

**A strategic overview of the diversion of drug-related offenders in NSW**

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Drug & Alcohol Offenders**

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## Executive Summary

In 1999, the NSW Intersectoral Taskforce on Recidivism of Drug and Alcohol Offenders commissioned the production of a strategic overview of diversion in NSW. The overview was written on the basis of published and unpublished literature and consultations with experts, key players and stakeholders. This overview was completed in October 1999 and was not able to be published until 8 months after its completion. While further developments in drug diversion have occurred between the report being completed and published, much of the information is still relevant and useful. For this reason, the report as written is published here as a National Drug and Alcohol Research Centre Technical Report.

Diversion systems are designed to improve outcomes both for the community at large and for offenders who commit drug-related crimes. Diversion involves a graduated series of interventions that are appropriate and proportionate to the seriousness and circumstances of the offence, and the personal circumstances of the offender. Interventions aim to prevent first offenders from entering the criminal justice system and to divert offenders with drug problems into appropriate treatment.

The target group of diversion strategies is offenders whose criminal offence is related to drug(s). This includes people whose offending is directly linked to intoxication from legal (e.g. alcohol) or illegal drugs; who are charged with use, possession and/or supply of an illicit drug; and/or who have committed an offence in order to obtain drugs or support drug use.

The rationale for having diversion strategies is somewhat complex, because of the range of offences, groups and strategies involved. There is a significant link between alcohol and other drug use and involvement in crime, particularly property crime and violent crime. Such crimes have significant economic and social costs for the community. Law enforcement, court proceedings and detention are costly means of dealing with drug-related offences with limited effect. For example, court services are expensive and there are currently lengthy court delays due to the lack of resources to deal with the number of crimes committed and taken to court. Furthermore, outcomes such as a criminal record and detention can have negative effects on individuals and their families that go beyond the intended consequences. Furthermore, there are high rates of drug problems among offenders in detention, suggesting a need for drug treatment interventions. Recidivism appears to increase with each period of detention and with release without parole, suggesting that avoiding detention or increasing early release to supervised parole programs could reduce recidivism. Drug treatment programs have been found to reduce drug use and criminal behaviour, suggesting that, for those with a drug-related problem, diversion to treatment is likely to have better outcomes than criminal sanctions. Coercion to treatment is considered ethical if the offender has a choice in whether or not to be diverted and a choice in the treatment to which s/he is diverted. In sum, for those unlikely to re-offend, the negative consequences of criminal justice proceedings can be difficult to justify. For those with significant drug-related problems, treatment can be more efficacious than criminal justice sanctions alone.

Opportunities for minimising the progress of offenders through the criminal justice system or diverting them out of the system altogether are:

- a) **Pre-arrest:** when an offence is first detected, prior to a charge being laid. This is generally known as police diversion and includes fines, warnings, and cautions.
- b) **Pre-trial:** when a charge is made but before the matter is heard at court. Examples are treatment as a condition of bail, conferencing, prosecutor discretion, and assessment and supervision by a panel.
- c) **Pre-sentence:** delay of sentence while assessment and treatment are sought.
- d) **Post-sentence:** as part of sentencing, for example, suspended sentences, sentencing to treatment (Drug Courts), non-custodial sentences and circle sentencing.
- e) **Pre-release:** prior to release from a sentence, on parole.

The characteristics of effective diversion strategies and suggested standards for diversion were outlined. These included, for example, the use of assessment and referral to appropriate treatment programs; appropriate and immediate positive reinforcement for positive behaviour change; and sanctions for non-compliance to treatment contracts. A concern for all diversion strategies was the issue of net widening. If a diversion program is considered less onerous than the usual criminal justice sanction, it might be applied to a person who would not otherwise be sanctioned at all. If the person then performs poorly at diversion or breaches undertakings made to the diversion program supervisors, s/he might then face more serious sanctions than if s/he had not entered the diversion scheme in the first place. In this scenario, diversion has inadvertently increased the likelihood of re-offending and created the collateral problems that it was intended to avoid.

The existing and planned diversion strategies in New South Wales were described and reviewed. On the basis of this review, a model for diversion in NSW is proposed. It is recommended that a range of diversion strategies that are appropriate to the history and risk of criminal and drug-abuse behaviours be available for drug-related offenders. Offenders who are neither substantially involved in crime or drug abuse, nor at significant risk of being so involved in the future, receive sufficient sanctions to deter continued offences, such as a warning or caution from police, without further consequences. The aim of such early diversion is to avoid unnecessary costs and negative consequences of involvement with the legal system for offenders who are unlikely to re-offend. The rationale for diversion in these cases is that involvement with the criminal system for those who are unlikely to re-offend is not cost-effective and likely to have unreasonably negative consequences for the offender. As the criminal career and drug problems escalate, a series of diversion strategies should be available that are appropriate to the history and potential of the offender.

These strategies should include pre-trial strategies such as conferencing; pre-sentence strategies such as the Griffiths Remand; post-sentence strategies such as suspended sentences; and, for those with the most severe history of repeated failure with drug treatment and judicial interventions: Drug Courts. The aim of these diversion strategies is to use the offence as an opportunity to divert the offender to activities and interventions that will have positive outcomes in terms of health, welfare and criminal activity rather than

to detention. The rationale for diversion in these cases is that treatment in the community is likely to be more cost-effective than detention. For those offenders who enter detention because the crime necessitates detention or because all other diversion strategies have failed, it is recommended that pre-release diversion be a priority. The aim of diversion in this case is to prevent recidivism by providing appropriate interventions prior to release from detention and after leaving detention.

Given the current state of diversion strategies and plans in NSW described in this report, the following recommendations are made:

1. A trial of suspended sentences be conducted. Suspended sentences would provide the level of consequences, structure and supervision of a Drug Court with less cost.
2. All diversion programs be carefully evaluated.
3. A single body be given the brief of overseeing diversion in NSW and the resources to do so. This body should be able to work across government departments and with non-government organisations.

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## Definitions

**Drug:** Throughout this document, the term ‘drug’ denotes all psychoactive substances, including alcohol, prescribed drugs, inhalants, cannabis, amphetamines, cocaine, heroin, and other drugs.

**Offences dealt with summarily:** Minor criminal offences that are dealt with before a magistrate without a jury.

**Offences dealt with on indictment:** Serious criminal offences that are normally heard by a Judge and Jury but on occasions by a Judge alone.

## Acknowledgments

This report draws significantly upon the work of The Alcohol and Other Drugs Council of Australia's Diversion Project: In 1995-97, the Alcohol and other Drugs Council of Australia (ADCA) conducted a national study of diversion of drug-related offenders, including a literature review and consultations with key players. Rather than duplicate ADCA's work, this report used the information from that project as a starting point.

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## **Background**

### ***Terms of reference***

This document was commissioned by the NSW Intersectoral Taskforce on Recidivism of Drug and Alcohol Offenders. The Taskforce was established in December 1996 under the auspices of the NSW Police Service and was constituted as a subcommittee of the NSW Premier's Council on Crime Prevention in 1998. The Chair of the Taskforce is Hans Heilpern, Senior Member of the Fair Trading Tribunal and Member of the Parole Board. Members of the Taskforce include representatives the NSW Attorney General's Department, NSW Departments of Community Services, Corrective Services, Health, and Juvenile Justice, Aboriginal Medical Service, Judicial Commission, Network of Alcohol and Other Drug Agencies, NSW Users and AIDS Association, NSW Police Ministry, NSW Police Service, and We Help Ourselves.

The terms of reference were to provide a) a strategic overview of diversion in NSW, including an analysis of the costs and benefits of diversion strategies, and b) plans for two pilot projects that will address a need not addressed by existing strategies and plans for diversion in NSW. It was beyond the terms of reference to a) review the assessment, education and treatment options to which offenders are or could be diverted; and b) review and consider changes to legislation dealing with drug offences (that is, use, possession, trafficking).

A 4-month period was given for the completion of the overview and the pilot project plans (May to August 1999). During this time, there was a substantial amount of government interest in diversion. In particular, the Council of Australian Governments (COAG) communique had just been released, outlining a national diversion strategy, and the NSW Drug Summit was conducted. The government response to the NSW Drug Summit included a range of new diversion strategies (further details of these government initiatives are provided below). Consequently, this overview was written during a period of change in the diversion of drug-related offenders in NSW.

### ***Definition of diversion***

Diversion systems are designed to improve outcomes both for the community at large and for offenders who commit drug-related crimes. Diversion involves a graduated series of interventions that are appropriate and proportionate to the seriousness and circumstances of the offence, and the personal circumstances of the offender. Interventions aim to prevent first offenders from entering the criminal justice system and to divert offenders with drug problems into appropriate treatment.

## ***Target group***

The target group of diversion strategies is offenders whose criminal offence is related to drug(s). This includes people whose offending is directly linked to intoxication from legal (e.g. alcohol) or illegal drugs; who are charged with use, possession and/or supply of an illicit drug; and/or who have committed an offence in order to obtain drugs or support drug use. The target group includes a broad range of people, including:

- a) people who use illicit drugs but are otherwise law-abiding citizens, as well people with a significant criminal history;
- b) people with a range of patterns of drug use, from non-problematic (apart from the problem of its use being illegal) to dependent use;
- c) people who will not re-offend, people at risk of re-offending, and recidivist offenders. For example, most juveniles who face court do not reappear in court. Between 1992 and 1997, 37% of juveniles appearing before the court had a subsequent court appearance, 17% had more than one proven court appearance.<sup>1</sup> While court-based data is an incomplete measure of re-offending,<sup>1</sup> it does provide an indicator of recidivism; and
- d) people who have committed a range of offences, and are subject to a range of sanctions. For example, most arrests do not result in a prison sentence. Only about 6% of people who are sentenced in a local court get a full-time gaol term.<sup>a 2</sup>

Such heterogeneity within the target group suggests the need for a range of responses, depending upon the nature and extent of drug use, the criminal behaviour and the risk of re-offending.

## ***Method for development of this strategy***

The process for the development of the overview and pilot project plans was as follows. The first draft of the overview of diversion was written on basis of the literature review and consultations completed by the ADCA diversion project, 1997.<sup>3-7</sup> Subsequent drafts were written on the basis of literature identified by databases searches (Medline, Psychlit, Current Contents) and internet sites (for example, sites for the Australian Institute of Criminology and NSW Lawlink); government policies and plans; and consultations with Taskforce members and other key players, stakeholders and experts. Consultations were conducted with representatives and experts from the NSW Department of Aboriginal Affairs, NSW Attorney General's Department, NSW Department of Community Services, NSW Department of Corrective Services, NSW Health Department, NSW Department of Juvenile Justice, NSW Police Service, NSW

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<sup>a</sup> It was noted during the consultations for this report that many of the studies cited in this report are studies of prison populations. As custodial sentences are reserved for the most serious offences, statistics based on prison populations are not generalisable to all offenders. They over-represent violent and property offenders and under-represent white-collar criminals.

Police Ministry, NSW Premier's Department, Aboriginal Medical Service, Family Drug Support Unit, Judicial Commission, Law Society, Network of Alcohol and other Drugs Agency (NADA), NSW Users and Aids Association (NUAA), Department of Criminology (University of Melbourne), Shopfront Youth Legal Centre, Australian Institute of Criminology, and Turning Point. Given the lack of evaluation research on diversion strategies, this report summarises pros and cons from the literature, when available, and from stakeholders, key players and experts on diversion and related issues.

In developing the overview of diversion and pilot projects, it was recognised that there are a number of NSW and national government committees who have a role in examining diversion options and whose decisions will have implications for this plan. These included the following:

1. NSW Government Senior Officers Coordinating Committee (SOCC)

SOCC brings together senior level officers from government agencies charged with addressing drug and alcohol issues. The committee was established to facilitate a 'whole of government' approach to drug issues. Appropriate sub-committees of SOCC are established to address particular issues and develop specific strategies. Membership on SOCC includes NSW Health, Education and Training, Premier's, Community Services, Juvenile Justice, Corrective Services and Attorney General's Departments, the Police Service, Police Ministry, Treasury, and Cabinet Office.

2. State/Territories Working Group on Drugs

This group, auspiced by the Department of Prime Minister and Cabinet, reports directly to the Prime Minister. It advises on the appropriate national placement of the *Tough on Drug* allocations, including funds for the national diversion strategy. The group is comprised of senior officers from central agencies in the States and Territories, including Premier's Departments, Cabinet Offices, and Health Departments.

3. Ministerial Council on Drug Strategy (MCDS)

The National Drug Strategy operates under the direction of the Ministerial Council on Drug Strategy, comprising health and law enforcement ministers from each Australian jurisdiction. The MCDS is the peak ministerial policy and decision making body in relation to licit and illicit drugs.

4. Inter-Governmental Committee on Drugs (IGCD)

The Inter-Governmental Committee on Drugs (formerly the National Drug Strategy Committee), comprising senior health and law enforcement officers from each Australian jurisdiction, provides policy advice to Ministers on the full range of drug issues and is responsible for implementing policies and programs as directed by MCDS. Other members of the IGCD provide expertise on identified priorities, for example, representatives from the Australia Customs Service and the Department of Employment, Education, Training and Youth Affairs. The IGCD has established a number of National Expert Advisory

Committees to provide advice to the MCDS. Each committee has a specific area of expertise, such as alcohol or illicit drugs.

#### 5. Australian National Council on Drugs

The Australian National Council on Drugs (ANCD) consists of government, non-government, and community sector representatives. The role of the ANCD is to provide independent advice from non-government organisations and experts working in the drug field to the MCDS and the Prime Minister. For example, the ANCD is involved with the IGCD in developing a framework for nationally consistent diversion initiatives to meet the COAG decision of 9 April, 1999.

### **Need for diversion strategies (rationale)**

The rationale for diversion is that, for offenders who commit minor crimes and are unlikely to re-offend, involvement with the criminal justice system is not cost-effective and can have disproportionately negative consequences for the offender. For offenders with significant drug-related problems, whose drug use exacerbates recidivism, treatment programs are more likely to reduce recidivism than criminal sanctions. This rationale is supported by the discussion and literature review presented below.

### ***Prevalence and types of drug-related crime***

A minority of recorded offences is specifically 'drug offences' and most of those drug offences relate to cannabis use. The NSW Bureau of Crime Statistics and Research has reported that, in 1996, there were 19,845 drug offences recorded by police. This represented just 3% of all recorded offences. Of these 19,845 drug offences, the majority (62%) was for possessing and/or using illegal drugs. Nearly half (48%) were for possession or use of cannabis. Other offences included cultivating cannabis (14%), dealing/trafficking (11%), and other offences such as manufacturing or smuggling of illegal drugs (13%). Offences involving cannabis accounted for over two thirds of all drug offence incidents.<sup>8</sup>

Few people whose most serious offence was a simple drug offence (use or possession of drug/drug implement/forged prescription) are put in prison for that offence. In 1994 in NSW there were 62 prison inmates whose most serious offence was a simple drug offence. The majority of this group had served a prior sentence and about a third returned to prison for a subsequent sentence within 2 years.<sup>7</sup> This suggests that, when people are imprisoned for simple drug offences, it is usually in the context of repeat offending.

Drug-related crime covers more than specific drug offences such as possession, use and trafficking. While 41% of males and 55% of females in prison described their crime as drug related, drug offences appeared as the most serious offence for only 14% of inmates in NSW prisons in June 1995.<sup>9</sup> The two main types of drug-related offending are offences committed while the offender is intoxicated, and offences committed to fund drug use. These are discussed below.

Offences are often perpetrated while the offender is intoxicated. Kevin reported that 71% of males and 79% of females in prison have reported that they were intoxicated at the time of the serious offence.<sup>9</sup> There are likely to be a number of reasons for this, such as intoxication reducing inhibitions and impairing reasoning capacity.

In particular, consistent with research that has identified associations between alcohol and violence,<sup>10-13</sup> there appears to be a strong association between alcohol and violent crime. A study by Ireland and Tommeny found that more than three quarters of street offences (assault, domestic violence, offensive behaviour and language, malicious damage, drink driving and noise complaints) that came to the attention of police involved alcohol.<sup>14</sup> Inmates imprisoned for assault in New South Wales reported that alcohol was related to the violence in the majority of cases.<sup>15</sup> US research has found that repeat drink-drivers have more non-traffic convictions such as assault.<sup>16</sup> Data from the national Drug Strategy Household Survey has shown that, in 1998, at least 9% of Australians suffered property loss or damage in alcohol-related incidents, 6% suffered alcohol-related physical assault, and 28% suffered alcohol-related verbal assault. Research by the Australian Institute of Criminology has shown that alcohol is an important factor in homicide, with 34% of all offenders and 31% of all victims being under the influence of alcohol at the time of the incident.<sup>17,18</sup> After calculating the extent of drug caused morbidity and mortality in Australia, Holman, English and colleagues concluded that, of all the drugs, alcohol presents the most serious threat to public safety.<sup>19,20</sup>

Alcohol-related offending is a particular concern for Aboriginal communities. While a smaller proportion of urban Aboriginal and Torres Strait Islander people drink alcohol (62%) compared to the general population living in urban areas (73%), those who do drink alcohol are much more likely to having consumption patterns that place their health at higher risk (51% compared with 22% of drinkers in the general urban community). Overall, 32% of urban Aboriginal and Torres Strait Islander people were found to be higher risk drinkers, compared with 16% in the general community.<sup>21</sup> Hence, it is not surprising that the most common reason for arrest of Aboriginal people in 1994 was alcohol-related. The most recent arrest of 23% of males and 7% of females had been charges for drink-driving or drinking in public. Theft was a relatively minor component of arrests among Aboriginal people.<sup>22</sup>

Property crime, on the other hand, has been associated with the need to fund illicit drug use, particularly dependent heroin use. Such crimes are usually, but not always, non-violent. Makkai reviewed studies of prisoners and ex-prisoners.<sup>23</sup> Among these samples, 63% to 75% reportedly committed a property offence to support a drug habit; and 22% to 48% reported that they committed a violent offence to support a drug habit. Makkai also reviewed studies of injecting drug users and reported that, in the previous month, 3% to 10% had committed a violent offence; 9% to 16% had committed fraud; and 22% to 36% had committed a

property offence. The rate of property offences increased to 70% in a study of heroin users.<sup>23</sup> In comparing alcohol and other drug-related crimes, Kevin reported that people convicted of property crimes were more likely to be under the influence of drugs other than alcohol. Illicit drug users also committed more property crimes than other property offenders.<sup>24</sup> A survey of imprisoned burglars identified strong links between heroin use and burglaries.<sup>25</sup> For example, heroin users reported higher average rates of burglaries than non-heroin users (14 compared with 9 per month). Recent increases in various forms of theft<sup>26</sup> have been attributed to an apparent increase in heroin use.<sup>27</sup> This has fuelled community concern over the issue of heroin-related property crime and community pressure to do something about it.<sup>28</sup>

In sum, drug offences per se constitute the minority of recorded drug-related offences. Most drug-related offences occur while the offender is intoxicated and/or to fund drug use.

### ***Drugs-crime link***

Research has consistently demonstrated that there is an association between drug use and crime. A multivariate analysis of US general population data indicated that lifetime drinking problems are significant predictors of current criminal behaviour, arrest and conviction, even after controlling for age, gender, marital status, income, employment, education and race.<sup>29</sup> Among an Australian general population sample and after adjusting for socioeconomic status, the heavier the style of drinking, the greater the probability of committing offences such as drink-driving, steal property, damage property, and verbal or physical abuse.<sup>30</sup> A study of juveniles in detention found that greater involvement in drug use (alcohol, cannabis, tobacco, narcotics and multiple drugs) was associated with greater involvement with crime.<sup>31</sup> Similarly, associations between drug use and recidivism have been identified: 74% of re-offending inmates stated that their current offence was related to their use of alcohol or drugs, compared with 62% of first offenders.<sup>32</sup>

While drug use and crime are linked, drug use does not necessarily *cause* offending. All crime is not drug-related and many illicit drug users commit no other crime than using an illicit drug. Violent crime, in particular, requires a predisposition to violence rather than drug use.<sup>33</sup> Nearly three quarters of heroin users had committed a property crime *before* using illicit drugs.<sup>34</sup> While drug use does not necessarily initiate criminal behaviour, it is certainly related to the maintenance and frequency of offending.<sup>35,36</sup> Addressing drug use is likely to reduce crime levels and recidivism, even if it does not eliminate crime.

### ***High costs of drug-related crime***

Drug-related crime is a significant financial burden for the community. It is difficult to estimate the cost, given that most drug-related offences are not detected. One study estimated there was one arrest for each 413 crimes committed.<sup>33</sup> Despite such difficulties, the Australian Institute of Criminology estimated that drug-related crime cost Australia \$2000 million in 1996.<sup>37</sup> Reducing drug-related crime is likely to result in a financial saving for the community. As argued below, diversion of drug-related offenders from detention to treatment programs is likely to reduce recidivism, and hence reduce drug-related crime and its associated costs.

### ***Court delays***

Excessive court delays reduce the fairness and effectiveness of judicial interventions. Delays violate the basic psychological principle of consequences closely following actions. Further, the longer the delay, the more difficult it is for witnesses to reliably recall events. However, court delays are currently common in NSW. In the Higher Courts in 1996, half the defended cases where the defendant was acquitted of all charges took 11 months or less from committal to finalisation. The median time in custody for those people remanded in custody before being acquitted was 40 days before a Local Court and over 6 months before a Higher Court.<sup>8</sup> Diversion strategies that reduce the number of offenders taken to court should reduce such court delays.

### ***High costs of law enforcement and criminal sanctions***

Criminal justice and law enforcement approaches to drug-related offences are costly. In 1996/97 the NSW Government spent \$2,090.7 million on recurrent expenses in the area of law, order and public safety. In addition, \$189.7 million was spent on capital works such as building police stations, courthouses and prisons.<sup>8</sup> Collins and Lapsley were unable to estimate the law enforcement costs related to alcohol, but they did report that the national law enforcement costs related to illicit drugs in 1988, including police, customs, prisons, and courts, was \$258 million.<sup>38</sup>

Looking at the monetary costs of detention, each inmate in detention in 1997-98 cost the NSW Department of Corrective Services an average \$148 per day.<sup>39</sup> This cost varied as a result of the type of security: \$179 for maximum security, \$168 for medium security and \$121 for minimum security. Males tend to spend at least the first third of their sentence in maximum security. Females commence their period of detention in minimum security and only progress to higher levels of security if necessary.

Spooner and colleagues compared the daily cost of keeping an adolescent in a detention centre keeping an adolescent in a residential drug-treatment. They found that the treatment intervention had less clients per staff member than detention (.4 compared with 1.6), but was less costly per client per day than detention

(\$257 compared with \$316).<sup>40</sup> Given that such a treatment program was the most expensive available treatment option for drug dependence, comparisons with other treatment options - such as day programs, sessional programs and pharmacotherapies - would favour treatment rather than detention to an even greater degree.

In sum, law enforcement and detention are costly strategies and diversion strategies could result in significant cost savings to the government in these areas.

### ***High rates of drug problems among prisoners***

Prison populations typically have high rates of drug problems.<sup>41</sup> For example, Kevin found that alcohol is a major concern for many inmates. About half of the inmates (46% of females and 59% of males) interviewed on reception to NSW prisons were classified as 'hazardous drinkers' using the World Health Organization AUDIT scale; 47% of the males had scores that were indicative of 'alcohol dependence'. This rate was 76% for Aboriginal males. Around half (41% of males and 54% of females) had received treatment for their alcohol and other drug problems in the community; 12% of males and 39% of females reported that they were currently receiving methadone.<sup>9</sup> Furthermore, heroin problems appear to be increasing among juvenile offenders. The Illicit Drug Reporting System has noted an increased use of heroin by young people.<sup>27</sup> The number of juvenile offenders known to have undergone withdrawal at Cobham Juvenile Justice Centre (western Sydney) increased from 17 in 1994 to 108 in 1997.<sup>42</sup> Therefore, whether or not drug use problems contribute to criminal activity, there is a health need for drug treatment programs for prison populations. However, as argued above, there is link between drug use and crime that suggests that addressing those drug problems can assist in a reduction in recidivism.

### ***Cost-effectiveness of legislation/law enforcement***

Results of a RAND analysis of responses to the cocaine epidemic in the US have relevance for dealing with our current 'heroin epidemic' and high levels of alcohol-related problems.<sup>43</sup> Rydell has concluded that, when heavy use and problems are already high within a population, emphasis should be placed upon treatment, rather than prevention or enforcement. Rydell estimated that, for each million dollars spent on enforcement, the reduction in cocaine consumption was 27 kilograms. However, for each million dollars spent on treatment, the reduction in cocaine consumption was 104 kilograms.<sup>43</sup> Rydell concluded that: 'enforcement at the start of the epidemic is more cost effective than enforcement later in the epidemic. There are two reasons for this pattern. First, at the beginning the drug market is very small and it is easier to target enforcement resources. Second, and even more important, price increases at the start of the epidemic help discourage initiation.' (p. 18)<sup>43</sup> Furthermore, Rydell argued that consumption in the last half of the epidemic is driven largely by the build up of heavy users. At this time it is too late for prevention to affect

that build up. Treatment, however, can reduce demand. He calculated that treating 75% of heavy users from 1998 would have reduced consumption over the remainder of the epidemic by two thirds.<sup>43</sup> In conclusion, Rydell recommended that policies for dealing with drug epidemics emphasise prevention and enforcement early in the epidemic, and treatment in the later stages of the epidemic.<sup>43</sup> This does not mean that law enforcement strategies are ineffective and should be abandoned. It means that greater emphasis should be placed upon treatment when the problems are already entrenched.

### ***Effectiveness of criminal sanctions***

The Australian Institute of Criminology conducted a review of the international literature on the effect of treatment and criminal sanctions on recidivism among offenders (not specific to drug-related offenders).<sup>44</sup> A meta-analysis of the effect of the criminal sanctions, including fines, 'shock incarceration', 'scared straight', intensive probation, drug testing, electronic monitoring, and restitution was reported.<sup>45</sup> This meta-analysis identified negligible effect sizes (range -.07 to +.06, mean = 0.00) for criminal justice sanctions. In comparison, a meta-analysis of the effect of rehabilitation programs identified small to moderate effect sizes (range +0.10 to +0.36).<sup>46</sup> From this review, the Institute of Criminology concluded that a) criminal sanctions could reduce recidivism *only* when a treatment component is added, and b) programs delivered in community settings produce better outcomes than those delivered in institutions. Consultations for this project have suggested that there is currently a lack of drug-treatment services in juvenile and adult detention centres in NSW.

The reasons for the relative lack of effectiveness of criminal sanctions would vary according to the type of sanction and the behaviour being sanctioned. Looking specifically at detention, the rationale for detention has traditionally included retribution, rehabilitation, deterrence, and incapacitation.<sup>47</sup> However, the benefits of detention on recidivism have been questioned. Chan reviewed the literature relating to incapacitation. That is, imprisonment as a means of isolating offenders from the rest of society so they are unable to re-offend. She concluded that incapacitation had only a very modest effect on recidivism.<sup>47</sup>

As another example, Lenton investigated the lack of deterrence effect of criminal sanctions in the context of cannabis use.<sup>48</sup> He argued that deterrence effects are undermined where punishments are perceived as disproportionate to the crimes and there are low levels of social support for the specific law; and that research has identified low levels of public support for the laws that apply to minor cannabis offences. It is beyond the scope of this project to review the effectiveness of all sanctions with all offences. However, the evidence in relation to drug offences suggests that, when criminal justice sanctions are not supported by the community and do not have a treatment component, they are not likely to have positive, long-lasting effects.

Before concluding this point, it is important to note that detention can have some benefits if the environment is positive and appropriate programs are in place. For example, an evaluation of a drug-

treatment program for adolescents identified that juveniles who went to detention actually reduced their drug use to a greater degree than adolescents who attended a residential drug-treatment program in the community did.<sup>40</sup> These results should be treated with caution because the study was not designed to evaluate detention centres. The results did suggest, however, that at least in the case of juvenile offenders, attending a juvenile detention facility might be beneficial in some cases. For example, detention can provide the 'time-out' from a chaotic and risky lifestyle that might be required before change can occur. Furthermore, criminal sanctions such as detention have other objectives apart from rehabilitation and deterrence, such as punishment and incapacitation. The community expects the criminal justice system to address these objectives, so diversion is not always possible.

### ***Negative consequences of criminal sanctions***

Coumarelos and Weatherburn have argued that criminal sanctions and formal rituals of disapproval play an important role in the regulation of social conduct.<sup>49</sup> However, some criminal sanctions can have negative consequences for offenders that go beyond the intended consequences. For example, Lenton investigated criminal sanctions for cannabis use. He identified significant and long-standing negative consequences relating to employment (e.g. job loss), problems travelling overseas or accelerated involvement with the criminal justice system as a result of convictions related to cannabis use.<sup>48</sup> Given the over-representation of Aboriginal people among those who come before the criminal justice system, Aboriginal communities face a disproportionate amount of negative consequences from criminal sanctions. Having been arrested has been found to significantly decrease the employment prospects of Aboriginal offenders by 18% for males and 13% for females.<sup>22</sup> Concern has also been expressed about involvement of Aboriginal children in the process of juvenile justice as it might cause alienation from family and culture.<sup>50</sup> While criminal sanctions are generally intended to involve punishment, they are not supposed to be a source of additional negative consequences.

Detention in particular can aggravate problems, rather than reducing them. In terms of mental health, offenders can become incorporated into an offending subculture where they feel alienated, stigmatised, angry and powerless.<sup>7</sup> In terms of physical health, prison is a high-risk area for transmissible diseases.<sup>51</sup> For example, rates of HIV and hepatitis are significantly higher in prison populations than in the general community, injecting drug use and penetrative sex are practiced in prisons, and facilities for preventing transmission (for example, condoms and safe injecting equipment) are less available in prison than in the community.<sup>41</sup> Detention is increasingly associated with mortality. During the year ended 30 June 1998, 99 people were reported to have died in custody in Australia: 76 in prison and 23 in police custody. Within this total, 37 were in NSW, 17 were Aboriginal and Torres Strait Islander people. The most frequent manner of death was self-inflicted, nearly all from hanging. Deaths in prison custody have risen steadily over the last 18 years, from 28 deaths in 1980-81 to 76 deaths in 1997-98.<sup>52</sup> There has been particular concern about Aboriginal deaths in custody, resulting in recommendations that custodial

sentences for Aboriginal people be avoided whenever possible.<sup>53,54</sup> The Standing Committee on Social Issues investigated the issue of children of imprisoned parents and noted the detrimental consequences of having a parent in gaol, including being separated from parents, being forced to move from home, suffering stigma and loss, and being placed in substitute care. Accordingly, the Committee recommended that imprisonment be used as a last resort for primary carers of children.<sup>55</sup>

In sum, criminal sanctions can have negative outcomes that are beyond the intentions of the justice system. Detention in particular is expensive and can have detrimental outcomes, so it should be avoided when possible. Concern especially arises for incarceration for crimes that could be considered minor, particularly when those crimes are victimless. Incarceration of otherwise law-abiding citizens can 'criminalise' those people and have unnecessarily harmful consequences, particularly if the 'offender' has children. These offenders and their families can lose respect for the law (and law enforcers) as the legal system appears inappropriately harsh and out-of-step with community values. However, for those with more significant offending histories, avoiding detention might not be a possible or best strategy. Increasing resources for therapeutic interventions within the detention system, therefore, also needs to be considered.

### ***Drug treatment can be effective***

There is considerable evidence that drug treatment can reduce substance abuse and the frequency with which drug users commit crimes.<sup>56-59</sup> From his review of the literature, Hall concluded that treatment effectiveness is not diminished by coercion to treatment.<sup>60</sup> Makkai also concluded from her review of the literature that treatment is even more effective when combined with criminal justice sanctions.<sup>28</sup>

A number of factors such as the quality of treatment implementation are important considerations in the effectiveness of treatment.<sup>61,62</sup> Of particular concern for diversion programs is that the treatment type and intensity must be appropriate for the type and level of abuse or dependence.<sup>60</sup> For example, in the case of heroin-dependent individuals, treatment must be both intensive and long term.<sup>63</sup> Alcohol-related offenders also need a range of interventions from brief interventions for drink-drivers with a minor alcohol abuse problem to intensive, long-term programs for offenders with a significant alcohol-dependence problem.<sup>60,64</sup> Consequently, assessment and referral to appropriate treatment is necessary for treatment to be effective. Diversion to a single 'one-size-fits-all' intervention is not likely to be effective. Studies relating to the effectiveness of treatment are presented below.

### ***Summary***

There is a significant link between alcohol and other drug use and involvement in crime, particularly property crime and violent crime. Such crimes have significant economic and social costs for the community. Law enforcement, court proceedings and detention are costly means of dealing with drug-

related offences with limited effect. For example, court services are expensive and there are currently lengthy court delays due to the lack of resources to deal with the number of crimes committed and taken to court. Furthermore, outcomes such as a criminal record and detention can have negative effects on individuals and their families that go beyond the intended consequences. Looking at offenders in detention, there are high rates of drug problems among prisoners, suggesting a need for drug treatment interventions. Recidivism appears to increase with each period of detention and with release without parole, suggesting that avoiding detention or increasing early release to supervised parole programs could reduce recidivism. Drug treatment programs have been found to reduce drug use and criminal behaviour, suggesting that, for those with a drug-related problem, diversion to treatment might have better outcomes than criminal sanctions alone.

## **Diversión issues**

### ***Coercion into treatment***

Hall has critically reviewed the issue of coercion into treatment.<sup>60</sup> He summarised some of the arguments in favour of treatment under coercion as follows. Firstly, the drug dependence of some offenders contributes significantly to their offending behaviour and treatment under coercion is an effective way of treating that dependence, and thereby reducing the risk of re-offending.<sup>65</sup> Second, there is evidence that heroin-dependent offenders tend to relapse to drug use upon release from prison, hence to re-offend, and then return to prison. As treatment reduces relapse to heroin use and criminal recidivism, coerced treatment provides an alternative to prison that can reduce recidivism.<sup>66,67</sup> Third, the advent of HIV/AIDS has provided additional argument for treating rather than imprisoning offenders, as prisoners are at risk of contracting HIV while in prison.<sup>68</sup> Fourth, it is less costly to treat drug dependent offenders in the community than it is to incarcerate them.<sup>66</sup> A further argument in favour of coercion into treatment is that, relative to voluntary treatment, it has been associated with increased entry to treatment<sup>69</sup> and retention in treatment.<sup>70</sup>

Hall then reviewed the ethical concerns about coerced treatment. Szasz has argued that drug use is an individual choice and that dependence does not exist, so it does not require treatment. Hence coercion to treatment is unethical.<sup>71</sup> This libertarian view is not widely supported. Newman has argued that coercion to treatment for drug dependence is not ethical because treatment is void of benefit.<sup>72</sup> However, as reviewed elsewhere, treatment can be effective if the appropriate treatment is provided at sufficient intensity and duration with program integrity.<sup>60-62</sup> It can be argued that it is unfair to give treatment places to offenders when places for people who voluntarily seek treatment are in short supply. This ethical

concern can be addressed by ensuring treatment places for coerced offenders are funded separately, and this funding does not reduce funding for treatment places for people voluntarily seeking treatment.

A consensus view on the ethics of treatment under coercion was reached by the World Health Organization in 1986.<sup>73</sup> In their view, compulsory treatment is legally and ethically justified only if the rights of the individuals are protected by 'due process', and if effective and humane treatment is provided.<sup>73</sup> Further, it has been argued that in relation to diversion, offenders should be allowed at least two types of 'constrained choice'.<sup>74</sup> That is, a) a choice between treatment and the usual criminal justice process, and b) a choice as to the type of treatment they receive.

In sum, coercion to treatment does not appear to be a barrier to the effectiveness of treatment programs. Coercion to treatment is not unethical if appropriate treatment is offered and the offender has the right to exercise some choice as to the a) treatment and the usual criminal justice process, and b) type of treatment they receive.

## ***Families***

During consultations for this project, the importance of families was repeatedly stressed. Diversion strategies will have an impact on families and families can influence the outcomes of diversion strategies.

### **Impact of diversion on families**

Diversion strategies that keep offenders with drug abuse/dependence problems out of detention can place strain on the families of those offenders. In the experience of some people consulted for this project, a family member with a drug-use problem being sent to detention can sometimes be a relief for family members who are responsible for or affected by that offender. For example, parents of juvenile offenders who are unable to manage their child can feel some relief that the child is safe and not getting into trouble. Partners of offenders who perpetrate drug-related domestic violence<sup>75</sup> are likely to continue to be subjected to that violence unless an effective intervention is instigated.<sup>76</sup>

There has been substantial concern and research about an association between parental substance abuse and child neglect and abuse in the short term,<sup>77,78</sup> and in the long term.<sup>76,79,80</sup> Consultations for this project suggested that resources are required to support the parents and their children, to ensure the safety and well-being of the children. Interventions to assist offenders with drug-related problems to care for their children,<sup>81,82</sup> or other arrangements as indicated, need to be incorporated into diversion strategy plans.

## Impact of families on diversion strategies

Returning offenders to families and communities that have contributed to the drug use and offending behaviour can undermine the effectiveness of the diversion strategy. People from Aboriginal organisations consulted for this project were particularly concerned about this issue for Aboriginal offenders. On the other hand, positive family support can facilitate positive treatment outcomes for juveniles<sup>83</sup> and adults.<sup>84,85</sup> There is some evidence that interventions that improve family functioning and improve the ability of families to support young people in treatment can improve retention and outcomes for juveniles.<sup>86,87</sup> Research has generally been favourable in regard to involving family and mentors in interventions to reduce drug problems and recidivism.<sup>88</sup>

In sum, diversion strategies that divert offenders from prison back to their family and community environment need to have the capacity to deal with the ramifications of the diversion. Family support, skills training, and therapy can assist the family to support the offender. Assessment for the need for interventions to address specific problems such as domestic violence and the care of dependent children is also recommended. It is further recommended that such interventions need to be provided by adequately trained and culturally effective professionals.

### ***Net widening***

If a diversion program is thought to be less difficult and less burdensome than the usual criminal justice sanction, it might be applied to a person who would not otherwise be sanctioned at all. If the person then breaches conditions of the diversion program, s/he might then face more serious sanctions from the criminal justice system than if s/he had not entered the diversion scheme in the first place. In such cases, diversion has increased the offender's exposure to criminal justice sanctions, rather than reduced them.<sup>7</sup> This is known as 'net widening' and is a common problem with diversion strategies if specific precautions are not taken.

## Outcomes of an effective diversion system

Effective diversion programs can have multiple positive outcomes. Examples are provided below.

### ***Community safety and law enforcement outcomes***

Research has repeatedly identified a reduction in crime associated with participation in drug treatment.<sup>58,89-91</sup> The benefits of traffic offender programs have been less pronounced, probably due to a range of factors that could be addressed, including poor matching of interventions to the level of alcohol abuse or dependence.<sup>60,92</sup>

### ***Economic outcomes***

Economic evaluations have repeatedly identified cost benefits with the treatment of drug-dependency. The US Department of Health and Human Services reported that every \$1 invested in substance abuse treatment in California saved taxpayers \$7 in subsequent costs.<sup>93</sup> Cost benefit analyses indicated that, in Miami, for every \$1 spent on Drug Courts approximately \$7 is saved elsewhere in the criminal justice system.<sup>94</sup> The UK National Treatment Outcome Study identified that for every extra pound spent on drug misuse treatment, there was a return of more than three pounds in terms of cost savings associated with victim costs of crime, and reduced demands upon the criminal justice system. The authors argued that the true cost savings to society could be even greater than this.<sup>89</sup> Such research has supported Hall's assertion that the most compelling reason for legally coercing drug offenders to enter drug treatment is not because it is an effective intervention but because the alternative of imprisonment is so expensive and ineffective in reducing drug use and crime.<sup>60</sup>

### ***Health outcomes***

Numerous research studies have identified positive health and social outcomes with drug treatment. For example, a long term study of people found guilty of driving under the influence of alcohol or other drugs found a 30% lower mortality rate in people who had been diverted to treatment compared to those who did not attend treatment.<sup>95</sup> The National Treatment Improvement Evaluation Study, a 5-year study of the impact of drug and alcohol treatments in the USA, identified increased employment and income, improved mental and physical health, decreased medical costs, decreased criminal activity, decreased homelessness, and decreased HIV-risk behaviours 1 year after treatment.<sup>58</sup> Finally, the National Treatment Outcome Study monitored the progress of clients of drug treatment services in the UK and reported substantial improvements in drug use, HIV-risk behaviours, physical and psychological health, and criminality.<sup>89</sup> Thus, there is considerable evidence that drug treatment programs can contribute to positive health outcomes.

### ***Ethical outcomes***

Diversion can avert the negative effects (described above) of involving otherwise law-abiding people in the criminal justice system.<sup>7</sup> For example, imprisonment of mothers can have particularly detrimental effects upon their children: 'When the mother is given a gaol sentence, the child is given a life sentence.'<sup>55</sup>

### ***Community confidence***

The community expects the government to demonstrate leadership and use a responsible, effective approach to reduce the negative impacts drug-related crime. Well-resourced, well-planned and well-

implemented diversion programs can effectively address drug-related problems, thereby increasing community confidence in the government.<sup>7</sup>

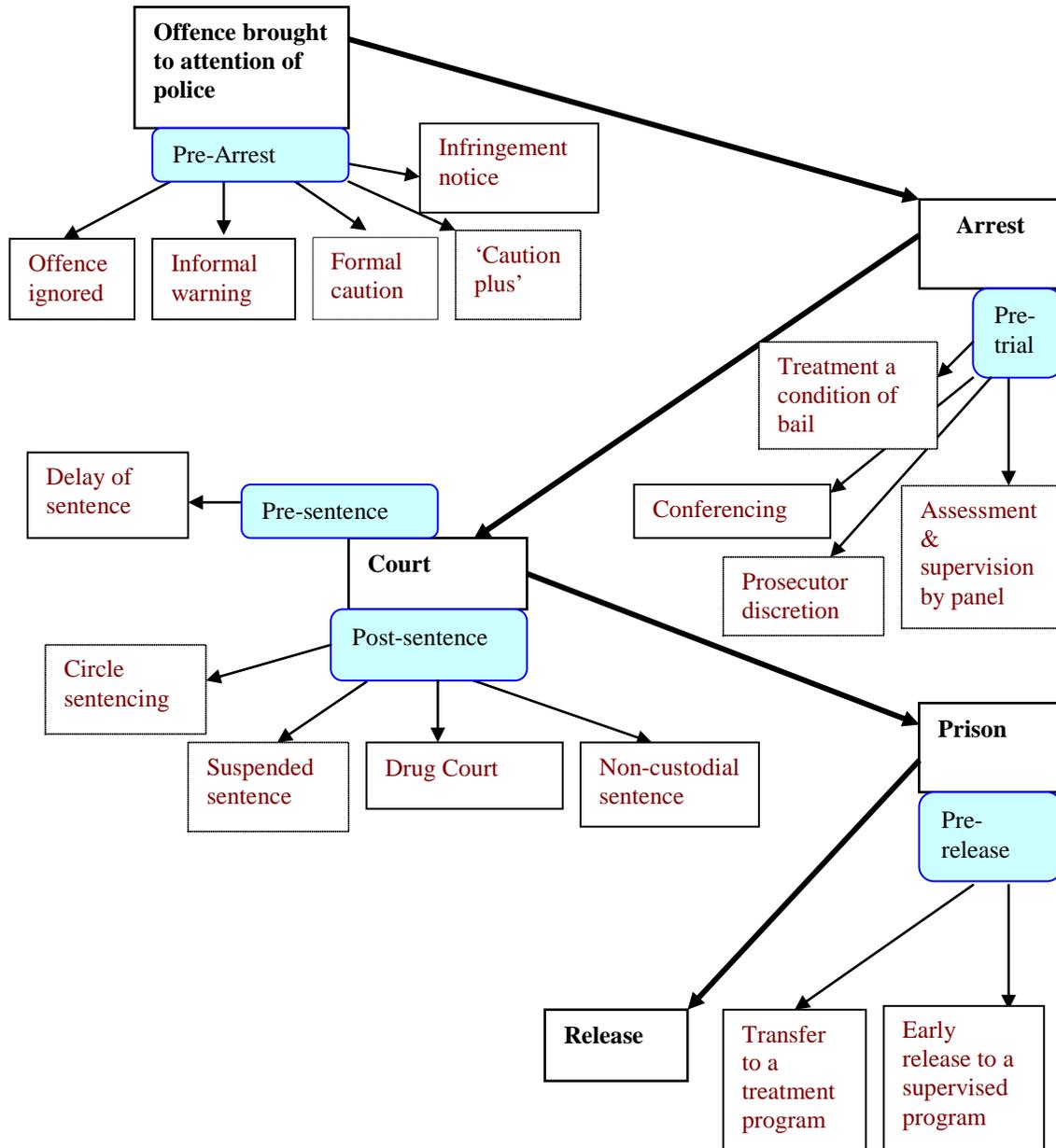
## **Possible diversion options – Introductory overview**

Opportunities for minimising the progress of offenders through the criminal justice system or diverting them out of the system altogether are:

- Pre-arrest: when an offence is first detected, prior to a charge being laid
- Pre-trial: when a charge is made but before the matter is heard at court
- Pre-sentence: before sentencing
- Post-sentence: as part of sentencing
- Pre-release: prior to release from a sentence, on parole.

There are numerous possible diversion strategies, and each strategy can be implemented in a variety of ways. Rather than an exhaustive review of all of the existing and possible diversion strategies used around the world, brief descriptions and comments on some relevant types of diversion that are not specific to NSW are presented in Figure 1 and described below.

**Figure 1 Diversion possibilities**



Above is a flowchart of possible diversion options. Not all options are currently in operation in NSW or in operation for both juveniles and adults. Options with a dotted box are not currently in operation in NSW. Brief descriptions of these possible options are presented below. Details of existing, proposed and planned programs in NSW are presented later in this document.

## Pre-arrest diversion

Pre-arrest diversion generally entails warnings or cautions by the police. Warnings are informal while cautions are formal. They may be used for disorderly offences associated with drunkenness, use or possession of illicit drugs (mainly cannabis), and offences against public order.<sup>96</sup> Warnings take place 'on-the-spot' without, in theory, any legal repercussions for the individual involved (e.g. a verbal warning, escorting a person home, or moving them along).<sup>96</sup> Cautions can be formal, in that there are usually set procedures to be followed and a record is kept of the incident. Cautioning programs can include referral to assessment, education and/or treatment, such as the Victorian trial of police cautions and referral to treatment. Such programs have been referred to as 'caution plus' programs.<sup>97</sup>

Coumarelos and Weatherburn have recommended warnings and cautions for first offenders, on the basis that most offenders do not offend again.<sup>49</sup> Morrison has conducted a study of police diversion in Australia and has written a summary of the pros and cons of police discretion and of the formalisation of that discretion.<sup>97</sup> The arguments generally posed *in defence* of the use of police discretion are that it reduces the high workloads of police, releases court time for more serious cases, reduces the potential harms caused by police arrest and prosecution of offenders (described above), and avoids a potential mismatch between sanction and crime, when criminal justice processes and sanctions are perceived to be 'over-the-top' responses to minor offences. Many of the arguments *against* the use of police discretion are related to the lack of consistency and accountability that is inherent in the use of discretion. Inconsistent use of discretionary powers between police districts can lead to a form of 'justice by geography'. Discrimination by individual police officers against certain classes of people, for example, young people, racial minorities, or low socio-economic classes, can occur. There is no visible accountability mechanism to address concerns of discrimination. Consequently, police discretion has the potential to be misused as a means of 'leaning on' offenders or potential informants and to lead to police corruption in the form of monetary rewards in return for leniency. Discretion can also be unsupported by the community, as it is seen as 'going soft' on crime. Finally, by using their discretion not to proceed, the offenders could be being denied a means of access to treatment or other services that could be available through diversion at a later stage in the criminal justice system.

Formal procedures for police diversion aim to address the problems with accountability and consistency noted above. Some formal schemes can influence offenders' access to, and willingness to seek, treatment through coercion, so they have the potential to reduce further involvement in crime. However, there are a number of arguments against the concept of formal diversion, mostly relating to problems with net widening. The lack of 'due process' in formal diversion schemes could lead to offenders being cautioned when there is insufficient evidence to prosecute. Despite this lack of due process, sanctions can be recorded as an 'official' part of an individual's offending history and individuals can be subject to formal sanctions.

Some innocent individuals might admit guilt in order to obtain formal diversion in preference to facing court. In addition to these problems with net widening, the requirements of diversion programs can sometimes be more onerous than those which would otherwise have been imposed had the person progressed through the criminal justice system in the usual way. Finally, formal diversion can lack community support if it is regarded as a form of *de facto* decriminalisation of illicit drugs.

Consultations for this project also raised concerns about the ability of police to identify when and which drug treatment intervention was appropriate. Caution-plus programs that include mandatory referral to an assessment can increase the likelihood of offenders being diverted to appropriate treatments if required. However, such a system would be very costly to implement.

Infringement notices include fines for offences such as drink-driving, as well as schemes such as those in South Australia, the ACT and the Northern Territory whereby fines are given for minor drug offences, such as possession of small amounts of cannabis. There has been concern about net widening, when young and/or low-income people cannot afford to pay the fine, and are then incarcerated for a crime that would not have previously resulted in detention. An evaluation of the Cannabis Expiation Notice (CEN) scheme in South Australia identified an increase in the number of minor cannabis offences for which CENs were issued from 6,231 expiable offences in the 1987/88 financial year to a peak of 17,425 offences in 1993/94. The increase appeared unrelated to the prevalence of cannabis use. It did, however, appear likely to be related to changes in police procedures as more operational police were available for this work, and the work involved in issuing a CEN was much less onerous than that required under a prohibition model.<sup>98</sup> About half of the CENs were not expiated and most of the unpaid CENs resulted in a court conviction.

## Pre-trial diversion

There are a number of systems for diverting offenders prior to prosecution, which generally require prior admission of guilt. This could encourage people to admit guilt to avoid trial and/or sanctions, when they might have been found not guilty. Participants could face the ‘double jeopardy’ of falsely admitting guilt to avoid trial, then receiving criminal sanctions if the mandated treatment is not successfully completed. A number of relevant examples are described below.

### *Public prosecutor discretion*

Public prosecutors could offer an offender the option of attending a drug-treatment intervention rather than proceeding with prosecution. Charges would then not be pursued if the offender successfully completes treatment. There has been some evidence of net widening effects, which would need to be controlled by specific guidelines.<sup>7</sup>

*Assessment & supervision by a panel if guilt of possession admitted*

A person who pleads guilty to a charge of simple possession of an illicit drug can be assessed by an expert panel and prescribed a course of action for up to 6 months. The person can leave the criminal justice system if s/he successfully completes the prescribed action; if not, s/he can be prosecuted. Such a program is currently practiced in South Australia. Under the South Australian *Controlled Substances Act 1984*, people alleged to be in possession of specified drugs of dependence (other than cannabis) for personal use can be referred to a Drug Assessment and Aid Panel (**DAAP**). The Panel includes a legal practitioner and two others with extensive knowledge of drug misuse and treatment. The Panel assesses the offender and can require that s/he enter into a written undertaking, effective for up to 6 months. The undertaking can include participation in a drug treatment program or any other undertakings that will assist in the offender overcoming any problems that might have contributed to the misuse of drugs. Non cooperation can lead to prosecution. No conviction is recorded if an offender successfully completes the undertakings.<sup>99</sup> Net widening from this system has been reported, particularly for young people.<sup>7</sup>

*Treatment as part of bail conditions*

Victoria has pilot-tested a pre-trial diversion program called CREDIT - Court Referral Evaluation & Drug Intervention Treatment.<sup>100</sup> The 9-month trial (November 1998 – August 1999) was located at Melbourne Magistrates' Court. Eligible offenders were assessed by a drug-treatment clinician who provided a written report to the Magistrate regarding the offender's suitability for the program and an appropriate treatment plan. The offender was then bailed under strict conditions regarding treatment, and the clinician organised the offender's admission to the treatment program.

Turning Point was conducting a process evaluation of CREDIT. Results are not yet available. There are no plans for an impact/outcome evaluation. In the meantime, the clinicians and Deputy Magistrate involved in the implementation of CREDIT have reported that the initial results appear positive.<sup>100</sup> However, they reported that roughly half of the eligible defendants elected to not participate. There was also an 'unacceptable' rate of defendants who were not answering their bail at the first remand date, so they did not participate in the program. On the positive side, they reported that some participants remained in treatment after completion of the program. Recidivism while on bail appeared to decrease, some participants entered employment, and cases appeared to be being finalised more quickly than usual because of a reduction in applications for adjournments. Mackinnon and colleagues also asserted that the length of criminal history did not appear to affect outcome and some offenders opted for CREDIT when the likely criminal justice sanction was expected to be minor, because it provided an opportunity to access treatment.

### *Conferencing*

Conferencing describes schemes whereby victims and other members of the community, including experts and family members, become involved in dealing with offenders beyond the normal confines of the criminal justice system.<sup>101</sup> It can occur in place of a trial as a diversion scheme. The aims of conferencing can be diverting offenders from the criminal justice system and reintegrating them into the community and/or involving victims in the resolution of cases as a means of empowering them and acknowledging their need for recognition. The NSW Law Reform Commission has argued that the most successful conferencing schemes rely on maintaining a balance between these two aims.<sup>101</sup>

A variant of conferencing is family conferencing, sometimes referred to as 'reintegrative shaming'. It is most often used for juvenile offenders, generally emphasises reparation rather than retribution, and is often used as a means of establishing a greater degree of community control over local crime. The New South Wales Law Reform Commission has described a number of advantages and disadvantages of conferencing.<sup>101</sup> Advantages of conferencing are that it can empower victims and reduce victim anger and trauma, facilitate rehabilitation and reconciliation, promote community involvement in local crime, and divert offenders from the court system.

Disadvantages include the possibility of net widening. Offenders could be charged rather than cautioned to make them eligible for conferencing. In addition, the results of conferencing can be more restrictive than might otherwise result through the normal judicial system. This is of particular concern if agreements are coerced rather than negotiated. Depending upon how conferencing is set up, there can be problems with predictability, equity and procedural justice. The Commission also questioned the appropriateness of some police to run such schemes when a welfare role is required. Finally, a limitation of conferencing is that it can only operate where there is a 'community' and that community is willing to participate.

### **Pre-sentence diversion**

#### **Delay of sentence**

A magistrate or judge can use adjournments, assessments and other means to delay or stop proceedings prior to sentencing while the offender seeks out treatment or assessment. The process can be initiated by the defence lawyer. Some diversion systems allow for no conviction to be recorded if the person successfully completes the program. Sanctions can also be built in for non-compliance.<sup>7</sup>

#### **Post-sentence diversion**

A magistrate or judge can specify that offenders participate in particular drug-treatment interventions as part of their sentence.<sup>7</sup> Three variations on this option are described below: circle sentencing, Drug Courts, and suspended sentences.

### **Circle sentencing**

A Canadian Judge, in consultation with a local Indian community and using principles of restorative justice, developed circle sentencing or circle courts. This approach focuses on the needs of the victim, on healing the damage that has been done by the offence and on empowering individuals, families and whole communities in the justice process. Circle sentencing is not, strictly speaking, a diversionary strategy because the sentence can still include detention. However, circle sentencing is included in this overview for two reasons. First, the emphasis is on rehabilitation rather than punishment, and detention sentences have tended to be used less. Second, it is a model that has been developed with and used by indigenous people in Canada and the US that might be appropriate for indigenous people in Australia. The information on circle sentencing provided below was obtained from the Aboriginal Justice Advisory Council draft overview on circle sentencing. 102

There is some variation in the implementation of circle sentencing in different circle courts. Following is a typical description. After an offender has pleaded guilty or has been found guilty by a court, s/he must do extensive work prior to being accepted to a circle court. If a community has established a community justice committee to administer the circle court, the offender must gain the approval of that committee plus the active support of other influential community members, particularly elders. To demonstrate that they are committed to the circle court process, offenders need to show that they are committed to healing the harm caused by their actions and setting themselves on the path to rehabilitation, not just participating because they think they will get a lighter sentence. This could involve participation in programs, such as drug and alcohol treatment programs, prior to the circle court.

Circle court participants include the presiding judicial officer, the offender, the defence council, the offender's family and/or support people, the victim and his/her support people, and a community elder. Seats are arranged in a room in a circle and participants are welcomed to the circle by community elders and the judicial officer. People then introduce themselves and explain why they are there. The crown presents the facts of the case and the defence is then allowed to comment. A group discussion then focuses on issues such as the extent of similar crimes in the community; the underlying causes of such crime; the impact of these crimes on community life, on family life, and on victims; what can be done in community to prevent this type of behaviour; what must be done to heal the victim; what must be done to heal the offender; the sentence plan; who will be responsible for carrying out the sentence plan; who will support the offender to ensure that the sentence plan is completed; and what support can be provided for the victim. This discussion can take from 2-3 hours to a couple of days. At the end of the circle a set of goals are set for the offender such as curfew, work programs, abstention of alcohol, and/or drug-treatment programs. The circle is then adjourned and these items set as bail conditions.

The circle is reconvened several months later and the court hears from the support group about the offender's progress. If the offender has successfully met the conditions, they might be extended or modified as probation conditions. If the offender has shown no willingness to meet the conditions then the circle might be abandoned and the offender sentenced in a regular court.

General benefits of circle sentencing are the breadth of information the court is able to receive and the breadth of solutions that the court can facilitate. The court receives information about the whole community, the background to the offenders, the impact of the offence on the victim, the problems experienced by the local community. This information is received to a level rarely available through written pre sentence reports. The circle court can attempt to address the causes of criminal behaviour and to implement broader solutions to the issues raised, actively involving the community in solving its own problem. It can look beyond the individual criminal act and examine ways of preventing similar behaviour in the same community. A more detailed discussion of the general benefits of circle sentencing is contained in the AJAC's overview of circle sentencing.

As described by the AJAC, there are a number of particular benefits of circle sentencing for Aboriginal people. It allows the Aboriginal community involvement in determining the conditions for punishment. This increases the cultural relevance of the punishment, particularly in the eyes of the offender. Having communities punish their own members means that punishments are seen as real community sanctions and not a continuation of an oppressive colonial system. The offender is confronted with his or her sentencers every day, making their sentence more real and immediate. As members of the community play a significant role in sentencing, the potential for racial bias in the court and in the sentence is significantly reduced or removed. Finally, circle courts allow the values of indigenous people and the structure of the western justice system to be merged.

Problems with circle courts described by the AJAC relate to consistency, cost and the level of family and community involvement. Circle sentencing has no legislative base, so there can be inconsistency in application between and within communities. The cost is much higher than the usual court costs as they can take four to five times longer than regular sentencing and because many are conducted in remote locations. This can add to court delays for other matters. Finally, implementation of the sentencing plan often requires support from family and community members. If this is not available, then circle courts are not viable.

### **Drug Courts**

Drug Courts have been defined as 'courts specifically designated to administer cases referred for judicially supervised drug treatment and rehabilitation within a jurisdiction or court-enforced drug treatment program.' (p. 68) <sup>103</sup> They can be pretrial/preplea, pretrial/postplea, post-conviction or a combination of these options so they don't fit neatly into the above categories. <sup>104</sup> However, as they are implemented as post-sentence programs in NSW, they are described in this section.

Drug courts have been described and reviewed elsewhere. <sup>28,105</sup> From these reviews, Makkai has concluded that Drug Courts have had successes, but will not produce a success every time and careful judgements need to be made about acceptable failure rates. They are more expensive than traditional courts but when taking the whole package of court+imprisonment+cost of re-offending, they could be much cheaper. Finally, Drug Courts face implementation challenges with integrating criminal justice and

treatment agencies, cooperative arrangements between judge, prosecutor and defence, and achieving objectives broader than those of the criminal justice system. <sup>28</sup>

While Drug Courts vary substantially from one another, ten key components for a successful Drug Court have been identified by the Office of Justice Programs and are presented below.

1. Alcohol and other drug treatment services are integrated with the justice system case processing.
2. Prosecution and defence counsel work together to promote public safety while safeguarding the participants' rights to due process.
3. Participants are identified early and promptly placed in a treatment program.
4. There is access to a continuum of alcohol, drug and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent drug testing.
6. A coordinated strategy governs Drug Court responses to participants' compliance.
7. There is ongoing judicial interaction with each Drug Court participant.
8. Monitoring and evaluation is used to measure the achievement of program goals and assess effectiveness.
9. Continuing interdisciplinary education is used to promote effective Drug Court planning, implementation and operations.
10. Partnerships between Drug Courts, public agencies, and community-based organisations generate local support and enhance Drug Court effectiveness. <sup>106</sup>

Makkai has noted that Drug Courts should not be constrained to dealing with those appearing on drug charges or first-time offenders because the costs involved in running a Drug Court make it unlikely that they would be a cost-effective mechanism for dealing with such offenders. <sup>28</sup>

### **Suspended sentences**

Drug Courts are a specialist form of suspended sentences. Suspending sentences involved the court imposing a sentence of imprisonment, and then suspending its operation for a period of time while the offender is released on specific conditions (bond). Bonds can contain conditions relating to matters such as probation supervision, associates, abstinence from drugs, and participation in treatment. If the offender breaches any of the conditions, he/she might be liable to serve the sentence originally imposed or face other consequences. If no breach occurs during the bond period, the offender can be discharged. <sup>101</sup> The main benefit of suspended sentences is that they provide the coercion to treatment of real and specific consequence for non-adherence to the conditions of the suspended sentence, without additional court costs. Suspended sentences share many of the same concerns as Drug Courts, such as the possibility of net widening. That is, individuals who would not otherwise have received a custodial sentence are given such a sentence so that they can be diverted to treatment via a suspended sentence.

## Pre-release diversion

An inmate may be eligible for early release from detention into a structured, supervised treatment program to address their drug problems and assist with re-integration into the community.<sup>7</sup> Alternatively, an inmate could be transferred to a community-based treatment program that provides 24-hour supervision. In this latter option, the offender is still regarded as being in custody.

## Characteristics of effective diversion systems

### *General characteristics*

A number of reviews of diversion systems have identified the characteristics of effective diversion programs. Russell identified that programs that were able to demonstrate effectiveness in reducing re-offending used multi-modal approaches, connecting to a cross-section of other community resources; addressed the characteristics of the individual offenders; were properly designed, staffed, supervised and funded, providing each offender with adequate hours of intervention; were based on cognitive-behavioural and social-learning intervention approaches; reinforced pro-social behavioural, focussing on promoting pro-social behaviour rather than on eliminating anti-social behaviour; provided high risk offenders with more intensive interventions; and provided offenders the opportunity to develop skills in preventing and managing relapse.<sup>7</sup>

The US National Highway Transport Safety Administration and the National Institute on Alcohol Abuse and Alcoholism specified criteria for effective drink-driver programs.<sup>16</sup> These were assessing offenders for alcohol-related problems and recidivism, selecting appropriate sanctions and remedies for each offender, including provisions for appropriate treatment in the sentencing order where required, monitoring compliance with treatment, acting swiftly to correct non-compliance.

Guidelines for best practice in diversionary schemes for vehicle crime have been developed by Smith from UK Policing and Reducing Crime Unit.<sup>92</sup> While these guidelines are not specific to programs for drug-related offenders, the principles have relevance for drug-related diversion strategies. In particular, Smith noted the need to maintain program integrity, to target criminogenic needs, and to use incentives to keep participants involved.

## Standards for diversion

On the basis of a review of the literature and consultations with experts, ADCA has suggested key principles for best practice in diversion.<sup>7</sup> These principles are reproduced below.

## **Philosophical base**

The program is based on the principle of harm reduction. It is regarded as a trigger for change that involves interplay of many inter-related social factors including employment, finance, health and legal issues.

## **Range of options**

There is a broad range of diversion options that can be tailored to address individual circumstances.

## **Legislation**

State legislation is consistent with, or at least not contradictory to, legislation with other states.

## **Planning**

Police, offenders/clients, correctional services, juvenile justice, treatment services, magistrates and judges, court workers will be involved in planning, implementing and reviewing the diversion system.

## **Communication**

Key stakeholders involved in the delivery of the program have clear communication systems. Procedures that outline the role and function of the participants are regularly reviewed.

## **Program documentation**

Both formal and informal diversion practices are documented clearly. Workers involved in the various processes are provided with guidelines and a flexible framework in which to operate.

## **Clarity of roles**

Processes and guidelines are outlined to ensure good diversion practice is recognised as a legitimate part of the work of police, courts and others for whom diversion may not be considered 'core business'.

## **Client rights**

Diversion does not compromise the rights an offender would enjoy during the normal course of the criminal justice system, in particular, rights to procedural fairness, the right to appeal and protection from self incrimination.

## **Accessibility**

A range of well targeted programs are available to offenders regardless of their age, preferred substance, gender, cultural background, geographic location and economic status.

## Follow-up

Appropriate follow up services are available to offenders once their legal obligations have been fulfilled.

## Training

Training is provided to all those expected to deliver various aspects of the program.

## Funding

Programs are funded on a 3-year basis with clear procedures for review and a specific allocation for evaluation.

## Evaluation

Programs are evaluated according to agreed outcome measures and in a way that allows comparisons across state and territory borders.

# Existing diversion strategies in NSW

## *Overview*

Table 1 presents the diversion strategies that are currently used in NSW. The table cross-tabulates the timing of diversion strategies by the government departments with main responsibility for particular diversion strategies. This format aims to illustrate how the main responsibility for initiating diversion shifts across departments from pre-arrest to pre-release. However, few diversion strategies are implemented by a single department – most require the involvement of several government departments and non-government organisations.

Those diversion strategies that are specific to NSW are discussed below. While it was beyond the terms of reference of this report to review the various treatment interventions to which offenders can be referred, some treatment interventions that are specifically established as diversion options are mentioned below (e.g. Traffic Offender Programs). The reason for including such programs stems from the fact that people consulted for this project tended to nominate such interventions as ‘diversion strategies’ when they are not diversion strategies, they are treatment interventions to which offenders are diverted. These treatment interventions are included only to demonstrate where they fit in the diversion system.

It is noted that drug-treatment programs tend not to be designed specifically for offenders, they are generally available for anyone with drug problems that meet their respective criteria, including clients not currently involved in the criminal justice system. Similarly, some diversion strategies are not specifically designed to deal with drug-related offenders.

Finally, diversion strategies for young people are not the same as for adults. As there is significant overlap, the strategies are not presented separately. However, note is made of strategies that apply only to young people or adults.

**Table 1 Currently used diversion strategies by government department<sup>1</sup>**

Department <sup>2</sup>	Pre-arrest	Pre-trial	Pre-sentence	Post-sentence	Pre-release
Police	Informal warnings under common law  Formal warnings and cautions under <i>Young Offenders Act</i> (Juveniles)				
Attorney General's (Court Services)		Sex offenders' program <sup>3</sup> (Adults)	Delay of sentencing (Griffiths Remand) TOPS CAPS	Intervention as part of sentence: Supervised by Corrective Services / JJ Supervised by court: Drug Courts (Adults) Diversion from detention as part of sentence (e.g. CSO)	
Juvenile Justice (Juveniles)		Youth Justice Conferences	Forensic Program		Early release to intervention e.g. IPU
Corrective Services (Adults)			Conferencing		Transfer to treatment programs: female carers to residential treatment TCs in jail  Early release

Notes: 1. Drug treatment programs in adult and juvenile detention centres and in the community are not included here, as they are not diversion programs, they are the treatment programs to which offenders can be diverted. 2. 'Department' refers to the main Government Department responsible for implementing/initiating the diversion of offenders, recognising that most programs are inter-departmental. 3 The Sex Offenders' Program is not a drug-offenders diversion program, but is included as a relevant model.

## **Pre-arrest**

### **Police: Informal warnings**

Under common law in NSW, individual police officers have discretion to not charge a person with an offence. They have the power to simply send him or her on their way with a warning. There have been some concerns about net widening and accountability (described above). During consultations for this project, it was suggested that consideration be given to incorporating into the diversionary system an informal warning plus the option of treatment for minor offenders. This would have the advantage of providing referral to treatment without a conviction being recorded. This option would have little coercive power to actually get people into treatment. However, it could be possible to improve its effectiveness by incorporating incentive schemes. A key informant consulted for this project responded to this idea as follows:

*'I think it is a fantastic idea to incorporate an informal warning with the chance of treatment. All my findings support the fact that police deal with people informally all the time anyway - so why not give them the chance of going to treatment? Many won't take it up, but some will. Also, it is possible to introduce incentive schemes. For example, one program I have heard about from the US gives out free food coupons to people who attend drug rehabilitation programs. Even offering a free lunch might attract a few people.'*

### **Police: Formal warnings and cautions under *Young Offenders Act 1997***

For most non-violent, summary offences, a warning may be given by an investigating official (generally a police officer). Children who have previously offended or been dealt with under the *Young Offenders Act* are not excluded from receiving warnings. Conditions or additional sanctions cannot be attached to warnings. Records of warnings must be kept, but the children involved cannot be identified. Children need not admit to the offence to receive a warning.

More serious offences can be dealt with by way of cautions. A caution notice must be given, containing certain information such as the child's name; person who gave the caution; details of the offence; and the purpose, nature and effect of the caution. To receive a caution, the offender must admit to the offence and agree to receive a caution. While cautions are generally to be given by police in police stations, a respected member of the community can give them if this is considered appropriate by the investigating officer. The court can also issue cautions under the Act. The only condition that can be given with a caution is a request that the offender provides a written apology to a victim of the alleged offence. Records of cautions are kept, so children do receive a criminal record as a result of cautions.

## ***Pre-trial***

### **Conferencing programs**

‘Conferencing sits at the top of a hierarchy of possible pre-court interventions, comprising informal police warnings for summary offences, formal police cautions and conferencing. Formal cautions and conferences are available for summary offences and indictable offences that may be tried summarily pursuant to Part 9A of the *Criminal Procedure Act*, excluding the more serious matters, including sexual offences and drug trafficking offences.

Police officers are required by the Act to consider the appropriateness of less formal interventions, before taking more formal interventions or court proceedings. Cautions and conferencing are only available where the young person has admitted the offence. A conference is preferred over a caution or warning having regard to factors including the degree of violence involved in the offence, the effect on the victim and the child’s history of offending.’<sup>107</sup>

Three conferencing programs for juvenile offenders have been successively trialed in NSW: 1) the Wagga Wagga juvenile cautioning program since 1991, 2) Community Youth Conferences 1994-98 and 3) Youth Justice Conferences since 1998. Youth Justice Conferences were established by the *Young Offenders Act 1997* and are coordinated by the Department of Juvenile Justice. The objectives of the *Young Offenders Act 1997* are to establish:

- a) an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings;
- b) a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences; and
- c) youth justice conferences to deal with alleged offenders in a way that enables a community based negotiated response to offences, emphasises restitution and the acceptance of responsibility by the offender, and meets the needs of offenders and victims.

Offences covered by the Act are summary offences and indictable offences that may be dealt with summarily pursuant to Part 9A of the *Criminal Procedure Act*. A number of offences were explicitly not covered by the Act, including sexual offences and most offences under the *Drug Misuse and Trafficking Act 1985*. Legislation for the Act to include drug offences has been approved by Cabinet. Some people consulted for this project thought that conferencing was not appropriate for drug use and possession charges because such crimes have no ‘victim’. Others suggested that there can be ‘victims’ of drug use, for example, when families of drug users suffer as a result of a person’s drug use. In such circumstances, conferencing could be appropriate.

The Act does not apply to adults. There is no reason in principle, however, why the scheme could not be so extended.

Children who have admitted guilt and agree to conferencing may be referred to conferencing by specialist youth police officers, the Director of Public Prosecutions or a court (at any time before or during

court proceedings). Conferences can be convened at any place agreed to by the participants. Participants can include the convener, police, legal aid, the offender, the victim, family members, and support people for the offender and for the victim. Outcomes of conferences can include the participation of the child in an appropriate program to address a cause of the offending behaviour.

The NSW Bureau of Crime Statistics and Research is currently conducting an evaluation of participant satisfaction with Community Justice Conferences. The people consulted for this project on Youth Justice Conferencing gave mixed reports on their impressions of its effectiveness. Reported advantages of the program are that it is inclusive, comprehensive, and allows people to communicate. However, a number of problems relating to implementation were identified. These included: a) a lack of programs to which offenders can be referred, b) lack of awareness among police about the existence of the program, c) overly high community expectations when the program starts to work well and, d) the possibility of net widening. One informant expressed concern that young people might be being arrested so that they could receive a formal caution, then receive a record that they might not have otherwise received. However, the Police Service data indicate that there has been an increase in legal processes (police interventions) with young people, but not an increase in arrests per se. Further, it appears that this increase is likely to be due to factors other than the Young Offenders Act. Clearly, the impact and outcomes of youth conferencing will only be known if an appropriate evaluation is conducted.

## Court-referred Sex Offenders Program

The NSW Pre-Trial Diversion of Offenders Program (Cedar Cottage) is not a diversion program for drug-related offences, but is included here as a relevant diversion model in NSW. The program is being trialled over 2 years by the Department of Health as a diversionary program and is separate to the Sex Offenders Programs run by Corrective Services for prisoners.

The NSW Pre-Trial Diversion of Offenders Program has a statutory base, the *Pre-Trial Diversion of Offenders Act 1985*. The Act provides for certain categories of child sexual assault offenders to be diverted from certain sentencing outcomes into a 2-3 year treatment program. The diversion occurs after charges have been filed but before the matter proceeds to conviction or entry of judgement. Immediately following being charged with defined child sexual offences, the Police have the responsibility of giving the offender a brochure about the program. The onus then shifts to the offenders to nominate whether they wish to apply. If they do not, the usual course of prosecution proceeds. If an offender wishes to apply for an assessment, they indicate this in the **Local Court** prior to entering any plea or giving an indication of plea. An adjournment is then granted for a period not exceeding 4 weeks in which the **Director of Public Prosecutions** will conduct their assessment of eligibility. If a person is eligible, they are then referred for clinical assessment of suitability at the program. A further adjournment is made of up to 8 weeks. If a person is assessed as suitable, they are then asked to formally enter their plea(s) in the Local Court. Upon entering plea(s) of guilt to all charges, they can then commence treatment at the Pre-trial Diversion

Program, run by the **Department of Health**. The matter is next heard in the **District Court**, where the offender is convicted with respect to each of the offences and enters an 'Undertaking' to participate in the program following the 'reasonable directions' of the Director. These directions are set out in a treatment agreement that is provided to the Court, having been signed by the offender. There is often a difference in time of several months between entering pleas in the Local Court and an Undertaking in the District Court. Consequently, the program provides a brief report to the District Court regarding progress by the offender in this period. Progress by offenders is assessed at regular intervals throughout treatment and detail of those assessments is provided to partners or former partners of offenders (if they want this information). If an offender satisfactorily completes all aspects of treatment, at the conclusion of 2 years there is no further legal mandated requirement to continue with treatment.

If a person breaches conditions of their treatment agreement (and therefore their Undertaking), the matter is referred to the District Court as a breach of Undertaking. At the District court the Judge has a discretion which may be exercised. As at July 1996, the District Court had accepted recommendations made by the Program Director with respect to continuation, exclusion or continuation with an extension of time. If a person is excluded from the program at this point in time, they are sentenced for the offences for which they have been convicted. The general sentencing principle is that participation in the program is not taken into account. If an offender seeks an extension of time and this is supported by the program, it may be granted for an additional period of up to 1 year, making a maximum total of 3 years. The program recommends offenders continue for a substantial period of therapy on a voluntary basis following the conclusion of their mandated period.

The program is unique in that a legislative basis provides an incentive for offenders to plead guilty and thereby gain access to treatment. Convictions are recorded but entry into the program precludes imprisonment or other sentences provided treatment is successfully completed. Conviction on the basis of guilty plea(s) relieves the child victim(s) of giving evidence in contested matters. A second unique feature is that, while applying to the criminal processes in prosecuting an offender, the stated purpose of the legislation is protection of the identified child victim(s).

The sex offender program provides a model for court diversion to treatment that avoids the economic and emotional costs of a court trial, and allows for rapid entry to treatment. Net widening would be an issue if offenders see treatment as an option to avoid trial and a likely prison sentence.

## ***Pre-sentence***

### **Community Aid Panels**

'Community Aid Panels (CAPs) are an example ... of a mediation program for adult offenders, although they are also an option for dealing with juvenile offenders... The panels are used after a plea of guilty has been entered but before sentencing by the court and are not used as a means of trial diversion. The Court

will normally adjourn for a period of three months to allow the offence and related matters to be discussed before a panel. The panel consists of a police officer, a lawyer and two members of the community who will discuss with the offender (and the offender's family where the offender is a juvenile) the circumstances of the offence and any underlying problems. The panel will then recommend a course of action that could involve voluntary community work, skills training or counselling. The matter is then returned to the Court for final determination. It has been suggested that it would be desirable if offenders who have complied with recommendations of a panel were not required to return to Court.' (pp. 363-6) <sup>101</sup> As CAPs is not an *official* program, there was no single organisation or person from whom information could be obtained and variation between programs, for example, inclusion criteria, is likely. The CAPS program at Bankstown Local Court, for example, tends to not deal with drug charges such as use and possession, but deals with minor offences like offensive behaviour, shoplifting and offensive language.

As victims are not required to participate, CAPs have been criticised for not addressing the offender's emotions of shame and anger, and not encouraging the offender to feel empathy for the victim. <sup>101</sup> A number of other criticisms were made in relation to CAPS during consultations for this project. Firstly, there were concerns about procedural fairness. There are no legislative constraints to ensure that the offender does not do more than the sentence would have required. This violates the principle that diversion programs should not make a person do more or suffer more than would have been the case with the criminal justice system. That is, the response should not exceed that which is warranted by the offence. It was alleged that CAPS has tended to be excessive in its recommended course of action. A further criticism is that the offender does not 'volunteer' for CAPS – coercion is involved. Finally, due to a lack of guidelines, there has allegedly been considerable variation in its implementation. No formal evaluation was found to verify or refute these criticisms or to demonstrate effectiveness.

## Delay of sentencing

In New South Wales the **Griffiths Remand** is available under common law. This allows an offender to be released from custody while the court assesses their behaviour and capacity for rehabilitation before imposing a sentence. The sentencing officer may specify attendance at treatment as part of bail or as a condition of their recognisance order. The Probation and Parole service (for adults) or the Department of Juvenile Justice (for young offenders) provides the court with a pre-sentence report. This report outlines the outcomes of the drug assessment and/or recommends particular drug-treatment interventions (e.g. Attendance Centre, Drug and Alcohol Intervention Program (DAIP) or an AOD service provided by Department of Health or a non-government agency). The *NSW Crimes Act, Section 556(A)* provides the option for no conviction to be recorded. Alternatively the person may be placed on a bond under **Section 558** which could stipulate that they enter into or continue AOD treatment. <sup>7</sup>

The demand for pre-sentence reports has increased, suggesting an increase in the use of Griffiths Remands. For example, the Probation and Parole Service provided 15,631 reports in 1993-94, and 20,167

in 1997-98.<sup>108</sup> Given increasing demand and limited resources, in 1998 Probation and Parole negotiated a protocol for court reports. The court now requests specific reports from Probation and Parole so that comprehensive reports are not prepared for each offender. According to one contact from Probation and Parole, this protocol is reportedly working well, but has not yet been formally evaluated.

Consultations for this project have suggested that the Griffiths Remand is 'not as successful as people think'. It was purported that there is a tendency for offenders under a Griffiths Remand to not get adequate supervision, to not participate in treatment, and to commit further offences. In fact, it was suggested that offenders commit offences while under a Griffiths Remand as a means of delaying sentencing, because additional court reports are required with each new charge. This adds to administrative costs. Furthermore, sentence delays tend to decrease the effectiveness of sentencing.

A specific treatment intervention to which Magistrates might refer offenders, if the offender pleads guilty, is the **Traffic Offenders Program (TOPS)**. There are nine such programs in NSW, including two run by Juvenile Justice (Mt Penang and Newcastle), two run by the Department of Corrective Services (Sutherland and Campbelltown), one run by an Ambulance Officer in Blacktown. Each program is independent, so there is variation between programs. There is no legislative basis for referral to TOPS - referral is informal. The offender, the solicitor or the Magistrate can initiate referral, and it is dependent upon one of those parties knowing about TOPS, regarding TOPS as appropriate, and having access to TOPS. There are no fixed criteria for Magistrates in referring offenders to TOPS. The focus of TOPS is responsible driving, they do not aim to treat alcohol abuse or dependence. The Roads and Traffic Authority is currently evaluating TOPs.

Another program to which Magistrates might refer offenders in the near future is **conferencing**. The Department of Corrective Services has established a restorative justice program to be administered by its Restorative Justice Unit. The unit will be responsible for the conduct of victim-offender family group conferences. The conferences will be conducted as part of a pilot scheme to commence in Sydney from September 1999. While the conferences have not been established as a diversionary program, it is possible that a pre-sentence report written by Probation and Parole could suggest conferencing and the Magistrate could defer sentencing under a Griffiths Remand to allow this.

### Juvenile Justice forensic program

The Forensic Program provides pre-sentence mental health assessments of young offenders referred by the court. This is currently a means of diverting some young offenders from detention.

## ***Post-sentence***

### **Intervention as part of a sentence**

#### **Supervised by Corrective Services / Juvenile Justice**

A magistrate or judge may specify that offenders participate in particular AOD interventions as part of their sentence. In NSW, adult offenders can be required to attend DAIP (described below), complete a specified number of hours at an Attendance Centre, or attend an AOD treatment service provided in the community or through the Offender Management Program under the supervision of their Probation & Parole Officer. (pp. 20-21 <sup>7</sup>) Juvenile offenders can be sentenced to an Intensive Program Unit (details below).

#### *DAIP*

The Probation and Parole Service of the Department of Corrective Services operates the Drug and Alcohol Intervention Program (DAIP) as a post-sentence intervention. Eligible offenders following conviction are required, as part of their sentence, to enter into a recognisance order with a special condition to attend DAIP. This intervention is a structured, relatively brief, therapeutic program consisting of an 18-hour skills-based group-work component followed by an intensive, short-term period of one-to-one supervision. The intervention is planned to last up to 6 months although in individual cases this can be extended to 9 months. As an 'early intervention', DAIP targets drug and alcohol offenders who have little previous contact with the criminal justice service and who are not 'entrenched' long-term users. The aim is also to target those who are 'motivated' to change their pattern of substance use, although it is acknowledged that the assessment of motivation in these cases is extremely difficult. DAIP is currently offered from nine locations throughout the State including four locations outside the Sydney metropolitan area. In the 1997/98 financial year, 420 offenders participated in the scheme. The intervention has yet to be formally evaluated but follow up of offenders who have completed their orders is underway. <sup>39</sup>

#### *Intensive Program Units*

The Intensive Program Unit (IPU) program is part of a range of non-custodial sentencing options for juvenile offenders whose offending is related to emotional/behavioural problems which are amenable to counselling, either immediately or after a period of intensive casework designed to stabilise them in the community.

When preparing court reports, Juvenile Justice Officers (JJOs) screen young offenders and, if they appear appropriate for this program, they are referred to the IPU for an assessment. Should a young person be sentenced to a Control Order (detention), the Magistrate/Judge may support a recommendation in the background report that they be granted conditional discharge with IPU supervision after a specified period of time.

Legislative options which magistrates can invoke, and to which departmental discretion can apply, to direct suitable young people into the program are a) IPU Probation and b) Section 24(1)(c) of the

*Children (Detention Centres) Act 1987*. There are also a number of other options such as Parole, Griffiths Remand and Recognisance that are used less frequently. Under certain conditions, Youth Justice Conferencing may result in an outcome that recommends IPU involvement. This involvement is carried out in accordance with Protocol 7, under the provisions of the *Young Offenders Act (1997)*.

Prescribed attendance is required for the client to meet the requirements of the supervision order. Strict accountability requires weekly intensive monitoring of client participation. Monitoring includes looking at the client's attendance, engagement and progress related to defined and targeted outcomes.

A number of procedures are established to increase the cultural effectiveness of the program. For example, all Aboriginal clients are to be met by an Aboriginal worker on their first day of attendance; all group work involving Aboriginal youth is to involve an Aboriginal facilitator; and regular consultation relating to case work is to be conducted with families, elders and community. Similar involvement and consultation with non-English-speaking-background communities is also required.

Strengths of IPUs that were identified during consultations for this project relate to the use of protocols and training to maintain standards. IPU staff work in accordance with a central, overarching model and philosophy which incorporates a 'holistic' (multisystemic), group counselling model, engaging families and other systems wherever possible and culturally appropriate workers as needed. All staff members are trained in the skills specific to this model and follow an Intervention Manual that contains week by week session content and a resource guide. IPU staff members work closely with other agencies to promote successful reintegration into the community.

### **Supervised by the court: Drug Courts**

New South Wales has commenced a two-year trial of a US-style Drug Court.<sup>109</sup> The program has as its primary aim the cessation of illicit drug use by offenders whilst participating in the program together with a reduction in recidivism and crime associated with illicit drug use. The *Drug Court Act 1998* established a court of statutory jurisdiction to deal with drug offenders who commit certain offences. The court is of the same status as the District Court and has all the jurisdiction and functions of the Local Court and District Court necessary to perform its functions. The Drug Court team is led by the Drug Court Judge and includes an Associate to the Senior Judge and a Court Registrar plus officers from the Office of the Director of Public Prosecutions; Legal Aid Commission of NSW; Attorney General's Department; Department of Corrective Services (Probation and Parole); Department of Health (Corrections Health Service); and the NSW Police Service.

Drug dependent people who are charged with offences (other than certain offences involving violence, sex offences or the supply of drugs) can be referred to the Drug Court on indicating that they intend to plead guilty. Specifically, the types of offences dealt with by the Drug Court are non-violent offences such as: break and enter; possession and use of prohibited drugs; fraud/forgery offences; offences involving stealing from a person where no physical harm is incurred; and supplying quantities of prohibited drugs below the indictable limit.

The NSW Drug Court trial deals with offenders who are drug dependent, adult, residents of Western Sydney, likely to go to gaol and willing to participate, who committed non-violent offences and plead guilty. Offenders within the program are convicted and sentenced by the Drug Court but have their sentence suspended. The program lasts for at least 12 months and consists of: treatment for the drug problem; random urine tests to detect illicit drug use; intensive supervision and case management by the Probation and Parole Service; frequent judicial supervision; provision of a range of support services for educational, employment, and health issues and other conditions as specific requirements as set by the Court. Everyone who participates in the Drug Court trial undertakes in a 7-day detoxification program in detention.

People accepted into Drug Court programs must agree to abide by the conditions set by the court and are subject to rewards and sanctions imposed by the Drug Court, in relation to their compliance with those conditions. Failure to comply with the program may result in the original sentence being imposed while successful completion means the sentence is revisited. The Drug Court is required, when terminating a person's program, to reconsider the sentence first imposed on the person at the time the program began.

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During consultations for this project, a mixture of optimism and some concern was expressed. On the positive side, the ability to encourage people to enter and stay in treatment was seen as a unique advantage of Drug Courts:

*It is already our experience that the threat of eventual sanction is little incentive to people who are drug dependent to remain in treatment. Constant monitoring, encouraging and sanctioning are needed to keep them involved, and these are powers which are fundamental to a Drug Court.*

*There are no similar powers existing within the law that could be used by Magistrates or Judges to achieve this.*

On the other hand, the following concerns were raised. Specialisation within the judicial system could raise complex issues such as the creation of a set of principles and precedents cut-off from the general court system. Also, the costs of setting up Drug Courts, administering them and placing offenders before judges on a mandatorily-prescribed, weekly basis are substantial. The justification of this cost was questioned in light of other less expensive and flexible powers that could be given to judges such as the power to impose suspended sentences. There was a range of opinion on the evidence relating to their success. The Bureau of Crime Statistics and Research has been given the responsibility of conducting a comprehensive and ongoing evaluation of the Parramatta Drug Court. At the end of the 2-year trial period, decisions can then be made as to the success or otherwise of the initiative.

## Non-treatment alternatives to detention as part of sentence

Judges and magistrates have a number of alternatives to full-time detention when sentencing offenders: community service orders, periodic detention, bonds and home detention. While these might not be regarded as 'treatment' interventions, they do divert offenders from the prison system. While these options

can be useful diversion strategies, there is a concern about net widening. A review of the use of periodic detention and community service orders found that alternative sentencing options had served to 'widen the net' to include people who would otherwise have received bonds or fines.'<sup>110</sup>

### **Community Service Orders (CSO)**

A CSO can be imposed with the offender's consent. Judges and Magistrates may sentence suitably assessed offenders to perform community work to a maximum of 500 hours. The offenders are allocated to perform unpaid work at non-profit agencies and are supervised during their community service. In 1998, Probation and Parole supervised 4,972 offenders on CSOs.<sup>39</sup> In 1997-98, 1,318 Juvenile Justice clients were placed on CSO.<sup>111</sup>

### **Periodic detention**

A periodic detention order requires an offender to be in the Department of Corrective Service's custody for a specific period of each week of the sentence of imprisonment to which the order applies. About one fifth of people in adult detention have been sentenced to periodic detention.<sup>111</sup> Periodic detention satisfies the need for a sentence to provide punishment, without directly or significantly interfering with an offender's ability to live in a community, to live with family, to attend treatment, or to participate in training and/or employment.

### **Home Detention**

In February 1997, Home Detention was introduced as an alternative manner of serving a term of imprisonment of up to 18 months. Offenders subject to Home Detention are required to remain within their residences unless undertaking approved activities. Participants might be required to perform community service, enter treatment programs, submit to urinalysis and breath analysis and seek and maintain employment. Probation and Parole Officers monitor offenders' compliance with Home Detention conditions on a 24-hour-a-day basis, utilising electronic means. Breaches of conditions result in further penalties, including return to Court. Further offences or unauthorised absences result in imprisonment. In 1997-98, 267 offenders were placed on home detention and 79% of these were successfully completed. Most (71%) of the 49 women placed on home detention were the primary carers of young children; 7% of those placed on home detention identified as Aboriginal.<sup>39</sup> People in a home detention program are not considered to be in gaol, so they can receive a Department of Social Security pension, if eligible. The Department of Corrective Services' Research and Statistics Unit is evaluating home detention.

### **Bonds**

Under **Section 554** of the Crimes Act, offenders can be sentenced to a bond to be 'of good behaviour'. Specific conditions cannot be placed on offenders under s554. If this bond is broken, the offender has to

pay a fine. Consultations for this project suggested that a facility to place conditions on offenders under Section 554 would improve the effectiveness of this option.

## ***Pre-release***

### Transfer of prisoners to treatment programs

#### **Transfer of female carers of children to residential program**

A woman inmate who is the primary carer of young dependent children may be transferred under Section 29(2)(c) to a residential rehabilitation program that can provide 24-hour supervision and a structured program for her and her children. The woman is still regarded as an inmate.<sup>7</sup> This option is not often used, particularly as a special unit for mothers and children aged less than 5 years has been built at Emu Plains. Women under this option are still 'in custody' with no access to Medicare or Social Security. Medical expenses are covered by Corrections Health. Some treatment agencies require Social Security payments to be paid towards board. If this option were to be expanded, it would have significant cost implications.

#### **Therapeutic communities in detention**

Therapeutic communities have been established in three detention centres by Corrective Services. These Therapeutic communities do not aim to compete with non-government treatment services in the community. They aim to overcome the transitional problems between the two systems while providing a complete component of a person's treatment program.

### Juvenile Justice: Early release

The Director General of Juvenile Justice may discharge a person subject to control from detention if arrangements for the supervision of the person during the period of detention are made. This provision is available under the *Children (Detention Centres) Act, (1987)* and Section 24 (1) (c).<sup>112</sup> That is, juvenile offenders who have been sentenced to detention can be released from detention early and placed in therapeutic programs such as IPUs (described above) and residential treatment programs (such as the Ted Noffs Foundation's Program for Adolescent Life Management).

### Corrective Services (Probation & Parole): Early release

Offenders sentenced to detention can receive a minimum term plus an additional term during which the prisoner can be released to parole. When the total sentence exceeds 3 years, Probation and Parole Officers prepare pre-release reports for the releasing authorities. When released to parole supervision, an offender can be subject to specific conditions such as specified treatment. Failure to abide by these conditions can

result in revocation of the parole order and return to prison. Probation and Parole Officers are responsible for monitoring parole conditions. In 1998, 2,557 offenders were supervised on a parole order.

The following concerns were expressed about post-sentence and pre-release diversion from detention. First, court reports rely upon the skills and knowledge of the assessor and the adequacy of assessment protocols. Some concerns were expressed about the ability of Probation and Parole Officers to conduct adequate assessments and make appropriate recommendations. In particular, the adequacy of Probation and Parole Officers' skills to do thorough assessments of drug and other issues and links with the treatment system to know where to refer offenders were questioned. In contrast to these concerns, a case was also made that court reports were efficiently and effectively prepared. Only an objective evaluation will be able to address this concern.

Second, pre-release programs were seen to need a greater focus on transitional programs (to facilitate the transition between detention and independent life in the community); coordinated approaches (dealing with, for example, housing and employment); and follow-through (supporting parolees until they are managing well and no longer need support). It was suggested that at least 12 months post-release support be given because this is the period of highest risk for recidivism and other problems.

## **Strengths and weaknesses**

A fundamental strength of the NSW diversion system is that it is supported by the various jurisdictions involved in the criminal justice system. For example, the *Justices Act*, Section 80AB (1) states that A Justice or Justices shall not sentence a person to full-time imprisonment unless satisfied, having considered all possible alternatives, that no other course is appropriate.<sup>7</sup> Accordingly, NSW already has a number of diversion options in place and experience in the implementation of diversion programs.

However, many more weaknesses than strengths in the system were identified by the ADCA diversion project.<sup>7</sup> Many of these weaknesses have been identified in the discussion above on individual diversion options, but are provided below as a form of summary of common weaknesses. Firstly, there is no systematic process for assessment. Assessments are conducted by a wide range of people and agencies with varying levels of competence and differing expectations of diversion. The system can be cumbersome, repetitive, and inconsistent. Even if a quality assessment is conducted, there is little evaluative information to inform magistrates, judges, police and others about the effectiveness of treatment options. This reduces the confidence of magistrates and others to make referrals. Furthermore, there are significant shortages and gaps in the availability of drug-treatment services. A survey of residential services in NSW found that only 32% of people seeking admission were actually admitted.<sup>113</sup>

With any diversion strategy, there is the potential for net widening. If police, magistrates, judges or probation officers consider a diversion program to be less onerous than the usual criminal justice

sanction, they might apply it to a person who would not otherwise be sanctioned at all. Where there is a lack of formal guidelines and procedures for diversion, diversion can lack of accountability, producing unequal outcomes for offenders in equivalent circumstances.

A third area of weakness relates to inter-sectoral cooperation. While most sectors agree that an inter-sectoral approach is required, there are many barriers to actually achieving this. For example, it takes time to develop and maintain inter-agency relations and to learn what each other can and cannot do. There can also be a tendency towards territorialism and to over-estimate what others can or should do. Difficulties can also arise because of different values and political pressures in different systems.

Finally, there is an absence of protocols for dealing with special needs groups and people from minority groups. While most people consulted for this project identified the need for culturally appropriate diversion strategies and treatment programs and for addressing the needs of special-needs groups such as the intellectually impaired, few people could provide concrete guidelines for how this could be done.

## **Opportunities and threats**

There is currently a great opportunity to increase the number and quality of diversion options in NSW. There is political and community support for diversion strategies, for example, in the Drug Summit recommendations and the National Diversion project. This support will provide additional monetary and human resources for diversion. There is also political and community concern about drug problems. Additional resources are being made for improving the quality and quantity of drug treatment interventions at the state and federal level.

However, there are a number of threats to current and possible diversion strategies. In particular, if the community and media perceive that diversion strategies are too 'soft on drugs', that diverted offenders are taking treatment places from voluntary clients, or that diversion programs are perverting justice or making the community unsafe by releasing violent criminals, the political will to support them could wane. Furthermore, diversion strategies tend not to be well evaluated. If diversion strategies are expanded before careful evaluation trials are conducted, resources can be wasted and diversion strategies could be undeservedly regarded as ineffective.

## **Relevant national and state policies, plans and strategies**

Diversion in NSW has been and will be influenced by a number of national and state policies and plans, as described below. These can generally be regarded as 'opportunities' for diversion, as they give diversion government priority and resources.

## ***National***

### **National Illicit Drug Strategy (1997)**

On 2 November 1997 the Prime Minister announced the first installment of a National Illicit Drug Strategy 'Tough on Drugs'. The strategy aims to focus on reducing the supply of drugs and on reducing demand through enhanced drug education in schools and the broader community, expanded treatment options and the development of more effective treatment options. The 1999/2000 Federal Budget allocated \$221 million over four years for the National Illicit Drug Strategy. A major thrust of the Strategy is to steer illicit drug users away from the criminal justice system into treatment programs.

### **National Drug Strategic Framework 1998-99 to 2002-03**

The National Drug Strategic Framework 1998-99 to 2002-03 was prepared under the direction of the Ministerial Council on Drug Strategy (MCDS).<sup>114</sup> Principles that were seen as important for the success of the strategy are harm minimisation; a coordinated, integrated approach; a partnership approach including health, law enforcement, customs, education and the community and business sectors; a balanced approach, evidence-based practice, and social justice. The Framework objective that is most relevant to this plan is 'to reduce the risks to the community of criminal drug offences and other drug-related crime, violence and anti-social behaviour'.

### **Council of Australian Governments (1999)**

A special Council of Australian Governments' (COAG) meeting was held on 9 April 1999. The Council, comprising the Prime Minister, Premiers, Chief Ministers and the President of the Local Government Association discussed a national approach to illicit drug use.<sup>115</sup> The agreed outcomes from the meeting that are particularly relevant to this diversion plan are the agreements for States and territories to provide the law enforcement basis for diverting drug users into treatment programs; for the Commonwealth to provide funding for significantly expanded early intervention treatment and rehabilitation places linked to police and court diversion; and for the development and trial of diversionary treatment programs within the gaol system for dependent users. Leaders agreed to partnership arrangements to link the education, law enforcement and treatment efforts of all levels of government and the wider community. A total of \$220.464 million over 4 years was allocated for the national implementation of these (and other) agreements.

It was noted that implementation of the agreements will require a number of issues to be addressed. These issues include training of front-line police, managers and supervisors; the development of transparent and accountable structures for appropriate diversion by police to ensure police are not exposed to accusations of corruption; the development of new relationships and protocols between police and

treatment agencies; a review of legislation to ensure that it facilitates diversion; the development of monitoring and evaluation systems; and adequate funding for the development, implementation, evaluation and refinement of the new system. To facilitate the national implementation of these agreements, the Inter-Governmental Committee on Drugs has established five working. The five groups are joint planning; evaluation and monitoring; education and training; police diversion; and assessment, treatment, education and post-treatment support.

## **State**

### **NSW Drug Summit**

In May 1999, the New South Wales Parliament resolved to agree to the holding of a Drug Summit at Parliament House, involving Members of both Houses of Parliament and invited community representatives. The primary aim of the Drug Summit was to recommend a course of action for dealing with 'the illicit drug problem' for the Government to consider.<sup>116</sup> One of 20 principles of the Drug Summit was that it 'believes that the solutions that will be of most benefit to the community are those that can successfully divert drug users away from the criminal justice system and into treatment.'<sup>117</sup> A number of recommendations with ramifications for diversion were made and are reproduced in Appendix 1. These include expansion and improvement of drug treatment services for offenders diverted to treatment and trialing or implementing a range of diversion strategies. The diversion strategies to be introduced include police cautioning based upon Victorian trials of police cautioning programs, a pre-trial diversion program based on Victoria's CREDIT program, conferencing for adults, of a Drug Court for juveniles, and expansion of home detention for offenders with drug problems.

### **Summary of current programs and plans**

As summarised in Table 2, various diversion strategies are in place and there are existing plans to enhance these.

**Table 2 Summary of current diversion programs and plans for drug-related offenders in NSW**

Existing strategies	Planned strategies
<b>PRE-ARREST</b>	
Informal police warnings under common law	COAG agreement: Introduction of Victorian model of formal procedures for police diversion to assessment. From Drug Summit: Statewide implementation of cannabis cautioning scheme for adults in possession of small amounts of cannabis From Drug Summit: Pilot of caution-plus compulsory treatment for adults in possession of small quantities of illicit drugs other than cannabis in Illawarra and Far North Coast
Formal police warnings and cautions under <i>Young Offenders Act 1997</i>	From Drug Summit: <i>Young Offenders Act 1997</i> be amended to include minor drug offences
<b>PRE-TRIAL</b>	
Youth Justice conferencing scheme.	From Drug Summit: Adult offenders conferencing program to be piloted.  From Drug Summit: Pilot of pre-trial court diversion to treatment program in Lismore, based on Victorian CREDIT program.
<b>PRE-SENTENCE</b>	
Delay of sentencing – (Griffiths Remand)	From Drug Summit: legislation to be introduced to clarify the power of the courts to refer offenders to treatment using the Griffiths Bond From Drug Summit: Bail Act to be reviewed to assess its efficacy in dealing with drug offenders, particularly recidivist offenders
<b>CAPS</b> Forensic Program (juveniles)	The Aboriginal Justice Advisory Council is looking at establishing circle sentencing.
<b>POST-SENTENCE</b>	
Intervention as part of sentence – supervised by P&P/JJ	Reintroduction of suspended sentences recommended by NSW Law Reform Commission
Intervention as part of sentence – supervised by Court e.g.: Drug court trial (adults only):	From Drug Summit: Juvenile Drug Court to be trialed in western Sydney
Sentencing to community options: home detention (adults only), community service	From Drug Summit: home detention to be expanded
<b>PRE-RELEASE</b>	
Transfer to a treatment program: transfer of female carers to residential programs, TCs in prison	From Drug Summit: Integrated Care Trial for women prisoners in transition to the community
Early release to intervention: IPU or other treatment (Juveniles), P&P (adults)	From Drug Summit: Commonwealth funding to be requested for an Integrated Care Trial for juvenile justice detainees

## Costs and benefits of diversion strategy options

Rigorous evaluations, let alone cost-effectiveness studies of diversionary programs, are rare.<sup>49,60</sup> In Australia, they appear to be non-existent. Table 3 contains a compilation of the limited amount of information that could be collected for this overview. Many of the costs and benefits provided below are based upon observation or ‘educated guess’ rather than rigorous cost-benefit research. Detailed costings of options were rarely available. Costs that could be generalised to all situations were not available. No diversion option has a single monetary cost. The cost will depend upon a range of factors, including existing infrastructure at the time of implementation, the extent of an intervention (number of offenders involved), the location (e.g. urban or remote), and the exact method of implementation. For example, for any diversion option, the costs associated with implementation such as evaluating the strategy and supplying appropriate interventions (assessment, education and/or treatment) are not fixed. Given that each of the diversion options in Table 3 has been discussed above, only the more salient non-monetary costs and benefits are presented.

Some costs and benefits are applicable to more than one option, so they have not been included in the table. Unless otherwise stated, it is assumed that all of the strategies have the potential to reduce drug use and reduce offending if the option is implemented in a ‘best practice’ manner. Diversion strategies that keep offenders with drug abuse/dependence problems out of detention can place strain on the families of those offenders. Thus, full family assessments and consideration of the support needs for family members of offenders need to be considered and costed. A benefit of any diversion strategy that coerces offenders to enter and remain in treatment is that it increases the exposure of offenders with drug problems to treatment. This is particularly important because coercion to treatment contributes to retention in treatment and treatment outcomes are associated with retention in treatment.<sup>118</sup> Finally, it is assumed that all options will require resources for program development, training of key players, and evaluation.

**Table 3 Costs and benefits of a range of current and proposed diversion strategies**

Option	Costs	Benefits
<b>PRE-ARREST</b>		
Police: Informal warnings	<p>Reduced police and court costs</p> <p>Reduced income from fines</p> <p>Problems with accountability if there are inadequate protocols</p> <p>Community concern about lack of punishment for offences</p> <p>Loss of deterrent potential of legal consequences for offending</p>	<p>Can avoid negative impact of exposure to legal and corrective systems e.g. criminal record, labelling.</p> <p>Appear to exert equivalent effects on recidivism among first offenders as court appearances at less cost. 119</p>
Police: Cautioning schemes	<p>Reduced court costs</p> <p>Increased police effort</p> <p>Offender receives a criminal record</p>	<p>As above, but protocols increase accountability.</p>
Police: Caution-plus schemes	<p>Reduced court costs</p> <p>Increased police effort</p> <p>Increased treatment costs</p>	<p>As above, plus coercion to treatment can be beneficial if treatment is indicated.</p>
<b>PRE-TRIAL</b>		
Juvenile Justice: Youth Justice Conferencing	<p>Reduced court costs</p> <p>Increased effort for police and others involved</p>	<p>Legislative base makes YJC more consistent and accountable than previous conferencing programs.</p> <p>Focus on rehabilitation and restitution rather than punishment.</p>
Courts: Pre-trial diversion to treatment (e.g. CREDIT, Sex Offender Program, DAAP)	<p>Savings in court costs.</p> <p>DAAP has had funding of \$220,000pa with referrals increasing from 300pa to 800pa. The increase in referrals has caused a 16-week delay in assessments, so that funding is not adequate for 800 offenders pa.</p>	<p>Early entry to treatment (relative to post-trial diversion).</p>
<b>PRE-SENTENCE</b>		
Police: CAPS	<p>Increased effort (cost) for police and others on panel</p>	<p>Opportunity for treatment and non-judicial forms of restitution</p>
Courts: Delay of sentencing (Griffiths Remand)	<p>Costs of assessment, referral and case-management by JJ/PP, cost of treatment.</p> <p>No savings in court costs.</p>	<p>Opportunity for treatment to be obtained and judicial/correctional options to be avoided</p>
<b>POST-SENTENCE</b>		
Courts: Participation in an intervention as part of a sentence (supervised by JJ or P&P)	<p>Costs of assessment, referral and case-management by JJ/PP.</p> <p>Cost of treatment.</p> <p>No savings in court costs.</p> <p>Cost of each pre-sentence report written by P&amp;P: \$415</p>	<p>Participation in treatment encouraged.</p>

Courts: Drug courts	As above, but additional court costs. For example: trial of 1 Drug Court in NSW over 2 years is costing \$5.6million. Cost benefit analyses indicated that in Miami for every \$US1 spent on Drug Courts approximately \$US7 is saved elsewhere in the criminal justice system <sup>94</sup> (p. 5 28)	Coercion into treatment can increase length of stay in treatment, hence treatment effectiveness Savings in costs of detention, probation supervision, police overtime and other criminal justice system costs, victimisation, theft reduction, public assistance and medical claims costs to the criminal justice costs. <sup>105</sup>
Suspended sentences	No additional court costs	As for Drug Courts
Courts: Circle sentencing	4-5 times the time required for sentencing	Culturally appropriate interventions. Community involvement in sentence & its implementation.
Corrective Services: Detention	Average cost per day \$148. Note: Due to economies of scale, significant cost savings do not occur until there are enough offenders diverted to close a whole wing. Prison experience can be detrimental e.g. 'harden' criminality, stigmatisation, depression, and transmissible diseases. Dependents (e.g. children) lose their support	Satisfies the community's & the victims' needs for retribution. Time out from lifestyle that contributed to offending Time out for the family of the offender. Opportunity for participation in various programs e.g. education & AOD program Opportunity for participation in vocational training
Juvenile Justice: Detention	Cost per day: \$316 <sup>120</sup> Prison experience can be detrimental e.g. adoption of criminal identity during formative years	As for adult in detention
<b>PRE-RELEASE</b>		
Juvenile Justice: Early release	Reduced cost for detention centres Cost of IPU services	Treatment provided while in the community can promote reintegration
Corrective Services: Early release	Reduced cost for detention centres Cost of Probation & Parole Cost of transitional housing	The estimated value of CSO work in 1996-7 was \$14,3 million. Recidivism is high in the first 3-6 months. Such programs can be effective in reducing recidivism. Interventions, if/when provided while in the community, can promote reintegration
Corrective Services: Female carers of children to residential program	Reduced costs of detention Medical expenses need to be met by Corrections Health Board not met by Social Security	Women able to care for children outside a correctional facility
Corrective Services: TC in prison	For a 40 bed program, 1 clinical manager and 5 counsellor therapists would be required in addition to normal security costs.	Transition between detention and community facilitated.

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**AT ANY STAGE**

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Health/NGOs: AOD Treatment

Cost varies with the intervention. For example: Sessional counselling can cost \$75 per hour if delivered by a person of Health Education Officer level. The cost of staffing and providing IT for a 24-hour counselling and information service could approach \$200,000. A comprehensive, residential rehabilitation centre with capacity for 8 adolescent clients at any one time could cost \$1million in capital and \$800,000 recurrent. The cost of providing methadone in public clinics per client per year ranges from \$1,500 to over \$6,600. <sup>121</sup>  
Literature suggests for every dollar spent on treatment, \$7 is saved.

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AOD problems treated as a health problem, rather than legal/justice issue

## **A suggested model for diversion in NSW**

### ***Goals and objectives***

The goal of the proposed diversion model is to reduce recidivism among people who commit drug-related offences. That is, to shorten the criminal career of offenders or to reduce their level of offending.

Towards the achievement of this goal, the objective of the diversion model is to increase the proportion of drug-related offenders who are diverted from the criminal justice system in an ‘appropriate manner’. An appropriate manner depends upon the history of the offender. As a general principle, it is to divert offenders with less involvement in drug abuse and crime away from the criminal justice process, and to coerce offenders with greater drug dependence and criminal involvement into treatment (see Figure 1).

The suggested strategy is to increase the appropriateness and effectiveness of the criminal justice system in dealing with drug-related offenders, by increasing the range and effectiveness of diversion options.

Performance indicators need to be specific, measurable, time-bound and achievable. Possible performance indicators could relate to the following key areas of outcome:

- Increase in the number of diversion options available for drug-related offenders.
- Increase in the proportion of drug-related offenders, who do not have significant drug problems and who are unlikely to re-offend, who are diverted from the criminal justice system.
- Increase in the proportion of drug-related offenders, where treatment is indicated, diverted to appropriate treatment.

- Reduction in recidivism among drug-related offenders.

### **Target groups**

Diversion strategies should be in place at each opportunity, from pre-arrest to pre-release. Within each stage, strategies need to ensure that they are accessible, appropriate and effective for all individuals. It is recommended that priority be given to those groups who are disproportionately affected by exposure to the criminal justice system and/or disproportionately represented in the criminal justice system. For example, young people, males, Aboriginal people and some ethnic groups are disproportionately represented in the adult prison system. In 1996, 60% of convicted offenders were under 30 years of age. Less than half of the general population are in this age group. 45% of prisoners were in the 20-29 year age group.<sup>8</sup> In 1996, 84% of proven adult offenders were male, 94% of adult prisoners were male.<sup>8</sup> The imprisonment rate of Aborigines (938 per 100,000) is about 4.2 times higher than that for the non-Aboriginal population (224 per 100,000).<sup>8</sup> Between 1993 and 1996 in New South Wales, Aboriginal youth were 18.2 times more likely to be detained than non-Aboriginal youth.<sup>122</sup> Some research suggests that this is a result of policing practice rather than sentencing.<sup>123</sup> Other research has suggested that, at least in the case of juvenile offenders, Aboriginal offenders received harsher penalties than other offenders.<sup>124</sup> While the percentage of inmates in adult prisons born overseas (30%) is similar to the general community, countries in South East Asia, the Pacific Islands (except New Zealand), and the European Balkans are over-represented.<sup>32</sup> In Juvenile Justice centres, Indo-Chinese, Lebanese, Pacific Islanders and Maoris are disproportionately represented.

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It is further recommended that priority be given to interventions for offenders at risk of re-offending, particularly when the diversion option is more costly than the cost of normal process.<sup>49</sup> Most offenders are not recidivists. Among adults, the recidivism rate has been found to be 35% for males and 38% for females.<sup>67</sup> Coumarelos identified that 70% of juveniles who appeared in court had no subsequent criminal appearances (proven or unproven). Further, a disproportionately large percentage of court appearances tend to be accounted for by a small percentage of juvenile offenders. Coumarelos identified that nearly half (45%) of court appearances were accounted for by the 15% of juveniles who had more than two court appearances.<sup>126</sup> Consequently, it is not cost-effective to provide intensive interventions to all first offenders, given that most do not return to court. It is, however, likely to be cost-effective to target first offenders who are at risk of re-offending, if they can be reliably identified. Salmelainen identified illicit drug use as one of the main factors associated with re-offending by juveniles.<sup>31</sup> Other risk factors for re-offending identified by Salmelainen include family factors (e.g. degree of parental supervision, relations with parents, parental involvement with the child), schooling (e.g. truancy, disruptive behaviour in school,

leaving school early), unemployment, socialising with criminal peers, and attitudes that are pro-crime. Similar risk factors for substance abuse by adolescents have been identified. A comprehensive literature review by Spooner and colleagues identified that the risk factors for drug abuse and delinquency overlapped significantly, that these behaviours often co-exist as a problem behaviour syndrome, and that interventions that are appropriate for the treatment of one tend to have effect on the other.<sup>127</sup> In sum, it is recommended that priority be given to offenders who are at risk of re-offending, and that assessment be used to identify offenders who are at risk of re-offending.

## **Principles**

The following principles for diversion are recommended.

Philosophy:

- Consistency with philosophy of harm reduction
- Harm to others should be the basis for criminalising behaviour

Prevention of negative consequences:

- Minimisation of net-widening

Strategy:

- Intersectoral approach, particularly between law enforcement and health, consistent with the principles and partnerships set out in the *National Strategic Framework 1998-1999 to 2002-03*
- Strategies should build upon existing structures and practices to increase cost efficiency and minimise disruption
- Strategies should be sustainable, based on sound design and involving stakeholders
- Solutions need to target specific problems (i.e. not be seen as panaceas or appropriate for all groups of offenders, all crimes, and all geographic areas)
- Strategies should be evidence-based
- The individual needs and backgrounds of offenders need to be considered, including pregnant women<sup>128</sup>, people with an intellectual disability,<sup>129</sup> people with a dual diagnosis,<sup>130</sup> people from different cultural backgrounds,<sup>131</sup> and so on.

Treatment interventions:

- Best practice in drug treatment should be adhered to:
  - Comprehensive approach – address multiple contributors to drug-related problems and offending
  - Provision of aftercare
  - Documentation of all program protocols
  - Adequate training and supervision of staff
  - Evaluation used for program accountability and ongoing improvement
- Mandated treatment options should be triggered by evidence of an abuse or dependence disorder, not just drug use

- Treatment for offenders should be *resourced* so offenders diverted to treatment do not deprive voluntary clients of treatment.

### ***Criteria for choosing strategies***

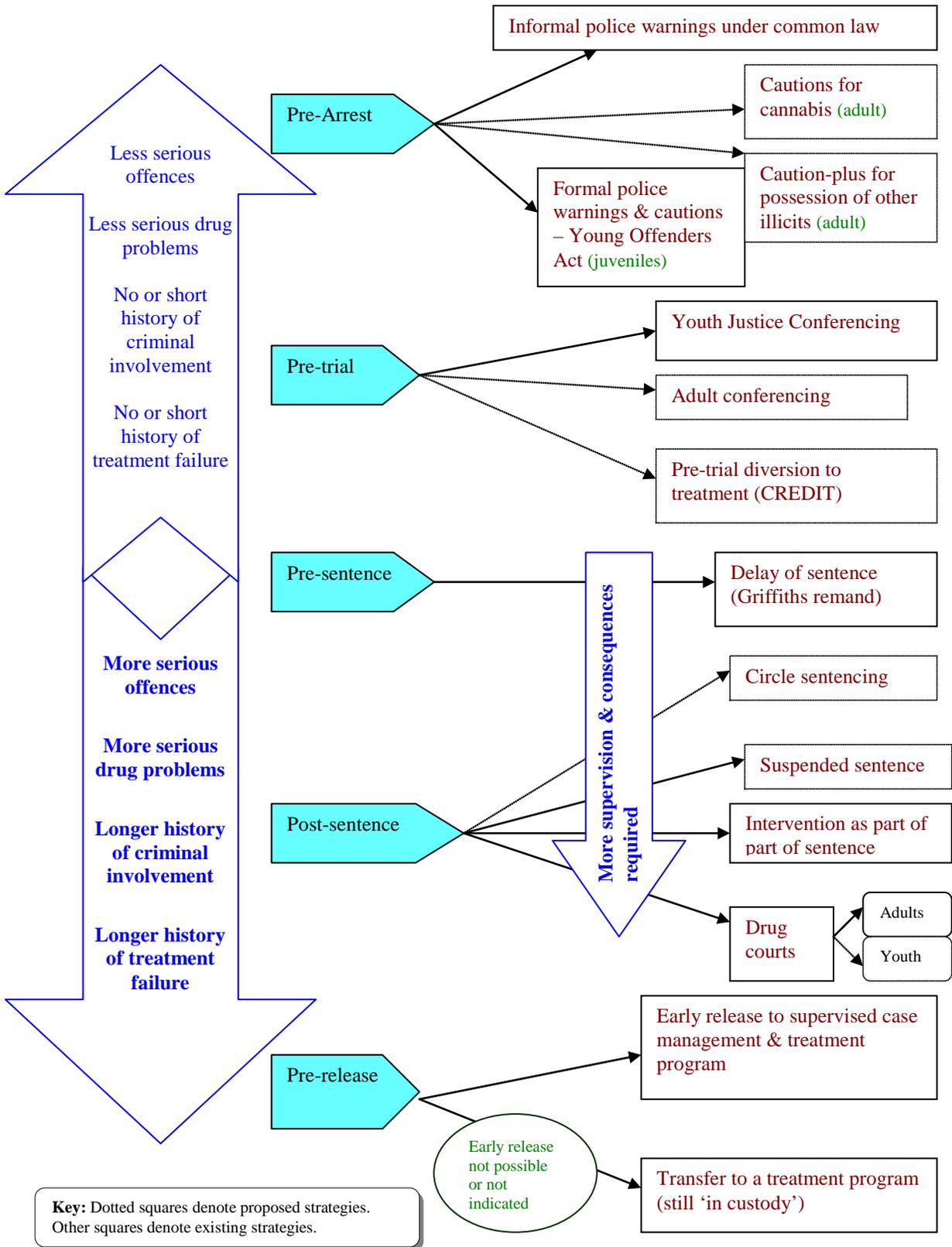
The following criteria for choosing diversion strategies are recommended:

- acceptability to key decision makers and stakeholders
- acceptability to the general public
- demonstrated need, for example, due to a gap in the diversion system
- consistency with public policy
- likelihood of high positive impacts and low negative impact
- cost-effectiveness
- compatibility with existing strategies/plans
- feasibility, including availability of resources.

### ***The NSW diversion model***

In consideration of the goals, principles and criteria outlined above, a model for the diversion system in NSW is proposed. It is recommended that the model for diversion of AOD related offenders in NSW should incorporate diversion strategies at each opportunity for diversion. These strategies should be evidence-based and appropriate to the offence and to the offender. That is, there should be a range of appropriate means of diversion from (pre-arrest) police warnings and cautions for simple, victimless crimes relating to non-problematic use of 'soft' drugs; (pre-trial) conferencing for non-serious crimes, to prevent or reduce involvement with the criminal justice system when a community-based intervention can be effective; (pre-sentence) delay of sentencing for more serious crimes requiring court involvement when drug problems are significant, and (post-sentence) for those for whom more coercion to treatment are required, suspended sentences, then Drug Courts. Finally, (pre-release), for those for whom detention has become necessary, supervised early release schemes are recommended. A model for diversion in NSW is illustrated in Figure 2.

**Figure 2 NSW Diversion Model**



## Conclusions and recommendations

It is recommended that a range of diversion strategies that are appropriate to the history and risk of criminal and drug-abuse behaviours be available for drug-related offenders. Offenders who are neither substantially involved in crime or drug abuse, nor at significant risk of being so involved in the future, should receive sufficient sanctions to deter continued offences, such as a warning or caution from police, without further consequences. The aim of such early diversion is to avoid unnecessary costs and negative consequences of involvement with the legal system. The rationale for diversion in these cases is that involvement with the criminal system for those who are unlikely to re-offend is not cost-effective and likely to have unreasonably negative consequences for the offender. As the criminal career and drug problems escalate, a series of diversion strategies should be available that are appropriate to the history and potential of the offender.

These strategies should include pre-trial strategies such as conferencing; pre-sentence strategies such as the Griffiths Remand; post-sentence strategies such as suspended sentences; and, for those with the most severe history of repeated failure with drug treatment and judicial interventions: Drug Courts. Strategies that involve family and community members, such as conferencing and circle sentencing are recommended as a means of increasing the cultural appropriateness of criminal sanctions. The aim of these diversion strategies is to use the offence as an opportunity to divert the offender to activities and interventions that will have more positive outcomes in terms of health, welfare and criminal activity than would detention. The rationale for diversion in these cases is that treatment in the community is likely to be more cost-effective than detention. For those offenders who enter detention because the crime necessitates detention or because all other diversion strategies have failed, it is recommended that pre-release diversion be a priority. The aim of diversion in this case is to prevent recidivism by providing appropriate interventions prior to release from detention as well as after leaving detention.

It is noted that a range of diversion strategies is already in place, and that plans exist to fill a number of the existing gaps. Given the current state of diversion strategies and plans in NSW described in this report, the following further recommendations are made:

4. A trial of suspended sentences be conducted. Suspended sentences would provide the level of consequences, structure and supervision of a Drug Court with less cost.
5. All diversion programs be carefully evaluated.
6. A single body be given the brief of overseeing diversion in NSW and the resources to do so. This body should be able to work across government departments and with non-government organisations.

## **Appendix 1: Relevant excerpts from the government response to the NSW Drug Summit**

### SECTION 2 - YOUNG PEOPLE AND DRUG ABUSE

The Government will expand the Department of Juvenile Justice's Intensive Programs Units to provide alcohol and drug treatment infrastructure for young people diverted to these programs through the Drug Court.

The existing NSW Drug Strategy Branch in NSW Health will be expanded and refocussed as the NSW Health Drug Programs Bureau. A Senior Clinical Consultant will be appointed to provide advice on service development and delivery.

The Government will provide immediate additional funding for drug treatment services to enhance those already announced as part of the Fighting Drugs Policy and in the recent Budget.

### SECTION 3 – HEALTH MAINTENANCE AND TREATMENT SERVICES

A five year Drug Treatment Services Plan will be developed in consultation with the new Expert Advisory Group on Illicit Drugs to ensure that all regions of NSW have a service system that is comprehensive, innovative and evidence based.

Treatment services will also be enhanced to meet demand from police and court intervention and compulsory treatment schemes. NSW will seek funding for these services under the Commonwealth Drug Diversion program.

Accreditation standards will also be introduced for service delivery by non-government organisations.

### SECTION 4 - CASE MANAGEMENT, COORDINATED CARE, SERVICE STANDARDS

The Government proposes to undertake three Integrated Care Trials for Drug Users on a staged basis, commencing in 2000.

The trials will involve the full range of government, non-government, and community services, and will also seek to involve GPs. They will involve referral and linkage of clients to services including health, education, legal advice, housing, family support, childcare, child protection, financial advice, employment and training.

(One of the trials) will target... women inmates with drug and alcohol problems approaching release and in post-release. This trial will include the establishment of a transitional centre.

A third trial will be conducted if Commonwealth funding can be obtained under the coordinated care trials program. This trial will focus on up to 20 juvenile justice detainees or young people at risk of entering the juvenile justice system.

## SECTION 6 - BREAKING THE DRUGS AND CRIME CYCLE

The Government will promote whole of government co-ordination of drug services by giving the Special Minister for State primary responsibility for ensuring a co-ordinated government response.

The Government will continue the Cabinet Committee on Drugs, and establish an Office of Drug Policy within The Cabinet Office.

A range of schemes to break the cycle of drug misuse and crime will be trialed. Under these schemes police and courts will refer offenders with drug problems to treatment and rehabilitation in appropriate cases.

A trial Cannabis Cautioning Scheme, based on the approach taken in Victoria, will run statewide for twelve months from April 2000. The scheme will apply to adults caught by police in possession of small amounts of cannabis. Offenders who are cautioned will be confronted with the health and legal consequences of cannabis use in a cannabis cautioning notice issued by police.

A Drug Offenders Compulsory Treatment Pilot will be trialed in the Illawarra and Far North Coast areas for twelve months from July 2000. The pilot will apply to adults caught by police in possession of small amounts of a prohibited drug. Police cautions for these offences will be conditional upon the offender signing an

agreement to undergo assessment and treatment. Again, this pilot is based on the approach taken in Victoria.

The Young Offenders Act 1997, which has been operating successfully since its introduction in April 1998, will be expanded to include minor drug offences in the formal system of warnings, cautions and conferences for which it provides. The scheme will aim at early intervention for young people with drug problems, providing a greater chance of their long term rehabilitation.

To complement the Drug Court approach, an Early Court Intervention Pilot will be conducted at the Lismore Local Court for twelve months from July 2000. The scheme will target less serious offenders who are motivated to seek treatment and their progress will be closely supervised by the Court.

A Youth Drug Court pilot project will be conducted over two years commencing in July 2000. Unlike the adult Drug Court, it will target alcohol abuse as well as illicit drugs.

There will be a detailed comparative evaluation of each of these new schemes. The Bureau of Crime Statistics and Research will also include research on best points of intervention for drug users in its review of drug related research.

The Government will retain legislation to discourage the widespread use and sale of cannabis.

The Government will review all current drug law enforcement policies to ensure they target solutions to specific problems, reflect a commitment to evaluation and full cost accounting, and appropriately balance a range of strategies.

The Government will bring forward a proposal to establish an adult offenders conferencing program on a pilot basis, to promote restorative justice for victims and the community in respect of offenders who commit drug-related and non-violent offences.

## SECTION 7 - DRUGS IN CORRECTIONAL CENTRES

Significant new resources will be allocated to combat drug supply and enhance treatment programs in correctional centres, with the aim of breaking the cycle of drugs and crime for this high risk group.

Home detention will be expanded as an important sentencing option for offenders with alcohol and other drug problems.

High and multiple needs inmates will be targeted in an Integrated Care Trial for Women Prisoners in Transition to the community. This trial will include the establishment of a Transitional Centre.

## SECTION 9 - DRUG AND LAW ENFORCEMENT: DEALING WITH DRUG RELATED CRIME

The Government will introduce legislation to clarify the power of courts to refer offenders to rehabilitation using Griffith bonds.

The Government will review the Bail Act to assess its efficacy in dealing with drug offenders, particularly recidivist offenders.

Minor drug offenders will be referred by police to compulsory assessment and treatment under a trial scheme to be piloted in Illawarra and the Far North Coast.

Police will be provided with guidelines for dealing with drug incidents such as overdoses, needle and syringe programs, cannabis cautioning and compulsory treatment programs. The guidelines will allow officers to respond appropriately while ensuring police resources are used effectively to target drug-related crime. <sup>132</sup>

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