (Further Amendment) Act 2006* repealed this exclusionary criteria and replaced it with a requirement that the multi-disciplinary team consider "the offender's history of committing offences involving violence" when making a suitability assessment.<sup>57</sup> The Review is not aware of any difficulties created by this reform.

This Review considers that Judge Dive's proposal represents an appropriate compromise between the need to preserve the policy intent of the CDTP while ensuring that otherwise appropriate offenders are not excluded from the program on the basis of excessively arbitrary criteria. The additional criteria for the multi-disciplinary team to consider when assessing suitability can be drafted in way that clearly reflects the policy intent of the CDTP i.e. to target recidivist drug-dependent offenders.

Transitional provisions will be included in the legislation to ensure that offenders who were referred for assessment prior to the reforms receive the benefit of the amended eligibility and suitability requirements.

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<sup>57</sup> Section 18E(2)(c1) *Drug Court Act 1998*

**Recommendation 5:** The legislation be amended to: remove the recidivism criteria from the definition of “eligible convicted offender” in section 5A of the *Drug Court Act 1998*; and, provide that when assessing an offender’s suitability to serve a sentence by way of compulsory drug treatment detention, the multi-disciplinary team is to have regard to whether the offender has a history of prior criminal offending which is related to long-term drug dependency and associated lifestyle.

### **3.3.5 Revocation of CDTOs**

Judge Dive also supported the submission of CDTCC Director Dr Astrid Birgden at 3.2.3 above, for a provision enabling the revocation of a CDTO without the need for an offender to commit a serious breach of the program to ensure his removal. He noted “Experience has shown that a situation can arise whereby an offender wants to leave the CDTP, and the Director and staff agree that it would be better if a participant left the program. Such a departure can be beneficial for all involved, including the other participants, who may be being endlessly distracted by an offender who is now in the wrong program... Leaving unsuitable or unwilling participants in the program is of no benefit to them, the treatment staff, or other participants.”

This proposal is discussed at 3.2.3 above and forms Recommendation 1.

### **3.3.6 Regression decisions**

Judge Dive noted that he had discussed with Dr Birgden, Director CDTCC, her submission (at 3.2.4 above) that the Director could regress a participant without the need for the matter to be first considered by the Drug Court, subject to notification of the regression to the Drug Court and a provision that the participant may seek a swift review of that regression decision by the Drug Court. This proposal is discussed at 3.2.4 above and forms Recommendation 2.

### **3.3.7 Registrar’s powers**

Judge Dive submitted that “It would be of practical assistance if the Registrar of the Drug Court could receive delegated powers from the Senior Judge to perform some more minor judicial functions of the Drug Court (and not only in relation to the CDTP). Section 29 of the *Drug Court Act 1998* provides for the exercise of ‘administrative functions’ by the Registrar, however, it would also be appropriate for the Registrar to be empowered to perform more minor judicial functions, such as the granting of adjournments, the setting of timetables as to hearings, the ordering of warrants etc, just as many Registrars in other jurisdictions can.”

## **Discussion**

The Drug Court of New South Wales is constituted as "a court of record"<sup>58</sup>. It has: (a) the criminal jurisdiction of the District Court, (b) the criminal jurisdiction of the Local Court, and (c) such other jurisdiction as is vested in the Drug Court "by this or any other Act"<sup>59</sup>.

For the purpose of enabling it to exercise its jurisdiction, the Drug Court has (a) all of the functions of the District Court that are exercisable in relation to its criminal jurisdiction, (b) all of the functions of the Local Court that are exercisable in relation to its criminal jurisdiction, including all the functions exercisable by a Magistrate under the *Criminal Procedure Act 1986* or the *Bail Act 1978*, and (c) such other functions as are conferred on it "by this or any other Act"<sup>60</sup>.

Judge Dive has referred to the issuing of warrants as one of the judicial functions that could be delegated to a Registrar, however this is already permitted by section 106X of the *CAS Act*<sup>61</sup> - the Registrar may issue an arrest warrant for a Stage 2 or Stage 3 CDTO participant who is suspected of not complying with their CDTF.

Pursuant to section 29 of the *Drug Court Act 1998*, the Registrar of the Drug Court may exercise (a) such administrative functions of the Court as are conferred or imposed on the registrar by the regulations or the rules of court, (b) such of the functions of a registrar of the District Court as are relevant to the exercise by the Drug Court of the criminal jurisdiction of a District Court, and (c) such of the functions of a registrar of a Local Court as are relevant to the exercise by the Drug Court of the criminal jurisdiction of the Local Court<sup>62</sup>. The *Drug Court Regulation 2010* does not make any provision with respect to registrar's functions<sup>63</sup>.

The powers of a Judicial Registrar of the District Court are contained in section 18FB (1) of the *District Court Act 1973*:

- (1) *The Judicial Registrar may, subject to the direction of the Chief Judge, exercise such powers of the Court as are, by or under this or any other Act, conferred on the Judicial Registrar. The Judicial Registrar constitutes the Court for the purpose of the exercise of those powers.*

The *District Court Rules 1973* (Part 43A, Rule 1) provide:

- (1) *For the purpose of section 18FB(1) of the Act, all of the powers of the Court are conferred on the Judicial Registrar other than:*
  - (a) *the powers of the Court in its criminal jurisdiction (except for the Court's powers under rule 6, 7 or 10F of Part 53 or under the Bail Act 1978), or*
  - (b) *the power of the Court to deal with contempt of Court.*

<sup>58</sup> Section 19 *Drug Court Act 1998*

<sup>59</sup> Section 24(1) *Drug Court Act 1998*

<sup>60</sup> Section 24(2) *Drug Court Act 1998*

<sup>61</sup> Section 106X: "(1) If it suspects that an offender who is not serving the offender's sentence of imprisonment in the Compulsory Drug Treatment Correctional Centre may have failed to comply with his or her compulsory drug treatment personal plan, the Drug Court may issue a warrant for the offender's arrest. ... (4) The Drug Court's functions under this section may be exercised by the Registrar of the Drug Court."

<sup>62</sup> Section 29(2) *Drug Court Act 1998*

<sup>63</sup> Likewise its predecessor the *Drug Court Regulation 2005*

Therefore, registrars of the District Court have a delegation with regard to the listing and adjournment of matters (Part 53, Rule 6), the venue for matters (Part 53, Rule 7) and determination of bail.

Section 19(1) of the *Local Court Act 2007* provides:

- (1) *A Registrar has and may exercise the functions conferred on a registrar by or under this Act, the rules or any other Act or law.*

Rule 8.2 of the *Local Court Rules 2009* lists the functions of the Local Court that may be exercised by a registrar, including timetable management, adjournments and the determination of preliminary matters.

By operation of sections 29(2)(b) and (c) of the *Drug Court Act 1998*, the Drug Court Registrar can exercise all the functions of a Registrar of both the District and Local Courts in their criminal jurisdiction, which would include all the functions referred to above.

In subsequent representations, Judge Dive raised particular concern about the use of the word “administrative” in section 29(2)(a) to describe the functions which can be conferred on the Drug Court Registrar. The Review notes that the provisions conferring functions on Registrars of the Local and District Courts, as set out above, simply refer to “functions”, not “administrative functions”. In order to avoid confusion, and ensure that the Registrar of the Drug Court has powers consistent with those of the Local and District Courts, it is proposed to amend the legislation to remove the word “administrative” from section 29(2)(a).

**Recommendation 6: The legislation be amended to remove the word “administrative” from section 29(1)(a) of the *Drug Court Act 1998*.**

### 3.4 Mr N. R. Cowdery QC, Director of Public Prosecutions<sup>64</sup>

The then Director of Public Prosecutions, Mr N. R. Cowdery QC stated in his submission that he understands from ODPP lawyers working at the Drug Court that the compulsory drug treatment program is generally working very well and he only wished to raise two aspects of the legislative framework for consideration.

#### 3.4.1 Definition of eligible convicted offender

Mr Cowdery drew attention to section 5A of the *Drug Court Act 1998*, which provides:

- (1) *A person is an eligible convicted offender if:*
- (a) *the person is convicted of an offence, other than an offence referred to in subsection (2), and*
  - (b) *the person has been sentenced to a term of imprisonment for the offence to be served by way of full-time detention and the unexpired non-parole period in relation to that sentence is:*

<sup>64</sup> Mr Cowdery retired as Director of Public Prosecutions on 8 March 2011.

- (i) ***at the time the Drug Court is determining whether to make a compulsory drug treatment order with respect to the person—a period of no more than 3 years, and***
- (ii) *at the time that the sentence was imposed—a period of at least 18 months, and*
- (c) ....

Mr Cowdery stated that section 5A(1)(b)(i) may be interpreted to allow a delay in assessment so an offender with a substantially longer non-parole period than 3 years could be found eligible, and advised that there was an instance of a Court Registry not forwarding the referral papers for 9 months, the papers having been marked by the judge “to be referred at the appropriate time.” If the person had been referred immediately post-sentence, he would have been ineligible as the unexpired non-parole period was 3 years 6 months at the time of sentence<sup>65</sup>.

Mr Cowdery observed that “the wording of the section and the beneficial nature of Drug Court legislation allow for the provision to be read in the applicant’s favour. However, an equity issue arises as other applicants to the Drug Court are routinely excluded from the program if they have sentences longer than 3 years. If the policy is that only offenders who receive sentences within this range are to be eligible for this program, the original wording of section 5A(1)(b) achieved this policy, namely:

*“(b) the person has been sentenced to a term of imprisonment for the offence to be served by way of full-time detention and the unexpired non-parole period in relation to that sentence is a period of at least 18 months but not more than 3 years.”*

Mr Cowdery recommended a minor amendment to the wording of the section and a regulation or practice note in respect of timing for referrals.

## Discussion

The original wording of section 5A was amended by the *Courts Legislation Further Amendment Act 2006*. In the Second Reading Speech to the Bill on 24 May 2006, the Parliamentary Secretary Mr Newell MP set out the reason for the amendment:

*“Item [1] of Schedule 2 adjusts the criteria to allow offenders with an unexpired non-parole period at the time of sentence to access the program. Currently, an offender must have an unexpired non-parole period of at least 18 months at the time the Drug Court makes the compulsory drug treatment order. This means that an offender who has an 18 month non-parole period at the time of sentence will automatically become ineligible by the time the matter is assessed by the Drug Court. The amendment will increase potential referrals by preventing offenders from lapsing out of eligibility due to the processing time between referral by a sentencing court and the making of the Drug Court’s compulsory drug treatment order.”*

No change was made by the Amending Act to the maximum 3 year unexpired non-parole period from the date of the Drug Court determination. The amendment only

<sup>65</sup> His Honour Judge Dive, Senior Judge of the Drug Court, also referred to this instance in his submission, describing it as “not a scenario envisaged in the design of the program”.

changed the relevant time at which the maximum unexpired non-parole period had relevance (ie, at the time of the Drug Court determination) and separated it from the time when the minimum non-parole period had relevance (time of sentence). The instance mentioned by Mr Cowdery appears to have allowed a referral for an offender who would not have been originally intended as an eligible convicted offender.

Section 18B (3) of the *Drug Court Act 1998* provides that "The duty imposed on a court by this section (to refer a potentially eligible offender to the Drug Court) is to be exercised as soon as practicable after the person is sentenced to imprisonment or the appeal is dealt with." The proper application of this provision should avoid cases such as that cited by Mr Cowdery. Whilst amendment is not warranted on this basis, it is noted that the effect of Recommendation 4 i.e. calculating the upper limit from the date of sentence, will in itself avoid the situation occurring again.

### **3.4.2 Definition of "old sentence" in the *Crimes (Administration of Sentences) Act 1999*.**

The second submission by Mr Cowdery was in relation to section 106W of the CAS Act, which provides:

- (1) *If an offender is convicted and sentenced to a term of imprisonment (a **new sentence**) for an offence that occurred before the offender's compulsory drug treatment order was made, the court that sentenced that offender is to refer the offender to the Drug Court to determine whether the offender's compulsory drug treatment order should:*
  - (a) *be varied so as to apply also in relation to the new sentence, or*
  - (b) *be revoked.*
- (2) *The Drug Court may vary a compulsory drug treatment order so as to direct an offender to serve a new sentence of imprisonment by way of compulsory drug treatment detention.*
- (3) *Subject to subsection (4), the Drug Court must not vary a compulsory drug treatment order under this section unless the offender is an eligible convicted offender (within the meaning of the Drug Court Act 1998).*
- (4) *Despite section 5A (1) (b) of the Drug Court Act 1998, the Drug Court may vary a compulsory drug treatment order under this section if the cumulative unexpired non-parole period for the offender's term of imprisonment under all sentences in force is greater than 3 years but not more than 4 years."*

"Offender" is defined in Part 4A of the CAS Act to mean "a person in respect of whom a compulsory drug treatment order is in force".

This section allows outstanding eligible matters to be brought to the Drug Court that may have been dealt with by other courts for a CDTP participant, and was drafted (according to Mr Cowdery's submission) on the assumption that this would occur post-CDTO. Mr Cowdery submitted:

"This is a very practical provision that acknowledges that it is in the nature of recidivist offenders to have outstanding 'old' matters that may come to light at a later date and result in a further sentence. However, an issue could arise in respect of timing, given the current wording of the section.

"The problem arises in this way. While a referred eligible convicted offender is awaiting assessment for suitability, s/he is not subject to a CDTO. The period



for assessment can be lengthy... If they are sentenced (for another matter) in the assessment period, that sentence cannot be referred, as it pre-dates the order."

Mr Cowdery suggested an amendment such as:

*"Or, if the Drug Court is made aware that a new sentence (as defined in section 1) was imposed by another Court whilst an eligible convicted offender was awaiting a compulsory drug treatment order, the Drug Court may request the new sentence be referred to the Court to determine whether the offender's compulsory drug treatment order should:*

- (a) be varied so as to apply in relation to the new sentence, or*
- (b) be revoked."*

## Discussion

Mr Cowdery's submission overlaps with Judge Dive's proposal at 3.3.3.

Mr Cowdery's submission focussed on sentences imposed while an offender is being assessed as to suitability for a CDTO, noting that such sentences cannot presently be referred to the Drug Court under the terms of section 106W. Judge Dive also noted this issue but raised a further concern about sentences imposed prior to the person being referred to the Drug Court which are still running at the time the CDTO is imposed.

These difficulties arise largely because of the definition of "offender" in Part 4A. As the definition only captures persons already subject to a CDTO, the obligation under section 106W only applies where a court is sentencing an offender who is already on the CDTP.

The issue can be resolved by way of an amendment to the section to provide that the obligation to refer a sentence to the Drug Court applies to any court which has imposed a sentence that will be served concurrently or partially concurrently with a sentence in relation to which a CDTO is in place, regardless of when the original sentence was imposed. In practice, this will mean that an offender whose sentence is referred to the Drug Court for consideration of a CDTO, will be able to have any other sentences that overlap with the referred sentence also referred to the Drug Court for its consideration. This will address the issues raised by both Mr Cowdery and Judge Dive.

**Recommendation 7: The legislation be amended to provide that section 106W of the *Crimes (Administration of Sentences) Act 1999* requires a court to refer to the Drug Court any sentence that will be served concurrently or partially concurrently with a sentence in relation to which a CDTO is in place, regardless of when the sentence was imposed. .**

## 3.5 Mr Tim Wilson, Chaplain CDTCC

### 3.5.1 Eligibility criteria to the CDTCC

Mr Wilson submitted that the legislative eligibility criteria need to reflect that a person will not be prevented from entering the CDTP on the basis of an intellectual disability, and that where a person has a diagnosed intellectual disability the program should make necessary adjustments to accommodate the participant.

Mr Wilson also submitted that the eligibility criteria should give preference (where appropriate) to Indigenous applicants, in light of the incarceration rate of Indigenous people; and that eligibility should be geared towards older participants.

## **Discussion**

Consideration of participants with an intellectual disability is considered at 3.10.1 in discussion of the submission from Ageing Disability and Homecare, Department of Human Services.

The status of indigenous participants is considered at 3.9.1 in discussion of the submission from Aboriginal Affairs, Department of Human Services.

The age of eligible participants is considered at 3.13.1 in discussion of the views expressed by program participants.

### **3.5.2 Non-contact visits for Stage 1.**

Whilst recognising the security considerations inherent in restricting visits to Stage 1 participants to non-contact visits, Mr Wilson raised the issue of non-contact visits as potentially breaching human rights, particularly with respect to participants' children. He described non-contact visits as a form of punishment, submitting that participants are in Stage 1 for at least 8 months and in some cases for over 12 months depending on their progress, and deprived of contact visits for that time. Where the participant has a child, the restriction to box visits could profoundly affect the emotional and psychological welfare of the child.

Mr Wilson submits that non-contact visits should only be employed where a participant in Stage 1 has used illicit drugs or been involved in procuring, organising or handling illicit drugs while in Stage 1, or persons regressed to Stage 1 after being breached on the same grounds in Stage 2 or Stage 3.

## **Discussion**

The regulation of visits does not form part of the legislation under review but the submissions are noted here as restriction to non-contact visits in Stage 1 is the one aspect of the program that received the most adverse comments from participants, both in the discussion groups<sup>66</sup> and the BOCSAR Evaluation. The BOCSAR Evaluation reported<sup>67</sup>: "Participants expressed their dislike of these visits, with several adding that non-contact meant lack of support from family and friends, at a time when it is most needed. Some participants suggested adding contact visits in Stage 1 as a reward for positive behaviour, or adding contact visits after a certain amount of time spent in Stage 1 had elapsed or allowing contact visits under stringent supervision."

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<sup>66</sup> See 3.14.3 below

<sup>67</sup> Page 35

The CDTCC was deliberately established as a strict correctional centre for high risk drug offenders; and the system of non-contact visits in Stage 1 matches that establishment. As with compulsion<sup>68</sup>, the restriction is balanced by the availability of accelerated release to the community during the later Stages of the program.

The system of non-contact visits in Stage 1 of the program is related to risk – the risk of the introduction of drugs into a specialist correctional centre, notwithstanding the CDTCC's security classification as a minimum security correctional centre. Non contact visits were allied with the provision of strict search procedures in order to establish a correctional centre with the most stringent measures in place to prevent the introduction and use of non-prescribed drugs. This stringency is justified by the categorisation of the participant population of the CDTCC as "the most desperately entrenched criminal addicts"<sup>69</sup>.

Nevertheless, the results of the drug tests carried out in the evaluation period and reported in the BOCSAR Evaluation showed that some drugs still managed to enter the Stage 1 area of the CDTCC. In fact, the number and rate of positive drug tests of participants in Stage 1 (91 from 6,820 tests, or 1.3%) were not significantly different to the number and rate in Stage 2 (126 from 6,822 tests, or 1.8%)<sup>70</sup>.

The BOCSAR Evaluation said<sup>71</sup>: "If elimination of drug use among *all* participants in the CDTP was an overly ambitious policy objective, the elimination of drug use among participants in Stage 1 of the program might nonetheless have reasonably been expected. After all, during Stage 1, participants are in the CDTCC (ie they are in detention) and visitors are prevented from making any physical contact with them. It is hard to avoid the conclusion that illegal drugs were filtering into the CDTCC. If the program is to continue, this is a problem that clearly needs to be addressed."

If some participants are held in Stage 1 for over 12 months (as submitted by Mr Wilson), it is because they have not progressed sufficiently in their CDTP to reach Stage 2. The fact they do not progress from Stage 1 is not a basis for complaint that Stage 1 is too strict.

Further consideration of this issue would be informed by further information as to whether the low level of positive drug tests occurred *because of* non-contact visits or *in spite of* non-contact visits.

### 3.5.3 Community involvement

Mr Wilson also submitted that legislation needs to empower the CDTCC under the authority of the Minister for Justice to organise a regional committee for the purpose of focusing on and assisting the CDTP. Representatives of the local community would have input into developing strategies for work, housing, education, health (well-being) and relationship and mentoring programs for participants in Stages 2 and 3, focusing on developing 'circles of support and care' for them. The Regional Committee would also include representatives from relevant government

<sup>68</sup> See 3.2.2 above

<sup>69</sup> The Hon. John Della Bosca MLC, Second Reading Speech *Compulsory Drug Treatment Correctional Centre Bill 2004*

<sup>70</sup> BOCSAR Evaluation page 37.

<sup>71</sup> Page 42

departments and agencies including Drug Court representatives. A committee representing non-government agencies would formalise this process and could be a sub-committee of the CDTCC Implementation Taskforce.

## **Discussion**

Much of the work recommended by Mr Wilson for the proposed committee is already performed by the CDTCC Implementation Taskforce and community agencies approached by the Director of the CDTCC for the purposes recommended by Mr Wilson. No legislative amendment is warranted.

### **3.5.4 Restorative justice, personal case plans and participants' families**

Mr Wilson submits that the dual nature of a drug offender's relationship with his family is often overlooked: whilst an offender needs family support for rehabilitation and re-integration in the community, the same family members have often been direct and indirect victims of the offender's criminality in pursuit of his addiction. Mr Wilson submitted that where the family of a participant is willing to enter a restorative justice process, such a process should be employed prior to seeking the assistance of the offender's family in the rehabilitation and re-integration process. In cases where other victims of a participant's crimes are prepared to be involved, a restorative justice model should also be developed and included in legislation so it can shape parts of the participants' personal plans.

## **Discussion**

CDT personal plans are developed for each participant, and section 106 of the CAS Act sets out the kind of conditions that may be imposed<sup>72</sup>. The provisions include "such other conditions as the Commissioner / Drug Court considers appropriate in the circumstances." The family restorative justice process could be included at the Commissioner's initiative in circumstances where it comes to the CDTCC Director's knowledge that a participant's family is willing to be involved in this process and can provide a positive benefit to the offender.

CDTCC participants can request and access a family restorative justice process through the CSNSW Restorative Justice Unit, both for victims defined in legislation and with family members. Enforcing this process through legislation could be problematic as the process is consensual for all parties, and placing it within a personal plan could lead to sanctions for failing to meet the condition. Nevertheless the clinical guidelines for personal plan development should be amended to mention the availability of this process, outside a personal plan, in appropriate cases.

**Recommendation 8: The guidelines for personal plan development be amended to include the provision of information to participants regarding the availability of a restorative justice program in addition to a personal plan.**

## **3.6 Corrective Services NSW**

### **3.6.1 Breaches of parole and return to the program**

<sup>72</sup> Section 106F CAS Act

The CSNSW submission noted that there is no provision for return to the CDTP for a participant who is released to parole but subsequently has his parole revoked. Section 106E of the *CAS Act* provides that unless sooner revoked, an offender's CDTO expires (a) at the end of the sentence to which it relates, or (b) when the offender is released to parole, whichever occurs first.

If an ex-participant subsequently has his parole revoked, he is returned to the general prison population. He is not eligible for a new CDTO since he does not come before a sentencing court for referral to the Drug Court; and there is no legislative provision to re-instate his previous CDTO when, arguably, a return to the CDTP may be assessed as the most appropriate rehabilitative measure for him.

## Discussion

CDTO parolees could be considered for re-entry to a CDTO by adding the SPA to the list of referring courts prescribed by the Drug Court Regulation<sup>73</sup>, but only in respect of an offender who was released to parole by the Drug Court acting as Parole Authority under section 106T of the *CAS Act* and whose parole order has subsequently been revoked.

The offender would again be subject to assessment by the multidisciplinary team for suitability for the CDTP. The multi-disciplinary team would then be required to consider the circumstances of the revocation of parole in determining the offender's suitability for re-entry to the CDTP, including any charges or convictions for offences committed whilst on parole.

Given that the offender would have previously progressed under a CDTO, it may also be appropriate for the eligibility criteria relating to the sentence parameters of such an offender to be eased, that is, the 18 month minimum requirement may not need to be adhered to. It should be noted that if an offender's parole order has been revoked, the offender's new parole eligibility date becomes the date 12 months after his return to custody, provided that the overall sentence does not finish in the meantime<sup>74</sup>, which should be ample time to resume and complete custodial program participation.

**Recommendation 9: Amend the legislation to provide that (i) the State Parole Authority is a referring court in respect of persons who are serving a sentence that has previously been the subject of a compulsory drug treatment order which has expired under section 106E(b) of the *Crimes (Administration of Sentences) Act 1999*, for the purpose of section 18B(1) of the *Drug Court Act 1998*; (ii) section 5A of the *Drug Court Act 1998* provides a less restrictive definition of "eligible convicted offender" applicable to such persons; and (iii) if the State Parole Authority refers a person to the Drug Court under this provision, the Drug Court may reinstate the person's previous compulsory drug treatment order or make a new compulsory drug treatment order, but only after the Drug Court has considered the circumstances of the revocation**

<sup>73</sup> Clause 9

<sup>74</sup> See definition of *parole eligibility date* in section 3 *CAS Act*

**of the person's parole order (including any charges or convictions for offences committed by the person whilst on parole).**

In commenting on this recommendation, Judge Dive said that the Drug Court had no objection to the recommendation, but expressed some concern as to resources being diverted to potential 'returnees', and noted that there may need to be some policy development to minimise scarce resources being diverted to likely failed participants. The Review notes these concerns, but considers that the Recommendation provides sufficient scope for the Drug Court / multi-disciplinary team to find a returnee unsuitable for the CDT, where the circumstances identify him as a likely failed participant and make such a finding of unsuitability appropriate.

### **3.7 Australian Law Reform Commission**

#### **3.7.1 Eligibility of federal offenders**

The Australian Law Reform Commission (ALRC) restricted its comments to whether federal offenders can access state and territory drug courts. ALRC Report No 103 *Same Crime, Same Time – Sentencing of Federal Offenders* (2006) held<sup>75</sup>:

*"Courts sentencing federal offenders have a discretion to consider an offender's drug addiction if the court is aware of the addiction.*

*Federal offenders should generally be permitted to access state and territory drug courts... Providing federal offenders with access to drug courts will assist them to address the underlying causes of their criminal behaviour while simultaneously promoting their health and well-being. In some cases it may be possible to facilitate the access of federal offenders to state or territory drug courts by amending federal sentencing legislation to ensure that the sentencing options available in the drug courts can be picked up and applied to federal offenders. In other cases it may be necessary for states and territories to amend their drug court legislation to enable federal offenders to access these courts."*

The ALRC states in its Report that Judge Dive "indicated that the Court's programs would be suitable for federal offenders."

### **Discussion**

At present the Drug Court does not have the jurisdiction to deal with Commonwealth offences – the *Crimes Act 1914 (Cth)* remains the exclusive repository for the sentencing of federal offenders, not the *Crimes (Sentencing Procedure) Act 1999*. Only where the *Crimes Act 1914* specifically mentions "limited state sentencing options" such as community service orders and periodic detention orders<sup>76</sup> can those state sentences be applied to federal offenders unless otherwise prescribed. Drug court orders and compulsory drug treatment orders are not currently included in these provisions as prescribed.

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<sup>75</sup> Paragraphs 29.104-105

<sup>76</sup> Section 20AB

Any amendments to allow Commonwealth offenders to be eligible for CDTOs will need to be effected at the Commonwealth level in the first instance, preferably in consultation with those states and territories which have versions of the Drug Court.

The Review was informed by the Commonwealth Attorney General's Department that the Commonwealth is currently considering providing federal offenders with access to drug courts as part of its review of federal sentencing legislation and this review is being informed by the *Same Crime, Same Time – Sentencing of Federal Offenders* report. The Review supports this reform and has requested that the Commonwealth Attorney General consider progressing it as a matter of priority.

### **3.8 Royal Australasian College of Physicians and National Drug and Alcohol Research Centre**

#### **3.8.1 Pharmacotherapy-based treatment options**

The Royal Australasian College of Physicians expressed concern that there is a lack of addiction medicine expertise being used in the treatment planning and on-going monitoring of CDTP participants, in particular with "the possibility that participants may be pressured to cease methadone and buprenorphine treatment, when continuing these treatments is clinically indicated."

The National Drug and Alcohol Research Centre made a submission supporting the provision of pharmacotherapy-based treatment options to offenders serving CDTOs, in appropriate circumstances.

#### **Discussion**

In commenting on the Royal Australasian College of Physicians' submission, Dr Astrid Birgden, former Director, CDTCC, disputed the College's assertion quoted above, noting that Justice Health employs a psychiatrist, a general practitioner with addiction medicine expertise, and nurses with expertise in alcohol and other drug (AOD) addictions in the Program, and that Justice Health provides follow-up and liaison with identified general practitioners and NSW Health in the community. "If there is any contra-indication that a person ought not to be abstinent, they are placed back on methadone and either paroled (if appropriate and eligible) or revoked."

The abstinence-based nature of the CDTP is not prescribed by legislation, and it is thus outside the scope of a statutory review. It is the proper role of the CDTCC Implementation Taskforce to review operational aspects of the CDTP, including the provision of medical treatment.

### **3.9 Aboriginal Affairs, Department of Human Services NSW<sup>77</sup>**

#### **3.9.1 Eligibility for program participation**

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<sup>77</sup> From 3 April 2011, Aboriginal Affairs NSW is part of the Department of Education and Communities

Aboriginal Affairs, Department of Human Services NSW noted that previous concerns raised about the low rate of Aboriginal offenders being referred to the program have been addressed through implementation strategies and do not need to be dealt with under the legislation.

Aboriginal Affairs also noted that, for inclusion in the program, section 5A of the *Drug Court Act 1998* requires offenders to have been convicted of at least two other offences in the five years prior to their index conviction. Aboriginal Affairs submitted that "The cycle of substance abuse and crime is often established for young Aboriginal offenders prior to them having several convictions recorded, and consequently appropriate opportunities for effective intervention may be lost under the current criteria. A more sensitive measure of previous engagement in anti-social behaviour should be considered in order to increase the accessibility of the program for young Aboriginal offenders."

## Discussion

The BOCSAR Evaluation reported<sup>78</sup> that "At the time of the baseline (first) interview 9.5% (of the 95 interview survey participants) identified their cultural background as Aboriginal or Torres Strait Islander." On 17 June 2012, 22.0% of all male offenders in custody identified as Aboriginal or Torres Strait Islander<sup>79</sup>.

The CDTP was and is aimed at "entrenched drug offenders... with a longstanding addiction who have committed multiple criminal offences over a long period (and who) have either failed numerous attempts at voluntary or court-mandated treatment or, due to their unwillingness or chaotic lifestyle, have never accessed treatment"<sup>80</sup>. The intended criminality extends beyond an engagement in anti-social behaviour arising from substance abuse.

The recidivism criteria for eligibility was discussed at 3.3.4 and Recommendation 5 above.

Replacing the recidivism criteria with a consideration regarding the offender's criminal history, as proposed in Recommendation 5, may achieve the result sought by Aboriginal Affairs. It is anticipated that it will broaden accessibility to the program for a wider pool of participants (including Aboriginal participants) who are not currently eligible owing to the current requirement for two prior convictions within five years and strict interpretation of the meaning of 'conviction'.

CSNSW advised the Review that in the early years of CDTP inception, there was concern expressed at CDTCC Implementation Taskforce level about the lack of representation of Aboriginal offenders; however the situation has changed dramatically in recent times: on 19 August 2011, Aboriginal participants represented approximately 37% of participants, while on 24 February 2012 Aboriginal participants represented 16.3% of participants. Anecdotal evidence to CSNSW suggests that a positive view of the CDTP by Aboriginal Legal Services and Aboriginal agencies, and personal recommendations from family/kinship members

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<sup>78</sup> Page 17

<sup>79</sup> CSNSW "Offender Population Report" (internal document) 17 June 2012.

<sup>80</sup> *A new way to break the drug-crime cycle – Labor's Compulsory Drug Treatment Program* (Australian Labor Party NSW Branch 2003)



either currently on the program or who have recently completed the program, contributed to the increased Aboriginal participation in the CDTP.

### **3.10 Ageing, Disability and Home Care, Department of Human Services NSW<sup>81</sup>**

#### **3.10.1 Practical exclusion of persons with intellectual disability**

Ageing, Disability and Home Care, Department of Human Services NSW (ADHC) submitted that the benefits of the CDTP and the CDTCC are not being made available to people with an intellectual disability and that, while the CDT legislation does not specifically exclude people with an intellectual disability, ADHC understands that in practice they are likely to be screened out during the suitability assessment process "as any such impairment is considered to impact on their ability to participate in the program."

ADHC therefore recommended that Corrective Services NSW develop modified treatment programs for people with intellectual disability, stating "ADHC has a close and collaborative working relationship with Corrective Services' Statewide Disability Services, and would be happy to work with Corrective Services in developing such a program or providing disability awareness education to staff."

#### **Discussion**

In commenting for the purpose of the Review, Sue Henry-Edwards, Principal Advisor AOD/HP<sup>82</sup> CSNSW, advised that CSNSW Statewide Disability Services recently identified at least 8 CDTP participants with an intellectual disability or cognitive impairment who were on their database (ie, had entered the CDTP), of whom only 1 was too low-functioning for acceptance. CSNSW has set up a working party to investigate the development of strategies to address the AOD needs of offenders with an intellectual disability; and the Director of the CDTCC is a member of the working party.

### **3.11 NSW Health**

#### **3.11.1 Minimum non-parole period for program eligibility**

NSW Health submitted, on behalf of Justice Health (as it was then known; now the Justice and Forensic Mental Health Network), that consideration be given to reducing the minimum non-parole period (currently 18 months), though did not suggest a replacement period. NSW Health submitted that such a reduction would be more consistent with the duration of programs that may provide similar types of treatment, such as residential rehabilitation programs, and would allow a larger proportion of offenders to be eligible for the program. However, given that this would be a significant change to the program, NSW Health suggested that the proposal should first be discussed with the CDTCC Taskforce.

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<sup>81</sup> From 3 April 2011, Ageing, Disability and Home Care is part of the Department of Family and Community Services NSW.

<sup>82</sup> Alcohol and Other Drugs / Health Promotion.

## **Discussion**

The minimum non-parole period is discussed at 3.3.3 and Recommendation 4 above. The Review does not support reducing the minimum non-parole period from its current 18 months from date of sentence.

### **3.11.2 Provision of opioid substitution programs**

The NSW Health submission also noted that “while no suggestions have been raised that the Review may change the parameters of the drug treatment program to make opioid substitution programs available for participants, any change to the availability of opioid substitution programs would affect the resources of the Department, Justice Health and Area Health Services.”

## **Discussion**

As noted at 3.8.1 above, the issue falls outside the scope of a statutory review.

## **3.12 CDTCC staff feedback**

The Director of the CDTCC, Dr Astrid Birgden conducted information and consultation sessions for both staff of the CDTCC and CDTCC participants. Dr Birgden delivered a PowerPoint presentation covering the process and purpose of this Review, the objectives of the compulsory drug treatment program, and asked whether, in the view of staff and participants based on their first-hand experience, those objectives were being met. Feedback was received from staff either at staff meetings or electronically. In forwarding the feedback, Dr Birgden noted that some of the feedback was relevant to CDTCC practices rather than legislation. Dr Birgden commented on some of these suggestions in her own submission (see 3.2).

### **3.12.1 Eligibility and suitability for a CDTO**

The CDTCC staff queried whether a minimum 18 months non-parole period is a practical timeframe. They said that, in practice, participants with an 18 month non-parole period remain in Stage 1 for 8 months, leaving a minimum of 6 months in Stage 2 and then only 4 months in Stage 3 – assuming uninterrupted progression without regression. They suggested either increasing the minimum non-parole period to 20 months, or changing the criteria from 18 months non-parole period to 18 months left to serve (ie, 18 months from date of the Drug Court’s determination<sup>83</sup>).

The staff reported that participants do not fully understand that their parole period is not automatic and that they may lose ‘parole time’; and suggested an information sheet be provided during the eligibility phase.

## **Discussion**

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<sup>83</sup> This would re-instate the original criteria, however note the comments in the second reading speech reported in the discussion at 3.4.1.

The parameters of maximum and minimum terms for eligibility were discussed in reference to the submission of Judge Dive at 3.3.3 and Recommendation 4 above. The Review does not support increasing the minimum non-parole period from its current 18 months from date of sentence.

The Review understands that a plain English information sheet has been developed for CDTO participants providing information on the impact of a CDTO on their parole.

### **3.12.2 The compulsory nature of a CDTO and the CDTCC**

The staff had a divided view about whether it is useful to compulsorily order a reluctant offender to the CDTP. Some suggested that a quasi-compulsory drug treatment order (under which Stage 1 would be compulsory, with a choice of continuing on to Stage 2 and 3 at the completion of Stage 1) would give more flexibility in program provision, noting that there had been participants ordered to attend who originally did not want to, but who gradually improved their attitude and stayed drug-free during their time in Stage 1 who then wanted to progress. On the other hand, the staff did not want to be required to continue with participants who demoralised others, and were of the opinion that the program would be better off without them.

The staff pointed out what they viewed as unsatisfactory revocation requirements from the program: participants who wanted to leave, and whom the staff wanted to leave because they were disruptive and demoralising to other participants, felt the need to “act out and be a problem” in order for the Drug Court to revoke them from the program. They suggested that it was preferable to create provisions to be able to revoke a participant based on ‘mutual agreement’ of the participant and the staff determining a likely failure to progress.

## **Discussion**

As noted at 3.2.2 and 3.3.1 above, it is not proposed that any amendment be made to the compulsory imposition of the CDTP on eligible suitable offenders at this time.

As also noted above, if the participants have a perception that actual or threatened violence is needed to bring about revocation, then the revocation test is too high. This Review does not support any proposal that provides participants with an opt-out mechanism, since that would defeat the compulsory nature of the program.

The Review does recommend, however, that the revocation test be eased so that a CDTO may be revoked if, in the opinion of the Drug Court following advice by the Director, the offender is unlikely to make further progress under the order (Recommendation 1).

### **3.12.3 Reports and personal plan documents**

Staff generally considered that there are too many reports and case reviews required by case co-ordinators, though efforts are being made to streamline these processes. They said that legislative changes could reduce the number of reports that need to be provided to the Drug Court, without interfering with its independent judicial oversight.

Staff valued the Personal Plan as the instrument of reference when a participant's behaviour is unsatisfactory, but felt that the participants did not appreciate that the personal plan is a direction from the Drug Court (providing the compulsory part of the program) in which the participant has had input. One staff member stated "I am aware of only 1 participant that has consciously read their personal plan and made reference to it in any discussion with me. In general I don't think they are aware of the content, let alone the potential impact when/if they breach any of it."<sup>84</sup> Staff reported that the point in the personal plan most overlooked by participants was the requirement to remain in the defined geographical area unless approved otherwise by the Drug Court Judge.

## Discussion

Personal plans are considered in discussion of the participants' feedback at 3.13.3 below.

No change to the existing personal plan development process or conditions is warranted at this time.

The submissions by Dr Birgden and Judge Dive (at 3.2.4 and 3.3.6 above) that the Director should be provided with the capacity to regress a participant for no longer than 3 months and notify the Drug Court via email rather than by providing a report, with the participant having the option of requesting a regression report be provided to the Drug Court for decision to either confirm, revoke or amend the Director's regression, are supported (Recommendation 2).

Section 106U of the *CAS Act* requires the Director of the CDTCC, in consultation with Justice Health and the Drug Court, "to cause regular assessment reports to be prepared setting out the progress of each offender's drug treatment and rehabilitation and the offender's compliance with his or her compulsory drug treatment personal plan." Section 106U(3) provides that the regulations may make provision for the frequency of such reports and the procedures that must be followed with respect to assessment of offenders, however, the *CAS Regulation* is silent in this respect.

In practice, such reports form the basis of weekly case management assessments. All behaviour of participants (both positive and negative) is case-noted, including all aspects of a participant's motivation and attitude such as dress violations (eg not wear a shirt), participation in (or disruption of) discussion groups etc. The case notes are used both as a management tool and as the basis of information provided to the Drug Court when the Drug Court reviews a participant's progress. The case notes are far more detailed than those compiled for case management of mainstream inmates; and the weekly case management meetings are held far more frequently than case management team meetings for mainstream inmates<sup>85</sup>. The weekly case management meeting itself, involving the participant, may itself generate further case notes.

<sup>84</sup> Contrast the BOCSAR Evaluation at page 31: "At the beginning of Stage 1, 95.8% of participants agreed that they understood what was required of them on the CDTP."

<sup>85</sup> Clause 12 of the *CAS Regulation* requires case management plans (for mainstream inmates) to be reviewed not later than 6 months after preparation and adoption

Part 4A of the *CAS Act* requires the following reports or documents to be compiled:

- An initial personal plan (to be drawn up by the Commissioner in consultation with the Chief Executive Officer of Justice Health)<sup>86</sup>;
- An assessment report (to be compiled by the Director of the CDTCC) for a participant's progression from Stage 1 to Stage 2 or from Stage 2 to Stage 3)<sup>87</sup>;
- An assessment report (to be compiled by a Probation and Parole Officer) for a participant's progression from Stage 2 to Stage 3<sup>88</sup>;
- A referral to the Drug Court for a regression order, revocation order or variation of community supervision order arising from a serious failure to comply with any condition of a personal plan<sup>89</sup>;
- A referral to the Drug Court for failure to comply with a personal plan as a result of an offender being charged with an offence referred to in section 5A(2) of the Drug Court Act 1998<sup>90</sup> (ie, an offence that would make the offender ineligible for a CDTO);
- Notification that the Commissioner has made a removal or regression order in special circumstances<sup>91</sup>.

Other reports that may be prepared by the Commissioner under the *CAS Act* for consideration by the Drug Court are:

- An assessment of proposed Stage 3 accommodation<sup>92</sup>;
- Variations to a personal plan (in consultation with the Chief Executive Officer of Justice Health<sup>93</sup>) – which can only come into effect when approved by the Drug Court;
- Conferral of a reward by applying for variation of a personal plan to decrease the frequency with which an offender must undergo periodic testing for drugs<sup>94</sup>;
- Conferral of a reward by applying for variation of a community supervision order to decrease the level of supervision to which the offender is subject<sup>95</sup>;
- Progression and regression between stages of detention<sup>96</sup>;
- The making or variation of a community supervision order allowing the participant to be absent from the CDTCC<sup>97</sup> (including conditions related to proposed residence, association, attendance at specific locations, employment etc);
- Revocation of a CDTO following serious failure to comply with conditions<sup>98</sup>.

Whilst the *CAS Act* provides that the Commissioner “may” compile these reports, in fact they must be compiled if any change to the participant's progress or personal plan is being proposed. The content of these reports necessarily involves inclusion

<sup>86</sup> Mandatory under section 106F

<sup>87</sup> Section 106N

<sup>88</sup> Section 106N(1)(b)

<sup>89</sup> Section 106I(3)

<sup>90</sup> Section 106I(4)

<sup>91</sup> Section 106P

<sup>92</sup> Section 106D(4)

<sup>93</sup> Section 106G

<sup>94</sup> Section 106J (2)(d)

<sup>95</sup> Section 106J (2) (c)

<sup>96</sup> Section 106M; assessment reports required under section 106N

<sup>97</sup> Section 106 O; section 106O(3) requires weight to be given to recommendations of the Commissioner

<sup>98</sup> Section 106Q(1)

of case notes compiled by staff in relation to the offender. The Drug Court needs such extensive information in relation to the participant's behaviour in order to consider his progress under a CDTO.

The comments by staff related to dissatisfaction or frustration with the number of reports that need to be provided, may be a reflection of the different requirements for reports on CDTO participants compared to staff experience in preparing reports for inmates in the mainstream correctional system.

Other than immediate regression by the Director and subsequent notification to the Drug Court for obvious breach of personal plan (as proposed in Recommendation 2), there does not appear to be scope for a reduction in the legislative requirements for the provision of reports

### **3.12.4 The relationship between drug dependency and violence**

Some staff were of the view that greater regard should be paid to violent offending (including violent behaviour in custody) in offender assessments.

Some staff were also of the view that there was a need to place greater emphasis on addressing violence in the CDTP, estimating that 70% of participants lead an anti-social lifestyle which attracts drug use and dependence while 30% of participants committed crime to support an existing drug dependence<sup>99</sup>. It was suggested that some participants with a high level of violence may be better served by the Violent Offender Therapeutic Program<sup>100</sup> (VOTP), though that would mean their drug use is not specifically addressed. Some participants had already completed the VOTP.

## **Discussion**

The BOCSAR Evaluation reported<sup>101</sup> that 90.5% of participants were serving a sentence for break and enter or robbery. The most serious offence for which each participant was referred to the CDTP were:

- Robbery/steal from the person (including aggravated circumstances): 5.3%
- armed robbery or robbery in company: 23.2%
- break and enter and commit serious indictable offence: 29.5%
- aggravated break and enter and commit serious indictable offence: 28.4%
- break and enter with intent to commit serious indictable offence: 4.2%
- other: 9.5%.

Convictions for violence do not automatically exclude an offender from the definition of "eligible convicted offender"<sup>102</sup> unless the violence involved murder, attempted

<sup>99</sup> This view is confirmed by academic findings: "Most Australian heroin users commit criminal offences before they use heroin (Hall, Bell & Carless 1993a) but heroin dependence increases the frequency of criminal activity (Ball, Shaffer & Nurco 1983)" – quoted in *Legally Coerced Addiction Treatment for Drug Addicted Offenders: Ethical and Policy Issues*, by Wayne Hall and Jayne Lucke – paper presented at BOCSAR Seminar Sydney 14 July 2010.

<sup>100</sup> The VOTP is a 12-18 month therapeutic program for violent inmates, who participate in intensive case management to address their violent offending, available at Long Bay (Metropolitan Special Programs Centre) and Lithgow and Bathurst Correctional Centres (and formerly at Kirkconnell Correctional Centre).

<sup>101</sup> Pages 18-19

murder, sexual assault of an adult or child, a sexual offence involving a child, or the use of a firearm.

Originally serious violence was an exclusionary factor. Section 5A(2)(d) of the *Drug Court Act 1998* originally provided that "A person is not an eligible convicted offender if the person has been convicted of ... (d) any offence that, in the opinion of the Drug Court, involves serious violence (such as malicious wounding or assault with intent to do grievous bodily harm, but not including common assault or assault occasioning actual bodily harm)", but was repealed by the *Courts Legislation (Further Amendment) Act 2006*. This amending Act also inserted section 18E(2)(c1) "the offender's history of committing offences involving violence" as a matter to be taken into account in a suitability assessment for compulsory drug treatment detention.

In the Second Reading Speech to this Bill, the Parliamentary Secretary Mr Newell gave the rationale for the amendments:

*"Item [3] will remove the automatic exclusion of offenders convicted at any time of an offence involving serious violence but will require the Drug Court to have regard to the offender's history of committing offences involving violence as part of the assessment of the offender's suitability for the program. The amendment will create greater flexibility for the Drug Court to consider whether offenders who may have committed an offence involving violence at some point in their criminal history should nonetheless be suitable for the program. The existing blanket exclusion would preclude any further consideration of those issues."*

Sue Henry-Edwards, Principal Advisor AOD/HP CSNSW, submitted to the review that "Drug use and its relationship with offending should also be addressed in the Violent Offender Therapeutic Program and the sex offender treatment programs – it doesn't occur in isolation." The fact that some participants had already completed the VOTP (and therefore had been assessed as needing treatment for both drug use and violence) supports this comment.

Offences committed in custody may be considered during the suitability assessment in relation to the offender's history of committing offences involving violence<sup>103</sup>, whether the offender is a suitable person to serve the sentence by way of CDT detention<sup>104</sup> or whether the offender's participation in the program will damage the program or any other person's participation in it<sup>105</sup>. Whilst an offence in custody may not result in a criminal conviction unless police charges arise, correctional centre offences are listed in the *CAS Regulation*<sup>106</sup>; and guilty findings in relation to correctional centre offences appear on an offender's "offence history" in the CSNSW database.

Dr Birgden's comment in her submission that there is no apparent correlation between the nature of the offence, institutional behaviour within the CDTCC, and the likelihood of an offender being revoked or regressed, is pertinent with respect to offenders who have committed violent offences.

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<sup>102</sup> Section 5A *Drug Court Act 1998*

<sup>103</sup> Section 18E(2)(c1) *Drug Court Act 1998*

<sup>104</sup> Section 18D(1)(b)(iii)

<sup>105</sup> Section 18D(1)(b)(vi)

<sup>106</sup> Clause 117

Nevertheless, the present requirement for an offender's history of violent offending, if any, to be considered during the suitability assessment process is considered appropriate, and (with the exception of weapons/firearm offences considered at 3.13.1 below) no change is warranted at this time.

### **3.13 CDTCC participant feedback**

Nearly all Stage 1 and Stage 2 participants<sup>107</sup> attended one of five focus groups of 2 hours duration, facilitated by the CDTCC Director and the CDTCC Integration Manager, and provided comments during discussion of the Director's PowerPoint presentation on the Statutory Review. Their comments were collated by Dr Birgden and provided to the Review.

#### **3.13.1 Eligibility and suitability for a CDTO**

The participants commented that a minimum of 18 months was needed in the CDTCC to complete the CDTP. This mirrors the feedback from CDTCC staff<sup>108</sup>.

In this respect, participants commented that solicitors and barristers are still describing the CDTP rather simplistically to them as "6 months per stage = 18 months total", without explaining that pattern is in fact the minimum requirement. They also omit to mention that completion of all 3 stages is only achieved in a minority of cases.

Participants stated that, whilst needing a minimum 18 months to complete the program, they always "had one eye on their parole"; and that once the end of their non-parole period was imminent, "getting parole" had greater significance than completing the program. It was reported at 3.12.1 above that staff reported that participants do not fully understand that their parole period is not automatic and they may lose 'parole time', however, that only applies whilst they are subject to the CDTP. If they exit the program and are subject to court-based parole<sup>109</sup>, this consideration does not apply. Some participants do attempt to exit the program in advance of their parole date on the statutory excuse that they are unlikely to progress further under the program, and then feel "blocked in" by the perceived need to commit or threaten violence<sup>110</sup> in order to exercise the "statutory excuse".

In this respect, some participants suggested that the Drug Court should have the power to extend a participant's non-parole period for sufficient time to enable a participant to complete the program. Others suggested that participants should "sign their parole over" at the beginning of the program.

Some participants also suggested that younger offenders were less likely to complete the program than older offenders. Comments made included:

- 20 year olds should not be labelled as 'desperately entrenched criminals',

<sup>107</sup> At the time submissions to this review were called – ie, June 2010.

<sup>108</sup> See paragraph 3.12.1

<sup>109</sup> Serving sentences of 3 years or less, for whom release to parole at the expiry of the non-parole period is automatic – section 50(1) *Crimes (Sentencing Procedure) Act 1999*

<sup>110</sup> "failure of a serious nature" – section 106Q(1)(a) *CAS Act* – see 3.2.3 above.



- Participants should be at least 25 years of age because the young ones don't take it seriously and distract people who do take it seriously,
- This program should be a program of last chance (before a long sentence), not a first chance program.

Some participants questioned the total exclusionary nature of firearms offences in the eligibility criteria<sup>111</sup>, suggesting that it should only apply if the offence was in the previous 5 years. A participant knew of one offender who had been excluded because a gun had been found at his house; he had never been convicted of using a firearm in a crime. Others queried why a robbery with a replica firearm was not excluded, whereas a robbery with a real (unloaded) firearm was.

Some participants queried the possession of a commercial quantity of drugs as excluding a person from the eligibility criteria<sup>112</sup>, since a commercial quantity was easy to get and many drug users sold drugs solely to finance their own drug use.

Finally, some participants suggested that the CDTP could be used as a pre-release program for people serving longer sentences, rather than being restricted to "front-end" sentences. This would allow access to persons with long-standing drug addiction whose crimes had been equally drug-related but of a more serious or extensive nature.

## Discussion

### Minimum non-parole period

The parameters of maximum and minimum terms for eligibility were discussed in reference to the submission of Judge Dive at 3.3.3 and the Director of Public Prosecutions at 3.4.1. The impact of parole dates and the necessary changes are discussed at 3.3.2 and form the basis of Recommendation 3.

### Limiting the age / drug use experience of participants

In the Second Reading Speech introducing the *Compulsory Drug Treatment Correctional Centre Bill 2004*, the Hon. John Della Bosca MLC said:

*"This program sits at the end of the continuum of drug diversion programs in New South Wales aimed at breaking the drug-crime cycle... The aim is to achieve better outcomes for the state's most desperately entrenched criminal addicts...."*

The original policy proposal<sup>113</sup> described the target group of offenders as "entrenched drug offenders", and said:

*"The program will be aimed at offenders with a longstanding addiction who have committed multiple criminal offences over a long period (who) have either failed numerous attempts at voluntary or court-mandated treatment or, due to their unwillingness or chaotic lifestyle, have never accessed treatment"<sup>114</sup>.*

<sup>111</sup> Section 5A(2)(c) Drug Court Act 1998

<sup>112</sup> Section 5A(2)(e) Drug Court Act 1998

<sup>113</sup> *A new way to break the drug-crime cycle – Labor's Compulsory Drug Treatment Plan 2003*

<sup>114</sup> These factors have been incorporated into the definition of eligible convicted offender in section 5A of the *Drug Court Act 1998*

The age of the offender does not appear to have come into consideration, other than the offender being of or above the age of 18 years<sup>115</sup>. Theoretically, it would be possible for an offender's maturity to be considered when the Drug Court is considering "that the offender is a suitable person to serve the sentence by way of compulsory drug treatment detention"<sup>116</sup>, and when the multi-disciplinary team is assessing the offender's suitability for compulsory drug treatment detention having regard to "the offender's level of motivation and attitude to the compulsory drug treatment program and the offender's drug treatment history"<sup>117</sup>.

The BOCSAR Evaluation reported<sup>118</sup>: "At the time of the baseline (first) interview the average age of the 95 interview survey participants was 30.1 years (... age range 20.2 to 58.1 years)..." The Evaluation also reported<sup>119</sup>: "Seventy-eight per cent of CDTP participants reported that they received their first criminal conviction before the age of 18 years. The average age reported at first conviction was 15.8 years"<sup>120</sup>.

The BOCSAR Evaluation also reported<sup>121</sup> that "the vast majority (83.2%) of participants had entered at least one form of drug treatment before their CDTO was made. The study participants had, on average, started any type of drug treatment at least eight times before entering the CDTP (the mean number of times any treatment was started was 6.7 when the statistical outlier, the offender who reported starting treatment 130 times, was excluded)... Multiple entries into the same type of treatment were common. For example, the mean number of times participants had entered self-help groups such as Narcotics Anonymous was 2.5 times... More than half of the participants (52.6%) had previously entered methadone maintenance treatment. As well as entering the same type of drug treatment multiple times, most participants reported trying more than one type of treatment with 30.5% having tried between two and three different types of treatment, and 27.4% having tried between four and six different types of treatment. "

The individual responses of program participants regarding younger participants are not reflected in the average age and range of ages of participants at baseline interview reported by the BOCSAR Evaluation. Further, there is no evidence that younger participants are less successful in the program than others. No change to the eligibility criteria related to participant age is warranted at this time.

### **Firearms offences as an exclusionary factor**

Section 5A(2)(c) of the *Drug Court Act 1998* provides that "A person is not an eligible convicted offender if the person has been convicted at any time of ... (c) *any offence involving the use of a firearm*" (emphasis added).

The original policy proposal document<sup>122</sup> said<sup>123</sup>: "Typical offenders will have committed break and enter, robbery, larceny, steal from a vehicle or person, motor

<sup>115</sup> Section 18D(1)(b)(i) *Drug Court Act 1998*

<sup>116</sup> Under section 18D(1)(b) of the *Drug Court Act 1998*

<sup>117</sup> Under section 18E of the *Drug Court Act 1998*.

<sup>118</sup> Page 17

<sup>119</sup> Page 18

<sup>120</sup> "However, the recording of a conviction is a discretionary issue in the Children's Court and is often not recorded. As such, self-reported age at first conviction may not reflect actual age at first conviction."

<sup>121</sup> Page 17

<sup>122</sup> *A new way to break the drug-crime cycle – Labor's Compulsory Drug Treatment Plan*

vehicle theft, assault and minor drug offences. Sex offenders and those who have committed serious violent crimes would be excluded." It did not mention firearms offences.

In the Second Reading Speech to the *Compulsory Drug Treatment Correctional Centre Bill 2004* on 12 May 2004, the Special Minister of State the Hon. John Della Bosca MLC said:

*"Serious offenders convicted, at any time, of offences such as murder, manslaughter, sexual assault, firearms-related offences or commercial drug trafficking will be excluded from the program."*

This statement may reflect a perception that a firearms-related offence must involve a serious offender; but this is not necessarily the case.

In *Paton [2007] NSWDRGC 2*<sup>124</sup>, the Drug Court considered the eligibility of an offender who, when aged 15 in 1984, had appeared before a Children's Court charged with discharging a Daisy airgun at some pigeons sitting on the railway lines at a country railway station; he was fined \$50 and the airgun was forfeited. In the judgment, the Drug Court (Dive J) said: "It could not be argued that a boy who had used an airgun 23 years ago, and who was dealt with by way of a \$50 fine, could be categorised, by virtue of that offence, as such a serious offender that he should be excluded from the opportunity of a CDTO. Mr Paton is not someone who would otherwise be regarded as a violent or dangerous offender. His adult offences are driving, drug and dishonesty matters. He has not committed personal violence offences such as robberies, and his extensive custodial history does not record any violent offences – there is only one offence of failing to attend for a prison muster."

Nevertheless, the offender in *Paton* was only found to be an eligible convicted offender because the finding of guilt recorded against him in the Children's Court in 1984 was found not to be a "conviction" for the purposes of section 5A of the *Drug Court Act 1998*. Had he been an adult convicted of the offence in a Local Court, he would have been found ineligible to participate in the program.

Judge Dive also advised the Review of an applicant who was convicted and fined for trespassing and shooting a rifle at a tree stump and some ducks in a pond in 1990, and is thereby ineligible. By contrast, offenders who have committed armed robberies whilst armed with weapons other than firearms (eg knives, syringes, baseball bats etc) have been found eligible<sup>125</sup>.

Mrs Kay Valder, Official Visitor to the CDTCC as well as an Official Visitor to Parklea Correctional Centre, in a letter to the Review subsequent to her submission, advised the Review of a long-term offender who "... had spent much of the past 18 years coming in and out of prison due to his drug addiction, (who) had never worked and had no skills to support himself whenever he was released, so he reverted to crime. The offender is now 39 years old and ... when he was aged 18 he was charged with using a firearm shooting at tin cans off a log. This offence has caused him to be denied acceptance as a participant in the program... The rigid

<sup>123</sup> Page 5

<sup>124</sup> Available at [http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll\\_caselaw.nsf/pages/cl\\_drug\\_court](http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_drug_court)

<sup>125</sup> BOCSAR Evaluation page 19: robbery etc being armed or in company was listed as the most serious offence for 23.2% of participants.

interpretation of section 5A(2)(c) excludes any person who has used a firearm, either in a frivolous or serious manner, from participating in the program.”

The breadth and relevance of “firearms-related offences” may unnecessarily exclude other potential program participants.

At the same time, the concentration on firearms in the legislation tends to deflect attention away from other weapons that may be used in the commission of a crime. In relation to this, Judge Dive suggested that section 18E(2)(c1) of the *Drug Court Act 1998* should be amended to read “the offender’s history of committing offences involving *weapons or violence*<sup>126</sup>”. The Review supports this proposed wording.

Judge Dive also suggested that the legislation should be amended to provide that a person is not an eligible convicted offender if the *referred* offence<sup>127</sup> involves the use of a firearm. This approach is consistent with the apparent original intention of excluding *serious offenders*, without the unintended consequence of also excluding minor offenders whose past firearms offences were not serious.

The preferred solution is therefore to remove the automatic exclusion of firearms-related offences from section 5A of the *Drug Court Act 1998*, and replace it with the more limited restriction proposed by Judge Dive, that is, to exclude offenders if the referred offence involved a firearm. A history of weapon use and violence should not however be ignored but it is more properly considered in the assessment process. This could be achieved by a requirement for the multi-disciplinary team to consider whether the offender’s history of committing offences involving weapons or violence (which would include consideration of past firearms usage) makes an offender unsuitable for the program under section 18E(2) – ie, the same approach adopted by the Government with respect to offences involving serious violence under the *Courts Legislation (Further Amendment) Bill 2006*, discussed under 3.12.4 above.

An alternative approach may be to amend the exclusion to refer only to a *serious* firearms or weapons offence, and prescribe a definition of “serious firearms or weapons offence” similar to that in clause 63(3) of the *Criminal Procedure Regulation 2010*<sup>128</sup>. However, this approach is not recommended by the Review as it would remove the flexibility of the assessment team to consider all aspects of the offence, including its age.

**Recommendation 10: Amend the legislation to remove reference to “any offence involving the use of a firearm” from the definition of an eligible convicted offender, and instead require that (i) a person is not an eligible convicted offender if the offence for which the person is referred to the Drug Court for assessment involved the use of a firearm; and (ii) when the multi-disciplinary team is assessing whether an offender is a suitable person to serve a sentence by way of compulsory drug treatment detention, the multi-**

<sup>126</sup> As a matter to which the multi-disciplinary team must have regard when assessing suitability

<sup>127</sup> ie, the offence for which the offender is referred to the Drug Court for assessment for a CDTO

<sup>128</sup> “serious firearms or weapons offence means any of the following offences: (a) an offence under section 93G, 93GA, 93H(2), 93I(2) or 154D of the *Crimes Act 1900*, (b) an offence under section 7, 36, 50, 50A(2), 51(1A) or (2A), 51A or 51D(2) of the *Firearms Act 1996*, being an offence that relates to a prohibited firearm or pistol, (c) an offence under section 51B or 51BB of the *Firearms Act 1996*.”

**disciplinary team is to have regard to the offender's history of committing offences involving weapons or violence.**

### **Drug dealing (commercial quantities) as an exclusionary factor**

The *Drug Misuse and Trafficking Act 1985* defines<sup>129</sup> a commercial quantity of a prohibited drug to include 250 grams of heroin, cocaine, and amphetamines; 25 kilograms of cannabis leaf; and 2.5 kilograms of cannabis resin. The maximum sentence for supply of a *commercial* quantity is 20 years imprisonment, and the sentences imposed for such an offence would probably be well beyond the limits of the program.

The participants effectively suggested that the restriction on “an offence at any time under section 25(2)<sup>130</sup> of the *Drug Misuse and Trafficking Act 1985* involving a commercial quantity of a prohibited plant/drug”<sup>131</sup> as an eligibility exclusionary factor may unnecessarily exclude some potential program participants, since many drug users finance their addiction by drug dealing. Such an exclusion could be queried when compared to apparently more serious but eligible offences such as armed or aggravated robbery etc perpetrated by the customers of the user-dealer.

According to the second-reading speech to the *Compulsory Drug Treatment Correctional Centre Bill 2004*, offences involving commercial supply have been excluded from the CDTP because of their seriousness.<sup>132</sup> This policy consideration remains valid. Commercial supply matters are regarded very seriously by the community. This seriousness is reflected in the maximum prison term and standard non-parole period prescribed for these offences.<sup>133</sup>

Judge Dive has noted that the sentences imposed for an offence involving a commercial quantity of a prohibited drug or plant would probably be well beyond the limits of the CDTP; and that in any event, such serious offenders were unlikely to be simply drug users.

No legislative amendment is warranted at this time.

### **The CDTCC as a pre-release program**

In setting the target group for the CDTP as “the State’s most desperately entrenched criminal addicts” and/or “offenders with a longstanding addiction who have committed multiple criminal offences over a long period (who) have either failed numerous attempts at voluntary or court-mandated treatment or ... have never accessed treatment”<sup>134</sup>, the Government targeted the program at offenders being newly sentenced (ie, a front-end sentencing option) rather than inmates already in custody.

<sup>129</sup> Schedule 1

<sup>130</sup> “Supply of prohibited drugs”

<sup>131</sup> Section 5A(2)(e) *Drug Court Act 1998*

<sup>132</sup> The Hon. John Della Bosca MLC, Second Reading Speech *Compulsory Drug Treatment Correctional Centre Bill 2004*

<sup>133</sup> see section 33 *Drug Misuse & Trafficking Act 1985* and Table of standard non-parole periods in Division 1A, *Crimes (Sentencing Procedure) Act 1999*

<sup>134</sup> The Hon. John Della Bosca MLC, Second Reading Speech, *Compulsory Drug Treatment Correctional Centre Bill 12 May 2004*

There seems no logical reason why, if the compulsory drug treatment program is successful in its aims and objectives as a front-end sentence, it should be denied to offenders for whom it would be equally appropriate as a back-end sentence, if there was spare capacity available and an inmate otherwise met all the eligibility and suitability requirements.

The *Compulsory Drug Treatment Correctional Centre Act 2004* provided a small 'window of opportunity' to allow some existing inmates to be admitted to the CDTCC as 'foundation participants' – a CDTO could be made in respect of inmates sentenced in the 12 months before the commencement of the legislation who met the general criteria of eligibility, and who still had an unexpired non-parole period of between 18 months and 3 years<sup>135</sup>. There was a further requirement that the participant would ordinarily be a resident of the local government areas prescribed in the Regulation.

The 'foundation participants' provision was intended to provide a pool of existing inmates to enable the CDTCC to begin operation without having to wait for potential participants to be sentenced and assessed for suitability. It was apparently expected that the CDTP would soon achieve its capacity from freshly sentenced offenders, and would not need to search any further.

Dr Birgden, Director, CDTCC, noted in her submission that in 4 years, the CDTCC has never been at 100% capacity. Consequently, the apparent original expectation of achieving capacity only from freshly sentenced inmates was not met.

Judge Dive submitted that "It would of course be possible for the program to be made available to prisoners at the end of a long sentence, perhaps years after sentencing. However, that should be a deliberate policy decision, and not the product of innovation."

One problem with using compulsory drug detention treatment as a back-end, pre-release program is the involvement of the sentencing court under the legislation: it is the duty of a sentencing court to ascertain whether there are grounds on which the Drug Court might find the person to be an eligible convicted offender, and if so, to refer the person to the Drug Court to determine whether the person should be the subject of a compulsory drug treatment order. Given that in the case of an offender serving a long sentence of imprisonment, the sentencing court may not have dealt with the offender for many years, an alternative authority for referring the offender to the Drug Court would need to be prescribed. Any such procedure would require the involvement and agreement of the various agencies involved in the operation of the compulsory drug treatment program.

Discussion should include consideration of:

- i. whether the changes recommended by this Review result in an increase in the number of CDTP participants and thereby result in the CDTCC consistently operating at full capacity. If there remains spare capacity even after adoption of this Review's recommendations, a pre-release CDTP may be an appropriate measure to fill it.

<sup>135</sup> Drug Court Act 1998, Schedule 2, cl. 4

- ii. The Government has recently established the Intensive Drug and Alcohol Treatment Program (IDATP) at John Morony Correctional Centre, which will be extended to Dillwynia Correctional Centre, with 300 beds when fully operational. The program is based on the CDTP, and is targeted at sentenced inmates with a minimum non-parole period of 6 months still to serve and a minimum or medium security classification. Offenders subject to the IDATP will be supported in their transition back to the community. Arguably, the IDATP will fulfil the potential role suggested for the CDTCC as a pre-release program; nevertheless, if demand for the IDATP exceeds its capacity, a potential role for the CDTCC in this regard may still be available and this option should not be closed.

**Recommendation 11: The Government monitor the rate of utilisation of the compulsory drug treatment program in terms of its capacity, and consider the introduction of compulsory drug treatment detention as a pre-release program for eligible and suitable offenders.**

### 3.13.2 The compulsory nature of the CDTP

Some participants submitted that the current provisions required no change. Compulsion did not bother them but they did not think it necessary, on the basis that they felt they had volunteered for the program and did not want to leave.

"If the compulsory part is to complete the programs, then yes make it compulsory to complete the programs. However, if it is for the sentencing judge to force someone here, then we should get rid of that. Why would you force someone to do the changes they don't want to do?"

Still others opted for some form of semi-compulsion, such as

- (a) Choosing whether to be sentenced to the CDTCC or to a mainstream gaol but once at CDTCC, submitting to compulsory program participation until program completion; or
- (b) Trying Stage 1 for a month and leaving if not satisfied; or
- (c) Making Stage 1 compulsory, with an option to progress to Stages 2 and 3 or returning to the mainstream.

Some participants noted that "some of us sit here and jump out just before parole. You would get a lot less of these people if you could leave by mutual agreement." In suggesting "mutual agreement", some noted "otherwise you have to do something dramatic like head butt someone." Others suggested a week's cooling off period after requesting to leave by mutual agreement: "You've had a bad day, and I've had heaps of them, and say 'I want out of here', next day I regret it and think 'What did I do that for?'"

Participants observed that "the services you get counteract the compulsory part – family access, housing assistance, access to TAFE studies, education and job networks."

## Discussion

The issue of compulsion is discussed in detail at 3.2.2 and 3.3.5 above.

It is not proposed that any amendment be made to the compulsory imposition of the program at this time.

### **3.13.3 Personal plan development and personal plan conditions**

Most participants felt that they were involved in the development of their personal plans, but more so in Stage 2 than in Stage 1. In Stage 1 they tended to sign it because they were given it, whereas in Stage 2 “you know more about what you want to do in your personal plan and you’re no longer on drugs so you think more clearly. You’re more informed when you get to Stage 2 – whether you like it or not you’ve learned a lot.”

Most participants had no issues with personal plan conditions. Some resented paying rent to CSNSW from employment earnings, and paying a rental fee for electronic monitoring bracelets used in the community. Some complained of the time taken to complete background checks of potential employers.

Generally, the range of programs provided was viewed as adequate, with additional focus on employment and housing being desirable, as well as more intensive and consistent service delivery from case co-ordinators. Participants were clear that they were in the program to reduce drug use and reduce re-offending, and generally agreed with the programs available to assist these aims.

Generally, participants agreed with an abstinence-based approach<sup>136</sup>, but would like to be re-administered methadone if required, rather than be revoked from the program.

Participants enjoyed the judicial supervision<sup>137</sup> of the program<sup>138</sup>, but felt the regression process was delayed since the reports need to get to the Drug Court for sign-off. It was suggested that the Director be empowered to regress participants, with the option of an appeal to the Drug Court if the participant did not agree with the Director’s decision. (Generally, participants have agreed with a regression decision, particularly for non-admitted drug or alcohol use.)

Participants are not happy with non-contact visits in Stage 1, and note that drugs still come into the CDTCC “by other means”. The BOCSAR Evaluation<sup>139</sup> confirmed this situation: “At the end of Stage 1, 64.8 per cent of participants agreed that box visits upset them. Further, 31.5 per cent of participants agreed that it upset them to have only one visiting time per week.” Furthermore<sup>140</sup>: “More than 70 per cent of participants disliked non-contact visits at each interview.”<sup>141</sup>

## **Discussion**

<sup>136</sup> This observation is supported by the BOCSAR Evaluation

<sup>137</sup> Judicial supervision commences half way through Stage 2, with appearances before the Drug Court every 2-4 weeks

<sup>138</sup> The BOCSAR Evaluation reported at page 34: “At the end of Stage 3, eighty-five percent of participants agreed that supervision was reasonable and fair... Most indicated that supervision maintained a focus on behaviour change ... and that supervision gives extra support.”

<sup>139</sup> Page 31

<sup>140</sup> Page 33

<sup>141</sup> Note, however, that 16.8% of participants reported they ‘liked’ non-contact box visits (page 32).



The BOCSAR Evaluation found<sup>142</sup> “At the end of Stages 1 and 2, 77.0 per cent and 53.9 per cent of participants, respectively, agreed that the personal plans were helpful.”

No change to the existing personal plan development process or conditions seems warranted (other than the provision of information regarding the availability of the restorative justice program outside a personal plan – see Recommendation 8).

However, the suggestion that the Director of the CDTCC be empowered to regress a participant, with the option of an appeal to the Drug Court by the participant, has merit. This suggestion has been discussed at 3.2.4 and 3.3.6 above, and is included in Recommendation 2.

Non-contact visits are discussed at 3.6.2 above. As noted, at 3.8.1 and 3.11.2, the abstinence based approach of the program falls outside of the scope of a statutory review.

### **3.13.4 Rewards and sanctions**

Many participants seemed to feel that progression to the next Stage of the CDTP is a reward in itself, and complained about delay in progression. Given that Stage 2 is less stringent and has advantages over Stage 1 (eg, community access), this view is not surprising.

Some suggested that regressions should last 4 weeks rather than 8 weeks: “8 weeks is a long time, especially when you have a taste of the outside, what more can you learn in 4 weeks as opposed to 8 weeks? The first week is when you really learn.”

Otherwise, most had no complaints about the system of rewards and sanctions, just the application of some individual instances of reward or sanction. The BOCSAR Evaluation found similar complaints with the application of sanctions, reporting<sup>143</sup>: “Comments regarding sanctions occurred at most interview stages. Comments included the inconsistency with which people were given sanctions, stating that the rules and punishments kept changing over time; the unfairness of collective punishment; and the severity of sanctions for returning very dilute drug tests and non-admitted drug use. The perceived lack of reward for positive behaviour was also mentioned, and participants expressed their frustration and feelings of being let down because they expected something in return for doing ‘the right thing’.”

## **Discussion**

The Review rejects the criticism of “lack of reward for positive behaviour”. As noted in Dr Birgden’s submission at 3.2.5, the CDTCC has had a reward to sanction ratio of 4:1 and the system appears to be working well.

The CDTCC provides clear and immediate consequences for drug and alcohol use, responding *every time* with an immediate sanction and more targeted treatment. The consequence for non-admitted use or a ‘very dilute’ result is immediate

<sup>142</sup> Page 31 – in response to statement “My Stage 1 / Stage 2 personal plan helped me a lot.”

<sup>143</sup> Page 35

regression for at least 8 weeks, or revocation for repeated use. Each drug use results in the participant's Personal Plan being reviewed by the multi-disciplinary team and the Drug Court if required.

CSNSW advised the Review that preliminary CDTCC data indicated that those participants who are more likely to be regressed are those who lack impulse control and are overly confident about managing drug use.

Substance abuse is a chronic, relapsing condition so that remaining drug-free can often involve several incidents of "two steps forward and one step back". The benefit to the participants and the community of the CDTP is that any relapse to drug use is responded to immediately under tightly controlled conditions, with the support of highly trained clinicians.

As discussed at 3.2.5 above, no change to the rewards and sanctions provisions is proposed at this time.

### **3.14 His Honour Judge Nicholson, District Court of NSW**

#### **3.14.1 Eligible convicted offender: dependency on *prohibited* drugs**

Judge Nicholson drew attention to the definition of eligible convicted offender in section 5A of the *Drug Court Act 1998*, and particularly section 5A(1)(d): "*A person is an eligible convicted offender if the person has a long-term dependency on the use of prohibited drugs....*" (His Honour's emphasis).

He contrasted this limitation to the use of prohibited drugs with the definition of drug when assessing offences of driving under the influence in the *Road Transport (Safety and Management) Act 1999* (applied to section 52A of the *Crimes Act 1900* "Dangerous driving: substantive matters"):

"*drug means*

(a) *alcohol, and*

(b) *a prohibited drug within the meaning of the Drug Misuse and Trafficking Act 1985, not being a substance specified in the regulations as being excepted from this definition, and*

(c) *any other substance prescribed as a drug for the purposes of this definition.*"

Judge Nicholson submitted that "it would be advantageous to sentencing judges to have access to compulsory drug treatment programs for all recidivist drug offenders, including those whose drug of choice is not an illicit drug, but rather alcohol or a Schedule 4 drug."

### **Discussion**

The extension of the CDTP to alcohol-addicted offenders could result in "mission creep" or "net-widening": courts could be tempted to refer offenders for compulsory alcohol treatment simply because it is there, rather than because it is the best available treatment option. Alcohol addiction treatment is widely available in the mainstream correctional system.

The target group of offenders for compulsory drug treatment<sup>144</sup> is “drug dependent persons who repeatedly resort to criminal activity *to support their dependency*”.

One of the rationales behind the creation of the CDTP was that offenders were committing property-related crimes to fund their drug-addicted lifestyle – the cost of their addiction could generally be measured in hundreds of dollars per day, and the cost of their criminality to the community could be measured in multiples of this cost, as well as the intangible cost to the health and well-being of victims of violent crimes such as robberies.

Criminality related to alcohol addiction rarely follows the pattern of property-related crime to support the addiction or dependency: generally the crime follows the alcohol consumption; it is not motivated by a need to obtain alcohol by any means. Whilst Judge Nicholson’s view of the benefit of the CDTP for alcohol-addicted offenders is acknowledged, this cohort of offenders does not fall within the group of offenders who are subject to the objectives of the CDTP.

Judge Nicholson’s proposal is worthy of further consideration as a policy decision in its own right, but the Review does not propose any change to the criteria of addiction to prohibited drugs at this time. Further consultation between NSW Health, DAGJ Crime Prevention Division and CSNSW in respect of other non-illicit drugs and alcohol may be appropriate in order to properly consider Judge Nicholson’s proposal.

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<sup>144</sup> Section 106B CAS Act

## 4. BOCSAR: An Evaluation of the Compulsory Drug Treatment Program (CDTP)<sup>145</sup>

The original proposal for a compulsory drug treatment program<sup>146</sup> undertook to “invite the Director of the Bureau of Crime Statistics and Research to chair an expert committee to conduct an independent and scientific, randomised controlled study of the program in line with the Government’s evidence-based approach to drug policy.”

In its Evaluation, BOCSAR noted that it was directed by the NSW Government to undertake a randomised controlled trial (“the most rigorous form of evaluation”) of the CDTP in 2003, but “This proved impossible because the number of offenders eligible for the program was never large enough to conduct a meaningful randomised controlled trial... The evaluation was therefore limited to assessing the impact of the CDTP on the health and wellbeing of participants; measuring changes in perceived coercion, affective reactions, treatment readiness and therapeutic alliance; gauging participant satisfaction with various aspects of the program; and monitoring participants’ drug use while on the program. While these measures do not encompass all aspects of program effectiveness, they do have an important bearing upon the legislative objectives governing the program ... in terms of their bearing upon the four<sup>147</sup> legislative program objectives.”<sup>148</sup>

In the BOCSAR Evaluation, the authors noted the requirement of a statutory review, and stated<sup>149</sup> “The present report aims to inform this review process by describing an evaluation of the impact of the CDTP on participants’ changes in health and wellbeing, perceived coercion, affective reactions, treatment readiness and therapeutic alliance, drug use while on the program, as well as describing participants’ attitude towards the program.”

In light of the objectives of the CDTP and the impossibility of conducting a randomised controlled trial, the BOCSAR Evaluation became<sup>150</sup> “a simple pre-post test of changes in the cohort of offenders placed on the CDTP.... The specific aims of the study were to assess:

- a. Whether indicators of CDTP participants’ health and wellbeing changed as they progressed through the program;
- b. Whether indicators of the participants’ perceived coercion to be on the program, readiness to change and the degree to which they developed a good working relationship with their therapist changed as they progressed through the program;
- c. Participants’ views towards various aspects of the program; and
- d. Participants’ drug use throughout the program.”

### 4.1 Statistics from the BOCSAR Evaluation

<sup>145</sup> Joula Dekker, Kate O’Brien and Nadine Smith; NSW Bureau of Crime Statistics and Research 2010

<sup>146</sup> *A new way to break the drug-crime cycle – Labor’s Compulsory Drug Treatment Plan*, page 2

<sup>147</sup> As set out in section 106B *Crimes (Administration of Sentences) Act 1999* – see Executive Summary above

<sup>148</sup> BOCSAR Evaluation page vii.

<sup>149</sup> Page 3

<sup>150</sup> BOCSAR Evaluation page 8

The BOCSAR Evaluation noted: "Between 1 August 2006 and 31 July 2009, 198 offenders were referred to the NSW Drug Court for eligibility and suitability assessments for entry to the CDTCC. The Drug Court judges subsequently made 109 CDTOs. Of the 198 referrals, 45 per cent (n=89) were deemed ineligible or unsuitable to be put on a CDTO... Of the 109 offenders who entered the program, three had their CDTOs revoked before they could be invited to take part in the study... Of (the remaining) 106 offenders, 95 agreed to participate in the study, a 90 per cent response rate."<sup>151</sup> Of these 95 offenders, 74 completed Stage 1; 39 completed Stage 2 and 13 completed Stage 3<sup>152</sup>.

Statistics from the BOCSAR Evaluation have been quoted in many discussions within this Review, to place each discussion in context with the number of participants affected, and in some cases to illustrate a particular submission topic<sup>153</sup>.

## 4.2 Conclusions from the BOCSAR Evaluation

The BOCSAR Evaluation made no Recommendations, however it reached certain conclusions which it included in the "Discussion" chapter<sup>154</sup>. These may be summarised as follows:

- The first objective<sup>155</sup> (to provide a program of compulsory treatment and rehabilitation for drug dependent persons) was largely met once the CDTCC became operational;
- *Prima facie*, the aim of effectively treating drug dependency appears to have been successful;
- The aim of completely eliminating drug use while on the program has not been met, though it has been met as well as could reasonably be expected;
- It is impossible to say whether the aim of reducing the likelihood of relapse was met;
- On measures of health and wellbeing, the aim of promoting the re-integration of participants into the community appears to have been met;
- In its current form the CDTP is too small to permit a rigorous assessment of its effectiveness in the aim of reducing re-offending or long-term drug use.

This Review endorses these conclusions, and provides the following discussion.

## 4.3 Discussion

### 4.3.1 Effectively treat drug dependency, eliminate drug use while on the program and reduce the likelihood of relapse on release.

The BOCSAR Evaluation<sup>156</sup> noted that only 1.8% of non-baseline drug tests conducted during the study were classified as positive for non-prescribed drugs<sup>157</sup>;

<sup>151</sup> BOCSAR Evaluation, page 9

<sup>152</sup> Note that some who completed a Stage were later regressed back to that Stage from a subsequent Stage.

<sup>153</sup> For example, at 3.2.2 the numbers of participants revoked from different stages of the CDTP is cited in illustration of a suggestion to do with revocation.

<sup>154</sup> Pages 41-43

<sup>155</sup> Section 106B CAS Act

<sup>156</sup> Page 41

and it is likely that a proportion of the positive tests was due to one incident of drug use showing up in two or more consecutive test results. "The proportion of positive tests, therefore, may overstate the frequency of drug use."

By comparison, 21.1% of participants' baseline drug tests (before starting the program proper) were positive<sup>158</sup>.

The majority of participants (61.1%) returned at least one positive test (excluding their baseline drug test). The lowest percentage of positive tests (1.3%) was returned by participants on Stage 1, and the highest percentage (4.5%) was returned by participants on Stage 3 – perhaps reflecting the less restrictive confinement regimes of Stages 2 and 3 compared to Stage 1.

CSNSW advised that, in addition to targeted and random drug testing, periodic drug testing occurs twice weekly in Stage 1 and three times per week in Stages 2 and 3.

The BOCSAR Evaluation concluded<sup>159</sup> "The aim of completely eliminating drug use while on the program, however, has clearly not been met". It is clear, however, that participants' drug use while on the program has been significantly reduced from the baseline test results, given the reduction in the rate of positive tests at baseline and non-baseline quoted in the BOCSAR Evaluation.

In this respect, the BOCSAR Evaluation commented<sup>160</sup>: "The elimination of drug use among chronic drug users is a very ambitious objective except in conditions where it is impossible to obtain drugs... In hindsight, it might have been more realistic to set a reduction in drug use as the goal of the program rather than its elimination. Had it been possible to evaluate the CDTP against this criterion, the CDTP might have turned out (like the NSW Drug Court<sup>161</sup>) to be significantly better than the available alternatives." This Review supports the BOCSAR view, and recommends that any future Review consider the reduction in participants' drug use rather than its elimination in determining whether the objectives have been met. There is no need, however, to amend the legislative objective, since any alternative would need qualification of minimum or acceptable reduction etc.

Nevertheless, the BOCSAR Evaluation noted<sup>162</sup> that the elimination of drug use among participants in Stage 1 might have reasonably been expected, given that Stage 1 participants are in detention and visitors are prevented from making any physical contact with them. Although some positive tests in Stage 1 could have resulted from participants who were returned from Stage 2 or 3, the bulk of the positive tests in Stage 1 involved participants who had not yet progressed to Stage 2. "It is hard to avoid the conclusion that illegal drugs were filtering into the CDTCC despite the precautions taken to prevent this occurring. If the program is to continue, this is a problem that clearly needs to be addressed."

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<sup>157</sup> Page 36: a total of 14,529 non-baseline unique tests were conducted between 1 September 2006 and 30 September 2009, of which 13,903 (95.7%) were free of non-prescribed drugs, 257 (1.8%) were positive, 160 (1.1%) were dilute and 209 (1.4%) were inconclusive.

<sup>158</sup> Page 36

<sup>159</sup> Page 41

<sup>160</sup> Page 41

<sup>161</sup> See "The NSW Drug Court – a re-evaluation of its effectiveness" BOCSAR, Contemporary Issues in Crime and Justice Number 121, September 2008.

<sup>162</sup> Page 42

In relation to this, Dr Birgden informed the Review that anecdotal evidence was that the majority of drugs that enter the CDTCC, do so via Stage 2 participants returning to the centre and introducing them to Stage 1 participants via a dividing steel mesh fence. It is perhaps a design flaw (arising from the conversion of an existing correctional facility) that the Stage 1 and Stage 2 residential areas are located adjacent to each other, separated only by a steel mesh fence. Dr Birgden suggested that if a purpose-built facility were to be considered in future, then the Stage 1 residential area should be self-contained and not adjoin any Stage 2 areas.

In the context of the existing premises (which have been shown otherwise to be well suited to the CDTCC role), it may be appropriate for an increased level of searches (including sniffer dogs) to be applied to participants in Stages 2 and 3 returning to the CDTCC from the community.

The BOCSAR Evaluation was unable to examine whether the program reduced the likelihood of relapse, since to do so, it would be necessary to compare participants with a control group of similar offenders who did not enter the CDTP. BOCSAR concluded<sup>163</sup> "It is therefore impossible to say whether the program reduced the likelihood of relapse into drug use. The best that can be said is that the majority of participants wanted to be on the program, thought it would be helpful and made positive comments regarding the program. Despite its coercive nature, the vast majority (84.2%) of participants appeared to consider that attending the program was voluntary. These findings suggest that participants in the program at the very least wanted to reduce their drug use. The relatively high revocation rate highlights the difficulty faced by offenders in achieving this goal."

This Review agrees with the BOCSAR Evaluation that it is impossible to say whether the program reduced the likelihood of a relapse into drug use by participants. Further, it will be very difficult to ever ascertain whether this objective has been achieved, since there is no mechanism to track all participants' drug use post-sentence<sup>164</sup>. There would only be incomplete data if ex-participants subsequently return to custody or supervision for drug-related offences, and even this would be inconclusive since a person might subsequently relapse into drug use but at a much lower level than before undertaking the CDTP.

Even if participants subsequently return to custody, there is no mechanism to compare their return-to-custody or return-to-supervision rate with other offenders who did not participate in the program; and any studies of ex-participants subsequently returned to the correctional system would require many years to build a significant database.

The BOCSAR Evaluation could not provide a definitive answer as to whether the CDTP reduces re-offending or long-term drug use, because of the small sample of participants, a lack of a comparison group and the relatively short timeframe.

In response to these difficulties, CSNSW in partnership with Deakin University obtained an Australian Research Council (ARC) Linkage Grant to conduct a three-year outcome study. This project is entitled "*The effective treatment of drug-using offenders: The impact of treatment and modality, coercion and treatment readiness*

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<sup>163</sup> Page 42

<sup>164</sup> Stage 5 of the program is *voluntary* post-sentence case management in the community.

on criminal recidivism<sup>165</sup>. It is expected that this outcome study will expand on the BOCSAR Final Evaluation Report using a larger sample, providing a comparison group and enjoying a longer timeframe (2006 to 2013).

**Recommendation 12: Any future review or evaluation of the compulsory drug treatment program should include an examination of the reduction in drug usage achieved by the program, in determining the extent to which the objectives of the compulsory drug treatment program have been met.**

#### 4.3.2 Promote re-integration in the community

The BOCSAR Evaluation noted<sup>166</sup> that the legislation did not stipulate any criteria for successful re-integration, so BOCSAR examined improvements in health and well-being and reported "The results on measures of health and well-being were fairly positive." The Evaluation added, however, "Just how indicative these results are of substantial and durable behavioural change is impossible to say. More importantly, the lack of a control group makes it impossible to determine whether these favourable outcomes would have occurred even without the CDTTP."

The Evaluation also examined employment as indicative of re-integration, finding that 8 of the 13 participants who reached the end of Stage 3 and were approaching their parole date reported they were unemployed<sup>167</sup>. BOCSAR noted, however: "Because the study lacked a comparison group, it is impossible to say whether CDTTP participants were any worse off (in terms of employment) than offenders leaving mainstream gaols."

CSNSW advised the Review that although the participants reported to BOCSAR (and repeated in their PowerPoint sessions) that they had difficulty obtaining employment in Stages 2 and 3, between July 2007 and January 2010, 34 of 68 Stage 2 and 3 participants (50%) had achieved employment, with 44% retaining work at 4 weeks, 28% at 13 weeks and 16% at 26 weeks<sup>168</sup>. CSNSW described these figures as "a significant milestone in comparison to similar services in other States."

Figures compiled by CSNSW in August 2011 are impressive. Of 11 participants in Stage 2, 8 were employed full time and 2 were attending TAFE vocational courses, while of 7 participants in Stage 3, 5 were in full-time work, one was employed casually and one was performing community service with a local agency. The total of 16 of 22 Stage 2 and 3 participants in full time and casual work is due to a combination of a successful partnership with a local employment agency and positive pro-social efforts by the participants who are achieving accelerated community re-integration.

CSNSW also advised the Review that according to CDTCC data, between July 2007 and January 2010, 38 participants had been employed in the community for various periods of time ranging from 1 day to 218 days, and averaging 62 days. Further, if not employed, participants spend up to 30 hours per week in community service

<sup>165</sup> Dr Sharon Casey, Associate Professor Andrew Day and Dr Astrid Birgden

<sup>166</sup> Page 42

<sup>167</sup> Page 42

<sup>168</sup> WISE Employment data provided to CSNSW



work: North West Community Care and Stage 2 participants have established a project feeding the homeless in Parramatta, and other charity work.

Nevertheless employment in the community, particularly when facilitated under the program rather than solely by self-initiative, is only one aspect of community re-integration. Other aspects of community re-integration such as family re-integration, relationship stability and participation in community organisations will take longer to become evident.

This Review agrees that the results of any attempt to comprehensively evaluate the achievement or otherwise of the community re-integration objective would be inconclusive at this time.

#### **4.3.3 Prevent and reduce crime by reducing participants' need to resort to criminal activity in support of their drug dependency.**

The BOCSAR Evaluation stated<sup>169</sup> "For reasons already explained, it was impossible to evaluate the effectiveness of the program in relation to the fourth objective."

This Review acknowledges that finding, but notes the ARC Linkage Grant described above.

#### **4.3.4 Should the program be continued, abandoned or expanded?**

The BOCSAR Evaluation posed this question<sup>170</sup> and answered: "The evaluation, unfortunately, does not provide the kind of information needed to give a definitive answer to this question. In its current form the CDTP is too small to permit a rigorous assessment of its effectiveness in reducing re-offending or long-term drug use. The lack of a comparison group, moreover, makes it impossible to determine with any degree of certainty whether the positive outcomes observed in connection with the program would have occurred in its absence."

The overwhelming response to this Review is that the compulsory drug treatment program should be continued. Of 22 responses received, none suggested the program be curtailed, and the majority expressed support for the program to continue.

The NSW Sentencing Council said: "The objectives of the CDTCC set out in s.106B of the *Crimes (Administration of Sentences) Act 1999* provide a structured framework of focused rehabilitation, and the Council is supportive of any program that promotes and facilitates the re-integration into lawful community life for those offenders caught in the drug-crime cycle. By targeting people with long-term drug addictions and a concomitant life of crime and recurring imprisonment, the program has the potential to reconcile many of the seemingly incongruent purposes of sentencing for this class of offender. While the BOCSAR Evaluation did not provide any conclusive evidence in relation to the recidivism of the program participants, the Council is of the view that the objectives remain valid and supports the continuation

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<sup>169</sup> Page 43

<sup>170</sup> Page 43

of the program so as to enable a future assessment of its effectiveness in preventing and reducing crime.”

The NSW Bar Association submitted: “The Association’s Criminal Law Committee has examined the issues raised, and has concluded that the objectives of the compulsory drug treatment program as set out in s106B of the Act appear to be valid and worthy policy objectives which go to addressing the underlying cause of most property crime.”

Corrective Services NSW submitted that the focus at the CDTCC has been upon engaging potentially reluctant offenders to become treatment ready and engage in behaviour change; and it believes that this service delivery objective has been achieved.

Mrs Kay Valder, Official Visitor to the CDTCC, said: “Having been an Official Visitor for 20 years, I was aware of the huge number of inmates charged with drug-related crimes. It was only when I was appointed as Official Visitor to the CDTCC that I realised much could be achieved in a therapeutic centre of this kind. Over the last 4 years I have visited regularly and it has been rewarding to observe the interaction between staff and participants... It is now time the Government accepted that more centres of this type are needed due to the numbers of drug addicts in our prisons.”

This Review is strongly of the view that the program should be continued.

The original policy proposal stated<sup>171</sup> “Once the program is established and working effectively, it is envisaged that the catchment area could be broadened.” It also stated that the program would be reviewed after two years with a view to extending it to female offenders.

The Drug Court has recently expanded its activities (though not the CDTP) to the Hunter Region; and the Government has announced that a second Sydney Drug Court will commence at Downing Centre court complex. The success or otherwise of the Hunter Region and Downing Centre Drug Courts is likely to be a major consideration for the Government in any future deliberations on the possible establishment of a second compulsory drug treatment program.

Corrective Services NSW submitted that it is planning to conduct a feasibility study in respect of extending the CDTP to female offenders. This study will be overseen by a sub-Committee of the CDT Implementation Committee.

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<sup>171</sup> *A new way to break the drug-crime cycle – Labor’s Compulsory Drug Treatment Plan*, page 5

## 5. Conclusion

**The Review finds that the policy objectives of the Act remain valid.**

The overwhelming response to this Review is that the policy objectives of the Act remain valid. The 22 submissions received contained no suggestions that the policy objectives were not valid, and most of the submissions (including all those considered in Chapter 3 of this Review) expressly stated that the policy objectives were valid.

The policy objectives were considered in detail in Chapter 4 of this Review. The fact that some of the objectives have not been met, or met in full, or that there is insufficient data to establish whether some objectives have been met or not, does not invalidate the objectives.

The submissions to the Review confirmed the need for the compulsory drug treatment program and the Compulsory Drug Treatment Correctional Centre. There still remains a pool of drug-addicted offenders who satisfy the eligibility and suitability criteria, and for whom the program represents the best chance of them overcoming or managing their addiction and becoming productive citizens. At present, many offenders are found unsuitable to participate in the program by the application of the eligibility and suitability criteria.

Notwithstanding the element of compulsion, the program is almost universally accepted by the medical fraternity, the legal fraternity and the offender population. Most of the negative comments about the program are essentially suggestions to expand and extend the program.

This Review recommends amendments to the eligibility and suitability criteria which, if accepted, may increase the pool of potential participants.

The *Compulsory Drug Treatment Correctional Centre Act 2004* was described in the submission of Mr N. R. Cowdery QC, Director of Public Prosecutions, as having a beneficial nature. Legislation is characterised as beneficial when its purpose is to provide benefits to those affected.

The Long Title of the *Compulsory Drug Treatment Correctional Centre Act 2004* was 'An Act to amend the *Drug Court Act 1998*, the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* to provide for the compulsory treatment and rehabilitation of recidivist drug offenders; and for related purposes'.

It is clear that rehabilitation of recidivist drug offenders can only be to their benefit; and if the rehabilitation arises from compulsory treatment, then it too is beneficial. Given that the target group for the Act was "entrenched drug offenders... with a longstanding addiction who have committed multiple criminal offences over a long period (and who) have either failed numerous attempts at voluntary or court-mandated treatment or, due to their unwillingness or chaotic lifestyle, have never accessed treatment"<sup>172</sup>, it is also clear that the beneficial purpose of the Act derives from both the compulsory treatment and the intended resultant rehabilitation.

<sup>172</sup> *A new way to break the drug-crime cycle – Labor's Compulsory Drug Treatment Program 2003*

Furthermore, the objectives of compulsory drug treatment set out in section 106B of the *Crimes (Administration of Sentences) Act 1999*<sup>173</sup> support a beneficial categorisation of the CDT legislation. The Court of Appeal has said<sup>174</sup>: “Once appropriate recognition is given to these objects (of the *Drug Court Act 1998*), it is appropriate to give recognition to the fact that the legislation is remedial. It is beneficial, both to the individual and to the public. It is necessary and proper that, in those circumstances, the legislation be construed beneficially.”

The legislation, therefore, does not benefit only the program participants. Ultimately the benefits should flow to society as a whole through a reduction in crime, an improvement in health of program participants and greater social cohesion following the re-engagement in society of successful participants.

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<sup>173</sup> See Executive Summary on page 3

<sup>174</sup> *Director of Public Prosecutions v Hilzinger & Drug Court of New South Wales* [2011] NSWCA 106 at 80. See also *R v Harris* [2011] NSWCCA 105 at paragraph 118.

# Appendix 1

## List of Submissions

Submissions / responses to the Review were received from the following individuals and organisations<sup>175</sup>:

- Australian Institute of Criminology
- Australian Law Reform Commission
- Dr Astrid Birgden, Director, CDTCC
- Community Relations Commission of NSW
- Corrective Services NSW
- Mr N. R. Cowdery QC, Director of Public Prosecutions
- His Honour Judge Dive, Senior Judge of the Drug Court of NSW
- Department of Human Services, Aboriginal Affairs NSW
- Department of Human Services, Ageing, Disability and Home Care
- National Drug and Alcohol Research Centre
- His Honour Judge Nicholson, District Court of NSW
- NSW Bar Association
- NSW Health
- NSW Police Force
- Program participants, CDTCC
- Royal Australasian College of Physicians
- Sentencing Council of NSW
- Staff, CDTCC
- Mrs Kay Valder, Official Visitor, CDTCC
- Mr Tim Wilson, Chaplain, CDTCC.

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<sup>175</sup> This list is compiled by reference to agency and position titles at the time submissions were lodged.

## Appendix 2

### ***Policy 14 – Parole for Participants of the Compulsory Drug Treatment Correctional Centre***

#### **DRUG COURT OF NEW SOUTH WALES**

<b><i>Policy 14</i></b>	<b>Parole for Participants of the Compulsory Drug Treatment Correctional Centre</b>
<b><i>Commenced</i></b>	June 2010

#### **PURPOSES OF POLICY**

- To define procedures regarding the consideration of parole for offenders who are subject to a Compulsory Drug Treatment Order (CDTO) at the Compulsory Drug Treatment Centre (CDTCC).
- To define the expectations of Drug Court, which constitutes the Parole Authority for offenders on a CDTO, as to the completion of the program prior to a grant of parole being considered.

#### **DEFINITIONS**

<b><i>Act</i></b>	means the Drug Court Act 1998
<b><i>Case Coordinator</i></b>	means delegated CDTCC member of the multi-disciplinary team
<b><i>CDTCC</i></b>	means the Compulsory Drug Treatment Correctional Centre
<b><i>CDTO</i></b>	means Compulsory Drug Treatment Order
<b><i>CDTP</i></b>	means Compulsory Drug Treatment Program
<b><i>CDTP Participant</i></b>	means an offender who has received a CDTO
<b><i>Drug Court</i></b>	means the Drug Court of N.S.W.
<b><i>Multi-disciplinary team</i></b>	means the Director (or delegate) of the CDTCC, a probation and parole officer and an appointee of Justice Health
<b><i>Registrar</i></b>	means the Registrar of the Drug Court

#### **POLICY**

##### ***1 BACKGROUND***

- 1.1 CDTP participants have a unique and special opportunity to achieve rehabilitation. In addition to intensive programs at the CDTCC, participants have early access to freedoms in the community to attend to education, employment, community and social activities.
- 1.2 The CDTP not only provides support to participants during the currency of the order, but also after the expiry of the order, including when released to parole.
- 1.3 With such opportunity comes a responsibility for participants to fully engage in the CDTP, and to maximise the benefits of the program for both the participant and the community.

- 1.4 Participants are expected to complete their total sentence by way of CDTO, however parole will be considered if circumstances suggest parole is more appropriate.

## **2 PAROLE FOR OFFENDERS ON A CDTO**

- 2.1 The Drug Court is the parole authority for offenders in compulsory drug treatment detention.<sup>176</sup> Exercising that jurisdiction, the Drug Court applies the ordinary law in relation to the granting of parole, including the general duty that the release of the offender is appropriate in the public interest.<sup>177</sup> To meet the public interest need, and having regard to the statutory considerations regarding parole<sup>178</sup>, including the need to be satisfied of the likelihood of the offender being able to adapt to normal lawful community life, the Drug Court will expect the offender:

- To have complied with the CDTO and advanced through the CDTP.
- To have made a genuine effort to engage in the treatment programs of the CDTP.
- *To have completed as many Stages of the CDTP as the length of their sentence reasonably allows.*
- If their sentence is of sufficient length, to have advanced to Stage 3 and completed six continuous successful months in the community on Stage 3.
- To have achieved a secure and stable income, with a clear expectation of being engaged in paid employment (unless either in full-time education or requiring the support of a Disability Support Pension).
- To have suitable and approved accommodation.

## **3 SENTENCES OF THREE YEARS OR LESS**

- 3.1 When a sentencing court imposes a sentence of three years or less, being a sentence that has a non-parole period, it must make an order directing the release of the offender on parole at the end of the non-parole period (Section 50 *Crimes (Sentencing Procedures) Act 1999*).
- 3.2 However, the making of a CDTO has the effect of revoking any parole order made under s 50 referred to above<sup>179</sup>, and participants can expect to remain on a CDTO until their total sentence expires.
- 3.3 Therefore, as there is no date upon which parole is to be granted, or can be expected to be granted, the Drug Court does not require the preparation of any reports or recommendations regarding parole, unless such a report is requested by the court.

### ***Application for Parole – Sentences of three years or less***

<sup>176</sup> Section 106T Crimes (Administration of Sentences) Act 1999

<sup>177</sup> Section 135 Crimes (Administration of Sentences) Act 1999

<sup>178</sup> Section 135 Crimes (Administration of Sentences) Act 1999

<sup>179</sup> Section 18G (b) Drug Court Act 1998

- 3.4 If a CDTP participant with a sentence of three years or less wishes to be considered for parole, a written application is to be completed, on the required form, and the application is to be filed with the Registrar of the Drug Court. The participant's Case Coordinator will provide assistance in the preparation of that application, if requested.
- 3.5 The Registrar will refer the application to a Drug Court judge in chambers. The judge may either:
  - Refuse the application, or
  - Seek a Short Pre-Release report from the Multi-Disciplinary Team.
- 3.6 If the Judge seeks a Short Pre-Release Report, a date will be set for the consideration of the grant of parole, and the Registrar will notify the CDTCC and the CDTP participant of that date.
- 3.7 The CDTCC and the CDTP participant may provide further written or documentary material to the Drug Court for consideration of parole.
- 3.8 The Drug Court judge will usually consider the question of parole in chambers, and the CDTP participant will be notified of the outcome by the Drug Court Registry.
- 3.9 If the Drug Court judge is of the opinion that the hearing of evidence and/or oral submissions would assist in the determination of the question of parole, the matter will be set down for hearing. The Registrar will notify all parties of the Judge's directions and of the hearing date set.

#### **4 SENTENCES OVER THREE YEARS**

- 4.1 When a sentencing court imposes a sentence of more than three years, the sentencing court specifies a date upon which the offender is eligible for release on parole. For offenders who have received a CDTO, the Drug Court becomes the Parole Authority, and is required to determine if and when the offender should be released to parole.
- 4.2 Participants are expected to complete their sentence by CDTO, however the legislation requires the Drug Court to consider the question of release on parole at least 60 days before that participant's parole eligibility date.
- 4.3 To allow that to occur, four months before the participant's parole eligibility date, the Multi-Disciplinary Team will discuss the issue of parole with the participant. A CDTP participant may be seeking parole, or may not wish to be granted parole, preferring instead to retain the advantages of a CDTO.
- 4.4 There are two possible outcomes from those discussions:
  - (a) If the participant does not wish to be considered for parole, a short report stating such will be prepared and provided to the Registrar of the Drug Court. The Drug Court will take no further action.
  - (b) If the participant does wish to be considered for parole, a CDTCC probation and parole officer will prepare a Pre-Release report and include a recommendation from the multi-disciplinary team. That report is to be



provided to the Drug Court 10 weeks before the participant's parole eligibility date, so as to allow the Drug Court to consider the question of parole at least 60 days before the eligibility date<sup>180</sup>.

- 4.5 If at a later date a CDTP participant who did not want to be considered for parole now wishes to be considered, a written application is to be completed, on the required form, and the application is to be filed with the Registrar of the Drug Court. The participant's Case Coordinator will provide assistance to the participant in the preparation of that application, if requested.
- 4.6 On receipt of the application, the Drug Court will request a Pre-Release report and recommendation from the Multi-Disciplinary Team. That report is to be provided to the Drug Court within 1 month of the request for the report.

## **5 FURTHER APPLICATIONS FOR PAROLE**

- 5.1 Participants who have been refused parole may make further applications to the Drug Court for parole. Unless there are exceptional circumstances, no further application will be considered within 3 months of the last determination of parole.
- 5.2 The Registrar will refer all such applications for parole to a Drug Court judge in chambers. The judge may either:
  - (a) Refuse the application, or
  - (b) Seek a Pre-Release report and recommendation from the Multi-Disciplinary Team.
- 5.3 If the Judge seeks a Pre-Release Report, a date will be set for the consideration of the grant of parole, and the Registrar will notify the CDTCC and the CDTP participant of that date.
- 5.4 The CDTCC and the CDTP participant may provide further written or documentary material to the Drug Court for consideration of Parole.
- 5.5 The Drug Court judge will usually consider all parole matters in chambers, and the Drug Court Registry will notify the CDTCC participant of the outcome.
- 5.6 If the Drug Court judge is of the opinion that the hearing of evidence and/or oral submissions would assist in the determination of the question of parole, the matter will be set down for hearing. The Registrar will notify all parties of the Judge's directions and of the hearing date set.

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<sup>180</sup> Section 137(1) Crimes (Administration of Sentences) Act 1999

## **Appendix 3 – CDTCC Interagency Taskforce**

The CDTCC Interagency Taskforce supports the assessment, treatment and management of drug treatment and rehabilitation to offenders who have been sentenced to imprisonment by way of compulsory drug treatment detention. The purpose of the Taskforce is to establish a forum to provide advice, maximise effective and efficient service delivery and resolve inter-agency problems as they arise.

### **Terms of Reference**

1. To foster and support an inter-agency approach to the Compulsory Drug Treatment Program.
2. To provide regular reports to key agencies to facilitate information sharing.
3. To oversee the targeting and evaluation of: reduced drug use, reduced criminal activity and enhanced community re-integration.
4. To deliver agency services in accordance with the Memorandum of Understanding and associated Standard Operating Procedures.
5. To provide expert advice regarding the service delivery model of the CDTCC and any subsequent developments or revisions.
6. To invite specialists to provide expert advice on specific issues.
7. To resolve inter-agency issues as they arise, in accordance with the Memorandum of Understanding.

### **Membership**

The CDTCC Interagency Taskforce was established at the outset of the establishment of the CDTP. It was originally chaired by the Director, Office of Drug Policy (The Cabinet Office), and included representatives of the Drug Court, (former) Attorney General's Department, NSW Health, Justice Health, Treasury, Corrective Services NSW, The Cabinet Office, the Bureau of Crime Statistics and Research, and Professor Ian Webster, of the Expert Advisory Group on Drugs and Alcohol.

Current membership consists of:

- Assistant Commissioner, CSNSW (Chair)
- Director, CDTCC
- Executive Director / Registrar, Drug Court of NSW
- Director, Drug and Alcohol Services, Justice and Forensic Mental Health Network
- Service Director, Drug and Alcohol Services, Justice and Forensic Mental Health Network
- Clinical Director, Drug and Alcohol Services, Justice and Forensic Mental Health Network
- Senior Project Officer (Treatment Services Implementation, Drug and Alcohol Clinical Program, Mental Health and Drug and Alcohol Office) NSW Health
- Director, Criminal Law Review, Department of Attorney General and Justice
- Director, Corporate Legislation & Parliamentary Support, CSNSW

- Manager Service Planning and Priority Projects, Office of the Senior Practitioner, Ageing Disability and Home Care, Department of Family and Community Services NSW