Drug Courts in Australia: The First Generation

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Introduction

The first Australian drug court was established in New South Wales in 1999. In 2000 drug courts were introduced in South Australia, Western Australia and Queensland. Victoria introduced its first drug court in 2002. The virtually simultaneous adoption by the States of an experimental strategy that pushes the boundaries of criminal justice is rare in Australia. One distinct advantage presented by this first generation of Australian drug courts is the opportunity to compare the various forms of drug court that have been implemented. The manner and the speed with which drug courts were embraced in Australia is by itself noteworthy and reflects the quality of a 'movement' which has been linked with drug courts in the United States (Nolan 2002).

A number of critical questions have arisen from the implementation of Australian drug courts. These mainly concern the most appropriate target group of offenders and whether the courts make any substantial gains over previously existing arrangements. In this paper we describe the emergence of drug courts in Australia and then consider these courts in light of these critical questions. First we provide a brief background of the drug court movement in the United States. This is followed by an outline of the history of diversion programs for drug dependent offenders in Australia. We then examine the emergence of drug courts in Australia, summarising the salient features of each of the five State drug courts. Finally we outline the critical issues to consider in evaluating the success of drug courts.

The Drug Court Movement

Most histories of the drug court start with the court that emerged in Dade County, Florida, in 1989. The proliferation of drug courts throughout the United States over the ensuing decade has been truly phenomenal, with 1044 drug courts operating in the US by May 2003 (American University 2003). This has given rise to the use of the term 'movement' to describe the enthusiastic support these courts attract. This movement is made up of the range of individuals working in, or associated with, these courts. Other indicators of the 'movement' phenomenon include the rapid organisational and structural supports for drug courts and the degree of public and political advocacy for drug courts. Late in the 1990s the drug court movement burst the borders of the US and a variety of drug courts have been set up in other countries including Canada, the United Kingdom and Australia.

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The enthusiasm for drug courts and its quality as a 'movement' has been examined by James Nolan (2001, 2002). Nolan considered the social dimensions of the drug court movement and as its relationship to contemporary culture and justice. This relationship encompasses the way drug courts both reflect contemporary concepts of justice and also break new ground. Amongst other things drug courts represent the best known form of 'therapeutic jurisprudence' — an approach to criminal justice which seeks to use the court process to enhance and support the possibilities for the treatment of offenders (Wexler 1995). Although the intention of drug courts to do good has rarely been questioned, a number of questions may arise about whose interests are served by the drug courts, which conceptions of justice are reinforced and whether indeed it is possible to effectively merge the interests of justice and treatment without doing damage to either or both. It is also necessary to realise that the rapid spread of drug courts has not been a function of their proved effectiveness, but because they represented an idea whose time has come. Most drug courts were implemented before any body of evidence on the effectiveness of these courts had accumulated, and, as we shall see, it is arguable that such evidence is still far from complete and may only relate to certain types of drug courts and certain types of offenders.

There are various reasons why the concept of drug court is so politically attractive at the present time. One appealing feature of the drug court is the implicit assumption of an approach that is both 'tough' and 'effective' in terms of saving money and reducing crime. This feature, or at least promise, of drug courts has two elements. First, much contemporary public policy on crime assumes that the 'causes' of crime, especially property crime, are highly bound up with drug dependency problems of offenders. Drug courts are thus attractive in that they are seen as going to the 'heart' of the problem dealing with the underlying 'causes' of crime. Second, drug courts capitalise on the perceived benefits of diversion and/or providing alternatives to imprisonment that are cheaper and perhaps more effective. The political prospects of being able to do more with offenders for less (cost) presents obvious political temptations.

A further reason for the popularity of drug courts is the growing awareness that the courts are not providing an effective response to crime in sending offenders to prison. The belief that prisons are an ineffective and expensive response to crime has become mainstream. While an interest in justice/retribution will maintain the popularity of prison for violent and persistent offenders, there is an opportunity to present potentially more effective responses for those offenders who are not violent and who appear to have 'personal' problems.

The American drug court movement has paved the way for the establishment of similar courts in other countries. The same dynamics outlined above which explain the popularity of drug courts in the US also appear in these countries. However these jurisdictions often have systems that have always been more receptive to treatment and so drug courts may in fact not 'add' as much as they do in many American states. Furthermore, countries such as Australia and Canada have a far less punitive approach to drug users and offenders generally. These countries are more likely than most States in the US to consider imprisonment as a 'last resort'. All this means that the wholesale importation of American style drug courts may be not be as simple or as beneficial as might otherwise be thought. Alternately it requires us to ask in more detail about the particular models or types of drug court that are adopted.

The Development of Diversionary Programs for Drug Dependent Offenders in Australia

Drug courts represent a form of diversion of the drug dependent offender from the criminal justice system. The idea of diverting drug dependent offenders from any contact, or deeper contact, with the criminal justice system is consistent with the belief that it is better to deal with certain offenders on a therapeutic rather than punitive basis. The therapeutic approach is seen to be appropriate for certain groups of offenders such as drug offenders and juvenile offenders where personal issues are more readily seen to be the reason for the offending. It follows that a more effective response lies in addressing the personal problems of the offender rather than simply making things 'worse' for them by sending them to prison.

Diversion programs for drug dependent offenders in Australia have a relatively long history. The first explicitly named drug diversion program developed in NSW in 1977. Although early indications were that it had not achieved its goals (Williams & Bush 1982) a second diversionary strategy, the Drug and Alcohol Court Assessment Program was established in NSW two years later. Victoria also developed broadly based diversion programs, however these were typically on the more secure legal footing of a post-sentence order (Skene 1987). This post sentence order was created by section 13 of the *Alcoholics and Drug Dependent Persons Act* 1968 (Victoria). According to Skene (1987) almost 1300 offenders were dealt with by way of s13 orders between 1983 and 1986 inclusive. However, it appears that s13 orders lost the confidence of the judiciary who believed the orders were not adequately supervised and breaches not reported (Skene 1987).

Other states also developed diversion programs for drug dependent offenders. South Australia developed the Drug Aid and Assessment Panel in 1984 (Lawrence & Freeman 2002) and in Western Australia the Court Diversion Service (CDS) was developed in 1988 by the Western Australian Drug and Alcohol Authority in co-operation with the Western Australian Department of Corrective Services. The thinking behind the establishment of the CDS was to 'use the anxiety associated with the period preceding sentence to encourage drug users to engage in treatment' (Rigg & Indermaur 1996:248).

Australian diversionary approaches rapidly increased through the 1990s, particularly in regard to cannabis offences. Following the lead of South Australia, most Australian jurisdictions have developed arrangements to deal with minor cannabis offenders so that there is less involvement with the criminal justice system.

In 1994 the Alcohol and Other Drugs Council of Australia prepared a report for the National Drug Crime Prevention Fund on alternatives to the prosecution of alcohol and drug offenders (Alcohol and Other Drugs Council of Australia 1994). The report included a review of literature on diversion within Australia and internationally, as well as the results from a telephone survey with 150 representatives from police, judiciary, alcohol and drug agencies, policy makers and 12 key informants. Key issues identified in the literature review in relation to diversion were labelling, net widening, the compromise of due process, the efficacy of the program to which offenders are diverted and the cost-effectiveness of programs. From the telephone survey (p 4) it was noted that:

> There is a general belief that the criminal justice system, as it currently operates, is inappropriate for the majority of alcohol and drug offenders. In this context, appropriate and well planned diversion programs are seen to offer some considerable hope for the future.

Diversion programs in Australia were boosted by a Commonwealth initiative associated with the national anti-drugs initiative. The Council of Australian Governments (COAG) launched its 'Diversion Initiative' in 1999, a four year program with a budget of $105m

(linked to state co-operation and further state funding) for the States and Territories of Australia (see <http://www.health.gov.au/pubhlth/nds/nids/diversion/frmwrk.htm>). The diversion 'initiative' comprises a range of programs aimed at diverting drug using offenders from deeper involvement in the criminal justice system. A number of authors (e.g. Loxley & Haines, 2003; Spooner et al 2001; and Makkai 2002) have provided reviews of recent diversion strategies and initiatives in Australia.

The question of whether diversion initiatives (including drug courts) really do divert or simply add levels of complexity and supervision, fostering the growth of the criminal justice system (i.e. netwidening) is a serious one. Particularly where minor offenders are involved, providing treatment services runs the risk of increasing the number of individuals that come into some contact with the criminal justice system or its related agencies as well as the depth of the contact. This is because the system extends itself out to 'capture' or involve itself more intensely with a group who previously would have no (or limited) contact with the system. Sarre (1999) highlighted the potential for diversionary services to result in 'wider nets' (more people in system), 'denser nets' (increased intensity of intervention) and 'different nets' (new services supplementing rather than replacing existing services). Sarre noted that diversionary schemes have not resulted in a reduction in the numbers of people entering the criminal justice system — which should be a key performance indicator for the success of such schemes.

Drug Courts in Australia

Prior to the implementation of drug courts in Australia, Makkai (1998) critically reviewed the history of US drug courts, highlighting the need for pilot projects in Australia to adapt overseas drug court models to local conditions. In a recent review Makkai (2002) noted that drug treatment courts did not develop in Australia in the same way as they did in the US. While US drug treatment courts developed as part of a judicial 'grass roots' movement, in Australia their introduction came about through the activities of various senior bureaucrats and policy makers exploring ways to provide more appropriate treatment options and/or address the drug crime problem. Many of the drug courts were also introduced, or at least 'sold', as a cost cutting measure aimed at reducing the number of offenders being sent to prison

The first Australian drug court opened in NSW in 1999. This was followed by the opening of courts the following year in Queensland, South Australia and Western Australia. Most Australian jurisdictions have fully funded their drug court pilot projects, although the level of funding varies greatly. NSW spent $13.5m over a two year period on its pilot (Freiberg 2002a). Queensland committed $6.3m to a 30 month trial (Freiberg 2002a). The West Australian state government provided $5.5m over four years to the drug court, with $2.7m devoted to the two year pilot and the remainder to be committed if the pilot was successful (Freiberg 2002a). An overview of the implementation of Australian drug courts is presented below in chronological order of their date of inception. The results of evaluations of these drug courts are also presented where available.

New South Wales

The NSW drug court commenced in February 1999 as a pilot and incorporated a randomised control study design. The court was based on the US drug court model and was specifically supported by legislation (*The Drug Court Act* 1998 NSW). The court operates in Western Sydney and receives referrals from 11 local and 4 district courts in the western part of Sydney.

The legislation allowed for a one year program with three phases with reducing attendances required in court. Lawrence and Freeman (2002) noted a variety of implementation problems: potential conflicts of interest for legal aid lawyers; an absence of social workers on the team; no training for the team in drug and alcohol issues; problems with information sharing; conflicts between treatment and legal issues; the high cost of program non-compliance; lower than expected referral rates; problems with the supervision and reporting of urine tests; and the problem of drug court clients getting access to treatment services before non-offenders.

The NSW program was very much located at the 'hard end' in terms of offence and offender seriousness. Many participants enter the program from prison and exit the program (if terminated) back into prison. The program itself is tough and long. This may explain why retention rates for the NSW program are much lower than is typical in US programs. In fact, only 10 participants graduated in the first 17 months, and the percentage of persons terminated from the program within the first year of treatment was over 60% (Freeman 2003).

The NSW Bureau of Crime Statistics and Research has produced a series of evaluations of the NSW Drug Court (Briscoe & Coumarelos 2000; Freeman 2001, 2002; Freeman et al 2000; Lind et al 2002; Taplin 2002). The cost effectiveness evaluation of the NSW drug court (Lind et al 2002) included a randomized control group to assess the effectiveness of the drug court in reducing recidivism. Drug court offenders took significantly longer to reoffend with drug and shop stealing offences and had significantly lower rates of drug offending than those in the control group. These results depended on comparing the two groups in terms of equivalent exposure, thus correcting for the advantage the imprisoned group would have because they were unable to re-offend whilst in custody. When some of the benefits of the drug court (such as the improvements in health and well-being) and lower costs of treatment compared to imprisonment are considered in addition to the modest crime reduction benefits the case for the drug court becomes stronger.

While these findings are encouraging, they should be seen as only preliminary results. The evaluation was hampered by the small number of graduates (12) of the drug court. The short period of time elapsed since graduation meant the recidivism analysis was based on the time period from referral to, rather than completion of, the drug court. Further, the measure of recidivism, court appearances, is a less sensitive measure of re-offending than arrests.

There are reasons to believe that the NSW drug court could be fine tuned to improve its cost effectiveness. Lind et al (2002:66) argued that the cost effectiveness of the court could be improved through improving selection processes, earlier termination of unsuitable offenders, improving the match between offenders and treatment programs, developing more realistic graduation criteria and improving co-ordination between agencies.

Queensland

In Queensland a pilot drug court was introduced in January 2000. The Queensland statute governing the operation of the drug court (*The Drug Rehabilitation (Court Diversion) Act* 2000 (Qld)) authorised the drug court to operate at three Magistrates' Courts in the Brisbane area: Beenleigh, Ipswich and Southport. The Magistrates court was favoured rather than a higher court because this court processed a greater number of drug dependent offenders and allowed for faster and cheaper processing than a higher court (Freiberg 2002a citing the explanation from the first Queensland drug court Magistrate John Costanzo). However, the legislation and associated procedures were designed to ensure that in Queensland those dealt with by the drug court are likely to truly be at the 'hard end' and would otherwise serve a term of imprisonment.

The statute explicitly states that those suitable for processing in the drug court are those 'likely' to be imprisoned (Freiberg 2002a). The Queensland legislation provides for a sentencing disposition (the Intensive Drug Rehabilitation Order — IDRO) as a form of suspended sentence. The offender is in effect sentenced to a period of imprisonment and the IDRO serves to allow the imposition of a range of conditions governing the suspension. At the termination of the IDRO, whether through successful or unsuccessful completion of the stated conditions, the magistrate issues a final sentence.

The Queensland model has a number of potential problems. These include the unspecified duration of the IDRO and the fact that many conditions can be issued as part of the IDRO. It is quite possible that the obligations placed on offenders are unrealistic and will 'set them up to fail'.

The Queensland Drug Court has been evaluated by a team at the Australian Institute of Criminology which released the first publicly available evaluation report in June 2003 (Makkai & Veraar 2003). By the end of December 2002, when the pilot program ceased, only 44 graduates had actually completed the program. The first report, the Interim Process Report (Makkai & Veraar 2002) completed in April 2002 was not released by the Queensland Department of Justice and Attorney General.

Makkai and Veraar (2003) reported that over the period of the pilot project the number of referrals deemed ineligible had increased, suggesting that initially referring magistrates were not screening referrals closely enough.

Makkai and Veraar (2003) conducted a recidivism analysis based on an average follow up period of about one and a half years. The measure of reoffending used was conviction data and thus is likely to be a greater underestimate of the true rate of offending than arrest data. A survival analysis technique was used. This estimates probability of failure based on the pattern of failures from individuals in the group over the available observation period (which will vary for each individual). Results of the recidivism analysis indicated that although drug court offenders took slightly longer to re-offend than two comparison groups the differences were not statistically significant. Program graduates had a lower chance of re-offending than those terminated from the program, but this could be observed from the post entry follow up period. Therefore, the more parsimonious explanation is that they were the group of offenders that would have not re-offended 'anyway'.

South Australia

The South Australian Drug Court began as a two year pilot program based in the Adelaide Magistrates' Court in May 2000. It was aimed at adults with significant drug problems who had committed offences that would probably attract a term of imprisonment. The Court builds on the remand provisions available in South Australia which allow a deferral of sentence for a period of up to 12 months. The South Australian drug court program was launched as a state initiative designed to complement the aims of the Commonwealth 'Tough on Drugs' strategy. Although initially scheduled to run for two years, the program has been extended to at least December 2003 (Harrison & McRostie 2002:3).

An interim evaluation report of the South Australia Drug Court (Harrison & McRostie 2002) was conducted by the South Australian Office of Crime Statistics. This report examined the operation of the pilot program during its first 18 months of operation and aimed to identify some of the issues that need to be addressed for successful implementation.

In addition to the normal implementation problems the South Australian Drug Court faced some particular difficulties. A moratorium was placed on receiving new referrals to the court in November 2000 and not lifted until May 2001. In the first stage (May to November 2000) there were 313 referrals involving 308 distinct individuals. In the period following the lifting of the moratorium (May to December 2001) the referral rate was much lower (only 83 in this period). Less than half of all referrals went on to participate in the program and the participation rate was higher in the first 6 months of the program than after the moratorium. The moratorium allowed the court to be re-organised and process a developing backlog of referrals, however it may well have dampened the momentum for the court as indicated by reduced referrals in the second period (Harrison & McRostie 2002).

By December 2001, of the 150 clients admitted to the drug court program 18% had graduated and 14% were still engaged with the drug court. This amounts to a program completion rate of 15% if we consider the number of program graduates as a percentage of referrals. For those who were terminated the average length of stay on the program was around five months. Most of those accepted onto the program were male (87%) and the average age was quite old at 29 years (Harrison & McRostie 2002).

Western Australia

In December 2000 the Western Australian Department of Justice established the Perth drug court as a pilot project. The implementation of the drug court followed the results of a feasibility study (Edith Cowan University 1999) commissioned by the Western Australian Ministry of Justice and the West Australian Drug Strategy Office. Although the feasibility study presented a strong case for locating the court at the District Court level, the court was established within the Court of Petty Sessions. The existing Court Diversionary Service (CDS) was transformed into the Court Assessment and Treatment Service (CATS) to provide services to the drug court. This decision to locate the court at the Petty Sessions level appears to have been influenced by the desire to capitalise on the success of the CDS.

The WA drug court was designed to provide a comprehensive diversion service with three programs aimed at different types of drug abusing offenders. At the very 'low' end a 'Brief Intervention Regime' (BIR) was designed as a simple education disposition for those with minor cannabis charges. Second a 'Supervised Treatment Intervention Regime' was designed for minor offenders with substance abuse problems and to cover the client group previously serviced by the CDS. Finally a new 'high end' program designed for those requiring intensive supervision and who might otherwise be facing a term of imprisonment was developed, this is referred to as the 'Drug Court Regime' (DCR).

Much of the original planning of the drug court (in particular in relation to the new group — DCR) was predicated on changes to legislation that were recommended in the feasibility study. However, these particular legislative changes were not introduced. Without legislation the DCR was limited to six months from the time of first appearance, under the deferral provision of section 16(2) of the *Sentencing Act* 1995 (WA). This results in an effective treatment period of only four months following the assessment period.[1] Airey & Wiese (2001:12) expressed the widely held view that the program length is too short 'to measure true 'success' and to deal fully with the complexity of the issues often underlying drug use'.

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1 Since preparing the first and second drafts of this article, new legislation has been introduced in Western Australia (in August 2003) providing for pre-sentence orders and the adjournment of sentencing for up to 24 months. The provisions for longer deferral and pre-sentence orders overcome the particular problem referred to here.

Airey and Wiese (2001) reported further problems with the West Australian drug court. These included the large waiting list, the shortage of rehabilitation services, the absence of secure detoxification facilities with psychiatric services access and an absence of culturally appropriate detoxification facilities for Aboriginal people.

Drug court Magistrate Julie Wager has worked as a fierce advocate for the court and produced a number of papers on various aspects of the drug court for a wide variety of audiences (e.g. Wager 2001, 2002, 2003). These papers describe the operation of the drug court, its benefits and also the problems, particularly in finding support from the government through legislation to allow the full operation of the drug court as it was intended. The major issue of the inadequate length of the program is highlighted in this series of papers. Resource and staffing issues (e.g. the need for more CATS officers, the restrictions imposed by the CATS capacity and the subsequent under-utilisation of other court resources and the Commonwealth funding) are also discussed.

The Crime Research Centre at the University of Western Australia conducted the evaluation of the Perth Drug Court Pilot Project (Indermaur et al 2003). The report was completed in June 2003 and is due for release in the latter part of November 2003.

Victoria

Interestingly, there appears to have been a resistance to the establishment of drug courts in Victoria that is not apparent in other jurisdictions. First, the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) scheme was thought to be sufficient for Victoria's needs. Freiberg (2002b:283) cited Heale and Lang (2001) who explained that the CREDIT program was established after the decision was made 'that the US drug treatment court model was inappropriate for the Victorian context'. Second, the authoritative Drug Policy Expert Committee established under the leadership of Professor Penington advised the government against the establishment of drug courts, partly out of a concern that it would be focused at the hard end and consequently 'lower end' drug using offenders would be neglected (Freiberg 2002b).

As part of a broader review of sentencing and following the Penington review, Freiberg (2001) produced a discussion paper exploring the value of a range of sentencing options for drug affected offenders. He recommended the introduction of a new post-conviction sentencing order known as the Intensive Drug Supervision Treatment Order (IDSTO). This new order was based on two key assumptions. First, that it is 'necessary and right for the courts to provide for serious interventions into the lives of offenders' (p 10). Second, that the order encompass 'the key features of the drug court model' (p 11). The IDTSO was designed to provide flexibility regarding length of order, conditions imposed and consequences of breach.

The Victorian drug court was eventually established as a three year trial at the Dandenong Magistrates' Court in May 2002. This Court was established with its own enabling legislation (*Sentencing (Amendment) Act* 2002 (Vic)) which created a new division of the Magistrates' Court and a new sentencing order — the Drug Treatment Order (DTO). The legislation clearly states that the DTO is intended to be used when a sentence of imprisonment is warranted. The DTO establishes the terms for treatment and supervision and also for a term of imprisonment, if the offender fails to succeed on treatment the custodial sentence can be activated without further ado. The custodial part of DTO is suspended unless activated by the court for non-compliance or cancellation of order. The treatment and supervision parts of DTO remain active for a period of two years. Unlike other Australian drug courts the Victorian court targets both drug and alcohol dependent offenders sentenced in the Magistrates' court.

An evaluation of the Victorian Drug Court is currently being conducted by Turning Point due for release early in 2004 and will be based on 28 offenders placed on a DTO between November 2002 and May 2003.

Australian Juvenile Drug Courts

Although originally designed for adults, in a number of jurisdictions the drug court model has been adapted for juveniles. A drug court for juveniles commenced in July 2001 in Western Sydney (Cobham and Campbelltown). The court operates under the framework of the existing Children's Court. The program combines intensive judicial supervision and case management for young offenders who are charged with criminal offences that result from alcohol or drug use (Graham 2000). Graham (2000) reported that it was estimated that there would be eight referrals to initial assessment at the Youth Drug Court per week. From these initial referrals only half were expected to go on to in-depth assessment and two to three to be accepted onto the program.

In Western Australia the Perth Drug Court also encompasses services to the Children's Court. Juveniles with substance abuse problems are dealt with by a special sitting of the Children's Court and provided with services through the CATS team. As with the adult court in Western Australia this new operation did not involve any new legislation and served mainly to provide an enhanced level of service for juveniles and a special focus for the Children's Court.

Australian Drug Courts in Perspective

There are a number of points of similarity and difference between the Australian drug courts. An overview of the Australian drug courts is provided in Table 1. The issue of where precisely to locate the drug court on the diversion continuum and which group of offenders to target remains a matter of essential difference between Australian drug courts. There remains much debate and some confusion over whether drug courts are a form of 'early' intervention, or a 'last chance' for an offender before imprisonment. Many of the purported benefits of drug courts are expressed in terms of preventing the expensive use of imprisonment, yet all drug courts in Australia except in NSW are located at a Magistrates' court, a level of court that more often than not produces non custodial sentences. This may be necessary to capture those offenders whose offending is not quite so serious as to impel a term of imprisonment. However it does, at the same time, establish that the major risk for Australian drug courts is net widening. The temptation will be to reach into the vast supply of 'needy' cases to provide help rather that use the drug court as an alternative to custody. Australian drug courts are sometimes used in the way they are in many American jurisdictions for dealing with relatively minor offenders. For example, one of the Perth Drug Court programs, (the BIR) deals with cannabis offenders, some facing only their second charge for simple possession.

Table 1. A quick comparison of Australian drug courts

	State				
	NSW	**Qld**	**SA**	**WA**	**Vic**
Date Started	1999	2000	2000	2000	2002
Special Legislation?	Yes	Yes	No	No	Yes
Evaluations[1]	C	C	U	C	U
Length of Pilot (Yrs)	2+	2+	3+	2+	3
Location of Court[2]	D	M	M	M	M
Alcohol Excluded	Yes	No	Yes	Yes	No
State Funding $millions/yrs	13.5/2	6.3/2.5	NA	5.5/4	NA

*1. **Evaluations**:* C= Completed; U=Underway
*2. **Location of court**:* D= District (higher court); M=Magistrates' court

Makkai (2002) pointed out that Australian drug treatment courts share with their US counterparts some of the most innovative elements of drug courts. These include the notion of prosecution and defence working together rather than in an adversarial way, early identification and placement on treatment programs, frequent drug testing and ongoing involvement of the magistrate or judge with the offender.

However, perhaps one important difference between the US and Australian experience is that Australia has always had a fairly well developed range of treatment options and a number of mechanisms to encourage offenders into treatment. In Australia a system of case management had already been developed and agencies had a history of trying to work together. This has been further developed with the introduction of drug courts to provide intensive case management and monitoring by the drug court team. What is new is that the magistrate or judge should become the 'case manager' and become involved in the minutiae of the treatment and life circumstances of the offender.

Makkai (2002) identified three main 'implementation hiccups' that have afflicted the establishment of drug courts in Australia. First, it appears that all the Australian drug courts, some more than others, have had difficulty developing the required data bases to allow for proper management and evaluation. This relates to the more general problem of management and the policing of standards. In the US the Drug Courts Program Office in the Federal Department of Justice plays this role to some extent. A similar body would be welcome in Australia, but it is difficult to imagine how it may operate unless it focused on the monitoring the expenditure of Commonwealth funds.

Second, various problems have also arisen in a core aspect of the drug courts — the provision for random urine testing. Problems from financing the tests to information sharing the results to sanctions (for 'dirty' urines) have been experienced.

The third major problem is that providing a high level of monitoring and intervention with a particularly difficult client group may actually exacerbate the legal problems faced by offenders and authorities. The more intensive engagement with this group multiplies the opportunities for tension and failure. The level of input required from justice and treatment agencies was perhaps not appreciated before the programs began and have generally led to lower numbers of offenders being processed than planned.

One of the interesting issues that is highlighted by a comparison of drug courts around Australia is the question of whether to exclude alcohol or other substance abuse problems. Notably, Victoria and Queensland include alcohol but other states exclude it. Logically there appears to be no grounds for privileging one form of substance abuse over another. There are two main reasons usually advanced for the exclusion of alcohol. First, drug courts are often popular because they provide a focus on those drugs that many believe are associated with a greater degree of dependence. The most widely appreciated drug of dependence is heroin. The belief that heroin addicts 'need treatment' because the addiction 'causes' the addict to commit crime is so widely accepted that it has made drug courts easy to sell if this type of offender is the focus. Second, drug courts are usually introduced for a manageable and select group of offenders who will be targeted. However both these arguments are flawed. First, the degree of dependence is not strictly determined by the type of substance involved. Second, and perhaps more importantly, if the interest is in restricting numbers, better criteria could be developed along the lines which would optimise returns. Basically, given limited resources this means employing screening mechanisms that would select those individuals of highest risk who are likely to benefit from treatment. Although logic does not support a selection procedure based on the type of drug being abused, politics may dictate a focus on the high profile illicit drugs and it is important the basis for such decisions be made explicit.

Different patterns of drug use between Australian States may affect the comparability and applicability of different drug court models. Data on the drug use patterns of arrestees has been collected for four years now and shows some consistent differences in drug use by criminals in NSW, Queensland and Western Australia (Makkai & McGregor 2003). In Western Australia the most common 'hard' drug (cannabis is the most common drug used by offenders in all sites) is amphetamines, in New South Wales it is opiates while in Queensland there appears to be roughly equal levels of opiates and amphetamines. The differences are quite large and may affect the operation, if not the applicability, of the drug court model in Perth compared to Sydney and Brisbane.

Evaluation of the Success of Drug Court

There is now a growing body of literature focusing on the crucial question 'Do drug courts work?' (e.g. Belenko 1998, 2001; Peters & Murrin 2000; Goldkamp et al 2001). Some general reviews attempt to summarise a large number of individual evaluation studies. The much cited Belenko reviews (Belenko 1998, 2001) are popular because they appear to give a summary view of the evaluations. However, these summaries mask substantial differences between evaluation studies.

In his 1998 paper Belenko included 59 evaluations of 48 drug courts and in his 2001 review he updated the earlier study with 37 published studies between 1999 and 2001. Belenko commented on the limited number of rigorous evaluations that had been conducted. He also restricted his analysis to independent evaluations as one way to increase the methodological rigor.

Belenko (1998, 2001) listed a range of benefits of drug courts for which evidence was accumulating. Most of these related to non crime reduction benefits such as facilitating access to treatment for drug abusing offenders, reductions in drug abuse and facilitating co-operation and partnerships between the criminal justice system, substance abuse treatment professionals, and other social service providers. Belenko concluded that there was also evidence for real crime reduction in terms of cost savings, at least in the short term, from

reductions in jail time and prison use, court and other justice system costs, and reduced criminality. However, Belenko (2001) noted that straight diversion may be less expensive and less intrusive for low risk offenders and achieve similar outcomes as drug courts.

The US Drug Courts Program Office initiated a nationwide evaluation of drug courts focusing on 14 drug treatment courts. The evaluation conducted by the RAND group (Turner et al 2002) found that drug courts did meet most of the criteria listed as indicative of effective drug treatment courts. However, the one component that was most difficult to meet was the monitoring and evaluation of the achievement of program effectiveness.

Most of the evaluation studies suffer from major methodological flaws that disallow a simple kind of accumulation of evidence or attempt to ascertain what the 'balance' of the evidence suggests. The biggest complication is that most evaluation studies are limited because suitable comparison groups are not available. A second major methodological flaw is that follow up times are usually not sufficiently long to fairly gauge the effect of the court. A third is that outcome measures are not sufficiently robust to test the impact of the court. In most jurisdictions the outcome measure is future convictions — not future offending or future arrests. Finally, most of the US studies are limited to convictions that occur in the state or county under consideration, therefore offenders who move from their local area and re-offend are not counted.

A Closer Look at Methodological Challenges Facing the Evaluations of Drug Courts

Goldkamp and colleagues (2001) pointed out that the question 'do drug courts work?' has three distinct components. First, the question essentially asks us to compare the operation of the drug court to some alternative (usually previous) operation such as 'regular probation'. Second, for almost all decision makers the key indicator of success is crime reduction, as reflected in reductions in re-offending of drug court participants. Third, another measure of success, but clearly a secondary one, is cost reduction. A further question, if real reductions can be demonstrated, is which particular component(s) of the drug court was active in producing the results. This is important because it is possible that the active component of the drug court may be something relatively simple and cheap, and if this is the case it may be possible to re-configure the drug court operation to achieve the same effect in terms of crime reduction at less cost.

Although there is enough encouraging evidence to support the promise of drug courts, much more work is needed to isolate which groups of offenders are best served by this approach and which particular models or components are relevant to positive outcomes. In this vein Goldkamp and colleagues (2001) argued that evaluations of drug courts need to be informed by a typology of courts. This would help add texture to the discussion on drug courts which is often guided by the false assumption that all drug courts are essentially the same. What the Goldkamp group are advocating fits with the approach to evaluation advocated by Pawson and Tilley (1997). In their 'realistic evaluation' model, Pawson and Tilley argued that evaluation should be more dynamic and exploratory trying to isolate the active ingredient or 'mechanism' that is purported to produce the effect that is being sought. Primarily, realistic evaluation requires that we consider in greater depth what it is about drug courts that could cause a change that would reduce the likelihood of drug related offending. By almost all accounts this amounts to using the authoritative power of the courts to coerce offenders into treatment. The active ingredient for change thus remains the treatment but combined with this is the overall likelihood of engaging in treatment engendered by the involvement of the court. However, the realistic evaluation approach

demands that we remain critical about what may actually cause the change. It may be for example that simply reducing drug use for a period of time (due to the constant monitoring allowed by urinalysis) results in changes within the individual that allows them to break away from problematic drug use. The importance of context is also reinforced in the realistic evaluation model. Providing treatment programs within the context of a threat of imprisonment for non-compliance appears to provide a motivator for certain offenders who may lack other sufficiently strong motivation to reduce problematic drug use. Given the variety of models of drug courts and the variety of groups of offenders, the appropriate question to ask is not 'do drug courts work?' but 'which types of drug courts work with which types of offenders in which circumstances?' This re-phrasing or re-configuration of the question clearly draws on the lessons from the 'what works' literature on correctional treatment. (e.g. McGuire 2002; Hollin 2002).

Probably the biggest single point of confusion in assessing the efficacy of drug courts relates to the establishment of a fair comparison group. Goldkamp et al (2001) noted that many studies compare program completers with those in a matched control group. However, this is an invalid comparison. Out of any cohort of offenders placed on a drug court program there will be one group that goes on to comply and complete the program and a group that drops out or is rejected. If we simply compare the successes with the whole of the cohort placed in the comparison (control) group we will be comparing the 'successes' with a mixed bag in the other group. We need to counter the argument that the drug court program does nothing but allows for the selection or sorting within the treatment group in terms of some personal variable, such as compliance, which is related to risk but independent of the intervention effect. Procedures adopted by the drug court, such as continual monitoring, will operate to filter out more problematic offenders making it more likely that amongst program completers there will be a much greater proportion of those who would have done better 'anyway'.

If the drug court program has anything active to offer to the criminal justice system it must demonstrate a capacity to lift the mean (the average performance) of the whole cohort of offenders placed on the drug court program. Thus it is important to demonstrate an effect over and above any sorting that occurs. For a fair test it is also important that the socio-demographic variables and legal factors are equivalent in the intervention and control groups. This may seem obvious and logical, but the operation of many drug court programs include eligibility criteria that reject some of the key high risk groups (such as those with a history of violence) and it is not always clear that such individuals are not included in the comparison group. A number of evaluations raise the prospect that if the selection issue is not handled carefully drug courts could actually increase risks of recidivism. For example, Miethe et al (2000) examined recidivism rates two years following completion of a drug court program in Las Vegas, reporting drug court graduates actually had a higher recidivism rate than a matched control group. Notably, Miethe et al tested the effect of the drug court by comparing the whole group placed in the drug court with a matched comparison group. Table 2 provides a brief checklist for ensuring a fair comparison between a drug court cohort and a comparison cohort in order to test the effectiveness of the drug court intervention.

Table 2: Checklist of factors needed for a fair test of the effectiveness of a drug court in producing a crime reduction effect.

1. **A meaningful outcome measure.** A measure of success is determined and is capable of being measured. This is either re-offending, re-arrest or re-conviction measured at least two years after the completion of the intervention or a reliable calculation of the probability of recidivism using a mathematical technique such as failure rate analysis.
2. **A meaningful comparison group.** Ideally, offenders should be randomly allocated to an intervention or control group. Failing this, there should be at least a matched comparison group that has exactly the same range of socio demographic and legal variables as the group placed on the drug court. Every effort needs to be taken to ensure there remain no threats to the integrity of the comparison. For example, it is not sufficient to compare a group who did request treatment with a similar group where there is no evidence of a request for treatment — the request for treatment would signify an important difference in the readiness or motivation for change that would corrupt the comparison.
3. **The comparison needs to be fair.** To be fair a comparison needs to be made between the cohort of individuals placed on the drug court at the very first instance of placement prior to any assessment and a matched comparison group. The many points of attrition from the first point of placement has the effect of sorting through to a group of offenders who were always more likely to succeed. For an active component of the drug court to be demonstrated all the drop outs and rejects need to be included in.
4. **All the components** of the drug court treatment that the treatment group received but the comparison group did not receive needs to be documented. It is not possible without further analysis to know what aspect may produce a positive outcome if one is achieved. It may be that some procedure or treatment that is not formally part of the drug court program produced the impact.
5. **Any other factor which may affect the comparison.** Any factor that may affect the comparison needs to be identified and controlled for. This includes 'exposure time' (those in prison will have less opportunity to offend than those not in prison).

Implementation Obstacles

Almost all evaluations and reviews of evaluations point to a range of common implementation problems. These implementation problems mainly relate to data, management and practice. Many of these problems can be seen as a function of the conflicting needs and interests of practitioners and evaluators. To ensure that the right group is targeted in the way planned it is essential that thorough data bases be maintained. This has been found vital to ensure that it is the target group that is recruited and not some other

group. For example, Listwan et al (2002) completed a survey of 11 drug courts in Ohio and found that assessment procedures were a weak area for many courts. Listwan and colleagues recommended courts could improve their assessment procedures and maximise potential effectiveness by adopting a standardized risk and need instrument that includes criminogenic needs in addition to substance addiction.

In reviewing the introduction of the Drug Treatment and Testing Order in England and Wales Turnbull et al (2000) identified a series of issues that would affect the anticipated national roll out of the scheme. The lack of effective inter-agency work was identified as the single most important factor to address. The second problem identified was the lack of sufficient referrals and screening of referrals. The need for an effective 'triage' approach that rejects both those likely to fail and those that need little help was suggested as was the need for a specific diagnostic tool to achieve this. A tool that has been found elsewhere to be useful for this purpose is the Level of Supervision Inventory developed by Andrews and Bonta (1995) which serves as both an objective measure of risk and also an indicator of 'need'.

Conclusion

It is too early to make definitive statements regarding the effectiveness of Australian drug courts. In many ways the first generation of courts have fleshed out a range of implementation difficulties and the associated evaluations have documented these well. Most evaluations have also had their scope limited in various ways. This, together with the tentative nature of the actual findings suggests that it is optimistic to think that the evaluations of the first generation of Australian drug courts will provide the kind of unequivocal endorsement some may be seeking for the courts. However the evaluations have identified that there is considerable room for improvement as well as the mechanisms by which the potential effectiveness of these courts can be optimised.

The most significant danger with drug courts in the current climate is not the lack of support for the courts but that the effort will be misdirected and an opportunity to make a substantial difference would be wasted. Enthusiasm for the benefits of drug courts may result in referral of 'deserving' cases to drug courts. Many of these 'deserving' cases will be offenders facing a community based sanction and with a good chance of desisting from crime in any case. The tendency for rehabilitation programs being attracted to likeable clients with good chances of success is understandable, but does not make for a cost effective response to crime. The possibility that drug courts may (now, or in the future) simply provide enhanced treatment services to community based clients is a real prospect. In reality such an outcome would be easier for everyone involved with the drug court but would ensure that the drug court would not achieve the objectives of reducing imprisonment and recidivism rates. This is because the resources of the drug court will be diverted to offenders who are less likely to re-offend in any case.

If we accept that there is a tendency for the system to create denser nets (Cohen 1985) without reducing re-offending or imprisonment rates the remedy we need to accept is continued monitoring of the achievement of goals, particularly in terms of the purported cost effectiveness of the courts. Such monitoring will necessarily involve a critical review of the types of offenders targeted and processed by the drug courts.

In the absence of clear results about effectiveness it becomes important that principles of 'best practice' are observed to ensure that offenders involved in drug courts are not disadvantaged: 'good diversion practice will not compromise the rights the offender would

enjoy during the normal course of the criminal justice process, in particular the rights to procedural fairness, the right to appeal and protection from self incrimination' (Alcohol and Other Drugs Council of Australia 1996:2–4). Other 'best practice' principles outlined by the Alcohol and Other Drugs Council of Australia (1996) that may be hard for many Australian programs to achieve are to ensure that there are a range of diversion programs accessible to all offenders and that follow up services are available.

The systematic adoption of best practice principles to the implementation of Australian drug courts may help the courts remain focused in terms of the target group and the form of the intervention. The adoption of these principles could be facilitated by the development of a national association or perhaps a federal body that would assist in the development and assessment of drug courts.

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