Drug Court of New South Wales

28 August 2012

Mr Paul McKnight
Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Mr McKnight,

Sentencing Question Paper 6

Intermediate custodial sentencing options

The following material draws on submissions I have already made to a (as yet incomplete) review of the legislation governing the Compulsory Drug Treatment Program. I wish to make some general comments firstly, then address the questions posed at 6.1 of the Commission's paper.

Overview

Firstly can I say that this court remains impressed by the results being achieved by the Compulsory Drug Treatment Program (CDTP), and is committed to supporting the program in future years. 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.

The Drug Court has, of course, been closely involved with the CDTP since before it commenced. That involvement has increased in recent times – not through just 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.

The Drug Court has a number of roles in relation to the CDTP, including the role of Parole Authority regarding the question of release of offenders to parole at the end of their program. The Court has now published a policy in relation to parole, which places a clear emphasis on the completion of a sentence by CDTO

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in lieu of the parole regime. This new emphasis is a direct result of the success of the program and the targeted support for participants being provided throughout the program.

In summary, my recommendations are:

1) The legislation be amended so as to ensure there is a larger potential pool of participants

2) The recidivism requirement be totally removed

3) The making of a CDTO revokes any parole date provided by the sentencing court

4) The upper limit of sentences that are eligible for the program should be determined by the total term, not the outstanding non-parole period

5) Provision by made for the revocation of a CDTO if the offender is failing to progress in any meaningful fashion, and both the Director and the participant agree it is time for the offender to leave the program

6) The Director be empowered to 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.

7) Provision be made for short concurrent sentences to be included, by administrative action, within a CDTO.

1. The available pool of participants

In the following, more detailed, comments, I make some suggestions that will increase the potential pool of eligible participants for the CDTP. As an overarching recommendation however, and independent of some changes that will have that effect anyway, ***deliberate legislative changes should be made to ensure there is a larger potential pool of participants***.

My long experience with therapeutic programs is that there should be an ongoing demand tension for places on program. That is therapeutic in itself, and has a number of positive influences on the program. It places pressure on participants to put their opportunity to good use, or that opportunity will be taken away and given to another potential participant. It places pressure on the program managers, treatment partners, and individual practitioners to encourage participants to use their opportunity, or lose it. It helps create a culture that the opportunity of the program is valuable, and will be lost unless both participants and program staff maintain a level of concentration. It allows for programs and groups to commence, because there are enough new participants to form a new "class". Lastly, it prevents an aspect of "over servicing", whereby clearly unmotivated or inept participants are retained longer than they should be, simply because staff have the time (and also the desire) to go on trying, even though an objective assessment would suggest it was time to stop.

2. The recidivism criteria

The eligibility criteria for the making of a CDTO are set out in s 5A of the *Drug Court Act 1998*. 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 reluctant participants, and, in my view, is now obsolete. Six years of experience shows that reluctance has not been an issue. There have only been three occasions in those years of a participant resisting the making of a CDTO. In one case, tragically, it was because the offender's father was already a participant. In another 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.

Rather than offenders seeking to avoid a compulsory order, experience shows that offenders, their lawyers and the sentencing judges are raising the issue of a potential CDTO, and addressing the eligibility issues, at an early point in sentencing. Indeed one prisoner asked for an **extra** six weeks be added to his sentence so he would be eligible for a CDTO.

The recidivism criteria, essentially, demand an offender who has done two small crimes, then a big one, all within five years. So if you do a big crime, get four years, then another big crime, and you did not have enough time to get caught for another small crime in the intervening period, you are ineligible.

My recommendation is that the recidivism requirement be removed. The question as to suitability should be left to the assessment of the multi-disciplinary team, which is going to provide a far more relevant and accurate assessment than the fact the offender has two recent 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[1] 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 that, in any event, that this group of potential participants are probably committing crimes each day.

There are other problems with the recidivism criteria in section 5A. The current provisions have unfortunately excluded otherwise eligible offenders, no doubt unintentionally. For example, offenders are sensibly encouraged by the criminal justice system to ask a sentencing court to take other matters into account when imposing a sentence. Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* provides an avenue for offenders to ask for matters to be taken into account on what is known as a "Form 1". Having cases dealt with in this way is an important tool in managing the sentencing workload of our courts, and there should be no disincentives. However by having matters included on a Form 1 means there has been no conviction for those matters, and it can be that the absence of those prior convictions renders a potential offender ineligible. Similarly, there may be arguments as to whether orders made in the Children's Courts "count" towards the recidivism criteria, especially if no specific conviction order was made in the Children's Court.

[1] S 5A (1)(e) Drug Court Act 1998

Of course, the last-mentioned problems are overcome if the recidivism criteria are simply removed.

3. Revoking the original parole order

During the currency of this program, emphasis on the eligibility for parole, and the date upon which the offender is (or was) eligible for parole has been reduced. The Drug Court has recently published *Policy 14: "Parole for Participants of the Compulsory Drug Treatment Correctional Centre"* (copy enclosed) which sets out the Court's expectations as to complying with, and indeed embracing, a CDTO instead of awaiting parole. It has become quite clear that participants need to forget their parole date and concentrate on succeeding on 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.

The legislation already automatically revokes the parole eligibility date for those with sentences of three years or less[2], but not for those whose sentence is over three years. ***It is suggested that the making of a CDTO revoke any parole date provided by the sentencing court.***

If the current distinction is removed, all participants would have equal CDTOs, and all would have the same incentive to pursue success on their CDTP. On the making of a CDTO in the courtroom, 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.

4. Eligibility – length of sentence

The upper limit of sentences that are eligible for the program should be determined by the total term, not the outstanding non-parole period. This would remove an occasional unnecessary barrier to eligibility, and logically fits with the submission above regarding the increasing lack of relevance of the specified non-parole period.

I would suggest a total term of six years being the new upper limit, and retain the current minimum of 18 months non-parole period at the time of sentence.

A loophole in the legislation has emerged regarding length of sentence and eligibility. On one occasion an offender who would not have been eligible (because of the substantial length of his non-parole period) became eligible by virtue of the sentencing court retaining the file until some six months had passed. By the time the file was provided, the offender met the criteria. That was not a scenario envisaged in the design of the program.

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, or provide a separate stream of access by way of assessment and recommendation from within Corrective Services. However any new avenues of entry should be a deliberate policy decision, and not the product of innovation.

[2] Section 18G(b) of the Drug Court Act 1998

5. Eligibility – other short sentences

An otherwise suitable offender may not be eligible for the CDTP 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 twelve months, a sentence which is wholly concurrent with a longer (eligible) sentence imposed in the District Court. That twelve month sentence cannot be the subject of a CDTO, and cannot be added to the CDTO under section 106W of the *Crimes (Administration of Sentences) Act 1999*, as the CDTO is not yet in force. Such ineligibility cannot have been intended by the legislation.

6. Revocation of CDTOs

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.

As the law currently stands, the offender needs to commit a serious breach of program to ensure his removal. That is problematic, and could lead to, for example, injuries to staff. If Section 106Q of the *Crimes (Administration of Sentences) Act 1999* was re-arranged and amended, the current test as to an offender being "unlikely to progress" could be split from the requirement of a serious breach of program. ***My recommendation is that it should be possible for a CDTO to be revoked if the offender is failing to progress in any meaningful fashion, and both the Director and the participant agree it is time for the offender to leave the program.*** Leaving unsuitable or unwilling participants in the program is of no benefit to them, the treatment staff, or other participants.

Participants will still have a clear incentive to make the best possible effort to complete the CDTP. Section 106Q(2) of the *Crimes (Administration of Sentences) Act* requires the Parole Authority to have regard to the circumstances which led to the revocation of a CDTO when considering parole, and there are newly established lines of communication between the Drug Court and the Parole Authority on this issue.

7. Regression decisions

I have previously discussed with Dr Astrid Birgden, the former Director of the CDTCC, the suggestion that the Director could deal with regression issues without the need for the matter to be re-considered by the Drug Court in all instances. I support that suggestion. Experience shows that, in many instances. the regression is an obvious and necessary response to a breach of 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.

Thank you for the opportunity to respond to the Law Reform Commission's reference. I would, of course, be available to discuss any of the above recommendations if that would be of assistance.

Yours sincerely

J R Dive
Senior Judge