

Size Does Matter: Establishing a Drug Court Pilot in Tasmania

Tasmania is the only state in Australia yet to pilot or establish a drug court within its jurisdiction. Before the Tasmania Law Reform Institute (TLRI) embarked on its research project, the former Attorney General, Judy Jackson, was of the view that drug courts were an “old idea”. Responding to a question in Parliament in June last year she said:

“The issue here is that we are a small jurisdiction, and it is not possible for us to have a court for every single class of crime. {she later went on to say}. . .The drug court suggestion is a fairly old idea.”

The first Australian drug court was established in New South Wales in 1999. Drug courts were established in South Australia, Western Australia and Queensland in 2000. Victoria implemented its drug court regime in 2002. The Tasmanian Government currently employs only a pre-court Police Diversion Program to divert illicit drug users away from the criminal justice system. This program, which I will take a brief look at later, is fundamentally different to the established drug court models that function in other Australian jurisdictions.

This paper will ask:

Is the reluctance in Tasmania to trial a drug court a result of the perceived size of the drug problem in the state?

Is it based on the idea, that is, that the drug problem is too small to warrant a move to a new type of court?

For the purposes of my discussion today I would like to deploy a rather inelegant term, which I think is rather useful for considering the issues involved in Tasmania: diseconomies of scale. Diseconomies of scale are like economies of scale but with the implication that they are negative; that is, size mitigates against effectiveness. This term is especially relevant to the debate about drug courts in Tasmania. In order to assess whether the size of the market is insufficient for a drug court to perform efficiently and effectively, this paper will focus on two key variables

1. the level of demand from offenders with drug problems, who have committed an offence under the influence of drugs or to support a drug habit, and
2. the underdeveloped capacity of the drug and alcohol service sector.

Within these terms, a larger scale jurisdiction would be more efficient and effective because of the increased demand from illicit drug offenders and offenders with drug problems (in plain volume terms) and the increased capacity of the drug and alcohol sector to cope with such demand.

To examine these issues of size and diseconomies of scale my discussion will ask two questions:

- 1) What is the extent of illicit drug use and drug-related crime in Tasmania? and
- 2) Do current treatment and support services have the capacity to integrate and collaborate with a drug court pilot?

1. The extent of illicit drug use

The first step in the TLRI's project to determine the need for a drug court pilot in Tasmania is to map the size and shape of illicit drug usage and drug-related crime in the state. Mapping the size of the drug 'problem' in Tasmania is controversial. The conventional view is that Tasmania is too small to have a serious illicit drug problem and its geography separates it from the dangerous heroin and cocaine markets on the mainland.

While Tasmania is very different to other Australian jurisdictions, significant data collections indicate that, despite its size, Tasmania suffers from widespread licit and illicit drug usage.

Some of the key findings specific to Tasmania from a recent national study¹ indicate that.

¹ See Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: State and territory supplement*, (2005) AIHW cat. no. PHE 61. Canberra: AIHW. The survey provides a general picture of the extent of drug use in Tasmania in epidemiological terms. While the AIHW survey data is currently the best available, and indeed the only data that measures prevalence of illegal drug use across the general community, there is a major methodological limitation to this study. The study surveys a relatively small Tasmanian population. While the national results are based on a survey of almost 30,000 Australians aged 14 years and over, in the case of Tasmania, only 1,208

- 15.4% of the Tasmanian population recorded recent illicit drug use (that is, in the past 12 months), higher than the proportions in both New South Wales and Victoria:
- More than 1 person in 100 used the following illicit drugs recently: marijuana/cannabis (approx. 11), pain-killers/analgesics used for non-medical purposes (approx. 4), methamphetamine (approx. 2), and ecstasy (approx. 2);
- Tasmania recorded the second-highest proportion of persons within the States and Territories recently using pain-killers/analgesics for non-medical purposes (3.9%);
- 40.1% of the total Tasmanian population are found to be at risk or high-risk of alcohol related harm in the short-term, which is the second-highest of all States and Territories and 4.7% above the national average; and
- 48.6% of the Tasmanian male population are found to be at risk or high-risk of alcohol related harm in the short-term, which is the second-highest of all States and Territories and 8.3% above the national average.

The findings of the this study are complemented by the Tasmanian findings from the Illicit Drug Reporting System (IDRS)²:

- Cannabis remains the most widely used illicit drug both with Injecting drug users (IDU) and the community more generally, although its prevalence in recent years has appeared to decrease,
- Tasmania is experiencing increased availability of methamphetamine and increased prevalence of use of this drug (like other jurisdictions). There are also an increased number of younger (late teen) and female consumers of the drug.

people are sampled for the survey. Consequently, in terms of illicit drug use, it means that we are estimating population levels from around 150 people recorded as using any illicit drug in the past 12 months, and just a handful of people using drugs 'harder' than cannabis.

² See Bruno, Raimondo, *Tasmanian Drug Trends 2004: Findings from the Illicit Drug Reporting System (IDRS) (NDARC Technical Report No. 215)*, 2005: NDARC. The IDRS is Australia's national illicit drug monitoring system and is conducted each year in every State and Territory by the National Drug and Alcohol Research Centre (NDARC). NDARC acknowledges that the IDRS gives a somewhat biased picture of local substance use as the study deploys a methodology that relies on interviewing regular and frequent illicit drug users (IDU). As the populations used for the IDRS in Tasmania is quite limited (i.e. 100 people) and as the study is designed primarily to act as an early warning indicator of the availability and use of illicit drugs, the implications to be drawn from the data require cautious consideration. Furthermore, the Tasmanian study is essentially a Hobart analysis as the IDU participants are drawn from the south of the State. There has been little specific research examining patterns of drug use within Launceston and the North-West coast.

- There is a significant market in the illicit use of methadone. The drug is easy to access and access has remained stable. Methadone is usually obtained from persons on methadone maintenance programs (and their friends) as a result of threatening or aggressive behaviour,
- The widespread injection of benzodiazepines is a stable feature of Tasmania's illicit drug market with use amongst local IDU consumers at a relatively high level in comparison to other Australian jurisdictions; and
- The availability and use of heroin and cocaine in Tasmania continues to be very low.

The results from these studies confirm that the Tasmanian illicit drug use culture is substantially different from that of other jurisdictions and that has historically been the case. One of the major differences relates to higher patterns of illicit use of pharmaceutical products rather than substances such as heroin or cocaine, due principally to the low local availability of these drugs. There are also specific psychological and physical harms, including overdose, associated with the injection of pharmaceuticals (benzodiazepines) that are less common in other jurisdictions. The danger heightens when the pharmaceuticals are simultaneously combined with methadone syrup or other opioids. Also, trends indicate that the methamphetamine market and patterns of methamphetamine use, while smaller than other jurisdictions, are expanding rapidly. Continuing a trend noted since 2001, increasing numbers of IDU are shifting from being predominant users of opioids to being predominant users of methamphetamine. Two reliable conclusions can be drawn from these recent studies:

- 1) Harmful alcohol consumption is a major issue for Tasmania, particularly for the male population, and
- 2) Comparatively speaking, the recent use of illicit drugs in Tasmania is not insubstantial and there is an illicit drug-using culture of consequence in the state.

2. Drug-related crime in Tasmania

Crime Amongst Injecting Drug Users

Tasmanian Drug Trends 2004 canvasses the extent of criminal and police activity reported by the IDU sample of 100 in southern Tasmania.³ According to the IDRS, almost two-thirds (63%) of the local IDU respondents reported involvement in some type of criminal activity in the preceding month, a level that is significantly greater than that reported in the national IDU sample (48%, total sample size 948). Moreover, the proportion of the cohort reporting recent involvement in crime increased nearly 10% from 52% in 2003 to 63% in 2004. Much of this increase in reported criminal activity can be attributed to the rise in the number of individuals reporting recent involvement in dealing (32% in 2003, 43% in 2004) and recent involvement in property crime (22% in 2003, 34% in 2004). The increase in the proportion of the sample reporting involvement in property crime continues a steadily escalating trend of such involvement across the local samples (from 18% in 2000, 28% in 2002 and 34% in the current study). Relatively few respondents reported involvement in violent crime (5%) or fraud (7%).

There are some interesting differences between the reporting of criminal activity and reporting of arrest. Half (51%) of the local IDU respondents had been arrested in the previous twelve months (compared to 63% who reported involvement in some type of criminal activity in the preceding month). More strikingly, however, the most common ground for arrest was not drug dealing (the most commonly reported crime in the local cohort), but far and away property crime (29%). Smaller proportions of the IDU sample reported being arrested for possession (9%), violent crime (9%) or driving offences (6%). In fact, in 2004 only one person reported being arrested for dealing in the year prior to interview despite the predominance of dealing as the most common criminal activity. As the table below illustrates, the proportions of the IDRS IDU sample reporting arrests for property crime have been steadily increasing: from 16% in 2000 to 29% in 2004. It means that the drug users that constitute the IDU sample in Tasmania are generally more than 20 times more likely to be arrested for property crime than for dealing or trafficking.

³ Bruno, Raimondo, *Tasmanian Drug Trends 2004: Findings from the Illicit Drug Reporting System (IDRS)* (NDARC Technical Report No. 215), 2005: NDARC, p. 143-45.

Table 1. Reported criminal activity among IDU (n=100)

Activity	2000 IDRS %	2001 IDRS %	2002 IDRS %	2003 IDRS %	2004 IDRS %
Crime (% in last month)					
Dealing	49	41	34	32	43
Property crime	18	23	28	22	34
Violent crime	10	4	6	5	5
Fraud	5	4	2	6	7
Any crime	64	56	50	52	63
Arrested last 12 months (%)	43	41	41	46	51
Arrested for property crime	16	13	25	21	29
Arrested for use/possession	9	1	9	2	9
Arrested for violent crime	6	9	14	5	9
Arrested for fraud	2	0	0	3	2
Arrested for dealing/trafficking	1	2	1	0	1

Source: Bruno, Raimondo, *Tasmanian Drug Trends 2004: Findings from the Illicit Drug Reporting System (IDRS)*

Arrest and Diversion data on drug offences

Official police data on drug-related arrests in Tasmania highlight some of the trends in illicit drug usage indicated by the IDRS but does not communicate how fully drug dependent offenders are involved in crimes other than drug crimes to support their dependency/addiction. There is no police data in Tasmania for property offences or violent offences or other types of offences committed under the influence of either illicit or licit drugs (although there is data for drugs/drinking and driving offences).

As the table below shows, between 1996 and 2004 there was a significant increase then decrease in arrests for methamphetamine-related offences – peaking in 2000/01 and 2001/02 and declining in recent years (from 89 in 2001/02 to 39 in 2003/04). Cannabis-related arrests continue to increase across the state: from 736 in 1999/00 to 1830 in 2002/03. As this increasing trend coincides with the implementation of the Police Diversion Program (which I refer to below), it is likely that much of this increase may simply reflect the increase in utilisation of official cautions and diversions by Tasmania Police (which are included in these statistics) over unofficial warnings, which would not have been recorded in these statistics in

preceding years. In contrast to the trend of the preceding five financial years, cannabis-related arrests/diversions declined in 2003/04.

Table 2: Number of arrests (including cautions and diversions) for cannabis, methamphetamine, opioid and cocaine related offences in Tasmania, 1996-2004

Type of offence	1996/ 97	1997/ 98	1998/ 99	1999/ 00	2000/ 01	2001/ 02	2002/ 03	2003/ 04
Cannabis	1079	1196	736	799	1050	1540	1830	1638
Methamphetamine	20	15	7	28	70	89	66	39
Opioids	28	16	25	9	9	34	9	10
Cocaine	0	0	0	0	4	1	0	0

Source: Bruno, Raimondo, *Tasmanian Drug Trends 2004: Findings from the Illicit Drug Reporting System (IDRS)*

The Police Diversion Program allows for police to divert people found using or possessing small quantities of illicit drugs away from the judicial system into health assessment and treatment. It consists of three levels of diversion. Police retain discretionary powers at all times and can charge rather than ‘divert’ a person, depending on the circumstances of the offence. The program appears to be well supported by police. Nearly six thousand offenders (5849) had been diverted under the program from the period July 2000 to the end of June 2005. More than 1000 diversions have been made per annum in each of the past three financial years. Not surprisingly, the majority of these diversions involved cautions or counselling for minor cannabis use offences. Generally, around three quarters of all diversions are a first level diversion. The total number of persons diverted to health intervention (second- and third-level diversions) statewide has increased progressively from 163 in July 2000-June 2001 to 418 in the last completed financial year. Notably, however, over the five-year period represented in the table there has been a dramatic reduction in the number of people who have complied with a Drug Diversion Notice to attend some form of health intervention, assessment or treatment. Over the last three completed financial years, just over half of the second- and third-level drug diversions issued by Tasmania Police were complied with, that is, around half of the offenders potentially diverted to health interventions were instead prosecuted for their drug offence(s).

Table 3: Drug diversions or cautions issued by Tasmania Police 2000-2005

	Jul 2000 – Jun 2001	Jul 2001 – Jun 2002	Jul 2002 – Jun 2003	Jul 2003 – Jun 2004	Jul 2004 – Jun 2005
Number of 1st Level Diversions (Cannabis Caution)	584	820	919	1158	930
Number of 2nd Level Diversions (Brief Intervention)	101	128	203	286	296
Number of 3 rd Level Diversions (Treatment)	62	42	97	101	122
Total number of cautions/diversions statewide	747	990	1219	1545	1348
Cannabis Cautions as a proportion of all cautions/diversion	78%	83%	75%	75%	69%
Total number diverted to health intervention statewide	163	170	300	387	418
Number diverted to health interventions that complied with the request	160 (or 98%)	127 (or 75%)	166 (or 55%)	209 (or 54%)	229 (or 55%)

Source: Tasmania Police

The Drugs/Crime Nexus

While in comparative national terms, 1000 illicit drug cases per annum before the Magistrates Court of Tasmania seems rather small – the court recorded 918 illicit drug offences lodged with it in 2003-04 - this data only represents part of the story, and a small part at that. The connection between drug use and crime is an area of ongoing theoretical contestation, particularly whether and to what extent criminal behavior can be attributed to the use of drugs. As indicated by the IDRS data, we know that other offences, predominantly property offences, are committed by drug dependent offenders or by offenders to support their drug habit.

In their Drug Use Careers of Offenders (DUCO) project, Makkai and Payne investigated the significance of illegal drug use in male criminal behaviour.⁴ They

⁴ See Makkai, Toni and Payne, Jason, “Key Findings from the Drug Use Careers of Offenders (DUCO) Study”, 267 *Trends & Issues in Crime and Criminal Justice* (November 2003) 1. The Drug Use Careers of Offenders (DUCO) project conducted by the Australian Institute of Criminology provides

found that 62 % of all offenders reported regular illegal drug use in the six months prior to their most recent arrest. Offenders most reported regular use of cannabis (53%), amphetamine (31%), heroin (21%) and cocaine (7%). Thirty-five per cent of all offenders reported regular use of two or more of the above illegal drugs in the six months prior to their most recent arrest. The DUCO project also found that:

- 39% of all offenders causally attributed the offence/s for which they were incarcerated to alcohol and/or illegal drugs - 18% to illegal drugs, 9% to alcohol and 12% to both⁵,
- 52% of the total sample reported addiction to alcohol or illegal drugs during the six months prior to the most recent arrest;
- 62% of the total sample reported being intoxicated at the time of their most serious offence - 24 % were high on illicit drugs, 21% on alcohol and 17% on both;
- of those who reported drug use, 51% attributed all or most of their criminal offending to illegal drugs and alcohol;
- regular amphetamine users were more likely to be engaged in violent offending such as physical assault and were significantly more likely to act impulsively; and
- regardless of drug type, *addicted* offenders reported more frequent property offending.

The DUCO project data shows us that despite the relatively modest volume of drug cases in Tasmanian courts (approx. 1000 per annum), Tasmanian illicit (and licit) drug users are more likely to commit crime, especially property crime, than non-drug users and that approximately four in ten people in prison in Tasmania are likely to causally attribute alcohol and/or illegal drugs to the offence/s for which they were incarcerated. Also, one in every two offenders regular using illegal drugs is likely to attribute all or most of their criminal offending to illegal drugs and alcohol. Tasmania

some research evidence of the level of illicit drug use among incarcerated offenders. The DUCO project (male) involved a survey of 2,135 adult male offenders who were incarcerated in prisons in Queensland, Western Australia, Tasmania, and the Northern Territory in mid-2001.

⁵ In the Drug Use Career of Female Offenders Study, 41 per cent of female offenders causally attributed their offending to their drug and alcohol abuse -31 per cent to illegal drugs, nine per cent to alcohol and one per cent to both. See Johnson, Holly, "Key findings from the Drug Use Careers of Female Offenders study", 289 *Trends & Issues in Crime and Criminal Justice* (November 2004), p.5.

is experiencing relatively high levels of harm-related alcohol consumption and also experiencing increased availability of methamphetamine and increased prevalence of use of this drug. It is, therefore, worth noting that the DUCO study also found that amphetamine or alcohol users were more likely to attribute offending to psychopharmacological factors, which implies that individuals commit the crime because of the short- or long-term effects of the drugs themselves.

Tasmania does have a unique illicit drug use culture but it is not one that is separated from the incidence of crime. Most offenders who come to the attention of the Tasmanian criminal justice system have used illegal drugs, mostly cannabis and increasingly methamphetamine, and approximately half of them are addicted to alcohol or illegal drugs during the six months prior to the most recent arrest. The nexus between drugs and crime is as strong in Tasmania as anywhere in the country, but because of its atypical drug usage patterns, the harm minimisation, drug education or drug diversion programs it deploys need to be tailored to the particular needs and types of substances most used within the state.

3. Facilities and Resources

As demonstrated in other Australian jurisdictions (except NSW), it is not necessary to establish, through legislation, a completely separate court to administer sentencing orders aimed at intensive drug treatment and supervision. However, like the other jurisdictions, it is important for functional and symbolic reasons to create a distinct and specialised division of a court, which can be described and understood as a ‘drug court’. The Magistrates Court of Tasmania could, on the will of the government, employ a drug court subject to s 3B of the *Magistrates Court Act 1987* (Tas) and such a court could be based in one or more locations throughout the state. Tasmania has the judicial system and the physical infrastructure in which a drug court could be established. More importantly, it has magistrates whose judicial authority enables them to hear and determine matters in a drug court according to a drug court philosophy.

At one level, therefore, some of the resources are already present - physical and judicial resources – but at another level, considerable economic resources are required to build a drug court with all the features necessary for its successful

deployment. It is the perilegal resources that are a major source of concern in Tasmania. By perilegal, I mean the community and health resources and infrastructure around or near the drug court that support the operation of the court: multi-disciplinary alcohol and drug centres, clinical services, social support services, residential services, detox facilities and more.

Drug courts are distinguishable from traditional courts because they emphasise problem solving and dispute avoidance collaboratively with a wide range of participants and stakeholders. Moreover, as Freiberg has said, drug courts also seek to “re-engineer” how the criminal justice system, health system and systems of social value respond to the problems of drug-addiction. As Freiberg says, for drug courts to be successful they have to promote system change “outside the court house as well as within.”⁶ The key method of promoting system change outside the court house is the development of a genuinely collaborative approach to solving the drug addiction(s) of offenders. Partnerships between the justice and (government and community) health care systems are the basis of the perilegal approach of drug courts in other jurisdictions. As well as relying on traditional court players, such as the magistrate and lawyers, the drug courts equally relies upon alcohol and drug workers, medical specialists, psychologists, social workers and others.

Tasmania has a poorly funded and underdeveloped drug treatment service sector. The sector is composed of the government-administered Alcohol and Drug Service and government-funded programs administered by non-government organisations. Unlike the situation in larger jurisdictions, which were able to provide a reasonably expansive drug treatment and supervision program at the time of drug court establishment, the size and relatively homogeneous nature of Tasmania’s drug treatment service sector presents problems for the establishment of a drug court. By relatively homogeneous, I mean that the majority of drug treatment and alcohol services in Tasmania are clearly better suited to treating alcoholism. National figures confirm that Tasmanian services predominantly treat client’s whose main drug problem is alcohol use.⁷ Fifteen agencies have been identified as providing face-to-

⁶ Freiberg, A., *Sentencing Review: Drug Courts and Related Sentencing Options* Melbourne: Department of Justice (2001), p. 6

⁷ See Shand, F. & Mattick, R., *Census of Clients of Treatment Service Agencies (COTSA) 2001* Sydney: University of New South Wales (2002).

face specialist treatment for alcohol and other drug problems, which is the second lowest number of treatment agencies in Australia (3 %).

The sector struggles to recruit and retain clinically trained specialists able to administer medically-supervised detox or provide psychological treatment to people with illicit drug problems. There is a lack of multidisciplinary health and community support and quality short- and long-term residential services. The small size of the sector means that it may not have the capacity to coordinate a large volume of mandated drug treatment and supervision programs emanating from a drug court. It is estimated that the sector as it currently stands would not be able to assess and treat proficiently and assuredly two or three score drug court cases per annum. Unless developed appreciably, the sector could not maintain ongoing drug court mandated assessment and treatment.

4. Conclusion

The size of Tasmania presents both opportunities and problems for the establishment of a drug court pilot. It is small enough to manage its unique licit and illicit drug culture creatively. For example, it is small enough to set up a drug court to service the whole state rather than particular locales, and it may also be able to focus on particular illicit drugs on the rise, such as methamphetamine.

However, the undersized nature of the illicit drug treatment sector will pose difficulties for the establishment of a drug treatment court. Successful drug court programs rely heavily on an expert and multi-disciplinary alcohol and drug sector. The primary challenge for the establishment of a drug court pilot in Tasmania is not so much the legal and institutional arrangements of the court itself (although they are significant) but the perilegal requirements for the court. The currently available government- and community-managed drug treatment infrastructure is insufficiently resourced to provide the high level, long-term, intensive and integrated case-management required by a drug court. Before a drug court can get up and start running in Tasmania, the justice sector (and the wider community) need to be assured that the drug court program participants will be placed in sufficient high quality and effective treatment programs.

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