



Courts Innovation Program
Brisbane Magistrates Court
Department of Justice and Attorney-General
George Street
BRISBANE QLD 4000
By email: SCCDFeedback@justice.qld.gov.au

27 November 2015

Dear Colleague,

Discussion paper - Reinstatement of the Special Circumstances Court Diversion Program

We welcome and appreciate the opportunity to make a submission on the Discussion paper - Reinstatement of the Special Circumstances Court Diversion Program (“the Discussion Paper”).

PRELIMINARY CONSIDERATION: OUR BACKGROUND TO COMMENT

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd (“ATSILS”) provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education; and Early Intervention and Prevention initiative (which includes related law reform activities and monitoring Indigenous Australian deaths in custody). As an organisation which, for over four decades, has practised at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or

purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

Response:

- 1. What components of the former SCCDP do you think worked well?**
- 2. What lessons can be learned from the former SCCD?**
- 3. What components of QCR do you think work well?**
- 4. How could QCR be improved?**
- 17. Which of the current QCR locations do you consider to work well and why?**

The main component that worked well in the Special Circumstances Court Diversion Program (“SCCDP”) was the case management model, which was a team-based approach to provide holistic care to people that traditional criminal justice systems were ineffective for. The comparable component in the Queensland Courts Referral (“QCR”) is the referral and facilitative model. As mentioned at Part 1.1 of the Discussion Paper, the success of specialist courts is dependent on ‘effective collaboration among criminal justice, mental health, substance abuse and other related services in order to improve defendants’ general health and well-being’. We strongly agree with this statement. The SCCDP and QCR both have advantages however ultimately; their success is dependent on adequate funding to facilitate effective collaboration, rather than the components of each program.

The current QCR locations that work well are those where the service providers and criminal justice system are engaged, and transport to both is reasonably easy for people. It follows that to improve the QCR, greater collaboration is needed between service providers and the criminal justice system, and the person’s ability to access and/or afford transport (to court and to service providers) must be considered when imposing conditions.

5. What do you consider to be the most important aims of the SCCDP?

6. What do you think should be the expected outcomes and benefits of the SCCDP?

7. How can the justice system and the social services sector work together to achieve these outcomes?

The aim of the SCCDP should be to break the cycle of offending behaviour by connecting people with the services they need to address the underlying causes of their offending behaviour. The outcome and benefits that flow from this are in the interests of the individual and the community. The individual can expect an opportunity to access support services that improve their wellbeing, and the community can expect reduced recidivism rates which results in safer communities and reduced pressure on the criminal justice system.

As previously touched upon, successful specialist courts require effective communication between service providers and the legal system. There are many excellent service providers in the community that are not being utilised to their full potential because people are either unaware of their existence, or they do not have the financial means to reach these services. To overcome this, greater collaboration is required between service providers and the legal system, particularly in regards to the eligibility requirements for various services. That said, governments also need to invest in additional support infrastructure – an example of **justice reinvestment** in action.

8. What do you think the purpose of a SCCDP model should be?

9. What is a suitable amount of time for a person to be placed on bail under the SCCDP?

The purpose of a SCCDP model should be to address the underlying causes of offending behaviour so people can be treated by the social services sector, rather than punished by the justice system. To that extent, we support the hybrid model suggested at 4.1.2 in the Discussion Paper.

With respect to the question of bail, we feel this should be determined based on each individual's circumstances rather than a mandatory minimum or maximum. Particular consideration should be given to the question of whether a person in complying with their

bail conditions *to the best of their ability*. Many persons in the SCCDP have complex/high needs including mental health issues, homelessness, addiction issues and debt. There are many reasons that people do not comply with bail conditions including if they do not have the financial means to meet bail requirements (in particular, those that require use of public transport), they do not understand the bail conditions and/or they do not want to participate in the SCCDP. A 'one size fits all' approach can jeopardise the system by not adequately addressing each and every individual need, which is what is required to reduce offending behaviour.

10. How should the initial screening be conducted and by whom?

11. Do you agree a dedicated SCCDP facilitator is required at each location?

12. What should the role of the SCCDP facilitator be throughout the SCCDP process?

13. Who should be responsible in conducting the assessment of the offender to determine suitability and relevant programs?

14. What do you consider the role of an assessment body, like the CAG, to be in the future SCCDP?

24. Who should be responsible to conduct a risk assessment on the offender to determine eligibility, particularly where offenders are charged with violent or sexual offences?

One of the issues we noticed with the previous SCCDP was that many people who breached conditions of their bail did so because they did not want to be part of the program, did not have the financial means to comply with the program, and/or did not understand the conditions of the program prior to entry. To overcome this issue, there needs to be an opportunity for people to receive legal advice on the SCCDP before entering it. To achieve this, we suggest that the initial screening be conducted after the person first appears in the Magistrates, but before they are transferred to SCCDP. The person should also be given a hard copy of the conditions of their entry into SCCDP to take home and review.

The Case Assessment Group (CAG) in the QCR system plays an important role in ensuring service providers and the legal system are interconnected. We would welcome the introduction of CAG to the SCCDP. The collective knowledge of service providers is an asset to the court system and should be utilised to the greatest extent.

SCCDP facilitators are integral to the success of the program and should be required at each SCCDP location. This facilitator should be delegated the roles of screening persons, monitoring compliance with the SCCDP program, and providing updates to the court when matters are returnable.

We believe the Magistrates of the SCCDP should be responsible for a risk assessment based on submissions from the Prosecution, defendant and court co-ordinator.

15. How should referrals be made by the court to a service provider?

16. What are the advantages and disadvantages to the court in making a general referral order?

We note the inconsistencies in the way magistrates make referrals to service providers. The previous SCCDP and the Murri Court have representatives of the service provider present on the day of court. Either the defence lawyer or the Case Coordinator will refer the person to the service provider to make the relevant requirements for the referral. This information is then given to the Magistrate when the matter is being mentioned in court. However, the Magistrate can also ask the defendant to see the representative of the service provider after their matter has been mentioned for a referral. This system is effective, however it is obviously dependent on the service providers attending court which is not always possible, particularly in rural or remote areas. Therefore a general referral order may be more advantageous where service providers do not attend court. However, one of the disadvantages we have seen arise from general referral orders is they can result in non-compliance with the order if the defendant is unable to access the services, either because they do not have the financial means to do so or they are ineligible for assistance from the service provider. To overcome this, we suggest that defendants be made to sign an acknowledgement before entering the SCCDP, similar to what defendants in the Murri court system do.

18. Are there any other locations in which you think SCCDP would be appropriate?

19. What factors should be considered when determining the locations of the SCCDP?

As identified at point 4.3.1 in the Discussion Paper, the locations where programs are successful enjoy engaged service providers, staff and stakeholders, passionate magistrates and a need for the program. The only deterrent to this success is if people are unable to attend service providers or court appearance because there no suitable and/or affordable transport. Therefore, we feel the cost of transport should be one of the main considerations in determining the locations of the SCCDP. For example, it should be considered that a place like Townsville covers a sparse area serviced by limited public transport. Notwithstanding that there is a need for a SCCDP, the issue of transport must be acknowledged and overcome, otherwise there will be more breaches of bail conditions by people unable to reach services. Further, any non-compliance with bail conditions should not of itself, constitute an offence.

21. Do you think SCCDP should provide the availability for programs to be ordered as a condition of a sentence?

22. How do you think compliance with programs ordered at sentence could be monitored?

The SCCDP should provide the availability for programs to be ordered as a condition of a sentence, however the *Penalties and Sentences Act 1992* would need to be amended to allow for the various programs to be included in sentencing (e.g. attendance at men's group or 'yarning circle' are not programs that can be included in sentencing and therefore they could only be provided for as a special condition of a probation order). Compliance could be monitored by the Office of Probation and Parole or the SCCDP facilitator.

23. What do you think should be the eligibility requirements for a defendant to participate in SCCDP?

25. Do you think it is appropriate for defendants charged with an offence that must be dealt with in the Supreme and District Court to be placed on a SCCD program?

26. Should current eligible defendants (e.g. homelessness, impaired capacity, mental health etc.) also have the option of attending perpetrator programs?

27. Alternatively, should SCCDP expand the current eligibility requirements to include perpetrator programs for offenders charged with a domestic violence related offence?

28. Should SCCDP expand the current eligibility requirements to include defendants who have a disability that contributes to their offending? If so, what other disabilities may be relevant?

29. Should children and young people be eligible to participate in SCCDP?

We support the eligibility requirements for the QCR, being those with impaired capacity, homelessness, drug and/or alcohol dependency, mental illness, cognitive impairment and intellectual disability. There is a further cohort of offenders whom the criminal justice system is not assisting, and that is those who suffer from Foetal Alcohol Syndrome Disorder (“FASD”). FASD is an emerging problem that is often extremely difficult to diagnose and treat, and therefore many who suffer from FASD are commonly falling through the cracks of the legal system and health system (for example, so far as we know, there is only one psychiatrist in Queensland who can diagnose FASD). We therefore suggest that this cohort be added into the eligibility equation.

We do not think it is appropriate for defendants charged with an offence that must be dealt with in the Supreme or District Court to be placed on a SCCD program because of the complexity and time involved in higher court proceedings. Although there are probably comparable numbers of complex needs clients in the Magistrates, District and Supreme Court, the higher court proceedings command greater attention that often overrides consideration of the individual’s needs.

We would support the SCCDP being expanded to include perpetrator programs for offenders charged with a domestic violence offence. Such offenders should be subject to the same screening test as any other offender. In our experience, the offence a person is charged with is irrelevant to the question of whether they will re-offend. What is more relevant is whether the underlying causes that led to the offending behaviour are addressed. In that regard, offenders charged with domestic violence offences are just as likely to benefit from the SCCDP and/or be unsuitable for the traditional criminal justice system.

We also do not believe children and young people should be eligible to participate in SCCDP purely from the view of conserving resources. The clients we had in the SCCDP were mostly complex needs clients who were not receiving the support and services they required. The Department of Child Safety and Youth Justice do an excellent job of connecting children and young people in the justice system with the services they need, and therefore the SCCDP would be a duplication of resources.

30. Should SCCDP be outlined in legislation? If not, what other forms of regulation would be suitable?

As touched upon earlier, it is important that the SCCDP remain flexible and accommodating to the various complex needs of each person. This is difficult to legislate for and in fact, often legislation that restricts judicial discretion can counteract the objectives it is trying to achieve. We support informal, amendable forms of regulation to outline the SCCDP.

We note that one of the issues identified with the previous SCCDP was the lack of clear guidelines about the roles and responsibilities of court partners. This meant that the success of each court was reliant on the stakeholders having effective relationships. Our view is that this issue should be addressed by mandating and facilitating greater collaboration between the stakeholders. Those involved in SCCDP should be having regular meetings and be required to provide to the court basic details about their service (eligibility, appointment times, services offered) which can be shared by court members.

20. What is the best way to use the brokerage funding that will be available?

31. Should consideration be given to allowing a defendant's debt at SPER to be reduced after completing a program?

32. What are some other innovative ideas to increase participation in the SCCDP?

We believe the brokerage funding should be applied to more case coordinators and psychiatrist reports, which would assist in identifying the needs of a person and arranging for appropriate services.

We would strongly support consideration being given to allowing a defendant's debt at SPER to be reduced after completing a program for two reasons:

1. It would be an incentive for persons to participate in the SCCDP; and
2. It would provide a person in the SCCDP with a genuine opportunity to move on from the issues that had caused their offending behaviour.

We note certain over-seas jurisdictions where sentencing judicial officers have the power to waive unpaid fines in appropriate circumstances. Our own experiences of applying for a waiver to SPER have been ineffective – even where such involved homeless individuals suffering from mental illnesses.

The main issue we saw with the previous SCCDP is that people did not have the financial means to meet their conditions. This could be overcome by assisting with the cost of transport (Pre-purchased transport tickets), allowing for travel warrants, and providing food vouchers.

We thank the Courts Innovation Program for this opportunity to provide feedback, and wish it every success with the reinstatement of the SCCDP.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Shane Duffy', written in a cursive style.

Shane Duffy

Chief Executive Officer