

Alcohol Court Survival for Lawyers: The Next Round Is On You

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"Where did all the sages get the idea that a man's desires must be normal and virtuous? Why did they all imagine that he must inevitably will what is reasonable and profitable?" Dostoyevsky Notes from the Underground.

Criminal courts responding to the flow of substance abuse matters are incorporating therapeutic options in a wide range of drug court programs across Australia. While the Northern Territory arrived late to the practice of therapeutic jurisprudence, the *Alcohol Court Act 2005* establishes the Territory's first drug court with the incorporation of therapeutic goals with traditional justice sanctions.

Operating in a custodial system which processes the largest representation of Indigenous people and an overall population which drinks twice the national average, the Alcohol Court represents a significant challenge for alternative sentencing options. Alcohol Intervention Orders also provide a 'testing ground' where junior counsel ore tenus is put on her mettle to persuade the court at regular intervals and milestones beyond the general mitigation principles of section five of the *Sentencing Act*.

Crime and Punishment

What is the Alcohol Court?

The Alcohol Court is an infant drug court¹ operating in the summary courts and aimed at reducing alcohol related recidivism through the provision of targeted interventions, including treatment. It represents one of the six recognised drug treatment courts in Australia, with the first trial of a specialised



court with judicially sanctioned drug treatment at Parramatta Court in New South Wales in 1999. As with the Parramatta Drug Court, the Alcohol Court is exceptional among drug treatment courts throughout the world to have exclusive legislation that empowers and directs the court.

Two Tiers

The legislation provides for Alcohol Intervention Orders, a form of sentencing order consisting of a term of imprisonment that is fully or partially suspended and incorporates treatment, supervision and case management by court clinicians.

Prohibition Orders are targeted at the supply side of alcohol management, and involves the Director of Licensing enforcing compliance through licensees at the point of sale. As such, there are no sanctions for non-compliance for individual offenders, they are simply restricted from purchasing alcohol and may be directed into compulsory treatment.

Only Alcohol Intervention Orders operate under the principles of

drug court diversion analogous to other drug court schemes in Australia, and Prohibition Orders are properly the subject of separate discussion.

Generic elements of Australian Drug Courts correlated with Alcohol Intervention Order provisions under Alcohol Court Act 2005

- Targeting high-end offenders with significant drug dependency issues facing a likely term of imprisonment, (see section 18 (1)(b) & section 20 (1) (a)(b)).
 - Engaging the offender in intensive treatment and access to additional support (section 20 (1) (i) and section 20(3)).
 - Run for 12 months or longer, (section 20 (1)(b)).
 - Presided over by judicial officer and intensive judicial supervision with appearances for regular reviews to monitor progress, (section 23).
 - A graduated system of rewards and sanctions including
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the option of short periods of incarceration for repetitive non-compliance, (section 24 and section 28 (1)(a)(b)).

- Requires participants to undergo frequent and random urinalysis testing (section 20 (1) (ii) and section 20(2) (e) (f)).
- Interdisciplinary teams of specialists and case managers to assist the court (section 39).

Alcohol: No Ordinary Commodity²

While the Northern Territory Alcohol Court is based on other drug treatment courts around Australia, it is distinguished in targeting alcohol as the substance of choice. Alcohol is no ordinary commodity; it is a legal, economically embedded commodity and viewed as a normal social activity intrinsic to Northern Territory culture. However the production, sale and use of alcohol comes at an enormous price: the cost to Australia of alcoholism is estimated to be in excess of \$6 billion annually³ and for Indigenous persons, alcohol is identified as the primer for contact with the justice system.⁴

Cheap Shots

Additionally the typology of alcohol dependency compared to illicit drug users is significant for drug courts in terms of prognosis and treatment outcomes. For lawyers in the Northern Territory criminal courts, it is trite to correlate alcohol with the commission of offences; nonetheless the practices in the Alcohol Court as a therapeutic court demands a deeper understanding of problematic alcohol use beyond the ineluctable harms seen in the courts everyday.

While severe alcoholism is characterised as a chronically relapsing condition, alcohol dependent individuals are not a homogenous group, and no single treatment approach has been found superior. In this regard, Alcohol Intervention Orders allow for the

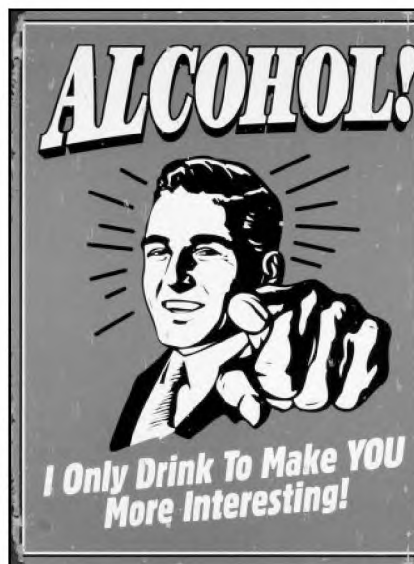
possibility of distinct treatment strategies by virtue of a magistrate who, informed by court clinicians, retains full discretion across the *Alcohol Court Act*, the *Sentencing Act*, *Bail Act* and *Justices Act*.⁵

"Give me an act - any act, and I will show you a country where it is a crime." Marcel Proust.

The structure of Alcohol Intervention Orders⁶ satisfies the demands of natural justice in dealing with more serious offenders. The framework of the orders incorporates traditional penal sanctions and enforces the orders through Community Corrections supervision and scheduled reviews by the court. By mandating abstinence as a condition of Alcohol Intervention Orders, the court is essentially criminalising an otherwise legal act for that individual offender - creating new expectations in terms of sanctions and enforcement compared to other drug courts. The conditions and provisions relating to Alcohol Intervention Orders are thus able to overcome the constant issue which lies at the heart of all therapeutic jurisprudence: the provision of therapeutic goals within the stable, predictable and cautious elements of traditional justice aims.

Tough Love

Referral to the Alcohol Court



Referral may be on the initiative of the court or on application by a prosecutor, a police officer or the offender as an eligible person.⁷ In reality most referrals are initiated by the court itself or by the 'eligible person' through counsel.

The court clinicians assessment report contains detailed information about the individual offender and assists counsel in skilfully unveiling the case for an Alcohol Intervention Order to be made, persuading the court that this is an opportunity for both the court and the offender. The court is not bound by rules of evidence and 'may inform itself in the manner it considers appropriate'⁸ whereby the court adopts a more intrusive role into the private lives of offenders. A behavioural contract is entered into with the offender through communicative dialogue with the court and places them in a position of qualified trust. At review appearances counsel can seek to rely on external referents in the form of treatment reports, testing outcomes and behavioural change which demonstrate an offender's reform rather than simply explicating an offender's personal circumstances as factors in mitigation.

'Holding the Ring':

Using Alcohol Court Bail

Alcohol Court Bail diverts the offender into treatment and places them under the direction of the court clinician and supervision of Community Corrections.⁹ The court can also make any orders that the court considers necessary, and may or not may not include the condition to remain abstinent.

At the completion of treatment under Alcohol Court Bail, the court will then proceed to sentence the offender. The procedure is thus used to encourage motivation from an otherwise ambivalent offender, and contribute to the courts decision to proceed to the making of an enduring Alcohol Intervention Order. However,

the court is not just diverting the offender into treatment, the court actually becomes part of the treatment process, through interaction between the offender and the judicial officer and soliciting the participant's commitment to the terms of the order.

The utility of Alcohol Court Bail is also realised when the court clinician identifies the need for a negotiated withdrawal from alcohol in the initial assessment report. The difficulty with placing such a person under an Alcohol Intervention Order forthwith is the mandatory condition of abstinence places the offender under medical risk. Abrupt and untreated cessation of alcohol can result in severe withdrawal symptoms and is correlated with a 40 % mortality rate,¹⁰ making section 17 (2) an essential discretion exercised by the court to promote and protect offender health.

Making the Order

Once the court has considered the court clinicians report and recorded a conviction, section 20 (2) outlines the essential conditions of an Alcohol Intervention Order. The court clinicians report may identify further individual offender needs under section 20(3) optional conditions, although most alcohol dependent offenders will require stabilisation in treatment initially.

Milestones

Once the Alcohol Intervention order is made, a review will be scheduled for six weeks time and a progress report will be submitted to the court by the court clinician. The benefit of direct speech from the bench on individuals otherwise detached from court proceedings demystifies the process and cannot be understated in increasing an offender's motivation. Communicative dialogue is unusual in judicial life with the court applying its powers of evaluation, measurement and judgement to achieve

positive change in an individual offender's case.

Breach in the Real World

Where an offender fails to comply with an Alcohol Intervention Order, a prosecutor or the Director of Community Corrections can make an application to the Alcohol Court for action under the breach conditions in Division 4 of the *Act*.¹¹ Additionally, the police may arrest an offender who they believe has contravened an Alcohol Intervention Order in the community and the court may issue a summons to appear or a warrant of arrest to bring the offender back to court to answer the breach.¹²

Frequently at the 11th hour, counsel is required to beseech the Magistrate for an adjournment to make submissions on a conditional breach and to establish grounds for possible re-admission under the order. The court clinician will submit a report outlining the client's history under the order and the possibility of re-engaging the client in treatment. The *Act* provides for re-admission in recognition of offenders confronting dependency who may be in treatment for the first time, and it is imperative to the therapeutic ethos of the court that readmission be exhausted legally and clinically before any revocation of an



Alcohol Intervention Order.

Lapse or Relapse?

If the basis of the breach is resumed alcohol consumption, the court clinician will address whether the lapse is clinically significant and what response is required for an individual offender. A single lapse is viewed from the standpoint of whether an individual has returned to pre-treatment baseline levels and does not necessarily equate with total failure. In clinical practice, lapses vary in terms of negative, or positive, effects on the patient, and can actually lead to increasing motivation. Lapse is well recognised in the context of quitting cigarette smoking in Australia, where on average it takes nine attempts before the 10th attempt is successful, and clients in any form of rehabilitation also undergo the same process of incremental change.

It is critical in a therapeutic court that not every infraction leads to failure; every treatment problem or lapse encountered should not engender a punitive response from the criminal justice system. Rather, what is paramount in a therapeutic court is the offender returning to court and facing responsibility for the circumstances leading to lapse, such as early reporting

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and re-engagement in treatment. By the court taking a problem-solving approach to relapse, the process can significantly enhance an offender's self-efficacy by encouraging individuals who face adversity not to give up.¹³ Those offenders who ultimately fail to meet the high demands set by the court nevertheless benefit from the treatment received on the program, and may gain recognition from the court for partially completing an order.

"The life of the law has not been logic: it has been experience."

Oliver Wendell Holmes

Managing Expectations

Therapeutic courts are always fascinating. The court, as an impartial adjudicator of facts, is exchanged for an interventionist approach, placing an expectation of responsibility on an offender in a position of situational crisis and opportunity. That treatment and sanctions are negotiated with the offender, sets Alcohol Intervention Orders apart from any other sentencing order available in the



criminal courts of the Northern Territory. By operating within a normal criminal justice case processing system, Alcohol Intervention Orders move our courts from a 'nothing works' perspective to a strength based concept of rehabilitation driven by rigorous program evaluation and evidence based program delivery.

Footnotes

1. Operational from July 2006.
2. *WHO* 'Alcohol: No Ordinary Commodity' 2003, *Addiction*, 4, 1343-1350.
3. *Drug and Alcohol Review* (January 2007), 26, 3-8.

4. Weatherburn, D, Snowball, L, Hunter, B 'The economic and social factors underpinning Indigenous contact with the justice system' Results from multivariate analysis using 2002 National Aboriginal and Torres Strait Islander Social Survey. *Crime and Justice Bulletin* 104. Sydney: NSW Bureau of Crime Statistics and Research, 2006.

5. Section 7 *Alcohol Court Act*

6. Section 20 (2)(c)

7. Section 15 (2)

8. Section 18 (3)

9. Section 17 (2)

10. Progress of alcohol withdrawal syndrome Source: NSW Health (2000, p.14).

11. Section 25

12. Sections 26 and 27.

13. King, M SM, 'What can mainstream courts learn from problem-solving courts?' *Alternative Law Journal*, 32, 2 June 2007, 91-94.

Drug Courts in Australia

