TALK AT OPENING OF DRUG COURT TRAINING

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Addiction to illicit drugs is a bad thing. So is addiction to tobacco and to alcohol. I am not alone in saying or thinking this. All of these addictions lead to the deaths of some of their users; certainly their health is affected to varying degrees. With the exception of addiction to tobacco, people who would otherwise lead normal, averagely happy, productive lives can be prevented, by their addiction, from choosing drug-free lives.

39% of Australians over 14 have tried illegal drugs and, in the *25-39* year age group, 62% have tried illegal drugs. Unmet human needs can produce stress and pain and drug users seek relief in their use. Those who become addicts are caught up in a world of instant gratification - a world of no tomorrows, only today. As well as physical addiction, users are often addicted to the "sense of acceptance of sharing drugs", which sense is often heightened through a drug's illegality. Untreated and alone, more than 600 people die each year from drug overdoses in Australia. The main reason they die is that they take unknown doses of unknown drugs from unknown sources.(1)

Sending drug addicted offenders to prisons is not necessarily a solution. Up to *25%* of people in prison continue to use heroin (N.S.W. Prison Health Survey) and up to 40% use some illegal drug. Up to 10% of intravenous drug users in prison use a needle for the first time in prison and *75%* of drug users share needles in prison. With 38% being Hepatitis C carriers, disease becomes an additional personal and health care cost to the community. (2)

The failure of prisons to stop people using drugs illustrates a basic principle - only one person can ever stop someone using drugs and that is the person his or herself. Those trying to stop can become involved in a cycle of trying and failing, promising and "busting". However, if individuals are treated as valuable and have a choice, it can be expected that their health and behaviour can improve. (3)

Illicit drug use, its causes, effects, desired treatments and deterrent policies - none of these issues come within my area of expertise. I offer the above observations as background to the rest of my paper. You will hear from many experts over the course of your training program, I am sure.

The link between illicit drug use and offending is where I, as Chief Magistrate of Queensland do come in. The Queensland Government has decided to do something about this problem. The proposed Pilot Program Court, which will operate out of three magistrates court in the south-east corner of Queensland, come within my purview, as will the activities and responsibilities of the Pilot Program Magistrate ("PPM") and another Magistrate who will be trained to be available to relieve the PPM when he or she is ill, on recreation leave, or otherwise unavailable.

I have to date worked and will continue to do so, towards the efficient implementation of the pilot program courts. I will be taking an active interest in the appointment of the two magistrates, the training of other magistrates at the three pilot program courts who will have a role in referring appropriate persons to the PPM and in supporting the work of the PPM and back-up PPM in any way I can.

This definition of my role, as well as clarifying my part in the process, also relieves me from advocating the strong or weak points of the subject legislation - I can safely leave that to others. My recent attendance at a workshop in Melbourne, a short time ago, organised by Professor Arie Freiberg, Professor of Criminology at

the University of Melbourne, will assist me in putting into perspective for you the model of a "drug court" with which you will be working here in Queensland. To properly do this I must firstly talk around the issue of "therapeutic jurisprudence" a concept previously unknown to me before my attendance at the workshop in Melbourne. Had I heard of it before then, I may have thought it referred to a judge with a hangover needing an instant cure but not so!!

"Therapeutic jurisprudence" has been defined as

> "the study of the extent to which substantive rules, legal procedures and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences for individuals involved in the legal process" (4)

It recognises that the law itself can function as a therapeutic agent. From its beginnings in mental health law, it has expanded to corrections, domestic violence, family law and children's courts to give but a few examples. It looks for "therapeutic moments", those times when criminal justice interventions can be effective. It also examines the nature of the interaction between individuals, the dynamics of the courtroom and the way in which legal and personal responsibility is accepted. At the court level, it sees the creation of a separate, specialised court based on immediate intervention, non-adversarial adjudication, hands-on judicial involvement and treatment programs with clear rules and structured goals as therapeutic imperatives. *(5)*

The emergence of drug courts is evidence of

> "some broader changes in the administration of criminal justice over the last two decades of the twentieth century, in particular, the renaissance of rehabilitation, the search for alternative forms

> ofjustice, the acceptance by judges of their managerial role and development of a “problem-solving” orientation by police, courts and other agencies”. (6)

This followed on from the decline of the ‘just deserts”, punitive model prevalent from the mid-1960’s, as it became obvious that law enforcement and punishment alone were ineffective responses to crime, particularly drug crime. Further, there developed a renewal of interest in crime prevention. Drug policy reflected a two-tiered approach to punishment .tough laws for dealers and importers, while lower level participants have become the subject of harmminimisation or harm reduction polices and diversion and treatment options.

Drug courts (in the U.S. and England) have come to be seen as an example that properly resourced and targeted interventions can have a positive effect.

Also involved is the concept and application of restorative justice, reflecting a profound disillusionment with the traditional court system and a search for engagement with offenders, dialogue between offenders and victims and for positive action aimed at restoration of the offender and his or her reintegration into the community.

Further, the growth of managerialism in the civil and criminal court system has accustomed

judges to take a more interventionist role in the pre-trial and trial process, as they “case-manage” matters through the litigation process to address problems of delay, cost and unfairness in civil litigation. This involved judges acting in a facilitative rather than an adjudicative manner.

All of the above, combined with the development of a problem-solving orientation by government agencies,

where the individual is seen as a sympton rather than a cause and the realisation that social problems require broader social solutions rather than narrow legal responses has contributed to the changed perspective. (6)

So, if this is the jurisprudential and social policy basis for drug court practice, what, then, is a Drug Court?

Ten key components of drug courts have been identified: (7)

Drug courts integrate alcohol and other drug treatment services with justice system case processing

Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due process rights Eligible participants are identified early and promptly placed in the drug court program

Drug courts provide access to a continuum of alcohol, drug and other related treatment and rehabilitation services

Abstinence is monitored by frequent alcohol and other drug testing A coordinated strategy governs drug court responses to participants' compliance

Ongoing judicial interaction with each drug court participant is essential Monitoring and evaluation measure the achievement of program goals and gauge effectiveness

Continuing interdisciplinary education promotes effective drug court planning, implementation and operations

Forging partnerships among drug courts, public agencies and community-based organisations generates local support and enhances drug court effectiveness.

Of these, the essential elements, I believe, in the effective working of a drug court, is the interaction between the judge/magistrate with the offender and the teamwork necessary between the judge/magistrate, the prosecution, the defence lawyers and the government agencies - more of that later.

There are several models of drug courts. The two basic options are pre-adjudicative (deferred prosecution - post-charge schemes in the form of bail or other diversionary processes) or post-adjudicative (deferred or suspended sentencing following a plea or finding of guilt). A recent survey of 97 drug courts in the United States found that 30% were pre-trial, pre-plea schemes. 42% had a combination of options. (8)

Drug courts had their beginning in Dade County, Florida in 1989 and have spread rapidly across most of the U.S., until now, when there are anywhere between 400 and 700 such courts, with no two drug courts being alike. They were developed primarily as a means of preventing local courts from being overwhelmed by drug cases with the pressure for their establishment coming primarily from the judiciary.

The Australian experience has seen experimentation with pre- and post-court interventions:

The CREDIT (Victorian Court Referral and Evaluation for Drug Intervention Treatment) is an experimental bail scheme under which arrestees brought before a magistrate who are assessed as committing

drug-related non-violent indictable offences and as being suitable for treatment are released on bail for periods of up to four months or more. A variety of treatment services is available, brokered by the Victorian Offenders Support Agency, but the responsibility for which rests with clinicians attached to the Magistrates' Courts. Direct service delivery is provided by a number of agencies. When, or if, the charge is eventually heard, the defendant's participation in the scheme does not affect the issue of their guilt or innocence, but will affect the sentencing outcome. Treatment with the same providers can continue under conditional sentencing orders. The capacity of the scheme is 30 offenders per month and referrals can only come from police.

In Western Australia, their bail diversion scheme, the Court Diversion Service, has been operating since 1988 under the *BailAct* 1982 (WA). In the A.C.T., under the *Drugs of Dependence Act* 1989 (ACT), a magistrate may order a person whose offending behaviour is considered to be related to drug dependence, to be referred for assessment and treatment by the Drugs of Dependence Assessment Panel. In appropriate cases, the panel may order the offender to participate in a treatment program for up to two years as an alternative to conviction and sentence. Successful completion of the program may result in dismissal of the original charge, whereas breach can ultimately result in revocation of the treatment order and the court proceeding to conviction and sentence.

It was announced at the recent workshop in Melbourne, that South Australia are adopting a scheme similar to the CREDIT Scheme in Victoria.

In New South Wales, a drug court operates at District Court level, under the *Drug Court Act* 1998 (NSW). I have had the opportunity to witness the operation of this court at first hand and will comment on that later. The *Drug Rehabilitation (Court Diversion) Act* 1999 (Qld) ("the Act") was passed through Parliament here

last week and is modelled closely on the N.S.W. model, while targeting a different group of offenders. John Costanzo will detail for you the workings of the Act and can also explain the reasoning behind the selection of the group of offenders at which Queensland's legislation is aimed.

Suffice it to say, in both New South Wales and Queensland, the offender must be, or appear to be, drug dependent, but Queensland's legislation requires the court to be satisfied that the dependence contributed to the commission of the offence (Act - s.6(l)(b)

Both NSW and Queensland drug court schemes (and try as we will to have the Queensland court referred to as the "pilot program court", it will inevitably be known as "the drug court"), are post-adjudicative, requiring either a plea of guilty or an intention to so plead. (Act - s. 15(2). Both also require the court to be satisfied that the person would, if convicted, be likely to be sentenced to a term of imprisonment (Act - s. 6(1)(c)).

In N.S.W., the court is presided over by a District Court Judge and has the powers of both the District and Local Court (the equivalent of our Magistrates Court). In Queensland, the court will, as I have stated, be presided over by a magistrate. The schemes of the two Acts are similar, but not identical. I must say, from my observation of the workings of the NSW court and my knowledge of the alternative schemes in operation throughout Australia at the present, that I consider we are fortunate in having a "drug court" scheme enshrined in legislation, with defined eligibility criteria for offenders to participate in the programs, regulated procedures in relation to deferral of sentencing, procedures for the offender to report on a regular basis to the court, sanctions and reward provisions and guidelines for deferred and final sentencing.

In Queensland, the Objects of the Act are aimed at reducing -

"(a) the level of drug dependency in the community; and

(b) the level of criminal activity associated with drug dependency; and

(c) health risks to the community associated with drug dependency; and

(d) pressure on resources in the court and prison systems.

In the Explanatory Notes for the Bill, the reasons for the objectives are stated as being –

The rate of imprisonment for drug and property offences now exceeds the rate of population increases in Queensland.

At 30 June 1998, Queensland had the highest imprisonment rate in Australia at more than 40 per cent above the national rate.

Approximately 60 per cent of incoming prisoners have a drug dependency, therefore

supporting anecdotal evidence that many property and other offences are committed to feed drug habits.

The Bill, at clause 3, sets out four specific ways that the objects are to be achieved, namely by establishing a pilot court diversion program to:

(a) Identify drug dependant persons who are suitable to receive intensive drug rehabilitation; and

(b) improve the ability of those persons to function as law abiding citizens; and

(c) improve their employability; and

(d) improve their health.

The legislation is designed so that, if the proposed pilot program is successful, and if it is decided to implement the program in other courts, the provision of the Bill would be able to be adapted for inclusion in the *Penalties and Sentences Act 1992* as a further sentencing option.

Given the stated objects of the Act and the stipulation as to the ways in which the objects are to be achieved; given that the legislation excludes appeals against various decisions of the PPM, so that the pilot program is not ground to a halt pending appeal decisions; given the conditions that the offender must report to the Court on a regular basis during the order's existence; given the intended provisions of rehabilitation programs agreed to by the offender and forming part of the IDRO requiring reports for drug testing to an authorised corrective services officer; given the

provision that persons are not liable to be prosecuted for particular offences as a result of any admission made by that person for the purpose of deciding whether he or she is eligible for rehabilitation; it can be said, I think you would agree, that the proposed pilot program court fits within the model of a drug court, as outlined above.

Drug courts have been described as delivering "charismatic justice". This is because, in the United States, drug courts were very much a product of judicial activism. The courts have tended to be staffed by committed judges with a passionate concern and interest in the establishment and success of the courts. The role of the judge is considered pivotal: his or her personality, the depth of involvement in the cases, the continuing supervision and the direct engagement with the defendant in court, rather than through legal counsel. Drug courts have been likened to theatre or to psychodramas - "in which the judge, the lead actor/player, is confessor, task master, cheerleader and mentor". (10). The changes in the judge's traditional role are reflected in the changes to the roles of the prosecution and the defence.

Added to this dynamic, is the constant interchange between the Judge, prosecution and defence and the corrections and health professionals, who form part of the "team" which makes up the drug court.

The prosecutor's role is no longer to seek convictions but to seek to protect public safety by ensuring that appropriate candidates are selected for the program and that they comply with its requirements. Similarly, defence counsel must relinquish their traditional roles of seeking to defend their clients at any cost and advocating the least restrictive sanction appropriate to the crime and the criminal in favour of recognising that although treatment programs may be more onerous, they may, in the long term, be more beneficial for the offender. (11). A recent survey of drug court defenders carried out by the National Legal Aid and Defender Association 1997 (in the U.S.), found that the great majority were pleased with the operation of the drug courts and were unanimous in the view that their clients were seldom worse off in a drug court. Ninety per cent reported higher job satisfaction and, in a separate survey, 80% felt that reliance on treatment and rehabilitation was a more appropriate response to drug cases.

Not to put pressure on the "team" which will constitute the pilot program court in Queensland, operating out of the three magistrates courts referred to, the success of the pilot program will, to a certain extent, depend on a number of matters -

> The ability of the PPM and the back-up PPM to be enthusiastic and committed to the objects of the legislation.
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> His or her ability to empathise with offenders who satisfy the criteria and who may be assisted to break the vicious cycle of drug use and offending to support a drug habit. His or her ability to work

closely with a team, both in court and in team meetings, which are an essential part of the process;

His or her ability to be a sound sentencer, a good communicator, someone who can inspire persons to achieve high goals, while reality testing at all times; His or her susceptibility to elation and disappointment as persons perform well or fall off the programs;

His or her ability to be part of a team while remaining judicially aloof, where appropriate;

His or her willingness to be mentored by experienced drug court judges or magistrates; His or her ability to run a court calendar and rotate his or her court work through three courts.

These are the qualities I observed in my attendance at the Drug Court in Parramatta in N.S.W. recently, to see for myself first-hand, the operation of the Court (except for the necessity to sit at more than one court). I sat on the bench with Judge Gay Murrell for part of the day and through a team meeting, on a sentencing and reporting day for the Court. I heard about “clean” and “dirty” “urines”. (tests). The system allows for sanctions and rewards. I observed people being sanctioned by being sentenced to a short term in imprisonment for, say, use of illegal drugs, despite denials of such usages, of which the prosecution team member was aware. I saw people who had perhaps never received approbation for any behaviour, or very little, in their lives, being applauded from the bench and from the body of the court and saw the pride in their faces. I saw the presentation of certificates to persons “graduating” from one phase of a program to another, by the judge entering the body of the court to present them to the proud recipients. I observed persons addressing the judge directly and observed her close attention to their addresses. I found the whole experience uplifting, but then I have an interest in alternatives to precedent-based, inflexible sentencing practices and am encouraging Queensland magistrates to be inclusive of stakeholders in their courts, rather

than sit in ivory towers, removed from the human tragedy and despair with which we are daily faced in the courts. I envy the pilot program magistrate and the back-up magistrate the exciting jurisprudential experience which lies ahead of them.

So, where, then, do I find these gems of judicial rectitude, compassion, flexibility and enthusiasm? I don't know yet, but I await the appointment of a new magistrate by the Attorney-General, as provided for under the legislation, so that I may allocate the functions of a pilot program magistrate to two magistrates (as I may, under section 10 of the Act), so that they can be trained together in relation to the Act and proposed procedures in the pilot program courts.

The best possible training is undoubtedly for the two magistrates to visit the Drug Court in N.S.W. and witness its operations at first hand. Indeed, I have suggested that the whole team should do so, if that court is willing to accommodate them. I have also suggested moot courts for training purposes and am happy to support that part of the training in whatever way possible. I would like to see such moot courts being performed at the three subject courts and that the local magistrates participate, in that they will have a role in referring appropriate offenders to the pilot program court and in relation to assessment. That process will provide an opportunity for all staff at those courts to meet the "Drug Court" team, as the drug court will be moving in and out of courts on a regular basis. The role of the court co-ordinator, presently being filled, should alleviate any concerns in this regard and I have the support of the Supervising Magistrates at the three courts in relation to the workings of the pilot program court. The magistrate will, for all intents and purposes be a regular magistrate, in that he or she will be available to undertake regular magistrate's work, if available and called upon to do so. However, I intend to take an active role in the setting up of the pilot program court, so that the experiment has the fullest support possible and is as problem-free as it can be.

The moot courts at the three courts could also fulfil another purpose - that of explaining the role of the defence lawyers in the pilot program court process. We heard at the workshop in Melbourne about the resolution of the ethical dilemma for the defence lawyer (being a Legal Aid Office (NSW) salaried lawyer) who both represents offenders before the court and who sits in team meetings, discussing the progress of their client within the program, including decisions on possible sanctions or rewards for their clients. It is considered that one lawyer only should be involved from first appearance before the drug court on sentencing and throughout the life of the IDRO and on final sentence. Otherwise, the concept of "the team" would be under heavy pressure. To interpose into the team of corrections and health professionals, the prosecutor and the magistrate, used to working with each other on a daily basis, a member of the private profession imbued with the principles of non-disclosure of defences or reluctance to plead in the magistrates court, will be potentially disastrous for the experiment. Legal Aid Office (Qld) is supportive of providing a salaried lawyer to initiate the pilot program, although details are yet to be worked out. A dedicated police prosecutor has been named to the team. The corrections and health professionals are also named and I have met with them on a regular basis on the interdepartmental committee charged with the implementation of the pilot program.

I foresee a dedicated and close team developing to work hard together on this innovative and challenging experiment in an attempt to change and indeed, save the lives of persons otherwise potentially doomed to ongoing cycles of drug addiction and drug-related offending with potentially dire circumstances. My resources and best wishes, are with you. The "team" and possibly the PPM/back-up PPM will require regular debriefing, I am sure. This is a brave and different experiment in judicial experience - "therapeutic jurisprudence" indeed.

Best of luck for a productive and information three-week training programme. You will discuss the intricacies of urinalysis, saliva testing, suitable treatment plans, detoxification schemes, rehabilitative programs. Out of it will come, I am sure, a well trained group of professionals willing and able for the great challenges ahead.

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