

Drug Court of NSW
10th Anniversary Practitioners' Conference
6 February 2009

A PROSECUTOR'S VIEWS

Nicholas Cowdery AM QC

Director of Public Prosecutions, NSW
Past President, International Association of Prosecutors

Almost seven years ago, on 1 March 2002, I made a small contribution to the Drug Court Conference that year, commenting on a paper by Dr Paul Read of the Corrections Health Service. At that time I was cautious about the prospects for the Drug Court which was then three years old. My Office has always supplied lawyers to it and my senior lawyers have been very much involved in its conduct and development. I said in 2002: *“Like many, including the government, I want to see more of what [the Drug Court] can deliver in the context of criminal justice in the State overall.”* The Court was and is a different way of treating certain offenders within the criminal justice system. I said: *“We need to keep an open mind about it until we see what results the experiment can produce for that system as a whole”*.

My caution probably stemmed from the way in which the idea came to these shores from the USA only a few years earlier. The first specialist drug court opened in Dade County, Florida in 1989. Like many people I am cautious about many American imports and a couple of the proselytizers had just a faint whiff of snake oil about them at that time (or so I thought).

Time has proven that caution unnecessary and the snake oil at least avoidable – but not only time has been involved: proof of the value of the Drug Court has been the product of the model chosen for the Court and the hard, relentless and above all carefully considered application of many professionals in different disciplines to the operations of the Court itself.

We know from others of the success of the Court – of its cost effectiveness (always a big winner with government, especially); of its effectiveness in reducing recidivism; of the benefits it has bestowed upon the participants in the program and those associated with them. I have no hesitation at all in stating my belief at this Conference in 2009 that the Drug Court of NSW is a success.

The Drug Court has passed its “pilot” phase and now that it has its wings is a permanent feature of the legal landscape. So why is the model confined to this part of western Sydney? At the 2002 Conference I also said: *“If [the Drug Court] continues as presently constituted it will operate to the exclusion of people in other parts of the State who are unable to apply for its services. Especially given the spread of drug use into country areas ... that would mean inconsistency in the application of criminal*

justice in this State. That is undesirable. Generally, we work very hard to ensure that criminal justice is provided consistently within the jurisdiction wherever the offending occurs.”

I note now, however, that the Attorney General has told Parliament that “*the Government will consult with the Drug Court and stakeholders to investigate expanding the court’s scope.*” That is not exactly a cast iron commitment to expansion or even to ensuring consistency in the provision of criminal justice statewide; but it does provide some hope and I look forward to being consulted as a stakeholder.

True it is that the NSW Youth Drug and Alcohol Court has grown out of the Drug Court experience; but even that is operating now only at Campbelltown, Bidura and Cobham Children’s Courts.

CRIME

Drugs and crime make a controversial mix – a heady cocktail at the bar of public discourse. What are the ingredients? I propose to make some observations first about the nature of crime and the capacities of the criminal justice process; then about illicit drugs and some of our approaches to them. I shall conclude with some specific observations on prosecutors in the Drug Court.

Ever since humans came together in communities there has been a need for rules for our conduct – community life, even in its simplest forms, would be intolerable without them. Rules are required to enable us to interact peacefully and productively.

Some of those rules are prohibitions against or restrictions upon personal conduct. Those regulations are put in place for our common benefit – to assist us to live together in our communities, but also in some cases for our own protection. (Much has been said about the limits and conditions that should apply in both cases and I am not taking time here to discuss those issues.)

From time to time and in various places over the course of history there have been prohibitions and restrictions on the creation, possession, use and distribution of various drugs, including so-called illicit drugs, tobacco, alcohol and prescription medications. Sanctions have been provided for breaches of those regulations. One wonders, however, at the failure of our legislators to learn the lessons of history as they keep repeating failed strategies in their attempts to protect and please the majority (although occasionally, usually by accident rather than by design, an initiative might produce some benefit). One wonders, too, about the harms that we tolerate from tobacco and alcohol.

It must be clearly understood, however, that the substantive criminal laws (as we call those prohibitions and restrictions) do not and cannot prevent breaches of those laws themselves. They are not self-enforcing or self-executing norms, but just words reflecting aspirations. Crime still happens – it always has and it always will – it is hardwired in our human nature – and it comes about by reason of factors other than any deliberate and discrete desire to flout a prescribed norm. Criminal law cannot and

will not prevent crime – it merely creates it. When there are rules there will be rule breakers.

The laws that apply after crime has been committed, those prescribing punishment and the laws of procedure and evidence applying to its prosecution, similarly cannot and do not prevent its commission (whatever platitudes we mouth about specific and general deterrence as an objective of punishment). It needs to be clearly understood also that procedural criminal law merely provides the framework for a socially acceptable mechanism for dealing with crime after it has occurred: nothing more, nothing less. So when one comes to conventional state-sanctioned punishment we should always remain alert to the possibility of more effective (but still socially acceptable) mechanisms for dealing with crime in ways that may truly prevent it from happening again and make the offender once more a worthy citizen. That is where an opening exists for the Drug Court.

I expect that most of you will have been heartened by the front page story in the *Sydney Morning Herald* of Thursday 8 January 2009 reporting the shadow Attorney General (and former Deputy DPP) Greg Smith SC pledging to end the customary election time “law and order auction”. He pointed to the 10,000 or so prisoners in NSW, to the recidivism rate of 43.5%, to the prisoners’ learning difficulties, early deprivations, drug and alcohol addiction and mental health problems. He emphasised the need for greater attention and resources to be spent on rehabilitation.

In the same edition of the newspaper, the Attorney General emphasised the need for deterrence (it being implied that harsher state-sanctioned punishment was a more effective deterrent) and to the fact that in the last 15 years the courts had become more severe in their approach to sentencing. There were echoes here of a statement he had made on 5 August 2008 that the rise in the number of serious offenders in custody (those serving sentences of 12 years or more) was a positive outcome in terms of the state’s crime levels. He said: “*The rise of the overall prison population and, in particular, serious offenders, has had a direct impact on levels of crime, which are falling or stable in almost every category*”. No doubt it is that sort of analysis that drives the government on to increase even more the prison population, but one wonders on what evidence such policy is based.

The Attorney General also referred in that *SMH* report to community based sentencing including rehabilitation programs; and true it is that some attention is given by Corrective Services to rehabilitation in prison and following release.

There was a follow-up piece the next day; and in a letter to the *Sydney Morning Herald* on 13 January 2009 Mr Peter Law, apparently a criminal lawyer (and maybe the person by that name in my Office – I have not checked), wrote:

“The level of recidivism has not varied in 40 years, despite longer and longer periods of imprisonment. The courts are obliged to consider all other options and imprisonment is always a last resort for judges and magistrates [cf section 5 of the Crimes (Sentencing Procedure) Act 1999]. I would propose a dedicated court for recidivist offenders that would operate in a similar fashion to the Drug Court. A specialist court could operate outside the adversarial model and allow the sentencing judge to make

whatever inquiries necessary and take into account material presented by the defence and the Crown. The sentencing judge could make use of specialists to initiate programs tailored to individual offenders.

Breaking the cycle in which many offenders find themselves will be money well spent. There are huge savings to be gained by reducing the prison population, but these would be far exceeded by a reduction in the social costs of crime.”

It is, of course, advantageous to do what we can by any means available to prevent crime from happening in the first place. But the criminal law is not designed to do that and does not do it and it is time that some politicians and the media dropped their attachment to state-sanctioned punishment as a universal cure-all. When it comes to cleaning up after the event, however, some mechanisms are more effective in preventing re-offending and the Drug Court is one.

As DPP I have a close interest in such measures, because they ultimately mean less work for my Office.

DRUGS

Lawmakers have been dancing around the problem of illicit drugs for as long as particular drugs at particular times in particular places have been proscribed. There are many reasons for this in Australia, not the least being the continuing official desire to tug the forelock to the great and powerful USA through appeasement of international agencies such as the International Narcotics Control Board. In the meantime lives are needlessly destroyed.

For many years the Australian Bureau of Criminal Intelligence (before it was replaced by the Australian Crime Commission in 2003) published annually the Australian Illicit Drug Report. The edition for the financial year 2000-2001, not long after the Drug Court of NSW opened its doors, highlighted some of the difficulties faced by law enforcement authorities in carrying out the task they have in relation to illicit drugs.

“As a marketable commodity, illicit drugs exist by default in a secretive subculture. This society of secrecy extends from users to street dealers up to syndicated cultivators, manufacturers and traffickers. Because of the nature of this illicit market, the development of a complete understanding of it has presented a consistent difficulty to government, researchers and law enforcement over the past 30 years.

The ABCI is in a unique position to complete part of the picture, but it must always be acknowledged that the complexities of this market, and the nature of the data presented in this report, are always open to wide interpretation.”

The Report referred to the ABCI's ten year history and the decade-long picture of the illicit drug situation in Australia.

“The illicit drug seizure and arrest figures of ten years ago are much lower than those reported in the past few years. The question remains, however: what proportion of this is due to increased law enforcement efficiency in

detecting and disrupting drug syndicates and what proportion is due to an increase in the overall market? Clearly there is a dynamic tension between these two factors and the true point of delineation between law enforcement success and the size of the problem is, by its nature, an insoluble problem. The general maxim that when law enforcement is aware of a quantity of illicit drugs they are seized, means of course that the drugs not seized are not known about and therefore cannot be quantified.”

The assignment by our lawmakers of the illicit drug “problem” to the criminal justice system has created issues of principle and practice. These passages from the Australian Illicit Drug Report are notable for at least two propositions: first, that it is practically impossible to measure the effect that law enforcement activity has on the distribution of illicit drugs; and secondly, that drugs are traded in a secret market in which there are always sellers and buyers.

If our national law enforcement bodies recognise that they are dealing (perhaps not very effectively, but who can tell?) with a market, why cannot our lawmakers acknowledge it and respond to it as such, rather than just giving us more of the same?

DRUGS – THE MARKET

It is a curious proposition – and a futile hope – that the criminal justice system should be given the task of destroying a market of this type. Markets are established between people for mutual benefit. They are social constructs. The drug market is secret and extremely diverse. It also has health consequences for end-users, so there is a legitimate medical interest in what occurs (which is not strictly any business of the criminal courts). Drug addiction is a chronic relapsing disease. But where does the conventional criminal justice process have an effective role? It might exact revenge against miscreants on behalf of the community generally for their endangering the wellbeing of themselves and others, but what is the use of that? Perhaps if it did that only against those who callously profit at the expense of the suffering of others, then that role might be defensible – but it has a far greater reach. It is even a criminal offence to self-administer a prohibited drug (as if enough harm had not already been done).

The fiction exists that the criminal law can destroy the market either by preventing the supply or by eliminating the demand. Decades of practical experience have provided compelling evidence that this is nonsense. There will always be a supply of drugs, even if the amounts and the market shares and the different types available alter from time to time. And, despite our best efforts, there will always be some people willing to use them. The criminal justice process can only perform an “undertaker” role, cleaning up after the criminal event.

The way to destroy a market is to make it unprofitable for the operators. They very soon turn their attention to other activities. How can that be done to the drug market?

DRUGS – MEASURES TO BE TAKEN

There are three main arms to our present drugs strategy: law enforcement activity aimed at interdiction and the punishment of the traffickers and profiteers – and ultimately the users – which must nevertheless be confined to a sensible and affordable level of activity; prevention; and harm minimisation for those who succumb. The Drug Court uses the criminal justice process to minimise harm and indirectly prevent further drug use and the criminal offending that accompanies it. But these *ex post facto* measures, in my view, while laudable are not enough. Various types of “legalisation” or “decriminalisation” can also be effective options and, in my view, should be explored further.

More needs to be done of a more fundamental kind. Decisions need to be made by politicians, but they proceed cautiously. If they are made aware that they have community support for the small steps that they do make, then they may just be encouraged to take more of them.

In a recent plebiscite in Switzerland (late last year) almost 70% of voters approved of the free, prescribed provision of heroin to addicts in carefully controlled doses. In that country, crime by heroin addicts has fallen 60% in the last 14 years during which health clinics have been allowed to administer controlled doses to addicts.

In relation to heroin (which comes and goes as a significant problem in our community) I suggest that the next step should be a limited trial of free, medically prescribed heroin to volunteer addicts. I foresee in the very long term (maybe not in my lifetime) the free supply of heroin on prescription – and maybe other drugs; perhaps with cannabis, for example, being available as tobacco is now (for despite its harmful effects, it is still less dangerous than nicotine).

In May 1999 the NSW government held a much trumpeted Drug Summit for a week. Out of the 20 principles and 172 recommendations, one initiative of new significance emerged – the trial of safe injecting premises for intravenous drug users. Laws needed to be made to enable this to be established and the process of community consultation and legal challenge continued for a long time. Eventually one such facility was established in Kings Cross and it continues today. It has been rigorously evaluated and the results are positive indeed. Lives are being saved with the prospect that those people will be able, in due course and when they are ready, to end their addiction. We should examine taking the next step, rather than requiring addicts to BYO.

The Medically Supervised Injecting Centre requires users to obtain their drugs unlawfully, transport them to the premises unlawfully and then inject in sanctuary under medical supervision. This poses significant problems for law enforcement. Where is the boundary to be drawn? What of intravenous drug users in the rest of the State?

The Drug Court similarly is available only to qualifying defendants from a limited geographical area. Why should such a service not be available equally to residents of all parts of the jurisdiction? I suggest that this is the next step for the Drug Court of NSW.

THE ODPP'S ROLE IN THE DRUG COURT

I am going to say something about the role of the ODPP solicitors in the operations of the Drug Court, because it is a little different from the general run of the prosecution mill. I am very grateful to Rene Atkins, ODPP solicitor presently at the Drug Court, for this part of the paper – it shows very clearly and at firsthand how the ODPP solicitors have approached the task and the effect the regime has had on them.

There are the traditional legal roles of assisting the Court in sentence proceedings and any other legal hearings; however, a fundamental part of the ODPP solicitor's role is collaborating as a Drug Court team member. Once the defendant becomes a participant in a Drug Court program the ODPP role, while representing the community's interests at all times, is also to assist and encourage the participant in his or her rehabilitation as part of the team. The ODPP solicitor participates in team meetings and in the discussion of appropriate rewards and sanctions.

Whilst that collaboration is crucial to the success of the team-based approach, it is the ODPP solicitor's specific monitoring role that ensures that the community's interests are represented. This requires that a participant's program and progress be considered thoroughly, ensuring that the appropriate balance is struck between providing opportunities for rehabilitation and identifying any pattern of continued drug use or lack of engagement which may then raise a real risk of re-offending.

The ODPP solicitor is responsible in that case for providing information to the Court on why it would be appropriate that a participant's program should be terminated. The ODPP solicitor assumes a more traditional, adversarial role at this point, making submissions in relation to whether or not a participant is unlikely to make any further progress on the program or whether further participation poses an unacceptable risk to the community of re-offending. Consequently, the ODPP solicitor contributes significantly to the Court's consideration of the factors for and against termination.

CHALLENGES AND BENEFITS FOR ODPP SOLICITORS

* An early challenge for the first ODPP solicitors at the Drug Court was having to supervise the provision of urine samples by the participants for drug screening. (That was a fine example of multi-skilling on our part, something that we encourage everywhere as resources dwindle.) Thankfully that task is now left to the health service providers.

* The ODPP solicitor must learn to switch between the role of therapeutic team member and community representative. However, as we know, the program's comprehensive, holistic approach ensures that the individual participant who genuinely engages with the Court's rehabilitative aims can take significant steps to break his or her cycle of drug addiction and crime.

* As all of the ODPP solicitors who have come to the Drug Court have worked already in the "conventional" criminal justice system, each has been in an excellent position to quickly acknowledge that this a great example of what could be achieved by a more therapeutic approach if such programs could be replicated elsewhere.

[Perhaps Mr Law had a good point in his letter?] Whilst there is no criticism of the conventional court system in its attempts to provide rehabilitative measures by way of conditions attaching to bonds or parole and suchlike, it is rarely as successful as the closely monitored program of the Drug Court.

* The Drug Court also provides insights for ODPP solicitors into why they often appear in the conventional courts in matters involving the same people committing the same crimes over and over again. A closely monitored Drug Court participant may reveal other underlying issues, such as mental illness or social tensions, which may not have been previously recognised if they had been processed in the traditional system. With the limited specialist knowledge and resources open to the conventional courts for following through these issues, a person may return to the system time and time again. [Yes, I think Mr Law did have a good point...]

* In addition to addressing recidivism, the Drug Court also provides practical benefits to the community such as saving the cost of running a large number of matters to hearing. There must be a plea of guilty entered or an indication of a plea for entry onto the program. Once a person is accepted onto the program, there are often a number of outstanding charges identified by way of DNA or fingerprint comparison or outstanding breaches of bonds, etc that are then brought across to the Drug Court and dealt with in a more expedient and cost-efficient manner than in the conventional courts.

* ODPP solicitors are often reminded of the benefits to the community when they reflect on the criminal history of a chronic recidivist at successful completion of the program (i.e. someone who has not re-offended whilst on the program) and it is clearly the first time for many of the participants that there is a real break in their offending behaviour. The practical benefits and effectiveness of the program are clearly evidenced in such outcomes.

* There are many stories told at graduation day to evidence such significant outcomes. An ODPP solicitor will hear a graduate's life journey through the criminal justice system. For example, a recent graduate told the Court of how he was first placed in custody at the age of 12 for stealing and then spent the majority of the next three decades in custody. [This story was related to Parliament by the Attorney General in November and transmitted to the Drug Court staff by Judge Dive the next day.] Essentially his life experience prior to the Drug Court was one where his longest continuous period in the community was 3 months. The graduate also calculated that in the 10 years prior to starting his Drug Court program, 9 ½ years were spent in custody. This graduate remained out of custody for the duration of the program and has now successfully re-integrated into the community. There are similar stories each month at graduation and these successes are not only of benefit to the community, but they are an important motivating factor for the Drug Court team.

* Perhaps less obvious benefits to the community are recognised by the ODPP; for example, the Drug Court program may provide the impetus for breaking the generational addiction/crime cycle. Participants often come from dysfunctional backgrounds that have seen generations of family members in the same cycle of addiction and crime. A successful participant's re-integration into the community through this program not only effects positive changes in that life, it may also have a

real impact on the person's children's futures and successive generations. The benefits to the community in this respect are enormous.

* There is also a practical benefit for the participants as their time at the Drug Court may have been the first positive interaction they have ever had with either an ODPP solicitor or Police Prosecutor or the criminal justice system generally. A participant will be congratulated by the ODPP solicitor for any achievements made. Furthermore, Court ordered hearings such as a participant's potential to remain on the program would not be pressed by the ODPP solicitor if a participant had fulfilled all the necessary obligations of the program during the intervening period. If complete re-engagement is achieved the usual practice is for the ODPP solicitor to invite the Court to find positive potential, effectively allowing a participant's program to continue, with their remaining in the community rather than returning to serve the sentence.

* For the ODPP solicitor at the Drug Court it is at times a balancing exercise: there is the duplicitous role of team member one minute and more conventional prosecutor the next. A major challenge is to remain objective in light of the very human stories that are explored at the Drug Court. Nevertheless, an ODPP solicitor's objectivity is vital to maintaining the continued success of the program and ensuring community confidence in therapeutic jurisprudence. The challenges are outweighed by the rewards and they are great. An ODPP solicitor's observing such significant transformations in a person's life makes it all worth the extra and different involvement.

I have frequently said that unless prosecutors have the support and confidence of at least a majority of the population, we are wasting our time. The Drug Court has the confidence of the community.