

## Chapter 9 Offenders

A large proportion of offences committed are related to offenders' abuse of, or dependence on, drugs or alcohol. In the case of dependence on illicit drugs, the expense of the habit often gives rise to the need to steal to raise funds to buy drugs and otherwise support the user. By contrast, alcohol dependence is commonly associated with assaults and drink driving. In such cases as these, the community may best be served by treating the dependencies of the offenders rather than incarcerating them. It is in these circumstances that compulsory treatment of offenders is contemplated.

Compulsory treatment of offenders can occur at several stages of the criminal justice system. Defendants can be diverted into treatment prior to entering a plea, as part of bail conditions, after conviction, as a condition of a suspended sentence, or whilst on parole.

This chapter provides an examination of the provisions of the *Inebriates Act* that relate to offenders, and considers whether the new legislative framework that replaces the Act should include provisions for offenders. Alternative existing court-based treatment programs for offenders are surveyed and evaluated, and areas requiring further treatment options are considered. First, however, the Committee examines the effectiveness and ethics of compulsory treatment of offenders.

### Compulsory treatment of offenders

**9.1** Before commencing this section, we note that the term 'compulsory treatment' in this section generally refers to situations in which offenders are given the option to choose between undertaking a treatment program or traditional criminal justice system approaches such as imprisonment. It should perhaps more correctly be referred to as coerced or mandated treatment, however the term 'compulsory treatment' is that used in our terms of reference, and we use the terms interchangeably.

**9.2** Recent years have seen a growing commitment to the principles of therapeutic jurisprudence, which can be explained as follows:

It is a mental health approach to law that uses the tools of behavioural sciences to assess the law's therapeutic impact and, where consistent with other important values, to reshape the law and legal processes in ways that can improve the psychological functioning and social well-being of those affected.<sup>515</sup>

**9.3** Professor Freiberg identified five elements of court-focused therapeutic jurisprudence: judicial supervision; the availability of treatment; a multi-disciplinary approach; a system of rewards and sanctions; and procedural justice.<sup>516</sup> It is in this context that the trend toward diversion programs and compulsory treatment of offenders has developed.

<sup>515</sup> Winnick B, cited by Professor Arie Freiberg, Criminologist and Dean of Law, Monash University, Evidence, 18 February 2004, p44

<sup>516</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, p44

### **The effectiveness of compulsory treatment of offenders**

- 9.4** Generally speaking, there is a better evidence base for compulsory treatment in relation to offenders than for non-offenders. The available evidence suggests that compulsory treatment of offenders with drug and alcohol problems can be effective. The literature review conducted by the Turning Point Alcohol and Drug Centre in Victoria provided an overview of research studies that examined outcomes of court-mandated treatment, offering a range of conclusions about its effectiveness, with advantages identified by a number of studies.<sup>517</sup>
- 9.5** The studies overviewed by Turning Point Alcohol and Drug Centre indicated that court-mandated clients have treatment outcomes that are comparable to those of voluntary clients. Court-mandated treatment was reported to have reduced offending rates and improved the psychosocial status of participants. In relation to retention in treatment, mandated clients remained in treatment 'at least as long as voluntary clients', with some studies revealing that they are retained in treatment longer.<sup>518</sup>
- 9.6** Providing an overview of the evidence of outcomes of compulsory treatment, Professor Wayne Hall told the Committee:
- Very broadly, it suggests that coercion of offenders results in better retention in treatment and probably no worse outcome, so it does not appear to impair outcomes. Therefore there is probably some benefit, in some circumstances, in coercing some offenders into treatment.<sup>519</sup>
- 9.7** Professor Ian Webster drew a distinction between enforced drug and alcohol treatment (in which offenders are not given any choice about participating in treatment) and treatment undertaken by offenders in an environment of constrained choice. He advised that enforced treatment within the criminal justice system 'has poor results, although these are better when there is a sustained and continuing programme that continues into community settings'.<sup>520</sup>
- 9.8** As we documented in previous chapters in relation to non-offenders, an important concern raised during the inquiry relating to compulsory treatment programs for offenders is the potential impact on voluntary clients. One inquiry participant gave evidence that:
- People who do go into the rehabilitation centres from the courthouse have an effect on the people who are there who genuinely want to sober up. They cannot. They find it very hard because of the people who are coming from the courts to the rehabilitation centres.<sup>521</sup>
- 9.9** A similar concern was raised by a service provider:

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<sup>517</sup> Turning Point Alcohol and Drug Centre, *The Alcoholics and Drug-dependent Persons Act (ADDPA) 1968: A Review*, March 2004, pp17-18

<sup>518</sup> Turning Point Alcohol and Drug Centre, *The Alcoholics and Drug-dependent Persons Act (ADDPA) 1968: A Review*, March 2004, p17

<sup>519</sup> Professor Wayne Hall, Office of Public Policy and Ethics, Institute for Molecular Bioscience, University of Queensland, Evidence, 29 April 2004, pp2-3

<sup>520</sup> Submission 43, Professor Ian Webster, p6

<sup>521</sup> Mr Faulkner Munroe, Evidence, 24 March 2004, p26

In my opinion they should not be taking court referrals unless there is a guarantee that they want to get sober, or that they are committed to getting sober. This going in because it is going to save them from going to gaol just does not work. It is a waste of the system. I think it is an abuse of the system. It should not be allowed.<sup>522</sup>

**9.10** Others consider that there are benefits in mixing voluntary and mandated clients:

I think it is actually good and that there is a benefit to having a balance of clientele. We find that people who come with no orders and who are doing it for themselves or for their family - it might have come to a push because of a relationship or something or a child order, or something not necessarily legal - they actually add a calming influence to the units in terms of they are usually older and usually a little bit wiser and they have had other life experiences. Some of the other people who come on orders might come with what I always call a chip on their shoulder. They come through the door with the attitude.

They actually settle down if they are given time and learn to talk to other people and find out that this is not such a bad place and they can be treated humanely and with respect if they treat other people with respect, and so forth. We do occasionally see change. It is not very often that people just get up and walk out, but certainly it is more of the case when they are forced to come here than when they voluntarily come. But I think the mix is good. You may as well put people in gaol if you are going to separate them. Why not have the people undergoing rehabilitation in gaols and spend money there in the first place if you are going to have a special place for people who have been put on orders like MERIT or court and bail. You may as well have them in gaol and do it.<sup>523</sup>

**9.11** In addition, there is a risk that access to voluntary programs could be affected if compulsory programs are under-resourced:

... the major concern I would have would be ensuring that this system is adequately resourced so that it was not at the expense of the voluntary treatment system. We have to think clearly in considering the involuntary treatment and its potential impact on the quality of treatment provided for people who request assistance with their addiction. If that is not properly resourced, that can be a real issue and I think there are issues I will come to later on, the circumstances in which the treatment is provided. If we end up having locked wards where people are compulsorily treated and they are the same sorts of locations as people seeking voluntary treatment, I think that can have adverse effects on the attractiveness of treatment both for patients and also for staff who work in those sorts of treatment centres.<sup>524</sup>

**9.12** Under-resourcing is also a potential risk for the compulsory programs themselves, according to Professor Mattick:

The difficulty with introducing coercive treatment is that it is likely that over time it will not be particularly well run and if it is going to be introduced, it needs to be well resourced, implemented and humane. There are tensions between the criminal justice and health systems in terms of how they deal with individuals who may not meet the

<sup>522</sup> Ms Val Dahlstrom, Area Manager, Aboriginal Health, New England Area Health Service, Evidence, 24 March 2004, p26

<sup>523</sup> Ms Christine McInnes, Program Director, Lyndon Withdrawal Unit, Evidence, 25 March 2004, p44

<sup>524</sup> Professor Hall, University of Queensland, Evidence, 29 April 2004, p2

expectations of treatment. But around the world there are examples of coercive treatments and they have tended to last for a number of years and then they gradually get rundown and disappear.<sup>525</sup>

- 9.13** These comments underscore the importance of adequately resourcing treatment programs, both voluntary and compulsory. The Committee notes that, arising from the Alcohol Summit, NSW Health is auditing existing drug and alcohol treatment services and reviewing the level of unmet need for treatment across the State. The review will be completed in 2005 and will:

... enable better planning and more flexible targeting of clinical services to areas of need, including population groups with specific needs [and] will enhance access to services and better support the Government's Diversion Program, including adult and young offenders who may elect voluntarily to access treatment.<sup>526</sup>

- 9.14** The review will form the basis for a new *NSW Drug Treatment Services Development Plan 2006-2015*.

- 9.15** An evaluation of specific treatment programs for offenders in New South Wales is found later in this chapter.

### **The ethics of compulsory treatment of offenders**

- 9.16** Compulsory treatment of offenders raised few ethical objections amongst inquiry participants. The fact that offenders, through their offences, have manifestly impacted on others reduces the dilemma: as we noted in Chapter 6, intervention against a person's will is justified under criminal law on the basis that offenders have harmed others. The dilemma is also reduced by the evidence that compulsorily treating offenders has had some success. Moreover, there is an element of choice for offenders about entering treatment – albeit a very constrained choice – as an alternative to traditional criminal justice sanctions.

- 9.17** Several inquiry participants commented on this degree of choice for offenders:

Although there is a coercive element, they are given some choices, some of which are more pleasant than others. Secondly, they have to consent through the process of treatment, which is sometimes hard. They can say, "I am not going to do this any more. I would rather go back to gaol", and some of them do. It is much easier to go to gaol.<sup>527</sup>

- 9.18** Another witness noted:

While they have been bonded to treatment, they choose to take that bond.<sup>528</sup>

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<sup>525</sup> Professor Richard Mattick, Director, National Drug and Alcohol Research Centre, University of NSW, Evidence, 8 April 2004, p8

<sup>526</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse. Changing the Culture of Alcohol Use in New South Wales*, May 2004, p224

<sup>527</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, p48

<sup>528</sup> Ms Tonina Harvey, Area Director, Drug and Alcohol Services, Northern Sydney Health, Evidence, 4 March 2004, p9

- 9.19** Mr Scantleton, who was involved in establishing a trial treatment program for offenders in northern New South Wales, told the Committee:

The threat of breach action, and particularly the involvement of the criminal justice system, can be very useful in helping people to keep them in treatment when they might otherwise want to drop out. It is an interesting concept of coercion when it is a voluntary program. It certainly does not present any problems for me from an ethical point of view but it is something which has enabled us to have far more significant outcomes.<sup>529</sup>

- 9.20** Other participants, such as Professor Freiberg, noted that, conversely, offenders' choices in relation to treatment could be seen to have elements of coercion. Referring to Richard Fox's argument in *The Compulsion of Voluntary Treatment*, Professor Freiburg told the Committee:

He makes the point that there is a continuum of coercion and it is really not helpful to make a clear dichotomy. If you said, "Do you want to be locked up in gaol or go on this treatment?", is it really voluntary consent? "Do you want to do this or go to gaol?" Is it voluntary? "Do you want to be hung or quartered?" ... I do not think you should get hung up about coercive versus non-coercive. I think it is a continuum.<sup>530</sup>

- 9.21** The Committee notes that the World Health Organisation has endorsed mandated treatment of offenders in certain circumstances:

I guess if we look first at the situation of legally coerced treatment ... the position I took there was the one set out in 1986 by the World Health Organisation that it was ethically justified to provide treatment for a person who was drug and alcohol dependent who had been convicted of an offence to which their drug dependence contributed, and that that treatment be undertaken under threat of imprisonment if they fail to comply with these conditions.<sup>531</sup>

- 9.22** Professor Mattick outlined the circumstances in which he considered compulsory treatment for offenders to be appropriate:

The general sense that we have is that coercive treatment would be appropriate as an alternative to prison where there are demonstrable, diagnosable problems or where the individual chooses treatment rather than going to prison.<sup>532</sup>

- 9.23** Similarly, Professor Wayne Hall advised:

I regard that as ethically acceptable if the following conditions were met: that there was judicial oversight of the system - so there was a member of the judiciary, whether a magistrate or a judge, who took the evidence and was involved in the decision; and that the offenders were given a constrained choice - as they were not sentenced to a particular form of treatment they had the choice on the first instance of whether they want to be treated or not, and if they chose not to then they would be processed in

<sup>529</sup> Mr John Scantleton, Manager, MERIT Program, Northern Rivers Area Health Service, Evidence, 18 February 2004, pp6-17

<sup>530</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, p46, citing Richard Fox's argument in 'The Compulsion of Voluntary Treatment', *Criminal Law Journal*, Vol 16, 1992

<sup>531</sup> Professor Hall, University of Queensland, Evidence, 29 April 2004, p1

<sup>532</sup> Professor Mattick, National Drug and Alcohol Research Centre, Evidence, 8 April 2004, p7

the usual way by the criminal justice system and that might involve imprisonment. If they chose treatment then they ought to have a choice on the type of treatment rather than be sentenced to a particular variety of one. The other condition is that humane and effective treatment had to be provided. I think there has been a real concern about the way in which a lot of these systems have operated.<sup>533</sup>

- 9.24** While the compulsory treatment of offenders is relatively uncontroversial, the use of the *Inebriates Act* as the legislative basis for such treatment was not generally supported through the inquiry, as the next section discusses.

## Assessment of the *Inebriates Act's* offender provisions

### Offender provisions under the *Inebriates Act*

- 9.25** As outlined in Chapter Two, Part 3 of the *Inebriates Act* relates to 'inebriates' convicted of certain offences. Where an 'inebriate' has been convicted of an offence of which drunkenness is a contributing factor, or if the offence involves assault of women, cruelty to children, attempted suicide, or wilful damage to property related to drunkenness, the Act allows a magistrate to conditionally discharge the offender. The conditions may include a recognizance or 12 months incarceration in an institution.

### Problems with the offender provisions

- 9.26** Of all the comments received by the Committee relating to the offender provisions of the Act, none were positive. In fact, witnesses were in agreement that the offender provisions were rarely, if ever, used as they are outdated and have been superseded by more appropriate mechanisms. The NSW Chief Magistrate, Judge Price, advised the Committee:

Part 3 is not used. It is out of date and it is simply not resorted to by the courts because of all the other methods of dealing with persons for whom alcohol has been an ingredient of an offence. Section 11 and the sections go back to the times when there was an offence of drunkenness. That went out in 1979 and there is no longer an offence of public drunkenness. The law has moved on. However, part 3 is still there but it is not resorted to. When I say that the Act ought to be repealed, part 3 is archaic and part 2 is in many of its aspects as well, and it should be replaced by modern legislation.<sup>534</sup>

- 9.27** The Committee heard that alternative pathways are in place for diverting offenders into treatment:

There are many other methods of dealing with people where alcohol is an ingredient of the offence ... To answer your general question in relation to drug-dependent people, the justice system is not inert in dealing with that problem. It has been proactive in recent years with the Drug Court, the Youth Drug Court, the Magistrate's Early Referral Into Treatment, Circle Sentencing and, so far as alcohol is concerned, the Sober Driver Program. For many years, probation and parole have been doing

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<sup>533</sup> Professor Hall, University of Queensland, Evidence, 29 April 2004, pp1-2

<sup>534</sup> Judge Derek Price, Chief Magistrate, Local Court of New South Wales, Evidence, 26 November 2003, pp7-8

good work with specific alcohol and drug dependence programs in trying to keep people out of gaol. Magistrates frequently place people on good behaviour bonds conditional on their accepting the supervision and guidance of the New South Wales Probation Service.<sup>535</sup>

**9.28** The Attorney General's Department concurred with this assessment:

As far as offenders go, we have a very well developed jurisprudence in relation to the role that courts can play in directing and diverting people to appropriate care. Part of the Department's view is that you do not need to have an *Inebriates Act* in relation to offenders because there is ample provision in the current law to deal with any offender who comes before the court and who can be referred to appropriate treatment as a condition of bail, a bond or whatever. The courts do that every single day; they are very well acquainted with it. We have some very sophisticated programs at the moment in terms of the youth and adult drug courts and the Magistrates Early Referral Into Treatment [MERIT] Program, which is a much more well-developed, program-based, multidisciplinary way of looking at these problems. That is yet another example of the court playing a direct role, with other government agencies, in taking the opportunity that is presented when someone comes before the court on a charge to look at them holistically and ask, "How can we reduce offending in the long run by dealing with a person's substance abuse problem?"<sup>536</sup>

**The Committee's view**

**9.29** Based on the evidence and submissions before it, the Committee considers that the offender provisions of the *Inebriates Act* have very little to recommend them. The mechanisms for treatment of offenders in the Act represent a very outmoded approach to drug and alcohol dependence, and to options for diversion under the criminal justice system. It is the Committee's firm view that provisions relating to offenders should not be included in the new legislation which we have recommended to replace the *Inebriates Act*.

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**Recommendation 48**

That no provisions relating to offenders be included in the new legislation that replaces the *Inebriates Act*.

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**9.30** As several participants referred the Committee to the alternative treatment mechanisms for offenders, a brief evaluation of those alternatives is provided below. While these diversionary programs are not strictly within the Committee's terms of reference, it is important that the Committee, having recommended against re-enactment of offenders provisions, be confident that alternative treatment for offenders is readily available.

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<sup>535</sup> Judge Price, Chief Magistrate, Evidence, 26 November 2003, p11

<sup>536</sup> Mr John Feneley, Assistant Director General, Policy and Crime Prevention, Attorney General's Department, Evidence, 11 December 2003, p10

## Alternative programs for offenders

### The Drug Court

- 9.31** The Drug Court of New South Wales is a specialist court that aims to reduce the level of criminal activity resulting from drug dependency by diverting offenders into court-supervised treatment. The Court commenced operation at the Parramatta Court Complex on 8 February 1999 and was initially funded as a two year trial.
- 9.32** Participants in the program are referred from both the District and the Local Courts after a successful assessment. The specific eligibility criteria are that a person must:
- be a willing participant
  - be 18 years of age or over
  - be dependent on the use of prohibited drugs
  - have indicated that he or she will plead guilty to the offence
  - be likely to be sentenced to full-time imprisonment if convicted
  - reside within the specified catchment area or have been referred from a court within this area.<sup>537</sup>
- 9.33** Offenders charged with violent offences, sexual offences and certain drug trafficking offences are ineligible to participate.<sup>538</sup>
- 9.34** At present, an average of four offenders per week enter the program.<sup>539</sup> Participants in the program have typically repeatedly committed property related offences:
- As to who turned up on the Drug Court program, mostly people who had long criminal records for break enter and steal, motor vehicle theft, fraud, those sorts of offences were characteristic, people who were going to go to gaol because of their long criminal record but for whom their present offence, the offence that had brought them before the Drug Court, did not explicitly involve violence.<sup>540</sup>
- 9.35** When appearing at a participating Local or District Court, offenders who appear to meet the eligibility criteria are referred to the Drug Court for an initial screening by Drug Court Registry staff.<sup>541</sup> The offender then appears at the Drug Court and inquiries about eligibility, including an evaluation of drug dependency, are made.
- 9.36** Eligible participants are then remanded by the Drug Court for a period of up to 2 weeks for detoxification and completion of a detailed assessment, including a mental health review, by

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<sup>537</sup> [www.lawlink.nsw.gov.au/drugcrt](http://www.lawlink.nsw.gov.au/drugcrt) About the Drug Court of New South Wales, accessed 02/02/04

<sup>538</sup> [www.lawlink.nsw.gov.au/drugcrt](http://www.lawlink.nsw.gov.au/drugcrt) About the Drug Court of New South Wales, accessed 02/02/04

<sup>539</sup> [www.lawlink.nsw.gov.au/drugcrt](http://www.lawlink.nsw.gov.au/drugcrt) About the Drug Court of New South Wales, accessed 02/02/04

<sup>540</sup> Dr Don Weatherburn, Director, NSW Bureau of Crime Statistics and Research (BOCSAR), Evidence, 18 February 2004, p37

<sup>541</sup> [www.lawlink.nsw.gov.au/bocsar1.nsf/pages/cjb52text](http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/cjb52text), accessed on 22/9/03



Corrections Health. A personalised treatment plan is devised in consultation with a Drug Team consisting of health and legal specialists.<sup>542</sup> Following this, the offender reappears before the Drug Court, and enters a guilty plea, receiving a suspended sentence and signing an undertaking to abide by the program conditions.

- 9.37** While treatment plans vary between individuals, all include evidence-based therapy, social support and the development of living skills, regular reporting to the Court, and regular testing. Programs are at least 12 months long. To complete the program the participants must show progress in their program and engagement in their treatment, achieve previously set reintegration goals, have had no drug use for at least three months (or have demonstrated preparedness to re-engage in treatment in the event of a relapse) and must not have been charged with any offence in the previous six months.<sup>543</sup> During the period February 1999 to October 2003, 100 participants successfully graduated from the program.<sup>544</sup>
- 9.38** Early termination of the program can occur at the participant's request, or if the Court decides that the participant is unlikely to make any further progress in the program, or that further participation poses an unacceptable risk to the community that the offender will re-offend.<sup>545</sup>

### Assessment of the Drug Court

- 9.39** Inquiry participants generally were supportive of the Drug Court, and considered that it had been successful on a number of fronts. Having conducted the formal evaluation of the Drug Court pilot, Dr Don Weatherburn of the Bureau of Crime Statistics and Research was well placed to comment on its effectiveness. He advised the Committee that:

The evidence generally is strongly in favour of drug court programs. There are some negative findings but they are outweighed by positive findings in well-conducted studies. If you read Wayne Hall's review in the Australian New Zealand Journal of Criminology where he goes through a sea of coercive treatment programs, I think he draws the conclusion that if they are adequately resourced - and that is a key point - if they are adequately resourced they are effective. The mere fact that they involve some degree of coercion does not necessarily make them ineffective.<sup>546</sup>

- 9.40** Problems identified in the evaluation of the Drug Court, which were most apparent early in the pilot, included:
- tensions between the courts and treatment providers over urine sampling
  - problems with sanctions being harsh
  - an unrealistic requirement that participants be drug free for six months to graduate (later changed)

<sup>542</sup> [www.lawlink.nsw.gov.au/bocsar1.nsf/pages/cjb52text](http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/cjb52text), accessed on 22/9/03

<sup>543</sup> [www.lawlink.nsw.gov.au/drugcrt](http://www.lawlink.nsw.gov.au/drugcrt) Drug Court Programs, Goals and Measures, September 2002, s 3.8, accessed 04/08/04

<sup>544</sup> [www.lawlink.nsw.gov.au/drugcrt](http://www.lawlink.nsw.gov.au/drugcrt) Extract from the 2003 Annual review, accessed 04/08/04

<sup>545</sup> [www.lawlink.nsw.gov.au/drugcrt](http://www.lawlink.nsw.gov.au/drugcrt) About the Drug Court of New South Wales, accessed 02/02/04

<sup>546</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, p41

- a lack of after-care support.<sup>547</sup>

**9.41** Dr Weatherburn briefed the Committee on the Bureau of Crime Statistics and Research's findings about the success of the Drug Court against specific measures:

The results at a glance, people who went to the Drug Court program generally took longer to their first offence, if they had a first offence, than people who received conventional sanctions. Treated subjects, that is to say people in the Drug Court program, generally appeared less often than did people given conventional sanctions. The Drug Court turned out to be slightly cheaper than conventional sanctions, although I should say right at this point it had the potential to be substantially cheaper than conventional sanctions ... The salient point here is that at any given point in time there is a larger proportion of Drug Court participants who still have not offended than there is in the control group. Of course, as time passes both groups, fewer and fewer of them have managed to survive without an offence up to the follow-up period 500 days later, where you still have 40 per cent that did not re-offend.<sup>548</sup>

**9.42** Outcomes relating to health and social functioning were also positive:

The health of Drug Court participants who stayed on the program definitely improved. Their social functioning improved. That is to say they had more stable relationships, more chance of being in a job, more stable addresses, and their income from illegal sources dropped sharply, although I should add that assessment is based on self-report. It was to some extent backed up by the results of urine tests that were conducted.<sup>549</sup>

**9.43** Dr Weatherburn explained that the Drug Court is also cost-effective:

It is about as cost effective, in terms of time to first offence, to put someone in gaol as it is to leave them free and put them in the community. In terms of the rate of offending, it is more cost effective to have them on the Drug Court program.<sup>550</sup>

**9.44** Practitioners who work with the Drug Court participants, such as Professor Webster, were also supportive of the program:

The Drug Court idea, like many people I was apprehensive about it, but having experienced seeing people in it and how they had responded to it and the opportunities that were given to them in the associated programs with it and the way it has been run, I feel quite positively about it, and I was rather surprised at the results, although they were positive, in the analysis, they were not more positive than they had been.<sup>551</sup>

**9.45** In a confidential session, it was suggested to the Committee that the Drug Court program should be geographically expanded, as it is now covering only about one-third of Sydney's

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<sup>547</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, p36

<sup>548</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, p32

<sup>549</sup> Dr Weatherburn, BOCSAR. Evidence, 18 February 2004, p34

<sup>550</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, p34

<sup>551</sup> Emeritus Professor Ian Webster AO, Chair, NSW Expert Advisory Committee on Drugs, Evidence, 18 February 2004, p14

population, and ballots are needed to select which of the eligible candidates are able to participate in the program. It was suggested that three drug courts would be required to cover the whole of Sydney, with one in Wollongong and one in Newcastle. The program could be extended to smaller towns by having half a day each week set aside for Drug Court matters.

**9.46** Dr Weatherburn also considered it feasible to extend the program to other areas of the state:

I just think it is a demonstrably effective, if not spectacularly effective, program and I see no reason why it should not be extended.<sup>552</sup>

**9.47** The Committee did not receive any evidence indicating the Government's intentions about rolling-out the Drug Court program to other areas of the State. The positive evaluation and the comments of inquiry participants certainly suggest to us that geographic expansion of the program is worth considering. The current restriction of the program to Western Sydney is inequitable in terms of access in regional and rural areas, limiting the program's capacity to benefit many more individuals and communities. The Committee also notes that, due to lack of resources, the Drug Court is unable to provide places to all eligible candidates, and has been obliged to select participants by ballot. We consider it undesirable that a lottery should have any place in the allocation of places in a rehabilitative program of this nature.

**9.48** The Committee therefore recommends that the Government assess the feasibility of expanding the Drug Court program with a view to making it accessible to eligible offenders throughout New South Wales. The Committee has made a further recommendation about extending eligibility to the Drug Court later in this chapter (see Recommendation 51).

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### **Recommendation 49**

That the Government assess the feasibility of expanding the Drug Court program with a view to making it accessible throughout New South Wales.

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### **Magistrates Early Referral into Treatment (MERIT)**

**9.49** The Magistrates Early Referral Into Treatment program was established as a pilot in 2000 in the Northern Rivers region of New South Wales, following a recommendation from the 1999 Drug Summit.<sup>553</sup> The objective of the program is to divert drug offenders into treatment programs, with the intended outcomes including decreased drug-related crime, decreased illicit drug use and improved health and social functioning for participants. After a successful pilot, roll out of the program across the State commenced in 2001.<sup>554</sup>

**9.50** The Committee heard that MERIT complements the work of the Drug Court, focusing on offences at the local court level rather than the more serious offences dealt with by the Drug Court. Under MERIT, a defendant charged with a drug-related offence can be referred to

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<sup>552</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, p41

<sup>553</sup> Tabled Document No 9, *NSW MERIT Program*, April 2002, p3

<sup>554</sup> Tabled Document No 9, p4

undertake treatment as part of bail conditions.<sup>555</sup> The referral takes place prior to the defendant entering a plea, with the matter adjourned until after the defendant completes the program, at which time the case is heard and finalised.<sup>556</sup> The most common charges against participants entering the program are theft and related offences and drug offences, with these constituting over half (52%) of all charges against MERIT participants.<sup>557</sup> The majority of participants were heroin users, with 62% identifying it as a problem drug for them.<sup>558</sup>

- 9.51** Eligibility is limited to adult offenders with treatable illicit drug use problems who have committed non-violent, non-indictable offences and are eligible for bail. Unlike the Drug Court, participants are not required to plead guilty to be eligible. However, they must be motivated to engage in treatment.<sup>559</sup>
- 9.52** A defendant can be referred to the program by police, magistrates, legal representatives, probation and parole, by the defendants themselves or by their families. Referred clients are rigorously assessed by specialist workers engaged by NSW Health who operate independently of the courts. Assessment includes psychosocial information, criminogenic background, family background, mental health issues, drug use patterns and 'readiness to change'.<sup>560</sup> A recommendation is then made to the court, and the magistrate determines whether the defendant enters the program.<sup>561</sup>
- 9.53** Following acceptance into the program, an extensive personalised treatment plan is developed, and a contract for attendance and other requirements is agreed to. Treatment programs are typically three months long and are very intensive. In addition to drug treatment, participants' secondary needs (such as education, health, medical, housing and living skills) are identified and addressed.<sup>562</sup>
- 9.54** Urine analysis is used to assess participants' drug use, which is used for therapeutic purposes, but is not provided to the courts. Unannounced home visits also occur.<sup>563</sup> Judicial supervision is a crucial aspect of the program, with the defendant returning to the court to report on progress, to receive encouragement where appropriate or to be reminded of the consequences of non-compliance. Participants who do not comply with the program or their bail conditions, or who commit further offences, are breached from the program and may have bail withdrawn.<sup>564</sup>

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<sup>555</sup> Tabled Document No 9, pp4-5

<sup>556</sup> John Scantleton et al, 'MERIT', *a cooperative approach to addressing drug addiction and recidivism*, MERIT Conference Paper, Perth, May 2002, p1

<sup>557</sup> NSW Attorney General's Department, *MERIT Annual Report*, 2002, p6

<sup>558</sup> Scantleton et al, 'MERIT', *a cooperative approach to addressing drug addiction and recidivism*, p6

<sup>559</sup> Tabled document No 9, pp3-5

<sup>560</sup> Mr John Scantleton, Manager, Magistrates Early Referral into Treatment (MERIT) Program, Northern Rivers Area Health Service, Evidence, 18 February 2004, pp6-17

<sup>561</sup> Magistrate Jeff Linden, *Magistrates Early Referral into Treatment Program*, Judicial Officers Bulletin, Vol 14 No 5, June 2003, p34

<sup>562</sup> Tabled document No 9, pp9-10

<sup>563</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp6-17

<sup>564</sup> Tabled document No 9, p12

- 9.55** At the completion of the program, clients are re-assessed and a comprehensive report and relapse-prevention plan are developed. At the final hearing, the magistrate is provided with the report about the defendant's participation, and sentencing occurs, during which the magistrate has discretion to consider the defendant's compliance or non-compliance with the program.<sup>565</sup>

### **Evaluation of MERIT**

- 9.56** The evidence received by the Committee, and the formal evaluations we considered, all indicate that MERIT has been successful across a number of measures. It should be noted, however, that success does not necessarily equate with abstinence for all participants:

When we started MERIT over 12 months ago we set our standards really high. We thought that, if we were to break the drug crime cycle, they had to stop using drugs. It was pretty clear very quickly that that was not going to occur. Somebody who was using \$200 worth of cannabis a day might have ended up using \$10 worth of cannabis a day after being on the MERIT program and probably was no longer breaking into my house to steal my money to pay for those drugs.<sup>566</sup>

- 9.57** Nevertheless, Mr Scantleton told the Committee that a considerable proportion of MERIT graduates achieve abstinence:

32 per cent of the clients who are completing the program are attaining abstinence from all illicit drugs, which is quite significant given the background of these people...<sup>567</sup>

- 9.58** Other performance measures are also encouraging. In relation to commission of further offences, a study of 96 graduates was conducted in April 2002, an average of 13 months they after completed of the program. The study found that:

Of those people, 60% had no legal action against them during the time of that 13 months and 40.6% had not come under any police notice whatsoever including intelligence reports. So, if they were seen by police or not seen by police to be down town with someone else who is a known drug user, criminal, whatever, is the type of information which is generally included in intelligence reports. At that point in time we were very happy with those outcomes.<sup>568</sup>

- 9.59** By comparison, non-completers of the program were twice as likely to re-offend as program graduates.<sup>569</sup>

- 9.60** The health and well-being of participants also improved, particularly psychological health, and social skills were enhanced:

<sup>565</sup> Tabled document No 9, pp12-13

<sup>566</sup> Ms Toni Colby, MERIT Caseworker, Alcohol and Other Drugs Service, Tamworth, New England Area Health Service, Evidence, 21 March 2004, p21

<sup>567</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp6-17

<sup>568</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp18-19

<sup>569</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, p19

In summary, it indicated there were significant improvements in drug use, health and social functioning. Where heroin was a drug of choice there was a significant reduction in the heroin use. The participants reported substantial improvements in life skills, family relationships and self-esteem.<sup>570</sup>

- 9.61** Criminologist Professor Arie Freiberg, whilst supportive of the early intervention approach, considered that serious interventions such as MERIT should not occur as part of bail (when the defendant has not been convicted of any crime), but should occur as part of sentencing:

My argument is not with the intention, which is to provide services to people who might have alcohol or drug or other problems. It is that bail has been asked to do the job that sentencing is supposed to do. I think it is an improper legal foundation for serious interventions in people's lives. At heart I am a civil libertarian. The state can intervene when you have broken the law. Prior to that it can only intervene for certain purposes. Bail is to make sure you come back to court. I have no objections to providing help for people on bail, such as alcohol and drug help, if it is solely for the purpose of ensuring you will turn up for court. If it is a long term intervention, it is an improper legal foundation.<sup>571</sup> ... Do not get me wrong, I think the earlier you deal with people the better, but have the right tools to go with it.<sup>572</sup>

- 9.62** However, others considered that the program was operating well without the need for new legislation:

From a legal perspective, legislation to underpin MERIT is not required. MERIT works under the bail system. The amendment to the *Bail Act*, section 36 which allowed treatment to be undertaken for 12 months, is seen to be quite adequate. There is some talk about providing legislation but I really do not think it is necessary. MERIT fits in very well with the shift from the adversarial criminal justice system to therapeutic jurisprudence, allowing the court to address the causes of crime.<sup>573</sup>

## **Additional programs for offenders**

- 9.63** This section examines suggestions for additional programs for offenders with drug and alcohol problems. A particular issue is the comparative lack of diversionary options for alcohol related offenders as opposed to drug dependent offenders.

### **Extension of diversionary programs to offenders with alcohol dependence**

- 9.64** In spite of the frequency with which alcohol problems are connected with offending behaviour, at present (except as detailed below) offenders for whom alcohol is the primary drug problem are excluded from the MERIT and Drug Court programs.
- 9.65** Speaking at the NSW Alcohol Summit in 2003, the NSW Chief Magistrate noted the link between alcohol consumption and the commission of offences:

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<sup>570</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, p19

<sup>571</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, pp49-50

<sup>572</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, p51

<sup>573</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp21-22

The excessive consumption of alcohol ... is a substantial factor in bringing persons into contact with the Justice System.<sup>574</sup>

**9.66** He reported that in 2002, mid-range drink driving was the most common offence for persons sentenced in the Local Court. The second most common was common assault, an offence frequently committed under the influence of alcohol.<sup>575</sup>

**9.67** According to the manager of the Northern Rivers MERIT program, the exclusion of alcohol related offences has particular repercussions:

[Alcohol] was an exclusion criteria, and that is a particular issue which probably prevented a lot of Aboriginal people coming in, although particularly with Koori people we were very flexible as far as that criteria went.<sup>576</sup>

**9.68** A number of inquiry participants proposed that offenders with serious alcohol problems should be eligible to access the MERIT and Drug Court programs, given the benefits of these programs for both participants and the broader community. The Committee notes that this was a recommendation of the 2003 Alcohol Summit.

**9.69** Professor Freiberg commented that, theoretically, there is no reason why alcohol related offences should not be treated the same way as drug-related ones:

To me, a lawyer, the key is that you have a substance abuse problem, whether it be drug or alcohol related. If that is a contributing factor to the commission of offences, then whatever the treatment is, whether it is detox or methadone, whatever it is, it is the reduction of the criminal behaviour, and one hopes improvement of the health outcomes, which is the key. I do not see any theoretical difference between the two.<sup>577</sup>

**9.70** In fact, Professor Freiberg considers that the prevalence of alcohol related crime makes diversionary programs for alcohol more critical, even in comparison to illicit drug-related crime:

Really, if you look at the data, and you look back a hundred years or further, and look at the date of your *Inebriates Act*, alcohol is 50 or a 100 times more serious in its prevalence in the commission of crime, especially violent crime, than drugs, and we have ignored it because it is so deeply entrenched in our society it is disingenuous to say otherwise.<sup>578</sup>

**9.71** The Shopfront Youth Legal Centre was critical about the lack of diversionary options for offenders with alcohol problems:

However, notwithstanding the fact that alcohol abuse is linked to the commission of numerous crimes, the NSW justice system has failed to institute adequate diversionary programs for offenders suffering from alcohol abuse.<sup>579</sup>

<sup>574</sup> Submission 1, Judge Derek Price, Chief Magistrate, Attachment 1, p1

<sup>575</sup> Submission 1, Judge Derek Price, Chief Magistrate, p3

<sup>576</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, p22

<sup>577</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, p52

<sup>578</sup> Professor Freiberg, Monash University, Evidence, 18 February 2004, p49

<sup>579</sup> Submission 9, Shopfront Youth Legal Centre, p4

**9.72** Judge Price proposed early in the Inquiry that persons with alcohol problems be eligible for MERIT:

I have referred also to the Magistrates Early Referral Into Treatment [MERIT] Program, which is a pre-plea diversion program for offenders with illicit drug problems. That is now in use in more than 50 per cent of courts. It is being gradually rolled out across the State. I suggest that it be extended to offenders with alcohol problems. The extension of MERIT in such a way would have the advantage of linking offenders at an early stage to services, government or private, that may assist in stabilising their lifestyles, just as with those with drug problems, and address the cause of their alcohol use.<sup>580</sup>

**9.73** Ms Chris McInnes, Program Director at Lyndon Withdrawal Unit in Orange is supportive of extending the MERIT program to alcohol abusers, though she does identify some practical challenges:

We have often wanted to make referrals to MERIT, but they could not take them because they were not illicit drug users. They fit the criteria beautifully. It will open up far more referrals because we know that alcohol is a bigger problem in this area. Drink driving offences are increasing ... We will have to look closely at whether they do residential rehabilitation or outpatient treatment. Many people with alcohol problems work. We must consider those things. We could have after-work lessons, lectures, groups, treatment, therapy or whatever.<sup>581</sup>

**9.74** Mr Scantleton has in the past sought funding to trial a MERIT-based treatment program for alcohol related offenders. However he is aware of a number of difficulties likely to be faced in the extension of diversionary programs to alcohol:

The disadvantages include the legality of alcohol use in our society ... There is less of an inclination to cease drinking as it is legal. Many of the undesirable behaviours associated with alcohol may be hidden, particularly domestic violence. The program would need to develop specific strategies to deal with this. From a management perspective, alcohol users present with more violent tendencies and I would be concerned as to how to best effect treatment whilst providing a safe working environment for staff.<sup>582</sup>

**9.75** There was also support for extending the Drug Court program to include offenders with alcohol abuse problems, although witnesses who spoke to the Committee explained that different, alcohol-specific programs would need to be established.

**9.76** While supportive of the principle of extending the Drug Court to include offenders with alcohol problems, Dr Weatherburn also noted potential difficulties, including the numbers of likely referrals:

There are some specific issues that come up in the context of trying to deal with alcohol related crime by a Drug Court process. One of them is that there are vast numbers of people involved. A Drug Court which is at the moment barely adequate

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<sup>580</sup> Judge Price, Chief Magistrate, Evidence, 26 November 2003, pp11-12

<sup>581</sup> Ms Christine McInnes, Program Director, Lyndon Withdrawal Unit, Evidence, 25 March 2004, p43

<sup>582</sup> Tabled Document No 19, Mr John Scantleton, *Proposed Questions*, p4



to meet the existing demands it faces would have to be dramatically expanded if you were going to try and include people with alcohol related problems in that program.<sup>583</sup>

**9.77** The frequent co-existence of violence and alcohol was another challenge identified by Dr Weatherburn:

... it is easy to find people who are heroin addicted and who have committed non-violent property crimes; it is somewhat harder to find people who are addicted to alcohol who have not committed a violent offence. Well, if not politically fraught, at least there are bigger public safety issues associated with taking someone who has committed a violent offence and who might be otherwise suitable for gaol and placing them in a treatment program in the community.<sup>584</sup>

**9.78** The Committee understands that some progress is being made in trialling the diversion of alcohol related offenders. In response to the Alcohol Summit's recommendations, the Government has commenced a trial of a new alcohol diversion scheme in the mid-West of the State at Orange and Bathurst Local Courts, and is also enabling the MERIT program at Broken Hill to target adult offenders with alcohol problems. These programs will be subject to an evaluation that will form the basis of decisions about whether to roll out the program more widely.<sup>585</sup>

**9.79** The Committee heard that there are some concerns about the levels of resources available to the pilots. Mr Scantleton gave evidence that:

The Committee might be aware that the MERIT funding was held up late last year and early this year and as a consequence of that a lot of the experienced staff in the mid west have actually left the program. So their skills base is probably not desirable to run a challenging program like that. I visited the mid-West area and, whilst they have an NGO out there that provides a detox facility and rehab, I think the area generally is a bit light on in terms of some of the other infrastructure to support the likes of an alcohol program like that. So I think one way or the other it is going to be quite challenging.

They have also been requested to start the program in two courts, Orange and Bathurst, and both of those are fairly busy courts and there will be a lot of people referred to the program. I think it is going to be very challenging. It will be challenging in any area but I think it will be more challenging in that area because of unfortunate circumstances and the lack of infrastructure.<sup>586</sup>

**9.80** The Committee strongly supports the trial to extend MERIT to alcohol and considers it has great potential to be implemented more widely in the future. Given the evidence about the sparse access to services and lack of resources, particularly in rural areas, we urge the Government to adequately fund alcohol and drug services to support these programs. Failure to do so would make success of the trials very unlikely.

<sup>583</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, pp38-39

<sup>584</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, pp38-39

<sup>585</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p224

<sup>586</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, p28

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**Recommendation 50**

That the Committee support the planned trial extension of MERIT to alcohol in the mid-West and Broken Hill, and recommends that the Government ensure that the programs are adequately resourced.

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**9.81** In relation to the Drug Court the Government has indicated that it does not support the proposal to include alcohol related offences. The proposal was considered by the Drug Court Monitoring Committee (chaired by the Attorney General's Department) in September 2003, following the recommendations of the 2003 Alcohol Summit. It recommended against extending the role of the court for reasons that included:

- The category of offenders dealt with by the Court. Drug Court clients are non-violent illicit drug dependent offenders predominantly convicted of acquisitional crimes.
- Alcohol related offenders facing custodial sentences are typically persons who have committed violent offences including domestic violence or are repeat drink drivers.
- The need for quite different treatment responses. Clinicians have advised that offenders with serious alcohol problems require significantly different treatment interventions and should not generally be combined with illicit drug offenders.
- The existence of appropriate court based intervention programs for two identified groups of alcohol related offenders. Programs such as Alcohol Interlock Program, Sober Driver Program and the Traffic Offender Program are available for drink drivers. The Probation and Parole Service of the Department of Corrective Services also conducts anger management programs for violent offenders.
- The view that non-dependent alcohol related offenders may be better dealt with in pre-sentence programs such as MERIT.<sup>587</sup>

**9.82** The Committee is not convinced that these are sufficient grounds for excluding alcohol related offenders from the Drug Court program, given the potential benefits to the community arising from the inclusion of alcohol. As witnesses noted, the relevant consideration is that substance dependence or abuse is contributing to the offending behaviour; the nature of the substance is irrelevant in principle. The need for linkages to treatment and improvements in psycho-social situation and health are as relevant for people with severe alcohol problems as they are for people with dependence on illicit drugs.

**9.83** The fact that 'quite different treatment responses' are required for offenders with serious alcohol problems should not, in our opinion, rule out such offenders from accessing and benefiting from the programs; it merely indicates the need for different interventions to be offered in the programs. Presumably this occurred when the Youth Drug and Alcohol Court and the MERIT pilot project began allowing access for offenders with alcohol problems. The

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<sup>587</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p226

existing court based intervention programs for some alcohol related offenders should not be a reason for excluding alcohol related offences from the Drug Court either. Rather, we believe the availability of such existing programs could be considered for utilisation by the Drug Court.

- 9.84** Given the ineligibility of violent offenders accessing the Drug Court, the violent nature of many alcohol related offences may well exclude many alcohol-affected offenders. The Committee does not suggest that the exclusionary rules relating to violence be altered. Rather, we propose that having alcohol as the primary drug problem should no longer, of itself, be a basis for exclusion.
- 9.85** The Committee therefore recommends that a pilot project be developed to trial the inclusion of alcohol related offenders in the Drug Court program as long as the offenders meet the other eligibility criteria. This will clearly require the provision of relevant alcohol-focused treatment programs. The pilot should be subject to a rigorous evaluation, which should form the basis for decision making about rolling out the program state-wide. In such circumstances, the Drug Court would appropriately be renamed the Drug and Alcohol Court.

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### **Recommendation 51**

That a pilot project be developed to trial the inclusion in the Drug Court program of alcohol related offenders who meet the other eligibility criteria. This should include the provision of relevant alcohol-focused interventions.

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### **Extension to young offenders**

- 9.86** The extension of diversionary treatment programs for juvenile offenders was also flagged during the hearings. In relation to MERIT, Mr Scantleton gave evidence that ‘a lot of people would like to see MERIT for juveniles’.<sup>588</sup> He noted that some potential obstacles exist in the ‘level of maturity’ of many juveniles:

If you were to run a MERIT style program for juveniles I think it would be very challenging for young people who have not got to the point where they realise they have got a drug problem. They are still in party mode; they have not reached that stage where they say, “Hell, my life has fallen apart”. Until people get to that stage you are not going to get that level of insight and consequently you are not going to get the level of motivation to want to do something about it. I think it will eventually come, but when it comes I think it will be very challenging for the people who do it. A lot of the juveniles I have dealt with over the years are pretty fearless and rarely have insight into what some of their issues are.<sup>589</sup>

- 9.87** A number of diversionary programs have been developed for juvenile offenders in recent years. In the response to the Alcohol Summit, the Government noted that it had:

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<sup>588</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp21-22

<sup>589</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, p23

... established a continuum of diversion programs to deal with young offenders coming into contact with the criminal justice system. These programs provide a range of interventions and treatment responses depending on the seriousness of the offence and the treatment needs of the young offender.<sup>590</sup>

Young offenders, who commit less serious offences, including alcohol related offences, may be diverted from the criminal justice system by police or the Children's Court under the Government's *Young Offenders Act 1997* through a scheme of police warnings, formal cautions and youth justice conferences.

- 9.88** The Committee notes that the Youth Drug Court already covers young offenders with problematic drug and alcohol related behaviour and dependency, and has been re-named the Youth Drug and Alcohol Court. The program targets both licit and illicit drug use, including the use of inhalants, binge drinking, and injecting drug use:

More serious offenders with drug or alcohol related problems may be dealt with in the Youth Drug and Alcohol Court and be referred to judicially supervised treatment and other programs.<sup>591</sup>

- 9.89** Judge Price identified additional programs under consideration for juveniles:

There is also scope to provide intensive court supervision, in relation to children in particular, which relevantly identifies high-risk, persistent offenders who abuse alcohol and require comprehensive long-term management. This program is under consideration at present, particularly with older juveniles. Their alcohol use is identified and they are effectively case managed by the judicial officer. They keep coming back before the judicial officer to see whether they are complying. It is not just a question of being put on a bond and being let go; they are case managed effectively and they are under the intensive supervision of the court.<sup>592</sup>

- 9.90** From the evidence before the Committee about programs underway or being considered, it does not appear necessary to make recommendations in relation to young offenders with drug and alcohol problems.

### **Domestic violence**

- 9.91** Another issue raised during the Inquiry concerns alcohol related domestic violence, particularly in situations where assault charges are not laid. Chief Magistrate Judge Price proposed that apprehended domestic violence orders should be reformed to require offenders to be compelled to undertake an alcohol treatment program if alcohol is a significant component of their abusive behaviour:

I refer to apprehended domestic violence orders. A large number of matters that come before the local courts are applications for apprehended domestic violence orders. Frequently they are alcohol related, as I referred to in my paper. The link between alcohol use and domestic violence is readily apparent. Last year we made 16,046 final domestic violence orders. One of my recommendations is that the court's

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<sup>590</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p226

<sup>591</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p226

<sup>592</sup> Judge Price, Chief Magistrate, Evidence, 26 November 2003, p15

power to make apprehended domestic violence orders be extended to enable the court to make an order in appropriate cases where an offender undertakes a compulsory program to deal with his or her alcohol use.<sup>593</sup>

- 9.92** It is worth noting that domestic violence is caused by a range of factors, and would not simply disappear if alcohol were absent. This is a point strenuously made by the Wirringa Baiya Aboriginal Women's Legal Centre:

One point I would like to make clear is that some people and government organisations think that alcohol and substance abuse cause domestic violence, sexual assault and child sexual assault. This is not true. Domestic violence, sexual assault and child sexual assault are premeditated and deliberate and the victims are most often women and children. This is distressing for services such as ours as we all know that alcohol is not the cause of the violence.<sup>594</sup>

- 9.93** Legislative amendment would be required to enable treatment orders of the kind proposed by Judge Price to be made as part of an apprehended domestic violence order:

At present, apprehended domestic violence orders are preventive. You make an order that, for example, one person must not approach another, go near the home, or assault, molest or interfere in any way with the person who seeks the protection of the order. But nothing positive is being done at that early stage. The legislation does not permit a positive order to be made.

I recommend that section 562AE of the *Crimes Act* be amended so that when an apprehended domestic violence order is made the court can order the offender to undertake a compulsory program to deal with the alcohol problem, which is the cause of the problem. Very good work is being done along the lines of intensive education, such as the sober driver program, which goes into the causes of alcohol use and the commission of the offence. That type of intensive education program could well be extended into the compulsory program that the court could make in relation to the apprehended domestic violence situation.<sup>595</sup>

- 9.94** Judge Price envisaged a treatment order to be appropriate wherever alcohol contributed to domestic violence, arguing that he did not think it unreasonable for a court to require a perpetrator of domestic violence to attend a rehabilitation program if there were evidence that alcohol was a significant cause of the need for the apprehended violence order. Failure to attend treatment would be considered an offence.<sup>596</sup>

- 9.95** The NSW Police considered that Judge Price's proposal could be feasible:

Under the current legislation for apprehended violence orders, with some amendment to the law, it could be a condition of the order that the offender gets treatment. The

<sup>593</sup> Judge Price, Chief Magistrate, Evidence, 26 November 2003, pp11-12

<sup>594</sup> Submission 39, Wirringa Baiya Aboriginal Women's Legal Centre, pp1-2

<sup>595</sup> Judge Price, Chief Magistrate, Evidence, 26 November 2003, pp11-12

<sup>596</sup> Judge Price, Chief Magistrate, Evidence, 26 November 2003, pp14-15

offender has not committed an offence at that stage. There has been a threat or the proposal that there may be a threat.<sup>597</sup>

- 9.96** However, it is also clear that there may be ethical concerns connected with compelling treatment for individuals who have not been convicted of any offences.
- 9.97** The Committee notes that the justice system already provides for some responses to domestic violence. Apprehended Violence Orders can be used to protect families and where assaults occur, charges can be laid. The current regime is set out in the Government's response to the Alcohol Summit:

The Government strongly supports the current statutory regime under Part 15A of the *Crimes Act 1900* which establishes powers for the courts to give orders for the protection of victims of domestic violence, including alcohol related domestic violence ... At present, the courts are empowered to make orders on the perpetrators of domestic violence which prohibit or restrict that person's actions. The courts may also issue a warrant for that person's arrest to protect the personal safety of the victim.<sup>598</sup>

- 9.98** However, it appears that there are no preventative or diversionary measures in place that deal with alcohol as a contributor to family violence. The Government has advised that new initiatives are under consideration, including Judge Price's proposal relating to Apprehended Violence Orders:

The Attorney General has referred the issue of empowering the courts to order domestic violence defendants to undertake compulsory alcohol treatment to the Apprehended Violence Legal Issues Coordinating Committee. This Committee is chaired by the Criminal Law Review Division of the Attorney General's Department and includes the Chief Magistrate with representatives from NSW Police, Department of Community Services, Department of Corrective Services, Office of the Public Prosecutor, Judicial Commission of NSW, NSW Legal Aid Commission and community representatives. NSW Health will also be consulted with regard to the impact on local treatment services.

This Committee will be asked to report by early 2005 on legislative proposals to amend the *Crimes Act 1900* to link drug and alcohol treatment with the way defendants may be dealt with under Part 15A of the *Crimes Act 1900* where drug and alcohol abuse is a factor.<sup>599</sup>

- 9.99** A proposal for an integrated Domestic Violence court is also being examined:

The Government is developing proposals to trial a new integrated *Domestic Violence Court Intervention Model* in two locations, including one rural or regional location. This will benefit victims and families affected by domestic violence.

In addition to better supporting the victims of domestic violence through the criminal justice process, the model is intended to enhance the police and court capacity to

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<sup>597</sup> Assistant Commissioner Bob Waites, Commander, Greater Metropolitan Region and Corporate Spokesperson, Alcohol related Crime, Evidence, 27 November 2003, p29

<sup>598</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p236

<sup>599</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p236

successfully prosecute perpetrators by improved policing and prosecution practices, increased collaboration between legal and welfare agency responses and development of specialist knowledge and expertise for magistrates and other stakeholders.

The model is being developed by an interagency working group led by the Attorney General's Department's Violence Against Women Specialist Unit with representatives from Local Courts, NSW Police, Department of Corrective Services' Probation and Parole Service, Department of Community Services and the Women's Domestic Violence Court Assistance Program. The Attorney General will report to the Government in 2005 on final proposals for the trials.<sup>600</sup>

- 9.100** The Committee did not receive sufficient evidence about the proposals under consideration to enable us to undertake a detailed analysis. However, we consider it crucial that the link between alcohol and family violence be addressed as a matter of priority, and encourage the consideration of therapeutic justice programs that seek innovative responses to this problem. The Committee urges the Attorney General to consider, as a matter of priority, the reports relating to the Domestic Violence Court Intervention Model and the issue of Apprehended Violence Orders and alcohol treatment due in 2005 as identified above.

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### **Recommendation 52**

That, given the importance of addressing the link between alcohol and family violence, the Attorney General consider, as a matter of priority, interagency task force reports due in 2005 relating to the Domestic Violence Court Intervention Model and the issue of Apprehended Violence Orders and alcohol treatment.

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### **Post-program support**

- 9.101** A final matter worth briefly discussing is the provision of post-program support for people graduating from MERIT. All participants have a relapse prevention plan developed, which refers them to community-based services, however there is no formal ongoing support. Mr Scantleton gave evidence that this lack of post-program support has been identified as a problem by participants themselves:

The participants are quite critical of the [MERIT] program in that when it ends it ends and they effectively have no more program support. Quite clearly there is a need for post-program, after care type support program.<sup>601</sup>

- 9.102** This was also an area for improvement identified by the evaluation of the Lismore MERIT Pilot Program. The evaluation noted that the nature of MERIT as a closely supervised and directive program meant that many participants could do well during the program, but might be unable to sustain their achievements on their own. The lack of community based treatment services was identified as contributing to the problem. The evaluation report noted that a few months after exiting the program, only 53% of participants were in treatment.<sup>602</sup>

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<sup>600</sup> NSW Government, *Outcomes of the NSW Summit on Alcohol Abuse*, p238

<sup>601</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp21-22

<sup>602</sup> Tabled Document No 22, *Evaluation of the Lismore MERIT Pilot Program*, Final Report, October 2003, p101

- 9.103** Mr Scantleton proposed that more formal after-care support should be incorporated into the program for some at-risk participants:

In some cases where there is a high risk of a person re-offending we might write in the report that at some future time this person might benefit from more formal support with a counselling role, and if the person is convicted the court might put them on a supervised bond as a result of those comments, but generally speaking it is quite well acknowledged in a lot of information that an after care program would be desirable.<sup>603</sup>

- 9.104** While not having definite views about the MERIT post-program support process, Dr Weatherburn noted generally that a lack of after-care could be problematic:

I think it is desirable not simply, once a person has shown they are capable of doing without drugs or substantially reducing their drug consumption and certainly eliminating crime, to just wave goodbye at the door of the court as if there were no further risks at hand.<sup>604</sup>

- 9.105** The Committee notes that it has only received limited information about the need for post-program support for MERIT participants. However it seems logical that participants completing a short term, intensively supervised treatment program will need ongoing support. The Committee considers that the level of need for post-MERIT program support should be assessed and appropriate programs should to be developed to address this unmet need.

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**9.106****Recommendation 53**

That the level of need for post-program support for MERIT graduates be assessed and appropriate programs be developed to address the unmet need.

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**Compulsory Drug Treatment Correctional Centre (CDTCC)**

- 9.107** In early 2003, the Government announced a proposal to establish a compulsory drug treatment correctional centre. The legislation was passed through Parliament in June this year.<sup>605</sup> Regulations containing the details of the program have not yet been developed. According to the second reading speech, the Government anticipates that the CDTCC will be operational by the end of 2005.<sup>606</sup>
- 9.108** The Committee heard that the CDTCC is to be targeted at long term offenders with a history of recidivism and severe drug dependency, seeking to:

... make a significant impact on their criminal behaviour and also provide them with an opportunity for longer-term rehabilitation and social reintegration.<sup>607</sup>

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<sup>603</sup> Mr Scantleton, MERIT Northern Rivers, Evidence, 18 February 2004, pp21-22

<sup>604</sup> Dr Weatherburn, BOCSAR, Evidence, 18 February 2004, p42

<sup>605</sup> *Compulsory Drug Treatment Correctional Centre Act 2004* No42 (NSW), assented to 6 July 2004

<sup>606</sup> Graham West MP, Legislative Assembly New South Wales, *Hansard*, 23 June 2004, p9966

<sup>607</sup> Mr Geoff Barnden, Director, Office of Drug Policy, The Cabinet Office, Evidence, 11 December 2003, p11



**9.109** According to the second reading speech, the program:

is aimed at breaking the drug-crime cycle. Eligible offenders to the program will be sent to a special correctional facility dedicated to abstinence-based treatment, rehabilitation and education. There will be intensive judicial case management of these offenders in close partnership with the correctional authorities as well as with health and other service providers. The Compulsory Drug Treatment Program will build on the productive justice and health system linkages already established for programs such as the Drug Court program. Offenders will be gradually reintegrated back into the community and targeted with support after the completion of their program and even beyond parole.

The aim is to achieve better outcomes for the State's most desperate and entrenched criminal addicts, assisting them to become drug and crime free, to take personal responsibility and to achieve a more productive lifestyle.<sup>608</sup>

**9.110** Offenders will be eligible for the program if they have been convicted and sentenced to imprisonment for an offence related to drug dependency following at least three other convictions for offences in the previous five years. The offender's sentence must be long enough to complete an 18-month to three-year drug treatment program. Offenders convicted of murder, manslaughter, sexual assault, firearms-related offences or commercial drug trafficking will not be eligible, nor will those with serious mental illnesses that could prevent or restrict the person's active participation in the program.<sup>609</sup>**9.111** The second reading speech also outlined the three stages of compulsory drug treatment detention:

Stage one, closed detention, where inmates will be incarcerated in the Compulsory Drug Treatment Correctional Centre for intensive drug treatment and rehabilitation; stage two, semi-open detention, where offenders will live at the centre but spend time outside in employment, training or other approved programs; and stage three, community custody, which is similar to home detention. During this stage, the offender will move to semi-open independent living but remain under intensive supervision, including electronic monitoring.<sup>610</sup>

**9.112** Personal treatment plans will be drawn up to form the basis of each offender's treatment and rehabilitation program. Social skills, preparation for the job market, management of debt and leisure time will also be taught to the inmates.<sup>611</sup>**9.113** At the time we were taking evidence, the final details of the Bill were not yet known. The few witnesses who commented on the proposed Compulsory Drug Treatment Correctional Centre therefore usually made only general comments, as indicated below.**9.114** Professor Carney gave evidence that he supported the proposal in principle:

<sup>608</sup> Graham West MP, Legislative Assembly New South Wales, *Hansard*, 23 June 2004, p9966

<sup>609</sup> Graham West MP, Legislative Assembly New South Wales, *Hansard*, 23 June 2004, p9966

<sup>610</sup> Graham West MP, Legislative Assembly New South Wales, *Hansard*, 23 June 2004, p9966

<sup>611</sup> Graham West MP, Legislative Assembly New South Wales, *Hansard*, 23 June 2004, p9966

Yes, there is certainly merit in offering services to people who suffer from an addiction and are going to be detained because of an offence that they have committed. There are clearly strong humanitarian, medical, ethical and many other arguments to be made in favour of basically offering rehabilitation opportunities within a person's period of incarceration.<sup>612</sup>

- 9.115** He noted some reservations, arguing that offenders should be entitled to choose whether they participate in the program,<sup>613</sup> a point also made by Professor Ian Webster, due to the absence of evidence that 'enforced treatment' is successful:

... Enforced treatment does not have good evidence of success, and it is often based on fallacious notions of what can influence behaviour of a person dependent on substances.

However, where the treatment offers a 'constrained choice' and does attempt to tailor 'treatment' to the needs and characteristics of the individual, accepts that objectives need to be medium to long-term and that a chain of follow-up and engagement are essential, it is possible that compulsory treatment of offenders will work.

I accept the proposal being developed by the NSW Government, on the basis that it is fully informed of all the issues, is carefully and humanely planned and above all is subject to critical external scrutiny and evaluation.<sup>614</sup>

- 9.116** Professor Carney also stated the opinion that inmates' participation in the program should not extend beyond the duration of their criminal justice orders:

I support any measure that offers any kind of treatment option *within* the duration of the deprivation of liberty that would otherwise have been imposed on the basis of the gravity of the offence that has triggered the person's presence within a correctional facility or under any correctional order. I have given the references to the superior case law in this country and overseas. That indicates that as a matter of common law principle it has always been the case that it is wrong to extend treatment beyond that period that would otherwise have been provided had the person been treated as an offender and sentenced in the ordinary way.<sup>615</sup>

- 9.117** The Redfern Legal Centre submission expressed concern with the emphasis on abstinence as the basis for treatment in the CDTCC:

RLC notes with some concern the announcement by the Premier on 28 October 2003 to trial a Drug Prison in which repeat drug offenders would be locked up and undergo intensive treatment that will demand total abstinence, with not even substitutes like methadone generally available.

The cruelty and pain potentially inflicted on a person by forcing them to go "cold turkey" raises human rights issues. There may also be serious questions about the

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<sup>612</sup> Professor Terry Carney, Professor of Law, University of Sydney, Evidence, 8 April 2004, pp29-30

<sup>613</sup> Professor Carney, University of Sydney, Evidence, 8 April 2004, pp29-30

<sup>614</sup> Submission 43, Professor Ian Webster, p7

<sup>615</sup> Professor Carney, University of Sydney, Evidence, 8 April 2004, pp29-30

effectiveness of such treatments in rehabilitating persons with substance dependence.<sup>616</sup>

- 9.118** Asked about whether offenders with alcohol problems would be eligible for the CDTCC, Mr Geoff Barnden, Director of the Office of Drug Policy at The Cabinet Office responded:

I think we would take advice from our health colleagues. But I would say the treatment modalities and regimes would be very different and the issues would probably be very different. Although, of course, as we know, in all these areas there is a huge number of co-morbidity issues and the use of drugs right across the spectrum by people with these sorts of problems, and issues of dual diagnosis and multiple drug use are often interlinked. Whilst I am saying it is primarily focused on illicit drugs, many of these people, I imagine, also have alcohol related issues.<sup>617</sup>

- 9.119** The Committee notes that the *Compulsory Drug Treatment Correctional Centre Act* does not appear to encompass treatment of offenders with serious alcohol problems. This confirms the information in the Government submission, which states that the CDTCC will not cover offenders affected by alcohol.<sup>618</sup>

#### **Committee comment on the proposed CDTCC**

- 9.120** While noting our general support for the concept of a therapeutic correctional centre, we do not believe that we have received enough evidence to be able to discuss the proposed Compulsory Drug Treatment Correctional Centre at length.
- 9.121** Nevertheless, we do wish to comment on two particular aspects of the CDTCC. The first, as identified by the Redfern Legal Centre, is the suggestion that there will be a focus on abstinence-based therapy. We note, however, that we do not have details about the nature of the treatment likely to be provided at the CDTCC, nor the extent to which pharmacotherapies will or will not be used. There can be no doubt that abstinence is a legitimate objective for drug and alcohol interventions. However, this should not undermine the application of evidence-based treatment, including pharmacotherapies such as methadone, where this is indicated as the appropriate treatment option.

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#### **Recommendation 54**

That the Government ensure that the full range of evidence-based interventions are available at the Compulsory Drug Treatment Correctional Centre.

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- 9.122** The second point we wish to raise is the exclusion of alcohol related offenders from the CDTCC. As we previously noted in relation to the Drug Court, the significant community benefits to be achieved in the treatment of drug-dependent offenders are equally applicable to offenders with serious alcohol problems. The Committee can see no logical basis for distinguishing between alcohol and other drugs in determining the eligibility for admission to

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<sup>616</sup> Submission 18, Redfern Legal Centre, p9

<sup>617</sup> Mr Barnden, The Cabinet Office, Evidence, 11 December 2003, p12

<sup>618</sup> Submission 47, NSW Government, p16

the CDTCC. We acknowledge that the inclusion of alcohol related offenders would require additional programs and approaches at the CDTCC, but consider that the potential benefits to the individuals and the community warrant the additional expenditure this would entail. Such a program would not necessarily be required to be located at the same venue, and an alternative name could be considered.

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**Recommendation 55**

That the Government reconsider the exclusion of offenders with serious alcohol problems from participation in the Compulsory Drug Treatment Correctional Centre.

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