

# Judicial Officers' Bulletin

August 2006

Volume 18 No 7

Published by the Judicial Commission of NSW

## Features

51 Compulsory drug treatment in gaol — a new sentencing issue

*His Honour Judge Roger Dive*

55 Announcing the release of the new JIRS

## Recent Decisions

58 High Court

— *Darkan v The Queen*

— *Bounds v The Queen*

— *Smits v Roach*

59 Court of Criminal Appeal

— *R v McNaughton*

— *R v Robinson*

— *R v Saba*

62 Education Calendar

Select Legislation

Judicial Moves

## Compulsory drug treatment in gaol — a new sentencing issue



**His Honour Judge Roger Dive**

*Senior Judge, Drug Court of New South Wales*

The Compulsory Drug Treatment Correctional Centre has recently been opened at Parklea. The enabling legislation commenced on 21 July 2006.<sup>1</sup> The following article outlines the duties of sentencing courts in the Sydney metropolitan area to refer eligible and suitable offenders to the centre.

### An outline

The Compulsory Drug Treatment Correctional Centre (CDTCC) will provide compulsory treatment and rehabilitation of recidivist drug offenders in a separate gaol on the Parklea site. The 70-bed centre for adult male prisoners will be equipped with the necessary clinical facilities and other resources.

### Three-stage program

If found to be an eligible and suitable prisoner as specifically defined in the legislation, the Drug Court may make a compulsory drug treatment order (“CDTO”).<sup>2</sup> The prisoner will be then transferred into the CDTCC, and commence closed detention for at least six months (stage 1). The detail of the offender’s drug treatment and rehabilitation will be set out in a personal plan<sup>3</sup> prepared by the Commissioner for Corrective Services in consultation with Justice Health and approved by the Drug Court.

Corrective Services regulations will define the requirements of each stage. It is anticipated, however, that conditions during stage 1 will be aimed at minimising any possibility of drug use, including no

contact visits. Stage 2, which will also be for at least six months, will be semi-open detention, whereby the prisoner will be able to take part in work release or other positive activity outside the centre. Stage 2 prisoners will be housed in an area separate to those completing stage 1.

Upon completion of stage 2, the prisoner will be under “community custody” and will reside at an address approved in his community supervision order (stage 3).<sup>4</sup> The conditions of stage 3 will be similar to those of home detention.

### Access to this program

A prisoner’s avenue to this facility is complex. The legislation imposes a duty upon the sentencing court to ascertain “as soon as practicable” after a person is sentenced to imprisonment whether there are grounds upon which the Drug Court might find the person to be an “eligible convicted offender”.<sup>5</sup> If the sentencing court forms that view, then the sentencing court must refer the person to the Drug Court,<sup>6</sup> which will then determine if the prisoner meets the legislative criteria of being both eligible and suitable for a CDTO.<sup>7</sup>



The sentencing courts with this new duty extend across the broader Sydney metropolitan area, and include the Court of Criminal Appeal, the District Court at Sydney, Parramatta, Penrith and Campbelltown, and many Local Courts, geographically encompassing Waverley to Penrith and Hornsby to Camden.<sup>8</sup>

A plea of guilty is not required, so a sentencing court must consider referral even after a finding of guilt at either summary or jury trial. Consent is not required, and neither the Crown nor the offender has a right to object to referral. No appeal lies against a court's decision to refer or not refer a person to the Drug Court for consideration of a CDTO.<sup>9</sup>

### The legislation

To bring the CDTCC into operation, the *Compulsory Drug Treatment Correctional Centre Act 2004* amends three Acts: the *Crimes (Sentencing Procedure) Act 1999*, the *Crimes (Administration of Sentences) Act 1999* and the *Drug Court Act 1998*. Various Regulations support the legislation.

Importantly, the objectives of compulsory drug treatment are set out in the legislation:<sup>10</sup>

- (a) to provide a comprehensive program of compulsory treatment and rehabilitation under judicial supervision for drug dependent persons who repeatedly resort to criminal activity to support that dependency
- (b) to effectively treat those persons for drug dependency, eliminating their illicit drug use while in the program, and to reduce the likelihood of relapse on release
- (c) to promote the re-integration of those persons into the community, and
- (d) to prevent and reduce crime by reducing those persons' need to resort to criminal activity to support their dependency.

The provision of clear objectives in the legislation, which then assist in the administration of the program and the meaningful evaluation of it, is to be welcomed.

### Eligibility

The legislation stipulates eight criteria, of which the sentencing court should consider the first five:

1. The person has been sentenced to a term of full-time imprisonment with an *unexpired* non-parole period of 18 months at the time of sentence, and no more than three years when the CDTO is made.<sup>11</sup>
2. In the five years preceding the sentence, the person has been convicted of at least two offences (not arising from the same circumstances) that resulted in imprisonment (including suspended sentences), a community service order or a good behaviour bond.
3. The person must *not* have been convicted at *any* time of some specified offences. These include murder, attempted murder, sexual assault, any offence involving the use of a firearm, and offences involving the supply or manufacture of a commercial quantity of a prohibited drug.<sup>12</sup>
4. The person's usual place of residence must be within the broader Sydney region, extending as far as the

Hawkesbury, Hornsby, Pittwater, Manly, Sutherland, Camden and Penrith Local Government Areas.<sup>13</sup>

5. The matter is not within the Children's Court's jurisdiction and the person must be over the age of 18 years.

The three remaining eligibility criteria relate to matters that a sentencing court would not ordinarily investigate. So, before making any CDTO, the Drug Court will need to ensure that the five criteria above are met, together with the three remaining criteria. The further criteria are:

6. The person has a long-term drug dependency.<sup>14</sup>
7. The facts of the offence for which the person has been sentenced, together with his antecedents, indicate that the offence was related to the person's long-term drug dependency and associated lifestyle.<sup>15</sup>
8. The person must not suffer from a mental illness or disorder that is "serious" or leads to the person being violent, and the illness or condition could prevent or restrict the person's active participation in a drug treatment program.<sup>16</sup>

In relation to some referred offenders, there may be a contested hearing before the Drug Court concerning one or more of the eligibility criteria. The usual place of residence, aspects of the criminal record, or the mental health of the offender may be in issue.

### Suitability

If a person is found to be an "eligible convicted offender", the next question to be considered by the Drug Court is the requirement of "suitability". To assist in that determination, the prisoner is referred to a multi-disciplinary team who will investigate, assess and report.<sup>17</sup> When considering suitability, the multi-disciplinary team will have regard to the offender's level of motivation and attitude to compulsory drug treatment, his drug treatment history, the offender's history of committing offences involving violence, and the likelihood of the offender committing a domestic violence offence when released to community custody in stage 3 of the program.

### What happens to the prisoner if no CDTO is made?

If the Drug Court declines to make a CDTO, then the prisoner's sentence will continue in accordance with the decision of the sentencing court. However, if a CDTO is declined because "the offender's participation in the program will damage the program or any other person's participation in the program", the Drug Court may revoke any parole order made under s 50 of the *Crimes (Sentencing Procedure) Act 1999* and notify the Parole Authority of the decision and the circumstances which led to declining to make a CDTO.<sup>18</sup>

### Progression and regression between stages

Progression and regression between the stages of detention will be by order of the Drug Court, based on assessment reports prepared by the Director of the CDTCC, together with a report from a probation and parole officer if the offender is progressing to stage 3.

The Commissioner of Corrective Services may, however, in "special circumstances"<sup>19</sup> make regression orders, such as

requiring a prisoner to revert from stage 3 to stage 2 or even stage 1, and/or make an order removing a prisoner from the CDTCC and transferring him to another gaol. Such an order can be made when the Commissioner is of the view that, for example, the security of the community is threatened, or the good order and discipline of the correctional centre may be jeopardised.

The Commissioner must immediately notify the Drug Court when a regression order has been made, and the Drug Court is to review the Commissioner's order within 21 days. When reviewing the Commissioner's order, the court must "have regard to and give substantial weight" to any recommendations of the Commissioner.<sup>20</sup>

### When does Compulsory Drug Treatment cease?

The making of a CDTO has the effect of formally revoking any parole order made by the sentencing court,<sup>21</sup> so an order of the Drug Court is required to allow the prisoner to be released from his CDTO obligations, *and* to acquire parole.

A CDTO will come to an end if there is a serious breach of the offender's personal plan and the Drug Court is of the "opinion" that the offender is unlikely to make any further progress on his program, poses an unacceptable risk to the community of re-offending, or poses a significant risk of harming others or himself.<sup>22</sup>

Importantly, there is a specific power for a CDTO to be revoked if the non-parole period for the offender's sentence has expired or is about to expire, *and* the offender is in stage 1 or stage 2 of a CDTO. Presumably the "expiry" referred to is the expiry of the (now revoked) non-parole period set by the sentencing court.

If, however, the offender is in community custody (stage 3), there is no direct avenue to trigger the revocation of the CDTO upon the expiration of the non-parole period that was set by the sentencing court. The offender may therefore be subject to a CDTO beyond the expiry of the non-parole period set by the sentencing court. To obtain release from CDTO obligations, it may be that s 106Q(1)(d) of the amended *Crimes (Administration of Sentences) Act 1999* will be relied upon, whereby the Drug Court can revoke a CDTO "for any other reason the Drug Court sees fit".

The level of satisfaction required for the Drug Court to make a revocation order is the forming of an "opinion". What this means in practice will no doubt be the subject of future contest. No appeal lies against the Drug Court's revocation of a CDTO.<sup>23</sup> However, at some time an appellate court will no doubt be asked to determine whether an appeal does lie against any decision of the Drug Court *not* to revoke a CDTO — something both the Crown and the offender may wish to achieve.

The Drug Court will also be the parole authority for offenders in compulsory drug treatment detention, and will have to determine whether offenders are to be released on parole. In practice, questions of revocation and suitability for parole will need to be addressed concurrently, and the Drug Court, constituting the Parole Authority, is to have

regard to the circumstances that led the Drug Court to revoke the CDTO.<sup>24</sup>

### Foundation inmates

The legislation provides a small window of opportunity to allow some existing prisoners to be admitted into the CDTCC. A CDTO can be made in respect of prisoners sentenced in the 12 months before the commencement of the legislation who meet the general criteria of eligibility, and who still have an unexpired non-parole period of between 18 months and three years. A further requirement is that the prisoner would ordinarily be a resident of the local government areas prescribed in the Regulations.<sup>25</sup>

### Old offences

It is inevitable that offenders taking part in a CDTO will be charged and sentenced for crimes committed in the past. Developments in the gathering and matching of forensic evidence will continue to see this particular group of offenders charged with old crimes. The new legislation provides that, if an offender is convicted and sentenced in any court to a term of imprisonment for an offence that occurred before the current CDTO was made, then that court must refer that offender to the Drug Court. The Drug Court may then vary the CDTO so as to apply it to the new sentence, or revoke the CDTO. The legislation allows the Drug Court to effectively extend a CDTO:

"if the cumulative unexpired non-parole period for the offender's term of imprisonment under all sentences in force is greater than 3 years but not more than 4 years."<sup>26</sup>

There is an unresolved issue as to how the court sentencing the offender for the old offence/s will comply with s 47 of the *Crimes (Sentencing Procedure) Act 1999* and specify the commencement date of any new cumulative sentence as the making of a CDTO for the original sentence has revoked the non-parole period set by the original sentencing court.

### New offences

Offenders on the program have committed crimes before coming to compulsory drug treatment, and they may well commit further offences of varying degrees of seriousness while on a CDTO. The amending legislation is silent as to any special procedure regarding any offending while on a CDTO. There is no obligation on a court to refer such an offence to the Drug Court, and presumably the allegations will be dealt with in the ordinary way. After a court determines such a case, the offender may or may not remain available to continue his CDTO. The offender may, of course, also face proceedings to revoke his CDTO for having committed a new crime.

### Stage 3 community custody — the crucial stage

The general community has a substantial interest in the provision of high quality services, support and programs to this group of offenders, as the prisoners potentially involved in this program will be prisoners who have received substantial

sentences before entering the CDTCC and, by definition, must have a recent history of repeat offending.

Progression to stage 3 (and indeed to stage 2) requires the making of a “community supervision order”.<sup>27</sup> A stage 3 community supervision order will involve allowing the offender to reside at an address in the community, and will include conditions as to supervision, drug testing, association and attendance for work or activities.

Experience would suggest that the efficacy of the CDTCC program, the availability of community supervision orders, and indeed the suitability of making them will be determined by the quality of the services and support provided during the final community custody stage.

## Conclusion

There are many issues in relation to the CDTCC, and the way in which the new legislation and programs will work in practice, still to be resolved. However, when I recently visited the Parklea premises, I was impressed by the facilities and resources established there. The centre’s first director, Ms Astrid Birgden, and her staff are clearly committed to doing some very intense and innovative work with the prisoner participants. It can be expected that the intensive programs planned for the participants, especially during stages 1 and 2, will substantially benefit the community when the participants are released to attempt long-term lawful community life.

## Endnotes

- 1 *Compulsory Drug Treatment Correctional Centre Act* 2004.
- 2 Section 18C of the *Drug Court Act* 1998.
- 3 Section 106F of the *Crimes (Administration of Sentences) Act* 1999.
- 4 Section 106O of the *Crimes (Administration of Sentences) Act* 1999.
- 5 “Eligible convicted offender” is defined in s 5A of the *Drug Court Act* 1998.
- 6 Section 18B of the *Drug Court Act* 1998.
- 7 Section 5A of the *Drug Court Act* 1998.
- 8 Drug Court Regulation 2005, cl 7A (amended by Drug Court Amendment (Compulsory Drug Treatment Correctional Centre) Regulation 2006, Sch 1, Gazette No 84, p 4823).
- 9 Section 18B(5) of the *Drug Court Act* 1998.
- 10 Section 106B of the *Crimes (Administration of Sentences) Act* 1999.
- 11 Section 5A of the *Drug Court Act* 1998.
- 12 Section 5A(2) of the *Drug Court Act* 1998.
- 13 Drug Court Regulation 2005, cl 4A (amended by the Drug Court Amendment (Compulsory Drug Treatment Correctional Centre) Regulation 2006, Sch 1). The prescribed Local Government Areas are: Ashfield, Auburn, Bankstown, Baulkham Hills, Blacktown, Botany Bay, Burwood, Camden, Campbelltown, Canada Bay, Canterbury, Fairfield, Hawkesbury, Holroyd, Hornsby, Hunter’s Hill, Hurstville, Kogarah, Ku-ring-gai, Lane Cove, Leichhardt, Liverpool, Manly, Marrickville, Mosman, North Sydney, Parramatta, Penrith, Pittwater, Randwick, Rockdale, Ryde, Strathfield, Sutherland Shire, City of Sydney, Warringah, Waverley, Willoughby and Woollahra.
- 14 Section 5A(1)(d) of the *Drug Court Act* 1998.
- 15 Section 5A(1)(e) of the *Drug Court Act* 1998.
- 16 Section 5A(3) of the *Drug Court Act* 1998.
- 17 Section 18D of the *Drug Court Act* 1998.
- 18 Section 18D(2) of the *Drug Court Act* 1998.
- 19 Section 106P of the *Crimes (Administration of Sentences) Act* 1999.
- 20 Section 106P(6) of the *Crimes (Administration of Sentences) Act* 1999.
- 21 Section 18G of the *Drug Court Act* 1998.
- 22 Section 106Q of the *Crimes (Administration of Sentences) Act* 1999.
- 23 Section 106Q(3) of the *Crimes (Administration of Sentences) Act* 1999.
- 24 Section 106Q(2) of the *Crimes (Administration of Sentences) Act* 1999.
- 25 Clause 14 of the Regulations. The Local Government areas prescribed are identical to those listed in endnote 13 above.
- 26 Section 106W(4) of the *Crimes (Administration of Sentences) Act* 1999.
- 27 Section 106O of the *Crimes (Administration of Sentences) Act* 1999.

*His Honour Judge Roger Dive with Dr Louisa Degenhardt, Senior Lecturer, National Drug and Alcohol Research Centre and Dr Ingrid van Beek, Director, Kirketon Road Centre, and Medical Director, Sydney MSIC, at the Drug Court Practitioners’ Conference, May 2006*

