QUEENSLAND COURTS

IMPLEMENTING DRUG COURT JURISPRUDENCE INTO "MAINSTREAM" DRUG TREATMENT ORDERS

TASMANIAN MAGISTRATES CONFERENCE, HOBART

20 June 2008

Magistrate Anne Thacker

I would like to use the time we have this morning to go to some issues I surmise have arisen in your attempts to implement the Court Mandated Diversion (CMD) regime and engage in at least some aspects of therapeutic jurisprudential practices in your otherwise busy traditional courts.

Therapeutic jurisprudence is an ideal that embraces a range of attitudes and activities around therapeutic communication including understanding the roles of motivation and ambivalence in offenders, use of persuasive strategies etc.

[Refer to the material from my April visit to you.]
www.therapeuticjurisprudence.org is a very useful website, especially if you look through the pages titled Australasian TJ Clearinghouse and TJ Law Reviews.

The changed role of the magistrate
I understand there is concern about how therapeutic practices might sit with the Court's independence, impartiality and fairness, and maintenance of the rules of criminal procedure and rules of evidence. It is all very well to say magistrates will engage in a therapeutic jurisprudential exercise but quite another to flick the switch during your working day. For this reason, I have found my *modus operandi* has shifted - incrementally but persistently - towards more TJ practices generally, since I educated myself. I encourage all my colleagues to take up the challenge and do likewise.

While I do not profess to have the answers appropriate for your circumstances in Tasmania, I hope I can give you some ideas and

explanations that will make you feel more comfortable to persist with the Drug Treatment Order (DTO) regime.

From my own experience, as I think I said to you during my previous trip, dealing with drug offenders to manage their rehabilitation in a direct way does not come easy or overnight for many of us. And in my case, I took comfort in my scepticism of the process for some time and until I had developed my own methodology, as it were, to ensure that the therapeutic practices I embraced did not take the Court too far away from the tried and trusted aspects of the criminal jurisdiction. So, how many of you have tried clapping as an in-court reward since I was here last?

I received clarity of purpose when we made the Drug Court video: When the script arrived I was surprised to find it was not a script at all. Rather it talked about what Drug Court aimed at doing. More importantly there was no script for what each of the actors would say! Rather there was a detailed description of each offender role. The detail included how each offender felt about themselves at the prospect of coming to Drug Court and how they reacted to what happened to them during their time on the Drug Court program. I thought this is going to be an interesting schmozzle…

The three actors arrived to play the role of the drug offenders. They didn't seem perturbed by a lack of script. What I saw occur though as we commenced the role play was that each actor had a clear idea of what was required of them within their character and acted accordingly. I did the same. The point I am making is this: we have to "re-jig" our headspace. We have been in the criminal justice system for a long time and know the procedures very well. We are very comfortable with them and understand why we are engaging in them. The logic of it all is clear.

What we are now asked to do is wrap that way of being a lawyer and magistrate around some new rules of engagement, some of which fly in the face of our training and years of experience. This we cannot do overnight without redefining the description of our role and purpose to ourselves first. As an interim measure, if you're anything like me, you'll try and put together a script in your head. How did you actually get to the point where the courtroom started clapping? Did you think -

> "I am going to say … 'Let us all show John Smith what we think of his efforts this week by giving him a round of applause. I want the whole courtroom to give him a clap!'"

The agreement between Court and offender

The offender too must be made aware that there is a special and different procedure happening at Court. It is not just another day in Court… The offender enters an entirely new and different relationship with the Court when agreeing to be subject to a DTO.

This is easy for those of us operating in a Drug Court because this message is sent well before they reach the door of the Drug Court by virtue of it being a discrete and separate court.

Before the offender arrives at being required to give consent to the DTO then there must be ample opportunity / opportunities to have appropriate information given to the defendant about what a DTO is and what would be required of him on the Order.

Who gives this information?

How is it given?

When is it given?

1. The arresting officer / The Prosecutor
2. Defence Counsel
3. The Court Diversion Officer
4. The Anglicare workers
5. The Magistrate

The Magistrate might feel more confident that when the defendant / offender is spoken to in Court there has been some considerable work by education / information / understanding preparation given to the defendant by others in what I'll call "the CMD team".

Magistrates have a statutory responsibility I see to inform an offender of the term of the custodial part of the order: However, from the offender's point of view this is not going to make sense unless the information has context and forms part of a whole-of-understanding approach by the Magistrate.

Informed consent

A significant issue is the giving of informed consent by the offender. Magistrates should not rely on a quick question "Do you understand?" and response "Yes". Equally, the Magistrate must feel confident of what the CMD team tells the offender in preparation for the sentencing day.

Informed consent cannot be obtained without active preparation by the offender. He must actively position himself ready to undertake the DTO by eg attending all appointments for assessment in a timely fashion, complying with his bail conditions, and generally showing a readiness to change at the least. The best indicator is commencement of abstinence from illicit drug use.

I do not accept offenders onto the Drug Court program unless they have already undergone detoxification. I am not sure this occurs in Tasmania.

I do not sentence an offender if the offender is known to be using illicit drugs on the reasoning that if they are then their ability to give informed consent to the order is not possible. I expect the prosecutor or defence counsel to seek an adjournment. I expect the adjournment will include either bail and only on conditions related to detoxification as an in-patient, or the defendant's bail is revoked.

The suspicion can be raised by anyone, including myself by observation. The Prosecutor should make his own investigations. The security guard at the front door might make observation and tell the Prosecutor. Defence Counsel should advise the Court if they become aware. (I might say the Queensland Drug Court is assisted by a nurse on the Drug Court team and also the Court's ability to order a urine test by the defendant at Court, either in custody or on bail.)

Drug Court does not have an agreement with an offender that he will *try* to abstain. The special relationship commences on the footing that the offender is abstinent and will stay that way or be sanctioned or terminated from the order.

At sentence then obtaining informed consent to the DTO will cement the new agreement between the Court and the offender. Magistrate John Costanzo would take sometimes over an hour at sentence explaining the sentence in detailed discussion directly with the offender, asking questions, eliciting from the offender his understanding of the Order etc. This approach not only settles the informed consent question but also settles the parameters of the new agreement between the Court and the offender.

Thereafter, I use any opportunity I get to ensure the offender has retained a copy of their order, and re-read it. For example, I give them a fresh copy from time to time; a sanction maybe to sit in the back of the Court and re-read their order.

Ongoing collaboration of the CMD team

> The collaborative processes of the Qld Drug Court are established under Partner and Cooperating Organisation agreements and operationalised within the culture of interdepartmental cooperation developed within the Drug Court. Such agreements reflect the operational commitments of each Partner to coordinate its particular area of expertise in concert with the expertise of other Partners, to achieve the successful drug rehabilitation of participants.
>
> (Taken from the Joint Practices and Procedures Manuel utilised by Qld Drug Court partners)

The Court delegates responsibility to others to supervise and direct the offender pursuant to the DTO.

Most Drug Courts utilize a team based approach to treatment, that is, a co-ordinated strategy among judge, prosecution, defence, and treatment providers to govern offender compliance. This approach draws its strength from each representative providing input from their unique institutional perspective.

The team-based approach has resulted in the creation of new roles for the traditional judicial players. Judges are no longer "dispassionate, disinterested magistrates" but instead, are "emphatic counsellors" who play an active role in the treatment process, monitoring compliance, rewarding progress and sanctioning infractions. "The prosecution and defence are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs." (See Judith S Kaye, "Lawyering for a New Age" (1998))

Offenders are case managed by the Magistrate but only with contributing advice of the CMD team. Between court appearances, the supervision and direction of offenders must be shared by the CMD team (exclusive of the Magistrate). In Queensland information is readily exchanged between all members of the Drug Court Team to monitor and supervise compliance. The information exchanged is limited by relevance and is generally also limited to a one page document, sent by email. The Magistrate is provided a copy at the Case Conference.

Another vital point for Magistrates: especially at Case Conference, team members might stray due to enthusiasm, ignorance of the law, mere voyeurism…. It is for the Magistrate to keep hold of the reigns as it were and keep the CMD team within the boundaries of the law and what is fair and reasonable in the circumstances.

The Court Diversion Officer

The role of the Court Diversion Officer (CDO) as manager of the interface between the Court and the offender means that the CDO will have a high degree of interaction with each member of the CMD team. This appears to have occurred in the framework set up regarding the assessment phase certainly.

However, I have read the *Evaluation: Second Progress Report* and it does not appear that the CDO has any formal responsibility to ensure that the CMD team speaks to each other between Case Conferences and Court Reviews beyond (and I quote) -

> Maintaining a diary of court review dates and liaise with case managers to ensure progress reports are prepared and delivered to the court on time." (at p 10)

While formally at least, all information comes to the Court, there might be - as in Queensland - an informal or joint practice or procedural agreement that information is shared in the CMD team via the CDO.

The CDO must take a very pro-active role in preparation for the case conference and Court Review. Case conferencing and Court Review are two important elements of the DTO that confront / affront the traditional criminal justice system. The magistrate cannot hold to the agreement embedded in the DTO alone. The offender cannot hold to his end of the agreement alone.

Queensland Drug Court has legislated protection and management tools to support the collaborative endeavours of the Drug Court team. Find attached the full text for the following sections of the *Drug Court Act* (Qld):
Section 36A - Drug Court magistrate must consider views of Drug Court team
Section 37 - Immunity from prosecution
Section 38 - Random drug testing
Section 39 - Disclosure of compliance and related information
Section 39A - Disclosure of relevant information
Section 39B - Protection from liability
Section 39C - Protection of personal information about offenders

Case Conferencing

The purpose of case management is to focus the combined expertise of the magistrate, the CMD team and cooperating organisations on an individually developed plan for the rehabilitation of the offender.

The collected wisdom is that firm support and direction assist a drug dependant offender to learn to live and manage their social environment without illicit drug use. This support is conditional on the Court receiving ongoing advice from members of the CMD team that the offender is progressing in their rehabilitation: see the Queensland Drug Court Joint Practices and Procedures Manual.

The case management has been provided by the Department of Community Corrections. However, with Anglicare taking on the role of case managers there will be changes that require a different management strategy, I suspect. This will create some new challenges in the near future given Anglicare is not intimately associated with compliance matters, as the Department is and also Anglicare will not be experienced with responding to Court requirements. Nevertheless, Anglicare will need to become a CMD team member and should be involved in communications with all the CMD team members between case conferences.

The Magistrate is in the best position to send a strong and clear message **valuing** the contributions of co-operating organisations - Anglicare, and others in a similar position eg housing providers perhaps - by strategic case conference management. Further, the Court should maintain wariness against being managed by co-operative organisations who say they "won't" or "can't" do what is required.

A good level of co-operative relationship within the CMD team will reduce the Magistrate's work load to the supervisory end of the spectrum. Essential ingredients I think include:

- Clear instructions to the team members regarding Magistrate expectations of them.
    - I reject written reports from time to time with reasons why they are not acceptable.
- Written reports that are concise and current on the salient features to be managed are a must.
    - Use of reports: spend time to establish with the team what you require in the report to be useful
- Reports must be made available to all team members in a timely fashion.
- Open lines of communication between all team members (except the Magistrate. I stay out of the loop and deal with each matter once - at the case conference) so that there is currency in the sharing of information between the team members.
- Firm management of the rules of evidence and boundaries of the case conference procedure
    - Magistrate firmly stopping inappropriate discussion of sentencing decision / final sentence / sanction
    - Where the case conference is convened ensuring security of privacy eg not in the court room if the digital recording cannot be turned off. Further, consideration of seating positions of team members around the table is important eg a round table is preferable.
- Acknowledgement of the additional work required by case conferencing procedure by small kindnesses.
    - Conduct the CMD team meetings over morning tea
    - Have photocopying facilities readily available

To ensure the subsequent Court Review remains as close as possible to a traditional court hearing, what I do at the Case Conference is:

- Make notes on the Case Conference record sheet of - (no more than) three points that need to be made to the offender;

  Two points should ideally be positively in favour of the offender's effort!

  List any breaches leaving blank space to fill in any sanction to be imposed ie always have a heading "Sanction" but never fill it in the Case Conference

See attached: Example of the "green sheet" Queensland Drug Court uses at Case Conferences.

Court Reviews

The Court Review should not be a rubber stamp of what was decided in the Case Conference. Equally, do not spring any surprises on the CMD team in the court room eg. where further information is given - usually by the offender - in the Court Review do not merely call for further submissions in the Court Review. Rather, stand down and convene a further Case Conference.

May I suggest that as part of this new agreement / relationship between the Court and the offender, it is vital to acknowledge to the offender that you've been "talking about him behind his back". I say to offenders "we've had a case conference **about your position** this morning".

May I suggest, I ask offenders if they have seen a copy of the report. Many don't want to but the opportunity to be actively involved in their recovery means they should - at the least - be given the opportunity. "Have you seen this report? It says…." Is another of my possible opening pronouncements to an offender.

It is in the Court Review that the Magistrate speaks directly with the offender. Material addressing this aspect has been made available previously re motivational interviewing techniques etc. Remember: Drug Court acknowledges three elements central to effective drug rehabilitation:

- **Drug abstinence.** Monitored by regular and random drug testing.
- **Honesty.** Usually an early casualty in the use of illicit drugs, honesty is essential to the therapeutic relationship between the participant and Drug Court. It is also essential in re-establishing non-exploitive relationships with partners, families and employers whose trust has usually been lost in the participant's use and

pursuit of illicit drugs. Honesty is a cornerstone of effective rehabilitation.

- **Disclosure.** During their rehabilitation participants are required to engage in a process of identification of triggers and risk situations that lead to relapse. Failure to participate in a full debrief of a relapse with a case manager or reassessment officer may be regarded as a failure to maintain commitment to the supervised rehabilitation offered by a DTO.

Therapeutic jurisprudence accepted wisdom is that the Court acknowledges (not necessarily out loud) that an offender may relapse during the course of the order. At these times the Court will be guided by assessments of the offender's response (vis. honesty and disclosure) to that relapse to determine sanction and also continued viability as a participant on the DTO. Such information and advice may be utilised to modify the offender's Rehabilitation Program as necessary.

Prolonged failure in all three elements will be regarded as a demonstration of the participant's failure to satisfactorily engage in the Drug Court program and invoke termination proceedings.

BEWARE: Court Reviews are not an extension of the Case Conference. I have always managed Court Reviews in a rather formal style for fear of having the interchange required fall into a mere discussion. Especially where breach is being alleged, I hold strictly to the format of a criminal proceeding: The breach allegation is put; then each party makes their submission and the offender makes his response either himself or through his defence counsel.

Scenario examples:

Offenders presents journal.

I read it and choose what I will comment on x reference to my list made at Case Conference. Discussion directly with the offender occurs.

I tell the offender what I intend to do next:

Where there has been positive response - style of interaction continues to be direct between offender and bench in discussion….

Where there has been a breach the temptation will be to launch directly at the offender…. However, may I suggest the safest way forward: Court Diversion Officer to put the allegations of non-compliance. Then ask the offender to respond.

Having said that: Remember this new agreement / relationship between the Court and the offender… so, offenders will often enough tell you what's happened where they have not told anyone else…. In Queensland the legislation provides a measure of protection to offenders

pursuant to section 37 - *Immunity from prosecution*: See detail of the section attached.

For this reason, questions like “How was your week?” “How are you going?” “What’s been happening for you?” are good open ended questions.

Use of sanctions and rewards

See some background information attached.

In Queensland, Drug Court will not advance an offender until there is (by urine testing) proven abstinence from all illicit drugs for a period of at least 12 weeks. Coupled with this are sanctions for illicit drug use - the range commencing with imprisonment in most instances.

At the same time Queensland Drug Court acknowledges that an offender may relapse during the period of the court ordered supervision. In all instances of relapse the Court will be guided by assessments of the participant’s response (namely honesty and disclosure) to that relapse to determine penalty and continued viability as a participant on the program. Such information and advice may be utilised to modify the offender’s Rehabilitation Program as necessary.

Drug Court magistrates have, for the sake of consistency, agreed to a general policy that “an illicit drug free period count” would re-start if -
(a) an offender has used; or
(b) an offender has missed a random urine test.

To determine if there are any circumstances under which the Drug Court would not restart the illicit drug free count time, the following considerations (set by Magistrate Costanzo early on) are entertained:
General Rule: If the offender has not attended for the minimum number of urine tests required and random urine tests, then the illicit drug free count time is turned back to zero x sanction. Reasoning: experience has shown this sanction usually puts a stop to the excuses for failure and mostly improves future attendance supporting urine testing as a vital component of the Intensive Drug Rehabilitation Order (IDRO).

For example: A participant on the IDRO for the second time said he went to the Gold Coast for his first leave from Moonyah Rehabilitation Centre on a Saturday leave pass; got the call at 7.35 am to return for a random urine test and said he would not return because he felt it was not a reasonable direction. Then he phoned the van on Sunday and asked them to test him at Burleigh Heads if they were coming down the coast. NOT ON! His clock was turned to zero after 13 weeks clean in Phase One. Everyone was reminded that if they decide to take their leave so far away from their rehabilitation centre they must be willing to return if called for a random urine test. Community Corrections were asked to send a letter to all offenders to remind them about this aspect of their

IDRO to nip it in the bud. Emphasis was also placed on processes to make sure this is explained at induction time.

Exception: Those offenders otherwise performing in an exemplary fashion on the IDRO and who do provide what appears to be a legitimate excuse or an excuse which is corroborated eg car accident… is clearly a good excuse.

Final Sentence

Support for what Drug Courts are trying to do has been given by various higher courts:

In Queensland see:

R v Newman: [2008] QCA 147 McMurdo P, Fryberg J and Lyons J 6 June 2008

NB: See attached for full extract of the Court's comments re use of the graduation certificate issued by the Drug Court.

http://www.sclqld.org.au/qjudgment/casenums/63683

http://archive.sclqld.org.au/qjudgment/2008/QCA08-147.pdf

Ms Newman applied for leave to appeal against her sentence, contending that it was manifestly excessive; gave insufficient weight to rehabilitation and should have contained a parole release date, not a parole eligibility date. The applicant successfully completed an intensive drug rehabilitation program - a magistrate signed the applicant's graduation certificate on behalf of the Drug Court team congratulating her on her achievement - appropriateness of such comment by a magistrate in the certificate.

R v Muller: [2005] QCA 417 Williams JA, Jerrard JA and Atkinson J 11 November 2005

http://archive.sclqld.org.au/qjudgment/2005/QCA05-147.pdf

Court dealt with (inter alia) whether judge gave insufficient weight to rehabilitation efforts when activating part of suspended sentence - whether applicant is at less risk of re-offending whilst on probation rather than in prison. QCA supportive of Drug Court.

R v Muller & Attorney-General of Queensland [1995] QCA 457 Pincus JA, Moynihan J and Shepherdson J 11 August 1995

http://archive.sclqld.org.au/qjudgment/1995/QCA95-457.pdf

Where no fresh circumstances - in the sense of having arisen since the suspended sentence was imposed - order to activate the whole or part of the suspended sentence is well-founded. It was not enough merely to assert that the respondent had a bad drug problem and that his barrister was of the view that counselling might help.

In NSW see:

A most useful website accessing all decisions of the NSW Drug Court:

http://www.lawlink.nsw.gov.au/drgcjudgments/nswdrgc.nsf/WebView?OpenView&Start=1&Count=30&ExpandView

R v Vickovic [2006] NSWCCA 231 Giles, Groves and Hidden JJ

The CCA rejected the prosecution submission that imposing GBB x six months with supervision was manifestly inadequate.

The Respondent has been a “gold medal” graduate from Drug Court programme and his initial sentence had been a head sentence of three years and six months.

It shows therefore that sentencing to a bond at the end of a DTO is in some circumstances a sentence that could be imposed.

In Conclusion
The extent of the usefulness of a DTO:
The DTO will not be suitable for everyone coming to Court seeking one. Of those who are granted a DTO there will be those who cannot withstand the rigours involved.

I say often enough in Drug Court: Drug Court cannot help everyone. If an offender is not responding / is not remaining abstinent / is not progressing within the parameters set for movement between phases I terminate them from the program giving them the credit for the work they have attempted.

For many, it will be the first time they’ve seriously attempted to change. For many it will the first time they have achieved any level of success in their lives - even if they do not succeed in completing the DTO.

The research supports this. Many offenders are a success if the DTO opens their eyes to a belief in themselves; opens a new prospect of a life without drugs when they could not previously imagined that was possible. Sometimes it is as simple as showing an offender that they can give away the only thing they love (illicit drugs) and get a better life. These are intensely personal motivators.

The reviews show there is improvement for the community in terms of less frequent criminal activity and lesser serious criminal activity from those who undertake a Drug Court type order.

As sentencers we get to know these offenders much more closely and can weigh the level of their commitment and the reasons for their successes and failure with greater clarity because we have a much closer hand in their management for a time. It means that the sentence, in the end is more meaningful.

Attachments Index:
1. “The green sheet” used at Case Conferences in Queensland Drug Court
2. More recent amendments made to the *Drug Court Act* (Qld) after proved useful in our experience
3. Background information on rewards and sanctions
4. Case law notes

"The green sheet" used at Case Conferences:

Drug Court: Date / /		**Venue: ☐ Beenleigh ☐ Southport ☐ Ipswich**		
Magistrate: ☐ A.C. Thacker ☐ G.C. Lee ☐ M.R. McLaughlin _ ☐ B.F. Tynan		**Weeks Clean**	**Phase**	**☐ Review** / **☐ Mention**
ORDERS MADE TODAY	**☐ Reward**	**☐ Sanction**		
	☐ Amendment to IDRO			
COMMENTS				
	☐ Restitution Paid – Amount $			
	☐ Bench Warrant ☐ s 40(1)(a) (FTA) ☐ s 40(1)(b) (EPT)			
	☐ Sentenced on further charges:			
	☐ NEXT COURT REVIEW DATE:			
Drug Court: Date / /		**Venue: ☐ Beenleigh ☐ Southport ☐ Ipswich**		
Magistrate: ☐ B.F. Tynan ☐ G.C. Lee ☐ M.R. McLaughlin _ ☐ A.C. Thacker ☐		**Weeks Clean**	**Phase**	**☐ Review** / **☐ Mention**
ORD ER	**☐ Reward**	**☐ Sanction**		

	☐ **Amendment to IDRO**	
COMMENTS		
	☐ **Restitution Paid – Amount $**	
	☐ **Bench Warrant** ☐ **s 40(1)(a) (FTA)** ☐ **s 40(1)(b) (EPT)**	
	☐ **Sentenced on further charges:**	
	☐ **NEXT COURT REVIEW DATE:**	

Drug Court: Date / /		**Venue:** ☐ **Beenleigh** ☐ **Southport** ☐ **Ipswich**		
Magistrate: ☐ **B.F. Tynan** ☐ **G.C. Lee** ☐ **M.R. McLaughlin** ☐ **A.C. Thacker** ☐	**Weeks Clean**	**Phase**	☐ **Review**	☐ **Mention**
ORDERS MADE TODAY	☐ **Reward**	☐ **Sanction**		
	☐ **Amendment to IDRO**			

COMMENTS

☐ Restitution Paid – Amount $

☐ Bench Warrant ☐ s 40(1)(a) (FTA) ☐ s 40(1)(b) (EPT)

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ORDERS MADE TODAY

☐ Reward	☐ Sanction

☐ Amendment to IDRO

COMMENTS

☐ Restitution Paid – Amount $

☐ Bench Warrant ☐ s 40(1)(a) (FTA) ☐ s 40(1)(b) (EPT)

☐ **Sentenced on further charges:**
☐ **NEXT COURT REVIEW DATE:**

More recent amendments made to the Drug Court Act (Qld) after proved useful in our experience.

Section 36A - **Drug court magistrate must consider views of drug court team**

(1) This section applies if a drug court magistrate is making a decision (a relevant decision) about any of the following matters—
(a) whether an offender's rehabilitation program should include medical, psychiatric or psychological treatment (health treatment);
(b) what matters should be included in an offender's rehabilitation program about the offender's health treatment;
(c) where the offender should be placed for health treatment, including, for example, in a residential rehabilitation facility, an outpatient facility or with a particular service provider;
(d) how often the offender should meet with the persons providing or supervising the offender's rehabilitation program, including health treatment;
(e) how often the offender should appear before a drug court magistrate;
(f) whether or not to give a reward to, or impose a sanction on, an offender;
(g) whether or not an intensive drug rehabilitation order or a rehabilitation program for an offender should be amended;
(h) whether or not an intensive drug rehabilitation order for an offender should be terminated.

(2) The drug court magistrate must consider the views of the members of the offender's drug court team in making the relevant decision.

(3) In this section—
drug court team, for an offender, means the persons who—
(a) act for an interested entity; and
(b) attend a hearing at which a relevant decision is made about the offender.
interested entity means any of the following—
(a) Legal Aid (Queensland);
(b) a prosecuting authority;
(c) the department in which the Corrective Services Act 2000 is administered;
(d) the department in which the Health Services Act 1991 is administered.

Section 37 - **Immunity from prosecution**

(1) A person is not liable to be prosecuted for an offence as a result of an admission made by the person—
(a) for the purposes of deciding whether the person—
(i) is, or appears to be, an eligible person; or
(ii) is suitable for rehabilitation; or
(b) to someone responsible for the person's supervision or treatment under this Act.

(1A) To remove any doubt, it is declared that subsection (1) does not prevent a prosecution if there is evidence, other than the admission or evidence obtained as a result of the admission, implicating the accused.

(2) The admission, and any evidence obtained as a result of the admission, is not admissible against the person in proceedings for an offence.

(3) However, this section does not apply to—
(a) a disqualifying offence; or
(b) an indictable offence, other than an indictable offence mentioned in the Criminal Code, section 552B(Charges of indictable offences that may be dealt with summarily) or the Drugs Misuse Act 1986, section 13(Certain offences may be dealt with summarily); or
(c) an offence committed in connection with an offence mentioned in paragraph (a) or (b).

Section 38 - **Random drug testing**
If a rehabilitation program under an intensive drug rehabilitation order includes a requirement that the offender must report for drug testing and states the frequency for the testing, an authorised corrective services officer—
(a) may decide when and where the offender is to report; and
(b) may require the offender to report for further random testing as directed by the officer.

Section 39 - **Disclosure of compliance and related information**
(1) A prescribed person—
(a) must promptly give the chief executive (corrective services), or a drug court magistrate, any compliance information the prescribed person has about the offender; and
(b) may enter in the drug court database any compliance information or related information the prescribed person has about the offender.

(2) Subsection (1) applies despite any Act, oath, rule of law or practice that prohibits or restricts the disclosure of information.

(3) In this section—
compliance information means any information about the offender's compliance with, or failure to comply with—
(a) the requirements of the offender's intensive drug rehabilitation order; or
(b) the offender's rehabilitation program.
drug court database means a database for the drug court diversion program to which only a prescribed person has access.
information includes a document.
prescribed person means a person involved in the administration of, or who provides services in connection with, an offender's rehabilitation program who is prescribed under a regulation.
related information means any information, other than compliance information, about the offender obtained in the administration of, or in the provision of services in connection with, the offender's rehabilitation program.

Section 39A - **Disclosure of relevant information**
(1) A person who is a member of a drug court team for an offender may give another member of the drug court team any relevant information the person has about the offender.

(2) In this section—
compliance information see section 39.
drug court team, for an offender, means any of the following persons who are responsible for attending the drug court and providing reports to the drug court magistrate about the performance of the offender under the intensive drug rehabilitation order—
(a) a corrective services officer;
(b) a police officer;
(c) a person employed for the purposes of the Director of Public Prosecutions Act 1984;
(d) a health service employee under the Health Services Act 1991;
(e) a Legal Aid employee under the Legal Aid Queensland Act 1997.
related information see section 39.
relevant information means—
(a) compliance information; or
(b) related information; or
(c) any other information prescribed under a regulation for this section;
but does not include information to which legal professional privilege attaches.

Section 39B - **Protection from liability**
(1) This section applies if—

(a) a person who is a health professional gives an indicative assessment report to the chief executive (health) or a drug court magistrate; or
(b) a person who is a health professional gives an assessment report to the chief executive (health) or a drug court magistrate; or
(c) a prescribed person gives the chief executive (corrective services) or a drug court magistrate compliance information under section 39; or
(d) a prescribed person enters compliance information or related information in the drug court database under section 39; or
(e) a person who is a member of a drug court team for an offender gives another member of the team relevant information under section 39A.

(2) The person is not liable, civilly, criminally or under an administrative process, for giving the report, or giving or entering the information, honestly and on reasonable grounds.

(3) Also, merely because the person gives the report, or gives or enters the information, the person can not be held to have—
(a) breached any code of professional etiquette or ethics; or
(b) departed from accepted standards of professional conduct.

(4) Without limiting subsections (2) and (3)—
(a) in a proceeding for defamation, the person has a defence of absolute privilege for publishing the report or information; and
(b) if the person would otherwise be required to maintain confidentiality about the report or information under an Act, oath or rule of law or practice, the person—
(i) does not contravene the Act, oath or rule of law or practice by giving the report or giving or entering information; and
(ii) is not liable to disciplinary action for giving the report or giving or entering information.

Section 39C - **Protection of personal information about offenders**
(1) This section applies if a personal information document about an offender is given to a drug court.

(2) The clerk of the court of a drug court may give a copy of a personal information document to a person, other than the offender to whom the document relates, only if—
(a) the person applies to the drug court for a copy of the document; and
(b) the court is satisfied the person has a sufficient interest in the document; and
(c) the court orders the person is to be given a copy of the document.

(3) A regulation may provide for the storage of personal information documents to ensure the confidentiality of information in the document.
Example for subsection (3)—
A regulation may provide that a medical report about an offender, kept in the offender's file, is to be stored in a sealed envelope.

(4) This section applies despite any other Act, including the Justices Act 1886, section 154(related to managing copies of the record).

(5) In this section—
personal information document means a document that is prescribed, under a regulation, to be a document to which this section applies.

Background information on rewards and sanctions:
(I have read) the use of sanctions and treatment in Drug Courts in America and Canada American drug courts emerged in part as a reaction to the "zero tolerance" policy of many U.S. jurisdictions in which possession of even a relatively small quantity of cocaine resulted in mandatory minimum sentences. eg possession of half a gram of cocaine or 16 ounces of marijuana requires a minimum sentence of 1-3 years.

The Toronto Drug Treatment Court by contrast, developed in the absence of mandatory minimum sentences for drug offences. In addition, unlike many U.S. drug courts, which are based on abstinence from all drugs, the Toronto DTC requires that participants work towards abstinence from illegal drugs. The program demands that participants be free of illicit drugs before completion. In the U.S. almost all drug courts either prohibit or strongly discourage the use of both illegal drugs as well as alcohol by drug court participants. By way of contrast, in Toronto where participants have achieved a positive lifestyle change, have stopped using crack/cocaine, heroin and other non-medically prescribed drugs and have at least one marijuana free urine, they may be permitted to complete Phase I of the program at the discretion of the DTC team.

There is a wide variance among U.S. Drug Courts in the imposition of sanctions. Some courts employ a zero tolerance towards any drug use. Other courts utilize a harm reduction approach involving sanctions, which increase in their severity for repeated drug use.

It is very rare for sanctions to be used in Canadian drug treatment courts. When they are used, it is typically only after an offender has been in the drug treatment program for a lengthy period of time and upon the advice of treatment providers. In Toronto, relapse is an anticipated part of the recovery process and continued drug use will not lead to expulsion from the drug program. If participants admit to use and the DTC team believes that they are committed to work towards abstinence, then such use will not be an impediment to continued involvement in the program.

It is also noteworthy that unlike most U.S. drug courts, the Toronto DTC and also in Queensland's Drug Courts methadone maintenance is incorporated as part of the treatment arsenal for heroin addicts. The abstinence model of most U.S. courts does not permit the use of methadone. In Toronto, it is felt that methadone is an effective treatment option that should not be excluded simply because it does not fit the model of complete abstinence.

Queensland Health Department does not condone the use of Naltrexone and Drug Court supports and follows this position.

Abstinence from substance abuse is only one of a number of preconditions that must be fulfilled before the offender will be allowed to

end his or her participation in Toronto's DTC. Participants are also required to demonstrate a fundamental lifestyle change including improved interpersonal skill development, stable and appropriate housing, and education and vocational skills. It is the belief of the Toronto DTC that these requirements are necessary to improve the likelihood that offenders will remain drug and crime free. A comparable program and rationale exits in the U.S. where almost all drug courts require participants after they have become clean and sober to obtain a high school diploma or GED certificate, maintain employment, be current in all financial obligations, including drug court fees and child support payments and have a sponsor in the community.

In Queensland Drug Court a similar set of requirements is mandatory with one major difference – the participant must be either employed or have completed qualifications and undertaking interviews that mean employment ready.

Caselaw notes
R v Newman
06 June 2008 QCA McMurdo P Fryberg J Lyons J
http://www.sclqld.org.au/qjudgment/casenums/63683
http://archive.sclqld.org.au/qjudgment/2008/QCA08-147.pdf

Re: The Court of Appeal's comments re **the graduation certificate signed by the Magistrate on behalf of the Drug Court Team**

McMurdo P:
[29] Although it is unnecessary to deal with this matter in determining the appeal, I wish to make some brief additional observations concerning the primary judge's comments about Ms Newman's graduation certificate and the magistrate's comments contained in it.

[30] Ms Newman's graduation certificate signed by the magistrate on behalf of the Drug Court Team was in these terms:

> "Congratulations Malarka. You have completed all three stages of your intensive drug rehabilitation program. You have struggled against formidable odds and achieved a considerable period of abstinence. You have learnt the tools to regain control of your life and earned yourself a place in society. You should feel proud of, and keep safe, your achievements. You have our best wishes as you continue your journey through life."

During sentencing submissions, the judge questioned the appropriateness of a magistrate making such comments. His Honour referred to unspecified "ethical matters", adding that this had nothing to do with the sentencing proceeding.

[31] His Honour made the following observations during his sentencing remarks:

> "Amongst the documentary material which supports the improvements in that regard, in passing - nothing to do with the sentence in this case - is the Court or the community entitled to be a bit concerned by Exhibit 7 when the Magistrate, who has to be seen to be impartial and objective, has written what she has, and it looks like the prosecution has also joined in, if one can read what they write that correctly, though it is not a matter for consideration today, it may well have an ethical connotation for others to look at."

[32] Drug Courts were established by the legislature under the *Drug Court Act* 2000 (Qld). The objects of the Act are:

> "(1) …
>
> (a) to reduce the level of drug dependency in the community and the drug dependency of eligible persons; and
>
> (b) to reduce the level of criminal activity associated with drug dependency; and
>
> (c) to reduce the health risks associated with drug dependency of eligible persons; and
>
> (d) to promote the rehabilitation of eligible persons and their reintegration into the community; and
>
> (e) to reduce pressure on resources in the court and prison systems.
>
> (2) The objects are to be achieved by establishing drug courts."[10]

[33] Whilst Drug Court magistrates must have regard to the principles stated in the

Penalties and Sentences Act 1992 (Qld),[11] they also have broader powers. These include doing "all things necessary or convenient to be done for the performance of [their] functions"[12] and "conduct[ing] proceedings quickly and in a way that avoids unnecessary technicalities and facilitates the fair and practical conduct of the proceedings"[13]. They are "not bound by the rules of evidence but may inform [themselves] in any way [they] consider appropriate".[14] In making "relevant decisions",[15] Drug Court magistrates are required to consider the views of the offender's Drug Court team and other interested entities including Legal Aid (Queensland), a prosecuting authority, and departments administering the *Corrective Services Act* 2000 (Qld) and the *Health Services Act* 1991 (Qld).[16]

[34] In the context of this statutory framework, I am unable to apprehend any "ethical connotation" or lack of the magistrate or prosecuting authority being "seen to be impartial and objective" arising from the graduation certificate dated 3 December 2007 signed by the magistrate on behalf of the Drug Court team. Ms Newman's IDRO was by then vacated. She was still subject to court orders and liable to statutory sanctions if she breached them. But as at 3 December 2007, at least on the information before this Court, the statements contained in her graduation certificate were appropriately made.

[10] *Drug Court Act* 2000 (Qld), s 3.
[11] *Drug Court Act* 2000 (Qld), s 4(1)(a).
[12] *Drug Court Act* 2000 (Qld), s 11(3).
[13] *Drug Court Act* 2000 (Qld), s 11(4).
[14] *Drug Court Act* 2000 (Qld), s 11(5).
[15] *Drug Court Act* 2000 (Qld), s 36A(1)
[16] *Drug Court Act* 2000 (Qld), s 36A(2) and (3).

[35] **FRYBERG J:** I concurred in the orders which the Court made on 10 April 2008. My reasons for doing so are reflected in the President's reasons for judgment, with which I agree. I also agree with her Honour's comments regarding the graduation certificate signed by the magistrate on behalf of the Drug Court Team.

[36] **LYONS J**: I have had the advantage of reading the reasons of McMurdo P. I agree with her Honour’s reasons and with the orders made.